Land Banking Under New York Law

What laws expressly control land banks?
What laws are likely to control land banks?

ALBANY LAW SCHOOL
GOVERNMENT LAW CENTER

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What Laws Expressly Control Land Banks?

What Laws are likely to Control Land Banking?

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Executive Summary

This handbook examines the obligations of New York State Land Banks under State Law, Local Law, and the enabling statute, The Land Bank Act. Land banks are statutorily subject to the Public Officers Law, Public Authorities Law, Open Meetings Law, and the Freedom of Information Law in New York State. While these laws will apply to land banks, it is not clear what public remedies exist for potential violations of these laws by land banks.

The Regional Innovation Lab believes that CPLR Article 78 applies to actions of the land banks. No land bank to date has violated one of the specific laws they are subject to, in a way that would trigger a citizen to file an Article 78 proceeding. However, since the common remedy of violating New York's Open Meetings Law or Freedom of Information Law is an Article 78 proceeding, we believe this would be the remedy used against a land bank by a private citizen.

The Land Bank Act provides that the land bank has the ability to finance bonds or create development mechanisms. In those particular instances, the land bank would be engaged in rulemaking as a public authority and would also likely be subject to the State Administrative Procedure Act. While no land bank has financed a bond or created a local development plan for a section of the municipality that the land bank operates in, land banks are specifically endowed with the ability to engage in these activities. These activities under New York law are considered rulemaking actions and as rulemaking actions, the land bank is likely to be subject to the State Administrative Procedure Act.

In presenting this handbook, The Regional Innovation Lab is presenting facts to New York State land banks as a resource of prevention. Land banks can refer to this manual as a tool in their decision making. The Regional Innovation Lab, a joint project of the Government Law Center at Albany Law School and the Community Loan Fund of the Capital Region, offers this guidance so that as a land bank maneuvers and plans for the future, its director and staff can be informed of obligations and procedures that have the potential to cause road blocks to the land bank's goals and objectives.

INTRODUCTION

A major plague of urban centers, even before the mortgage crisis hit in 2008, was the scourge of aging, decaying housing stock. Historic houses, once the well-kept residences of upright citizens, from up-and-coming blue-collar workers to rich merchant princes, were abandoned by the thousands in America's cities, as waves of urban dwellers headed for the suburbs in search of security, tranquility and better schools.

In the state of New York, in cities like Albany, Buffalo, Newburgh, and Schenectady, vacant houses, often boarded up with rotting plywood, present an unattractive spectacle illustrating the consequences of carelessness and neglect. This neglect is not specific to one particular class of owner; it can be seen in properties that are bank owned, municipality owned and privately owned. Vacant houses tend to cluster together and form empty neighborhoods. Albany, for example, has an overabundance of empty properties in the neighborhoods of Arbor Hill and Mansion Hill. Newburgh's Lander Street neighborhood is reminiscent of an urban ghost town.

These clusters of blight depress property values and increase resident dismay. When the house of a neighbor is falling down, it is difficult to keep up one's own property, let alone one's morale. Where is the motivation to keep up curb appeal and home repairs if your neighbors have left behind boarded-up brownstones?

Decades ago, city leaders in Flint, Michigan, adopted a new approach to blight. They called this innovative approach the land bank. The idea behind the land bank is simple: form a public-private corporation to buy (or receive as gifts) vacant houses – whether foreclosed upon or not – and hold them. Then, assemble these houses in clusters, restoring, gutting, and renovating, or, in cases in which the houses cannot be saved, tearing them down in groups, affording a chance to rebuild in a practical, creative way. Land banks quickly gained traction, and today this promising approach to urban redevelopment is widely embraced by cities throughout the country.[1]

Ideally, land banks offer neighborhood members opportunity for genuine input, and are perceived as helpful to the community. Neighborhood residents, however, can feel wary. The memories of failed federal and state "urban renewal" projects, prevalent throughout the 1950s and 1960s, linger in many minds. As a result, homeowners in modern-day blighted communities fear that land banking will amount to just another reprise of wide scale demolition.[2]

[1] *See* Center for Community Progress, Frequently Asked Questions on Land Banking, http://www.communityprogress.net/land-bank-faq-pages-449.php (accessed Sept. 29, 2014) (estimating that approximately 120 land banks currently exist nationwide).

[2] Such concerns were voiced prior to the creation of the Albany County land bank in 2014. Collaborative writer attended a heated community meeting on the matter in the West Hill neighborhood in April 2013.

The Empire State Plaza, or the South Mall Project, is a major source of these concerns. After half a century, this taking and demolition is still fresh in the minds of many Capital Region residents. Photo from: Times Union Archives

In 2011, New York lawmakers passed enabling legislation, paving the way for the establishment of land banks throughout the State.[3] The Land Bank Act lays the foundation for communities in our state to reimagine and revitalize blighted neighborhoods and to promote economic growth by returning vacant, abandoned or tax-delinquent properties to productive use.

To incentivize local governments to establish a land bank, the New York State Attorney General's Office announced that $20 million would be initially available for up to 10 land banks to divide and use as capital for acquisition of land and repair or demolition of buildings. These land banks were to be chosen by the Empire State Development Corporation (ESDC), from applications submitted by local governments, school districts, and counties.

However, the Land Bank Act, as a new statute, also presents novel issues of law. As a public and private corporation, the legal ramifications of the land bank entity are complex. Public institutions must comply with the Open Meetings Law, the Freedom of Information Law and certain of the ethics provisions of the Public Officers

A.G. Schneiderman Awards $20M to Land Banks Across New York State

Community Revitalization Initiative Will Help New York Communities Restore Abandoned And Dangerous Properties
Schneiderman: We Are Empowering Local Communities To Rebuild Their Own Neighborhoods, House By House, Block By Block

SYRACUSE – Attorney General Eric Schneiderman today joined with elected officials and staff from the Syracuse Land Bank to announce that his office has awarded $20 million to New York State land banks that are working to rebuild and restore neighborhoods hit hard by the housing crisis. The Attorney General's Land Bank Community Revitalization Initiative is making a new allocation of nearly $20 million to eligible land banks, in addition to the $13 million allocated through a competitive application process last year, bringing the total commitment to $33 million. Today's announcement was made at 157 Maplewood Ave, one of 1,800 vacant and neglected structures in the City of Syracuse that negatively impact surrounding neighbor's quality of life and property values. This property is one of 50 homes undergoing renovation by the Greater Syracuse Land Bank, which has already received $3 million in funding from Attorney General Schneiderman's office, and will be receiving nearly $2 million in additional funding as part of the second round of funding.

[3] McKinney's 2011 Sess. Laws NY, Ch. 257, Article 16 – Land Banks, § 1 at 1033.

Law. Private institutions, however, do not. Where do land banks fall with these mandates? Are they public or private? Also, are land banks subject to NY administrative law and Article 78 of the CPLR? This handbook seeks to tackle these issues for land banks to ensure compliance with all necessary mandates.

First, what is the precise legal nature of a land bank? Designated a charitable not-for-profit corporation, while simultaneously subject to the Freedom of Information Law (FOIL), the Open Meetings Law (OML), and Sections 73 and 74 of the Public Officers Law (POL), the land bank is something of a hybrid: a different kind of legal entity.

Second, given its unique nature, is a land bank subject, either wholly or in part, to Article 78 of the Civil Practice Law and Rules (CPLR)? This Handbook will address these questions of law and the interplay between the Land Bank Act, FOIL, the OML, POL and other state administrative law considerations.

Finally, the handbook will consider what role citizens are entitled to play in monitoring and even challenging the actions and decisions of New York's land banks.

Creation of a Land Bank

Pursuant to the Land Bank Act of 2011, there are specific requirements and steps that must be taken in order to create a land bank. These steps may provide insight and indications of the role of a land bank and the oversight applicable to the land bank as a public corporation/not-for-profit entity.

