PREEMPTION OF LOCAL ZONING BY FEDERAL LESSEE

In *Thanet Corp. v. Board of Adjustment*,[1] the owner of undeveloped property in Princeton Township, N. J., entered into an agreement to execute an assignable ground lease with the United States acting through the Postmaster General. The United States agreed to use the land for a proposed post office facility,[2] even though it was zoned as an Engineering Research District in which, absent a variance or special use permit,[3] a postal use was nonconforming.[4] Thanet was unsuccessful in securing the requisite permit or variance from the Township Board of Adjustment.[5] Nevertheless, the Postmaster General signed the lease on August 8, 1968.

On its appeal to the Superior Court, Law Division, Thanet argued, not that the denial of the variances was improper,[6] but that the

1. 104 N.J. Super. 180, 249 A.2d 31 (Super. Ct. 1969).

2. The lease agreement called for "the establishment of a post office for a 20-year term, renewable for a maximum of seven successive five-year terms at the option of the Post Office." *Id.* at 181, 249 A.2d at 32. The agreement was by its terms assignable at the tenant's discretion, possibly to allow for the contingency of the creation of the U.S. Postal Service to replace the Department. The court, however, ignored this issue and the potential problems of immunity in the event an assignment takes place. *But see* State v. Stonybrook, 149 Conn. 492, 181 A.2d 601 (1962).

3. *See generally,* Cunningham, *Zoning Law in Michigan and New Jersey: A Comparative Study,* 63 MICH. L. REV. 1171 (1965).

4. Mineola v. Michael Realty Corp. (Sup. Ct. N.Y. 1965), in N.Y.L.J., Dec. 7, 1965 at 19, col. 4.

5. Thanet Corporation, the lessor, was appealing from a denial of a variance which would have enabled the Post Office to use the land for a postal facility. A municipal board of adjustment, created under authority of N.J. STAT. ANN. § 40:55-36, is a quasi-judicial agency vested with original jurisdiction to "hear and decide appeals" from the decisions of the building inspector or administrative agency charged with the enforcement of the zoning ordinances. It is vested with a quasi-judicial discretion to grant variances consistent with the statutory criteria of N.J. STAT. ANN. § 40:55-39. The decision of a board is subject to review in a "Civil Action at Law in Lieu of Prerogative Writ of Certiorari" in the Superior Court, Law Division, under Rule 4:88 of the Rules of Civil Practice (1968). Beirn v. Morris, 14 N.J. 529, 103 A.2d 361 (1954); Izenberg v. Board of Adjustment, 35 N.J. Super. 583, 114 A.2d 732 (Super. Ct. 1955); *see* Davis, *Administrative Remedies Often Need Not Be Exhausted,* 19 F.R.D. 437, 485-92 (1957).

6. The United States Supreme Court has held that a zoning ordinance is not unconstitutional if its provisions are reasonable and bear a substantial relation to

ordinances were not applicable to the lessor of property designated for use by the United States Government. Accepting this contention, the court held[7] that the immunity which extends to the United States when it builds a postal facility[8] applies whether the Government owns or leases the land.

The court employed a presumption that the Post Office Department, as a federal agency, is immune from local land use controls in the absence of an explicit statutory waiver. It was unwilling to apply local zoning ordinances,[9] since doing so would subject the Postmaster General's administrative decisions concerning the necessity and location of postal facilities to local judicial scrutiny. But the court reached this result by waiting until after the date the lease was executed, for prior to execution the court was faced with a request by a private citizen for immunity in the pre-acquisition or site-designation stage, where the lessor retained the current possessory estate and the Postmaster General possessed a mere option to lease. Courts generally have been reluctant to grant immunity to governmental land uses when there is less than a current possessory estate.[10] This court was of the same view, as the two-year delay from the filing of the action until its decision indicates.

Leaving aside the timing of Thanet's application for immunity, the court's decision to apply immunity to the lessor follows the line of more recent cases applying immunity to the federal government as owner of the property immunized.[11] *City of Chicago v. Sheridan & Co.*[12] summarizes the constitutional aspects of the immunity doctrine applied by these cases. In *Sheridan,* the Illinois Court of Ap-

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the public health, safety, morals, or general welfare. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

7. 104 N.J. Super. at 186, 249 A.2d at 34.

