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Zoning and Land Use Planning

Preemption Doctrine: Limitation on Home Rule Power

In New York, a town or village may exercise lawmaking authority only to the extent that such authority has been delegated to it by the state. Toward that end, the Legislature has empowered local governments to legislate in a wide range of matters relating to local concern, while retaining authority in matters of state concern. Thus, for example, the Municipal Home Rule Law allows incorporated villages and towns to amend or supersede provisions of the Village Law and the Town Law as they relate to zoning and other matters of local concern. In particular, with respect to villages, the Municipal Home Rule Law provides that a village has the power to amend or supersede "any provision of the village law relating to the property, affairs or government of the village."[1]

When municipalities act within their so-called supersession authority, even local laws that are inconsistent with state law may be valid. Indeed, inconsistency is a premise of the supersession authority, for there is otherwise little need of the power to amend or supersede state law.

There are two important limitations on this supersession power. First, it does not apply where the legislature has expressly prohibited the adoption of such a local law.[2] Second, towns and villages cannot supersede a state law where a local law is otherwise preempted by state law. Indeed, as the New York Court of Appeals has recognized, the preemption doctrine represents a "fundamental limitation"[3] on home rule powers. Although local

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governments have been invested with substantial powers both by affirmative grant and by restriction on state powers in matters of local concern, the Court has declared that "the overriding limitation" of the preemption doctrine embodies the "untrammeled primacy" of the legislature to act with respect to matters of state concern.[4]

Preemption applies both in cases of express conflict between local and state law and in cases where the state has evidenced its intent to occupy the field. The Court of Appeals has observed that the legislature may expressly state its intent to preempt. Additionally, the Court has indicated that the legislature's intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including the need for statewide uniformity in a particular area. Thus, a comprehensive, detailed regulatory scheme may be evidence of the legislature's intent to preempt.[5]

Last month, the Court of Appeals in *Matter of Cohen v. Board of Appeals of the Village of Saddle Rock*,[6] applied these principles to invalidate the local laws of two Long Island villages which superseded Village Law §7-712-b(3) and imposed a practical difficulty and unnecessary hardship standard for reviewing area variance. As the basis for invalidation, the Court found that the state had implicitly preempted the field of area variance review when it enacted Village Law §7-712-b(3)[7] (and a corresponding Town Law provision)[8] in 1991.

Variances Sought

The cases arose when Jack Cohen and Frank and Jamie Russo applied to their respective village zoning boards of appeal for area variances. Mr. Cohen sought a variance from certain Village of Saddle Rock zoning requirements as a prerequisite to obtaining a permit to build a single-family home on his unimproved ocean-front lot. The Russos applied for a height variance to install an 11-foot wrought iron gate in the driveway of their North Hills residence.

In both cases, a village building inspector denied the applications, and petitioners appealed to their local zoning boards. Both boards denied the appeals, finding that petitioners had failed to demonstrate "practical difficulties" or "undue hardship" in complying with existing zoning requirements, within the meaning of their local village codes.

Mr. Cohen commenced a CPLR article 78 proceeding seeking to annul the determination of the Saddle Rock Zoning Board of Appeals. He claimed that the board should have reviewed his application using the "balancing" test contained

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in Village Law §7-712-b(3) because, he argued, it had preempted the practical difficulty or undue hardship standard contained in the village code. The trial court agreed, invalidating §150-24(B) of the Saddle Rock Village Code and annulling the determination of the board. On appeal, the Appellate Division affirmed, concluding that the legislature had intended Village Law §7-712-b to preempt enactment of conflicting local laws.

The Russos followed a similar course, with the Supreme Court, Nassau County, granting their article 78 petition, invalidating §174-31.2 of the North Hills Village Code and annulling the determination of the North Hills Zoning Board of Appeals. The Appellate Division affirmed this ruling, as well, and the two cases reached the Court of Appeals.

