



## Local Undesirable Land Use Regulation

A Division of New York Department of State

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### Uses most don't want next door...

- Allowed or not allowed in zoning code
- Zoning provisions
  - "Uses not listed as allowed are prohibited"
- Special status
  - Court decisions
  - State or federal law



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### Acronyms

- LULU Locally undesirable land use
- NIMBY Not in my backyard
- NIMEY Not in my election year
- NIMTOO Not in my term of office
- NOPE Not on planet Earth
- BANANA Build absolutely nothing anywhere near anything
- CAVEs Citizens against virtually everything

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### Potentially controversial uses

- Mining & gas drilling
- Wind turbines
- Telecommunications facilities
- Adult uses
- Billboards & signs
- Manufactured housing
- Group homes
- "Monster" houses
- Landfills
- Home day care
- Backyard chickens
- Non-retail storefronts
- Large-scale retail



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### Comprehensive planning

- Reduces controversy
- Legal support
- Infrastructure investments
  - Identifies areas for municipal & private investment
- Public input on controversial issues

#### Municipalities with Comprehensive Plans

|            |     |
|------------|-----|
| ▪ Cities   | 92% |
| ▪ Towns    | 71% |
| ▪ Villages | 66% |
| ▪ All      | 76% |

Source: NYS Legislative Commission on Rural Resources (2008)



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### Can a use be prohibited?

#### Exclusionary Zoning

- Regulations that singly or in concert tend to exclude low or moderate income housing municipal-wide

Most non-residential uses may be zoned out if the exclusion is supported by the comprehensive plan

#### Examples:

- Large lot or high minimum square footage requirement
- Excluding multiple dwellings or mobile home



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### Spot zoning

- Parcel can be rezoned to allow use supported by comprehensive plan
- Zoning changes must be reasonably related to legitimate public purposes

"the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners . . ."

*Rogers v. Tarrytown, 302 NY 115, 96 NE2d 731 (1951)*

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### Wind turbines

#### Distinguish between residential, agricultural or commercial turbines

- Regulate with zoning:
  - Restrict to districts or municipal-wide
  - Setbacks
  - Sound
  - Special Use Permit (SUP)
- Regulate without zoning:
  - Site plan review
- Article X



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### Solar energy

- Scale
- Protecting solar access
- Comprehensive Plan
  - Policy statement
  - Resource map
- Potential adverse impacts
  - Glare
  - Neighborhood character



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**Residential/small solar**

- Regulations & review
  - Street & lot layout
  - Setbacks
  - Height
    - Solar setback
    - "Solar fence"
- Solar-ready construction
  - Building Code or incentive zoning




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**Solar systems & historic resources**

**Design Guidelines for Solar Installations  
(National Trust for Historic Preservation)**

- locate on non-historic buildings or additions
- minimize their visibility from the road
- avoid permanent loss of character-defining features




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**Commercial/ industrial solar**

**Regulations & review**

- Special Use Permit
- Industrial & agricultural zones
- Adverse impacts
- Lot size
- Screening
- Safety
- Decommissioning




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### Agricultural Districts & NYS Laws

- Agricultural & Markets Law (AML)
  - Agricultural District Law (§25 AA)
- Uniform Fire Prevention & Building Code
- Alcohol Beverage Control Law (ABC)
- Education Law
- Agricultural Districts:
  - <http://www.agriculture.ny.gov/AP/aqservices/aqdistricts.html>




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### Special events & activities

- Agri-tourism
- Agri-tainment
  - Corn Mazes
  - Hay rides
  - Fall festivals
  - Petting zoos
  - Fiber tours




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### Special events & activities

- Newer trends
- Catering
    - Weddings & parties
    - Charity events
  - Tasting rooms
    - Wineries
    - Distilleries



- Other Non-Agricultural uses
  - Energy
    - Solar Farms
    - Wind
    - Gas & Oil,
  - Timber operations
  - Landscaping




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## A Partnership to Review Impacts

### Agriculture & Markets

- Farm operation?
- In an agricultural district
- Zoning definitions
- Is activity permitted
- Require a variance
- State Law
- Cost and time, etc.

### Municipal regulations

- Reasonable,
- Public health & safety threatened
- Amendments needed,
- Is an expedited review an option



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## Mining

Regulate with zoning:

- Restrict to districts or municipal-wide
- SUP with conditions:
  - Ingress & egress
  - Truck routes

Regulate without zoning:

- Site Plan Review



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## DEC mining permit process

Municipalities submit recommendations to NYS DEC:

- Setbacks from
  - property boundaries
  - public R-O-W
- Dust control
- Hours of operation
- Barriers restricting access



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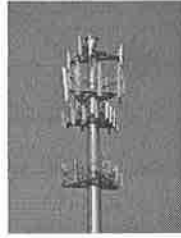
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### Cell towers as public utility

- Cell towers defined as a public utility (*Cellular Telephone Co. v. Rosenberg (NYS Court of Appeals, 1993)*)
- Compelling reasons to grant use variance:
  - Necessary to provide safe & adequate service
  - Significant gaps in coverage if placed on alternative sites



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### Telecommunications Act of 1996

#### MUNICIPALITY MUST NOT

- Prohibit personal wireless service
- Unreasonably discriminate among providers
- Regulate based on health effects from RF emissions

#### MUNICIPALITY MUST

- Act on applications within "reasonable period of time"
- 90 days for co-locations
- 150 for others

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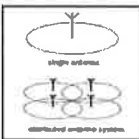
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### Section 6409

#### Middle Class Tax Relief & Job Creation Act of 2012



A diagram contrasting a single antenna configuration with DAS.

- Applies to support structures and to transmission equipment used with any Commission-licensed or authorized wireless transmission
- Limits local control of co-location and replacement of equipment on existing towers
- Good news: increased use of DAS (distributed antenna system) technology

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### Dish antenna (1m or less)

#### Over-the Air Reception Devices (OTARD) Rule

##### Municipality cannot:

- Delay or prevent signal use
- Unreasonably increase cost of dish installation

##### Municipality can:

- Regulate for safety
- Regulate in historic districts by least burdensome, clearly defined restrictions



www.fcc.gov/mb/facts/otard.html




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### Drones (Unmanned Aerial Vehicles)

#### The Federal Aviation Administration (FAA)

- Regulates airspace from the ground up
- Defines drones as "aircraft". National Transportation Safety Board agrees
- Aircraft (even model aircraft) manned or unmanned need FAA approval
- Commercial use of UAV's currently regulated on a case-by-case basis

State and Local Laws that attempt to take regulation of aircraft from the FAA have been unsuccessful when challenged in court.

Local regulations may prohibit conduct but not the tool used.

The U.S. Government, by federal statute, has exclusive sovereignty of national airspace.(49 U.S. Code §40103(a)(1))




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### Hovering over lawmakers

#### In General

- Users must be at least 13 years of age to register use of drones.
- Drones must be flown within line of sight
- If operating a drone within 5 miles of an airport, users should call the airport to ask if it is safe to operate within that zone.
- Unsafe operation of drones should be reported to local police, which will work with the FAA to enforce.



FAA's Certificate of Approval (COA) required for drone use by public entities.




