

Town Cannot Use Zoning Law to Ban Check Cashing Businesses

A seven-year battle over a Long Island town's efforts to use its local zoning powers to ban check cashing establishments has come to an end. In *Sunrise Check Cashing and Payroll Services v. Town of Hempstead*,¹ the New York Court of Appeals has struck down the Town of Hempstead's zoning measure in a decision that sets forth significant limitations on the ability of municipalities to use their zoning laws to regulate businesses. Indeed, with very limited exceptions, the ruling makes it highly unlikely that local governments will be able to use zoning to bar businesses from operating in their communities where state law otherwise permits these businesses to exist.

The Ordinance

In January 2006, Hempstead adopted Section 302(K) of Article XXXI of its zoning ordinance. Section 302(K) "expressly prohibited" check cashing establishments in "any use district except Y Industrial and LM Light Manufacturing districts." Under an amortization provision in Section 302(K), preexisting check cashing businesses located in districts where they would be prohibited under Section 302(K) were required to terminate by amortization no later than five years after the effective date of the law.²

The only document explaining the purpose of this enactment was a memorandum from the town attorney's office dated Dec. 13, 2005, the same date as the public hearing on the law that became Section 302(K). The subject of the memorandum was "Public Policy

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Behind Check Cashing Ordinance." The memorandum stated that the measure represented "sound public policy" because:

Essentially, it serves the interest of encouraging young people and those of lower incomes to establish savings and checking accounts, do their banking at sound and reputable banking institutions, and develop credit ratings. It also eliminates predatory and exploitative finance enterprises from commercial areas, which is beneficial because these enterprises tend to keep a neighborhood down.

The memorandum consisted of several pages criticizing check cashing establishments on social policy grounds. It stated that check cashing businesses made it convenient for young and lower income people "to remain in the cash-only economy," adding, "[t]his is bad for society as a whole." The memorandum referred to studies finding that check cashing businesses "actually exploit the poor and African Americans." It concluded that the proposal encouraged "young and lower income people to open up bank accounts, save their money, and develop a credit rating" and also removed "a seedy type of operation, akin to pawnshops and strip clubs, from the commercial areas of the Town." Section 302(K) was adopted by the Town Board about four weeks after the memorandum was issued.

The Litigation

Several check cashing businesses went to court, seeking a declaration that Section 302(K) was invalid and an injunction against its enforcement. They argued, among other things, that Section 302(K) conflicted with New York state law, was not reasonably related to promoting the public health, safety, morals, or general welfare of the town, and was not a valid exercise of the town's zoning power because, rather than dealing with the zoning of property, it impermissibly addressed the operation of the plaintiffs' businesses.

The Supreme Court, Nassau County, granted the town's motion for summary judgment dismissing the complaint.³ The trial court concluded, in effect, that the Legislature had not intended to occupy the field of regulating check cashing establishments, that the plaintiffs had failed to demonstrate that the doctrines of field preemption or conflict preemption prevented the town from enacting Section 302(K), and that the plaintiffs failed to rebut the presumption of validity that applied to Section 302(K).

The Appellate Division, Second Department, reversed.⁴ It held that Section 302(K) was preempted by Article IX-A of the New York Banking Law and related regulations that govern the licensing of check cashers.⁵ The town appealed as of right to the Court of Appeals.

The Court Of Appeals Decision

The court, in a unanimous decision by Judge Robert S. Smith (with Judge Jenny Rivera not participating), affirmed the Second Department's decision, but on a different ground than the Second Department had relied upon. The court

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specifically did not reach the preemption issue, instead holding that the Hempstead zoning measure was invalid because it violated the principle that zoning was concerned "with the use of land, not with the identity of the user."

The court explained that a town's power to adopt zoning regulations derived from Town Law §261, which authorizes town boards "to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."⁶

Moreover, the court continued, the zoning power was not a general police power but a power to regulate land use, stating that it was "a fundamental principle of zoning that a zoning board is charged with the regulation of land use and not with the person who owns or occupies it." It then found that the Hempstead cash checking law contradicted this principle.

In the court's view, it was "clear" from the town attorney's memorandum that Section 302(K) "was directed at the perceived social evil" of check cashing services, which were thought to exploit the younger and lower income people who were their main customers. According to the court, whatever the merits of this view as a policy matter, it could not be implemented through zoning. The court stated that Section 302(K) was "obviously concerned not with the use of the land but with the business done by those who occupy it."

