

MUNICIPAL LAW

BY JEFFREY D. FRIEDLANDER

The City as Regulator

In order to help ensure the maintenance of a high quality of life, the City has put in place a network of regulatory laws intended to balance the interests of all residents, workers, businesses and visitors. Most of the City's regulatory laws are set forth in the Administrative Code of the City of New York (Administrative Code) as well as in other local enactments such as the New York City Zoning Resolution (Zoning Resolution).

Rules and regulations implementing these laws are promulgated by the City's administrative agencies and are contained in the Rules of the City of New York (RCNY).

The City's regulatory laws cover a wide range of activity, from regulation of the use of the City's streets and sidewalks to the use and development of private property and the licensing and regulation of certain businesses. Regulations governing the use of the streets balance the needs of the various groups that seek to use the streets for activities such as transportation, street fairs, vending, newsstand operation and parades (which merit discussion in a separate column). Zoning and landmark designations are intended to enhance the quality of life by preserving the City's character and aesthetic features; and regulations governing private businesses protect the health and safety of employees and customers of those businesses. It is no surprise that litigation often arises as a result of the implementation of these laws. Attorneys in the Law Department's Administrative Law Division defend the City in lawsuits that challenge the validity of the broad range of regulatory laws and the policies and actions of the administrative agencies charged with enforcing them.

This article will highlight some of the interesting recent litigation involving the City's regulatory functions.

Regulation of the Use of the City's Streets

Many of the nontransportation uses of the City's streets and sidewalks contain elements of expression that are protected by the First Amendment of the U.S. Constitution and Article 1, §8 of the New York State Constitution. As the City's streets are "quintessential public forums" for communication, the City is faced with the difficult task of ensuring that its regulation of the streets complies with constitutional standards while safeguarding their use for pedestrian and vehicular traffic.¹

• *Street Vendors.* The City requires that anyone wishing to sell food or merchandise on its streets must obtain a license from the Department of Health and Mental Hygiene or the Department of Consumer Affairs. Once licensed, vendors are able to conduct their businesses on the City's streets in accordance with certain time, place and manner regulations.² Vendors of written matter, however, may sell their wares without having first obtained licenses because the First Amendment protects the sale of expressive merchandise.³ Similarly, vendors who sell artwork



including paintings, photographs, prints and sculpture, may also sell their merchandise on the City's streets without having first obtained licenses. The issue of whether the sale of artwork on the City's streets is protected by the First Amendment was litigated by the City in *Bery v. City of New York*, 97 F3d 689 (2d Cir. 1996), cert. denied, 520 US 1251 (1997). In *Bery*, the U.S. Court of Appeals for the Second Circuit rejected the City's position that the sale of artwork is not sufficiently communicative to warrant First Amendment protection. After the Supreme Court denied certiorari, the City consented to entry of a permanent injunction allowing vendors who sell paintings, photographs, prints and

sculpture to do so without having to obtain licenses.

The City has faced many challenges in determining whether particular merchandise is considered artwork within the meaning of the First Amendment. For instance, the City is currently engaged in litigation regarding whether baseball hats that are decorated with graffiti-style lettering and symbols are artwork within the meaning of the First Amendment as articulated by *Bery*.⁴

• *Street Furniture.* The City also regulates the placement of street furniture, including newsstands, on its streets. Anyone seeking to operate a newsstand on a City street must obtain a license from the Department of Consumer Affairs.⁵ On Aug. 19, 2003, the City Council, acting pursuant to §363 of the New York City Charter, adopted a resolution which authorizes the granting of a franchise (the Coordinated Street Furniture Franchise) to install, operate and maintain bus stop shelters, newsstands, automatic public toilets and public service structures. The purpose of this resolution is to improve the appearance and quality of the largest items of furniture on public streets and sidewalks. The City's Department of Transportation is currently evaluating proposals submitted by potential franchisees. When a proposal has been selected, it will be presented to the Franchise and Concession Review Committee and the mayor for approval pursuant to §§372 and 373 of the charter.

