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Can Parties Stipulate As to Whether An Apartment Is Rent-Stabilized?

By Jeffrey Turkel

Legal disputes as to the rent regulated status of an apartment are as old as rent regulation itself. On occasion, landlords and tenants have purported to "agree" in a lease or stipulation as to whether a unit is regulated. This article surveys case law as to how courts treat such agreements.

STATUTORY COVERAGE IS A MATTER OF LAW, AND CANNOT BE WAIVED

Rent stabilization coverage is a matter of statutory right and cannot be created by waiver or estoppel. *See, Matter of Trainer v. New York State Div. of Hous. & Community Renewal*, 162 AD3d 461, 462 (1st Dept. 2018). Nor can coverage be created by agreements between landlords and tenants. RSC §2520.13, captioned "Waiver of Benefit Void," states that "[a]n agreement by the tenant to waive the benefit of any provision of the RSL or this Code is void." As the First Department held in *Drucker v. Mauro*, 30 AD3d 37, 39 (1st Dept 2006):

"It is well settled that the parties to a lease governing a rent-stabilized apartment cannot, by agreement, incorporate terms that compromise the integrity and enforcement of the Rent Stabilization Law. Any lease provision that subverts a protection afforded by the rent stabilization scheme is not merely voidable, but void."

Critically, the First Department in *Drucker* added that this rule applies even if: 1) "the particular agreement is a product of a stipulated settlement;" and 2) "it is the tenants who seek to gain advantage by enforcing the unlawful lease provision to evade the operation of the law and regulations." *Id*. at 41.

Reichenbach

In *Reichenbach v. Jacin Invs. Corp., N.V.*, 2021 WL 27643 (1st Dept. 2021), the landlord and tenant executed a stipulation in Housing Court whereby the tenant, *inter alia*, conceded that her apartment was not rent-stabilized. When

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she, among other tenants, sought a declaration of stabilized status in a subsequent Supreme Court action, the landlord moved to dismiss the complaint against her based on the stipulation.

Supreme Court (Kalish, J.) denied the motion to dismiss, holding that Civil Court's so-ordering of the stipulation was not tantamount to a finding of fact that the apartment was exempt. The First Department agreed, writing that "the parties themselves are not the arbiters of whether the apartment is subject to rent stabilization." *See also, Mautner-Glick Corp. v. Higgins*, 64 Misc 3d 16 (App Term 1st Dept 2019) ("To the extent that the parties' so-ordered stipulation of settlement … in a prior 2013 nonpayment proceeding states that … the subject apartment … was 'not regulated,' the protection of the Rent Stabilization Law and Code cannot be waived if the apartment at issue is determined to be covered by rent regulation").

In *River Tower Owner, LLC v. 140 West 57 St. Corp.*, 172 AD3d 537 (1st Dept. 2019), the corporate tenant-defendant entered into a lease with the landlord's predecessor providing for a fixed 40-year term. The landlord, upon purchasing the building, sought a declaration that the lease was void as against public policy. The First Department held that the lease was unenforceable:

> "The lease reflects an impermissible intention to remove the apartment from rent stabilization under Rent Stabilization Code (9 NYCRR) §2520.13.
>
> * * *
>
> The lease violated the rent stabilization scheme in several respects. The 40-year term violated 9 NYCRR 2522.5(a)(1) and (b)(1), which allows a tenant to choose between a one- and two-year lease or renewal only. By setting the 40-year fixed term, the lease effectively removed the apartment from rent stabilization for a generation."

204 Columbia Heights, LLC

A more nuanced scenario was presented in *204 Columbia Hgts., LLC v. Manheim*, 148 AD3d 59 (1st Dept. 2017). There, a tenant leased two rent-controlled apartments in a building. After a third apartment became vacant, the landlord and tenant entered into a lease whereby they agreed that all three apartments would be combined, and that the new combined apartment would be rent-stabilized. The First Department rejected the tenant's claim that the lease was void as against public policy, noting that the lease allowed for the possibility the apartment was not stabilized:

"While we do not waiver from the strong public policy and this Court's consistent precedent in this area, we reject defendant's claim that the lease he entered into with plaintiff's predecessor is void as against public policy. Unlike the leases invalidated in the foregoing cases, the subject lease did not seek to completely deregulate the apartment. Rather, the parties to this lease agreement who did not know the rent regulation status of this apartment merely tried to move the apartment from rent control to rent stabilization with certain concessions, and set out the terms for such transition, if possible.

