NEW YORK
ZONING LAW AND PRACTICE REPORT

November / December 2002 Vol. 3, No. 3

In This Issue

Published six times a year by West Group

Editorial Offices: 50 Broad Street East, Rochester, NY 14694

Tel.: 585-546-5530 Fax: 585-258-3774

Customer Service: 610 Opperman Drive, Eagan, MN 55123

Tel.: 800-328-4880 Fax: 612-340-9378

RELIGIOUS USES

by John M. Armentano, Esq.*

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The free exercise of religion means, first and foremost, the right to believe and profess whatever religious faith one desires. Thus, the First Amendment protects against any governmental regulation of religious beliefs. In other words, government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.[1]

The U.S. Supreme Court has interpreted and applied the Free Exercise Clause on numerous occasions. About a decade ago, in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), the Court held that generally applicable, religion-neutral laws need not be justified by a compelling governmental interest, even if they burden religious practices. This decision rejected the prior standard requiring the government to justify a substantial burden on religion by a compelling state interest and by means narrowly tailored to achieve that interest.

Smith obviously is a major change from prior decisions, and it has a direct effect on zoning and land use planning. Indeed, since the Supreme Court's ruling, a number of courts have applied the decision to uphold neutral, generally applicable zoning laws against free exercise challenges.

* John M. Armentano, a partner with the Long Island firm of Farrell Fritz, P.C., represents local governments and developers in zoning, land use, and environmental matters, including litigation. He may be reached at jarmentano@farrellfritz.com.
Elaine R. Sammon, an associate at Farrell Fritz, assisted in the preparation of this article.

New York Zoning Law and Practice Report is published by West Group, 50 Broad Street East, Rochester, NY 14694.

18527855

Although Congress has sought to overrule *Smith* by statute, it has failed once and is now trying again. Since the second attempt has not yet reached the Supreme Court, municipal governments may still attempt to rely on *Smith* when enacting rules and regulations that impact religious exercise.

After the *Smith* decision, Congress attempted to overrule it by legislation reinstating the "compelling state interest" test which *Smith* expressly jettisoned. This legislation, known as the Religious Freedom and Restoration Act of 1993 (RFRA), was declared unconstitutional by the Supreme Court, which found that Congress had acted in excess of its power under Section 5 of the 14th Amendment. City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). Undaunted, Congress relied on its powers under the Spending and Commerce Clauses in a second attempt to resurrect the "compelling state interest" test. This second attempt (the Religious Land Use and Institutionalized Persons Act, or RLUIPA) has been held to be constitutional by a United States District Court in Pennsylvania. Freedom Baptist Church of Delaware County v. Tp. of Middletown, 204 F. Supp. 2d 857, 863 (E.D. Pa. 2002). In Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), the defendants did not challenge RLUIPA's constitutionality. However, in gratuitous dicta, the court suggested that it thought that RLUIPA "avoided the flaws of its predecessor RFRA." 218 F. Supp. 2d at 1221, n. 7.

An analysis of the decisions reveals that they have not come to grips with 10th Amendment arguments under Printz v. U.S., 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), and U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000), two recent Supreme Court cases, which severely limit Congressional power over matters that are truly local. In *Morrison,* it is specifically noted that "the Constitution requires a distinction between what is truly national and what is truly local." 529 U.S. at 617-618. This second attempt at federal regulation of local land use may very well suffer the same ultimate defeat that RFRA suffered in *Boerne.* At present, the *Smith* test controls.

The *Smith* Decision

The *Smith* case arose when the State of Oregon's Employment Division denied unemployment benefits to members of the Native American Church after the church members were terminated by their employer for having ingested peyote, a hallucinogenic drug, the consumption of which was prohibited under Oregon's criminal law. The church members had ingested the drug allegedly for sacramental purposes at a church ceremony. They sued Oregon's Employment Division, alleging that the denial of their unemployment benefits violated their free exercise rights. They contended, among other things, that their religious motivation for using peyote placed them beyond the reach of Oregon's criminal law.

