*To be Argued by:*
MEGAN K. DORRITIE
*(Time Requested: 10 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.*

## REPLY BRIEF FOR PETITIONER-PLAINTIFF-APPELLANT TOWN OF IRONDEQUOIT

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## PRELIMINARY STATEMENT

The New York State Legislature established a statutory scheme that allows and encourages towns to address the pressing issue of blighted and neglected properties and the corresponding public health and welfare concerns. That the New York State Legislature intended for counties to guarantee and credit towns for unpaid delinquent town charges and taxes, including the property maintenance and demolition charges at issue here, is supported by multiple statutes, nearly a century of jurisprudence, and many administrative opinions that explain the history and practicalities of this policy. The County of Monroe (the "County") now seeks to upset this scheme. And if the order from the three-justice majority of the Appellate Division is allowed to stand, counties will be able to back away from certain of their guarantee obligations

## ARGUMENT

### I. STATUTORY AUTHORITY AND OTHER PRECEDENTS REQUIRE THE COUNTY TO GUARANTEE THE TOWN'S PROPERTY MAINTENANCE AND DEMOLITION CHARGES.

The County's primary argument that it need not guarantee the Town's maintenance and demolition charges because the charges are "special assessments," and thus excluded from the definition of a "tax," fails for at least two reasons. First, the property maintenance and demolition charges are not special assessments. And

despite the County's insistence that the Appellate Division held that the charges are special assessments, the Appellate Division did no such thing.

Second, even if the property maintenance and demolition charges are special assessments, they are included in the Real Property Tax Law's ("RPTL") definition of "delinquent taxes" that the County is obligated to guarantee under RPTL § 936.

The Town's position has been consistently reinforced by this Court, numerous other courts in the State, and many administrative agencies. The County's reliance on caselaw arising in different contexts or under clearly distinguishable circumstances does not apply to this dispute.

### A. The Real Property Tax Law Defines the Property Maintenance and Demolition Charges as Taxes that the County Must Guarantee.

The County is wrong that "neither the Town Law, Municipal Home Rule Law, or Real Property Tax Law define the term 'charge against property' as automatically being a 'tax'" (County Br. p. 14). The RPTL clearly defines a "tax" as including charges against property:

> "'Tax' or 'taxation means a charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes" (RPTL § 102[20]).

Perhaps because this section goes on to exclude special assessments from the definition of a "tax" (*id.*), the County attempts to classify the property maintenance

and demolition charges as special assessments. But the classification does not readily fit.

First, additional statutory authority establishes that the property maintenance and demolition charges are in the nature of taxes. The Town Law and Municipal Home Rule Law allow towns to impose property maintenance and demolition charges and also authorize the imposition of unpaid demolition and clean-up expenses as charges upon real property, *i.e.*, as taxes (*see* Town Law § 64 [5-a]; Town Law § 130 [16] [g]); Municipal Home Rule Law §§ 10 [1] [ii] [a] [8], [9-a], [14]). The Irondequoit Town Code intentionally mirrors the language of the RPTL, Town Law, and Municipal Home Rule Law and also authorizes the imposition of unpaid demolition and clean-up expenses as charges upon real property, *i.e.*, as taxes (*see* Irondequoit Town Code §§ 104-14, 94-9, 94-1 [B]).

Second, as established in the Town's opening brief, the property maintenance and demolition charges are a part of a larger program, codified at Town Code Chapter 94, aimed at addressing the problem of "zombie homes," and thus serve a public benefit, not a private benefit. The County misconstrues this point when it measures benefit only by reference to property value (*see* County Br. p. 18). Here, the benefit is clearly to the public as the charges meant "[t]o protect the public health, safety and the general welfare of the residents of the Town of Irondequoit" (Irondequoit Town Code § 94-1, *see* Town Code § 104-2 [c] ["It is the purpose of

this chapter to ensure the safety, health, protection and general welfare of persons and property in the Town of Irondequoit by addressing vacant and unsafe properties"]). Town Code Chapter 94, and its property maintenance and demolition charges, addresses various public harms including unhealthful, hazardous, and/or dangerous conditions caused by dilapidated structures and yards, and associated loss of quality of life (R. 280-281). Thus, the purpose behind Town Code Chapter 94 is much broader than the increase in property values in one neighborhood as the County contends.

Third, for the property maintenance and demolition charges to be a special assessment there must be a special district. The County admits that no special district exists here (*see* County Br. p. 30).

But even if the property maintenance and demolition charges are best classified as special assessments, they must be guaranteed by the County. The County incorrectly maintains that special assessments are "exempted" from the County's guarantee obligation (County Br. p. 32).

