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# Engaging Deliberative Democracy at the Grassroots: Prioritizing the Effects of the Fiscal Crisis in New York at the Local Government Level

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## ENGAGING DELIBERATIVE DEMOCRACY AT THE GRASSROOTS: PRIORITIZING THE EFFECTS OF THE FISCAL CRISIS IN NEW YORK AT THE LOCAL GOVERNMENT LEVEL

*Patricia E. Salkin & Charles Gottlieb\**

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## INTRODUCTION

Local governments are facing unprecedented fiscal challenges across the country. These challenges have forced many municipalities to examine insolvency<sup>1</sup> and have subjected others to state-initiated fiscal control boards.<sup>2</sup> In March 2011, *The New York Times* reported

1. See Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crisis*, 88 B.U. L. REV. 633, 634, 646 (2008); see also *In re City of Vallejo*, 408 B.R. 280 (B.A.P. 9th Cir. 2009); *In re County of Orange*, 183 B.R. 594 (Bankr. C.D. Cal. 1995); *In re City of Bridgeport*, 129 B.R. 332 (Bankr. D. Conn. 1991); Michael A. Fletcher, *Pa. Capital Files for Bankruptcy*, WASH. POST, Oct. 13, 2011, at A14 (discussing the City of Harrisburg, Pennsylvania filing for bankruptcy); Susanna Kim, *Harrisburg Joins List of Cities Filing for Bankruptcy*, ABC NEWS (Oct. 12, 2011), <http://abcnews.go.com/blogs/business/2011/10/harrisburg-joins-list-of-cities-filing-for-bankruptcy/> (noting that the City of Harrisburg, Pennsylvania is facing a \$458 million in creditor claims); Mary Williams Walsh & Katie Zezima, *Small City, Big Debt Problems*, N.Y. TIMES, Aug. 2, 2011, at B1 (noting that the City of Central Falls Rhode Island filed for bankruptcy on August 1, 2011); *City of Central Falls*, UNITED STATES BANKRUPTCY COURT, DRI, <http://www.rib.uscourts.gov/newhome/central%20falls.asp> (last visited Oct. 24, 2011).

2. The Financial Emergency Act of 1975 established the New York City Financial Control Board. N.Y. Unconsol. §§ 5401–5420 (McKinney 1975); see also Gayle Gutekunst-Roth, *New York — A City in Crisis: Fiscal Emergency Legislation and the Constitutional Attacks*, 6 FORDHAM URB. L.J. 65, 72 (1977) (“The Emergency Act provides for a State Emergency Financial Control Board which wields review power over City operations and control over City funds to ensure that payment of debt service obligations receives highest priority.”); N.Y. Pub. Auth. Law § 3652 (McKinney

that states across the nation were planning severe budget cuts in aid to cities and other local governments.<sup>3</sup> These cuts were expected to lead to more lay-offs, cuts in services, and increases in local taxes.<sup>4</sup> New York's roughly 1600 municipalities and 10,000 special improvement districts are no exception to these trends.<sup>5</sup> For example, in the summer of 2011, Nassau County reported fiscal problems that were exacerbated by \$43 million in increased labor costs for a county already under the watchful eye of a state fiscal oversight agency.<sup>6</sup>

In 2006, then-State Comptroller Alan Hevesi began his annual report on local governments with the ominous warning, "[l]ocal gov-

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2011) (setting up the Nassau County Interim Finance Authority); N.Y. Pub. Auth. Law § 3850-a (McKinney 2011) (creating the Buffalo Fiscal Stability Authority in 2003); N.Y. Pub. Auth. Law § 3950-a (McKinney 2011) (creating the Erie County Fiscal Stability Authority in 2005). The Act creating the Buffalo Fiscal Stability Authority reads: "[t]he legislature hereby finds and declares that the city of Buffalo is facing a severe fiscal crisis, and that the crisis cannot be resolved absent assistance from the state. The legislature finds that the city has repeatedly relied on annual extraordinary increases in state aid to balance its budget, and that the state cannot continue to take such extraordinary actions on the city's behalf. The legislature further finds and declares that maintenance of a balanced budget by the city of Buffalo is a matter of overriding state concern, requiring the legislature to intervene to provide a means whereby: the long-term fiscal stability of the city will be assured, the confidence of investors in the city's bonds and notes is preserved, and the economy of both the region and the state as a whole is protected." N.Y. Pub. Auth. Law § 3850-a (McKinney 2011). The Erie County legislation uses similar language. N.Y. Pub. Auth. Law § 3950-a (McKinney 2011).

3. Michal Cooper, *States Pass Budget Pain to Cities*, N.Y. TIMES (Mar. 23, 2011), <http://www.nytimes.com/2011/03/24/us/24cities.html> (reporting that New York Governor Andrew Cuomo decided against restoring \$302 million in aid to the City of New York).

4. According to a recent report, there are 1607 general purpose local governments comprising of counties, cities, towns, and villages, which are governed by elected boards; 1811 special purpose local governments such as school, fire, and library districts, which are able "to impose taxes and/or issue debt directly or through another local government;" 1302 "other governmental entities" that include special purpose units (BOCES, community colleges, consolidated health districts) as well as public authorities, and thousands of special improvement districts organized pursuant to N.Y. Town Law Arts. 12 and 12-A. See New York Commission on Local Government Efficiency and Competitiveness, *21st Century Local Government* 10 (April 2008), available at [http://www.nyslocalgov.org/pdf/LGEC\\_Final\\_Report.pdf?pagemo de=bookmarks](http://www.nyslocalgov.org/pdf/LGEC_Final_Report.pdf?pagemo de=bookmarks).

5. *Id.*

6. Robert Brodsky, *Union Cuts Pose a \$115M Hurdle for Nassau*, NEWSDAY (Aug. 15, 2011), <http://www.newsday.com/long-island/nassau/union-costs-pose-115m-hurdle-for-nassau-1.3099363> (reporting that labor costs will continue to rise every year through 2015 when all five labor union contracts are up for negotiation.).

ernments across New York operate amid evidence of mounting fiscal stress . . . .”<sup>7</sup> A year later, Comptroller Thomas DiNapoli warned,

Recent economic developments at the national, state and regional levels make this year’s annual report on the state of New York’s local governments a cautionary tale . . . . These signs point to slower revenue growth for local governments, potentially less State aid, and increased pressures on the revenue of last resort—the property tax . . . . This sobering news comes at a time when local governments already face a host of other fiscal pressures: growing debt burdens, new federal and state mandates, rising health care costs for active employees and retirees, and (particularly for schools) higher expectations for performance.<sup>8</sup>

Another piece of legislation that further exacerbates the grim local fiscal situation in New York is the recently enacted local property tax cap.<sup>9</sup> Some view the cap as a way to control local spending or as a method of ensuring that local residents do not have to fear tax bills out of line with inflation. Others consider the tax cap a significant burden on local officials who must balance the paradigm of paying for federally and state mandated programs with the expectations for locally developed and delivered programs and services unique to each community. In his 2010 Report on Local Governments, Comptroller DiNapoli cautioned generally:

The road to recovery for State and local government finances will likely be a long and difficult one. In particular, school districts and counties face the expiration of federal stimulus funds at a time when State and local revenue growth will not be adequate to make up for the loss of federal dollars. Difficult decisions regarding spending and program levels loom ahead.<sup>10</sup>

Exactly how to accomplish this feat in a political system where local elected officials often desire to be re-elected and where the laws do not require meaningful public engagement in local fiscal decision making, presents a major challenge.

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7. Alan Hevesi, *2006 Annual Report on Local Governments*, OFFICE OF THE NEW YORK STATE COMPTROLLER, at 3, available at <http://osc.state.ny.us/localgov/datanstat/annreport/06annreport.pdf>.

8. Thomas DiNapoli, *2007 Annual Reports on Local Governments*, OFFICE OF THE NEW YORK STATE COMPTROLLER, at 3, available at <http://osc.state.ny.us/localgov/datanstat/annreport/07annreport.pdf>.

9. See N.Y. Gen. Mun. Law § 3-c (McKinney 2011).

10. Thomas DiNapoli, *2010 Annual Reports on Local Governments*, OFFICE OF THE STATE COMPTROLLER, at 3, available at <http://osc.state.ny.us/localgov/datanstat/annreport/10annreport.pdf>.

Part I of this Article discusses many of the factors contributing to the fiscal crisis at the local level in New York including historic decreases in federal and state revenue sharing, the imposition of a new property tax cap, the failure of New York to address meaningfully the subject of unfunded mandates on local governments, and the dependency of some local jurisdictions on the timely adoption of a state budget. Part II discusses concepts of deliberative democracy and how local residents might be engaged to become partners with local officials in making difficult fiscal decisions that impact all community residents. Public polling, participatory budgeting, collaborative decision making, and citizen advisory committees are all examples of models promoted as methods for enhancing civil discourse and public engagement in helping to set local fiscal priorities. The Article concludes in Part III with a recognition that “business as usual” in New York is simply not sustainable and that while the state must do its part to ease some of the fiscal burdens, local government officials must return to the people who put them in office to seek more frequent input in an organized and methodical manner by employing one or more of the deliberative democracy techniques discussed in Part II.

### I. KEY CONTRIBUTORS TO THE CURRENT FISCAL CRISIS

Local governments in fiscal crises are not new in New York.<sup>11</sup> In the 1970s, the State intervened to rescue New York City,<sup>12</sup> which was on the brink of disastrous bankruptcy.<sup>13</sup> Since then, six municipalities

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11. See Joel E. Cohen, *The Limits of State Intervention in a Municipal Fiscal Crisis*, 4 *FORDHAM URB. L.J.* 545 (1976) (explaining that, at the time of publication, municipal fiscal crises were becoming more frequent).

12. See Gutekunst-Roth, *supra* note 2, at 72 (discussing the three methods of state intervention that were forced upon the failing New York City finances). First, the Stabilization Reserve Corporation (SRC) was enacted by the New York State legislature in 1974 to create capital for New York City expenses. *Id.* at 66. Secondly, Municipal Assistance Corporations were created by the 1975 legislature with a similar purpose to the proper SRCs. *Id.* at 68–69. Finally, the State passed the Financial Emergency Act which set up a Financial Control Board to review the City’s operations and funds to make certain that debts were paid. *Id.* at 72.

13. Roy Bahl & William Duncombe, *Economic Change and Fiscal Planning: The Origins of the Fiscal Crisis in New York State*, 52 *PUB. ADMIN. REV.* 547 (1992); see also WILLIAM K. TABB, *THE LONG DEFAULT: NEW YORK CITY AND THE URBAN FISCAL CRISIS*, 2–5, 24 (1982) (explaining that the cause of the New York City fiscal crisis was a complex mixture of many factors including capital borrowing, high interest rates from banks, high revenue estimates, increased spending during a time of financial worry, and the combination of a “post-industrial economy” coupled with a “pre-industrial population”).

in the state have been subject to state fiscal control boards.<sup>14</sup> The power to tax is vested in the State Legislature, and the Legislature may grant to counties and cities the limited power to raise revenue through taxation.<sup>15</sup> Many believe that the fiscal crisis is due to a combination of factors: rising municipal costs and limited ability to raise revenue to pay for these costs.<sup>16</sup> The structure of local government in New York has also been under attack as being too complex, overlapping, inefficient, and costly.<sup>17</sup> At the core of these problems, however,

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14. See statutes cited *supra* note 2; see also Financial Emergency Act of 1984 for the City of Yonkers, 1984 N.Y. Laws 1632. Yonkers also experienced the control of a state financial board in 1975 as a result of its fiscal instability. See JOSEPH F. ZIMMERMAN, *THE GOVERNMENT AND POLITICS OF NEW YORK STATE* 34–35 (2d ed. 2008). The Comptroller now oversees fiscal issues in Yonkers pursuant to the Fiscal Agent Act, 1976 N.Y. Laws 1. Furthermore, in New York City, there still exists a Municipal Assistance Corporation, pursuant to N.Y. Pub. Auth. Law §§ 3031–3032 (McKinney 1990), with appointed officials on its nine member control board that issues bonds and notes to help the city's finances. See ZIMMERMAN, *supra*, at 34. The City of Troy is also subjected to the oversight and assistance of a municipal assistance corporation. N.Y. Pub. Auth. Law §§ 3051–3053 (McKinney 2003). In addition, the Troy Supervisory Board has the powers to oversee the city. See 1994 N.Y. Laws 3669.

15. See N.Y. CONST. art. 16 § 1 (“The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. Any laws which delegate the taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review. Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.”); see also *Sonmax, Inc. v. City of New York*, 392 N.Y.S.2d 810 (N.Y. Co. 1977), *aff’d* 372 N.E.2d 9 (1977) (“It is well settled that all taxing power in the State of New York is granted to the Legislature pursuant to [Articles 3, § 1 and 16, § 1 of the State Constitution.] However, the State may delegate to the county or city the power to assess and collect taxes.”) (citations omitted).

16. Congressional Budget Office, *Fiscal Stress Faced by Local Governments*, at 2 (2010), available at [http://www.cbo.gov/ftpdocs/120xx/doc12005/12-09-Municipalities\\_Brief.pdf](http://www.cbo.gov/ftpdocs/120xx/doc12005/12-09-Municipalities_Brief.pdf).

17. See, e.g., *A New N.Y.: A Blueprint to Reform Government*, NEW YORK STATE ATTORNEY GENERAL, [http://www.reformnygov.com/for\\_citizens.html](http://www.reformnygov.com/for_citizens.html) (last visited Feb. 18, 2012). As Attorney General, Andrew Cuomo proposed and pushed for the ultimate enactment of the New York Government Reorganization and Citizen Empowerment Act. The law is designed to allow citizens to take an active role in calling for municipal consolidation. The act allows two or more local governments to consolidate their local governments into one entity. The consolidation can be initiated by either one of two ways: (1) joint resolution by both local governments, or (2) through an elector initiative. See Press Release, Attorney General Cuomo Unveils Landmark Government Consolidation Legislation (May 21, 2009), available at [http://www.ag.ny.gov/media\\_center/2009/may/may21b\\_09.html](http://www.ag.ny.gov/media_center/2009/may/may21b_09.html); see also N.Y. Gen. Mun. Law § 751. If the consolidating entities are villages and towns, then there is a requirement that the two localities be contiguous. *Id.* Further, the Act only applies to town, village, district, special improvement district, or other improvement districts,

rests the roots of federalism. Should the federal and state governments continue to mandate cost-sharing by local governments for services and programs that are developed and controlled at the federal and state levels, and can and should local governments count on fiscal assistance from the federal and state governments to meet their obligations to support local residents (including funding mandated programs and services)?

#### A. Typical Municipal Expenditures in New York

One cause of local fiscal stress is the long list of expected services on which a locality must expend its resources to maintain a well-functioning local government. The Office of the New York State Comptroller has identified eight function service categories of local government expenditures (not including New York City).<sup>18</sup> In 2008, the largest service expenditure was for education, which amounted to 30% of local government spending.<sup>19</sup> The second largest categories were general government services and employee benefits, each of which accounted for 16% of local government spending.<sup>20</sup> Other services, in the order of resources spent, included public safety, debt service, transportation, and sanitation and utilities.<sup>21</sup>

Data from the State Comptroller's Office reveals that from 1998 to 2008 expenditures for counties increased on an annual basis by 4.55%.<sup>22</sup> From 2004 to 2009 the total amount of county expenditures increased by \$4,422,239,080.<sup>23</sup> Social services have been identified as the major expenditures for county governments, representing 26% of

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but it does not apply to school districts, city districts, or special purpose districts created by counties under the N.Y. County Law. *Id.*

18. New York Dep't of State, *Local Gov't Efficiency Program Ann. Rep. 2009–2010*, at 4, available at <http://www.dos.state.ny.us/lg/publications/LGEannualreport/SFY09.pdf>.

19. *Id.*

20. *Id.*

21. *Id.* Local government expenditures were as follows in 2008 (excluding New York City General Government): services represented 16%, education represented 30%, public safety represented 8%, transportation 5%, sanitation and utilities 4%, other functions 14%, employee benefits 16%, and debt services 7%.

22. New York State Office of the State Comptroller, *2010 Ann. Rep. on Local Gov'ts*, at 28, available at <http://www.osc.state.ny.us/localgov/datanstat/annreport/10annreport.pdf> [hereinafter *2010 Ann. Rep.*].

