

Land Use Laws – Navigating a Path to Local Control

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Overview

- Disclaimer: Educational – Not Legal Advice
- Need for Local Action
- Limitations on and Basis for Local Power
- Form of Local Action

Need for Local Control

- Exemptions & Exclusions from Federal Law
 - Safe Drinking Water Act (UIC Program)
 - Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)
 - Clean Air Act
 - Toxic Substance Control Act
 - Clean Water Act
 - Resource Conservation and Recovery Act
 - (E&P wastes considered “solid waste”)
 - National Environmental Policy Act
 - Toxic Release Inventory under the Emergency Planning and Community Right to Know Act

Need for Local Control

- New York State Law
 - Statewide Generic Permitting under SEQRA
 - Lack of Regulations for ECL Article 23
 - State Pollution Discharge Elimination System (state implementation of CWA) does not apply to well injections
 - Oil or gas drilling, production and treatment wastes (such as brines, oil, and frac fluids) considered solid wastes (6 NYCRR §360-12)

Basis for Local Power

Home Rule

- In general, local governments only have the lawmaking powers that the Legislature has conferred upon them.
- Article IX of the NY State Constitution declares that effective local self-government and intergovernmental cooperation are purposes of the people of this State.
- In 1964 a “home rule package” was adopted consisting of article I of the State Constitution, the Municipal Home Rule Law, and the Statute of Local Governments.
- Municipal Home Rule Law § 10(11), (12) vests towns with the police power to enact laws relating to the “protection and enhancement of its physical and visual environment” and for the “protection, order, conduct, safety, health and well-being of persons or property therein.”

Home Rule con't

- Section 10(6) of the Statute of Local Governments specifically authorizes municipalities to adopt, amend and repeal zoning regulations.
- Article 16 of the Town Law also sets forth specific zoning powers.
- Municipal Home Rule and Statute of Local Governments authority must be specifically cited to overrule/supersede provisions of Town Law.

Police Power – Protects Community Rights

- Every citizen holds his or her property subject to the reasonable exercise of the police power of a municipality.
People v. Murphy, 195 NY 126 (1909)

A person's ability to pursue what is otherwise lawful may be curtailed if "this infringement and deprivation [is] reasonably necessary for the common welfare." See *People v. Bunis*, 9 NY2d 1 (1961)

Limited Right to Extract Minerals

“A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.”

Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 NY2d 668 (1996)

Zoning

- Purposes of zoning set forth in Town, Village and City Law, and include lessen traffic congestion, secure safety, promote health and welfare, provide adequate light and air, prevent overcrowding, facilitate adequate services.
- Cannot in conflict with fundamental land use policies and development plans of community.
- May use zoning to prevent uses for which the physical and financial resources of the town are inadequate.
Golden v. Town of Rampano, 30 NY2d 359 (1972)

Limitations on Local Power

Restrictions on Local Power

- A municipality cannot adopt local laws that are inconsistent with the State Constitution or any general law of the State.
MHRL §10(1)(ii)
- Preemption may be express or implied.
- Implied preemption may be established by a declaration of State Policy by the Legislature or the enactment of comprehensive and detailed regulatory scheme.

Implied vs. Express Preemption

“ When dealing with an express preemption provision, as we do here, it is unnecessary to consider the doctrines of implied or conflict preemption. Instead, the resolution in this case turns solely upon proper statutory construction of TILA’s credit card application and solicitation preemption provision. *People of the State of New York v. Applied Card Service*, 11 N.Y.3d 105 (2008)(citing *Frew Run*, citations omitted).

Oil & Gas Preemption Statute

New York State Oil & Gas Law, ECL §23-0303(2):

“The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.”

1975 Mining Law

- §23-2703: For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry;
provided however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.

NY Court of Appeals

“Turning first to the statute’s plain meaning and reading the language in its natural and most obvious sense, we cannot interpret the phrase ‘local laws relating to the extractive industry’ as including the Town of Carroll Zoning Ordinance.”

In the Matter of Frew Run Gravel Products, Inc. v. Town of Carroll, 71 N.Y.2d 126 (1987)

Moratorium

- May be adopted as a “stop gap or interim measure where it is reasonably designed to temporarily halt development while the municipality considers, inter alia, comprehensive zoning changes.” *Cellular Telephone v. Village of Tarrytown*, 624 NYS2d 170 (2nd Dept. 1995)
- Enactment of moratorium requires following same legal procedures as had to be followed when the legislation that it suspends.
- Moratorium is a Type II Action and is exempt from SEQRA
 - 6 NYCRR § 617.5(c)(30)

Requirements

- Moratorium found to be roughly equivalent to zoning law and therefore subject to notice, hearing and other procedural requirements required under state and local zoning laws. *B & L Development Corp. v. Town of Greenfield*, 551 NYS2d 734 (Sup. 1990)
- Limited Duration – no bright line test.

