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City's Watershed Regulation: Localities, Landowners Object to Changes in Jurisdiction

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Abstract: The Watershed Rules and Regulations, created by New York City's Department of Environmental Protection, influence several facets of law, including the ability of local governments to regulate actions such as construction. Several landowners in the affected area have taken issue with the regulation. Specifically, they challenge the constitutionality of the city's extraterritorial control on outside municipalities because of the resulting diminutive effect of the regulations on private property values. This article discusses these issues, as well as the legal ability for potential plaintiffs to sue.

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I. Introduction

New York City's Department of Environmental Protection (DEP) has authority to regulate land use over a region that encompasses 2000 square miles, 1.2 million acres, nine counties and seventy local governments. In a state with a strong tradition of conferring home rule authority on its cities, towns and villages, this is a curious exception.

On May 1, 1997, the Watershed Rules and Regulations became effective. In addition to regulating the discharge, handling and storage of a variety of chemicals, wastes and hazardous substances, the regulations directly affect the development of land and the jurisdiction of local governments to regulate land uses. These regulations have encountered serious resistance among affected landowners and have caught the attention of local officials whose cooperation in their enforcement is anticipated under a memorandum of agreement signed on January 21, 1997.

In *Loft Corporation v. City of New York* (New York Law Journal, July 1, 1997 at 36 (N.Y.Sup. Ct. 1997)), over fifty landowners in Putnam County brought nine separate actions against the City. They allege that the City's enforcement of the

watershed regulations causes injury that requires compensation under Public Health Law § 1105 and violates the just compensation clause of the state constitution. A number of issues regarding these regulations, their enforceability and the liability of the City for the diminution of property values have been raised since the regulations were issued, many of which are discussed by Judge Hickman in the *Loft Corporation* case.

II. How Do the Regulations Impact Private Land Development and Local Home Rule Authority?

First, they prevent most construction activity within 100 feet of a watercourse or 300-500 feet of a reservoir, reservoir stem or controlled lake (§§18-36-18-39). Of particular note are restrictions on the construction in these buffer zones of subsurface discharge sewage treatment systems and of most impervious surfaces such as roads, driveways, sidewalks and roofs. Second, in designated 60 day travel zones and phosphorus restricted basins, the construction of new surface discharge wastewater treatment plants is prohibited (§36(b) & (d)). Such plants are deemed necessary to serve the needs of larger scale development projects. DEP may approve the construction of such plants over time, if the local governments complete a number of planning studies (§ 18-82(b)(3)). Since these studies will take years to complete, the development potential of significant areas will not be known to landowners for some time.

In Putnam County, the DEP anticipates the participation of local governments in the "Croton Plan." This, in turn, may require amendments to local comprehensive plans and land use regulations. Substantial portions of four of the six towns in Putnam County are located in phosphorus restricted and 60 day travel time basins. Where surface wastewater plants are allowed to be constructed will have great influence over where significant development projects will be located; normally this is a function of local policy and regulation.

III. Is the City's Use of it's Extraterritorial Jurisdiction Constitutional?

In *Loft,* Judge Hickman writes that the extraterritorial jurisdiction of New York City "may well pose a serious constitutional issue. Is it a proper exercise of extraterritorial power to induce municipalities to change their master plans?" The same question was raised in 1977 by landowners who attacked legislation empowering the Adirondack Park Agency (APA) to regulate land uses in an area encompassing 12 counties, 92 towns and 15 villages. The Court of Appeals upheld the legislation noting that the "future of a cherished regional park is a matter of State concern." The court held that the Act's impairment of home rule is justified when "the motive is to serve a supervening State concern transcending local interests." *Wambat Realty Corp. v. New York* (41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977))

The Public Health Law grants concurrent jurisdiction to the State Department of Health and the DEP, whose regulations and enforcement activities are subject to the approval of the State Commissioner of Health. In this legal regime, the DEP is operating like the Adirondack Park Agency, as a state delegate, charged with promoting a matter of state concern. The APA has authority to adopt land use plans and policies to which affected localities must conform. It is empowered to review and approve or disapprove local land use plans (N.Y. Exec. Law §§ 805 & 807). The Court of Appeals had no trouble sustaining its constitutionality.

The mystery of the City's jurisdiction is lessened by seeing it as analogous to the authority of the Adirondack Park Agency. The legislative scheme that empowers the City to regulate extraterritorially serves the broad state interest of protecting the quality of drinking water.

IV. Are the Plaintiff's Property Claims Ripe for Adjudication?

Judge Hickman wrote in *Loft* that the ongoing enforcement by DEP of previous watershed regulations and "obvious intention to actively enforce the new regulations are a sufficient basis to reject the City's argument that the owners…must apply for and await rejection of a specific project before their claims are ripe." To the City's claim that the general rule of ripeness requires landowners to exhaust administrative remedies, such as applications for development permits and variances, Judge Hickman responds that there are exceptions to the ripeness rule, among which are "where such pursuits would be futile, or would cause irreparable injury."