A Foreclosing Government Unit must adopt a local law, ordinance, or resolution to establish the land bank. Included in this law, ordinance, or resolution must be:

- Name of the land bank
- The number of members for the initial Board of Directors
- Names of the initial individuals to serve as members of the Board of Directors
- Term length of the initial Board Members
- Qualifications, section or appointment process, and term of office of those board members
- Articles of Incorporation for the land bank

LEGISLATIVE HISTORY

THE LAND BANK ACT

Article 16 of the Not-For-Profit Corporation Law (Land Bank Act) enables municipalities to create land banks. It was signed into law on July 29, 2011, by Governor Andrew M. Cuomo after an unsuccessful attempt to pass legislation in 2008 at the start of the fiscal crisis. That initial bill was vetoed by then-Governor David A. Paterson because the act did not provide funding for land banks. The 2011 legislation notes that there were, at the time, an estimated 13,000 vacant parcels in Buffalo alone. Among those were

approximately 4,000 vacant buildings with 22,290 vacant residential units.[4]

The Land Bank Act authorized the creation of up to 20 land banks statewide, each contingent upon approval of the state Urban Development Corporation, doing business as the ESDC. It further provided that each "land bank shall constitute a type C not-for-profit corporation under New York law."[5]

Interestingly, although the statute labels land banks not-for-profit corporations, it also imposes additional obligations upon them – atypical of not-for-profit corporations – such as compliance with state laws such as Not-for-Profit Corporation Law, Public Authorities Accountability Act, OML, POL and FOIL. Thus, the land bank is an unusual entity and one warranting a closer look.

THE STATUTE

Each land bank is created as a not-for-profit corporation pursuant to Article 16 of the Not-For-Profit Corporation Law. However, a land bank differs in key ways from a typical not-for-profit entity. An examination of the distinctive features that set land banks apart reveals that:

Land banks can only be created by one or more "Foreclosing Governmental Unit" (FGU), usually cities or counties.[6] This distinction arises because foreclosed properties will make up the first, and possibly the largest, tranche of housing units to be controlled through operations of the land bank.

Though created by an FGU, a land banks runs its own finances. Land banks are able to issue bonds and notes, decide upon development plans and set their own rules as to meetings.[7] Additionally, land banks have complete autonomy from the FGU when engaged in the business of land banking; they can sell their real estate, or lease it, or give it away.[8]

While initial directors and board members are appointed by the creating entity, subsequent directors and board members are selected using the means enumerated under the initial articles of incorporation for the land bank.[9] The board members of the land banks are vested with the power to "organize and reorganize the executive, administrative, clerical and other departments of the land bank, and to fix the duties, powers, and compensation of all employees, agents and consultants."[10]

The Land Bank Act allows any FGU to create a land bank, so long as the FGU abides by the procedural requirements set forth in the Act.[11] In the City of Albany, for example, the City is made whole by Albany County for all property taxes paid or unpaid by its citizens. Therefore, because Albany County is the tax collecting entity, the County is the enforcing foreclosing unit for

[4] The Act credits the Cornell Cooperative Extension Association of Erie County for these numbers, Land Bank Act § 1601.
[5] Land Bank Act, § 1607.
[6] *Id*., § 1603(a).
However, in some cases, a school district may participate in the creation of the land bank, if the school district has the capacity to foreclose for school bond tax on property.
[7] *Id*., § 1605.
[8] *Id*., § 1607(a)(12).
[9] *Id*., § 1603(a)(4), § 1605(f).
[10] Land Bank Act, *supra* § 1606.
[11] *Id*., § 1603(a).

properties. This means that Albany County **must** be involved in the creation of the land bank.[12]

The FGU is charged with first passing its own laws which:

1- Spell out the name of the land bank.
2- Set the number of directors (not less than five, nor more than 15).
3- Names the first directors, and the length of their terms.

The FGU additionally must specify:

4- The newly named board members' qualifications.
5- The manner of selection of those board members.
6- Terms of office for the board.[13]

The FGU will also:

7- Draft the Articles of Incorporation for the land bank.
8- File them with the New York Secretary of State.[14]

Article 16 further allows two or more foreclosing entities to join together to form a common land bank.[15]

Upon proper formation, a land bank is further differentiated from most public agencies through additional requirements. Land banks must establish:

1- A separate, unpaid board of directors.[16]
2- A staff for whom the only mission is land banking: turning properties back into use by community residents and other interested people (redevelopment).[17]

Because the land bank is separate from the sponsoring entity, the money it makes through transactions such as real estate sales and rentals, is also separate; the land bank's goal is to eventually become a self-supporting corporation.

As a separate and distinct entity, land banks can use their revenue in a range of ways, so long as it is not used for private gain. Land banks may "design, develop, construct, demolish, reconstruct, rehabilitate, renovate, relocate and otherwise improve real property."[18] Much of this can be accomplished through contracts with private or public development corporations and investors. Thus, a land bank may also enter into and form private partnerships, joint ventures and other collaborative business entities.[19] In fact, the enabling legislation states that "the land bank shall have complete control as fully and completely as if it represented a private property owner."[20] The only limitations hinge on specifically forbidden power and specifically prohibited behavior, such as

[12] *See* "Round Three New York State Land Bank Program," the application submitted to ESDC, March 26, 2014.
[13] Land Bank Act, *supra*, § 1603(a)(1-4).
[14] *Id*., § 1603(5).
[15] *Id*., § 1603(b).
[16] *Id*., § 1605(g).
[17] *See* Land Bank Act, *supra*, § 1601, "Legislative Intent." The law states that land banks create "new tools to be available to communities throughout New York enabling them to turn vacant spaces into vibrant places." (Note: This last phrase is taken verbatim from the slogan for the Center for Community Progress, a national organization devoted to land banking.)
[18] Land Bank Act, *supra*, § 1607(a)(13).
[19] *Id*., § 1607(a)(16).
[20] *Id*., § 1615.

conflicts of interest for staff and directors.[21] Moreover, other than the municipal restrictions detailed in the legislation itself, the land bank "shall not be subject to restrictions imposed by the charter, ordinances, or resolutions of a local unit of government."[22] This means that if a charter, ordinance, or resolution would not apply to a private property owner, it **will not** apply to the land bank's use of land/property.

Though the land bank's mandate is broad, it has significant restrictions. A land bank does not have the right of eminent domain; the land bank may acquire property – whether vacant land or building – by grant of foreclosed property from an FGU exchange, transfer, purchase, or gift.[23] Land banks cannot take a person's property through eminent domain, even with "just consideration," the vital Constitutional protection.

Land acquired by the land bank becomes tax-free, but only so long as it is in the possession of the land bank. This means the land bank will not pay property tax on the property while it is owned by the land bank. However, after the land bank disposes of the property, the new owner will be taxed on the property. Pursuant to the Land Bank Act, the land bank **may** be entitled to half of the tax revenues on the property for five years, the other half going to the tax collecting entity.[24] This benefit to land banks must be enacted under proper local legislation that provides this split of tax monies.[25] For example, in Albany the Albany land bank could receive half of the property tax for five years and the other half will go to the County of Albany. After five years, the County of Albany would receive 100% of the property tax. This arrangement can benefit the County by: redeveloping a property that may have been delinquent on taxes, and getting it back on the tax roles at a potentially higher assessment for the county portion of the real property tax. But also this arrangement benefits the land bank through short-term tax revenue for the land bank, a potential sustainability factor for a land bank.

In addition to having their own power over property, land banks are also vested with the power to:

1- Sue and be sued in their own names, and to join and be joined in civil actions including actions to clear title.
2- Make contracts, give guarantees and incur debts.
3- Issue bonds that are tax-free in New York[26] and borrow money.
4- Enter into intergovernmental agreements under 119-0 of the General Municipal Law.
5- Invest money of the land bank, and insure its properties.

[21] *Id*., § 1614.
[22] *Id*.
[23] Land Bank Act, *supra*, § 1608(b).
[24] In the New York land banking provisions, the 50 percent tax allowance is valid for five years, and is derived from foreclosed properties redeveloped by the land bank and sold. The split applies to those properties returned to the tax rolls through the efforts of the land bank. If the FGU holds an auction of properties not targeted by the land bank for redevelopment, and if through another program are restored to the tax rolls, the land bank would not benefit.
[25] Land Bank Act, *supra*, § 1610(c).
[26] But land banks must hold a public hearing to solicit community comment prior to financing or issuing bonds, and shall accommodate the public if appropriate.

