

New York Law Journal

LONG ISLAND EDITION

VOLUME 3—NO. 50

©2001 NLP IP Company

MONDAY, DECEMBER 16, 2002

ZONING AND LAND USE PLANNING

BY ANTHONY S. GUARDINO

Atlantic Beach Wins Battle for Zoning Powers

Since the Village of Atlantic Beach was incorporated in the early 1960s, it has been unable to rule on zoning questions; instead, the Town of Hempstead, in which the village is located, has exercised all zoning authority. That made Atlantic Beach the only incorporated village in the entire state of New York that did not have its own zoning powers.

That situation changed this past Election Day, when Nassau County voters approved a county-wide referendum to amend the county's charter in a manner that would permit Atlantic Beach's businesses and homeowners to go directly to Atlantic Beach officials — rather than to the Hempstead town zoning board — for zoning approvals. The decades-long battle¹ is over, but the legal issues it raised — and the way they ultimately were resolved — remain quite interesting.

Nassau County Charter

The beginning point is the New York state Legislature's adoption of Chapter 879 of the Laws of 1936, which established an "Alternative



Form of Government for Certain Counties." The statute provided a complete charter for an eligible county that elected to adopt its form as its county charter.² Nassau County adopted the form as its county charter in 1938. Included within this county charter was a provision, §1607, that preserved zoning laws enacted by any village and in effect on the date that the charter became effective in the county. Thus, pursuant to the Nassau County charter, any village in existence, but without its own zoning laws on the effective date of the charter, and any village established after that date, became subject to the zoning regulations of the town of which it was a part.

With the exception of the Village of Atlantic Beach, which was not incorporated until 1962, all villages that are

in existence in Nassau County today were in existence and exercised zoning powers on the effective date of the Nassau County charter. Accordingly, Atlantic Beach became the only village in Nassau County subject to a town's zoning powers.

In May 2000, the Nassau County Legislature passed a local law to amend §1607 to grant zoning powers to Atlantic Beach. The county executive at the time, Thomas Gulotta, vetoed the legislation and requested an opinion from the New York state attorney general regarding the proposed amendment. In August 2000, the attorney general issued an informal opinion expressing the view that Nassau County could enact a local law to amend its county charter in order to grant zoning powers to the Village of Atlantic Beach, subject to the referendum requirements of the state constitution.³

About two weeks later, in accordance with the attorney general's opinion, the Nassau County Legislature again passed a local law to amend §1607. The county executive again vetoed the law, relying this time on an opinion from the Nassau County Attorney that was contrary to the opinion of the attorney general.

In January 2002, a new county executive and a new county attorney subsequently took office, and the Nassau County Legislature passed a law to

Anthony S. Guardino is counsel with Farrell Fritz, P.C., and is resident in the firm's Melville office.

amend the county's charter for a third time. The new county attorney rescinded her predecessor's opinion and opined that the Nassau County Legislature had the power to amend the charter to bestow zoning powers on Atlantic Beach. County Executive Thomas Suozzi signed this third local law, which was subsequently approved in the Election Day referendum.

The Legal Dispute

During this process, the courts became involved in the dispute when the mayor and trustees of Atlantic Beach brought suit for a declaration that the Nassau County Legislature had the authority to pass a local law amending §1607.⁴ The plaintiffs moved for summary judgment and, in August 2001, Nassau County Supreme Court Justice Allan L. Winick found that the Legislature was barred from so acting by Nassau County Charter §154(8)⁵ as well as Article IX, §2(d) of the New York Constitution.

Section 2(d) states: "Except in the case of a transfer of functions under an alternative form of county government, a local government shall not have power to adopt local laws which impair the powers of any other local government." The plaintiffs appealed.