8. United States v. Carmack, 329 U.S. 230 (1946).

9. 104 N.J. Super. at 183, 249 A.2d at 33.

10. The doctrine of immunity developed in cases where the superior governmental agency had a present proprietary interest in the land zoned. *See* 31 GEO. WASH. L. REV. 525 (1962).

11. United States v. Carmack, 329 U.S. 230 (1946); Crivello v. Board of Adjustment, 183 F. Supp. 826 (D.N.J. 1960); Tim v. City of Long Branch, 135 N.J.L. 549, 53 A.2d 164 (E. & A. 1947); Mineola v. Michael Realty Corp. (Sup. Ct. N.Y. 1965), in N.Y.L.J., Dec. 7, 1965 at 19, col. 4. *Contra,* Carroll v. Board of Adjustment, 15 N.J. Super. 363, 83 A.2d 448 (Super. Ct. 1951); City of Chicago v. Sheridan & Co., 18 Ill. App. 2d 57, 151 N.E.2d 451 (1958); City of Baltimore v. Linthicum Corp., 170 Md. 245, 183 A. 531 (Ct. App. 1936).

12. 18 Ill. App. 2d 57, 151 N.E.2d 451 (1958).

peals stated the basic principle of intergovernmental preemption when it commented that the issue:

> . . . consistently [turns] on the question, in each particular case, whether or not the federal government can achieve its objective within the framework of the local law. If it can, it becomes subject to such laws; if it cannot, such laws must yield to the superior interest of the federal government.[13]

The *Thanet* court seems to accept this notion of immunity based on preemption, but it was faced with the problem of transmitting immunity from tenant to lessor. It is a basic rule of landlord and tenant law that leases for illegal or prohibited purposes are unenforceable when the premises were let with the knowledge and intent of both parties that they were to be used for an illegal purpose.[14] Moreover, such leases are voidable by the governmental entity they offend.[15] Thus the court could have found on the facts that the lease violated Princeton Township's zoning ordinances, and could have declared it void.[16] The court chose instead to rely on *Tim v. City of Long Branch*,[17] a zoning case in which the New Jersey Supreme Court upheld the United States Government's right, under the Lanham Public War Housing Act,[18] to convert a residence that it leased into an apartment building in violation of the local zoning ordinances. The *Tim* court specifically found that the Lanham Act superseded

13. *Id.* at 59, 151 N.E.2d at 455; *see also* James v. Dravo Contracting Co., 302 U.S. 134 (1937); Mayo v. United States, 319 U.S. 441 (1942); United States v. City of Chester, 144 F.2d 415 (3rd Cir. 1944); Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237, 113 A.2d 658 (1955); Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

14. 1 AMERICAN LAW OF PROPERTY § 3 (A.J. Casner ed. 1952).

15. Hartsin Const. Corp. v. Millhauser, 136 Misc. 646, 241 N.Y.S. 428 (App. Div. 1930); Ober v. Metropolitan Life Ins. Co., 157 Misc. 869, 284 N.Y.S. 966 (N.Y. City Ct. 1935); Annot., 128 A.L.R. 87 (1940).

16. City of Baltimore v. Linthicum Corp., 170 Md. 245, 183 A. 531 (Ct. App. 1936).

17. 135 N.J.L. 549, 53 A.2d 164 (E. & A. 1947).

18. 42 U.S.C. §§ 1521 et seq. (1942). The *Tim* court commented that "[t]he policy and purposes of the [Lanham Act] are, for the duration of the emergency as declared by the President of the United States, to further the national defense by providing 'housing for persons engaged in national-defense activities, and their families . . . in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed.'" Tim v. City of Long Branch, 135 N.J.L. 549, 551, 53 A.2d 164, 166 (E. & A. 1947).

the local zoning law and held the lessor immune because the federal government was the tenant.[19]

But a later New Jersey case indicates that the mere fact that the lessee is a government does not necessarily assure immunity for the lessor. In *Carroll v. Board of Adjustment,*[20] the lessor of property designated for use by the *state* as an Employment Security Office was held not to be immune from contrary local zoning. The rationale was that the tenant takes his interest solely from that which the lessor can convey; only the *owner* can confer immunity, and to do so it must be a governmental agency.[21] *Carroll* thus denies to the state the preemption allowed the federal government in *Tim.* By implication, only when the tenant is the *federal* government is the lessor assured of immunity.