Zoning Requirements

Comprehensive Plan

- Zoning must be accomplished in accordance with a comprehensive or well-considered plan.
 - Gen. City Law §§ 20(25), 28-a; Town Law §§ 263, 272-a; Village Law §§ 7-704, 7-722
- The requirement of a comprehensive or well-considered plan not only insures that local authorities act for the benefit of the community as a whole but protects individuals from arbitrary restrictions on the use of their land. *Asian Americans for Equality v. Koch*, 72 NY2d 121 (1988)

Special Use Permits

- Gen. City Law § 27-b(4), Town Law § 274-b(4), Village Law 7-725(b)(4)
- Special uses are allowed uses – their inclusion in a zoning code is equivalent to a legislative determination that they are proper for the zone. As a general matter, a town cannot deny the application on the ground that it is not in harmony with the purpose and intent of zoning. A reviewing board is thus required to grant the permit unless there are significant negative impacts. *North Shore Steak House Inc. V. Board of Appeals of Incorporated Village of Thomaston*, 30 NY2d 238 (1972)
- Allows heightened level of review, may impose mitigating conditions.

Site Plan Approval

- Often required, even for allowed uses.
- Opportunity for community to review scale, dimensions, location and other features of a project.
- May impose conditions and mitigations.
- Enabling legislation: Gen City Law § 27-a(2)(a); Town Law § 271-1(2)(a), Village Law 7-725-a(2)(a).
- Triggers SEQRA review. *Di Veronica v. Arsenault*, 507 NYS2d 541, (3rd Dept. 1986)

Requirements for Local Actions

- Consistent, Rational.
- Determination must have a rational basis – not arbitrary and capricious.
- Ordinance must be designed in good faith to accomplish the general public good for which the ordinance is adopted.
- Courts cannot inquire into motives inducing legislative act (absent fraud/corruption) but will consider purpose.
- Consider problems presented and reasonable and uniform provisions to deal with them, that tend to promote the general community welfare (as compared to individuals).

Law Must Be Calculated to Achieve Objectives

- “Applicable case law draws a dichotomy between those regulations that directly relate to the physical use of land and those that regulate the manner of operation of a business or other enterprise. In the first group are regulations relating either to the use of such land or to the potential impact of land use on neighboring properties. Courts generally uphold such regulations, including those directed at **physical externalities** such as light, air quality, safety, population density, traffic, and even less tangible externalities such as property values, aesthetic, or environmental values.”

Louhal Properties, Inc. v. Strada, 743 NYS2d 810 (Nassau Cty 2002), *aff'd* 763 NYS2d 773 (2nd Dept. 2003)

Supporting Record

- Record of the substantial impacts sought to be avoided
- Evidence of connection between the law and the purported harm.
- Not overly broad – does not proscribe conduct that does not pose a threat to the public welfare.

Prohibition of Land Uses

Presumptions

An ordinance regulating property use will therefore be upheld unless it is “clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, moral, or general welfare.”

Village of Euclid v. Ambler Realty Co., 272 US 365 (1926)

Are Some Uses Special?

- “[E]ven religious [and educational] institutions [must] accommodate to factors directly relevant to public health, safety or welfare, inclusive of fire and similar emergency risks, and traffic conditions insofar as they involve public safety [citations omitted]” *Cornell University v. Bagnardi*, 510 NYS2d 861 (1986) quoting *Jewish Reconstructionist Synagogue v. Incorporated Vil. of Roslyn Harbor*, 379 N.Y.S.2d 747, [Breitel, Ch.J., concurring]).

Industrial Uses

- May exclude industrial uses from residential, commercial and agricultural districts. *Village of Belle Terre*, 416 US 1 (1974)
- Community may act to preserve rural environment.
- May completely exclude industrial uses and natural resource extraction. *Gernatt Asphalt*, 87 NY2d 668 (1996)
- By definition HIIU produce nuisances, negative externalities.
- Relate definition to health and general welfare.
- Distinguish HIIU from permitted uses based on substantial differences.
- Specially permitted uses are considered to be appropriate to a district, but may require conditions to be imposed. Permit may not be withheld on basis of community objections.

