

New York Law Journal

Long Island Weekly

Tuesday, October 29, 2003



ZONING AND LAND USE PLANNING

Restrictions on 24/7 Businesses Typically Rejected by Courts

More and more consumer-oriented businesses have determined in recent years that it would be profitable to stay open beyond traditional hours. Pharmacies, fast-food restaurants, gasoline service stations, donut shops and convenience stores, among others, all have sought to extend the time within which they may serve their customers. Indeed, many want to operate 24 hours a day, seven days a week, or on some other greatly expanded schedule.

This has not been much of an issue for some local governments. Others, however, have attempted to restrict these efforts. When challenged, local zoning regulations limiting businesses' hours of operation typically have been rejected by the courts on the basis that these kinds of regulations are not a valid exercise of zoning power. In essence, these courts conclude that such zoning restrictions are more aptly characterized as an improper restriction on the internal operation of a business than as a valid regulation of land use.¹ Consider the decision by Supreme Court, Nassau County, in *Louhal Properties, Inc. v. Strada*, a case challenging a local zoning law enacted by the Village of Westbury.² The decision was affirmed several weeks ago by the Appellate Division, Second Department.³

Anthony S. Guardino is a partner with Farrell Fritz, resident in the firm's Melville office.



ANTHONY S. GUARDINO

The *Louhal Properties* case arose after 7-Eleven, Inc. filed a building permit application and application for site plan review with the Village of Westbury Building Department to enable it to operate a convenience store in the village. Around the time those applications were filed, the village apparently began to receive complaints from residents about the manner of operation of certain businesses, at other sites in the village, that were located in close proximity to residential property.

According to the village, there was increasing public concern about the cumulative effect of a growing number of businesses remaining open all night. In response, the village's board of trustees enacted a local law which prohibited a business, located within 100 feet of property zoned for residential use, from operating between the hours of 11:00 p.m. and 6:00 a.m. the following day. A business located elsewhere within the village could operate during such hours only if it first obtained a

special use permit.

The enactment of the zoning law effectively aborted 7-Eleven's plans for developing the property because 7-Eleven intended to operate as a 24-hour business, and because the property was located within 100 feet of residentially zoned property. 7-Eleven filed an action in Supreme Court, Nassau County, seeking a declaration that the local law was invalid. In particular, 7-Eleven asserted, among other things, that the enactment of the law exceeded the zoning powers delegated to the local government under Village Law §7-700.

Physical Use of Land

In its decision on 7-Eleven's motion for an order enjoining the village from enforcing the law, the court noted that Village Law §7-700 sets forth the grant of zoning authority to local villages, and lists specific items that a village may regulate under such authority. As the court observed, all of the enumerated items have one thing in common: they bear some relation to the physical use of land (e.g., size, height and number of stories of buildings and other structures, percentage of lot that may be occupied, and the location and use of buildings, structures and land for trade, industry, residence or other purposes).

The court observed that there is a dichotomy between regulations that directly relate to the physical use of land and those that regulate the manner of

operation of a business or other enterprise. In the first group, it said, are regulations relating either to the use of land or to the potential impact of land use on neighboring properties. Courts generally uphold such regulations, including those directed at physical externalities such as light, air quality, safety, population density and traffic, and even less tangible externalities such as property values, aesthetic or environmental values. In the second group are those regulations that restrict the manner in which a business conducts its operations. Such regulations, the court added, generally are invalid as bearing insufficient relationship to the physical use of land.⁴

The court conceded that the concept of relationship to the physical use of land often is broadly interpreted. It noted, for instance, that in one case, a court upheld a limitation on the number and age of dogs permitted in a kennel, finding that this limitation was "directly allied to the use and enjoyment of neighboring land."⁵

In essence, the village asserted in the *Louhal Properties* case that it was regulating a new category of land use, namely, the 24-hour use, and it cited the negative impact of such land use upon neighboring residential property. The court, however, rejected the village's argument that the zoning law was more aptly characterized as a regulation of land use than as a restriction on the internal operation of a business. In reaching its decision, the court relied in large measure on the Second Department's holding in *Matter of Old Country Burgers Co. v. Town Bd. of Town of Oyster Bay*⁶ that a restriction on the time a drive-through window of a Burger King restaurant could operate was "an impermissible attempt to regulate the details of the operation of the petitioner's enterprise."

