Two Recent Court of Appeals' Cases Dealing With Cellular Towers

By Katherine Zalantis[1]

Chambers v. Old Stone Hill,.1 N.Y. 3d 424, 806 N.E.2d 979, 774 N.Y.S.2d 866 (2004).

In a case of first impression, the Court of Appeals in *Chambers v. Old Stone Hill*,[2] established that the Telecommunications Act of 1996[3] does not trump the rights of private landowners to enforce restrictive covenants. At issue was the construction of a wireless telecommunications facility consisting of a 120-foot monopole (along with a 660-square-foot two-story equipment building and commercial parking lot) (the "Facility") in the middle of a rural section of the Town of Pound Ridge, New York surrounded by single family homes. The Supreme Court determined,[4] as affirmed by the Appellate Division,[5] that the restrictive covenant at issue prohibited the Facility's construction. And in a six to one decision, the Court of Appeals affirmed both lower court decisions.[6]

Factual Background

The Facility was constructed on defendant-developer Old Stone Hill's land, which land was burdened by a covenant restricting use of the property to single family homes. Plaintiffs are landowners and homeowners whose property is benefited by the restrictive covenant. Old Stone Hill subdivided and developed a larger parcel for single family residential use and actually sold one parcel of land to two of the Plaintiffs (the Chambers). Thereafter, Old Stone Hill abandoned the development of single family homes and entered into a lease with defendant Verizon to place the Facility in close proximity to Plaintiffs' homes.

Restrictive Covenant

The restrictive covenant provided that grantee shall:

> not erect or permit upon any portion of the said premises any building except detached residential dwelling houses each for occupancy and use of one family . . . excepting, however, the garages or other private buildings used in connection with such occupancy . . . .

And further specifically prohibited any commercial enterprises as it barred:

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[2] 1 N.Y. 3d 424, 806 N.E.2d 979, 774 N.Y.S.2d 866 (2004).

[3] 47 USC § 151 *et seq.*

[4] *Chambers v. Old Stone Hill Road Assoc.* (Sup. Ct., Westchester Co., Index No. 00-044475, Cowhey, J. November 14, 2001).

[5] *Chambers v. Old Stone Hill Road Associates*, 303 A.D.2d 536, 757 N.Y.S.2d 70 (2d Dep't 2003).

[6] *Chambers v. Old Stone Hill Road Associates,* 1 N.Y.3d 424, 806 N.E.2d 979, 774 N.Y.S.2d 866 (2004).

> any trade or business **whatsoever**, or any boarding house, vacation resort, hospital or convalescence home, restaurant, or any establishment for the sale or consumption of liquor, or for any other purpose which might be characterized or deemed by other residents of the locality to be a nuisance.

Verizon's Application Before the Town Board

In assessing Verizon's application to construct the Facility, the Town Board of the Town of Pound Ridge considered various sites, including the Old Stone Hill's parcel of land, as well as land owned by the Town's Department of Public Works. The Town ultimately approved the Facility's construction on Old Stone Hill's land finding that this site was the most likely to result in a "single site solution" for wireless service in the Town.

Procedural History

But before the issuance of any permit to Verizon (including, both the special permit and the building permit), Plaintiffs commenced an action against the defendants Old Stone Hill and Verizon to enforce the restrictive covenant.[7] In addition, once the special permit was issued, Chambers (and two other plaintiffs) commenced a separate Article 78 proceeding against the Town of Pound Ridge seeking to overturn the Town Board's decision granting Verizon the special permit.[8]

In the restrictive covenant action, the Court found that Plaintiffs' lands were benefited by the restrictive covenant and that the restrictive covenant clearly prohibited the Facility. The Court found that Defendants were put on notice in this action as well as in the Article 78 proceeding, that Plaintiffs were seeking to prohibit the Facility, but Defendants nonetheless, proceeded "at their own peril" and constructed the Facility while the action was pending. Noting that the action was commenced before any permits were issued, the Court found the Plaintiffs were not guilty of laches. Further, the Court found that Defendants' actions were committed with knowledge that they were acting in violation of the restrictive covenant, and the Court ruled that Defendants' position "does not appeal to the equitable conscience." Finally, the Court held that the Facility had a potential impact on the value of the Plaintiffs' property and therefore the restrictive covenant was of sufficient benefit to the Plaintiffs to avoid extinguishing the restrictive covenant under RPAPL § 1951. Thus, the Supreme Court issued a permanent injunction against the violation of the restrictive covenant and ordered the Facility's removal.

