



Special Use Permits

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Special Use Permit

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Use permitted by zoning but subject to requirements or conditions:

- In harmony with zoning
- No adverse impacts to neighborhood
- General City Law § 27-b
- Town Law § 274-b
- Village Law §7-725-b

Sometimes referred to as:

- Special exceptions
- Conditional uses



Purpose

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- Some uses require special attention
- Added layer of review
- Allows for mitigation of potential adverse impacts
- Allows for greater variety of land uses while maintaining zoning standards



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Not a use variance

Use Variance	Special Use Permit
<ul style="list-style-type: none"> • Required for use prohibited by zoning • Required for use not listed as permitted • Statutory test • Zoning board of appeals 	<ul style="list-style-type: none"> • Required for use permitted by zoning but subject to additional requirements • Local standards • ZBA, planning board, or other review board

North Shore Steak House Inc, v. Board of Appeals of the Village of Thomaston

Special Uses

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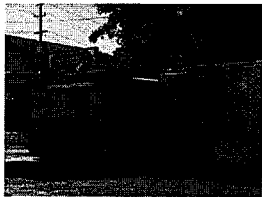


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Uses allowed by special use permit

- List and define in text of zoning regulations:
- Avoid vague language
 - "or similar uses"
- Avoid broad categories
 - "restaurant"
 - Sit down, take-out, drive-thru, mobile



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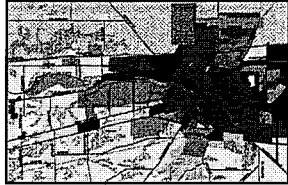


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Special uses allowed by location

- By use regardless of zoning district
- By zoning district
- By overlay zone



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Example of special use in district

Gas station allowed by SUP in neighborhood commercial district



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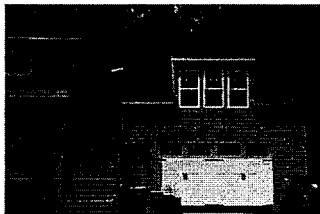
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Example of special use in district

Accessory apartments in single-family residential district:

- Granny flats
- Elder cottages

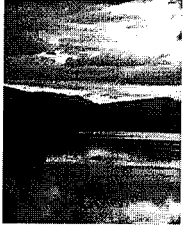


Defining "family": www.dos.ny.gov/cnsl/lu05.htm


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Reservoir protection overlay

- Multi-family houses
- Cemeteries
- Plant nursery
- Recreational vehicle parks



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Waterfront overlay

All commercial uses over (pre-determined) floor area threshold


- Retail, office, restaurants

All residential

- Multiple units

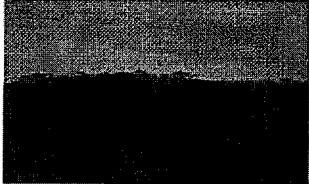
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
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Ridgeline protection overlay

- All new construction or development above set elevation
- Possible exceptions
 - Accessory structures
 - Agricultural structures



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Permit Types & Other Considerations

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Temporary permit

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- Allows review board to re-appraise application
 - New facts & circumstances
- Most appropriate for seasonal uses
- Requires authorization from governing board (Scott v. ZBA of the Town of Salina; S.V. Space Development Corp. v. Town of Babylon ZBA)



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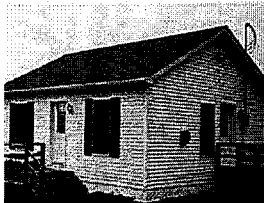


Renewable permits

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If renewal application is subject to same review as a new application, SUP can't be denied

(provided all requirements and conditions are met)



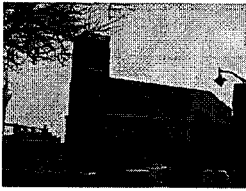

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Religious & Educational Uses

- Special treatment
 - Institutions serve public welfare
 - Religious Land Use & Institutionalized Persons Act (RLUIPA) 42 U.S.C. § 2000cc-1
- Requires reasonable accommodation in review
 - Cornell U. v. Bagnardi






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Mining


- Municipality can only regulate non-mining aspects of mining operation
 - (Schadow v. Wilson)
- State permitting of mining activities
 - Mined Land Reclamation Law
 - (ECL Article 23, Title 27 limits local review)

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Review Authority

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Review board

Governing board may retain authority to review SUP applications

OR

Delegate authority to another board

- Planning board
- Zoning board of appeals as "original jurisdiction"
- Other boards



Delegation of authority

Option to further delegate specific review to different boards, for example:

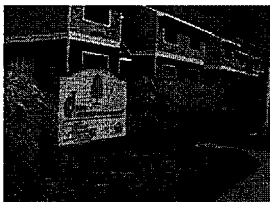
- Planning Board authorized to conduct all reviews except those in historic district
- Applications in historic district instead are reviewed by historic architecture preservation commission or board



Standards

Without standards to guide review, decisions may be invalidated

(Shepard v. ZBA of the City of Johnstown)



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Standards

General	Specific
<p>Will usually be upheld:</p> <ul style="list-style-type: none"> • "...in the consideration of public health, safety & general welfare" • "...shall be in harmony with the general purposes & intent of the zoning ordinance & the comprehensive plan" 	<p>Best practice:</p> <ul style="list-style-type: none"> • "Design of new primary and accessory structures shall be consistent in scale, materials, and character with the existing vernacular architecture of the surrounding neighborhood or district"

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Standards - example

<p>General</p> <p>"Trash dumpsters must be provided and screened from view"</p>	
<p>Specific</p> <p>"Trash dumpsters must be provided with screening using materials, colors and a design appropriate in character to the primary building on the lot"</p>	

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Waiver of requirements

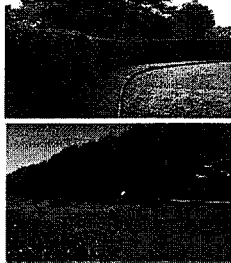
Review board may waive submission/permit requirements

- Review board determines if requirement:
 - Is not needed in the interest of public health, safety or general welfare
 - Is not appropriate for that particular property
- Must be authorized by governing board

www.dos.ny.gov/cnsl/comments/realholding.htm

Waiver of requirements - example

When existing or natural buffer is present, consider waiving required buffer or screening



