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New York's High Court Creates Another Obstacle For Property Owners Asserting Regulatory Takings Claims

by Robert S. Davis and Judith M. Gallent

I. INTRODUCTION

In *Bonnie Briar Syndicate, Inc. v. The Town of Mamaroneck*,¹ the New York Court of Appeals' most recent takings decision, the Court rejected a property owner's claim that the Town of Mamaroneck's rezoning of a golf course from single-family residential to private recreational use effected a taking of property requiring just compensation under both the United States and New York State constitutions. In so holding, the Court has settled a question important to both landowners and municipalities in New York that had been left open by the United States Supreme Court as to the proper standard for reviewing regulatory takings claims not involving exactions. The Court's decision reinforces the deference traditionally afforded municipalities in establishing zoning classifications through legislative action and, along with the court's 1997 trilogy of takings decisions—*Gazza v. New York State Department of Environmental Conservation*,² *Anello v. Zoning Board of Appeals of Dobbs Ferry*,³ and *Kim v. City of New York*⁴—places yet another obstacle in the path of the private property owner seeking to establish a regulatory taking claim in the courts of New York State.

II. THE FACTS

Plaintiff Bonnie Briar Syndicate, Inc. is the owner of approximately 150 acres of land located in the Town of Mamaroneck, on which the Bonnie Briar Country Club is situated. The Club has operated on the Bonnie Briar property, which contains wetlands, water bodies, and rock outcroppings, continuously

since the 1920s. A portion of the property is within the floodplain of the Sheldrake River and serves as a natural detention basin for floodwater from the River.

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514 mining permits, including 88 new permits and 426 renewals or modifications. DEC also approved the reclamation of over 595 acres of mined land. The report is available by writing to: Oil & Gas Report, NYSDEC, Division of Mineral Resources, 50 Wolf Rd., Room 290, Albany NY 12233-6500, and from DEC's web site at <<http://www.dec.state.ny.us/website/dmn/divrpts.htm>>. DEC Press Release (Feb. 15, 2000).

New York's Public Forests Receive "Green" Certification

New York has become the first state to receive the National Wildlife Federation/SmartWood certification for its multiple-use public forest lands. Over 700,000 acres of state forest land outside the Adirondack and Catskill Forest Preserves were certified as "well-managed" for the long-term health of the forest. To become certified, DEC had to meet over 75 criteria established by the Forest Stewardship Council that verify that forests are managed for long-term ecological, social, and economic health. Forest products from these lands can be labeled as "certified," which helps consumers who wish to purchase wood products or lumber from well-managed forests. New York's forests support a \$2 billion wood products industry that employs over 65,000 people. SmartWood, formed in 1989 by environmental groups and forest products industry representatives to establish sustainable forestry guidelines, is the oldest non-profit certifier in the country accredited by the Forest Stewardship Council. DEC Press Release (Jan. 21, 2000).

UPCOMING EVENTS

April 30-May 3, 2000

"Conference of Solid Waste Associations," Sagamore, Bolton Landing. Information: Eric Swenson, (516) 677-5790 or ny-waste@erols.com.

May 22-26, 2000

"Summer Institute in Environmental Law," New York University Wagner Graduate School of Public Service. Information: Charles Nicolson, (212) 998-7418.

June 6-9, 2000

"Annual Summer Institute in Risk Management in Environmental Health and Protection (and Quantitative Risk Assessment)," sponsored by New York University, Wagner Graduate School of Public Service. For information on course content, contact Professor Rae Zimmerman, (212) 998-7432 (rae.zimmerman@nyu.edu). For registration information, contact Charles Nicolson, (212) 998-7418 (charles.nicolson@nyu.edu).

June 12, 2000

"EPA Region 2 Conference," 9 a.m. -2:30 p.m., co-sponsored by New York State, New York City, New Jersey, and

American Bar Associations. Manhattan. Information: Lisa Murtha Bromberg, (973) 538-4006.

WORTH READING

Stephen L. Kass and Jean M. McCarroll, "The Commerce Clause and the Clean Water Act," *New York Law Journal*, Feb. 25, 2000, at 3:1.

Rick Mandell and Michael B. Gerrard, "Clean Sweep" [brownfields redevelopment], *Financial Executive*, Mar./Apr. 2000, at 32.

