Division of Local Government Services

Governmental Immunity from Zoning

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Governments often undertake development activities within their own or other communities. Local governments may find their community to be the site of a development action by another nearby municipality or another level of government, such as the county or the state. For example, a county may construct a new building in a town, village or city. When this happens, questions are often asked about how zoning regulations affect these development activities. This paper is a guide for local government officials faced with these questions.

Certain acts of government may be exempt, or "immune," from zoning. Before 1988, New York courts recognized that certain entities were entitled to absolute immunity from zoning regulations, including the federal government; state government; state urban development corporations; and public schools. These entities were not required to comply with local land use regulations. Other governmental entities, such as towns, villages, cities, counties and fire districts, are accorded only a limited immunity, and may be subject to local land use regulations.

In making a determination as to whether the actions of governmental units are "exempt" from local zoning regulations, the New York Court of Appeals in the 1988 case of *Matter of County of Monroe v City of Rochester*, 72 N.Y.2d 338, 533 N.Y.S.2d 702, established a new method for resolving inter-governmental land use disputes using the "balancing of public interests" analytic approach. Unless a statute exempts it, the encroaching governmental unit is presumed to be subject to the zoning regulations of the host community where the land is located. Working from that premise, a host community then considers several factors to determine whether or not it is in the public interest to continue to subject the encroaching government to its land use regulations. The host community is to weigh the following nine factors:

1. the nature and scope of the instrumentality seeking immunity;
2. the encroaching government's legislative grant of authority;
3. the kind of function or land use involved;
4. the effect local land use regulation would have upon the enterprise concerned;
5. alternative locations for the facility in less restrictive zoning areas;
6. the impact upon legitimate local interests;
7. alternative methods of providing the proposed improvement;
8. the extent of the public interest to be served by the improvements; and
9. intergovernmental participation in the project development process and an opportunity to be heard.

Neither the New York Court of Appeals nor the New York State statutes specify which board in the host municipality makes the determination of governmental immunity. This raises two questions – when in the development approval process is this determination made, and who makes it? The following are some alternative scenarios which may lead to a determination of governmental immunity.

A Municipality Developing Within its Own Jurisdiction

When a local government proposes to establish a facility or undertake an activity within its own geographic boundaries, the courts have held that it is subject to the *County of Monroe* "balancing of interests" test. In other words, the local government is presumed to be subject to its own regulations. (*Dunn v. Town of Warwick*, 146 AD2d 601 (2nd Dept. 1989); and *Armenia v. Luther*, 152 AD2d 928 (4th Dept. 1989) Which board conducts the balancing analysis to determine whether this is in the public interest has been a matter of speculation. Some suggestions:

A municipal governing board may choose to bind some or all actions of its own municipality to the requirements of its zoning regulations by specifying so within the zoning law or ordinance. Where a municipality has done so, a zoning permit should be applied for. A referral to the planning board or zoning board for a special use permit or site plan review may be necessary as well. Any immunity challenge that the municipality wishes to make may be brought before the zoning board of appeals.

Where a local government has not bound itself to the requirements of its zoning regulations, the municipal governing board must protect the public interest by examining the nine factors as applied to the current project. It must determine whether it is immune from the requirements of the zoning regulations, and whether a zoning permit is necessary. Even where a municipal governing board has declared an action immune from zoning, it may still wish to comply with the requirements of zoning, where practicable, and with public notice and hearing requirements.

A Municipality Developing Within Another Jurisdiction

In the absence of a statute to the contrary, where a municipality or other governmental unit proposes a project in another community, the two governments should assume that the action is subject to the host community's zoning requirements. One key unresolved question is whether the host community or the encroaching government should apply the nine factors set forth in the *County of Monroe* case to determine the extent to which the host community's regulations will actually apply. One court recently discussed this matter:

> Whether the intruder or the host should be entitled to a first instance review of a proposed project was not entirely resolved in *County of Monroe*. The issue has a long and contentious history (4 Rathkopf's The Law of Zoning and Planning, § § 53.03-53.05, 53.09). However, under the emerging majority view, where the intruder is not explicitly immune from the land use regulations of the host, and assuming the intruder cannot demonstrate that its interests are paramount in some important res publica sense, the host is permitted to scrutinize the intruder's project in the first instance. Thereafter, the intruder is entitled to pursue any available judicial remedy. The court may then review a developed factual record. Thus, it is argued, the prerogatives of the localities which have been given express land use regulatory powers are preserved, subject to modification in the interest of other compelling and transcending public purposes (4 Rathkopf's, supra, § 53.03 [3]).

Where a municipality or other governmental unit undertakes development activities associated with a project without applying for a zoning permit, the host community will need to make a determination as to whether to initiate enforcement action against the developing municipality or governmental unit. Any disagreement between the parties may be resolved by the appeals process of the host community or by the courts.

Extending State's Limited Immunity through Private Contracts

The New York Court of Appeals recently held that the State of New York, following application of the *County of Monroe* "balancing" test, enjoys limited immunity from local zoning when installing telecommunication towers on State land and the State may extend that immunity to private partners through contractual agreements. In *Crown Communication New York, Inc. v. Department of Transportation of the State of New York,* 4 N.Y.3d 159, 791 N.Y.S.2d 494 (2005), the Court held that the holders of a contract to build towers on State owned land were similarly exempt from local zoning regulations which required applications for special permits. The Court stated "[though] the . . . [contractors] will also realize profit from their services [it] does not undermine the public interests served by co-location. Such shared use and benefit is analogous to the . . . development project in *County of Monroe,* which likewise served both public and private interests. Subjecting the private... [contractors] to local regulation . . .'could otherwise foil the fulfillment of the greater public purpose of promoting' the State's public safety and environmental goals associated with its . . . development plan." *Id.* at 167 (citation omitted).

The decision made clear, however, that the State does not have "blanket authority" to allow contractors to bypass all zoning regulations. The grant of immunity maybe extended where the factors as outlined in *County of Monroe* weigh in favor of the State use .

Unresolved Questions

Although the *County of Monroe* case was decided almost twenty years ago, several questions regarding the application of the test remain unanswered. First, the case dealt with site plan regulations which were adopted as part of the local zoning law. Whether the decision of the court would apply to the application of site plan regulations adopted independently of zoning, or for that matter, to compliance with subdivision review or other land use regulations has not been resolved.

Second, it is not clear which board in the host municipality weighs the nine factors and determines whether the governmental unit undertaking the development activity is immune from local land use regulations or not. Normally, the zoning administrator or zoning enforcement officer acts as the gatekeeper for applications and makes the first determination whether a land use can proceed as of right or whether it may require site plan or some other type of discretionary review. Under the state zoning enabling laws, the zoning administrator's determinations are appealable to the zoning board of appeals – which might then hear arguments based on the *Monroe* balancing test. In other instances, the governing board of the host

municipality has applied the balancing test. Also ambiguous is when, during the development process, that decision is made.

Finally, where a governmental unit is absolutely immune from zoning or other land use regulations, it is unclear what deference that unit of government should give to the host government's regulations. The courts have not answered the question, "Should the immune governmental unit nevertheless try to comply with the host municipality's regulations?" as a matter of governmental comity.

Ultimately, resolution of these questions may lie with the courts or the State Legislature.