6- Charge and collect rents and issue licenses and easements.[27]

Each land bank in New York State is created as an independent, not-for-profit corporation; yet, because a land bank engages in public redevelopment, they are also considered local public authorities, and are subject to the POL.[28] In addition, the enabling statute specifically requires that each director, officer and employee "shall be a state officer or employee for the purposes of Sections 73 and 74 of the Public Officers Law."[29] This mandate in the enabling statute in addition to the role a land bank plays with redevelopment is what requires compliance with the POL.

PUBLIC OFFICERS LAW

Directors and officers of land banks are required, pursuant to the enabling statute, to comply with Sections 73 and 74 of the POL, which holds them to express ethical standards and conflicts-of-interest restrictions.[30] Thus, while a land bank is separate from a local government unit, it still falls under the purview of government personnel ethical conduct standards. This is an important distinction, since the officers and directors of private corporations do not have this obligation.

This nuance of the Land Bank Act subjects the actions of the board and the directors to public scrutiny at a deeper level than that for a private charitable corporation. Private charitable corporations are often held accountable by members of the charitable organization or beneficiaries of the corporation. However, in the case of a land bank, consider the stockholders' role being filled by the public that the land bank serves.

Directors must file extensive reports on their personal finances and affiliations for unpaid positions. These reports outline salary and trust income of the directors and their spouses as well as:

1- Any gifts received over $1,000.

Section 73 of the Public Officers Law

Section 73 creates a requirement for officers of, in this case, Public Corporations to disclose specific information about each officer. Also Section 73 requires the forms and tracking of officer's disclosures be done in a way that is transparent to the public.

This act allows the public to easily and quickly identify the board and directors of a corporation and their roles and responsibilities within the corporation.

[27] This is a partial list; the complete list is contained in § 1607 of the Land Bank Act, as cited previously.
[28] Land Bank Act, § 1609, 1608(b).
[29] *Id.*, § 1608(b).
[30] Land Bank Act, 2011 N.Y. A.N. 373 § 1605(l).

2- Any contracts, promises or other agreements between the reporting individual and any person, firm or corporation with respect to the employment of such individual after leaving the office or position (other than a leave of absence).
3- All securities held by the reporting person and spouse.

Almost without exception, the information filed by the land bank is public. Officers may request that certain items remain confidential; however, these requests can be rejected under the auspices of transparency. Public Officers Law says: "The more open a government is with its citizenry, the greater the understanding and participation of the public in government."[31]

Additionally, the Land Bank Act directs that land banks are required to follow the policies and procedures of the OML and FOIL: "The board shall cause minutes and a record to be kept of all its proceedings. Except as otherwise provided in this section, the land bank shall be subject to the open meetings law and the freedom of information law."[32]

Section 74 of Public Officers Law

Section 74 codifies requirements for, in this case, public corporations to disclose any interested party in a position to make decisions for the corporation in an action being taken by the corporation.

This is a check point for ethical conduct by the board. The public can see if there are any people on the board profiting or benefitting from the actions of the corporation.

[31] Freedom of Information Law, Public Officers Law, Article 6, § 84, "Legislative Declaration."

[32] Land Bank Act, 2011 N.Y.A.N 373 § 1612(a).

FREEDOM OF INFORMATION LAW

The Freedom of Information Law (FOIL) is a mechanism for private citizens to gain access to documents, reports, and information that has to be collected by agencies.[33] FOIL generally applies to any entity falling within the definition of an agency as defined in the POL. Article 6 of the POL is what is referred to as FOIL and governs any governmental agency. Section 86 of FOIL defines an agency as:

". . . Any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, officer or other government entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."[34]

Although the land bank enabling statute explicitly mandates that land banks adhere to the policy and procedure of FOIL, it is important to note that even without this express requirement, FOIL would most likely apply to land banks.[35]

Jurisprudence shows that courts generally consider a corporation formed by a government entity, channeling public funds into the community, and enjoying many of the attributes of a public entity as an agency under the definition of FOIL.[36] Since a land bank is a public corporation, formed by a government entity and is performing a proprietary function for municipalities, land banks are agencies as defined by the State of New York.

For example, in the *Buffalo News* case, the court indicates that even without express language subjecting a not-for-profit corporation to FOIL in the enabling statute, the courts would likely define those

Buffalo News v. Buffalo Enter. Dev. Corp.

Thomas Dolan, a reporter with the *Buffalo News*, had submitted a FOIL request to the Buffalo Enterprise Development Corporation (BEDC) for financial documents pertaining to non-performing loans included in BEDC's annual budget. BEDC's response was a list of delinquent loans but denial of access to loans that had been forgiven or discharged by BEDC. When the Chairperson of the Board of BEDC, at that time the mayor of Buffalo, continued to refuse access, *Buffalo News* commenced a CPLR Article 78 action against the BEDC to compel disclosure of these documents. The Supreme Court in Erie County upheld BEDC's administrative decision to deny the FOIL request. These early decisions were based upon the interpretation that BEDC was not an agency within the grasp of Article 78 and so did not even reach the question of whether the documents were available under FOIL. *Buffalo News* filed an appeal with the 4th Department Appellate Division of the Supreme Court of the State of New York. The court reversed the administrative and Erie County Supreme Court decisions that BEDC was not an agency subject to Article 78 and further held that *Buffalo News* was entitled to the documents it had requested pursuant to FOIL. The Appellate Court's decision was affirmed by the New York Court of Appeals.

[33] *Id.*
[34] Freedom of Information Law, Public Officers Law, Article 6, § 86.
[35] Pursuant to Not-for-Profit Corporation Law § 1612, land banks are subject to both New York's Open Meetings Law and Freedom of Information Law.
[36] *Buffalo News v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488 (N.Y. 1994).

corporations as an agency within the reach of FOIL.

At issue in this case was whether a not-for-profit corporation was an "agency" within the meaning of FOIL. Public Officers Law defines "agency" for FOIL purposes as a public corporation performing a governmental or proprietary function for the state or any one or more municipalities thereof. The lower court held that Buffalo Enterprise Development Corporation (BEDC) was a not-for-profit corporation which did not fit within FOIL's definition of "agency." The Appellate Court reversed holding that BEDC, which channeled public funds into the community, enjoyed many attributes of public entities, and was created exclusively by and for a city to attract investment and stimulate growth, was an agency and within the reach of FOIL. This disposition granted the local newspaper the right to request the corporation's annual budget and mandated the corporation to comply with that request.

This distinction, upheld by the New York Court of Appeals, is important because it asserts that corporations created by a government entity can be subject to public entity or agency standards. While a land bank is not a development corporation like BEDC, land banks are created by a government entity to perform specific duties. As outlined in the enabling statute and to date in the articles of incorporation for existing land banks, these activities include those which have been traditionally undertaken by government entities, such as: demolition and redevelopment of blighted, vacant, or foreclosed properties. Furthermore, a land bank also enjoys many attributes of a public entity or agency, primarily a tax exemption on property held by the corporation.

The enabling statute and jurisprudence therefore show that land banks must comply with FOIL by making their records available to the public and copying them (at not more than 25 cents for letter-sized page copies; and for reasonable cost for other sizes), with certain exceptions. Such exemptions from disclosure include, but are not limited to, the following[37]:

1- Items that are specifically exempted by state or federal statute.
2- Items that, if disclosed, would constitute an unwarranted invasion of personal privacy (i.e., personal address).
3- Items that, if disclosed, would impair "present or imminent" contracts or collective bargaining.
4- Items that are deemed trade secrets or would cause competitive injury to the commercial entity submitting.
5- Items that interfere with law enforcement or judicial proceedings.[38]

Understanding these exceptions, FOIL requires disclosure of records and defines those records as:

> "any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever

[37] Public Officers Law, *supra*, § 87 – Access to agency records.

