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New York Law Journal

ZONING AND LAND USE PLANNING

Court Expands 'Monroe' Test For Zoning Immunity

By John C. Armentano
January 24, 2024

The demand for mobile devices and our increasing reliance on them in our everyday lives has brought with it the proliferation of "cell phone towers." What were at one time novel structures have now blended into the landscape. They hide in plain sight on top of light poles and buildings, and alongside highways, providing connectivity for arguably the most important technological invention in the last 40 years. Yet, they continue to face opposition by many local regulatory boards.

Last fall, New York's Second Department issued a decision regarding the application of the *Monroe* balancing of public interests test to a proposed cell tower project situated on public parkland. In *Matter of Town of Beekman v. Town Board of the Town of Union Vale*, 219 A.D.3d 1430, the court held that the Town of Union Vale's lease to a private company of parkland located in the Town of Beekman for the construction of a cell tower was immune from Beekman's zoning regulations.

Much like the cell tower at the center of its controversy, *Beekman* is hiding in plain sight as more than an appellate decision about the location of a single tower. It is, in fact, one of a growing number of appellate decisions that may serve to provide private projects in New York with the same zoning immunity afforded to municipalities under the *Monroe* balancing test.

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Precedent

Before discussing *Beekman*, it is important to understand the seminal case decided 36 years ago, *Matter of County of Monroe (City of Rochester)*, 72 N.Y.2d 338 (1988), in which the New York Court of Appeals considered whether property owned by a municipal government but physically located in another municipality should be subject to the "host" municipality's land use and zoning laws.

In *Monroe*, the County of Monroe sought to expand the Greater Rochester International Airport. Monroe County owned the airport, but it was located both in the county and, concentrically, within the boundaries of two separate townships

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and the City of Rochester. Monroe County argued that the planned expanded uses were governmental in nature and, therefore, immune from the land use regulations of the City of Rochester. The county claimed its prior practice of submitting expansion plans to the city was a courtesy rather than acquiescence to the city's zoning review.

Prior to *Monroe*, municipalities were considered exempt from zoning laws when carrying out governmental functions, but not when engaged in corporate or proprietary functions, such as the operation of an asphalt plant. New York courts, such as the Appellate Division earlier in the *Monroe* litigation, applied the "governmental-proprietary" function test to determine whether a municipality's project was exempt from zoning restrictions. The Appellate Division determined that operating the airport was a governmental function, and that the New York State legislation that authorized Monroe County to operate and maintain the airport freed it from Rochester's zoning requirements.

'Beekman' and several other fairly recent decisions suggest that municipalities' zoning immunity may extend to other private uses of public land, so long as the private use produces a valuable public benefit.

In affirming the Appellate Division's decision, the Court of Appeals retired the "governmental-proprietary" function test in favor of a new multi-factor test that involved the balancing of public interests to determine which governmental interest should prevail in a conflict between the zoning ordinances of one municipality and the statutory authority of another.

The new test first considered whether there was a legislative intent to subject the encroaching municipal entity to the zoning requirements of the host municipality. Next, courts were to consider nine factors:

- The nature and scope of the instrumentality seeking immunity;
- The kind of function or land use involved;
- The extent of the public interest being served by the proposed land use;
- The effect of the local land use laws on the enterprise seeking the proposed land use;
- The impact of the proposed land use on legitimate local interests;
- The encroaching municipality's legislative grant of authority;
- Alternative locations for the proposed land use in less restrictive zoning areas;
- Alternative methods for providing the governmental service; and
- Intergovernmental participation in the development process and whether the host municipality had an opportunity to be heard.

Under the new test, an encroaching municipality had to show that, on the balance of the factors, the proposed land use in another municipality benefited the public. Although no one factor was controlling, based on the facts of a case, one factor could overshadow the others. As a result, beneficial land uses could enjoy limited immunity from some or all local land use regulations. Although municipal agencies are still presumed to remain subject to their own zoning laws when developing municipal-owned property within their own boundaries, they may also consider employing the immunity balancing test of *Monroe* when they do so.

'Monroe' Applied to Cell Phone Tower On Public Land

Recently, in *Matter of the Town of Beekman*, the Appellate Division applied the *Monroe* balancing test to a situation different than the one the *Monroe* Court faced.

In *Beekman*, the Town of Union Vale approved an option and ground lease agreement with Homeland Towers, LLC, to construct and operate a 15-story telecommunications tower and related equipment on parkland owned by Union Vale that was within the boundaries of the Town of Beekman. After conducting its own *Monroe* analysis through several public hearings, Union Vale determined that the project was exempt from Beekman's local zoning laws and approved the project.

Beekman filed suit seeking to invalidate Union Vale's project approval, arguing that the project was not exempt from Beekman's local land use laws. The Supreme Court, Dutchess County dismissed the petition based on its analysis of the *Monroe* factors, and Beekman appealed.

The Appellate Division affirmed the dismissal of Beekman's petition, finding that the Supreme Court properly balanced the *Monroe* factors and determined that they weigh in favor of exempting the project from Beekman's zoning laws. Specifically, the Appellate Division upheld Union Vale's determination that installing the telecommunications tower would serve the public interest by eliminating a gap in cellular coverage and providing cell phone service to emergency services, including 911, at no rental charge. Notably, the Appellate Division ruled that public purposes of the project were not undermined because Homeland Towers, LLC's private interests would also benefit from building and operating the tower.

One Small Step for Cell Phone Towers, One Giant Leap for Other Private Land Uses?

With the caveat that the New York Court of Appeals still may have the final say on this conflict between Union Vale and Beekman, the Appellate Division's decision in *Beekman* could change municipalities' willingness to challenge neighboring municipalities' zoning regulations that appear to prevent new projects by private companies, and increase their rate of success when doing so.

For the past three and a half decades, New York courts have applied the *Monroe* factors to traditional municipal facilities and services, such as police stations, firehouses, and public libraries. But *Beekman* and several other fairly recent decisions suggest that municipalities' zoning immunity may extend to other private uses of public land, so long as the private use produces a valuable public benefit. In the short-term, cell tower operators across the state may increasingly attempt to avoid the restrictions of local zoning laws, such as height restrictions or setback requirements, by constructing towers on municipal-owned land and pointing to the public benefits their towers bring, such as increased cell phone reception and aiding emergency services.

But in the long-term, other private and non-governmental entities might use *Beekman* to immunize their projects on a municipality's land if they can point to a public benefit and satisfy the *Monroe* factors. It is easy to imagine private or non-governmental entities like waste removal, renewable energy, recycling companies, or other facilities agreeing with municipalities to build facilities on municipal land.

Interestingly, municipalities could use *Monroe* and *Beekman* for new projects that have public benefits but that neighbors oppose. Green energy projects, rehabilitation facilities, and even low-income housing are examples of such projects. However, if these projects successfully avoid municipalities' zoning requirements, they could further boost criticism of *Monroe*, which some zoning proponents believe opened the door to private parties usurping zoning laws and disrupting orderly land development.