

Two Important Decisions for Parties Involved in Land Use and Development

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Over the past few weeks, the New Jersey Supreme Court and the Federal Court of Appeals for the Ninth Circuit issued important decisions that have implications for all parties involved in land use and development including developers, land use boards, local governments, homeowners, and vacationers alike. In Shipyard Associates L.P. v. Hoboken, decided May 5, 2020, the New Jersey Supreme Court held that zoning ordinances that became effective within two years after a developer obtained final site plan approval could not be applied to prevent the developer's approved project. In Rosenblatt v. Santa Monica, the Supreme Court recently declined to review the judgement of the Ninth Circuit upholding a local ordinance banning most short-term rentals in the city against a claim that such an ordinance violated the Constitution's Dormant Commerce Clause. Both cases and their implications are discussed below.

Shipyard Associates L.P. v. Hoboken

The New Jersey Supreme Court's Shipyard Associates decision is the latest installment in a long-running dispute between the City of Hoboken and Shipyard Associates L.P. ("Shipyard"). The genesis of the dispute arose over Shipyard's plan to construct two high-rise residential towers on the Hoboken waterfront. Shipyard obtained final site plan approval to construct that project in 2012 over Hoboken's strenuous objection and eventual litigation.

While Shipyard's final site plan approval was being appealed, Hoboken enacted two ordinances that became effective in January 2014, Z-263 and Z-264. Z-264, which prohibited new construction or substantial improvement of existing structures on a portion of the waterfront, would have stopped Shipyard's project entirely. Z-263 limited permissible uses and imposed heightened construction standards in certain coastal and floodplain areas such that residential projects were not permitted where Shipyard's site is located. Z-264 was described as a zoning ordinance under the Municipal Land Use Law (MLUL); Z-263 was described as having been enacted pursuant to Hoboken's police powers.

Shipyard filed a complaint against Hoboken, in part challenging the applicability of the two ordinances to its project. The Law Division and the Appellate Division both held that the two ordinances could not be applied to Shipyard's project because Section 52(a) of the MLUL provides a two-year period of protection against any zoning changes to a project after that project obtains final approval. The New Jersey Supreme Court granted Hoboken's petition for certification.

Hon. Walter F. Timpone, writing for the Court, first considered Hoboken's argument that Z-263 was not a zoning ordinance but was instead a general environmental ordinance such that Section

52(a) of the MLUL would not bar its applicability to Shipyard's project. The Court found Hoboken's argument unpersuasive, holding that, although Z-263 was passed pursuant to the city's police powers and in the wake of Superstorm Sandy, it fundamentally altered the permissible uses in the area where Shipyard's site is located and placed limits on how and where Shipyard could build. The Court also found it significant that any appeals of floodplain permitting or variance requests under Z-263 are submitted to the same board that makes land use determinations in Hoboken. As such, the Court determined that Z-263 was "unmistakably" a zoning ordinance subject to the MLUL because it "set specific standards, methods, and uses governing construction."

Justice Timpona then considered Hoboken's argument that Section 52(a) of the MLUL, which pertains to final approvals, should be read to permit changes in zoning that are related to health and public safety that are set forth in Section 49 of the MLUL, which deals with preliminary approvals, and Section 10.5 of the MLUL which governs applications for development. The Court rejected this argument, relying on the plain language of Section 52(a) which does not contain any of the exceptions that are found in Sections 49 and 10.5.

In the end, the Supreme Court concluded that since Z-263 and Z-264 were both zoning ordinances that became effective within two years after Shipyard obtained final approval, and that Section 52(a) of the MLUL did not contain any exceptions for changes in zoning related to health and public safety, the MLUL prevented those ordinances from being applied to Shipyard's project.

The Court's decision in Shipyard Associates has implications beyond the long-running dispute between the two parties in that case. As the Shipyard Court observed, the MLUL contains increasingly favorable protections for developers as a project progresses from application to final approval. In our current economic and health climate, developers and municipalities should be aware of their respective rights under the MLUL and the ability to protect and promote public health and safety in good faith. However, Shipyard also vindicates that the MLUL provides developers with rights under the MLUL against sustained, and sometimes creative, municipal attacks against a project with final approval that a municipality does not want to proceed or would like to alter after-the-fact.

Rosenblatt v. Santa Monica

As of May 2020, the online marketplace AirBnB, which permits property owners to list and rent their private residences to guests for a short term, has over 7,000,000 listings in over 100,000 cities in over 220 countries with roughly 150,000,000 users. Municipalities traditionally regulate hotel and bed and breakfast uses in the usual fashion: permit such uses in certain zones and impose parking, traffic circulation, lighting, lot size, and other requirements on those uses within those zones. Municipalities also often collect taxes on those uses. Hotels in Santa Monica, for example, are subject to a 14% transient occupancy tax that AirBnB listings are not required to pay.