John R. Nolon, "Managing Growth - Local Governments: Drawing the Boundaries," *New York Law Journal*, Feb. 16, 2000, at 5.

Robert B. Porter, "Legalizing, Decolonizing, and Modernizing New York State's Indian Law," *63 Albany Law Review* 125 (1999).

Philip Weinberg, "To the Supreme Court: Keep the Court-house Doors Open," *New York State Bar Association Journal*, Feb. 2000, at 55.

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Prior to the rezoning, both Bonnie Briar and the nearby 280-acre Winged Foot Golf Club, the Town's only remaining large open spaces, were zoned R-30, which permitted the development of as many as 125 and 285 single-family residential units on Bonnie Briar and Winged Foot, respectively.

A. Comprehensive Planning History

The record in the case demonstrated that the rezoning was the culmination of a well-documented 30-year comprehensive planning process, which began in the 1960s as development spread through southern Westchester. Specifically, the Town's 1966 Master Plan and 1976 Master Plan Update both recommended that Bonnie Briar and Winged Foot remain as golf courses for their recreational and open space value as well as their important role in avoiding increased flooding in the area.

In 1985, a regional land use study, "Westchester 2000," sponsored by Westchester County, among others, reiterated the recommendations of the Master Plan and its Update that both golf courses remain as open spaces for continued recreational use and as buffer zones to encroaching urbanization. In 1986, the Town completed a Local Waterfront Revitalization Program (LWRP). The LWRP observed that the Town's ecosystems had been damaged by upstream flooding from overbuilt watersheds. It cautioned the Town to deal with the possibility of future changes in land use intensity that could have further adverse impact and repeatedly underscored the need to protect the golf

course properties as open space. In response, the Town designated both golf courses as Critical Environmental Areas. In 1989 the Federal Emergency Management Agency acknowledged the role of the properties in preventing more frequent and damaging flooding downstream.

B. The Rezoning Process

In response to the inconsistency between the then existing R-30 zoning of the golf courses and the recommendations of the Master Plan, the Update, "Westchester 2000" and the LWRP that the lands be preserved as open space, the Town embarked on a four year review of the zoning affecting the properties. As part of that effort, and in accordance with its obligations under the State Environmental Quality Review Act (SEQRA), the Town prepared a Generic Environmental Impact Statement (GEIS), which considered the impacts of ten alternative development scenarios at varying densities. The GEIS also considered the Recreation Zone, which permitted private recreation facilities and prohibited residential development. Subsequently, the Town Board prepared a Supplemental Draft GEIS, largely to consider three additional development scenarios submitted by the Syndicate, and a Final GEIS.

After nearly four years of review, the Town Board adopted a 76-page SEQRA findings statement in which it concluded that of all the alternatives, the Recreation Zone would best achieve the objectives of local, state, regional and federal policies that had guided the Town's comprehensive planning for almost three decades. Moreover, it would be most consistent with the goals that emerged from the Town's comprehensive planning process; (1) maintaining scarce open space as a means of providing physical relief from increasing urbanization and sustaining natural habitats, scenic vistas, and other aesthetic values; (2) preserving recreation opportunities for area residents; and (3) avoiding any increases in flooding of Town homes.

Thereafter, in accordance with its findings, the Town Board adopted Local Law 6-1994. Local Law 6 rezoned the Golf Course Properties to a Recreation Zone in which private recreation uses, including the existing golf club uses, tennis, and swim clubs, with associated restaurant and club facilities, are permitted as of right. The ordinance limits building coverage to 1.25% of total lot area.

III. THE SYNDICATE'S TAKINGS CLAIM

In response to the rezoning, the Syndicate commenced an action in New York Supreme Court, Westchester County, alleging among other things that Local Law 6 effected a taking of property under both the United States and New York State constitutions because it did not substantially advance a legitimate government interest.⁵ Both the Syndicate and the Town moved for summary judgment on these claims.