Courts are more likely to enforce a stipulation relating to apartment status where the parties agree that the unit is rent-stabilized. In *Kattan v. 119 Christopher LLC*, 180 AD3d 566 (1st Dept. 2020), the First Department wrote:

> "We note that, contrary to defendant's contention, plaintiff's rights under the rent stabilization laws do not arise from the stipulation but under the relevant statutes that confer rent-stabilized protections on them, and those rights were not and

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could not be terminated simply because the prior landlord failed to offer plaintiffs rent-stabilized leases. However, given that the stipulation stated that plaintiffs were rent-stabilized tenants, calculated in good faith the legal regulated rent for the apartment, and provided compensation for the alleged overcharges, the court correctly determined that the stipulation was not an attempt to circumvent the rent stabilization laws and therefore was enforceable."

CONTRACTING INTO 'RENT STABILIZATION'

In *546 W. 156th St. HDFC v. Smalls*, 43 AD3d 7 (1st Dept. 2007), the owner of an HFDC building exempt from rent stabilization entered into a stipulation with a tenant stating that her tenancy would be subject to the RSL. In its petition in a subsequent non-payment proceeding, the landlord characterized the unit as exempt. The tenant sought dismissal based on the prior stipulation.

Reversing Appellate Term, the First Department reinstated the petition, holding that the Legislature's intent that HDFC buildings are exempt from rent stabilization must govern:

"It is apparent that the Legislature has provided a framework for the operation of an HDFC to accomplish the legislative purpose in enacting the Private Housing Finance Law. It is equally apparent that the objective of providing housing to low income families is not shared by the Rent Stabilization Law, application of which extends to tenants of far more substantial means. Where, as here, the Legislature has subjected premises to a particular form of organization and regulation, the courts are obliged to apply the pertinent status so as to promote its purpose.

Would the result in *546 W. 156th St. HDFC* have been different if the building were not an exempt HDFC? Perhaps so. In *Carrano v. Castro*, 44 AD3d 1038 (2d Dept. 2007), the "rent-stabilized" apartment was located in a building that was exempt from stabilization coverage because it contained fewer than six units. In a prior stipulation, the landlord had agreed that the tenants would be "deemed" to be entitled to all rights under the RSL. The Second Department enforced the stipulation, holding:

"Contrary to the petitioner's contention, when read as a whole, the stipulation relied upon by the tenants merely sought to confer upon them, by way of an express contract referring to the rent stabilization law, the same rights as those afforded tenants protected by the rent stabilization law. It did not seek, by contract, to evade or circumvent a mandatory rent regulation scheme."

Thus, while a stipulation cannot convert an otherwise exempt apartment into a stabilized unit, it can be enforced to the extent that it purports to treat the apartment *as if* it were subject to the RSL. Landlords beware.

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REAL PROPERTY LAW

OWNER ENTITLED TO CANCELLATION OF NOTICE OF PENDENCY UPON POSTING OF BOND

Hakmon v. 244 East 48th Street Development, LLC

NYLJ 11/13/20, p. 19, col. 4
AppDiv, First Dept.
(memorandum opinion)

Property owner appealed from Supreme Court's denial of its motion to cancel a notice of pendency filed by holder of an alleged right of first refusal. The Appellate Division reversed, and held that owner was entitled to cancellation upon posting an undertaking of $1,826,000, unless holder of the first refusal right were to post a bond in the amount of $1,162,307.40.

Holder of the alleged first refusal right sought title to the property, which she asserts is worth more than the $8.05 million offer the current owner has received. In connection with the action, she filed a notice of pendency. Owner moved to cancel the notice of pendency. Supreme Court denied the initial motion with leave to renew because owner had not established the value of the premises. Supreme Court then denied owner's motion for leave to renew even after owner submitted an affidavit of a real estate broker who opined that an $8.05 million offer represented fair market value. Owner appealed.

In reversing, the Appellate Division noted that the double bonding approach of CPLR 6515(2) was appropriate in the circumstances of the case. The court then held that a bond of $1,826,000 would be sufficient to protect the interest of the holder of the first refusal right. It reached that number by subtracting owner's purchase price ($4.235 million) from the market value of $8.05 million, dividing that number by three, and then adding one-third of the rent proceeds plus the contribution made by the holder of the first refusal right. The court then held that upon posting of that bond, the notice of pendency would be cancelled unless the holder of the first refusal right were to post a bond in the amount of $1,162,307.40.

