

Land Use Law Report

SLANTS & TRENDS

RECONCILABLE DIFFERENCES? The California Court of Appeal (5th Dist.) found no insurmountable incongruity between its April 5 decision that an ordinance barring certain types of “big box” stores was valid (*see story, p. 53*) and a ruling the previous week by a different panel of the same court that an ordinance banning certain retailers from selling furniture violated their equal protection rights (*see story, p. 56*).

The appeals court panel handling the “big box” case reasoned that the ban on big-box stores that also sell groceries was rationally related to a legitimate governmental objective, encouraging neighborhood-oriented grocery stores. The furniture sales restrictions, on the other hand, it said, were not rationally related to the stated objective of preserving downtown businesses.

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A NEW YORK LANDOWNER’S LAWYERS found a new way to attack a municipality’s redevelopment scheme – expose inconsistencies in its environmental impact statement (*see story, p. 54*).

In preliminary environmental impact statements and in public hearings, the planners and village officials insisted the redevelopment plan could not go forward unless two existing sewage treatment plants on the site were taken out of service. But by the time the final environmental impact statement was prepared, the village was insisting the removal of the sewage treatment plants and the rezoning of the land from industrial to residential were two entirely separate projects. A trial court judge ruled that was improper segmentation of the environmental review, and invalidated the rezoning.

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THE 3RD U.S. CIRCUIT Court of Appeals may be backing away a bit from its insistence that only

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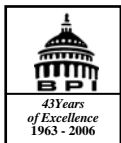
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governmental conduct that “shocks the conscience” gives rise to a substantive due process violation in the land-use regulatory context (*see story, p. 50*).

The court distinguished its ruling in *United Artists Theater Circuit* by saying the holding in that case was limited to executive action. A different standard applied to legislative action, as in the case before it. Legislative action that seems unrelated to furthering any legitimate governmental interest raises an inference of irrationality and arbitrariness, the court said. In this case, it continued, there seemed to be no possible motive for a township’s rezoning of industrial property to residential other than to put the landowner out of business.

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SPEAKING OF IRRATIONALITY, the Missouri Supreme Court found a city’s denial of a subdivision plat that met all legal requirements was “truly irrational,” justifying an award of damages (*see story, p. 51*).



Village Improperly 'Segmented' Environmental Review

A New York trial court has ruled a Long Island municipality improperly segmented its environmental review of a rezoning, rendering the rezoning invalid (*Waldbaum Inc. v. Village of Great Neck*, No. 008948/05, Jan. 9, 2006).

In 2001, the village began the process of redeveloping about 27 acres of commercial and industrial zoned land on Manhasset Bay by hiring a consultant to prepare a draft generic environmental impact statement (DGEIS) under the State Environmental Quality Review Act. The village intended to replace the existing commercial and industrial uses with a residential community, public park and promenade along the bay. Among the existing industrial uses are two sewage treatment plants, one owned by the Great Neck Water Pollution Control District, which serves several villages on the Great Neck Peninsula, and the other owned by the village.

Sewage Diversion 'Key' to Project

During 2002 and 2003, four "preliminary" DGEIS's were prepared. All of them indicated that closure of the existing sewage treatment plants and diversion of the sewage to a plant on the south shore of Long Island was key to the redevelopment. At a public hearing in March 2003, the mayor explicitly stated that if the diversion did not go forward the development would fail. However, at a May 2003 public hearing on the DGEIS, the village attorney, apparently for the first time, claimed the diversion project was separate and apart from the rezoning. When the final GEIS was issued in June, the village took the position that the diversion project was independent and it did not have to respond to public comments regarding the diversion. The FGEIS also did not address the environmental impact of increased discharges of treated sewage into Long Island Sound or the ability of the existing system to absorb increased sewage flow from new construction.

In 2004, the village board of trustees adopted ordinances rezoning the redevelopment area. Waldbaum, which owns a 2.4-acre parcel of land in the former industrial district, filed suit to invalidate the rezoning.

Segmentation, the court observed, is "the division of the environmental review of action such that various activities or stages are addressed ... as though they were independent, unrelated activities, needing individual determinations of signifi-

cance." Under SEQRA regulations, segmentation to evade consideration of the cumulative effects of individual parts of a project is considered contrary to the intent of the law. The court said it found the village's argument that the sewer diversion project was part of a completely separate initiative completely without merit.

If the lead agency believes segmentation is warranted, it must clearly state its supporting reasons and demonstrate that a segmented review clearly is no less protective of the environment, the court continued. Even though the DGEIS and the statements of the village mayor confirmed the interrelated nature of the rezoning and the sewer diversion project, the village never explained why segmentation was permissible and no less protective of the environment.

The court rejected the village's contention that there was no segmentation because the sewer diversion project was merely speculative and not necessary to the rezoning. The evidence supported Waldbaum's contention that a long-range plan that was not speculative existed for the development of Great Neck and that the diversion project was the key to that development, the court said. It was clear from the reading of the village's conceptual plan for the redevelopment area that the area occupied by the sewage treatment plants would be redeveloped with residential and retail structures. Therefore, it concluded, the proposed redevelopment involved closing the existing treatment plants and diverting the village's sewage to a new location.

No 'Hard Look' Taken

The court also agreed with Waldbaum that the village failed to take the requisite "hard look" at the environmental concerns related to the redevelopment. Those included the closure of the sewage treatment plants and diversion of sewage elsewhere; construction of residential units in close proximity to the existing treatment plants; the impact of additional sewage on Long Island Sound's water quality; soil and groundwater contamination in the rezoned area; and the effects of dredging Manhasset Bay to construct a public promenade. The village did not consider the impact of constructing a 6.5-mile pipeline to connect its sewers to Nassau County's system; the problem of noxious odors emanating from the existing treatment plants; the impact of increased sewage flow from its admittedly obsolescent treatment plants into the Sound; the existence of pollution "hot spots" in the rezoned area; and the need to get a tidal wetlands permit in order to construct the promenade.