Prohibit Use Due to Traffic

- Zoning Ordinances may be “designed to lessen congestions in the streets.” Town Law § 263, Village Law § 7-704, City Law §20(24)
- The interest of the government in preserving comparative tranquility in residential areas is unquestionably legitimate and protects quiet places where motor vehicles are restricted. *Village of Belle Terre v. Boraas*, 416 US 1 (1974)
- Local government may consider and respond to health and safety concerns from diesel exhaust, truck accidents, dangers to pedestrians.

RJ Valente Gravel Inc. Case

Planning Board denied a special use permit for a mine, finding:

“substantial traffic congestion and safety hazards would be created by trucks..... with no feasible alternatives presented...”

“trucks necessary for the operation of the mine” would create safety problems travelling through Main Street in the Village.

“heavy volume of pedestrian and vehicular traffic existed at school campus by which the truck route would have to pass.

Court upheld the denial and found that the mining company’s promise to correct or mitigate problems later, if so directed by NYS DOT, was reasonably found to be inadequate in light of the impact on the community.

R.J. Valente Gravel Inc. v. Town of Kinderhook, 673 NYS2d 265 (3rd Dept. 1998)

Prohibit Unregulated Pipelines

- Local governments may not regulate pipeline safety. (Federal Pipeline Safety Act, 49 USC §§ 60101 et seq.)
- FERC regulates interstate pipelines. FERC does not regulate production or gathering lines. (Natural Gas Act, § 1(b))
- NY Public Service Corporation does not regulate pipelines “to be used to transport fuels at” under 125 psi. (NY Public Service Law § 120)

Compressor Stations & Public Utility Facilities

- Public Utilities generally entitled to less demanding review in issuance of special permits and variances.
- Need to ensure that definition of public utility only extends to utilities providing services directly to the public.

Disposal of Certain “Solid Wastes”

- Code of Federal Regulations Title 40, § 261.4(b)(5)
 - Drilling fluids, produced waters, and other wastes associated with the exploration, development or production of crude oil, natural gas are solid wastes and not hazardous wastes.
- NY Environmental Conservation Law § 27-0711
 - Counties, cities, towns and villages may enact local laws regulating solid waste so long as such local laws are at least as stringent as the state regulations.
- 6 NYCRR § 360-12
 - Oil or gas drilling, production and treatment wastes (such as brines, oil, and frack fluids) considered solid wastes
- *Town of Concord v. Duwe*, 4 NY3d 870 (2005)
 - Local laws governing solid waste that are broader than, but consistent with, state legislation are explicitly permitted.

Clean Water Act - SPDES

“We find no merit to the State Department of Environmental Conservation’s argument that the [local] regulation of such sewage and effluent disposal has been ‘impliedly pre-empted by the State Pollution Discharge Elimination System (SPDES) permit regulation (see ECL 17-0701 et seq.). SPDES regulation is not ‘so broad in scope or so detailed as to require a determination that [article 17] has superseded all existing and future local regulation.’”

Bri-Mar Corp. v. Town Bd. of Town of Knox, 546 N.Y.S.2d 826 (1989)

Safe Drinking Water Act

- Designed to protect nation's drinking water by preventing underground injection which endangers drinking water sources. (42 USC § 300h(b)(1))
- Federal underground injection control regulations do not diminish local authority to adopt or enforce any law respecting underground injection. (42 USC § 300h(d))
- Each county, city, town or village may enact sanitary regulations not inconsistent with the sanitary code established by the public health and health planning council. (NY Public Health Law § 228(2)).

Air Pollution Control

- Clean Air Act 42 USC § 7416
 - Does not preempt state or local ability to adopt air pollution limitations for stationary point sources.
- NY Environmental Conservation Law § 19-0709
 - Counties, cities, towns and villages may pass air pollution laws that comply with at least the minimum applicable State requirements.
- “Local governments are intended to function in the air pollution area.” *Oriental Bvl’d Co. v. Heller*, 27 NY2d 212 (1970)

Typical Objections

Improper Exclusionary Zoning?