The parties agreed that the standard set forth by the United States Supreme Court in *Agins v. City of Tiburon*⁶— that a regulation effects a taking of property if "the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of land . . ." —

applied to the Syndicate's claims.⁷ However, the Syndicate asserted that in determining whether a regulation such as Local Law 6 runs afoul of the first prong of the *Agins* test, the Court must apply the "rough proportionality" and "essential nexus" requirements articulated in *Dolan v. City of Tigard*⁸ and *Nollan v. California Coastal Commission*,⁹ which, it argued, are simply refinements of the "substantially advance" test that apply to all regulatory takings claims. Thus, it argued, for a law to substantially advance a legitimate state interest, there must be a direct relationship between the condition imposed on development and the impact on the community associated with the development.

The Syndicate contended that Local Law 6 could not survive such heightened scrutiny because, in essence, there were means less restrictive of the Syndicate's property rights available to the Town to achieve its concededly legitimate interests. Because Local Law 6 was not necessary to achieve the Town's stated goals, it argued, it did not bear an essential nexus to those goals, and was not roughly proportional to the problem it purported to solve.

The motion court rejected the Syndicate's arguments. It explained that the "essential nexus" and "rough proportionality" tests of *Nollan* and *Dolan*, respectively, have their origins in the narrow class of regulations involving adjudicatory exactions associated with individual permit applications. Accordingly, it held, as the Town had urged, that such heightened scrutiny is inapplicable to a zoning regulation such as Local Law 6 that does not involve exactions.

In *Nollan*, the Supreme Court held that for a permit condition to pass constitutional muster there must be an "essential nexus" between the condition imposed and the legitimate state interest that it is alleged to advance.¹⁰ Applying this test, the Court held that the condition attached to a permit for the rebuilding of the Nollans' house, which required the dedication of a public easement across the Nollans' beachfront lot, effected a taking. The easement exaction was constitutionally infirm because there was no nexus between the easement, which was designed to give the public lateral access to two beaches separated by the Nollan's property, and the legitimate interest that the California Coastal Commission sought to advance— increasing the public's *visual* access to the beach. Because enhancing the public's ability to traverse the beach did not serve the same governmental purpose of protecting visual access to the ocean, the permit condition constituted a taking. In justifying its imposition of the "essential nexus" requirement to the permit condition, the Supreme Court relied exclusively on state court developmental exaction cases.¹¹

Dolan, like *Nollan*, was also a permit exaction case. There, plaintiff Florence Dolan applied for a permit to redevelop her property in Tigard, Oregon's central business district by razing her existing plumbing supply store, erecting a store twice the size on the same site, paving a 39-space parking lot, and building an additional structure for a complementary business. This redevelopment was consistent with the existing zoning. In response, the city conditioned Dolan's building permit on her dedication of roughly 10% of her property to the city for the improvement of a storm drainage system and a 15-foot adjacent

strip for a pedestrian-bicycle path. The city justified its exaction as necessary to mitigate the increased stormwater runoff that would result from the proposed increase in impervious surface and to offset the increased traffic that would result from the larger store.

The Supreme Court first found that an "essential nexus" existed between the city's legitimate interests in the reduction of traffic congestion and flood control and the city's permit conditions.¹² It therefore framed the question presented by the case as "what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development."¹³ The Court answered that question by holding that there must be "rough proportionality" between the exaction sought to be imposed and the impact of the proposed development. Thus, the Court explained, a municipality must "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."¹⁴

The motion court in *Bonnie Briar* reasoned that the U.S. Supreme Court's application of a higher degree of scrutiny to developmental exactions than to traditional zoning ordinances such as Local Law 6 is doctrinally sound because there are fundamental differences between the two.¹⁵ These critical differences warrant heightened scrutiny of permit exaction cases, but make it unnecessary for zoning cases that do not involve exactions. Traditional zoning, such as Local Law 6, merely regulates land use by limiting the use of property, permitting some uses and prohibiting others. By contrast, permit exactions impose affirmative duties on the owner to construct public improvements, convey land to the municipality for public use or pay cash, with the obvious potential for governmental misuse. Because zoning regulations such as Local Law 6 do not involve concerns about government extortion, the court reasoned, heightened scrutiny is unnecessary. Moreover, permit exactions typically condition the right of a property owner to do something that the government has already found to be generally permissible on the relinquishment of property rights.