In the past, an operator who had received a permit from the City would construct the newsstand pursuant to specifications approved by the licensing agency. However, pursuant to Local Law No. 64 of 2003 (which was enacted to implement the Coordinated Street Furniture Franchise), sidewalk newsstand licensees are now required to operate out of structures that will be built and maintained under the franchise. Current newsstands will be replaced by new structures that will be designed to minimize disruption and maximize the convenience of newsstand customers. Recently, a group of newsstand operators filed suit in New York State Supreme Court seeking to enjoin the enforcement of Local Law 64 and preclude the City from entering into a new Street Furniture Franchise (*Uhlfelder, et al. v. Weinstall, et al.*, Index No. 109890/04 [N.Y. County]). Plaintiffs allege, among other things, that Local Law 64 and the proposed Street Furniture Franchise violate the First Amendment, are unconstitutionally vague, deprive them of their property without Due Process and deny their right to Equal Protection. The City has responded that Local Law 64 is designed to prevent pedestrian congestion and provide

Jeffrey D. Friedlander is first assistant corporation counsel of the City of New York. Sheryl Neufeld, senior counsel in the Administrative Law Division of the Law Department, assisted in the preparation of this article.

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aesthetically pleasing street furniture and is thus a proper regulation of the siting of commercially lucrative newsstands on New York City streets. At this time, the matter is sub judice.

• *Zoning, Landmark Designation and the Regulation of Private Property.* The City is divided into various zoning districts (residential, commercial and manufacturing), and the City's Zoning Resolution sets forth the ways in which private property in these districts can be used and developed. When a property owner wants to develop property in a way that is not permitted by the Zoning Resolution, he or she may apply to the City's Board of Standards and Appeals (BSA) for a variance. In addition, certain uses are only permitted after a special permit has been applied for and obtained from the BSA or the City Planning Commission. The grant or denial of special permits and variances are often challenged by disappointed property owners as well as disapproving community groups, and, thus, these actions generate a significant amount of litigation for the City.

For example, in 2002, a group of community members in Red Hook challenged the City Planning Commission's decision to allow the development of a Fairway supermarket (along with additional stores, residential units and space for offices and artists' studios) in that area of Brooklyn (*Red Hook Civic Assoc. v. City of New York* 111393/02 [N.Y. County]). Petitioners objected to the issuance of a special permit and the disposition of a City-owned mid-19th-century warehouse, alleging that the grant of the special permit violated provisions of the Zoning Resolution and that the environmental review was inadequate. In a decision dated Nov. 13, 2002, New York County Supreme Court Justice Marcy Friedman denied petitioner's application for rescission of the special permit, finding that the project met the required criteria for a special permit and that the environmental review was proper.

The City Planning Commission also has authority to review zoning district designations and make recommendations for zoning changes to the City Council.⁶ When a zoning district designation changes, the use and development of land within that area likewise changes. When the change results in a reduction of a property owner's ability to develop his or her land, it is often met with a challenge. For example, the City's decision to downzone a part of the South Street Seaport Historic District was recently challenged by a property owner affected by the change (*Peck Sllp Associates v. City Council*, 2004 NY Slip Op 24458 (Sept. 29, 2004)). Plaintiff claimed that the action was unconstitutional because it was allegedly intended to prevent plaintiff from developing its property with a high-density building and therefore constituted an unlawful taking of property. The City responded that the downzoning applied to a 10-

block historic area and was intended to make the applicable zoning controls more consistent with the existing building context and historical character of the area. In a decision in late September of this year, New York County Supreme Court Justice Michael Stallman rejected plaintiff's claims and upheld the amendments against this constitutional challenge.⁷

In addition to compliance with zoning requirements, development (as well as alteration and demolition) in areas that have been designated historic landmark districts also requires prior approval from the Landmarks Preservation Commission.⁸ The commission review helps ensure that the special character of the historic district will be maintained. One interesting example of the reach of the landmark law can be seen in the case of *Board of Managers*

