

Emerging Equities in Paying for Municipal Services—The Problem with the Real Property Tax

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The Eroding Real Property Tax Base

The primary source of revenue to finance municipal services,¹ such as police, fire protection, emergency services, park and recreation facilities, etc., is the real property tax (RPT), that lien on real property levied annually by local governments satisfied by paying your RPT each year. Non-payment of the RPT will eventually result in the local government's foreclosure on an individual's residence or business. Not surprisingly, the RPT is the most effective form of local government taxation—easy to collect and easy to increase because real property can never be relocated. The only unpredictable aspect of the RPT comes from state-mandated limits on the RPT levy² and figuring out the assessed value.³

Some real property is not subject to the RPT, resulting in lost revenue, which local governments crave today. Article XVI, section 1 of the New York State Constitution provides that tax exemptions “may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes...and owned by any corporation or association organized or conducted exclusively for one or more such purposes and not operating for profit.”⁴ This constitutional rule was then codified in the Real Property Tax Law.⁵ Title 1 of the Real Property Tax Law exempts government property from the RPT.⁶ Those corporations whose real or personal property is exempt from the RPT include those granted an exemption from the federal income tax under § 501(c) of the Internal Revenue Code of 1986, as amended (the “Code”).⁷

The problem facing local governments with rising municipal costs is that the amount of tax-free property is so great; it results in municipal debt because municipalities cannot receive payment for mandated services. At its worst, some municipalities must remain financially fit while only receiving tax income from just half of the property within the municipal boundaries.⁸ For example, in the City of Albany, nearly 60% of the City's real property is exempt from the RPTs, with about one-half of that amount being state-owned property.⁹ Similarly, in the Village of New Paltz, home of a major SUNY campus, nearly 75% of the Village's real property is exempt from the RPT.¹⁰ In 2012, a report issued by the New York State Comptroller (the “Report”) indicated that tax-exempt government property made up \$343 billion, or 41%, of the value of total tax-exempt property in the state of New York (the “State” or “New York”).¹¹ Government property includes property owned by the United States (buildings and land), the State (buildings, jails, and courthouses), state agencies (bridges and tunnels, water systems, sewer systems), local governments (police stations, firehouses,

and public libraries), school districts, and foreign governments.¹² Additionally, the Report showed that non-for-profit corporations (NFPC) made up \$111.8 billion, or 14% of the value of total tax-exempt property in the State.¹³ NFPCs include houses of worship, health care facilities and education facilities.¹⁴ The Code currently exempts income tax from NFPCs because these entities provide goods and services that the government cannot afford or will not provide.¹⁵ New York employs the same rationale to exempt real property of NFPCs and government institutions from the RPT.

There is no provision in law that permits local governments to recover the cost of providing municipal services from NFPCs and government institutions.¹⁶ The law requires all properties, regardless of taxable status, to receive the same quantity and quality of municipal services.¹⁷ Providing such services to NFPCs and government institutions places an extraordinary burden on residential property owners and businesses that pay the RPT. As the Report indicates, nearly 30% of all real property in New York is exempt from the real property tax base.¹⁸ On average, the cost of municipal services to residential and commercial real property is nearly 45% more than if all real property were subject to the RPT.¹⁹ We refer to this tax anomaly in RPT policy as the “RPT Premium.” As a result, it comes as no surprise that New York is considered the state with the highest local government real property taxes in the nation.²⁰ The State's high RPT levels are in direct relationship to the migration of New Yorkers to states with lower RPT burdens.²¹

Attempts to relieve the unfriendly effect of New York's high RPT on businesses have inflamed the RPT Premium on residents and businesses by taking more real property from the tax rolls. Like many states, New York offers generous tax incentives (e.g., exemption from RPT; sales tax exemption on construction costs; mortgage recording tax exemption) to private businesses looking to open or expand in the State.²² Regardless of whether these incentives provide employment opportunities or increase surrounding home values, they immediately remove taxable parcels from the tax rolls, thus increasing the RPT Premium.²³ For example, the current program called START-UP NY, a partnership between academic institutions and start-up companies, grants a 10-year RPT exemption for businesses that build on or near an academic institution in the program.²⁴ These economic development programs, intended to spur private sector employment, do not take into account the increased cost of municipal services on account of (i) increased demand on infrastructure resulting from increased employment,

and (ii) reduced RPT to local governments by taking real property off the tax rolls.²⁵

This is not to say that current law and policy is indifferent to the windfall tax-exempt properties receive from free municipal services. The RPT, based on 19th and 20th century tax policy, was effective until the 1970s when various industries and people began leaving New York for better economic opportunities.²⁶ In order to revitalize the weak upstate New York economy, the legislature has enacted several economic development statutes that stimulate building hospitals, shopping centers and educational facilities.²⁷ But once these parcels start to generate economic activity requiring municipal services, how long should the State allow tax abatements to continue? The question becomes: how is the public well-served if municipal services are financed by only two-thirds of the real property subject to the RPT? Without a tax or fee for municipal services imposed on all developed parcels, the value of economic development primarily benefits private sector investors but does nothing for local governments without a replacement for lost RPT.²⁸

