New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 257—NO. 16
WEDNESDAY, JANUARY 25, 2017

ZONING AND LAND USE PLANNING

Can Zoning Stop Property Owners from Renting?

By **Anthony S. Guardino**

Many local governments (and residents) prefer property owners living in their communities rather than tenants. This is not a new concern. Disputes between municipal officials and renters, whether for the short-term or over a more extended period, have long preceded the recent public battles over Airbnb and other online marketplaces and homestay networks. In many cases, courts have resolved the issues in important rulings.

This column explores a number of the significant New York court decisions that help to establish a framework for analyzing the validity of zoning restrictions and the conditions imposed by local governments on permits and variances when rental units are involved.

Waterfront Development

Consider the decisions by the Appellate Division, Second Department, in *Blue Island Dev. v. Town of Hempstead*, 131 A.D.3d 497 (2d Dept. 2015), and *Blue Island Dev. v. Town of Hempstead*, 143 A.D.3d 656 (2d Dept. 2016).

The underlying dispute arose when Blue Island Development and Posillico Development Company at Harbor Island, purchased land in the town of Hempstead on Long Island that formerly had been used as an oil storage facility. The developers intended to remediate the environmental contamination and develop the property into 172 waterfront condominium units.

> Disputes between municipal officials and renters have long preceded the recent public battles over Airbnb and other online marketplaces and homestay networks.

The town approved their request for a change in the property's zoning but imposed a restrictive covenant on the property that required, among other things, that the developers sell all of the units in the proposed development as condominiums. The covenant permitted any subsequent owners of the units to lease the units to the extent otherwise permissible under town law.

On the request of the developers, the town subsequently modified the restriction to permit them to lease up to 17 of the 172 units for five years after the issuance of the certificate of occupancy or until the delivery of title to the 155th unit, whichever occurred first. The town, however, denied the developers' later request to further modify the restriction to permit them to sell 32 units and maintain the remaining 140 units as rentals.

The developers then sued the town, challenging the validity of the town's restriction on their renting the units.

In its 2015 decision, the Second Department explained that the power to zone was "not a general police power, but a power to regulate land use." It cited the "fundamental

ANTHONY S. GUARDINO *is a partner with Farrell Fritz in the firm's Hauppauge office.*

rule" that zoning essentially deals "with land use and not with the person who owns or occupies it."

It then found that the developers had sufficiently alleged that the restrictive covenant was improper because it regulated their "ability as the owner of the property to rent the units rather than the use of the land itself." In the view of the court, particularly in light of the provision in the restrictive covenant permitting future owners to lease units in the development, the covenant had "no substantial relation to…the public health, safety, morals or general welfare" and the Supreme Court, Nassau County, had properly declined to dismiss the developers' cause of action seeking to declare the covenant invalid.

The Second Department's 2016 decision easily followed from its 2015 ruling. In 2016, it agreed with the developers that the restrictive covenant was unenforceable because it was of "no actual and substantial benefit" to the town.

The key lesson that can be taken from the *Blue Island* cases is that a restrictive covenant imposed as part of a zoning change limiting the ability of a developer to rent units in a multi-family development is unenforceable. This does not mean, however, that all rent-versus-own limitations are invalid.

Accessory Apartments

Nearly 30 years ago, in 1988, the Second Department decided *Kasper v. Town of Brookhaven*, 142 A.D.2d 213 (2d Dept. 1988).

This case involved a challenge to a local law adopted in the Long Island town of Brookhaven providing for the issuance of a limited number of permits allowing the creation and maintenance of accessory rental apartments within owner-occupied single-family homes.

> On the one hand, zoning deals with the use of land, and where multi-family housing is the "use," it should not matter whether occupants own their property and make a monthly mortgage payment to their bank or lease it and make monthly rent payments to their landlord. On the other hand, communities have a strong interest in preserving the quality of life in their residential neighborhoods by encouraging owners to occupy their homes.

A property owner who did not live in the home he owned asserted that the law drew an irrational distinction between owners who occupied their homes and those who did not, and that it impermissibly regulated the users of the property rather than the use of property.

The Second Department was not persuaded.

It first found that the distinction had been adopted by the town for a "legitimate governmental purpose"—to aid occupying homeowners in retaining and maintaining their properties while answering the need for affordable rental accommodations without disturbing the single-family-residence character of the affected districts—and that it was "reasonably related to some manifest evil." The Second Department ruled that there was nothing improper in the town's goal of alleviating the growing shortage of affordable housing within the town while at the same time providing financial relief to those homeowners who might be of modest means and who would be better able to retain ownership of their residences and to maintain them in aesthetically acceptable condition by leasing the available, unused living space in their homes.

The Second Department next rejected the plaintiff's argument that the town's law impermissibly regulated the users of property rather than its use given that it required that homeowners occupy their homes to obtain the permit. After observing that, "as a practical matter, many zoning laws extend beyond the mere regulation of property to affect the owners and users thereof," the court explained that an accessory-use zoning provision such as Brookhaven had adopted "by its very nature" ordinarily attached "to the occupancy of the premises

rather than to the mere ownership thereof," so that the property owner "typically must occupy the premises in order to take advantage of the benefits offered by accessory-use legislation."

Use Variance

Two years later, the Second Department issued its decision in *Matter of Finger v. Levenson*, 163 A.D.2d 477 (2d Dept. 1990), upholding an owner-occupy restriction in connection with a town's issuance of a use variance.

Here, the upstate town of Putnam Valley granted a property owner a use variance to use his property as two dwelling units and a store selling antiques so long as the antiques store occupied no more than 25 percent of the total floor space of the dwelling and he resided in one of the units.

The Second Department noted that the property was in an area zoned for single-family dwellings. It then concluded that the conditions were "reasonably related" to the purposes underlying the town's zoning code, and were valid.

Special Use Permits

Then, in 2004, the Appellate Division, Third Department, decided *Spilka v. Town of Inlet,* 8 A.D.3d 812 (3d Dept. 2004).

The owner of a one-family dwelling located in a residential neighborhood of the upstate town of Inlet alleged that the property was his primary residence but that he rented it out on a short-term basis for approximately three months per year. He challenged an amendment to the town's zoning ordinance requiring special use permits for the rental of non-owner-occupied dwellings for periods of less than four months.

The Third Department upheld the ordinance, finding that it was not "arbitrary, capricious or illegal." It noted that the town had identified many "legitimate governmental purposes" for the ordinance's enactment, including preserving aesthetic integrity in residential neighborhoods, encouraging residential property maintenance, prevention of neighborhood blight, protecting residential property values, permitting efficient use of the town's dwellings to provide economic support to residents, and enhancing the quality of life in residential neighborhoods.

In the Third Department's view, placing restrictions on absentee landlords was "reasonably related to achieving these goals" and did not improperly distinguish between homeowners who occupied their premises and those who did not.

Conclusion

The court decisions discussed in this column all explore whether municipalities can use zoning to limit renters in their communities. On the one hand, zoning deals with the use of land, and where multi-family housing is the "use," it should not matter whether occupants own their property and make a monthly mortgage payment to their bank or lease it and make monthly rent payments to their landlord. Thus, where an ordinance or regulation seeks to prohibit renters in a multi-family development, as in the *Blue Island* cases, it will not be upheld.

On the other hand, communities have a strong interest—a legitimate governmental purpose—in preserving the quality of life in their residential neighborhoods by encouraging owners to occupy their homes. Thus, with respect to single-family neighborhoods, courts historically have been more tolerant of regulations that were reasonably aimed at achieving these goals by limiting renters and requiring or favoring owner-occupancy.