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ZONING AND LAND USE PLANNING

Law Affecting Check Cashing Businesses Struck Down

By
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The tension between the powers of the New York State government and those of local municipalities, which to a large extent mirrors the longstanding—and continuing—debate over federalism, federal authority, and state rights, is particularly noticeable in the area of zoning and land use planning. New York law makes an effort to clearly set the boundaries. On the one hand, the state constitution has a home rule provision[1] that "confers broad police powers upon local governments relating to the welfare of its citizens."[2] On the other hand, local governments cannot adopt laws that are inconsistent with the constitution or with any general state law.[3] Put differently, the power of local governments to enact laws is subject to the limitations of the preemption doctrine.[4] At times, however, it may not be perfectly clear where the actual boundaries of that doctrine are located.

The difficulty of drawing those lines can be seen from an important zoning/preemption decision in a case of apparent first impression that was issued recently by the Appellate Division, Second Department. In *Sunrise Check Cashing and Payroll Services Inc. v. Town of Hempstead*,[5] the Second Department reversed a decision by the Supreme Court, Nassau County, and ruled that a local zoning law affecting check cashing businesses is preempted by state law.

The appellate court's opinion is significant in and of itself for what it says about the ability of local authorities to regulate check cashing operations through zoning laws. If in the future the Second Department or other courts find that its analysis has applicability to other commercial entities, it very well may be seen as a groundbreaking, and as a rules-changing, decision as well.

Background

The case arose in January 2006 when the Town of Hempstead, in Nassau County, Long Island, adopted Section 302(K) of Article XXXI of the town's Building Zone Ordinance. Section 302(K) prohibited check cashing establishments within the town in any districts other than industrial and light manufacturing districts, where oil refineries, recycling facilities, truck depots, and the like are located. Under an amortization provision in Section 302(K), preexisting check cashing establishments located in districts where they would be prohibited under Section 302(K) were required to terminate no later than five years after the law's effective date.

> The crux of conflict preemption is whether there is "a head-on collision" between a local ordinance as applied and a state statute.

The operators of a number of check cashing businesses in the town's business district, which became nonconforming uses after the zoning change—and which were required to close down or relocate to the town's industrial or light manufacturing districts within five years—challenged the zoning law in state court and sought a judgment declaring it to be void and of no effect. The plaintiffs claimed, among other things, that Section 302(K) was preempted by state law.

After the town joined issue, the plaintiffs moved for summary judgment. The town cross-moved for summary judgment and for an order, in effect, declaring that Section 302(K) was valid. The Nassau Supreme Court denied the plaintiffs' motion and granted the town's cross motion, and the plaintiffs appealed.

The Appellate Ruling

The plaintiffs asserted that check cashing establishments in New York are completely regulated by the New York State Banking Department (now known as the Department of Financial Services)[6] and the Superintendent of Banks (now known as the Superintendent of Financial Services).[7] According to the plaintiffs, the New York Banking Law preempted Section 302(K) because the Banking Law, in Article 9-A, set forth a detailed and comprehensive regulatory scheme that evidenced the state's intent to reserve the field of banking for state oversight and control. The plaintiffs contended that, because the field was preempted by the state, the town was precluded from enacting legislation in the same area.

For its part, the town contended that the relevant body of state law did not demonstrate that the Legislature had intended to occupy the field of regulating check cashing establishments.

In its decision, the Second Department explained that, broadly speaking, state preemption occurs in one of two ways: First, when a local government adopts a law that directly conflicts with a state statute, and, second, when a local government legislates in a field for which the state Legislature has assumed full regulatory responsibility. Under the doctrine of conflict preemption, the Second Department continued, a local law is preempted by a state law when a right or benefit is expressly given by state law that has then been curtailed or taken away by the local law. In other words, the Second Department explained, conflict preemption occurs when a local law prohibits what a state law explicitly allows, or when a state law prohibits what a local law explicitly allows.

It noted that, as the Court of Appeals has stated, the crux of conflict preemption is whether there is "a head-on collision"[8] between a local ordinance as applied and a state statute.[9]

The appellate court then examined the provisions of New York Banking Law Article 9-A to determine whether Section 302(K) was preempted. It pointed out that a note accompanying Article

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9-A, setting forth the legislative findings, states, in relevant part:

> The legislature hereby finds and declares that the purpose and objective of article 9-A of the banking law, and specifically section 367 of such article, is to provide for the regulation of the business of cashing checks by the superintendent of banks whether the cashing of checks, drafts and money orders, as prescribed by article 9-A and regulations of such superintendent, is performed for customers that are natural persons or any business, corporation, partnership, limited liability company or partnership, association or sole proprietorship, or any other entity.[10]

Moreover, the Second Department continued, Banking Law section 367 pertains to, among other things, license requirements for cashers of checks. Under that section, "No person, partnership, association or corporation shall engage in the business of cashing checks, drafts or money orders for a consideration without first obtaining a license from the superintendent."[11] In addition, to obtain a license, a person or entity must apply, in writing, under oath, "in the form prescribed by the superintendent."[12] The applicant also must pay a fee to the superintendent "for investigating the application."[13]

