



Commercial space: Municipal use prohibitions prohibited

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New York's highest court, the Court of Appeals, ruled earlier this year that "zoning is concerned with the use of land, not with the identity of the user" in the case of Sunrise Check Cashing and Payroll Services, Inc. v. Town of Hempstead. What does this mean to commercial landlords and tenants? How should you, a real estate professional, be equipped to now navigate the commercial real estate industry? Let's find out.

In simple terms, it means that New York is open for business, any business will do. Have you ever heard that fast food restaurants aren't permitted in this town or that village? What about franchises and chains? Or better yet, what about prohibiting more real estate brokerage companies from opening in a given municipality? Yes, we have all heard it and we shouldn't hear it anymore. The effect of this decision should be greatly felt and expand all of our options when leasing commercial property or establishing a new use at our recently purchased space. Better yet, the due diligence costs inherent in ascertaining the viability of a particular location should be greatly reduced because there is now more certainty that the proposed use will be approved. Therefore, as a real estate professional, you should expect a boom to business and advise your clients to become greater risk takers when seeking out properties.

However, law is never that simple. In the decision, the court looked to the purpose of the zoning ordinance at issue, which prohibited cash checking establishments in the town's business district. In a nutshell, the court found that the social policy grounds, "which were thought to exploit the younger and lower income people who are their main customers," did not correlate with "'negative secondary effects' on the surrounding community." Read this way, it appears that a zoning restriction on a particular business will now require that the municipal ordinance contains an express statutory purpose that demonstrates that the business adversely affects the surrounding community. To illustrate, it is generally accepted, and even endorsed in the decision, that "adult entertainment" has such an effect. Yet, a general dislike of a particular business is not enough, regardless if the business exploits the poor and African Americans, as check cashing allegedly does based upon the Town of Hempstead's arguments.

Therefore, it is now becoming more necessary for real estate professionals to understand social science as an incident to their profession. When working with a given business, you should explore what adverse impact it may have on the surrounding community. Think beyond your like or dislike of a particular business to whether it creates increases in crime, damage to property or risks to safety. While the Town of Hempstead argued that their Ordinance was attributed to "protecting the health and safety of the community against the dangers created by armed robbery," the court called them out on this by saying that the "record clearly refutes the idea." So, we are left with ambiguity moving forward because the court did not set forth a precise element based test to determine if a zoning ordinance will be enforced, but the pendulum has shifted to a business friendly environment. In fact,

as Michael Murphy, managing director and executive vice president of Douglas Elliman Real Estate commercial services division, said when we discussed this decision, "The court has placed the burden of proof on the municipality to demonstrate that a proposed business will be a detriment to the community. Until such time, all proposed uses are fair game." So, New York is open for business.

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