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Abstract: The Second Department Appellate Division's holding in *Bonnie Briar Syndicate, Inc. v. Mamaroneck* upheld local rezoning in Mamaroneck, New York, from residential to recreational use despite legal challenges that the zoning change constituted an unreasonable use of municipal police power as well as a regulatory taking. The case cited several New York precedents. Each held that so long as rezoning is in accordance with the local comprehensive plan, the zoning shall be held constitutional. However, concerns linger among private residents and local municipalities regarding recreational rezoning projects, which despite providing significant benefits for the community, must be justified by a local comprehensive plan.

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Recreational zoning is a novel concept. It was upheld in Bonnie Briar Syndicate, Inc. v. Mamaroneck, a recent Second Department Appellate Division case (661 NYS2d 1005). The plaintiff alleged that the rezoning of its land from residential to recreational use was an unreasonable exercise of the police power and a regulatory taking. The success of the case to date has led some to advocate recreational zoning as a means of preventing residential or commercial development of critical parcels of land in quite different contexts. Although the Appellate Division upheld a carefully reasoned Supreme Court decision (N.Y. Law Journal, July 19, 1997), the concept raises troubling issues if applied inappropriately in other situations.

In *Bonnie Briar*, the Town of Mamaroneck rezoned three parcels of land consisting of 428 acres from R-30, allowing single family home construction on 30,000 square foot lots, to R, a recreational zoning district. The new district limited principal permitted uses to private recreation facilities, such as country clubs, golf courses, fitness centers, riding stables, and tennis and swimming clubs. The recreational district includes lands owned by three private country clubs, including one operated by Bonnie Briar Country Club, Inc. on land owned by the plaintiff, the Bonnie Briar Syndicate, Inc. The plaintiff's land consists of 141 acres that have been used continuously as a country club since 1921, prior to the adoption of the town's first zoning ordinance. Among other features, the

land contains scenic vistas, rock outcroppings, and wetlands and is within a critical flood plain of the town, which is situated on Long Island Sound whose environmental problems abound.

Prior to the rezoning, the Town adopted an extensive Local Waterfront Revitalization Plan. Pursuant to the plan, the Town adopted a number of measures including the challenged rezoning to prevent siltation, pollution and flooding. Additional objectives of the rezoning were to maintain "important open space and recreational resources" and "the suburban quality of the community as a whole." The plaintiff had proposed a tightly clustered subdivision of 71 homes, preserving 112 acres for open space and the continuation of the golf course. Plaintiff argued that its proposed development, which was denied as not permitted under the new zoning, was consistent with the objectives of the Local Waterfront Revitalization Plan.

The plaintiff claimed that the rezoning constituted an unconstitutional taking of its property. It argued that the amendment failed to substantially advance a legitimate public purpose, did not bear a close causal nexus with such a purpose, and that its restrictions are not roughly proportional to the impacts which might have resulted from the property's development. The plaintiff also claimed that its property was unduly singled out to bear a public burden under the guise of regulation that takes away the use for which the property is reasonably adapted.

Judge Leavitt, writing for the Supreme Court in Westchester County, rejected these claims and, in doing so, presented a useful framework for applying regulatory takings law. He placed these facts within stable core of takings jurisprudence which involves regulations that apply generally throughout the community such as a zoning ordinance and its amendments, as in the instant case. Within this core, a number of settled principles apply. First, the regulations are presumed to be constitutional. Second, to overcome this presumption, the plaintiff must carry a heavy burden of proof requiring a demonstration that the regulation is unconstitutional beyond a reasonable doubt. Third, this burden is not carried when the plaintiff shows that the regulation has caused a significant diminution in the property's value or that a substantially higher value could be obtained if an alternate use were permitted. Fourth, to carry its burden, the plaintiff must show that the land cannot yield an economically reasonable return under any use allowed by the zoning. Ironically, the population growth in the Mamaroneck area due to the residential development of other land has created significant demand among relatively affluent people for the type of private recreational uses allowed by the recreational zone.

A principal claim of the plaintiff in *Bonnie Briar* was that the recreational zoning amendment was unreasonable because less restrictive means were available to accomplish the objectives sought. Without restricting the plaintiff's right to build single family homes, the Town could have required a tightly clustered subdivision of the type proposed by the plaintiff. The court puts this

argument to rest, citing *Tilles Investment Company v. Huntington* (528 NYS2d 386 (2nd Dept 1988)) for the proposition that "the Town was not required to explore or utilize alternative measures which would place less restrictions on the possible uses to which plaintiff's property might be put." To act otherwise would put the court in the position of second guessing the discretionary judgments of the local legislature. This is anathema to judges and why they cloak regulatory actions with a presumption of validity.

In rejecting the application of three much-trumpeted takings tests articulated by the U.S. Supreme Court and urged by the plaintiff, Judge Leavitt noted simply that they apply in an entirely different context of cases. The plaintiff argued that Mamaroneck's recreational zoning failed to pass the essential nexus, rough proportionality and individualized determination tests created by the Supreme Court in the 1987 *Nollan* (483 U.S. 825) and 1994 *Dolan* (512 U.S. 374) cases. These tests are reserved for situations where the government imposes an exaction, such as an affirmative easement, on the subject land in exchange for a development permit or otherwise disturbs the fundamental rights of owners to exclude others or to lease, dispose of or manage their properties. In these cases, the court applies a higher level of scrutiny, curious as to whether property rights are being taken as a regulatory shortcut to acquiring them by eminent domain and paying just compensation.

