

Governmental Immunity

Courts Seek to Balance Restrictions, Policy Choices

BY ANTHONY S. GUARDINO

Land use disputes over rules relating to zoning and permitting most commonly arise between developers or other owners of private property and local municipalities. When a governmental entity itself seeks to erect a cell tower, firehouse or other facility, however, the question often becomes not how to comply with local zoning rules, but whether they even apply. In these instances, governments may claim that they are immune to the requirements that they otherwise would have had to meet.

Two decades ago, in *Matter of County of Monroe*,¹ the New York Court of Appeals set forth the standard to use to determine when one governmental unit must comply with another's zoning rules. The question in this case was whether the expansion, with accessory uses, of the Greater Rochester International Airport by Monroe County was subject to the site plan approval requirements of the city of Rochester. The Court ruled that it was not.

The airport was owned and operated by the county and was located substantially in Rochester. The county proposed and approved amendments to its master plan for the airport, including expansion of the main terminal, improvement of the runway apron, and addition of an enclosed parking garage, an air freight facility, a hotel and a temporary parking facility for use during construction of the enclosed parking facility. All improvements were on property located wholly within Rochester.

The county initially submitted a site plan application to Rochester for all of the planned improvements except the temporary parking



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facility, the air freight facility, and the runways. Rochester requested additional information concerning the improvements and compliance with the State Environmental Quality Review Act. The county responded that the planned uses (with the exception of the hotel, which was not in issue in this case) were immune from Rochester's site plan requirements, and that its prior practice of keeping Rochester apprised of airport proposals had been only a courtesy, not an acquiescence to Rochester review. The Appellate Division, Fourth Department, unanimously declared that the "Rochester City Code § 115-30 D(7) and City permit requirements do not apply to the expansion," and the dispute reached the Court of Appeals.

In its decision, the Court abandoned the traditional governmental-proprietary function standard that had been used to determine whether a municipality is immune from otherwise applicable zoning regulations and articulated a "balancing of public interests" test to be used in its place. The Court explained that this "balancing approach" subjected the encroaching governmental unit in the first instance, in the

absence of an expression of contrary legislative intent, to the zoning requirements of the host governmental unit where the extraterritorial land use would be employed. Then, it said, among the factors to be weighed were the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise, and the impact upon legitimate local interests. The Court added that one factor in the calculus could be more influential than another or may be so significant as to completely overshadow all others, but that no element should be "thought of as ritualistically required or controlling."

In applying this standard, the Court first dealt with the legislative intent factor, finding that the Legislature, through General Municipal Law § 350(1), had exempted the county from Rochester's preapproval requirement because the airport was situated within the county and within the boundaries of two separate townships and Rochester.² The Court added that "competing land use restrictions and policy choices among these various municipalities" could otherwise foil the fulfillment of the greater public purpose of promoting intra- and interstate air commerce.

The Court also found the additional public interest factors in this case to be significant. It explained that the dispute involved a county plan that sought to expand an existing use; given the existing land use, there was no other practical location for the proposed use; the expansion was subject to county land use oversight approval, including public hearings and a comment period in which Rochester could have participated; there was no express city oversight authority in the state enabling legislation; there was no alleged detriment to adjoining landowners, as opposed to competing political interests; and

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the nature of an international municipal airport, serving interstate and intrastate commerce goals, was in both the local and greater public interest.³ Accordingly, the Court held that the expansion of the Monroe County Airport was free of land use oversight from Rochester, and that the airport terminal, parking facilities, and air freight facility were embraced within the immunity from the requirements of Rochester's land use laws because they constituted accessory uses customarily incidental to an airport operation.

Cell Towers

More recently, in *Matter of Crown Communication New York, Inc. v. Department of Transportation*,⁴ the Court reaffirmed the County of Monroe "balancing" test and, over a dissent, held that the installation of private antennae on two state-owned telecommunications towers in New Rochelle was exempt from local zoning regulation and that the commercial telecommunications providers involved in the project were not required to make applications for special permits. The Court rejected New Rochelle's contentions that, although the towers themselves were exempt from regulation, no justification existed to extend such immunity to the installation of licensed commercial antennae on the towers. Instead, the Court determined that the installation of licensed commercial antennae on the towers should be accorded immunity because co-location served a number of significant public interests that were advanced by the state's overall telecommunications plan and the public and private uses of the towers were "sufficiently intertwined" to justify exemption of the wireless providers from local zoning regulations.⁵

It should be noted that the Court emphasized that its determination that immunity was warranted in this case should not be taken as "blanket authority" for the placement of state-owned towers at any location the state desired. Indeed, courts applying the *County of Monroe* balancing test have not uniformly found immunity from local regulation.

