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ZONING IMMUNITY: WHAT'S THAT?

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INTRODUCTION

Zoning immunity or preemption involves a determination that certain types of land uses may be exempt or “immune” from complying with local zoning and land use laws. The application of zoning immunity is deeply rooted in fundamental land use principles which provide that certain types of uses—both public and private—should not be restricted by local zoning and land use requirements because they are inherently critical to the proper functioning of government; are inherently beneficial to the public’s health, safety and welfare; or are solely within the purview of the federal and state governments. Notwithstanding these principles, unwary land-use practitioners and municipal boards continue to unnecessarily subject immune uses to local zoning laws thereby creating unnecessary delays in the development of these uses, unnecessary waste of municipal resources and unnecessary increases in the costs to taxpayers. Possessing a basic understanding of zoning immunity will ensure that such pitfalls are avoided in the future.

This article discusses the three types of zoning immunity in New York State—absolute, statutory and limited immunity—and provides practical advice

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for how this immunity should be applied by land-use practitioners and municipalities.

I. ABSOLUTE IMMUNITY

Absolute immunity applies to federal and state government uses. As the sovereign, these governments and their institutions are absolutely exempt or immune from local zoning and land use requirements.

FEDERAL USES

The Supremacy Clause of the U.S. Constitution establishes federal law as the supreme law of the land.¹ The doctrine of federal supremacy protects the legitimate activities of the United States Government from regulation by state and local authorities.² This protection extends to the land and facilities of the federal government such that they are exempt from municipal zoning regulations.³ For example, “[c]ourts have consistently held that local municipalities cannot regulate the United States Postal [Service] regarding its opening of post offices.”⁴ Pursuant to Article I, Section 8 of the U.S. Constitution, “[t]he Congress shall have Power . . . to establish Post Offices” In accordance with this express grant of authority, Congress established the Postal Service and granted the Postmaster General the authority “to establish and maintain postal facilities of such character and in such locations. . . .” as he deems necessary.⁵

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The preemption afforded to post offices includes local zoning laws and related regulations.⁶

Additionally, the construction of federal buildings⁷ and federal housing projects⁸ are free from the restrictions imposed by local zoning regulations in the municipalities in which they are located.

STATE USES

Absolute immunity also applies to state government uses. The courts have held that “the state is not amenable to local zoning regulations, and that municipal corporations lack power to impose such regulations on the state or its institutions.”⁹ Court precedent has established that immunity has been extended to the following state entities or user:

- State agencies¹⁰
- The New York Off-Track Betting Corporation¹¹
- A race track licensed by the state¹²
- The Urban Development Corporation¹³
- The Dormitory Authority¹⁴
- Government refuse disposal¹⁵

Public schools are also not subject to regulation by municipal zoning laws since they carry out State functions.¹⁶ “The New York State Constitution imposes the duty upon the Legislature to provide a system of free public education, and reserves to the Legislature full power in relation to the ‘maintenance, support or administration’ of the system, notwithstanding the powers conferred by the Home Rule provisions of the Constitution.”¹⁷ Pursuant to Section 1801 of the NYS Education Law, the Commissioner of Education is empowered “to lay out central school districts * * * and to fix, determine and define the boundaries” thereof. Thus, municipalities are preempted from limiting the location of schools within their borders.¹⁸ To the extent that schools serve a vital public purpose, a municipality is without justification in its police power to exclude them from the community or otherwise “enforce any of the provisions of its zoning ordinance against a school district.”¹⁹

II. STATUTORY IMMUNITY

In addition to the absolute immunity afforded to the federal and state governments, zoning immunity is also

granted through State statutes to both public and private land uses. An examination of New York State laws identifies a number of specific uses where the State has expressly preempted local zoning. Examples of uses which are statutorily exempt from local zoning include, among others: (i) electric generating facilities; (ii) hazardous waste facilities; (iii) residential day cares; (iv) casinos; (v) mines; and (vi) oil and gas drilling. These examples are discussed in more detail below.

1. ELECTRIC GENERATING FACILITIES

New York State Public Service Law § 172 provides that “[n]otwithstanding any other provision of law, no state agency, municipality or any agency thereof may . . . require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility” Such a facility is defined as “electric generating facility with a nameplate generating capacity of twenty-five thousand kilowatts or more, including interconnection electric transmission lines and fuel gas transmission lines that are not subject to review under article seven of this chapter.”²⁰ Facilities smaller than 25kW are not covered by this statute and could be subject to local zoning requirements.

While the language of this statute does not expressly provide that an electric generating facility is exempt from *local zoning regulation*, the language is clear that a municipality cannot require approval, consent or permits for the construction or operation of a major electric generating facility. “The intent to pre-empt need not be express. It is enough that the Legislature has impliedly evinced its desire to do so. A desire to pre-empt may be implied from a declaration of State policy by the Legislature or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area. Here both apply. . . .”²¹ Thus, electric generating facilities covered by Section 172 are immune from local zoning and land use requirements.

2. HAZARDOUS WASTE FACILITIES

Under New York State law, the development and operation of governmental and private hazardous waste facilities are also immune from local zoning and land use requirements. This exemption is based Section 27-1107 of the N.Y.S Environmental Conservation Law (“ECL”) which states:

“Notwithstanding any other provision of law, no municipality may, except as expressly authorized by this article . . . ,

require any approval, consent, permit, certificate or other condition including conformity with local zoning or land use law and ordinances *regarding the operation* of a facility with respect to which a certificate hereunder has been granted; provided that such municipality has received notice of the filing of the application therefore.” (Emphasis supplied).

The exemption broadly covers facilities that treat, store and dispose of hazardous waste materials including, without limitation, the following facilities: incinerators, compacting and composting facilities, shredding plants, recycling facilities, landfills, transfer stations, baling facilities as well as railroad and maritime facilities.

