

Governmental Immunity from Zoning and Other Legislation

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I. Overview

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. Government acts could also be exempt or “immune” from other forms of local regulation. 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.ⁱ 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 zoning and other local land use regulations.

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, the New York Court of Appeals (highest State court) established a new method for determining whether the actions of governmental units are “exempt” from local zoning regulations using the “balancing of public interests” analytic approach. Unless a statute exempts it, an encroaching governmental unit is presumed to be subject to the zoning regulations of a host community when the encroacher seeks to develop within the geographic boundaries of the host. Working from that premise, the following nine factors are considered to determine whether or not it is in the public interest to continue to subject the encroaching government to the land use regulations of the host community:

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.

After that 1988 case, the “balancing of public interests” analytic approach has been the method to be used to resolve various inter-governmental zoning disputes. See, for example, the case of *Cty. of Herkimer v. Vill. of Herkimer*, 109 A.D.3d 1166, 1167 (4th Dept., 2013), which identified the approach to resolve whether the site of the proposed Herkimer County Correctional Facility would be subject to certain new Village of Herkimer Zoning provisions.

In addition, when an encroaching government seeks to undertake activities, other than zoning, within the geographic boundaries of a host government, the “balancing of the public interests” analytical approach and its nine factors have been used to determine whether or not it is in the public’s interest to subject the encroacher government to the host government’s legislation.ⁱⁱ

The discussion below addresses some practical application of the “balancing of the public interests” analytical approach and its nine factors.

II. Which Body Makes the Governmental Immunity Determination?

Neither the New York Court of Appeals nor the New York State statutes specify which government or board within a local government must make the determination of governmental immunity. However, lower court opinions have provided guidance on the appropriate entity to decide the governmental immunity question and the minimum procedures to be followed when doing so.

In the first instance, the board or entity specifically designated by the host government makes the determination of governmental immunity. In the event that the host government has not designated a specific board or entity to make the determination, then the governing body of the host government is deemed to have the power to perform the “balancing of public interests” test and make the determination of governmental immunity.ⁱⁱⁱ

No agency or board of a local government should consider and decide the question of whether governmental immunity must be accorded an encroaching government without a hearing. The hearing should be open to the public and held after the host government gives reasonable notice of the time and place where relevant public comments and questions can be heard. Although holding a public hearing is the minimum procedure identified by courts to be followed when making the determination of governmental immunity, local governments may adopt and include in local legislation any additional procedures to be followed. Such additional procedures may specify the minimum advance notice requirement, and whether written public comments would be accepted for review by the board or entity making the determination of governmental immunity.

III. Scenarios that May Lead to A Determination of Governmental Immunity

1. 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.^{iv}

A municipal governing board may choose to bind some or all actions of its own municipality to the requirements of its zoning regulation and other legislation by specifying so within the zoning regulation or other legislation. Where a municipality has so chosen, such legislation should include the requirement for a governmental immunity applicant to apply for a zoning or other permit. The legislation may also require a referral to the planning board or zoning board for a special use permit or site plan review as well. At the very least, any immunity challenge that the municipality wishes to make should be brought before the zoning board of appeals.

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

2. 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 court discussion about this type of scenario may provide guidance:

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]).^{vi}

Where a municipality or other governmental unit undertakes development activities associated with a project without applying for a zoning or other 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, such as before the zoning board of appeals, and all disagreements are subject to review by the courts.

3. Extending Limited Governmental Immunity through Private Contracts with the State

The New York Court of Appeals has held that the State of New York, following application of the *County of Monroe* "balancing of interests" 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 the case of *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 *Crown Communication* decision made clear, however, that the State does not have "blanket authority" to allow contractors to bypass all zoning regulations. The grant of immunity from a host government's regulations may be extended where the factors as outlined in the *County of Monroe* case weigh in favor of the State contracted use.

IV. Unresolved Questions

Although the *County of Monroe* case was decided more than thirty years ago, some questions regarding the application of the test remain unanswered. First, it is not clear when, during the development or other decision process, the determination of governmental immunity is made.

Secondly, 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. Otherwise stated: "Should the immune governmental unit nevertheless try to comply with the host municipality's regulations" as a matter of governmental comity?