23. *Search Local Government Spending*, OPEN BOOK NEW YORK, <http://wwe1.osc.state.ny.us/transparency/LocalGov/localgovintro.cfm> (choose "Trend," check "Expenditures," submit, then search all counties in all categories for 2004 and 2009) (last visited Feb. 18, 2012).

local spending.<sup>24</sup> For a decade, starting in 1998, towns experienced an annual increase in their expenditures of 5.2%.<sup>25</sup> Also, from 2004 to 2009, the average annual expenditure by town governments was \$956,784,818.<sup>26</sup> Transportation was the leading local government expenditure by towns, accounting for up to 22% of all spending, which increased annually by 5%.<sup>27</sup> Sanitation, public safety, and employee benefits also made up a large portion of town expenditures.<sup>28</sup> Villages experienced an annual increase in their expenditures by 4.7% from 1998 to 2008.<sup>29</sup> From 2005 to 2010, increases in village expenditures totaled \$67,639,969.<sup>30</sup> For villages, public safety represents the largest category of expenditure at 21%.<sup>31</sup>

Lastly, cities (excluding New York City) during 1998 to 2008 experienced an annual expenditure increase of 4%.<sup>32</sup> City expenditures from 2004 to 2009 increased by \$722,475,073.<sup>33</sup> As with other levels of government, from 1998 to 2009, public safety was the largest city expenditure.<sup>34</sup> Cities, out of all local governments, are most dependent on state aid, and when this source of revenue is reduced, it places a large strain on city governments.<sup>35</sup> Absent structural changes, the cost of these services can be expected to rise over time. Federal and state aid has traditionally been a source of revenue for local governments. In tough economic times, however, this expectation must change. State and federal governments no longer have the resources

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24. *2010 Ann. Rep.*, *supra* note 22, at 28.

25. *Id.* at 32.

26. *Search Local Government Spending*, OPEN BOOK NEW YORK, <http://wwe1.osc.state.ny.us/transparency/LocalGov/localgovintro.cfm> (choose “Trend,” check “Expenditures,” submit, then search all towns in all categories for 2004 and 2009) (last visited Feb. 18, 2012).

27. *2010 Ann. Rep.*, *supra* note 22, at 32.

28. Congressional Budget Office, *supra* note 16, at 2.

29. *2010 Ann. Rep.*, *supra* note 22, at 34.

30. *Search Local Government Spending*, OPEN BOOK NEW YORK, <http://wwe1.osc.state.ny.us/transparency/LocalGov/localgovintro.cfm> (choose “Trend,” check “Expenditures,” submit, then search all villages in all categories for 2005 and 2010) (last visited Feb. 18, 2012).

31. *2010 Ann. Rep.*, *supra* note 22, at 34.

32. *Id.* at 30.

33. *Search Local Government Spending*, OPEN BOOK NEW YORK, <http://wwe1.osc.state.ny.us/transparency/LocalGov/localgovintro.cfm> (choose “Trend,” check “Expenditures,” submit, then search all cities in all categories for 2004 and 2009) (last visited Feb. 18, 2012).

34. *2010 Ann. Rep.*, *supra* note 22, at 31.

35. *Id.* at 30.

to aid local governments sufficiently to ease the local burden for the rising costs of these services.

### B. Fiscal Federalism: The Federal Fiscal Relationship with Local Governments

The theory of federalism is based upon the principle of “shared governance” between the three different layers of government: national, state, and local.<sup>36</sup> Shared governance reflects a partnership with the federal and state governments that constantly changes according to national policies and priorities.<sup>37</sup> An integral part of this theory is the financial assistance<sup>38</sup> that the federal government distributes to the state and local governments, embracing a top-down approach to financing the lower levels of government.<sup>39</sup> Fiscal federalism decentralizes the government, creating a “vertical structure” of governance.<sup>40</sup> This vertical structure allows for the national government to assign programs and functions to lower levels of government while supporting these programs by funding the lower level governments accordingly.<sup>41</sup> In effect, this financial assistance transfers the policies that are created at the national and state level to the local governments for implementation.<sup>42</sup>

Fiscal federalism is seen as an efficient process as it allows for larger governmental policies to be tailored to different local interests across many jurisdictions.<sup>43</sup> Scholars note that, “[a] core principle in fiscal federalism theory is a purist view of public-sector functions: government steps in where the private market system fails, and ‘government agencies, as ‘custodians of the public interest’ . . . seek to maximize social welfare.’”<sup>44</sup> Often these services come in the form of grant-in-aid programs that create a “partnership between the federal government and the states, a collaboration of shared finances and

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36. Daniel L. Hatcher, *Property Revenue: The Subversion of Fiscal Federalism*, 52 ARIZ. L. REV. 675, 682 (2010).

37. *Id.*

38. *Id.* at 683.

39. JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER 114–15 (2nd ed. 2008).

40. See Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120 (1999).

41. *Id.* at 1121.

42. David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2550 (2005) (discussing three models of fiscal federalism: the contemporary model, the superior capacity model, and the leadership model).

43. Hatcher, *supra* note 36, at 684.

44. *Id.*

governance intended to increase services and programs for those in need of assistance.”<sup>45</sup> Overall, the fiscal federalism approach and the resulting decentralized vertical structure of government allow the federal government to address certain regional needs.<sup>46</sup> Fiscal federalism does not come without limits, however. The theory allows local governments to tax for spending on services that are within the discretion of the local government, but it does not allow the local government to use federal support to finance discretionary agendas.<sup>47</sup>

1. *The Decline of Federal and Local Municipal Revenue Sharing Programs*

Revenue sharing was introduced during the Nixon Administration when Congress passed the State and Local Fiscal Assistance Act of 1972.<sup>48</sup> It allowed for intergovernmental capital distribution from the national government to state and local governments without mandates for spending the funds.<sup>49</sup> Local government could spend the funds for any non-discriminatory, legal purpose.<sup>50</sup> Revenue sharing was, “designed to relieve tax shortages, develop local self-sufficiency, create a better tax system, equalize the fiscal capabilities of each state, and encourage the development of new revenue resources at the state and local level.”<sup>51</sup> In effect, the main purpose of revenue sharing was to aid local governments in recovering from their financial hardships.<sup>52</sup> At the time, revenue sharing was an efficient way for the national government to distribute collected taxes to lower level governments because taxing at the local level had been proven to be

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45. *Id.* at 681.

46. *Id.* at 689.

47. Yishai Blank, *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 FORDHAM URB. L.J. 509, 555 (2010).

48. State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (1972); Duance A. Martin, *The President and the Cities: Clinton's Urban Aid Agenda*, 26 URB. LAW. 99, 103 (1994). Under the 1972 Act, “Congress appropriated 30.2 billion to be given to the fifty states and approximately 38,000 general purpose local governments over a five-year period with few attached conditions.” ZIMMERMAN, *supra* note 39, at 125.

49. Jesse H. Choper, *The Scope of National Power Vis-a-Vis The States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1569 (1977).

50. State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, § 103, 86 Stat. 919 (1972); ZIMMERMAN, *supra* note 39, at 125.

51. Martin, *supra* note 48, at 103 (quoting Robert H. Freilich, *Current Developments in Local Government Law—A Review of Recent Decisions, Statutes, and Events, and Their Impact in the Field of Urban Law*, 6 URB. LAW. 288, 290 (1974)).

52. Choper, *supra* note 49, at 1569.

more “regressive” than at the national level.<sup>53</sup> Therefore, revenue sharing was a vehicle to balance out the taxing inequity between the different levels of government by transferring the funds unconditionally.<sup>54</sup>

Although the 1972 Act was popular with the states and local governments because of its “no strings attached” funding,<sup>55</sup> the Reagan Administration sought to lessen taxes and government spending, providing for economic growth through the private markets.<sup>56</sup> With this principle in mind, Reagan sought to enhance decision making at the local level with regard to public services with less federal involvement.<sup>57</sup> To accomplish these goals, Reagan abolished the general revenue scheme that had provided substantial and unconditional financial support to local governments.<sup>58</sup> As of 1980, the revenue sharing scheme had endowed local governments with \$10.8 billion in direct financial assistance and \$1.75 billion to cities with populations exceeding 300,000.<sup>59</sup> President Reagan deserted the revenue sharing scheme while in office, and the effects were notable.<sup>60</sup> While the scheme was in place in 1980, federal dollars represented 14.3% of the cities’ budget.<sup>61</sup> In 1992, however, without a revenue sharing program, federal dollars added up to less than 5% of cities’ budgets.<sup>62</sup> This reallocation of funds forced local governments to cut spending drastically and to seek the little state aid that was available.<sup>63</sup> These statistics illustrate how cuts in federal aid to municipalities have the ability to induce financial crisis in a local government. For instance, if federal aid had not been lessened by the elimination of revenue sharing, then New York City might have been able to avoid the budget crises in 1990 and 1991.<sup>64</sup>

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53. Oates, *supra* note 40, at 1128.

54. *Id.*

55. ZIMMERMAN, *supra* note 39, at 124–25.

56. Martin, *supra* note 48, at 111.

57. *Id.* at 112.

58. Peter Dreier, *Americans Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1384 (1993).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Demetrios Caraley, *Washington Abandons the Cities*, 107 POL. SCI. Q. 1, 1–30 (1992). During 1989 and into the early 1990s the northeast experienced an economic recession that was exacerbated by these cuts in federal aid to cities. In 1980, 52% of New York City’s general spending was funded by federal aid. This number dramati-

2. *Decrease in Federal Support Creates a Strain on Local Governments to Balance Their Budgets*

When federal funding to states and local governments is either diminished or comes to an end, it places a strain on local governments to balance their budgets.<sup>65</sup> The uncertainty of federal support becomes an annual concern because state and local governments must balance their budgets yearly, basing their decisions on the amount of anticipated federal aid.<sup>66</sup> While the federal government typically frames budget cuts as a “shared sacrifice,” local governments tend to suffer more with cuts to grants and aid programs where they are left to make up the shortfall from decreased federal aid.<sup>67</sup> For example, when the federal budget is cut by 5%, the effect on local governments may result in a loss of 20% of grants and federal aid.<sup>68</sup> This is because, as one scholar explains, when the federal government makes budget cuts it often involves policies and services that are related to the functionality of local governments.<sup>69</sup> Further, federal policies and services are less susceptible or even immune to federal budget cuts.<sup>70</sup> This disparity creates an adverse effect on local governments because their budgets are more vulnerable to a decrease in federal spending.<sup>71</sup>

A current example of another potential crisis looming is the end of the federal American Recovery and Reinvestment Act (ARRA) in State Fiscal Year (SFY) 2011–12 which will force local governments to again rebalance their already strapped budgets.<sup>72</sup> The ARRA

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cally dropped to 32% in 1989 partly from the elimination of revenue sharing. As a result, New York City was forced to cut \$4 billion from its budget leading to a financial crisis in both 1990 and 1991 due to trouble balancing its budget without the relied upon federal aid. *Id.*

65. Office of the New York State Comptroller, Division of Local Government and School Accountability, *2010 Ann. Rep. on Local Governments*, at 16, available at <http://syracusecoe.org/EFC/images/allmedia/LIBRARYcapitalplanning.pdf>. A concern arises when the federal government has yet to create a budget outlining funding to local governments, then the locality cannot implement the federal changes into its financial plans. Super, *supra* note 42, at 2591–92.

66. See J. Edwin Benton, *The Effects of Changes in Federal Aid on State and Local Government Spending*, 22 PUBLIUS 71, 71–82 (1992).

67. Super, *supra* note 42, at 2591.

68. *Id.* at 2591–92.

69. *Id.* at 2591.

70. *Id.* (noting that such services include, military, national debt, long term leases, *et cetera*).

71. *Id.*

72. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009); see also Office of the N.Y. State Comptroller, REPORT ON THE STATE FISCAL YEAR 2010–11 ENACTED BUDGET, at 14, available at <http://www.osc>.

sought to stimulate the economy through infrastructure growth and investment.<sup>73</sup> In New York alone the ARRA provided \$500 million for water and sewer infrastructure work and \$1.1 billion for roads and highways.<sup>74</sup> The state government passed through a large portion of the ARRA funding to the local governments: in SFY 2010–11, local governments received \$4.9 billion, and in SFY 2008–09 and 2009–10 local governments received \$2.7 billion.<sup>75</sup> These funds provided significant resources to support local government services and priorities consistent with the purposes of the ARRA.

### C. New York State's Fiscal Relationship with Local Governments

Commonly, municipalities are viewed as the “direct link” between state policies and their application to New York residents.<sup>76</sup> As previously noted, local governments are “creatures of the state” and therefore possess only the powers and authorities that the state constitution and various statutes grant them.<sup>77</sup> In New York, “the State

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state.ny.us/reports/budget/2011/2010-11enactedbudgetreport.pdf (stating that federal stimulus money as a result of the ARRA is not expected to be received for the SFY of 2012–13).

73. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 3(a)(1-5), 123 Stat. 115, 115 (2009).

74. Office of the N.Y. State Comptroller, Division of Local Government and School Accountability, *Research Brief: Cracks in the Foundation: Local Government Infrastructure and Capital Planning Needs*, at 2, available at <http://syracusecoe.org/EFC/images/allmedia/LIBRARYcapitalplanning.pdf>.

75. Office of the N.Y. State Comptroller, REPORT ON THE STATE FISCAL YEAR 2010–11 ENACTED BUDGET, at 14, available at <http://www.osc.state.ny.us/reports/budget/2011/2010-11enactedbudgetreport.pdf>. These funds were primarily used for general budget relief for local governments and tax cuts. See Dean Skelos et al., *New York State Economic Review SFY 2011–2012*, 11–14 (2011) available at [http://www.nysenate.gov/files/pdfs/2011\\_SFC\\_Majority\\_Revenue\\_Forecast\\_Report.pdf](http://www.nysenate.gov/files/pdfs/2011_SFC_Majority_Revenue_Forecast_Report.pdf).

76. See 2011 Mandate Relief Redesign Team, *Preliminary Report, Putting the Brakes on Unfunded Mandates: A New State-Local Partnership: A Report to the Governor of Findings and Proposals* § I (2011), available at <http://www.governor.ny.gov/assets/documents/finalmandate.pdf> [hereinafter *Unfunded Mandates*].

77. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907); see also Kimhi, *supra* note 1, at 634, 664; New York Dep't of State, *Local Government Handbook*, 29–38 (2009), available at [http://www.dos.state.ny.us/lg/publications/Local\\_Government\\_Handbook.pdf](http://www.dos.state.ny.us/lg/publications/Local_Government_Handbook.pdf) [hereinafter *Local Government Handbook*]. Article IX of the State Constitution required the State Legislature to enact a “Statute of Local Governments” in order to grant certain powers to local governments. The granted powers include the power to: adopt ordinances, resolutions, rules and regulations; acquire real and personal property; acquire, establish and maintain recreational facilities; fix, levy and collect charges and fees; and in the case of a city, town or village, to adopt zoning regulations and conduct comprehensive planning. *Id.*

relies on its municipalities and school districts to deliver vital services to its residents and often prescribes exactly how these services should be provided. This limits flexibility and increases costs.”<sup>78</sup> The fiscal health of local government is also tied to the state budget, and when the state budget is late it can impair some local governments’ ability to create an effective financial plan.<sup>79</sup> Article VII of the State Constitution requires the Governor to prepare the state budget and charges the Senate and Assembly with the duty to review it.<sup>80</sup> While the most recent New York State budget was approved on time,<sup>81</sup> in previous years, it was not uncommon for the state budget to be delayed, sometimes for up to five months.<sup>82</sup> The best example of the havoc that delayed state budgets cause is the impact on local school district budgets, which must be approved in May without knowing state aid amounts, a major source of their funding.<sup>83</sup>

Three major aspects of the state and local government fiscal relationship in New York—state aid to municipalities, property tax and

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78. *Unfunded Mandates*, *supra* note 76, § I.

79. Office of the New York State Comptroller, *Local Gov’t Snapshot, State Budget Delay: Impact on Local Governments and School Districts*, at 1 (2010), available at <http://www.osc.state.ny.us/localgov/pubs/research/snapshot/0510snapshot.pdf> [hereinafter *Local Government Snapshot*]. The State fiscal year begins April 1, yet the majority of local government budgets are on the calendar fiscal year (beginning January 1). By statute, Towns must prepare their budgets by November, Villages are authorized to select one of three different fiscal years, and city fiscal years are set in their charters. See N.Y. TOWN LAW § 109(a) (McKinney 2004); N.Y. VILLAGE LAW § 5-510 (McKinney 2010); see also Office of State Comptroller, *Citizens’ Guide to Local Budgets*, at 2 (2011), available at <http://www.osc.state.ny.us/localgov/pubs/releases/LocalBudgetGuide2010.pdf> [hereinafter *Guide to Local Budgets*].

80. See N.Y. CONST. art. VII §§ 1–3 (“Annually, on or before the first day of February in each year following the year fixed by the constitution for the election of governor and lieutenant governor, and on or before the second Tuesday following the first day of the annual meeting of the legislature, in all other years, the governor shall submit to the legislature a budget containing a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year and all moneys and revenues estimated to be available therefore, together with an explanation of the basis of such estimates and recommendations as to proposed legislation, if any, which the governor may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures. It shall also contain such other recommendations and information as the governor may deem proper and such additional information as may be required by law.”).

81. Thomas Kaplan, *Despite Hecklers, Lawmakers Close in on Rare Early Budget*, N.Y. TIMES, Mar. 31, 2011, at A24 (“[O]nly six times since 1975 has the state passed a budget by the time March turned into April.”).

82. Danny Hakim, *125 Days Late, A State Budget With New Taxes*, N.Y. TIMES, Aug. 3, 2010, at A1 (discussing the trouble with passing the 2010 budget, which was passed on August 3, 2010); see *Local Government Snapshot*, *supra* note 79, at 1.