It is interesting to note that the plain language of Section 27-1107 extends zoning immunity to the “operation” of hazardous waste facilities. This means that municipalities cannot seek to enforce their zoning laws as they relate to the operation of such facilities. However, it is unclear if the statutory language also extends immunity to zoning and land use laws that relate to the non-operational details of these facilities including where such facilities could be located in a municipality—which is the essence of zoning. Municipalities desiring to control where hazardous waste facilities may be sited within their borders should keep this open question in mind. It is likely this question will have to be addressed by the courts through future litigation.

3. RESIDENTIAL DAY CARES

The evolution of day care regulation has afforded statutory immunity to day-care homes based on public policy. In 1969, the State Legislature declared that providing adequate day care is a legitimate public purpose.²² In 1987, the State Legislature established the first statutory preemption from local land use controls for “group family day care.”²³ As codified in Social Services Law § 390, no local government could prohibit the following classes of dwelling units from being used for group family day care, provided that the group family day care was licensed by the State Department of Social Services: (a) single family dwellings, (b) multiple family dwellings classified as fireproof, and (c) dwelling units on the ground floor of multiple family dwellings not classified as fireproof. In 1998, an amendment to Section 390 “extended the law’s protection from prohibitory local zoning regulations to the owners of single-family and certain multi-family dwelling units used for the provision of ‘family day care.’ ”

Currently, Section 390(12) of the Social Services Law provides that:

“Notwithstanding any other provision of law, . . . no village, town, city or county shall adopt or enact any law, ordinance, rule or regulation which would impose, mandate or otherwise enforce standards for sanitation, health, fire safety or building construction of a one or two family dwelling or multiple dwelling used to provide group family day care or family day care No village, town (outside the area of any incorporated village), city or county shall prohibit or restrict use of a one or two family dwelling, or multiple dwelling for family or group family day care where a license or registration for such use has been issued in accordance with these regulations. . . .”

New York Courts have held that by enacting Section 390 of the Social Services Law, “the State Legislature had intended to ‘occupy the field’ of family day care regulation, and thus supersede the authority of local governments to regulate that use through zoning laws.”²⁴ Despite the statutory immunity granted to family day cares, other child care facilities, particularly commercial day care centers, are fully subject to local zoning control.²⁵

4. CASINOS

A hot topic recently has been the siting of several new casinos in upstate New York. In 2013, the State Legislature adopted the Upstate New York Gaming Economic Development Act (“GEDA”)²⁶ which outlined the procedure and process for siting as many as four new destination gaming resorts in New York State. The casinos would be located in three regions of the State consisting of the Capital District, the Catskills/Hudson Valley and the Eastern Southern Tier. No more than two casinos would be allowed in any of the three regions. The law prohibited downstate gaming resorts for at least seven years after the first gaming license is awarded for an upstate casino. The casinos were expected to be either entirely new resorts or conversions of existing New York racinos.

These privately owned casinos were also granted immunity for local zoning and land use requirements—presumably to eliminate local hurdles that might delay their development and the receipt of their economic benefits. Specifically, Section 1366 of the N.Y. Rac. Pari-Mut. Wag. & Breed. Law states that “[n]otwithstanding any inconsistent provision of law, gaming authorized at a location pursuant to this article shall be deemed an approved activity for such location under the relevant city, county, town, or village land use or zoning ordinances, rules, or regulations.”

The broad language of the statute seemed to grant the casinos complete immunity from local zoning and land use laws. However, the NYS Gaming Commission, the State

agency required to implement GEDA, issued guidance which narrowly interpreted the statute to mean that Section 1366 extends zoning immunity for gaming activities only; however, uses or activities that do not constitute gaming but which could still be part of a casino (e.g., hotels, restaurants, parking, roadways, recreational uses, utility infrastructure, etc.) are not extended immunity.²⁷

5. MINING

The development and operation of mines—both governmental and private—have also been granted limited statutory immunity from certain local zoning and land use requirements. This limited immunity is created by the State’s Mined Land Reclamation Law (“MLRL”) found in Section 23-2703(2) of the ECL. Specifically, this section provides:

“For purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry provided, however, that nothing in this title shall be construed to prevent any local government from: . . . (b) enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts. Where mining is designated a permissible use in a zoning district and allowed by special use permit, conditions placed on such special use permits shall be limited to the following: (i) ingress and egress to public thoroughfares controlled by the local government; (ii) routing mineral transport vehicles on roads controlled by the local government; (iii) requirements and conditions as specified in the permit issued by [NYSDEC] under this title concerning setback from property boundaries and public thoroughfares rights-of-way natural or man-made barriers to restrict access, if required, dust control and hours of operation . . . ; (iv) enforcement of reclamation requirements contained in mined land reclamation permits issued by the state.”

This statute limits municipal zoning authority to selecting where mines can be located within a municipality and to allowing the imposition of only five express conditions on any special use permit granted for a mine. The statute extends zoning immunity to all other aspects of mining operations.

Shortly after the statute was adopted, the Court Appeals was called upon to determine whether the statute allowed a municipality to ban mining as a land use through its zoning laws. In *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, the high Court held that Section 23-2703(2) permitted a local government to adopt a zoning ban on mining (except for pre-existing nonconforming mining).²⁸ The court went on to hold that a municipality may not directly regulate the operation of mining but it had the power to determine where

mines could be located—even if it zone them out completely.²⁹

6. OIL AND GAS DRILLING

Similar to the MLRL, the Oil, Gas and Solution Mining Law (“OGSML”) contains a supersession clause which states “[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.”³⁰ In the recent *Middlefield* and *Dryden* cases, the Court of Appeals closely scrutinized this supersession clause and held in the absence of a clear expression of preemptive intent in the OGSML, municipalities have the authority to pass zoning laws, pursuant to their home rule authority, that ban oil, gas and hydrofracking activities in order to preserve the existing character of their communities.³²

Further, the Court foreclosed on the drilling companies’ fallback position that even if all zoning laws are not preempted by the OGSML’s supersession clause, a local law that completely prohibits oil and gas activities should be interpreted as preempted because it regulates the industry. Citing *Gernatt*, the Court explained, “a municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.”³³ Notwithstanding, municipalities may not regulate the operations of the oil and gas industry, which is left to the regulation of the New York State Department of Environmental Conservation. Thus, operations of oil and gas drilling are immune from local zoning.