- Exclusionary zoning has been defined as “ ‘land use control regulations which singly or in concert tend to exclude persons of low or moderate income from the zoning municipality.’ ” *Continental Bldg. Co. v. Town of North Salem*, 211 A.D.2d 88, 625 N.Y.S.2d 700, 704 (3d Dep't 1995) (quoting 1 Anderson, *New York Zoning Law and Practice* § 8.02, at 360 [3d ed.]); see *Suffolk Housing Servs. v. Town of Brookhaven*, 70 N.Y.2d 122, 517 N.Y.S.2d 924, 926, 511 N.E.2d 67 (1987) (“a municipality may not legitimately exercise its zoning power to effectuate socioeconomic or racial discrimination”). The rule against exclusionary zoning, however, does not apply “to prevent the exclusion of industrial uses.” *Gernatt Asphalt*, 642 N.Y.S.2d at 173, 664 N.E.2d 1226. Thus, plaintiff's allegation that it was barred from establishing a superstore in the Town does not state a claim. *Great Atlantic & Pacific Tea Co. v. Town of East Hampton*, 997 F.Supp. 340 (1998)

Content Based Restrictions

- Nor is it significant that definitions of adult uses in the Amended Zoning Resolution are based in part on the content of the entertainment offered rather than exclusively on the age of the businesses' clientele (cf., *Matter of Town of Islip v. Caviglia*, supra, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215). The test under both *Islip* and *Renton* is not whether the regulated establishments are defined without reference to content but whether the ordinance's goal is unrelated to suppressing that content (73 N.Y.2d, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215, 475 U.S. at 44, 47-50, 106 S.Ct. at 927, 928-930; see also, *Young v. American Mini Theatres*, supra, at 52-54, 70-71, 96 S.Ct. at 2443-2445, 2452-2453 [plurality opn]). That test is plainly met here.
- *Stringfellow's of New York Ltd v. City of New York*, 91 NY2d 382 (1998)

Taking

- “As the United States Supreme Court has noted, ‘the submission that [a property owner] may establish a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.’”
Briarcliff Associates Inc. v. Town of Cortlandt, (quoting *Penn Central Transp. Co. v. City of New York*, 438 US 104.)

Relevant Parcel

- Likewise, to state a taking claim under the New York State constitution requires that the economic value of the property be entirely dissolved. *See Gazza v. New York State Dep't of Env'tl. Conservation*, 89 N.Y.2d 603, 618–619 (Ct.App.N.Y.), cert. den., 522 U.S. 813 (1997). *Determination of whether the property has been completely devalued requires analysis of the property as a whole: it “does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130–131 (1978).

DC3 LLC v. The Town of Geneva, 2011 WL 1449040 (WDNY 2011)

Constitutional Challenges

- Equal Protection, Substantive Due Process, Procedural Due Process, § 1983 Challenge
- Ripeness
- Party challenging an ordinance has the burden to negative every conceivable [rational and legitimate] basis which might support the ordinance. Tuan Anh Nguyen v. INS 533 US 53 (2001)

Constitutionality Presumed

- An ordinance regulating property use will be upheld unless it is “clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, moral, or general welfare.” Village of Euclid v. Ambler Realty Co., 272 US 365 (1926)

Constitutional Challenges

- “There are two types of constitutional challenges to a statute [or other legislative act]: facial challenges, in which a statute is alleged to be unconstitutional on its face, i.e. in all circumstances, and ‘as applied’ challenges, in which a statute is alleged to be unconstitutional under the particular facts of the plaintiff’s case. A legislative enactment may be struck down as unconstitutional on its face if the plaintiff demonstrates that it is ‘arbitrary and/or unreasonable, and not rationally related to a legitimate government interest. Rational-basis review is properly applied to legislation that does not implicate any suspect classification or impinge upon the exercise of a fundamental right.” *Casciani v. Nesbitt*, 659 F.Supp.2d 427 (W.D. NY 2009)

Equal Protection

- The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
- *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920). See also *City of Cleburne, Tex. v. Cleburne Living Center*, 473 US 432 (1985)

Equal Protection

- “Statutes create many classifications which do not deny equal protection; it is only ‘invidious discrimination’ which offends the Constitution.” *Ferguson v. Skrups*, 372 US 726 (1963)

EP – Legitimate State Interest

- “As a general rule, ‘legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.’ Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.”

Nordlinger v. Hahn, 505 US 1 (1992)

Basis for Discrimination

- In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational,. . . the State has a legitimate interest in local neighborhood preservation, continuity, and stability.

Nordlinger v. Hahn, 505 US 1 (1992)

Due Process

- The touchstone of due process is whether a law is reasonable in relation to its subject matter and is adopted in the interests of the community. While there is, of course, a strong presumption of constitutionality, the measure must bear ‘some fair, just and reasonable’ relation to the ‘promotion of health, comfort, safety and welfare of society.’ Moreover, it is an accepted proposition that, in the absence of mitigating considerations, an enactment ‘may not legally diminish or otherwise adversely affect’ vested rights.”