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### Adult uses

- Cannot prohibit (1<sup>st</sup> Amendment Protection)
- Regulate with zoning
  - Must provide viable locations
  - Definitions must be clear
- Aim regulations at secondary effects



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### Billboards

- Can't regulate content (1<sup>st</sup> Amendment protection)
- Regulate size & location:
  - State Uniform Code
  - Zoning
  - Site Plan Review
  - Local Permit
- NYS DOT regulates signs along interstate & primary highways
  - Municipality may be more restrictive than DOT



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### Temporary signs

- Regulate physical characteristics:
  - traffic safety, aesthetics, property values
- Regulation should be content neutral:
  - size, height & location:
    - ban all signs on public property
  - Permits: apply to all signs
  - Duration: apply evenly
  - Fees: relate to administrative costs



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**Manufactured homes**

- Federal: Construction & Safety
- State:
  - Uniform Code
  - Manufacturer's Manual
  - NYS Dept. of Health: Mobile home parks with 5 or more homes (Sanitary Code Part 17)




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**Manufactured homes**

- Health, safety & general welfare of the public
- Zoning
  - Limit to certain districts
  - Lot size & setbacks
  - Special Use Permit
- Site Plan Review
- Cannot exclude completely
  - *Town of Pompey v. Parker*
- Cannot exclude based on age of home




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**Manufactured homes**

- Amend zoning or adopt local law to address farm worker housing
- Examples of local law provisions:
  - Show proof of continuing employment on the farm
  - Do not allow the creation of new lots
  - Do not allow permanent additions to the home




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### Group homes for the disabled

- Will facility result in a concentration of similar homes to the extent that community character is altered?
- "A community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances." (Mental Hygiene Law § 41.34)




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### Religious Land Use & Institutionalized Persons Act (RLUIPA)

- Religious uses are not exempt from land use regulations
- Municipalities may not:
  - Place "substantial burden"
  - Zone out of residential districts
  - Prohibit if impact similar to other allowed uses



Regulate characteristics influencing physical environment: lot coverage, parking, signage

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### Home day care

Comprehensive plan should recognize need for residential daycare and identify appropriate areas; zoning should follow suit

**Enforceable:**

- fire, building and health regulations

**Not enforceable:**

- anything beyond the underlying residential use, i.e.:
  - minimum lot size
  - minimum floor-space per child
  - off-street parking
  - off-street pickup/drop-off areas
  - no outdoor play area after \_\_ p.m.

**Definitions are Important:**

- "Family home day care" and "Group family home day care" allowed by right in single-family and multi-family dwellings
- "Child day care center" and "school age child care" are different, and fully subject to zoning

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### Kennels: commercial & noncommercial

Definitions are important

**Commercial:**

" \_\_\_ or more dogs/cats over 4 months old, kept for any commercial purpose: boarding, breeding, grooming, letting for hire, training for a fee or selling."

**Noncommercial:**

Personal use; animal shelters, vet hospitals, groomers

**Consider regulating:**

- ✓ Minimum lot size
- ✓ number of animals
- ✓ Setbacks from nearest residence
- ✓ hours dogs can outside on run
- ✓ Sound barriers
- ✓ Emergency response plan

Note: Sale or exchange of 1 litter in 12 months is not a kennel operation




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### Short-term rental housing

**Precise definitions are essential:**

- Generally rented for less than 30 days
- Permanent provision for living, sleeping, eating, cooking, and sanitation
- Owner not necessarily on premises




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### Short-term rental housing

| Pros  |
|---|
| <ul style="list-style-type: none"> <li>• Supplemental income to owners</li> <li>• Discounted lodging and interesting tourist experience for guests</li> </ul> |

| Cons   |
|--|
| <ul style="list-style-type: none"> <li>• Transient guests</li> <li>• Excessive noise</li> <li>• Increased traffic</li> <li>• Commercial use in residential district</li> <li>• Unfair competition to hotels</li> <li>• Lost lodging tax revenue</li> <li>• Inflated housing costs</li> </ul> |




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### Quantitative Restrictions

- Restrict by zoning district
- Cap number of permits
- Proximity restrictions
- Maintain ratio of long-term dwelling units to short-term units




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### Operational Restrictions

- Maximum occupancy limits
- Rental period and frequency
- Parking
- Noise
- Emergency access
- Mandatory designated representatives
- Trash and refuse




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### Nonretail uses in retail districts

Reduces critical mass of retail shopping district

- Zoning Tools:
  - Exclude residential on first floor
  - Minimum percentage street-level retail
  - SUP for nonretail
  - Exclude all or some non-sales tax generating uses
  - Minimum separation between non-sales tax generating uses
  - Pedestrian-Oriented Shopping overlay




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## Defending Your Decisions

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### Inform & involve public

- Unearth controversy early
  - Receptive to change
  - Before the public feels steamrolled
- Potentially controversial projects
  - Hold informational meetings with residents & stakeholders



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### Community opposition

If already permitted by zoning, and requirements are met, then community opposition is generally not a valid basis for denying most applications



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### Moratoria

Adopt moratorium law to:

- Update comprehensive plan to consider new uses
- Update regulations to prevent:
  - hasty decision
  - unplanned & inefficient growth
  - construction inconsistent with comprehensive plan



- Wrong reasons for moratoria:
- Slow development hoping developer will go away
  - Halt development while municipality considers buying land

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### Positive press for controversial issues

Bad press usually results from ignorance, not bias:

- Inaccurate, or wrong conclusions from facts
- Accurate, but unfavorable tone
- Overly selective or unbalanced reporting
- Blurred lines between fact and opinion



#### Remedy ignorance with non-confrontation

- Be prepared to correct false assumptions
- Response plan: phone, press release, news conference
- One spokesperson controls message

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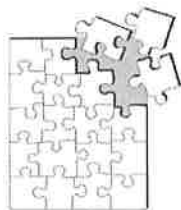
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### The Record

Materials in the record tell the story of the application & typically include:

- Application & supporting documentation
- Newspaper notices
- Meeting minutes
- SEQR materials
- Public hearing testimony
- Written submissions from public
- Expert opinion
- Decision, conditions, findings




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**Findings**

- Describe application's reasons for denial or approval & may support:
  - Why a condition was imposed
  - Decision if challenged in court
- Conclusory statements are not "Findings"
  - "The standards were not met."
- A decision based on conclusory statements is:
  - Not supported by factual information in the record
  - Will be struck down in the courts




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**New York Department of State**

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 (518) 474-6740      Counsel's Office  
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## SECTION 1. SHORT TITLE.

This Act may be cited as the **'Religious Land Use and Institutionalized Persons Act of 2000'**.

## SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

### (a) SUBSTANTIAL BURDENS-

(1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION- This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

### (b) DISCRIMINATION AND EXCLUSION-

(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

## SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE- No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION- This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

## SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION- A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION- If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT- Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) ATTORNEYS' FEES- Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended--

(1) by inserting 'the Religious Land Use and Institutionalized Persons Act of 2000,' after 'Religious Freedom Restoration Act of 1993,'; and

(2) by striking the comma that follows a comma.

