

How to lease a school building without losing zoning exemptions

By the New York State
Association of School Attorneys

Since 1970, elementary and secondary public school enrollment in New York State has dropped by 800,000 students to less than 2.7 million. At least 250 school buildings have closed across the state since 2006, and many school districts have sought tenants for these buildings to create a new source of revenue. When a school building is leased, local government officials may claim the district is no longer entitled to local tax or zoning exemptions. In such cases, school officials need to know how the law applies and often protects the district's interests.

District's authority to lease school buildings

Education Law section 403-a authorizes boards of education to lease unneeded school district property if they determine that leasing is in the best interest of the district. Section 403-a requires: (i) the rent must be at least fair market value, as determined by the board; (ii) the lease cannot be for more than 10 years, (except that the voters can approve a longer term or it can be renewed for up to 10 years with the consent of the commissioner of education); and (iii) the lessee is obligated to restore the property to its original condition, unless the board of education waives this requirement because removing improvements would cause substantial damage.

While school districts are expressly authorized by statute to lease school district property, significant legal issues may offset the benefits. Will the school district's property lose its tax-exempt status once it is leased? Will the school property and buildings be subject to local zoning laws and local ordinances if the property is no longer used for public education purposes?

Tax-exempt status

New York State Real Property Tax Law section 408 exempts from taxation "all real property owned by a school district or board of cooperative educational services and all improvements leased by such a district or board provided that such leased improvements are used for educational purposes..." Because school districts are exempt from property taxes by virtue of their ownership of the property, rather than the manner in which the property is used, school district property retains its tax exempt status even when leased.

Local officials pursuing taxes from a school district have sometimes misconstrued section 408 as requiring that the leased building be "used for educational purposes" in order to stay tax exempt.



The Stephentown Elementary School in Rensselaer County was closed in 2008 due to low enrollment. Owned by the Berlin Central School District, the building has been offered to the Town of Stephentown. Photo by Barbara Bennett

However, the Legislature added that requirement in 1985 solely to provide an exemption for portables leased by a school district, as a tenant, and placed upon school property. Thus, the criterion that a lease be "used for educational purposes" does not apply to the school as landlord of the school building.

Fear not, a school district will not lose its tax-exempt status when leasing property, regardless of the tenant or nature of the tenant's use.

Local zoning and building code regulations

Whether school district property will be subject to local zoning or building requirements is a much more complex issue. School districts are obviously located within the jurisdiction of another governmental entity, such as a town or village. However, buildings being used to educate public school students are governed by building codes and regulations set by the State Education Department (SED).

Separately, a local municipality may attempt to enforce its zoning and building codes, depending upon the manner in which school district property will be used when leased. Courts have struggled to set a bright-line rule for the conditions that trigger a municipal zoning code taking effect.

Decades ago, the state comptroller took the position that leases under Edu-

cation Law section 403-a were exempt from zoning ordinances, stating: "All activities of a school district (unlike a municipality) necessarily are governmental in nature and ..., accordingly, all school district property, being governmental in nature, would be exempt from local zoning restrictions and could be leased without regard to such restrictions."

Then the state's highest court developed the "governmental-proprietary test." In 1976, the Court of Appeals ruled in *Little Joseph Realty v. Town of Babylon* that the manner in which the property was used made a difference. The court explained: "A local government may carry out its governmental operations without regard to zoning restrictions, but it is subject to the same restrictions that are imposed on a non-governmental land owner when it acts in a proprietary capacity."

After *Town of Babylon* the comptroller changed course and opined that immunity to local zoning and building ordinances terminate when the property is leased to a private company.

In 1988 the Court of Appeals revisited the subject of leases in *County of Monroe v. City of Rochester*. It abandoned the governmental-proprietary test and endorsed a case-by-case approach that involved a balancing of public interests. Factors include the nature and scope of the entity seeking immunity, the

kind of function or land use involved, the extent of the public interest to be served thereby, the effect the local land use regulation would have upon the enterprise concerned and the impact upon the legitimate local interests.

The balancing of the public interests test is more flexible than the governmental-proprietary test and permits local governments to determine whether it is in the public's interest for local ordinances to apply to the lease of a school building to a private, commercial entity. Typically, the balancing test is conducted in a public "Monroe Hearing" at which the school district will have the opportunity to demonstrate that its property should remain exempt from local regulations or that its proposed lease/use of the property continues to be appropriate, even under the local government's regulations.

Districts that have been successful in preserving zoning exemptions typically submit evidence that the proposed lease will not alter the essential character of the former school's neighborhood. Municipalities also consider the type of entities involved, their hours of operation, and the effect the lease will have on traffic flow.

Leases to private and parochial schools, colleges and universities should be viewed with favor because their work within a leased public school building would be like that of a public school. Beyond that, Education Law section 414, which governs use of school facilities by outsiders, provides examples to support a lease for instruction in any branch of education, learning or the arts, social, civil and recreational meetings and entertainments, and other uses pertaining to the welfare of the community, community centers, recreation, physical training and athletics. With regard to other types of leases, light office use would likely be viewed more favorably than a large commercial entity which has frequent patronage, such as a restaurant or strip mall.

At least one court has explained that the purpose behind allowing the lease of school buildings is to expand the opportunity of school districts, faced with declining enrollments, to lease their vacant school property. To ensure that districts are able to preserve their zoning exemptions, school boards should ensure that leasing their vacant buildings will not alter the essential character of the buildings' neighborhoods.

The New York State Association of School Attorneys represents school districts and BOCES. This article was written by Michael G. Vigliotta of the Law Offices of Thomas M. Volz, PLLC. Look for an article on the sale of school property in the next issue of On Board.