COMMENT

Courts apply C.P.L.R. §6515(2)'s double bonding procedure in cases where a property owner seeks to cancel a notice of pendency. The statute authorizes a court to cancel the notice of pendency if the owner posts a bond in an amount determined by the court, unless the party who filed the notice of pendency posts a bond, also in an amount determined by the court. Presumably, if the filer

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posts a bond in order to maintain the notice of pendency, the owner is released from its bond.

In setting the amount of the owner's bond, courts approximate the loss the filer would suffer if the notice were to be cancelled and the filer were ultimately to prevail in litigation. For example, in Brooklyn Restorations, LLC v. S. 1st St. Dev., LLC, *129 AD3d 1010, the Second Department held that the Supreme Court providently set the defendant's undertaking at $500,000. The A neighbor had filed a notice of pendency after the owner had constructed a two-foot encroachment upon the neighbor's parking lot. Although Supreme Court found it difficult to ascertain the full extent of the neighbor's damages, the court set the owner's undertaking at $500,000, which was commensurate with the amount of damages the neighbor alleged in the complaint.*

Similarly, in setting the amount of the filer's bond, courts attempt to compensate the owner for losses the defendant would suffer if the notice were not to be cancelled and the owner were ultimately to prevail in litigation. For example, in Andesco, Inc. v. Page, *137 AD2d 349, the First Department held that an undertaking of $2,500,000 by the filer in addition to $500,000 held in escrow would adequately compensate the owner for its damages stemming from the notice of pendency. In* Andesco, *the filer had entered a contract to purchase the owner's property, and after the owner refused to permit the filer to inspect the premises, the filer adjourned the closing. The owner declared that the filer had forfeited its $500,000 deposit and found a second purchaser. The filer responded with a notice of pendency, which the owner sought to cancel. The court estimated that $3,000,000 would adequately compensate the owner for its damages, which included the cost of maintaining the nearly empty building and being unable to sell it to the prospective purchaser, the loss of interest that the owner would have earned on proceeds from the prospective purchaser, and increased federal capital gains taxes, which resulted from an increase in the tax rate.*

Mortgage Enjoys Priority Over Homeowners Association Lien for Common Charges

Aspen Shackleford III, LLC v. Gordon

NYLJ 12/11/20, p. 22, col. 4
AppDiv, Second Dept.
(memorandum opinion)

In mortgage lender's foreclosure action, homeowners association appealed from Supreme Court's grant of summary judgment to lender. The Appellate Division affirmed, holding that the mortgage enjoyed priority over the association's lien for common charges.

Mortgagee and borrower entered into a loan modification agreement while borrower was already delinquent in payment of common charges. When borrower defaulted, mortgagee brought this foreclosure action, and the homeowners association counterclaimed, asserting priority for its lien for common charges. Supreme Court granted summary judgment to mortgagee.

In affirming, the Appellate Division noted that the priority of liens is generally determined by the priority of recording, but held that the continuing lien for unpaid common charges created in the association's Declaration of Covenants, Restrictions, Charges and Liens merely provided a potential lien. As a result, even though the Declaration was recorded before the mortgage, the mortgage enjoyed priority.

Bona Fide Purchasers Protected When They Had No Notice of Alleged Fraud

Cencore Properties, Inc. v. Spitzer

NYLJ 12/11/20, p. 23, col. 2
AppDiv, Second Dept.
(memorandum opinion)

In a quiet title action against subsequent purchasers, prior owner appealed from Supreme Court's award of summary judgment to the subsequent purchasers. The Appellate Division affirmed, holding that subsequent purchasers had established that they were bona fide purchasers for value without prior notice of any alleged fraud.

Prior owner had executed a deed to Spitzer. Although the deed was intended to serve as security for a loan, the deed was converted to a deed in lieu of foreclosure, with prior owner's consent, when prior owner defaulted on the loan. Prior owner had executed a confession of judgment and had submitted TP-584 forms indicating that the deed to Spitzer was in lieu of foreclosure. Spitzer then sold the property to one subsequent purchaser, and prior owner received $72,546 of the $600,000 purchase price, representing the excess proceeds after satisfying the Spitzer mortgage. That subsequent purchaser then transferred title to yet another subsequent purchaser. When prior owner brought this quiet title action, Supreme Court granted summary judgment to the subsequent purchasers.

