New York Law Journal
Thursday, April 19, 2007

MUNICIPAL LAW

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Land Use: From Industrial Plants' Locations to Signage

In 1916, the city of New York became the first municipality in the country to enact comprehensive zoning legislation. In 1961, due to the expansion that occurred during the first half of the century, the city enacted the Zoning Resolution that is in effect today.

Under the current Zoning Resolution, which has been substantially amended since its adoption, the city is divided into manufacturing, commercial and residential zoning districts. The provisions of the Zoning Resolution regulate, among other things, the types of property uses that are permissible in each of the districts. From their inception, the city's zoning laws have regulated the use and development of private property so as to promote the general welfare, public health and public safety as well as provide a rational plan for future building in the city. The matters regulated range from the location of manufacturing plants to the size and placement of signage.

Most recently, the Zoning Resolution has been amended to enact several important initiatives of the administration of Mayor Michael Bloomberg, including the Hudson Yards rezoning (the subject of my previous article in the New York Law Journal on Feb. 16, 2007, at p. 3) and the regeneration of the Brooklyn waterfront. These initiatives became the focus of litigation that received significant attention.

In this article, I will focus on certain other land use matters, perhaps less dramatic (though complex and lengthy), which have nevertheless had important effects on the city's landscape and life over many years and are the subjects of pending lawsuits. Such litigation is handled by the Law Department's administrative law division, whose attorneys represent city agencies charged with enforcing the city's codes and regulations that relate not only to land use, but more broadly to public health and safety.

Two of the pending land use matters of interest that are currently being litigated by lawyers in the administrative law division involve zoning regulation: the provisions of the Zoning Resolution which regulate the size and location of outdoor advertising signs in proximity to the city's arterial highways and larger public parks, and those which regulate the location of establishments that feature adult material. Another is an example of the city's efforts to obtain compliance with the city's Landmarks Preservation Law.

Regulation of Outdoor Advertising Signs

The size and location of outdoor advertising signs in New York City have been regulated since 1940. At that time, as today, there was concern about the proliferation of such signs and their effect on the cityscape. To respond to what the city Planning Commission then described as both an aesthetic and economic problem for the city, it proposed, and the city adopted, signage restrictions intended to stem a rapid increase in the number of outdoor advertising signs, particularly around the city's major highways and parks. Advertising signs were treated differently from business/accessory signs (which announce a business located on the premises where the sign is located) because the latter is in furtherance of a use permitted by zoning. When the city adopted its comprehensive new Zoning Resolution in 1961, it largely maintained the framework for regulating outdoor advertising signs that had been established in 1940.

However, the unlawful erection of advertising signs in proximity to the city's arterial highways and public parks did not abate. In order to address the traffic safety and aesthetic issues caused by such signs, the city amended the Zoning Resolution's arterial signage regulations several times between 1961 and 2001. Nevertheless, the city continued to receive complaints about outdoor advertising signs along the city's arterial highways.

On Feb. 27, 2001, the city adopted two measures in response to widespread concern about the proliferation of out-of-scale and often illegal outdoor signs in the city. One of these measures amended the Zoning Resolution, the other, a local law enacted by the City Council, amended the Administrative Code of the City of New York. The amendments to the Administrative Code created an enhanced enforcement mechanism directed at ensuring compliance with provisions of the Zoning Resolution and Administrative Code relating to outdoor advertising signs.

Shortly after the adoption of these provisions, Infinity Outdoor Inc. commenced an action challenging them as violating the First Amendment's protection of commercial speech. In an opinion issued in October 2001, U.S. District Court Judge Nina Gershon of the Eastern District of New York found the amendments to be constitutional in all respects. See *Infinity Outdoor Inc. v. City of New York*, 165 FSupp2d 403 (EDNY 2001).

In the course of drafting rules to implement the new enforcement mechanism, the city's Department of Buildings (DOB) determined that there were several obstacles to successful implementation. Most significantly, it had become apparent that a Voluntary Compliance Plan (VCP), mandated by the Administrative Code amendments, whereby outdoor advertising companies would agree to the voluntary removal of illegal signs over time, would not be effective. As a result, in April 2005, the City Council enacted further legislation repealing the VCP and modifying other provisions of the 2001 amendments. Implementation of these new amendments likewise required rulemaking by DOB.

These rules, issued in July 2006, required that all outdoor advertising companies doing business in the city register with DOB and submit an inventory of all their signs located in proximity to arterial highways

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and larger public parks by Oct. 25, 2006. Any outdoor advertising company which fails to submit a complete and accurate inventory or which is found at least three times within a three-year period to be maintaining one or more signs in violation of the Zoning Resolution is subject to suspension or revocation of its registration, in addition to fines and other civil and criminal penalties. The DOB may also commence a nuisance abatement proceeding to obtain the removal of any such sign.

In anticipation of the registration deadline, several outdoor advertising companies commenced two lawsuits in federal court. In these now-consolidated lawsuits, the plaintiffs contend, among other things, that the provisions of the Zoning Regulation, local laws and rules which restrict the size and location of advertising signage in proximity to arterial highways and larger public parks are unconstitutional because they do not advance the city's interest in traffic safety and aesthetics. *Atlantic Outdoor Advertising, Inc. et al. v. City of New York et al.*, No. 06 Civ. 8219 (SDNY); *Clear Channel Outdoor, Inc. v. City of New York et al.*, No. 06 Civ. 8193 (SDNY). In addition to the federal lawsuits, OTR Media Group has commenced an action in New York State Supreme Court challenging the constitutionality of these signage regulations under the Free Speech and Equal Protection clauses of the New York State Constitution. OTR further contends that the regulations, in conjunction with the Street Furniture Franchise that governs advertising on bus stop shelters and other forms of street furniture, restrain trade in violation of the New York State Donnelly Act. *OTR Media Group, Inc. v. City of New York et al.*, Index No. 116293/06 (Sup. Ct., N.Y. Co.). While the lawsuits are pending, the city is stayed from enforcing the provisions of law which prohibit signs in proximity to arterial highways and larger public parks. Litigation continues to delay for years implementation of a measure intended to promote public safety and aesthetics.