In a companion decision issued that same day, however, the Supreme Court denied the Article 78 petition.[9] The Court ruled that the Town Board's decision was not arbitrary and capricious in approving the special permit and that the decision had a rational basis. No appeal was taken from this determination.

The Defendants appealed from the Supreme Court's decision ordering the Facility's removal. Although the Defendants abandoned many of the arguments made before the Supreme Court, they raised for the first time on appeal to the Appellate Division Second Department, that the restrictive covenant's enforcement violates the Telecommunications Act of 1996[10] ("TCA").

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[7] *Chambers v. Old Stone Hill Road Assoc.* (Sup. Ct., Westchester Co., Index No. 00-044475, Cowhey, J., November 14, 2001).

[8] *Sorkin v. Simkins* (Sup. Ct., Westchester Co., Index No. 7498/00, Cowhey, J. November 14, 2001).

[9] *Id.*

[10] 47 USC § 151 *et seq.*

But in upholding the Supreme Court's decision, the Second Department concluded that the TCA did not "expressly or impliedly preempt" private citizens from enforcing restrictive covenants.[11] Defendants sought leave to appeal from the Court of Appeals, which the Court granted.[12]

Court of Appeals' Decision

The Court of Appeals considered this matter of first impression – whether the TCA preempted Plaintiffs from enforcing the restrictive covenant – and in so doing, explained and reaffirmed two of its previous decisions. The restrictive covenant's intent was to preserve the neighborhood's residential character, which the Court of Appeals ruled was a reasonable limitation. In upholding the restrictive covenant, the Court rejected Defendants' two challenges to its enforcement: (i) that the restrictive covenant offends public policy and therefore, Plaintiffs' contractual rights should yield to public policy; and (ii) that the restrictive covenant should be extinguished under Real Property Actions and Proceedings Law ("RPAPL") § 1951.

Public Policy: the TCA

The Defendants argued that the enforcement of the restrictive covenant was tantamount to a prohibition of service in violation of the TCA, because enforcement of the restrictive covenant would eliminate the only wireless site in the Town. The TCA provides that a state's or local government's regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[13] Defendants claimed that enforcing the restrictive covenant would effectively prohibit wireless service in the Town of Pound Ridge.

The Court of Appeals explained that the Town Board's finding that Old Stone Hill's site "might be the best single site solution"[14] did not mean that Old Stone Hill's site was the only site capable of providing wireless coverage in Pound Ridge. Even though Old Stone Hill's site may have had the best chance of being the only site necessary to meet the telecommunication needs of Pound Ridge and another site may have required additional antennas, citing *Sitetech Group Ltd. v. Board of Zoning Appeals of the Town of Brookhaven,*[15] the Court ruled that Old Stone Hill's site was not the only site in Pound Ridge that could accommodate a wireless facility. In *Sitetech*, the United States District Court, Eastern District of New York upheld a zoning board's denial of a special use permit on the grounds that there were alternate sites even though the alternate sites would not have completely closed the gaps and would have required the erection of additional antennas. The Court of Appeals also noted that the Town itself conceded that there were alternate sites and that during the review process, Verizon was alternatively considering and applied for another site (on land owned by the Town). Thus, the Court held that Plaintiff's contractual right (the restrictive covenant) "in no way denies wireless telecommunications services in the Town of Pound Ridge."[16]

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[11] *Chambers v. Old Stone Hill Road Associates*, 303 A.D.2d 536, 538, 757 N.Y.S.2d 70, 71 (2d Dep't 2003).

[12] *Chambers v. Old Stone Hill Road Associates*, 100 N.Y.2d 506, 795 N.E.2d 38, 763 N.Y.S.2d 812 (2003).

[13] 47 USC § 332(c)(7)(B)(i)(II).

[14] *Chambers v. Old Stone Hill*, 1 N.Y.3d 424, 806 N.E.2d 979, 74 N.Y.S.2d 866, 869 (2004).

