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### ZONING AND LAND USE PLANNING

# Bamboo Battles: Local Governments Take Action an IP Audit When Laws Change

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Good fences may make good neighbors,<sup>1</sup> but the growing use of bamboo by more and more suburban homeowners as a border on their property is causing some other property owners a great deal of concern. On the one hand, bamboo—reputed to be the fastest-growing plant on earth<sup>2</sup>—very quickly can create a wonderful and attractive privacy screen. On the other hand, its rapid growth can rather easily get out of control,<sup>3</sup> and the invasive nature<sup>4</sup> of the roots of certain varieties of bamboo plants can damage neighboring property.<sup>5</sup>

Recently, a number of local Long Island governments have considered whether to enact legislation regulating or even banning the use of bamboo by property owners. Indeed, in New York State, the interest to date generally seems to be limited exclusively to Long Island municipalities. One can expect, however, that villages, towns, and counties throughout the state will soon have to consider taking action, as property owners recognize that neighboring bamboo is growing out of control and seek legislative relief.<sup>6</sup>

#### The Smithtown Rules

The Long Island Town of Smithtown has sweeping regulations governing the planting and growing of bamboo. In August 2011, the Smithtown Town Code was amended to provide that:

No owner, tenant or occupier of property anywhere within the Town of Smithtown shall cause, suffer or allow bamboo to be planted, maintained or otherwise permitted to exist within 10 feet of any property line, street, sidewalk or public right-of-way.<sup>7</sup>

If a homeowner or tenant violates this section of the town code, the town has to notify the person, who then has 72 hours to cure the problem. In the event that the situation is not remedied, the law deems the property owner in default and the town may cure the default itself—with the property owner responsible for the costs, which can lead to a lien on the property in favor of the town.

#### Babylon's Ban

Last September, the Village of Babylon adopted a complete new chapter of its village code, entitled “Bamboo.”<sup>8</sup> After setting forth a general statement of purpose, i.e., to “promote and protect the property, property values and welfare” of residents, guests, and visitors and to “protect the property and preserve the aesthetic qualities”<sup>9</sup> of the village’s environment, the code sets forth the intent of the new chapter:

It is the finding of the Board of Trustees that the planting and/or the growing of bamboo... within the Village of Babylon has been and will continue to be destructive to the natural environment, including indigenous flora, and destructive to structures and walks on properties within the Village adjoining and neighboring those properties where bamboo has been planted and/or permitted to grow; that because of these effects the planting and the growing of bamboo threatens the value and physical integrity of both public and private property in the Village; and that therefore, in order to protect and preserve said environment and values, the Village declares it necessary to regulate or prohibit the planting and/or growing of bamboo within the Village.<sup>10</sup>

The Babylon code defines bamboo carefully, but broadly, as “[a]ny tropical or semitropical grass of the genera *Bambusa*, *Dendrocalamus* or of any other related genera.”<sup>11</sup> It also contains a



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broad definition of “Bamboo Property Owner” that not only includes a property owner who has planted or grown or caused the planting or growing of bamboo on his or her property but also a property owner who has permitted the growing of bamboo on his or her property where that bamboo had initially encroached “from an adjoining or neighboring property.”<sup>12</sup>

Then, the code has a broad statement of applicability, declaring that:

[I]f bamboo is found growing upon a property that shall constitute presumptive evidence

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that the growing of bamboo on the property shall have occurred with the consent of the owner of such property, except that such property owner shall not be presumed to be a bamboo property owner if the property owner did not plant or grow or cause said bamboo to be planted or grown in his property and he shall provide the Building Inspector with proof, satisfactory to the Building Inspector, that within a reasonable period of time after he first learned of the encroachment of bamboo onto his property from an adjoining or neighboring property he advised the owner of such adjoining or neighboring property of his objection to the encroachment of bamboo onto his property and/or initiated steps for the removal of the bamboo from his property.<sup>13</sup>

The next provision of the chapter enacts a complete prohibition on the new planting or growing of bamboo in Babylon—a step much beyond the more limited ban adopted by the Town of Smithtown. According to the Babylon village code:

Effective upon the date this provision shall become law, the planting or growing of bamboo shall be prohibited within the Village of Babylon. Any person who thereafter plants or grows, or causes to be planted to grow, bamboo within the Village shall be deemed to be in violation of this section, and shall be subject to such penalties as are set forth hereunder.<sup>14</sup>

In July, the Town of Hempstead adopted a complete bamboo ban, declaring it “unlawful” to plant, grow, or maintain bamboo—whether it originates or encroaches on an owner’s property.

Moreover, the new Babylon village code even regulates existing bamboo in the village. It provides that any existing bamboo that has been planted or otherwise permitted to grow in any property in the village may remain on the property subject to new code regulations that provide that a Bamboo Property Owner is responsible to ensure that the bamboo planted or growing on his or her property prior to the enactment of the complete ban “does not encroach or grow upon any adjoining or neighboring property or properties.”