Applying the "substantially advance" prong of the *Agin*s test, the motion court held that Local Law 6 substantially advances the ordinance's legitimate goals. "Obviously," the court held, "the maintenance of open space, recreational resources and the suburban quality of the community, and the reduction of flood hazard will be substantially advanced by measures that prohibit all . . . but recreational development of . . . existing open space and recreational resources such as country clubs." In so holding, the court rejected the Syndicate's contention that the Town was obligated to achieve its ends by the means that least restrict the use of its property.

The Appellate Division, Second Department affirmed the lower court decision. Without any discussion of the appropriate standard, the court held that "an essential nexus exists between [Local Law 6] and the legitimate governmental interests of . . . preserving open space and preventing the risk of additional flooding and other related adverse environmental effects."¹⁶

IV. THE COURT OF APPEALS' DECISION

The New York Court of Appeals, in a unanimous decision,¹⁷ affirmed the order of the Appellate Division upholding Local Law 6, but disagreed with its application of the "essential nexus" requirement in determining whether it effected a taking of the Property. The Court held that *Nollan's* "essential nexus" test, and the relatively more demanding degree of scrutiny implied by that decision, are confined to the exactions context.

A. Court of Appeals Precedents

The Court explained that in the aftermath of *Nollan* and *Dolan* there was "considerable disagreement as to the reach of those holdings" in both academia and the judiciary. Indeed, citing its decisions in *Seawall Assocs. v. City of New York*¹⁸ and *Manochevian v. Lenox Hill Hospital*,¹⁹ two non-zoning takings cases relied on by the Syndicate in which the majority and dissent disagreed as to the applicability of the "essential nexus" test, the New York Court of Appeals acknowledged that there had been a sharp debate within the Court itself on this issue.

Seawall involved a constitutional challenge to New York City's single room occupancy (SRO) law, which established a moratorium on the conversion and demolition of SRO units and required owners to restore all existing units to habitable condition and lease them at controlled rents for an indefinite period. Citing *Nollan*, the majority explained that to pass constitutional muster, there must be a "sufficiently close nexus" between the burdens the law imposed on property owners and the end advanced as the justification for them. Finding that the the nexus between the obligations placed on SRO property owners and the alleviation of homelessness, the law's stated goal, was "indirect at best and conjectural," the majority found that the law could not survive *Nollan's* heightened scrutiny.

Dissenting Judge Bellacosa disagreed with the majority's application of *Nollan's* "essential nexus" requirement, explaining *Nollan* as a physical taking case in which heightened scrutiny was justified. With respect to the SRO law, he argued for a more deferential standard of review, stating that "[a]s long as the law has an identifiable public character, the means by which it is attained is for the legislative body to determine, not the courts."²⁰

In *Manochevian*, the New York Court of Appeals considered the constitutionality of Chapter 940, an amendment to the Rent Stabilization Law that exempted Lenox Hill Hospital from certain subletting provisions of that statute and compelled the plaintiff landlord to give Lenox Hill Hospital a perpetual leasehold on certain apartments.²¹ In declaring that Chapter 940 was unconstitutional because it failed to advance a legitimate state interest, the majority, in an opinion by Judge Bellacosa, stated that both state and federal precedent require that the substantial state purpose for such legislation "must be bound by a 'close causal nexus' to survive scrutiny."²² Accordingly, the majority explained, *Nollan's* heightened scrutiny was applicable to Chapter 940.

In a sharply worded dissent, Judge Levine disagreed with the

majority's view of the broad applicability of *Nollan's* "essential nexus" requirement. Rather, he argued, both *Nollan* and its doctrinal companion, *Dolan*, involved the imposition by local land use administrative agencies of conditions for discretionary approval of building permit applications, thereby requiring the landowners to dedicate property rights of permanent physical occupation of their land to the general public.²³ In such situations, he explained, there is a risk that municipal extortion may masquerade as a conditional land development permit approval, and thus heightened scrutiny is justified. Because such dangers are not present in the context of a law like Chapter 940 that merely regulates the use of property, such heightened scrutiny is not warranted.

B. The "Essential Nexus" Issue

Judge Levine, writing for the majority in *Bonnie Briar Syndicate*, explained that the debate within the Court of Appeals concerning applicability of the "essential nexus" requirement was finally resolved by the United States Supreme Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,²⁴ its latest takings case, decided while *Bonnie Briar Syndicate* was being briefed in the Court of Appeals. There, the Supreme Court made explicit that *Dolan's* "rough proportionality" requirement does not apply outside the context of exactions.²⁵ The Court of Appeals rejected for two reasons the Syndicate's argument that because the Supreme Court did not expressly declare *Nollan's* "essential nexus" test inapplicable outside the exaction context, a reviewing court is still bound to apply it.

