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Recommended Citation
John R. Nolon and Jessica A. Bacher, Zoning Exemptions: Granting Immunity to Private Wireless Providers, New York Law Journal, Apr. 20, 2005, at 5.

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Zoning Exemptions:
Granting Immunity to Private Wireless Providers

Written for Publication in the New York Law Journal
April 20, 2005

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Abstract: Contrary to the Telecommunications Act of 1996, the New York Court of Appeals in the *Matter of Crown Communication New York, Inc. v. Department of Transportation of the State of New York, City of New Rochelle et al.*, held that, both private companies who contract with local governments to build towers on public land, and the private companies who build attached antennae to these towers, are immune from local zoning regulations. The court's decision is due to the public nature and importance of the mass communication these structures will provide. Of particular importance, was public good to be served by the Statewide Wireless Network, which increased the state's emergency communication capabilities, and how emergency communications abilities will flourish if tower construction remains unfettered by local regulations.

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In the *Matter of Crown Communication New York, Inc. v. Department of Transportation of the State of New York, City of New Rochelle et al.*, the Court of Appeals held that, under the facts of the case, the commercial telecommunication providers are exempt from local zoning with regard to the installation of private antennae on state owned telecommunication towers. 2005 N.Y. LEXIS 109 (February 10, 2005). This likely surprised the City because the Telecommunications Act of 1996 (TCA) preserves the authority of local governments to play a critical role in cell tower regulation. Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending Communications Act of 1934, codified at 47 U.S.C. § 151). The TCA provides for the creation of an efficient nationwide cellular communications system. Section 704 preserves local zoning authority over the placement, construction, and modification of wireless service facilities. The only limitations on this authority are that local regulations must not be based on the health effects of radio frequency emissions, discriminate among providers of functionally equivalent services, or fail to respond to applications from wireless carriers within a reasonable time.

Consistent with the authority outlined by the TCA, New Rochelle adopted a comprehensive zoning regulation that deals with telecommunication facilities. New Rochelle Code Article IXA. The provisions favor co-location on existing towers, outline requirements for facilities that wish to co-locate, and require the granting of orders to fill gaps in service. "While the City understands the need for telecommunication services, it 'finds that these regulations are necessary to protect the environmental, scenic and historical resources of the city and to ensure that adverse visual and operational effects will not contribute to blighting or deterioration of the surrounding neighborhood.'" *Matter of Crown Communication,* 2005 N.Y. LEXIS, at *15-*16 (quoting New Rochelle Code § 331-64.4 [C]). The decision of the Court of Appeals in *Crown Communication* to grant immunity from local requirements to private communication facilities located on state property appears, on its face, inconsistent with the intentions of the TCA.

In 1997, Castle Tower Holding Corporation and the New York State Police, on behalf of participating State agencies, entered into an agreement providing Castle with an exclusive license to build and operate telecommunications towers on state-owned lands and rights-of-way. The agreement also allowed for the licensing of space on the towers to localities and commercial wireless providers. The agreement was later assigned to Crown Communication New York, Inc. Crown identified two sites for towers in the City of New Rochelle along the Hutchinson River Parkway. One was a 120-foot monopole that would replace an existing 110-foot lattice and the other was a lattice-type structure that would be erected at a Department of Transportation (DOT) maintenance yard.

In 2000, Crown presented the plans to the Mayor and City Council and offered the City space on the towers for use by the City's public safety agencies. The City made no objections. DOT then performed an environmental review of the sites pursuant to the State Environmental Quality Review Act. DOT issued a negative declaration finding that neither tower would result in a significant adverse environmental or aesthetic impact. Crown then licensed space on the towers to several private telecommunications companies. Crown constructed one of the towers and then began construction on the second tower at which time the City issued a stop work order, claiming that a special permit was necessary for the construction of the towers under the zoning laws.

In 2001, Crown commenced an action to prohibit the City from enforcing its zoning and to declare that the towers were immune from local zoning regulation. The Supreme Court applied the "balancing of public interest" test adopted by the Court of Appeals in *Matter of County of Monroe*, 530 N.E.2d 202 (N.Y. 1988), and held that Crown was exempt from complying with the local zoning requirements, but the private telecommunications providers licensed to install their equipment on the towers were not. *Matter of Crown Communication,* 2005 N.Y. LEXIS, at *4-*5. The Appellate Division reversed in part holding that,

like Crown, the private wireless telecommunications providers were exempt from the local zoning laws. "[T]elecommunication companies 'are not precluded from enjoying the State's immunity simply because they are private entities or because co-locating on the DOT's towers will advance their financial interest.'" *Id.* at *6 (quoting *Matter of Crown Communication New York, Inc. v. Department of Transportation of the State of New York, City of New Rochelle et al.*, 765 N.Y.S.2d 898, 901 (N.Y. App. Div. 2003)). "[I]t is not the private status of the Wireless Telephone Providers but, rather, the public nature of the activity sought to be regulated by the local zoning authority that is determinative in this case." *Id.* The Court of Appeals affirmed the Appellate Division.

