

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONTARIO

TOWN OF RICHMOND,

Plaintiff,

DECISION

vs.

Index No. 95775

BSD SOTO, INC.; MICHAEL FURIA and
BESAYDA SOTO

Defendants.

Hon. Craig J. Doran, Presiding

The above-captioned action was brought seeking judgment in the nature of a permanent injunction, requiring that the business known as "Neptune's" be brought into full compliance with the terms and conditions of the December 21, 2004, Resolution of the Town of Richmond Zoning Board of Appeals, specifically enjoining the defendants from causing or allowing the said business to operate outside the hours specified in the aforesaid Resolution.

By way of Order to Show Cause dated February 8, 2005, the plaintiff seeks a preliminary injunction requiring Neptune's to be brought into full compliance with the aforementioned Resolution. The Court heard oral argument on the Town's motion for a preliminary injunction on March 9, 2004, and reserved decision.

The defendants herein operate a business known as

"Neptune's Bar & Grill" (hereinafter referred to as "Neptune's") located at 5226 East Lake Road, Honeoye, New York. Neptune's is a lakefront property located in a Residential District within the Town of Richmond and is allowed to operate by virtue of a Use Variance initially granted by the ZBA on February 15, 2000. Since the issuance of the Use Variance, there have been multiple proceedings before the Richmond ZBA in order to clarify the conditions of the Variance. A challenge to the authority of the ZBA to issue clarifications as to the conditions of the Use Variance was brought by Neptune's owners, via an Article 78 proceeding. In an order dated August 26, 2004, this Court affirmed the determinations of the ZBA. It further confirmed the rights of the owners of the real property to request modification of the conditions of the Use Variance by proper application to the ZBA.

Thereafter, the Board issued a determination Resolution, dated December 21, 2004, clarifying the conditions of the Use Variance. The defendants had also presented an application to the ZBA requesting modification of some of the conditions of the Use Variance. The defendants' application resulted in a determination Resolution, also issued on December 21, 2004, by the ZBA granting, in part, the relief requested by the defendants.

In relevant part, the Resolution of the ZBA clarifying the conditions of the Use Variance provided that the hours of operation of the restaurant are to be limited to a 10:00 p.m. closing time. Correspondingly, the ZBA Resolution relative to the defendants' modification application extended the hours of operation to allow for an 11:00 p.m. closing time on Friday and Saturday evenings.

The plaintiff now alleges that the defendants have repeatedly and on an on-going basis failed and refused to comply with the ZBA's condition of the Use Variance as to hours of operation and have allowed the business to remain open past the required closing time.

It appears uncontroverted that the defendants failed to raise objections to the Board's aforementioned resolutions in a timely fashion pursuant to Town Law §267-c. Rather, the defendants seek to assert that the resolutions of the ZBA with respect to hours of operation are preempted by New York State's Alcoholic Beverage Control Law. Quite simply, the defendants assert that the Board's authority to regulate Neptune's hours of operation are preempted by the State's Alcoholic Beverage Control Law.

The argument that the State Law preempts the conditions imposed by the ZBA in connection with its Use Variance is faulty. The cases cited by the defendants herein stand for

the proposition that the State has preempted any local regulation concerning the subject matter of hours of operation, distribution or consumption of alcoholic beverages (see, *Lansdown Entertainment Corporation v. New York City Dept. of Consumer Affairs*, 74 NY2d 761).

Contrary to defendants' argument that the State's ABC law preempts the Town's ability to impose conditions in the context of a use variance, the cases cited by the defendants in support of their position relate only to a local municipality's ability to enact a local ordinance in direct conflict with state law. Clearly, there is no local ordinance at issue in the case before this Court.

Rather, there is a specific statute that grants the Zoning Board authority in the granting of both use variances and area variance "to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property... for the purpose of minimizing any adverse impacts such variance may have on the neighborhood or community" (see, Town Law §267-b[4]). There is specific statutory authority for the Zoning Board of Appeals to impose certain conditions when granting a use variance, recognizing that in granting such a variance, the Board is, in effect, allowing an otherwise illegal use to be established.

In the instant case, the conditions imposed by the Zoning

Board of Appeals in relation to hours of operation were imposed in the context of granting an exception to local residential zoning requirements. These conditions were imposed to address the "adverse impacts" stemming from a commercial enterprise in a residential district.

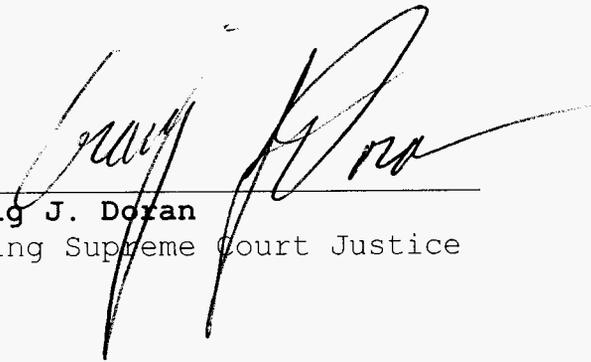
Even in the context of municipal ordinances, the courts have recognized that where the thrust is zoning and not the regulation of alcohol, a local law is valid even if in conflict with the ABC law (see, *DJL Restaurant Corp. V. City of New York*, 96 NY2d 91). As the Court of Appeals noted in *DJL Restaurant Corp.*, supra, state statutes do not necessarily preempt local laws having only tangential impact on the State's interests.

Preemption by state law relates only to the enactment of a "local ordinance" as opposed to the circumstances in the instant case, which relate to the Board's imposition of conditions in the context of a use variance (see, *DJL Restaurant Corp.*, supra).

Based upon the foregoing, this Court hereby grants the plaintiff's request for a preliminary injunction, requiring that the business known as "Neptune's" be brought into full compliance with the terms and conditions of the December 21, 2004, Resolution of the Town of Richmond Zoning Board of Appeals, during the pendency of this action and until further

Order of this Court.

This shall constitute the Decision of the Court. Submit
Order accordingly.



Craig J. Doran
Acting Supreme Court Justice

Dated at Canandaigua, New York
this 21st day of March, 2005.