Review Procedures

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SEQRA compliance

- Must complete SEQRA before making final local decision
- Require Environmental Assessment Form (EAF) with application submission
- Establish lead agency if coordinated review
- Make determination of significance (positive or negative declaration)
- "Complete application"
 - Negative declaration issued
 - Positive declaration issued and Draft Environmental Impact Statement (DEIS) accepted for public review
 - NYCRR Part 617.3



Public hearing

- Hold within 62 days of "complete application"
- If DEIS hearing, hold in conjunction with SUP hearing
- Open Meetings Law
- Publish legal notice in newspaper of general circulation at least 5 days prior
 - Extend to at least 14 days when DEIS hearing
- Mail notice 10 days prior:
 - Applicant
 - County planning (GML 239-m) if applicable
 - Adjacent municipality (GML 239-nn) if applicable



County referrals GML § 239-m

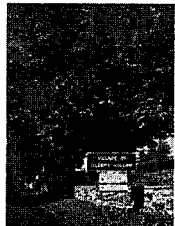
Application must be referred to county planning board if it applies to real property within 500 feet of:

- Municipal boundary
- Boundary of state or county
- Park or recreation area
- R-O-W of state or county road
- R-O-W of county-owned stream or drainage channel
- Boundary of state or county land on which public building is located
- Boundary of farm operation in state agricultural district (except for area variances)



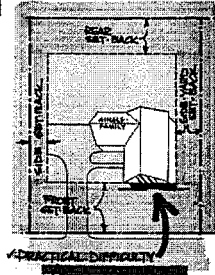
Adjacent municipalities GML § 239-nn

- SUP applications require notice when 500 feet from municipal boundary
- Notice by mail or email to clerk of adjacent municipality at least 10 days prior public hearing



Area variance also required

Direct appeal for SUP that would require an area variance



Basis for Decision Making

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Granting permits

- Must be approved if local requirements are met
 - Pleasant Valley Home Construction v. Van Wagner
- Mitigate environmental impacts before approval
 - Must make SEQRA findings prior to making decision



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Granting permits

- Zoning deals with land use; not applicant, land owner, or occupant
- SUP approval is granted to and stays with the property
 - Dexter v. Town Board of the Town of Gates
 - Weinrib v. Weisler



Denying the permit

- Base denial on reasonable grounds:
 - Site not appropriate for use
 - Property depreciation
 - Traffic impact beyond permitted use (YMCA v. Burns)
- Support with evidence
 - For example, traffic study



Wrong reasons for denial

Community opposition:

Cannot base denial solely on "...generalized objections concerns of neighboring community members"

- Chernick v. McGowan
- Pleasant Valley Home v. Van Wagner



Wrong reasons for denial

General objections to use as undesirable

For example, tavern permit denied citing reasons of late hours, noise, traffic, etc.

- Holbrook Assoc. Development Co. v. McGowan



Wrong reasons for denial

- Unrelated violation
 - i.e., applicant has violation on different property
- Previous violation
 - "...the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed special use"



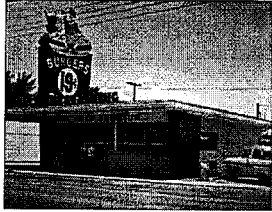
Conditions

- Review board has express statutory authority to impose conditions
- Must be reasonable
 - Tandem Holding Corp. v. Board of Appeals of the Town of Hempstead
- Must directly relate to impact of development on land itself
 - Should not relate to internal operations of business or activity



Regulate hours of operation only if

- Authorized by governing board;
and
- Substantial evidence of impacts that relate to physical use of the land
 - Old Country Burgers v. Town of Oyster Bay



Regulating Hours of Operation: www.dos.ny.gov/cns/lu15.htm

Findings

- Demonstrate reason for approval or denial
 - Applicant did or didn't meet required standards
- Disclose all evidence relied on in reaching decision
- Include analysis of evidence
- Relate facts to legal standards
- File with decision document

Role of Findings in LG Decisions: www.dos.state.ny.us/cns/lq02.htm

After the Decision

Decision and appeals

- Must render within 62 days after close of hearing
- File with municipal clerk within 5 business days
 - 30 day statute of limitations for appeal
- Decisions are not appealed to governing board
- Aggrieved parties may file appeals under Article 78 Civil Practice Law and Rules
 - NYS Supreme Court
 - Appellate Division
 - Court of Appeals



Revoking special use permit

- Non-compliance
- Substantial evidence
- Failed to comply with imposed conditions
 - Persico v. Incorporated Village of Mineola
- Permit holder entitled to hearing before revocation



Enforcement

- Authorize zoning or code enforcement officer to enforce SUP conditions
- Could be stated in
 - Zoning law
 - CEO/ZEO duties
- Require conditions be met before issuing building permit or certificate of occupancy



New York Department of State

Division of Local Government
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www.dos.ny.gov/lq/index.html





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Legal Memorandum LU15

Can Local Boards Regulate the Hours of Operation of a Business?

Municipal officials often ask whether, and by what means, a municipality can regulate the hours of operation of a business. The answer to this seemingly easy question is quite complicated.

Zoning conditions and restrictions imposed by a municipal board in the exercise of its zoning powers must be related to the use of land and must be for a proper purpose of zoning.¹ The conditions imposed must be reasonable and "directly related to and incidental to" the proposed use.² The courts have held that municipalities are prohibited from using their zoning powers to regulate the internal operations or the details of a business.³ Zoning conditions and restrictions that are aimed at controlling the details or operation of an owner's use of land are outside of a municipality's delegated authority.⁴

The question, then, is whether the hours of operation of a business is a component of its "internal operation". If it is, then it's not within the reach of a municipality's zoning power.

Restricting Hours of Operation through Conditions

New York courts have struck down conditions imposed by planning and zoning boards that regulate the hours of operation of a business as an attempt to regulate its internal operations or details, unless there appeared to be substantial evidence relating the hours of the business's operation to its impact on the surrounding neighborhood.

