

SUPERIOR COURT OF NEW JERSEY

MENELAOS W. TOSKOS
JUDGE



BERGEN COUNTY JUSTICE CENTER
HACKENSACK, NJ 07601
201-527-2675

November 10, 2009

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Re: NOH, Inc. and 7-Eleven, Inc. v. Borough of Rutherford
Council and Mary P. Kriston as Borough Clerk
Docket No. BER-L-5173-07

Dear Counsel:

Enclosed please find the Court's opinion and Final Judgment with respect to the above matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Menelaos W. Toskos", written over the typed name below.

Menelaos W. Toskos, J.S.C.

MWT/ds
Enclosures

Hon. Menelaos W. Toskos, J.S.C.
SUPERIOR COURT OF NEW JERSEY
Bergen County Justice Center
10 Main Street
Hackensack, New Jersey 07601

FILED

NOV 10 2009

**MENELAOS W. TOSKOS
J.S.C.**

This Order is prepared and filed by the Court:

NOH, INC. and 7-ELEVEN, INC.,

Plaintiffs,

vs.

BOROUGH OF RUTHERFORD COUNCIL
and MARY B. KRISTON as Borough Clerk,

Defendants.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY
DOCKET NO. BER-L-5173-07**

Civil Action

ORDER FOR JUDGMENT

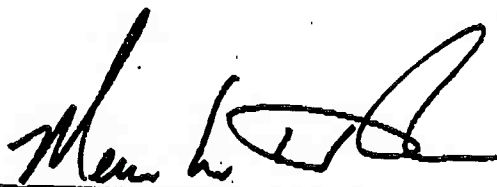
This matter having come before the Court by way of trial on August 28, 2009 before the Honorable Menelaos W. Toskos, J.S.C. in the presence of Amato & Associates, P.C. (Richard S. Keenan, Esq., appearing) admitted pro hac vice on behalf of the plaintiffs, NOH, Inc. and 7-Eleven, Inc. and Cifelli & Davie (Kenneth P. Davie, Esq., appearing) on behalf of the defendants, the Borough of Rutherford Council and Mary P. Kriston as Borough Clerk and the Court having considered the Complaint in Lieu of Prerogative Writ challenging the validity of the Borough of Rutherford Ordinance No. 3139-07 entitled An Ordinance to Amend and Supplement the Code of the Borough of Rutherford, Chapter 22A, Entitled "Convenience Stores" and the counterclaim of the defendant Borough of Rutherford seeking a declaratory judgment holding Ordinance No. 3139-07 to be valid, and the Court having further considered the briefs and oral argument of counsel and for all the reasons expressed by the Court in its

written opinion dated November 10, 2009, which opinion is incorporated herein by reference,
and for other good cause appearing

It is on this 10th day of November, 2009

ORDERED and **ADJUDGED** that Ordinance No. 3139-07 regulating the hours of
operation of convenience stores in certain zones in the Borough of Rutherford is declared to be
invalid and of no further force and effect; and it is further

ORDERED that the counterclaim is dismissed with prejudice.



MENELAOS W. TOSKOS, J.S.C.

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

NOH, INC. and 7-ELEVEN, INC.,

Plaintiffs,

v.

BOROUGH OF RUTHERFORD COUNCIL
and MARY P. KRISTON as Borough Clcrk,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY
DOCKET NO. BER-L-5173-07

Civil Action

OPINION

Decided: November 10, 2009

Richard S. Keenan admitted pro hac vice on behalf of Plaintiffs,
NOH, Inc. and 7-Eleven, Inc. (Amato & Associates, P.C.).

Kenneth P. Davie on behalf of Defendants, the Borough of
Rutherford Council and Mary P. Kriston, as Borough Clerk (Cifelli
& Davie).

MENELAOS W. TOSKOS, J.S.C.