In affirming, the Appellate Division concluded that prior owner had failed to raise a triable issue of fact. The court emphasized that neither purchaser had knowledge of facts that would have led a reasonably prudent purchaser to make further inquiry about the facts surrounding the deed to Spitzer.

Failure to Inspect Premises Precludes Purchasers' Claim For Fraud

Heid v. Mohring

NYLJ 12/2/20, p. 17, col. 3
Supreme Ct., Nassau Cty.
(Voutsinas, J.)

In an action by home purchasers for fraud and breach of the covenant of good faith and fair dealing, seller moved for summary judgment. The court granted seller's motion, holding that purchasers' failure to

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inspect the premises before signing the contract, and purchasers' acceptance of a deed, extinguished any claims purchasers might have had.

Purchasers contracted to buy a home originally built in the 1920s. The sale contract provided that purchasers were aware of the condition of the premises based on their own inspection and investigation, and that purchasers agreed to accept the premises "as is." A rider provided that seller had not made and did not make any representations as to the physical condition of the premises, and that purchasers acknowledged that no representations had been made and that purchasers had personally made an inspection of the premises. Purchasers first had the home personally inspected three months after closing. The inspection report indicated that purchaser had found deficiencies prior to closing, and that the inspection was conducted in accessible and observable areas. The inspector reported, however, that seller made renovations that required building and other permits without obtaining those permits. Purchasers then brought this action alleging fraud by active concealment of defects.

In granting summary judgment to seller, the court started by noting that the merger doctrine precluded contract claims once seller had delivered the deed, unless there was a clear intent by the parties that a particular provision would survive delivery. In this case, the contract included no provision. The court then held that purchasers could not rely on an active concealment exception to the caveat emptor doctrine because purchaser could not show that seller had thwarted purchasers' efforts to investigate the property. Purchasers' failure to conduct an inspection before closing precluded any fraud claim.

Broker Conflicts of Interest Did Not Constitute Breach Of Contract or Breach of Fiduciary Duty

106 N. Broadway, LLC v. Houlihan Lawrence

NYLJ 12/4/20, p. 29, col. 1
AppDiv, Second Dept.
(memorandum opinion)

In seller's action against broker for breach of the obligation of good faith and fair dealing and breach of fiduciary duty, seller appealed from Supreme Court's dismissal of all causes of action. The Appellate Division modified to reinstate the claim for breach of the duty of good faith and fair dealing, but otherwise affirmed, holding that alleged conflicts of interest by the broker's agents did not constitute breach of contract or breach of fiduciary duty.

Seller entered into an exclusive agreement with broker and then, eight months later, entered into a sale contract with purchaser for $6,125,000 conditioned on purchaser's ability to obtain zoning approval for a senior living facility by the closing date or any extension of the closing date. One of the broker's agents was a member of the village planning board, and another agent allegedly used her political influence to prevent the zoning approval. Purchaser terminated the sale contract when purchaser could not obtain the needed zoning approval. Seller then brought this action against broker alleging breach of fiduciary duty, breach of the duty of good faith and fair dealing, and tortious interference with business relationships or expectancies. Supreme Court dismissed the claims and seller appealed.

In upholding dismissal of the breach of fiduciary duty claim, the court concluded that seller had not demonstrated any wrongful conduct by either of its agents after seller complained to broker. The court also upheld dismissal of the tortious interference claim, noting that none of the alleged wrongful conduct was directed at the purchaser of the property. But the court held that the claim for breach of the duty of good faith and fair dealing should not have been dismissed because the broker had not submitted evidence to support its position that the two agents were outside the scope of their employment when they took actions to block approval of the project.

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CO-OPS AND CONDOMINIUMS

Sponsor Liable for Fraudulent Conveyance To Related Entities

Board of Managers of BE@William Condominium v. 90 William St. Development Group LLC

NYLJ 11/2/20, p. 19, col. 6
AppDiv, First Dept.
(memorandum opinion)

In an action by condominium board against the sponsor and various entities related to the sponsor, the sponsor and related entities appealed from Supreme Court's award of summary judgment to the board on its claims for breach of the offering plan and on its claims establishing fraudulent conveyances from the sponsor to the related entities. The Appellate Division affirmed, holding that the board did not have to establish a fiduciary duty to prevail on the fraudulent conveyance claims,

The offering plan required sponsor to obtain a permanent certificate of occupancy within two years of the first closing. Sponsor concededly failed to obtain the C of O, and sponsor also conceded that certain aspects of the building were not constructed according to the offering plan. Before the board brought this action, sponsor also conveyed millions of dollars — substantially all of its assets — to the related entities. When the board brought this action, Supreme Court awarded the board summary judgment on the breach of contract claims, and

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also on the fraudulent conveyance claims.