[38] *See*, *Id*., Sub.2 of § 89, 87 subs i-iv.

> including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."[39]

In the instance of a land bank this will include annual budgets, ledgers of property, bank account balances, proceed sheets from the disposal of properties, and any other record of action taken by the land bank. These disclosures help further the government's legitimate interest of transparency for its own agencies as well as publicly authorized corporations.

FOIL also requires that votes of all public meetings, salaries of all employees, and a list of records on file be made available to the public and updated annually.

The Committee on Open Government (COG) can help land banks determine whether a document is subject to FOIL. COG is responsible for issuing advisory opinions to agencies, the public and the news media, issuing regulations, and annually reporting its observations and recommendations regarding the operation of FOIL and the OML to the Governor and the Legislature.[40]

The Committee provides written and oral advice on questions arising under the OML or FOIL. Additionally, the Committee mediates controversies in which rights may be unclear. Municipal and land bank officers and employees needing advice regarding the OML or FOIL may contact the Committee at: **Committee on Open Government, NYS Department of State, One Commerce Plaza, Suite 650, 99 Washington Avenue, Albany, NY 12231, Ph (518) 474-2518, Fax (518) 474-1927, www.dos.state.ny.us/coog/index.html.**

Most of the Committee's publications are available online, including ***Your Right to Know*, FOIL FAQs,** and ***Open Meetings Law FAQ,*** as well as the actual statutory language of the FOIL and the OML. The Committee's Advisory Opinions are available online, with the opinions listed alphabetically by key phrase. Specific issues, such as whether building plans are subject to FOIL (they are)[41] or whether members of a public body may vote by telephone (they may not),[42] are addressed in the opinions. Chances are that an advisory opinion has already been written on the subject of interest to municipal and land bank employees, and is available online.

[39] *Id*., § 86(4).
[40] Public Officers Law § 109.
[41] N.Y. St. Comm. Open Gov't. FOIL-AO-7821.
[42] N.Y. St. Comm. Open Gov't. OML-AO-4306.

OPEN MEETINGS LAW

Pursuant to the Land Bank Act § 1612, a land bank is subject to the Open Meetings Law.[43] Pursuant to Public Officers Law § 102, a meeting is defined as:

". . . the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body. . . for which a quorum is required in order to conduct public business and which consists of two or more members. . ."[44]

Pursuant to Public Officers Law § 105, public bodies may enter into executive session (that portion of a meeting not open to the general public) to consider various subjects, including:

1- Matters that will imperil the public safety if disclosed.
2- The medical, financial, credit or employment history of a particular person or corporation.
3- Matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal, or removal of a particular person or corporation.
4- The proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.[45]

Open Meetings Law

Public Officers Law (POL) § 103 is generally referred to as the Open Meetings Law. This section of the POL identifies clearly the requirements for government, quasi-governmental, and public corporations in relation to action.

An important facet of § 103 allows a court to invalidate actions enacted in violation of the Open Meetings Law. This means that if a body violates the steps of the OML in taking action or in having a meeting, those actions or all decisions made at the meeting in violation, can be reversed by a court.

If a body violates the OML either through improper executive session, failure of notice, or lack of proper access to the public, the court can void an action and demand that the body comply with § 103 and re-try a passage of the action.

[43] As previously noted, Not-For-Profit Corporation Law § 1612 also subjects land banks to New York's Open Meetings Law. Consequently, land banks are subject to the rules of notice, comment, and executive session defined under New York State Open Meetings Law. OML requires land banks to give the community notice of upcoming meetings, allowing citizens to submit comments about potential business plans, and to strictly adhere to the initiation of executive sessions and the disclosure of any decisions made during and executive session.

[44] *Id.*, at (1-2).

[45] Public Officers Law, *supra*, § 102, at § 105(1)(a-h) (this is not an exhaustive list and more exceptions occur in the law but likely are not relevant to land bank operation).

Since land banks, as a not-for-profit corporation, are subject to such a unique set of state statutes and have very stringent guidelines that appear to identify them as an agency under POL, there is some uncertainty as to how claims of grievance against a land bank will play out when brought by the public.

CPLR ARTICLE 78

For many state agencies, local municipalities, quasi-governmental corporations, and arguably public not-for-profit corporations, public accountability is enforced through the use of Article 78 lawsuits. This arm of the CPLR is a forum for the public to bring suit and redress potential failures of transparency or harm committed by government, quasi-governmental, or public corporations.

Four primary arguments support the conclusion that a land bank is likely subject to Article 78 of the CPLR. First, as a government-formed charitable public corporation, land banks must have oversight because of the way they have been formed and the potential for abuse of power. Second, land banks are serving as redevelopment hubs, a typically governmental role in our society. Third, FOIL and OML are most regularly enforced through Article 78 proceedings. Finally, fourth, because the Public Authorities Accountability Act likely applies by definition and all assets would return to a governmental body upon dissolution, land banks lie within reach of Article 78.

The enabling legislation for the land banks clearly states that the unpaid directors of the land bank will not be held **personally** responsible for their decisions that may result in harm against individuals or groups of people in the public.[46] However, there must still be an avenue for redressability by the public for capricious, arbitrary, or potentially unconstitutional actions by the land bank. The land bank cannot act without potential repercussions, which could result in flagrant abuses of power. So, to avoid a public corporation without culpability, that repercussion comes in the form of public accountability. So, since the unpaid directors and board members will not be held personally accountable, would these complaints then be filed against the corporation itself?

When the public disagrees with the action taken by a government agency, they may potentially seek redress through an Article 78 proceeding. Article 78 is a procedural vehicle for persons seeking to challenge the conduct of a government entity in court. This process is likely the redressability vehicle for a public complaint against a land bank. Even though the land bank's enabling legislation restricts the unpaid director's personal liability, it does not limit the liability of the public corporation itself. The question is whether Article 78 can be applied to a land bank.

It may be, and likely is possible that, an Article 78 proceeding would seem to provide a vehicle for challenging decisions by the land bank and its officers that are illegal, or are deemed arbitrary and

[46] Land Bank Act, 2011 N.Y.A.N 373 § 1605(j).

capricious. Specifically, Article 78 permits the commencement of a proceeding against a "body or officer,"[47] meaning "every court, tribunal, board, **corporation**, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article."[48]

Article 78 gives private citizens or groups of citizens an avenue to pursue court action against a public corporation, government, or quasi-governmental entity.

For example, a person may use what is referred to as an Article 78 proceeding to challenge the denial of a FOIL request or where the Open Meetings Law has been violated. Additionally, in instances where an entity required to follow the Open Meetings Law of the State violates the procedures of OML, Article 78 is a proper forum to address the failure and any estop actions enacted during the meeting that was in violation.

There is no express indication that CPLR Article 78 would apply to a land bank, and, furthermore, there is no jurisprudence specifically related to land bank activities that provide direct evidence of such accountability. It does, however, appear that there is a strong indication that the legislative intent was to make land banks subject to Article 78, since land banks are specifically subject to many of the state laws that are generally governed by Article 78 (FOIL and OML).[49]

Moreover, case law surrounding similar issues provides that similarly situated entities are subject to Article 78. Following this train of jurisprudence would likely result in courts subscribing to the understanding that it is proper to subject a land bank to Article 78.

Gray v. Canisius

A tenured professor was discharged based on alleged violations of the rules of the College, not for violations of her employment contract. Initially the courts sided with the College, because the College was considered a public corporation, under § 7804(f), citing that a public corporation's discretionary actions are not available for review.

Under a unanimous decision, on appeal to the New York State Court of Appeals, the view that discretionary actions of a public corporation are not reviewable under Article 78 was discredited.

The Court held that both private and public corporations which are **created by government action must have discretionary actions subject to review** in order to prevent abuses of power and promote public transparency.

The Court, in this action, thus reversed the decision and remanded the case back for proper Article 78 proceedings.

