



# The Drawingboard

## Queens Chapter

New York State Society of Professional Engineers

September 2009

Volume 9, Number 9

### In This Issue

- President's Message
- Meeting Information
- State Education Department Interpretation
- Lawsuit Decision and Order
- Professional Services Directory
- Sponsors
- Legal Fund

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### President's Message

*By Chris Petallides, P.E.  
President*



We hope you all had a wonderful summer in spite of the rains. It's now back to normal, i.e., our constant battle to educate/convince the world that engineering is a "profession" worthy of respect.

The summer recess brought a number of developments (see elsewhere in this newsletter).

With regard to the Society's lawsuit against NYC for violating State Education Law by appointing a non-professional as Buildings' Commissioner, the judge ruled August 12, 2009 that it's OK for **Mr. LiMandri** to drive without a license, so long as the person in the passenger seat (**Fatima**) is licensed. We don't know what this judge was smoking or who got to her before she made her "ruling" but we do know one thing for sure; we are filing an APPEAL immediately. Now is the time, therefore, for all PE's and RA's to finally unite, speak with one voice and demand our due.

With regard to the problem of "expeditors" posing as engineers and architects and offering professional services to the general public illegally (with the help of rubber-stampers), we have recently located the signed "Memo from the Commissioner", (**Joel A. Miele, Sr., PE**), dated April 21, 1994, prohibiting anyone other than "full-time employees of licensed design professionals from engaging in technical discussions with DOB plan examiners, etc. Apparently, this caused the expeditors to organize in 1994 and the Commissioner's Memo to mysteriously become lost and, of course, never implemented.

*Continued Next Page*

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Today, fifteen years later, expeditors still run everything, the DOB is in a bigger mess than ever before and we, Engineers and Architects, need to take the lead in putting things RIGHT.

With regard to the decision to revive the MCPC (Metropolitan Chapter Presidents' Council), first established around 1970 under the auspices of NYSSPE, to "represent the five county chapters of Greater NYC in all professional matters of mutual interest", the 1<sup>st</sup> meeting took place in NYC July 22, 2009, with all five NYC chapter presidents and other key Society officers present. The meeting unanimously decided to move forward in a united front, under the able chairmanship and strong leadership of current Staten Island president, **Mr. Joseph Pasaturo, P.E.** More MCPC initiatives are now in the pipeline and we will be sharing those with you in the coming months.

Our first general meeting of the season is **Thursday, September 17, 2009**, 6:30PM at Fort Totten. (NOTE: The date of **this month's general meeting was pushed up** to this date because of a conflict with a previously scheduled joint NYSSPE/AIA state convention in Rochester, NY, September 24 to the 26. Next month's general meeting will be October 22, 2009, the 4<sup>th</sup> Thursday of the Month).

We look forward to seeing all of you this Thursday. Your input is welcome and essential.

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## Upcoming Meeting Information

This month's member's meeting will be held on Thursday **September 17, 2009 at 6:30 PM** at the Professional Design Center at Fort Totten, Queens, NY. The sponsor and program will be announced.

**422 Weaver Ave., Fort Totten, New York**

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August 20, 2009

Mr. Constadino "Gus" Sirakis  
Acting Director of Engineering Technical Affairs  
New York City Department of Buildings  
280 Broadway, 7<sup>th</sup> Floor  
New York, New York 10007

RE: Special Inspections

Dear Mr. Sirakis:

We write as a follow-up to our May 2009 conference call where we discussed the Department of Buildings' adoption of new Section 101-06 to Subchapter A of Chapter 100 of Title 1 of the Official Compilation of the Rules of the City of New York, regarding special inspections and the qualification of these special inspectors.

The New York State Education Department - Office of Professions (Department) and the State Boards for Engineering & Land Surveying and Architecture have reviewed Section 101-06 and also Chapter 17 - Structural Tests and Special Inspections from the 2008 New York City Building Code provided by you subsequent to our conference call in May.

After a careful review of the above documents and lengthy discussion, the State Board of Engineering and Land Surveying at their June 2009 Board meeting, voted unanimously to recommend to the Department that the Special Inspections as defined in Chapter 17 and Section 101-06 of the Rules on the City of New York fall within the scope of practice for engineers as defined in Education Law, Articles 145. Likewise, the State Board for Architecture at their July 2009 Board meeting, also voted unanimously to recommend to the Department that the Special Inspections as defined in Chapter 17 and Section 101-06 of the Rules on the City of New York fall within the scope of practice for architects as defined in Education Law, Articles 147. With unanimous support from the Boards, and consultation with our attorneys and senior management within the Department, we believe that all special inspections as currently defined should be performed by the appropriate licensed (and currently registered) design professional.

