NEW YORK
ZONING LAW
AND PRACTICE REPORT

MARCH/APRIL 2018 | VOLUME 18 | ISSUE 5

BLURRED LINES: WHEN DOES ZONING CROSS THE BOUNDARY BETWEEN LEGITIMATE REGULATION OF LAND USE AND IMPERMISSIBLE REGULATION OF OWNER OR OCCUPANT, FORM OF OWNERSHIP, OR INTERNAL BUSINESS OPERATIONS?

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I. INTRODUCTION

While three central limitations on the zoning authority of municipalities are deceptively simple to state, they leave "blurred lines" between those regulations and approval conditions which are allowed and those which are proscribed. The Court of Appeals has repeatedly acknowledged the first of the trilogy, stating that it is a "fundamental rule that zoning deals basically with land use and not with the person who owns

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or occupies it." *Dexter v. Town Bd. of Town of Gates*, 36 N.Y.2d 102, 105, 365 N.Y.S.2d 506, 507, 324 N.E.2d 870 (1975); *See St. Onge v. Donovan*, 71 N.Y.2d 507, 511, 527 N.Y.S.2d 721, 722, 522 N.E.2d 1019 (1988)(recognizing that it had previously held "that although a local zoning board may impose 'appropriate conditions and safeguards' in conjunction with a change of zone or a grant of a variance or special permit,' those conditions 'must be reasonable and relate only to the real estate involved without regard to the person who owns or occupies it.' ''). The other two principles, which closely relate to the first one, provide that zoning cannot be used to regulate: (1) the form of ownership of property (*FGL & L Property Corp. v. City of Rye*, 66 N.Y.2d 111, 495 N.Y.S.2d 321, 485 N.E.2d 986 (1985)); or (2) the internal operations of a business, as opposed to impacts generated by the use of land. *See Sunrise Check Cashing v. Town of Hempstead*, 20 N.Y.3d 481, 964 N.Y.S.2d 64, 986 N.E.2d 898 (2013); *Old Country Burgers Co., Inc. v. Town Bd. of Town of Oyster Bay*, 160 A.D.2d 805, 806, 553 N.Y.S.2d 843, 844 (2d Dep't 1990)(stating that conditions imposed in connection with a permit "must relate directly to the proposed use of the property, and not to the manner of the operation of the particular enterprise conducted on the premises"). All three rules are premised on the conclusion that state zoning enabling legislation only authorizes the regulation of use and dimensional requirements, not ownership, form of ownership or business operations, as well as being attributed to limitations inherent in the fundamental tenets of zoning.[1] *See Sunrise Check Cashing,* 20 N.Y.3d at 485, 964 N.Y.S.2d at 65-66; *St. Onge,* 71 N.Y.2d at 515-517, 527 N.Y.S.2d at 724-726; *FGL & L Property Corp*., 66 N.Y.2d at 115-117, 495 N.Y.S.2d at 324-325; *Dexter,* 36 N.Y.2d at 105, 365 N.Y.S.2d at 507- 508. The inconsistencies in the application of such constraints on zoning authority not only provide the basis for an interesting doctrinal discussion, but have real-world implications with respect to, among other things, amendments of zoning laws and the nature of conditions which can be imposed in connection with special permits, site plan approvals and variances.

II. ZONING REGULATES THE USE NOT THE USER

That zoning regulates land use, rather than the identity of the owner or user of the land, would seem to constitute a straight-forward concept that is simple to apply. Such certainly is the case if a zoning provision identifies a party specifically—e.g., any corporation can occupy offices so long as its initials are "I.B.M." [*Spoiler alert—such a restriction* would be no good]. However, as zoning provisions or conditions deviate from expressly identifying a party, to ones which are in varying degrees related to the nature of the owner or occupant of the property, the outcome becomes less certain. At least a few decisions suggest that absent explicit identification of a specific individual entity or person a zoning regulation or condition linked to ownership or occupancy may be sustainable; others cut strongly against such an outcome.

A. EXPRESS IDENTIFICATION OF THE OCCUPANT OR USER OF PROPERTY IS INVALID.

A prototypical example of, and one of the leading cases on, the proscription of regulation grounded on the identity of the owner or occupant of property is *Dexter, supra.* In *Dexter*, the Court of Appeals considered a challenge to a rezoning which imposed a condi-

New York Zoning Law & Practice Report (USPS 013-500), is published Bi-monthly, 6 times per year by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Periodical Postage is paid at Twin Cities, MN. POSTMASTER: Send address changes to New York Zoning Law & Practice Report, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

tion providing that the application for "the construction of a retail supermarket by Wegman Enterprises, Inc., and related commercial structures, shall inure to the benefit of Wegman Enterprises, Inc., only, and for that specific purpose only." *Dexter*, 36 N.Y.2d at 104, 365 N.Y.S.2d at 507. Naturally, the Court held that the condition was personal to Wegman's supermarket solely and did not relate to the use of property or zoning thereof. Therefore, *Dexter* annulled the rezoning as improper and unauthorized by law. In its analysis the Court recognized that while zoning must regulate land use and not the person who owns or occupies the land, the reality is more complicated. The decision reads as follows:

> While it is a fundamental principle of zoning that a zoning board is charged with the regulation of land use and not with the person who owns or occupies it . . . we recognize that customarily, as is here illustrated, when a change of zone, a variance or a special permit is sought, there is a specific project sponsored by a particular developer which is the subject of the application. As a practical matter, the application is usually predicated on a particular type structure, often accompanied by architectural renderings, for a particular use by a specific intended user. In the usual case, the application and accompanying graphic material come to constitute a series of representations frequently bolstered at the hearing by additional promises or assurances made to meet objections there raised. Throughout, attention focuses on the reputation of the applicant and his relationship to the community and the particular intended use. And all too often the administrative or legislative determination seems to turn on the identity of the applicant or intended user, rather than upon neutral planning and zoning principles.

Dexter, 36 N.Y.2d at 105, 365 N.Y.S.2d at 507-508 (citation omitted).

St. Onge, supra, was actually two consolidated appeals decided in a single opinion.[2] In *St. Onge* itself, the Court of Appeals reviewed a record in which a prior owner of a property had been granted a variance by the Town of Colonie Zoning Board to use a house in a residential zoning district as a real estate office. A condition to the variance provided that the building was "to be used solely by the applicants and may be used only in connection with their existing real estate office." *St. Onge*, 71 N.Y.2d at 512, 527 N.Y.S.2d at 722. When contract vendees for the property sought site plan approval, the planning board denied the application, finding that the variance which had been granted was temporary and that transfer of the property to a party other than the variance recipient would terminate it. The zoning board reached the same conclusion, requiring the petitioners to obtain a new variance if they wanted to secure approval for a real estate business on the site.