In *Matter of Schlosser v. Michaelis*,⁵ the zoning board of appeals granted the petitioner's application for a use variance to use the property as a wholesale florist business, subject to certain conditions, such as limiting the number of employees and the hours and days of operation. The court invalidated those conditions stating that "the [b]oard of [a]ppeals has no power to impose conditions which apply to the details of the operation of the business and not to the zoning use of the premises."⁶

In *Summit School v. Neugent*,⁷ the petitioner applied to the zoning board of appeals for a variance and a special use permit to use the property as a school for handicapped children. The variance and special use permit were granted subject to numerous conditions, including conditions which limited the months, days and times of the classes.⁸ The court stated that the conditions imposed went beyond the power conferred upon the zoning board of appeals to impose conditions on administrative permits.⁹ The conditions did not relate to the use of the land but rather to the manner of operation of the school. Therefore, the conditions were held to be invalid as an improper "attempt to control the details of the operation of a private school."¹⁰

In *Old Country Burgers Corp., Inc. v. Town Board of Town of Oyster Bay*,¹¹ the petitioner, Burger King, applied for a special use permit to operate a drive-through window. The town board granted the application subject to certain conditions on its use. One such condition was a prohibition on the use of the drive-through "between the hours of 8 a.m. and 9:30 a.m.; 12 noon and 1:30 p.m.; and 5 p.m. and 6:30 p.m."¹² The court held that this condition, which prohibited the operation of the drive-through window during peak meal-time hours, was "an impermissible attempt to regulate the details of the operation of the [business]."¹³ Although the town sought to justify the condition based on increased traffic, the court found that "the condition was not based upon substantial evidence" and therefore invalidated the condition.¹⁴

In *Master Billiard Co., Inc. v. Rose*,¹⁵ the zoning board of appeals granted an application for a special use permit that imposed several conditions, including a restriction on the billiard parlor's hours of operation.¹⁶ The court held that four of the ten conditions imposed, including the hours of operation restriction, did not relate to the use of the land but "to the internal operations of petitioner's business and were unrelated to the purpose of the zoning."¹⁷ The court found that these conditions were outside the scope of the permit application, and therefore, unlawful.

These cases have established a trend in the law in which conditioning administrative approvals based upon the hours of operation of a business is regarded as an improper attempt to regulate the internal operations of a business. These cases involved conditions which were invalidated as having an insufficient relationship to the physical use of land.¹⁸ The courts have held that “[c]onditions . . . must relate to the proposed use of the property, and not to the manner of the operation of the particular enterprise conducted on the premises.”¹⁹

Some courts have upheld time-related conditions where the record substantiates a relationship between hours of operation and neighborhood impact. In the case of *Twin Town Little League Inc. v. Town of Poestenkill*,²⁰ the court upheld conditions imposed on a site plan for a little league baseball complex. The planning board had imposed nine conditions upon the approval of the site plan, including restrictions on the hours of operation. The court held that the conditions were supported by substantial evidence and that they were “directly related to and incidental to the proposed use of the property.”²¹ The court recognized that the conditions were necessary to mitigate the adverse impacts, specifically neighborhood concerns regarding the depreciation of property value due to increased noise, traffic and lighting, while ensuring compatibility with the neighborhood.²² The court regarded these conditions as acceptable, finding the conditions to be “a reasonable attempt to alleviate these concerns . . . as they relate directly to the use of the land.”²³ In a recent case, the court affirmed a city zoning board of appeals’ imposition of a condition limiting a pizzeria’s hours of operation, as “....proper because it relates directly to the use of the property and is intended to protect the neighboring residential properties from the possible adverse effects of the petitioner’s operation, such as the anticipated increase in traffic congestion, parking problems, and noise...”²⁴

Limiting Hours of Operation through Zoning Legislation

Some courts appear to distinguish between administrative and legislative acts (the adoption of a local law or ordinance). Those courts have expressed the view that certain conditions, such as hours of operation, can be dealt with legislatively rather than administratively.²⁵

The law is unsettled with respect to whether a governing board can legislate the hours of operation of a business under its zoning authority. The fundamental rule that zoning conditions and restrictions must relate to the physical use of the land and not the operation of an applicant’s business also applies to zoning legislation; the determination must be made as to whether the regulation of the hours of operation of a business is a legitimate purpose of zoning.²⁶

In *Southland Corp. v. Janoski*,²⁷ the Supreme Court in Suffolk County upheld a local law rezoning a retail district which limited the hours of operation of retail businesses between 12 a.m. and 5 a.m.²⁸ The court found the local law to be a proper exercise of the town’s police powers enacted to encourage harmony between businesses and residents and to promote the “health, safety, peace and comfort” of local residents.²⁹ The local law served the legitimate governmental purpose of controlling traffic and noise. The local law was upheld as constitutional and affirmed on appeal.³⁰

In contrast, the Supreme Court in Nassau County, in *Louhal Properties, Inc. v. Strada*,³¹ held that the Village of Westbury’s law, which restricted the operation of certain businesses between the hours of 11 p.m. and 6 a.m., was an invalid exercise of zoning power.³² The court stated that “applicable case law draws a dichotomy between those regulations that directly relate to the physical use of land and those that regulate the manner of operation of a business or other enterprise.”³³ The court based its decision on the rule derived from *Old Country Burgers*, where the Second Department held that “absent substantial evidence showing the external impact of the land use in question, a restriction on hours of operation must be deemed an impermissible attempt to regulate the details of the operation of a business.”³⁴ The court, in *Louhal*, felt that “[t]he Village [had] failed to adequately substantiate its claim with respect to the adverse impact of 24-hour uses on neighboring properties.”³⁵ There was no evidence presented that businesses open 24 hours had a greater impact on neighboring properties than businesses operating during regular business hours.³⁶

Although reaching different conclusions, the two cases dealing with local laws limiting the hours of operation of a business appear to use the same test: if provided with substantial evidence showing that restricting the hours of operation relates to the physical use of land and not to the internal operation of a business, the local law will likely be upheld as a legitimate exercise of the municipality’s zoning power.³⁷

Restricting Hours of Operation through Municipal Police Power Regulations and State Laws which Authorize the Regulation of Hours of Operation

As distinguished from zoning, the courts have not prohibited municipalities from regulating the hours of operation of

a business through the use of its general police powers. There is no requirement that such regulations relate to the physical use of the land, nor is there a prohibition against the regulation of the internal operations of a business.

