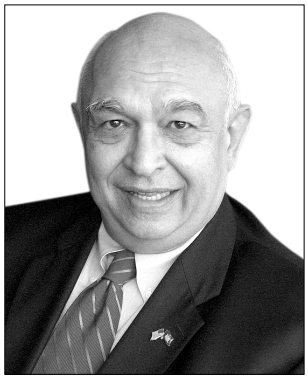
New York Law Journal
Real Estate Update
Wednesday, September 22, 2004

Owners Beware

High Court Is Reluctant to Restrain Local Officials

ZONING AND LAND USE PLANNING



JOHN M. ARMENTANO

NEARLY 80 years ago, in an extensive and thoughtful opinion, the U.S. Supreme Court for the first time affirmed the authority of a local municipality to enact a comprehensive zoning ordinance restructuring the use of property. The Court, in *Village of Euclid v. Ambler Realty Co.*,[1] acknowledged the concerns expressed by the landowner who had challenged the ordinance claiming that it had destroyed part of the value of his property, and it established a balancing test of sorts that could be used to weigh the enforceability of such zoning rules against constitutional challenges. The purpose was to create a standard to guide local government officials in exercising this power. The Court indicated that a reasonable ordinance which is substantially related to the public health, safety, morals or general welfare, and that is not "arbitrary," should be upheld.

In the years following *Euclid*, the New York Court of Appeals also sought to carefully balance the rights of property owners against the power of local governments to zone private property. For instance, the Court stated that a zoning ordinance must be "strictly construed" against government because it is "in derogation of common-law property rights."[2] Moreover, the Court made clear that any ambiguity in the language used in such a regulation "must be resolved in favor of the property owner."[3]

Those rulings and the standards they enunciated, however, almost seem quaint, and of historical interest only, given a host of more recent Court of Appeals opinions in zoning cases and in other disputes involving local governments. It is not a far stretch — if indeed it is a stretch at all — to say that local government, when pitted against property rights, now enjoys a very strong and favored position in the Court of Appeals.

John M. Armentano, *a partner with the Long Island law firm of Farrell Fritz, represents local governments and developers in zoning, land use and environmental matters, including litigation. He may be reached at jarmentano@farrellfritz.com.*

'Colella' and 'New York Telephone'

Colella v. Bd. of Assessors of the County of Nassau[4] arose when neighbors of the Yun Lin Temple in the Village of Old Westbury on Long Island brought an article 78 proceeding against the Nassau County Board of Assessors challenging the board's grant and renewal of a real property tax exemption with respect to the land and building owned and occupied by the temple. The petitioners alleged that they had been injured by being subject to higher real property taxes as a result of what they contended was the wrongfully granted exemption to the temple.

Supreme Court, Nassau County, dismissed the petition after finding that the petitioners lacked standing to challenge the assessor's granting of the exemption, and the Appellate Division, Second Department, reversed. The Court of Appeals reversed the Second Department's decision, finding that the "possible measurable financial damage" the petitioners apparently had demonstrated was not enough to confer standing. As a result of this ruling, no determination by a local tax assessor granting a tax exemption may be challenged. As a practical matter, the tax assessors' power is unchecked.

In another tax case emanating from Nassau County, the Court rendered a rather unusual opinion. In *New York Telephone Co. v. County of Nassau*,[5] a telephone company and two water companies contended that special ad valorem levies by the county on non-countywide special districts violated the Real Property Tax Law. They demanded tax refunds of the overpayments.

Nassau County Supreme Court granted the petitioners relief and referred the issue of damages to trial. On appeal, the Appellate Division, Second Department, held that, owing to the county's financial situation, the utilities were not entitled to county tax refunds, even though the Second Department conceded that the utilities had been improperly assessed a tax.

The Second Department pointed out that the record revealed that the payment of tax refunds would have "a significant financial impact" in many non-countywide special districts, "where taxes have been paid, tax liens matured, budgets adopted, and expenditures made, all in reliance on the ad valorem levies." Under these circumstances, it stated, courts should exercise restraint and not act so as to "cause disorder and confusion in public affairs even though there may be a strict legal right."

Remarkably, the Court of Appeals did not reinstate the trial court's decision. Instead, it stated that, in some circumstances, relief may be denied "based on the effect it would have on the municipality." The Court then noted

that the trial court had "declined to hear evidence of hardship" and held that the amount of refund to which the utilities were entitled — including consideration of any financial impact on the county of requiring payment — had to be determined at a hearing.

In summary, in *New York Telephone*, taxpayers paid real property taxes in excess of the amounts required, won their case, yet were denied full recovery of the excess payments because of the financial situation of the county, and in *Colella* the Court held that no one had standing to review the assessor's decision to grant an exemption. The Court went one step further in *Twin Lakes Development Corp. v. Town of Monroe*.[6]

'Twin Lakes'

In *Twin Lakes*, a real estate developer seeking approval from the Town of Monroe to subdivide property it owned into various residential lots paid $33,000 for "in lieu of parkland" fees and $22,000 in consulting costs to the town, all "under protest." The developer thereafter sought to obtain a refund of the fees, arguing that the provisions of the town code setting these fee requirements were unconstitutional.