In distinguishing *Tim* by the presence of specific federal legislation empowering the United States to lease necessary property without regard to municipal ordinance,[22] *Carroll* sows the seeds of its own distinction by indicating that no claim was made there that similar overriding legislation was applicable. Without citing *Carroll,* the *Thanet* court notes that the Postmaster General is empowered by statute to enter into leases to secure postal facilities.[23] However, these statutes seem to be cited not so much to demonstrate the kind of preemption found in *Tim,* but to show the absence of a waiver of immunity.

Federal statute empowers the Postmaster General to acquire property by eminent domain as well as by purchase or by lease.[24] Had the Postmaster General chosen to condemn Thanet's land, it is clear that the Princeton Township Board of Adjustment could not have re-

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19. Tim v. City of Long Branch, 135 N.J.L. 549, 554, 53 A.2d 164, 167 (E. & A 1947).

20. 15 N.J. Super. 363, 83 A.2d 448 (App. Div. 1951).

21. The fact that the building was to be used for governmental purposes was immaterial. The corporation was in fact the owner, and could not be considered a governmental agency. 15 N.J. Super. at 368, 83 A.2d at 450.

22. *Id.*

23. "[T]he Postmaster General . . . may: . . . acquire by purchase, condemnation, [or] lease, . . . real property and interests therein, for use for postal purposes . . . ." 39 U.S.C. § 2103(a)(2)(A) (Supp. V 1970).

24. Authority for taking by eminent domain is contained in 39 U.S.C. §§ 2103(a)(2)(A), 2113(a), and 2115, supplementing the authority granted by 40 U.S.C. § 257: "In every case in which . . . any . . . officer of the Government has been authorized to procure real estate for the erection of a public building or for other public use, he may acquire the same for the United States by condemnation . . . ."

viewed that decision to take,[25] nor could it have impeded the taking.[26] Furthermore, it has been held[27] that where property is taken by purchase, but could have been taken by eminent domain, the use of the land for governmental purposes is not subject to zoning restrictions.[28] It seems reasonable to apply the same theory where the interest could be acquired by lease.[29]

In appealing the denial of the variances, Thanet sought a form of relief amounting to mandamus. But the Board of Adjustment is unable to enforce the zoning ordinances by enjoining Thanet. This result obtains since, in a proceeding for an injunction against the use of leased premises, the tenant, as a real party in interest, is entitled to be represented.[30] In *Mineola v. Michael Realty Corp.*,[31] where the United States was the tenant, this procedural argument was coupled with the doctrine of sovereign immunity to deny the competency of a state court's jurisdiction. The *Mineola* court held that an injunction:

> . . . will not lie against the owner of an improved parcel which has been leased to the United States Government as a Post Office, to restrain an aspect of its use. Such action, while only against the owner nominally, is in actuality against the operator, i.e., the United States.[32]

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25. *See, e.g.*, Kohl v. United States, 91 U.S. 367 (1875); United States v. Carmack, 329 U.S. 230 (1946); Berman v. Parker, 348 U.S. 26 (1954); United States v. An Easement and Right-of-Way, 246 F. Supp. 263 (W.D. Ky. 1965).

26. *See, e.g.*, United States v. Sixteen Parcels, 281 F.2d 271 (8th Cir. 1960); United States v. Mischke, 285 F.2d 628 (8th Cir. 1961); United States v. Certain Property in Manhattan, 32 F.R.D. 48 (S.D.N.Y. 1962); Rassi v. Trunkline Gas Co.,—Ind.—, 240 N.E.2d 49 (1968); 1 NICHOLS' THE LAW OF EMINENT DOMAIN § 411(3) (Supp. 1969).

