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NEW YORK CITY AS ORGANIZED CRIME FIGHTER

JAMES B. JACOBS & ALEX HORTIS*

This targeted criminal cartel is a “black hole” in New York City’s economic life. Like those dense stars found in the firmament, the cartel cannot be seen and its existence can only be shown by its effect on the conduct of (those) falling within its ambit. Because of its strong gravitational field, no light escapes very far from a “black hole” before it is dragged back . . . [T]he record before us reveals that from the cartel’s domination of the commercial waste industry, no carter escapes. Local Law 42 establishes a new commission and regulatory scheme to address this pervasive problem.¹

For most of the twentieth century, Cosa Nostra has been deeply and powerfully entrenched in the economy of New York City. It has been a dominant force, in both sea and air cargo operations at the ports and airports, the garment center, the Javits Exhibition Center as well as in the construction industry and in commercial waste hauling.² Although there have been sporadic local, state, and federal law enforcement initiatives against the mob since the early decades of the twentieth century, the U.S. Department of Justice did not mount a concerted anti-organized crime effort until the 1980s.³ As U.S. Attorney for the Southern District of New

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1. *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 989 (2d Cir. 1997) (citations omitted) (upholding the constitutionality of Local Law 42).

2. See JAMES B. JACOBS ET AL., *BUSTING THE MOB: UNITED STATES V. COSA NOSTRA* 23 (1994) [hereinafter JACOBS, *BUSTING THE MOB*]; Brian Carrol, *Combating Racketeering in the Fulton Fish Market*, in *ORGANIZED CRIME AND ITS CONTAINMENT: A TRANSATLANTIC INITIATIVE* 183 (Cyrille Fijnaut & James B. Jacobs eds., 1991) (providing an assessment of organized crime in the Fulton Fish Market); *NEW YORK STATE ORGANIZED CRIME TASK FORCE, CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY: THE FINAL REPORT* (1990) (presenting a study of racketeering in construction); VIRGIL PETERSON, *THE MOB: TWO HUNDRED YEARS OF ORGANIZED CRIME IN NEW YORK* (1983) (discussing the early history of organized crime in New York City).

3. See JACOBS, *BUSTING THE MOB*, *supra* note 2, at 18.

York from 1983 to 1989, Rudolph Giuliani played a major role in this attack on Cosa Nostra.⁴

When Giuliani became New York City's mayor in 1993, he committed himself to purge Cosa Nostra from New York City's economy by using the powers of City government. Through the creative use of regulatory authority, especially licensing, the City launched a number of extraordinary initiatives. Giuliani demonstrated that the City Charter and City government are flexible enough to deal successfully with problems long thought inexorable and inevitable. The administration's unprecedented initiatives have drawn the attention of law enforcement agencies and governments all over the world.⁵ At the cusp of the twenty-first century, New York City has expanded the domain of local government to deal with a criminal syndicate that, until recently, had seemed omnipotent.

This Article traces the creation, development, and strategic initiatives of the Trade Waste Commission ("TWC"), a small New York City agency established for the sole purpose of breaking up and eliminating the cartel that had dominated commercial waste hauling in the city for fifty years.⁶ Part I⁷ describes Cosa Nostra's domination of the commercial waste hauling industry. Part II⁸ traces the political developments leading up to the establishment of the TWC. Part III⁹ sets out the structure, authority, and staffing of this new agency. Part IV¹⁰ explains the strategic initiatives that the TWC has taken to break up the waste hauling cartel and to purge Cosa Nostra from the industry. Part V¹¹ discusses the legal challenges to the TWC. The conclusion reflects on the importance of the TWC as a model for attacking entrenched corruption and racketeering in local government.

4. *See id.* at 20, 80-81, 86, 89.

5. *See, e.g.*, Conference on the Waste Industry: Italy-America Achieving a Crime-Free Market 288 *passim* (1997) [hereinafter Conference] (discussing various aspects of New York City Trade Waste Commission at international conference on organized crime in waste hauling).

6. *See infra* Part I.

7. *See infra* notes 12-51 and accompanying text.

8. *See infra* notes 52-68 and accompanying text.

9. *See infra* notes 69-116 and accompanying text.

10. *See infra* notes 117-30 and accompanying text.

11. *See infra* notes 131-163 and accompanying text.

I. THE NATURE OF COSA NOSTRA'S DOMINATION OF NEW YORK CITY'S WASTE HAULING INDUSTRY

Cosa Nostra has controlled several national unions¹² and has conducted international money laundering and drug smuggling operations.¹³ It derives much of its power from its domination of unions and businesses at local and regional levels.¹⁴

Typically, Cosa Nostra used its control over union locals to organize cartels.¹⁵ Cosa Nostra then enforced the cartels' rules by threatening business disruption, labor problems, and personal violence. Competitors were prevented from participating in the industry, and cartel members were prevented from cheating. Cartel members forced industry participants and consumers to pay inflated prices to receive the good or service controlled by the cartel. The inflated price for goods and services passed along to consumers has been called a "cartel tax" or "mob tax."¹⁶

The New York City waste hauling industry provides an excellent example of a Cosa Nostra-sponsored cartel. As early as 1947, New York City officials received reports that "illegal activities" were restricting competition in certain small niches of waste hauling controlled by private haulers.¹⁷ Nonetheless, in 1956, Mayor Robert Wagner decided to privatize waste hauling for commercial establishments.¹⁸ Suddenly, there were approximately 52,000 new customers for private waste hauling

12. See, e.g., JACOBS, *BUSTING THE MOB*, *supra* note 2, at 167-81 (describing civil RICO suit to purge organized crime from the Teamsters union).

13. See, e.g., *id.* at 129-66 (describing the "Pizza Connection" case involving an international drug smuggling ring).

14. See generally PETER REUTER ET AL., *RACKETEERING IN LEGITIMATE INDUSTRIES: TWO CASE STUDIES* (1983) (discussing the economics of intimidation by racketeers in legitimate business).

15. For an excellent exposition of organized crime racketeering, see generally PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *ORGANIZED CRIME AND LABOR-MANAGEMENT RACKETEERING IN THE UNITED STATES* (1985). See also PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *THE EDGE: ORGANIZED CRIME, BUSINESS AND LABOR UNIONS* (1986).

16. See, e.g., David Stout, *With New Waste Commission, Mayor Vows to End 'Mob Tax,'* N.Y. TIMES, June 9, 1996, at A39.

17. See *City Ends Monopoly in Waste Collection*, N.Y. TIMES, Mar. 15, 1947, at A11.

18. The mayor decided that the city's commercial waste hauling services were an improper subsidy to a specific class of business. See REUTER ET AL., *supra* note 14, at 9.

services—a seventy percent increase.¹⁹ Cosa Nostra immediately organized the dozens of small waste haulers into an effective cartel.²⁰

As early as 1958, the U.S. Senate Select Committee on Improper Activities in the Labor or Management Field (“McClellan Committee”) recognized that “underworld hoodlums . . . have attempted to build business empires in the private carting industry through a monopoly system enforced by trade associations and cooperative labor unions.”²¹ The cartel established a property rights system of customer allocation: each customer belonged to a particular member; no other firm could compete for that customer’s business. If a rebel carter tried to “steal” a cartel member’s customer, or even attempt to enter the market without the cartel’s permission, that carter would face union problems, damage to his trucks, threats of violence, and intimidation.²² Without competition, the cartel members imposed highly inflated waste hauling charges.