The Supreme Court disagreed. Justice Scalia, writing for the Court, noted that the Court's decisions had "consistently held" that the right of free exercise did not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that the religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879. The Court then held that, because the church members' ingestion of peyote was prohibited by a neutral law of general applicability, Oregon could, consistent with the Free Exercise Clause, deny the church members unemployment compensation, i.e., it was not a constitutional violation to deprive them of the benefits, even if they had ingested the peyote as part of a religious exercise. In *Smith*, they were punished for conduct, not belief.

Smith Applied

One of the first courts to apply *Smith* in the zoning arena was the U.S. Court of Appeals for the Eighth Circuit, in Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991). In that case, the zoning ordinance of Hastings, Minnesota, prohibited churches in the city's central business district. A church applied to the city for a change of zoning to permit it to use a building in the city's central business district for church purposes. When the application was denied, the church sued the city, alleging that its free exercise rights had been violated.

In affirming the grant of summary judgment to the city, the Eighth Circuit analyzed the legislative language and applied the *Smith* standard, holding that the ordinance was a general

law that applied to all land use in Hastings. In the Eighth Circuit's view, the law did not directly regulate religious-based conduct, and there was no evidence that the city had an antireligious purpose in enforcing the ordinance. The Circuit Court concluded that, absent evidence of the city's intent to regulate religious worship, the ordinance was properly viewed as a neutral law of general applicability, and under *Smith*, summary judgment on the church's free exercise claim was appropriate. *Cornerstone Bible*, 984 F.2d at 472.

The Eleventh Circuit reached a similar conclusion in First Assembly of God of Naples, Florida, Inc. v. Collier County, Fla., 20 F.3d 419 (11th Cir. 1994). In that case, a county zoning board determined that a church had violated a county's zoning code by constructing a homeless shelter on its property. The church sued, alleging, among other things, a violation of its free exercise rights. The Eleventh Circuit, in affirming the grant of summary judgment to the county, analyzed the terms of the law and held that, because the zoning laws at issue were neutral and generally applicable, they did not violate the church's right to the free exercise of religion. *First Assembly,* 20 F.3d at 423.

In New York, the *Smith* standard has been embraced by both the Second Circuit and the New York Court of Appeals. See Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207, 121 Ed. Law Rep. 892 (2d Cir. 1997); New York State Employment Relations Bd. v. Christ the King Regional High School, 90 N.Y.2d 244, 660 N.Y.S.2d 359, 682 N.E.2d 960, 120 Ed. Law Rep. 226 (1997).

In *Bronx Household,* a church sued a local school district, alleging that its free exercise rights had been violated when the school district refused to make a public school auditorium available to the church as a place of weekly religious worship. The school district prohibited the use of school premises for religious services; in addition, the use of a school building for religious worship was not among the uses designated by the New York legislature for public schools and school grounds in New York State.

The Second Circuit rejected the church's free exercise claim, holding that the local policy and the state statute did not interfere with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion. The court held that the members of the church were free to practice their religion, albeit in a different location. Significantly, the Second Circuit stated that the right to believe and profess their religious doctrine had "not been taken from the members of the church." *Bronx Household,* 127 F.3d at 216.

In New York State Employment Relations Bd. v. Christ the King Regional High School, 90 N.Y.2d 244, 660 N.Y.S.2d 359, 682 N.E.2d 960, 120 Ed. Law Rep. 226 (1997), the New York Court of Appeals relied on the *Smith* standard in a case involving a Catholic high school's refusal to bargain with a union formed by members of its lay faculty. The high school argued that its constitutional right to free exercise of religion exempted it from the operation of the state Labor Relations Act. 90 N.Y.2d at 247. The Court of Appeals rejected this claim on the basis of *Smith*, holding that the New York State law did not abridge the high school's rights under the free exercise clause, because the statute was a facially neutral law universally applicable to secular and religious organizations alike. Because the law did not implicate religious conduct or beliefs, and did not purport to impose any express or implied restrictions or burdens on religious beliefs or activities, the court held that the school's rights had not been violated.