(e) PRISONERS- Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT- The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION- If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

#### SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED- Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED- Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED- Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED- Nothing in this Act shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE- A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW- With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION- This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL- Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY- If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

#### SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the 'Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term 'granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

#### SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS- Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended--

(1) in paragraph (1), by striking 'a State, or a subdivision of a State' and inserting 'or of a covered entity';

(2) in paragraph (2), by striking 'term' and all that follows through 'includes' and inserting 'term 'covered entity' means'; and

(3) in paragraph (4), by striking all after 'means' and inserting 'religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.'.

(b) CONFORMING AMENDMENT- Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking 'and State'.

#### SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT- The term 'claimant' means a person raising a claim or defense under this Act.

(2) DEMONSTRATES- The term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE- The term 'Free Exercise Clause' means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT- The term 'government'--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION- The term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY- The term 'program or activity' means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE-

(A) IN GENERAL- The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE- The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

The **Over-the-Air Reception Devices (OTARD) Rule (47 C.F.R. Section 1.4000)** was created to promote a fair and competitive consumer television reception market. In effect since October 1996, it prohibits restrictions that impair the installation, maintenance or use of antennas used to receive video programming and data.

### The OTARD Rule Covers:

A “dish” antenna that is one meter (39.37”) or less in diameter (or any size dish if located in Alaska) including direct-to-home satellite dishes, TV antennas, wireless cable antennas and customer-end antennas that receive and transmit fixed wireless signals

The OTARD Rule applies to most **state and local laws and landlord or community association rules** that contain antenna restrictions that:

- Unreasonably delay or prevent installation, maintenance or use
- Unreasonably increase the cost of installation, maintenance or use
- Preclude a person from receiving or transmitting an acceptable quality signal from an antenna covered under the Rule

A consumer’s use of a covered dish antenna is **protected** by the OTARD Rule if:

- Placement of a dish is in the resident’s (owner or renter) *exclusive use area*, such as a balcony, deck, garden, yard or patio
- Placement of a dish is *wholly* within the user’s exclusive use area

State and local laws and landlord and community association rules generally **CANNOT**:

- Require prior approval or a permit
- Require any type of permit or prior approval fee

State and local laws and landlord and community association rules generally **MAY**:

- Ban the use of a dish in a common area or if any part of the dish protrudes or hangs into a common area, such as a walkway or garden, outdoor siding, windowsill, etc.
- Suggest a location for the dish as long as there is the ability for exceptions if an acceptable quality signal cannot be received in the preferred location
- Indicate a preference for camouflaging the dish (i.e. painting or shrubbery shield), as long as the requirement would not unreasonably delay installation or unreasonably increase the cost of installation, maintenance or use

## SEQRA, ZONING REGULATION AND THE NORTH ELBA WAL-MART DECISION

Wal-Mart Stores, Inc. applied for a conditional use permit and site plan approval from the Town of North Elba to construct a store in the Adirondacks just outside the resort village of Lake Placid in a Scenic Preservation Overlay District with views of Whiteface Mountain. The Town's Planning Board denied the permits and Wal-Mart challenged the decision. The court held that a municipality may use the potential adverse economic and community-character impacts of a proposed "big-box" development on existing, small retail businesses as bases for the denials. A town's conditional (special) use permit regulation, however, must contain properly-worded explicit standards. In addition, the potential negative economic impact of the "big-box store" on smaller retail businesses and the visual, aesthetic, community-character and other socio-economic impacts must be explained in the State Environmental Quality Review Act (SEQRA) documents, local resolutions and findings.

The North Elba Planning Board had adopted a final environmental impact statement (EIS) that addressed the project's potential visual impact on scenic values and its effects on the community's general character and ambience. The EIS also analyzed secondary growth effects from increased competition and potential store closings on the adjacent Town and nearby Lake Placid Village areas. The SEQRA findings noted these significant adverse socio-economic and community character impacts.

The court also found, however, [h]ere, it must be borne in mind that respondent concluded not only that the proposal did not meet the requirements of SEQRA, but also that it did not satisfy the relevant criteria set forth in the Town Land Use Code, including two of the three specific conditions for obtaining a conditional use permit (namely, those providing that a permit will only be granted if the proposed use "will not have a materially adverse impact upon adjoining and nearby properties," and "will not result in a clearly adverse aesthetic impact"). Additionally, respondent found that several "general development considerations," which it was constrained to evaluate and which have as their aim the avoidance of "any undue adverse impact on the natural, physical, social and economic resources of the Town," were not met. In making these findings, respondent was entitled to consider factors outside the scope of the environmental review mandated by SEQRA, insofar as they bear on matters legitimately within the purview of the Town Land Use Code.

The decision underscores that a municipality should conduct comprehensive planning and

- identify areas requiring special visual, aesthetic, community character and socio-economic protection;
- include specific standards for review in the zoning code;
- develop a strong record;
- derive conclusions from a thorough analysis of the impacts on the affected community; and
- articulate the reasons for denials.

It is important to remember, however, that permit denials based upon generalized opposition or sentiment unsupported by the written record are not likely to be upheld by the court.

***Excerpt from an article entitled: Store Size Cap - North Elba, NY, published by The New Rules Project of the Institute for Local Self-Reliance on the New Rules website: <http://www.newrules.org>***

Residents of North Elba, New York spent five years trying to stop Wal-Mart from erecting an 80,000-square-foot store within their town. The town's planning board rejected the retailer's plans in January 1996, citing several reasons including the fact that "the project will likely result in a large amount of impacted retail space (83,000 to 114,000 square feet), which could take up to 14 years to refill, over 20,000 square feet of which could become chronically vacant. These potential impacts would have a significant unmitigatable adverse impact on the character and culture of the community by resulting in vacant storefronts, a loss of 'critical mass' in existing downtown areas, and an adverse psychological, visual and economic climate."

The planning board was sued by Wal-Mart, which claimed its decision was unsubstantiated, arbitrary and capricious. Wal-Mart argued that the rejection of its proposal was based on impermissible considerations, including the economic impact of the development. A New York appellate court upheld the planning board, finding that although its decision "refers to the economic effect the proposed store would be expected to have upon other local businesses, it does so in the context of assessing the probability and extent of the change it would work upon the overall character of the community, as a result of an increased vacancy rate among commercial properties in the downtown area---an entirely proper avenue of inquiry. . ."

The ordeal prompted the community to enact a size cap ordinance limiting single retail stores to 40,000 square feet and capping shopping centers at 68,000 square feet.

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Enacted in February 1998, North Elba's retail size cap was part of a larger law that amended various parts of the Town Land Use Code. The relevant portion is excerpted here.

**Section 12.** Part V Section 17 (D) of said local law is hereby amended by adding a new subparagraph (22), to read as follows:

(22) Retail Trade Uses; Grouped Retail Business Uses.

A. An individual Retail Trade use shall not exceed 40,000 square feet of floor area, whether in one building or more than one building.

B. A Grouped Retail Business Use shall not exceed a total of 68,000 square feet of floor area, in all buildings which constitute the use.

C. For the purpose of the size limits set forth in clauses A and B, floor area shall include floor area or floor space of any sort within a building as well as exterior space used for sale or storage of merchandise.

New York

## RESTRICTIONS ON ELECTION SIGNS

Some local governments have attempted to deal with the clutter of election campaign signs by limiting the period in which they may be posted. Typical local regulations specify a period after an election by which such signs must be removed. Some local regulations also limit the posting of such signs to a specified period before a primary or election or the number of such signs that may be posted.