While the New York City Department of Consumer Affairs (“DCA”) had explicit authority to deny licenses to waste haulers lacking “good character,” it failed to use this power.²³ For example, in 1974, when the Brooklyn DA’s Office secured indictments against fifty-five waste hauling firms,²⁴ the DCA briefly considered denying licenses to these firms, but ultimately granted them.²⁵ One City official was quoted as saying that the Mayor’s Office hoped it “would just blow over,” and another official explained the DCA’s lax licensing procedures by stating “we didn’t want

19. See TRADE WASTE COMMISSION, REPORT ON THE REDUCTION OF THE MAXIMUM LEGAL RATE FOR THE REMOVAL OF TRADE WASTE 6 (1997) [hereinafter TRADE WASTE COMMISSION].

20. Similar cartels were formed on Long Island. See *United States v. Private Sanitation Indus. Ass’n*, 811 F. Supp. 808, 810 (E.D.N.Y. 1992) (describing organized crime in Long Island waste hauling industry); Ralph Blumenthal, *A 30-Year Reign: Mob Ruling an Empire of Garbage*, N.Y. TIMES, Jan. 24, 1988, § 4, at 6 (noting Westchester waste hauling firms’ links to organized crime).

21. *Hearings Before The Select Committee on Improper Activities in the Labor or Management Field*, 85th Cong. 6672 (1958) (statement of Sen. McClellan) [hereinafter McClellan Committee].

22. See Peter Reuter, *The Cartage Industry in New York*, 18 J. CRIME & JUST., 149, 160 (1993) (observing damage to equipment); see also Allan R. Gold, *U.S. Acts to End Monopolies in New York Trash Hauling*, N.Y. TIMES, Feb. 6, 1991, at A1 (describing how violence and intimidation deterred outside waste haulers from entering market).

23. See Conference, *supra* note 5, at 373 (comparing DCA and TWC).

24. The indictments were the result of a two-year sting operation investigating illegal restraint of trade in the Brooklyn waste hauling industry. In addition to the firms, indictments were also brought against nine industry officials. See Frank J. Prial, *55 Carters Are Charged with Brooklyn Monopoly*, N.Y. TIMES, Mar. 29, 1974, at A1.

25. See David Bird, *City May Take Indicted Carters’ Routes*, N.Y. TIMES, July 22, 1974, at A1; see also *State Seeks to Curb Brooklyn Carters*, N.Y. TIMES, Nov. 21, 1974, at A38.

price wars and chaos in the industry. We didn't think that would protect the public."²⁶ The DCA, more or less, functioned as a captive agency that set high maximum rates that, in effect, served as the only rate for all customers. New York City's regulated maximum rate²⁷ of \$14.70 per cubic yard served as the only rate, and it was more than double the rates in Boston (\$5.30), Chicago (\$4.49), Philadelphia (\$4.25), and Los Angeles (\$3.27).²⁸ The DCA's maximum rate-setting power actually functioned to strengthen the cartel.²⁹ Worse still, the DCA helped to institutionalize and bureaucratize the property rights/customer allocation system by regularly approving and recording transfers of customers between waste hauling firms.³⁰

Cosa Nostra crushed rebel waste hauling firms with union problems, intimidation, sabotage, and in at least one verified case on Long Island, murder.³¹ The result was that no national waste hauling firms were able to compete for business in the country's largest market.³² Cosa Nostra made it clear to customers that they had no say in choosing a firm to pick up their waste. Commercial businesses that tried to break away from their assigned waste hauler faced threats, intimidation, and property damage.³³

Some of the most powerful Cosa Nostra figures, including Joseph Gambino, the son of Gambino crime family boss Carlo Gambino, and Matthew "Matty the Horse" Ianiello, an underboss in the Genovese crime family, held open ownership interests in waste hauling firms.³⁴ However,

26. Bird, *supra* note 25.

27. See *infra* note 29 and accompanying text; see also *infra* Part III.A.4 for a description of the TWC's maximum rate-setting powers.

28. See REUTER ET AL., *supra* note 14, at 29-31.

29. Before the TWC, the DCA had the authority to set the legal maximum rate on waste hauling charges. However, the DCA routinely approved large increases in the maximum rate and operated on the assumption that the waste hauling firms would uniformly charge that maximum rate. As a result, the legal maximum rate served as the only rate in the industry. See EXECUTIVE STAFF RECOMMENDATION, *infra* note 109, at 13.

30. See REUTER ET AL., *supra* note 14, at 160-62.

31. See *Jerry Kubecka, Inc. v. Avellino*, 898 F. Supp. 963, 966 (E.D.N.Y. 1995) (citing murder of waste hauler by a member of organized crime); see also John T. McQuiston, *Families of Slain Informants Awarded \$10.8 Million*, N.Y. TIMES, July 22, 1998, at B7 (describing successful tort suit by families of murdered waste haulers against the Organized Crime Task Force for failing to adequately protect waste hauler informants).

32. See Matthew L. Wald, *Trash Giant Makes Plans to Expand in New York*, N.Y. TIMES, Oct. 7, 1993, at B5 (identifying New York as only major city with no national waste hauler).

33. See REUTER ET AL., *supra* note 14, at 158-67 (detailing intimidation and violence against customers).

34. See Arnold H. Lubasch, *19 Are Charged in City in Racketeering Inquiry*, N.Y. TIMES, Feb. 20, 1985, at B3 (describing Ianiello's ownership interests); Arnold H. Lubasch, *Undercover Concern Used in Garbage Case*, N.Y. TIMES, May 20, 1977, at A26

most of New York City's three hundred waste hauling firms were small, family-owned enterprises; the largest had only twenty trucks.³⁵ Since the waste haulers themselves benefitted from the inflated prices, they also had a stake in the cartel.

The Manhattan DA's Office uncovered the waste hauling cartel's operation during a five year investigation that consisted of three undercover operations. The first was launched after a rebel carter's truck was torched in response to his refusal to return a waste hauling stop he acquired by underbidding a cartel member.³⁶ Rather than remaining silent, the rebel carter reported the incident to the Department of Consumer Affairs, which reported it to the Organized Crime Control Bureau of the New York City Police Department. For the next three years, a detective assumed the role of a family relative and manager of the rebel carting company and tape recorded incriminating conversations with cartel members.³⁷ The second major undercover operation occurred when Browning-Ferris International ("BFI"), unable to gain a foothold in New York City's waste hauling industry, agreed to allow an agent of the Manhattan DA's Office to pose as a BFI employee.³⁸ The agent was able to gather information from both customers and the cartel members. BFI's entry into the market was also important because it struck at the heart of the cartel.³⁹ The third operation consisted of planting a police detective as the building manager at 55 Water Street.⁴⁰ The Manhattan DA's Office targeted that building because it was serviced by V. Ponte and Sons, the second largest waste hauling company in New York City and believed to be one of the leading members of the cartel.⁴¹

The investigations gathered valuable information on the cartel and revealed how Cosa Nostra managed the cartel through four trade associations made up of firms participating in the industry.⁴² Two of the associations—the Kings County Trade Waste Association and the Greater New York Waste Paper Association—were controlled by the Genovese

(noting Joseph Gambino's involvement in the waste hauling industry).

