To be Argued by:
KENNETH W. GORDON
(Time Requested: 15 Minutes)

APL-2019-00195
Appellate Division Docket No. CA 18-01448
Monroe County Clerk's Index No. 2017-4442

Court of Appeals

of the

State of New York

In the Matter of
TOWN OF IRONDEQUOIT and TOWN OF BRIGHTON,

Petitioners-Plaintiffs-Appellants,

– against –

COUNTY OF MONROE, TIMOTHY P. MURPHY, as Director of REAL PROPERTY TAX SERVICE FOR COUNTY OF MONROE, and ROBERT FRANKLIN, Director of Finance and Chief Financial Officer of COUNTY OF MONROE,

Respondents-Defendants-Respondents.

BRIEF FOR PETITIONER-PLAINTIFF-APPELLANT TOWN OF BRIGHTON

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November 18, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Other Authorities:

QUESTIONS PRESENTED

1. Whether the Fourth Department erred in changing long established policy set forth by the New York State Legislature in Real Property Tax Law §936 by holding that such section does not require the county to credit the towns for the amount of unpaid maintenance and demolition charges or to guarantee those amounts?

It is respectfully submitted that the court below erred in legislating new policy in the absence of any action by the Legislature to change a long established practice and policy as it has been functioning under statutes enacted by the Legislature for many decades.

NATURE OF THE CASE

This is an appeal pursuant to CPLR 5601(a) from the decision of the Supreme Court, Appellate Division, Fourth Department which reversed the decision of New York State Supreme Court Justice J. Scott Odorisi issued on November 3, 2017 which granted the verified petition filed in this Article 78 proceeding. The appeal is premised on the dissent on the issues of law set forth by Justices Nemoyer and Troutman in the court below.

STATEMENT OF FACTS

Under Town Law §64(5-a), towns are authorized to impose property clean-up and demolition charges against real property on which the towns perform work. The Town of Brighton has adopted local laws that impose such demolition and maintenance charges as a lien against real property where the Town has expended its resources and funds to clean up or demolish a property not in compliance with Town Code. (see R 116-125; 135-138) Charges by the Town for such work are added to the tax bill for real property in the Town. While it is hoped that the charges imposed will be paid by the owner of the property, this payment is not always forthcoming and tax bills and charges can go unpaid by the property owner.

Real Property Tax Law §936 requires the counties to guarantee and credit the towns for unpaid charges assessed against real property. (R, 65-66) For many decades, the County of Monroe has in fact reimbursed the Town of Brighton and other towns in the county for unpaid charges for maintenance and clean up appearing on the tax bill pursuant to the above statutory scheme. (R, 35)

On December 30, 2016, Timothy P. Murphy, the Director of Real Property Services for the County, issued a Tax Bill Charges Memo (the "Tax Memo"). (R, 56-58) The Tax Memo stated that the County of Monroe would no longer guarantee and credit the towns in Monroe County for unpaid charges for property maintenance and demolition contrary to the State statutory scheme, State agency

opinion and established practice. Moreover, the Tax Memo stated an additional new policy that the County of Monroe would unilaterally deduct from sales tax distributions to the towns any monies owed to the city for past years' property maintenance and demolition charges that remain unpaid by property owners. Letters by counsel to the Town of Irondequoit to the Monroe County Law Department protesting these new and unfounded policies failed to resolve matters. (R 59-64) This litigation ensued.

It is noteworthy that the Tax Memo was not issued in response to any change in State statutory law. Neither Town Law §64(5-a) nor Real Property Tax Law §936 has been recently amended by the New York State Legislature. It appears as if Monroe County simply issued the Tax Memo in an effort to change the established practice of how maintenance and demolition charges had been reimbursed to the towns without waiting for any Legislative action in Albany.

