CONFUSING ZONING CONCEPTS

Jefferson Community College – November 21, 2019

Confusing concepts:

- Site plan review vs. special use permit
- Nonconformities vs. illegal use
- Mobile home definitions
- Appeals for interpretations

Best practice thoughts:

- Measuring road setbacks
- Change in use definition
- NYS Town Law Section 280-a -- open development districts
- Legitimate purposes of zoning
- Abutter notifications of hearings

Lack of statutory guidance:

- Area variance for site plan/special permit/subdivision
- Governmental immunity
- Abbreviated subdivision review
- Straddled parcels

Site Review and Special Use Permit

Site Plan Review

Definition: A rendering, drawing, or sketch prepared to specifications and containing necessary elements, as set forth in the applicable zoning ordinance or local law, which shows the arrangement, layout and design of the proposed use of a single parcel of land as shown on said plan.

The required site plan elements which are included in the zoning ordinance or local law may include, where appropriate, those related to:

- parking
- means of access
- screening
- signs
- landscaping
- architectural features,
- location and dimensions of buildings
- adjacent land uses and physical features meant to protect adjacent land uses
- any additional elements specified by the town/village board

Statutes

- NYS Town Law Section 274-a
- NYS Village Law Section 7-725-a

Process

Statute does NOT require a public hearing, so hearing requirements are based on what is adopted in zoning ordinance or local law.

Special Use Permit

Definition: An authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met.

Statutes

- NYS Town Law Section 274-b
- NYS Village Law Section 7-725-b

Process

Statutes DOES require a public hearing.

ARTICLE 14 - NONCONFORMITIES

Section 14.01 Intent

The intent of this article is to recognize lots, structures and uses of land and structures which legally existed prior to the enactment or subsequent amendment of this law which would be prohibited or unreasonably restricted by the requirements herein. All rights of nonconformity shall continue regardless of the transfer of ownership of nonconforming lots, structures or uses.

Section 14.02 Nonconforming Lots

Any lot held under separate ownership prior to the enactment or amendment of this law, and having a width or area less than the minimum requirements set forth in this law, may be developed for any use allowed in the zone in which it is located, as designated in Section 5.02 of this law, provided that such lot has sufficient width and area to undertake development which will:

1. maintain the required minimum front, side and rear yard setback;
2. comply with the required sewage, wastewater and well setbacks.

Where two or more adjoining lots exist in the same ownership, such lots shall be considered as combined to meet the requirements of this law.

Section 14.03 Nonconforming Structures

No structure which by the enactment or amendment of this law is made nonconforming or placed in a nonconforming situation with regard to setback sizes, lot coverage, height or any requirement of this law, other than the use to which it is put, shall be changed so as to increase its nonconformity, except as follows. A structure that is nonconforming as to front, side or rear setbacks may be increased in size within the setback area as long as no part of the addition is closer to the lot boundary than the closest part of the previous nonconforming structure. If a structure is nonconforming as to use, see Section 14.04 below. Any such nonconforming structure may be used for any compatible use listed for the zone in which it is located as designated in Section 5.01 of this law.

Section 14.04 Nonconforming Uses of Land or Structures

Any use of land or structures which by the enactment or amendment of this law is made nonconforming may be continued on the premises and to the extent preexisting provided that:

1. no nonconforming use shall be increased in size so as to occupy a greater area of land or floor area than was committed to the nonconforming use at the time of such enactment or amendment;
2. no nonconforming use which has for any reason been discontinued for a period of one year or more shall be reestablished, except where transfer has been delayed in a probate case; and
3. a special use permit shall be required for any alteration or reconstruction which is on the premises of a nonconforming multi-family residential or nonresidential use.

Section 14.05 Nonconforming Structures Damaged or Destroyed

Any structure which is nonconforming as to use, setbacks, height or any other requirement of this law, which is damaged or destroyed by fire or other hazard, may be repaired, restored or reconstructed provided that application for such work is made within one year of the date on which the damage or destruction occurred. No such work shall increase the nonconformity of the structure.

Section 14.06 Nonconforming Signs

See Section 13.10 of this law.

Section 14.07 Nonconforming Mobile Homes

See Section 9.03 of this law.

NYS Building Code Definitions

MANUFACTURED HOME. A factory-manufactured dwelling unit built on or after June 15, 1976, and conforming to the requirements of the Department of Housing and Urban Development (HUD), Manufactured Home Construction and Safety Standards, 24 CFR Part 3208, 4/1/93, transportable in one or more sections, which in the traveling mode, is 8 feet (2438 mm) or more in width or 40 feet (12192 mm) or more in length, or, when erected on site, is 320 square feet (29.7 m^2) minimum, constructed on a permanent chassis and designed to be used with or without a permanent foundation when connected to the required utilities and includes the plumbing, heating, air conditioning and electrical systems contained therein. The term "manufactured home" shall also include any structure that meets all the requirements of this definition except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Federal Department of Housing and Urban Development and complies with the standards established under the national Manufactured Housing Construction and Safety Act of 1974, as amended. The term "manufactured home" shall not include any self-propelled recreational vehicle.