Ultimately, either the courts or the State Legislature will resolve these questions.

V. ENDNOTES

ⁱ *But see, Ravena-Coeymans-Selkirk Cent. Sch. Dist. v. Town of Bethlehem*, 156 A.D.3d 179, 185 (3d Dept. 2017) quoting:

Petitioner [public school district] argues that, alternatively, it is entitled to immunity under Matter of County of Monroe (City of Rochester), 72 N.Y.2d 338, 341–343, 533 N.Y.S.2d 702, 530 N.E.2d 202 (1988), in which the Court of Appeals addressed the applicability of local zoning laws where a conflict exists between two governmental entities and articulated "a balancing of public interests" test. The test has not previously been applied to a school district or educational use. Rather, the test has generally been employed in situations involving competing localities (see e.g. Matter of County of Herkimer v. Village of Herkimer, 109 A.D.3d 1166, 1167, 971 N.Y.S.2d 764 [2013]; Village of Woodbury v. Brach, 99 A.D.3d 697, 700, 952 N.Y.S.2d 92 [2012]; Town of Fenton v. Town of Chenango, 91 A.D.3d 1246, 1250, 937 N.Y.S.2d 677 [2012], lv. dismissed and denied 19 N.Y.3d 898, 949 N.Y.S.2d 342, 972 N.E.2d 507 [2012]). In our view, although petitioner is a governmental unit, the balancing of public interests test is not necessary in relation to schools. The more specific zoning principles pertaining to schools and churches, as discussed in *Cornell Univ. v. Bagnardi* [68 N.Y.2d 583, 595 (N.Y. 1986)](supra) and related cases, are applicable here. Indeed, cases involving schools seeking variances do not reference the balancing test urged by petitioner and instead rely on the premise that "[g]reater flexibility than would attach to applications for variances made by commercial institutions is required and the controlling consideration must always be the over-all impact on the public's welfare" (*Matter of Lawrence School Corp. v. Lewis*, 174 A.D.2d 42, 46, 578 N.Y.S.2d 627 [1992] [internal quotation marks, ellipsis and citation omitted]).

ⁱⁱ *Village of Woodbury v. Brach*, 99 A.D.3d 697 (2d Dep't 2012) (considering the question of whether conveyance of subject property was exempt from subdivision review by host municipality); *Town of Fenton v. Town of Chenango*, 91 A.D.3d 1246 (3d Dep't 2012) (reviewing whether town was exempt from the neighboring host town's aquifer law in discharging effluent from its wastewater plant near host town's potable water supply); *King v. County of Saratoga Indus. Development Agency*, 208 A.D.2d 194 (3d Dep't 1995) (holding that the industrial development agency was exempt from planned unit development requirements).

ⁱⁱⁱ *Id.*; *Nanuet Fire Engine Co. No. 1, Inc. v. Amster*, 676 N.Y.S.2d 890 (N.Y. Sup. Ct. 1998).

^{iv} *Dunn v. Town of Warwick*, 146 AD2d 601 (2nd Dept. 1989); *Armenia v. Luther*, 152 AD2d 928 (4th Dept. 1989).

^v Since the County of Monroe "balancing of interests" test was established, at least one court has identified that the interests of an encroaching government may be paramount when the encroaching action constitutes a "res publicae" action, which denotes "public things." Black's Law Dictionary (9th ed. 2009). In that court's view, "res publicae" concerns impliedly outweigh those of the host under circumstances where subjecting the intruder's proposed land use action to the host government's land use and other regulations would prevent the provision of a need constituting a greater public purpose. *Town of Caroline v. County of Tompkins*, 2001 N.Y. Slip Op. 40205(U) (N.Y. Sup.Ct. 2001)(determining that a county's proposed telecommunications tower for emergency communications would be immune from town and village regulations);

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see also, Corrini v. Village Of Scarsdale, 781 N.Y.S.2d 623, 1 Misc.3d 907(A) (N.Y. Sup.Ct. 2003)(holding that village's proposed ambulance facility should be exempt from the village zoning ordinance).

^{vi} *Town of Caroline et al v. County of Tompkins*, 2001 N.Y. Slip Op. 40205(U) (Sup. Ct. Tompkins County)(Index #2001-0788)(9/20/01) p. 3.

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