This past Sept. 23, six weeks before Election Day, the Appellate Division, Second Department, reversed the trial court's decision. In its decision, the Second Department looked not to §154(8) of the Nassau charter, which, it said, arguably would not authorize the amendment. Instead, the appellate court determined that the Nassau County Legislature was acting within its powers under the authority of Article IX, §1(h)(1) of the New York Constitution,⁶ and of Municipal Home Rule Law, Article 4, which permits the establishment or amendment of a county charter by act of the legislature or by local law to transfer functions of

a county or of political subdivisions in the county "to each other."⁷

The Appellate Division also rejected the trial court's finding that Article IX, §2(d) of the New York Constitution would prohibit this particular charter amendment. While it agreed that any transfer of the zoning functions from the Town of Hempstead to the Incorporated Village of Atlantic Beach would impair the powers of the town within the meaning of §2(d), it noted that the lead-in clause to that section — "Except in the case of a transfer of functions" — authorized the amendment.

Finally, the appellate court rejected the Town of Hempstead's reliance on Municipal Home Rule Law §11(2)(b),⁸ which would prevent the Nassau County Legislature from adopting a local law that it is otherwise authorized to adopt pursuant to the Municipal Home Rule Law if the Nassau County charter prohibits its adoption. As the Second Department pointed out, the county Legislature adopted the local law amending §1607, subject to a referendum, pursuant to the authority of Article IX, §1(h)(1) of the New York Constitution.

The Nassau County charter does not, in §154(8), duplicate such authority, but, the Second Department stated, arguably withholds such authority from the Nassau County Legislature to accomplish a transfer of the zoning power. In the Second Department's opinion, this withholding was not the same as a charter "prohibition" within the meaning of Municipal Home Rule Law §11(2)(b).

Accordingly, the appellate court ruled that the Supreme Court should have granted the plaintiffs' motion for summary judgment and entered a declaration as they requested. The referendum then appeared on the ballot and was approved.

Conclusion

Does the change in the Nassau County charter permitting Atlantic

Beach to exercise its own zoning authority amount to an extension of democracy, as some have argued, or the creation of an unneeded layer of government on an all-too-decentralized island, as others have contended? That debate is now moot, given that the proponents of home rule have succeeded both in the courts and in the ballot box. However, at least one thing is certain: it no doubt will be quite interesting to developers and land use attorneys to see how Atlantic Beach elects to exercise its newly acquired zoning powers.



(1) See, e.g., *Incorporated Village of Atlantic Beach v. Town of Hempstead*, 27 A.D.2d 566 (2d Dept. 1966), aff'd, 19 N.Y.2d 929 (1967) (upholding validity of §1607 of the Nassau County charter).

(2) See L. 1936 ch. 879, §§2601, 2602.

(3) See, Op. Atty. Gen. (Inf.) 2000-15.

(4) See *Mahler v. Gulotta*, n.o.r. (Sup. Ct., Nassau Co., Aug. 28, 2001).

(5) Section 154(8) of the Nassau County charter provides, "Notwithstanding any provision of this chapter, the county legislature of the county shall not be deemed authorized by this article to adopt a local law, which supersedes a state statute now in force or hereafter enacted by the legislature, if such local law:

Applies to or affects any provision of law relating to the property, affairs or government of any village within the territory of such county.

(6) Section 1(h)(1) states that, "Counties ... shall be empowered by general law, or by special law enacted upon county requests pursuant to section two of this article, to adopt, amend or repeal alternative forms of county government provided by the legislature."

(7) A county charter may include a charter law "which would have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county." Municipal Home Rule Law §33(7)(b). In these cases, recognizing the significance of a transfer of functions, the New York State Constitution requires approval via referendum of the transfer by a majority of the voters in the area of the county outside of cities as a unit, in the cities of the county as a unit and, where a function is transferred to or from a village or villages, approval by the voters of the villages that are affected. N.Y. Const, Article IX, §1(h)(1).

(8) Section 11(2)(b) of that statute provides that "[n]otwithstanding any provision of this chapter, the legislative body of a county, city or village shall not be authorized by this chapter to adopt any local law which ... the legislative body is by provision of the charter prohibited to adopt."

This article is reprinted with permission from the December 16, 2002 edition of the NEW YORK LAW JOURNAL. © 2002 NLP IP Company. All rights reserved. Further duplication without permission is prohibited. For information contact, American Lawyer Media, Reprint Department at 800-888-8300 x6111. #070-01-03-0001