The Court was careful to confirm that, where appropriate, land use boards have discretionary authority to impose reasonable conditions, but stated that such conditions must be "directly related to and incidental to the proposed use of the property and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit." *St. Onge*, 71 N.Y.2d at 516, 527 N.Y.S.2d at 725. In contrast, the decision specified that a board may not impose conditions which are unrelated to the purposes of zoning or to the relief sought in the application, require dedication of land that is not the subject of the variance or seek to regulate the details of the operation of an enterprise, rather than the land use.[3] *St. Onge* struck down the variance condition because it was tied to an existing business, explaining its rationale in the following passage:

> the condition imposed on the variance granted by the Town Zoning Board in 1977 clearly relates to the landowner rather than the use of the land. By its terms, the condition purports to terminate the variance automatically if any persons other than the original applicants use the property as a real estate office. *This is precisely the type of personal condition proscribed by [Dexter] for it focuses on the persons occupying the property rather than the use of the land or the possible effects of that use on the surrounding area. As this condition bears no relation to the proper purposes of zoning, therefore, it was properly ruled invalid.*

St. Onge, 71 N.Y.2d at 517, 527 N.Y.S.2d at 725 (emphasis added).[4] *See Weinrib v. Weisler*, 27 N.Y.2d 592, 313 N.Y.S.2d 407, 261 N.E.2d 406 (1970)(invalidating a building code's prohibition against the assignment of building permits as unconstitutional because it attempted to control ownership and the transfer of property, rather than its use); *Middleland, Inc. v. City Council of City of New York*, 14 Misc.3d 1223(A), 836

N.Y.S.2d 486 (Sup. Ct., Kings Co. 2006)(annulling as an impermissible regulation of user, rather than use, a restrictive covenant, imposed as a condition of a rezoning, limiting use of property to a parking lot for an adjoining IBM facility); *Countryman v. Schmitt*, 176 Misc. 2d 736, 673 N.Y.S.2d 521 (Sup. Ct., Monroe Co. 1998)(invalidating zoning provisions governing special permits for cell towers based largely on ownership of the property on which the antenna would be sited—e.g., giving high priority to land owned by the Town and fire department—because with narrow exceptions "it relates solely to the fortuitous circumstance of ownership . . .")

B. DIFFERENT ZONING TREATMENT OF OWNER-OCCUPIED VERSUS ABSENTEE-OWNED DWELLING UNITS.

Although imposing divergent zoning regulations on dwelling units occupied by their owners and those which are rental units could be classified as a distinction based on the user, rather than the land use, courts have upheld such differential treatment. In a generic sense, whether a two-bedroom apartment is occupied by its owner or rented to a tenant, the use is the same. Nonetheless, the courts have accepted the theory that it is rational to conclude that rental units, because they tend to be run on a "commercial" basis, may have different impacts than dwelling units occupied by their owners and, therefore, may be regulated differently.

For example, in *Kasper v. Town of Brookhaven*, 142 A.D.2d 213, 535 N.Y.S.2d 621 (2d Dep't 1988), the court upheld against a number of constitutional and statutory challenges a local law which permitted only homeowners who occupied their residences to apply for permits to rent a portion of their house as an accessory apartment, while not providing the same option to absentee owners. In rejecting the contention that the provision was an improper regulation of the users of property, rather than of the land use, the Appellate Division acknowledged that as a practical matter many zoning laws extend beyond the mere regulation of properties to affect the owners and users. *Kasper*, 142 A.D.2d at 222, 535 N.Y.S.2d at 627. To support its conclusion, *Kasper* relied on the observation that the challenged zoning did not attach a personal condition to any individual land owner and was not unrelated to the use of property. *Kasper*, 142 A.D.2d at 223, 535 N.Y.S.2d at 627.[5] *See Spilka v. Town of Inlet*, 8 A.D.3d 812, 815, 778 N.Y.S.2d 222, 225 (3d Dep't 2004)(deciding that a zoning amendment requiring special use permits for rental of non-owner-occupied dwellings for periods of less than four months, that imposed no similar restriction on owner-occupied dwellings, does not improperly distinguish between homeowners who occupy their premises and those who do not).[6]

C. RESTRICTIONS ON CLASSES OF RESIDENTS.

Restrictions on the characteristics of a resident who is permitted to occupy a dwelling unit may or may not be upheld depending on the nature of the attributes of the occupant which invokes the zoning restriction, and, perhaps, policy considerations. Not surprisingly, in *Maldini v. Ambro*, 36 N.Y.2d 481, 369 N.Y.S.2d 385, 330 N.E.2d 403 (1975), the Court of Appeals upheld a zoning amendment establishing a retirement community district which allowed, among other uses, multiple residences designed to provide living/dining accommodations, including social, health care and other supportive services and facilities for senior citizens, which were to be owned and operated by a nonprofit corporation.[7] The Court analyzed the issue (and reinforced the thesis of this article) as follows:

> [t]hat the 'users' of the retirement community district have been considered in creating the zoning classification does not necessarily render the amendment suspect, nor does it clash with traditional 'use' concepts of zoning. Including *the needs of potential 'users' cannot be disassociated from sensible community planning based upon the 'use' to which property is to be put. The line between legitimate and illegitimate exercise of the zoning power cannot be drawn by resort to formula, but as in other areas of the law, will vary with surrounding circumstances and conditions* . . . Therefore it cannot be said that the board acted unreasonably in this case in making special provision for housing designed for the elderly, one of the major groupings within our population.

Maldini, 36 N.Y.2d at 487-488, 369 N.Y.S.2d at 391-392 (emphasis added; citation omitted).

The Court bolstered its holding by reasoning that:

> 'Senior citizenship' may be more appropriately regarded as a stage in life within the normal expectancy of most people than as an unalterable or obstinate classification like race . . . Therefore, providing for land use suitable for the elderly may, as here, be viewed as a nondiscriminatory exercise of the power to provide for the general welfare of all people, especially since, even if the validity of that zoning classification were 'fairly debatable, (the town board's) legislative judgment must be allowed to control.'