83. *Local Government Snapshot*, *supra* note 79, at 1.

mandate relief—are discussed below. Each aspect has its own contributing effect or impact on the fiscal crisis at the local level. Similar to the decrease in federal aid, decreasing state aid to municipalities has the effect of straining the local budget because there is less revenue and state aid may be unknown when formulating the local budget and accounting for expected revenue.<sup>84</sup> Although New York municipalities have the power to tax property to raise revenue to support local services, such action is constrained by the New York State Constitution and further limited by the recent New York Property Tax Cap law, also discussed in detail below. Lastly, New York State has a history of encumbering the local budget with unfunded state mandates. Continued calls for reform, as described below, have yet to produce meaningful fiscal relief for local governments.

### 1. *State Aid to Municipalities*

State fiscal assistance to local governments is a major component of local finances.<sup>85</sup> For example, in 2005 state aid represented one-quarter of local government revenue.<sup>86</sup> Within the state budget, the Governor allocates support for local governments through the Aid and Incentives for Municipalities (AIM) program.<sup>87</sup> The AIM program provides for “the payment of general purpose local government aid for the support of local government for state fiscal years . . . [and] shall be paid from an appropriation made for the aid and incentives for municipalities program pursuant to the public protection and general government budget for such state fiscal years. . . .”<sup>88</sup> The AIM program was created in 2005 and 2006 and had the effect of increasing “unrestricted aid” to localities by \$57 million.<sup>89</sup> From 2007 to 2008,

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84. See *supra* note 79 and accompanying text; see also Congressional Budget Office, *Fiscal Stress Faced by Local Governments*, at 2 (2010), available at [http://www.cbo.gov/ftpdocs/120xx/doc12005/12-09-Municipalities\\_Brief.pdf](http://www.cbo.gov/ftpdocs/120xx/doc12005/12-09-Municipalities_Brief.pdf).

85. *Local Government Handbook*, *supra* note 77, at 103; see New York Conference of Mayors, *Connecting the Dots: A Blue Print for Revitalizing Our Communities and Our State*, at 6 (2006), available at <http://www.nycom.org/documents/ConnectingDots.pdf> (demonstrating a trend of rising local government revenues and decreasing state aid, creating a strain on local government financing).

86. *Local Government Handbook*, *supra* note 77, at 103.

87. N.Y. STATE FIN. LAW § 54(10) (McKinney 2011).

88. *Id.* For the appropriation bill that sets out the budget from the state to aid local governments, see N.Y. Bill S.2803/A4003 (2011), available at <http://publications.budget.ny.gov/eBudget1112/fy1112appropbills/Local.pdf>.

89. *Local Government Handbook*, *supra* note 77, at 103; see David A. Paterson, *2010–2011 Executive Budget Briefing Book*, available at <http://www.budget.ny.gov/pubs/archive/fy1011archive/eBudget1011/fy1011littlebook/BriefingBook.pdf>.

the Enacted Budget restructured the AIM program, allowing for more aid to municipalities experiencing a financial crisis.<sup>90</sup> These increases were aimed at helping with improved accountability requirements and encouraging shared services programs and merger and consolidations.<sup>91</sup> Due to the economic environment, however, the Enacted Budget for the SFY of 2011–12 has reduced the AIM program funding by 2% from the 2010–11 Enacted Budget, resulting in a decrease of \$14.6 million dollars.<sup>92</sup>

State statutes set out budgeting standards for counties, villages, and towns.<sup>93</sup> In cities, budgeting standards are typically contained in the city charter.<sup>94</sup> A local government's budget details projected expenditures and revenues.<sup>95</sup> One of the revenues accounted for in the local budget is, "payments from other governments in the form of grants-in-aid."<sup>96</sup> State Aid programs are funded to certain local governments through the general government fund, "reflecting all expenditures made for local assistance."<sup>97</sup> Local governments are able to budget more accurately when there is certainty in the process for awarding of State Aid.<sup>98</sup>

## 2. *Municipal Power to Tax*

While New York municipalities have the power to collect property taxes, the state retains the original power to assess and collect the property tax.<sup>99</sup> Within a municipality there are taxing units and as-

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90. *Local Government Handbook*, *supra* note 77, at 103.

91. *Id.*

92. See Thomas P. DiNapoli, *Report on the State Fiscal Year 2011-12 Enacted Budget* at 50 (2011), available at [http://www.osc.state.ny.us/reports/budget/2011/2011\\_enactedbudgetreport\\_0511.pdf](http://www.osc.state.ny.us/reports/budget/2011/2011_enactedbudgetreport_0511.pdf). For a breakdown of the aid to each municipality and the decrease since the 2010-11 Enacted Budget, see Division of Budget, *2011-12 Executive Budget Aid and Incentives for Municipalities* (2011), available at <http://publications.budget.ny.gov/eBudget1112/fy1112localities/local/1112AidforMunicipalities.pdf>.

93. See N.Y. COUNTY LAW §§ 354–60; N.Y. TOWN LAW §§ 102–15; N.Y. VILLAGE LAW §§ 5-500 to 5-532.

94. *Guide to Local Budgets*, *supra* note 79, at 2.

95. *Local Government Handbook*, *supra* note 77, at 109.

96. *Id.*

97. N.Y. STATE FIN. LAW § 54 (McKinney 2010).

98. See Office of N.Y. State Comptroller, *Understanding the Budget Process* at 8 (2011), available at <http://www.osc.state.ny.us/localgov/pubs/lmgm/budgetprocess08.pdf>.

99. N.Y. CONST. art. XVI; see also Steven V. Melnik & Daved S. Cenedella, *Tax Assessment in New York State*, 4 ALB. GOV'T L. REV. 427, 430 (2011).

sessing units.<sup>100</sup> Assessing units estimate the value of the real property within their jurisdiction for taxing purposes.<sup>101</sup> Taxing units then use those assessments to calculate the tax upon the property owner in accordance with the value of their property as assessed,<sup>102</sup> and the counties then levy the tax.<sup>103</sup> Collected taxes support the finances of the local government and also support the local public schools.<sup>104</sup> The State Legislature has oversight authority over the real property taxing scheme.<sup>105</sup> The New York State Constitution sets limitations as to the amount of real property taxes that can be collected by some municipalities based upon the make-up of the local taxing unit.<sup>106</sup> Depending on the jurisdiction, the amount of revenue that is raised from real property taxes cannot exceed a certain percentage of the average value of all the taxable property within that taxing jurisdiction.<sup>107</sup> Such percentages range from 1.5% to 2.5%.<sup>108</sup>

Residents are already overburdened when it comes to property taxes in New York, as the state has the dubious distinction of local taxes amounting to 79% above the national average.<sup>109</sup> Due to the

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100. N.Y. CONST. art. XVI; *see also* Melnik & Cenedella, *supra* note 99, at 434.

101. N.Y. CONST. art. XVI; *see also* Melnik & Cenedella, *supra* note 99, at 434.

102. Melnik & Cenedella, *supra* note 99, at 434. Each county in the State, through a board of supervisors and in accordance with the N.Y. Real Property Tax Law, levies taxes on real property within the county based on mandated valuation methods and property assessments provided by cities and towns within the county. N.Y. REAL PROP. TAX LAW § 900 (McKinney 2010).

103. N.Y. REAL PROP. TAX LAW § 900.

104. Melnik & Cenedella, *supra* note 99, at 430.

105. N.Y. REAL PROP. TAX LAW § 202(1)(d)–(e); N.Y. REAL PROP. TAX LAW §§ 301, 305.

106. N.Y. CONST. art. VIII, § 10 (stating that the percentage limits for the amount of real property taxes that can be collected are “(a) . . . any county, for county purposes, one and one-half per centum; provided, however, that the legislature may prescribe a method by which such limitation may be increased so as not to exceed two per centum; (b) any city of one hundred twenty-five thousand or more inhabitants according to the latest federal census, for city purposes, two per centum; (c) any city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, for city purposes, two per centum; (d) any village, for village purposes, two per centum; (e) Notwithstanding the provisions of sub-paragraphs (a) and (b) of this section, the city of New York and the counties therein, for city and county purposes, a combined total of two and one-half per centum.”) It should be noted that within this constitutional provision there is no tax limit applicable to towns. *Id.*

107. *Id.*

108. *Id.*; *see also* Melnik & Cenedella, *supra* note 99, at 451.

109. New York State Commission on Property Tax Relief, *A Preliminary Report of Findings and Recommendations to Gov. David A. Paterson*, at 13 (2008), available at <http://blog.syracuse.com/indepth/2008/06/Suozzi%20report> (citing Citizens Budget Commission, *Local Taxes in New York State: Easing the Burden* 9 (2007)).

limitations on local power to tax to generate revenue, over the years municipalities have sought to charge fees, as opposed to taxes, as a source of revenue to pay for certain government services. For example, in the land development process, while certain fees, such as environmental review fees and building permit fees are specifically authorized by statute,<sup>110</sup> other types of fees, such as impact fees, have not survived legal challenge absent specific authorization from the state legislature.<sup>111</sup>

a. *The Property Tax Cap of 2011*

On June 24, 2011, the New York legislature signed into law the property tax cap that places a limit on the amount of annual growth of property taxes that can be levied per year to the lesser of two percent or the rate of inflation.<sup>112</sup> The law applies to school districts, special districts, and all local governments except New York City.<sup>113</sup> The tax cap only limits the annual levy and does not limit the tax rate.<sup>114</sup> Therefore, residents' individual property taxes may increase by more than two percent annually even with the two percent levy limit. Limited exclusions to the cap include tax levies for certain tort actions against the local government and certain pension increases.<sup>115</sup>

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110. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.13 (2011) (authorizing the use of a fee applied to applicants during the State Environmental Quality Review Act process.); see also N.Y. TOWN LAW § 261 (McKinney 2010).

111. See Patricia E. Salkin, *Impact Fees for New York Municipalities: Time For Legislative Action?*, at 38-48 (1991), available at [http://www.governmentlaw.org/files/impact\\_fees\\_ny\\_municipalities.pdf](http://www.governmentlaw.org/files/impact_fees_ny_municipalities.pdf).

112. 2011 N.Y. Sess. Laws ch.97, § 1 (McKinney 2011); 2011 N.Y. Sess. Laws ch.97, § 2 (McKinney 2011); see also New York State Dep't of Taxation and Finance, *The Property Tax Cap Guidelines for Implementation*, at 1 (2011), available at <http://www.tax.ny.gov/pdf/publications/orpts/capguidelines.pdf> [hereinafter *Tax Cap Guidelines*]. Serious consideration of a tax cap began in January 2008 with Executive Order 22 issued by Governor Eliot Spitzer establishing the New York State Commission on Property Tax Relief. The Commission was continued by Governor David Paterson pursuant to Executive Order 1 issued in March 2008. See New York State Commission on the Property Tax, *Final Report to Governor David Paterson* (Dec. 1, 2008), available at [http://www.cptr.state.ny.us/reports/CPTRFinalReport\\_20081201.pdf](http://www.cptr.state.ny.us/reports/CPTRFinalReport_20081201.pdf).

113. 2011 N.Y. Sess. Laws ch.97, § 1; see also *Tax Cap Guidelines*, *supra* note 112, at 2.

114. 2011 N.Y. Sess. Laws ch.97, § 1; see also *Tax Cap Guidelines*, *supra* note 112, at 2.

115. 2011 N.Y. Sess. Laws ch.97, § 1. "Local governments can increase their property tax levy beginning for fiscal year 2012 above the limit levy . . . for costs resulting from court orders or judgments against the local government arising out of tort action to be paid in the coming fiscal year." *Tax Cap Guidelines*, *supra* note 112, at 6. The tort judgment must be above five percent of the total levy for the previous year. 2011

The fact that residents of many local governments may actually receive increases of more than two percent in their local property tax bills is not well understood by the public, most of whom are simply aware of the media sound bite “two percent tax cap.”<sup>116</sup>

Perhaps the most significant and controversial aspect of the New York Property Tax Cap legislation is its override mechanism. Local governments may override the levy limit by first enacting a local law for this purpose.<sup>117</sup> The local law must be passed by a supermajority of the governing body within the local government.<sup>118</sup> For a school district to override the cap, however, it requires 60% of the “voting power” for approval of the school budget.<sup>119</sup> The public votes on a school district’s budget.<sup>120</sup> Therefore, the public is the voting body with the authority to approve or disapprove the proposed school budget. Because of this approach, an override law must have 60% of the governing body’s votes to be enacted, and because the governing body is the voting public, 60% of the voting public must agree to the override law.<sup>121</sup> A local override law must be passed before the final budget is enacted.<sup>122</sup>

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N.Y. Sess. Laws ch.97, § 1. Pension increases are excluded and occur when “the annual growth in the average actuarial contribution rate for the Employee’s Retirement System (ERS), the Police and Fire Retirement System (PFRS), or the normal contribution rate for Teacher Retirement System (TRS) exceeds two percentage points.” *Id.*

116. See generally N.Y. Office of State Comptroller, *Local Government and School Accountability, Real Property Tax Cap Information*, <http://www.osc.state.ny.us/localgov/realprop/index.htm> (last visited Jan. 30, 2012).

117. 2011 N.Y. Sess. Laws 5856 (McKinney 2011); see also *Tax Cap Guidelines, supra* note 112, at 9.

118. 2011 N.Y. Sess. Laws 5856 (“A local government may adopt a budget that requires a tax levy that is greater than the tax levy limit for the coming fiscal year, not including any levy necessary to support the expenditures pursuant to subparagraphs (i) through (iv) of paragraph g of subdivision two of this section, only if the governing body of such local government first enacts, by a vote of sixty percent of the total voting power of such body, a local law to override such limit for such coming fiscal year only”); see also *Tax Cap Guidelines, supra* note 112, at 9. So, for example, if the legislative body consists of five members, three legislators must vote in favor of the proposed override. This is because three votes out of the five possible is 60% of the legislative body, the supermajority needed to enact the override legislation.

119. See 2011 N.Y. Sess. Laws 5856 (“[I]n the case of a district or fire district, a resolution, approved by a vote of sixty percent of the total voting power of such body, to override such limit for such coming fiscal year only.”); see also *Tax Cap Guidelines, supra* note 112, at 9.

120. N.Y. EDUC. LAW. § 2023-a (McKinney 2011).

121. 2011 N.Y. Sess. Laws 5856.

122. *Id.*; see also *Tax Cap Guidelines, supra* note 112, at 9.

Adjustments to the tax cap can be made for municipalities that consolidate or dissolve.<sup>123</sup> The law does not apply to newly created local governments in the first fiscal year.<sup>124</sup> Further, adjustments can be made for local governments who transfer functions.<sup>125</sup> Local government restructuring has long been touted by various State Administrations as a way of reducing the local property tax burden.<sup>126</sup> When these situations occur, it is the responsibility of the Office of the State Comptroller to adjust the tax levy for the upcoming fiscal year.<sup>127</sup>

Local governments, already fiscally strapped due to federal and state mandates as well as the rising costs associated with public sector

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123. 2011 N.Y. Sess. Laws 5856 (“(a) When two or more local governments consolidate, the state comptroller shall determine the tax levy limit for the consolidated local government for the first fiscal year following the consolidation based on the respective tax levy limits of the component local governments that formed such consolidated local government from the last fiscal year prior to the consolidation. (b) When a local government dissolves, the state comptroller shall determine the tax levy limit for the local government that assumes the debts, liabilities, and obligations of such dissolved local government for the first fiscal year following the dissolution based on the respective tax levy limits of such dissolved local government and such local government that assumes the debts, liabilities, and obligations of such dissolved local government from the last fiscal year prior to the dissolution.”).

124. *Id.* (“The tax levy limit established by this section shall not apply to the first fiscal year after a local government is newly established or constituted through a process other than consolidation or dissolution.”); *see also Tax Cap Guidelines, supra* note 112, at 11–12.

125. 2011 N.Y. Sess. Laws 5856; *see also Tax Cap Guidelines, supra* note 112, at 12.

126. *See* Andrew Cuomo, *Cap N.Y. Property Taxes The New, N.Y. Agenda* 14 (2010), available at [http://www.andrewcuomo.com/system/storage/6/4a/5/1131/andrew\\_cuomo\\_cap\\_ny\\_property\\_taxes.pdf](http://www.andrewcuomo.com/system/storage/6/4a/5/1131/andrew_cuomo_cap_ny_property_taxes.pdf).

127. 2011 N.Y. Sess. Laws 5856; *see also Tax Cap Guidelines, supra* note 112, at 11–12. For the consolidation of two or more local governments, “the Office of State Comptroller will calculate the tax levy limit for the first year after the consolidation. This calculation will be based upon the prior year tax levy limits of both local governments, but other factors pertaining to the consolidation may also be considered.” *Id.* at 11. For the transfer of functions from one local government to another local government, “the office of the State Comptroller shall determine the costs and savings of the associated function for both local governments. This determination will be provided to the local governments so that the appropriate adjustments can be made to their tax levy limit calculations.” *Id.* at 12. For dissolutions when one government completely dissolves,

the Office of the State Comptroller will calculate the tax levy limit for the local government that assumes the debts, liabilities and obligations of the former local government. This calculation will be based upon the prior year tax levy limits of both local governments, but other factors pertaining to the dissolution may also be considered.