RPTL § 936 establishes a county's guarantee obligation for "delinquent taxes." RPTL § 1102(2), which deals with tax collection, defines a "delinquent tax" to include all charges against property, including special assessments:

> "'Delinquent tax' means an unpaid tax, special ad valorem levy, special assessment or other charge imposed on real property by or on behalf of a municipal corporation or special district, plus all applicable charges, relating to any

> parcel which is included in the return of unpaid delinquent taxes prepared pursuant to section nine hundred thirty-six of this chapter or other general, special, or local law as may be applicable" (RPTL § 1102 [2]).

Nothing within RPTL § 936 specifically exempts the County from guaranteeing special assessments. And based on the language of RPTL § 1102(2), it is clear that the Legislature intended for counties to guarantee many types of taxes and charges, including special assessments.

The County also incorrectly argues that the if the property maintenance and demolition charges were intended to be treated like a tax for guarantee obligation purposes, "there would be no need for the RPTL to create definitions for 'special assessment' or 'special ad valorem levy' because every charge imposed by a town would be a 'tax'" (County Br. p. 22). Importantly, RPTL § 1102(2) is housed in one of twenty articles that comprise the Real Property Tax Law. The term "tax" is used throughout the RPTL. That the Legislature defined delinquent taxes in the section of the RPTL that deals with collection of taxes to include special assessments and other charges against real property is no mistake. The Legislature intended for the County's guarantee obligation to include delinquent charges against real property—such as the property maintenance and demolition charges.

Recognizing this intention does not eliminate the need to define the terms "special assessment" or "special ad valorem levy" in other parts of the RPTL. Take for example Article 4 of the RPTL, which establishes real property tax exemptions.

RPTL Article 4 relies on the distinctions between taxes, special assessments, and special ad valorem levies to establish that even those property owners entitled to a mandatory exemption are responsible for paying certain special assessments and ad valorem levies (*see* RPTL §§ 420-a, 490). Thus, properly classifying the property maintenance and demolition charges as a tax, or alternatively as a special assessment, in no way eliminates the need to define special assessment and ad valorem levy within the RPTL.

Whether properly classified as a tax or a special assessment, the County must guarantee the Town's property maintenance and demolition charges pursuant to RPTL § 936.

### B. Precedents Require the County to Guarantee the Town's Property Maintenance and Demolition Charges.

As demonstrated in the Town's opening brief, the RPTL's mandate that the County guarantee the Town's property maintenance and demolition charges has been consistently reinforced by the courts and various administrative agencies.

To support its contrary position, the County: (1) relies on a misreading of the holding in *Lane v City of Mount Vernon*, 38 NY2d 344 (1976); (2) urges the Court to adopt a superficial analysis of three irrelevant lower court cases; and (3) boldly states that the Court should ignore all contradictory administrative opinions. The County's analysis is misleadingly superficial and ignores the nuances of municipal law in general and the specific context of each of its supporting cases.

First, the County fails to appreciate the nuances of *Lane* and municipal law generally. Plainly, cities, town, and villages are all subject to regulation by the State through separate and distinct statutory schemes (*compare* New York Town Law, *with* New York Village Law, *with* New York General City Law).

Whether or not the County intentionally turned a blind eye to these important statutory distinctions, its misunderstanding of *Lane* (and reliance on comptroller and attorney general opinions that deal exclusively with villages, not towns) demonstrates the imprecision of its arguments.

The General City Law at issue in *Lane* allowed the City of Mount Vernon to *choose* whether to enforce any costs incurred by tax levy or by special assessment (*see* 38 NY2d at 348). There, the City chose the assessment option (*see id.* at 347). There is no similar discretion found in the Town Law. Rather, under the Town Law, repair costs and demolition charges "shall be collected in the same manner and at the same time as other town charges," *i.e.,* as taxes (Town Law § 64 [5-a]).

What *Lane* stands for, then, is the proposition that enabling legislation, and a subsequent ordinance, that allows for costs of "repair, vacation or demolition to be charged against the land . . . as a municipal lien, or cause such costs to be added to the tax roll as an assessment *or to be levied as a special tax against the land upon which the building or structure stands or did stand*" are valid and constitutional (38 NY2d at 348 [emphasis added]). Note that the *Lane* court classified the charge at

issue as a "special tax" (*id.*), not as a "special assessment," as represented by the County (County Br. p. 20 ["Claiming *Lane* differs because the term 'special assessment' was used by the Court in describing the demolition charge is circular reasoning"]).