Local Law Struck Down

The *Louhal Properties* court was not persuaded that the local law should be upheld because it sought to address the adverse impact of 24-hour uses on neighboring properties. The court noted that there was no evidence that overnight business operations per se had a greater impact on neighboring properties than they would have during regular business hours. Indeed, the court stated, the record revealed that the complaints received by the village prior to enactment of the zoning law related primarily to traffic, garbage and parking problems arising at other locations in the village, "problems that were unrelated to the hours of operation."

In the court's view, the village's concern about the potential disruption of sleep caused by light and noise from all-night businesses in close proximity to residential property was "conjectural," supported only by a consultant's report on 24-hour uses commissioned by the village. "The record is devoid of prior complaints related to noise or light, or to the hours of operation of any of the existing 24-hour businesses," the court emphasized.

Accordingly, the court held that, absent substantial evidence showing the external impact of the land use in question, a restriction on hours of operation had to be deemed an impermissible attempt to regulate the details of the operation of a business. As such, Supreme Court held (and the Appellate Division affirmed) that the local law represented an invalid exercise of zoning power, and had to be struck down.

Certainly, not all challenges to zoning regulations that restrict hours of operation are successful.⁷ There also are issues in addition to the grant of authority from the state to local governments that need to be considered when analyzing

the validity of such regulations. For example, the regulatory scheme set forth in the Alcoholic Beverage Control Law, in conjunction with the declared goal of the statute to "regulate and control the manufacture, sale and distribution within the state of alcoholic beverages," means that a municipality may not regulate the sale of alcoholic beverages. Thus, for example, an ordinance prohibiting the sale of alcoholic beverages at gasoline service stations would be unenforceable.⁸ It seems clear, however, that a local zoning regulation attempting to regulate business hours is likely to be struck down, especially if it does not have a sufficient nexus to the physical use of land. *Matter of Westbury Trombo, Inc. v. Board of Trustees of Village of Westbury*, 763 N.Y.S.2d 674 (2d Dept. 2003).



(1) See, e.g., *Matter of Texaco Refining & Marketing, Inc. v. Valente*, 174 A.D.2d 674 (2d Dept. 1991); *Matter of Old Country Burgers Co., Inc. v. Town Bd. of Town of Oyster Bay*, 160 A.D.2d 805 (2d Dept. 1990).

(2) 191 Misc.2d 746 (Sup. Ct. Nassau Co. 2002).

(3) 763 N.Y.S.2d 773 (2d Dept. 2003).

(4) See, e.g., *Matter of Summit School v. Neugent*, 82 A.D.2d 463 (2d Dept. 1981).

(5) *Town of Huntington v. Sudano*, 42 A.D.2d 791, 792 (2d Dept. 1973), affirmed, 35 N.Y. 706 (1974).

(6) 160 A.D.2d 805, 806 (2d Dept. 1990).

(7) See, e.g., *Matter of 1833 Nostrand Avenue Corp. v. Chin*, 302 A.D.2d 460 (2d Dept. 2003) (holding that Board of Standards and Appeals for the City of New York properly limited the proposed hours of operation of store so that the retail use conformed to the character of the surrounding retail and residential neighborhood).

(8) See, e.g., *Matter of Lansdown Entertainment Corp. v. New York City Dept. of Consumer Affairs*, 74 N.Y.2d 761 (1989) (state statute preempts local regulations concerning, among other things, hours of operation of regulated businesses); cf. *People v. Amerada Hess Corp.*, 2003 N.Y. Misc. Lexis 836 (D. Ct. Nassau Co. June 16, 2003) (restrictive covenant running with the land may not bar the sale of alcoholic beverages at the location where such sale is licensed by the New York State Liquor Authority).

This article is reprinted with permission from the October 21, 2003 edition of the NEW YORK LAW JOURNAL. © 2003 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact American Lawyer Media, Reprint Department at 800-888-8300 x6111. #070-10-03-0047