MOBILE HOME. A factory-manufactured dwelling unit built prior to June 15, 1976, with or without a label certifying compliance with NFPA, ANSI or a specific state standard, transportable in one or more sections, which in the traveling mode, is 8 feet (2438 mm) or more in width or 40 feet (12192 mm) or more in length, or, when erected on site, is 320 square feet (29.7 m^2) minimum, constructed on a permanent chassis and designed to be used with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning and electrical systems contained therein. The term "mobile home" shall not include travel trailers or any self-propelled recreational vehicle.

FACTORY MANUFACTURED HOME means a structure designed primarily for residential occupancy, constructed by a method or system of construction whereby the structure or its components are wholly or in substantial part manufactured in manufacturing facilities, intended or designed for permanent installation, or assembly and permanent installation, on a building site.

NYS Town Law Section 280-a. Permits for buildings not on improved mapped streets.

1. No permit for the erection of any building shall be issued unless a street or highway giving access to such proposed structure has been duly placed on the official map or plan, or if there be no official map or plan, unless such street or highway is (a) an existing state, county or town highway, or (b) a street shown upon a plat approved by the planning board as provided in sections two hundred seventy-six and two hundred seventy-seven of this article, as in effect at the time such plat was approved, or (c) a street on a plat duly filed and recorded in the office of the county clerk or register prior to the appointment of such planning board and the grant to such board of the power to approve plats.

2. Before such permit shall be issued such street or highway shall have been suitably improved to the satisfaction of the town board or planning board, if empowered by the town board in accordance with standards and specifications approved by the town board, as adequate in respect to the public health, safety and general welfare for the special circumstances of the particular street or highway.

Alternatively, and in the discretion of such board, a performance bond sufficient to cover the full cost of such improvement as estimated by such board shall be furnished to the town by the owner. Such performance bond shall be issued by a bonding or surety company approved by the town board or by the owner with security acceptable to the town board, and shall also be approved by such town board as to form, sufficiency and manner of execution. The term, manner of modification and method of enforcement of such bond shall be determined by the appropriate board in substantial conformity with section two hundred seventy-seven of this article.

3. The applicant for such a permit may appeal from the decision of the administrative officer having charge of the issue of permits to the board of appeals or other similar board, in any town which has established a board having the power to make variances or exceptions in zoning regulations for: (a) an exception if the circumstances of the case do not require the structure to be related to existing or proposed streets or highways, and/or (b) an area variance pursuant to section two hundred sixty-seven-b of this chapter, and the same provisions are hereby applied to such appeals and to such board as are provided in cases of appeals on zoning regulations. The board may in passing on such appeal make any reasonable exception and issue the permit subject to conditions that will protect any future street or highway layout. Any such decision shall be subject to review by certiorari order issued out of a special term of the supreme court in the same manner and pursuant to the same provisions as in appeals from the decisions of such board upon zoning regulations.

4. The town board may, by resolution, establish an open development area or areas within the town, wherein permits may be issued for the erection of structures to which access is given by right of way or easement, upon such conditions and subject to such limitations as may be prescribed by general or special rule of the planning board, if one exists, or of the town board if a planning board does not exist. If a planning board exists in such town, the town board, before establishing any such open development area or areas, shall refer the matter to such planning board for its advice and shall allow such planning board a reasonable time to report.

5. For the purposes of this section the word "access" shall mean that the plot on which such structure is proposed to be erected directly abuts on such street or highway and has sufficient frontage thereon to

allow the ingress and egress of fire trucks, ambulances, police cars and other emergency vehicles, and, a frontage of fifteen feet shall presumptively be sufficient for that purpose.

NYS Village Law Section 7-736. Construction of municipal utility in streets; permits for erection of buildings; appeal; review by court.

1. No public municipal street utility or improvement shall be constructed by the village in any street or highway until it has become a public street or highway and is duly placed on the official map or plan; except that the board of trustees may authorize the construction of a public municipal street utility or improvement in or under a street which has not been dedicated, but which has been used by the public as a street for five years or more, prior to March second, nineteen hundred thirty-eight, and is shown as a street on a plat of a subdivision of land which had been filed prior to March second, nineteen hundred thirty-eight, in the office of the county clerk or register of the county in which such village is located.

2. No permit for the erection of any building shall be issued unless a street or highway giving access to such proposed structure has been duly placed on the official map or plan, or if there be no official map or plan, unless such street or highway is (a) an existing state, county, town or village highway, or (b) a street shown upon a plat approved by the planning board as provided under the provisions of this article, as in effect at the time such plat was approved, or (c) a street on a plat duly filed and recorded in the office of the county clerk or register prior to the appointment of such planning board and the grant to such board of the power to approve plats. Before such permit shall be issued such street or highway shall have been suitably improved to the satisfaction of the planning board in accordance with standards and specifications approved by the appropriate village officers as adequate in respect to the public health, safety and general welfare for the special circumstances of the particular street or highway, or alternatively, and in the discretion of such board, a performance bond sufficient to cover the full cost of such improvement as estimated by such board or other appropriate village departments designated by such board shall be furnished to the village by the owner. Such performance bond shall be issued by a bonding or surety company approved by the board of trustees or by the owner with security acceptable to the board of trustees, and shall also be approved by the village attorney as to form, sufficiency and manner of execution. The term, manner of modification and method of enforcement of such bond shall be determined by the appropriate board in substantial conformity with section 7-730 of this article.