New York Law, Pre-*Smith*

Prior to *Smith*, the law of New York, as developed by the New York Court of Appeals, employed an all-but-conclusive presumption that a religious use always outweighed concerns for public health, safety, and welfare (see Community Synagogue v. Bates, 1 N.Y.2d 445, 154 N.Y.S.2d 15, 136 N.E.2d 488 (1956)). However, in Jewish Reconstructionist Synagogue of North Shore, Inc. v. Incorporated Village of Roslyn Harbor, 38 N.Y.2d 283, 379 N.Y.S.2d 747, 342 N.E.2d 534 (1975), Judges Breitel and Jones unsuccessfully sought to give more flexibility to government regulations, and to dilute the preferred status of educational and religious uses. Their view prevailed several years later, in Cornell University v. Bagnardi, 68 N.Y.2d 583, 510 N.Y.S.2d 861, 503 N.E.2d 509, 37 Ed. Law Rep. 292 (1986), in which the court embraced a balancing test for schools and religious uses, because it recognized the possibility of genuinely negative impacts of religious uses in residential areas.

Indicating an inclination toward greater regulation of religious uses, including possible exclusion from certain areas, the Court of Appeals in *Cornell University* observed:

> The controlling consideration in reviewing the request of a school or church for permission to expand into a residential area must always be the over-all impact on the public's welfare. Although the special treatment afforded schools and churches stems from their presumed beneficial effect on the community, there are many instances in which a particular educational or religious use may actually detract from the public's health, safety, welfare or morals. *In those instances, the institution may be properly denied.* There is simply no conclusive presumption that any religious or educational use automatically outweighs its ill effects [citation omitted].
>
> * * *
>
> A community that resides in close proximity to a college should not be obligated to stand helpless in the face of proposed uses that are dangerous to the surrounding area.

68 N.Y.2d at 595 (emphasis added).

In the educational arena, the Court of Appeals has held that a city code provision may not absolutely ban an educational use from a historic district on its face. Rather, under the *Cornell University* test, the code provision must allow for the balancing of the beneficial effects of the proposed use against the use's potential for harming the community. Such an analysis must culminate in a factual finding based on evidence before the Board. Trustees of Union College in Town of Schenectady in State of N.Y. v. Members of Schenectady City Council, 91 N.Y.2d 161, 667 N.Y.S.2d 978, 690 N.E.2d 862, 123 Ed. Law Rep. 1247 (1997).

More recently, in McGann v. Incorporated Village of Old Westbury, 256 A.D.2d 556, 682 N.Y.S.2d 433 (2d Dep't 1998), the court was dealing, not with a church or place of worship, but with a proposed Catholic cemetery, which the Catholic Diocese of Rockville Centre claimed was a religious use and hence would override the four-acre residential zoning of the defendant village. The Appellate Division held that the zoning was in accordance with the comprehensive plan, the ban against cemeteries was neutral and not discriminatory against the plaintiffs (or any religion), thereby passing the *Smith* standard, and First Amendment rights were not implicated. In spite of that holding, the Appellate Division nevertheless remanded the matter for trial on the issue of whether or not the cemetery was a religious use.

After a lengthy trial, the court found that the use was a religious use. On appeal, the Appellate Division invoked *Cornell University* and added a SEQRA component, holding that the plaintiffs' proposed use qualified as a Type I Listed Action under the State Environmental Quality Review Act (ECL article 8; hereinafter SEQRA), in that they sought a zoning change or change in permissible uses affecting 25 acres or more of land, and, therefore, the proposed use carried with it the presumption that it was likely to have a significant adverse impact on the environment and might require an Environmental Impact Statement (citing 6 NYCRR 617.4(a)(1); (b)(2), (b)(3)). McGann v. Incorporated Village of Old Westbury, 293 A.D.2d 581, 741 N.Y.S.2d 75 (2d Dep't 2002), appeal dismissed (N.Y. Sept. 10, 2002). The matter was remitted to the Board of Trustees to determine the environmental impact of the plaintiffs' proposed use, including examination under SEQRA of the effect of any possible mitigating measures. Id.