[15] 140 F. Supp.2d 255 (E.D.N.Y. 2001)

[16] *Chambers* at 869.

Further, the majority of the Court addressed the dissent's purported reliance upon a leading Second Circuit TCA case, *Sprint Spectrum, L.P. v. Willoth*[17] and ruled that *Willoth* was inapposite for three reasons. First, unlike in *Willoth*, the issue in this case was the enforceability of the restrictive covenant and not the Town's "separate and distinct" authority to grant the permit.[18] Second, the TCA's ban against the prohibition of wireless service applies to "State or local government(s) or instrumentalit(ies)," not individual citizens' efforts to enforce their rights. Third, *Willoth* did not involve private contract rights as that case involved a municipality's rejection of a wireless service application. Further, the Court of Appeals noted that the Second Circuit declined to place the TCA's public policy over all other considerations as the Second Circuit held that: "[w]e do not read the TCA to allow the goals of increased competition and rapid deployment to trump all other important considerations, including the preservation of the autonomy of the states and municipalities."[19]

Public Policy: *Knowlton* and *Crane*

The Court also rejected Defendants' policy argument that the Town Board's granting of the Special Permit negated the restrictive covenant and that the decision in the companion Article 78 proceeding upholding the issuance of the special permit precluded Plaintiffs from enforcing the restrictive covenant. The Court relied on its decision in *Friends of the Shawangunks, Inc. v. Knowlton*,[20] where the Court held that "a particular use of land may be enjoined as in violation of a restrictive covenant, although the use is permissible under the zoning ordinance."[21] Conversely, the *Knowlton* Court held that a permit for a use allowed by a zoning ordinance "may not be denied because the proposed use would be in violation of a restrictive covenant."[22] Thus, the Town Board's issuance of the special permit to construct the Facility is wholly "separate and distinct" from Plaintiffs' right to enforce the restrictive covenant. The Court specifically relied upon *Knowlton's* pronouncement that:

> the use that may be made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of a private agreement.[23]

The Court held the Town Board, therefore, could not consider the restrictive covenant nor deny Verizon's application based upon the restrictive covenant. In addition, the Town Board could not enforce the restrictive covenant – only Plaintiffs could enforce that private right. By separately dismissing the Article 78 proceeding challenging the issuance of the Special Permit in one decision and on the same day issuing a decision enforcing the restrictive covenant, the Court determined that the Supreme Court correctly refused to allow the Town Board's decision to

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[17] 176 F.3d 630 (2d Cir. 1999).

[18] Chambers at 869, *relying upon, Knowlton, see infra.*

[19] *Chambers* 869, *relying upon, Willoth* at 639.

[20] 64 N.Y.2d 387, 476 N.E.2d 988, 487 N.Y.S.2d 543 (1985).

[21] *Id.* at 392.

[22] *Id.*

[23] *Chambers* at 869, *relying upon, Knowlton* at 392.

override Plaintiffs' contractual rights. In conclusion, the Court of Appeals determined that the Defendants and the Town could not negate the restrictive covenant by simply ignoring it and proceeding with the permit process and construction.[24]

The Court also rejected defendants' interpretation of its decision in *Crane Neck Ass'n, Inc. v. City of New York*[25] to support their argument that the restrictive covenant violates public policy. In *Crane*, there was a specific legislative enactment precluding or curtailing even local municipal input and selection of appropriate locations for certain facilities.[26] In that decision, the Court extended the statute's reach by voiding a restrictive covenant that prohibited such a facility, holding that the statute could not have intended to grant private parties greater authority than municipalities in locating these facilities. But the Court of Appeals found that no analogy could be made between the legislative enactment in *Crane* (the Mental Hygiene Law) and the TCA. Unlike the Mental Hygiene Law, the TCA expressly preserves local authority over the location and placement of wireless communications towers and therefore, specifically permits municipalities to restrict the use at particular sites.