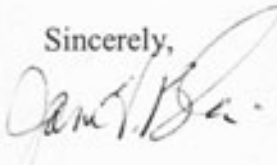
We applaud the efforts of the NYC Department of Buildings to put in place consistent standards for the qualification of Special Inspectors that will enhance public safety and the integrity of the

construction process. Specific qualifications will help to ensure that the Special Inspectors have the appropriate knowledge, expertise, and experience, to perform this very critical step in the design and construction process and support the requirement that they sign and seal the Technical Report – Statement of Responsibility document.


We appreciate the opportunity to discuss this very important scope of practice issue related to the design professions and look forward to future discussions on issues where we may work together to further enhance the protection of the public.

If you have any questions, please do not hesitate to contact me or Robert Lopez at the contact information provided above.

Sincerely,



Jane Blair, PE  
Executive Secretary



Robert Lopez, RA  
Executive Secretary

C: Frank Munoz – Associate Commissioner

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN A. RAKOWER**

PART 5

Index Number : 101179/2009  
SOCIETY OF PROFESSIONAL ENGIN  
vs  
CITY OF NEW YORK  
Sequence Number : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

... papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1, 2, 3  
4, 5

**FILED**

Cross-Motion:  Yes  No AUG 12 2009

Upon the foregoing papers, it is ordered that the motion

COUNTY CLERK'S OFFICE  
NEW YORK

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 8/7/09

  
HON. EILEEN A. RAKOWER

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check If appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK; PART 5

-----X  
THE NEW YORK STATE SOCIETY OF  
PROFESSIONAL ENGINEERS, INC., et al.,

Index No.  
101179/09

**DECISION  
and ORDER**

- against -

THE CITY OF NEW YORK, et al.

Mot. Seq.  
002 & 003

-----X  
HON. EILEEN A. RAKOWER

Plaintiffs, the New York State Society of Professional Engineers, Inc. ("Plaintiffs") commenced this action seeking a judgment declaring that New York City Local Law 39 of 2008 ("Local Law 39") is unconstitutional on its face, and an order removing New York City Department of Buildings ("DOB") Commissioner Robert LiMandri from his position and enjoining him (and any other person who does not possess of New York State Professional Engineering License) from serving in the capacity of DOB Commissioner.

Presently before the court is a motion by the City of New York ("City") to dismiss the action for failure to state a claim, pursuant to CPLR §3211(a)(7). The City submits an affirmation and a memorandum of law in support of its motion. Annexed to the affirmation as exhibits are copies of DOB Executive Order #7/08; a stipulation dated 2/6/09, whereby Plaintiffs withdrew their motion for a preliminary injunction; and the NYLS' New York City Bill Jacket for Local Law 39.

Plaintiffs have cross-moved for summary judgment. In support of their cross-motion and in opposition to the City's motion, Plaintiffs have submitted a statement of material facts as to which they contend there is no dispute, and a memorandum of law. Annexed to the statement of material facts as exhibits are copies of a 1991 court decision from New York Supreme Court, Albany County; and an affidavit of Joel A. Miele, Sr., a Professional Engineer and former DOB Commissioner.

The City has submitted a memorandum of law in reply.

The parties are in agreement that no issues of fact are presented, and that the only question before the court is whether Local Law 39 is constitutional on its face.

Local Law 39 originated in the New York City Council as Int. 755-A, a proposed local law which would amend Chapter 26 of the New York City Charter to enable an individual who is not a licensed professional engineer or a registered architect to serve as DOB Commissioner. In addition, Int. 755-A expressly provided that the DOB Commissioner was authorized to delegate any duties to the First Deputy Commissioner.<sup>3</sup> Int. 755-A was passed by the City Council, and was signed into law by Mayor Michael Bloomberg on September 3, 2008, at which time it became Local Law 39.

The practice of engineering is defined in Title VIII of the New York State Education Law ("Title VIII"). Specifically, §7201 defines the practice of engineering as follows:

Performing professional services such as consultation, investigation, evaluation, planning, design or supervision of construction or operation in connection with any utilities, structures, buildings, machines, equipment, processes, works, or projects wherein the safeguarding of life, health and property is concerned, when such service or work requires the application of engineering principles and data.

Education Law §7202 forbids individuals from engaging in the practice of engineering or using the title "professional engineer" without being licensed or otherwise authorized by law.

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<sup>3</sup>The City notes that this provision is redundant of §1101 of the City Charter, which provides that

"Any head of a department... may... by instrument in writing filed in the department designate any deputy to possess any of the powers and exercise such of the duties of the head of the department and for such times and under such conditions as such head of a department may specify."

Education Law §7201 defines the practice of architecture as follows:

[The] rendering or offering to render services which require the application of the art, science, and aesthetics of design and construction of buildings, groups of buildings, including their components and appurtenances and the spaces around them wherein the safeguarding of life, health, property, and public welfare is concerned. Such services include, but are not limited to consultation, evaluation, planning, the provision of preliminary studies, designs, construction documents, construction management, and the administration of construction contracts.

Education Law §7302 forbids individuals from engaging in the practice of architecture or using the title "architect" without being licensed or otherwise authorized by law.

