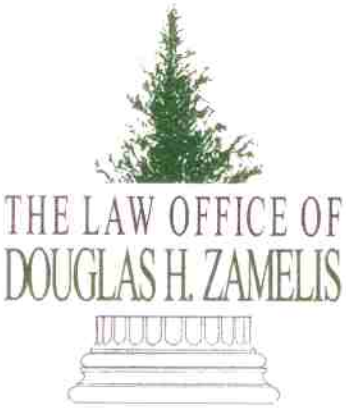

LEGISLATIVE IMMUNITY OF LOCAL ELECTED OFFICIALS

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Local governments in New York throughout the Marcellus Shale play are responding to the prospect of large scale natural gas development within their corporate limits and proponents of the natural gas industry predictably have opposed the adoption of local zoning and police power laws intended to regulate the exploration, development, and production of natural gas facilities. As more and more municipal governments exercise the broad authority granted to them by the New York State Constitution, the Statute of Local Governments, the Municipal Home Rule Law, and the Town Law, proponents of the natural gas industry have issued threats that local legislators who vote to adopt local laws to regulate natural gas facilities could be subject to personal liability in lawsuits brought by natural gas lessees and lessors. Such threats find no support in the law, as it is well established that federal, state, regional, and local legislators are entitled to absolute immunity from civil liability for their legitimate legislative activities.

A proceeding pursuant to Article 78 of the Civil Practice Law and Rules is the proper vehicle for seeking review of the procedures followed in the adoption of a statute, law, or ordinance. *Save the Pine Bush v. City of Albany*, 70 NY2d 193, 202, (1987); see also, *Highland Hall Apartments, LLC v. New York State Div. of Housing and Community Renewal*, 66 AD3d 678, 681, (2nd Dept. 2009)). However, where the substance of the law, "its wisdom and merit" (*Voelckers v. Guelli*, 58 N.Y.2d 170, 177, (1983)), or its constitutionality is challenged, then the proper procedure is to commence an action for a declaratory

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judgment. *New York City Health & Hosp. Corp. v. McBarnette*, 84 N.Y.2d 194, (1994); *P & N Tiffany Props., Inc. v. Village of Tuckahoe*, 33 A.D.3d 61 (2nd Dept 2006); *see also, Highland Hall Apartments, LLC* at 681. The Town Law directs that such proceedings or actions are to be brought against the town and the defense of such proceedings and actions is to be borne by the municipality. Town Law § 65 entitled "Actions and proceedings by and against towns" provides in pertinent part at subsection 1 that:

> Any action or special proceeding for or against a town, . . . or to enforce any liability created, or duly enjoined upon it, or upon any of its officers or agents for which it is liable, or to recover damages for any injury to any property or rights for which it is liable, shall be in the name of the town. The town board of any town may authorize and direct any town officer or officers to institute, defend or appear, in any action or legal proceeding, in the name of the town, as in its judgment may be necessary, for the benefit or protection of the town, in any of its rights or property. It shall be the duty of any officer or officers so authorized and directed to institute said action or legal proceeding or to defend or appear therein, and the reasonable and necessary expense of such action or proceeding, or defense or appearance shall be a town charge.

As discussed herein, local elected representatives have no personal liability in such proceedings and actions, nor do they do place their personal and family fortune at risk for the defense of such proceedings and actions when they take office, for if they did, the wisdom of any person seeking election to local office would have to be seriously questioned.

Beyond the Article 78 proceeding and declaratory judgment action is the specter of a civil rights action brought pursuant to 42 U.S.C. § 1983. In the context of land use, § 1983 provides protection against municipal actions which violate a landowner's rights under the Just Compensation Clause of the Fifth Amendment or the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Frequently cited in this context is the 1996 decision of New York's highest court, the Court of Appeals, where the Town of Orangetown's liability was affirmed for violating a developer's constitutionally protected property rights by revoking approvals after the developer had invested considerable sums and acquired "vested rights" by making substantial alterations to the project site in reliance on such approvals. *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996). It should be noted that it was the Town of Orangetown that was held liable not the individual elected representatives, and in that case the approvals were revoked for political purposes after the developer had successfully acquired vested rights.

Forty U.S.C. § 1983 provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ..

While municipal governments are clearly subject to potential liability under § 1983, individual local legislators, such as Town Board members, are not because they are protected by absolute legislative immunity for their legitimate legislative acts.

The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law. This privilege "has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries" and was "taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951). The United States Constitution, the constitutions of many states, and the common law thus protected legislators from liability for their legislative activities. See U.S. Const., Art. I, § 6; *Tenney, supra*, at 372-375. Recognizing this venerable tradition, the United States Supreme Court first held that state and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities. *Tenney, supra* (state legislators); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (regional legislators).

In 1998 the United States Supreme Court decided *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). In *Bogan*, the Supreme Court reviewed the long standing common law, the legislative history of § 1983, and its previous decisions concerning absolute legislative immunity. In an opinion by Justice Thomas, the Supreme Court determined that:

> Because the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, ***we now hold that local legislators are likewise absolutely immune from suit under § 1983 for their legislative activities*** (emphasis added). *Bogan* at 49.

Justice Thomas elaborated that "Absolute immunity for local legislators under § 1983 finds support not only in history, but also in reason" citing *Tenney* at 376, and that:

> The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. See *Spallone* v. *United States*, 493 U.S. 265, 279(1990) (noting, in the context of addressing local legislative action, that "any restriction on a legislator's freedom undermines the `public good' by interfering with the rights of the people to representation in the democratic process"); see also *Kilbourn* v. *Thompson*, 103 U.S., at 201-204 (federal legislators); *Tenney, supra*, at 377(state legislators); *Lake Country Estates*, 440 U.S., at 405 (regional legislators). Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. See *Tenney, supra*, at 377 (citing "the cost and inconvenience and distractions of a trial"). And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982). *Bogan* at 52.

The United States Supreme Court's decision in *Bogan* finds support for legislative immunity specifically in New York law when it references that:

> New York's highest court, for example, held that municipal aldermen were immune from suit for their discretionary decisions. *Wilson* v. *New York*, 1 Denio 595 (1845). The court explained that when a local legislator exercises discretionary powers, he "is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done." *Id.*, at 599. These principles, according to the court, were "too familiar and well settled to require illustration or authority." *Id.*, at 599-600. *Bogan* at 50.

Both the United States Supreme Court and New York Court of Appeals have confirmed that the principle of legislative immunity protects local elected officials from personal liability in suits for damages for deprivation of constitutionally protected rights under the color of law when acting within the sphere of legitimate legislative activity. New York municipalities are statutorily authorized to adopt zoning regulations and local laws for the protection of health, safety, and public welfare, and the adoption of such local laws for such purposes is undoubtedly within the sphere of legitimate legislative activity. Therefore, municipal officials who vote on whether to adopt such local laws, including laws regulating natural gas facilities, enjoy absolute immunity from personal liability under 42 U.S.C. § 1983.