In ruling that the enforcement of the restrictive covenant in that case would be contrary to public policy, the *Crane* Court extended the Mental Hygiene Law to private contracts. There, the restrictive covenant limited the use of the premises to a "single family dwelling," and therefore, necessarily prohibited a group home for eight mentally disabled individuals who were in need of uninterrupted supervision. The relevant statute in *Crane* – the Mental Hygiene Law – was enacted to provide for the fair distribution of community residences for the mentally disabled and to prevent "legal battles that had impeded the community residence program."[27]

Unlike the TCA, the Mental Hygiene Law does not give municipalities approval authority — only the right to object. Mental Hygiene Law § 41.34, entitled "site selection of community residential facilities," removed from local government the discretion to plan the location of community residential facilities for the mentally disabled. Specifically, once a site has been proposed for a residential facility for the disabled, a municipality must, within forty (40) days, either: (i) approve the proposed site; (ii) "suggest one or more suitable sites" within its jurisdiction which could accommodate such a facility; or (ii) object to the facility on the basis that there will be a "concentration" of community residential facilities for the mentally disabled.[28] In the event a municipality objects to a site on the basis of a concentration of facilities, the Mental Hygiene Law § 41.43 provides for an expedited resolution as the statute: (i) gives the sponsoring agency the right to request an "immediate hearing;"[29] (ii) requires that a hearing be conducted within fifteen days of the request;[30] and (iii) mandates that a decision be rendered within thirty (30) days of the hearing.[31] In reviewing an objection, a reviewing authority under the Mental Hygiene Law may only consider the need for facilities and the

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[24] *Id.* at 870.

[25] 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984), *cert denied*, 469 U.S. 804 (1984).

[26] *Mental Hygiene Law* § 41.34.

[27] *Crane* at 163.

[28] Mental Hygiene Law § 41.34(c)(1) [*emphasis added*].

[29] Mental Hygiene Law § 41.34(c)(5).

[30] *Id.*

[31] *Id.*

"existing concentration"[32] of such facilities. A municipality's objection may only be sustained if "the nature and character of the area in which the facility is to be based would be substantially altered as a result of the establishment of the facility."

The *Crane* Court in extending the Mental Hygiene Law's reach to private contracts noted that if municipalities were not permitted to regulate the location of such facilities, the legislature clearly did not intend to grant private individuals greater authority. Accordingly, in noting the State's ability to impair private contracts to protect the general good of the public, the *Crane* Court held that the State's interest "in protecting the welfare of mentally and developmentally disabled individuals" trumped the private contract rights. Thus, that Court ruled that the restrictive covenant could not be equitably enforced.

Here, the Court of Appeals held that in contrast to the Mental Hygiene Law in *Crane*, Congress expressly recognized the importance of local land use authority under the TCA and the TCA specifically preserves local planning and zoning. Congress in the TCA preempted jurisdiction over wireless telecommunications facilities except that it also specifically chose to "preserve **all local zoning authority** 'over decisions regarding the placement, construction, and modification of personal wireless service facilities.'"[33] Thus, the Court held that "there is not comparable public policy being transgressed, indeed no preemption that might motivate the Court to extend a statutory mandate to extinguish private rights."[34]

RPAPL § 1951

In addition, the Court rejected Defendants' argument that the restrictive covenant should be extinguished under *RPAPL* § 1951. The Court reiterated the standard it established in *Orange and Rockland Utilities, Inc. v. Philwold Estates; Inc*,[35] to extinguish a restrictive covenant under *RPAPL* § 1951: "[t]he issue in not whether [the party seeking the enforcement of the restriction] obtains any benefit form the existence of the restriction but whether in a balancing of the equities it can be, in the wording of the statute, 'of **no** actual and **substantial benefit.**'"[36] The Court noted that both lower courts found that Defendants failed to demonstrate that Plaintiffs did not derive a benefit from the restrictive covenant and "given the ample support in the record" for this conclusion, this affirmed factual finding was beyond the scope of the Court's review.

Crown Communication New York, Inc. v. Department of Transportation of the State of New York, 2005 WL 309974 (2005).

The Court of Appeals ruled on whether the installation of private antennae by commercial carriers on two State owned telecommunications towers is exempt from local zoning. A sharply decided Court of Appeals ruled that the installation of the private antennae was exempt from local zoning.

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[32] *Id.*

[33] *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999) [*emphasis added*]; 47 U.S.C. § 332(c)(7).