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of SoHo International Arts Condominium v. City of New York, et. al., 01 Civ. 1226 (DAB), which is currently pending in the U.S. District Court for the Southern District of New York. Board of Managers of the SoHo International Arts Condominium is the owner of a building located on the northern end of SoHo along Houston Street. In 2000, the commission denied an application to remove a work of art attached to the facade of the building. The owner then commenced an action in federal court challenging the denial as violative of various constitutional guarantees, including its right to free speech, alleging that it was being compelled to engage in speech contrary to its will. The court dismissed most of the plaintiff's claims against the City, including the First Amendment claims, but held that there were questions of fact as to who owned the artwork.⁹ As a result, plaintiff's claim that the requirement that it maintain the artwork on its building constituted an unconstitutional taking of property is still unresolved.

Regulation of Businesses

One notable example of the City's regulation of private businesses is the Smoke-Free Air Act,

which, as amended by Local Law No. 47 of 2002, prohibits smoking in nearly every indoor area in the City where people work. Shortly before this enactment was to take effect, C.L.A.S.H. Inc., an organization dedicated to advancing the interests of smokers, commenced a lawsuit challenging the constitutionality of this prohibition on the grounds that it violates their right to freedom of assembly, speech, travel, equal protection and the right to enter into contracts.¹⁰ In a lengthy decision, Judge Victor Marrero rejected all of plaintiff's claims and concluded that the smoking ban was a valid exercise of the City's power to protect the health and welfare of its citizens.

A novel regulation which was the subject of a court challenge is a rule promulgated by the Taxi and Limousine Commission, which requires all for-hire vehicle base stations to provide wheelchair-accessible transportation on demand to a person in need of such service. The rule, promulgated after solicited comments and public hearings disclosed that adequate demand-responsive services were not available to individuals with disabilities, was recently upheld by the Appellate Division, First Department after it was challenged by a group of base-station owners who claimed that it effected a taking of private property and violated their equal protection rights.¹¹

Conclusion

As can be seen from the regulations highlighted herein, preservation of the quality of life in New York City affects many diverse and sometimes conflicting interests. The Law Department plays a significant part in the City's efforts to balance these competing interests.

1. The government may regulate the time, place and manner of speech in a public forum so long as that regulation is content-neutral, narrowly tailored to meet a significant governmental interest and leaves open alternative means of communication. *Clark v. Community for Creative Non-Violence*, 468 US 288, 293 (1984).

2. See Administrative Code §17-306 et seq. and §20-452 et seq., and RCNY Title 6, §2-310, et seq. See also, New York State General Business Law §35-a, which permits disabled veterans, regardless of the merchandise they sell, to vend in areas of the City that would otherwise be off-limits to vending activity.

3. See Administrative Code §20-473. See also, e.g., *One World One Family Now v. City & County of Honolulu*, 76 F3d 1005 (9th Cir. 1996) (finding the sale of T-Shirts imprinted with philosophical and inspirational messages to be protected by the First Amendment).

4. See *Mastrovincenzo v. City of New York*, 313 FSupp2d 280 (SDNY 2004). Judge Victor Marrero's decision granting a preliminary injunction against enforcement of the City's licensing requirements in this case is currently on appeal to the Second Circuit Court of Appeals.

5. See Administrative Code §20-229, 6 RCNY §§2-61 et seq.

6. See New York City Charter §192.

7. Petitioners have noticed an appeal of Justice Stallman's decision.

8. See Administrative Code §25-301, et seq.

9. 2004 U.S. Dist. Lexis 17807 (SDNY Sept. 8, 2004).

10. See *NYC C.L.A.S.H. Inc., et al. v. City of New York, et al.*, 315 FSupp2d 461 (SDNY 2004).

11. See *Transportation Unlimited Car Service, Inc., et al. v. New York City Taxi and Limousine Commission*, 2004 N.Y. App. Div. Lexis 12452 (Oct. 26, 2004).