3. The applicant for such a permit may appeal from the decision of the administrative officer having charge of the issue of permits to the board of appeals or other similar board, in any village which has established a board having the power to make variances or exceptions in zoning regulations for: (a) an exception if the circumstances of the case do not require the structure to be related to existing or proposed streets or highways, and/or (b) an area variance pursuant to section 7-712-b of this chapter, and the same provisions are hereby applied to such appeals and to such board as are provided in cases of appeals on zoning regulations. The board may in passing on such appeal make any reasonable exception and issue the permit subject to conditions that will protect any future street or highway layout. Any such decision shall be subject to review in the same manner and pursuant to the same provisions as in appeals from the decisions of such board upon zoning regulations.

NYS Department of State General Counsel - Legal Memorandum LU15

Can Local Boards Regulate the Hours of Operation of a Business?

Municipal officials often ask whether, and by what means, a municipality can regulate the hours of operation of a business. The answer to this seemingly easy question is quite complicated.

Zoning conditions and restrictions imposed by a municipal board in the exercise of its zoning powers must be related to the use of land and must be for a proper purpose of zoning.[1] The conditions imposed must be reasonable and "directly related to and incidental to" the proposed use.[2] The courts have held that municipalities are prohibited from using their zoning powers to regulate the internal operations or the details of a business.[3] Zoning conditions and restrictions that are aimed at controlling the details or operation of an owner's use of land are outside of a municipality's delegated authority.[4]

The question, then, is whether the hours of operation of a business is a component of its "internal operation". If it is, then it's not within the reach of a municipality's zoning power.

Restricting Hours of Operation through Conditions

New York courts have struck down conditions imposed by planning and zoning boards that regulate the hours of operation of a business as an attempt to regulate its internal operations or details, unless there appeared to be substantial evidence relating the hours of the business's operation to its impact on the surrounding neighborhood.

In *Matter of Schlosser v. Michaelis*,[5] the zoning board of appeals granted the petitioner's application for a use variance to use the property as a wholesale florist business, subject to certain conditions, such as limiting the number of employees and the hours and days of operation. The court invalidated those conditions stating that "the [b]oard of [a]ppeals has no power to impose conditions which apply to the details of the operation of the business and not to the zoning use of the premises."[6]

In *Summit School v. Neugent*,[7] the petitioner applied to the zoning board of appeals for a variance and a special use permit to use the property as a school for handicapped children. The variance and special use permit were granted subject to numerous conditions, including conditions which limited the months, days and times of the classes.[8] The court stated that the conditions imposed went beyond the power conferred upon the zoning board of appeals to impose conditions on administrative permits.[9] The conditions did not relate to the use of the land but rather to the manner of operation of the school. Therefore, the conditions were held to be invalid as an improper "attempt to control the details of the operation of a private school."[10]

In *Old Country Burgers Corp., Inc. v. Town Board of Town of Oyster Bay*,[11] the petitioner, Burger King, applied for a special use permit to operate a drive-through window. The town board granted the application subject to certain conditions on its use. One such condition was a prohibition on the use of the drive-through "between the hours of 8 a.m. and 9:30 a.m.; 12 noon and 1:30 p.m.; and 5 p.m. and 6:30 p.m."[12] The court held that this condition, which prohibited the operation of the drive-through window during peak meal-time hours, was "an impermissible attempt to regulate the details of the operation of the [business]."[13] Although the town sought to justify the condition based on increased traffic, the court found that "the condition was not based upon substantial evidence" and therefore invalidated the condition.[14]

In *Master Billiard Co., Inc. v. Rose*,[15] the zoning board of appeals granted an application for a special use permit that imposed several conditions, including a restriction on the billiard parlor's hours of operation.[16] The court held that four of the ten conditions imposed, including the hours of operation restriction, did not relate to the use of the land but "to the internal operations of petitioner's business and were unrelated to the purpose of the zoning."[17] The court found that
these conditions were outside the scope of the permit application, and therefore, unlawful.

