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MUNICIPAL LAW

BY JEFFREY D. FRIEDLANDER

Protecting the City's Quality of Life

Law Department attorneys play an important role in defending and helping to enforce the numerous local laws and rules regulating private property and activities, which, in the aggregate, safeguard safety and quality of life in New York City. These provisions of law, based for the most part on the city's exercise of the police power, range in subject matter from public health to zoning regulations and the maintenance and construction of buildings. The sources of law in these areas are the Administrative Code of the City of New York, which codifies local laws enacted by the city, the Rules of the City of New York, which compiles rules adopted by city agencies, the city's Zoning Resolution, and Health Code. Representing the city in defending and enforcing these measures is the responsibility of the 24 attorneys of the Law Department's Administrative Law Division.

Certain subjects of regulation are recurrently the focus of litigation, and have been considered in previous columns. These include the regulation of outdoor advertising signs (billboards), the preservation of landmarks and the restriction of "adult use" establishments. I will survey recent litigation in these areas. In addition, I will discuss other cases of note handled recently by Administrative Law Division attorneys. These cases arise from regulation by the city in matters including the manufacture and sale of flavored tobacco, and the operation of cranes, derricks and hoists.

Outdoor Advertising Signs

For the past 70 years the city's Zoning Resolution has controlled the placement of advertising signs within view and within 200 feet of parkways and arterial highways as well as city parks of over one-half acre. Despite these restrictions, numerous nonconforming advertising signs have been erected. In an attempt to combat their proliferation, Local Law 14 of 2001, as amended by Local Law 31 of 2005, was enacted to enhance enforcement of the zoning law, and the city's Department of Buildings (DOB) adopted rules providing for the registration and monitoring of outdoor advertising companies doing business in the city.

In 2006, several outdoor advertising companies commenced litigation in U.S. District Court for the Southern District of New York, alleging that the city's arterial advertising regulations restrictions violate their free speech rights under both the federal and New York State constitutions. Clear Channel Outdoor Inc. et al. v. City of New York et al., 608 F.Supp.2d 477 (SDNY 2009), aff'd 594 F.2d 94 (2d Cir. 2010). Among other things, the plaintiffs asserted that the restrictions fail to advance a legitimate governmental interest, in this case the city's interest in traffic safety and aesthetics, because they leave untouched outdoor advertising signs placed on MTA and Port Authority property as well as on the city's sidewalks.

On March 31, 2009, Judge Paul A. Crotty rejected the plaintiffs' arguments and dismissed the federal action. Accepting in part the city's argument, Judge Crotty found that the arterial advertising restrictions advanced the city's interest in traffic safety and aesthetics and were not more extensive than necessary to serve that interest.

The court further concluded that the placement of outdoor advertising signs on MTA and Port Authority property did not undermine the city's position in view of the city's announced intention to enforce the restrictions with regard to those signs to the extent permitted by law, and that outdoor advertising on city sidewalks presented a distinct type of commercial speech which was irrelevant to the inquiry respecting billboards. Judge Crotty's determination was upheld by the U.S. Court of Appeals for the Second Circuit in a decision issued on Feb. 3, 2010. Separate challenges to the city's regulations are pending in state court. OTR Media Group Inc. v. City of New York et al., Index No. 116293/06 (Sup. Ct., N.Y. Co.); Willow Media LLC et al. v. City of New York et al., Index No. 103313/10 (Sup. Ct., N.Y. Co.).

Landmarks Preservation

The city's Landmarks Preservation Law,1 which protects landmarks and historic districts from demolition and inappropriate alteration, also requires owners or persons in control of landmark designated buildings (including buildings within historic districts) to maintain their buildings in good repair, so that significant architectural and historical features are not at risk of being damaged or destroyed.

If an owner fails to comply with the Landmarks Preservation Law, and does not comply with requests and orders issued by the Landmarks Preservation Commission (LPC), the LPC is authorized to commence a "demolition-by-neglect" action in State Supreme Court seeking an order compelling the owner to repair the building and imposing civil penalties of up to $5,000 for each day the condition is not corrected. Recently, the LPC, represented by attorneys of the Administrative Law Division, brought enforcement actions

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against the owners or persons in control of several landmark buildings who have let their property deteriorate to the point of threatened collapse.