PROCEDURAL HISTORY

The owner and the operator of a 7-Eleven franchise located in the Borough of Rutherford (“Borough”) has filed this Complaint in Lieu of Prerogative Writ challenging the validity of a certain amendment to the zoning ordinance. The plaintiff, NOH, Inc. (“NOH”) operates a franchise it received from 7-Eleven, Inc. (“7-11”) at 110 Jackson Avenue in Rutherford, New Jersey (the “Property”). On October 1, 2006, NOH entered into a lease with the owner of the Property and shortly thereafter, on December 26th entered into a franchise agreement to operate a 7-11 at the Property. The Property had never been occupied by a business that operated for twenty-four hours. Therefore, plaintiff began to convert the existing building on the Property

into a 7-11 store. The Property is located in a "B3-three story office and retail zone". The Property is located adjacent to and is part of a retail commercial center. By recorded easements, the Property and retail commercial center share the same driveway entrances. The retail commercial center contains four neighborhood stores. These include a retailer's office, a laundromat, a lunchconette and a hair salon. None of these stores operate on a twenty-four hour basis. Excluding the adjoining retail commercial center, the nearest commercial property is located two blocks northeast of the Property, in a B-1 zone.

At the public work session of the Borough Council on April 17, 2007, a number of citizens expressed their concerns about the 7-11 store. A signed petition with 299 signatures was produced and submitted to the Council. Thereafter, on May 1, 2007 the Borough Council introduced Ordinance No. 3139-07 amending Chapter 22A entitled "Convenience Stores" (the "Ordinance"). This Ordinance regulated the hours of all convenience stores in all but two zoning districts. On May 22, 2007 the Ordinance passed on second reading. At the time of the public hearing on the Ordinance the Council only heard from Nassor Nassor, a principal of NOH. Mr. Nassor spoke in opposition to the passage of the Ordinance. Certain council members spoke in support of the Ordinance. Councilman Reyes noted that it regulates the hours of all convenience stores and is not directed to any one particular location. He further stated that based on his twenty years as a police officer, residents needed to be protected from the operation of convenience stores between the hours of midnight and five in the morning. Councilman Genovesi stated that the Ordinance reflected guidelines and regulations the Borough set forth in regard to the hours of operation for all convenience stores in the Borough. This Ordinance, he stated, reflects the decision of the governing body as to what is best for the community. The Mayor also spoke urging all those doing business within the Borough to be good neighbors.

The following day a temporary certificate of occupancy was issued and the 7-11 opened for business on May 30, 2007. A summons was issued for violating the Ordinance on June 1, 2007. Since the issuance of that summons, 7-11 has been in compliance with the hours set forth in the Ordinance.

Presently, within the Borough there are at least three businesses that operate on a twenty-four hour basis. A Dunkin Donuts store at 56 Park Avenue, which is located within the B-3/SH zone. Apartments are located above the Dunkin Donuts in the same building. The Dunkin Donuts is on the main street for the business district. The other two businesses which operate on a twenty-four hour basis are both gasoline service stations. There is an Exxon/Mobil gasoline station with a convenience store located on State Highway Route 17. This business is in an HC zone. Across from the Exxon/Mobil gasoline station also on Route 17 in the HC zone is a Lukoil service station which operates on a twenty-four hour basis. Finally a New Jersey Transit bus stop located adjacent to the 7-11 store operates on a twenty-four hour basis.

Plaintiff alleges that the Ordinance abridges their constitutional rights. They argue that Article I of the New Jersey State Constitution as well as the Fourteenth Amendment to the United States Constitution provide to citizens the right to acquire, possess and protect property. Embedded within these provisions is the right to operate lawful businesses. Plaintiff argues this includes the right to remain open during late night and overnight hours. Therefore, plaintiff contends an ordinance cannot impose unnecessary, unreasonable and arbitrary restrictions with no relation to the public interest.