27. United States v. An Easement and Right-of-Way, 246 F. Supp. 263 (W.D. Ky. 1965).

28. Union Bldg. & Const. Corp. v. Borough of Totowa, 98 N.J. Super. 446, 237 A.2d 637 (Super. Ct. 1968).

29. Other areas of the law have accepted similar contentions that possession of a leasehold is for those purposes the equivalent of a fee. *See, e.g.*, Treas. Reg. § 1.1031(a)-1(c) (1956), which provides that an exchange of a fee for a 30-year or more leasehold interest qualifies as a like kind exchange. *See also* Camara v. Municipal Ct., 387 U.S. 523 (1967), validating consent to building code searches where consent is given by the occupant of the building although only the owner is subject to code penalties.

30. 4 NICHOLS' THE LAW OF EMINENT DOMAIN § 1241(1) (Supp. 1969).

31. Mineola v. Michael Realty Corp. (Sup. Ct. N.Y. 1965), in N.Y.L.J., Dec. 7, 1965 at 19, col. 4; 1 RATHKOPFT, LAW OF ZONING AND PLANNING 31-26 (Supp. 1969).

32. N.Y.L.J., Dec. 7, 1965 at 19, col. 6.

Thus a suit in a state court against the United States as the unnamed real party in interest is not maintainable.[33]

Removal to a federal court may provide a forum for the controversy but little actual relief. If the federal court views the problem in terms of the federal power of eminent domain, the local zoning will be preempted[34] unless the proposed action would be contrary to an express congressional policy.[35] The fate of local zoning in the face of federal land acquisitions by purchase, lease or condemnation would seem therefore to depend on an expression of congressional intent to limit the application of federal preemption. Such an expression is found, at least with regard to urban lands, in the Intergovernmental Cooperation Act of 1968.[36] Title V of the Act provides that urban land transactions of the federal government "shall, to the greatest extent practicable, be consistent with zoning and land use practices and shall be made to the greatest extent practicable in accordance with planning and development objectives of the local governments and local planning agencies concerned."[37]

Title V is not the whole answer to the *Thanet* problem. The Act is limited to urban areas,[38] and the determination of "practicability" is to be made by the federal administrator. Final resolution, however, will of necessity await judicial re-evaluation of the preemption case law in light of the Intergovernmental Cooperation Act.

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33. *See* Crivello v. Board of Adjustment, 183 F. Supp. 826 (D.N.J. 1960), where such a case was removed to the federal courts. *See also* Byse, *Sovereign Immunity*, 75 HARV. L. REV. 1479 (1962); Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435 (1962).

34. United States v. Sixteen Parcels, 281 F.2d 271 (8th Cir. 1960); Maun v. United States, 347 F.2d 970 (9th Cir. 1965); City of Pleasant Ridge v. Romney, 382 Mich. 225, 169 N.W.2d 625 (1969).

35. Maun v. United States, 347 F.2d 970 (9th Cir. 1965), holding that the policy behind preservation of the ecological integrity of the California Redwood area was in accord with the goals of established federal policy evidenced by 42 U.S.C. § 1500 (Supp. V 1970) and 23 U.S.C. § 131 (Supp. V 1970).

36. Act of Oct. 16, 1968, Pub. L. No. 90-577, 82 Stat. 1103. This Act was codified as 42 U.S.C. §§ 4201 et seq. (Supp. V 1970) and 40 U.S.C. §§ 531 et seq. (Supp. V 1970).

37. Act of Oct. 16, 1968, Pub. L. No. 90-577, § 501, 82 Stat. 1104.

38. 40 U.S.C. § 535(b) (Supp. V 1970) defines an "urban area" as:

> . . . any geographical area within the jurisdiction of any incorporated city, town, borough, village, or other unit of general local government, except county or parish, having a population of ten thousand or more inhabitants . . . [or portions of counties having] a population density equal to or exceeding one thousand five hundred inhabitants per square mile and situated adjacent to the boundary of any incorporated unit of general local government which has a population of ten thousand.