Regulation of Accessory Religious Uses

The courts have also given constitutional protection to uses accessory to a religious use. In the event that the ordinance involved specifically defines what an accessory use is, the court will be bound by it in analyzing whether the proposed accessory use indeed deserves constitutional protection. The Court of Appeals, however, has accepted and applied the definition of an accessory use as "a use customarily incidental and subordinate to the main use conducted on the lot." Dellwood Dairy Co. v. City of New Rochelle, 7 N.Y.2d 374, 375, 197 N.Y.S.2d 719, 165 N.E.2d 566 (1960). It is also clear that, even if a code does not define accessory uses, the courts will protect a church or synagogue which has activities that go beyond prayer and worship. Diocese of Rochester v. Planning Bd. of Town of Brighton, 1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956). The Court of Appeals has frequently relied upon language from Community Synagogue v. Bates, 1 N.Y.2d 445, 154 N.Y.S.2d 15, 136 N.E.2d 488 (1956) and *Town of Brighton* as the basis for supporting a broad range of accessory uses.

Consistent with the expansive language of *Community Synagogue,* permissible "accessory

uses" for a church or synagogue have been held to include indoor and outdoor activities for youth and community work [*Community Synagogue v. Bates*], use of a former guest house as a residence for a rabbi [Jewish Reconstructionist Synagogue of North Shore, Inc. v. Incorporated Village of Roslyn Harbor, 38 N.Y.2d 283, 379 N.Y.S.2d 747, 342 N.E.2d 534 (1975)]; a school, meeting room, and play areas at a church [*Town of Brighton,* supra]; a day-care center [Unitarian Universalist Church of Central Nassau v. Shorten, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (Sup 1970)]; a drug counseling program [Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312, 319 N.Y.S.2d 937 (Sup 1971)]; a gymnasium [Shaffer v. Temple Beth Emeth of Flatbush, 198 A.D. 607, 190 N.Y.S. 841 (2d Dep't 1921)]; the teaching of secular subjects [Westbury Hebrew Congregation Inc. v. Downer, 59 Misc. 2d 387, 302 N.Y.S.2d 923 (Sup 1969)]; meetings of the Boy Scouts and Girl Scouts [Application of Garden City Jewish Center, 157 N.Y.S.2d 435 (Sup 1956)]; a religious correspondence school, including necessary mailing machinery [Application of Faith for Today, Inc., 11 A.D.2d 718, 204 N.Y.S.2d 751 (2d Dep't 1960), order aff'd, 9 N.Y.2d 761, 215 N.Y.S.2d 70, 174 N.E.2d 743 (1961)], as well as an emergency temporary shelter for the homeless operated by a church [Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church, 146 Misc. 2d 500, 550 N.Y.S.2d 981 (Sup 1989)]. It is important to note, however, that while the scope of permissible accessory religious uses is indeed broad, the Court of Appeals has made it clear that "each case ultimately rests upon its own facts." *Community Synagogue,* 1 N.Y.2d at 453.

Moreover, assuming arguendo that a proposed religious use is determined to be accessory to a permitted use, the accessory use may still be excluded from a zoning district unless the accessory use is confined to the same lot on which the principal use is located, see, e.g., Sinon v. Zoning Bd. of Appeals of Town of Shelter Island, 117 A.D.2d 606, 497 N.Y.S.2d 952 (2d Dep't 1986); Bright Horizon House, Inc. v. Zoning Bd. of Appeals of Town of Henrietta, Monroe County, 121 Misc. 2d 703, 469 N.Y.S.2d 851 (Sup 1983), or at least situated on contiguous lots such that the principal and accessory structures form a "unified facility." De Mott v. Notey, 3 N.Y.2d 116, 164 N.Y.S.2d 398, 143 N.E.2d 804 (1957).

In *Bright Horizon House,* 121 Misc. 2d at 707-8, the Supreme Court refused to recognize a facility, wherein members of a religious faith would study the tenets of their religion for purposes of healing, as an accessory use to a local church not located on the lot. As a basis for its determination, the court opined: "The town code defines an accessory use or structure as one 'customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building.' In this case, not only is the subject property physically separated from the local Christian Science Church, which is located across the street, but also the petitioner is a separate organization in no way affiliated with the church or its activities." 121 Misc.2d at 707 (emphasis in original; citation omitted).