It is undisputed by the parties that some of the powers and duties of the DOB Commissioner (as set forth in §645 of the City Charter) entail the practice of engineering. Plaintiffs allege that Local Law 39 is thus facially unconstitutional in that it is both preempted by, and violative of, Title VIII.

The City asserts that Plaintiffs' facial challenge must fail, because, at a minimum, Local Law 39 is capable of being applied constitutionally. Specifically, the City argues that, since a non-engineer DOB Commissioner is empowered to delegate engineering responsibilities to his or her First Deputy, Local Law 39 poses no constitutional problems. Moreover, the City notes that, even though Plaintiffs do not interpose an as-applied challenge to Local Law 39, the current operational structure of DOB is perfectly constitutional, in that it does not run afoul of the Education Law. Specifically, the City notes that, by Executive Order dated October 28, 2008, current DOB Commissioner Robert D. LiMandri (a non-engineer) appointed Fatma Amer (a professional engineer) First Deputy Commissioner, and simultaneously delegated to her "primary responsibility and ultimate authority... for the technical interpretation of the City's Construction and Building Codes and for the Zoning Resolution."

It is well settled that a party attempting to have a legislative enactment declared unconstitutional must overcome a "strong presumption of validity" and must



overcome that presumption beyond a reasonable doubt (*see Fenster v. Leary*, 20 N.Y.2d 309, 314 [1967]). This presumption applies in equal force to local legislation (*see Robert E. Kurzius v. Upper Brookville*, 51 N.Y.2d 338, 344 [1980]). Further,

A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment. In other words, the challenger must establish that no set of circumstances exists under which the Act would be valid.

(*Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 [2003]) (citations and internal quotations omitted).

Article IX, §2(c) of the New York State Constitution explicitly grants local governments the power to "adopt and amend local laws not inconsistent with the provisions of this constitution or any general law...." This power is further codified in §10 of the Municipal Home Rule Law. These provisions vest broad powers in local governments to regulate matters of public health, safety, and the general welfare of their citizens (*see People v. Lewis*, 295 N.Y. 42, 49 [1945]; *New York State Club Assoc. v. City of New York*, 69 N.Y.2d 211, 217 [1987]).

While the State Constitution and Municipal Home Rule Law confer broad police powers upon local governments, the power of the State Legislature is "supreme and transcendent" (*Brown v. Board of Trustees*, 303 N.Y. 484, 488 [1952]). Accordingly, local laws may be preempted by State legislation where either (1) a local government's law directly conflicts with a State statute; or (2) when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility - either by explicitly stating its intention to occupy the field, or by implication, where there exists a "comprehensive and detailed regulatory scheme" in the subject field of regulation (*see DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91, 95 [2001]).

Applying the foregoing principles to the case at bar, the court finds that Plaintiffs have failed to sustain their burden, and that Local Law 39 is a valid legislative enactment pursuant to the police powers conferred upon the City by the New York State Constitution and the Municipal Home Rule Law. Plaintiffs' argument that Local Law 39 is preempted by the State Education Law is unavailing, as nowhere

in Local Law 39 does the City attempt to either redefine the practice of engineering, or permit individuals to engage in the practice of engineering without the necessary licensure and/or authorization, as delineated by the State Legislature. Local Law 39 can be followed without running afoul of any State legislation by having a DOB Commissioner who is not an engineer delegate all engineering-related duties to the First Deputy, who is a licensed engineer. Not only is this arrangement a conceivable constitutional application of Local Law 39, it is in fact the present arrangement at DOB.

Wherefore it is hereby

ORDERED that the City's motion is to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that Plaintiffs' cross-motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 7, 2009

  
BILEEN A. RAKOWER, J.S.C.



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JOSE VELASQUEZ, PE  
Secretary/Treasurer

November 20, 2008

Dear Colleague,

The Queens Chapter – NYSSPE is soliciting contributions from Engineers and Architects in the NY area to help fund a lawsuit by the NY State Society of Professional Engineers (NYSSPE) against the City of New York. As you probably already know, the NY City Council recently passed a law changing the City Charter, at the insistence of Mayor Bloomberg, which removed the licensure requirement from the Commissioner of the Department of Buildings. The new law now states that the Buildings Commissioner need not be licensed. Presently, an unlicensed lay person is Buildings Commissioner.

The Queens Chapter is leading the fight in the NY Metropolitan area AGAINST the Mayor's irresponsible actions which endanger the public's health, safety and welfare while undermining and diminishing both the Engineering and Architectural professions.

The Queens Chapter leadership is asking all Engineers and Architects to contribute to a legal fund which will support the NYSSPE legal suit against the City of New York. Please make whatever contribution is within your means.

It's about time we stand up for our Profession and the people of New York!

Suggested contributions:

\$1,000 \_\_\_\_\_ \$ 750 \_\_\_\_\_ \$ 500 \_\_\_\_\_ \$ 250 \_\_\_\_\_ \$ 100 \_\_\_\_\_ Other \_\_\_\_\_

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