Niagara Recycling Inc. v. Town of Niagara, 443 NYS2d 939 (2nd Dept. 1981)

Procedural Due Process

- A law fails to meet the requirements of the Due Process Clause if it is so vague and without standards that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.”
People v. Scott, 26 NY2c 286 (1970)

Substantive Due Process

- Violation of the federal and state constitutional guarantee that the state not deprive it of property without due process of law.
- Two elements. (1) The person claiming the right must establish a legitimate claim of entitlement to it. *Bd of Regents v. Roth*, 408 US 564 (1972) Under NY law, a property owner has no right to the existing zoning status of his land unless his right has become 'vested.' *Ellington Construction Corp.*
- (2) the government action was wholly without legal justification. *Bower Associates*
- Supreme Court has said that only the most egregious official conduct can be said to be arbitrary in the constitutional sense. *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 US 188 (2003)

42 USC § 1983

- “federal courts dismissing section 1983 land-use claims have repeatedly noted that they do not function as zoning boards of appeal, or substitute for state courts interpreting land-use regulations.” A permit denial is not tantamount to a constitutional violation under 42 USC § 1983. *Bower Associates v. Town of Pleasant Valley*, 2 NY3d 617 (2004)

Dormant Commerce Clause

- Limits the powers of the states to erect barriers to interstate trade.
- Discrimination against out of state commerce are almost always unconstitutional.
- Are burdens on interstate trade clearly excessive in relation to putative local benefits?
- Pike v. Bruce Church, 397 US 137 (1970)
- Key: all entities treated equally and legitimate local interests

Other Laws & Restrictions

Establish Truck Routes

NYS Vehicle and Traffic Law § 1660

- 10. Establish a system of truck routes upon which all trucks, tractors, and tractor-trailer combinations having a total gross weight in excess of ten thousand pounds are permitted to travel and operate and excluding such vehicles and combinations from all highways except those which constitute such truck route systems. Such exclusion shall not be construed to prevent the delivery or pickup of merchandise or other property along the highways from which such vehicles and combinations are otherwise excluded. Any such system of truck routes shall provide suitable connection with all state routes entering or leaving such town.
- Note: Such truck routes can include state, county and town highways

Truck Restrictions

- Public highways are available for “ordinary use, transportation, and traffic in any reasonable manner.... the [government] has the right to consider the convenience of the great majority of the citizens and the burdens that may be imposed upon them by taxation for construction and maintaining highways.

It has the power and right to exclude from the use of the highways persons using vehicles constituting a danger... to the integrity of the highway itself. ...

[These restrictions are] intended to protect and preserve for ordinary and common use the improved highways constructed at great expense. (con't next slide)

Town of Waterford v. LB Brockett Lumber Co., 237 NYS 436 (3rd Dept. 1929)

Town of Waterford Case (con't)

“...all persons are forbidden to cause unnecessary injury or destruction to an improved highway.

In other words, there is no absolute right on the part of any person to use the highways in an unreasonable manner, so that life may be endangered or the highway may be injured and rendered impassable.

Highways are intended for the convenient passage of traffic ordinarily to be expected under present conditions by vehicles in common use.

When so used, there will be gradual wear and deterioration which will be augmented by weather and climatic conditions.

But highways are not built to serve the needs of some particular person, who wished to sue them for a special and unusual purpose.”

Truck Traffic – Towns

- NY Vehicle & Traffic Law § 1660

“(a) The town board of any town with respect to highways outside of any villages in any such town, but not including state highways maintained by the state, may....

17. Exclude trucks, commercial vehicles, tractors, tractor-trailer combinations, tractor-semitrailer combinations, or tractor-trailer-semitrailer combinations from highways specified by such town board. Such exclusions shall not be construed to prevent the delivery or pickup of merchandise or other property along the highways from which such vehicles and combinations are otherwise excluded.
25. Adopt such additional reasonable ordinances, orders, rules and regulations with respect to traffic as local conditions may require subject to the limitations contained in the various laws of this state.”

Other Truck Restrictions

- it is necessary to balance the effect of the ordinance in promoting the health, safety and welfare of the community against the hardships and difficulties it causes to individual property owners.

White Plains Automotive Supply v. City of Peeksville, **469 N.Y.S.2d 487** (2nd Dept. 1983)

Discussion about Dryden Ordinance

THANK YOU

Community Environmental Defense Council, Inc. is a 501(c)(3) public interest law firm and is funded entirely by charitable donations/grants.
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