The appellate court then discussed Banking Law §369, which addresses conditions precedent to the issuance of a license, the issuance and filing of a license, and posting the license. As the Second Department observed, this section of the Banking Law provides, in part, that:

> if the superintendent shall find that the granting of such application will promote the convenience and advantage of the area in which such business is to be conducted, and if the superintendent shall find that the applicant has available for the operation of such business for each location and for each mobile unit specified in the application liquid assets of at least ten thousand dollars, the superintendent shall thereupon execute a license in duplicate to permit the cashing of checks, drafts and money orders in accordance with the provisions of this article at the location or in the area specified in such application. In finding whether the application will promote the convenience and advantage to the public, the superintendent shall determine whether there is a community need for a new licensee in the proposed area to be served. No license shall be issued to an applicant for a license, at a location to be licensed which is closer than one thousand five hundred eighty-four feet (three-tenths of a mile) from an existing licensee, except with the written consent of such existing licensee or pursuant to subdivision three of section three hundred seventy of this article, subject to any restriction or condition as the superintendent may promulgate by regulation.[14]

In the Second Department's view, the "clear language" of this section of the Banking Law demonstrates that the Legislature has vested the superintendent with the duty to determine whether each applicant for a check cashing license proposes to perform that function "in an appropriate location, whether there is a community need for a new licensee in that location, and whether the granting of such an application will be advantageous to the public."

The Second Department next pointed out that, in setting forth the legislative intent in connection with the 1994 amendment of Banking Law §369(1), which added a substantial portion of the quoted language to that subsection, the Legislature found "that check cashers provide important and vital services to New York citizens; that the business of check cashers shall be supervised and regulated through the banking department in such a manner as to maintain consumer confidence in such business and protect the public interest; that the licensing of check cashers shall be determined in accordance with the needs of the communities they are to serve; and that it is in the public interest to promote the stability of the check cashing business for the purpose of meeting the needs of the communities that are served by check cashers."[15]

When a license is granted to a check cashing business, the successful applicant "has demonstrated that it is appropriately located based upon community needs, economic development plans, and demographic patterns."

The Second Department also noted that the superintendent has promulgated regulations concerning licensed cashers of checks,[16] including specific regulations pertaining to the issuance of a license or the change of control of a license.[17] Thus, the Second Department reasoned, based on the Banking Law and the regulations, when a license is granted to a check cashing business, the successful applicant "has demonstrated that it is appropriately located based upon community needs, economic development plans, and demographic patterns."

Accordingly, the Second Department ruled that Section 302(K), which prohibits check cashing establishments from being located anywhere in the Town of Hempstead with the exception of industrial and light manufacturing districts, conflicts with the state law that specifically delegates to the superintendent the task of determining whether particular locations are appropriate for check cashing establishments. Because existing check cashing establishments at locations in the town's business district, each of which was necessarily determined by the superintendent to be appropriately located to serve a community need, would find themselves in violation of Section 302(K), Section 302(K) "is preempted" under the doctrine of conflict preemption, the Second Department held. It ordered the Supreme Court to enter judgment declaring Section 302(K) void.

Conclusion

One of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances. That can entail exerting control over particular commercial ventures. Certainly, the Second Department's decision in *Sunrise Check Cashing* may be limited to check cashing businesses. It remains to be seen, however, whether its reasoning will be applied beyond that to other business entities that are regulated by state law, such as collateral loan brokers (also known as pawnbrokers), regulated by Article 5 of the General Business Law, businesses that sell alcoholic beverages, regulated by the Alcoholic Beverage Control Law, or natural gas mining operations, regulated by Article 23, Title 3, of the Environmental Conservation Law.

1. See N.Y. Const., Art. IX, §2(c).
2. *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91 (1987).
3. See, e.g. I*ncorporated Vil. of Nyack v. Daytop Vil.*, 78 N.Y.2d 500 (1991).
4. See, e.g., *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91 (2001).
5. 933 N.Y.S.2d 388 (App. Div. 2d Dept. 2011).
6. See N.Y. Banking Law §10.
7. See http://www.dfs.ny.gov/index.htm.
8. *Matter of Lansdown Entertainment Corp. v. New York City Dept. of Consumer Affairs*, 74 N.Y.2d 761 (1989).
9. With respect to the doctrine of field preemption, the Second Department explained that a local law regulating the same subject matter as a state law is deemed inconsistent with the state's transcendent interest, whether or not the terms of the local law actually conflict with a state-wide statute, where the local laws would tend to inhibit the operation of the state's general law and thereby thwart the operation of the state's overriding policy concerns.
10. McKinney's Cons. Laws of New York, Book 4, Banking Law, Article 9-A, Historical and Statutory Notes, p. 417 (2008 ed.).
11. Banking Law §367(1).
12. Banking Law §367(2).
13. Banking Law §367(3).
14. Banking Law §369(1).
15. L 1994, ch. 546, §1.
16. See 3 NYCRR part 400.
17. See 3 NYCRR 400.1.