III. LIMITED IMMUNITY

In addition to absolute and statutory immunity, the New York courts have also created limited immunity from local zoning and land use requirements. This immunity applies only to local governments including municipalities, counties, and fire districts, among others, arising when: (1) a municipality undertakes a project within its own borders; or (2) undertakes a project within the borders of another municipality. Prior to 1988, a municipality was exempt from zoning restrictions when carrying out its governmental functions, but was subject to such restrictions when engaged in a proprietary function. After years of debate trying to decide

which functions were governmental and which were proprietary, the Court of Appeals decided the seminal case *County of Monroe v. City of Rochester*, which retired the old governmental-proprietary test and established a new method for resolving inter-governmental land use disputes using the “balancing of public interest” test.³³ Unlike absolute immunity, a local governmental entity may be subject to local land use regulations if its project does not weigh more heavily in favor of the “balancing of public interest.”

In *County of Monroe v. City of Rochester*, the Court of Appeals addressed the issue of whether projects undertaken by one municipality within the territory of another municipality are subject to the latter’s zoning laws. Specifically, the Court was asked to determine whether the County of Monroe’s proposed expansion of the county airport was a governmental use immune from the zoning regulations of the City of Rochester in which the airport was situated. The Court established the balancing of public interest approach, which provides that unless a statute expressly exempts it (as discussed above), the encroaching government is presumed to be subject to the zoning regulations of the host community where the land is located.³⁴ The host community should then consider several factors to determine whether or not it is in the public interest to require the encroaching government to comply with the host community’s land use regulations. Among the factors to be considered are:

- (1) The nature and scope of the instrumentality seeking immunity;
- (2) The encroaching government’s legislative grant of authority;
- (3) The kind of function or land use involved;
- (4) The effect local land use regulation would have upon the enterprise concerned;
- (5) Alternative locations for the facility in less restrictive zoning areas;
- (6) The impact upon legitimate local interests;
- (7) Alternative methods for providing the proposed improvement;
- (8) Intergovernmental participation in the project development process and an opportunity to be heard; and
- (9) The extent of the public interest to be served by the improvements.³⁵

While no one factor is controlling, one factor can overshadow all others in a given case.³⁶

In determining that the expansion of the Monroe County Airport was free from land use oversight by the City of Rochester, the Court in *Monroe* also considered these additional public interest factors, of equal significance: (i) that given the existing land use, there was no other practical location for the proposed use; (ii) the expansion was subject to county land use oversight approval, including public hearings and a comment period in which the city could have participated; (iii) there was not express city oversight authority in the State enabling Legislation; (iv) there was no detriment to adjoining landowners, as opposed to competing political interests; and (v) the nature of an international municipal airport, serving interstate and intrastate commerce goals, was in both the local and greater public interest.

Since *Monroe*, the balancing of public interest test has been applied to a number of municipal projects, including without limitation:

- Firehouses;
- Telecommunications towers;
- County facilities;
- Police stations;
- Ambulance facilities;
- Municipal districts; and
- Public libraries.

Some of these projects are discussed in more detail below.

Firehouses

When a local government, fire district, or private fire company undertakes the construction or expansion of a firehouse within its own borders or within the boundaries of another municipality, such construction may not be subject to the host municipality's zoning requirements. A number of courts have addressed this issue. In *Nanuet Fire Engine Co. No. 1 v. Amster*, the court concluded that for purposes of determining whether property to be utilized for a fire station is subject to applicable zoning laws, a non-for-profit fire company stands upon the same footing as a fire district³⁷ even though the private fire company lacked certain critical indicia of government like taxing authority and a publicly elected board of directors.³⁸ The court considered the relationship between the fire district and the company and held:

“A fire company. . . is essentially under the control of the Fire District’. . . In order for the fire district to provide services required to provide by law, it must function through fire companies. . . Thus, for purposes of determining whether property to be utilized for a fire station is subject to applicable zoning laws, a fire company stands upon the same footing as a fire district.”⁴⁰

Thus, in *Nanuet*, the construction of a firehouse, which required an area variance and a site plan approval, was subject to the Monroe “balancing of public interest” test, rather than the unqualified application of the Town's zoning.⁴⁰ When the court returned the matter to the Town to conduct the balancing of public interest test, the Town determined that public safety and other factors warranted allowing construction to proceed.⁴¹

Firehouses serve an essential purpose in the community to protect people and property from the danger and damage of fire and the location of firehouses is critical to providing these purposes regardless of zoning constraints.⁴² Thus, the functions of firehouses generally weigh more heavily in their favor in the balancing of public interests test. Based on the precedent established by *Monroe* and *Nanuet*, it may be easier to locate firehouses in areas where they might otherwise raise zoning or site plan issues.⁴³ Notwithstanding the foregoing, firehouses will not always be afforded immunity from other land use regulations. At least two New York courts have held that firehouses are still subject to site plan approval by the host municipality.⁴⁴

Telecommunication Towers

Municipalities are frequently tasked with regulating telecommunication towers and antennas under their zoning and land use laws. The New York Court of Appeals has declared cellular phone transmission to be a public utility, giving cellular providers greater protection against restrictive zoning rules to the extent that municipal zoning must allow it a reasonable opportunity to exist and to serve its market.⁴⁵ While a municipality may determine which districts are appropriate for the use of telecommunications towers and limit them to certain districts, telecommunications may not be outright banned.⁴⁶ Site plan review and/or a special use permit may be required. Where telecommunications projects are being reviewed as a special use permit, some local zoning regulations provide the community authority to consider alternative sites. Municipalities should consult their attorney as to the limits of its local authority for the particular case at hand.

