

exemption and the financial agreement with the urban renewal entity receiving the exemption, within 10 days of either the effective date of the ordinance following final adoption, or execution of the financial agreement by the urban renewal entity, whichever occurs later. The law also requires the municipality to turn over five percent of the portion of the payment in lieu of taxes that it has collected from an urban renewal entity during a tax quarter to the county, instead of five percent of the amount due and payable. The law took effect on January 19, 2016.

P.L. 2015, c. 270, sponsored by Assemblymen Eustace, Lagana, Wimberly and Assemblywomen Mosquera, Vainieri Huttle and Senator Gordon, amends the "Flood Hazard Area Control Act" to require DEP to take certain actions concerning delineations of flood hazard areas and floodplains. This law, which the League supported, makes changes to the "Flood Hazard Area Control Act" used by the Department of Environmental Protection to delineate areas prone to flooding, in order to ensure that appropriate steps are taken to protect the public's health and safety. This bill also directs DEP to update its delineations and to prioritize its work based on flood risks. It took effect on January 19, 2016. §

Hours of Operation and Site Plan Approval

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Does A Planning Board Have Inherent Authority To Impose Reasonable Hours Of Operation On The Granting Of Site Plan Approval?

Starting from the premise that there is no such thing as a perfect zoning ordinance, particularly as relates to reconciling use compatibility issues between adjoining residential and nonresidential zoning districts and properties, there has been a longstanding tradition of planning boards restricting hours of operation by condition on a site plan approval to protect neighboring properties.

This unspoken rule is seemingly self-evident: scouring Cox & Koenig's land use treatise, *New Jersey Zoning & Land Use Administration*, it is baffling that no discussion or legal analysis on the topic exists in the 1009 page treatise. Indeed, this author, over two decades, has drafted countless resolutions of site plan approval with a condition of approval restricting hours of operation.

Does this power derive from tradition, or common sense that a planning board has inherent zoning responsibility to address land use compatibility issues? It would seem so. However, on a recent site plan application approved by a planning board client, the applicant challenged the notion that a planning board has "inherent authority" to restrict hours of operation. This applicant was going to spend \$10 million to construct a very unique recreational facility and was determined to ensure an adequate return on its investment, which prospect was enhanced by allowing operating hours after 10 p.m. The afterhours revenues were projected to be approximately \$350,000 per year, based on the average of more than a dozen of the applicant's facilities throughout the United States. This approximated to an additional two (2) plus hours of operation per day, and the extrahours time was to be flexible and set by appointment only.

Further complicating the matter, this property was included in a redevelopment zone with customized zoning bulk standards to address the issue of the narrow depth of a property fronting on a busy state highway that had existing residential development to the rear. The closest residential property to the proposed building would be a distance of less than 100 feet.

In seeking approval for the earlier adopted redevelopment plan (which included reduced bulk standards for setbacks due to the narrow depth of the parcel), the applicant was less than forthcoming in explaining its hours of operation (i.e. the applicant silently acquiesced when a member of the governing body suggested at the public hearing to adopt the redevelopment plan ordinance that the planning board would address hours of operation at site plan approval).

When the site plan hearings commenced, the applicant aggressively asserted its right to operate beyond the hour of 10 p.m., relying upon authority from a 2013 unreported Law Division opinion out of Ocean County. *White Castle Sys. v. Twp. of Lacey Planning Bd.*, 2013 N.J. While the authority to regulate of hours of operation appears to derive from the power to zone, *N.J.S.A.40:55D62and 65*, it is generally

implemented by a planning board through condition of site plan approval.

Super. LEXIS 1873, (Docket No. OCNL257612 PW). In this opinion, the assignment judge held that a planning board does not possess “inherent authority” to impose reasonable hours of operation as a condition of site plan approval. Rather, it may only impose such conditions: (1) if the local zoning ordinance specifically confers such power on a site plan application; or (2) if a bulk variance is required from the setback from an adjoining property owner. In the latter circumstance, the restriction of hours of operation would mitigate any potential impacts from the granting of the bulk variance.

The *White Castle* opinion is not published, nor is it analyzed in the Cox treatise. While it is not binding legal authority, its foundation on the legal question appears to have merit. After all, if the municipality desires to impose buffer requirements separating residential and nonresidential development on site plan applications, it must do so by ordinance. Why would restricting hours of operation be any different? There is also an established body of decisional law on the “reasonableness” of planning board conditions, wherein one of the five (5) criteria is whether the condition is “reasonably calculated to achieve some legitimate objective of the zoning ordinance”. *Orloski v. Planning Board*, 226 N.J. Super. 666, 672 (Law Div. 1988).

But, then again, what developer could argue that it would not expect a planning board to restrict hours of operation if a neighboring property might reasonably be affected by the proposed use.

In fact, my planning board clients, over two decades, have routinely imposed such condition on site plan approvals without protest or legal challenge and in the absence of an enabling ordinance. Again, is not a planning board’s authority to reasonably restrict hours of operation “selfevident”? And why should a municipality have to “opt in” by adopting an enabling ordinance to exercise one of its most basic zoning responsibilities? Should not the “default option” be that such power exists as an inherent right?

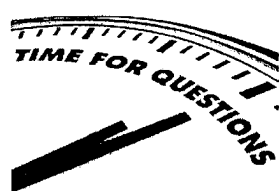
Sympathetic to the above arguments, the Appellate Panel in the unpublished opinion of *Stacey A. Declement v. Township of Elk, et al.*, Appellate Division, Docket No. A219904T2, decided November 23, 2005, affirmed a joint land use board’s denial of an application to modify a prior

condition of site plan approval to eliminate hours of operations restrictions on an existing gas station and convenience store, notwithstanding the absence of an enabling municipal ordinance.

The Appellate Panel distilled its reasoning as follows: To summarize, the belated challenge to the authority of the Board to impose a limitation upon the hours of operation must fail. So too, the challenge to the Board’s denial of the request to amend the limitation in the final site plan. In this case, the Board did not deny a permitted use. Rather, it reaffirmed a safeguarding condition by reason of the nature, location and incidents of the particular use. Such action did not contravene and was not inconsistent with any municipal ordinance. It was an appropriate exercise of discretion, determined by the Board to be in the best interests of the community’s health, peace and comfort. The trial court’s order sustaining the Board’s decision was likewise appropriate.

The fact that the *White Castle* and *Declement* opinions have not been published, or analyzed in the Cox treatise, leaves the matter ripe for clarification in a published opinion. Hours of operation are a commonplace issue on site plan applications.

However, in the interim, best practice would be to error on the side of caution by adopting an enabling ordinance to permit hours of operations restrictions on site plans. **¶**



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