These cases have established a trend in the law in which conditioning administrative approvals based upon the hours of operation of a business is regarded as an improper attempt to regulate the internal operations of a business. These cases involved conditions which were invalidated as having an insufficient relationship to the physical use of land.[18] The courts have held that "[c]onditions . . . must relate to the proposed use of the property, and not to the manner of the operation of the particular enterprise conducted on the premises."[19]

Some courts have upheld time-related conditions where the record substantiates a relationship between hours of operation and neighborhood impact. In the case of *Twin Town Little League Inc. v. Town of Poestenkill*,[20] the court upheld conditions imposed on a site plan for a little league baseball complex. The planning board had imposed nine conditions upon the approval of the site plan, including restrictions on the hours of operation. The court held that the conditions were supported by substantial evidence and that they were "directly related to and incidental to the proposed use of the property."[21] The court recognized that the conditions were necessary to mitigate the adverse impacts, specifically neighborhood concerns regarding the depreciation of property value due to increased noise, traffic and lighting, while ensuring compatibility with the neighborhood.[22] The court regarded these conditions as acceptable, finding the conditions to be "a reasonable attempt to alleviate these concerns . . . as they relate directly to the use of the land."[23] In a recent case, the court affirmed a city zoning board of appeals' imposition of a condition limiting a pizzeria's hours of operation, as "....proper because it relates directly to the use of the property and is intended to protect the neighboring residential properties from the possible adverse effects of the petitioner's operation, such as the anticipated increase in traffic congestion, parking problems, and noise...".[24]

Limiting Hours of Operation through Zoning Legislation

Some courts appear to distinguish between administrative and legislative acts (the adoption of a local law or ordinance). Those courts have expressed the view that certain conditions, such as hours of operation, can be dealt with legislatively rather than administratively.[25]

The law is unsettled with respect to whether a governing board can legislate the hours of operation of a business under its zoning authority. The fundamental rule that zoning conditions and restrictions must relate to the physical use of the land and not the operation of an applicant's business also applies to zoning legislation; the determination must be made as to whether the regulation of the hours of operation of a business is a legitimate purpose of zoning.[26]

In *Southland Corp. v. Janoski*,[27] the Supreme Court in Suffolk County upheld a local law rezoning a retail district which limited the hours of operation of retail businesses between 12 a.m. and 5 a.m.[28] The court found the local law to be a proper exercise of the town's police powers enacted to encourage harmony between businesses and residents and to promote the "health, safety, peace and comfort" of local residents.[29] The local law served the legitimate governmental purpose of controlling traffic and noise. The local law was upheld as constitutional and affirmed on appeal.[30]

In contrast, the *Supreme Court in Nassau County, in Louhal Properties, Inc. v. Strada*,[31] held that the Village of Westbury's law, which restricted the operation of certain businesses between the hours of 11 p.m. and 6 a.m, was an invalid exercise of zoning power.[32] The court stated that "applicable case law draws a dichotomy between those regulations that directly relate to the physical use of land and those that regulate the manner of operation of a business or other enterprise."[33] The court based its decision on the rule derived from *Old Country Burgers*, where the Second Department held that "absent substantial evidence showing the external impact of the land use in question, a restriction on hours of operation must be deemed an impermissible attempt to regulate the details of the operation of a business."[34] The court, in *Louhal*, felt that "[t]he Village [had] failed to adequately substantiate its claim with respect to the adverse impact of 24-hour uses on neighboring properties."[35] There was no evidence presented that businesses open 24 hours had a greater impact on neighboring properties than businesses operating during regular business hours.[36]

Although reaching different conclusions, the two cases dealing with local laws limiting the hours of operation of a business appear to use the same test: if provided with substantial evidence showing that restricting the hours of operation relates to the physical use of land and not to the internal operation of a business, the local law will likely be upheld as a legitimate exercise of the municipality's zoning power.[37]

Restricting Hours of Operation through Municipal Police Power Regulations and State Laws which Authorize the Regulation of Hours of Operation

As distinguished from zoning, the courts have not prohibited municipalities from regulating the hours of operation of a business through the use of its general police powers. There is no requirement that such regulations relate to the physical use of the land, nor is there a prohibition against the regulation of the internal operations of a business.

The State Constitution permits municipalities to adopt and amend local laws for the preservation of health, safety and welfare of their citizens.[38] Any regulations enacted under a municipality's police power must be reasonable and reasonably related to a legitimate governmental purpose.[39] For instance, in *Town Board of the Town of Southampton v. 1320 Entertainment, Inc.*,[40] the Town Code restricted the hours of operation of the defendant's automobile racetrack. The court held that "insofar as [the] Town Code . . . imposes reasonable limitations upon the days and hours during which races may be conducted, it is a proper exercise of the town's police powers."[41]

Municipalities may regulate the hours of operation of a business through specific statutory authority. For example, section 130 of the Town Law allows for the regulation of certain uses and businesses, specifically allowing the town board to establish the opening and closing hours of all beverage and eating places.[42] A municipality may also regulate hours of operation under certain provisions of the Municipal Home Rule Law. The Municipal Home Rule Law allows a municipality to adopt or amend local laws, pursuant to its police powers, for the regulation or licensing of businesses.[43] As long as the municipality is not regulating by means of its zoning powers, the broad authority to regulate or license businesses under the Municipal Home Rule Law appears to encompass the regulation of hours of operation.[44]

Conclusion

The courts have held that without showing a direct impact on the land, regulating the hours of operation of a business is not a proper purpose of zoning, but rather an improper attempt to regulate the internal operations of a business. While municipalities are restricted in their ability to regulate using their zoning powers, there does not appear to be a similar restriction on enacting legislation for non-zoning purposes.