Adult Establishments

Another notable example of delay through litigation of the implementation of city policy is the attempt to regulate adult establishments, a lengthy saga that began a dozen years ago and has yet to be concluded.

In 1995, following publication of a study by the Department of City Planning which found that establishments with a primary focus on adult entertainment have adverse effects on their neighborhoods, the Zoning Resolution was amended to restrict the location of adult establishments. After these amendments were upheld as constitutional, many adult establishments exploited loopholes in the law to evade enforcement and remain open at prohibited locations.

For example, in the 1995 regulations, an adult bookstore was defined as a book or video store with more than 40 percent of its stock or floor area devoted to adult materials. To avoid closing, many triple-X video stores located in prohibited areas acquired a large number of nonadult videos and stocked them in areas not frequented by customers. These establishments, which became known as "60-40 establishments," technically complied with the 40 percent test, while continuing to have peep booths, exclude minors and otherwise maintain a primary focus on adult materials.

In 2001, the adult zoning provisions of the Zoning Resolution were again amended to close this and other loopholes. These amendments were challenged in state court in the two pending lawsuits: *For The People Theatres v. City of New York*, and *Ten's Cabaret Inc. v. City of New York*. In October 2003, the Supreme Court, New York County, granted summary judgment to the two sets of plaintiffs, setting aside the 2001 amendments. *Ten's Cabaret, Inc. v. City of New York*, 1 Misc3d 399 (Sup. Ct., N.Y. Co. 2003); *For The People Theatres of N.Y., Inc. v. City of New York*, 1 Misc3d 394 (Sup. Ct., N.Y. Co. 2003). In his decision, Justice Louis York determined that the 2001 amendments were unconstitutional because the city did not do a new study to determine whether the 60-40 establishments have an adverse impact on their neighborhoods. In April 2005, the Appellate Division, First Department reversed and granted summary judgment to the city, finding that a new study was not necessary because it was reasonable to conclude that the regulated 60-40 establishments were businesses that maintained a primary, ongoing focus on adult materials. *For The People Theatres of N.Y., Inc. v. City of New York* and *Ten's Cabaret, Inc. v. City of New York*, 20 AD3d 1 (1st Dept. 2005).

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The Court of Appeals, however, reversed the grant of judgment to the city and sent the matter back for a trial on the merits. *For The People Theatres of N.Y., Inc. v. City of New York* and *Ten's Cabaret, Inc. v. City of New York*, 6 NY3d 63 (2005). The Court determined that the city is required to establish at trial that, "despite formal compliance with the 60/40 formula, these businesses display a prominent, ongoing focus on sexually explicit materials or entertainment, and thus their essential nature has not changed." If the city can so establish at trial, it will be entitled to judgment upholding the 2001 amendments. A trial is expected to take place later this year.

Landmarks Preservation

The Landmarks Preservation Law, set forth in chapter 3 of Title 25 of the Administrative Code, also regulates the development of private property. Enacted in 1965, it has been the subject of dramatic and widely publicized litigation, most notably *Penn Central Transportation Co. v. City of New York*, 438 US 104 (1978), in which the U.S. Supreme Court upheld the law as applied to Grand Central Station. Nevertheless, the Landmarks Preservation Law, as continually enforced by the Landmarks Preservation Commission (LPC), has other applications which are of great importance for the city's urban landscape. One of these is the designation by the LPC of historic districts within the city.

An historic district is an area of the city whose buildings are found by the LPC to have a distinct "sense of place" because they represent at least one period or style of architecture typical of one or more eras of the city's history. LPC approval is required prior to the alteration of the exterior of any building in a historic district. If alterations are made to the exterior of a building in a historic district without prior LPC approval, the city may commence a lawsuit and seek an order directing that the building owner or occupant refrain from continuing to violate the law, and correct or abate such violation.

An example of the city's enforcement of the Landmarks Preservation Law is a lawsuit in New York County Supreme Court in January 2003 (*City of New York v. 83-87 Seventh Avenue South, et al.*, N.Y. Co. Index No. 400212/03) to compel the removal of an illegal rooftop addition to a building occupied by the Sushi Samba restaurant in the Greenwich Village Historic District, an early district designated by the LPC. The city also sought monetary penalties for violation of the Landmarks Preservation Law.

Three years later, after three motions by the city for injunctive relief and a series of postponements caused by Sushi Samba's attempts to obtain after-the-fact approval from LPC for the unauthorized rooftop structure and to persuade the building owner to allow the construction of a second story to the premises, New York County Supreme Court Justice Paul Feinman granted the city's application for an injunction, finding that the illegal rooftop covering had never been permitted and had to be removed.

Shortly after Justice Feinman's determination, Sushi Samba reached agreement with the building owner on construction of a second-story structure, LPC approved Sushi Samba's construction plan and the DOB issued a permit for this work. Construction of the second-story structure is scheduled to be completed by the end of April 2007. In addition, on Feb. 1, 2007, the parties agreed to a Stipulation of Settlement whereby Sushi Samba: (1) is enjoined from violating the Landmarks Law at the premises in the future; (2) agreed to pay the city a total of $500,000, or $100,000 a year for each year of its illegal conduct; and (3) committed to complete construction of a legal second-story addition. This is the largest settlement the LPC has ever received for a violation of the Landmarks Preservation Law.

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