*Id.* In the event that an entirely new local government is created the tax cap does not apply to the first fiscal year. *Id.*

collective bargaining,<sup>128</sup> are understandably concerned over the property tax cap. In response to questions about the override process, the New York Association of Towns has published a model override local law.<sup>129</sup> Lewis County, along with other counties, requested that the Attorney General review the new tax cap law for constitutionality.<sup>130</sup>

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128. The New York State constitution states that “[e]mployees shall have the right to organize and to bargain collectively through representatives of their own choosing.” N.Y. CONST. art. I, § 17. Collective bargaining, however, has not transformed into a constitutional right. JEROME LEFKOWITZ, JEAN DOERR, & SHARON BERLIN, PUBLIC SECTOR LABOR AND EMPLOYMENT LAW § 1.12 (2009). That is to say, while the public employees have the right to organize and bargain collectively, the employers are not under such an obligation. *Id.* New York’s collective bargaining law is called the Taylor Law and states that “[p]ublic employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.” N.Y. CIV. SERV. LAW § 202 (McKinney 2010). Further, such public employees share the right “to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment.” *Id.* § 203. These laws are in place to protect public employees while in the negotiation process from employer interference. LEFKOWITZ et al., *supra*, at § 3.19. Of these protections, most notable is that of the employees (union) to negotiate their contracts (terms and conditions) in good faith with their employer by a certified representative. N.Y. CIV. SERV. LAW § 209-a(1)(d). The employees therefore are protected from the employer bypassing the negotiation and bargaining process before implementing a policy “pertaining to a mandatory subject of bargaining.” LEFKOWITZ et al., *supra*, at § 3.19. The terms and conditions of employment are mandatory subjects of negotiation. N.Y. CIV. SERV. LAW § 204(2). This subject includes “salaries, wages, hours and other terms and conditions of employment.” N.Y. CIV. SERV. LAW § 201(4). Further, health, dental and life insurance are mandatory subjects of bargaining. LEFKOWITZ et al., *supra*, at § 7.7. The Taylor Law also preserves the contracts status quo when the previous contract has expired and is being negotiated. N.Y. CIV. SERV. LAW § 209-a(1)(e). With this protection all the contract provisions from the previous contract remain in effect until a new contract is created, unless the union affects the status quo such as an illegal strike. LEFKOWITZ et al., *supra*, at § 3.19; *see also In re Village of Valley Stream*, 6 PERB 3076 (1973). It is for this reason that a municipality has trouble cutting the salaries or benefits from the public sector workforce—there can be no cuts unless negotiated because the expired contract is preserved until a new contract is negotiated. *See* Rick Karlin, *Tax Cap Pressures Work Rules in Contracts*, TIMES UNION, Nov. 1, 2011, at A3 (“Now that there is a 2 percent property tax cap in the state, towns, counties and school districts need to see changes in work rules that govern labor contracts between municipalities and public sector unions.”).

129. *See* Association of Towns, *Tax Cap Information for Towns*, [http://www.nytowns.org/web/2011/08/tax\\_cap\\_information\\_for\\_towns.aspx](http://www.nytowns.org/web/2011/08/tax_cap_information_for_towns.aspx) (last visited Sept. 9, 2011).

130. Letter from Richard J. Graham, County Attorney, Lewis County, New York, to Eric T. Scheiderman, Attorney General, State of New York (Aug. 25, 2011) (on file with authors). The Office of the Attorney General of the State of New York has declined to opine as to the constitutionality of the statute because it is “longstanding” policy for the Attorney General’s Office to decline giving an opinion as to the constitutionality of a state statute. Letter from Kathryn Sheingold, Assistant Solicitor General in Charge of Opinions, to Rodger A. Wickes, President of the County Attorney’s

The request asked the Attorney General to consider whether the new legislation violates Article VIII §§ 8, 10-A, and 12 of the New York State Constitution, specifically Article VIII § 12, which states:

Nothing in this article shall be construed to prevent the legislature from further restricting the powers herein specified of any county, city, town, village or school district to contract indebtedness or to levy taxes on real estate. *The legislature shall not, however, restrict the power to levy taxes on real estate for the payment of interest on or principal of indebtedness theretofore contracted.*<sup>131</sup>

Based on long-standing policy of the Office, the Attorney General declined to comment on the constitutionality of a state statute since the Office could be called upon to defend the statute.<sup>132</sup>

Scholars and policymakers may debate the effectiveness of property tax caps in general, as well as caps mandated in tough economic times. For example, in Massachusetts, Proposition 2 ½ researchers asserted that a property tax cap enacted during an economic recession would impair local government, resulting in cuts to vital services and most notably decreases in school budgets.<sup>133</sup> The researchers noted that the loss of property tax revenue will increase the need for state aid, which “can be a highly volatile revenue source.”<sup>134</sup> Therefore, the study concluded that tax caps during a weak economy are harmful to local governments because state aid cannot be expected to fill the revenue loss.<sup>135</sup>

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Association of New York and County Attorney for Washington County, New York (Sept. 28, 2011) (on file with authors).

131. N.Y. CONST. art. VIII, § 12 (emphasis added). This concern was expressed by Lewis County, New York. In Lewis County, the letter explained, the County’s outstanding indebtedness is \$13.3 million and the tax levy limit for fiscal year 2012 would be \$249,000 when the increase to the county’s budget, for Medicaid alone, is \$230,000. Letter from Richard J. Graham to Eric T. Scheiderman, *supra* note 130.

132. Letter from Kathryn Sheingold to Roger A. Wickes, *supra* note 130.

133. See Phil Oliff & Iris J. Lav, CTR. ON BUDGET AND POLICY PRIORITIES, *Hidden Consequences: Lessons From Massachusetts for States Considering a Property Tax Cap*, at 7 (2010), available at <http://www.cbpp.org/files/5-21-08sfp.pdf>.

134. *Id.*

135. *Id.* One article reports that an eleven-year-old, 1850 square foot home in Pittsfield, Massachusetts, worth \$305,000, was assessed \$4579 in annual property taxes. In contrast, a twenty-one-year-old, 1850 square foot home in Troy, New York, worth \$164,000, was assessed \$6564 in property taxes, demonstrating a stark difference between property tax liabilities in New York and in Massachusetts. See Rick Karlin, *Lesson in Tax Relief*, TIMES UNION, Oct. 29, 2011, at A1.

### 3. *New York's Unfunded Mandate Problem*

Further exacerbating the fiscal stress on local governments is a long list of unfunded state mandates. New York Counties are feeling this stress because they have no control over the cost of mandated programs including Medicaid, pre-school special education, welfare, pension rate increases, early intervention, child protective services, youth detention facilities, Temporary Assistance for Needy Families (TANF), TANF Safety Net, food stamp administration, public health care services, indigent legal defense services, and probation.<sup>136</sup> In Sullivan County, the cost of unfunded state mandates relating to health and family services is 50% of the overall budget.<sup>137</sup>

A 1973 report of the Temporary State Commission on the Powers of Local Government documents the tensions over state mandates on local governments, stating:

In many localities, officials feel that their units of government are treated as poor relatives in the distribution of resources by the higher levels of government, even though local residents and their business enterprises are the principal tax source for these higher government levels . . . . [T]hey see themselves being harassed and oppressed by supervening agencies invested with the power to affect the lives of entire neighborhoods and communities, without being required to secure the approval or even consult with local authorities. Finally, local governments feel themselves weighed down by costly and at times oppressive State legislative mandates for new functions, programs and employee benefits.<sup>138</sup>

States have always mandated that local governments take specific actions.<sup>139</sup> The U.S. Advisory Commission on Intergovernmental Re-

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136. Mark LaVigne, *Property Tax Relief Must Begin with Mandate Reform* (Sept. 24, 2010), <http://nysac.org/news/nysac-news/property-tax-relief-must-begin-with-mandate-reform> (asserting that most of these mandated programs place over 50% of the implementation cost on the counties).

137. Ira J. Cohen, *Unfunded Mandates Continue to Force Property Tax Hikes* (Sept. 24, 2010), <http://nysac.org/news/nysac-news/unfunded-mandates-continue-to-force-property-tax-hikes/> (explaining that 75% of the budget is dedicated to all unfunded mandates both federal and state wide, allowing for 25% of the budget to be discretionary).

138. *Unfunded Mandates*, *supra* note 76, § I (quoting TEMPORARY STATE COMMISSION ON THE POWERS OF LOCAL GOVERNMENT (1973)).

139. Advisory Comm'n on Intergovernmental Relations, *Mandates: Cases in State and Local Relations* 1 (1990), available at <http://www.library.unt.edu/gpo/acir/Reports/information/M-173.pdf>.

lations (ACIR) first studied the state mandate issue in 1978.<sup>140</sup> In addition to the fiscal tensions, the 1978 report noted another concern with state mandates, “. . . substitut[ing] state for local priorities.”<sup>141</sup> Local governments see mandates as restraining their ability to act in the best interests of their own citizens and the demands of their populations.<sup>142</sup> In 1990, the ACIR found that the New York legislature reviewed 20,000 bills a year and 85% of them placed a financial demand on either the state or the local governments.<sup>143</sup>

Typically, local governments accept state mandates more readily when they seek to achieve a uniform statewide policy as opposed to when they individually apply to certain localities.<sup>144</sup> In its 1990 report, the ACIR addressed the different sources and comparative legitimacy of state mandates.<sup>145</sup> There are various legal authorities within state government from which mandates may emanate: the state constitution, citizen initiatives, statutes, judicial decisions, and administrative rulemaking.<sup>146</sup> Commenting on the legitimacy of these sources, the ACIR stated that, “[i]t can be argued that those sources closer to the people have more democratic legitimacy, while those farther removed from the citizenry have less democratic legitimacy because their political accountability is less direct.”<sup>147</sup>

To satisfy increasing fiscal demands necessitated through unfunded mandates, local governments often are forced to raise property taxes, the only viable source of revenue to pay for the unwanted expense.<sup>148</sup> Therefore, the problem is amplified when the state that restrains the local taxing power simultaneously requires local governments to comply with certain mandates,<sup>149</sup> hence the cry emanating from municipal officials in response to the property tax cap described in the previous section. A recent editorial summed it up well:

With New York’s current fiscal crisis, local governments in New York State can’t expect more state aid anytime soon, and they’ll be

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140. Advisory Comm’n on Intergovernmental Relations, *State Mandating of Local Expenditures* 1 (1978), available at <http://www.library.unt.edu/gpo/acir/Reports/policy/A-67.pdf> [hereinafter *Local Expenditures*].

141. *Id.* at 2.

142. *Local Expenditures*, *supra* note 140, at 6.

143. *Id.* at 51.

144. *Id.* at 3.

145. *Id.* at 1.

146. *Id.* at 3.

147. *Id.*

148. *See id.* at 13.

149. *Id.* at 4–5.

very lucky to keep what they have now. If the state can't provide money, it can at least provide something that can *save* money: mandate relief.<sup>150</sup>

#### 4. *The Modern State Response to the Unfunded Mandate Challenge*

Over the years, various state legislatures and governors have attempted to study the mandate problem. For example, in 1977 Governor Hugh Carey acknowledged the heavy burden state mandates place on local governments and affirmed his commitment to reduce the unnecessary administrative and financial costs that they impose.<sup>151</sup> The next year, the ACIR noted: “[i]t would be difficult to find an issue that sparks more resentment among local officials than that caused by state-mandated expenditures.”<sup>152</sup> A central finding of ACIR’s report was that New York State imposed mandates on its local governments in sixty of the seventy-seven functional areas studied—the most of any state.<sup>153</sup>

In 1981, the New York Legislative Commission on Expenditure Review (LCER) compiled a comprehensive list of mandates in New York.<sup>154</sup> The LCER report focused just on the mandates imposed on county governments, and found a total of 2632 mandates, of which 608 (23%) were the most onerous ones that imposed additional costs without providing funding for them.<sup>155</sup>

More than thirty years later, Governor David Paterson called for mandate relief in his January 2009 address to the Legislature.<sup>156</sup> In April 2009, Governor Paterson issued an Executive Order prohibiting Executive branch agencies from recommending, proposing, publishing, or submitting legislation or regulations containing a mandate

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150. Editorial, *Time for State to Get Serious about Mandate Relief*, DAILY GAZETTE (Schenectady, NY) (Dec. 1, 2008), [http://www.dailygazette.com/news/2008/dec/01/1201\\_edit1/?print](http://www.dailygazette.com/news/2008/dec/01/1201_edit1/?print).

151. Governor Hugh L. Carey, *Budget Message: Relaxation on State-Imposed Local Government Mandates*, in PUBLIC PAPERS OF HUGH L. CAREY (1977), 1807, 1814.

152. *Local Expenditures*, *supra* note 140, at 1.

153. *Id.* at 3.

154. *See generally* State of N.Y. Legislative Commission on Expenditure Review, *State Mandates to Counties* (1981).

155. *Id.* at 12.

156. Governor David A. Paterson, State of the State Address: Our Time to Lead (Jan. 7, 2009), *available at* [http://www.ny.gov/governor/keydocs/pdf/speech\\_0107091.pdf](http://www.ny.gov/governor/keydocs/pdf/speech_0107091.pdf). The Governor stated that “State mandates are too burdensome. We should relieve them.” *Id.*

without first analyzing their impact on local governments.<sup>157</sup> The Order also put the Legislature on notice that he would not sign any bill that did not comply with this Order.<sup>158</sup>

Governor Andrew Cuomo continued Paterson's effort in January 2011 when he issued Executive Order No. 6 which established the Mandate Relief Team to study the effects of unfunded mandates on property taxes.<sup>159</sup> A preliminary report issued in 2011 presents recommendations for initial relief for municipalities and school districts.<sup>160</sup> The report suggests that New York State should stop the "proliferation of mandates" by prohibiting them in a constitutional amendment and in the interim through statute.<sup>161</sup> The report also recommends that a cost analysis be completed with every bill, requiring bill sponsors for proposed legislation that would "substantially" affect local government finances, to prepare a "fiscal impact note" along with the bill.<sup>162</sup> The ACIR has already suggested fiscal notes, but while fiscal notes are a way to prevent potential unfunded future mandates, they are not effective for addressing existing mandates.<sup>163</sup> Other recommendations include creating a new pension tier designed to reduce existing local pension contribution liabilities<sup>164</sup> and amending the State Administrative Procedures Act (SAPA) to provide more flexibility in managing unfunded mandates.<sup>165</sup> The report charges the Mandate Relief Team with supplementing its report with

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157. N.Y. State Exec. Order No. 17 (2009).

158. N.Y. COMP. CODES R. & REGS. tit. 9, § 7.17 (2009).

159. N.Y. State Exec. Order No. 6 (2011).

160. *Unfunded Mandates*, *supra* note 76, § I.

161. *Id.* § II A.

162. *Id.* Requiring this analysis would enable local governments to review the fiscal implications of each bill, increasing government transparency and accountability.

163. *Local Expenditures*, *supra* note 140, at 50.

164. The report noted that "pension spending is one of the major cost drivers in the state. . . . [It] can have a significant impact on the local property tax burden." *Unfunded Mandates*, *supra* note 76, § II B. Further, in 2010, all municipalities outside of New York City paid approximately \$2 billion in pension costs, 7% of taxes levied in those areas. *See id.* Therefore, the report recommends creating a new pension tier where employees contribute more, the minimum retirement age is raised, and the length required to work prior to pension is extended. *See id.*

165. Specifically, the report acknowledges that the SAPA process discourages local governments from seeking relief because of a complicated petition process, and states that an amendment to SAPA § 204 may allow the local government to search for alternatives to implement the mandate as well as waivers for avoiding the mandate. *See id.* § II C. Further, the report recommends that all agencies involved in creating mandates should be required to complete a "full agency review" of the mandates' impacts on local governments. *See id.*

quarterly updates and a final report by the end of the 2011–2012 fiscal year.<sup>166</sup>

Furthermore, as part of the 2011 Property Tax Cap law, a number of initiatives were enacted for the purpose of reducing some fiscal burdens on local governments. For example, language was added to the State Administrative Procedures Act to allow a local government or local governments jointly to seek approval for an “alternate method of implementing a regulatory mandate by submitting [a petition] to the appropriate state agency.”<sup>167</sup> The agency then has thirty days to make a decision regarding the petition.<sup>168</sup> In addition, the new law creates a Mandate Relief Council, consisting of eleven members including the Secretary to the Governor (Chair), Counsel to the Governor, the Director of the Division of Budget, the Secretary of State, three members appointed from the governor’s executive chamber staff, two members appointed by temporary president of the senate, and two appointed by the speaker of the assembly.<sup>169</sup> The Mandate Relief council is designed to identify and review mandates that can be eliminated or reformed.<sup>170</sup> The Mandate Relief Council, however, may not consider federal mandates or federal eligibility standards, mandates that apportion the costs of activities between boards of education and municipalities, mandates emanating from the state constitution, or mandates that are necessary for the public health and safety of the people of New York.<sup>171</sup> For regulatory mandates that the council has found to be “imposed upon any local government in an unsound, unduly burdensome or costly manner,” the council may re-

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166. N.Y. State Exec. Order No. 6 (2011).