With the striking increase in demand for cellular tele-

phone service, some local governments have sought to lease their land to private telecommunication towers to improve cellular service and EMS services within their borders and to provide additional revenue for the municipalities. Whether or not such towers must comply with the municipality's own zoning laws would be subject to the balancing of public interest test. At least one municipality tried unsuccessfully to exempt a private telecommunication tower on municipal land from its own zoning law. In *Kastan v. Town of Gardiner Town Board*, the court annulled the Town's approval of the tower and its immunity from local zoning after holding that the balancing of public interest test required the Town to consider alternative locations for the tower and the Town had failed to consider any sites other than on municipal property.⁴⁷ In instances where the siting of wireless telecommunications towers and private antennae occur on state land, the Court of Appeals has held that the State and its private contractors are exempt from local zoning regulations based on the benefit to the public.⁴⁸

County Facilities

New York State Courts have held that county facilities, such as landfills⁴⁹ and airports,⁵⁰ are immune from local zoning regulations where the project benefits the greater public welfare.

However, where the record fails to substantiate a determination of zoning immunity, the courts have remanded or deferred to the municipalities to conduct the balancing of public interest test.⁵¹ For example, in the *City of Ithaca v. Tompkins Cnty. Bd. of Representatives*, the County was determining the location of a new waste processing facility.⁵² After selecting a site in the City and completing a full environmental review under the State Environmental Quality Review Act ("SEQRA") review, the County approved a final environmental impact statement, which the City challenged. Among other things, the City alleged it was improperly excluded from SEQRA as an involved agency, arguing that the facility would require a City permit to discharge into the City's sewer system.⁵³ The County asserted that it was not required to obtain such a permit because it was immune from the City's local laws. The court held that the record failed to demonstrate that the facility required a permit under the City's code.⁵⁴ Notwithstanding that, the court stated that the County may very well be exempt from the City's permitting requirements under the balancing of public interest test.⁵⁵ Thus, the court left it unclear whether county waste processing facilities are indeed exempt. Similarly, without conducting the balancing

test, the courts have held that it is unclear whether county correctional facilities and emergency communication towers would also be exempt from zoning regulations.⁵⁶

IV. PRACTICAL CONSIDERATIONS

While the *County of Monroe* case tried to clarify the legal process for determining when municipal projects would be immune from local zoning laws, the high Court's decision also left a number of unanswered questions that continue to plague land-use practitioners and municipalities alike. For example:

- 1) When in the development process should the determination of zoning immunity be made; or
- 2) Which municipal board makes the determination of immunity.

Despite the lack of clarity in the law on these issues, it is recommended to make the determination of immunity as early as possible in a project. In particular, a request of immunity from the host community should be made prior to or at the time the application for the project is submitted. The project sponsor should balance the *Monroe* factors and make a case to the host community why the project is immune from local zoning. Making such a request at this early stage helps to avoid any unnecessary time and expense in the application and approval process. It will also help to identify which local agencies will have permitting authority over the project and could serve as the lead agency to conduct the environmental review for the project under the SEQRA.

The host community should then designate a board to be responsible for conducting the balancing test and making the determination of whether zoning immunity should be granted. Although it is unclear from statute or case law which board in the host community should make the determination, the options are generally: (i) the Town/Village Board or City Council; (ii) the Code Enforcement Officer ("CEO"); (iii) the Zoning Board of Appeals ("ZBA"); or (iv) the Planning Board. If the CEO makes the determination, the practitioner should keep in mind that this decision could be appealed to the ZBA which would make the final decision on immunity. We would assert that the Town/Village Board or City Council, as the elected legislative body for the municipality, is the preferred board to make such determination.

A municipality may also choose to bind some or all of its own municipal projects, occurring within its own borders,

to the requirements of its zoning law by specifying so in its law. This may be a general statement or specific statement identifying which municipal projects would be exempt from compliance with the code. Municipalities across the State of New York have adopted such regulations into their zoning codes.⁵⁷ Furthermore, the Appellate Division has upheld municipal immunity when such exemptions are built into the municipal zoning code.⁵⁸ However, if a municipal code does not expressly address immunity, a municipality will have to undertake the “balancing of public interest” test to determine if it has to comply with its own zoning code.

When a determination of governmental zoning immunity is made, a municipality should consider adopting a resolution exempting the project from its zoning law, thereby formalizing the determination. The municipality should also consider preparing and executing a Memorandum of Understanding (“MOU”) between the project sponsor and the host community to formalize the grant of immunity and to define its scope. The following terms could be incorporated as part of any MOU:

- Provide the background of the project including a general description of the project and how it will benefit the community.
- Establish that the project is immune from the host community’s zoning code and include an analysis of the Monroe factors.
- Despite immunity, the project sponsor should agree to cooperate with the host community by providing information about the project or meeting with certain municipal boards and the public to obtain informal feedback on the project.
- Specify which local laws the project sponsor will be immune from to avoid any confusion during the construction process.
- Clarify that the immunity does not obviate the project sponsor from obtaining a building permit from the host community under the NYS Uniform Fire Prevention and Building Code.

The host community should consult with its municipal attorney to assist in its preparation of the MOU.

Conclusion

Zoning immunity serves an important function to free certain types of land uses—both public and private—from

zoning restrictions where the project/facility serves a greater public interest. In the absence of absolute immunity or statutory preemption, it is well-settled that the balancing of public interest test is to be applied in making a determination of immunity. Such determination should be made at the onset of a project to conserve municipal resources and ensure the determination of immunity is clearly articulated between the project sponsor and host community.