First, the Court accepted the Town's argument that, in *Dolan*, the Supreme Court merely quantified the degree of nexus required by *Nollan* between the impact of a development project and a required exaction. The "rough proportionality" requirement merely elaborates on and sets forth a corollary to *Nollan's* nexus requirement. Thus, in explicitly limiting the applicability of the "rough proportionality" test to those cases involving exactions, "the Supreme Court necessarily rejected the applicability of the 'essential nexus' inquiry to general zoning regulations as well."²⁶ Second, the Court of Appeals relied on the fact that although the *Del Monte Dunes* Court was divided on the main issue in the case — the availability of a jury trial in takings cases — the Supreme Court agreed unanimously that the charge given by the trial court to the jury accurately reflected the standard for a non-exaction regulatory takings claim. That charge, the Court of Appeals noted, made no reference to the "essential nexus" requirement, but simply required that in order to substantially advance a legitimate public purpose, a regulation must bear "a reasonable relationship to [the governmental] objective."²⁷

The Court of Appeals implicitly rejected the Syndicate's argument that in light of *Del Monte Dunes*, the federal and state standards applicable to regulations such as Local Law 6 that do not involve exactions differ. Pointing to the *Manocheirian* majority's statement that the Supreme Court refrained from placing any limitation on the application of the "essential nexus"

test, the Syndicate argued that the court's opinion in *Manocheirian* explicitly established a single standard of heightened scrutiny applicable to all regulatory takings claims under the state constitution. Although this issue is not addressed directly in the Court's *Bonnie Briar Syndicate* opinion, the Court's holding implicitly rejects it and, at oral argument, the notion that the federal and state standards differed was received by the bench with skepticism.

C. The Amici

The Court of Appeals also declined the invitation of several amici in the case — the American Planning Association, Natural Resources Defense Council, Scenic Hudson, and Scenic Hudson Land Trust — to revisit the *Agins* standard. Specifically, the amici argued that takings analysis does not require courts to reexamine the reasonableness and validity of a regulation by evaluating the fit between the legislatively chosen means and ends. Rather, such means-ends scrutiny, which, they asserted, is inconsistent with the text and history of the Takings Clause, is appropriate only in the context of Due Process analysis. Moreover, pointing to the Supreme Court's opinion in *Eastern Enterprises v. Apfel*, these amici asserted that the Supreme Court has backed away from the notion that takings analysis requires scrutiny of governmental means and ends.²⁸

Eastern Enterprises v. Apfel involved the constitutionality of the federal Coal Industry Retiree Health Benefit Act of 1992. A four justice plurality concluded that the Act effected a taking because it imposed extreme, retroactive financial burdens.²⁹ Although the plurality did not discuss *Agins*, five Justices rejected the notion that means-ends scrutiny has a proper place in takings analysis. Rather, these Justices concluded in different opinions that the reasonableness of socioeconomic legislation should be measured under the Due Process Clause, not the Takings Clause. Thus, the amici claimed, the first prong of the *Agins* test is not an appropriate basis for takings liability.

The Court of Appeals dismissed the amici's argument in a footnote, stating that "no majority [of the Supreme Court] has accepted the invitation to rework the *Agins* standard. We similarly decline to address or revisit that standard."³⁰ Having accepted the *Agins* framework, but confining *Nollan's* heightened scrutiny to exaction cases, the Court of Appeals then turned to an analysis of Local Law 6.