[34] *Chambers* at 870.

[35] 52 N.Y.2d 253, 418 N.E.2d 1310, 437 N.Y.S.2d 291 (1981).

[36] *Chambers* at 871, *relying upon, Orange & Rockland Util. v. Philwold Estates*, 52 N.Y.2d 253 (1981) *(emphasis in original)*.

Factual Background

The New York State Department of Transportation ("DOT") granted Crown approval to construct two towers on State owned property within the City of New Rochelle ("City") (the two properties were a DOT right of way and a DOT maintenance yard). DOT, as lead agency, performed an environmental review under *SEQRA* and issued a negative declaration in connection with both sites. Crown proceeded with construction of the towers and entered into several license agreements with a number of wireless telecommunications providers to lease space on the tower for their equipment. After one of the towers was completed and during construction of the other tower, the City issued a stop work order contending that the towers were subject to the City's zoning laws.

Procedural History

Crown commenced separate hybrid declaratory judgment and CPLR Article 78 proceedings seeking judgment prohibiting the City from enforcing its zoning regulations, which actions were later consolidated. Although the DOT was named as a defendant, it joined Crown in the requested relief. Later, the Town of Eastchester and its Supervisor, individually, intervened in the action as an additional defendant based upon the impact of one of towers on the Town of Eastchester's residents.

In its Decision, Order and Judgment dated November 9, 2001 ("Prior Order")[37] the Supreme Court, Westchester County (per Hon. Nicholas Colabella) ("Supreme Court") held that the two cellular towers located on DOT land, but located within the City were exempt from the City's wireless law (New Rochelle Code, Telecommunications Facilities § 331-64.1, et. seq) ("Local Law").[38] The Lower Court, however, was presented with two separate and distinct agreements: (i) the "exclusive license" agreement between Crown and the DOT ("Exclusive License Agreement"); and (2) the subsequent agreements between Crown and Commercial Carriers ("Subsequent License Agreements").

With respect to Crown's Exclusive License Agreement with the DOT, the Lower Court applied the *Matter of County of Monroe*[39] balancing test and determined that Crown itself and Crown's construction of the cellular towers at issue were exempt from the Local Law. Under the Exclusive License Agreement, the DOT granted Crown the "exclusive right" to develop new and existing state owned lands for the "design, construction, operation, marketing and maintenance of wireless telecommunication facilities," including the cellular towers at issue below. The Lower Court found that Crown was the DOT's "agent" for the purpose of constructing these facilities on the DOT's land in furtherance of the DOT's purpose and therefore held that the DOT, and not Crown, was actually the "instrumentality seeking immunity."[40] The Supreme Court noted that the development of the cellular towers in question was "consistent with, and related to" the DOT's governmental function and that the cellular towers would serve the public interest as they will support the DOT's Intelligent Transportation System and the Statewide Wireless Network.[41] Thus, the Supreme Court held in its Prior Order that the DOT's interests

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[37] *Crown Communication New York, Inc. v. City of New Rochelle*, Index No. 01-07863 (November 9, 2001).

[38] *Id.* at 5.

[39] *Matter of County of Monroe*, 72 N.Y.2d 338, 530 N.E.2d 877, 529 N.Y.S.2d 276 (1988).

[40] *Crown Communication New York, Inc. v. City of New Rochelle*, Index No. 01-07863 (November 9, 2001).

[41] *Id.*

outweighed City's interests and held therefore, that the cellular towers were exempt from the Local Law.

But the Prior Order left unanswered whether Crown's Subsequent License Agreements and the subsequent commercial providers were similarly exempt from the City's Local Law. The Supreme Court granted the City's application for reargument to address this issue and modified its Prior Order by Decision and Order dated May 28, 2002[42] ("Supreme Court's Order"). In the Supreme Court's Order, the Supreme Court adhered to its Prior Order in all respects, except that it determined that the Commercial Carriers were subject to the City's Local Law.[43] Both Crown and the DOT appealed from the Supreme Court's Order.