Maldini, 36 N.Y.2d at 487-488, 369 N.Y.S.2d at 391-392. While this latter rationale could be more relevant to an equal protection analysis, as opposed to the demarcation of the line between use and user, it certainly underscores the pivotal role that policy considerations play where courts demarcate the sometimes blurred line between *ultra vires* and permissible regulation based on characteristics of the occupant. *See also Greens at Half Hollow Home Owners Ass'n, Inc. v. Greens Golf Club, LLC*, 131 A.D.3d 1108, 17 N.Y.S.3d 158 (2d Dep't 2015), leave to appeal dismissed in part, denied in part, 27 N.Y.3d 1077, 35 N.Y.S.3d 299, 54 N.E.3d 1171 (2016)(holding that the creation of a community restricted to residents 55 years of age or older and limiting use of recreational facilities and the clubhouse only to those senior residents living in the community, did not violate the prohibition against regulating users rather than use); *Campbell v. Barraud*, 58 A.D.2d 570, 394 N.Y.S.2d 909 (2d Dep't 1977).

In contrast, the Second Department exhibited hostility toward a subspecies of senior-citizen zoning regulation which imposed a durational residency requirement. In *Allen v. Town of North Hempstead*, 103 A.D.2d 144, 478 N.Y.S.2d 919 (2d Dep't 1984), the ordinance, which established a 'Golden Age Resident District' to facilitate multi-family housing for senior citizens, included the requirement that to qualify for such housing a prospective resident must have resided within the Town for at least one year. Interestingly, applying a slightly different perspective than *Maldini*, *Allen* characterized zoning for senior citizen housing as falling within the "*limited exceptions*" to the general prohibition against zoning ordinances regulating users or owners of property. *Allen*, 103 A.D.2d at 146, 478 N.Y.S.2d at 921. Relying on this mode of analysis, the court held that durational residency requirement was not within the ambit of those exceptions. The court also viewed the durational limitation, favoring, as it did, Town residents, to be exclusionary. *Allen*, 103 A.D.2d at 146-147, 478 N.Y.S.2d at 921-922. As such, *Allen* concluded that the challenged zoning was illegal both as exclusionary and an impermissible regulation which was premised on the identity of the users or owners of property. Again, it should be readily apparent that policy considerations played a significant role in *Allen's* outcome.

D. AMORTIZATION BASED ON CHANGE OF OWNERSHIP.

Logically a mere change in the ownership of property should not affect the right to continue a nonconforming use authorized by zoning, as evidenced by the invalidation in *Weinrib* of the building code provision prohibiting assignment of building permits and the annulment in *St. Onge* of a variance condition making the variance ineffective on transfer of the subject property. However, the Court of Appeals eschewed such reasoning in *Village of Valatie v. Smith*, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994)

Generally, a municipality may require the elimination of a nonconforming use after providing a so called "amortization period" which allows the owners of the property to phase out their operations, while giving them an opportunity to recoup all or at least a significant portion of their investment. *See Town of Islip v. Caviglia*, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215 (1989); *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977). The validity of an amortization period depends on whether it is reasonable. *Town of Islip v. Caviglia, supra.*[8]

Village of Valatie upheld a law linking the termination of the preexisting legally nonconforming use of mobile homes to the transfer of ownership of either the mobile home or the land on which it was situated. The Court started its analysis by noting that the challenger to the law did not attack the provision's constitutionality under the balancing test for amortization periods—that is the standard of reasonableness as informed by

whether the individual loss outweighs the public benefit. *Village of Valatie*, 83 N.Y.2d at 401, 610 N.Y.S.2d at 944. It also took pains to point out that in some instances no amortization is required and that a variety of events and time periods can serve as grounds for requiring discontinuance of a nonconforming use, including ones that are unpredictable, such as the destruction of a building by fire or other casualty. *Village of Valatie*, 83 N.Y.2d at 401, 610 N.Y.S.2d at 944.

The Court then distinguished the use-versus-user authority embodied in cases such as *Dexter, supra*, attributing the basis for the principle to be the proscription against *ad hominem* zoning. Specifically, the decision reads as follows:

> The hallmark of cases like *Dexter* and *Fuhst*[9] *(supra)* is that an identifiable individual is singled out for special treatment in land use regulation. No such individualized treatment is involved in the present case. All similarly situated owners are treated identically. The same is true for all prospective buyers. The only preferential treatment identified by defendant is that the owner in 1968 has rights that no future owner will enjoy. But the law has long recognized the special status of those who have a preexisting use at the time land controls are adopted. Indeed, the allowance of a nonconforming use in the first instance is based on that recognition. To the extent that defendant's argument is an attack on special treatment for the owners of nonconforming uses it flies in the face of established law.
>
> In fact, what defendant is actually arguing is that the Village should not be allowed to infringe on an owner's ability to transfer the right to continue a nonconforming use . . . It is true that, in the absence of amortization legislation, the right to continue a nonconforming use runs with the land . . .[10] However, once a valid amortization scheme is enacted, the right ends at the termination of the amortization period. As a practical matter, that means the owner of record during the amortization period will enjoy a right that cannot be transferred to a subsequent owner once the period passes.

Village of Valatie, 83 N.Y.2d at 403-404, 610 N.Y.S.2d at 945-946.

To the extent the broad language employed by the Court could be read to require zoning to identify a particular user in order to run afoul of the user versus use distinction, the author submits that it should not be extrapolated to regulatory situations outside of the limited context of nonconforming uses. The conclusion in *Village of Valatie* is clearly shaped by the only grudging acceptance of nonconforming uses, the public policy favoring their eventual elimination and the earlier acceptance by the courts of a wide variety of events and time periods as a basis to for terminate such uses. In the resolution of issues unrelated to nonconforming uses, *Maldini* should provide the applicable, more flexible approach: "[t]he line between legitimate and illegitimate exercise of the zoning power cannot be drawn by resort to formula, but . . . will vary with surrounding circumstances and conditions." *Maldini*, 36 N.Y.2d at 487-488, 369 N.Y.S.2d at 391-392. In fact, as should be apparent, a decision such as *Weinrib* does not invalidate the challenged provisions because they identified a specific user, but because they merely prevented transfer of a land use approval—no "identifiable individual [was] singled out for special treatment." *See also Sunrise Check Cashing*, ((discussed in more detail below) which invalidated a prohibition of a particular type of business as, *inter alia*, an impermissible regulation based on ownership, where no specific owner or occupant was identified by the challenged law).