First:

As a government-formed charitable public corporation, there must be oversight

[47] NY CLS CPLR § 7801(1).
[48] *Id*. at 7802(a).
[49] Land Bank Act, 2011 N.Y.A.N 373. Supra notes 26 and 30.

of land banks because of the way they have been formed and the potential for abuse of power.

Land banks are public corporations subject to New York's Not-For-Profit Corporations Law.

The Practice Commentary for CPLR § 7802 notes that historically these proceedings have been used to police activity by public corporations. The seminal case on this issue is *Gray v. Canisius College of Buffalo.* Under *Gray* the New York State Appellate Division, Fourth Department held that a college classified as a public corporation can be subject to an Article 78 proceeding to review acts alleging a violation of its own rules. Stating that:

> "Because these institutions are creations of the government and a supervisory or visitorial power is always impliedly reserved to see that corporations act agreeably to the end of their institution, that they keep within the limits of their lawful powers, and to correct and punish abuses of their franchises."[50]

This holding indicates that a court would be the proper oversight body for a corporation created by a government entity such as a land bank.

Furthermore this holding points out that it is necessary to review actions of private corporations that operate under the auspices of a public corporation to avoid abuses of the corporate power by the board governing the corporation. This indicates the need to have transparency checkpoints on public corporations, something that the enabling statute for land banks clearly identifies as a necessary component to the success of these corporations by subjecting them to FOIL and OML.

For land banks, this holding has particular significance in two parts. First because of the *Gray* holding, land banks are likely to fall under the umbrella of Article 78 enforcement because they are created by a government entity. Second, the discretionary actions of the board are likely subject to review to ensure that the land bank has operated within the limits of its power and no abuse of such power or impropriety of action has occurred.

It is further evidence that Article 78 is also likely to apply to land banks because of how they are created and the purpose for which they are created. Under the Land Bank Act, the organization of the land banks can only be established through the State's enabling legislation and approval by a State entity (ESDC). This formation requirement in the enabling act appears to support the holding from *Weidenfeld v. Keppler*. Under *Weidenfeld,* the court held that corporations and state-chartered organizations are subject to Article 78 because their existence is established by state charter.[51] Because a land bank can only exist because the state passed an enabling statute, it should be subject to Article 78. While *Weidenfeld* is a case from the turn of the 20th century, it is still widely cited as a controlling opinion.

In *Weidenfeld* the New York Stock Exchange (NYSE) was being asked to

[50] *Gray v. Canisius College of Buffalo*, 76 A.D.2d 30, 33 (N.Y. App. Div. 4th Dep't; 1980).

[51] *Id.* Citing a discussion among justices while in deliberation of *Weidenfeld v. Keppler*, 84 A.D. 235 (N.Y. App. Div. 1st Dept., 1903); aff'd 176 N.Y. 562 (1903).

reinstate a former broker who had been suspended. While the effort for reinstatement was ultimately unsuccessful, the Appellate Division determined that the NYSE was a chartered private entity. This distinction turns on the fact that:

> "A writ of mandamus is applicable to corporations, both public and private, because these institutions are creations of the government and a supervisory or visitorial power is always impliedly reserved to see that corporations act agreeably to the end of their institution, that they keep within the limits of their lawful powers, and to correct and punish abuses of their franchises. These corporations, having accepted a charter and having thus become a quasi-governmental body, can be compelled in a proceeding under N.Y. C.P.L.R. 78 to fulfill not only obligations imposed upon them by state or municipal statutes, but also those imposed by their internal rules."[52]

Under this idea that because a land bank cannot exist without the State's action (enabling act and incorporation by a foreclosing governmental unit), it is likely that a similar interpretation would be applied by courts for actions of the land banks. Thus under both *Gray* and *Weidenfeld*, a land bank is likely to be subject to Article 78.

Second:

Land banks are serving as redevelopment hubs, a typically governmental role in our society.

The primary purpose of the land banks is to serve as redevelopment hubs for tax-foreclosed, blighted, and vacant property, for the creating government entity that forms each land bank. Because the land bank serves to provide a service that substitutes a government action, it should be subject to Article 78.

The court in *Matter of Griffiss Local Dev. Corp.* held that a corporation formed to lessen the burden on government and tasked with action in the interest of the public must be subject to Article 78.

The new Griffiss Business and Technology Park on the site of the abandoned Griffiss Air Force Base in Rome, New York. [53]

[52] Id., at 235, See also 2014 N.Y. Op. Atty. Gen. No. 5 (N.Y.A.G.), 2014.

[53]http://www.griffissbusinesspark.com/why_griffiss.asp#global.

Griffiss pitted a public corporation, formed under specific direction from Oneida County and the City of Rome, against the State of New York Authority Budget Office. The role of this corporation included lessening the burden on governments and acting in the public's best interest in the redevelopment of the former Griffiss Air Force Base.

The enabling statute provides: "The primary focus of land bank operations is the acquisition of real property that is tax delinquent, tax foreclosed, vacant, abandoned, *and the use of tools authorized in this article to eliminate the harms and liabilities caused by such properties* [emphasis added]."[54] This wording by the legislature clearly shows that land banks are intended to lessen the burden on government and will act in the best interest of the public.

Based upon the structure of a land bank it is likely to meet the criteria to be considered a public development corporation. Courts have deemed that public development corporations meet the standard for an Article 78 review.[55] The disposition in the *Griffiss* matter made a determination that "a not-for-profit local development corporation whose sole purpose is redevelopment"[56] was subject to Article 78. A land bank's sole purpose is the acquisition of land for development purposes. This development can take several forms, but ultimately any action by a land bank is specifically focused on redevelopment in the community that the land bank operates. As such, *Griffiss* provides the likely outcome

Jackson v. UDC

The Jackson case was actually a joining together of four challenges to the Urban Development Corporation's (UDC) action by two separate groups of petitioners.

Group one was asserting a challenge based on UDC's right to acquire and demolish some of the Times Square buildings that were slated for a new development. This argument asserted that the plan did not sufficiently address traffic and air quality, which was an implication that UDC had violated the OML by not properly considering public comment and environmental concerns. Another group challenged the UDC under FOIL, claiming that reports were defective, and demanded a release of those reports.

Under the holding of both the Supreme Court, Appellate Division, and ultimately the New York Court of Appeals, it was clearly established that based upon the claims being made, there were implications of violations, not only of the governing environmental, developmental, and eminent domain laws, but also of the OML and FOIL.

While the courts ultimately decided that there were no violations and the actions of UDC were proper under all relevant law, it importantly stated that the standard of review for a public corporation for these allegations was Article 78.

[54] Land Bank Act, 2011 N.Y. A.N. 373 § 1601 (Legislative intent). Emphasis added in italics by author to demonstrate the development definition of roles of land banks.

[55] *Matter of Griffiss Local Dev. Corp. v. State of N.Y. Auth. Budget Off.*, 85 A.D.3d 1402 (2011).

[56] *Id.*

for a challenge of Article 78 applicability: Article 78 will likely apply to land banks.

Under this argument using the *Griffiss* case, a court is likely to arrive at a similar conclusion, placing land banks within reach of Article 78.

Third:

FOIL and OML are most regularly enforced through Article 78 proceedings.

The Land Bank Act specifically subjects all New York land banks to the Freedom of Information Law and the Open Meetings Law. This aspect of the Act is an indication that, although not expressed in the legislative intent of the Act, the legislature likely intended that a land bank would be subject to Article 78.

This intent is further amplified by the Land Bank Act clearly directing that officers and directors are subject to the POL. Since the primary course of redress for a failure to comply with FOIL or OML is an Article 78 proceeding, it is a logical leap to state the legislature intended land banks to fall under Article 78's purview.

Both FOIL and OML are laws primarily enforced through CPLR Article 78. While it is possible to bring a claim of "unconstitutionality" against actions or omissions under both FOIL and OML, it is vastly more efficient to file under the processes of Article 78.

