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MUNICIPAL LAW

BY JEFFREY D. FRIEDLANDER

The City of New York As Friend of the Court

The Law Department's task of representing the City of New York's legal interests requires that it direct its attention not only to cases in which the city is a named party, but also, on occasion, to litigation in which the city is not a party but whose outcome will nevertheless impact its rights and obligations. In these cases, the Law Department seeks and is usually granted permission to file an amicus curiae brief, as a "Friend of the Court." Last year, Law Department attorneys prepared and filed 13 amicus briefs in a wide range of cases.

Most amicus briefs are prepared by one of the 35 lawyers in the Law Department's Appeals Division, but when issues presented require specialized expertise, attorneys in other divisions, notably Tax and Bankruptcy or Environmental Law, may handle them. The purpose of these submissions is not to repeat the arguments that the parties have already presented to the court, but to bring to its attention the interests of the city that may be affected by the court's decision. For example, the city felt compelled to submit an amicus brief in *Pleasant Grove City v. Summum*, 129 S.Ct. 1125 (2009), discussed below, where the decision of the U.S. Supreme Court, in a case involving the placement of a donated statue in Pleasant Grove City, Utah, would have a substantial impact on the display of art in our city's parks.

In other cases, where the city has achieved a significant legal victory, the Law Department sometimes offers assistance to another governmental jurisdiction that is seeking to achieve a similar result. Thus, the Law Department, after successfully defending a groundbreaking Board of Health regulation which requires certain city restaurants to post calorie content information on their menus and menu boards, see N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009), filed an amicus brief in support of a similar measure enacted in San Francisco.[1]

This article will discuss some notable recent cases across the country in which the Law Department submitted amicus briefs that have presented New York City's perspective in litigation involving diverse areas such as eminent domain, evidence, environmental law, the First Amendment, and criminal law.

Eminent Domain

Kelo v. City of New London, 545 U.S. 469 (2005), addressed the question whether economic development could constitute a "public use" under the Takings Clause of the Fifth Amendment to the U.S. Constitution. The case arose from condemnation proceedings initiated on behalf of New London, Conn., to assemble property for a residential-commercial development project on the site of a former military base. After the Supreme Court of Connecticut upheld the project as a permissible use of condemnation, the U.S. Supreme Court granted certiorari on the petition of homeowners whose property had been slated for condemnation.

The Law Department filed an amicus brief in support of the City of New London, presenting arguments for use of the power of eminent domain as an essential tool of successful, large-scale redevelopment. The brief argued that, in a city as densely populated as New York, the acquisition of parcels suitable for an extensive development project is frequently impossible without the aid of public condemnation, as evidenced by Lincoln Center, the redevelopment of Times Square, the Metrotech development in Brooklyn and the World Trade Center, and that economic development is a "public use" under the Takings Clause of the Fifth Amendment. In a 5-4 decision, the Court agreed.

Municipal Finance

Article VIII, §1, of the New York State Constitution (the "gift and loan provision") prohibits a county, city, town, village or school district from lending money or property to or in aid of any individual or private entity. In 10 East Realty, LLC v. Incorporated Village of Valley Stream, 49 A.D.3d 764 (2d Dept. 2008), the Appellate Division, Second Department, held that the prohibition was violated when a locality transferred a municipal parking garage to a private developer in return for a purchase money mortgage. When the Village of Valley Stream appealed the Second Department's decision to the New York Court of Appeals, the Law Department filed an amicus brief arguing that affirmance of the Second Department's ruling could undermine the efforts of the New York City Department of Housing, Preservation and Development to develop and preserve affordable housing.

The Court of Appeals reversed the Second Department's decision, holding that the purchase money mortgage taken by the Village of Valley Stream did not violate Art. VIII, §1. The Court concluded that the grantee's promise of deferred payment with interest constituted consideration for the transfer, and that the transaction was not a prohibited loan by the locality. 10 East Realty LLC v. Incorporated Village of Valley Stream, 2009 N.Y. LEXIS 142.

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Expert Testimony

The city and the New York City Health and Hospitals Corporation are often defendants in personal injury and medical malpractice actions, frequently turning on complex scientific proof of causation. Law Department attorneys often seek to oppose the testimony of experts presented by plaintiffs who propound theories that go beyond the bounds of scientific principles and methodologies that are commonly accepted as reliable. As a result, Parker v. Mobil Oil Corp., 7 N.Y.3d 434 (2006), gave the Law Department an opportunity to address this problem in the role of amicus.