III. ZONING CANNOT REGULATE THE FORM OF OWNERSHIP

Of the triad of legal principles discussed in this article, the prohibition against regulating form of ownership is the easiest to apply. The rule is clear cut; it cannot be done. In *FGL & L Property Corp.*, *supra*, the City of Rye required that any development of property, which was a site of the historic "Jay Mansion" and an associated carriage house, be retained on a minimum 22-acre lot, that an undeveloped "viewway" be maintained near the mansion, that the interiors of the buildings be converted to residential units and, most importantly, that the applicant submit a draft condominium offering plan for the units. The Court invalidated the law as mandating the form of ownership. It analyzed the issue in the context of the state enabling provision, Section 20(24) of the General City Law, in the following passage:

> Nothing in that subdivision speaks to ownership rather than use, and while it does not expressly forbid provi-

> sions relating to ownership, the City suggests nothing within the spirit of zoning legislation generally or this subdivision specifically that offers justification for implying such power. Indeed, the cases are legion, in this State and elsewhere, which hold that "zoning . . . in the very nature of things has reference to land rather than to owner" . . . and that it is a "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it" . . . Most of the out-of-State cases hold, as did the *North Fork Motel* case, that a zoning ordinance cannot be used to exclude a condominium. The City correctly notes that exclusion of condominiums is a different proposition than requiring that property in a given area be held in condominium ownership. However, we agree with the Appellate Division's conclusion that the distinction is without a difference, or, if difference there is, that there exists no independent justification within the spirit of subdivision 24's zoning provision from which the power to *require* condominium ownership can be implied.

FGL & L Property Corp., 66 N.Y.2d at 116-117, 495 N.Y.S.2d at 324-325.[11]

In *BLF Associates, LLC v. Town of Hempstead*, 12 N.Y.3d 714, 883 N.Y.S.2d 797, 911 N.E.2d 860 (2009), the Court similarly invalidated provisions in a zoning ordinance that required a recreational facility in a senior citizen housing complex to be owned by a homeowners association and that the dwellings themselves be cooperative units.[12] It stated that such requirements were "*ultra vires* and void" and violated the fundamental rule that zoning deals with land use and not the person who owns or occupies it.

As addressed in the discussion in *FGL & L*, it matters little whether a regulation seeks to mandate or proscribe the form of ownership; in either case it is still invalid. In *P.O.K. RSA, Inc. v. Village of New Paltz*, 157 A.D.2d 15, 555 N.Y.S.2d 476 (3d Dep't 1990), the court was faced with an ordinance that prohibited the conversion of the units in multiple dwellings to condominium or cooperative ownership until the village building inspector determined that the structure complied with the New York State Building Code and all applicable building laws, rules and regulations, and issued a new certificate of occupancy authorizing the change. The Village implemented the law putatively based on a determination that the sponsors of the conversion of the units had no intention of correcting existing violations prior to selling them and that the law was needed, therefore, to protect potential buyers. Although the Third Department upheld the law against a number of challenges, it found that it was an impermissible regulation of the form of ownership. The court stated:

> The Village does not have the legislative power to regulate the conversion of property ownership which does not involve an alteration in the owner's use of the property. Municipalities have no inherent capacity to mandate the manner in which property may be owned or held . . .

P.O.K. RSA, Inc., 157 A.D.2d at 20, 555 N.Y.S.2d at 479; *see North Fork Motel, Inc. v. Grigonis*, 93 A.D.2d 883, 461 N.Y.S.2d 414, 415 (2d Dep't 1983)("[z]oning ordinances cannot be employed by a municipality to exclude condominiums or discriminate against condominium ownership, for it is use rather than form of ownership that is the proper concern and focus of zoning and planning regulations")[13]

IV. ZONING REGULATES THE LAND USE RATHER THAN THE OPERATION OF THE ENTERPRISE LOCATED ON THE LAND

The third of the principles addressed in this article is that zoning regulates the use of the land, rather than the operations of an entity located thereon. Again, this limitation on the zoning power is closely related to the truism that zoning relates to use but not the person who owns or occupies the land. *Sunrise Check Cashing*, 20 N.Y.3d at 485, 964 N.Y.S.2d at 66. As evidenced by case law, it also may be the most difficult of the three rules to apply in a consistent fashion.

A. GENERAL APPLICATION OF THE PRINCIPLE.

1. Zoning Laws

The Court of Appeals' most recent application of the rule foreclosing the use of zoning to regulate internal operations is *Sunrise Check Cashing*. Therein, the highest Court invalidated a provision of the Town of Hempstead's Zoning Ordinance which, among other things, prohibited check cashing businesses in that

town's business district. It held that the regulation was impermissible, both because it was based on the identity of the user rather than the use of the land and constituted an attempt to regulate business operations. The administrative record established that the putative purposes of the zoning were to encourage young people and the poor to utilize more conventional banking institutions, rather than, what the town attorney characterized as, "seedy" check cashing businesses and to eliminate predatory and exploitive finance enterprises from commercial areas in order to mitigate the adverse impacts which could be associated with such businesses. *Sunrise Check Cashing*, 20 N.Y.3d at 484, 964 N.Y.S.2d at 65.

The decision explained that the prohibition was beyond the authority granted under Town Law § 261 to, among other things, regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residences or other purposes. *Sunrise Check Cashing*, 20 N.Y.3d at 485, 964 N.Y.S.2d at 65. While the Court expressly declined to rule on the soundness of the municipality's objectives, it held that they could not be achieved through zoning. The decision explained:

> Whatever the merits of this view as a policy matter, it cannot be implemented through zoning [The regulation] *is obviously concerned not with the use of land but with the business done by those who occupy it.* It is true that there are cases in which the nature of the business is relevant to zoning because of the business' "negative secondary effects" on the surrounding community; this is true of so-called "adult entertainment" uses . . . the town has not tried to show and does not argue that check-cashing services are in a similar category.

Sunrise Check Cashing, 20 N.Y.3d at 485, 964 N.Y.S.2d at 66 (emphasis added; citation omitted).

Louhal Properties, Inc., v. Strada, 191 Misc.2d 746, 743 N.Y.S.2d 810 (Sup. Ct., Nassau Co. 2002), aff'd and remanded, 307 A.D.2d 1029, 763 N.Y.S.2d 773 (2d Dep't 2003), also employed the prohibition against regulating internal business operations to invalidate a law purporting to regulate hours of operation. In *Louhal*, the municipality enacted zoning: (1) prohibiting the operation of businesses located within 100 feet of property zoned for residential use between the hours of 11:00 P.M. and 6:00 A.M.; and (2) requiring a special permit to operate during such hours for businesses located anywhere else within the community. A 7-Eleven convenience store sued to invalidate the restrictions. The court began its analysis with reference to the state zoning enabling legislation (Village Law § 7-700) recognizing that the items subject to regulation thereunder "have one thing in common—they bear some relation to the physical use of land." It then explained:

> 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. . . . In the first group are regulations relating either to the use of land or to the potential impact of land use on neighboring properties. Courts generally uphold such regulations, including those directed at physical externalities such as light, air quality, safety, population density and traffic, and even less tangible externalities such as property values, aesthetic or environmental values. . . . In the second group are those regulations that restrict the "details of operation or manner of on-site use, . . . which do not impose externalities on nearby land." . . .

