

# Real Estate Journal

COVERING ALL OF LONG ISLAND, NEW YORK CITY AND UPSTATE NEW YORK

## What every retail property owner and tenant should know about zoning violations in New York


**Howard Geneslaw**


Gibbons, Del  
Deo, Dolan,  
Griffinger &  
Vecchione, P.C.


**Jennifer Porter**


Gibbons, Del  
Deo, Dolan,  
Griffinger &  
Vecchione, P.C.

This article is the second in a 4-part series which explores what every retail property owner and tenant should know regarding zoning violations in New York. This article (part two) reviews the burden of proof and the factors to consider when determining whether to plead guilty or proceed to trial. Part one examined how zoning violations can be avoided and, when they do occur, who is responsible for them. Part three will discuss the computation of penalties and how the duration of the violation can impact the penalty amount. Part four will address the importance of whether the alleged conduct is classified as a "misdemeanor" versus a "violation."

### Part Two: The Burden of Proof and Factors to be Considered in Determining Zoning Violations

#### Burden of Proof

The burden of proof for establishing zoning violations, as for other criminal violations, rests with the municipality, which must prove each of the elements of the

violation beyond a reasonable doubt. Proof that a violation occurred must be established by "legally sufficient evidence" which means "competent evidence, which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof." This presentation of proof by the municipal prosecutor at trial is commonly referred to as the *prima facie* case.

Once the *prima facie* case has been presented by the municipal prosecutor, the defendant may ask questions concerning the evidence or testimony presented by the prosecutor. Then it is the defendant's turn to present a defense. Aside from traditional defenses relating to the truth and validity of the allegations asserted by the prosecutor, the defendant may assert that his or her actions are permitted or that the violation was issued in error. For instance, an affirmative defense that a retail property owner, charged with engaging in an unlawful use of his or her property, could present at trial would be that the use of the property is a lawful

preexisting nonconforming use which predates the provisions of the zoning law under which the defendant has been charged. If sufficient proof, such as a valid certificate of occupancy and/or relevant provisions of the municipal code establishing that the use was valid at the time it was created, can be shown, a dismissal of the violation or a not-guilty determination by the court may be warranted.

#### Factors for Determining Whether to Plead Guilty or Go to Trial

The most important factor for determining whether to plead guilty or go to trial is whether the zoning violation is substantively proper. The defendant should compare the factual allegations set forth in the accusatory instrument with the municipal code to see if all of the elements of the violation are properly and adequately alleged. If, after careful review and investigation, the defendant determines that the factual allegations asserted are true and have been properly alleged, it may be prudent to plead guilty to the original violation, or to enter into a plea bargain on a lesser charge or for a reduced fine amount, to avoid committing resources to defending a violation that will likely result in a guilty finding at trial.

On the other hand, if one of the elements of the alleged violation has not been properly alleged, the defendant can seek dismissal. But

so long as the violation continues to exist, even if the accusatory instrument is substantively improper, a new or superceding violation can be issued. The same is true for procedural errors on the accusatory instrument such as the wrong date or time, which may warrant procedural dismissal of the ticket but do not prevent the municipality from issuing corrected or new violations based upon the same underlying factual observations.

Ultimately, the decision to go to trial should be based on a careful review of the accusatory instrument and the municipal code and only after discussing the violation at least once with the code enforcement officer and/or municipal prosecutor to see if a plea bargain or other more favorable disposition can be reached. If the defendant has sufficient proof that the violation is improper or is permitted under the municipal code and the prosecutor is unwilling to dismiss the violation, a trial in local justice court may be the most appropriate course of action.

**Howard Geneslaw is a director, and Jennifer Porter is an associate, at the law firm of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., which has offices in New York, N.Y., Newark and Trenton, N.J. and Philadelphia, Penn.**