The City argued that it has the right to determine under its zoning authority whether private antennae are necessary to close gaps in cellular telecommunications coverage and to require aesthetic camouflaging of the equipment. Crown and the State contend that "the State's plan envisions a public-private partnership and that the joint use of its towers facilitates the State's public safety and environmental goals," and thus the private telecommunications providers should, like the state-owned towers, be immune from local zoning regulation. *Id.* at *****6-*7.

In *County of Monroe*, the Court of Appeals adopted the "balancing of public interests" test and abandoned the traditional governmental-proprietary classification standard for use in determining the applicability of zoning laws where a conflict exists between two governmental units. In *County of Monroe*, the issue was whether the City of Rochester's zoning regulations were applicable to the expansion and private accessory uses of a county-owned airport located in the City. The "balancing of public interests" test weighs "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interest." *Matter of County of Monroe,* 530 N.E.2d at 204. The *County of Monroe* court concluded that the County was immune from local zoning in its airport expansion and that such immunity extended to the accessory uses. This immunity was extended in spite of the fact that some of the new structures were leased to commercial entities.

Here, the Court of Appeals held that the State provided evidence that the towers would afford benefits to the public. The State is developing a Statewide Wireless Network that will enable the public sector to communicate across the State in emergency situations. The State must quadruple the number of radio sites across the state to create the Network and has reserved space on the replacement and maintenance towers in New Rochelle for such use. In addition, the towers will be used by the Intelligent Transportation System (ITS) which was created by the DOT. ITS enables the DOT to collect information on traffic flow, weather, and road conditions which improves the safety on the roads and aids in

reducing traffic congestion. Space on the towers is also offered to local public safety authorities accomplishing yet another public objective.

The court held that "the installation of licensed commercial antennae on the towers should also be accorded immunity because co-location serves a number of significant public interests that are advanced by the State's overall telecommunications plan." *Matter of Crown Communication,* 2005 N.Y. LEXIS, at *10. "[T]he presence of commercial equipment does not exclusively serve private interests." *Id.* Numerous public safety groups utilize cellular phone services of wireless communications companies that are located on the towers including: the Highway Emergency Local Patrol, Thruway Authority, Dormitory Authority, Department of Environmental Conservation, and Department of Health. The presence of additional private antennae also improves the availability of 911 calls made by the public.

In the present case, the fact that the private wireless providers will profit from use of the towers is analogous to the airport project in *County of Monroe* and, like it that case, the profits by the private entities do not undermine the public interest served. *Id.* at *11. "[T]he public and private uses of the towers are sufficiently intertwined to justify exemption of the wireless providers from local zoning regulations." *Id.* at *12.

The Court of Appeals did not apply the now abandoned "governmental-proprietary function test" utilized in *Little Joseph Realty, Inc. v. Town of Babylon* and relied upon by the City. 363 N.E.2d 1163 (N.Y. 1977). *Little Joseph* is distinguishable from the present case because it was a private asphalt company that leased town-owned land to operate for the sole commercial benefit of the asphalt company. The asphalt company was not immune from zoning laws. Here, the "licensing of space to commercial wireless providers is an integral component of the State's plan of promoting public safety and reducing the proliferation of cellular towers, clearly salient public purposes." *Matter of Crown Communication,* 2005 N.Y. LEXIS, at *13.

Additionally, and to the City's certain chagrin, the court found that the granting of immunity to the private wireless providers did not conflict with the Telecommunications Act of 1996 as argued by the dissent. "While the TCA may not limit a government's zoning ability, it does not dictate that a locality's regulations trump State interests where competing interests exist." *Id.* at *14. "[C]onsistent with *County of Monroe*, [the court] conclude[d] that any income the wireless providers derive from the antennae placed on the two towers does not subvert the underlying public interest served by the enhancement of wireless telecommunications, and such equipment is therefore embraced within the immunity already afforded to the state-owned towers pursuant to the balancing test." *Id.* at *14.

According to the three dissenters the primary issue was whether the State has preempted the area, so as to make the zoning law inapplicable. Relying on *Village of Nyack v. Daytop Villages, Inc.*, 583 N.E.2d 928 (N.Y. 1991), the dissent argued that the State had not preempted the field and the City has the right to regulate the placement of private wireless providers within its borders. The dissent stated that *Matter of County of Monroe* is inapplicable to the present case because the dispute is not between governmental units, but rather about the conflicting interests of a municipality and private commercial wireless providers. Even if the *County of Monroe* were applicable, according to the dissent, "there is no basis to cloak the private providers with the State's immunity." *Matter of Crown Communication,* 2005 N.Y. LEXIS, at *20. The dissent recognized that the State has an important interest in the towers, but claimed that "the primary use of the tower is currently private, making the majority of the benefits claimed to flow from the tower speculative." *Id.* at *21-*22. The dissent fears the potential abuses that may result from the majority's holding in that "[t]he State's conduct essentially amounts to selling its immunity from zoning regulations." *Id.* at *25.