While New York local governments are required to provide and incur the expense of municipal services to persons, businesses and institutions in any new development without any offsetting revenue, in Massachusetts²⁹ and New Jersey,³⁰ for example, the cost of municipal services may be exacted from developers. These “impact fees” or “linkage fees” are outlawed in the Empire State.³¹ Instead, New York relies on payment-in-lieu-of-taxes (PILOT) agreements, which attempt to offset a portion of the lost RPT resulting from policies granting exemption from the RPT.³² In theory, PILOTs lessen the burden of local government by requiring the benefited party to pay a portion of the RPT that would be levied on the real property, were it subject to RPT. However, as discussed below, the statutory regime to impose, collect and enforce payment of PILOTs is weak compared with the *in rem* remedies available to levy, collect and enforce the RPT. Further, PILOTs are subject to diversion from the municipal treasury, and their calculation is entirely arbitrary as a percentage of the RPT.³³ And, importantly, PILOT calculations bear no rational relationship to the actual cost of municipal services provided or benefits received by tax-exempt NFPCs and government institutions.

Addressing Inequities in Payment for Municipal Services

The State is failing local governments by not enacting a legal obligation requiring NFPCs and government institutions to contribute to the cost of municipal services. These services include, without limitation, services that we take for granted: police services and public safety facilities; fire prevention and protection services and firehouses; emergency medical services (EMS), including specialized equipment and vehicles for all services. They also include (i) water supply, distribution and treatment facilities; (ii) sewer disposal and treatment

facilities; (iii) streets, sidewalks, rainwater storm drains, street lights, traffic signals and signage; and (iv) parks and public recreation facilities. Public libraries are often part of municipal services.³⁴ Some would argue that local governments are not particularly burdened by providing municipal services to tax-exempt institutions. For example, there may be a little more police work required for pulling rowdy college students out of village bars at 2 a.m.;³⁵ there may be a little more litter in the parks on a nice summer’s day when the hospital staff takes lunch outside.³⁶ These are nothing more than the unintended consequences of the presence of a college campus and health care facility within a municipality. But could the same be argued when catastrophic events occur on these tax-exempt parcels? For example, should an oil train derail and explode on the Capital Region’s transportation artery³⁷ and damage a college campus,³⁸ or an aspiring jihadist trained in ISIS Internet propaganda open fire in a health care facility,³⁹ or protesters displeased with a grand jury verdict stage a “die-in” on a state or federal highway disrupting traffic and commerce for hours⁴⁰—the cost to the NFPCs and government institutions who benefit from the police, fire and emergency services who come to the rescue is zero.

In today’s world, we live in a less secure and potentially more violent society, compared to a century ago when statutory provisions were enacted to provide tax-exempt status to NFPCs and government institutions. Many would argue that these provisions are outdated and provide no rational relationship between those who benefit from municipal services and those who pay for them.⁴¹ Despite this argument, there is a strong bias in law that permits the RPT exemption to continue for NFPCs and government institutions.⁴²

In *Colleges of Seneca v. City of Geneva*⁴³ the Court of Appeals held a college dormitory built by a private sector organization on land owned by the college is part of the realty of the college for real property taxation and thus deemed owned by the college and exempt from RPT absent clear evidence of private ownership. In *Deromedi v. Town of Thermopolis*⁴⁴ the Wyoming Supreme Court held that a building purchased by the town of Thermopolis with a federal community development block grant in order to house the “Wax Museum of Old Wyoming,” as well as other cultural and recreational activities, was exempt from real property taxation as a building being used for a governmental purpose, despite the fact that the museum was operated by a for-profit business that was charging an admission fee and was paying rent to the town of Thermopolis. These cases also reaffirm that if the source of payment is the RPT, tax-exempt properties are under no obligation to pay for municipal services even if these properties directly benefit from such services. Currently, the law makes no distinction between real property taxpayers and non-taxpayers for the purposes of availability or deployment of municipal services.⁴⁵ Thus, police, fire and EMS responders are legally required to

shut down a binge-drinking party on a small-town college campus (tax-exempt) with the same allocation of resources as they would to a hostage/murder and suicide incident in a shopping center (taxable unless a PILOT is in place) or a private home (taxable). What legal bases may be developed to require financial contributions by NFPCs and government institutions to the cost of municipal services?

Aside from the growing RPT Premium stemming from the cost burden disproportionality of tax exemption, many have suggested schemes to better align the costs and benefits of municipal services among all members of the public. Such schemes are problematic because (i) consumption of basic municipal services (police, fire, EMS, etc.) by particular persons and properties is inconsistent over time, making the measurement of cost and benefit difficult; (ii) measurement of the cost of a unit of police, fire, EMS, etc. service needs to relate not only to annual budget expenses, but also to the future costs of emergency or catastrophic events; and (iii) significant municipal services are frequently deployed in poor neighborhoods where the real property tax generates little or no RPT. One could argue that the economic impact on local governments from the Great Recession is cause enough to reform constitutional and statutory RPT exemptions for government institutions and NFPCs. However, although the growth of the RPT Premium coupled with the effects of the Great Recession manifest the imbalance between the cost and benefit of municipal services, remedying fiscal stress is not a legal basis on which to compel NFPCs and government institutions to pay for the cost of municipal services.⁴⁶

