LAW OF THE LAND

A blog on land use law and zoning

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Posted by: **Patty Salkin** | January 1, 2009

Zoning Amendment Amounting to Detailed Reuse Plan for Closed Army Facility Voided as Ultra Vires

In 1996 the United States closed an Army Reserve facility on a 17-acre parcel of land in the Town of Hempstead. The parcel was located in an area zoned as "B Residence" permitting single-family detached homes on 6,000 square foot lots with minimum frontage of 55 feet. Also permitted in the zoning district are religious, municipal recreational and agricultural uses. Pursuant to the 1990 Federal Base Foreclosure and Realignment Act, the Town was offered the first opportunity to purchase the property and redevelop it for a public purpose. The Town formed a local redevelopment agency that issued a reuse plan and report which contemplated a specific mixed-use development limited to 34 single-family homes with a price cap, 40 senior citizen semi-detached dwellings with a price cap, and a community recreational facility. The Town intended that the plan be incorporated as a deed restriction in the land sale documents, but ultimately they decided not to purchase the property. Therefore, in 2004 the Army offered the property for sale and the "Notice of Availability" stated that the Town had a redevelopment plan for the property and described the desired housing and recreational facility. BLF Associates purchased the property in December 2004 and the exchange agreement made no reference to the Reuse Plan.

In November 2004 the Town held a public hearing on a proposed new Article for the Town's Building Zone Ordinance to implement the Reuse Plan for the property. In April 2005 the amendment was enacted creating to "North Bellmore Planned Residence District." The new article to the zoning ordinance was very specific, providing that the property, "'may be used for any of the following purposes and no other:' no more than 34 single-family homes, no more than 40 senior citizen semi-attached dwellings, and a community recreational facility. The community recreational facility was required to be a 9,000-square foot center on no fewer than 1.25 acres of land, with a swimming pool, a picnic area, a minimum of two tennis courts, an exercise room, no fewer than two shuffleboard courts, a kitchen, an office, and a community room/lounge." In addition, the amendment required that the recreational facility be transferred to a homeowners' association.

Title to the property was transferred to BLF Associates in November 2005, at which time BLF commenced an action seeking a declaratory judgment that the Town's zoning amendment was ultra vires, void, and unconstitutional. They also sought a preliminary injunction enjoining the Town from imposing the Reuse Plan upon BLF. The Court began with a review of Town Law sections 261 through 263 which provide the grant of authority for towns to enact zoning ordinances in accordance

with a comprehensive plan. The Court noted that "there is nothing in these sections which empowers the Town to create a zoning ordinance that specifies the exact number and type of dwelling allowed. Nor do the applicable enabling statutes purport to allow the enactment of a zoning ordinance that requires construction of a 9,000-square-foot community recreational facility, with specified amenities, on no fewer than 1.25 acres of land." The Court said that, "Zoning ordinances many go no further than determining what may or may not be built," and that the zoning amendment was excessively restrictive and not enacted for legitimate zoning purposes. Further, the Court declared that the requirement that the recreational facility be owned by a homeowners' association, and the requirement that he senior citizen housing units were to be cooperative units, are ultra vires and void since zoning deals with land use and not with the person who owns or occupies it. The Court also found that the zoning amendment was inconsistent with the surrounding area of the Town. Lastly, in response to the Town's claim that BLF knew of the Reuse Plan and the zoning amendment before it closed title, the Court said that knowledge of a restriction does not bar a purchaser from testing the validity of the zoning ordinance.

BLF Associates, LLC v. Town Hempstead, 208 WL 5376641 (N.Y.A.D. 2 Dept. 12/23/2008).

The opinion can be accessed at: http://www.nycourts.gov/reporter/3dseries/2008/2008_10111.htm

UPDATE: On June 24, 2009 the New York Court of Appeals denied cert. in this case. See, http://www.courts.state.ny.us/CTAPPS/decisions/2009/jun09/DecisionList062409.pdf

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