

Sunrise Check Cashing & Payroll Servs., Inc. v Town of Hempstead 2013 NY Slip Op 00949 Decided on February 14, 2013 Court of Appeals Smith, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on February 14, 2013

No. 12

[*1]Sunrise Check Cashing and Payroll Services, Inc., et al., Respondents,

v

Town of Hempstead, Appellant.

Peter Sullivan, for appellant.

Jeffrey R. Stark, for respondents.

Matthew W. Grieco, for amicus curiae Superintendent of Financial Services.

SMITH, J.: [*2]

We hold that a zoning measure that prohibits check cashing establishments in a town's business district is invalid, because it violates the principle that zoning is concerned with the use of land, not with the identity of the user.

The provision in question is section 302 (K) of article XXXI of the Building Zone Ordinance of the Town of Hempstead, adopted January 10, 2006. It says in pertinent part: "In any use district except Y Industrial and LM Light Manufacturing districts, check-cashing establishments are hereby expressly prohibited."

The only document explaining the purpose of this enactment is a memorandum from a deputy town attorney dated December 13, 2005, the date of a public hearing held on the proposal that became section 302 (K). The subject of the memorandum is "Public Policy behind Check Cashing Ordinance." The memorandum says that the measure "represents sound public policy" because: "Essentially, it serves the interest of encouraging young people and those of lower incomes to establish savings and checking accounts, do their banking at sound and reputable banking institutions, and develop credit ratings. It also eliminates predatory and exploitative finance enterprises from commercial areas, which is beneficial because these enterprises tend to keep a neighborhood

down."

The memorandum consists of several pages criticizing check-cashing establishments on social policy grounds. It says that such establishments make it convenient for young and lower income people "to remain in the cash-only economy" and adds: "This is bad for society as a whole." The memorandum refers to studies finding that "check-cashing establishments actually exploit the poor and African Americans." It concludes that the proposal under consideration "encourages young and lower income people to open up bank accounts, save their money, and develop a credit rating" and "also removes a seedy type of operation, akin to pawnshops and strip clubs, from the commercial areas of the Town." Section 302 (K) was adopted by the Town Board some four weeks after the memorandum was issued.

Several check-cashing establishments brought the present action, seeking a declaratory judgment that section 302 (K) is invalid, and an injunction against its enforcement. Supreme Court granted summary judgment dismissing the complaint. The Appellate Division reversed, holding section 302 (K) to be preempted by article IX-A of the Banking Law and related regulations, which govern the licensing of check-cashers (*Sunrise Check Cashing & Payroll Servs., Inc. v Town of Hempstead*, 91 AD3d 126 [2d Dept 2011]); the Town appeals to us as of right, pursuant to CPLR 5601 (b) (1). We affirm without

reaching the preemption issue, because the challenged provision is not a proper exercise of the zoning power.

A town's power to adopt zoning regulations derives from Town Law § 261, which [*3]authorizes town boards: "to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes" (see also Town Law § 263 [listing the purposes of zoning]).

Our cases make clear that the zoning power is not a general police power, but a power to regulate land use: "[I]t is a fundamental principle of zoning that a zoning board is charged with the regulation of land use and not with the person who owns or occupies it" (Matter of Dexter v Town Bd. of Town of Gates, 36 NY2d 102, 105 [1975] [internal citations omitted]; see also Matter of St. Onge v Donovan, 71 NY2d 507, 515, 517 [1988]).

The provision at issue here contradicts this principle. It is clear from the memorandum of the deputy town attorney that section 302 (K) was directed at the perceived social evil of check-cashing services, which were thought to exploit the younger and lower income people who are their main customers. Whatever the merits of this view as a policy matter, it cannot be implemented through zoning. Section 302 (K) is obviously concerned not with the use of

the land but with the business done by those who occupy it. It is true that there are cases in which the nature of the business is relevant to zoning because of the businesses' "negative secondary effects" on the surrounding community; this is true of so-called "adult entertainment" uses (see *Stringfellow's of N.Y. v City of New York*, 91 NY2d 382, 395-396 [1998]), but, despite the reference to "pawnshops and strip clubs" in the deputy town attorney's memorandum, the Town has not tried to show and does not argue that check cashing services are in a similar category.

Indeed, the Town makes no attempt to defend the purposes advanced in the memorandum as legitimate objects of the zoning power. Instead, the Town tries to save section 302 (K) by attributing to it a different purpose: protecting the health and safety of the community against the dangers created by armed robbery. The Town quotes the observation of the court in *American Broadcasting Cos. v Siebert* (110 Misc 2d 744, 746-747 [Sup Ct NY County 1981]) (a case arising under the Freedom of Information Law) that check-cashing facilities "are and have been over the years, the subject of robberies, kidnappings and murders" and that "the risk of robberies inherently exists in the check-cashing business." There is no evidence that the Town [*4]Board of Hempstead, when it enacted section 302 (K), was worrying about armed robbery; but the Town, relying on

the presumption of validity accorded to zoning legislation (see *Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville*, 51 NY2d 338, 344 [1980]; *Town of Huntington v Park Shore Country Day Camp of Dix Hills*, 47 NY2d 61, 65-66 [1979]) argues that, if any valid purpose for the enactment can be imagined, the body enacting it must be deemed to have had that purpose in view.

We reject the Town's argument. Deference to legislative enactments, at least where the issue is abuse of the zoning power, does not go as far as the Town would have us go. The record here clearly refutes the idea that section 302 (K) was a public safety measure. Assuming, without deciding, that a concern about armed robberies would justify a zoning regulation, this one cannot be justified on that ground.

Accordingly, the order of the Appellate Division should be affirmed, with costs. * * * * *

Order affirmed, with costs. Opinion by Judge Smith. Chief Judge Lippman and Judges Graffeo, Read and Pigott concur. Judge Rivera took no part. Decided February 14, 2013