For example, in *Town of Riverhead v. County of Suffolk*,⁶ the plaintiff town brought an action to enjoin Suffolk County from constructing and utilizing a fueling facility located on property inside the Indian Island County Park in Riverhead. The new facility was intended to replace an older facility in the park. The town alleged that the county had commenced construction of the new facility without securing the necessary town and state legislative approvals and permits, that the project violated the Riverhead Town Code, and that construction was continued in violation of a stop work order. Supreme Court, Suffolk County, granted the county's motion to

dismiss the complaint and the town appealed.

The Appellate Division, Second Department, found that, with respect to the town's cause of action predicated on the county's violation of the Riverhead Town Code and failure to procure the requisite town approvals and permits, there was a conflict between the town's

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regulations and the county's statutory authority to construct and utilize the fueling facility. This conflict, the Second Department stated, had to be resolved by the County of Monroe "balancing of public interests" approach. Based on what the Second Department found to be conflicting evidence in the record, it ruled that it could not determine whether, under the "balancing of public interests test," the county was entitled to construct and utilize the new fueling facility. Accordingly, it reinstated the action.

Firehouses

Similarly, in *Nanuet Fire Engine Co. No. 1, Inc. v. Amster*,⁷ the issue was whether the petitioner fire company was subject to the Town of Clarkstown's zoning ordinance to the extent that the town acted reasonably in revoking a building permit and requiring site plan review and a public hearing. After finding that the balancing of public interests test established in the County of Monroe case was applicable to the fire company, it explained that the test leaned toward a "limited, rather than absolute, immunity from local zoning regulation for the construction of fire stations." To determine whether the petitioner's planned construction was exempt from the zoning code, the court ruled that it had to conduct the balancing of public interests test. It then noted that significant factors were "intergovernmental participation in the project development process and an opportunity to be heard," neither of which had occurred with respect to the petitioner's planned construction.

Interestingly, the court pointed out that although the building inspector may have considered the *County of Monroe* criteria in issuing the petitioner's permit, there was "no authority for a building inspector to be the arbiter" of whether one governmental subdivision was subject to zoning regulation by another governmental subdivision, particularly where there had been no significant intergovernmental

participation in the project development process and no public hearing had been held. It then concluded that it did not have sufficient information to determine whether petitioner was subject to local zoning and ruled that it was for the town, in the first instance, after an opportunity to be heard was afforded other intergovernmental agencies and legitimate local interests, to apply the County of Monroe test.⁸

Conclusion

Whether the expansion of, or new construction of, buildings or facilities by a government entity is immune from local zoning regulations is determined on a case-by-case basis by the careful application of the balancing test established by the Court of Appeals in *County of Monroe*. However, it appears that the proper application of this test requires that all involved governmental agencies and the public be afforded an opportunity to be heard on the issue of governmental immunity. As a practical matter, this will require that a land use application be submitted to the zoning jurisdiction, which should then hold a public hearing to solicit input from all interested parties on the competing public interests prior to making its determination.



1 72 N.Y.2d 338 (1988).

2 General Municipal Law § 350(1) provides, in part, "[when] the airport or landing field is to be located in whole or in part outside the boundaries of the municipality seeking to establish or construct the facility, the approval of the local legislative body of the city, town or village within which the facility will be located shall be obtained." (emphasis added).

3 The Court noted that the fact that a portion of the planned improvements would be leased out for operation did not affect the result because the legislature expressly contemplated leases by a county for the operation or use of all or part of the county airport "for aviation purposes and for other purposes required for or necessary to the efficient and successful operation of an airport." General Municipal Law § 352(5).

4 4 N.Y.3d 159 (2005).

5 See, also, *Town of Hempstead v. State of New York*, 42 A.D.3d 527 (2d Dept. 2007) (affirming decision by Supreme Court, Nassau County, that state-owned telecommunications tower was immune from local zoning laws under "balancing of public interests" test).

6 39 A.D.3d 537 (2d Dept. 2007).

7 177 Misc. 2d 296 (Sup. Ct. Rockland Co. 1998).

8 See, also, *Volunteer Fire Association of Tappan Inc. v. Town of Orangetown*, 2007 N.Y. Misc. Lexis 3312 (Sup. Ct. Rockland Co. 2007) (finding that plaintiff had not established that it was exempt from defendant's zoning regulations under County of Monroe balancing test where, among other things, plaintiff had no expertise in or process for review of construction projects; no other entity would conduct an equivalent review if town planning board was not permitted to review the project; review by planning board would present no impediment to overall project).