ENDNOTES

[1] See *St. Onge v. Donovan*, 71 N.Y.2d 507, 515, 527 N.Y.S.2d 721 (1988), citing *Matter of Dexter v. Town Board*, 36 N.Y.2d 102, 105, 365 N.Y.S.2d 506 (1975), which held that conditions imposed by local zoning boards must be reasonable and relate only to the land at issue and not to the person who owns or occupies the land. See also *Province of Meribah Society of Mary Inc. v. Bd. of Zoning Appeals of Inc. Vil. Muttontown*, 148 A.D.2d 512, 538 N.Y.S.2d 850 (2d Dept., 1989); Rathkopf, A.H., Rathkopf, D.A. & Ziegler, E.H., Jr., *The Law of Zoning and Planning*, § 2:14 (rev. 2005), explaining that the authority under the zoning enabling statutes to impose restrictions or conditions must relate to the "objects and purposes of the enabling legislation"; Salkin, P.E., *New York Zoning Law and Practice* §§ 29:42 & 30:05 (4th ed., 2002).

[2] See *St. Onge v. Donovan*, 71 N.Y.2d 507, 516 (1988), quoting *Matter of Pearson v. Shoemaker*, 25 Misc.2d 591, 592, 202 N.Y.S.2d 779 (Sup. Ct., Rockland Co., 1960); N.Y. General City L. § 27-a & b(4); N.Y. Town L. § 274-a(4) & b(4); N.Y. Village L. 7-725-a(4) & b(4) ("The authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to....[a proposed project]"); Salkin, *supra*, note 1 at § 30:05)

[3] See *St. Onge v. Donovan, supra*.

[4] See Rathkopf, *supra*, note 1 at §§ 2:14 & 60:18, explaining that zoning restrictions and conditions relating to the use of land, such as landscaping, traffic access and open space, are proper objectives and purposes of regulation authorized and delegated by the zoning enabling statutes.

[5] 18 A.D.2d 940, 238 N.Y.S.2d 433 (2d Dept., 1963).

[6] *Id.* at 941, 238 N.Y.S.2d at 434-35; Rathkopf, *supra*, note 1 at § 60:18, explaining that several court decisions have held that the zoning enabling authority extends to the regulation of the use of land and that zoning which controls the details of an owner's operation is tantamount to an *ultra vires* act, beyond the statutory authority delegated.

[7] 82 A.D.2d 442, 442 N.Y.S.2d 73 (2d Dept., 1981).

[8] *Id.*

[9] *Id.*, at 467, 442 N.Y.S.2d at 77, stating that there is strong public policy against a municipality imposing conditions on the details of the operation of the educational process. The court held that it is improper and beyond the powers conferred upon a municipality to impose such conditions.

[10] *Id.* at 473, 442 N.Y.S.2d at 80.

[11] 160 A.D.2d 805, 553 N.Y.S.2d 843 (2d Dept., 1990).

[12] *Id.* at 805, 553 N.Y.S.2d at 844.

[13] *Id.*

[14] *Id.*, stating that "there was no showing that the proposed use would have a greater impact on traffic than other uses which are unconditionally permitted in the area".

[15] N.Y. Law Journal, June 3, 1994, at 31, col 3 (Sup. Ct., Nassau County), aff'd 194 A.D.2d 607, 599 N.Y.S.2d 68 (2d Dept., 1993).

[16] *Id.*, restricting the hours to "Sunday-Thursday from 10 A.M. to 12 midnight. Friday and Saturday from 10 A.M. to 1 A.M. of the following day and on evenings before holidays to 1 A.M. of the holiday."

[17] *Id.*

[18]. *See Old Country Burgers Corp., Inc. v. Town Board of Town of Oyster Bay*, 160 A.D.2d 805, 805, 553 N.Y.S.2d 843, 844 (2d Dept., 1990); *Schlosser v. Michaelis,* 18 A.D.2d 940, 238 N.Y.S.2d 433 (2d Dept., 1963); *Summit School v. Neugent*, 82 A.D.2d 463, 442 N.Y.S.2d 73 (2d Dept., 1981); *Louhal Properties, Inc. v. Strada,* 191 Misc.2d 746, 743 N.Y.S.2d 810 (Sup. Ct., Nassau County, 2002) , aff'd 307 A.D.2d 1029, 763 N.Y.S.2d 773 (2d Dept., 2003), explaining that a trend has been created where petitioners were unable to or did not provide the court with substantial evidence demonstrating that the conditions related to the use of land and not to the manner of operation of the owner's business.

[19] *Old Country Burgers Corp., Inc. v. Tn. Bd. of Tn. of Oyster Bay, supra*, at 805, 553 N.Y.S.2d at 844 (citing *Province of Meribah Society of Mary v. Village of Muttontown*, 148 A.D.2d 512, 538 N.Y.S.2d 85); *Summit School v. Neugent, supra,* finding that the power to grant conditions is not unlimited.