167. New York State Administrative Procedure Act, N.Y.P.A. § 204-a(2) (2011); see 2011 N.Y. Sess. Laws 5856 (McKinney 2011).

168. N.Y. STATE A.P.A. LAW § 204-a(2) (McKinney 2011); see 2011 N.Y. Sess. Laws 5856.

169. 2011 N.Y. Sess. Laws 5856.

170. *Id.* (“The council shall, upon request of a local government or one of the members of the council, identify and review mandates that can be eliminated or reformed, and make such other and further inquiries, reports and recommendations as the council may deem necessary and prudent to effectuate its mission of mandate relief. In identifying and determining whether such mandates are unsound, unduly burdensome or costly, the council shall receive and consider public comment about them and shall review them in light of cost-benefit principles and such other and further factors as the council shall deem necessary and prudent.”).

171. *Id.* (“(i) those which are required to comply with federal laws or rules or to meet eligibility standards for federal entitlements; (ii) those which reapportion the costs of activities between boards of education, counties, and municipalities; (iii) those which implement provisions of the state constitution; and (iv) those which the council determines are necessary for the maintenance of the public health or safety of the people of New York State.”).

fer a request by a local government to the appropriate agency pursuant to the N.Y. Administrative Procedure Act (SAPA) for a waiver, modification, or repeal of the regulatory mandate.<sup>172</sup> If the Council votes to make the referral the agency shall provide all necessary support to allow the local government to submit their petition in accordance with the SAPA provisions.<sup>173</sup> If the relief sought is not provided by the state agency the Council may hear an appeal and grant appropriate relief.<sup>174</sup> Aside from a referral the Council may also, with a two-thirds vote, refer the mandate to the governor for a repeal or modification of the mandate because of its unsound, unduly burdensome, and costly effect on local governments.<sup>175</sup> When a statutory mandate is involved, with a seven person vote the council can refer the designated unsound, unduly burdensome, and costly mandate to the governor for repeal or modification.<sup>176</sup> Further, a local government can pass a resolution to request that the council examine a statutory or regulatory mandate for possible repeal or modification.<sup>177</sup> A local government, however, may only make three requests per calendar year.<sup>178</sup> In addition, a majority vote can designate the mandates as unsound, unduly burdensome, and costly and therefore necessary to reform or repeal; however, the majority vote is not a judicial determination under the law.<sup>179</sup> Although the efforts in this most recent legislative enactment are a start, the municipal associations continue to call upon the Governor and the Legislature to eliminate more significant unfunded mandates.<sup>180</sup> As of the time this Article was written, the Governor's Mandate Relief Council has yet to take any publically reported actions, so the jury is out as to whether this initiative will yield successful returns for struggling local governments.

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172. *Id.*; N.Y. State A.P.A. Law § 204-a.

173. 2011 N.Y. Sess. Laws 5856; N.Y. State A.P.A. Law § 204-a.

174. 2011 N.Y. Sess. Laws 5856.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. Karlin, *supra* note 128 (reporting that the New York Conference of Mayors noted that the cost of personnel is a large part of a municipality's budget and new rules governing public sector work contracts are necessary to provide relief to municipalities which are trying to comply with the property tax cap).

## II. DELIBERATIVE DEMOCRACY: PARTICIPATORY GOVERNANCE AND VEHICLES FOR CIVIL DISCOURSE AS AN ALTERNATIVE FOR MUNICIPAL FISCAL DECISION MAKING

The preceding Part explained the challenges facing local government officials with respect to making difficult fiscal budgeting decisions, especially in the context of the current economy and the present environment of unfunded mandates, fixed government costs, dwindling revenues and now a property tax cap. As documented above, municipal officials have been trying since the late 1970s to undo many unfunded mandates, meeting with only minor periodic relief. Required expenditures, including payments pursuant to public sector collective bargaining agreements and public pension fund contributions, account for a significant percentage of municipal budgets.<sup>181</sup> Many required local expenditures can be traced to federal and state statutes and directives, and therefore do not fall within the exclusive purview of each individual municipality to control.<sup>182</sup> Further, absent a constitutional amendment to allow for initiatives and referenda in New York, local residents have little power to force state legislators to provide relief from these fiscal requirements. While municipal officials and advocates continue the important work of educating federal and state lawmakers about the costly impacts of these mandates and requirements on local governments, the current fiscal crisis presents the perfect storm to positively engage members of the public in taking greater ownership and interest in fiscal issues, and in providing meaningful input into the local budgeting process. A number of participatory frameworks exist from deliberative democracy processes to civic engagement strategies. This Part of the Article addresses different models that offer potential opportunities for the public to provide meaningful input and articulate preferences and priorities when it comes to the allocation of limited dollars to support local government service delivery.

The most identifiable method of public engagement is the public hearing.<sup>183</sup> Typically, however, state enabling statutes simply require

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181. See *Local Government and School Accountability, Cost Saving Ideas: Overtime Management and Planning*, N.Y. OFFICE STATE COMPTROLLER, <http://www.osc.state.ny.us/localgov/costsavings/overtimeplanning.htm> (last visited Jan. 30, 2012).

182. See Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. REG. 351, 377 (2010).

183. Sean F. Nolon, *Negotiating the Wind: A Framework to Engage Citizens in Siting Wind Turbines*, 12 CARDOZO J. CONFLICT RESOL. 327, 355 (2011).

one public hearing prior to local legislative decision making.<sup>184</sup> For example, as part of the town budgeting process in New York, the budget is drafted by the budget officer who then turns the tentative budget into the town clerk, after which the town board reviews the budget and modifies it as needed.<sup>185</sup> The town board then conducts a public hearing where town residents may voice their concerns.<sup>186</sup> After the public hearing occurs, the town board may change the preliminary budget further, but state law does not require another public hearing.<sup>187</sup> The local government, however, may prescribe additional requirements.<sup>188</sup> The required public hearing is not an effective method of public engagement for a number of reasons. First, hearings typically do not promote dialogue between members of the public and decision makers because to satisfy the law, legislators need only provide an opportunity for the public to speak. The legislators need not respond. Next, members of the public speak to the decision making body, but they do not have the opportunity to engage each other in conversation. Furthermore, members of the public typically have only a limited amount of time and to provide comments, and individuals are often prevented from speaking more than once during the hearing. These limitations mean that members of the public cannot respond to other comments. Public hearings can leave members of a community dissatisfied and frustrated, feeling disconnected and lacking ownership in the ultimate decision.

### A. Deliberative Democracy

In the participatory governance model, however, active involvement of residents in government decision making which may include deliberative democracy and collaborative governance is preferable.<sup>189</sup> It is when the vote is taken from the politicians and placed into the

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184. *See, e.g.*, N.Y. TOWN LAW § 265(a) (McKinney 2010) (requiring a public hearing prior to an amendment to the zoning provisions); N.Y. VILLAGE LAW § 7-708 (McKinney 2010) (requiring a public hearing prior to an amendment to the zoning provisions); N.Y. VILLAGE LAW § 7-712 (McKinney 2010) (requiring the Zoning Board of Appeals to hold public meetings); N.Y. GEN CITY LAW § 81-a (McKinney 2010) (requiring the Zoning Board of Appeals to hold public meetings).

185. N.Y. TOWN LAW § 106 (1)–(4).

186. N.Y. TOWN LAW § 108; *see also* N.Y. COUNTY LAW §§ 359–60; N.Y. VILLAGE LAW § 5-508(3)–(4).

187. N.Y. TOWN LAW § 109 (1)–(2).

188. *Id.*

189. Nolon, *supra* note 183, at 355. Recently, “[e]fforts to involve citizens directly in governmental decision making have showed great promise and produced modest successes.” *Id.*

“public sphere” that accountability and justification will emerge within government decision making.<sup>190</sup> For this to occur, the public must be united by a shared “collective identity.”<sup>191</sup> That is to say, the public should engage in collaborative techniques to shape their opinions collectively, working together to form a policy that reflects those collective opinions.

The theory of deliberative democracy suggests that the public can improve democracy by questioning and participating in governance, ensuring that government is run by the public’s standards. Deliberative democracy is founded on principles of accountability and discussion between members of the public to facilitate a deliberation that will better inform the public’s opinions.<sup>192</sup> This method embraces a “talk-centric” model of democracy instead of a “voting-centric” model.<sup>193</sup> Further, scholars note that deliberative democracy is “a communicative process based on reason . . . [and] is able to transform individual preferences and reach decisions oriented to the public good.”<sup>194</sup> As a result, the laws and policies will be based on the input of individual community members.<sup>195</sup> People engaged in discussions will form opinions and decisions around the information learned and brought out through the discussions,<sup>196</sup> and after the discussions, a goal of the process is that the group will be bound by the decision it has made.<sup>197</sup> This deliberative process allows for more competent government decision making because it ensures that the decisions reflect the public’s well-reasoned opinions.<sup>198</sup> In turn, this outcome connects the public with the governmental decision makers, doing away with the divide that is a cause for concern with most community members.<sup>199</sup>

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190. Simone Chambers, *Deliberative Democratic Theory*, 6 ANN. REV. POL. SCI. 307, 309 (2003).

191. *Id.* at 314.

192. *Id.* at 308. Voting-centric democracy uses “fixed preferences and interests” and implements them through a voting process, while talk-centric democracy focuses on the formulation of fixed preferences and interests prior to voting through proper communication. *Id.*

193. *See id.*

194. Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 501 (2008).

195. Archon Fung, *Democratic Theory and Political Science: A Pragmatic Method of Constructive Engagement*, 101 AM. POL. SCI. REV. 443, 449 (2007).

196. Chambers, *supra* note 190, at 309.

197. Thompson, *supra* note 194, at 502.

198. *See* Fung, *supra* note 195, at 449.

199. *Id.*

Essential to participatory governance is the concept of deliberation.<sup>200</sup> Deliberation is not to be confused with a debate. When parties debate over public policy, they each attempt to discredit the other side's arguments by identifying weaknesses.<sup>201</sup> On the other hand, deliberation is a process that involves "participants listen[ing] in an effort to better understand the other's viewpoint and identify questions or areas of confusion to probe for a deeper understanding. Deliberation is the thoughtful consideration of information, views, and ideas."<sup>202</sup> In essence, the deliberative model offers a process where differing viewpoints and interests can be expressed and participants can search for common ground.

### 1. *Methods of Deliberative Democracy*

Three methods of deliberative democracy have been identified: distributed deliberation, iterated deliberation, and decentralized deliberation. The first, "distributed deliberation," calls for different tasks during the deliberative process to be assigned to different groups.<sup>203</sup> "Distributed deliberation" recognizes that not all groups will be effective and attempts to maximize both effectiveness and efficiency by tasking different groups with different goals.<sup>204</sup>

The second method, "iterated deliberation," is where a decision making body solicits the help of a deliberating body that will deliberate on a suggested proposal and then send the proposal back to the governing body for correction, after which the proposal once more is sent back to the deliberating body for another round.<sup>205</sup> This process embraces the notion of self correction on behalf of the governing body and invites criticism from the deliberative body.<sup>206</sup>

"Decentralized deliberation" is the third method of deliberative democracy that limits the deliberative process to a unified system where all interested groups can engage in the deliberative process.<sup>207</sup> Participatory budgeting is the most commonly cited example of a de-

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200. Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 278 (2009).

201. *Id.*

202. *Id.*

203. Thompson, *supra* note 194, at 514.

204. *Id.*

205. *Id.* at 515.

206. *Id.*

207. *Id.* at 514.

centralized deliberation process.<sup>208</sup> Participatory budgeting allows the public to be involved with budgeting priorities, resulting in a “reflective preference” of the public which is then integrated into the local government’s budget.<sup>209</sup> Such a participatory democracy framework holds that the citizens must have taken a direct part in the decision making process such as making and hearing arguments, creating policies and choosing between alternatives provided.<sup>210</sup>

## 2. *Civil Discourse*

Civil discourse is the overarching term within deliberative democracy that describes the different levels and methods of participation that the public can utilize.<sup>211</sup> The concept levels the playing field for all participants and seeks to eliminate the adversarial and hierarchical systems for a more efficient way to reach conflict resolutions.<sup>212</sup> The goal is to achieve a respectful way in which community members can engage in discussions to improve the government decision making process and become more actively involved in informing policy decisions.<sup>213</sup> As such, public participants become a part of public policy decision making instead of standing idly by waiting for the policy effects.<sup>214</sup> Within the broader theory of civil discourse, citizen advisory groups, citizen panels, citizen juries, citizen initiative, negotiated rule making, mediation, compensation, and benefit sharing are all forms of public participation.<sup>215</sup>

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208. *Id.*

209. *Id.*

210. Fung, *supra* note 195, at 450.

211. See Ortwin Renn, Thomas Webler & Peter Wiedemann, *A Need for Discourse on Citizen Participation: Objectives and Structure of the Book*, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE 3 (Ortwin Renn, Thomas Webler & Peter Wiedemann eds., 1995).

212. *See id.*

213. See American Bar Association, *Affirms Role of Lawyers to Promote Civil Public Discourse, Resolution* (2011), available at [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1312826039108.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1312826039108.pdf) (“[T]he American Bar Association affirms the principle of civility as a foundation for democracy and the rule of law and urges lawyers to set a high standard for civil discourse as an example for others in resolving differences constructively and without disparagement of others . . . . [T]he American Bar Association urges all lawyers, ABA member entities and other bar associations to take meaningful steps to enhance the constructive role of lawyers in promoting a more civil and deliberative public discourse.”).

214. See Renn et al., *supra* note 211, at 1.

215. *Id.* at 10.

For example, Project Civil Discourse, an initiative of the Arizona Humanities Council, engages community members in dialogue sessions involving controversial public policy issues.<sup>216</sup> A core principle guiding this effort is respecting the opinion of all the participants in order to have a successful collaboration.<sup>217</sup> One of the recent Project Civil Discourse sessions focused on a local finance topic, “Arizona’s Sales Tax Referendum Town Hall: A Demonstration of Civil Dialogue and Discussion.”<sup>218</sup> The May 2010 session attracted 100 people who gathered to better understand “the implications of the sales tax vote on Arizona’s budget, and more importantly to demonstrate how an issue such as taxes can be discussed in a civil and respectful way.”<sup>219</sup> The large group was divided into smaller tables where trained facilitators engaged the participants in discussions of pre-determined questions.<sup>220</sup>

The outcome of the discussions varied and there were differences of opinion as to what services the state should provide to its residents.<sup>221</sup> A majority of the participants believed that the referendum should pass considering the tough financial times that Arizona faced, and many expressed the opinion that tax cuts are not the answer during a financial crisis, reasoning that tax cuts may have contributed to

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216. PROJECT CIVIL DISCOURSE, <http://www.projectcivildiscourse.org/index.php> (last visited Oct. 31, 2011) (stating that public policy issues at the center of a civil discourse program may involve “growth, education, healthcare, religion, race, immigration and transportation”). Further, the dialogue sessions include “trainings, forums, and special events that share, model and provide insight on collaborative problem-solving skills.” *Id.*

217. *See id.*

218. *Past Events: Sales Tax Referendum*, PROJECT CIVIL DISCOURSE, [http://www.projectcivildiscourse.org/arizona\\_sales\\_tax\\_referendum.php](http://www.projectcivildiscourse.org/arizona_sales_tax_referendum.php) (last visited Oct. 31, 2011).

219. Project Civil Discourse, *Arizona’s Sales Tax Referendum Town Hall: A Demonstration of Civil Dialogue and Discussion* 1 (2010), available at <http://www.projectcivildiscourse.org/media/PCD%20Sales%20Tax%20Town%20Hall%20Report.pdf>.

220. *Id.* at 2. The questions presented were:

1. There are viewpoints in favor of and against the proposed sales tax increase, which would raise the State of Arizona sales tax by 1% for three years. What are your thoughts about the different perspectives, giving particular consideration to the types of services that the state government should provide its citizens?
2. Regardless of the outcome of the May 18th referendum, the task of planning for Arizona’s long-term financial needs remains. What actions might Arizona citizens, elected officials, business leaders, and others take to meet the state’s future financial needs?

*Id.*

221. *Id.*

the financial crisis.<sup>222</sup> Other issues discussed included redesigning the tax revenue system in Arizona and alternate methods of increasing revenue and control costs.<sup>223</sup> The final report includes the ideas that emerged from the discussion as well as feedback from the participants.<sup>224</sup> It was noted in the report that the goal was not to change any minds but instead to understand the different viewpoints regarding governmental policy.<sup>225</sup>

### B. Participatory Budgeting

Another form of deliberative democracy or participatory governance is participatory budgeting, which allows for “an opportunity for citizens to engage in the processes of public spending decision making focused on their neighborhood, locality, or a particular public agency.”<sup>226</sup> This strategy gives community members a voice to influence their local budget by prioritizing local government spending and the allocation of public resources.<sup>227</sup> Participants have the opportunity to have their preferences impact local government decisions since the goal is for the local government to take the public preferences and translate them “into concrete budget items through a sophisticated system of grading and weighing preferences.”<sup>228</sup> Success is dependent on how the locality decides to organize its participatory budgeting scheme, tailoring the system to its unique characteristics, population, and geography.<sup>229</sup>

Participatory budgeting was first used in 1989 in Porto Alegre, Brazil, and it has been gaining popularity in other Latin American cities.<sup>230</sup> Prior to 1989, Porto Alegre was in dire financial straits and the

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222. *Id.* at 6. Conversely, some supported tax cuts that would have the effect of stimulating the economy. *Id.*

223. *Id.* at 8–9.

