

Land Use Case Law Update

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Court of Appeals Weighs in on Extent of Non-Conforming Use: *Jones v. Town of Carroll*

We received a positive reaction to our 2009 Planning and Zoning Case Law Update Briefings Series and decided not to wait until the end of the year to provide an update. Starting this fall, we will be sending out periodic electronic newsletters to highlight any significant new cases or other relevant developments in the land use field.

These newsletters will translate the legal developments into practical advice that can be used by local land use board members as well as by real estate and land use professionals in their day-to-day activities.

The state's highest court extended the doctrine of "non-conforming uses" in a third decision within the span of about a year. Non-conforming uses are those that were legal when started but which subsequently have been prohibited or limited through changes in the zoning code. If an activity has non-conforming use status, it is entitled to continue, the change in zoning notwithstanding. A controversial question has been the geographical extent over which a non-conforming use has been established.

In cases involving landfills or mines where the use typically moves from one portion of the property to another over time, the Court held that the entire property may be entitled to non-conforming use status, even where a large portion of the site is undeveloped. To enjoy non-conforming use status, the owner must show that the parcel was fully approved by the local government for the use and must also objectively demonstrate an intent to put the parcel fully to that use.

Lessons: Land use boards should take care to make sure any approvals granted specify the extent of the authorization, geographic and otherwise. In situations where development is sequential, the authorization should indicate the point, if any, at which additional approval will be needed. Local governing bodies should review local laws which specify the extent to which non-conforming use may be expanded as of right.

Developers who intend to develop properties in phases should endeavor to make their intent clear from the outset. They should seek objective ways of demonstrating that intent. For instance, SEQRA documents should clearly specify the full extent of the proposed project. To the extent that State permits are needed, developers should seek permits which cover the entire extent of the site, particularly where local regulation is minimal or non-existent.

Caution: The Court of Appeals has broadly interpreted the extent of non-conforming uses at sites where development is sequential. Although these rulings were issued in the context of mining and landfill cases, in the future, the Court may apply similar reasoning to other projects which are developed in phases.

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Federal Court Limits Local Basis for Regulating Cell Towers: Verizon v. Town of Clarkstown

The federal appeals court with jurisdiction in New York struck down key provisions in a local law regulating cell towers. The defect related to the Town's attempt to specify preferred cellular technologies. The Court held that the Federal Telecommunications Act leaves the regulation of all technical aspects of telecommunication to the exclusive jurisdiction of the Federal Communications Commission (FCC).

Lessons: Local governments must regulate cell towers through the control of impacts that are within the purview of zoning. Rather than choose preferred technologies as a surrogate for ensuring a level of acceptable impacts, they must regulate the impacts directly. If such regulation has an incidental impact on the choice of technology, such an approach will likely be found to be permissible.

Cell tower developers should have their antennas up (pun intended) for any local requirement that specifies a preferred technology or addresses any other technical requirement under the guise of zoning. If particular impacts of concern can be identified, the developer may address those concerns by the use of any technology acceptable to the FCC.

For further information on these cases or on other land use issues, please contact:

Robert H. Feller, Esq.
Bond, Schoeneck & King, PLLC
111 Washington Avenue, Albany, New York 12210
518-533-3222 ▪ rfeller@bsk.com