Louhal Properties, Inc., 191 Misc.2d at 751, 743 N.Y.S.2d at 814.

The *Louhal* court held that the proscription/restriction of overnight business operations, in fact, fell into the second category as an impermissible attempt to regulate the internal business operations. The decision placed particular emphasis on its observation that the legislative record was devoid of evidence showing that overnight business operations have a greater impact on neighboring properties *per se* than such activities during regular hours.

Among the cases addressing the difference between permissible regulation of use and inappropriate interference with internal business operations, *Mead Square Commons, LLC v. Village of Victor*, 97 A.D.3d 1162, 948 N.Y.S.2d 514 (4th Dep't 2012), is likely the most difficult to reconcile with the governing principle. It is the author's opinion that this Fourth Department case,

which reviewed legislation attempting to exclude fast food restaurants from a portion of a Village, misapplied the applicable legal rules and that it is quite possible that the outcome would have been different if decided by another department of the Appellate Division or the Court of Appeals. As it is, *Mead Square Commons* merely contributes to the blurring of lines between legitimate zoning regulation and *ultra vires* action.

In *Mead Square Commons,* the plaintiff attacked a zoning prohibition against "formula fast food restaurants" ("FFFRs") in the Central Business District, contained in Section 170-13 of the Village of Victor's Code. FFFR was defined in the following manner:

> "[a]ny establishment, required by contract, franchise or other arrangements, to offer two or more of the following: [1] Standardized menus, ingredients, food preparation, and/or uniforms[;] [2] Prepared food in ready-to-consume state[;] [3] Food sold over the counter in disposable containers and wrappers[;] [4] Food selected from a limited menu[;] [5] Food sold for immediate consumption on or off premises [;] [6] Where customer pays before eating." The stated purpose of section 170-13(C)(1)(a) is "to maintain [defendant's] . . . unique village character, the vitality of [its] commercial districts, and the quality of life of [its] residents."

Mead Square Commons, LLC, 97 A.D.3d at 1163, 948 N.Y.S.2d at 515.

The plaintiff, the owner of property which it sought to lease to a Subway restaurant, argued both that the prohibition was invalid because it was based upon the ownership or control of property and not its use, and that it impermissibly regulated the business operations. The court rejected the plaintiff's position, reasoning that:

> unlike in *Dexter*, the challenged Ordinance section does not single out a particular property owner for favorable or unfavorable treatment . . . Rather, all property owners in the Central Business District are treated the same under section 170-13 inasmuch as all property owners are prohibited from operating an FFFR . . . Contrary to plaintiff's related contention, we conclude that section 170-13 regulates the use, not the ownership, of the subject property. Indeed, plaintiff is not an FFFR, nor does it seek to operate an FFFR. Instead, plaintiff is a property owner that seeks to rent commercial space to an FFFR. Thus, it is plaintiff's use of the property that is being regulated, and its ownership status is irrelevant.
>
> We further conclude that the court properly determined that Ordinance
>
> § 170-13 does not improperly regulate the manner of plaintiff's business operations. *Mead Square Commons, LLC,* 97 A.D.3d at 1163-1164, 948 N.Y.S.2d at 516 (citations omitted).[14]

Aside from the fact that it is at best doubtful whether items 1 through 6 in the paragraph defining FFFR—e.g., standardized menus, ingredients, food preparation, and/or uniforms, prepared food in ready-to-consume state; and food selected from a limited menu—all relate to the land use, as opposed to the restaurant business itself, the clause limiting FFFRs only to those businesses which are required by contract, franchise or other arrangements, to meet several of those criteria, can only reasonably be viewed as relating to internal operations and/or the identity of the user. Why should an independent restaurant owned and operated by a local resident be permitted, when one that is operationally identical to it is prohibited, just because the latter is a franchise or operated by or has a contractual arrangement with a national chain? The author contends that the answer should have been that "it cannot."

2. Permit Conditions

The restriction against regulating internal business operations applies with vigor in the context of permit conditions. For example, in the widely-cited case, *Summit School v. Neugent*, 82 A.D.2d 463, 442 N.Y.S.2d 73 (2d Dep't 1981), the Second Department applied the prohibition to invalidate certain conditions in a special permit, albeit against the backdrop of a school use. The court stated the rule that special permit conditions must "relate directly to, and be incidental to, the proposed *use* of the real property and not to the manner of operation of the particular enterprise conducted on the premises . . ." *Summit School*, 82 A.D.2d at 467, 442 N.Y.S.2d at 76-77. It held that conditions limiting the total number of students in the school, mandating a ratio of staff members per student, controlling the times of day when classes were held,

providing that athletic activities were to be of secondary importance to education and held indoors or sufficiently distant from school boundaries, confining student activities, to the extent possible, to school grounds and requiring suitable supervision for students leaving school grounds, constituted improper interference with operations of the enterprise or educational processes.[15] It also held that conditions requiring the school to be non-profit and non-sectarian had "no rational relationship to the manner of how land may be used and is not a legitimate special permit condition." *Summit School*, 82 A.D.2d at 47, 442 N.Y.S.2d at 79.[16] *See Province of Meribah Soc. of Mary, Inc. v. Village of Muttontown*, 148 A.D.2d 512, 538 N.Y.S.2d 850 (2d Dep't 1989)(annulling conditions imposed in connection with a variance for a religious retreat house, because they failed to adhere to the rule that they "must be reasonable and relate only to the real estate involved without regard to the person who owns or occupies it" and not to the internal operations of the user rather than the land use itself and its effect on surrounding land); *Schlosser v. Michaelis*, 18 A.D.2d 940, 238 N.Y.S.2d 433 (2d Dep't 1963) (invalidating conditions imposed by a zoning board in connection with a permit issued to a florist which limited the number of employees and business hours, because they impermissibly related to the details of the operation of the business and not to the zoning use of the property); *see generally*, *Amerada Hess Corp. v. Town of Oyster Bay*, 36 A.D.3d 729, 828 N.Y.S.2d 536 (2d Dep't 2007) (holding that a prohibition of the sale of alcoholic beverages at a convenience store was both preempted by state law and unenforceable by the Town because it was an impermissible attempt to regulate the details of the plaintiff's enterprise); *Blue Island Development, LLC v. Town of Hempstead*, 131 A.D.3d 497, 15 N.Y.S.3d 807 (2d Dep't 2015), (finding viable a claim that a restrictive covenant requiring a developer to sell 172 waterfront units as condominiums that had been imposed as a condition to a rezoning, was illegal because it regulated the ability of the property owner to rent the units, rather than regulating the use of the land itself.)