In affirming, the Appellate Division held that failure to obtain the C of O and failure to comply with the offering plan constitute a breach of contract, leaving only questions of damages to be resolved at trial. As a result, Supreme Court properly granted summary judgment to the board on the issue of liability. The court then rejected sponsor's argument that the board could not prevail on its fraudulent conveyance claim without establishing a fiduciary duty owed by the sponsor to the board. The court held that the Debtor-Creditor law imposed no fiduciary duty prerequisite to a fraudulent conveyance action.

President of Unincorporated Condominium Association Not Entitled to Indemnification

Board of Managers of the 25 Cliff Street Condominium v. Magure

NYLJ 11/23/20, p. 18, col. 6
AppDiv, First Dept.
(Opinion by Gische, J.)

In an action on behalf of a condominium by the condominium's board and residential unit owners against the owners and operators of the condominium's commercial unit, both the residential unit owners and the former board president, an owner of the commercial unit, appealed from Supreme court's order holding that the former board president was entitled to indemnification if she could prove good faith in the discharge of her duties. The Appellate Division reversed and held that the former president was not entitled to indemnification because the Business Corporation Law's indemnification provisions do not apply to unincorporated condominium associations.

The subject four-unit condominium includes three residential units and an ale house that occupies the building's first floor. In 2010, a fire caused extensive damage and left her residential owners unable to occupy their units for more than a year. The residential unit owners alleged that the former board president misappropriated insurance proceeds to improve and expand the ale house while making substandard repairs to the remainder of the building. The court dismissed the claims asserted derivatively because the unit owners had not shown futility. The court also held that the derivative claims and individual claims were so intertwined that the court dismissed all of the claims except claims for private nuisance and injunctive relief against the former board president, and some of the counterclaims by owners of the ale house. The former board president also counterclaimed for indemnification and legal fees. Supreme Court dismissed the claim for indemnification, but held that she had a claim for legal fees. All parties appealed.

In reversing, the Appellate Division first held that the indemnification provision in the condominium's bylaws applied only to contract claims, and did not protect board members from tort claims. The court then rejected the argument that the Business Corporation Law (BCL) provided indemnification for condominium board members, noting that the condominium had the option to organize in the corporate form, but did not do so. Similarly, the court held that the BCL's provision for attorney's fees did not apply to an unincorporated condominium. As a result, the common law applied and the former board president was responsible for her own legal fees.

Legal Malpractice Claim Dismissed

Ramos v. Goldberg, Schudieri & Lindenberg, P.C.

NYLJ 12/3/20, p. 19, col. 6
AppDiv, First Dept.
(memorandum opinion)

In an action for legal malpractice and breach of fiduciary duty, occupant of a co-op apartment appealed from Supreme Court's dismissal of the complaint. The Appellate Division affirmed, concluding that the occupant failed to establish that his lawyer's failure to call a witness proximately caused his loss.

A not-for-profit housing cooperative brought a holdover proceeding against occupant. In response, occupant brought a declaratory judgment proceeding to establish that he was the owner of the disputed unit. The holdover proceeding was stayed pending resolution of the declaratory judgment proceeding, in which the lawyer represented occupant, and which was resolved with a declaration that the occupant's ownership claim was invalid. Occupant then brought this malpractice action contending that the lawyer was negligent in not calling the cooperative board's lawyer as a witness to establish that the unit was validly transferred to him at a 1995 closing. Supreme Court dismissed the claim.

In affirming, the Appellate Division held that occupant's factual allegations failed to establish that but for the lawyer's alleged negligence, the lawyer's testimony would have established that the unit was validly transferred. The court noted that the occupant provided no factual allegations as to why or how the lawyer's testimony could have established the validity of the transfer. In addition, the court concluded that it was speculative whether any such testimony would have altered the result in light of the testimony by cooperative board members that no such transfer took place.