A principal case cited in *Loft* for the proposition that the plaintiff's claims are ripe is *Rockland Light & Power Co. v. City of New* York (289 N.Y. 45, 45 N.E. 2d 803 (1942). *Rockland* involved the City's plans to construct a dam that would deplete the flow of water passing potential water power sites owned by the plaintiffs and decrease the value of its land and business. This case is analogous in an important sense to the *Loft* case. In both, the facts indicate that it could be years before the full impact on the plaintiffs' land values could be fairly assessed. There, the analogy between the cases stops. There were no administrative remedies in the *Rockland* case available to the plaintiff. In *Loft,* the plaintiffs can apply for development permits and variances from the strict application of the regulations to prevent hardships (§ 18-23 & § 18.61). Because of the availability of these remedies, the ripeness doctrine applicable in *Loft* would normally be derived from the regulatory context rather than the public works context.

In a case decided by the U.S. Supreme Court this summer, the prudential reasons for refusing to exercise jurisdiction in regulatory takings cases were reviewed. In *Suitum v. Tahoe Regional Planning Agency* (117 S.Ct. 1659), the plaintiff based her claim on federal constitutional provisions similar to the state provisions relied on by the plaintiffs in *Loft*. The court noted that the plaintiff must demonstrate that she has received a "final decision regarding the application of

the [challenged] regulation to the property at issue…." The underlying idea, in the context of a challenge to land use regulations, is that "a court cannot determine whether a regulation has gone too far unless it knows how far the regulation goes." In *Loft* a great deal is not known about how far the watershed regulations go. Whether, in this context, the plaintiffs' claims are ripe is the major issue to be addressed on appeal.

V. What Injury to Property Rights is Protected?

Judge Hickman's opinion on the ripeness issue was influenced by § 1105 of the Public Health Law which, in his view, provides a broad statutory cause of action to all persons whose "rights of property" are injuriously affected by DEP's enforcement of the watershed regulations. The plaintiffs' complaints allege a variety of injuries to their property rights. These range from the taking of all economically beneficial use of their land to constraints on the marketability of land caused by the extensive time it will take to determine development potential under the regulations.

The general rule requiring compensation for injury to property rights in New York was set forth in St. Aubin v. Flacke (68 N.Y.2d 66, 496 N.E.2d 879, 505 N.Y.S.2d 859 (1986)). The Court of Appeals required that property owners must prove that "all but a bare residue of the economic value of the parcels must have been destroyed by the regulation at issue." The court further noted that "a property owner does not prove a taking solely by evidence that the value has been reduced by the regulation, even if it has been substantially reduced." To date, this has been the rule applied to proving injury to property rights unless the allegation is that the regulation serves as a guise for the condemnation of property for a public use, or that a fundamental right, such as the right to exclude others from one's property, has been taken.

Unfortunately, § 1105 does not define what it means by its use of the term "rights of property." The 1873 version of § 72 of the Public Health Law, from which § 1105 is descended, provided a cause of action to all persons affected by regulations which required the removal of any building. This century-old statute gave a cause of action to "all persons whose rights of property are injuriously affected by the enforcement of any such rule or regulation." This statutory language was crafted nearly a half century before the U.S. Supreme Court first held that a police power regulation can, if it goes too far, constitute a taking of property rights. The legislature, acting in 1873 was more likely protecting the owner's vested right in an existing building.

In 1953, this statutory cause of action was broadened to apply to the City of New York in recognition of its concurrent jurisdiction with the state board of health. At that time, new language was added that extended the cause of action to "all injuries caused to the legitimate use or operation of such property …." This language seems still to refer to damages caused by the removal of a building

occasioned or required by the offending regulation. Judge Hickman reads this language differently, seeing it as a transaction through which jurisdiction was given to DEP "specifically conditioned upon payment for any resulting injury to owners." He uses the Black's Law Dictionary definition of "injury" ("any damage done to another") as sufficient to demonstrate what the legislature intended. "The Court thus construes PHL § 1105 to mean exactly what it states, namely, that all plaintiffs need show is a present 'injury' arising from the acts of the City." Given this definition of the statute's intent, to grant the City's motion to dismiss would be in error since there is some evidence of "current injury" and depressed values in the real estate market. This would be sufficient to prove that the plaintiffs have been presently injured to some extent and that the case is ripe for adjudication. As noted, this is the principal issue to be decided on appeal.

VI. Conclusion

The stakes here are enormous, pitting the billions that the city and its rate payers will incur in constructing filtration plants against the billions that will allegedly be lost by private property owners whose lands are affected by the watershed regulations. The mechanics of governance in the state are challenged: the extraterritorial jurisdiction of the City is attacked as are the cooperative arrangements it has made with affected local governments whose home rule authority, in turn, is diminished by the regulations. The role of the courts and their prudential rules for avoiding controversies usually handled by administrative agencies established to determine rights and values prior to litigation is at issue as well. This is a drama well worth watching, and whose unfolding will greatly impact the future development of land, intergovernmental relations and land use litigation in the state.