In 2009, the LPC obtained a $1.1 million settlement for civil penalties and an order requiring shoring and bracing of the Windermere building, a historic 127-year-old landmarked apartment building. Located at 9th Avenue and 57th Street in Manhattan, the Windermere is the oldest known large apartment complex remaining in an area that was one of Manhattan's first apartment house districts, and the first apartment building in the city to house single women. City of New York et al. v. Toa Construction et al. (Sup. Ct., N.Y. Co., Index No. 400584/08).

In another case commenced in August 2008, the LPC obtained a preliminary injunction requiring the repair and restoration of a French neo-grec rowhouse dating from 1884, located in the Stuyvesant Heights historic district in Brooklyn. City of New York et al. v. Estate of Roundo Johnson et al., (Sup. Ct., Kings Co., Index No. 23104/08). While complete repairs have been delayed by the sale of the property, substantial interior repairs are now complete. The LPC is seeking a similar preliminary injunction in a separate case involving an 1852 brownstone and an adjacent carriage house located in the Cobble Hill historic district in Brooklyn. City of New York et al. v. Quadrozzi et al. (Sup. Ct., Kings Co., Index No. 8442/10).

The threat of enforcement action has also proved efficient. Attorneys of the division have recently obtained significant compliance with the Landmarks Law by sending letters advising owners that litigation will be commenced unless repairs are immediately begun. In response to one such letter, the person in control of an 1846 rowhouse in Greenwich Village, which has been vacant and abandoned for many years, has now cleaned the building of debris, obtained LPC and DOB approval for renovation plans, and is expected to commence repair work in the near future. The owners of three adjacent buildings in the Fulton Ferry historic district in Brooklyn have responded to a similar letter and submitted plans to the LPC for repair of their buildings.

Adult Use Establishments

The long-running judicial saga of the city's attempt to regulate the location of "adult establishments" dates from 1995, when the city amended its Zoning Resolution to prohibit "adult establishments" from locating in any zoning district where residential uses are permitted, and from locating within 500 feet of a school, place of worship, another adult establishment, or a zoning district where adult uses are prohibited.

The term "adult establishment" was defined to include "adult bookstores" (triple-X book/video stores), "adult eating or drinking establishments" (topless or strip clubs) and "adult theaters" (movie theaters and live theaters with no food or drink). These provisions, supported by a contemporaneous Department of City Planning study finding that adult establishments have a negative secondary impact on their neighborhoods, were upheld by the New York Court of Appeals in Stringfellow's of New York Ltd. v. City of New York, 91 N.Y.2d 382 (1998).

In 2001, the city further amended its Zoning Resolution to close certain loopholes in the definitions of "adult bookstore," "adult eating or drinking establishment" and "adult theater." In particular, establishments that limited adult materials or entertainment to less than 40 percent of their stock or floor area ("60/40 establishments") had been able to avoid being classified as adult establishments notwithstanding their predominant adult focus. The amendments, which corrected that omission, were challenged in two cases: For the People Theatres of NY, Inc. v. City of New York, Index No. 121080/02 (Sup. Ct., N.Y. Co.), challenging the 2001 definitions of "adult bookstore" and "adult theater," and Ten's Cabaret Inc. v. City of New York, Index No. 121197/02 (Sup. Ct., N.Y. Co.), challenging the 2001 definition of "adult eating or drinking establishment."

In each case, the plaintiffs argued that the amended definitions were unconstitutional because there had never been a study regarding the negative secondary effects of 60/40 establishments (which did not exist when the City Planning Study was conducted). In response, the city argued that the 60/40 establishments covered by the new definitions had a predominant adult focus notwithstanding their specific configurations and thus were covered by the original City Planning Study.

Plaintiffs prevailed in State Supreme Court in both cases, which were consolidated on the city's appeal. Although the Appellate Division, First Department, reversed and ruled for the city, the Court of Appeals again reversed and remitted both cases for trial. For the People Theatres of N.Y. Inc. v City of New York, 6 N.Y.3d 63 (2005). The Court of Appeals determined that there was a question of fact as to whether the 60/40 establishments covered by the amended definitions had a predominant adult focus and thus were covered by the 1994 City Planning study.

If the city could establish predominant adult focus at trial, it would be entitled to judgment in each case. After extensive discovery, For the People Theatres was tried in January 2009 and Ten's Cabaret was tried in February 2009, both in New York County Supreme Court. In each case, the city presented testimony regarding the layout and method of operation of the 60/40 establishments covered by the amended definitions.