In New Jersey, as well as in other jurisdictions, a similar result has been reached. See, e.g., Sexton v. Bates, 17 N.J. Super. 246, 85 A.2d 833 (Law Div. 1951), judgment aff'd, 21 N.J. Super. 329, 91 A.2d 162 (App. Div. 1952); Abbadessa v. Board of Zoning Appeals of City of New Haven, 134 Conn. 28, 32, 54 A.2d 675 (1947); Sanfilippo v. Board of Review of Town of Middletown, 96 R.I. 17, 188 A.2d 464 (1963).

A valid basis for subordinating religious uses to zoning regulations was also recognized in Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312, 319 N.Y.S.2d 937 (Sup 1971), wherein the court declared that "[i]f there is a genuine danger to the community, if an unreasonably unhealthful element is in fact introduced, the factor of religiosity alone cannot grant a legal immunity."

The Imposition of Conditions

As discussed above, in Cornell University v. Bagnardi, 68 N.Y.2d 583, 510 N.Y.S.2d 861, 503 N.E.2d 509, 37 Ed. Law Rep. 292 (1986), the Court of Appeals was called upon to determine the proper method of balancing the needs and rights of educational institutions, which enjoy a similar constitutional protection as a religious institution to expand within a residential community, against the concerns of surrounding residents. The court found that a zoning board had used an impermissible criterion when reviewing the applications of the schools, and that the board's reasons for denying the applications had no relationship to the protection of the public's health, safety,

welfare, and morals. In pertinent part, the court stated:

> We hold that the presumption that educational uses are always in furtherance of the public health, safety and morals may be rebutted by a showing that the proposed use would actually have a net negative impact, and that a reasonably drawn special permit requirement may be used to balance the competing interest in this area. *In all instances, the governing standard should be the protection of the public's health, safety, welfare and morals.* Since in these cases the schools involved were prevented from implementing their expansion plans for reasons not related to these considerations, the denial of their applications was improper.

68 N.Y.2d at 589 (emphasis added).

Applying the principles articulated above, the Appellate Division, in Holy Trinity Greek Orthodox Church of Hicksville, Inc. v. Casey, 150 A.D.2d 448, 541 N.Y.S.2d 56 (2d Dep't 1989), upheld a Board of Zoning Appeals denial of a variance for reduction of off-street parking spaces for a church use. In so holding, the court found that the record contained substantial evidence that a 50-space off-street parking deficiency generated by the proposed religious use would have a negative impact on the surrounding community and that the denial of the petitioner's application for a variance was reasonably related to the public health, safety, and welfare of the Town of Oyster Bay. *Holy Trinity,* 150 A.D.2d at 449.

The same court, in Holy Spirit Ass'n for Unification of World Christianity v. Rosenfeld, 91 A.D.2d 190, 458 N.Y.S.2d 920 (2d Dep't 1983), held that:

> In order to deny a special use permit for a religious use as "detrimental to the public health, safety and welfare", "it must be convincingly shown that the [proposed use] will have a direct and immediate adverse effect upon the health, safety or welfare of the community." *A distinction must be drawn between danger to the public and mere public inconvenience.*

91 A.D.2d at 198 (emphasis added; citations omitted).

In denying a constitutional challenge to a zoning provision requiring religious uses to obtain a special use permit conditioned upon compliance with certain standards and requirements, the Appellate Division, in Province of Meribah Soc. of Mary, Inc. v. Village of Muttontown, 148 A.D.2d 512, 538 N.Y.S.2d 850 (2d Dep't 1989), went so far as to state: "it is well established that a zoning ordinance may provide that the granting of a special permit to churches and other religious uses may be conditioned on the effect the use would have on traffic congestion, property values, municipal services, and the general plan for the development of the community." 148 A.D.2d at 515 (citations omitted). In *Province of Maribah,* the court upheld the following conditions and requirements imposed by the Village Board of Zoning Appeals: "Applicant shall provide sufficient off-street parking to handle the anticipated number of vehicles for all activities. There shall be no parking or standing of any vehicles on Muttontown Road."