[20] 249 A.D.2d 811, 671 N.Y.S.2d 831 (3d Dept., 1998).

[21] *Id.* at 813, 671 N.Y.S.2d at 833, alluding to the requirements in N.Y. Gen. City L. § 81-b, N.Y. Town L. § 267-b & N.Y. Village L. § 7-712-b, that conditions be reasonable and directly related to the proposed use of the property and that such conditions "be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community".

[22] *Id.*

[23] *Id.*

[24] *Milt-Nik Land Corp. v. City of Yonkers*, 24 A.D.3d 446, 806 N.Y.S.2d 217 (2d Dept., 2005). See also *Matter of 1833 Nostrand Ave. Corp. v. Chin*, 302 A.D.2d 460, 754 N.Y.S.2d 581 (2d Dept., 2003); *Taylor Tree, Inc. v. Planning Board of Town of Montgomery*, 272 A.D.2d 336, 707 N.Y.S.2d 193 (2d Dept. 2000); *Town of Richmond v. BSD Soto, Inc.*, 6 Misc.3d 1040, 800 N.Y.S.2d 358 (Sup. Ct., Ontario Co., 2005).

[25] See *Oakwood Island Yacht Club, Inc. v. Board of Appeals of City of New Rochelle,* 32 Misc.2d 677, 223 N.Y.S.2d 907 (Sup. Ct., Rockland Co., 1961). The court held that the condition attached to the issuance of a special use permit, imposing a curfew on the use of boats between 9 P.M. and 7 A.M., was an unreasonable restriction unrelated to the use applied for and thus beyond the power of the board. The court based its decision on the fact that nothing authorizes the board to impose such restrictions, holding that such a restriction "is a matter for legislative, not administrative, consideration". See also *De Ville Homes, Inc. v. Michaelis*, 201 N.Y.S.2d 129 (Sup. Ct. Nassau County, 1960), differentiating between legislative and administrative power, implying that certain conditions should be left for the governing board to deal with through legislation. The court stated "The power granted to or inherent in such Boards to impose reasonable conditions under proper circumstances applies to use of premises and not details of operation".

[26] Geneslaw, H., *The Validity of Special Use Permit and Site Plan Conditions of Approval,* Environmental Law in N.Y., vol. 7 no. 1, at 16 (January 1996) "To the extent that conditions imposed by a board restricting operation of an applicant's business are invalid as improper purposes of zoning, it should follow that the same conditions would also be invalid as improper purposes of zoning even if expressly set forth in the zoning law."

[27] Sup. Ct., Suffolk Co., June 13, 1994, Index No. 19836/91, aff'd 218 A.D.2d 733, 630 N.Y.S.2d 950 (2d Dept., 1995), lv. to app. den. 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058 (1996).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Cited *supra,* n. 18; see also *Westbury Trombo, Inc. v. Bd. of Trustees of Village of Westbury*, 307 A.D.2d 1043, 763 N.Y.S.2d 674 (2d Dept., 2003).

[32] See Village Law § 7-700, listing specific items, all relating to the use of land, that a village may regulate under such authority, such as size, height and location, and use of buildings. See also *De Sena v. Gulde*, 24 A.D.2d 165, 171, 265 N.Y.S.2d 239 (2d Dept., 1965), holding that zoning power must "operate in relation to the use of land and not for the accomplishment of purposes extraneous to that relation".

[33] *Louhal Properties, Inc. v. Strada,* 191 Misc.2d at 751, 743 N.Y.S.2d at 814; see, e.g., *Schlosser v. Michaelis,* 18 A.D.2d 940, 238 N.Y.S.2d 433 (2d Dept., 1963) and *Summit School v. Neugent,* supra; see also *St. Onge v. Donovan, supra;* Rathkopf, *supra,* note 1 at § 1.02[4][a], explaining that regulations relating to the use of land or to the impact of land use on neighboring properties are treated differently than regulations that restrict the manner of operation.

[34] *Id.* at 753, 743 N.Y.S.2d at 815, deriving this language from *Old Country Burgers Corp., Inc. v. Town Board of Town of Oyster Bay, supra,* 160 A.D.2d at 805, 553 N.Y.S.2d at 844.

[35] *Louhal Properties, Inc. v. Strada, supra.*

[36] *Id.*

[37] See *id.,* stating that the courts have generally upheld regulations directed at the physical use of land, "such as light, air quality, safety, population density and traffic . . . property values, aesthetics or environmental values."; see also *St. Onge v. Donovan, supra* (citing *Matter of Pearson v. Shoemaker, supra.*

[38] See N.Y. Const. Art. IX § 2(c)(ii): "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to:....(10) [t]he government, protection, order, conduct, safety, health and well-being of persons or property therein."; see also *Mayor of City of New York v. Council of City of New York*, 182 Misc.2d 330, 335, 696 N.Y.S.2d 761, 765 (Sup. Ct. New York County, 1999), holding that the "home rule provision of N.Y. Const. art. IX, § 2, cl. (c) gives local governments broad police powers relating to the welfare of their citizens...." (citing *New York State Club Assn., Inc. v. City of New York*, 69 N.Y.2d 211, 513 N.Y.S.2d 349, 505 N.E.2d 915 (1987), aff'd 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)).