If challenged, such local regulations are likely to be struck down by the courts as an unlawful interference with the right of free expression as guaranteed by the First Amendment to the United States Constitution. The main flaw in a local law or ordinance that applies specifically to election signs is that it imposes restrictions based on the content or message. Local legislation that regulates signs must be content neutral, meaning it must apply equally to all signs, regardless of message. While local governments have greater leeway in regulating commercial signs, restrictions on noncommercial signs, including those that support a candidate, must be limited to time, place and manner of posting, and must adhere to the following criteria:

1. The regulations must be justified without reference to the content of the signs subject to the law (i.e., content neutral);
2. The regulations must be narrowly tailored to serve a significant governmental interest; and
3. The regulations must leave open ample alternative channels for communication of the information.

*Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293, 82 L.Ed.2d 221, 227, 104 S.Ct. 3065 (1984).

Applying well established principles of constitutional law, a federal appeals court decided in 1995 that provisions of the municipal sign code of a town in Missouri that specifically regulated political signs were content-based and, therefore, unconstitutional as impermissible restraints on free speech. *Whitton v. City of Gladstone*, Missouri, 54 F.3d 1400 (8th Cir. 1995). The section of the code that limited the time in which political signs may be posted was found to be both content based and constitutionally suspect by granting certain forms of commercial speech a greater degree of protection than noncommercial political speech. For example, the limitations did not apply to "for sale" signs, that fall into the category of "commercial speech."

The justification for the time limitations was to curtail traffic dangers which political signs may pose and to promote esthetic beauty, but the regulation did not apply the restrictions to identical signs displaying nonpolitical messages. Thus, the regulation "differentiated between speakers for reasons unrelated to the legitimate interests that prompted the regulation." 54 F.3d at 1407, quoting *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir.), cert. denied, 515 U.S. 1103, 115 S.Ct. 2247, 132 L.Ed.2d 255 (1995). The Court in this case applied similar reasoning in striking down provisions of the sign code that prohibited external illumination of political signs and made candidates responsible for violations involving their political signs, including failure to remove within time limits specified in the code.

However, local legislation that prohibited the posting of all signs on public property has been upheld by the courts. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808, 80 L.Ed.2d 772, 104 S.Ct. 2118 (1984). Thus, a provision of the zoning code of the Town of Orangetown, New York that prohibited the posting of signs on public property without a permit from the Town Board was upheld as constitutional, even when it was used to prohibit the posting of political signs along public streets. *Abel v. Town of Orangetown*, 724 F.Supp. 232 (S.D. N.Y., 1989). The result would likely have been different if the law only prohibited the posting of political signs.

Local legislation that specifically targets political signs for removal within a specific time period, or that specifically prohibits the posting of campaign signs on public property, is likely to be struck down if challenged in court as an illegal restriction on the constitutional guarantee of freedom of expression.

For additional information on local regulation of signs, please refer to our publication, ***Municipal Control of Signs***, which is part of the NYS Department of State James A. Coon Local Government Technical Series available on the DOS website: <http://www.dos.state.ny.us/lqss/pdfs/municipalcontrolofsigns.pdf>

## MUNICIPAL REGULATION OF ADULT USES

### Constitutional Background

Municipal zoning regulation of adult business may be locally popular, but it raises serious constitutional issues when the regulation is directed at free expression protected by the federal and state Constitutions. Non-obscene expression, whether in the form of sexually explicit books, magazines, movies, or dancing, has traditionally been found to be entitled to such constitutional protection. When municipal regulations impinge on an adult business's freedom of expression, they lose the presumption of constitutionality that normally applies to zoning regulations, and the burden shifts to local governments to justify the restrictions.

In order to avoid constitutional problems, zoning regulations pertaining to adult uses must be drafted with skill and precision. Prior to adopting such zoning, a local government must usually show that it conducted or relied upon planning studies evidencing the need to protect neighborhoods from the harmful secondary effects of adult businesses. Some studies have identified such adverse secondary effects as urban blight, decreased retail shopping activity and reduced property values. However, courts will strike down regulations that seek to exclude all adult uses through an outright ban. Therefore, adult uses may be restricted (even substantially) within a community through zoning regulations, but may not be entirely prohibited.

Municipalities drafting adult use zoning legislation typically choose between two zoning techniques, which either: 1) concentrate adult uses in a single geographic area of the locality or 2) disperse adult uses using distance requirements. By concentrating adult uses in a specific area of the community, some municipalities believe these uses will affect fewer neighborhoods and can be avoided by persons who are offended by them. Other municipalities have taken the opposite approach and require that sexually oriented uses be separated from one another or from residential areas. By preventing a concentration of these uses, a municipality may attempt to avoid a "skid-row" effect.

In City of Renton v Playtime Theaters, 475 US 41, 89 L Ed 2d 29, 106 S Ct 925 (1986), the United States Supreme Court a four (4) part test for determining when it is permissible to use zoning to single out adult uses without violating the First Amendment of the US Constitution. In determining the constitutional validity of a zoning regulation, courts must consider whether:

1. The predominant purpose of zoning is to suppress the sexually explicit speech itself, or rather, to eliminate the "secondary effects" of adult uses;
2. The zoning regulation furthers a substantial governmental interest;
3. The zoning regulation is "narrowly tailored" to affect only those uses which produced the unwanted secondary effects; and
4. The zoning regulation leaves open reasonable alternative locations for adult uses.

This paper will focus on two New York Court of Appeals cases - *Stringfellows I* and *II* - which applied the federal constitutional test in *Renton* and delineated rules for cases relying on Article 1, Section 8 of the New York State Constitution<sup>1</sup>, the free speech provision.

### The New York City cases

In 1993, the New York City Division of City Planning conducted an "Adult Entertainment Study" to determine the nature and the impact that adult businesses had in the City. In addition, the City examined similar studies conducted in nine other localities. The City study concluded that, in the areas where they are concentrated, the presence of adult businesses tends to produce negative secondary effects such as increased crime, decreased property values, and reduced shopping and commercial activities.

In October 1995, in response to this study, the New York City Council amended its zoning regulations to place restrictions on the location and size of adult businesses. The zoning amendments were intended to break the concentration of adult businesses in certain neighborhoods by dispersing them.

The New York City zoning amendment applies to various types of "adult establishments" including adult bookstores, adult theaters, adult restaurants, and other adult commercial establishments. The definition of what is an "adult" business is keyed to the character of the activity that takes place in such establishments. If the business regularly features movies, photographs, or



live performances that emphasize "specified anatomical areas" or "specified sexual activities" and excludes minors by reason of age, it is considered "adult" and therefore covered by the zoning restrictions.

The New York City zoning amendment does not ban adult establishments outright. Rather, it limits the permissible zones or districts in New York City where they may operate, and terminates those businesses that are not located in those permitted districts. Adult uses are only allowed in a number of commercial and manufacturing districts. The zoning amendment specifically requires that, where permitted, adult establishments: (1) must be located at least 500 feet from a school, house of worship, day care center, or residential district; (2) must be located at least 500 feet from any other adult establishment; (3) must be limited to one establishment per zoning lot; and (4) must not exceed 10,000 square feet of floor space. By confining them to industrial and commercial districts and separating them within those districts, New York City used both concentration and distance requirements to control adult uses.