D. The Holding

Applying the relatively relaxed standard urged by the Town, the Court held that Local Law 6 easily passed the test. Citing the years of study and comprehensive planning undertaken by the Town, the Court held that "[b]ecause zoning plaintiff's property for solely recreational use bears a reasonable relation to the legitimate objectives stated within the law (to further open space, recreational opportunities and flood control), the regulatory action here substantially advances those purposes."³¹

Significantly, the Court of Appeals also rejected the Syndicate's contention that because the Town had available to it less restrictive means of achieving those ends, the law did not bear

the required relationship to the Town's goals. "So long as the method and solution the Board eventually chose substantially advances the public interest, it is not this Court's place to substitute its own judgment for that of the . . . Board." The Court further explained that "it is not for this Court to determine if, in regulating land use, the rezoning determination was more stringent than one might reasonably conclude was necessary to further public objectives." Thus the Court reinforced the deference traditionally afforded municipalities in land use determinations.³²

The Syndicate had argued that Local Law 6 did not bear the required nexus to the ends it was enacted to achieve because the Town's goals could have been achieved through controlling development under its subdivision plan under the pre-existing residential zoning; it was therefore unnecessary to achieve the Town's goals. Had the Court accepted this argument, it would have worked a fundamental reordering of zoning jurisprudence. Applying *Nollan* in this manner would have reversed the well-settled principle that "the primary goal of zoning is to provide for the development of a balanced, cohesive community which will make efficient use of the Town's available land."³³ The application of the "essential nexus" requirement to zoning restrictions like Local Law 6 through a required comparison between development scenarios under different regulatory schemes would prevent a municipality from zoning in the best interests of the community. Instead, it would require the municipality to zone in the best interests of each individual landowner. Requiring a rezoning to have an "essential nexus" to the impacts of potential development under the existing zoning, rather than reflecting the legislature's determination of the needs of the community, would have changed radically the nature of the zoning power and, as a practical matter, given landowners vested rights to existing zoning. The Court, consistent with its land use precedent, rejected this approach and properly confined *Nollan's* and *Dolan's* heightened scrutiny to the context in which those requirements were developed—exactions cases.

V. LESSONS FOR MUNICIPALITIES AND PROPERTY OWNERS

With its decision in *Bonnie Briar Syndicate*, the Court of Appeals settled definitively a question that had remained unanswered on both the federal and state levels since the Supreme Court's decision in *Nollan*—what is the nature of the requirement that a regulation not involving exactions

substantially advance a legitimate government interest. In declining the Syndicate's invitation to apply heightened scrutiny in the takings analysis of a generally applicable zoning regulation, the Court ratified the broad scope of a municipality's police power to zone for "health, safety, morals, or the general welfare of the community."³⁴

Bonnie Briar Syndicate's lesson for property owners, both on its own and in the context of the Court's 1997 takings trilogy—*Gazza v. New York State Department of Environmental Conservation*, *Anello v. Zoning Bd. of Appeals of Dobbs Ferry*, and *Kim v. City of New York*³⁵—is that takings claims are not easily established in the New York courts.

In its 1997 trilogy the Court of Appeals determined that land use regulations in place at the time property is purchased that limit the development potential of the property, such as wetlands regulations (*Gazza*), steep slope ordinances (*Anello*), and lateral support obligations (*Kim*), define and limit the property rights acquired by the owner. Accordingly, the denial of development based on such regulations does not constitute a taking because, the Court reasoned, the owner never possessed the property interest allegedly taken. By narrowing the concept of property and adopting a relatively deferential standard of review of municipal legislation, the Court has shifted the state's takings jurisprudence in favor of municipalities.

On the other hand, while municipalities should certainly take comfort from the recent direction of the New York Court of Appeals' takings decisions, they should not view these cases as a license to ride roughshod over property owners' rights. The record in *Bonnie Briar Syndicate* was exemplary—the rezoning was the culmination of nearly 30 years of land use planning, and the rezoning process itself took four years and involved the preparation of a thorough generic environmental impact statement. As importantly, the rezoning left the property owner with the same economically viable use to which the property had been put for the last 70 years.

Thus, municipalities cannot rezone property without careful study and analysis. They must engage in meaningful planning that identifies legitimate municipal objectives and craft regulations that accomplish significant movement toward the realization of those goals. The regulations must do so in a manner that does not deprive property owners of economically viable use or enjoyment of their property. Such responsible government action is likely to be warmly received by this state's courts in light of the Court of Appeals' recent takings jurisprudence.

Robert Davis and Judith Gallent are members of Robinson Silverman Pearce Aronsohn & Berman LLP, specializing in land use matters. Together with their partner, James Altman, they

represented the Town of Mamaroneck in Bonnie Briar Syndicate, Inc. v. The Town of Mamaroneck.