Plaintiff asserts that there is no public need served by this Ordinance. Plaintiff contends that the Borough has failed to demonstrate a compelling public need. Plaintiff notes that the premise for the Ordinance is the proximity of the 7-11 store to the residential neighborhood and

the need to protect the peace and repose of those adjoining residents. Plaintiff points to the absence of any investigations, studies, statistics or findings that would support this premise. Furthermore, plaintiff argues that the wrongs sought to be addressed by the Ordinance are already covered by existing legislation contained in the Municipal Code. Specifically Chapter 63 which regulates noise in order to "significantly reduce the ambient noise level in Rutherford, so as to foster and protect the public health, comfort, safety and welfare of its citizenry." Chapter 53 which prohibits littering and Section 131-13 which regulates lighting. Furthermore, plaintiff argues the issues of lighting, littering, and excessive noise, are not specifically related to the overnight operation of the 7-11 business.

Defendant answered and filed a counterclaim for a declaratory judgment contending that the Ordinance is valid and a constitutional exercise of the governing body's police powers. Defendant argues that the plaintiff's comparison to the three other twenty-four hour establishments in the municipality is inaccurate. The Dunkin Donuts, the defendant points out, is located on the main commercial street of the Borough of Rutherford. It is surrounded on all sides by commercial property. Additionally, Dunkin Donuts is not a convenience store. Each of the two twenty-four hour gas stations are located on Route 17. Therefore, defendant argues, neither property can be compared to the location of the 7-11 store.

Defendant states that the municipality in enacting the ordinance is entitled to a presumption of validity. Plaintiff has the burden to show that the Ordinance was arbitrary, capricious or unreasonable in order to overcome this presumption. The defendant contends that the plaintiff failed to show that there is no rational basis for the Ordinance. It was enacted in response to concern by nearby residents that their peace, privacy and repose would be affected by the operation of a twenty-four hour convenience store. Therefore, there exists a public need

and a rational basis for its passage. Additionally, defendant contends the Ordinance is narrowly tailored and not overbroad. It is restricted specifically to convenience stores operating in certain zoning districts. It does not attempt to legislate all businesses throughout the municipality. Although defendant acknowledges there are ordinances that regulate loitering, light and noise disturbance, they do not address the loss of repose that will be visited upon nearby residents by the operation of a convenience store for twenty-four hours. Therefore, the plaintiff having failed to meet its burden, the legislation should be upheld.

STANDARD OF REVIEW

In Title 40, specifically N.J.S.A. 40:48-1 et seq., the State has empowered municipalities to enact ordinances exercising police powers. The court reviews a challenge to an ordinance using the deferential standard espoused in Hudson Circle Service Center, Inc. v. Kearny, 70 N.J. 289, 298 (1976). As such, the Court approaches its review of the Ordinance with a presumption of validity. However, such presumption is not irrebuttable. Nonetheless, this deferential standard imposes a burden on plaintiff to overcome the presumption only by a clear showing that the Ordinance is arbitrary or unreasonable. Even if the ordinance "... may be open to a construction which would render it unconstitutional or permit its unconstitutional application, it is the duty of a reviewing court to so construe the ordinance as to render it constitutional if it is reasonably susceptible to such construction." State v. Holland, 132 N.J. Super. 17, 23 (A.D. 1975).

Judge Keefe in Southland Corp. v. Edison Tp., 217 N.J.S. 158 (L.D. 1982) affirmed 220 N.J.S. 294 cited Robinson v. Cahill, 62 N.J. 473 (1973) to identify the established approach the court must take. For due process purposes, the court must weigh the nature of the restraint against the apparent public justification and decide whether the governmental action is arbitrary.

With respect to equal protection arguments, the question to be answered is "whether there is an appropriate governmental interest suitably furthered by the deferential treatment." Borough of Collingswood v. Ringgold, 66 N.J. 350 (1975).