35. See REUTER ET AL., *supra* note 14, at 153-54, 161.

36. See Selwyn Raab, *When the Mafia Got Greedy, a Garbage Hauler Went Undercover*, N.Y. TIMES, June 9, 1996, at 37.

37. See *id.*

38. See Allen R. Myerson, *The Garbage Wars: Cracking the Cartel*, N.Y. TIMES, July 30, 1995, § 3, at 1.

39. See Conference, *supra* note 5, at 313.

40. See Elisabeth Bumiller, *Undercover Beat to Executive Suite: Case Over, He Assumes the Life of His Assumed Identity*, Nov. 30, 1997, at 37.

41. See *id.*

42. See Telephone Interview with Marybeth Richroath, Deputy Commissioner for Enforcement, New York City Trade Waste Commission (Mar. 13, 1998).

crime family.⁴³ Two others—the Queens County Trade Waste Association and the Association of Trade Waste Removers of Greater New York—were run by the Gambino crime family.⁴⁴ The associations met weekly to resolve disputes, assess fees, and manage the cartel.⁴⁵ For instance, when a carting company sold its route to another carting company, the association received either one month's income on the route or two percent on the sale, depending on the dollar value of the transaction.⁴⁶ If a rebel carter "stole" a customer stop, the association would send someone to collect a heavy "compensation" fee, typically thirty to thirty-five times the monthly income generated by the stop.⁴⁷ Perhaps the most notorious figure involved was James "Jimmy Brown" Failla, a powerful capo in the Gambino crime family, who ran the Association of Trade Waste Removers of New York for over thirty years.⁴⁸

In June 1995, the Manhattan District Attorney, Robert Morgenthau announced that his office had obtained a 114-count indictment against twenty-three waste hauling firms, seventeen individuals, and four trade associations for various racketeering offenses.⁴⁹ Most of the defendants entered into plea bargains, including Angelo and Vincent Ponte, the owners of V. Ponte & Sons.⁵⁰ The remaining two defendants were convicted in 1997 and received long prison sentences.⁵¹

II. THE ESTABLISHMENT OF THE NEW YORK CITY TRADE WASTE COMMISSION

The election as mayor of former U.S. Attorney Rudolph Giuliani in 1993 triggered a sophisticated reexamination of the City's role as organized crime fighter. The Giuliani Administration first moved against organized crime in the Fulton Fish Market ("the Market"). Since the rise to power

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See Selwyn Raab, He Runs Trash Hauling with Silence and Pastry*, N.Y. TIMES, Feb. 20, 1993, at A21.

49. *See* Indictment, *People v. Association of Trade Waste Removers*, Indictment No. 05614/95 (Sup. Ct. N.Y. County 1995).

50. *See Selwyn Raab, Trash Carter Pleads Guilty to Corruption*, N.Y. TIMES, Jan. 28, 1997, at B2. In addition to time in prison for Angelo Pontes, the Pontes agreed to pay \$7.5 million and to a lifetime ban from the waste hauling industry. *See id.*

51. *See Selwyn Raab, Two Convicted as Leaders of New York Trash Cartel*, N.Y. TIMES, Oct. 22, 1997, at B3; *see also Mob Leader Ordered to Jail*, N.Y. TIMES, Nov. 20, 1997, at B8.

of Joseph "Socks" Lanza in the 1930s, the Fulton Fish Market's operations were dominated by organized crime.⁵² Using evidence collected by Operation Seaprobe, a joint federal-local investigation, U.S. Attorney Giuliani filed a civil RICO suit against twenty-nine individual defendants, including officials of the United Seafood Workers Local 359 (the union local that controlled loading in the Market) and the Genovese crime family and sought a federal court trusteeship over the entire Market.⁵³

Most of the defendants entered into a consent agreement that allowed for the appointment of a court-appointed administrator for the Market.⁵⁴ While the administrator had wide-ranging powers to inspect records and implement rules and regulations over the Market, the administrator made clear that some form of sustained City-based regulatory oversight would be needed to purge Cosa Nostra from the Market.⁵⁵ In 1995, Mayor Giuliani successfully persuaded the City Council to pass Local Law 50, which imposed licensing requirements, background checks, new loading and parking procedures, and other regulations on vendors as well as employees in the Market. Despite strong resistance from the Committee to Preserve the Market and United Seafood Works Local 359, the City's licensing plan, coupled with aggressive enforcement of its regulations, reduced loading and unloading fees by seventy percent. By all indications the mob was purged from the Market.⁵⁶

The City's success in the Market, along with the new evidence produced by the Manhattan DA's waste hauling investigation, led to the creation of the Trade Waste Commission ("TWC") in 1996.⁵⁷ Regulating the \$1.5 billion New York City waste hauling industry was an ambitious undertaking. Proponents of proposed Local Law 42, led by Mayor Giuliani's Chief of Staff Randy Mastro,⁵⁸ presented their case at City Council hearings. Witnesses included the Manhattan District Attorney Robert Morgenthau, Ronald Goldstock, the former director of the New

52. See LANZA, *Joseph 'Socks' (1904-1968): Racket Boss of Fish Industry*, in THE MAFIA ENCYCLOPEDIA 181 (Carl Sifakis ed., 1987).

53. See *United States v. Local 359*, 705 F. Supp. 894, 900 (S.D.N.Y. 1989).

54. See Consent Agreement, *United States v. Local 359*, 87 Civ. 7351 (S.D.N.Y. 1989).

55. See, e.g., Midterm Report of the Market Administrator, Consent Agreement, *United States v. Local 359*, 87 Civ. 7351 (1990).

56. See Selwyn Raab, *A Crackdown on Fees at Fulton Market*, N.Y. TIMES, Jan. 11, 1997, at A28 (describing effects of reforms in Fulton Fish Market).

57. See Interview with Chad Vignola, Deputy Commissioner for Licensing & Operations, New York City Waste Commission, in New York, N.Y. (Dec. 11, 1997) [hereinafter Vignola].

58. Mastro worked under Giuliani in the U.S. Attorney's Office and was the lead counsel in the federal government's historic civil RICO suit against the International Brotherhood of Teamsters. See JACOBS, *BUSTING THE MOB*, *supra* note 2, at 170.