224. *See generally id.*

225. *Id.* at 9.

226. Communities and Local Government, *Empowering Communities to Influence Local Decision Making: A Systematic Review of the Evidence* 98 (2009), available at <http://www.communities.gov.uk/documents/localgovernment/pdf/1241955>.

227. Romulo Silveria da Rocha Sampaio, *Regulating Climate Change Risk at the Local Level—The Denver Experience: Green-print or Greenwash?*, 17 MO. ENVTL. L. & POL’Y REV. 356, 387 (2010).

228. Colin Crawford, *Our Bandit Future? Cities, Shantytowns, and Climate Change Governance*, 36 FORDHAM URB. L.J. 211, 248 (2009); *see also* Sampaio, *supra* note 227, at 387.

229. *See* Crawford, *supra* note 228, at 246.

230. *See id.* at 244; *see also* Dorit Rebinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 321,

participatory budgeting system was initially set in place to show the community the hardships of the budgeting process.<sup>231</sup> By the mid-1990s, the region was financially sound, due in part to a series of progressive taxes that the municipality levied allowing for more funding for governmental projects selected by the participatory budgeting process.<sup>232</sup> On another level, the participatory budgeting process has been successful in creating public rights. Members of the public now have a right to participate in governmental decision making, and community members enjoy the right to have the ideas they articulate during the budgeting process become binding upon the municipality to enact into law.<sup>233</sup> A typical design separates a municipality into its various regions where public meetings take place over a period of time.<sup>234</sup> At these meetings, budget and policy proposals are discussed and negotiated while delegates are elected to represent each region.<sup>235</sup> Further, a municipal participatory budget council is elected, consisting of two representatives from each region, to oversee and make final decisions.<sup>236</sup> Once the participatory budget is approved, it goes before the local legislative body for final approval.<sup>237</sup>

An important advantage of the participatory budgeting process is that it creates transparency in governmental decision making. Further, the often excluded low-income and less educated members of a locality are empowered to participate in policy making and influence the local budget by helping to prioritize the spending and allocation of resources.<sup>238</sup> Arguably, participatory budgeting creates a more ef-

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338–39 (2008–2009). In Porto Alegre, the locality organized its public participants into assemblies consisting of sixteen regional districts to deliberate on the budget. *Id.* Participants in each assembly discussed all resources concerning the budget, including sewage, transportation, health care, and housing. *Id.*; see Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT'L L. 435, 458 (2006); Thompson, *supra* note 194, at 514; see also REBECCA ABERS, *INVENTING LOCAL DEMOCRACY: GRASSROOTS POLITICS IN BRAZIL 2* (2000).

231. BRIAN WAMPLER, *PARTICIPATORY BUDGETING IN BRAZIL: CONTESTATION, COOPERATION, AND ACCOUNTABILITY* 126 (2007).

232. *Id.* at 126–27.

233. *Id.* at 127–28.

234. *Id.* at 52.

235. *Id.*

236. *Id.* at 53.

237. *Id.*

238. *Id.* at 68. Participatory budgeting is about access to government officials to lobby them for resources. Therefore, participatory budgeting allows those less fortunate, who otherwise would not have this access to government officials, the opportunity to lobby for a different allocation of resources. *Id.* at 66.

ficient budgetary process, resulting in better public policy decisions made through the deliberative process. Perhaps the best outcome of a process such as this is that the public becomes better informed and educated about the local government's fiscal picture, and the public is forced to prioritize a litany of services from the standpoint of community values and needs.

Participatory budgeting and governance, however, is not perfect. One challenge is that "the deliberation focuses on 'very local goods and needs' and does not dispose 'citizens to think about the greater good of the city, the just trade-offs between jurisdictions or the good of the city through the long arc of time.'"<sup>239</sup> Furthermore, the success of participatory democracy depends on the government's ability to make institutional changes to give the public a chance to be involved in government decision making.<sup>240</sup> A problem in the deliberative process can occur when the public participants are not educated on the topic discussed.<sup>241</sup> The concept of "meta-deliberation" can bridge this gap between the deliberative body and the expert assistance that must be a part of the resolution. Citizen assemblies are an example of such a method utilized to bridge this gap.<sup>242</sup> For example, British Columbia, Canada has experimented with the notion of using Citizen Assemblies, suggesting that, "ordinary citizens can acquire the competence necessary to design political institutions," which is a highly complex matter.<sup>243</sup> In Canada, citizen assemblies created by randomly selecting (accounting for regional and gender percentages) 160 constituents engaged in a deliberative process to discuss a political change in the voting system from a majoritarian system to a more proportional system.<sup>244</sup> The group met every other weekend for a year where it "learned about various electoral designs, attended open meetings to solicit public opinions, and deliberated about the merits of various voting systems."<sup>245</sup> An electoral change is a highly complex issue because "[t]he deliberation in the assembly is quite different from the deliberation in the public, who in the [Canadian] case ultimately vote in a referendum on the assembly's recommendation."<sup>246</sup> Further, the use of the assembly differs from a legislative action be-

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239. Thompson, *supra* note 194, at 514.

240. Fung, *supra* note 195, at 450.

241. Thompson, *supra* note 194, at 515.

242. *Id.*

243. Fung, *supra* note 195, at 452.

244. *Id.* at 450; Thompson, *supra* note 194, at 515.

245. Fung, *supra* note 195, at 450.

246. Thompson, *supra* note 194, at 516.

cause the public makes the final decision in the form of a referendum.<sup>247</sup> Therefore, the assembly was able to pass the final vote to the citizens, and they reached their recommendations “for reasons that most ordinary voters are not likely to fully appreciate.”<sup>248</sup>

### 1. Toronto, Canada

A recent illustration of participatory budgeting is Toronto, Canada. The City Council, facing a budget gap of \$774 million in 2012, undertook a Core Service Review Program in 2011 in an attempt to review all city services and implement a multi-year financial planning model.<sup>249</sup> The Core Service Review Program included a report from the city manager, a financial evaluation by KPMG, and a public engagement strategy.<sup>250</sup> KPMG’s review of Toronto’s services consisted of an analysis of services offered by the city, the city’s agencies, boards, and commissions, research, and a comparative analysis of surrounding municipalities.<sup>251</sup> The KPMG assessment of Toronto’s services included a determination of whether a service is core or discretionary and the “degree to which the standard was prescribed by legislation, set by Council, City management or by funding agreement.”<sup>252</sup> The report identified a list of opportunities and areas for potential cost savings.<sup>253</sup> Among those potential cuts were selling assets such as the Toronto Zoo and the Sony Centre for the Performing Arts; selling or leasing parking lots; eliminating programs that issue grants to cultural institutions like the Toronto Symphony Orchestra and AIDS and drug prevention programs; and eliminating public dental health care programs.<sup>254</sup> The KPMG consultants noted that Toronto has the highest police to population ratio in Ontario, and recommended that the city could reduce costs by reducing patrols to one officer and insti-

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247. *Id.*

248. *Id.* at 515.

249. City of Toronto Canada, *Core Service Review Program Backgrounder 1* (2011), available at [http://www.toronto.ca/torontoservicereview/pdf/core\\_services\\_review\\_backgrounder\\_july2011.pdf](http://www.toronto.ca/torontoservicereview/pdf/core_services_review_backgrounder_july2011.pdf) [hereinafter *Review Program Backgrounder*].

250. *See id.*

251. *Id.* at 1–2.

252. *Id.*

253. City of Toronto, *Core Service Review, Staff Report 3* (2011), available at <http://www.toronto.ca/legdocs/mmis/2011/pw/bgrd/backgroundfile-39504.pdf> [hereinafter *Staff Report*].

254. Natalie Alcoba, *The KPMG Report: Close Libraries, Sell the Zoo, Cut Back on Police*, NAT’L POST (July 21, 2011), <http://news.nationalpost.com/2011/07/21/the-kpmg-report-close-libraries-sell-the-zoo-cut-back-on-police/>.

tuting a hiring freeze.<sup>255</sup> The firm further recommended outsourcing parking enforcement, by-law enforcement, and towing and cutting the school crossing guard program.<sup>256</sup> The KPMG consultants further identified the Toronto Transit Commission (TTC) as an area of substantial savings.<sup>257</sup> The report also identified \$3.8 million for student nutrition programs, \$840,000 for drug prevention programs, and \$1.6 million for AIDS prevention and education programs as potential areas for spending reductions, but acknowledged the probability of an adverse impact on the vulnerable populations.<sup>258</sup>

The public engagement strategy was “designed to inform, involve and consult the public on city services.”<sup>259</sup> For approximately five weeks, the public was encouraged to discuss city services and priorities and to provide feedback through small group discussion, public meetings, interactive blogs, and feedback forms.<sup>260</sup> The object of the public consultation was “[providing] information to the public so that they could participate in the process, providing multiple options for participation and input, providing input to the City, Standing Committees and Council to assist them in their deliberations, and closing the communication loop with participants by posting raw and analyzed data.”<sup>261</sup> The input that the public provided was then compiled into a Public Consultation Report which contained the service areas where there was the greatest public feedback and an analysis of what the 13,000-plus participants felt were the most important issues facing the city.<sup>262</sup> Issues identified included public transit, infrastructure, support and housing for low-income and homeless residents, affordable housing, police services, and various environmental programs.<sup>263</sup> Overall, the results of the public consultation affirmed that the public values and relies on the services that the city of Toronto delivers and that generally, their prioritization of public services correlated to the

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255. *Id.*

256. *Id.*

257. *Id.* KPMG suggested the TTC’s budget of \$1.5 billion might be reduced by contracting out some bus services but noted that the savings would not be realized for a few years. *Id.*

258. *Id.*

259. *Review Program Backgrounder*, *supra* note 249, at 2.

260. *Id.*

261. *Staff Report*, *supra* note 253, at 4.

262. *Review Program Backgrounder*, *supra* note 249, at 3.

263. City of Toronto, *Toronto Core Service Review, Public Consultation Report* 19–34 (2011), available at <http://www.toronto.ca/legdocs/mmis/2011/pw/bgrd/backgroundfile-39507.pdf> [hereinafter *Public Consultation Report*].

rankings prepared by KPMG.<sup>264</sup> Furthermore, the report revealed that the public had mixed views on how to pay for city services—whether by increasing taxes or user fees, by service reductions rather than an increase in taxes or fees, or through a combination of tax and fee increases and service reductions.<sup>265</sup> The public also recommended services that they believed could be provided by private sector or not-for-profit actors.<sup>266</sup>

The Public Consultation report revealed that the public found having a transparent and accountable government to be their highest policy priority.<sup>267</sup> Participants' first choice for funding municipal programs was to increase property taxes to maintain the same level of city services currently being offered to residents, with increasing both user fees and property taxes to maintain the same level of services ranking a close second.<sup>268</sup> The great majority of participants in the project supported an increase in property taxes, with a mean increase of slightly over 5%.<sup>269</sup>

The KPMG experiment in Toronto is an example of participatory budgeting inasmuch as the city sought and compiled the public's opinion on what services it felt to be essential and others that it did not value as much. The public's opinion was also sought on the methods in which the government would use to raise the funds to continue such services. Members of Toronto's government did engage in deliberation with members of the public, by attending public hearings in which residents were given a forum to voice their opinions.<sup>270</sup> These hearings and feedback forms revealed that overwhelmingly, the people of Toronto had very similar and strong views on the direction the city could take to improve its budget crisis.

### C. Models of Collaboration: Lessons from Land Use and Environmental Law

There are other vehicles for a deliberative democracy that fall under the framework of participatory governance that can impact policy. Also referred to as participatory planning, "[t]hese processes have been used to provide valuable information about how to manage fi-

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264. *Staff Report*, *supra* note 253, at 5.

265. *Id.*

266. *Id.*

267. *Public Consultation Report*, *supra* note 263, at 4.

268. *Id.* at 7.

269. *Id.* at 8.

270. *See* Bingham, *supra* note 200, at 278.

nancial resources, set energy priorities, manage natural resources, and enable disadvantaged populations to assess their current circumstances.”<sup>271</sup> Looking for models from the land use and environmental fields can prove instructive since both government decision making regimes require elements of public participation and engagement during various points in the process. Furthermore, one of the core principles of environmental justice is to engage meaningful public participation in the government decision making process.<sup>272</sup> As a result, there is a wealth of experience to be studied and evaluated in terms of engaging the public.

Collaborative decision making processes have been successful in the land use arena where conflict often occurs between the locality, residents, and developers. These entities can achieve success and efficiency when they use the collaborative concept in addition to the required, already in place, land use decision making framework at the local level.<sup>273</sup> This outcome presents promise for the collaborative model when it comes to making local budgeting decisions.

In the land use context, parties to a conflict often believe that they must follow the required scheme set in place by law for resolving conflicts.<sup>274</sup> That required legal scheme, however, should not preclude other methods of conflict resolution.<sup>275</sup> Professor Sean Nolon has pointed out success stories where “parties decided that using predominately collaborative techniques presented significant advantages over predominantly adversarial techniques, and use of those techniques resulted in an approval that enjoyed widespread support.”<sup>276</sup>

First, lawyers must learn to appreciate the collaborative process before they will be willing to apply the schemes. Lawyers seek predict-

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271. Nolon, *supra* note 183, at 357–58.

272. *Environmental Justice, Basic Information*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/environmentaljustice/basics/index.html> (last visited Feb. 25, 2012).

273. See Sean F. Nolon, *The Lawyer as Process Advocate: Encouraging Collaborative Approaches to Controversial Development Decision*, 27 PACE ENVTL. L. REV. 103, 113–15 (2009).

274. See *id.* at 113.

275. See *id.*

276. See *id.* at 115. Nolon describes one case where a developer was seeking to turn a nursing home into apartments for the elderly when he learned he could also subdivide the property. He left the decision up to the residents on the condition that they would support the project. While the developer made his preference for senior housing known, the residents decided that subdividing the property would be the best fit, even after considering that the local board preferred a senior housing development. *Id.*

able resolutions to conflicts and many see the collaborative mechanisms as unpredictable.<sup>277</sup> This idea of unpredictability stems from the absence of a required system to implement the collaborative process, resulting in lawyers not knowing what to expect for their clients.<sup>278</sup> This issue is an important one that can be addressed upfront by participants to facilitate shared process and outcome expectations.

### 1. *Community Advisory Groups*

Community advisory groups, advisory committees, or advisory boards are other mechanisms of collaborative decision making and are identified as a “more structured type of collaborative decision-making process.”<sup>279</sup> Professor Sheila Foster explains that public participation through methods of public notice and comment periods in environmental law are ineffective because there is no requirement that the decision making deliberate in any meaningful way over the public comments.<sup>280</sup> The public notice and comment processes have become more of a “decide, announce, and defend,” method of public participation rather than fully engaging and deliberating over public opinion.<sup>281</sup> Because there is no true dialogue involved in public hearings, they “are a poor forum for ‘extensive development of information, a shared baseline of understanding, and the development of a consensus,’ which are necessary for a truly deliberative decision making process.”<sup>282</sup> It is in the area of environmental justice where the concern for not including minority opinions is most prevalent.<sup>283</sup>

As an alternative, advisory groups can be established through statute or agency rules mandating the collaboration of private and public interests.<sup>284</sup> Constituents or stakeholders are usually selected by the decision-making body or the entity who is most involved.<sup>285</sup> Further, that body will select members to participate who have the perceived

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277. *Id.* at 144.

278. *Id.*

279. Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459, 477 (2002).

280. See THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 242–43 (Michael B. Gerrard & Sheila R. Foster eds., 2nd ed. 2008).

281. John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 907–08 (1998).

282. THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, *supra* note 280, at 244.

283. *Id.* at 225.

284. Foster, *supra* note 279, at 477.

285. Applegate, *supra* note 281, at 921.

greatest interest in the outcome.<sup>286</sup> These groups consist of representatives from government agencies (federal, state, and local) advocates, local business, and property owners (if applicable).<sup>287</sup> If the conflict is highly technical, the group must have access to technical help that enables a layperson to become versed in the relevant technicalities and allows all interests to be influential.<sup>288</sup>

Advisory committees should engage in “active deliberation,” with the goal of finding a consensus based resolution.<sup>289</sup> Even if a consensus cannot be reached by the constituents, “a successful citizens advisory board can narrow areas of disagreement, help affected parties recognize others’ concerns and their bona fides, bring forward alternatives that had not previously been considered, and (if nothing else) elucidate the issues that remain to be resolved.”<sup>290</sup>

As with all participatory models, information is an essential component because without correct information, the participants will not be able to overcome their previous assumptions about the issue, enabling them to provide an informed and unbiased recommendation.<sup>291</sup> Similarly, as with other models of public engagement, because advisory committees are a mere portion of the overall public decision-making scheme, and the public as a whole cannot be involved, a high level of transparency is required to guard against public distrust in the process.<sup>292</sup>

The benefits of the advisory group model to engage the public in governmental decision making include that it informs public agencies about the community’s preferences. Members of the public have the opportunity to educate community members, and it allows for greater acceptance of governmental decisions.<sup>293</sup> Further, the model’s structure may be more efficient, or at least manageable, because the decision-making body deals with a set number of community members, instead of the community as a whole.<sup>294</sup> These benefits however, will

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286. *Id.*

287. Foster, *supra* note 279, at 479.

288. *Id.*

289. *Id.* at 478.

