Is your Moratorium Valid?

Jeffrey v. Ryan, 2012 NY SlipOp 51881(u)

In the latest decision addressing the authority of municipalities to adopt local laws in anticipation of natural gas drilling, the Supreme Court, Broome County invalidated a local law imposing a de facto moratorium on natural gas drilling activities. While the court held that the local law was not preempted by the Environmental Conservation Law, it found that the municipal defendant did not produce the proper evidence necessary to support its moratorium.

The case centered on a local law enacted by the city of Binghamton that prohibited certain activities related to the extraction, storage and disposal of natural gas for a period of two years. The local law was not a zoning law, but rather enacted pursuant to the city's general police powers. The plaintiffs, consisting of individual landowners, a coalition of landowners and a hotel, challenged the local law on the grounds that it was a zoning law that was not referred to the county planning board, that it was superseded by the Environmental Conservation Law and that, in the alternative, it was a moratorium law that did not meet the standards required of a general police power moratorium.

The court first addressed a few procedural issues, including the standing of the plaintiffs to bring this action. Finding that at least one of the plaintiffs (a landowner with property in a "heavy industrial zone") had standing to sue, the court did not consider the standing of the remaining plaintiffs.

Moving to the merits of the local law, the court first noted that the local law was not preempted by the Environmental Conservation Law. The court adopted "the well-reasoned, well-founded decisions" of the courts in *Anschutz v. Town of Dryden*, 35 Misc.3d 450 (2012) and *Cooperstown Holstein Corp v. Town of Middlefield*, 35 Misc.3d 767 (2012) and held that ECL 23-0303(2) did not preempt the local law in question.

The court recognized that a municipality may enact local laws pursuant to its police powers that are not zoning laws and that such local laws are not subject to review by the County Planning Board under section 239-m of the General Municipal Law. The court went on to note that a municipality may enact a temporary "stop-gap" measure to protect the health, safety and welfare of its residents. When the general police power is so invoked, it is considered to be an emergency measure and will be circumscribed by the exigencies of the emergency. Citing the case of *Belle Harbor Realty Corp v. Kerr*, 35 N.Y.2d 507 (1974), the court held that a municipality may not "invoke its police powers solely as a pretext to assuage strident community opposition; rather, it must establish that its actions are:

1. In response to a dire necessity
2. Reasonably calculated to alleviate or prevent a crisis condition; and
3. That the municipality is presently taking steps to rectify the problem."

Applying these criteria to the local law in question, the court found that the city failed to provide any evidence to justify the banning of the gas exploration, storage and extraction. In support of its conclusion, the court noted that the city failed to make the first two showings, offering no proof that there was a dire need or any crisis situation that needed to be averted. The court indicated that no such showings could possibly be made, as no drilling may take place until regulations are adopted and permits are issued. Perhaps most importantly, however, the court found that the city failed to satisfy the third element, as it clearly did not take any steps to study or alleviate any problems that may be caused by gas drilling, exploration or storage. Accordingly, the court held that the local law was invalid.

So what does this case mean for towns that have adopted moratoria? There are several observations to be gleaned from this case.

1. Perhaps most importantly, any town that enacts a moratorium should plan to make use of the time that the moratorium provides. The fact in this case that the city simply imposed the moratorium without any plan to undertake an evaluation of its laws or otherwise study an issue related to the moratorium appears to have factored prominently in this decision.

2. The opinion does not appear to address the issue of whether the local law in question was subject to referral to the county planning board. While it appears that the local law was deemed a police power law and thus not subject to county review, the court did not expressly state this.

3. The court did not address the standing issues of all of the plaintiffs, leaving open the questions of whether a property owner who may someday wish to lease his or her land for natural gas exploration, or businesses that stand to lose business due to the local law, have standing to sue.

4. There remain questions of whether the three-prong test set forth in *Belle Harbor* is the appropriate standard. At least one other court has held that this test only applies when the local law completely deprives a landowner of all use of the property; it does not apply when the landowner retains reasonable use of the property. See *Louhal Properties, Inc. v. Strada*, 191 Misc.2d 746, (2002). See also New York State Department of State, Land Use Moratoria, James A. Coon Local Government Technical Series, 2010, as found at http://www.dos.ny.gov/lg/publications/Land_Use_Moratoria.pdf

Lastly, the court, in dicta, stated that the first two elements of the test laid out in the case could not possibly be met as the state has not completed its review of the regulations and cannot issue any permits. Yet the court had already made a determination that the city failed to produce evidence in support of these criteria. Local governments enacting moratoria should be prepared to substantiate the dire need and crisis condition elements. Municipal boards are typically afforded deference in making these decisions related to their land uses, and where they are, courts are restrained from substituting their judgment for that of the municipal board.