The Second Department's decision in *Town of Huntington v. Sudano*, 42 A.D.2d 791, 346 N.Y.S.2d 582 (2d Dep't 1973), order aff'd, 35 N.Y.2d 796, 362 N.Y.S.2d 459, 321 N.E.2d 549 (1974), presents a good example of the difference between legitimate and impermissible conditions. In *Town of Huntington*, the defendants operated a kennel in a residential district that had been authorized by special permit issued 17 years prior to the defendants' acquisition of the facility. The permit allowed operation of "a dog kennel on the following terms: for the purpose of training dogs, limited to a maximum of ten (10) dogs at any time; it is understood that the training of the dogs is for the purpose of leading the blind." *Town of Huntington*, 42 A.D.2d at 790, 346 N.Y.S.2d at 583. As the defendants apparently had difficulties with math or an unhealthy disregard for the law, they housed as many as 45 dogs on the premises. The Appellate Division ruled that the zoning board had properly limited the number of dogs on the site because the restriction directly impacted the use and enjoyment of neighboring land and was not an improper regulation of the business. *Town of Huntington,* 42 A.D.2d at 792, 346 N.Y.S.2d at 583-584. However, it invalidated the condition limiting the use of the facility to the training of dogs for the blind, reasoning that it "does not bear on the use of the land, but rather on the operation of the business and hence is impermissible." *Town of Huntington,* 42 A.D.2d at 792, 346 N.Y.S.2d at 583-584.[17]

Similarly, *Edson v. Southold Town Zoning Bd. of Appeals*, 102 A.D.3d 687, 957 N.Y.S.2d 724 (2d Dep't 2013), illustrates the same distinction. Therein, a zoning board authorized a farm stand on the applicant's farm. The building exceeded the applicable 3,000 square-foot limitation, but the portion devoted to sales was restricted to that area by partitioning off the remaining 4,826 square feet of the structure. In granting the approval, the board imposed a condition dictating that only inventory produced on the farm, and not any incidental accessory items imported from offsite, could be stored in the latter area. The Second Department annulled that requirement, deciding that while the board could have required all storage to be included within the main 3,000 square-foot-area, it lacked authority to distinguish between inventory produced on the farm and products coming from other locations. It also rejected the zoning board's imposition of a condition limiting farm stand operations to a particular

season or specific dates, because there was authority to do so neither in the Town Law nor local zoning, and there was no evidentiary support for the condition.

B. REGULATION OF HOURS OF OPERATION.

Sometimes the restriction of hours of operation of an enterprise and/or its parking facilities is upheld, whether contained in a regulation or imposed as a permit condition. Other times it is annulled as an impermissible regulation of internal business operations. There is no bright line for determining whether a limitation warrants one treatment or the other. In short, the distinction between valid and invalid restrictions on hours may be the fuzziest of the blurred lines. A key question is whether the record establishes that the restriction is necessary to mitigate impacts of the land use itself on its surroundings. As was discussed above, *Louhal Properties* invalidated a zoning ordinance's prohibition/regulation of overnight hours of operation as an impermissible attempt to regulate internal business operations, rather than the use. The outcome was reached, in large measure, because there was no evidence before the local legislature that overnight business operations have a greater impact on neighboring properties than business activities during permitted hours. *Louhal Properties* appears to set a high bar for judging the propriety of legislative regulation of business hours; it would seem difficult for a legislative body to find support for the blanket conclusion that overnight operations "*per se*" have greater impacts than activities occurring during regular business hours. *See Louhal Properties, Inc.*, 191 Misc.2d at 752-753, 743 N.Y.S.2d at 814-815.

Westbury Trombo, Inc. v. Board of Trustees of Village of Westbury, 307 A.D.2d 1043, 763 N.Y.S.2d 674 (2d Dep't 2003), decided on the same day that the Appellate Division issued its decision in *Louhal*, held invalid the same law annulled in *Louhal.* In confirming the law's fundamental defect, the court stated:

> Assuming, without deciding, that Village Law § 7-700 authorized the Board to enact a local law prohibiting a restaurant or "fast food" business from operating within its jurisdiction, or subjecting such a business to an otherwise inapplicable requirement that it obtain a special use permit or variance, based solely on the fact that the business would operate between the hours of 11:00 P.M. and 6:00 A.M. . . . the exercise of such power must be supported, at the very least, by evidence showing that the "atmosphere of the surrounding area" would be adversely affected by the presence of such an overnight business . . . Because " generalized . . . concerns of the neighboring community . . . uncorroborated by any empirical data" are not probative of any such potential detriment . . . and the petitioner's property rights should not be impaired based on the "whims of an articulate minority . . . of the community" . . . and because the record in this case does not otherwise contain sufficient evidence in this respect, the local laws under review should not be upheld as a valid exercise of the Board's powers under Village Law § 7-700.

Westbury Trombo, Inc., 307 A.D.2d at 676, 307 N.Y.S.2d at 1044-1045 (citations omitted).[18]

The proscription against imposing permit conditions regulating hours of operation based on an unsubstantiated belief that such limitations will mitigate the impacts of the land use, is also exemplified by *Old Country Burgers Co., Inc. v. Town Bd. of Town of Oyster Bay*, 160 A.D.2d 805, 553 N.Y.S.2d 843 (2d Dep't 1990). In *Old County Burgers*, the town board imposed a condition on the operation of a drive-through window at a fast food restaurant which forbade operations between 8 A.M. and 9:30 A.M.;12 Noon through 1:30 P.M.; and 5 P.M. through 6:30 P.M. The court held that the condition violated the rule that special permit conditions "must relate directly to the proposed use of the real property, and not to the manner of operation of the particular enterprise conducted on the premises." *Old Country Burgers*, 160 A.D.2d at 806, 553 N.Y.S.2d at 844. The decision reads as follows:

> The zoning board attempted to justify this restriction by claiming that the operation of this window would significantly increase the existing traffic flow. However we note in this respect 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 . . .We find the imposition of this condition was no more than an impermissible attempt to regulate the details of the operation of the petitioner's enterprise (*see, Matter of Summit School v. Neugent, supra*), and conclude that upon this record it cannot be said that the so-called "meal-time restriction" was proper.