A municipality cannot interfere with constitutionally protected property rights unless it makes a clear showing that (a) a genuine public need exists and (b) the means adopted to meet those circumstances are tailored to address the public need. Fasino v. Borough of Montvale, 122 N.J. Super. 304 (L.D. 1973) aff'd 129 N.J. Super. 461 (A.D. 1973).

"There cannot be unnecessary and excessive restrictions upon the use of prior property to the pursuit of useful activities." Southland at p. 173.

The Court's review of a constitutional challenge to a municipal ordinance is de novo. State v. Clarksburg, 375 N.J. Super. 624, 631 (A.D. 2005). In this matter the court's de novo review is based upon facts stipulated by the parties.

DECISION

An examination of the Ordinance enacted into legislation on May 22, 2007 shows that the governing body determined that "there is a need for regulation of certain aspects of business operation for convenience stores." The purpose of the Ordinance is "to regulate the opening and closing hours of convenience stores in order to safeguard the health, safety and welfare of the citizens . . ." the governing body having ". . . determined that all night or late night commercial operations such as convenience stores . . . in close proximity to residential neighborhoods, disturbs the peace and repose of its citizens, and causes loitering, litter, traffic and parking noise and lighting disturbances, thereby creating a public nuisance." The Ordinance defined convenience stores as a retail business that offered for sale ". . . any prepackaged food products, household items, newspapers and magazines and sandwiches and other freshly prepared food

meant for consumption offsite." Convenience stores are only permitted to operate between the hours of 5:00 a.m. and twelve midnight except in the ORD and HC zoning districts.

Pursuant to Article I Paragraph 1 of the New Jersey Constitution, "all persons . . . have certain natural and unalienable rights, among which are . . . possessing and protecting property . . ." This provision provides constitutional safeguards with respect to laws regulating business conduct. As noted by Judge Keefe in Southland Corp. v. Edison Tp., 217 N.J. Super. 158 (L.D. 1986) affirmed 220 N.J. Super. 294:

Article I of the New Jersey Constitution affords our citizens the right to acquire, possess and protect property. Thus New Jersey citizens have a guaranteed right to pursue lawful vocations unless there is a superseding public need which requires that the lawful pursuit be regulated. P. 173.

The Fourteenth Amendment to the United States Constitution embodies a similar concept. (P. 175).

The restraint imposed by the Ordinance in this matter restricts the operation of convenience stores in all but two zoning districts, to the hours of 5 a.m. through twelve midnight. The public justification asserted by the Borough of Rutherford is to protect the "peace and repose" of the nearby residential neighborhoods. Plaintiff argues that there is no evidence that the operation of the 7-11 store would cause any undue disturbance to the Borough's residents. The Court has examined the stipulation of facts and the exhibits submitted, and agree that there is no evidence to support the Borough's position. In enacting the Ordinance there was no reference to any studies, or statistical data that would support the Borough's position. If any exists, the Court was not made aware of them. While the Borough has three businesses that operate on a twenty-four hour basis, the Borough cannot identify any incident which would illustrate that the twenty-four hour operation of these businesses disturbs the "peace and repose" of the nearby residents or led to increase loitering, litter, traffic, noise or light disturbance. The

minutes of the May 22nd council meeting during which the Ordinance was enacted failed to identify any evidence to justify its passage. The Court notes that Councilman Reyes who moved the Ordinance for passage, stated:

“ . . . the hours between five in the morning to midnight, is sufficient for any convenience store to be open throughout the borough. He said this is not directed at any one location but directed at all areas of the Borough of Rutherford. Councilman Reyes said he is using his past experience, twenty years as a police officer and appreciating the importance of a neighborhood and good neighbors, including businesses and he thinks that midnight is sufficient time for any store to be open in the Borough of Rutherford and he asked his fellow council members to support him on the ordinance.”

Clearly this is a conclusionary opinion unsupported by any factual evidence.