To guide its curiosity in reviewing regulatory exactions of this kind, the court requires an essential nexus between the regulation and the public purpose served by the regulation. It further requires some rough proportionality between the burden imposed on the property by the regulation and the negative impact its proposed development would have on the public. Some individualized determination, or study, of the impacts from this particular project is required. In *Grogan v. Zoning Board of Appeals* (633 NYS2d 819 (2nd Dept 1995)) these tests were applied to the imposition of a scenic and conservation easement on an individual parcel of land. The court noted that, in this context, the agency had a burden of demonstrating the required rough proportionality. By carefully explaining that these tests are not used to determine the validity of generally applicable zoning provisions, Judge Leavitt's decision may help to quiet the concerns raised by commentators and practitioners who generalize too broadly about the applicability of these recently articulated tests.

The plaintiff cited *Vernon Park Realty, Inc. v. Mount Vernon* (307 NY 493 (1954)) for the proposition that its land was unduly singled out to bear a burden that should be borne by the public as a whole. In that case, a two acre parcel situated across the street from a commuter train station was zoned exclusively for parking. The purpose of the zoning was to ease traffic congestion and improve parking conditions for the benefit of the community as a whole: a valid public purpose. The Court of Appeals found, however, that this regulation constituted an "undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation…." It has long been established

that regulations may not be used as a means of carrying out an enterprise that the government is authorized to pursue through the exercise of its power of eminent domain which includes condemning land for parking. This singling out of a small parcel was deemed to be "so unreasonable and arbitrary as to constitute an invasion of property rights, contrary to constitutional due process…."

Another example of singling out a small parcel that was found to be unreasonable and void is found *in Stevens v. Huntington* (20 NY 2d 352 (1967)). In *Stevens*, the residential zoning of a one-acre tract of land located on a corner of a heavily traveled artery in a highly commercial shopping area was found to be an unconstitutional taking. Although there was no government enterprise furthered in this case, the court found that the property "is so totally unadaptable for residential use that the existing ordinance amounts practically to confiscation."

The court in *Bonnie Briar* points out that, absent one of these special circumstances, there is nothing necessarily unconstitutional about singling out individual parcels for special regulation, citing several New York precedents. The test, in each case, is whether the regulation accomplishes the purposes of the community's comprehensive plan. The recreational zone in Mamaroneck passes that test since it was adopted to protect the flood plain, maintain open space and preserve the suburban quality of the community.

Other Applications

As the U. S. Supreme Court noted in *Goldblatt v. Hempstead* (369 U.S. 590 (1962)), "[T]his court, quite simply, has been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons." This is cautionary language. Regulators who are tempted to zone critically situated parcels for recreational use must study carefully the basis used by Judge Leavitt to sustain it in the *Bonnie Briar* context. What if the land were not located in a critical flood plain and did not contain wetlands and other environmental constraints? What if the zoning only applied to a single parcel, owned by one individual ? What if the objective of the recreational zoning were to create a park or other public place: a government enterprise? What if the land had not been used profitably for a private recreational use for over seven decades? What if the recreational uses allowed were too few or too limited to create a meaningful economic opportunity for the property owner? What if the demand for the recreational development allowed were weak in the vicinity of the land affected?

Three communities in the northern suburbs in the New York metropolitan area are debating open space and recreational zoning in contexts quite different from Mamaroneck's. In one village, a 55 acre parcel which had been used as an old age home, situated on rugged terrain, was zoned as a Preservation Development District. The principal uses permitted in this district were limited to

public parks, playgrounds or similar recreational areas; natural open space areas and uses designed for environmental or ecological preservation; and public buildings or uses operated by the village itself. By special permit, the district allowed the development of golf courses and country clubs, public utility facilities and cemeteries. The village comprehensive plan study calls the site “an unusually fine recreational asset for the Village” and proposes that it be used as a “park.” The 55 acre parcel is not suited for golf course development, leaving only quasi-public uses of doubtful economic value. Under the pressures of litigation, the village rezoned the area for low density, residential development designed to protect the natural environment. Still open for resolution is whether the village is liable for damages for a temporary taking under *First English Evangelical Lutheran Church* (482 U.S. 304, 1987) during the time the Preservation Development District was in existence.

In another community, a proposal has been made to zone a single, individually owned 160 acre parcel exclusively for open space and park uses. In another, a large relatively unconstrained parcel that has been proposed for condominium development is being considered for recreational zoning of the type adopted in the Town of Mamaroneck which prohibits residential use. This parcel is not severely constrained environmentally, is not located in a critical flood plain, and has not been used profitably as a private recreational facility. It is not situated next to two other large properties regulated in the same way and it is not the only property of its type in the community. The differences that these changes in context make regarding the validity of recreational zoning will be explored and, undoubtedly, litigated as the future of this novel land use technique unfolds in New York.