In summary, as a general proposition of law, a municipality may properly enact a zoning ordinance authorizing it to impose reasonable conditions on religious and educational uses which pose a substantial threat to public peace, safety, or order to protect the health, safety, and general welfare of its residents. *Cornell University,* 68 N.Y.2d at 595-96, Summit School v. Neugent, 82 A.D.2d 463, 442 N.Y.S.2d 73 (2d Dep't 1981). Such regulation does not run afoul of constitutional guarantees of free exercise of religion. See Holy Spirit Ass'n for Unification of World Christianity v. Rosenfeld, 91 A.D.2d 190, 198, 458 N.Y.S.2d 920 (2d Dep't 1983). However, the extent to which regulation is permitted depends largely upon whether sufficient proof is produced to overcome the rebuttable presumption of beneficial effect of the religious use. *Cornell University,* 68 N.Y.2d at 594-96. The presumed beneficial effect may be rebutted with "evidence of a significant impact on traffic congestion, property values, municipal services and the like." Id. at 595.

Since all of these cases will require a factual environmental evaluation under the State Environmental Quality Review Act, that law and the public hearing process present an effective vehicle for all appropriate inquiries and for the imposition of conditions within the context of the constitution. Further, special permit procedures afford another avenue of analysis and imposition of conditions, if warranted by the testimony. At present, such analysis must proceed within the arena of the *Smith* test.

NOTES

[1] The regulation of religious and educational uses are frequently interchangeably discussed, largely because educational uses are also treated in the Constitution of the State of New York (in Article XI thereof). Thus, with respect to educational uses, the Court of Appeals, in New

York Institute of Technology, Inc. v. LeBoutillier, 33 N.Y.2d 125, 350 N.Y.S.2d 623, 305 N.E.2d 754, 64 A.L.R.3d 1129 (1973), held that an educational use is, by its very nature, in furtherance of the general welfare and may not be completely excluded from a residential district.

Updates from the Federal Bench

Second Circuit dismisses takings claim on ripeness grounds where plaintiff failed to seek a state remedy.

In affirming the dismissal of a takings claim brought in the Western District of New York, the Second Circuit held that since the plaintiff had an opportunity to bring an Article 78 proceeding to compel public officials to comply with their responsibilities, the plaintiff's failure to do so prevented a takings claim from ripening. Although the four-month limitation period for bringing an Article 78 proceeding had passed, the Second Circuit, adopting language from the Seventh Circuit's decision in Gamble v. Eau Claire County, 5 F.3d 285, 286 (7th Cir. 1993), stated, "[A] claimant cannot be permitted to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open." The court dismissed the takings claim with prejudice. Vandor, Inc. v. Militello, 301 F.3d 37 (2d Cir. 2002).

Northern District of New York finds village sign ordinance unconstitutional as a violation of the First Amendment.

Following the September 11th terrorist attacks, the plaintiff, a resident of the Village of New Paltz, hung in a window of his building a sign which measured four feet by 25 feet and read "Keep looking over your shoulder terrorists—we're coming for you. God bless America." Although the plaintiff removed the sign in December 2001, he intended to post the sign again should there be another terrorist attack. In the meantime, however, the Village adopted an amendment to its zoning ordinance which would have required the plaintiff to obtain a permit to display the sign. The District Court determined that the amended zoning ordinance contained content-based exemptions from the permit requirement for certain classes of outsized noncommercial signs, since some noncommercial signs that exceeded size limits would not be subject to the permit requirement, depending upon their message (e.g., traffic signs, legal notices, historical plaques, memorial signs, and accessory signs). Furthermore, the ordinance's exemption from permit requirements for temporary signs covering political and sporting events, entertainments and elections, subject to timing limitations, also constituted a content-based distinction under the First Amendment. After reviewing the Village's purposes in regulating signs, the court concluded that the stated purposes primarily promoted aesthetics and traffic safety, and therefore the ordinance's infringement on the First Amendment could not survive strict scrutiny, since those purposes did not constitute a compelling state interest narrowly drawn to achieve that end. Savago v. Village of New Paltz, 214 F. Supp. 2d 252 (N.D. N.Y. 2002).

Updates from the New York State Courts

Court of Appeals holds that to properly file an Article 78 proceeding challenging a determination of the zoning board of appeals, the "clerk of the court" with whom such filing must be made is the county clerk, not the clerk of the Supreme Court.