ENDNOTES:

¹U.S. CONST., art. VI, cl. 2.

²See e.g., *Mayo v. U.S.*, 319 U.S. 441, 63 S. Ct. 1137, 87 L. Ed. 1504, 147 A.L.R. 761 (1943); *Middletown Tp. v. N/E Regional Office, U.S. Postal Service*, 601 F. Supp. 125, 127 (D.N.J. 1985) (“unless Congress clearly and affirmatively declares that federal instrumentalities shall be subject to state [or local] regulation, the federal function must be left free of such regulation.”).

³2 PATRICIA E. SALKIN, NEW YORK ZONING LAW AND PRACTICE § 11:07.

⁴*U.S. Postal Service v. Town of Greenwich, Conn.*, 901 F. Supp. 500, 505 (D. Conn. 1995).

⁵39 U.S.C.A. § 403(b)(3).

⁶See *Stewart v. U.S. Postal Service*, 508 F. Supp. 112, 115 (N.D. Cal. 1980) (Postal Service not required to comply with local zoning ordinances); *Greenwich*, supra at 505 (town could not impose State building code or building permit fee schedule on construction of new post office); *United States Postal Serv. v. Hollywood*, 974 F.Supp. 1459, 1465 (S.D.Fla. 1997) (city’s building permit requirement preempted in regard to post office); *Breeze v. Town of Bethlehem*, 151 Misc. 2d 230, 573 N.Y.S.2d 122, 124 (Sup 1991) (post office not subject to State or local zoning and land use regulations).

⁷Salkin, supra note iv, at § 11:07.

⁸1969 Ops. St. Compt. 69-917; See generally *Human Resource Research and Management Group, Inc. v. County of Suffolk*, 687 F. Supp. 2d 237, 253 (E.D. N.Y. 2010) (quoting *Bryant Woods Inn, Inc. v. Howard County, Md.*, 911 F. Supp. 918, 946, 14 A.D.D. 1039 (D. Md. 1996), judgment aff’d, 124 F.3d 597 (4th Cir. 1997) (“The [Fair Housing] Act prohibits local governments from applying land use regulations in a manner that will exclude people with disabilities entirely from zoning neighborhoods, particularly residential neighborhoods, or that will give disabled people less opportunity to live in certain neighborhoods than people without disabilities”).

⁹Salkin, supra note iv, at § 11:06.

¹⁰Id. (citing *Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park*, 198 Misc. 932, 102 N.Y.S.2d 81 (Sup 1950), order aff’d, 278 A.D. 706, 103 N.Y.S.2d 831 (2d Dep’t 1951)).

¹¹Id. (citing *Western Regional Off-Track Betting Corp.*

v. Town of Henrietta, 78 Misc. 2d 169, 355 N.Y.S.2d 738 (Sup 1974), judgment aff'd, 46 A.D.2d 1010, 363 N.Y.S.2d 320 (4th Dep't 1974)).

¹²Id. (citing *Town of Brookhaven v. Parr Co. of Suffolk, Inc.*, 76 Misc. 2d 378, 350 N.Y.S.2d 529 (Sup 1973), order modified, 47 A.D.2d 554, 363 N.Y.S.2d 640 (2d Dep't 1975)).

¹³Id. (citing *Town of Greece v. Urban Development Corp.-Greater Rochester, Inc.*, 79 Misc. 2d 375, 360 N.Y.S.2d 171 (Sup 1974)).

¹⁴Id. (citing 1964 Ops. St. Compt. 64-555).

¹⁵Id. (citing *City of Rochester v. Town of Rush*, 67 Misc. 2d 328, 324 N.Y.S.2d 201 (Sup 1971), order aff'd, 37 A.D.2d 795, 324 N.Y.S.2d 888 (4th Dep't 1971)).

¹⁶*Jewish Bd. of Family and Children's Services, Inc., v. Zoning Bd. of Appeals of Town of Mount Pleasant*, 79 A.D.2d 657, 658, 433 N.Y.S.2d 840 (2d Dep't 1980) (citing *Board of Coop. Educational Services of Nassau County v. Gaynor*, 33 A.D.2d 701, 306 N.Y.S.2d 216 (2d Dep't 1969); *Board of Ed. of City of Buffalo v. City of Buffalo*, 32 A.D.2d 98, 302 N.Y.S.2d 71 (4th Dep't 1969); *Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park*, 279 A.D. 618, 107 N.Y.S.2d 858 (2d Dep't 1951); *Town of Onondaga v. Central School Dist. No. 1 of Towns of Onondaga*, 56 Misc. 2d 26, 287 N.Y.S.2d 581 (Sup 1968).

¹⁷N.Y. CONST., art. XI; art. IX, § 2; *Town of Onondaga v. Central School Dist. No. 1 of Towns of Onondaga*, 56 Misc. 2d 26, 27-28, 287 N.Y.S.2d 581 (Sup 1968); see also *Board of Education of Union Free School Dist. No. 1 of Towns of Bethlehem, Coeymans and New Scotland v. Wilson*, 303 N.Y. 107, 114-15, 100 N.E.2d 159 (1951).

¹⁸See generally *Concordia Collegiate Institute v. Miller*, 301 N.Y. 189, 196, 93 N.E.2d 632, 636, 21 A.L.R.2d 544 (1950); *Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park*, 279 A.D. 618, 107 N.Y.S.2d 858 (2d Dep't 1951); *Town of Onondaga*, 56 Misc.2d at 28.

¹⁹*Cornell University v. Bagnardi*, 107 A.D.2d 398, 401, 486 N.Y.S.2d 964, 24 Ed. Law Rep. 396 (3d Dep't 1985), order modified, 68 N.Y.2d 583, 510 N.Y.S.2d 861, 503 N.E.2d 509, 37 Ed. Law Rep. 292 (1986); *Town of Onondaga*, 56 Misc.2d at 28; See also various state departments' opinions which completely exempt school districts from compliance with local building and zoning regulations (1 Education Department Reports 772; 59 State Department Reports 105; 7 Opinions of the State Comptroller 341; 8 Opinions of the State Comptroller 285 (concluding "School districts are not subject to town zoning provisions regulating setback[s]. . .").