The code adds that a bamboo property owner is “required to take such measures as are reasonably expected to prevent such bamboo from invading or growing onto adjoining or neighboring properties.” These measures include “installation of sheathing comprised of metal or other material impenetrable by bamboo at a sufficient depth within the property line or lines where the bamboo is

planted or is growing to prevent the growth or encroachment upon adjoining or neighboring property by said bamboo.”<sup>15</sup>

It should be noted that although the Babylon code allows existing bamboo to continue to exist, it specifically bars replanting or replacement of existing bamboo if that bamboo is or becomes, “for any reason, dead, destroyed, uprooted or otherwise removed.”<sup>16</sup>

The Babylon code contains a number of specific bamboo removal provisions.<sup>17</sup>

Under the code, in the event that bamboo growing on a bamboo property owner’s property invades or grows on an adjoining or neighboring property that is owned or held on behalf of the village,<sup>18</sup> the village “shall notify” the owner that the bamboo has invaded village property and that the owner is responsible for the removal of the bamboo from the village property. In the event that the owner does not remove or contract for the removal of the bamboo from the village property, or does not make an arrangement with the village for removal of the bamboo within 30 days, then the village, at its discretion, either may remove or arrange for the removal of the bamboo. The code imposes the removal costs on the owner, adding that they may be assessed against the property as a tax in the event that the costs remain unpaid more than 30 days after the village makes a demand for payment.

In addition, the code provides that if the village undertakes the removal or contracts for the removal of bamboo, neither the village nor its employees shall have any liability for damages or other claims to the bamboo property owner by reason of the removal of the bamboo—and if the removal entails or causes damages to the flora or other property of a neighboring property owner, the bamboo property owner is responsible for those damages.

Finally, the Babylon code also provides that a property owner who violates the new bamboo provisions “shall be guilty of a violation,” and that there is a separate violation for every day that a violation exists. A violation is punishable by a fine of up to \$250, with the village empowered to pursue civil or injunctive relief, or criminal penalties.<sup>19</sup>

### Other Jurisdictions

By no means do Smithtown and Babylon stand alone. In July, the Town of Hempstead adopted a complete bamboo ban, declaring it “unlawful” to plant, grow, or maintain bamboo—whether it originates or encroaches on an owner’s property; the Hempstead law uses the Babylon definition of bamboo, i.e., “any tropical or semi-tropical grass of the genera *Bambusa*, *Dendrocalamus* or of any other related genera.”<sup>20</sup> The Village of Ocean Beach, on Fire Island, also bans bamboo,<sup>21</sup> and makes a particular point of requiring that it must be “effectively removed by pulling such growth from the ground by the roots or by other methods which totally destroy the plants and roots to prevent further growth.”<sup>22</sup> This past July, bamboo also was banned in the Town of

Brookhaven.<sup>23</sup>

Of course, not every local government has decided to ban or regulate bamboo. For example, in a close vote, the Long Island Town of Huntington recently rejected a proposed bamboo ban.<sup>24</sup> Still, as the growth of bamboo-related legislation on Long Island suggests, other local governments can expect to have to deal with the issue in the near future.

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1. See, Robert Frost, “Mending Wall,” available at <http://writing.upenn.edu/~afireis/88/frost-mending.html>.

2. Michelle Nijhuis, “Bamboo Boom: Is This Material for You?,” *Scientific American*, July 20, 2009, available at <http://www.scientificamerican.com/article.cfm?id=bamboo-boom>. See, also, “Bamboo Time Lapse Growth 24hrs c/o BBC World,” available at <http://www.youtube.com/watch?v=FfD0MwFX5Hg&feature=related>.

3. “How to Kill Bamboo,” available at <http://www.bamboo-inspiration.com/how-to-kill-bamboo.html>.

4. “How to Remove Bamboo,” available at [http://www.completebamboo.com/bamboo\\_removal.html](http://www.completebamboo.com/bamboo_removal.html).

5. See, e.g., Matt Calamia, “Brookhaven Town Board votes to ban bamboo,” available at <http://www.northshoreoflongisland.com/Articles-News-i-2012-07-19-93156.112114-sub-Brookhaven-Town-Board-votes-to-ban-bamboo.html> (article says homeowner claimed a vacant property across from her home “has bamboo and it spread to her property through her driveway and patio”).

6. Litigation over bamboo already has reached the courts. See, e.g., *Yager v. Thompson*, 8 Misc.3d 138A (Sup. Ct. App. Term 2005).

7. Town of Smithtown Town Code, Article II. Property and Lot Maintenance, §221-4. A. (14), available at <http://ecode360.com/SM0115>.

8. See Village of Babylon Town Code, Chapter 270. BAMBOO, available at <http://www.ecode360.com/BA0592>.

9. *Id.*, at §270-1(A).

10. *Id.*, at §270-1(B).

11. *Id.*, at §270-2(A).

12. *Id.*

13. *Id.*, at §270-2(B).

14. *Id.*, at §270-2(C).

15. *Id.*, at §270-2(D). The code also authorizes the village board to enact further rules and regulations as may be necessary to effectuate this regulation. *Id.*

16. *Id.*, at §270-2(F).

17. *Id.*, at §270-2(E).

18. There is no similar provision for bamboo encroaching on neighboring property owned by private parties.

19. Village of Babylon Town Code, *supra*, at §270-3. A similar regulatory scheme was adopted in February 2008 by the Village of Saltaire on Fire Island. See Village of Saltaire Code, §38-20, available at <http://www.saltire.org/chap38.pdf>.

20. Town of Hempstead Town Code, §128-61.A(3), available at <http://ecode360.com/HE0207>.

21. See Village of Ocean Beach Code, §62-1, available at <http://www.ecode360.com/OC0808> (“No owner of any land within the Village of Ocean Beach shall permit any...bamboo...to grow upon such property”).

22. *Id.*, at §62-4.

23. See Local Law Filing, available at <http://www.ecode360.com/documents/BR0012/source/459181.pdf#search=bamboo>.

24. Rich Jacques, “Proposed Bamboo Regulations Eradicated, Pesky Plant Hangs Tough,” available at <http://huntington.patch.com/articles/proposed-bamboo-regulations-eradicated-pesky-plant-hangs-tough>.