Under *Jackson v. New York State Urban Dev. Corp.*, both the county Supreme Court and Appellate Division provide that the applicable standard of review for alleged violations of the Open Meetings Law is the standard of review prescribed under CPLR Article 78.[57]

One reason for this holding may be that Article 78 is a much more efficient vehicle for remedy because civil trials can stretch for years and this, in turn, can result in many actions becoming moot before redress is available. Response times and hearing schedules are accelerated and initial claims have a drastically shorter, four-month statute of limitations. These shortened times make relief more realistic for the public for violations by an agency.

Not only does Article 78 give relief faster, it also benefits the potential respondent, the land bank, by cutting off the ability for extensive filings through long statutes of limitation. Under a constitutional challenge of state action, land banks could be subject to filings of complaints for up to six years from the date of harm or breach of duty to the public. This long period has the potential to limit a land bank's ability to act by requiring reservation of limited resources. This reserve could eliminate the ability to continue their purpose of acquisition and redevelopment.

Because both FOIL and OML can be enforced under CPLR Article 78, it is likely that a court will find that a public corporation specifically subject to both FOIL and OML through a legislative statute was intended to also be within the reach of proceedings initiated under Article 78.

Similarly, because a public officer's actions may be scrutinized through the same

[57] Steven F. Meyer, *Jackson v. New York State Urban Development Corporation: Standard of Review for Sufficiency of Environmental Impact Statements*, 5 *Pace Envtl. L. Rev*. 279 (1987), at 294. Available at: http://digitalcommons.pace.edu/pelr/vol4/iss1/9.

options of Article 78 or constitutional violation, the same reasoning should apply. A court would likely find that it is most efficient that the POL be enforced under Article 78. Using the same argument from above, the likely outcome would be a holding that the standard of review of CPLR Article 78 is the controlling authority for directors and board members of a land bank.

Fourth:

Because the Public Authorities Accountability Act likely applies to a land bank, all assets would return to a governmental body upon the dissolution of a land bank.

The Public Authorities Accountability Act (PAAA) makes all legal authorities subject to Article 78, and defines a legal authority as, ". . . A not-for-profit corporation affiliated with, sponsored by, or created by a county, city, town, or village government."[58] Land banks are entities that are sponsored by and created by any county, city, town, or village government.[59] Therefore, they would be subject to the PAAA and thus Article 78.

Furthermore, the *Griffiss* court opines that when property of a development corporation reverts to the foreclosing governmental unit upon dissolution of the corporation, the actions of that corporation must be viewed as state actions and, therefore, must be subject to review through Article 78 proceedings, in compliance with the PAAA.[60]

Upon dissolution of the land bank all assets automatically revert back to the FGU. Case law indicates that this is a dispositive indication of application of the PAAA. The PAAA codifies that a state agency is subject to CPLR Article 78.[61]

When a public corporation takes possession of land and the certificate of incorporation explicitly states that said land, in the event of dissolution, is returned to the FGU, this is a strong enough link to require Article 78 compliance. This winding up event shows an intention of state action on the part of the corporation. If this intention exists, it also subjects the land bank to the PAAA.

According to the Certificates of Incorporation for land banks of New York State, all property in the corporation at the time of winding up its affairs or dissolution are returned to the FGU.[62] This designation is dispositive that a land bank is subject to Article 78 under the PAAA.[63]

Thus, since land banks must be sponsored or created by a county, town, or village government, AND all property, in the event of the demise of the corporation will return to the foreclosing government that established the corporation, the land bank is considered an agency under the PAAA, and is subject to Article 78 as a mechanism for review of actions taken.

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[58] Public Authorities Accountability Act, 2005 N.Y. ALS 766, 2005 N.Y. Laws 766, 2005 N.Y. S.N. 5927.
[59] The Land Bank Act, 2011 Bill Text NY, A.B. 373 § 1602(a-b).
[60] *Matter of Griffiss Local Dev. Corp. v. State of N.Y. Auth. Budget Off*., 85 A.D.3d 1402 (2011).
[61] Public Authorities Accountability Act, 2005 N.Y. ALS 766, 2005 N.Y. LAWS 766, 2005 N.Y. S.N. 5927.
[62] Certificate of Incorporation, Albany Land Bank § sixth, and Land Reutilization Corporation of the Capital Region § Ten.
[63] *Id*.

Courts would likely follow the *Griffiss* rationale and find land banks subject to CPLR Article 78.

Conclusion:

While there is no precedent or controlling authority that is on point for land banks, these arguments and holdings articulate a likely contention that a type C not-for-profit, public corporation that:

1- Is established by a foreclosing governmental unit;
2- Is tasked with the roles and responsibilities that have traditionally been conducted by state or municipal governments, specifically those responsibilities of development and utilization of land/property;
3- Has directors and board members who are subject to specific state ethical laws, including FOIL and OML; and
4- Is subject to the PAAA because it was sponsored or created by a local government and upon dissolution will revert all foreclosed upon property in the public corporation back to the foreclosing governmental unit that transferred the property to the corporation,

will also be subject to the application of Article 78.

APPLICATION OF ARTICLE 78

Pursuant to Article 78, land banks would be subject to challenges under five categories:

1- Whether the body or officer failed to perform the duty enjoined upon it by law; or
2- Whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3- Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4- Whether a determination was made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence; or
5- A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the

effective date of this subdivision.[64]

Under the above conditions, a citizen dissatisfied by a decision of a state-empowered land bank, and seeking a remedy for the problem, must demonstrate that he or she has the right to relief under one of the applicable headings: certiorari, mandamus, or prohibition.[65]

Of these actions, mandamus is the most probable to be employed by petitioners when they wish to challenge a land bank decision. A writ of mandamus comes in two versions:

1- Writ of mandamus to compel

Generally this is used when a petitioner wants to compel a specific act challenging the ministerial power of an agency (land bank). This means a person can file a writ of mandamus to compel a land bank to hold an annual meeting, which is required under New York law, or an action could be brought to force the land bank to open its books, or to hire more minorities as required under the statute.

2- Writ of mandamus to review

A writ of mandamus to review is used to challenge potentially arbitrary actions that have caused violations of legal obligation on the part of the agency (land bank). This request must be proven by the petitioner. The petitioner must have a clear and legal right to the relief. It is difficult for a person to successfully challenge a governmental or quasi-governmental body – like a land bank – for exceeding its legal mandate, or for its discretionary decisions.

Courts have consistently given deference to government decision making and often refuse to substitute a court's judgment on governmental action because government bodies are usually much closer to the situation, and better able to judge and thus are afforded a heightened level of deference.[66]

The other two mechanisms available are more difficult and cumbersome for a person to act against an agency or land bank.

People looking for relief under Article 78 could also apply for a writ of certiorari during an appeal. Certiorari **only** applies if a case is appealed to a higher court. This makes it unlikely that it would apply because it cannot be the initial proceeding to hold land banks accountable; there would need to be a preceding cause of action. This writ is a demand from a higher court to a lower court to release all related documents in a case for a full review of the lower court's disposition. Since this writ is not available until a ruling has occurred, it is unlikely to be the initial device by which an Article 78 proceeding is initiated.

The writ of prohibition, according to state courts, **cannot** be used "to prevent administrative action unless the agency is acting in judicial or quasi-judicial capacity and even then is generally not appropriate if another avenue of judicial review may be pursued without irreparable injury to the applicant."[67] Since a land bank is not acting

[64] CPLR Art. 78, § 7803(1-5), (Commonly referred to as Article 78 or special proceedings law).
[65] Land Bank Act, *supra*, § 1603(b).

[66] *See, Matter of Pell v. Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck*, 34 NY2d 222 at 232 (1974).
[67] *American Transit Ins. Co. v. Corcoran*, 65 N.Y.2d 828 (1985).

in a judicial or even quasi-judicial capacity, the actions of the land bank cannot be questioned under a writ of prohibition.

RULEMAKING COMPLIANCE

Utilizing the treatment from the discussion of the applicability of Article 78, it is similarly likely that land banks will fall under the umbrella of the State Administrative Procedure Act (SAPA) when engaged in certain specific actions of power that the land banks have been granted by statute.

