



Town of Rocky Hill v. Securcare Realty, LLC.

By Marie Grady

Tucked in back of a single-family neighborhood in Rocky Hill, Conn., the brick building surrounded by a stockade fence is barely noticeable to a passerby. But the site, a nursing home for former state inmates, became ground zero in a legal battle that tested the limits of sovereign immunity.

The nursing home, which also houses former state psychiatric patients, sparked a legal battle that went to the state's Supreme Court. At issue was whether the developer who contracted with the state to manage the facility enjoyed immunity from local zoning laws as an arm of the state.

Last December, the Connecticut Supreme Court decided that the developer did not have sovereign immunity. In late summer 2015, the case was still being battled at the local level after the town Zoning Board of Appeals dismissed the developer's appeal of a cease and desist order issued by the town.

"We emphasize that the extension of a state's immunity to a private, for profit entity should be a rare occurrence, and we conclude that the facts of this case do not present an appropriate occasion for affording such immunity," wrote senior Justice Christine S. Vertefeuille in the unanimous Connecticut Supreme Court decision in *Town of Rocky Hill v. Securcare Realty LLC*.

The town had attempted to halt the project with an injunction based on the argument that using the facility, a former nursing home that closed in 2011, to

house ex-inmates was a non-conforming use under town zoning laws. The project's private developers successfully argued before a Superior Court judge that they functioned as an "arm of the state" immune from zoning laws.

But the state's highest court disagreed, noting that the state request for proposals and contract with the defendants required them to adhere to local zoning laws. The court also cited the lack of clear legislative intent in the authorizing statute to allow any private developer to skirt local zoning regulations.

The case began before the court in dramatic fashion when attorney Proloy K. Das, representing the town of Rocky Hill along with his law partner, Town Attorney Morris R. Borea, rattled off some of the nursing home's current residents. They included sex offenders, some of whom had preyed on children. The nursing home, Das pointed out, is next to two parks that draw more than 200 children a day.

The possibility that the home could house dangerous predators, however elderly or infirm, sparked a public outcry that led to protests at the state Capitol. The Connecticut Conference of Municipalities (CCM) filed an amicus brief authored by the law firm Shipman & Goodwin in support of the town's appeal to the state's highest court.

"CCM is particularly concerned that, as a consequence of the trial court's conclusion that the defendants are entitled to sovereign immunity, other private developers, contractors and property owners will attempt to evade their tax obligations and local zoning regulations by contracting with the state and then asserting an entitlement to sovereign immunity."

The state, like others burdened with an aging and increasingly infirm inmate population, had been searching for an off-site nursing home facility for inmates and mentally ill people in state custody to become eligible for over \$5 million in Medicaid funding. Under federal law, Medicaid won't pay to treat sick inmates in a correctional facility.

In 2011, the legislature passed a law allowing the state to run such a facility itself or contract with another entity to do so. The law allowed the state to do so "notwithstanding any other provision of the general statutes." A year later legislators approved a law allowing for the release of inmates who had not been convicted of capital felonies or particularly heinous murders to community nursing home provided the inmates suffered from a terminal condition requiring end-of-life care or were so debilitated as to present no danger to society.

Attorney Jonathan M. Starble, lawyer for defendant Icare Management LLC, argued that the nursing home management company had specifically created two new entities to purchase the site for \$1.9 million and manage the nursing home for the state. The state in turn had agreed to cover significant start-up costs and closure costs should the project prematurely die. The contract also called for the state to cover up to \$50,000 in legal costs related to any action to stop the project in its tracks.

"The project should be entitled to the same shield of sovereign immunity that would exist if the state had chosen to develop the nursing home on its own," Starble argued.

But the Connecticut Supreme Court distinguished the case from another in 2004 (*Gordon v. HNS Management Co. Inc.*) in which it determined that a private entity hired to run a regional bus service for the state was an arm of the state for sovereign immunity purposes. In that case, the state had purchased a privately owned bus service, controlled all of the operation's assets and exerted complete financial control over the management company.

By contrast, the defendants in the nursing home suit owned the property outright, had to show independent financial viability to get the contract and agreed in writing to hold the state harmless in liability actions. The Connecticut Supreme Court agreed that the state was the nursing home's sole customer and that the home performed an important governmental function but noted that federal Medicaid dollars and not state funding alone, paid for the care received there.

The court also dismissed the defendant's argument that the statute authorizing the contract expressed legislative intent that zoning laws not apply to the nursing home.

The words "notwithstanding any other provision of the general statutes" applied to the state's ability to operate a home or contract with a private party to do so. "Although that language, arguably, suggests that § 17b-372a should operate independently of any other statutory requirements, it says nothing about the continued applicability of municipal regulations, including zoning," the court said. "When the legislature intends for a statutory provision to apply exclusive both of other statutes, and of other types of law, it knows how to say as much."

The court pointed to another provision in the statute stating that other laws pertaining to nursing homes would not apply to the home as further evidence that the "notwithstanding" phrase was not meant to make inapplicable any other law governing the operation of such a facility.

In reaching its decision, the court cited cases in other jurisdictions in which courts concluded contractors were not cloaked with the authority of states. They included a 2007 11th Circuit decision finding that a bad check restitution program run by a private contractor for the State's Attorney Office was not immune from suit alleging unfair debt collection practices, a 2002 10th Circuit case finding a non-profit state human services provider not immune from wage and hour laws and a 1989 Maryland case in which a non-profit provider of child-care facilities was not found to be immune from zoning laws.

The latest legal skirmish in the case involves a 2013 cease and desist order. The town argued that the developer failed a 30-day deadline to appeal the order. The developer argued that the order was moot at the time it was written because the lower court had decided the developer was immune from local zoning laws.

The Zoning Board of Appeals dismissed the appeal but the matter will ultimately be resolved in Superior Court where the town has filed a new legal action to rid itself of what detractors at a recent Zoning Board of Appeals hearing called "a prison" in disguise as a nursing home. Starble told town zoning officials that a decision to outright prohibit the home could run afoul of laws prohibiting discriminatory zoning.

For the Connecticut Conference of Municipalities, the Supreme Court decision halted what it sees as a dangerous and costly precedent in its tracks. M. Randall Collins Jr., advocacy manager for the organization, said the lower court's initial decision could have given state contractors a basis to skirt both tax obligations and municipal oversight under the broad cloak of sovereign immunity. The nursing home developers had refused to pay property taxes until the state Supreme Court reversed the lower court ruling.

"Every time you exempt something from taxation, it shifts the burden to other taxpayers; other

businesses," Collins said. "It just opened up such wide ranging potential consequences we felt it was imperative to get involved. We truly believe local zoning laws, unless specifically exempted by the state, are applicable. To us it was very clear it was not the intent of the legislature (to exempt those laws)."