POINT I

THE COURT BELOW IMPERMISSIBLY CREATED NEW LEGISLATIVE POLICY

Where the New York State Legislature has chosen not to act, a Court should refrain from legislating new policy particularly in light of a long standing statutory scheme which has been uniformly construed by those it effects and the administrative agencies overseeing such matters. It is a basic canon of statutory construction that:

> "[N]ew language cannot be imported into a statute to give it a meaning not otherwise found therein" (McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 190). Moreover, "a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact" (id., § 363, at 525). Also, an "inference must be drawn that what is omitted or not included was intended to be omitted and excluded" (id., § 240, at 412).

Chemical Specialties Mfrs. Ass'n v. Jorling, 85 N.Y.2d 382, 394 (1995).

Under Town Law §64(5-a), towns are authorized to impose property clean-up and demolition charges against real property on which the towns perform work. Said section provides as follows:

> Removal of fire and health hazards and weeds. The town board may require the owners of land to cut, trim or remove from the land owned by them brush, grass, rubbish, or weeds, or to spray poisonous shrubs or weeds on such land, and upon default may cause such grass, brush, rubbish or weeds to be cut, trimmed or removed and such poisonous shrubs or weeds to be sprayed by the town and the total expense of such cutting, trimming, removal or spraying may be assessed by the town board on the real property on which such brush, grass, rubbish, weeds or poisonous shrubs or weeds were found, and the expense

> so assessed shall constitute a lien and charge on the real property on which it is levied until paid or otherwise satisfied or discharged and shall be collected in the same manner and at the same time as other town charges.

Pursuant to Town Law §64(5-a), the Town of Brighton enacted a Local Law which put into effect the Town's powers to protect health and safety by imposing property maintenance requirements and by providing that the Town expense in correcting such code violations would become a lien and charge on the real property on which it was levied to be collected in the same manner and at the same time as other Town charges. (R, 116-124) Similarly, the Town of Brighton pursuant to Town Law §130(16) approved a local law adding Chapter 51 to the Town Code to deal with dangerous structures and provide a procedure for the Town to require the removal or demolition of dangerous buildings. (R 135-137) Chapter 51 also permits the assessment of Town expense in demolishing or removing a building as a lien and charge on the real property and directs that such charge be collected in the same manner and at the same time as other town charges. Thus, when property maintenance is performed by the Town of Brighton or when the Town is required to expend its funds in the removal or demolition or an unsafe structure or building, the charges for such work are added to the tax bill of the real property on which such work was performed.

The issues presented in this appeal arise when the property owner fails to pay the charges that are assessed against the property that are part of the tax bill. For decades, the County of Monroe would reimburse the Towns for maintenance and demolition charges assessed against properties just as the County reimburses Towns for other unpaid taxes appearing on the local real property tax bill. This practice comports with the language enacted by the New York State Legislature and set forth in Town Law §64(5-a) and RPTL 936. Moreover, the State Board of Equalization and Assessment opined nearly thirty years ago that maintenance, repair, and demolition charges assessed by the town against real property are "in the same nature" as taxes, and thus they are to be reimbursed by the counties to the towns pursuant to RPTL 936 (9 Op Counsel SBEA No. 55 [1990]). (R, 142-144) As the dissent below noted, "that has been the law in this State for decades." It was not until the County of Monroe issued the Tax Memo in December 2016 that the County suddenly and without any State legislative action sought to unilaterally change the local tax collection system.

Under established statutory law, the local tax collection system requires the County to guarantee to the Towns unpaid amounts on the tax bill with certain specific limited exclusions that do not apply here. This is the plain and literal reading of the relevant statute. Under RPTL 936:

> Upon the expiration of his warrant, each collecting officer shall make and deliver to the county treasurer an account, subscribed and affirmed by him as true under the penalties of perjury, of all taxes listed on the tax roll which remain unpaid, except that such collecting officer shall not include in such account the amount of the installments of taxes returned unpaid pursuant to section nine hundred twenty-eight-b or subdivision one of section nine hundred seventy-six of this chapter. The county treasurer shall, if satisfied that such account is correct, credit him with the amount of such unpaid delinquent taxes. Such return shall be endorsed upon or attached to the tax roll.