Any adult establishment operating in a zoning district where adult uses are prohibited must either conform to the new zoning or terminate its business within one year of the amendment's effective date. Narrow exceptions exist to this termination requirement for existing businesses which are not in compliance. Also, adult establishments faced with the one-year termination deadline may apply for an extension to the Board of Standards and Appeals, which may permit the applicant to remain open for a limited time to amortize any substantial and unrecovered costs associated with the adult portion of the establishment.

In the case of Stringfellow's of New York, Ltd., v City of New York ("Stringfellows I"), 91 N.Y.2d 382 (1998), Several adult businesses and their patrons brought three actions, consolidated by the lower court, challenging the NYC zoning regulation pertaining to adult establishments. They contended that since the NYC zoning amendment defines adult establishments as those allowing the exhibition of "specified anatomical areas" or "sexual activities," it is a content-based regulation that unlawfully suppresses expression. They claimed it was presumptively invalid under Article 1, Section 8 of the New York State Constitution.

The New York State Court of Appeals disagreed. While recognizing that municipalities possess considerable authority to enact zoning to improve the quality of their residents' lives, the Court noted that zoning authority is not unfettered. Zoning regulations that aim to curb "adult" uses implicate speech or conduct that is protected by Article I, Section 8 of the New York State Constitution. Consequently, in weighing the validity of such zoning regulations, courts must consider the constitutional values of free expression.

The Court developed a hybrid test, using state and federal constitutional standards, for determining whether zoning regulations are valid under Article 1, Section 8 of the New York State Constitution.

1. The zoning regulation must be justified by concerns unrelated to speech;
2. It must be "no broader than necessary" to achieve its purpose and
3. It must provide alternative locations for adult use businesses.

When existing adult businesses are rendered non-conforming by subsequent zoning amendments and directed to terminate operations, courts must additionally consider whether the amortization provisions allow for reasonable recoupment of the investment in the business.

#### 1. The Zoning Regulation's Purpose Is Unrelated to Speech

As a threshold issue, the Court focused on whether the City's zoning amendments were purposefully directed at controlling the content of the message conveyed through adult businesses or were instead aimed at an entirely separate societal goal. The federal constitutional analysis requires examination of the ordinance's "predominant purpose," while the State constitutional inquiry focuses on whether there has been "a purposeful attempt to regulate speech." The difference in language between the federal and state tests, however, did not significantly affect the outcome, since it was apparent from the legislative history that eliminating the negative secondary effects of adult uses was the City's goal.

Before enacting the zoning amendment, the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City. The Court found that New York City properly relied on studies from other jurisdictions:

"While none of the other studies considers a municipality which duplicates New York City in terms of variety of neighborhoods and built conditions, \* \* \* the findings of adverse secondary effects and the conditions found in these other studies are relevant to the different neighborhoods of New York City."

In view of the legislative record upon which the City Council rested its decision to regulate adult uses, enactment of the zoning amendment was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose.

As to the content of the City's regulation, the Court said:

"Nor is it significant that definitions of adult uses in the Amended Zoning Resolution are based in part on the content of the entertainment offered rather than exclusively on the age of the businesses' clientele (cf., *Town of Islip v Caviglia*, supra, at 557). *The test under both Islip and Renton is not whether the regulated establishments are defined without reference to content but whether the ordinance's goal is unrelated to suppressing that content.* That test is plainly met here." (Emphasis added.)

## 2. The Zoning Amendment Is No Broader Than Necessary

The Court next held that the City's zoning amendment represents a coherent regulatory scheme narrowly designed to attack the problems associated with adult establishments. The zoning amendment must set forth explicit standards for those who apply them to preclude arbitrary and discriminatory application. The amended zoning must affect only the category of uses that produce the unwanted negative effects. By preventing adult businesses from locating in residential districts while allowing such establishments to locate in manufacturing and commercial districts, the Court found the amendment protects only those communities and community institutions that are most vulnerable to their adverse impacts. Municipalities may constitutionally bar adult establishments from, or within, a specified distance of residentially-zoned areas and facilities in which families and children congregate. Moreover, zoning regulations may be used to prohibit an adult business from operating within a specified distance of another in order to avoid the undesirable impacts associated with concentration of such uses.

## 3. Reasonable Alternative Avenues of Communication

To further satisfy constitutional requirements, the City needed to assure reasonable alternative avenues of communication. In particular, there must be (1) ample space available for adult uses after the rezoning and (2) no showing by the challenger that enforcement of the ordinance will either substantially reduce the total number of adult outlets or significantly reduce the accessibility of those outlets to their potential patrons.

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the likelihood of their ever realistically becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise."

In the case of New York City, the zoning amendment's enforcement will lead to the forced relocation of some 84% of the City's 177 adult businesses. Given the extent of the dislocation, it was incumbent upon the City to demonstrate that sufficient alternative sites were available. The City asserted that the space available for adult uses constituted over 11% of the City's total land area and about 4% when reduced by land encumbered by properties that are unlikely to be developed for commercial use. City officials asserted that the amended zoning code leaves at least 500 potential sites available for adult use relocation. All of the area in Manhattan zoned for adult use and at least 80% of the land area in the other boroughs is within a 10-minute walk from a subway line or a major bus route. The Court concluded that the City satisfied its burden of showing that the space zoned for adult uses is adequate to accommodate the 177 existing adult businesses.

In their response, the adult businesses failed to make concrete allegations as to precisely how many of the 500 potential receptor sites identified by the City were unavailable. The criticisms raised by the adult businesses about various individual sites did not provide an adequate counter to the City's supported claim that, as a whole, there are more than enough receptor sites to accommodate the existing adult entertainment industry. Any future challenge to a similar zoning plan would need to analyze, with particularity and specificity, the sufficiency of alternative locations zoned for adult businesses.

#### 4. Termination and Amortization

Finally, the Court rejected the claim that enforcement of the zoning amendment would lead to an unconstitutional taking because substantial investments in the businesses would be lost if they are required to relocate. The Court said that no taking claim existed because the zoning amendments provide for hardship extensions. Under these provisions, a nonconforming adult establishment may apply to the Board of Standards and Appeals for permission to continue to operate beyond the one-year amortization period set forth in the statute where it can show that it has made substantial expenditures related to the adult use, that such expenditures cannot be recouped within a year and that the requested extension is the minimum period necessary to permit such recoupment.

#### **Stringfellows II**

Some adult businesses have tried some novel approaches to avoid having to comply with New York City's adult zoning restrictions. In a case that generated a good deal of publicity, City of New York v. Stringfellow's of New York, and Ten's World-Class Cabaret ("Stringfellows II"), 96 N.Y.2d 51 (2001), the Court of Appeals held that topless entertainment club could not admit minors to avoid being defined as an adult business under the New York City zoning regulations.

Under the City's zoning, a business is considered "adult" if it regularly features movies, photographs, or live performances that emphasize "specified anatomical areas" or "specified sexual activities" and is not customarily open to the general public during such features because *it excludes minors by reason of age*. In order to circumvent the City's zoning law, Ten Cabaret instituted a policy of *admitting children*, accompanied by a parent, if both sign statements that the child will not smoke or drink alcoholic beverages and will not be harmed by seeing "exposed female breasts." By allowing children onto its premises, Tens argued it was not an "adult" business.

