

# **Bond Case Briefs**

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## **ZONING - NEW YORK**

### **County of Herkimer v. Village of Herkimer**

**Supreme Court, Appellate Division, Fourth Department, New York - September 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 06176**

In hybrid proceeding, county sought declaratory relief and Article 78 review of village's denial of sanitary sewer system in connection with proposed county correctional facility. The Supreme Court declared null and void village's amendment to zoning ordinance, denied village's motions to dismiss and strike, and reserved decision with respect to sewer and municipal services.

The Supreme Court, Appellate Division, held that:

- Record was inadequate to determine if county was immune from village's amendments;
- Declaration that amendments were preempted by state law was unwarranted; and
- Amendments did not improperly concerned with owner or occupier of land.

Record was inadequate to make determination, based upon balancing of public interests, whether county was immune, with respect to its siting of proposed correctional facility, from requirements of village's amendments to its zoning ordinances to exclude correctional facilities from zoning districts in which proposed facility was sited, thus warranting remittal to lower court for determination, based upon more complete record, regarding such immunity.

Factors to be weighed in making a determination as to whether an entity is immune from a municipality's zoning ordinances are 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, the applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, alternative methods of providing the needed improvement, intergovernmental participation in the project development process and an opportunity to be heard.

Declaration that village's amendments to its zoning ordinances were null and void on state preemption grounds, insofar as they excluded correctional facilities from zoning districts in which proposed county facility was sited, was unwarranted in county's suit to challenge those amendments, in light of limitations of state legislative control over siting of county correctional facilities and absence of any comprehensive and detailed regulatory scheme.

Amendments to village's zoning ordinance to exclude correctional facilities from zoning districts in which proposed county facility was sited were not invalid on ground that they violated principle that zoning should be concerned with use of land, not with identity of user, because amendments were directed at land use, not at entity that owned or occupied land.

Amendments to village's zoning ordinance to exclude correctional facilities from zoning districts in which proposed county facility was sited did not constitute exclusionary zoning.