290. Applegate, *supra* note 281, at 921.

291. *Id.* at 941–42.

292. *Id.* at 945.

293. Frances M. Lynn & Jack D. Kartez, *The Redemption of Citizen Advisory Committees: A Perspective from Critical Theory*, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE, *supra* note 211, at 89.

294. *Id.*

not be realized without key considerations in committee composition. Diversity of the committee is a key component, and most often, advisory committees are not elected but are appointed by officials who usually have set agendas.<sup>295</sup> Without a serious commitment to diversity and representation of all stakeholder interests, true public input may not be achieved. Further, because advisory groups have no decision-making authority, the deliberative process can be perceived as ineffective because recommendations can be discarded, and therefore government officials may be less accountable to the public's desires.<sup>296</sup>

Many jurisdictions employ the use of advisory committees in various forms, and it is important to understand the context in which they were created, who appointed the members, and exactly what their charge or mission is. For example, some committees may consist of a small group of people selected by public officials with unknown motives (e.g., they could have been selected for independent expertise or they could have been selected for more partisan reasons). Advisory Committees may conduct deliberations in public or behind closed doors, and they may or may not seek to employ methods to engage broader public input to inform their deliberations or ultimate recommendations. One model is the Bethlehem New York 20/20 Advisory Committee (Advisory Committee) established by the Town Board in 2008 for the purpose of providing the Town "with a vehicle to involve key community stakeholders and to stimulate a community-wide conversation about the long-term strategic direction of the Town government."<sup>297</sup> The mission of the Advisory Committee was to assist the Town in making key organizational and investment decisions to ensure that it maximized the potential to achieve the Comp Plan's vision for 20/20.<sup>298</sup> The Committee, appointed by the Town board, consisted of about two dozen residents from different geographic areas of the Town, with different professional backgrounds and different interests, who worked together to identify shared values and provide recommendations to the Town Board.<sup>299</sup> Essentially, the Advisory Committee was focused on the long-term fiscal sustainability of the

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295. THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, *supra* note 280, at 244.

296. *Id.*

297. TOWN BETHLEHEM, NY, <http://www.townofbethlehem.org/pages/2020/adv2020.asp> (last visited Feb. 22, 2012).

298. *See id.*

299. *Id.*

community.<sup>300</sup> Further, its goals were to cultivate community leadership, identify issues and opportunities, build consensus, focus efforts, and guide decision making.<sup>301</sup> To engage wider public input, the Advisory Committee conducted a random, anonymous community survey in March of 2009.<sup>302</sup> Through the study, the Advisory Committee learned that only “12% of a property owner’s annual property taxes support the many services provided by Town government. This includes, among other things, highway maintenance, parks and recreation, police and public safety, senior services and operation of public water and sewer systems.”<sup>303</sup> Within that context, the Advisory Committee made a series of recommendations regarding fiscal sustainability for the Town, including economic development, and steps to encourage modernization of the functioning and operation of Town government.<sup>304</sup>

#### D. Deliberative Polling

Voters of the community are often unaware, overwhelmed, and uninformed about the budgeting system of local governments.<sup>305</sup> James S. Fishkin asserts that the Deliberative Polling method is an effective strategy that allows lay members of the public to participate in the creation of complex public policy.<sup>306</sup> The process is designed to replace irrational, illogical and lackadaisical polling conducted by most institutions.<sup>307</sup> Under the Deliberative Polling system, Fishkin asserts that the public’s views are more “rationalized and supported and perhaps more consistent with other elements of the respondents’ belief

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300. See generally *Bethlehem 20/20 Advisory Committee Final Report, Executive Summary* (2009), available at <http://www.townofbethlehem.org/images/pageImages/2020/2020%20Final%20Report%20&%20Exec%20Summ%20June%2024,%202009.pdf> [hereinafter *20/20 Executive Summary*].

301. See generally Town of Bethlehem, *Preliminary Report of the 20/20 Advisory Committee*, available at <http://www.townofbethlehem.org/images/pageImages/2020/2020%20Preliminary%20Report%20Presentation%20051109.pdf>.

302. A copy of the survey can be accessed at: <http://www.townofbethlehem.org/images/pageImages/2020/2009CommunitySurvey.pdf>.

303. *20/20 Executive Summary*, *supra* note 300, at 3.

304. See generally *id.*

305. James S. Fishkin, *Deliberative Polling: Toward a Better-Informed Democracy*, CENTER FOR DELIBERATIVE DEMOCRACY, <http://cdd.stanford.edu/polls/docs/summary/> (last visited Sept. 13, 2011) [hereinafter Fishkin, *Deliberative Polling*].

306. See generally JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2009).

307. See JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* 83 (1991).

system.”<sup>308</sup> The system seeks to poll how the public would vote if they were well informed.<sup>309</sup>

Deliberative Polling involves taking a random selection of people from across the region to be polled by first taking a baseline poll to see how the public would vote without in-depth information on the subject matter.<sup>310</sup> Then the sample group being polled is informed about the subject “with carefully balanced briefing materials, with intensive discussions in small groups, and with the chance to question competing experts and politicians.”<sup>311</sup> After informing the group and undergoing several face-to-face deliberations the group is polled in detail a second time, this time as informed voters.<sup>312</sup> This deliberative poll represents an informed vote—how the public would vote after deliberating over the issues and becoming well-versed on the subject matter.<sup>313</sup> Two essential aspects of the process are small-group deliberations that are followed by the opportunity to convene in a larger group to ask expert witnesses questions regarding the topic.<sup>314</sup> The deliberations are most effective face-to-face, however, online meetings have been successful in the past with the use of real time microphones.<sup>315</sup> Depending on the region, the average range for a subject group is 130 to 450 participants.<sup>316</sup>

*What’s Next California?* is an initiative seeking to produce discussions and ideas about government reform possibilities in California.<sup>317</sup> For two days in late June 2011, *What’s Next California?* administered a deliberative poll on the topic of government reform that involved 412 people.<sup>318</sup> Topics on which the group was polled included reforming the legislature, reforming the initiative process, state and local re-

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308. *Id.*

309. See JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* 162 (1995) [hereinafter, FISHKIN, *THE VOICE*].

310. Fishkin, *Deliberative Polling*, *supra* note 305.

311. FISHKIN, *THE VOICE*, *supra* note 309, at 162.

312. *Id.*

313. *Id.*

314. James Fishkin & Cynthia Farra, *Deliberative Polling From Experiment to Community Resource*, in *THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY* 73 (John Gastil & Peter Levine eds., 2005).

315. *Id.*

316. *Id.*

317. See *What’s Next California?*, *Deliberative Poll, June 24–26, 2011, Poll Results 1*, available at <http://cdd.stanford.edu/polls/california/2011/nextca-results.pdf>.

318. *Id.* at 2.

structuring, and tax and fiscal reforms.<sup>319</sup> The results revealed that some of those polled had a change of opinion during the informational session prior to the deliberative poll. There was larger support to refrain from decreasing the legislature's authority and also to reform the initiative process to make the voters more informed on relevant issues.<sup>320</sup> The results of the poll concerning state and local control showed a 6% increase of participants who support the idea of having the local government more in control of financing local programs.<sup>321</sup> There was, however, an increase in support after deliberation for allowing the state to handle "important policy decisions."<sup>322</sup> Most interesting was the approval and increase in support for transparency and accountability in the legislature for fiscal decisions.<sup>323</sup> Further, after the discussion, those that participated supported the idea that the government should provide benefits and services, even if it may be coupled with tax increases.<sup>324</sup> The deliberative polling experience in California was described as a success with 89% of the participants describing the program as "extremely valuable."<sup>325</sup>

### E. On-line Dialogue

Hampton, Virginia utilizes the internet for engaging public participation on matters of public policy, and more specifically the local budget.<sup>326</sup> To engage the public, Hampton has created "Budget Week," where residents gather to provide feedback to the local government concerning their attitudes toward the budget using polling technology and open meetings.<sup>327</sup> In addition, small, informal group sessions allow the public to engage in more of an open dialogue.<sup>328</sup>

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319. *See generally id.*

320. *Id.* at 3–4.

321. *Id.* at 5.

322. *Id.* at 6.

323. *Id.* The forms of transparency and accountability that were supported were "[requiring] the legislature to indicate how the state will pay for any new programs or tax cuts it [proposes,]" and an increase in the "rainy day fund." *Id.*

324. *Id.*

325. *Id.* at 8.

326. *Office of Budget, Council's Approved Budget for the City of Hampton, Virginia* 23 (2011), CITY HAMPTON, [http://www.hampton.gov/budget/pdf/11\\_budget/introduction.pdf](http://www.hampton.gov/budget/pdf/11_budget/introduction.pdf) (last visited Sept. 14, 2011).

327. *Citizens' Ideas on Annual City Budget During "Budget Week,"* CITY HAMPTON, [http://www.hampton.gov/press\\_release/2010\\_budget\\_week.html](http://www.hampton.gov/press_release/2010_budget_week.html) (last visited Sept. 14, 2011). The City of Hampton's government has noted that "communicating with citizens" is the highest priority when forming the budget. *Id.*

328. *Id.*

These events occurred at various times and places during February 2010.<sup>329</sup> To further this civic engagement, Hampton has created a Facebook page that allows community members to interact with each other and provide updates on city events and links to other governmental entities.<sup>330</sup> Most notably, the “I Value” tab on the Hampton Facebook page is a mechanism that allows Hampton residents to participate in the budget process and budget discussions.<sup>331</sup> One hundred people participated in budget week, and 985 participated in the online polling. The City published the results, allowing the community as a whole to view the input received.<sup>332</sup> The City reported the results by identifying different services and showing what percentage of those polled would like particular services increased, maintained, reduced, or eliminated.<sup>333</sup>

Online dialoguing can be an excellent resource for local governments to better understand their citizens. Advantages of these methods include:

- (1) They are less formal than many other public involvement processes, with adequate time for participation to understand others’ comments and make their case;
- (2) participants can join in at their convenience;
- (3) extensive resource materials are readily available and level the playing field by informing the public;
- (4) all participants, including policy makers, take part on an equal footing; and
- (5) the discussions are more deliberative, making for more interchange among participants than mere testimony to policymakers.<sup>334</sup>

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329. *Id.*

330. *Id.*

331. *Hampton Connects with Citizens through New Facebook Page*, CITY HAMPTON, [http://www.hampton.gov/press\\_release/hampton\\_facebook\\_page.html](http://www.hampton.gov/press_release/hampton_facebook_page.html) (last visited Sept. 13, 2011). The “I Value” tab allows those community members who are connected with Hampton on Facebook to learn the different ways they can interact with the government for local budget issues on Facebook. *Id.* There is also a discussion area where community members can share their opinions. *Id.*

332. *I Value the Future!*, CITY OF HAMPTON, <http://www.hampton.gov/hamptonvalues/ivalue2011/> (last visited Feb. 22, 2012) (providing poll results from the “Hampton I Value Campaign”).

333. *2011 Budget Polling Results* (2010), CITY HAMPTON, [http://www.hampton.gov/hamptonvalues/ivalue2011/pdf/2011\\_combined\\_polling\\_results.pdf](http://www.hampton.gov/hamptonvalues/ivalue2011/pdf/2011_combined_polling_results.pdf) (last visited Sept. 14, 2011).

334. Patricia A. Bonner et. al., *Bringing the Public and the Government Together Through On-Line Dialogue*, in THE DELIBERATIVE DEMOCRACY HANDBOOK:

Internet dialoguing, however, is not without its challenges. While it can increase the number of people that can be reached, creating a more diverse dialoguing body, it will leave out certain groups that are essential to the process. Specifically, minority groups, tribal groups, low-income groups, and the younger generations, among others, may have their opinions misplaced by the process of online dialoguing due to lack of internet access.<sup>335</sup>

#### F. Consensus Conferences and Planning Cells

In Denmark, “consensus conferences” are used where groups of the public participate in deliberations occurring over months.<sup>336</sup> While these groups make recommendations at the end of deliberations, the reports will not always result in government policy.<sup>337</sup> For a successful consensus conference, members of the public and government policy makers must meet for a set number of days.<sup>338</sup> First, the public learns about the topic to be deliberated, gaining enough information for a meaningful deliberation.<sup>339</sup> Then, towards the end of deliberations, members of the public compile a report of their recommendations for the policy makers.<sup>340</sup>

A similar system to consensus conferences has been used in Germany where “planning cells” consist of small groups of the public who deliberate on public policy issues.<sup>341</sup> Planning cells are most useful, “as a consultative body for administrative authorities in cases where different decisions are legally and politically possible.”<sup>342</sup> Planning cells are structured by having hundreds of community members organize into different groups of about twenty-five, which then split into

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STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY, *supra* note 314, at 143.

335. *Id.* at 149; see also Patricia E. Salkin, *Social Networking and Land Use Planning and Regulation: Practical Benefits, Pitfalls and Ethical Considerations*, 31 PACE L. REV. 54 (2011).

336. Reiss, *supra* note 230, at 339.

337. *Id.*

338. Kali N. Murray, *Rules for Radicals: A Politics of Patent Law*, 14 J. INTELL. PROP. L. 63, 103–04 (2006).

339. Carolyn M. Hendriks, *Consensus Conferences and Planning Cells Lay Citizen Deliberations*, in THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY, *supra* note 314, at 81.

340. *Id.*

341. *Id.* at 84.

342. Hans-Jörg Seiler, *Review of “Planning Cells:” Problems of Legitimation*, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE, *supra* note 211, at 151.

smaller working groups for in-depth deliberations.<sup>343</sup> Within the working groups, information is disseminated to the members.<sup>344</sup> Once the informational sessions are complete, the conveners of the cells take all recommendations and create a report of all of the recommendations, which is delivered to the policymakers and to the broader public.<sup>345</sup> The most significant aspect of planning cells is the small group deliberations, which give participants a greater chance to have their opinions heard in a meaningful way.<sup>346</sup>

Critics of planning cells argue that they are inefficient for long-term planning.<sup>347</sup> This inefficiency results because the members of the planning cells are not charged with implementation of the decisions and therefore do not consider the costs and work associated with implementation.<sup>348</sup> As a result, the members may make decisions that are not economically or physically possible when planning for the long term.<sup>349</sup> This outcome poses a problem if planning cells are used in the budget process because during the budget process, long term goals and feasibility of projects must be considered. Further, “external legitimation” poses a problem because planning cells are merely consultants to the local governments.<sup>350</sup> If the decision makers are a part of the planning cells process, however, then it is often hard to decipher between the decision and the decision making process.<sup>351</sup> Other scholars have expressed concerns about having a biased planning cell; for example, “close ties to the state enable planning cells to directly influence policy, but on the other hand it makes them more vulnerable to the imperatives of the state.”<sup>352</sup>

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343. Hendriks, *supra* note 339, at 84.

344. *Id.*

345. *Id.* at 85–86.

346. *Id.* at 87.

347. Peter C. Dienel & Ortwin Renn, *Planning Cells: A Gate to “Fractal” Mediation*, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE, *supra* note 211, at 129.

348. *Id.*

349. *Id.*

350. Seiler, *supra* note 342, at 144.

351. *Id.*

352. Hendriks, *supra* note 339, at 88.

### G. Citizen Juries

In 1993, during the Clinton Administration, the Jefferson Center conducted a citizen's jury to examine the federal budget.<sup>353</sup> "A citizen jury is a group of randomly selected people, gathered in such a way as to represent a microcosm of their community, who are paid to attend a series of meetings to learn about and discuss . . . a specific public policy issue and make public their conclusions."<sup>354</sup> The 1993 citizen jury was entitled *America's Tough Choices Citizens Jury on the Federal Budget* and was a twenty-four person group that met for five days with the goal of jumpstarting the economy and implementing a budget that would produce long-term growth.<sup>355</sup> The citizen jurors often expressed their appreciation of the Federal budget's complexity and for the officials forced to make these budgetary decisions. For example, one jury member who worked as a maintenance technician, stated, "I'm a lot more aware of how hard it is and I have more respect for the people who have to do it."<sup>356</sup>

The facilitators asked the jury to "set high and low figures in each budget area, but they came up with exact figures that reflected their priorities."<sup>357</sup> In addition, the Center required the jury to address the following six specific questions:

1. What are the most significant tough choices we face if America is to be strong and healthy in the 21<sup>st</sup> century?
2. What potential sacrifices do we face? Which sacrifices are you prepared to recommend? Are these distributed equally over society, or will some be asked to sacrifice more than others?
3. What budget would you propose for the federal government? If this differs significantly from what is proposed by President Clinton, explain where and why?