Supreme Court Justice Crane agreed and ruled that Ten's adult cabaret was not subject to the City's zoning law since it did not exclude minors by reason of age<sup>2</sup>. The Appellate Division reversed Justice Crane<sup>3</sup> and the Court of Appeals affirmed. The Court ruled that Ten's was attempting to make "an end run" around the City zoning law. It said that the letter of a statute will not be slavishly followed when it leads away from the true intent and purpose of the legislation and statutes are not to be read with literalness that destroys meaning, intention, purpose or beneficial end for which the statute has been designed. As a matter of policy, it certainly is highly inappropriate to encourage adult businesses to allow minors to enter their establishment, simply to circumvent the Zoning.

#### Conclusion

In conclusion, the Court of Appeals held that New York City's effort to address the negative secondary effects of adult establishments is not constitutionally objectionable under any of the applicable federal or state constitutional standards. The *Stringfellows* decisions are an important adult use case for claims brought under the New York State Constitution.

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#### Footnotes

1. Article 1, Section 8 of the New York State Constitution provides in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."
2. *City of New York v. Stringfellow's of New York*, 11/10/98 N.Y.L.J. 26 (col. 1)
3. 253 A.D.2d 110 (1st Dept. 1999). The matter was remanded to Justice Crane, who subsequently granted the City of New York partial summary judgment on the issue of whether defendant's cabaret falls within the definition of adult eating or drinking establishment contained in New York City Zoning Resolution. On appeal, the Appellate Division affirmed. 268 AD2d 216.

## Environmental Conservation Law

### Article 23

#### Title 27- NEW YORK STATE MINED LAND RECLAMATION LAW

##### § 23-2711. Permits.

1. After September first, nineteen hundred ninety-one, any person who mines or proposes to mine from each mine site more than one thousand tons or seven hundred fifty cubic yards, whichever is less, of minerals from the earth within twelve successive calendar months or who mines or proposes to mine over one hundred cubic yards of minerals from or adjacent to any body of water not subject to the jurisdiction of article fifteen of this chapter or to the public lands law shall not engage in such mining unless a permit for such mining operation has been obtained from the department. A separate permit shall be obtained for each mine site.

2. Applications for permits may be submitted for annual terms not to exceed five years. A complete application for a new mining permit shall contain the following:

- (a) completed application forms;
- (b) a mined land-use plan;
- (c) a statement by the applicant that mining is not prohibited at that location; and
- (d) such additional information as the department may require.

3. Upon receipt of a complete application for a mining permit, for a property not previously permitted pursuant to this title, a notice shall be sent by the department, by certified mail, to the chief administrative officer of the political subdivision in which the proposed mine is to be located (hereafter, "local government"). Such notice will be accompanied by copies of all documents which comprise the complete application and shall state whether the application is a major project or a minor project as described in article seventy of this chapter.

(a) The chief administrative officer may make a determination, and notify the department and applicant, in regard to:

- (i) appropriate setbacks from property boundaries or public thoroughfare rights-of-way,
- (ii) manmade or natural barriers designed to restrict access if needed, and, if affirmative, the type, length, height and location thereof,
- (iii) the control of dust,
- (iv) hours of operation, and
- (v) whether mining is prohibited at that location.

Any determination made by a local government hereunder shall be accompanied by supporting documentation justifying the particular determinations on an individual basis. The chief administrative officer must provide any determinations, notices and supporting documents according to the following schedule:

- (i) within thirty days after receipt for a major project,
- (ii) within thirty days after receipt for a minor project.

(b) If the department finds that the determinations made by the local government pursuant to paragraph (a) of this subdivision are reasonable and necessary, the department shall incorporate these into the permit, if one is issued. If the department does not agree that the determinations are justifiable, then the department shall provide a written statement to the local government and the applicant, as to the reason or reasons why the whole or a part of any of the determinations was not incorporated.

(c) A proposed mine of five acres or greater total acreage, regardless of length of the mining period, shall be a major project. The department shall, by regulation, provide a minimum thirty day public comment period on all permit applications for mined land reclamation permits classified as major projects.

4. Upon approval of the application by the department and receipt of financial security as provided in section 23-2715 of this title, a permit shall be issued by the department. Upon issuance of a permit by the department, the department shall forward a copy thereof by certified mail, to the chief executive officer of the county, town, village, or city in which the mining operation is located. The department may include in permits such conditions as may be required to achieve the purposes of this title.

5. A permit issued pursuant to this title or a certified copy thereof, must be publicly displayed by the permittee at the mine and must at all times be visible, legible, and protected from the elements.

6. The department may suspend or revoke a permit to mine for repeated or willful violation of any of the terms of the permit or provisions of this title or for repeated or willful deviation from those descriptions contained in the mined land-use plan. The department may refuse to renew a permit upon a finding that the permittee is in repeated or willful violation of any of the terms of the permit, this title or any rule, regulation, standard, or condition promulgated thereto.

7. Nothing in this title shall be construed as exempting any person from the provisions of any other law or regulation not otherwise superseded by this title.

8. Notwithstanding any other provision of law, counties, cities, towns and villages shall be exempted from the fees for the permit, application, amendment and renewal required by this article.

9. Counties, cities, towns and villages shall not be required to obtain a permit if such county, city, town or village mines or proposes to mine from any mine site less than one thousand tons or seven hundred fifty cubic yards, whichever is less, of minerals from the earth within twelve successive calendar months and which does not require a permit pursuant to title five of article fifteen of this chapter.

10. The applicant, permittee or, in the event no application has been made or permit issued, the person engaged in mining shall have the primary obligation to comply with the provisions of this title as well as the conditions of any permit issued thereunder.

11. Permits issued pursuant to this title shall be renewable. A complete application for renewal shall contain the following:

- (a) completed application forms;
- (b) an updated mining plan map consistent with paragraph (a) of subdivision one of section 23-2713 of this title and including an identification of the area to be mined during the proposed permit term; (c) a description of any changes to the mined land-use plan; and
- (d) an identification of reclamation accomplished during the existing permit term.

12. The procedure for transfer of a permit issued pursuant to this title is the procedure for permit modification pursuant to article seventy of this chapter.

12-a. (a) Notwithstanding any provision of this section to the contrary, any person who engages in or proposes to engage in bluestone mining exploration shall not commence such exploration unless a written authorization for such exploration has been obtained from the department. The department may grant an

authorization for bluestone mining exploration for a period of at least one hundred eighty days and not to exceed one year where the land affected by mining will not exceed one acre, and is not adjacent to any body of water. Bluestone to be removed from the site may not exceed five hundred tons in twelve successive calendar months and any overburden shall remain on the one acre site at all times. As used in this subdivision, the term "bluestone" means quartz/feldspathic sandstone of Devonian age, which is easily separated along bedding planes.

(b) Only persons with five or fewer employees shall be eligible to apply for an authorization for bluestone mining exploration, provided, however that a small business shall be eligible to apply on behalf of such a person. A person may possess no more than five authorizations for bluestone mining exploration at any one time, and no such authorizations shall be for adjacent sites. As used in this paragraph, "small business" means any business which is resident in this state, independently owned and operated, not dominant in its field, and employing not more than one hundred individuals.

