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# *On Guns, Adult Uses, Bronx Terminal Market, Columbus Circle*

Sometimes local policy initiatives require a protracted period of time to come to fruition. Whether because of determined opposition, repeated legal challenges, lengthy judicial decision-making, or a combination of these factors, years of litigation are sometimes necessary for a matter to be resolved.

In this article, I will present a progress report on recent developments in four matters in which Law Department attorneys have engaged in long-term efforts to shepherd administration programs through the courts. Each of these matters is noteworthy in that its outcome, I expect, will have a significant impact on our lives in New York City.

The control of guns on our streets has been a major initiative of the Bloomberg administration, as well as previous administrations. More than five years ago, the Law Department filed suit to hold gun manufacturers liable for the injury caused by their products, and this effort has recently been impacted by federal legislation which attempts to limit firearms-related litigation. Another recent reform initiative includes an attempt to limit the location of stores catering to adult use, a source of significant neighborhood blight, and this effort has also resulted in repeated litigation over the past 10 years. Another example relates to the Bronx Terminal Market, a city-owned wholesale and retail food market located on the Bronx waterfront near Yankee Stadium, where the city, in order to reverse years of deterioration, has engaged in prolonged negotiations and litigation with the market tenant, developers and subtenants, a process which it hopes will enable it to realize the site's full economic potential. Finally, as part of the revitalization of Columbus Circle, the Law Department has defended the city in repeated challenges over the past several years to the sale of a vacant city-owned building, which under its new owner will house the collection of the Museum of Arts and Design.

**Firearms Litigation**

As discussed in a previous column, the city has sued approximately 35 gun manufacturers and distributors, representing a substantial portion of the handgun market in the United States, on the ground that their sales practices cause a public nuisance in the city, in the form of a thriving market for illegal handguns. The city has marshaled evidence that establishes that a small number of firearms dealers are responsible for the sale of a large percentage of guns used in crimes and that gun manufacturers and distributors know or could know the identity of these "rogue dealers." The suit was slated to proceed to trial on Nov. 29, 2005, before U.S. District Court Judge Jack Weinstein in the Eastern District of New York. However, one month earlier, President George W. Bush signed into law the Protection of Lawful Commerce in Arms Act (PLCAA), which mandates the immediate dismissal, with certain exceptions, of any action against any gun manufacturer, distributor or retailer, if any third-party conduct contributed to the plaintiff's injury.

Upon enactment, the defendants in the city's lawsuit moved immediately for dismissal. The city, represented by attorneys from the Law Department's affirmative litigation division, argued that under the statute's plain language and in view of its legislative history, the PLCAA did not apply to the city's action. The city also argued that the PLCAA is unconstitutional.

Judge Weinstein upheld the PLCAA as a valid exercise of Congress' Commerce Clause powers, but ruled, in the city's favor, that under its plain terms the act did not apply to the city's lawsuit. *City of New York v. Beretta U.S.A. et al.*, 00 CV 3641. The basis for the ruling was that the PLCAA expressly exempts actions in which the conduct complained of violated a state or federal statute "applicable to" the sale or marketing of firearms. Because the allegations of the city's complaint made out a violation of N.Y. Penal Law §240.45, which makes it a misdemeanor to cause or contribute to a public nuisance, the city's action came within the act's exception and could not be dismissed. As an issue of first impression, Judge Weinstein stayed the trial, and certified his ruling for an interlocutory appeal to the U.S. Court of Appeals for the Second Circuit. The defendants' petition for an interlocutory appeal of Judge Weinstein's ruling construing the statute, and the city's cross-petition from the court's finding of the act's constitutionality are pending.

**Adult-Use Litigation**

Attorneys of the Law Department's appeals and administrative law divisions are currently handling two related lawsuits — *For The People Theatres v. City of New York*, and *Ten's Cabaret v. City of New York* — brought in state court by the operators of four topless bars, an adult video store and an adult theater. The plaintiffs are challenging the 2001 amendments to 1995 zoning provisions that limited where adult establishments may be located.

After the 1995 zoning regulations were upheld as constitutional, adult establishments began exploiting loopholes in the law to evade enforcement and remain open at locations where they were not permitted under the zoning law. For example, the 1995 regulations defined an adult bookstore as a book or video store with more than 40 percent of its stock or floor area devoted to adult materials. To escape being closed, triple-X video stores imported unmarketable nonadult videos comprising more than 60 percent of the establishment's stock. These stores, which became known as "60/40 establishments," argued that they were in compliance with the zoning requirement, while continuing to offer peep booths, exclude minors and otherwise maintain a primary focus on adult materials.

In 2001, the city amended its adult zoning provisions to close this and other loopholes. These amendments were challenged in the two pending lawsuits. In October 2003, the Supreme Court, New York County granted summary judgment to the two sets of plaintiffs setting aside the 2001 amendments. In two separate decisions, Justice Louis York determined that the 2001 amendments were unconstitutional because the city did not do a new study to determine whether the so-called 60/40 establishments have an adverse secondary impact on their neighborhoods, relying instead on its earlier study finding that establishments with a primary, ongoing focus on adult entertainment have such an adverse impact. *For the People Theatres v. City of New York*, 1 Misc3d 394; *Ten's Cabaret v. City of New York*, 1 Misc3d

399. In April 2005, the Appellate Division, First Department reversed and granted summary judgment to the city, finding that a new study was not necessary because it was reasonable for the City Council to conclude that the regulated 60/40 establishments were businesses that maintained a primary, ongoing focus on adult entertainment and materials. 20 AD3d 1.