²⁰N.Y. PUB. SERV. LAW § 160(2).

²¹*In re City of New York*, 10 Misc. 3d 1060(A), 809 N.Y.S.2d 480 (Sup 2005) (quoting *Consolidated Edison Co. of New York, Inc. v. Town of Red Hook*, 60 N.Y.2d 99, 103, 468 N.Y.S.2d 596, 456 N.E.2d 487 (1983).

²²Op. Gen. Counsel, N.Y. Dept. of State, Legal Memorandum LU16.

²³Id.

²⁴Id.; See *People v. Town of Clarkstown*, 160 A.D.2d 17, 559 N.Y.S.2d 736 (2d Dep't 1990).

²⁵Op. Gen. Counsel, N.Y. Dept. of State, Legal Memorandum LU16.

²⁶Chapters 174 and 175 of the Laws of 2013.

²⁷N.Y. Gaming Facility Location Board, Request For Applications To Develop and Operate a Gaming Facility in New York State, Round 1—Questions and Answers (April 23, 2014) at 53-56.

²⁸*Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996).

²⁹Id.

³⁰N.Y. ENVTL. CONSERV. LAW § 23-0303(2).

³²*Wallach v. Town of Dryden*, 23 N.Y.3d 728, 747, 992 N.Y.S.2d 710, 16 N.E.3d 1188 (2014).

³³*Gernatt*, 87 N.Y.2d at 684.

³³*Matter of City of Rochester*, 72 N.Y.2d 338, 343, 533 N.Y.S.2d 702, 530 N.E.2d 202 (1988).

³⁴Id.

³⁵Id.

³⁶*Westhab, Inc. v. Village of Elmsford*, 151 Misc. 2d 1071, 1074, 574 N.Y.S.2d 888 (Sup 1991).

³⁷*Nanuet Fire Engine Co. No. 1, Inc. v. Amster*, 177 Misc. 2d 296, 676 N.Y.S.2d 890 (Sup 1998).

³⁸Op. Gen. Counsel, N.Y. Dept. of State, Legal Memorandum LU07.

⁴⁰*Nanuet Fire Engine Co. No. 1*, 177 Misc.2d at 298 (quoting *Knapp v. Union Vale Fire Co., Inc.*, 141 A.D.2d 509, 529 N.Y.S.2d 132 (2d Dep't 1988).

⁴⁰Id.

⁴¹Op. Gen. Counsel, N.Y. Dept. of State, Legal Memorandum LU07.

⁴²Id.

⁴³Id.

⁴⁴*Volunteer Fire Ass'n of Tappan, Inc. v. Town of Orangetown*, 54 A.D.3d 850, 851, 863 N.Y.S.2d 502 (2d Dep't 2008) ("Unlike the encroaching governmental unit in *Matter of County of Monroe*, the plaintiff in this case does not have its own land use approval process with public hearings and a comment period, and if the project were not subjected to site plan review by the Planning Board, there would be no equivalent review by any other entity"); *Board of Fire Com'rs of Tappan Fire Dist. v. Planning Bd. of Town of Orangetown*, 253 A.D.2d 875, 678 N.Y.S.2d 508 (2d Dep't 1998).

⁴⁵*Cellular Telephone Co. v. Rosenberg*, 82 N.Y.2d 364, 604 N.Y.S.2d 895, 624 N.E.2d 990 (1993).

⁴⁶*Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9 (1st Cir. 1999); *AT & T Wireless Services of Florida, Inc. v. Orange County*, 982 F. Supp. 856 (M.D. Fla. 1997); *AT & T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 979 F. Supp. 416

(E.D. Va. 1997), aff'd in part, rev'd in part, 155 F.3d 423 (4th Cir. 1998) (rejected by, *PrimeCo Personal Communications, L.P. v. Village of Fox Lake*, 26 F. Supp. 2d 1052 (N.D. Ill. 1998)).

⁴⁷*Kastan v. Town of Gardiner Town Bd.*, 25 Misc. 3d 1225(A), 906 N.Y.S.2d 773 (Sup 2009).

⁴⁸*Crown Communication New York, Inc. v. Department of Transp. of State*, 4 N.Y.3d 159, 169, 791 N.Y.S.2d 494, 824 N.E.2d 934 (2005) (holding that the public safety interest, including the improved availability of 911 emergency calls and the availability of co-location offered to local public safety officers, justified the exemptions of the wireless providers from local zoning regulations when such facilities were located on state land).

⁴⁹*King v. County of Saratoga Indus. Development Agency*, 208 A.D.2d 194, 200, 622 N.Y.S.2d 339 (3d Dep't 1995) (holding that the inherent benefits in the development of a landfill was necessary to the economic well-being of the area, the project was observant of all relevant State statutes and regulations, and outweighed the interest of the Town in the banning such project from its precincts).

⁵⁰*Matter of City of Rochester*, 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202 (1988).

⁵¹*County of Herkimer v. Village of Herkimer*, 109 A.D.3d 1166, 971 N.Y.S.2d 764 (4th Dep't 2013) (holding there was not enough information on the record to appropriately make a determination of whether a county correctional facility was immune from local zoning and remanding the matter to the lower court for a determination); *City of Ithaca v. Tompkins County Bd. of Representatives*, 164 A.D.2d 726, 565 N.Y.S.2d 309 (3d Dep't 1991); *Nanuet Fire Engine Co. No. 1*, 177 Misc.2d at 296.

⁵²*City of Ithaca*, 164 A.D.2d at 726.

⁵³*Id.* at 730.

