

MEMORANDUM TO FILE

Subject: Preemption or Immunity of NJTransit from a Hoboken Redevelopment Plan

File: Hoboken

Date: August 11, 2008

Introduction

In the leading case of Rutgers v. Piluso, 60 N.J. 142 (1972), the issue was “what governmental units or instrumentalities are immune from municipal land use regulations, and to what extent.” The New Jersey Supreme Court held that the factors include:

. . . 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 interests.
Id. at 150-151.

At issue was whether the University was subject to Piscataway’s zoning ordinance in the development and construction of new dormitories. The Court held that since the local land use ordinance would restrict the university’s ability to properly grow and develop to better perform its essential governmental functions, the university, although a teaching and research institution, was immune from zoning ordinances when it took on the task of creating new housing for its residents. *See, also, Springfield Township v. New Jersey State Highway Department*, 91 N.J.Super. 567, 583 (Law Div. 1966) (stating, “an ordinance could not control action by the state on its own land); Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237 (1955) (holding a state highway authority is immune from local zoning ordinances when erecting a food stand, gas station, and motor vehicle service area adjacent to its highway).

The nexus between NJTransit’s public mission and its development aspirations in Hoboken, is not so clear. The main purpose of NJTransit is the “development of public transportation policy and planning” to provide “efficient, coordinated, safe and responsive public transportation.” N.J.S.A. 27:25-2. Based on the Rutgers holding, the argument being presented by NJTransit sympathizers is that Hoboken has no power to require NJTransit to adhere to the criteria of a redevelopment plan or local zoning¹. Those taking the position that NJTransit is immune from local law seek to accommodate NJTransit by designating it as its own redeveloper and thereby sanctioning a redevelopment plan that includes large-scale housing and commercial development that has a tenuous relationship at best to transportation.

¹ “Redevelopment” is derived from a different state statute than “zoning”. But there are no differences as they relate to the question of whether a State agency preempts local laws.

Analysis

The issue of whether NJTransit can disregard a Hoboken redevelopment plan is complex. No case law has yet decided the issue. Generally, claims of a municipality's lack of jurisdiction over a higher authority are analyzed in two ways. First, where the higher authority seeks to use land in a way forbidden or restricted by local law, the question is whether the higher authority preempts the municipal regulations. Cox, New Jersey Zoning and Land Use Administration, 485 (Gann 2008). There is a 5-prong test for determining if preemption has occurred. The 5-prong test is as follows:

1. Does the ordinance conflict with State law as to either conflicting policies or operational effect?
2. Was the State law intended, expressly or impliedly, to be exclusive in the field?
3. Does the subject matter reflect a need for uniformity?
4. Is the State scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives' of the Legislature?

Chester Township v. Environmental Protection Department, 181 N.J.Super. 445 (App. Div. 1981) (*quoting*, Overlook Terrace Management v. Rent Control Board of West New York, 71 N.J. 451, 461 (1976)).

Since the State legislature expressly delegated redevelopment authority to municipalities based on public policy concerns for the decline and deterioration of New Jersey's urban centers, it would be difficult to argue that, in general, a municipal redevelopment plan is in conflict with State law or State public policy. It is also unreasonable to argue that the State intended NJTransit's authority to be exclusive in the area of redevelopment and revitalization of its own property **in non-transit related use of its property**. It cannot reasonably be argued that the New Jersey Public Transportation Act of 1979, N.J.S.A. 27:25-1 et. seq., which delineates the authority of NJTransit, is so comprehensive as to override the express delegation of authority created by the same legislative body under the Local Redevelopment and Housing Law ("LRHL"). Such an argument would fail to take into account the division of authority which the legislature has clearly created by the enactment of both Acts. The LHRL, N.J.S.A. 40A:12A-1 et seq., is a statute of equal dignity with the New Jersey Public Transportation Act of 1979. The analysis depends on whether NJTransit can successfully argue that its authority preempts the procedures to be followed in an "area in need of redevelopment".

Cases have phrased State entity preemption of zoning ordinances as follows: "State legislation preempts a municipal zoning ordinance **when the ordinance expressly forbids something which is expressly authorized by statute or permits something which a statute**

expressly proscribes.” Bubis v. Kassin, 184 N.J. 612, 629 (2005). In the present case it is likely that nothing has been forbidden or permitted by the Redevelopment Plan that would interfere with NJTransit’s preeminent transportation role and the exclusivity of NJTransit in its primary grant of authority.