York State Organized Crime Task Force, and Mayor Rudolph Giuliani. U.S. attorneys Mary Jo White (Southern District of New York) and Zachary Carter (Eastern District of New York) and former New York State Attorney General Dennis Vacco submitted written statements supporting the proposed legislation.⁵⁹ Commenting on the wave of indictments his office secured against several major waste hauling figures, Morgenthau stated:

[I]ndictments alone cannot do the whole job. If we have learned anything from our industry-wide investigations and prosecutions, it is that systemic corruption must be addressed not only by the criminal law, but by the regulatory structure. Once law enforcement has done its job, there must be a regulatory structure in place with sufficient muscle behind it to ensure that systemic corruption cannot return . . . The licensing provisions [of Local Law 42], together with the mandated background checks can, and we believe will, help ensure that in order to do business in the City the garbage man will be clean.⁶⁰

In rebuttal, counsel for the Sanitation and Recycling Industry Council of New York ("SRI") argued that the entire industry was being smeared, and the SRI implied that proponents of the law favored large national companies over small, local family-owned firms.⁶¹ Counsel for SRI also impugned the character of Browning-Ferris International by charging that it, or its subsidiaries, had committed civil and criminal violations.⁶² He argued that New York waste haulers charged more than haulers did in other cities⁶³ because labor costs were higher in New York. He also argued that the proposed agency would be an expensive new bureaucracy, that the law set unconstitutionally vague standards, and that the law gave "a government appointee . . . power of life or death over who gets the work in this [waste hauling] business"⁶⁴

Opponents also tried to mobilize political influence. Council member Kenneth Fisher, a Democrat from Brooklyn who was the lead sponsor of

59. See *Transcript of the Minutes of the N.Y. City Council Committee on Consumer Affairs* 79 (Dec. 12, 1995) [hereinafter *Transcript*] (on file with the *New York Law School Law Review*).

60. *Id.* at 84-85 (statement of Robert M. Morgenthau, Manhattan District Attorney).

61. See *Transcript of the Minutes of the N.Y. City Council Committee on Consumer Affairs* 133-34 (Mar. 4, 1996) (statement of Gerald Walpin, Counsel, Sanitation and Recycling Industry Council) (on file with the *New York Law School Law Review*).

62. See *id.* at 110-13 (statement of Jeffrey Braun, Counsel, Sanitation and Recycling Industry Council of New York).

63. See *id.* at 105-06.

64. *Id.* at 109.

Local Law 42, reported a variety of pressures. "Major real estate players" told him not to "rock the boat" by disturbing their clients' existing sanitation services.⁶⁵ Small waste hauling firms all but admitted their complicity in the cartel and pleaded that they could not compete otherwise. Other opponents of Local Law 42 used more blunt tactics: Fisher was labeled anti-Italian, his financial disclosure records were combed for embarrassing information, and he was so seriously threatened that he requested and received police protection.⁶⁶

Local Law 42 passed by a vote of forty-one to six on May 22, 1996.⁶⁷ Finding that "the carting industry has been corruptly influenced by organized crime for more than four decades [and] . . . has fostered and sustained a cartel," Local Law 42 created a new commission with powers intended to improve the city's ability to combat the cartel's influence in the industry.⁶⁸

III. THE STRUCTURE, COMPOSITION, AND POWERS OF THE TRADE WASTE COMMISSION

A. *The Trade Waste Commission and Local Law 42*

Local Law 42, which took effect in June 1996, established the TWC and gave it broad regulatory powers.⁶⁹ According to the law, the Commission's mission is to: "enhance the city's ability to address organized crime corruption, to protect businesses who utilize private carting services, and to increase competition in the carting industry with the aim of reducing consumer prices."⁷⁰

The TWC is a regulatory agency that, in important respects, resembles a law enforcement agency. Its staff of executive officers, attorneys, auditors, inspectors, and police detectives was chosen for their collective expertise in organized crime control. Its regulatory function is to eliminate organized crime in a private industry. The TWC's budget for fiscal year 1997 was \$2,535,000.⁷¹

65. See Telephone Interview with Council member Kenneth Fisher (Mar. 9, 1998).

66. See *id.*

67. See *New Agency Is to Regulate Trash Haulers*, N.Y. TIMES, May 23, 1996, at B2.

68. Introductory Notes, N.Y. CITY ADMIN. CODE tit. 16-A, ch. 1 (1996).

69. In addition to the powers Local Law 42 granted, as an administrative body, the TWC can and has promulgated rules regarding waste hauling. See, e.g., N.Y. CITY COMP. R. tit. 17 (enumerating rules on the New York City trade waste industry).

70. Introductory Notes, N.Y. CITY ADMIN. CODE tit. 16-A, ch. 1 (1996).

71. See THE OFFICE OF THE MAYOR, FISCAL YEAR 1998 EXECUTIVE BUDGET AND PROJECTIONS, Ex. 2, at 239 (1997) (on file with the *New York Law School Law Review*).

The TWC consists of the Commissioner of Investigation, the Commissioner of Business Services, the Commissioner of Consumer Affairs, and the Commissioner of Sanitation, and is chaired by an executive director appointed by the mayor.⁷² The executive staff brought a wealth of experience in fighting organized crime to their positions. Both the Executive Director and the Deputy Commissioner for Operations and Licensing served as former assistant United States attorneys. They had extensive experience implementing civil RICO trusteeships in the Fulton Fish Market and in New York City union locals.⁷³ The Deputy Commissioner for Enforcement previously served as an assistant Manhattan district attorney and as deputy commissioner of the Department of Investigations. In both jobs, she investigated and prosecuted organized crime.⁷⁴ The TWC's five lawyers all had experience either prosecuting or investigating the waste hauling industry.⁷⁵ The TWC also employs eight accountants to audit records that waste hauling firms must now keep.⁷⁶ Seven inspectors, many with backgrounds in the Department of Sanitation, investigate violations of Local Law 42.⁷⁷

Thirty police detectives from the New York City Police Department, many of whom were recruited from the Organized Crime Control Bureau, are assigned to the Trade Waste Commission.⁷⁸ The police detectives have two functions. First, they conduct background checks on waste hauling firms to determine whether the firm or its principals have organized crime ties.⁷⁹ Second, they investigate complaints related to the waste hauling industry. Like other police detectives, they have the authority to carry weapons and make arrests.

72. See N.Y. CITY ADMIN. CODE § 16-502 (1996).

73. See Conference, *supra* note 5, at 368-69 (describing Executive Director's own experience with civil RICO prosecutions); see also Vignola, *supra* note 57 (noting Deputy Commissioner's background implementing civil RICO).

74. See Telephone Interview with Marybeth Richroath, Deputy Commissioner for Enforcement, New York City Trade Waste Commission (Mar. 13, 1998) [hereinafter Richroath].

75. Two attorneys came from the state Attorney General's Office and have experience working on environmental violations and appellate litigation. The third attorney was a former Assistant U.S. Attorney who had experience with organized crime investigations. The fourth attorney was an attorney in the Corporation Counsel Office and advised the Department of Sanitation. The fifth attorney worked at the Department of Consumer Affairs on waste hauling issues. New York City's Corporation Counsel represents the TWC in court appearances. See Vignola, *supra* note 57.

76. See Richroath, *supra* note 74.

77. See *id.*

78. See Vignola, *supra* note 57.

79. Background checks are now conducted as part of the application process to receive a license. See *infra* Part II.A.3.