In December 2005, the Court of Appeals sent the matter back to Justice York for a trial on the merits. Rather than defer to the legislative judgment of the City Council, the Court of Appeals determined that the city is required to establish at a trial that "despite formal compliance with the 60/40 formula, these businesses display a prominent, ongoing focus on sexually explicit materials or entertainment, and thus their essential nature has not changed." The Court of Appeals determined that if the city can so establish at trial, it will be entitled to judgment upholding the 2001 zoning amendments.

**Bronx Terminal Market**

The Bronx Terminal Market, located on the Bronx waterfront near Yankee Stadium, was the subject of decades of contentious litigation between the city and its ground lessee over such issues as the amount of rent owed the city, maintenance of the property and development rights and obligations. In 2002, the New York City Economic Development Corp., assisted by attorneys of the Law Department's economic development division, began negotiations with a developer with the aim of developing the Market as a multi-level retail complex, with an esplanade and riverfront park. After the ground lessee agreed in 2004 to relinquish its lease, the city signed a short-term lease with the developer, allowing it to operate the Market pending the public approvals and zoning changes necessary for the project's full realization. In the latest chapter, attorneys of the Law Department's commercial and real estate litigation division helped the project clear a further hurdle by successfully defending the city in an action brought by subtenant merchants at the Market, who sought to annul the city's agreement with the developer.

Plaintiffs alleged that the city lacked authority to issue a new market lease to the private developer because it did not comply with the public bidding and land use review procedures set forth in §384(b) of the New York City Charter. The city responded that, even though the lawsuit was not commenced as an Article 78 proceeding, it properly would have been such a proceeding, and was therefore time-barred because the applicable four-month statute of limitations had run. Furthermore, the city argued, even if the action had been timely commenced, the new market lease was exempt from the requirements of Charter §384(b) under provisions of the charter and the General Municipal Law which authorize the commissioner of Small Business Services to enter into leases for city property designated as public markets.

The Supreme Court, New York County agreed with the city's contention that plaintiffs' claims seeking equitable relief could have been brought in an Article 78 proceeding because they challenged the validity of municipal actions, and that the four-month statute of limitations began to run when the lease was executed. As a result, the court held that these claims were untimely, and dismissed them. *Siegmund Strauss, Inc. v. Strategic Development Concepts, Inc.*, Index No. 103443/05. The court further agreed that the city was exempt from the requirements of Charter §384(b) by reason of the authority granted to the commissioner of Small Business Services to enter into leases of public market property, and held that, even if plaintiffs' claims had been timely interposed, dismissal would still be warranted. The new lessee was granted immediate possession of the premises.

**Columbus Circle Litigation**

In *Landmark West v. Tierney*, the Appellate Division, First Department ruled in the city's favor in rejecting the latest of five challenges brought by Landmark West!, a community group, to the city's sale of the building at 2 Columbus Circle to the Museum of Arts and Design. Attorneys of the Law Department's economic development division helped complete the transaction, and attorneys of the appeals and environmental law divisions represented the city in the related litigation.

In its previous lawsuits, Landmark West! alleged, among other things, that the building's sale violated the common-law public-trust doctrine and the prohibition on gifts of public funds set forth in the New York State Constitution and further challenged the project's environmental review and its consideration for land use purposes. See *Landmark West v. City of New York*, 9 Misc3d 563 (Sup. Ct., N.Y. Co. 2005); *Landmark West v. Burden*, 3 Misc3d 1102A (Sup. Ct., N.Y. Co. 2004), aff'd, 15 AD3d 308 (1st Dept. 2005), lv. appeal denied, 2005 N.Y. Lexis 3200 (2005); *Landmark West v. Manhattan Borough Board*, Index No. 116913/04 (Sup. Ct., N.Y. Co. 2004).

In its latest action, the group, which has long opposed the determination of the city's Landmarks Preservation Commission that the building does not warrant a public hearing on landmark designation, sought to prevent the commission's chairman from participating in any future deliberations on such designation on the ground that he had "conspired" with representatives of the Museum of Arts and Design to prevent a hearing. The Appellate Division rejected that argument, holding that, since the commission's function is administrative and not adjudicatory in nature, the chairman could not be prevented from speaking with advocates or opponents of designation, or from participating in internal agency review of a proposal. 2006 N.Y. Slip Op. 10; 2006 N.Y. App. Div. LEXIS 29. Plaintiff is presently seeking leave to appeal the decision to the Court of Appeals.

The above-discussed matters are by no means the only significant changes brought about by the sustained efforts of Law Department attorneys. For instance, in 2003, in an effort to limit the city's liability in sidewalk slip-and-fall cases, attorneys of the legal counsel and tort divisions drafted a local law which, after vigorous advocacy by the corporation counsel leading to its enactment by the City Council, expressly attributed to adjoining property owners (with the exception of owner-occupied one-, two- and three-family dwellings) liability for injuries caused by failure to maintain a sidewalk in reasonably safe conditions, and excluded the city from such liability. Recently, attorneys of the Law Department's Bronx Tort office won the city's dismissal from the first lawsuit to proceed to trial under that law, *Phyllis Kandell v. Pedi*, Index No. 22558/04. In that case, arising from a slip and fall on a sidewalk adjoining a four-family home in the Bronx, the plaintiff ultimately settled with the adjoining property owner for $70,000, a sum for which the city would have been entirely liable under prior law.

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