Parker involved a plaintiff employed for 17 years as a gas station attendant who developed acute myelogenous leukemia. The plaintiff sued his employer, alleging that his condition resulted from prolonged workplace exposure to benzene, a known carcinogen. To prove his case, the plaintiff submitted the testimony of two physicians, both of whom concluded that, "to a reasonable degree of medical certainty," the plaintiff's condition was caused by occupational exposure to benzene. However, neither of plaintiff's experts was able to quantify his exposure to benzene, nor did they indicate, except in the most general terms, how plaintiff's exposure compared to the exposure of workers in other studies of benzene as a causative factor in the development of cancer, or address the unestablished relationship between exposure to benzene in gasoline and acute myelogenous leukemia.

The Appellate Division, Second Department, rejected plaintiff's expert testimony and dismissed the complaint, holding that plaintiff's exposure to benzene had to be quantified precisely and compared to a threshold level beyond which benzene exposure could reliably be established as a cause of cancer. Parker v. Mobil Oil Corp., 16 A.D.2d 648, 651 (2d Dept. 2005).

When the plaintiff appealed the Appellate Division's decision to the Court of Appeals, the Law Department submitted an amicus brief urging the Court to endorse a strong "gatekeeping" role for New York trial courts, similar to the practice of federal courts, so that only scientifically reliable and methodologically sound expert opinion on causation is admitted into evidence.

The Court of Appeals affirmed the Appellate Division's exclusion of the expert testimony. The Court held that, even if plaintiff's experts could not establish the precise level of plaintiff's exposure to benzene, they must, at a minimum, address the relationship of exposure to benzene in gasoline and plaintiff's condition and indicate, as specifically as possible, how plaintiff's benzene exposure compared to that of workers in other studies of the occupational hazards of benzene. In the absence of any such proof, the Court concluded, the testimony of plaintiff's experts was "general, subjective and conclusory," "plainly insufficient to establish causation," and "lacking in epidemiologic evidence to support the claim." *Parker*, 7 N.Y.3d at 449.

First Amendment

Alleging a violation of its First Amendment right to free speech, a small religious sect known as Summum sued Pleasant Grove City, Utah, when Pleasant Grove refused to accept and display a donated statue of Summum's Seven Aphorisms in a public park, next to a monument of the Ten Commandments. The U.S. Court of Appeals for the Tenth Circuit ruled in favor of the plaintiff, holding that the placement of donated art works in public parks constituted private speech in a traditionally public forum, and could therefore be subjected, at most, to content-neutral restrictions under a strict scrutiny standard. Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir. 2007).

When the U.S. Supreme Court granted certiorari, the dispute attracted New York City's attention because of the art that is displayed in the city's parks and public spaces. The Law Department prepared and filed an amicus brief that included color images of such iconic landmarks as Bethesda Fountain, Alice in Wonderland, and the Imagine mosaic in Central Park. The brief explained the history of public art in New York and urged that such displays are government speech, rather than private speech, and accordingly do not implicate the donor's First Amendment rights.

In a decision referring to the statues of Daniel Webster and Balto the sled dog and to the Imagine mosaic in Central Park, the Supreme Court agreed that monuments and other displays in public parks, even when privately donated, are forms of government speech. Such displays, the Court reasoned, are important means of presenting a city's identity and image; in addition, to prevent cluttering and present the proper focus, some form of selectivity, including content-based selection, is necessary and appropriate. Therefore, in the Court's view, cities are justified in carefully reviewing proferred art works for display in public parks, a function that cannot be subjected to a strict scrutiny standard. Pleasant Grove City, Utah v. Summum, 129 S.Ct. 1125 (2009).

Clean Water Act

The federal Clean Water Act (CWA) prohibits "the discharge of any pollutant by any person" that is not in compliance with the CWA. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§1311, 1362(12). Any person or entity performing such a discharge must obtain from the federal Environmental Protection Agency a permit, known as a National Pollution Discharge Elimination System (NPDES) permit.