1. Licensing

The TWC's most important power is its authority to issue or deny licenses to waste hauling firms. To haul commercial waste, a carter must obtain a license from the TWC.⁸⁰ New York City's authority to issue waste hauling licenses is a well-grounded police power.⁸¹ Like the Department of Consumer Affairs (DCA), the TWC has the power to deny a license to any applicant "who lacks good character, honesty, and integrity."⁸²

Local Law 42 also completely revamped the license application procedure. An applicant must provide information on its principals,⁸³ defined as officers, directors, holders of over ten percent equity, and relatives of such shareholders when the owner of record is acting on that relative's behalf.⁸⁴ In the event of a license denial, the TWC must state the reasons and provide the applicant an opportunity to be heard.⁸⁵

Unlike the DCA, the TWC operates under a law that provides factors that the agency must consider in determining whether to grant a license. These factors include: prior convictions⁸⁶ or pending criminal actions;⁸⁷ "knowing association with a person who has been convicted for a racketeering activity"⁸⁸ or with "any member or associate of an organized crime group" as identified by a federal, state, or city law enforcement or investigative agency;⁸⁹ and membership in trade associations that have been convicted of specific crimes or trade associations in which a member of an organized crime group holds a position.⁹⁰

2. Voiding Waste Hauling Contracts

When the TWC was established, about 300 waste hauling firms were operating in New York City. On June 3, 1996, Local Law 42 declared all commercial waste hauling contracts terminable-at-will by the customer on

80. See N.Y. CITY ADMIN. CODE § 16-505(a) (1996).

81. See *infra* Part III.

82. N.Y. CITY ADMIN. CODE § 16-509(a) (1996).

83. See *id.* § 16-508(a)(i).

84. See *id.* § 16-501(d).

85. See *id.* § 16-509(a).

86. See *id.* § 16-509(a)(iii).

87. See *id.* § 16-509(a)(ii).

88. *Id.* § 16-509(a)(v).

89. *Id.* § 16-509(a)(vi).

90. See *id.* §§ 16-509(a)(viii), 16-520(j)(i). These provisions were clearly intended as an attack on Cosa Nostra's use of trade associations.

thirty days notice.⁹¹ At one stroke, this move dismantled the property rights system that, for decades, had tied customers to their carters. Waste haulers could apply to the TWC for an exemption or waiver from this onerous provision. On waiver determinations, Local Law 42 stated:

In determining in its discretion whether a waiver of the termination would be *consistent with the purposes of this act*, the commission shall consider background information concerning the business and its principals and the full circumstances surrounding the negotiation or administration of such contracts, including but not limited to the form and content thereof.⁹²

The “purposes of this act” referred to eliminating anti-competitive practices, the cartel, and Cosa Nostra.⁹³ Of 212 waiver applications, the TWC granted 40 applications and denied 160; the remaining applicants failed to provide requested information or withdrew their applications before the TWC could make a final decision.⁹⁴

3. Background Investigations

The TWC has broad powers to conduct background investigations related to its license and waiver decisions.⁹⁵ It may request information on criminal investigations,⁹⁶ tax records,⁹⁷ real property,⁹⁸ indebtedness,⁹⁹ prior trade waste business interests,¹⁰⁰ and “such additional information concerning good character, honesty and integrity that the commission may deem appropriate”¹⁰¹ This scrutiny continues even after a carter is granted a license: The agency has authority to conduct unannounced inspections and audits of records that the licensee is required to keep.¹⁰² If

91. See Conference, *supra* note 5, at 373.

92. NEW YORK, N.Y., LOC. L. NO. 42 § 11(iii) (June 3, 1996) (emphasis added).

93. See *id.* § 1.

94. See Vignola, *supra* note 57.

95. See generally N.Y. CITY ADMIN. CODE § 16-508(b) (1996) (listing the requirements in connection with an application).

96. See *id.* § 16-508(b)(ii)(j).

97. See *id.* § 16-508(b)(ii)(k).

98. See *id.* § 16-508(b)(ii)(c).

99. See *id.* § 16-508(b)(ii)(b).

100. See *id.* § 16-508(b)(ii)(m).

101. *Id.* § 16-508(b)(ii)(n).

102. See *id.* §§ 16-504(c), (d); see also Conference, *supra* note 5, at 511 (discussing advantages of surprise audits).

the TWC finds that a carter violated Local Law 42, it can immediately revoke or suspend a license.¹⁰³

4. Setting Maximum Rates

The TWC used its rate-setting authority to attack the cartel. Local Law 42 authorized the TWC to: “[F]ix by rule and from time to time refix maximum and minimum rates . . . which rates shall be based upon a fair and reasonable return to the licensees and shall protect those using the services of such licensees from excessive or unreasonable charges.”¹⁰⁴ In the rate-setting process, the law authorized the TWC to “compel the attendance at a public hearing held pursuant to a rate-fixing rule-making of licensees and other persons having information in their possession” about waste hauling.¹⁰⁵ The TWC has the additional power to “compel the production of books and records” in relation to the hearing and to “require licensees to file with the commission schedules of rates.”¹⁰⁶

While some reformers opposed giving the TWC permanent maximum rate-setting authority,¹⁰⁷ others argued that until a free market developed, a maximum rate would restrain the cartel. As Randy Mastro, Giuliani’s chief-of-staff and later the interim director of the TWC, explained in his testimony before the City Council:

[A]s the Commission succeeds in its work of ridding the industry of corruption, of thereby helping to foster an increased competition, and through that increased competition reducing cost[s] . . . the authority to set [a] maximum rate will be less important, less vital, certainly something that the Commission would revisit and that all of us will look at over time. But the fact of the matter is that, in the first instance . . . the ability of this Commission to set a maximum rate and thereby prevent firms that have historically acted in a corrupt manner . . . that that is a necessary . . . enforcement mechanism in going forward¹⁰⁸

103. See N.Y. CITY ADMIN. CODE § 16-513 (1996).

104. *Id.* § 16-519.

105. *Id.*

106. *Id.*

107. See, e.g., Transcript, *supra* note 59, at 200 (statement of Philip Angell, Assistant to the Chairman, Brown-Ferris International).

108. *Id.* at 45-46 (statement of Randy Mastro, Chief of Staff, Giuliani Administration).

The TWC waited several months before exercising its power to fix maximum rates. In making its decision, the TWC found:

The proposed rate reduction will hasten the exodus of the organized crime families that historically have controlled the New York City trade waste industry by slashing the windfall profits they have reaped from decades of anti-competitive conduct. Moreover, this rate reduction will significantly reduce the annual trash bills of New York City businesses and thereby lower the costs of doing business in the City. At the same time, waste removal companies that operate honestly and efficiently will be able to recover their costs and earn an attractive return on their capital.¹⁰⁹

In recommending the new maximum rate of \$11.74 per cubic yard, the executive staff also predicted that the maximum rate would “exceed the average rates currently being negotiated and agreed upon in the newly competitive market.”¹¹⁰ The prediction is borne out by the 1998 market rate of \$8.70 per cubic yard—forty-one percent less than the old cartel rate of \$14.70 per cubic yard and well below the TWC’s maximum rate of \$11.74 per cubic yard.¹¹¹

5. Regulating Contracting and Billing Practices

Local Law 42 regulated the terms of private contracts in the waste hauling industry and limited their duration to two years.¹¹² Form contracts must be approved by the TWC and must conform to standards that prevent misleading contracting language and hidden clauses. Furthermore, the firms must bill in a way that makes clear to customers their legal rights and the specific charges for various waste hauling services.¹¹³ Customers may also terminate contracts within three months if their carter assigns their waste hauling contract to another firm, and the TWC must approve all sales and transfers of contracts.¹¹⁴

109. TRADE WASTE COMMISSION, EXECUTIVE STAFF RECOMMENDATION TO THE TRADE WASTE COMMISSION REGARDING THE MAXIMUM LEGAL RATE FOR THE REMOVAL OF TRADE WASTE 2 (Dec. 19, 1996) [hereinafter EXECUTIVE STAFF RECOMMENDATION].