The Court barred the developer from recovering these fees. By so doing, it severely undercut its own decision in *Video Aid Corp. v. Town of Wallkill*,[7] in which it stated, "payments under express protest is an indication that a tax is not paid voluntarily."

In slamming the door on the challenge to the fees in *Twin Lakes*, the Court, once again, sustained the government's actions in a case brought by a landowner.

'Bower' and 'Bonnie Briar'

The Court issued another disturbing ruling in *Bower Associates v. Town of Pleasant Valley*.[8] Here, it decided that "arbitrary and capricious" in the zoning context is not equivalent to "arbitrary and capricious" in a constitutional context.

The case arose after a town planning board denied a housing developer's application for a building permit and the developer brought an Article 78 proceeding. After the trial court ordered the permit to issue, ruling that the planning board's actions had been driven primarily by "community pressure" and was thus "arbitrary and capricious," the developer brought a civil rights action pursuant to 42 U.S.C. §1983 against the town. The developer argued, in effect, that victory in an article 78 proceeding — a finding that conduct was arbitrary, capricious and without rational basis, an abuse of discretion, or action beyond or outside a board's discretion — established a constitutionally protected property interest.

The Court disagreed, declaring only that "[t]he law is otherwise" and that, although the challenged conduct may have been arbitrary, capricious and without rational basis in an article 78 sense, it was not "constitutionally arbitrary." In other words, there is Article 78 "arbitrary" and there is constitutional "arbitrary."

Finally, in *Bonnie Briar Syndicate v. Town of Mamaroneck*,[9] the Court significantly expanded the definition of legitimate governmental purposes for which zoning will be sustained.

In this case, the town rezoned an entire golf course in Westchester County "for recreational use." The governmental interests the town was seeking to preserve were open space, recreational opportunities and mitigation of flooding of both coastal and flood plain areas. The Court stated that recreational use was a legitimate public purpose and that it was not going to attempt to second guess the decision of the legislative body in choosing between various ways to preserve the golf course.

The government, when pitted against property rights, enjoys a very strong and favored position in the Court of Appeals.

Bonnie Briar is particularly instructional in that the property owner that brought suit challenging this reclassification was met with the Court of Appeals' statement that it was "irrelevant" that the town had before it less restrictive options to choose from in reaching its ultimate goals. The Court held that "so long as the method and solution the Town eventually chose substantially advances the public interest, it is not this Court's place to substitute its own judgment for that of the Zoning Board."

This hands off approach by the Court has given encouragement to communities to impose something other than the least restrictive zoning to accomplish a public purpose. This of course is contrary to established law[10] and contrary to the predicate on which the Supreme Court decided *Euclid* in 1926.

These decisions do not stand alone. In another case, *Kim v. City of New York*,[11] the Court of Appeals rejected a compensation claim brought by property owners who alleged that New York City had physically invaded their property by placing side fill on the portion of their land abutting a roadway that had been below grade. The Court found that the plaintiffs had acquired their property with "constructive notice" that the property abutted a public road that was below the legal grade — but the notice to which the Court referred had been put in a map somewhere in the office of the Queens Borough President a decade before the plaintiffs purchased the property! It was not recorded anywhere. Compensation for the physical invasion was denied.

Conclusion

The conclusion to be drawn from these decisions is inescapable: The government, when pitted against property rights, enjoys a very strong and favored position in the Court of Appeals.

Fortunately for property owners, the playing field is somewhat more level in federal court where the burden of proof ("clear and convincing") is less than beyond a reasonable doubt required in state court and discovery is far more generous. Unfortunately, the Second Circuit, in the takings area, has established a nearly insurmountable hurdle in that a property right must be established before a taking will be found. However, in the area of equal protection of the laws, property owners may find some refuge in the U.S. Supreme Court decision in *Village of Willowbrook v. Olech*.[12]

1. 272 U.S. 365 (1926).
2. *Thomson Indus. v. Incorporated Village of Port Washington North*, 27 N.Y.2d 537 (1970).
3. *Allen v. Adami*, 39 N.Y.2d 275 (1976).
4. 95 N.Y.2d 401 (2000). The author and his firm represented the Incorporated Village of Old Westbury as amicus curiae in this case.
5. 1 N.Y.3d 485 (2004).
6. 1 N.Y.3d 98 (2003).
7. 85 N.Y.2d 663 (1995).
8. 2004 WL 1064237.
9. 94 N.Y.2d 96 (1999).
10. See, e.g., *Thomson Indus*, supra, *Allen*, supra.
11. 90 N.Y.2d 1 (1997).
12. 528 U. S. 562 (2000).