Recognizing the lack of payment toward municipal services, the cost-burden on local governments and the growing RPT Premium on individuals and small business, some governments have entered into cost-sharing

agreements, such as PILOT agreements, with NFPCs and government institutions.⁴⁷ These PILOT agreements attempt to offset the burden of the RPT Premium by requesting that tax-exempt NFPCs and government institutions contract with their local municipality to pay some portion of what their RPT would be.⁴⁸ What seems like a good idea in theory does not, however, translate well into legally sustainable cost-sharing arrangements. Beyond regulating PILOTs in the context of economic development, there is no statutory authority that recognizes PILOTs as legally binding, valid and enforceable cost-sharing agreements with NFPCs and government institutions. State law fails to address how PILOTs are authorized by the parties involved, on what basis payments to the local government are measured, how the payments are calculated, and when, how and from what specific source, if any, payments are made, or how payments are enforced. These matters are left to the discretion of the taxing jurisdiction and tax-exempt party to include in the four corners of their PILOT contract, therefore failing to create a uniform way to institute cost-sharing agreements. PILOTs to pay for the costs of municipal services are entirely voluntary gestures by tax-exempt institutions. Why would an NFPC pay the equivalent of an RPT when it can receive municipal services for free?

A PILOT is a poor scheme to alleviate the RPT Premium for local taxpayers. A PILOT assumes an NFPC or government institution would pay the RPT, but for the RPT exemption. As a matter of law, this assumption is wrong. The design of a PILOT agreement is to simply return a portion of lost RPT to the local municipality without regard to any other factor, including the correlation between the cost and benefit of the municipal service. The city of Syracuse has a PILOT program with Syracuse University, as does Cornell University and Ithaca College with its local municipalities.⁴⁹

Table 1⁵⁰

Voluntary Payment Arrangements Between Municipalities and Nonprofits in New York State			
Nonprofit	Municipalities	Amount	Note
Cornell University	Tompkins County, City of Ithaca, and Ithaca School District	\$1.9 million (2008); \$1.6 million (2009).	Part of ten-year PILOT agreement entered into in 2007. PILOT is based on what the University thinks it can afford.
Ithaca College	Tompkins County, Town of Ithaca, and Ithaca School District	\$355,295 (2011); between 2003 and 2011, Ithaca School District has received \$1.6 million and the Town and County have received \$1.3 million.	PILOT is based on the College voluntarily keeping apartments on the tax rolls since 2003.
Syracuse University	City of Syracuse	\$500,000 per year; costs above \$150,000 incurred by City for traffic control for Carrier Dome events; CPI-adjusted payments to university-area neighborhood groups (adjusted annually; \$368,000 as of 2011 survey).	The approximately \$1 million/year the City is receiving from SU represents only a small part of the roughly \$24 million in taxes the City has estimated that the University would generate if it were not tax-exempt.
Source: Lincoln Land Institute (PILOT Agreements as of 2011)			

Does the PILOT agreement with Syracuse University sufficiently cover its costs associated with the necessary police, fire and EMS responses to sorority and fraternity parties? Because PILOTS are only voluntary arrangements enforceable in a civil action for monetary damages (unlike the RPT, which is enforceable through a lien on real property), PILOT agreements fail to provide the security of pledged revenues to local governments. Further, their duration is often not more than one fiscal year. Additionally, NFPCs and government institutions are not above withholding PILOT payments when they are displeased with local municipalities.⁵¹ Akron General Medical Center, for instance, is holding its PILOT payment hostage from the Ohio State Tax Department because the state and the hospital disagree as to whether the hospital's "fitness center" is subject to the RPT.⁵² This uncertainty surrounding PILOTs frustrates local governments in their attempt to budget accurately and plan for the long-term. How would any government survive if paying taxes becomes nothing more than a voluntary gesture?

In addition, it is also doubtful whether municipalities could ever receive the equivalent of RPT through a PILOT program. A recent Florida Appellate Court decision has prohibited PILOT programs where the PILOT agreement requires a party to make payments that are the equivalent of ad valorem taxes that would otherwise be due but for a statutory tax exemption.⁵³ The Florida Appellate Court has certified this question to its Supreme Court to determine whether such agreements violate state statutes that provide organizations tax-exempt status.⁵⁴ An affirmative decision by the Florida Supreme Court would create a precedent for other states to invalidate PILOT agreements should their terms require the equivalent of ad valorem taxes. As a result, municipalities would never be able to receive the equivalent of the RPT through PILOT programs.