110. *Id.*

111. *See infra* Part IV.B.

112. *See* N.Y. CITY ADMIN. CODE § 16-520(e)(i) (1996).

113. *See id.* §§ 17-5-01, 17-5-04, 17-5-05.

114. *See id.* § 17-5-05(b)(1).

6. Role of Independent Monitors

If the background licensing check reveals "adverse information," the TWC may issue the license on the condition that the firm retain an independent monitor to oversee the firm's finances and activities.¹¹⁵ Some waste hauling companies have used private sector monitors to "pre-qualify" themselves before applying for a license.¹¹⁶

IV. STRATEGIC INITIATIVES TAKEN BY THE TWC

A. *Adopting Market-Oriented Policies*

The TWC recognized that simply purging cartel members from the industry would not be sufficient. The long-term remedy for racketeering requires creation of a free market in waste hauling. To achieve this goal, the TWC had to attract new firms into the market. One strategy was to inform customers of their right to choose their waste hauler and to encourage these customers to compare the prices and services of various carters.

Toward this end, as part of the license and waiver application process, waste hauling firms have to provide a list of their customers' names and addresses.¹¹⁷ With this information, the TWC has the ability to notify

115. *See id.* § 16-511(b). The idea of using an "independent inspector general" to prevent criminal activities within a firm has been most thoroughly developed by Ronald Goldstock:

An IPSIG [Independent Private Sector Inspector General Program] operates as a team with legal, auditing, investigative, management, research, analytic, loss prevention and other appropriate skills to ensure compliance with relevant law and regulations to deter, prevent, and detect unethical and illegal conduct by, within, and against the host organization . . . [T]he IPSIG must remain independent, autonomous and self-sufficient, and, although interactive with the organization, unconstrained by organizational biases which might seek to protect the corporate reputation at the expense of exposing illegal or unethical behavior. To ensure the IPSIG's integrity and credibility as an independent agent, it must have dual reporting responsibility—to the highest levels of the company . . . and to an independent body whether it be an agency of government or an outside Board of Directors.

Ronald Goldstock, *IPSIG: The Independent Private Sector Inspector General Program*, 4 CORP. CONDUCT Q. 38, 38 (1996).

116. *See* Conference, *supra* note 5, at 382.

117. The customers' names and addresses are entered into a computer database, and any licensed waste hauling firm can request lists sorted by zip code. The names and addresses of the former customers of a firm that was denied a license are sent to new license

customers that their carter was denied a license and would have to cease providing waste hauling services. Customers are informed that there are now over 300 carting companies permitted to collect waste, and they are advised either to seek another company servicing their neighborhood, by consulting the Yellow Pages, or calling the TWC to find out how to contact licensed carters.¹¹⁸ The notice informs customers of the maximum rate and of their rights under Local Law 42, and it encourages them to solicit at least four bids.¹¹⁹ The TWC has set up telephone help lines for Spanish, Mandarin/Cantonese, and Korean speakers.¹²⁰ The agency's detectives investigate complaints of intimidation within twenty-four hours and seek to convince customers and haulers alike that the days of mob rule are over.¹²¹ New firms have entered the market, including the biggest companies in the business—BFI, WMX, and USA Waste.¹²²

B. *The Results of the TWC's Work*

Within months the TWC's work began to show positive results. Waste hauling rates fell significantly across the city. The 1997 average market rate of \$8.70 per cubic yard was forty-one percent less than the old cartel rate of \$14.70 per cubic yard, and there were many examples of substantial savings. By 1997, the World Trade Center's annual waste hauling bill plummeted from \$3 million to \$600,000.¹²³ Columbia Presbyterian Hospital's charges dropped from \$1.2 million to \$480,000.¹²⁴ At 26 Federal Plaza, home of many federal agencies such as the Department of Justice, the waste hauling bill fell from \$369,000 to \$130,000.¹²⁵ In the Fulton Fish Market, wholesale waste hauling prices dropped over eighty percent, from \$46 per cubic yard to \$9.50 per cubic yard.¹²⁶

applicants. To gather information on the effects of a license denial decision, the TWC surveys the former customers. *See Vignola, supra note 57.*

118. *See, e.g.,* Notice from Edward T. Ferguson, III, Chair and Executive Director, New York City Trade Waste Commission, to Customers of V.A. Sanitation Inc. Regarding Termination of Carting Service (June 13, 1997).

119. *See id.*

120. *See* Letter from Edward T. Ferguson, III, Chair and Executive Director, New York City Trade Waste Commission, to Former Customer of Litod Paper Stock Corp. (July 30, 1997).

121. *See Vignola, supra note 57.*

122. *See* Conference, *supra note 5*, at 360, 383-86 (describing entry into market of national waste hauling firms).

123. *See* EXECUTIVE STAFF RECOMMENDATION, *supra note 109*, at 15.

124. *See id.*

125. *See id.*

126. *See id.*

These reductions have provided a boost for the city's myriad of small business owners. For example, the estimated annual savings for the average newsstand was \$750, for bakeries \$800, for produce markets \$1,330, and for delicatessens \$5,418.¹²⁷ The overall estimated annual savings reduction is over \$330 million.¹²⁸ The ripple effects for New York City's economy in terms of new hiring and expansion are undetermined but certainly significant. Consumers benefit as well by lower prices for goods and services.¹²⁹

In applauding the savings to the businesses and people of New York, we should not lose sight of another benefit: the economic loss to organized crime. Along with their relentless criminal court defeats (e.g., the recent conviction of Vincent "The Chin" Gigante, boss of the Genovese crime family),¹³⁰ New York's Cosa Nostra crime families are now forced to contend with the loss of a significant revenue source and power base.

V. LEGAL CHALLENGES TO THE TWC

It is not surprising that Local Law 42 and the TWC have provoked a number of state and federal constitutional and administrative law challenges. Although the lawsuits have raised a number of interesting issues, the courts have almost uniformly held in the TWC's favor, thus establishing the agency's solid legal foundations.

A. *Constitutional Challenges to the TWC*

The constitutionality of the TWC was upheld in *Sanitation Recycling Industry, Inc. v. City of New York*.¹³¹ The plaintiff, Sanitation and Recycling Industry, asked for a declaratory judgment holding Local Law 42 unconstitutional on grounds of impairment of contract, due process, vagueness, freedom of association, and privacy.