(c) An application for authorization must be submitted on a form prescribed by the department at least forty-five days before exploration and removal of bluestone is expected to commence. The requirements of such application shall include, but not be limited to, a description of the proposed activity, a map showing the area to be affected by mining, with the location of the one acre site on which mining activities are proposed and a statement that such mining activities conform with local zoning, copies of any local permits, and measures to control erosion of sediment and prevent contamination of groundwater or adverse impacts to aquifers. Upon receipt of a complete application for bluestone mining exploration authorization, for a property not previously authorized pursuant to this subdivision, a notice shall be sent by the department, by certified mail, to the chief administrative officer of the political subdivision in which the proposed bluestone mine is to be located. Such notice shall be accompanied by copies of all documents which comprise the complete application. The chief administrative officer may make a determination within thirty days after receipt accompanied by supporting documentation justifying the particular determinations on an individual basis pursuant to subparagraphs (i), (ii), (iii), (iv) and (v) of paragraph a of subdivision three of this section.

(d) An authorization for bluestone mining exploration issued pursuant to this subdivision must be publicly displayed by the holder at the one acre site and must at all times be visible, legible and protected from the elements.

(e) The person engaged in bluestone mining exploration shall complete reclamation, in accordance with requirements set forth by the department, no later than one year from the date of authorization by the department unless the person engaged in mining obtains a renewal of the authorization or a permit pursuant to this title. An authorization issued pursuant to this section may be renewed for an additional one year term upon application to the department at least thirty days prior to the expiration of the authorization. The total authorization period shall not exceed two years. Before the department may issue a bluestone mining exploration authorization, the applicant shall furnish acceptable financial security. Department review of acceptable financial security shall be governed by the provisions set forth in section 23-2715 of this title and the regulations promulgated pursuant to such section. There shall be no fee for such authorization.

(f) On or before March fifteenth, two thousand eight, the department shall submit a report to the governor and legislature regarding bluestone mining exploration in the state. Such report shall list the sites, including locations of sites, and detrimental environmental impacts, if any, an assessment as to the degree to which the adoption of this subdivision benefits the environment, as well as an assessment of the enforcement activities undertaken against individuals authorized pursuant to this subdivision.

13. The rules and regulations adopted by the department to implement this title and the provisions of article seventy and rules and regulations adopted thereunder shall govern permit applications, renewals, modifications, suspensions and revocations under this title.

**Guideline for Review of Local Laws Affecting Farm Operations Which Produce, Prepare and Market Crops for Wine, Beer, Cider and Distilled Spirits**

The following Agriculture and Markets Law (AML) provisions are relevant when evaluating whether farms which produce, prepare and market crops for wine, beer, cider and distilled spirits are protected as a "farm operation" for purposes of AML §305-a<sup>1</sup> :

AML §301(11) "farm operation" – "...means the land and on-farm buildings, equipment,... and practices which contribute to the **production, preparation and marketing of crops, livestock and livestock products** as a commercial enterprise. ... Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other." (emphasis added)

Definition of "**crops, livestock and livestock products**" as contained in AML §301(2) (a) includes, but is not limited to "...corn, wheat, oats, rye, barley..." and [hops] and §301(2) (b) "[f]ruits," including "...apples, peaches, grapes, cherries and berries."

The on-farm "**production, preparation and marketing**" [AML §301(11)] of grains, grapes and other fruits are considered part of a farm operation. The Department considers agricultural commodities produced "on-farm" to include any products that may have been produced by a farmer on his or her "farm operation," which could include a number of parcels owned or leased by that farmer throughout a town, county, or the State.

The Department considers the processing, distillation, brewing and fermentation activity and the on-farm buildings and equipment which are needed to produce, store, distill, brew and/or ferment grains, grapes or other fruits as part of the farm operation to the extent that the distilled or brewed product, cider and/or wine that is prepared is composed predominantly of grain, hops, grapes or other fruits produced on the farm.<sup>2,3</sup> In addition, the on-farm marketing of distilled and brewed products, cider and wine, when the distilled and brewed products, cider and wine is composed predominantly of on-farm produced grain, hops, grapes or other fruits, is part of the farm operation.

On-farm marketing of distilled, brewed, cider and wine-related products (e.g., food products such as cheese, pies and ice cream made with wine or on-farm produced fruit, as well as products used for transport, preparation and consumption of distilled or brewed products, cider or wine, such as shot glasses, cork screws, chillers and wine/beer/cider glasses) is also

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<sup>1</sup> Please see the Department's *Guideline for Review of Local Laws Affecting Preparation and Marketing Activities by Start-Up Farm Operations* for information about how the Department evaluates start-up farms that use their crops for the production and sale of beverages and other value-added products.

<sup>2</sup> Distilled or brewed products, cider and wine must be composed of 51% or more on-farm produced grains, hops, grapes or other fruits (if grapes or fruits are imported as whole fruit, then gross weight of the on-farm produced grapes/fruit must be at least 51% of the finished wine; if juice is imported, then the gross volume of juice from on-farm produced grapes/fruit must be at least 51% of the finished wine).

<sup>3</sup> While the Department sets standards for protection of "farm operations," the Alcoholic Beverage Control Law (ABC Law) provides the standards which must be met for farm brewery, cidery, winery and distillery licenses. Licensees must comply with the ABC Law standards to qualify for their licenses. While a license issued by the State Liquor Authority may allow for the sale of alcoholic beverages which are not made from crops grown by the farm, the Department does not consider such beverages to be part of a farm operation. Therefore, the production and sale of such beverages would not be protected under AML §305-a.

part of the farm operation when the amount of annual sales of such products is consistent with the size and scope of the farm operation and is incidental to the annual sales of the farm's distilled or brewed products or wine. **Farm operations must keep sufficient records to prove that these requirements are met.** The needs of "start-up" farm operations should also be considered. These farms often start out selling distilled or brewed products, cider and/or wine which is composed entirely, or primarily, of grain, hops, grapes/fruit grown off the farm in order to develop a customer base and maintain income while their crop (such as hops or grains) or vines/fruit trees are growing. These farms should be allowed a reasonable period of time to meet the predominance standard.<sup>4</sup>

#### **MARKETING ACTIVITIES (e.g., WEDDING RECEPTIONS, PARTIES and SPECIAL EVENTS)**

The Department has concluded that on-farm wedding receptions, parties and special events (e.g., harvest festivals or distillery, brewery, cidery and wine tastings), including charitable events, held at farms which market their crops as wine, beer, cider and distilled spirits, help market the farm operation's product. These activities are evaluated on a case-by-case basis to determine whether they are protected as part of the farm operation. The Department interprets AML §301(11) to include such receptions, parties and special events held on-farm as part of a farm operation under certain conditions. The events, whether public or private, must be: 1) directly related to the sale and promotion of the beverage produced at the farm (from at least 51% on-farm produced grain, hops, grapes/fruit/juice); 2) incidental and subordinate to the retail sale of the beverage on-site; 3) hosted by the farm or customers of the farm (not outside, unrelated parties); and 4) feature the beverage produced at the farm (from at least 51% on-farm produced grain, hops, grapes/fruit/juice).