The Appellate Division, Second Department ("Second Department") in its Decision and Order dated October 20, 2003 ("Second Department's Order")[44] reversed the Supreme Court's Order to the extent it modified the prior Order. The Second Department extended the DOT's "immunity" to the Commercial Carriers[45] based primarily on its finding that collocation by the Commercial Carriers would serve to "partially finance" the DOT's statewide wireless network and its "goals of improving traffic flow, motorist safety and emergency response along the Hutchinson River Parkway."[46] It concluded that allowing the City to enforce its zoning laws against the Commercial Carriers would "'foil the fulfillment of the greater public purpose' in constructing these facilities."[47]

The Court of Appeals granted reargument[48] and in a four (4) to three (3) decision affirmed the Appellate Division's Decision.

Court of Appeals Majority Opinion

The Majority opinion reaffirmed the *County of Monroe* balancing test. The issue in *County of Monroe* was whether the expansion and accessory uses of a county-owned airport located within the City of Rochester were subject to the City of Rochester's zoning regulations. There, the Court abandoned the governmental-proprietary standard and in its place, set forth a "balancing of public interests" test. Under that test, the following factors are considered: (1) "the nature and scope of the instrumentality seeking immunity"; (2) "the kind of function or land use involved"; (3) "the extent of the public interest to be served"; (4) "the effect local land use would have upon the enterprise concerned and the impact upon legitimate local interests"; (5) "alternative locations for the facility in less restrictive zoning areas and alternative methods of providing the needed improvement"; and (6) "intergovernmental participation in the project development process and an opportunity to be heard."[49] In *County of Monroe*, the Court of Appeals ruled that the county's expansion of the airport was immune from the City's zoning regulation.

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[42] *Crown Communication New York, Inc. v. City of New Rochelle*, Index No. 01-07863 (May 28, 2002).

[43] *Id.*

[44] *Crown Communication New York, Inc. v. Department of Transportation of the State of New York*, 309 A.D.2d 863, 765 N.Y.S.2d 898 (2d Dep't 2003).

[45] *Id.* at 900-901.

[46] *Id.* at 901.

[47] *Id., relying upon, Matter of County of Monroe at 344.*

[48] *Crown Communication New York, Inc. v. Department of Transportation of the State of New York*, 2 N.Y.3d 705, 812 N.E.2d 1261, 780 N.Y.S.2d 311 (2004)

[49] *Matter of County of Monroe* at 343.

In *Crown*, although the Court of Appeals acknowledged that the dispute was not between two municipalities, it nonetheless ruled that *County of Monroe* "informs the result."[50] The majority Court noted that the State submitted evidence of numerous benefits that the government's use of the towers would afford the public, including: (1) the Statewide Wireless Network, which permits interagency and intergovernmental communication; (2) an Intelligent Transportation System, which monitors traffic flow, weather and road conditions; and (3) the State's policy of offering space on its towers to local public safety authorities. Accordingly, the Court of Appeals determined that the installation of the antennae on the tower by the commercial providers should also be accorded significant immunity, because "co-location serves a number of significant public interests that are advanced by the State's overall telecommunications plan."[51]

The Court further found that the public interest served by co-location was not undermined simply because the wireless providers will also realize profit. The Court ruled that such shared use and benefit is analogous to the airport development project in *County of Monroe*. Thus, the Court ruled that "the public and private uses of the towers are **sufficiently intertwined** to justify the exemption of the wireless providers from local zoning regulations."[52]

In addressing the dissent's focus on *Incorporated Village of Nyack v. Daytop Village, Inc.*,[53] the majority Court explained that preemption is not the only means for determining whether a particular activity is exempt from local zoning regulation.[54] As detailed in the section below, the dissent contended that the proper inquiry should have been whether the state preempted a particular area to determine whether the private carriers were exempt from local zoning. But the majority court ruled instead that preemption was not the sole test and that the principles outlines in *County of Monroe* applied.