The State Constitution permits municipalities to adopt and amend local laws for the preservation of health, safety and welfare of their citizens.³⁸ Any regulations enacted under a municipality's police power must be reasonable and reasonably related to a legitimate governmental purpose.³⁹ For instance, in *Town Board of the Town of Southampton v. 1320 Entertainment, Inc.*,⁴⁰ the Town Code restricted the hours of operation of the defendant's automobile racetrack. The court held that "insofar as [the] Town Code . . . imposes reasonable limitations upon the days and hours during which races may be conducted, it is a proper exercise of the town's police powers."⁴¹

Municipalities may regulate the hours of operation of a business through specific statutory authority. For example, section 130 of the Town Law allows for the regulation of certain uses and businesses, specifically allowing the town board to establish the opening and closing hours of all beverage and eating places.⁴² A municipality may also regulate hours of operation under certain provisions of the Municipal Home Rule Law. The Municipal Home Rule Law allows a municipality to adopt or amend local laws, pursuant to its police powers, for the regulation or licensing of businesses.⁴³ As long as the municipality is not regulating by means of its zoning powers, the broad authority to regulate or license businesses under the Municipal Home Rule Law appears to encompass the regulation of hours of operation.⁴⁴

Conclusion

The courts have held that without showing a direct impact on the land, regulating the hours of operation of a business is not a proper purpose of zoning, but rather an improper attempt to regulate the internal operations of a business. While municipalities are restricted in their ability to regulate using their zoning powers, there does not appear to be a similar restriction on enacting legislation for non-zoning purposes.

ENDNOTES

¹ See *St. Onge v. Donovan*, 71 N.Y.2d 507, 515, 527 N.Y.S.2d 721 (1988), citing *Matter of Dexter v. Town Board*, 36 N.Y.2d 102, 105, 365 N.Y.S.2d 506 (1975), which held that conditions imposed by local zoning boards must be reasonable and relate only to the land at issue and not to the person who owns or occupies the land. See also *Province of Meribah Society of Mary Inc. v. Bd. of Zoning Appeals of Inc. Vil. Muttontown*, 148 A.D.2d 512, 538 N.Y.S.2d 850 (2d Dept., 1989); Rathkopf, A.H., Rathkopf, D.A. & Ziegler, E.H., Jr., *The Law of Zoning and Planning*, § 2:14 (rev. 2005), explaining that the authority under the zoning enabling statutes to impose restrictions or conditions must relate to the "objects and purposes of the enabling legislation"; Salkin, P.E., *New York Zoning Law and Practice* §§ 29:42 & 30:05 (4th ed., 2002).

² See *St. Onge v. Donovan*, 71 N.Y.2d 507, 516 (1988), quoting *Matter of Pearson v. Shoemaker*, 25 Misc.2d 591, 592, 202 N.Y.S.2d 779 (Sup. Ct., Rockland Co., 1960); N.Y. General City L. § 27-a & b(4); N.Y. Town L. § 274-a(4) & b(4); N.Y. Village L. 7-725-a(4) & b(4) ("The authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to....[a proposed project]"); Salkin, *supra*, note 1 at § 30:05)

³ See *St. Onge v. Donovan*, *supra*.

⁴ See Rathkopf, *supra*, note 1 at §§ 2:14 & 60:18, explaining that zoning restrictions and conditions relating to the use of land, such as landscaping, traffic access and open space, are proper objectives and purposes of regulation authorized and delegated by the zoning enabling statutes.

⁵ 18 A.D.2d 940, 238 N.Y.S.2d 433 (2d Dept., 1963).

⁶ *Id.* at 941, 238 N.Y.S.2d at 434-35; Rathkopf, *supra*, note 1 at § 60:18, explaining that several court decisions have held that the zoning enabling authority extends to the regulation of the use of land and that zoning which controls the details of an owner's operation is tantamount to an ultra vires act, beyond the statutory authority delegated.

⁷ 82 A.D.2d 442, 442 N.Y.S.2d 73 (2d Dept., 1981).

⁸ *Id.*

⁹ *Id.*, at 467, 442 N.Y.S.2d at 77, stating that there is strong public policy against a municipality imposing conditions on the details of the operation of the educational process. The court held that it is improper and beyond the powers

conferred upon a municipality to impose such conditions.

¹⁰ *Id.* at 473, 442 N.Y.S.2d at 80.

¹¹ 160 A.D.2d 805, 553 N.Y.S.2d 843 (2d Dept., 1990).

¹² *Id.* at 805, 553 N.Y.S.2d at 844.

¹³ *Id.*

¹⁴ *Id.*, stating that "there was no showing that the proposed use would have a greater impact on traffic than other uses which are unconditionally permitted in the area".

¹⁵ N.Y. Law Journal, June 3, 1994, at 31, col 3 (Sup. Ct., Nassau County), *aff'd* 194 A.D.2d 607, 599 N.Y.S.2d 68 (2d Dept., 1993).

¹⁶ *Id.*, restricting the hours to "Sunday-Thursday from 10 A.M. to 12 midnight. Friday and Saturday from 10 A.M. to 1 A.M. of the following day and on evenings before holidays to 1 A.M. of the holiday."

¹⁷ *Id.*

¹⁸ See *Old Country Burgers Corp., Inc. v. Town Board of Town of Oyster Bay*, 160 A.D.2d 805, 805, 553 N.Y.S.2d 843, 844 (2d Dept., 1990); *Schlosser v. Michaelis*, 18 A.D.2d 940, 238 N.Y.S.2d 433 (2d Dept., 1963); *Summit School v. Neugent*, 82 A.D.2d 463, 442 N.Y.S.2d 73 (2d Dept., 1981); *Louhal Properties, Inc. v. Strada*, 191 Misc.2d 746, 743 N.Y.S.2d 810 (Sup. Ct., Nassau County, 2002), *aff'd* 307 A.D.2d 1029, 763 N.Y.S.2d 773 (2d Dept., 2003), explaining that a trend has been created where petitioners were unable to or did not provide the court with substantial evidence demonstrating that the conditions related to the use of land and not to the manner of operation of the owner's business.

¹⁹ *Old Country Burgers Corp., Inc. v. Tn. Bd. of Tn. of Oyster Bay*, *supra*, at 805, 553 N.Y.S.2d at 844 (citing *Province of Meribah Society of Mary v. Village of Muttontown*, 148 A.D.2d 512, 538 N.Y.S.2d 85); *Summit School v. Neugent*, *supra*, finding that the power to grant conditions is not unlimited.