[39] See *People v. Goodman,* 31 N.Y.2d 262, 338 N.Y.S.2d 97, 290 N.E.2d 139 (1972); see also *Fred F. French Investing, Inc. v. City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976); see also 1991 N.Y. Op. Atty. Gen. (Inf.) 1108, stating that a "legitimate governmental purpose is one which promotes the public health, safety and well-being."; see also 1982 N.Y. Op. Atty. Gen. (Inf.) 227, stating that the "broad grant of the police power is limited by the requirement that its use must be reasonable."

[40] 236 A.D.2d 387, 653 N.Y.S.2d 364 (2d Dept., 1997).

[41] *Id.* at 388, 653 N.Y.S.2d at 365 (citing *Matter of Borer v. Vineberg*, 213 A.D.2d 828, 623 N.Y.S.2d 378 (3d Dept., 1995). In footnote 3, the court explained that the city may enact an ordinance regulating the hours of operation . . . if it was reasonably necessary to promote a public interest.

[42] See Town Law § 130(13), providing that the town board may regulate "all places selling or offering for sale at retail for consumption on the premises any beverage or food stuff; providing for sanitation and cleanliness and the inspection thereof and defining the opening and closing hours and all other matters related thereto." Municipalities are, however, preempted by Alcoholic Beverage Control Law from legislating with respect certain aspects of the sale of alcoholic beverages. See *Matter of Lansdown Entertainment Corp. v. New York City Dept. of Consumer Affairs,* 74 N.Y. 2d 761, 764, 545 N.Y.S.2d 82, 543 N.E.2d 725 (1989), stating that the Alcoholic Beverage Control Law specifically preempts local regulation "concerning the subject matter of hours of operation, distribution, or consumption."; see also *People v. De Jesus,* 54 N.Y.2d 465, 446 N.Y.S.2d 207, 430 N.E.2d 1260 (1981).

[43] See Municipal Home Rule Law § 10(1)(ii)(a)(12).

[44] See, e.g., Town Law § 136, granting municipalities plenary power with respect to the licensing of businesses. The statutory language is broad, arguably authorizing the regulation of a business' hours of operation. Regulating business, under Town Law §§ 130 & 136, is limited to the businesses listed in the relevant section, and only through a municipality's police powers can an unlisted business be regulated. See also, General City Law § 20(13), granting cities the power "[to] maintain order, enforce the laws, protect property and . . . for any of said purposes to regulate and license occupations and businesses."

Governmental Immunity from Zoning

Governments often undertake development activities within their own or other communities. Local governments may find their community to be the site of a development action by another nearby municipality or another level of government, such as the county or the state. For example, a county may construct a new building in a town, village or city. When this happens, questions are often asked about how zoning regulations affect these development activities. This paper is a guide for local government officials faced with these questions.

Certain acts of government may be exempt, or "immune," from zoning. Before 1988, New York courts recognized that certain entities were entitled to absolute immunity from zoning regulations, including the federal government; state government; state urban development corporations; and public schools. These entities were not required to comply with local land use regulations. Other governmental entities, such as towns, villages, cities, counties and fire districts, are accorded only a limited immunity, and may be subject to local land use regulations.

In making a determination as to whether the actions of governmental units are "exempt" from local zoning regulations, the New York Court of Appeals in the 1988 case of *Matter of County of Monroe v City of Rochester*, 72 N.Y.2d 338, 533 N.Y.S.2d 702, established a new method for resolving inter-governmental land use disputes using the "balancing of public interests" analytic approach. Unless a statute exempts it, the encroaching governmental unit is presumed to be subject to the zoning regulations of the host community where the land is located. Working from that premise, a host community then considers several factors to determine whether or not it is in the public interest to continue to subject the encroaching government to its land use regulations. The host community is to weigh the following nine factors:

1. the nature and scope of the instrumentality seeking immunity;
2. the encroaching government's legislative grant of authority;
3. the kind of function or land use involved;
4. the effect local land use regulation would have upon the enterprise concerned;
5. alternative locations for the facility in less restrictive zoning areas;
6. the impact upon legitimate local interests;
7. alternative methods of providing the proposed improvement;
8. the extent of the public interest to be served by the improvements; and
9. intergovernmental participation in the project development process and an opportunity to be heard.

Neither the New York Court of Appeals nor the New York State statutes specify which board in the host municipality makes the determination of governmental immunity. This raises two questions – when in the development approval process is this determination made, and who makes it? The following are some alternative scenarios which may lead to a determination of governmental immunity.