The Borough points to Quick Check Food Stores v. Springfield Township, 83 N.J. 438 (1980) to back its position that the exercise of its police power includes the authority to restrict business hours of retail establishments. In Quick Check, the Supreme Court held valid an ordinance which prohibited any retail establishment, except pharmacies and restaurants, from being opened between the hours of 9:00 p.m. and 6:00 a.m. in a neighborhood commercial zone. The purpose of the ordinance was a finding by the governing body that it furthers the public health and welfare goal to secure “. . . quiet seclusion, refreshment of repose and the tranquility of solitude.” The Borough argues that Quick Check is factually similar to the case at hand noting that the neighborhood commercial zones in Springfield all abutted residential areas. The intent of the Springfield ordinance was to protect the character of the residential neighborhoods. The Supreme Court held that Springfield was justified in enacting its ordinance to limit the hours of service of commercial establishments located “in a residential milieu” because it was related to the health, peace and comfort of the surrounding homes. The Borough maintains that the same public purpose is being served by its Ordinance and, therefore, this Court should find the Ordinance valid.

The Court agrees with plaintiff that the Supreme Court in Quick Check determined that a municipality may exercise its police powers to regulate business hours. Nonetheless, the Court does not concur that Quick Check is dispositive of this case. The Borough's argument ignores the factual differences between Quick Check and this matter. First, Rutherford's Ordinance deals only with convenience stores. The Springfield ordinance dealt with all retail establishments except pharmacies and restaurants. Here there is no empirical data that would differentiate convenience stores from any other retail business. In fact, Councilman Reyes in his statement supporting the passage of the Ordinance stated that he thought ". . . that midnight is sufficient time for any store to be opened in the Borough of Rutherford . . ." As noted by the plaintiff in its brief, Rutherford regulated only one type of business, a convenience store, and limited its hours of operations in thirteen out of fifteen zoning districts. Springfield, on the other hand, in its ordinance regulated almost all types of businesses located in only one particular zone. Consequently this Court can not simply conclude that reliance on Quick Check invariably means that an appropriate governmental interest is furthered by the deferential treatment of convenience stores. It is conceded that the Dunkin Donuts which operates on a twenty-four hour basis could move into the 7-11 location at 110 Jackson Avenue and operate on a twenty-four hour basis. According to the Borough's Construction Code Official, Dunkin Donuts is "not deemed a convenience store because they don't sell household items and the other stuff that a convenience store would sell." While this may be an accurate description, it fails to address the question of why the operation of a Dunkin Donuts operating on a twenty-four hour basis at the same location as presently exists a 7-11 would not equally disturb the "peace and repose" of the surrounding residential neighborhood. The same could be said for several other permitted uses in the B-1 zone business such as employment agencies, medical and dental clinics, laboratories,

travel agencies and banks. In a B-2 zone a new car and truck dealer could be opened for twenty-four hours. While in the B-3 zone barber shops, clothing stores, drug stores, food stores, meat and fish markets, bakeries, hardware stores, household appliance stores, liquor stores, appliance stores, movie theaters and video rental stores all could be opened for twenty-four hours. The Borough does have four ordinances that prohibit four specific types of businesses from twenty-four hour operation. These include gas stations, dry cleaners, laundromats and massage parlors. Yet, there is no evidential data before this Court to explain how a "public need" exists to regulate only the operation of convenience stores.

The Court's determination that the Ordinance is predicated on unsupported findings establishes that this legislative enactment is arbitrary, capricious and unreasonable. Delfalco Instant Towing, Inc. v. Borough of New Providence, 380 N.J. Super. 152, 158 (A.D. 2005). Additionally, the failure to regulate all businesses in a like manner is discriminatory. Hart v. Teaneck Tp., 135 N.J.L. 174 (E&A 1947). There has been no showing that convenience stores in general pose any particular risk to the Borough or its residents. Nor is there any evidence that would support the Ordinance's restrictive treatment of only convenience stores.