Sites such as AirBnB, however, have essentially turned any property into a possible hotel or bed and breakfast, often for much cheaper than a usual hotel stay but in areas that might not be suited for the corresponding increase in parking or traffic, among other issues the explosion of short-

term rental marketplaces have introduced, such as housing availability and property values, for example. Rosenblatt v. Santa Monica, 940 F.3d 439 (9th Cir. 2019) is a recent exposition of the clash between a municipality's attempt to regulate short term rentals and the tourism industry within city limits on the one hand, and a property owner's right to use their property as they see fit on the other hand.

In 2015, Santa Monica enacted an ordinance ("the Ordinance") prohibiting property rentals for 30 days or less except where a primary resident remained in the dwelling. In doing so, Santa Monica sought to preserve the city's "available housing stock and the character and charm which result, in part, from cultural, ethnic, and economic diversity of its resident population," and "its unique sense of community which derives, in large part, from residents' active participation in civic affairs, including local government, cultural events, and educational endeavors." The city council found that short-term rentals are detrimental to the community's welfare because guests do not have any connections to the community and "the presence of such visitors within the City's residential neighborhoods can sometimes disrupt the quietude and residential character of the neighborhoods."

Arlene Rosenblatt rented out her house using AirBnB for \$350 per night while she was away traveling. After the Ordinance was enacted, Rosenblatt sued Santa Monica claiming that the Ordinance violated the United States Constitution's Dormant Commerce Clause because the city was discriminating against out-of-state commerce. The District Court dismissed the complaint and Rosenblatt appealed to the Ninth Circuit.

The Court began by observing that the Constitution gives Congress the power to regulate interstate commerce. To that end, the Supreme Court has long recognized that the Constitution prohibits local laws that discriminate against interstate commerce by providing benefits to in-state economic interests while burdening out-of-state competition – the so called "Dormant Commerce Clause." Laws that directly discriminate against interstate commerce are usually struck down. But when reviewing a law that has only an indirect effect on interest commerce and regulates evenhandedly, a court determines whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

In light of that standard, the Ninth Circuit first determined that the Ordinance does not directly discriminate against interstate commerce, reasoning that the Ordinance regulates only conduct of persons in Santa Monica, regardless of whether those people are in-state or out-of-state, who choose to do business within the city through the use of local real estate.

The Court then concluded that the Ordinance did not burden interstate commerce. Judge Nguyen, writing for a unanimous panel, rejected Rosenblatt's argument that the Ordinance prevented out-of-state travelers from accessing Santa Monica's residential neighborhoods, reasoning that there were plenty of reasonable alternatives to her AirBnB listing and that the Ordinance did not prevent anyone residing outside of Santa Monica from purchasing property and residing within the city. The Court also disagreed with Rosenblatt's argument that the City was trying to promote its local hotel industry (and the tax revenue associated with it) over the short term rental industry by concluding that the Ordinance treated hotel owners, property owners, and renters equally without regard to their in-state or out-of-state status. Finally, the Ninth Circuit rejected the argument that the Ordinance created a "residency requirement" in

exempting short term rentals where the primary resident remained on-site, noting that the Ordinance did not require the primary resident to be a Santa Monica resident or otherwise.

Although the court concluded that the Ordinance did not directly regulate or burden interstate commerce, it noted—and Santa Monica conceded—that it did incidentally implicate that interstate commerce, which required the court to determine if the burdens of those implications clearly exceeded the local benefits of the Ordinance. The Ninth Circuit determined that Rosenblatt’s complaint failed to allege a high enough burden on interstate commerce and at most only alleged a small burden on Santa Monica’s local economy, thereby affirming the dismissal of the case. The United States Supreme Court denied Rosenblatt’s petition for certiorari on May 18, 2020.

The Rosenblatt case is not the only lawsuit over Santa Monica’s attempt to regulate short-term rentals. In 2019, the Ninth Circuit also upheld as constitutional a different Santa Monica ordinance that imposed obligations on online marketplaces such as AirBnB and HomeAway.

While the law surrounding regulation of online marketplaces that utilize local resources is still developing, the significance of the Rosenblatt case is that carefully crafted regulations continue – for the time being – to survive constitutional attacks. However, as municipalities across the United States continue to implement different ordinances with different obligations but all within the same market, a uniform national standard may be appropriate.