The Department considers events to be "incidental" only when the gross annual sales from the non-beverage portion of event sales (including any facility rental/vendor fees, admission fees, catering charges, sales of other alcoholic beverages, etc.) does not exceed 30% of total gross sales from the retail sale on-site of the beverage produced at the farm (from at least 51% on-farm produced grain, hops, grapes/fruit/juice) at such events, plus the retail sale of any other crops, livestock or products or beverage-related food products (produced on the farm) that may be sold at such events.<sup>5</sup> All products must be sold at a cost no higher than the current retail price of such products sold at the farm. **Farm operations must keep sufficient records to prove that this requirement is met. Further, local governments can require the farm to submit an annual report to the locality showing that these conditions have been met.**

In cases where the farm operation holds a special event as part of its overall marketing strategy, the event is open to the general public, and no admission, facility rental or vendor fees

<sup>4</sup> Please see the Department's *Guideline for Review of Local Laws Affecting Preparation and Marketing Activities by Start-Up Farm Operations* for the Department's view of reasonable time frames for various crops.

<sup>5</sup> When farm event customers arrange for their own catering, alcoholic beverage service, etc., and the farm does not charge for such items, these costs would not, of course, be counted as gross sales to the farm. Admission fees or minimum donations which are donated to a charity are also not subject to this condition. Further, the fact that admission fees or all, or a portion of, sales from the event are donated to a charity does not mean that the primary purpose is not to market the farm's distilled or brewed products, cider or wine. The Department evaluates all AML §305-a matters on a case-by-case basis. Therefore, if necessary, the Department would examine the specific event(s) to determine whether it is part of the farm operation.



are involved, an evaluation of fees versus sales of the farm's distilled or brewed products, cider and/or wine and wine-related food products would be unnecessary.

In all cases where on-farm wedding receptions, parties and special events are offered, the primary purpose of the events must be to market the farm's distilled or brewed products, cider and/or wines and the events must be sufficiently related to the farm operation. The Department examines the specific activities/events to determine whether they are part of the farm operation. In addition, these activities are subject to any State or federal requirements applicable to the processing, storage and sale of alcoholic products.

Information concerning the marketing of product grown and produced on the farm may be obtained from the *Guideline for Review of Local Laws Affecting Direct Farm Marketing Activities* (<http://www.agriculture.ny.gov/AP/agservices/guidancedocuments/305-aFarmMarket.pdf>).

CAN THE TYPES OF MARKETING ACTIVITIES CONDUCTED BY A FARM BE LIMITED?  
CAN THE NUMBER AND SIZE OF RECEPTIONS, PARTIES AND SPECIAL EVENTS BE LIMITED?

The types, size and scope of marketing activities that a farm growing crops for beverage production needs varies depending upon the amount of crops that the farm grows and uses for its beverage products and how the farm wishes to market its crops. Farms may market their beverages through a variety of methods: tastings, food pairings, beverage-themed dinners, wedding receptions, parties, fundraisers, etc. The Department considers these practices as part of the farm operation as long as the farm produces enough of its own crops or livestock to substantiate the need for these types of marketing tools. For example, a start-up farm that only grows a minimal amount of crops (and consequently a limited amount of beverages) would not require the same marketing tools as a larger, established farm.

The Department evaluates whether local restrictions, such as limits on the number and size of special events, are unreasonably restrictive of a farm operation. Therefore, a farm that has a limited amount of crop-based beverages to sell, 1,000 gallons of wine for example, would not need multiple, large-scale events to market such beverages. The size and number of events can be limited each year, based upon the previous year's production.

CONDITIONS TO ENSURE THAT THE PRIMARY PURPOSE OF RECEPTIONS, PARTIES AND SPECIAL EVENTS IS TO MARKET FARM'S DISTILLED OR BREWED PRODUCTS, CIDER AND/OR WINES; AND TO ENSURE THAT THE EVENTS ARE SUFFICIENTLY RELATED TO THE FARM OPERATION

In addition to the conditions discussed on page 2:

- The farm's distilled or brewed products, cider and/or wines must be prominently featured at all locations in which the event is conducted on the site. Marketing materials (e.g., brochures, pamphlets, presentations, photos, branded items, etc.) must be prominently displayed; and the farm's distilled or brewed products, cider and/or wines must be available for purchase at all locations and for the duration of the event.
- Any person serving the farm's distilled or brewed products, cider and/or wines must be thoroughly familiar with the farm and the products being served (not just a bartender); and the farm can only charge the customer for this service to the extent allowed by the ABC Law.

## LOCAL PERMITS AND APPROVALS FOR MARKETING ACTIVITIES

In regulating these activities, local governments may require farm landowners that hold such events to undergo an expedited site plan review process and/or obtain an event permit from the regulating municipality. The Department discusses an expedited site plan review process in its *Guideline for the Review of Local Zoning and Planning Laws* (<http://www.agriculture.ny.gov/AP/agsservices/guidancedocuments/305-aZoningGuidelines.pdf>). If the municipality requires the farm landowner to obtain an event permit, the permit should be issued on an expedited basis and not be excessively costly to obtain. For example, an event permit application meeting these standards might request information on such things as the date(s) of the event, type of event being held, the anticipated number of people in attendance, parking, whether catered food or food prepared on-site, the fee charged to rent the facility or the cost of admission and a description of the buildings to be used during the event. The permit could also make provisions for any inspections that must be made by the Code Enforcement Officer/Building Inspector, Fire Marshall and/or Health Department, and other reasonable requirements that may be pertinent to the holding of such events.

While special use permits should not generally be required for a farm that markets through a limited number of small scale events; farms which market their crop-based beverages through multiple, large-scale events on a regular basis could be required to obtain a special use permit. The Department supports such an approach, in certain cases, when the permit process is streamlined, since it allows local governments to comprehensively address specific facts and circumstances presented by the farm's events. If a farm claims that the process to obtain a permit, or the conditions imposed, are unreasonably restrictive, the Department could review the matter under AML §305-a.

The Department reviews all matters under AML §305-a on a case-by-case basis. A Department determination that a farm's marketing activities are part of a farm operation and, therefore, eligible for protection under AML §305-a; does not extend to the sale of products or the use of marketing activities that were not reviewed by the Department. Therefore, a local approval based upon the Department's enforcement of AML §305-a could be revoked if the farm changes the products that it sells or the marketing activities used.

## WHAT TYPES OF ACTIVITIES CAN BE OFFERED AT A FARM'S MARKETING EVENTS?

While events held at a farm which markets its crops as beverages may generally be considered part of a farm operation; not all activities which may be offered at such events are part of a farm operation. Specific marketing activities, and the components of those activities, are evaluated on a case-by-case basis. For example, the Department previously found that the following activities/uses at a certain farm's festival were not part of the farm operation: hot air balloon rides, fireworks, pedal karts, cow train and activities such as a jumping pillow and gemstone mining. The town involved in that matter explored a site plan review law to examine public events/venues and gatherings at farms.

The Department carefully evaluates farm marketing activities to ensure that the primary purpose of the events is to sell the farm's products; and that the activities are sufficiently related to the farm. For example, a corn cannon and pumpkin launcher were found to be part of the referenced farm's protected marketing activities since the farm's products were sold and directly used for the activity.