Old Country Burgers, 160 A.D.2d at 806, 553 N.Y.S.2d at 844 (citations omitted). *See Home Depot, U.S.A.*, *supra* (invalidating permit conditions restricting the hours of store operations and parking lot maintenance because there was a lack of proof or findings that they were designed to address impacts on surroundings); *Schlosser,* 18 A.D.2d at 941, 238 N.Y.S.2d at 434-435 (holding that a zoning board's imposition of conditions regulating the hours of operations of the business and the timing of deliveries was beyond the authority granted under the zoning ordinance as it was an impermissible attempt to regulate the internal operations of the business rather than the zoning use of the premises); *cf Edson,* 102 A.D.3d at 688, 957 N.Y.S.2d at 726 ("there is no authority under the Town Law or the Town Code, or any evidentiary basis, for the imposition of the condition limiting the operation of the proposed farm stand to a particular season or to specific dates.").

As alluded to above, courts certainly have upheld permit conditions limiting hours of operation where they are reasonable and directly related and incidental to the proposed use of the property and are aimed at minimizing the adverse impact that might result from the grant of the approval. For example, in *Twin Town Little League Inc. v. Town of Poestenkill*, 249 A.D.2d 811, 813, 671 N.Y.S.2d 831, 833 (3d Dep't 1998), the court confirmed a zoning board's imposition of conditions regulating the operations of a baseball complex with outdoor lighting, which among other things, limited the time of year when night games were allowed, required operations to cease at 9:30 P.M. or as soon as practicable after completion of a game and mandated that a particular bank of lights be turned off by a specified time. In pertinent part, the court stated:

> there is record evidence that the neighboring property owners raised concerns regarding the depreciation of the value of their property due to the noise and traffic associated with the ballgames and the intrusiveness of the lighting. In our view, the challenged conditions represent a reasonable attempt to alleviate these concerns and, as they relate directly to the use of the land, we find them to be proper . . .

Twin Town Little League, Inc., 249 A.D.2d at 813, 671 N.Y.S.2d at 833 (citation omitted).

Milt-Nik Land Corp. v. City of Yonkers, 24 A.D.3d 446, 806 N.Y.S.2d 217 (2d Dep't 2005), also upheld a variance condition which limited a pizzeria's hours, finding that it related directly to the use of the property and was intended to protect the neighboring residential properties from possible adverse effects, such as increase in traffic congestion, parking problems and noise.[19] Similarly, in *1833 Nostrand Ave. Corp. v. Chin*, 302 A.D.2d 460, 754 N.Y.S.2d 581 (2d Dep't 2003), the Second Department confirmed a variance condition which limited a store's proposed hours of operation, determining that there was a rational basis and substantial evidence supporting the board's conclusion that the limitation insured that the store would "conform to the surrounding retail and residential character." Unfortunately, the decision described neither the operational characteristics of the store and conditions in the surrounding neighborhood nor the proof in the administrative record regarding potential impacts related to the store's business hours.

The most recent example of a decision upholding a restriction on the hours of operation is *Bonefish Grill, LLC v. Zoning Bd. of Appeals of Village of Rockville Centre*, 153 A.D.3d 1394, 61 N.Y.S.3d 623 (2d Dep't 2017). Therein, the court considered a parking variance application to allow the demolition of an existing structure and the construction of a 5,400-square-foot restaurant. The variance sought by the applicant would have allowed it to provide no off-street parking, where the local ordinance would have required 54 spaces. The applicant proposed to remedy the 100% deficiency by merging the lot with an adjoining property. In fact, the joining of the two lots never occurred, prompting the applicant to offer to grant the restaurant the exclusive right to use the parking spaces on the adjoining lot between the hours of 4:00 P.M. and 12:30 A.M. during the week. The zoning board granted the variance, but limited the restaurant's operating hours to 4:00 P.M. to 12:30 A.M. and mandated that valet parking be provided. The court held that the conditions related directly to the use of the land and were intended to protect neighboring properties from an anticipated increase in traffic congestion and parking. In particular, the court relied on the fact that the zoning board's decision was supported by both empirical and testimo-

nial evidence, including testimony of the local store owners which did not constitute merely "generalized and conclusory community opposition." It also was supported by the applicant's own expert and the personal knowledge of the zoning board members of the area in question.

Other cases which upheld conditions on usage of off-street parking areas include *Voetsch v. Craven*, 48 A.D.3d 585, 852 N.Y.S.2d 225 (2d Dep't 2008)(upholding a condition to parking variances that prohibited overnight parking in the lot as being directly related to the use and designed to minimize adverse impacts on neighboring property, but invalidating the requirement that the lot entrance be chained); and *Plandome Donuts, Inc. v. Mammima*, 262 A.D.2d 491, 692 N.Y.S.2d 111 (2d Dep't 1999)(holding that a condition requiring a parking lot be open to retail and restaurant customers between 10 A.M. and 6 P.M. on Saturdays related directly to the land use and was intended to protect neighboring commercial land owners from adverse impacts of the petitioner's operation).

ENDNOTES:

[1]For example, Town Law § 261 provides, in pertinent part, the following:

> For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes . . .

Town Law § 261. Town Law Section 262 reinforces this authority in defining a town's power to establish and impose regulations applicable to zoning districts. The analogous provisions of the General City Law (Sections 24 and 25) and the Village Law (Sections 7-700 and 7-702) are in relevant respects substantially similar.

[2]The second case was *Driesbaugh v. Gagnon.*

[3]The court did list examples of what might be proper conditions, such as those relating "to fences, safety devices, landscaping, screening, access roads relating to period of use, screening, outdoor lighting and noises, enclosure of buildings, emission of odors, dust, smoke, refuse matter, vibration noise and other factors incidental to comfort, peace, enjoyment, health or safety of the surrounding area." *St. Onge*, 71 N.Y.2d at 516, 527 N.Y.S.2d at 725.

[4]In the companion appeal, *Driesbaugh*, the petitioner owned two automobile repair shops in the Town of Fenton—one was grandfathered as a legally preexisting nonconforming use, while the other violated the applicable restrictions of the zoning ordinance. The zoning board granted a use variance to allow continuation of the illegal use of the latter establishment, but imposed conditions restricting and ultimately requiring the phasing out of the grandfathered use located on separate property. The Court held that as the variance only related to one of the two properties, any condition imposed must relate solely to that property. It elucidated that "the Board has imposed a requirement completely unrelated to either the use of the land at issue or to the potential impact of that use on neighboring properties." *St. Onge*, 71 N.Y.2d at 517, 527 N.Y.S.2d at 726. The ownership of the land was dismissed by the Court as immaterial to the municipality's power to regulate, the decision stating: "[t]he fact that the two separate parcels here are held in common ownership is purely a matter of personal circumstance, and does not furnish a basis for regulating the parcel which is not a subject of the variance . . ." *St. Onge*, 71 N.Y.2d at 518, 527 N.Y.S.2d at 726.