Where petitioners attempted to challenge a determination of the Town of Mendon Zoning Board of Appeals, they submitted a petition and notice of petition to the office of the Chief Clerk of the Monroe County Supreme and County Courts, not to the county clerk. Section 304 of the CPLR provides in part that special proceedings are commenced by filing a petition with the clerk of the court. Although the CPLR does not define "clerk of the court," Article VI, § 6(e) of the State Constitution states that the County Clerks shall be the clerks of the Supreme Court. Furthermore, County Law § 525 (1) states that "the county clerk shall . . . be the clerk of the supreme court and clerk of the county court within his county." The Court of Appeals ruled that based upon these provisions, the term "clerk of the court" means the county clerk. Therefore, the petition was not properly filed and was properly dismissed below. Mendon Ponds Neighborhood Ass'n. v. Dehm, 2002 WL 31319507 (N.Y. 2002).

Second Department holds that a village may not adopt a test for the granting of an area variance that is different from the statutory test set forth in the Village Law, since the State Legislature expressed a desire to preempt such local action with the adoption of statewide standards.

In 1991, the State Legislature amended Village Law § 7-712-b (as well as parallel sections in the Town Law and General City Law) to provide a clear test for the granting of area variances by villages. The Village of Saddle Rock "repealed and superceded" this provision of the Village Law and replaced it with a different test articulated in the Village Code. After tracing the legislative history of the 1991 amendment to the Village Law, and finding that it was intended to standardize a uniform statewide test for the granting and denial of area variances, the Second Department found that the 1995 Court of Appeals decision in Sasso v. Osgood, 86 N.Y.2d 374, 633 N.Y.S.2d 259, 657 N.E.2d 254 (1995), holds that a village seeking to retain the "practical difficulties" standard would otherwise be precluded from doing so, as the Court of Appeals stated that the municipality had to apply the new state statutory test in evaluating a request for an area variance. In finding that the Village of Saddle Rock lacked authority under the Municipal Home Rule Law to alter the test set forth in the state statute, the Second Department stated that "by enacting Village Law sec. 7-712b, the Legislature expressed a desire to preempt the entire field of area variances, thereby precluding a Village from enacting its own standard." Cohen v. Board of Appeals of Village of Saddle Rock, 297 A.D.2d 38, 746 N.Y.S.2d 506 (2d Dep't 2002).

Third Department finds that a zoning board's denial of a special use permit for mining operations was not supported by substantial evidence.

Petitioners sought a special use permit to operate a sand and gravel mine on 4.8 acres of their 93-acre parcel within the Town of Ithaca. Under the Town's zoning ordinance, mining operations were allowed upon the issuance of a special use permit. In cases like the one presented, where the extraction of more than 2,500 cubic yards of material was involved, the zoning ordinance required a referral to the planning board for a recommendation. The application (which included a town development review application, a DEC mining permit application, a full EAF (with part one completed), the Town excavation or fill permit application, a mining plan and base map, a reclamation plan, and a letter from a consulting geologist) was reviewed by the Town's environmental planner, who concluded that the proposed action would not result in any significant environmental impacts. The Town Engineer concluded that the proposed plan would "adequately protect the property and surrounding properties from any significant adverse consequences," and the Planning Board, after a public hearing, recommended conditional approval. After the Zoning Board of Appeals conducted two public hearings, voted on the application subject to conditions agreed to by the applicant (which included, among other things, limited hours of the mining operation, limitations on the number of daily and hourly truckloads, and a permit expiration in three years), they ultimately voted to deny the application by a vote of 3-2, based upon their conclusions that the use would produce more noise and traffic, that there would be limited on-site supervision, that these activities would be detrimental to the neighborhood, and that the increase in traffic caused safety concerns. The Appellate Division, Third Department, concluded that the ZBA's denial was not supported by substantial evidence and that the Board's determination was based on "nothing more than several offhand comments made by a few of citizens who attended the public hearings." Eddy v. Niefer, 297 A.D.2d 410, 745 N.Y.S.2d 631 (3d Dep't 2002).