Court Of Appeals Decision

On appeal, the zoning boards contended that the standards contained in the local zoning laws were authorized by the supersession power granted in the Municipal Home Rule Law. They argued that Village Law §7-712-b(3) represented an effort by the legislature to clarify and codify various common law requirements for area variances that existed at the time of its enactment, and that it never was intended to supplant the power of localities to enact their own different — and possibly conflicting — requirements. The boards pointed out that the legislature could have foreclosed local supersession either by placing an express prohibition in §7-712-b or by codifying the zoning appeal standards in another statute beyond the villages' power to supersede, such as the General Municipal Law.

The Court, in an opinion by Judge Carmen Beauchamp Ciparick, was not persuaded by the zoning boards' arguments, finding instead that the legislature's inherent power to preempt was implicated in this case.

The Court acknowledged that inconsistency of a local zoning law with a state law of general application is insufficient to trigger the legislature's preemption power; if that could do so, the Court pointed out, the supersession authority granted by the Municipal Home Rule Law would be meaningless. However, the Court continued, local authority to contravene laws of general application must yield to the superior interest of the legislature when such interest has been demonstrated either by an express statutory prohibition (which, the Court conceded, was not present here) or by a finding of preemption.

In the Court's view, the 1991 amendments to both the Town and Village Laws, setting forth a standard of review for area variance applications, evinced an intent by the legislature to occupy the field and bring a measure of statewide consistency to the variance application and review process.

The Court found that the history of these amendments did not suggest that they were intended merely to codify the disparate attempts in the courts to define "practical difficulty" and, to a lesser extent, "undue hardship" — the earlier area variance standards embodied in the Village and Town Laws. Rather, it continued, the statutory history supported petitioners' position that the legislature intended to replace the confusing "practical difficulty" standard with a consistent test that requires a weighing of the benefit to the applicant against the detriment to the community, based on certain enumerated factors.

The Court found that the legislative history indicated that the statute was enacted to clarify existing law "by setting forth readily understandable guidelines" for both zoning boards of appeal and applicants for variances "and to eliminate the confusion that then surrounded applications for area variances." Simply put, the Court emphasized, faced with the turmoil and uncertainty that had plagued the law in this area, the legislature "intended to occupy the field and thus preempt local supersession authority."[9]

Conclusion

To a large extent, the Court's ruling in *Cohen* was not a surprise. In 1995, in *Matter of Sasso v. Osgood*,[10] the same Court determined that town zoning boards of appeal were required to review area variance applications using the balancing test contained in Town Law §267-b, the language of which is identical to that of Village Law §7-712-b.

It should be emphasized, however, that although the Court has made it clear that there must be a uniform, statewide standard for area variance review, local governments should not be concerned that their local zoning authority has been usurped. It is quite certain that they remain free to enact zoning regulations in the best interests of the health, safety and welfare of their communities. They may also continue to amend and supersede provisions of the Village Law and Town Law, provided that such local legislation is not prohibited or preempted by state law.

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(1) Municipal Home Rule Law §10(1)(ii) (e)(3).

(2) Id.

(3) *Albany Area Bldrs. Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989).

(4) Id.

(5) Id.

(6) 2003 N.Y. Lexis 1778 (July 2, 2003).

(7) Village Law §7-712-b(3) provides that a local zoning board of appeals shall have the power, upon an appeal from a decision or determination of the administrative official charged with the enforcement of such local law, to grant area variances and that, in making its determination, "the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant." The statute contains five additional factors to be considered on each review: 1) whether granting a variance will produce an undesirable change in the character of the neighborhood or create a detriment to nearby properties; 2) whether the benefit sought by the applicant can be achieved by some feasible method other than a variance; 3) whether the requested variance is substantial; 4) whether the proposed variance will have an adverse effect or impact on physical or environmental conditions; and 5) whether the need for the variance was self-created.

(8) See, Town Law §267-b(3).

(9) *Matter of Cohen v. Board of Appeals of the Village of Saddle Rock*, supra.

(10) 86 N.Y.2d 374 (1995).