Use of Commercial Unit Did Not Violate Zoning Regulations Or Condominium Bylaws

Condominium Board of Managers of Tribeca Summit v. 415 PR LLC

NYLJ 12/10/20, p. 18, col. 3
AppDiv, First Dept.
(memorandum opinion)

In an action by a condominium against the commercial unit owner, condominium appealed from Supreme Court's grant of summary judgment to the commercial unit owner. The Appellate Division affirmed, holding that operation of the commercial unit as

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a public garage did not violate either the applicable zoning regulations or the condominium's bylaws.

In 2005, the City Planning Commission (CPC) issued a special permit for use of the garage. At that time, the zoning resolution permitted use of the garage only as an accessory use to the residential use of the condominium. Until 2013, the garage was used only as an accessory garage. In 2013, however, the City Council amended the zoning ordinance to permit garages in the Manhattan Core that were formerly accessory garages to be used to provide parking for the general public. Current owner, who purchased the garage unit later in 2013, leased the premises to a tenant who began using the garage for public parking. The condominium brought this action contending that the zoning resolution's expansion only applied to new garages, and that the garage owner had therefore breached its agreement (in the condominium bylaws) to operate garage in compliance with existing laws. Supreme Court dismissed the action and the condominium appealed.

In affirming, the Appellate Division rejected the condominium's construction of the zoning resolution, holding that the amendment applied not merely to newly constructed garages but also to garages that had previously been devoted to accessory use. And because the use did not violate the zoning ordinance, it was also not in violation of the condominium bylaws.

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DEVELOPMENT

Village Lacked Power To Obligate Village Board To Enact Zoning Amendments

BT Holdings, LLC v. Village of Chester, Inc.

NYLJ 12/4/20, p. 23, col. 3
AppDiv, Second Dept.
(memorandum opinion)

In developer's action against a village for breach of contract and breach of the covenant of fair dealing, the village appealed from Supreme Court's judgment, after a jury trial, awarding developer $2,375,000 in damages. The developer cross-appealed on the issue of damages. The Appellate Division reversed and dismissed the complaint, holding first that the village had not breached the contract and second, that the village lacked power to include the contract provisions the developer alleged were breached.

A prior litigation between the Town of Chester and the Village of Chester over the village's attempt to annex a portion of developer's parcel and rezone it to permit the developer to build on the parcel, the developer was granted party status. That litigation was settled by stipulations under the terms of which developer agreed to reduce the scope of its proposed development, the town was to approve the annexation, and construction would be undertaken "in the matter described and set forth in the [FEIS] and the Village's SEQRA findings." The stipulations made the project subject to the review and approval of the village planning board. The village planning board then opposed the rezoning of the parcel, and the village board voted against three proposed zoning amendments. Developer then brought this action, alleging breach of contract and breach of the implied covenant of good faith and fair dealing. Supreme Court denied the village's motion to dismiss, and a jury returned a verdict in favor of developer. Based on the jury's verdict, Supreme Court awarded developer $2,375,000 in damages.

In reversing, the Appellate Division held first that the stipulation never obligated the village to enact any zoning with respect to developer's parcel. The court went on to hold that even if the stipulation had imposed an obligation on the village, the stipulation was unenforceable because a stipulation cannot impose on a village board the obligation to take a legislative action. The court went on to hold more generally that municipalities have no power to make contracts which would control them in the performance of legislative powers and duties.

Comment

New York courts have held that settlements between a landowner and a municipality that bind a local legislature to future rezoning of land are unenforceable as illegal contact zoning. For example, in Almor Assocs. v. Town of Skaneateles, *231 A.D.2d 836 the Fourth Department held that the Town of Skaneateles was not bound by the terms of a settlement it made with a developer because the municipality was not entitled to contract away its discretionary legislative authority. The municipality made a "conditional offer" with a developer that would terminate litigation in exchange for both the rezoning of a parcel to "Commercial" and the issuance of a building permit. The municipality subsequently adopted a zoning amendment rezoning the parcel but failed to issue a building permit.*

However, a zoning ordinance that conditions a zoning change upon the fulfillment of certain specified actions by the landowner is not impermissible contract zoning, but valid conditional zoning. For instance, in De Paolo v. Town of Ithaca, *258 A.D.2d 68 the Third Department held an agreement between Cornell University and the Town of Ithaca to be permissible conditional zoning because nothing in the agreement obligated the municipality to approve a rezoning application. Cornell University granted a license to the Town of Ithaca to use property as a public park, conditioned upon the rezoning of land to accommodate a project by the University.*