To develop a model correlating costs and benefits of municipal services upon which to construct a statutory regime obligating NFPCs and government institutions to pay for municipal services, we should look to those municipal services that are measurable based on consumption, special benefit and use, and for a statutory regime that already exists to measure costs and benefits. A cost/benefit model already exists for several forms of services, such as: (i) utility services (e.g., water, sewer and electric), whereby ordinances authorize rates by using a metering device and allocate capital costs to a "basic fee" to the consumer; (ii) optional services (i.e., toll roads) charging the consumer only if said consumer exercises the right to consume the service; and (iii) special benefit charges or user fees. Courts have upheld these models reasoning that assessments and user fees do not constitute a tax, and, as a result, may be imposed on all benefited properties, tax-exempt or not.⁵⁵ It makes no difference that assessments or user charges for these services had

been previously collected via the RPT and collected along with the RPT.⁵⁶ The courts do not dispute the validity of the assessment or user charge because either no service was in fact performed (so long as it was made available) or because the benefit was only a personnel service rather than a physical improvement to real property.⁵⁷ This cost/benefit model is a product of the post-World War II trend in the United States to assess the cost of government based on the consumption of municipal services and the receipt of special benefits, rather than relying solely on the revenues of the RPT.⁵⁸ Since special assessments and user charges have become a legally recognized method of raising local government revenues, without being considered an illegal tax, the cost/benefit model should be implemented in order to charge NFPCs and government institutions for the benefits of essential services (police, fire, EMS, etc.) that they receive.

A Model Law for NFPC/Government Institutions to Pay for Municipal Services

The new model to determine the financial contribution of NFPCs and government institutions toward municipal services is derived from a cost/benefit theory and principles of pay-as-you-go for consumption of municipal services. The model is unlikely to be considered a tax, the most likely challenge to a state law imposing assessments and user fees on the tax-exempt for municipal services.⁵⁹ The parameters of a cost/benefit assessment/user fee legal regime for NFPCs and government institutions are not difficult to understand and formulate. Initially, we discard those parameters that have questionable constitutional footing or fiscal sustainability.

First, we must discard the parameters that take into account the NFPCs' and government institutions' wealth or income. Governmental charges based on wealth or income are in the nature of taxes, from which NFPCs and governmental institutions are exempt. While charging a user fee only to entities such as the Ford Foundation, Rockefeller Foundation or SUNY campuses, which possess great wealth and may generate income from quasi-for-profit activities, is tempting, there is no sound legal foundation for this position. Equal Protection claims could be raised by these NFPCs and government institutions for discrimination in assessing costs based on their wealth or income because of the absence of any rational relationship between wealth/income and the value of the municipal services provided. The only way for the local government to charge for municipal services based on the tax-exempts' income or wealth is through voluntary agreements with said institutions (see *supra* Table 1).

Second, PILOTS fail as a parameter because there is no rational relationship between a percentage of the RPT and an allocable share of the cost of municipal services received.⁶⁰ These voluntary agreements lack a substantial

nexus to measure financial contributions to the cost of municipal services.⁶¹

A statute requiring NFPCs and government institutions to pay special assessments or user fees for the applicable costs of the municipal service provided is likely to withstand legal challenge if the statute provides that: (i) the assessment pays for a specific benefit, not a general service, and is therefore not a tax (even though it may be collected and enforced like the RPT); and (ii) principles of equity require that the beneficiary pay its fair share of the cost where the charges bear a reasonable relationship or substantial nexus to the benefit received under the same Due Process (and 5th Amendment “takings”) and Equal Protection (14th Amendment) principles.⁶²

New York law must be revised, although not much, in order to require NFPCs and government institutions to pay special assessments and user fees for municipal services. Legal procedures to impose special assessments and user fees for “improvements” to real property within designated assessment districts or areas presently exist for counties, towns and villages.⁶³ These procedures do not exist for cities, forcing cities to rely, by statute, on the Home Rule Law and state legislators to replicate local laws that are provided for other municipalities. These statutes define ‘improvements’ in terms of fixed physical assets attached to the benefitted real property subject to the applicable special assessments and user charges.⁶⁴ The definition of “improvements” needs to be expanded to include services, as well as fixed physical assets. Essential services would then be within the scope of the definition, including police, fire protection and EMS.

Determining a measurement for police, fire, EMS, etc. services is the most challenging task when amending municipal statutes. Current law speaks of measuring assessments for improvements in terms of front footage, an area of the parcel and *ad valorem* assessed value. These archaic measuring methods would fail to measure police, fire, and EMS protection from which to calculate the cost that should be assessed. For example, a large college campus of several acres in area may never require more than the college’s own “campus police.” Why would the college pay for local government policing it does not need based on the size of the campus? Similarly, a medical clinic having only 30 or 40 feet of street frontage, but full of disabled persons, may be the scene of a three-alarm fire requiring numerous police, fire and EMS personnel for several hours to save lives and property. A fee for municipal services based on front footage would be inequitable.

Certain municipal services, however, can be easily measured based on consumption in order to determine an assessment or user fee. The cost of driving on the Thruway depends on the length of the trip and what bridge is crossed. Water and sewer services are measured by the amount of water/effluent flowing through a meter. It is also worth noting that 75 years ago water services

were assessed on an *ad valorem* basis (i.e., a percentage of the assessed value of the property, without regard to consumption of water). As technology improved, water and sewer could be measured by metering and priced to the consumer through assessments and user charges on a pay-for-what-you-use basis. Such assessments and user fees are also not subject to the New York “tax cap.”⁶⁵

