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## Approvals restricting operating hours become increasingly common

Hours of operation often comes up during the planning and zoning board hearing process, particularly where the applicant seeks approval for retail or restaurant use. Typically, during the applicant's presentation, one of the board members or a member of the public inquires. Less frequently, the application form specifically requires that the applicant set forth its anticipated operating hours.

Although the inquiry may appear innocuous, the applicant's response can become a restriction, requiring board approval in order to make changes.

### Local Regulations

In most jurisdictions, operating hours can be limited in at least three ways. The first is a local regulation, which may apply to all businesses, all businesses within a specific geographic area, or all businesses within a particular zoning district. Such a restriction usually does not discriminate against a particular type or class of business and, therefore, courts generally uphold them under the municipality's police power to enact regulations to protect the public health and safety.

### Licensing Requirements

The second method of regulation is through a licensing ordinance that restricts the hours during which a licensed establishment may operate. This is most common in the case of establishments that sell al-



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coholic beverages or feature adult entertainment.

### Conditions of Development Approvals

The third method of regulation is through conditions of approval imposed by a permitting agency such as a planning or zoning board. Because these conditions are often discretionary, this category can be problematic. Where a restriction on operating hours is narrowly tailored to a particular impact, it may be justified. For example, suppose a restaurant violates the minimum required setback to a residential district in the rear. A board may justifiably impose a restriction on the restaurant's operating hours to mitigate noise impacts. Such a condition would be reasonable because there is a direct nexus between it and mitigation of the impact from the variance.

Some planning and zoning boards as a matter of practice condition the approval of

every application on the operating hours that the applicant provided to the board, whether or not the application involves a permitted use or variances. Conditions of this nature are troubling because they lack any nexus to a specific adverse impact. Where the application proposes a permitted use with no variances, and the municipality has not imposed a townwide restriction on operating hours, such a condition becomes difficult to justify and may be subject to reversal on appeal.

### Obtaining Relief From Operating Hour Restrictions

Whatever the basis for conditioning an approval on an operating hours restriction, the applicant is faced with two choices: appeal the condition, or deal with it in the future, when and if there is a desire to modify operating hours. Most applicants, having just received approval and wanting to open for business quickly, will opt against an appeal. While this may be a sound business decision, it can foreclose challenging the restriction in the future. Once the appeal period on the initial approval terminates, the applicant generally will have lost the opportunity to challenge the reasonableness of the restriction.

If the applicant decides to address the issue in the future, when there is a desire to change its operating hours, usually an application to the board is required

seeking an amendment to the original approval. Sometimes, public notice is required. In most jurisdictions, the applicant must show that a change in circumstances warrants a modification to the condition. If the amendment is denied, the applicant can file an appeal, although often the right to appeal is limited to the board's refusal to modify the condition, not its legitimacy.

### Avoiding Restrictions Entirely

Applicants confronted with questions about operating hours should be mindful that their response could become an unanticipated condition of approval. Any operating hours presented to the board should be qualified with an accompanying statement that the applicant retains the right to modify its operating hours as customer demand, business needs and other factors require. This statement may lead to a more detailed discussion concerning the circumstances under which the applicant may exercise that right, but at least it should avoid an unexpected condition of approval.

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