Since the late 1990s, there has been debate over whether NPDES permits are required when untreated water is transferred for water supply or water management purposes from one body of water to another. The city's water supply system relies on such water transfers, and, in the city's view, applying NPDES permit requirements to these operations

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unreasonably impairs routine water management activities, and is inconsistent with the purpose and language of the statute. In Catskill Mountains Chapter of Trout Unlimited v. City of New York, 451 F.3d 77 (2d Cir. 2006), cert. denied, 549 U.S. 1252 (2007), the U.S. Court of Appeals for the Second Circuit held that the city must obtain an NPDES permit to transfer water through the Shandaken Tunnel from the Schoharie Reservoir to Esopus Creek as part of its water supply system. Since that ruling, the city and other municipalities have submitted amicus briefs in parallel litigation in the U.S. Supreme Court and other federal appeals courts.

The most recent of these cases, *Friends of the Everglades, Inc., v. South Florida Water Management District*, 2006 U.S. Dist. LEXIS 89450 (S.D. Fla. 2006), involved the transfer of water into Lake Okeechobee, a large body of water north of the Everglades, from irrigation and drainage canals located nearby in the Everglades Agricultural Area. The U.S. District Court held that the South Florida Water Management District (SFWMD), which operates the area's water supply and control systems, must obtain an NPDES permit for the transfer, since the Lake is "meaningfully distinct" from the canals and its water is chemically different from that of the canals.

When SFWMD appealed the ruling to the U.S. Court of Appeals for the Eleventh Circuit, the City submitted an amicus brief in its support, arguing that such transfers "are essential to the design and operation of public water supply systems, municipal and regional flood control and water management efforts, and structures designed to assist in inland navigation[,]" and are not the type of discharge for which an NPDES permit is required under the CWA. The case is pending in the Eleventh Circuit Court of Appeals.

Prosecutorial Immunity

In 1980, Thomas Goldstein was convicted of murder based, in large part, on testimony from a jailhouse informant that was subsequently shown to be unreliable and perhaps even false. That informant, moreover, had previously been given reduced sentences in return for favorable testimony, a fact Los Angeles County prosecutors had never disclosed to Mr. Goldstein's defense attorney. After successfully challenging his conviction on that basis in a 1998 habeas corpus action, Mr. Goldstein filed a civil action against the former Los Angeles County district attorney and chief deputy district attorney pursuant to 42 U.S.C. §1983. He alleged that the failure to disclose the earlier testimony-related rewards violated the prosecution's constitutional duty to fully disclose all relevant information, and that this resulted from the failure of supervisory attorneys adequately to train and supervise the trial attorneys and to formulate appropriate information management policies and procedures.

The former prosecutors claimed absolute immunity from claims asserting municipal liability under §1983, and asked the U.S. District Court to dismiss the complaint. However, both the District Court and the U.S. Court of Appeals for the Ninth Circuit held that the complained-of conduct and omissions fell outside the scope of absolute immunity on the ground that they arose not from the prosecutors' function as officers of the court, but rather from their function as administrators of a government office. *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007).

When the U.S. Supreme Court granted Los Angeles County's petition for certiorari, the Law Department, on behalf of the city, filed an amicus brief in support of the appeal. The city urged that the conduct of supervisory prosecutors and the formulation of office policies constitute substantive prosecutorial work which is "intimately related to the judicial phase of criminal proceedings," thus satisfying the legal standard for absolute immunity.

The Supreme Court agreed, holding that the complained-of conduct was "directly connected" to the trial, in contrast to more general office functions such as workplace hiring, and therefore came within the scope of absolute immunity. Van de Kamp v. Goldstein, 129 S.Ct. 855 (2009). This decision is important to the city since recoveries against local district attorneys are paid from the city treasury.

In addition to the matters discussed here, the Law Department has submitted amicus briefs in several other recent cases that significantly affect the city's interests. These include the recently-decided Khrapunskiy v. Doar, 2009 N.Y. LEXIS 943 (May 12, 2009), holding that the state and local governments are not bound by a need-based standard when making public assistance payments that are not part of the "safety net" program; and Infante v. Dignan, 2009 N.Y. LEXIS 767 (May 5, 2009), holding that the common-law presumption against suicide does not apply to cause of death determinations made by medical examiners and coroners in New York State.

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1. San Francisco suspended the enforcement of its calorie count law after the State of California enacted statewide menu labeling legislation. Plaintiffs then withdrew the case without prejudice. See *California Restaurant Assn. v. City and County of San Francisco and San Francisco Dept. of Public Health*, CV-08-3247cw (U.S. Dist. Ct., N.D. Cal.).