The Second Circuit's decision, upholding District Court Judge Milton Pollack's grant of summary judgment for the City, recognized the extensive racketeering that had dominated the waste hauling market for half a

127. See TRADE WASTE COMMISSION, ESTIMATED ANNUAL SAVINGS FROM REDUCTIONS IN TRADE WASTE COLLECTION COSTS (1997) (on file with the *New York Law School Law Review*).

128. See TRADE WASTE COMMISSION, POTENTIAL SAVINGS IN NEW YORK CITY'S TRADE WASTE COLLECTION INDUSTRY (1997) (on file with the *New York Law School Law Review*).

129. See Vignola, *supra* note 57.

130. See *United States v. Gigante*, 982 F. Supp. 140, 145 (E.D.N.Y. 1997).

131. 107 F.3d 985 (2d Cir. 1997).

century.¹³² The Second Circuit rejected each of the plaintiff's claims. With respect to the argument that Local Law 42's termination of all waste hauling contracts violated the Contracts Clause of the U.S. Constitution, the court noted that waste hauling was already heavily regulated and that haulers could have anticipated such a regulation.¹³³ The court focused on the broad societal goal in passing Local Law 42—the elimination of organized crime—and found that the contract termination provisions were a reasonable means to achieve that end. The waste haulers argued that the waiver provisions were impermissibly vague, that the independent monitor provision was standardless, and that the whole scheme denied them an opportunity to be heard. The court found that economic regulations will be upheld unless they are impermissibly vague in all of their applications. Judged by that standard, the court found that the law's directions regarding license application decisions were sufficiently definite. The court pointed to Local Law 42's directions to the TWC to make waiver decisions based on the goal of eliminating organized crime from the industry and the law's specific instruction to the TWC to consider background information on the applicant and the circumstances of the contract negotiation. In rejecting the claim that the lack of a formal hearing denied due process, the court noted that the TWC had provided haulers an opportunity to respond and, in any event, that the plaintiffs lacked a legitimate property interest in a waiver application.¹³⁴

The Second Circuit also held that Local Law 42's provisions banning membership in organizations with ties to organized crime¹³⁵ “may be applied to associations that occur in connection with the waste disposal business without transgressing on the freedom of intimate association.”¹³⁶ However, the Second Circuit construed these provisions narrowly, holding: “When an applicant is shown to have knowingly associated with a person of prohibited status, the Commission must satisfy itself that the contact was improper under the City law in order for the associational conduct to serve as a basis for the denial of a license.”¹³⁷ As for the provision limiting membership in organizations with ties to organized crime, the court interpreted the law to mean that membership is prohibited only if the licensee knows or should have known that a person holding a position in the organization has “been *convicted* of being or is a member of an

132. See *supra* note 1 and accompanying text.

133. See *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997).

134. See *id.* at 995.

135. See *infra* Part III.A.1.

136. See *Sanitation & Recycling Indus., Inc.*, 107 F.3d at 996.

137. *Id.* at 998.

organized crime group.”¹³⁸ While the court did not formally rule on the issue, the court indicated that it would likely have rejected the claim that the disclosure of confidential information violates privacy rights.¹³⁹

District Court Judge Milton Pollack decided a second constitutional challenge in TWC’s favor. In *Universal Sanitation Corp v. Trade Waste Commission of the City of New York*,¹⁴⁰ the TWC denied a waiver application to two waste hauling firms principally owned by Benny Villani, whom the government alleged was affiliated with the Genovese crime family. Federal prosecutors had indicted Villani and his waste hauling firms on federal racketeering charges.¹⁴¹ The TWC determined that it would not be consistent with the purposes of Local Law 42 to allow Villani a waiver because of his pending racketeering charges, his alleged affiliation with the Genovese crime family, and his firm’s past contracting practices. These practices included the use of evergreen clauses which allowed contracts to renew themselves every five years.¹⁴²

In granting the TWC summary judgment, Judge Pollack cited *Sanitation Recycling’s* rejection of the contracts clause claim.¹⁴³ As for the argument that the TWC’s actions violated the takings clause, the court found that while the termination clause of Local Law 42 may have substantially diminished the value of the firms’ contracts, the firms could not show that their investment-backed expectations were infringed because the contracts were related to business dealings in an industry that was already heavily regulated.¹⁴⁴ The court rejected the procedural due process claim on the ground that the firms did not have a property right in the waiver itself but merely a unilateral desire to obtain one.¹⁴⁵ The firms argued that they had been deprived of a liberty interest without due process in that their waiver applications called into question their integrity and good name. The court reiterated that waiver decisions were within the discretion of the TWC and that rejection of the firm’s waiver application did not

138. *Id.* at 999.

139. *See id.* at 1000.

140. 940 F. Supp. 656 (S.D.N.Y. 1996).

141. *See id.* at 660.

142. *See id.* The waste hauling firms also challenged the waiver decision, alleging that it violated the Contracts Clause and the Takings Clause, denied them procedural due process, was unconstitutionally vague, and constituted a bill of attainder. *See id.* The firms also made a claim under state law, arguing that the decision violated Article 78 of the New York State Civil Practice Law and Rules. *See id.*

143. *See id.* at 661 (citing *Sanitation and Recycling Indus. Inc. v. City of New York*, 928 F. Supp. 407, 413-416 (S.D.N.Y. 1996)).

144. *See Universal Sanitation Corp. v. Trade Waste Comm’n*, 940 F. Supp. 656, 661 (S.D.N.Y. 1996).

145. *See id.* (quoting *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972)).

implicate a legal right or status.¹⁴⁶ As for the vagueness challenge, the court held that the direction to make license decisions “consistent with the purposes of [Local Law 42]” was a sufficiently informative standard for an administrative agency.¹⁴⁷ The court also rejected the claim that Local Law 42 constituted a bill of attainder because it “furthers legitimate non-punitive legislative purposes, does not confiscate property, and does not bar designated individuals or groups from participating in the carting industry.”¹⁴⁸

As for the state law claim that TWC’s administrative decision violated Article 78 (the New York state law that governs administrative bodies), the court held that the TWC’s decision was not “arbitrary and capricious or an abuse of discretion.”¹⁴⁹ The court found that Villani’s indictment and the presence of evergreen clauses in the company’s standard form contracts provided a rational basis for the decision.¹⁵⁰

B. *Administrative Law Challenges to the TWC*

To date, the courts have supported the TWC on each of three state law claims challenging license denials and all but one of the federal and state claims challenging the TWC’s waiver decisions.¹⁵¹ The only court decision that did not constitute a total TWC victory was *Frank Lomangino & Sons, Inc. v. City of New York*.¹⁵² In *Lomangino*, while the plaintiffs’ constitutional challenges were dismissed on summary judgment, their state law Article 78 challenge to a waiver denial was allowed to proceed.¹⁵³ The plaintiffs alleged that their waiver applications had been denied while those of similarly situated applicants had been successful.¹⁵⁴ To test the claim, the court determined that the plaintiffs needed access to the successful

146. *See id.* at 662.