Rulemaking for public corporations and agencies is a tenuous tight rope requiring compliance with the requirements of Article 2 of SAPA. Rulemaking is not specifically defined under the Land Bank Act; however, the statute identifies actions such as ISSUANCE OF BONDS, FINANCING, and DEVELOPMENT PLANS that must be open to public comment and consideration.[68] These actions are just different from the general role of a land bank, in that these actions are making decisions that have a greater and more direct impact on the community in which the land bank is situated. Furthermore, while these actions by a land bank have not been explicitly subjected to SAPA, it is in line with the definition of a rule from SAPA. Under SAPA, a rule is ". . . procedure or practice requirements"[69] and ". . . valuations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability."[70] This means any change to the land bank policy or procedure that has a potential to impact the citizenry must be vetted through these procedures of notice, publication, and comment.

Pursuant to its enabling statute, land banks must provide notice of public hearing and solicit public comment for consideration prior to engaging in the action of issuing bonds or financing bonds.[71] These guidelines in the Land Bank Act basically mirror the standards under SAPA. The one difference is that SAPA requires that the agency provide notice to the New York Secretary of State who will publish in the *State Register* the notice of proposed rulemaking[72] and the Land Bank Act does not. Because of the above arguments, it is likely best practice for land banks to follow SAPA when promulgating rules and policies that have a potential to impact the public.

Thus under both the enabling statute and likely SAPA, a land bank when engaged in the above activities, should provide notice of proposed rulemaking or policy change, and establish and provide notice of a meeting allowing time for public comment before any rule or policy that effects the public directly be voted on or implemented.

Should a person or group of persons feel that these steps have been ignored or not followed adequately, the appropriate avenue of redress is again an Article 78 proceeding. Under an Article 78 hearing for failure to comply with rulemaking procedures, the rule or policy may be nullified, if an administrative arbiter or tribunal agree with the plaintiff alleging the violation. This means that to move forward with this rule or policy, the land bank would need to start the

[68] Land Bank Act, *supra,* § 1612(b) (emphasis added by author).
[69] NY CLS St Admin P Act § 102(2)(a)(i).
[70] *Id*., at (2)(a)(ii).
[71] Land Bank Act, supra, § 1612(b).
[72] NY CLS St Admin P Act § 202(1)(a).

process over again: notice, comment, consideration, vote, and implementation.

CITIZENS ROLE

Since a land bank is established as a local public authority, and the board of directors and director are subject to State ethics laws, including PAAA and CPLR Article 78, a citizen has a right to police the activity, decisions, and policy of the land banks.[73]

A citizen who has suffered or will suffer an injury either from direct acts, potential acts, or procedures of the land bank has the right to assert this claim through the Article 78 process.[74] Furthermore, citizens who are requesting documents or adherence to open meetings laws have a similar remedy.

It is a citizen's right under the PAAA to transparency by legal authorities,[75] and this right is unencumbered by the land banks technically being corporations. So, if a land bank fails to operate in a manner that aligns with the transparency requirements and mandates, a citizen has the right to accountability through the court.

[73] *Matter of Griffiss Local Dev. Corp. v. State of N.Y. Auth. Budget Off.*, 85 A.D.3d 1402, 1402, 925 N.Y.S.2d 712, 714, 2011 N.Y. App. Div. LEXIS 5229, *1-2, 2011 NY Slip Op 5150, 2 (N.Y. App. Div. 3d Dep't 2011).

[74] CPLR Article 78 § 7801.

[75] Public Authorities Accountability Act, 2005 N.Y. ALS 766, 2005 N.Y. LAWS 766, 2005 N.Y. S.N. 5927.

Appendix

GUIDELINES FOR PROPOSAL AND ADOPTION OF RULES

RULE PROPOSAL AND ADOPTION

Under New York State's administrative code, a rule is "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof . . . . "[76] Additionally, a rule is any proposal "concerning the internal management of the agency which does not directly and significantly affect the rights of or procedures or practices available to the public; . . ."[77]

This means, for land banks acting as quasi-governmental bodies and local municipalities, that any proposal regarding the internal structure of the agency, i.e., director changes, board member appointments, procedural policy changes, etc., are subject to the rule making process of the New York State Administrative Code.

PROCEDURE FOR RULEMAKING

Prior to the enactment of a rule, specific steps must be taken:

- ☐ Notice: The initial step in rulemaking requires that notice is given to the public of the proposed rule. The notice MUST contain specific details regarding the rule.
- ☐ The notice of proposed rulemaking must be made at least 45 days before the proposed adoption.
- ☐ The notice must state the authority under which the rule is being made, and must be published in the *New York State Register*.
- ☐ The notice must contain the following: date, time, and place of where a public hearing will commence to discuss the rule, if a public hearing is being offered, or a deadline for public comment.
    - This information must also include accessibility and translator services that will be provided at the hearing, and
    - Text of proposed rule, or if the rule text exceeds 2000 words, then a 2000-word summary of the proposal must be included.
- ☐ After the proposed rule, a regulatory impact statement must be included.
- ☐ In addition to the regulatory impact statement, there must be a Rural Flexibility Analysis, which will outline:
    - The types and number of areas impacted by a proposal.
    - How the proposal will carry out record keeping.
    - The cost to the public for the proposal.

[76] NY CLS St Admin P Act § 102 (SAPA).
[77] *Id*. (2)(b)(i).

    - The adverse impact to rural areas.
    - The needed participation of the public.
- ☐ The final piece of the notice must include: the name, business address, and contact phone number of a representative who is knowledgeable of the details of the rule.
- ☐ Public Comment Period: The quasi-governmental body must accept and respond to public comments either through a public meeting or by accepting written comments regarding the rule and concerns of the public.
- ☐ Expiration: Upon completion of the notice and the public comment period, the agency can either formally adopt or withdraw the proposed rule.
- ☐ Publication of the proposed rule must be made in the *State Register*; or
- ☐ A notice stating the date of last hearing can be included in the initial notice.
    - Completion of this requirement triggers the NYS Secretary of State to publish a notice of expiration.
- ☐ Notice of Adoption: Final step to take prior to adoption or implementation of rule.
- ☐ The adopting agency or quasi-governmental body must submit the notice of adoption to the NYS Secretary of State.

CHALLENGING PROPOSED OR ADOPTED RULES

A proposed or adopted rule can be challenged for one of three reasons:

(1) The rule is unconstitutional on its face, meaning it violates the supremacy clause of New York's Constitution. This scenario is unlikely to present itself.

(2) The rule lacks statutory authority, meaning the rule makes a change that the agency is not authorized to engage in. This is also an unlikely scenario.

(3) The rule has been adopted without substantial compliance with the required rulemaking procedure. This is the most likely challenge the land bank will face, and this particular type of challenge has a 4-month statute of limitations.

STEPS TO CHALLENGE

A person who has been directly affected by the rule (has standing), may file a petition for review of the procedure of rule adoption.

- ☐ The agency then has 30 days to respond to the petition, either with an acknowledgement of the wrongdoing and a proposal of how to correct the error, or with a denial of the error (an assertion that all procedure was adhered to).
- ☐ The petitioner may then accept the response. The petitioner may also reject this response, or in the case of a non-response, may file for an adjudication of the petition.

- ☐ This petition will require that the agency submit to an adjudicator a transcript of the procedures followed and the transcripts of any meetings where a decision was made. Once the adjudicator has this information along with the petition, the adjudicator will hold a session and make a determination on the petition.
- ☐ If the petitioner does not agree with the adjudicator, or feels there was bias by the adjudicator, they may then file a notice.

ARTICLE 78 PROCEEDING

This will begin the formal Article 78 proceeding.

- ☐ If the petitioner chooses to file an appeal of the adjudication, the agency will be served with a notice and a petition at least 20 days before the scheduled hearing and this action is filed with the Supreme Court of the county in which the agency is located or the alleged harm occurred.
- ☐ The agency then has at least 5 days to reply to the petition in an answer and support affidavits to dispute the allegations of the petition.

There is limited discovery in an Article 78 proceeding.