Additionally, preemption at the state level is intended to basically mirror the rules of federal preemption. E.g., Overlook Terrace Management v. Rent Control Board of West New York, 71 N.J. 451 (1976). Therefore, whether at the state or federal level, the higher preemptive authority must be acting *within the scope of its delegated authority* in order for preemption to apply to conflicting laws and regulations. R.F. v. Abbott Laboratories, 162 N.J. 596, 619 (2000) (*citing*, Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141, 153-154 (1982)). **Without being delegated the authority to build, develop and redevelop lands for uses unrelated to public transportation, NJTransit would seemingly lack the delegated authority to preempt the municipal ordinances in the particular instance.**

The authority delegated to NJTransit is as follows:

The legislature finds and declares that:

- (a) The provisions of efficient, coordinated, safe and responsive public transportation is an essential public purpose which promotes mobility, serves the needs of the transit dependant, fosters commerce, conserves limited energy resources, protects the environment and promotes sound land use and the revitalization of our urban centers.
- (b) As a matter of public policy, it is the responsibility of the State to establish and provide for the operation and improvement of a coherent public transportation system in the most efficient and effective manner.
- (c) In the development of public transportation policy and planning, participation by county and municipal governments, transit riders and concerned citizens should be encouraged.
- (d) In the provision of public transportation services, it is desirable to encourage to the maximum extent feasible the participation of private enterprise and to avoid destructive competition.
- (e) In furtherance of these findings and declarations, a public corporation shall be created with the necessary powers to accomplish the purposes and goals set forth in this section, including the power to acquire and operate public transportation assets. **N.J.S.A. 27:25-2.**

Additionally, the legislature provided the following powers to NJTransit which may be applicable to the present issue:

In addition to the powers and duties conferred upon it elsewhere in this act, the corporation [NJTransit] may do all acts necessary and reasonably incident to carrying out the objectives of this act, including but not in limitation thereof the following:

- a. Sue and be sued;
- b. ...

- e. Adopt, amend and repeal such rules and regulations as it may deem necessary to effectuate the purposes of this act, which shall have the force and effect of law...
- f. ...
- h. Plan, design, construct, equip, operate, improve and maintain, either directly or by contract with any public or private entity, public transportation services, capital equipment and facilities or any parts or functions thereof, and other transportation projects, or any parts or functions thereof, which may be funded under section 3 of the federal Urban Mass Transportation Act of 1964... or any successor or additional federal act having substantially the same or similar purposes or functions...**
- i. ...
- j. Purchase, lease as lessee, or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, from any public or private entity, wherever situated;**
- k. ...
- l. Restrict the rights of persons to enter upon or construct any works in or upon any property owned or leased by the corporation, except under such terms as the corporate may prescribe; perform or contract for the performance of all acts necessary for the management, maintenance and repair of real or personal property leased or otherwise used or occupied pursuant to this act;
- m.
- v. Enter into any and all agreements or contracts, execute any and all instruments, and do and perform any and all acts or things necessary, convenient or desirable for the purposes of the corporation, or to carry out any power expressly or implicitly given in this act... **N.J.S.A. 27:25-5**

By its language inviting cooperative ventures with “public entities” and “public transportation services” in subsection (h) of **N.J.S.A. 27-25-5**, it cannot be concluded that redevelopment and public transportation entities cannot be coordinated. And it is clear that redevelopment of properties surrounding a transportation corridor and train station is not a transportation project per se, excluding the operation of the LRHL.

The Issue

The only question then is the following:

WHETHER OR TO WHAT EXTENT THE PROPERTIES OWNED BY NJTRANSIT THAT ARE NOT, OR CANNOT BE RATIONALIZED AS, PART OF NJTRANSIT’S PRIMARY JURISDICTION OR CONTROL OF “TRANSPORTATION”, CAN BE IMPRINTED WITH A REDEVELOPMENT SCHEME THAT NJTRANSIT WOULD OPPOSE.

The issue is not whether a private redeveloper can be given NJTransit’s property to redevelop, or put another way, whether the Hoboken Redevelopment Authority can condemn that property for the benefit of a redeveloper other than NJTransit. The issue arises, theoretically,

because NJTransit wants to develop its own land with heights and densities that Hoboken's zoning or redevelopment scheme would not tolerate – not that Hoboken wants to take away NJTransit's property or make NJTransit build what it does not want to build.

Presumption favoring NJTransit. The New Jersey Supreme Court has held that where the immunity from local regulations and ordinances is claimed to exist in favor of a superior authority, the presumption is that such immunity was intended in the absence of express statutory language to the contrary. Aviation Services v. Board of Adjustment of Hanover Township, 20 N.J. 275, 282 (1956).

Overcoming the Presumption. One New Jersey court has held that implied statutory language to the contrary would suffice to overcome the presumption of immunity. County of Union v. Benesch, 103 N.J.Super. 119, 123-124 (App. Div. 1968). Therefore, to overcome the presumption that NJTransit is immune from the Hoboken ordinances and redevelopment plan the municipality must show that there is statutory language which implies the redevelopment plan and its corresponding ordinances are free from claims of immunity by superior authority. The language of the LRHL is the key to creating this implication. Some of this is repetitive. The first of the applicable sections in the LRHL states that once an area has been determined to be an area in need of redevelopment:

- (a) No redevelopment project shall be undertaken or carried out except in accordance with a redevelopment plan adopted by ordinance of the municipal governing body, upon its finding that the specifically delineated project area is located in an area in need of redevelopment or in an area in need of rehabilitation, or in both...