In decisions issued in April 2010, Justice Louis York ruled in the city's favor with respect to the amended definitions of "adult bookstore," For the People Theatres, supra, and "adult eating or drinking establishment," Ten's Cabaret, supra, finding that the city had established that the 60/40 video stores and topless bars covered by these definitions had a predominant adult focus. However, Justice

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York ruled for the plaintiff with regard to the amended definition of "adult theater," concluding that the city had not proven that the two movie theaters operating in the city on a 60/40 basis had a predominant adult focus. For the People Theatres, supra.

Smokeless Tobacco

Attorneys of the Administrative Law Division are also defending a challenge to an important city health initiative, the recent action of the City Council enacting Local Law 69 of 2009,2 which prohibits the sale of flavored smokeless tobacco products throughout New York City, except in tobacco bars. The law defines a "flavored tobacco product" as "any tobacco product or any component thereof that contains a constituent that imparts a characterizing flavor."

The definition generally covers any flavored tobacco product, including cigars and chewing tobacco, with the exception of cigarettes, whose sale in flavored form is prohibited by the federal Family Smoking Prevention and Tobacco Control Act (FSPTCA).3 The new local law defines a "characterizing flavor" as a "distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen…including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice."

In U.S. Smokeless Tobacco Manufacturing Company, LLC and U.S. Smokeless Tobacco Brands Inc. v. City of New York, No. 09 Civ. 10511, 2010 U.S. Dist. LEXIS 39112 (SDNY 2010), the plaintiffs, manufacturers and distributors of smokeless tobacco products, challenged the local law in U.S. District Court for the Southern District on three grounds. They argued that, because federal law regulates various aspects of the sale and use of tobacco products, the city was preempted by the FSPTCA from regulating the sale of flavored tobacco; that the local law placed an impermissible burden on interstate commerce and therefore violated the Commerce Clause of the U.S. Constitution; and that the local law was unconstitutionally vague in violation of the Due Process clause of the Fourteenth Amendment.

In January 2010, the plaintiffs, relying on their preemption claim, sought a preliminary injunction to stay implementation and enforcement of the local law. On March 22, 2010, Judge Colleen McMahon rejected plaintiffs' arguments and denied the preliminary injunction motion. The court stated that there was "no basis on which to find that the City Ordinance is not 'consistent with the structure and purpose' of the Federal statutory scheme." Judge McMahon found that "Congress expressed a clear and unmistakable preference for limiting the federal government's role to setting a floor below which no local sales regulations could go, while remaining sensitive to differing sensibilities about the use of tobacco products in different parts of the country." Plaintiffs' action seeking a permanent injunction is pending.

Cranes, Derricks and Hoists

In the aftermath of several serious crane accidents in Manhattan, the Department of Buildings (DOB) has taken action during the past two years to more closely regulate the operation in the city of cranes, derricks and hoists. Last year, the Steel Institute of New York, an industry trade group, commenced an action in the Southern District seeking to invalidate 77 DOB rules and reference standards that relate to such equipment, including requirements for prototype approval, plan examination, permitting, and inspections. Steel Institute of New York v. The City of New York, 09 Civ 6539 (SDNY). Plaintiff bases its challenge to rules and reference standards on the argument that they impact worker safety in addition to the safety of the general public, and are therefore preempted by the federal Occupational Safety and Health Act (OSHA).4 Plaintiff also asserts due process and other federal constitutional claims against DOB's enforcement of some of its regulations.

Attorneys of the Administrative Law Division, representing DOB, argue in response that plaintiff has failed to show that Congress intended, through enactment of the OSHA, to preempt local building code provisions, such as the challenged crane regulations, that seek to protect the public. To the contrary, in the city's view, the lack of express preemption language in the OSHA, despite congressional consideration of the measure's effect on local building codes, together with the recognized presumption against federal preemption of regulations based on the traditional police powers of state and local governments, indicate an intent not to preempt. The U.S. Department of Labor, the agency responsible for enforcing the OSHA, is seeking permission from the court to file an amicus brief in support of the city's position.

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Endnotes:

1. Codified as New York City Administrative Code §25-301 et seq.

2. Codified at New York City Administrative Code §§17-701, et seq.

3. Public Law No. 111-31, 123 Stat. 1776 (June 22, 2009)

4. 29 U.S.C. 651 et seq.