- ☐ The Supreme Court will then make a determination of jurisdiction, statute of limitations, and *res judicata* (meaning already determined) and if the petition is not stopped by these standards, the Supreme Court must then transfer the case to the Appellate Division.

The Appellate Division will consider the merits of fact in the proceeding.

- ☐ The agency must show relevant proof that a reasonable mind would accept as adequate to support a conclusion that procedure was followed.
    - The Appellate Division can then annul, confirm, modify, or remand the adjudication.
    - If the adjudication or the decision of the court is that the agency did not follow the prescribed procedure to adopt the rule then the decisions at question are void.[78]

**The Court may award reasonable attorney's fees as part of judgment.

[78] CPLR Article 78 § 7804 (This entire outline of procedure is a breakdown of the response, time frames, statute of limitations, discovery, and adjudication set forth in this article).

OPEN MEETINGS LAW AND EXECUTIVE SESSIONS

OPEN MEETINGS LAW

Any meeting of an agency where a quorum (more than one half of the board) is present is considered a meeting and, unless this gathering is convened as an executive session, **must be open to the public**.[79] Specific rules dictate how a meeting must be run to conform to the Open Meetings Law just as specific procedural qualities must be met in order to have a meeting qualify as an executive session and thus be exempt from the OML.

PROCEEDURES FOR OPEN MEETINGS

Prior to any meeting by the board, specific steps must be taken to ensure compliance with the Public Officers Law[80]:

- ☐ Notice of meeting must be given. If the meeting is scheduled a week or more in advance, 72 hours must be given, and all other meetings require a reasonable time of notice.
- ☐ The notice must contain the time, place, and the date of the meeting along with information regarding the accessibility of the facilities and, if relevant, the use of any interpretive accommodations.
- ☐ The notice is valid if sent to the news media and the public (including posting on webpages for the agency).
- ☐ The notice must be posted in one or more designated public locations and, when possible, online.
- ☐ The minutes of the meeting should be taken and made available to the public within 2 weeks of the meeting or executive session.
- ☐ Although not a mandate, minutes not released may be subject to Freedom of Information Law (FOIL) requests and would thus be disclosed regardless.

[79] See generally, NY CLS Pub. Officers L. § 103.
[80] *Id*., at § 103.

EXECUTIVE SESSION

An executive session is not mandated to be open to the public. However, only specific content is afforded the cloaking of an executive session:

- ☐ Matters that may imperil the public safety if disclosed.
- ☐ Matters that may disclose the identity of a law enforcement agent or informant.
- ☐ Information relating to current or future criminal investigations or prosecutions that would imperil effective law enforcement if disclosed.
- ☐ Information regarding pending or current litigation.
- ☐ Collective bargaining negotiations pursuant to the civil service law.
- ☐ The medical, financial, credit or employment history of a particular person or corporation.
- ☐ Matters relating to exams.
- ☐ Matters relating to transactions involving real property or securities if disclosure would substantially effect the value of the property or securities.
- ☐ Additionally no action may be taken at the executive session to appropriate public monies.

CONVENING AN EXECUTIVE SESSION

An executive session may be convened at a public meeting, but only with the use of specific procedural process:

- ☐ A member of the public body must make a motion to close the meeting and enter an executive session.
- ☐ The motion must identify the *general area* of the subjects to be covered.
- ☐ The motion must be carried by a majority vote of the total membership of the public body.
- ☐ Minutes must be taken during the executive session of any formal vote, but the minutes do not need to include records protected under FOIL.

ARTICLE 78 PROCEEDING

If the OML is perceived as non-compliant, which may include the convening of an Executive Session, an Article 78 proceeding may be commenced by any person who has been injured by the decisions within the non-compliant meeting. The statute of limitations for the injured party to convene an Article 78 proceeding is 4 months.

If the petitioner chooses to file an appeal of the decision of the meeting, the agency will be served with a notice and a petition at least 20 days before the scheduled hearing. This action is

filed with the Supreme Court of the county in which the agency is located or alleged harm occurred.

- ☐ The agency then has at least 5 days to reply to the petition in an answer and support affidavits to dispute the allegations of the petition.

There is limited discovery in an Article 78 proceeding.

- ☐ The Supreme Court will then make a determination of jurisdiction, statute of limitations, and *res judicata* (meaning already determined) and if the petition is not stopped by these standards, the Supreme Court must then transfer the case to the Appellate Division.
- ☐ The Appellate Division will consider the merits of fact in the proceeding.
- ☐ The agency must show relevant proof that a reasonable mind would accept as adequate to support a conclusion that procedure was followed.
    - The Appellate Division can then affirm the agency's action; or
    - Find that the Open Meetings Law was violated which will void all decisions and actions taken by the agency during the meeting in question.[81]

**The Court may award reasonable attorney's fees as part of judgment.

[81] CPLR Article 78 § 7804 (This entire outline of procedure is a breakdown of the response, time frames, statute of limitations, discovery, and adjudication set forth in this article).

FREEDOM OF INFORMATION LAW

FREEDOM OF INFORMATION LAW (FOIL)

This law identifies the people's right to know the process by which government or certain quasi-governmental agencies engage in decision-making and grants review of documents and statistics that lead to these decisions. As a quasi-governmental agency that is engaged in a proprietary or government function, land banks and local municipalities are subject to the provisions of the Public Officers Law.[82]

PROCEDURE FOR FOIL REQUESTS

A FOIL request can be made by any private citizen, corporation, or group of businesses. Under FOIL, all records are available, unless an exception permits an agency to deny access to those records. Most exceptions are based upon the impact of disclosure, meaning common sense is generally used to predict the potential harm to the parties contained in the record.

RECORDS EXEMPTED UNDER FOIL

- ☐ Records, which if disclosed, would constitute unwarranted invasion of a person's privacy.
- ☐ Records, which if disclosed, would hinder law enforcement efforts.
- ☐ Records, which if disclosed, would endanger the life and safety of any person.
- ☐ Records, which if disclosed, would jeopardize the agency's ability to guarantee the security of its electronic information system.
- ☐ Inter- or Intra-agency material (such as emails, memos, or reports) that are pre-decisional (meaning the document contains advice, opinion, or recommendations on how the agency should proceed in a matter).

RESPONDING TO A FOIL REQUEST

- ☐ Upon receipt of a FOIL request, an agency has 5 days by which to respond to the request. The response can take 3 different forms:
    - Approval of request, and if simple enough, the record being requested.
    - Denial of request.

[82] Article 6 §§ 84-89 (FOIL).

- Acknowledgement of receipt of request and approximate date the request will be granted or denied.

- ☐ A person who is denied then has 30 days to appeal the denial and if an appeal is received the agency has 10 days to respond in one of two ways:
  - Explain the denial in detail.
  - Provide access to the record.

If the agency appeal again results in a denial of access, the person may then proceed with an Article 78 hearing.

ARTICLE 78 PROCEEDING

- ☐ If the agency is basing the denial of access upon an exemption above, then the burden of proving that the records fall into one of those categories lies with the agency.
- ☐ If the petitioner chooses to file an appeal of the denial, the agency will be served with a notice and a petition at least 20 days before the scheduled hearing and this action is filed with the Supreme Court of the county in which the agency is located or alleged harm occurred.
- ☐ The agency then has at least 5 days to reply to the petition in an answer and support affidavits to dispute the allegations of the petition.

There is limited discovery in an Article 78 proceeding.

- ☐ The Supreme Court will then make a determination of jurisdiction, statute of limitations, and *res judicata* (meaning already determined) and if the petition is not stopped by these standards, the Supreme Court must then transfer the case to the Appellate Division.
  - The Appellate Division will consider the merits of fact in the proceeding.
  - The Appellate Division can then affirm the agency decision to deny the record or order release of the record by the agency to the appealing party.[83]

**The Court may award reasonable attorney's fees as part of judgment.

[83] CPLR Article 78 § 7804 (This entire outline of procedure is a breakdown of the response, time frames, statute of limitations, discovery, and adjudication set forth in this article).