How could a local government “meter” police, fire, and EMS services? You do not need to reinvent the wheel in order to determine the cost of services provided to these NFPCs and governmental institutions. It would simply require a “pay-as-you-use” meter similar to that used by utilities and the EZ-Pass system. Such a system could be based on the “billable hours” of dispatching various staff to the NFPC or government institution for each emergency situation. First, the system would require a determination of the hourly rate of the various police, fire and EMS employee-titles. Where the employees are salaried, simply calculate the hourly rate by dividing the salary over 365 days. Next, take this daily rate and multiply it by the number of hours per shift. Each employee title (e.g., chief of police/fire, detective, “rookie” officer) would then have its own billable hours that could be metered per dispatch. Each police, fire and EMS department would be required to keep logs of each dispatch that outline the number and title of each officer that responds to a call and the length of time they remain on the scene. This information would be possible to track because each police, fire and EMS vehicle would be equipped with a GPS system. Currently, many small towns in Massachusetts are using GPS systems to improve the dispatch system.⁶⁶ The city of Boston is now considering their use.⁶⁷ This system could easily expand to include tracking time spent at locations for calls to NFPCs or government institutions. Additionally, the use of drones is currently being explored by police departments (City of Baltimore) and federal enforcement agencies (Department of Homeland Security) for high-risk responses.⁶⁸ As mentioned earlier, government institutions are often the location of mass shootings and the targets of terrorist organizations.⁶⁹ These drones could be used to monitor high-risk responses at these government institutions. The total cost of those on the scene would then be billed to the NFPC or government institution. Responses to a homicide or major fire, for instance, would be more expensive as these events would require a large dispatch of multiple officers, detectives, firefighters and the chiefs of police and fire departments. Yet, these expenses would be in an equitable relationship to the services received.

In addition to the charge for municipal services actually consumed, NFPCs and government institutions could be charged an “administrative fee” and “reserve fund fee,” i.e., fees that reflect: (i) the cost of administrative charges associated with metering and billing municipal services, and (ii) the reservation of funds for use in responding to catastrophic incidents. Administrative fees

are routinely charged by utility companies in addition to the charge for the product consumed (e.g., water, electricity). In the current age, exploding oil tankers, campus protests and open fires inside buildings are recurring catastrophes. The reserve fund fee can be calculated as a fractional share of the future value of the cost of such catastrophic costs associated with an emergency based on the probability of its occurrence or a flat rate fee that is divided between all NFPCs and government institutions within the municipality. Reserve fees could be charged monthly and placed into a reserve fund established by the local government or a consortium of local governments. Like the State Retirement Fund, once the accumulated accrued future costs are fully funded in the reserve, the reserve fee can be reduced or eliminated. Here, the benefit to local governments is fiscal and in the best tradition of “pay-as-you-go” public finance law. The cost of responding to future emergencies should not cause significant annual budget disruptions as it can be paid from reserves.

Finally, NFPCs and government institutions could also be charged for the cost of equipment associated with police/fire/EMS services, the same way doctors and hospitals charge patients per vaccination, bandage, tongue depressor, etc. Here, along with the metering charges, the NFPC or government institution would receive a charge for the equipment used while police/fire/EMS are dispatched to an NFPC or government institution. These charges could include costs for ammunition and bulletproof vests, if the dispatch involves a shootout, or replacement fire suits, where the suit is damaged while responding to a fire. Billing for these charges could eventually lead to a new line of insurance to cover the costs, thereby alleviating some of the burden on these NFPCs and government institutions that supporters claim is so desperately needed.

This method would be codified and enforced via the court. Parties that fail to pay their assessments or user fees open themselves up to civil actions. Where NFPCs and government institutions receive state financial aid, the statute could provide a state intercept remedy so that assessments and user fees are first paid to the local government from the state aid. A strong enforcement statute would make assessment and user charges enforceable *in rem*, similar to water and sewer assessments.

Shifting Power and Responsibility to Determine Tax Exemption

With the amount of fiscal stress that is placed on local governments to pay for municipal services, local governments should have the legal option to determine the extent to which NFPCs and government institutions are tax-exempt. As previously noted, the State Constitution exempts NFPCs, and the RPTL exempts government institutions, from the RPT, but neither law provides relief from lost RPT tax revenue. In Connecticut and Rhode

Island, both states have similar laws that exempt NFPCs and government institutions from the RPT, but unlike New York, both states provide a local remedy to alleviate lost RPT.⁷⁰ Connecticut subsidizes 77% of lost real property tax revenue to each local government, while Rhode Island subsidizes 27%. Here, state policy recognizes that local governments require an offset from tax exemption to provide mandated municipal services in a fiscally sound manner.⁷¹

State authority to grant RPT exemptions could be transferred to local governments, empowering them to determine if additional revenues need to be generated from the tax-exempt institution to fund basic municipal services. In 2002, voters in Virginia approved a referendum amending the state constitution to require that RPT exemptions be granted by local governments rather than by state law.⁷² Using this new power, the Board of Supervisors in Fairfax County adopted a law requiring all future real property acquired by NFPCs to be subject to the RPT.⁷³ It is argued here that local governments under state law should be empowered to determine the extent of exemption from the RPT.⁷⁴

Focusing on a user fee concept, the mayor of Pittsburgh proposed a “Post-Secondary Education Privilege Tax,” a 1% tuition tax levied on local university and college students.⁷⁵ Such a user fee seems quite equitable: Pittsburgh is home to 85,000 students at 10 universities and colleges; 40% of the City’s real property is exempt from the RPT.⁷⁶ The city argued that the 1% tuition tax was required because students used municipal services, roads, police and fire protection, and should contribute toward their cost.⁷⁷ But the NFPC and government institution lobby is strong and powerful; it opposes shifting costs of municipal services for the usual reasons any institution would oppose new fixed costs.⁷⁸ A compromise may be crafted on the basis of best practices in corporate citizenship: can major economic institutions (e.g., medical and educational institutions) that have become the core economy of 21st century urban centers continue to receive municipal services for free without compromising the availability and quality of those services? Consider the state of municipal services in Detroit before the city’s bankruptcy filing.⁷⁹

Protecting First Amendment Rights—Je Suis Charlie!