N.J.S.A. 40A:12A-7.

The second applicable section of the LRHL grants to a municipality or its designated redevelopment agency the following powers to carry out the plan:

Upon the adoption of a redevelopment plan pursuant to section 7... the municipality or redevelopment entity designated by the governing body may proceed with the clearance, replanning, development and redevelopment of the area designated in that plan. In order to carry out and effectuate the purposes of this act and the terms of the redevelopment plan, the municipality or designated entity may:

...

- f. Arrange or contract with public agencies or redevelopers for the planning, replanning, construction, or undertaking of any project or redevelopment work, or an part thereof... and arrange or contract with public agencies or redevelopers for the opening, grading or closing of streets, roads, railways, alleys, or other places or for the furnishing of facilities or for the acquisition by such agency of property options or property rights or for the furnishing of property or services in connection with a redevelopment area.**

N.J.S.A. 40A:12A-8.

With regard to the agreements between a municipality and a redeveloper taking on a project within the redevelopment area the statute states:

- a. All agreements, leases, deeds and other instruments from or between a municipality or redevelopment entity and to or with a redeveloper shall contain a covenant running with the land requiring that the owner shall construct only the uses established in the current redevelopment plan... and any other covenants, provisions and continuing controls as may be deemed necessary to effectuate the purposes of this act.

N.J.S.A. 40A:12A-9.

Lastly, the legislature specifically created a subsection of the LRHL which sets out the powers of public bodies for purposes of carrying out redevelopment projects. The subsection states:

For purposes of aiding and cooperating in the planning, undertaking, construction or operation of housing or redevelopment projects located within an area in which it is authorized to act, any public body may, upon such terms, with or without consideration, as it may determine:

- a. Dedicate, sell, convey or lease any of its property to a municipality or county, housing authority, redevelopment entity or the federal government;
- b. Cause parks, playgrounds, recreational, community, educational, water, sewer or drainage facilities, or any other works which it is otherwise empowered to undertake, to be furnished adjacent to or in connection with housing or redevelopment projects;
- c. Furnish, dedicate, close, pave, install, grade, plan or replan streets, roads, roadways, alleys, sidewalks, or other places which it is empowered to undertake;
- d. Plan or replan, zone or rezone any land within the jurisdiction of that public body, make exceptions from development regulations and ordinances, and change its map;
- e. Enter into agreements, which may extend over any period, notwithstanding any provision or rule of law to the contrary, with a housing authority or redevelopment entity or the federal government respecting action to be taken by such public body pursuant to any of the powers granted by this act. If at any time title to, or possession of, any project is held by any public body or governmental agency authorized by law to engage in the development or administration of public housing or redevelopment projects, including the federal government, the provisions of the agreement shall inure to the benefit of and may be enforced by that public body or governmental agency.
- f. Do any and all things necessary and convenient to aid and cooperate in the planning, undertaking, construction or operation of housing or redevelopment projects;
- g. Cause services to be furnished to a housing authority or redevelopment entity of the character which the public body is otherwise empowered to furnish;
- h. Enter into agreements with a housing authority or redevelopment entity respecting the exercise by such public body of its powers, relating to the repair, elimination or closing of unsafe, insanitary, or unfit dwellings;
- i. ...

- j. Grant, sell, convey or lease any of its property, including real property already devoted to public use, whether held in a proprietary or governmental capacity, to a housing authority or redevelopment entity; provided, that the public body making the grant or lease determines that the premises are no longer required for the public purpose to which the property is devoted, and that it is in the public interest so to grant, sell, convey, or lease the property.

N.J.S.A. 40A:12A-39.

There has not been a judicial analysis of these subsections of the LRHL as they relate to a claim of immunity by a higher State entity.

Conclusion

Since the LRHL statute explicitly states, at N.J.S.A. 40A:12A-7, that “[n]o redevelopment project shall be undertaken or carried out except in accordance with a redevelopment plan adopted by ordinance of the municipal governing body,” and does not exempt any entity or project from this requirement, NJTransit should not be able to ignore the requirements and regulations of a well designed redevelopment plan, intended to effectuate the goals and purpose of the LRHL, and immunize itself from those requirements and the general purpose of the LRHL. This is especially true given (1) the limitation of NJTransit’s powers and the express requirement that it ‘aid and cooperate’ with the local redevelopment authority with regard to redevelopment projects, pursuant to N.J.S.A. 40A:12A-39, and (2) the lack of any express language, and the unlikelihood that the legislature intended through the express language of N.J.S.A. 27:25-1 *et. seq.*, to provide NJTransit with the power to develop and/or administer redevelopment projects.

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