²⁰ 249 A.D.2d 811, 671 N.Y.S.2d 831 (3d Dept., 1998).

²¹ *Id.* at 813, 671 N.Y.S.2d at 833, alluding to the requirements in N.Y. Gen. City L. § 81-b, N.Y. Town L. § 267-b & N.Y. Village L. § 7-712-b, that conditions be reasonable and directly related to the proposed use of the property and that such conditions "be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community".

²² *Id.*

²³ *Id.*

²⁴ *Milt-Nik Land Corp. v. City of Yonkers*, 24 A.D.3d 446, 806 N.Y.S.2d 217 (2d Dept., 2005). See also *Matter of 1833 Nostrand Ave. Corp. v. Chin*, 302 A.D.2d 460, 754 N.Y.S.2d 581 (2d Dept., 2003); *Taylor Tree, Inc. v. Planning Board of Town of Montgomery*, 272 A.D.2d 336, 707 N.Y.S.2d 193 (2d Dept. 2000); *Town of Richmond v. BSD Soto, Inc.*, 6 Misc.3d 1040, 800 N.Y.S.2d 358 (Sup. Ct., Ontario Co., 2005).

²⁵ See *Oakwood Island Yacht Club, Inc. v. Board of Appeals of City of New Rochelle*, 32 Misc.2d 677, 223 N.Y.S.2d 907 (Sup. Ct., Rockland Co., 1961). The court held that the condition attached to the issuance of a special use permit, imposing a curfew on the use of boats between 9 P.M. and 7 A.M., was an unreasonable restriction unrelated to the use applied for and thus beyond the power of the board. The court based its decision on the fact that nothing authorizes the board to impose such restrictions, holding that such a restriction "is a matter for legislative, not administrative, consideration". See also *De Ville Homes, Inc. v. Michaelis*, 201 N.Y.S.2d 129 (Sup. Ct. Nassau County, 1960), differentiating between legislative and administrative power, implying that certain conditions should be left for the governing board to deal with through legislation. The court stated "The power granted to or inherent in such Boards to impose reasonable conditions under proper circumstances applies to use of premises and not details of operation".

²⁶ *Geneslaw, H., The Validity of Special Use Permit and Site Plan Conditions of Approval, Environmental Law in N.Y.*, vol. 7 no. 1, at 16 (January 1996) "To the extent that conditions imposed by a board restricting operation of an

applicant's business are invalid as improper purposes of zoning, it should follow that the same conditions would also be invalid as improper purposes of zoning even if expressly set forth in the zoning law."

²⁷ Sup. Ct., Suffolk Co., June 13, 1994, Index No. 19836/91, *aff'd* 218 A.D.2d 733, 630 N.Y.S.2d 950 (2d Dept., 1995), *lv. to app. den.* 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058 (1996).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Cited *supra*, n. 18; see also *Westbury Trombo, Inc. v. Bd. of Trustees of Village of Westbury*, 307 A.D.2d 1043, 763 N.Y.S.2d 674 (2d Dept., 2003).

³² See Village Law § 7-700, listing specific items, all relating to the use of land, that a village may regulate under such authority, such as size, height and location, and use of buildings. See also *De Sena v. Gulde*, 24 A.D.2d 165, 171, 265 N.Y.S.2d 239 (2d Dept., 1965), holding that zoning power must "operate in relation to the use of land and not for the accomplishment of purposes extraneous to that relation".

³³ *Louhal Properties, Inc. v. Strada*, 191 Misc.2d at 751, 743 N.Y.S.2d at 814; see, e.g., *Schlosser v. Michaelis*, 18 A.D.2d 940, 238 N.Y.S.2d 433 (2d Dept., 1963) and *Summit School v. Neugent*, *supra*; see also *St. Onge v. Donovan*, *supra*; *Rathkopf*, *supra*, note 1 at § 1.02[4][a], explaining that regulations relating to the use of land or to the impact of land use on neighboring properties are treated differently than regulations that restrict the manner of operation.

³⁴ *Id.* at 753, 743 N.Y.S.2d at 815, deriving this language from *Old Country Burgers Corp., Inc. v. Town Board of Town of Oyster Bay*, *supra*, 160 A.D.2d at 805, 553 N.Y.S.2d at 844.

³⁵ *Louhal Properties, Inc. v. Strada*, *supra*.

³⁶ *Id.*

³⁷ See *id.*, stating that the courts have generally upheld regulations directed at the physical use of land, "such as light, air quality, safety, population density and traffic . . . property values, aesthetics or environmental values."; see also *St. Onge v. Donovan*, *supra* (citing *Matter of Pearson v. Shoemaker*, *supra*).

³⁸ See N.Y. Const. Art. IX § 2(c)(ii): "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to:....(10) [t]he government, protection, order, conduct, safety, health and well-being of persons or property therein."; see also *Mayor of City of New York v. Council of City of New York*, 182 Misc.2d 330, 335, 696 N.Y.S.2d 761, 765 (Sup. Ct. New York County, 1999), holding that the "home rule provision of N.Y. Const. art. IX, § 2, cl. (c) gives local governments broad police powers relating to the welfare of their citizens...." (citing *New York State Club Assn., Inc. v. City of New York*, 69 N.Y.2d 211, 513 N.Y.S.2d 349, 505 N.E.2d 915 (1987), *aff'd* 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)).

³⁹ See *People v. Goodman*, 31 N.Y.2d 262, 338 N.Y.S.2d 97, 290 N.E.2d 139 (1972); see also *Fred F. French Investing, Inc. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976); see also 1991 N.Y. Op. Atty. Gen. (Inf.) 1108, stating that a "legitimate governmental purpose is one which promotes the public health, safety and well-being."; see also 1982 N.Y. Op. Atty. Gen. (Inf.) 227, stating that the "broad grant of the police power is limited by the requirement that its use must be reasonable."

⁴⁰ 236 A.D.2d 387, 653 N.Y.S.2d 364 (2d Dept., 1997).

⁴¹ *Id.* at 388, 653 N.Y.S.2d at 365 (citing *Matter of Borer v. Vineberg*, 213 A.D.2d 828, 623 N.Y.S.2d 378 (3d Dept., 1995)). In footnote 3, the court explained that the city may enact an ordinance regulating the hours of operation . . . if it was reasonably necessary to promote a public interest.