Quick Check is also distinguished in that the Supreme Court did not consider Quick Check's argument that there existed less restrictive alternatives which were more appropriately tailored to address Springfield's concerns. Here, however, plaintiff has asserted that with respect to the noise, littering, loitering and lighting concerns espoused in the Rutherford Ordinance, the Borough has sufficient legislative enactments to deal with these. As such, there exists a regulatory means to address the public concerns which would be less intrusive upon plaintiff's property rights since all of these concerns are regulated by existing borough ordinances.

The Court also determines that the purpose asserted by the Borough in its Ordinance could be addressed through less onerous and more effective means by enforcement of its existing ordinances. In Larsen v. Mayor and Council of Borough of Spring Lake Heights, 99 N.J. Super. 365 (L.D. 1968) the court struck down two ordinances from two municipalities each of which prohibited "group rentals" of unrelated persons. The ordinances were created because the municipalities determined that group rentals led to an increase of noise, acts of immorality, public drunkenness, lewd conduct, traffic and parking congestion. The court determined that the ordinances went:

Beyond the public need and are an excessive restriction on the use of private property and the pursuit of lawful activity . . . they are palpably excessive as a requirement necessary to minimize the offensive character of the conduct to be regulated. In short the sweeping rule of the ordinance is manifestly not sustainable as including only a reasonable margin to ensure effective enforcement of the asserted object. P. 373-374.

In striking down the ordinances the court in Larsen noted that there were other ordinances and statutes which existed that addressed the complaints sought to be alleviated by the two ordinances. Enforcement of these ordinances would suppress the problems complained of without imposing excessive restriction on the use of private property.

The problem is not the operation of the business itself, but the noise, light, loitering, littering and traffic that the business purportedly generates. There is nothing to indicate that those concerns are generated only by the operation of a convenience store business. While a law need not pose a complete solution to a particular problem, it should not operate in an unreasonable manner at the expense of private property rights.

The governing body was correct to consider and respond to concerns by its citizens. Finnegan, LLC v. Township Council, 394 N.J.S. 303, 311 (A.D. 2007). However, in its attempt to address the issues raised it acted arbitrarily. The Court accepts that the Ordinance was

adopted by the Borough of Rutherford in good faith. That it was adopted out of a legitimate concern for a potential harm to the nearby residential neighborhood.

Except for the B-2 zone which is bordered by the Eric Lackawanna railroad tracks, the ORD zone, and the HC zone, the Borough of Rutherford's commercial zones are all surrounded by or are adjacent to residential zones. Therefore, all businesses will have some impact in their operation on the surrounding residential neighborhoods. Perhaps because of the impending opening of the 7-11 store, the response of the governing body was myopic focusing only on convenience stores. There simply is no distinction between the operation of a twenty-four hour 7-11 and a twenty-four hour Dunkin Donuts, or any other type of business. If there was, the governing body did not identify such a distinction when enacting the Ordinance.

A business may be subject to the police power regulation designed to curtail a disturbance of the public repose. Nonetheless, the restriction must be so framed that it reasonably contributes to the general welfare. A closing restriction must be justified by specific dangers or conditions otherwise it is an unwarranted interference with the right of citizens to earn a living. An ordinance cannot validly regulate hours of operation of a lawful business on the unfounded basis of risks or problems that could be equally addressed through less restrictive methods. Nor can the police powers be focused only on one business without a reasonable explanation as to why other businesses should not be included under the regulation. Due process requires that such regulations be reasonably related to a public need. Equal protection requires that closing restrictions do not unreasonably discriminate against a particular business. To be valid, an ordinance must further a legitimate purpose and utilize a method to achieve that goal which does not exceed the scope of its police powers. Here the Ordinance enacted was not supported by evidential findings. The public need identified could be readily addressed through

less restrictive alternatives. Finally there is no evidence which could rationally support the disparate treatment of convenience stores. Judgment is, therefore, entered in favor of the plaintiff declaring that the Ordinance is an invalid exercise of the police powers of the Borough.