The terrorist attack on the offices of Charlie Hebdo in January 2015, which left a number of people wounded or dead, was an attack on the freedom of speech and freedom of expression.⁸⁰ The founding fathers intended that our First Amendment Rights be treated as fundamental individual rights. The people’s exercise of these rights on college campuses, in health care facilities, in museums and in government facilities is critical to the development of civilization in an open society. Curtailment of these rights on these properties for fear of injury or death is

detrimental to the principles our founding fathers envisioned when writing the First Amendment, yet NFPCs and government institutions are the known targets of organized global terror. Can there be any basis in equitable cost analysis, especially after the attack in Paris, to conclude that NFPCs and government institutions should continue to contribute nothing toward the cost of municipal services, particularly police, fire and EMS? How long will voters and taxpayers tolerate the increasing RPT premium for defending these freedoms on land that bears none of the cost? Is there a lawmaker brave enough to draft the model law we have presented?

Municipal Services as a Consumed Commodity Used and Paid for by All

The model law described above acknowledges that in a diverse and transparent urban society, clinging to the 19th century concept that municipal services are paid exclusively or primarily through the RPT, with no consequence to tax-exempt entities and properties, is grossly unfair and economically disabling to property subject to the RPT. New York is no longer mostly made up of large private businesses that could fund the revenues required for all municipal services for the small population that existed 150 years ago. A continuation of this status quo will only increase the RPT Premium, contribute to making New York uncompetitive both nationally and globally, and foster abuse in claiming tax-exempt status to avoid the RPT.

Local government is the provider of essential services everyone uses and needs. It must be viewed like any other entity that sells goods and services: if you use it, you pay for it.⁸¹ The ability to measure and price all municipal services is a somewhat new fiscal concept. Yet focusing on refinement and implementation of “you use it, you pay for it” should stimulate policy makers and legislators to move to enact the model. Finally, we should wean ourselves from the time-honored but now empirically proven false notion that NFPCs and government institutions save local governments money by providing services governments cannot or will not provide. SUNY produces skilled workers, but many of them move out of state. PILOTs for economic development fatten corporate profits, not local government revenues. Little of the generosity to tax-exempt institutions benefits local governments. Failure to defend First Amendment freedoms in the threat of organized global terror is unacceptable. If we want vibrant communities throughout New York, it is time the tax-exempt pay their fair share.

Endnotes

1. Basic and essential services provided by local governments (cities, counties, towns, villages, fire districts, school districts, special taxing districts for libraries) available to the public, not generally provided by the state or federal government, and required for daily work and domestic activities.
2. Taxable real property is assessed at “full value” as determined by the municipal assessor. A tax rate is applied to the assessed value to determine the tax. There may be different rates for different classes of real property.
3. 2011 N.Y. Laws ch. 97 limited the RPT levy increase for the next fiscal year to 2% of the current fiscal year levy, subject to increase over 2% by super-majority vote of the municipality’s governing body or the voters of a school district.
4. N.Y. CONST. art. XVI, § 1 (emphasis added).
5. N.Y. Real Prop. Tax Law § 420-A & 420-B (McKinney).
6. N.Y. Real Property Tax Law Ch-50a art. 4, T. 1.
7. I.R.C. § 501(c).
8. In the Village of New Paltz, home of a SUNY campus, nearly 75% of the real property in the village is exempt from RPT. See Rachel John & Gerald Benjamin, *Equity and the Property Tax Burden for Citizens of Ulster County*, CTR FOR RESEARCH, REG’L EDUC. & OUTREACH, SUNY AT NEW PALTZ, available at www.newpaltz.edu/crreo/discussionbrief1.pdf.
9. THOMAS P. DiNAPOLI, OFF. OF THE STATE COMPTROLLER, RESEARCH BRIEF: PROPERTY TAX EXEMPTIONS IN NEW YORK STATE 7 (Oct. 2013), available at http://www.osc.state.ny.us/localgov/pubs/research/propertytax_exemptions.pdf.
10. John & Benjamin, *supra* note 8, at 4.
11. DiNAPOLI, *supra* note 9, at 2.
12. *Id.* at 2–11.
13. *Id.* at 2.
14. *Id.* at 3.
15. I.R.C. § 501(c).
16. However, the Legislature has considered restricting the exemption from RPT to only certain purposes, irrespective of ownership of the real property by a NFPC, excluding those purposes that in the private sector would be engaged in for profit. See S.881, 2013 N.Y. Leg. Sess.
17. Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946, 950 (1987) (providing a book review of CHARLES M. HAAR & DANIEL W. FESSLER, *EQUALITY AND VARIETY IN THE DELIVERY OF MUNICIPAL SERVICES* (1986)).
18. DiNAPOLI, *supra* note 9, at 2.
19. 100% of the RPT paid for by 70% of real property ($100/70 = 1.429$, almost 45% more than if no real property were exempt).
20. Alexander E.M. Hess et al., *States with the Highest (and Lowest Taxes)*, 24/7 WALL STREET (Apr. 2, 2014, 9:02 AM), <http://247wallst.com/special-report/2014/04/02/states-with-the-highest-and-lowest-taxes/>.
21. E.J. McMahon, *Outflow of New Yorkers Rose in 2013-2014*, EMPIRE CTR (Dec. 23, 2014), www.empirecenter.org/publications/outflow-of-new-yorkers-rose-in-2014/; see also Jeff Platsky, *Baby Boomer Retirees Flee New York*, PRESS & SUN-BULLETIN (Dec. 10, 2014, 3:33 PM), www.pressconnects.com/story/news/local/2014/11/28/baby-boomers-abandon-state/19610089/.
22. N.Y. GEN. MUN. LAW art.18-A-C; art. 19-A.
23. *Avoiding Past Mistakes: Principles for Governing Regional Economic Development Councils*, CITIZENS BUDGET COMM’N (Sept. 13, 2011), <http://www.cbcny.org/content/avoiding-past-mistakes-principles-governing-regional-economic-development-councils>.
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25. Louise Story, *As Companies Seek Tax Deals, Governments Pay High Price*, N.Y. TIMES (Dec. 1, 2012), <http://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations>.