[5]It also furthered its determination by observing that by its very nature an accessory use normally attaches to the occupancy of premises, rather than to mere ownership thereof. *Kasper*, 142 A.D.2d at 223, 535 N.Y.S.2d at 627.

[6]The practitioner is cautioned, however, that when the distinction between owner-occupied and non-owner-occupied dwellings triggers different dimensional or bulk (including parking) requirements it will likely violate the uniformity provisions of state enabling legislation (Town Law Section 262; Village Law Section 7-702 and General City Law Section 20(24)). *See Tupper v. City of Syracuse*, 93 A.D.3d 1277, 941 N.Y.S.2d 383 (4th Dep't 2012)(invalidating an ordinance which, among other things, imposed different off-street parking regulations on owner-occupied and non-owner occupied dwellings as violating the uniformity requirement).

[7]The question of whether a senior housing ordinance is legal under New York State zoning, is entirely separate from the issue of whether it is exempt from the federal Fair Housing Act's prohibition against discrimination based on familial status or fits within the exemptions from that proscription established to accommodate "housing for older persons" found at 42 U.S.C.A. § 3607(b) and 24 C.F.R. 100.303-100.308.

[8]The Court of Appeals summarized the test for as-

sessing the validity of an amortization period as follows:

> Reasonableness is determined by examining all the facts, including the length of the amortization period in relation to the investment and the nature of the use. The period of amortization will normally increase as the amount invested increases or if the amortization applies to a structure rather than a use. Presumptively, amortization provisions are valid unless the owner can demonstrate that the loss suffered is so substantial that it outweighs the public benefit gained by the exercise of the police power.

Town of Islip, 73 N.Y.2d at 561, 542 N.Y.S.2d at 148.

[9]*Fuhst v. Foley*, 45 N.Y.2d 441, 382 N.Y.S.2d 56 (1978), decided that under the now-replaced practical difficulty standard for area variances, the variance could not be based on the personal difficulties of the applicant but had to relate to the land itself. The law, in that respect, does not appear to have been displaced when the practical difficulties standard was superseded by the statutory area variance criteria.

[10]*See Iazzetti v. Village of Tuxedo Park*, 145 Misc.2d 78, 82, 546 N.Y.S.2d 295, 297-298 (Sup. Ct. Orange Co. 1989)(invalidating a zoning board's determination that where the user of a property had changed the use was no longer a legal nonconforming use, explaining that "change in use that would justify termination relates directly to the use itself. It is the use which must change, not the ownership of the use.")

[11]*FGL & L Property Corp.* also found that the historic preservation provisions of the General Municipal Law did not provide a basis to mandate form of ownership.

[12]The court also invalidated a provision in that ordinance requiring construction of a 9,000 square foot community center with specific amenities on a specified land area, stating that "Zoning Ordinances can go no further than determining what may or may not be built and that [the challenged zoning] is unnecessarily and excessively restrictive leads us to conclude that it was not enacted for legitimate zoning purposes." *BLF Associates, LLC*, 59 A.D.3d at 55, 870 N.Y.S.2d at 426. *Town of Huntington v. Beechwood Carmen Bldg. Corp.*, 82 A.D.3d 1203, 1206-07, 920 N.Y.S.2d 198, 200-201 (2d Dep't 2011)(finding that a zoning regulation requiring construction of a particular amenity, a swimming pool and community center, would be beyond the power conferred by state enabling legislation.)

[13]The continued viability of so much of the holding in *North Fork*, as determined that a municipality cannot use the change in the form of ownership—in that case, from cooperative to condominium—as a basis to eliminate a valid nonconforming use, may be in doubt in the face of the Court of Appeals subsequent decision in *Village of Vallatie*, *supra*.

[14]Notably, the plaintiff did not preserve for the Fourth Department's review the argument that no rational basis exists for distinguishing between FFFRs and non-FFFRs that meet two or more of the criteria in the regulation. This question could have been a central consideration in determining if the Village's regulations were defensible.

[15]The rationale for the court's conclusion rested in varying degrees (and in some instances not at all) on the exclusive authority of State to regulate educational activities under the New York State Education Law.

[16]In contrast, *Summit School*, upheld conditions proscribing commercial activities and requiring signage to conform to the zoning ordinance.

[17]Another example is *Home Depot, U.S.A. v. Town Bd. of Town of Hempstead*, 63 A.D.3d 938, 881 N.Y.S.2d 160 (2d Dep't 2009), which was a split decision (figuratively, not literally) in assessing the validity of a number of conditions imposed on site plan approval to remodel a building to house a Home Depot store. It invalidated those conditions which it found to be unsupported either by proof or findings in the record establishing that they were designed to address impacts on surroundings. These included restrictions on hours of store operations and parking lot cleaning and a requirement that a closed circuit recording system be installed to monitor the parking area. *Home Depot,* U.S.A., 63 A.D.3d at 939, 881 N.Y.S.2d at 161. In contrast, the court upheld requirements relating to the location of a loading zone and the truck entry route, based on the express authorization in the Town Law to consider such issues in the context of site plan review and the board's judgment that the measures were appropriate to mitigate impacts surrounding roadways. *Home Depot,* U.S.A., 63 A.D.3d at 939-940, 881 N.Y.S.2d at 161. It also held that a fencing requirement was appropriate to protect the interests of nearby residents to preserve "a peaceful and pleasant residential environment." *Home Depot,* U.S.A., 63 A.D.3d at 940, 881 N.Y.S.2d at 161.

[18]Notably, the court also held that the village lacked authority under its general police powers to impose such a condition because "there is insufficient evidence to support the conclusion that the existence of a retail business that operates 24 hours a day in the vicinity of a residential area has any detrimental impact on the health, safety, welfare or morals of the community." *Westbury Trombo, Inc*., 307 A.D.2d at 676, 307 N.Y.S.2d at 1045.

[19]The court did, however, invalidate several conditions, including one limiting the number of seats in the restaurant, finding that to the extent it merely reiterated occupancy requirements in the city's code, it was unnecessary, and to the extent it imposed a more

stringent requirement, it was unlawful. *Milt-Nik Land Corp.*, 24 A.D.3d at 449, 806 N.Y.S.2d at 220.