A Municipality Developing Within its Own Jurisdiction

When a local government proposes to establish a facility or undertake an activity within its own geographic boundaries, the courts have held that it is subject to the *County of Monroe* "balancing of interests" test. In other words, the local government is presumed to be subject to its own regulations. (*Dunn v. Town of Warwick*, 146 AD2d 601 (2nd Dept. 1989); and *Armenia v. Luther*, 152 AD2d 928 (4th Dept. 1989) Which board conducts the balancing analysis to determine whether this is in the public interest has been a matter of speculation. Some suggestions:

A municipal governing board may choose to bind some or all actions of its own municipality to the requirements of its zoning regulations by specifying so within the zoning law or ordinance. Where a municipality has done so, a zoning permit should be applied for. A referral to the planning board or zoning board for a special use permit or site plan review may be necessary as well. Any immunity challenge that the municipality wishes to make may be brought before the zoning board of appeals.

Where a local government has not bound itself to the requirements of its zoning regulations, the municipal governing board must protect the public interest by examining the nine factors as applied to the current project. It must determine whether it is immune from the requirements of the zoning regulations, and whether a zoning permit is necessary. Even where a municipal governing board has declared an action immune from zoning, it may still wish to comply with the requirements of zoning, where practicable, and with public notice and hearing requirements.

A Municipality Developing Within Another Jurisdiction

In the absence of a statute to the contrary, where a municipality or other governmental unit proposes a project in another community, the two governments should assume that the action is subject to the host community's zoning requirements. One key unresolved question is whether the host community or the encroaching government should apply the nine factors set forth in the *County of Monroe* case to determine the extent to which the host community's regulations will actually apply. One court recently discussed this matter:

> Whether the intruder or the host should be entitled to a first instance review of a proposed project was not entirely resolved in *County of Monroe*. The issue has a long and contentious history (4 Rathkopf's The Law of Zoning and Planning, § § 53.03-53.05, 53.09). However, under the emerging majority view, where the intruder is not explicitly immune from the land use regulations of the host, and assuming the intruder cannot demonstrate that its interests are paramount in some important res publica sense, the host is permitted to scrutinize the intruder's project in the first instance. Thereafter, the intruder is entitled to pursue any available judicial remedy. The court may then review a developed factual record. Thus, it is argued, the prerogatives of the localities which have been given express land use regulatory powers are preserved, subject to modification in the interest of other compelling and transcending public purposes (4 Rathkopf's, supra, § 53.03 [3]).

Where a municipality or other governmental unit undertakes development activities associated with a project without applying for a zoning permit, the host community will need to make a determination as to whether to initiate enforcement action against the developing municipality or governmental unit. Any disagreement between the parties may be resolved by the appeals process of the host community or by the courts.

Extending State's Limited Immunity through Private Contracts

The New York Court of Appeals recently held that the State of New York, following application of the *County of Monroe* "balancing" test, enjoys limited immunity from local zoning when installing telecommunication towers on State land and the State may extend that immunity to private partners through contractual agreements. In *Crown Communication New York, Inc. v. Department of Transportation of the State of New York,* 4 N.Y.3d 159, 791 N.Y.S.2d 494 (2005), the Court held that the holders of a contract to build towers on State owned land were similarly exempt from local zoning regulations which required applications for special permits. The Court stated "[though] the . . . [contractors] will also realize profit from their services [it] does not undermine the public interests served by co-location. Such shared use and benefit is analogous to the . . . development project in *County of Monroe,* which likewise served both public and private interests. Subjecting the private... [contractors] to local regulation . . .'could otherwise foil the fulfillment of the greater public purpose of promoting' the State's public safety and environmental goals associated with its . . . development plan." *Id.* at 167 (citation omitted).

The decision made clear, however, that the State does not have "blanket authority" to allow contractors to bypass all zoning regulations. The grant of immunity maybe extended where the factors as outlined in *County of Monroe* weigh in favor of the State use .

Unresolved Questions

Although the *County of Monroe* case was decided almost twenty years ago, several questions regarding the application of the test remain unanswered. First, the case dealt with site plan regulations which were adopted as part of the local zoning law. Whether the decision of the court would apply to the application of site plan regulations adopted independently of zoning, or for that matter, to compliance with subdivision review or other land use regulations has not been resolved.

Second, it is not clear which board in the host municipality weighs the nine factors and determines whether the governmental unit undertaking the development activity is immune from local land use regulations or not. Normally, the zoning administrator or zoning enforcement officer acts as the gatekeeper for applications and makes the first determination whether a land use can proceed as of right or whether it may require site plan or some other type of discretionary review. Under the state zoning enabling laws, the zoning administrator's determinations are appealable to the zoning board of appeals – which might then hear arguments based on the *Monroe* balancing test. In other instances, the governing board of the host

municipality has applied the balancing test. Also ambiguous is when, during the development process, that decision is made.

Finally, where a governmental unit is absolutely immune from zoning or other land use regulations, it is unclear what deference that unit of government should give to the host government's regulations. The courts have not answered the question, "Should the immune governmental unit nevertheless try to comply with the host municipality's regulations?" as a matter of governmental comity.

Ultimately, resolution of these questions may lie with the courts or the State Legislature.