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26. Edward L. Glaeser, *Can Buffalo Ever Come Back?* N.Y. SUN (Oct. 19, 2007), <http://www.nysun.com/opinion/can-buffalo-ever-come-back/64879/>.
27. N.Y. GEN. MUN. LAW art. 18-A–C, art. 19-A.
28. Rachel Weber, *Why Local Economic Development Incentives Don't Create Jobs: The Role of Corporate Governance*, 32 URB. LAWYER 97 (2000), see also STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 37–78 (Mandelker, Wegner, Griffith, Bond & Tyson, eds., 8th ed. 2014).
29. BOSTON, MASS., ZONING CODE art. 26A (1986).
30. N.J. PERM. STAT., § 27:1C-1 et seq.; § 40:55D-42.
31. *Albany Area Bldrs. Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 375–76 (1989). “Impact fees” or “linkage fees,” where the developer pays for the public infrastructure supporting the development, are viewed as “taxes,” which may only be enacted by the Legislature, not by a local law under home rule powers. New York does not have an impact fee statute.
32. DiNAPOLI, *supra* note 9, at 7.
33. See Daphne A. Kenyon & Adam H. Langley, *Payment in Lieu of Taxes: Balancing Municipal and Non-Profit Interests*, LINCOLN INSTITUTE OF LAND POLICY (2010).
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42. Chris Vest, *Bill Aims to Help NonProfits Keep Tax-Exempt Status*, ASSOCIATIONS NOW (Feb. 17, 2015), <http://associationsnow.com/2015/02/proposed-bill-aims-help-nonprofits/>.
43. 94 N.Y.2d 713, 718 (2000).
44. *In re Town of Thermopolis*, 45 P.3d 1155, 1160 (W.Y. 2002).
45. *Colleges of the Seneca*, 94 N.Y.2d at 716–17.
46. See *Flushing Nat’l Bank v. Mun. Assistance Corp.*, 40 N.Y.2d 731, 740 (1976) (holding that emergencies, including financial emergencies and the police power, do not suspend constitutional principles).
47. DiNAPOLI, *supra* note 9, at 7.
48. *Id.*
49. *Id.* at 8.
50. *Id.*
51. In January 2015, Maine Governor Paul LePage proposed authorizing large communities to make up for the elimination of state revenue sharing in future budgets by taxing large nonprofit organizations (50% of the tax which would be levied if properties valued over \$500,000 were subject to RPT) such as hospitals, colleges and private schools. NFPCs claim this scheme would place an “undue economic burden” on students, force changes to financial aid for Mainers and impair longstanding relationships with host communities. The change also likely would leave towns and cities scrambling to assess those properties for the first time. See Beth Brogan, *Maine College Officials Question LePage Plan to Allow Communities to Tax Large Non Profits*, BANGOR DAILY NEWS (Jan. 12, 2015, 6:01 PM), www.bangordailynews.com/2015/01/12/politics/state-house/maine-college-officials-question-lepage-plan-to-allow-communities-to-tax-large-nonprofits/.
52. See Cheryl Powell, *Akron General Fights for Tax Exemption for Stow Fitness Center*, OHIO.COM (Jan. 6, 2015, 7:56 PM), www.ohio.com/news/local/akron-general-fights-for-tax-exemption-for-stow-fitness-center-1.555809 (stating that Akron General Medical Center is fighting an Ohio state tax department ruling that its “fitness center” is subject to RPT).
53. *AHF-Bay Fund, LLC v. City of Largo*, No. 2D14-408, 2015 LEXIS 5826, at *1 (Fla. 2d DCA).
54. *Id.* at *10.
55. User fees are recognized as a method of payment for improvements to real property (Opt. St. Compt. 88-2, 1099); see *YMCA v. Rochester Pure Waters District*, 354 N.Y.S.2d 201 (1974) (stating that YMCA was required to pay a fee for sewer service). The “sanitary sewer charge,” based on consumption of services, was a valid user charge even though it contained a charge for capital improvements. User fees must be equal among all users and not discriminate. Tax-exempt status is not a factor justifying reasonable differentiation in utility services or user fees.
56. See *People v. Townsend*, 18 N.Y.S.2d 865 (1940) (stating that Tax Law Sec 4, subd. 6, which exempts charitable institutions from taxation, was intended to exempt NFPCs from sharing in the cost of government but not intended to exempt NFPCs from assessments made for expense of improvement specifically benefiting property or to impose the whole of such expense on other property or the public generally). An NFPC is not exempt from the cost of water and garbage, fire and sewer districts, notwithstanding the absence of statutory authority that property should be assessed in proportion to the benefit received. Assessments were special assessments, not taxes from which NFPCs were exempt.
57. *City of River Falls v. St. Bridget’s Catholic Church of River Falls*, 513 N.W.2d 673, 675–76 (Wis. Ct. App. 1994). The Wisconsin Court of Appeals rejected the assertion that a fee is appropriate only where a service actually is used to fight a fire—or that to be a fee, a charge must be assessed for commodities actually consumed. See also Opt. St. Compt. 85-24 (stating that a local improvement need not be a physical betterment, but can be a service that enhances the value of benefited property).
58. E. Kurnow, *On the Elasticity of the Real Property Tax*, 18 J. FIN. 56–58 (Mar. 1963). See also L. Dadayan, *The Impact of the Great Recession on Local Property Taxes*, NELSON A. ROCKEFELLER INSTITUTE OF GOVERNMENT (2012) (stating that elasticity declined after 2008 when rising RPT met with declining real property values during the Great Recession).

