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## Beware the zoning adjudicatory board: Prepare to fight back if summoned to appear before one

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In the never-ending quest to gain more control over the enforcement of local laws and regulations, towns, villages and other municipalities often succumb to the temptation of creating their own adjudicatory board to hear and assess fines for zoning code and other violations. Why litigate misdemeanors and violations before an independent judiciary governed by strict rules of evidence and the troublesome reasonable doubt standard when, upon the creation of an adjudicatory bureau, a municipally-employed hearing officer can hear violations and impose massive "civil" fines supported by evidence barely meeting the preponderance of evidence standard? The short answer is that the local adjudicatory board, with its allure of municipal control and efficiency, is generally unlawful under New York law, and almost always deprives property owners of due process protections.

The unlawful creation of local adjudicatory boards is often justified by invoking the Municipal Home Rule Law. Although that law grants municipalities broad

power, it does not extend to the creation of local adjudicatory boards. Specifically, Section 11 of the Municipal Home Rule Law precludes a local municipal legislative body from adopting a local law superseding a state statute if such local law "[a]ppplies to or affects the courts as required or provided by article six of the constitution."<sup>1</sup> Under the State Constitution, only the Legislature has power to legislate with regard to the courts and judicial matters. As one court has noted in another context:

The organization of the courts and the procedures to be followed therein are matters of state concern. They have never been subject to the control or regulation of municipalities within whose territorial confines they are situated. If a local legislative body were allowed to control or legislate in regard to the jurisdiction and procedures of a local police court, the resulting situation would be one of chaos.

Consequently, a local municipality may not divest district courts from their jurisdiction over zoning violations. Nor may a local municipality foist upon the Supreme Court additional burdens associated with CPLR Article 78 special proceedings brought by persons aggrieved by "civil" determinations rendered by the municipality's own "kangaroo court." Indeed, the comptroller of the state of New York has expressly opined that "[a] municipality may not cre-

ate a code enforcement board to adjudicate alleged violations of the municipal building code and to impose penalties for such violations." As noted by the comptroller, "[i]t is apparent that the primary function, and indeed, perhaps the sole function, of the [code enforcement] board is to pass judgment on whether persons cited by the building inspector are in violation of various municipal building regulations and if found to be guilty thereof, to levy fines or order repairs made by the municipality with the cost thereof to be collected from the violator. That is a judicial power which in this state would normally be performed by a court." (citations omitted; emphasis added).

Thus, a municipality is not empowered by the Municipal Home Rule Law to create a code enforcement board with the power to adjudicate alleged violations of the municipal building code, and to impose penalties for such violations."

In addition, the legislature of the state of New York has already preempted the field of administrative adjudication of zoning-related violations by enacting Article 14-BB of the General Municipal Law, which, by its express and comprehensive terms, only may be invoked by municipalities having a population in excess of three hundred thousand, but less than three hundred fifty thousand. Most towns and virtually all villages, in

New York fall outside the narrow population threshold provided in Article 14-BB and, thus, cannot adopt any form of adjudicatory board. Simply put, most municipalities are without any power or authorization to create their own administrative adjudicatory board to hear and determine alleged zoning violations and to impose penalties for such violations. Nevertheless, villages and towns, from time to time, attempt to do so. See Huntington Town Code § 198-125(B). In the event that a party finds itself in one of those over aggressive municipalities, injunctive relief can be obtained to stay all proceedings until the illegality of the adjudicatory board can be passed upon by a real court. The need to fight back with an injunction is imperative given that procedures governing rogue adjudicatory boards provide no meaningful appeal rights and often subvert due process protections regarding enforcement of judgments. Indeed, at least one municipality provides for the collection of imposed fines by adding the amount to the property owner's real property tax bill.

In short, beware the zoning adjudicatory board, and be prepared to fight back if you find yourself summoned to appear before one.

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