⁴² See Town Law § 130(13), providing that the town board may regulate "all places selling or offering for sale at retail for consumption on the premises any beverage or food stuff; providing for sanitation and cleanliness and the inspection thereof and defining the opening and closing hours and all other matters related thereto." Municipalities are, however, preempted by Alcoholic Beverage Control Law from legislating with respect certain aspects of the sale of alcoholic beverages. See *Matter of Lansdown Entertainment Corp. v. New York City Dept. of Consumer Affairs*, 74 N.Y. 2d 761, 764, 545 N.Y.S.2d 82, 543 N.E.2d 725 (1989), stating that the Alcoholic Beverage Control Law specifically preempts local regulation "concerning the subject matter of hours of operation, distribution, or

consumption.”; see also *People v. De Jesus*, 54 N.Y.2d 465, 446 N.Y.S.2d 207, 430 N.E.2d 1260 (1981).

⁴³ See Municipal Home Rule Law § 10(1)(ii)(a)(12).

⁴⁴ See, e.g., Town Law § 136, granting municipalities plenary power with respect to the licensing of businesses. The statutory language is broad, arguably authorizing the regulation of a business’ hours of operation. Regulating business, under Town Law §§ 130 & 136, is limited to the businesses listed in the relevant section, and only through a municipality’s police powers can an unlisted business be regulated. See also, General City Law § 20(13), granting cities the power “[to] maintain order, enforce the laws, protect property and . . . for any of said purposes to regulate and license occupations and businesses.”

Town of Southampton, NY
Excerpt, Special Exceptions Section of Zoning

Delegation of authority.

The Planning Board is hereby authorized to act on proposed special exception uses which are specifically provided for in this chapter. Such action may include approval, conditional approval or disapproval based on the standards set forth in this chapter.

General procedure and conditions.

A. The Planning Board may adopt and file in the Town Clerk's office such rules of procedure as it may deem necessary to the proper exercise of its responsibilities with respect to special exception uses.

B. Prior to taking action on any special exception use, the Planning Board shall hold a public hearing after public notice, as provided in the case of an application for site plan approval pursuant to § 274-a, Subdivision 2, of the Town Law of the State of New York, by publication at least 10 days prior to the hearing in the official newspaper of the Town. Where a project is a special exception use and requires site plan approval, the Planning Board may hold one hearing for both applications. Any hearing to be held pursuant to the State Environmental Quality

(1) In addition, for all applications for a special exception submitted on or after the effective date of this amendment, the applicant shall erect or cause to be erected a sign which shall be displayed on the parcel upon which the application is made, facing each public street to which the property abuts, giving notice that an application has been made to the Southampton Town Planning Board for site plan approval along with the time and place of the hearing. The sign shall not be located more than 10 feet from the street line and shall not be less than two feet nor more than six feet above the natural grade at the street line. The sign shall be furnished by the Planning Board and shall be the only sign to be used. The sign shall be displayed not less than 10 days immediately preceding the public hearing or any adjournment date. The applicant shall file an affidavit with the Planning Board that he/she has complied with the provisions of this section prior to the opening of the public hearing.

(2) Additionally, for all applications submitted on or after the effective date of this amendment, the applicant shall mail notice of the public hearing date, at least 10 days prior thereto, to every property owner, as shown on the current Town of Southampton assessment rolls, of parcels abutting and/or directly opposite (by way of extension of lot lines through the street right-of-way) the property which is the subject of the public hearing. Such notice shall be by either certified or registered mail, return receipt requested. Proof of such notice shall consist of a copy of the assessment rolls, the return receipts, and an affidavit attesting to compliance with this mailing notification. Such proof shall be submitted to the Planning Board prior to the public hearing. No additional mailing shall be required for an adjournment.

C. All matters which are the subject of mandatory referral or notice to other agencies as set forth in the enabling statutes and in this chapter shall be transmitted to the appropriate agencies by the Planning Board in accordance with the provisions of those sections.

D. The Planning Board shall keep minutes of its proceedings showing the vote of each member upon every question or, if absent or failing to vote, indicating such fact. The Board shall also keep records of examinations and official actions, all of which shall be immediately filed in the office of the Planning Board and shall be a public record. Each decision of the Planning Board with respect to the approval of a special exception use shall be so stated and documented as to provide a definitive authorization to the Building Inspector for issuing a building permit or certificate occupancy.

E. A special exception authorization by the Planning Board for the issuance of a building permit shall expire within 90 days of such authorization in the event that such permit shall not be applied for within such ninety-day period. Extension of such authorization may be granted by the Planning Board for additional ninety-day periods.

F. A special exception use for which a building permit is authorized by the Planning Board pursuant to the provisions of this section shall be construed to be a conforming use.

G. Any violation of the limitations or special conditions and safeguards established by the Planning Board with respect to a specific authorization for a special exception use shall be deemed a violation of this chapter punishable under the provisions of § 330-186.

H. A fee schedule shall be established, and changed as needed, by resolution of the Southampton Town Board. A copy of the fee schedule is on file with the Town Clerk's office and the Department of Land Management.

General standards.

For every such special exception use, the Planning Board shall determine that:

A. Such use will be in harmony with and promote the general purposes and intent of this chapter as stated in § 330-3.

B. The plot area is sufficient, appropriate and adequate for the use and the reasonably anticipated operation and expansion thereof.

C. The proposed use will not prevent the orderly and reasonable use of adjacent properties, particularly where they are in a different district.

D. The site is particularly suitable for the location of such use in the Town.

E. The characteristics of the proposed use are not such that its proposed location would be unsuitably near to a church, school, theater, recreational area or other place of public assembly.

F. The proposed use, particularly in the case of a nonnuisance industry, conforms to this chapter definition of the special exception use where such definition exists or with the generally accepted definition of such use where it does not exist in this chapter.

G. Access facilities are adequate for the estimated traffic from public streets and sidewalks, so as to assure the public safety and to avoid traffic congestion; and, further, that vehicular entrances and exits shall be clearly visible from the street and not be within 75 feet of the intersection of street lines at a street intersection, except under unusual circumstances.