59. See *Sarasota County v. Sarasota County Church of Christ, Inc.*, 667 So. 2d 180 (Fla. 1995) (holding that (i) benefited parcels must pay the assessment without regard to their tax-exempt status, and (ii) the assessment pays for a specific benefit (even though the beneficiaries may be the general public) such that it is not a tax).
60. Brogan, *supra* note 51.
61. The requirement of a direct relationship between cost and benefit in imposing economic exactions has been addressed by the Supreme Court. See *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). In this case, a developer sought a permit but was told he would need to finance offsite environmental mitigation projects on public lands unrelated to his project. *Id.* The Supreme Court held that (i) the “unconstitutional conditions doctrine” (i.e., pay for unrelated environmental mitigation) prevents “government coercion” of enumerated rights, i.e., getting a building permit, and (ii) government may not leverage a legitimate state interest (land use regulation) that lacks a nexus and rough proportionality to that interest. *Id.*
62. PILOTs remain in the nature of a “tax”—to which state constitutions and statutory exemptions apply. Thus, PILOTs, while interesting as an economic development concept, are legally unenforceable against NFPCs and government institutions. Since special assessments and user fees are not viewed as taxes, they are enforceable, but their application must satisfy the allocation of cost/benefit tests of *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) (“essential nexus”) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (“rough proportionality”). *Nollan/Dolan* establishes the standard by which special assessments and user fees are subject to heightened scrutiny in due process and equal protection analysis.
63. See N.Y. COUNTY LAW art. 5.; see also N.Y. TOWN LAW arts. 12, 12-A, 12-C; N.Y. VILLAGE LAW ART. 22.
64. *Id.*
65. 2011 N.Y. Laws ch. 97 (Tax Levy Limit Law) does not apply to assessments and user fees.
66. Maria Cramer, *Boston Police Officers Wary of GPS for Cruisers*, BOSTON GLOBE (Nov. 18, 2013), <http://www.bostonglobe.com/metro/2013/11/18/gps-now-monitor-bpd/Vc6qOHTlvehT2YzYWIQkiP/story.html>.
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71. *Id.*
72. *Id.*
73. *Id.*
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75. Rich Lord & Tom Barnes, *Pittsburgh Mayor Drops Tuition Tax*, PITTSBURGH POST-GAZETTE (Dec. 22, 2009, 5:00 AM), <http://www.post-gazette.com/local/city/2009/12/22/Pittsburgh-s-mayor-drops-tuition-tax/stories/200912220181>.
76. *Id.*
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81. David Folz & Jacqueline Giles, *Municipal Experience with “Pay as You Throw” Policies: Findings From a National Survey*, 43 STATE & LOCAL GOV. REV. (2002); Lester M. Salamon, Stephanie L. Geller, & S. Wojciech Sokolowski, *Taxing the Tax-Exempt Sector—A Growing Danger for Nonprofit Organizations*, JOHNS HOPKINS UNIV. CTR. CIVIL SOC’Y STUDIES (2011), available at <http://ccss.jhu.edu/publications-findings/?did=244>; “The Nonprofit Margin: Addressing the Costs of the Nonprofit Exemption in New Orleans,” NEW ORLEANS BUREAU GOV’T RESEARCH (2011).

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