Finally, the majority court ruled that extending immunity to the private providers did not conflict with the TCA. The Court noted that the TCA § 332(c)(7)(A) provides that nothing in the Act "shall limit or affect the authority of the State or local government . . . over decisions regarding the placement . . . of personal wireless service facilities." The Court explained, however, that while the TCA does not limit a government's zoning ability, "it does not dictate that a locality's regulations trump State interests where competing interests exist."[55]

Dissenting Opinion

The dissent argued that the proper preliminary inquiry should be whether the State has preempted this area so that local zoning does not apply. The Court of Appeals set forth this preemption standard in *Incorporated Village of Nyack*, where the Court of Appeals considered "the interplay between State and local authority" in siting a substance abuse facility.[56] There, Daytop (an operator of a substance abuse facility) sought approval from the State to operate a residential substance abuse treatment facility in the Village of Nyack in Rockland County, New York.[57] The State reviewed Daytop's application and evaluated the proposed facility, which

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[50] *Crown* at 3 (unofficial page cite).

[51] Id. at 3 (unofficial page cite).

[52] Id. at 3 (unofficial page cite).

[53] 78 N.Y.2d 500, 583 N.E.2d 928, 577 N.Y.S.2d 215 (1991).

[54] *Crown* at 3 (unofficial page cite), fn. 3.

[55] Crown at 4 (unofficial page cite).

[56] *Incorporated Village of Nyack* at 506.

[57] *Id.* at 503.

evaluation included the location and adequacy of the facility, as well as the services Daytop intended to provide. The State subsequently issued Daytop a final certificate of approval. But Daytop did not seek either a variance or a certificate of occupancy from the Village even though the proposed site was located in the Village's commercial zone, which prohibited residential uses.[58] Consequently, the Village sought to stay Daytop's operation of the facility until such time as Daytop obtained a variance and certificate of occupancy from the Village.

In *Incorporated Village*, the Court of Appeals rejected Daytop's argument that the State's comprehensive efforts to deal with substance abuse evidenced its intention to preempt local oversight and consequently, rejected Daytop's claim that the State's Mental Hygiene Law preempted the Village's local zoning laws. Rather, the *Incorporated Village* Court held that that "[b]oth the State and the Village have important interests at stake in this controversy – the State in promoting its substance abuse policy, the Village in controlling its present shape and future growth."[59] In noting that these "interests are not necessarily contradictory,"[60] the Court in *Incorporated Village* explained that "State and local regulation of the placement of substance abuse facilities will not by their very nature produce conflict and inconsistency. Two separate levels of regulatory oversight can coexist."[61] Thus, the *Incorporated Village* Court specifically ruled that local zoning was not preempted by the State, but rather State and local oversight could "coexist."[62]

The dissent in *Crown* found that the State did not preempt the field of regulating telecommunications facilities. To the contrary, the dissent noted that although Highway Law § 10[38] granted the Commissioner the authority to lease state highway property, the development of such property "shall be subject to the zoning regulations and ordinances of the municipality in which said property is located . . . ."[63] Further, the dissent noted that the TCA specifically preserves local zoning.

The dissent stated that absent preemption, the City had a legitimate interest in regulating the placement of private wireless facilities within its border. The dissent argued that like in *Incorporated Village*, there was no proof that the City's regulations would be inconsistent with the State's goals, including the State's goal of establishing a Statewide Wireless Network. Further, the dissent noted that the City's goal of co-location was consistent with the State's goal. Thus, the dissent argued that the City should be permitted to exercise it zoning authority.

As for the *County of Monroe* balancing test, the dissent concluded that the test simply was not applicable, because the test applies to disputes between "governmental units." In contrast, *Crown* involved the interests of the municipality and the interests of a commercial wireless providers. Nonetheless, the dissent ruled that even applying the *County of Monroe* balancing test "there is no basis to cloak the private providers with the State's immunity."[64]

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[58] *Id.* at 504.

[59] *Id.* at 506.

[60] *Id.*

[61] *Id.*

[62] *Id.* [*emphasis added*]

[63] *Crown* at 5 (unofficial page cite).

[64] *Crown* at 6 (unofficial page cite).

In sum, the dissent argued that the State's conduct essentially amounts to selling its immunity from zoning regulation.[65] The dissent concluded that the State has not preempted local zoning regulations and there is no indication that the local zoning regulations would conflict with the State's purpose. Thus, the dissent contended that the state's immunity from local zoning should not be extended to the private providers.

[65] *Id., relying upon, Little Joseph Realty, Inc. v. Town of Babylon*, 51 A.D.2d 158 (2d Dep't 1976), *aff'd*, 41 N.Y.2d 738 (1977).