¹ 94 N.Y.2d 96, 699 N.Y.S.2d 721 (1999).

² 89 N.Y.2d 603, 657 N.Y.S.2d 555 (1997).

³ 89 N.Y.2d 535, 656 N.Y.S.2d 184 (1997).

⁴ 90 N.Y.2d 1, 659 N.Y.S.2d 145 (1997).

⁵ The Syndicate had earlier challenged the Town Board's SEQRA findings, which were sustained by the Supreme Court, Westchester County, in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, No. 2958/93 (July 6, 1995).

⁶ 447 U.S. 255 (1980).

⁷ On its motion, the Syndicate alleged only that Local Law 6 ran afoul of the first part of the *Agin*s test. However, its complaint also alleged that Local Law 6 effected a taking of the Property because it deprived the Syndicate of substantially all of its economic value. The fiscal prong claim was dismissed by the Appellate Division, Second Department on review of the Town's separate summary judgment motion. The Appellate Division found that the Syndicate's own appraisal demonstrated that the rezoning resulted in a reduction in value of only 38% and that sufficient value remained to defeat the claim. The Syndicate abandoned that claim in the Court of Appeals and it is not discussed in this article.

⁸ 512 U.S. 374 (1994).

⁹ 483 U.S. 825 (1987).

¹⁰ 483 U.S. at 836-37.

¹¹ 483 U.S. at 839.

¹² 512 U.S. at 387.

¹³ 512 U.S. at 386.

¹⁴ 512 U.S. at 391.

¹⁵ Slip op. at 5-6.

¹⁶ 242 A.D.2d 356, 357, 661 N.Y.S.2d 1005,1006 (2d Dept. 1997).

¹⁷ Judge Rosenblatt, who presided over the Appellate Division panel that decided the case, took no part in the Court's deliberations.

¹⁸ 74 N.Y.2d 92, 544 N.Y.S.2d 542, cert. denied, 493 U.S. 976 (1989).

¹⁹ 84 N.Y.2d 385, 618 N.Y.S.2d 857 (1994), cert. denied, 514 U.S. 1109 (1995).

²⁰ 74 N.Y.2d at 124, 544 N.Y.S.2d at 560.

²¹ See 84 N.Y.2d at 388, 618 N.Y.S.2d at 858.

²² 84 N.Y.2d at 392, 618 N.Y.S.2d at 860.

²³ 84 N.Y.S.2d 412-13, 618 N.Y.S.2d at 872.

²⁴ 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

²⁵ See 119 S. Ct. at 1635.

²⁶ 94 N.Y.2d at 105, 699 N.Y.S.2d 725-26.

²⁷ 94 N.Y.2d at 108, 699 N.Y.S.2d at 726 (quoting *Del Monte Dunes*, 119 S. Ct. at 1634, 143 L. Ed. 2d at 899).

²⁸ The State of New York also filed an *amicus curiae* brief in the case, but did not join in this argument. Rather, the State argued that to the extent means-ends analysis is applicable in Takings Clause jurisprudence at all, deferential rational basis scrutiny is required because the *Agin*s means-ends test was derived from cases involving challenges to the constitutionality of land use regulations under the substantive Due Process Clause, rather than the Takings Clause. See *Agin*s, 447 U.S. at 260 (citing, *Euclid v. Ambler*, 272 U.S. 365 (1926) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928)).

²⁹ 118 S. Ct. 2131 (1998).

³⁰ 94 N.Y.2d at 107 n.1; 699 N.Y.S.2d at 725.

³¹ 94 N.Y.2d at 108, 699 N.Y.S.2d at 726.

³² See, e.g., *Marcus Assocs. v. Inc. v. Town of Huntington*, 45 N.Y.2d 501, 506, 410 N.Y.S.2d 546, 548 (1978); *Tilles Investment Co. v. Town of Huntington*, 137 A.D.2d 118, 125-26, 528 N.Y.S.2d 386, 392 (2d Dept. 1988), *aff'd*, 74 N.Y.2d 885, 547 N.Y.S.2d 835 (1989).

³³ *Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 683, 642 N.Y.S.2d 164, 173 (1996).

³⁴ New York State Town Law § 261.

³⁵ See ns. 2, 3 and 4 *supra*.