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶See *County of Herkimer v. Village of Herkimer*, 109 A.D.3d 1166, 971 N.Y.S.2d 764 (4th Dep't 2013); See also *Town Bd. v. Garvey*, 34 Misc. 3d 1203(A), 946 N.Y.S.2d 69 (Sup. Ct. 2011).

⁵⁷Compare, e.g., *Town of Lenox Zoning Code* § 134-7 (“ . . . Municipal facilities deemed necessary and appropriate by the Town Board are hereby exempted from such area and bulk requirements”) with *Town of Woodstock Zoning Code*, § 260-74(c) (“Excluded from site plan review are Town of Woodstock municipal uses, provided that:

(1) The function and intensity of the proposed use is comparable to similar uses permitted in the district;

(2) The proposed structure or land use complies with the applicable provisions of Article IV, Area and Bulk Regulations, and Article V, Supplemental Regulations, contained in this chapter;

(3) No reasonable alternative location is available in a less-restrictive zoning district and in which the municipality has a legal or equitable interest;

(4) The proposed use serves a legitimate government interest;

(5) An alternative method for the public and interested parties to be heard is available and has been provided.”)

⁵⁸See *Mirabile v. City of Saratoga Springs*, 67 A.D.3d 1178, 888 N.Y.S.2d 325, 250 Ed. Law Rep. 736 (3d Dep't 2009) (holding that the City constitutes a political subdivision of the State and is therefore exempt from the requirements of its own zoning where the City's zoning ordinance provides in relevant part that ZBA approval is not required by any action “proposed by any agency, department, branch or division of New York State”).

CASE SUMMARIES

Eastern District of New York Finds Members of a Planning Board Entitled to Qualified Immunity

The Plaintiff, 545 Halsey Lane Properties, LLC commenced this action pursuant to 42 U.S.C.A. § 1983 against the Defendants Town of Southampton, Town of Southampton Planning Board, and the members of the Planning Board in their individual capacities. The Plaintiff challenged two decisions by the Planning Board involving conditional approvals of the Plaintiff's applications for a building permit for the construction of a barn and/or barns on its property. The Plaintiff also commenced two related state court proceedings pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) to challenge the decisions of the Planning Board as affected by errors of law, arbitrary and capricious decisions, abuses of discretion, and decisions not supported by a rational basis. On August 19, 2014, the Court denied the Defendants' motion to dismiss the complaint for lack of subject matter jurisdiction; failure to state a claim upon which relief can be granted, and, as to the individual defendants, on the basis of qualified immunity. On September 16, 2014, the Court dismissed the Plaintiff's substantive due process claim and dismissed the Plaintiff's breach of contract claim, declining to exercise supplemental jurisdiction over it. The Plaintiff appealed that order to the Second Circuit, while the Defendant made a motion of reconsideration of the August 19, 2014 order.

In this case, the Defendants sought dismissal of the complaint as against the individual defendants on the basis of qualified immunity on the basis that the individual defendants were performing a “discretionary function.” Thus, the question of whether the individual defendants are entitled to qualified immunity may be decided as a matter of law and the undisputed facts. For this reason, the court erred, at the motion to dismiss stage, in declining to decide the issue of qualified immunity. Accordingly, the Court held it would entertain a motion for partial reconsideration of that part of the August 19, 2014 Order denying the Defendants' motion

to dismiss the complaint as against the individual defendants on the basis of qualified immunity, on the condition that the Defendants withdraw their notice of appeal without prejudice within 14 days of the date of this order.

The court rejected the Defendants' ripeness argument, finding that the Resolutions issued by the Planning Board, which was not appealable to the Town's Zoning Board of Appeals, constituted "final, definitive positions as to how it could use its property," sufficient to establish the ripeness of its Equal Protection claim. As to the qualified immunity claim, the court found the members of the Planning Board could not be deemed to have violated "clearly established law" under the Town Code. Furthermore, even if they could be deemed to have violated "clearly established law," the Court determined that their actions were objectively reasonable under the circumstances. Thus the Court granted in part and denied in part the Defendants' motion for reconsideration of the August 19, 2014 order.

545 Halsey Lane Properties, LLC v. Town of Southampton, 2015 WL 1565487 (E.D. N.Y. 2015).

Eastern District in NY Dismisses Treatment Center Fair Housing Act and Americans with Disabilities Act Claims as Unripe

Plaintiff Safe Harbor Retreat, LLC proposed an "executive retreat" for persons suffering from alcoholism and other forms of substance abuse. Senior Building Inspector Thomas Preiato determined that Safe Harbor met the criteria of "functioning as a family unit" pursuant to sections 255-1-20 (Family) and 255-8-50 (Occupancy by a family). As a result of BI Preiato's determination, Safe Harbor claims to have expended significant funds and effort to establish the Premises as a community residence. BI Preiato then reversed his position to Safe Harbor, informing Safe Harbor that it was operating an unauthorized "Semi-Public Facility, in a residential district," and that, pursuant to Town Code, a "Special Permit" is required. Rather than seek a special permit from the Town's Planning Board, Safe Harbor instead filed an "Application" to the Town's ZBA to "appeal" BI Preiato's determination, claiming that its residents continue to be treated as the functional equivalent of a family, apparently to relieve it from special permit and variance requirements of the Town Code.

According to the Town, Safe Harbor was required to obtain a "final decision" from the Town on its request to operate at the Premises, but failed to do so because it never applied for a special permit from the Town. The federal

district court therefore found that because of Safe Harbor's failure to seek a special permit, the Town has not rendered a final decision regarding Safe Harbor's use of its Premises; nor has the Town had the opportunity to make an accommodation through the Town's "established procedures used to adjust the neutral policy in question," namely, special permit and variance procedures. Accordingly, the Court found that this action was not ripe, and dismissed it without prejudice.