H. All proposed curb cuts have been approved by the street or highway agency which has jurisdiction.

I. There are off-street parking and truck loading spaces at least in the number required by the provisions of §§ 330-92 through 330-101, but in any case an adequate number for the anticipated number of occupants, both employees and patrons or visitors; and, further, that the layout of the spaces and driveways is convenient and conducive to safe operation.

J. Adequate buffer yards and screening are provided where necessary to protect adjacent properties and land uses.

K. Adequate provisions will be made for the collection and disposal of stormwater runoff from the site and of sanitary sewage, refuse or other waste, whether liquid, solid, gaseous or of other character.

L. No outdoor sales lot, rental equipment storage or display area will be permitted in the required front yard area of any business district, except that in the HB District such uses may be permitted in the required front yard, provided that they are set back 50 feet from the front property lines.

M. The proposed use recognizes and provides for the further specific conditions and safeguards required for particular uses in this article.

Meeting of special conditions and safeguards required.

A. No authorization for a building permit shall be granted by the Planning Board for any use listed in this section unless the Board shall specifically find that, in addition to meeting all of the general standards set forth in § 330-122, the proposed special exception use also meets the special conditions and safeguards in this section.

B. Any deviation from the special conditions and safeguards in this section shall be prohibited and can only be treated as a use variance by the Zoning Board of Appeals.

§ 330-124 Automobile laundry.

A. The lot area shall be not less than 40,000 square feet nor shall it have a frontage of less than 150 feet along a secondary highway.

B. In the event that the site of a proposed automobile laundry is within 500 feet of a church, school, library, playground or similar place of public assembly, the Planning Board shall find the following:

- (1) That the design incorporates measures so that the traffic generated by the proposed facility will have no adverse impact upon the foregoing uses.
- (2) That the design incorporates measures so that the facility will not generate noise that will adversely affect the foregoing uses.
- (3) That the design incorporates measures so that the proposed facility will not adversely affect the safety of users of the foregoing uses.

C. Storage area for vehicles waiting for service shall be provided on the site and shall not occur on a public street or highway. Not more than five motor vehicles shall be stored outdoors overnight.

D. An automobile laundry shall not provide services other than washing, waxing, simonizing or similar treatment.

E. Outdoor storage and display of accessories, portable signs and outdoor repair work shall be prohibited at all times. Premises shall not be used for the sale, rental or display of automobiles, trailers, mobile homes, boats or other vehicles.

F. Water used in the washing process shall be recycled, and the overall facility shall be designed, located and operated to protect the groundwater reservoir from pollution.

§ 330-125 Beach club, nonprofit.

A. The lot area shall be not less than two acres nor shall there be less than two linear feet of beach frontage for each individual member.

B. A beach club shall not provide dwelling units or any other residence facility in excess of the number of dwelling units that would be permitted on the site through the regular application of this chapter.

C. All intensive outdoor activities shall be so located on the property with reference to surrounding properties that they shall be reasonably screened from view and compatible with the existing or potential use of neighboring properties.

D. Outdoor lighting shall not project light onto nor shall light sources be visible from neighboring properties. No outdoor light source shall be more than 10 feet above the ground level underneath it.

E. There shall be no outdoor public-address or music system.

F. Beach club activities shall not include a nightclub.

G. Provisions shall be made for proper sanitary waste disposal and water supply facilities in conformance with the requirements of municipality and the Suffolk County Health Department and shall be designed to protect the groundwater reservoir from pollution, saltwater intrusion or excessive demand detrimental to the environment and neighboring properties.

H. All parking of vehicles shall be provided for off the street in appropriate off-street parking areas sufficient to meet the needs of the membership and their guests.

I. Signs shall be limited to one announcement sign, not over 12 square feet in area, which may either be attached to a building wall or be a ground sign as provided in § 330-86B.

J. No food or beverage shall be served in any dining room or on any part of the grounds of such club between the hours of 9:00 p.m. and the following 9:00 a.m., except on Friday, Saturday and Sunday nights and on nights preceding holidays when the closing hour shall be 1:00 a.m., except that on Sunday nights it shall be 10:00 p.m.

§ 330-126 Boatyard.

A. All minor and major repairs to recreational boats and commercial fishing vessels may be provided if such major repair services shall not be deemed to be incompatible with the use of adjoining properties.

B. Outdoor storage of boats may be permitted.

C. Commercial fishing, dockage, warehousing, outdoor storage and similar accessory uses may be permitted in connection with a boatyard, provided that such uses are located at least 50 feet from any residential district and provided that such use will not be deemed to be incompatible with the use of adjoining properties.

D. In addition, all requirements listed for a marina shall also apply to a boatyard.

§ 330-127 Bus passenger shelter.

A. The shelter shall be located to permit ample room for the bus to conveniently leave the traveled roadway to pick up or discharge passengers.

B. The design shall be harmonious with adjacent properties.

C. Such structure shall have no more than one announcement sign, such sign not exceeding two square feet in area.

§ 330-128 Church or similar place of worship or religious instruction.

A. The lot area shall be not less than two acres, nor shall it have a frontage of less than 200 feet along a collector street or secondary highway.

B. All buildings and structures shall be at least 50 feet from any lot line, except that in no case shall it have less than the required yard in the district in which it is located.

C. Lot coverage shall not exceed 20% or the maximum percentage permitted in the applicable district, whichever is less.

D. Off-street parking shall not be located in any required side or front yard applicable to permitted uses in the district nor within 20 feet of any lot line in a required rear yard applicable to permitted uses in the district.

§ 330-129 Highway business uses with buildings or building complexes greater than 15,000 square feet.

For highway business uses with buildings or building complexes greater than 15,000 square feet:

A. A traffic impact analysis shall be submitted which determines that the existing roadway network in the area of the proposed development will be able to handle the existing through traffic plus the additional traffic that the development will generate.

B. Design of the subject building or buildings shall be consistent with the scale and character of the structures which have been historically developed within the Town. The following are design guidelines to be utilized in the design of the subject buildings:

(1) Roof type:

(a) No flat roofs.

(b) The two roof types that are predominantly encouraged in the Town are gable and hip.

(c) Given that there are a few examples of gambrel- and mansard-roofed structures within the Town, their proliferation is not encouraged; however, limited use of these roof types may be permitted to lend variety.

(2) Roof massing: Single-roof type is not encouraged for structures more than 5,000 square feet. Larger buildings shall have a more complex roof design which consists of the main roof with lower, intersecting secondary roof types, except for agricultural greenhouses.