147. *Id.*

148. *Id.*

149. *Id.*

150. *See id.*

151. *See Fava v. City of New York*, No. CV-97-0179 (E.D.N.Y. Mar. 13, 1997); *Universal Sanitation Corp. v. Trade Waste Comm’n*, 940 F. Supp. 656 (S.D.N.Y. 1996); *Vigliotti Bros. Carting Co. v. Trade Waste Comm’n*, 648 N.Y.S.2d 489 (1996); *D&D Carting Co. v. City*, 658 N.Y.S.2d 825 (Sup. Ct. N.Y. County Apr. 18, 1997); *Green Bay Sanitation Corp. v. City*, 658 N.Y.S.2d 825 (Sup. Ct. N.Y. County Apr. 18, 1997); *Mr. N Carting Corp. v. NYC TWC*, Index No. 10148/97 (Sup. Ct. N.Y. County Feb. 26, 1997); *Falso Carting v. NYC TWC*, Index No. 101407/97 (Sup. Ct. N.Y. County Feb. 24, 1997).

152. 980 F. Supp. 676 (E.D.N.Y. 1997).

153. The Second Circuit had granted summary judgment for the TWC on the plaintiff’s federal constitutional claims but denied it on the Article 78 claim. *See id.* at 678.

154. *See id.*

applications for waivers. The plaintiffs were permitted to view the successful waiver applications of ten waste hauling firms.¹⁵⁵ Of the seven plaintiffs, the court found that five had engaged in substantially more serious violations than the firms in the comparison group, comprised of the successful applicants. However, the court found that two plaintiffs had significantly similar records as those of the comparison group.¹⁵⁶ The court rejected the argument by the TWC that the proper solution was to rescind the waivers for the successful firms. Instead the court remanded the two plaintiffs' applications to the TWC for reconsideration.¹⁵⁷

*Morgenthau v. Allocca*¹⁵⁸ also considered the TWC's policy-making authority. In February 1997, Crest, a waste hauling firm, and Polidori, its president, pled guilty to one felony racketeering charge. As part of the plea bargain, Polidori had to sell his interest in the firm. However, the TWC ordered that the defendant's license application be processed before it considered Polidori's application to sell the company to USA Waste.¹⁵⁹ Since the license application would now surely be rejected, Crest would have no license and the firm's value would be destroyed. The matter was complicated by the TWC's prior decision that it intended to process sales applications first in order to induce waste hauling firms to enter the New York City market by purchasing already existing waste hauling firms intact.¹⁶⁰

In June 1997, Crest was sold to USA Waste, subject to approval of the sales application. However, in a regularly-scheduled TWC meeting in May 1997, the TWC changed its procedure. It decided to make case-by-case decisions as to whether the license or sales application would be processed first. The agency explained that head-to-head competition should take place now that many of the cartel members had left the market, and that the sale of customer accounts obtained through the cartel system should no longer always be considered in the public interest. Polidori argued that the change in policy amounted to the adoption of a regulation which, according

155. *See id.* There was vitriolic debate about the selection of the comparison group. It turned out that one of the comparison group's waste haulers had previously been denied a waiver and that another firm's waiver was being reviewed in light of new allegations. *See id.*

156. *See id.* at 679.

157. After their claim was remanded to the TWC for reconsideration, the plaintiffs failed to pursue it further. *See Vignola, supra* note 57.

158. 1998 WL 250553 (N.Y. App. Div. 1998). While the case grew out of the criminal prosecutions brought by the Manhattan District Attorney's Office, *see supra* Part I, the court considered this motion for an injunction against the TWC to be an administrative law challenge. *See Morgenthau v. Allocca*, N.Y. L.J., Oct. 21, 1997, at 26.

159. *See Morgenthau v. Allocca*, 1998 WL 250553 at *2.

160. *See infra* Part III.

to the City Administrative Procedure Act (CAPA),¹⁶¹ required notice and hearing.¹⁶² The TWC countered that the case-by-case decision making is not a formal rule change that requires compliance with CAPA.

The court ruled for the TWC, holding that the agency's previous procedure was a "temporary view" and that the new TWC policy was not a fixed general principle and thus did not fit the definition of a "rule" under article IV, section 8 of the New York State Constitution.¹⁶³ Crest alternatively argued that in the past the TWC permitted other waste hauling firms' license applications to be decided after their sales application, thereby allowing them to cash in on their cartel membership. The court distinguished Polidori's case by finding that the TWC had never approved a sales application before a license application for a convicted waste hauler. The court also found that the TWC's decision to change its policy was not arbitrary and capricious because market conditions had changed dramatically in the time since its original policy. This case demonstrates the willingness of the state courts to give TWC substantial deference.

VI. CONCLUSIONS: THE TWC AND THE FUTURE OF THE CITY AS ORGANIZED CRIME FIGHTER

New York City's experience with the TWC will provide invaluable lessons about how to use local government's regulatory powers to battle organized crime. In fact, the TWC is already a model for other municipalities: Westchester County, New York is holding hearings on the possibility of creating its own trade waste commission to combat a local waste hauling cartel.¹⁶⁴ In a prescriptive light, we offer the following preliminary conclusions.

In designing new anti-organized crime regulations, a local government cannot assume that just any government initiative will work. As we saw with the DCA, a grant of authority is meaningless if that authority is not exercised to fight organized crime. It is probably necessary to create a new regulatory body or branch that is singularly focused on fighting organized crime rather than on regulating the industry. That agency needs to be staffed with individuals with the expertise and ambition to challenge a powerful and entrenched organized crime regime. In the case of organized crime cartels, a long-term solution also requires attracting new competition-

161. See N.Y. CITY CHARTER ch. 45 (1989).

162. See *id.* § 1043.

163. See *Morgenthau*, 1998 WL 250553 at *3.

164. See Donna Greene, *Hearings Begin on Carting Industry*, N.Y. TIMES, Dec. 14, 1997, Westchester edition, § 14, at 1.

minded firms that are not intimidated by the industry's reputation of being run by the mob.

Politically, City crime-fighting officials will encounter entrenched interests allied with organized crime. Every agency action will be closely scrutinized by attorneys representing the cartel's interests. The City can do two things to enhance the likelihood that its actions will survive court challenges. First, documenting organized crime's presence and activities is extremely valuable; it forces courts to confront the problem that the strong remedies are intended to solve. Second, the closer the City stays within its traditional administrative and police powers, the less likely court challenges will succeed. In short, it is very difficult to argue persuasively that the City cannot innovate in a heavily regulated, mob-dominated industry.

By attacking organized crime at its root, the TWC has done what individual convictions could never do: end an industry cartel. Based on its tangible results, the TWC is becoming one of the most successful local government, anti-organized crime initiatives in the country. Waste-hauling rates have fallen dramatically, helping business and consumers. More importantly, as the structure of Cosa Nostra disintegrates under the pounding of criminal prosecutions, one of its primary bases of power is being dismantled by effective regulation. The TWC is showing how municipal government can use its regulatory powers to complement state and federal law enforcement's attacks on organized crime.

The true test of the TWC, however, will not come until the next mayoral administration. The TWC "works" with the full support of Mayor Giuliani, a former U.S. attorney, and with a staff comprised of his former aides as well as others experienced at fighting the mob. When the next administration changes the TWC's staff, will the agency lose its focus and competence? Unfortunately, the history of public administration is littered with stories of reform agencies that have been co-opted and even corrupted.