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When a municipality abides by an agreement with a developer, neighbors have standing to challenge the municipal action as the product of illegal contract zoning. In Matter of Neeman v. Town of Warwick, *184 A.D.3d 567 the Second Department invalidated a planning board's site plan approval, at least in part because it was based on an agreement between the Town of Warwick and a campground that the court concluded was illegal contract zoning. The "Development Agreement" would have obligated the municipality to: amend the zoning code to permit an increase in occupancy time on the campground, would have temporarily barred the municipality from modifying density restrictions on the property, and would have bound the zoning board of appeals to grant an area variance that would alleviate the landowner of its setback violation. When the planning board granted site plan approval for a project that made use of the setback variance the ZBA had granted, the neighbors brought suit. In invalidating the site plan approval, the court emphasized that the development agreement impermissibly limited the town's exercise of its legislative powers and duties.*

Landowner Entitled To Certificate Confirming Pre-Existing Nonconforming Use

Matter of Labate v. DeChance
NYLJ 12/2/20, p. 27, col. 3
AppDiv, Second Dept.
(memorandum opinion)

In landowner's article 78 proceeding to challenge denial of a certificate of existing use, landowner appealed from Supreme Court's confirmation of the denial. The Appellate Division reversed and directed the zoning board of appeals (ZBA) to grant the certificate, holding that the denial did not have a rational basis.

Landowner, who operate a construction company, acquired the subject property in 200. Before landowner acquired the property, it had been used to provide water to a private water company. The wife of the prior testified that the property had been used to store construction equipment including trucks and backhoes, since 1947. Landowner continued to use the property to store construction equipment, although the town code no longer permits that use. In 2012, landowner applied for a certificate of existing use to enable him to continue to use the property as a pre-existing nonconforming use. In addition to the testimony of the prior owner's wife and landowner's own testimony, landowner obtained an affidavit from an 87-year old woman with knowledge of the property who testified to its continued use to store construction equipment since 1947. The ZBA, however, accepted three aerial photographs from 1962, 1984, and 2001 showing the property without construction equipment. Based on those photographs, the ZBA denied the certificate of existing use, and Supreme Court upheld the denial, concluding that the board's determination was rational. Landowner appealed.

In reversing, the Appellate Division concluded that the three photographs did not rebut the testimony and affidavit submitted by landowner. The photographs did not establish a one-year cessation of use for storage of construction equipment. As a result, landowner was entitled to the certificate.

Neighbor's Challenge to Approval of A Building Permit Dismissed As Untimely

Jane H. Concannon Revocable Trust v. Building Department Of the Town of East Hampton
NYLJ 12/4/20, p. 30, col. 4
AppDiv, Second Dept.
(memorandum opinion)

In neighbor's article 78 proceeding and action for injunctive relief against the zoning board (ZBA)'s approval of a building permit, neighbor appealed from Supreme Court's dismissal of the proceeding. The Appellate Division affirmed, holding that neighbor's complaint was untimely.

Neighbor has a single family home adjacent to a resort motel. The motel had operated a restaurant from the 1950s to about 1970, after which the restaurant remained functional but unused. In 2005, the motel sought and received a certificate of occupancy in contemplation of reopening the restaurant. Five years later, the motel submitted a site plan for construction of an addition to the property, which was described as containing a restaurant, motel, and resort uses. Neighbor attended the public hearing, and the site plan was approved. Five years later, in 2015, when the motel applied for a building permit to renovate the existing kitchen and restaurant, the town issued a building permit. Neighbor then applied to the ZBA for a determination rescinding the inclusion of the restaurant in the 2005 certificate of occupancy and revoking the 2015 building permit. The ZBA concluded that neighbor had constructive notice of the restaurant use in 2010, and that neighbor's application was therefore untimely. Neighbor then brought this proceeding and sought a preliminary injunction preventing the motel from taking action to construct or operate a motel. Supreme Court dismissed the proceeding and denied the preliminary injunction.

In affirming, the Appellate Division held that Supreme Court's decision that neighbor had constructive notice of the C of O by 2010 was rational. As a result, the challenge to the C of O was untimely. And, because that challenge was untimely, neighbor was not entitled to injunctive relief.

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