(3) Roof pitch:

(a) Gable roofs below 7:12 are prohibited.

(b) Hip roofs shall be 4:12 to 9:12.

(c) Gambrel roofs:

[1] Upper roof shall be 5:12 to 8:12.

[2] Lower roof shall be 18:12 to 20:12.

(d) Mansard roofs shall be a maximum of eight feet in height and shall be designed in proportion to the size of the facade below. The roof shall step in from the eave to the top of the mansard one to two feet. This does not apply to agricultural greenhouses.

§ 330-130 Conversion of existing one-family detached dwelling for two families.

A conversion of an existing one-family detached dwelling for use as a two-family dwelling shall only be permitted where the lot area and floor area are double that required for each family in the applicable district and where the proposed dwelling also complies with all other applicable requirements of this chapter. The Planning Board may approve the conversion of an existing one-family dwelling on a parcel with a lot area greater than 1 1/2 times the minimum lot size of the applicable zoning district, provided that at least one development right or PBC is transferred to the site.

§ 330-131 Drive-through establishments.

A. Only one point of ingress and one point of egress, or one point of combined ingress and egress, shall be provided per street or common driveway frontage for each drive-through establishment. Where the point of ingress is provided separately from the point of egress on the same street or common driveway frontage, such points of access shall be separated by a minimum distance of 100 feet, measured from the center line of each point of access at the streetline.

B. The width of a curb cut from a street or common driveway for each point of access into a drive-through establishment shall only be as wide as necessary to accommodate the turning movements of service, delivery or emergency vehicles and, where applicable, shall be angled to provide safe and convenient turning movements, while discouraging illegal turning movements.

C. On-site circulation may be one-way or two-way. However, circulation for a drive-through establishment shall be in a one-way counterclockwise direction so as to permit the driver's side to be adjacent to the service window. On that side of a building that accommodates the drive-through service windows, traffic circulation shall be one-way only.

D. The width of a drive-through lane shall be at least 12 feet. Each stacking space within the drive-through lane shall be a minimum length of 20 feet. No stacking space, when occupied, shall prevent vehicles in designated parking spaces from turning into or backing out of a parking space, nor prohibit or inhibit vehicles from making turns or movements within the site. No portion of the designated drive-through lane, including the required stacking spaces within it, shall be utilized for or counted towards the minimum width necessary to provide a driveway or driveway aisle for any parking space provided adjacent to, parallel to or perpendicular to the drive-through lane.

E. An additional traffic lane shall be provided adjacent to and along the full width of the outermost drive-through stacking lane, to permit vehicles to leave the stacking lane and circulate around the site. The width of the additional traffic lane shall also be a minimum of 12 feet in width. The width of the additional lane may also be utilized for and counted towards the minimum width necessary to provide a driveway or driveway aisle for any parking space provided adjacent, parallel or perpendicular to the drive-through stacking lane. To the extent that the drive-through stacking lane and the additional traffic lane adjacent to it curves around the

rear of the building in which the service window is provided, such lanes shall be set back at least 25 feet from the rear wall of the building.

F. The on-site circulation system for a drive-through establishment shall provide for safe, convenient and free-flowing traffic circulation and shall avoid points of conflicting turning movements, the flow of two-way traffic lanes into a one-way lane coming in the opposite direction, sudden stops or requiring the sudden merging of traffic. These principles shall apply not only to automobile traffic movements but also to service delivery and unloading operations, to garbage pickup, and for other landscaping, maintenance, street cleaning and emergency vehicles.

G. Where more than one service window is provided for a drive-through establishment, such service windows shall be located on the same side of the building. Where more than one window is utilized for each transaction, such as ordering, payment and pickup, such windows shall be separated by a distance of at least 40 feet so as to allow one vehicle to stack between the vehicles located at each service window.

H. Ordering payment and pickup shall take place at service facilities only. One sign, no more than 32 square feet, shall be permitted.

I. No drive-through or drive-in facility shall be permitted in the front yard or in the case of a corner lot, in the side yard adjacent to a public street.

Town of Warwick - Zoning excerpt

Section 164-46 Site plan and special use permit

Purpose. The purpose of this section is to provide regulations governing the applicability, submission requirements, standards for review and design, and due process for site plan and special use permit review and approval. The intent is to ensure that the development and use of individual parcels of land do not have an adverse effect on adjacent lands or on the character of the community. Such regulations are designed to protect the community from traffic congestion and conflicts, noise, odor and other forms of pollution, inappropriate design, flooding, and excessive soil erosion, to ensure that the proposed use will be in harmony with the appropriate and orderly development of the district in which it is proposed, and that its impacts can be mitigated by compliance with reasonable conditions. The regulations are also designed to ensure that new development conforms with the Town's planning goals and objectives as expressed in its Comprehensive Plan.....

.....(11) One accessory residence to a single-family dwelling may be located on a lot as a guest home, not to exceed the size of the principal residential structure and not to be erected within the required front, side or rear yards of the principal building. Together, the principal residential structure and the accessory residence must occupy an area that could be legally subdivided, resulting in two conforming lots, each with a principal residential structure.

(12) **Elder cottage housing option** in the AI and AP-O Districts provided:

[Added 10-24-2002 by L.L. No. 6-2002; amended 9-11-2003 by L.L. No. 4-2003]

- (a) The principal dwelling on the premises is owner-occupied.
- (b) The principal dwelling is located on a single lot with a lot area of not less than 1 1/2 acres.
- (c) The ECHO unit shall be located no closer to any front property line than the principal dwelling on the lot or on that lot directly adjacent.
- (d) A reasonable determination can be made that the existing water supply and sewage disposal facilities are adequate or will be suitably improved to accommodate the ECHO unit.
- (e) All further requirements of the Town of Warwick are acknowledged in writing by the applicant, including a requirement that the special use permit will be annually reviewed for renewal by the Building Department and the further requirement that the structure be properly removed from the premises and its site restored to lawn area within six months of its discontinuance of use as an eligible elder cottage housing (ECHO) unit.

Editor's Note: Former Subsection J(12), which provided that an accessory professional office or studio must be incidental to the residential use of the premises and be carried on by the resident therein, was repealed 1-24-2002 by L.L. No. 2-2002.