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353. The Jefferson Center is a not for profit organization that facilitates the citizen jury process. See *History*, JEFFERSON CENTER, [http://www.jefferson-center.org/index.asp?Type=B\\_BASIC&SEC={99A0A8C2-31B5-4823-8D86-D88E80836743}](http://www.jefferson-center.org/index.asp?Type=B_BASIC&SEC={99A0A8C2-31B5-4823-8D86-D88E80836743}) (last visited Oct. 27, 2011).

354. Ned Crosby, *Citizen Juries: One Solution for Difficult Environmental Questions*, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE, *supra* note 211, at 157.

355. The Jefferson Center, *America's Tough Choices: Citizens Jury on the Federal Budget 1* (1993), available at <http://www.jefferson-center.org/vertical/Sites/%7BC73573A1-16DF-4030-99A5-8FCCA2F0BFED%7D/uploads/%7B7C4D1D0D-1C7B-48C9-98C8-7AAEC82567FD%7D.PDF> [hereinafter *America's Tough Choices*].

356. *Id.* at 3.

357. *Id.* at 2.

4. What are the smallest and largest budgets (either in terms of revenues and expenditures or deficit) you would propose? Under what circumstances would you propose these and why?
5. In light of what you have learned, do you think that President Clinton is asking too many sacrifices of the public, too few, or about the right amount? Why?
6. Is there anything additional that you would recommend to the President and Congress in terms of what is needed to make America strong and healthy in the 21<sup>st</sup> Century? Do our problems rest mainly in deciding what will work, or mainly in making tough choices regarding options which are fairly clear?<sup>358</sup>

Surprisingly, the jury of citizens decided to raise taxes.<sup>359</sup> While noting that it was difficult to do, they found there was no way around it to maintain essential governmental services while working to improve the deficit.<sup>360</sup> The jury decided to cut the defense budget, physical infrastructure funding, social security, and other governmental services (e.g., agricultural subsidies).<sup>361</sup> Newspapers that covered the citizen jury process weighed its successes. Interestingly, one jury member stated, “[c]oming into this thing, I never thought I’d make a choice to raise taxes. But I decided to bite the bullet. Our kids have to live with what we’ve done in this country.”<sup>362</sup> One columnist suggested that success was conditioned on whether the recommendations of raising taxes and cutting services would be accepted by the public as a whole.<sup>363</sup> Members of Congress and budget decision makers indicated they planned to use the recommendations in a meaningful way. For example, Senator Pryor stated, “[t]his is a turning point because the political system is out of kilter and out of touch . . . . If we don’t listen to what you say, we’ll be judged very harshly.”<sup>364</sup> Therefore, when elected representatives are the sponsors of a citizens jury, they are under a silent obligation to follow the recommendations wholeheartedly because if not, then they will be accountable in the upcoming elections. On the other hand, one juror stated, in regards

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358. *Id.* at 7.

359. *Id.* at 9.

360. *Id.*

361. *Id.*

362. William Claiborne, ‘Citizens Jury’ Demands Strong Action on Budget, *Clinton Urged to ‘Make The Tough Choices,’* WASH. POST, Jan. 21, 1993, at A12.

363. See William Raspberry, *Citizens’ Juries*, WASH. POST, Jan. 23, 1993, at A19.

364. *America’s Tough Choices*, *supra* note 355, at 3.

to the budget “[w]e’ll stand behind you if you make the tough choices.”<sup>365</sup>

Literature suggests that juries should be kept to twenty-four people or less for a strong and meaningful deliberative process.<sup>366</sup> Also, vital to the citizen jury process is having an official who convenes the jury and in turn will listen to the jury’s findings when creating public policy.<sup>367</sup> Further, citizen juries require resources, both financial and human, to be effective. Lastly, to be effective, the juror’s recommendations must be an important part of the local government’s decision making process.<sup>368</sup>

#### H. New England Town Meetings

To transform the status quo in local governments into a system that engages the public and is more participatory, institutional changes must occur.<sup>369</sup> Local governments should consider modeling the traditional New England Town Meetings where face-to-face deliberations and in-depth discussions can occur with policy makers and these “local assemblies should be vested with public power over local policies.”<sup>370</sup>

To prompt this institutional change, *AmericaSpeaks*, a non-profit organization promoting a more participatory government, has brought back the notion of New England Town Meetings by helping governments form 21<sup>st</sup> Century Town Meetings and by guiding governments in the implementation process.<sup>371</sup> During these meetings, public opinion is the main concern and priority of the policy makers, thus creating a link between the public voice and the implementation of the newly adopted policy.<sup>372</sup> Through its work, the organization

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365. Claiborne, *supra* note 362.

366. Ned Crosby & Doug Nethercut, *Citizen Juries: Creating a Trustworthy Voice of the People*, in THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY, *supra* note 314, at 111, 113.

367. *Id.* at 117.

368. Crosby, *supra* note 354, at 173.

369. See Fung, *supra* note 195, at 450.

370. *Id.*

371. *About Us*, AMERICASPEAKS, <http://americaspeaks.org/about/> (last visited Sept. 15, 2011). National Issues Forum is another organization that helps facilitate different processes that can bring people together to deliberate over public policy matters modeled after New England Town Meetings. See *The Forums*, NAT’L ISSUES F., <http://www.nifi.org/forums/index.aspx> (last visited Sept. 15, 2011).

372. Carolyn J. Lukensmeyer, Joe Goldman & Steven Brigham, *A Town Meeting for the Twenty-First Century*, in THE DELIBERATIVE DEMOCRACY HANDBOOK:

has found that “average citizens do have the ability to understand complex policy issues, make reasonable judgments about how to resolve them and commit to supporting the solution.”<sup>373</sup>

A comprehensive outreach plan must be implemented to ensure that all members of the public who would like to participate have the opportunity to do so.<sup>374</sup> As with all mechanisms for participatory governance, access to information on behalf of the participants is essential. *AmericaSpeaks* provides participants with guides that “are written to help people understand the context surrounding an issue and the diverse menu of options that policymakers are considering.”<sup>375</sup>

In 1999, District of Columbia Mayor Anthony Williams conducted a 21<sup>st</sup> Century Town Meeting regarding the local government’s annual budget.<sup>376</sup> It was Williams’ idea to give the residents the opportunity to decide the financial future of their local government by deciding on which services and priorities the locality should focus.<sup>377</sup> The community members at the town meeting sat in groups of ten around tables to discuss and review the governmental services on which the Mayor had to take action for the upcoming budget.<sup>378</sup> The meeting included a fully diverse body of participants from all regions of the District of Columbia community.<sup>379</sup> This town meeting was the first of the Mayor’s Neighborhood Action initiative to engage the public in the District of Columbia’s government.<sup>380</sup> The purpose of the initiative was to “engage[] District residents in creating the city’s budget and strategic plan, and hold[] the government accountable for responding.”<sup>381</sup> During the third and final citizens summit in 2003, “participants were asked to make budget trade-offs between the options.

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STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY, *supra* note 314, at 157.

373. *About Us*, AMERICASPEAKS, *supra* note 371. Important to the functioning of the organization is its ability to maintain its neutral and non-partisan position during the meeting process. By taking this position, *AmericaSpeaks* focuses only on providing facts to the public to conduct a balanced town meeting that permits all perspectives to be discussed and deliberated. *Id.*

374. See Lukensmeyer et al., *supra* note 372, at 158.

375. *Id.*

376. See Reiss, *supra* note 230, at 338–39.

377. Lukensmeyer et al., *supra* note 372, at 154.

378. *Id.* at 154–55.

379. *Id.* at 155.

380. Executive Office of Neighborhood Action, *Citizens Summit III: Real Challenges, Real Choices* 1, available at <http://rrc.dc.gov/rrc/cwp/view,a,1229,q,458860.asp>.

381. *Id.* at 2.

Participants were asked to determine which options they would vote for given a budget of \$60 million.”<sup>382</sup> The community members were clear about their priorities. Residents wanted to provide quality education, make the neighborhood safer, expand health care for residents, and approach city initiatives in a more efficient and multi-agency manner.<sup>383</sup> Participants were polled as to what actions the government should take in regards to education, public safety, job opportunities, housing, and healthcare.<sup>384</sup> The results show percentages of what residents recommend as their first and second choices regarding what services the local government should act on to balance the budget.<sup>385</sup>

On a more national scale, *AmericaSpeaks* helped organize a 21<sup>st</sup> Century Town Meeting in 2010 focusing on the federal budget entitled, “Our Budget, Our Economy.”<sup>386</sup> More than 3000 participants in nineteen communities across the country spent a Saturday deliberating over federal budget preferences and long-term effects, with the main question concerning how America should deal with the deficit.<sup>387</sup> *AmericaSpeaks* used various tools to evaluate the conferences including participant surveys, field reports, table key-pad responses, group surveys, elite opinions surveys, and census data.<sup>388</sup> Members of the public were able to deliberate on budget trade-offs to reduce the deficit, and in the end one policy that accumulated a majority of recommendations was to raise property taxes.<sup>389</sup>

According to *AmericaSpeaks*, participants overwhelmingly had a positive experience with the deliberations.<sup>390</sup> Eighty-five percent of participants felt they became more informed about the budget concerns and options for decreasing the deficit and 93% felt as though their voices were heard and other participants considered their

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382. Executive Office of Neighborhood Action, *Preliminary Report 3*, available at [http://rrc.dc.gov/rrc/lib/rrc/cs3/csiii\\_prelim\\_report4.pdf](http://rrc.dc.gov/rrc/lib/rrc/cs3/csiii_prelim_report4.pdf).

383. Executive Office of Neighborhood Action, *Citizen Summit III: Real Challenges, Real Choices, Executive Summary & Data Analysis 3-4*, available at [http://rrc.dc.gov/rrc/lib/rrc/cs3/exec\\_sum.pdf](http://rrc.dc.gov/rrc/lib/rrc/cs3/exec_sum.pdf).

384. *Id.* at 6-7.

385. *See id.*

386. Kevin Esterling, Archon Fung & Taeku Lee, *The Difference That Deliberation Makes: Evaluating the “Our Budget, Our Economy” Public Deliberation 1* (2010), available at <http://ash.harvard.edu/extension/ash/docs/AmericaSpeaks.pdf>.

387. *Id.*

388. *Id.* at 4-6.

389. *Id.* at 12-14.

390. *Id.* at 42.

views.<sup>391</sup> The participants worked together by setting aside their individual political ideologies to work for the betterment of the federal budget.<sup>392</sup> Therefore, the organization concluded that, “[p]ublic deliberation helps to reveal the *considered* opinions of citizens, a kind of opinion policy makers should care about as well.”<sup>393</sup>

### I. Initiative and Referenda

Not viewed as a method of civil discourse, both initiative and referenda merit discussion as they present a method for the public to communicate preferences on various issues, including fiscal or budget matters. Using the initiative, in certain states, the public has the power to propose and enact legislation by popular vote.<sup>394</sup> Further, an initiative can be used as a catalyst for a legislative vote to enact a law proposed by the voters.<sup>395</sup> These actions can result in significant fiscal implications for the government. By comparison, a referendum is a process that subjects proposed state legislation to the public vote for approval.<sup>396</sup> In addition, a referendum can result in the public voting to repeal a current law.<sup>397</sup>

In California, the concept of ballot box budgeting has sparked debate. California takes legislative actions and public initiatives concerning the state budget to a vote for approval by the populace.<sup>398</sup> Some have noted that ballot budgeting is not the most effective way to create a balanced budget can lead to financial crisis:

There are many causes of California’s current fiscal crisis—a global economic downturn, a tax structure which heavily relies on the state’s top wage earners; budgeting by initiative is just one factor among many. While we do not believe that budgeting by initiative alone has caused the current fiscal crisis, we do suggest voters should know the consequences of their ballot box decisions, such that measures which reduce revenue identify which programs will be cut, measures which call for new programs identify where the money for those programs will come from, and measures which call for the is-

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391. *Id.* at 42–43.

392. *Id.* at 45.

393. *Id.* at 46.

394. PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 11:3 (5th ed. 2011).

395. *Id.*

396. *Id.*

397. *Id.*

398. Jessica A. Levinson & Robert M. Stern, *Ballot Box Budgeting in California: The Bane of the Golden State or an Over-Stated Problem?*, 37 HASTINGS CONST. L. Q. 689, 689 (2010).

suance of bonds identify the programs that will be cut or taxes that will be increased to pay for those bonds.<sup>399</sup>

The initiative budget planning process has been criticized for lacking a comprehensive view of the budget and not considering the budgetary consequences of decisions.<sup>400</sup> The deliberative process is viewed as vital to budget planning because each decision made will have an effect on another public policy, and therefore, through deliberation and discussions, which occur during the legislative process, it is more likely that the effects of a proposed budget provision will be discovered, proving the ballot box budgeting system to be inefficient.<sup>401</sup>

Aside from the lack of a deliberative process, other problems have been identified that preclude this as an effective way to engage the public in budget planning. While the legislative process is prone to be influenced by strong lobbies or special interests groups, both initiatives and referenda are susceptible to the same influences.<sup>402</sup> Another concern is the lack of informed voters who are deciding whether to advocate for a particular initiative or referendum.<sup>403</sup> Further, critics note that not all voters registered actually vote, and therefore a budget provision enacted by the public may not be representative of the entire public opinion.<sup>404</sup>

In Hollywood, Florida, voters went to the polls to vote on a referendum that would severely cut the pension plans of police, fire, and city employees.<sup>405</sup> Local law allows such a referendum vote to go to the public when the municipality and the unions cannot agree on contract terms.<sup>406</sup> The voters approved the referendum, allowing the city to save \$8.5 million and avoid major cuts in the upcoming budget.<sup>407</sup> The union, however, has vowed to fight the vote in court.<sup>408</sup>

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399. *Id.* at 697–98.

400. *Id.* at 713–14.

401. *Id.* at 701.

402. *Id.* at 700.

403. *Id.* at 707–08. The author asserts that most of the public does not have the time, education, or ability to gain a complete understanding of a proposed law prior to voting on its approval. *Id.*

404. *Id.* at 712.

405. Carli Teproff, *Hollywood Voters: Cut the Pensions*, MIAMI HERALD (Sept. 13, 2011), <http://www.miamiherald.com/2011/09/13/2404725/hollywood-voters-getting-say-on.html>.

406. *Id.*

407. *Id.*

408. *Id.*

### CONCLUSION

New York governments need to find a better way to effectively educate the electorate about the critical and complex fiscal issues facing all levels of government, particularly local governments, whose fiscal health is tied to federal and state policies and resources. As discussed in Part I, the morass of political players and policy issues, combined with constitutional and statutory legal issues, adds to the challenge of explaining a complete picture of the past, present, and future fiscal situation to average New Yorkers. Yet, taxpayers deserve this explanation in understandable formats, and they are entitled to contribute input to help shape present fiscal priorities and plan for the future fiscal health and service delivery at the local government level. Utilizing one or more forms of deliberative democracy to engage the public has proven successful in communities across the nation and in other countries, and it deserves greater use in New York.

Due to the diversity in population, perception of civic engagement, geography, economic climate, and the services required by a given locality's infrastructure (city, town, or village), it is impossible to prescribe a universal "best practice" model for public participation in the budgeting process from the discussion of the various models set forth in Part II. It is clear from the results described, however, that any model deemed appropriate by the citizenry in a given locality can be highly effective. Overall, each of these participation models brings transparency and accountability to the formulation of local budgets. Transparency is present as resident participants become educated in the budgeting process and create their own opinions as to how to prioritize local budget items. For example, residents may decide what services are necessary and cannot be cut. Further, members of the public will be more aware of the amount of funding that each municipality receives and exactly how that money is applied, making it much more difficult for "business as usual" with local government officials formulating the budget behind the closed eyes of the community. Likewise, greater accountability is established when a locality employs these deliberative democracy models because residents are more likely to pay attention to the final outcomes of government decision making (e.g., voting on a final budget plan) when they have been directly engaged with the process. Accountability takes many forms, but most effectively at the ballot box when constituents decide whether to retain elected officials based on their prior actions and decisions, and in this case, specifically related to local fiscal issues. Therefore, elected officials who follow the collective advice gleaned

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from a participatory budgeting process may be more likely to earn the support of the electorate, and those who choose alternative priorities after full and complete vetting through a deliberative democracy public engagement process, may be more prone to expressions of public disapproval on Election Day.

With the inherent diversity among the local governments in New York, ranging from one of the largest cities in the country to small rural Adirondack towns, it would be difficult to speak with specificity about the desired needs and priorities for each community when it comes to local government services and programs. Civil discourse and other methods of deliberative democracy and participatory governance, however, are essential strategies for re-engaging the public in critical public policy issues, which almost always revert back to balancing fiscal resources. While many of the advisory boards, polling, and other participatory tools discussed in Part II can assist governments in making more widely acceptable fiscal decisions, to be successful it is essential that participants represent the many different ways in which communities are diverse (e.g., race, ethnicity, gender, age, geography, employment, *et cetera*). It is evident from the case studies discussed that an informed and engaged electorate can understand and work through the complexities of the fiscal morass confronting local government and that through deliberative democracy strategies, the electorate can accomplish effective and meaningful change in government structures and government fiscal decision making.