Of course, this Court is well familiar with the local tax collection system and summarized it well as follows in its opinion issued in Rose v. Eichhorst, 42 N.Y. 2d 92 (1977):

> Should the amount of taxes collected by the town tax collector be less than the sum levied for town purposes, the county must pay the town the difference (see Opns St Comp, 1976, No. 96). At this point, the responsibility for collecting the delinquent tax shifts to the county (see Matter of Wadhams, 249 App Div 271; 19 Opns St Comp, 1963, p 385). The county, rather than the town, holds a lien for the unpaid town taxes (see Opns St Comp, 1953, No. 6455). The county, but not the town, is authorized to collect the delinquent taxes (see Real Property Tax Law, arts 10, 11; see, generally, 58 NY Jur, Taxation, §§ 261-319.) [citing with approval agency opinions interpreting the relevant statutes.]

Id. at 95-96.

There can be no doubt that the Legislature intended to exclude from the taxes to be credited to the Towns tax payments to be made in installments "returned unpaid pursuant to section nine hundred twenty-eight-b or subdivision one of section nine hundred seventy-six" of the RPTL. This exclusion is expressly stated. However, there is no language seeking to exclude from the amounts to be

credited to the Town any maintenance or demolition charges assessed against the property pursuant to the powers set forth in Town Law §64(5-a). If the Legislature wished to exclude such charges, it could have simply added language to RPTL 936 to affect such an exclusion. No such language exists.

Moreover, there can be no serious debate over whether the Legislature has been aware of the long time practice of Counties across New York State reimbursing Towns for such maintenance and demolition charges which remain unpaid by the taxpayer/owner of the properties against which charges are assessed. Plainly, the Legislature would have been aware of the opinion of the SBEA from 1990 under which this very issue was resolved. Despite such knowledge, there has been no state legislative action to amend RPTL 936 to add the exclusion that the County of Monroe hopes to read into the statute. Where, as here, the Legislature has failed to act in the face of known and established practice and agency opinion, the courts should resist the invitation to legislate an exclusion where the Legislature has clearly chosen not to act.

One need look no further than other statutory provisions in the RPTL to further discern how the Legislature contemplated that these charges would be collected and treated if not timely paid by the property owner. As noted in the Dissent by Justices Nemoyer and Troutman, "[t]he term 'delinquent tax,' when used in article 11 of the RPTL, entitled 'Procedures for Enforcement of Collection

of Delinquent Taxes,' includes an unpaid 'special assessment **or other charge imposed upon real property by or on behalf of a municipal corporation** . . . relating to any parcel which is included in the return of unpaid delinquent taxes prepared pursuant to RPTL 936." (R, 346 [citing RPTL 1102[2]] emphasis supplied) Clearly, the Legislature has enacted a statutory scheme to provide for the imposition by towns of charges for maintenance and demolition and sensibly a method of collection of such delinquent charges which includes reimbursement to the towns and the power and ability held by the counties to foreclose tax liens. Adopting the view of the majority below and the interpretation of Respondent County would eviscerate the statutory scheme by depriving the towns of an effective means of collecting the very charges which the Legislature authorized the towns to assess as a lien on real property.

Another axiom of statutory construction is to interpret statutes in way that makes sense in the overall statutory scheme and appears consistent with legislative intent. It simply makes no sense that the Legislature would grant to towns the power to impose maintenance and demolition charges as a lien on real property but leave the towns with no effective means of collection. The only statutory interpretation which is consistent with legislative intent and which makes any common sense is the one propounded by the Dissent below.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the decision appealed from should be modified by granting the petition of Appellants - Petitioners and denying the motion to dismiss of the Respondent County.

Dated: Rochester, New York
November 18, 2019

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NEW YORK STATE COURT OF APPEALS

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: November 18, 2019

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