Safe Harbor Retreat, LLC v. Town of East Hampton, N.Y., 2015 WL 918771 (E.D. N.Y. 2015).

Eastern District of New York Dismisses Mobil Home Park Residents' Fair Housing and Equal Protection Claims over Rezoning

Frontier, a private developer, filed an application with the Town to rezone the Property from a mobile home park to a five hundred (500) residential unit with one (1) and two (2) bedroom apartments and up to forty-five thousand (45,000) square feet of retail space. On December 29, 2011, the Town Board of the Town of Babylon granted Frontier's application to change the zoning from E Business and B Residence to Multiple Residence use, subject to various conditions and covenants under Resolution 743. By Resolution Number 551, the Town Board of the Town of Babylon adopted the relocation plan ("Plan") for mobile homes and households on the Property, subject to the approval of the Town Attorney. The Plan provides for a maximum of twenty-thousand dollars (\$20,000) per household in relocation assistance, limited to residents in a household who: (1) actually occupy a unit; (2) are in good standing; (3) submit, to the Independent Relocation Consultant, the name and contact information of the resident who will receive the relocation assistance on behalf of the household; and (4) vacate the premises within ninety (90) days of receiving a notice to vacate. The complaint alleges that defendants violated: (1) the Fair Housing Act, 42 U.S.C.A. § 3601 et seq.; (2) 42 U.S.C.A. § 1981; (3) 42 U.S.C.A. § 1982; (4) 42 U.S.C.A. § 1983 and the Equal Protection Clause of the Fourteenth Amendment; and (5) 42 U.S.C.A. § 3608 and its "affirmatively furthering" obligations.

Frontier contended that this case should be dismissed for lack of subject matter jurisdiction because plaintiffs' claims were based upon the incorrect premise that the relocation plan required Frontier Park residents to sign a release giving up their "rights" to the one-hundred (100) affordable/workforce units. The complaint, however, contained no allegations that any plaintiffs executed the documents associ-

ated with the Relocation Plan, nor did it allege that plaintiffs applied for the affordable/workforce housing units which were denied based upon their agreement to the Plan. The court found that plaintiffs could not plausibly allege that execution of the Plan documents foreclosed any “right” to the affordable housing because the Plan contains no such provision; nor could plaintiffs allege that they applied for and were denied affordable/workforce housing as a consequence of agreeing to the Plan’s terms.

The court held that the complaint contained allegations wholly unsupported by the public record and by the documents upon which it is based and which have been included in, or affirmatively omitted from, its exhibits. The court found that the improper conduct was willful as Resolution 494 did not nullify Resolution 743 and none of the documents attached to plaintiffs’ complaint confer any rights to the affordable/workplace housing, or foreclose plaintiffs from applying for such housing, as a consequence of agreeing to the Plan. Accordingly, Frontier’s motion to dismiss for lack of subject matter jurisdiction was granted, plaintiffs’ complaint was dismissed with prejudice, and Frontier’s motion for Rule 11 sanctions was granted.

Amityville Mobile Home Civic Ass’n v. Town of Babylon, 2015 WL 1412655 (E.D. N.Y. 2015).

Southern District in New York Denies Motion to Dismiss Retaliation Claim Against Town Based on Evidence Plaintiff was Singled Out and Being Suffocated with Red Tape, but Dismisses Other Claims

Steven Sherman, a real estate developer, initially filed this suit on January 12, 2012, in the Supreme Court for Orange County, New York, alleging that for over the previous decade, the Town wrongfully obstructed his efforts to develop MareBrook, a 398 acre parcel of land he purchased in 2001. Plaintiff claimed that by implementing a series of amendments to the local zoning laws that specifically targeted his project, and otherwise engaging in conduct that frustrated his ability to even begin development, the Town violated his rights to freedom of religion, freedom to petition, substantive due process, procedural due process, equal protection, and his right not to have his property taken without just compensation under the federal and New York state constitutions. Pending before the Court in this case

was the Town’s renewed motion to dismiss following the Second Circuit’s reversal of this Court’s determination that Sherman’s federal takings claim was unripe.

As a preliminary matter, the Court noted that Sherman incorrectly relied on the Second Circuit’s conclusion that his takings claim constitutes a continuing violation. Under the continuing violation doctrine, where a plaintiff can demonstrate an ongoing or continuing violation of his federally protected rights, the plaintiff is entitled to bring suit challenging all conduct that was part of the violation, even conduct that occurred outside the limitations period. Under federal law, a claim arising under § 1983 accrues when the plaintiff knows or has reason to know of the injury which is the basis of his action. The court found that in order for Sherman to be entitled to the benefit of the tolling provision of § 1367(d), Sherman I must have been dismissed pursuant to § 1367(c). Since there was no dispute that Sherman I was voluntarily dismissed pursuant to Fed.R.Civ.P. 41(a)(1)(A)(i), a circumstance not contemplated by § 1367(c), Sherman’s federal constitutional claims must have accrued on or after January 12, 2009.

As to the retaliation claim, the Circuit Court’s opinion that the Town “singled out Sherman’s development, suffocating him with red tape” over the course of a decade to “make sure he could never succeed in developing MareBrook,” was sufficient to show that the defendants’ conduct was motivated by or substantially caused by [the plaintiff’s] exercise of speech. Evidence that Village repeatedly refused the plaintiffs’ requests to enforce zoning codes and ordinances over a nine-year period was sufficient to constitute a continuing violation. Conversely, Sherman’s due process claims did not constitute a continuing violation because they were based on discrete acts by the Town that were readily discerned by Sherman at the time the acts were taken. Finally, because Sherman’s complaints concerned the exercise of discretionary acts, the Town was entitled to immunity from his state law claims. Therefore, Defendants’ motion to dismiss was granted in part and denied in part.

Sherman v. Town of Chester, 2015 WL 1473430 (S.D. N.Y. 2015).

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