The court rejected the argument the town made to it that Section 302(K) was intended to protect the health and safety of the community against the dangers created by armed robbery,⁷ finding no evidence that the town board had been worrying about armed robbery when it enacted Section 302(K). It also rejected the town's reliance on the presumption of validity accorded to zoning legislation⁸ and the town's assertion that, if any valid purpose for the enactment could be imagined, the enacting body must be deemed to have had that purpose in view. The court ruled that "[d]eference to legislative enactments, at least where the issue is abuse of the zoning power, does not go as far as the [t]own would have us go."

Conclusion

The court's decision has important ramifications for local governments as well as for business and property owners. Proper zoning, as the court explained, regulates land use—and not the person who owns or occupies the land. Admittedly, the court left open the possibility that adverse secondary effects, if properly demonstrated, could serve as a permitted justification of a zoning regulation—and, in fact, it acknowledged, without explicitly deciding, that a concern about armed robberies might justify a zoning regulation. Still, given the hoops that local governments must jump through to demonstrate secondary effects sufficient to justify zoning restrictions on "adult entertainment" uses,⁹ the ability of local governments to limit check cashing services—or collateral loan brokers (also known as pawnbrokers),¹⁰ businesses that sell alcoholic beverages,¹¹ or other state-regulated commercial entities—through zoning faces significant obstacles.

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1. 2013 N.Y. Slip Op. 949 (Feb. 14, 2013).

2. Section 302(K), entitled, "Restrictions on check-cashing establishments," provided:

(1) Prohibition. In any use district except Y Industrial and LM Light Manufacturing Districts, check-cashing establishments are hereby expressly prohibited.

(2) Definition. A check-cashing establishment is defined as a place where checks are cashed and/or payday or other short-term type loans are offered, but where general banking services, including but not limited to the establishment of savings and checking accounts, provision for deposits and withdrawals therefrom, and payment of accrued interest, are not offered on a regular basis.

(3) Amortization. Any check-cashing establishment that is in violation of this subsection but is lawfully in existence in any unincorporated portion of the Town of Hempstead upon the effective date of this subsection shall become a legal nonconforming use and shall terminate by amortization no later than five years immediately following the effective date of this subsection.

3. *Sunrise Check Cashing and Payroll Services v. Town of Hempstead*, 2010 N.Y. Slip Op. 31005(U) (Sup. Ct. Nassau Co. Apr. 16, 2010).

4. *Sunrise Check Cashing and Payroll Services v. Town of Hempstead*, 91 A.D.3d 126 (App. Div. 2d Dept. 2011); see also Anthony S. Guardino, "Law Affecting Check Cashing Businesses Struck Down," NYLJ Jan. 25, 2012.

5. Banking Law Article 9-A pertains to "Licensed Cashers of Checks." Under Section 367, "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."

Banking Law §367(1). To obtain a license, a person or entity must apply, in writing, under oath, "in the form prescribed by the superintendent." Banking Law §367(2). The applicant also must pay a fee "for investigating the application." Banking Law §367(3). A note accompanying Article 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." L 2004, ch 432, §1, reprinted in McKinney's Cons Laws of N.Y., Book 4, Banking Law, Article 9-A, Historical and Statutory Notes, at 417 (2008 ed).

6. See also Town Law §263 (listing the purposes of zoning as "to lessen congestion in the streets; to secure safety from fire, flood, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to make provision for, so far as conditions may permit, the accommodation of solar energy systems and equipment and access to sunlight necessary therefor; to facilitate the practice of forestry; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements."

7. In support of this position, the town quoted a 1981 observation of a trial court that check cashing facilities were and had "been over the years, the subject of robberies, kidnappings and murders" and that the risk of robberies inherently existed in the check cashing business. *American Broadcasting v. Siebert*, 110 Misc.2d 744 (Sup.Ct. N.Y. Co. 1981).

8. See, *Robert E. Kurzius Inc. v. Vil. of Upper Brookville*, 51 N.Y.2d 338 (1980).

9. See, e.g., *Stringfellow's of N.Y. v. City of New York*, 91 N.Y.2d 382 (1998).

10. See, General Business Law Article 5.

11. See, Alcoholic Beverage Control Law.