Second, the trio of lower court cases on which the County relies are irrelevant. Here, the issue is not whether the terms "tax," "special assessment," and "special ad valorem levy" have separate definitions; the Town of Irondequoit does not argue otherwise. The issue is whether the maintenance and demolition charges authorized by the Town Law must be guaranteed and collected by the County pursuant to Article 9 of the RPTL.

This is why *Matter of Piccolo v New York State Tax Appeals Tribunal* is irrelevant (*see* 108 AD3d 107 [3d Dept 2013]). There, the question before the court was whether a certain "downtown improvement tax" fell within the phrase "eligible real property taxes," as used in Tax Law § 15 (*see id.* at 109 [discussing QEZE credit for real property taxes]). The discussion in *Piccolo* regarding tax exemption statutes is not instructive because it has nothing to do with whether a particular property is exempt from demolition and clean-up charges. Indeed, as discussed above, those portions of the RPTL dealing with tax exemptions treat special ad valorem levies, special assessments, and taxes very differently from those portions of the RPTL dealing with a county's obligation to guarantee delinquent taxes. Moreover, there,

the parties agreed that the charges were to support a "special district" (*see id.* at 113). Here, there is no special district and there is no claim that any property is exempt from the charges. Furthermore, the case does not address whether demolition and clean-up charges are required to be guaranteed by a county.

Likewise, the County's discussion of *Stevenson* and *Luther Forest* are similarly irrelevant (*see Matter of Stevenson v New York State Tax Appeals Trib.*, 106 AD3d 1146 [3d Dept 2013] [discussing Tax Law § 15 and QEZE tax credits]; *Matter of Luther Forest Corp. v McGuiness*, 164 AD2d 629, 631 [3d Dept 1991] [finding that RPTL § 480 does not apply to ad valorem levies or special assessments]). The question here is whether Real Property Tax Law Article 9 pertains to demolition and clean-up charges.

Third, the County urges this Court to ignore only those administrative decisions on which the Town relies, arguing that the opinions expressed are wrong as a matter of law and are entitled to no deference because this Court is best situated to opine on statutory interpretation. For all the reasons discussed in the Town's opening brief, the substance of the administrative opinions cited by the Town correctly lead to the conclusion that the property maintenance and demolition charges are taxes that the County is obligated to guarantee.

If nothing else, these opinions provide the decades-long historical and practical contexts surrounding the complex statutory real property taxation scheme

established by the Legislature. The Court should not disregard the important historical, practical, and policy lessons from the administrative opinions cited by the Town.

### C. The County's Opinions About Fairness Are Irrelevant.

The County's complaints regarding the amount the Town is charging for clean-up and demolition are irrelevant. The County has "no power . . . to review the monetary needs of a town as same [sic] have been determined by its authorities and properly certified for inclusion in the tax roll . . . . The duty of the [county] board of supervisors in levying the taxes for the towns is purely ministerial" (*Town of Irondequoit v Monroe County*, 158 Misc 123, 140–141 [Sup Ct, Monroe County 1938], *affd* 254 AD 933 [4th Dept 1938]). Moreover, demolition services are procured pursuant to the Town's procurement policy, and courts have upheld charges much larger than those imposed by the Town. For example, in *Matter of 4M Holding Co. v Diamante*, the Second Department upheld a $1,132,492.90 demolition/cleanup tax lien assessed against the petitioner's real property (*see* 215 AD2d 383, 384 [2d Dept 1995] [finding that both the amount of the lien and the assessment by the Town were not arbitrary, capricious, or in violation of the law]).

Finally, the County's claim that "towns could run amok and force counties to pay for all sorts of nonsense" is base speculation (County Br. p. 33). The New York State Legislature specifically authorizes the property maintenance and demolition

charges as necessary to protect public health and welfare. Towns that exercise this authority granted to them by the Legislature are not "running amok." And charges specifically authorized by the Legislature are not "nonsense."

## II. THE TOWN'S LOCAL LAWS DO NOT VIOLATE THE MUNICIPAL HOME RULE LAW.

The County asserts that the Town's local laws violate Municipal Home Rule Law § 10 (5) (derived from the state constitution), which provides that "a local government shall not have power to adopt local laws which impair the powers of any other public corporation" (Municipal Home Rule Law § 10 [5]).

But the County cannot make this argument here because it did not preserve the argument for appellate review. The Appellate Division concluded as much (*see Matter of Town of Irondequoit v County of Monroe*, 175 AD3d 846, 847 [4th Dept 2019]).

But even if the County could raise this argument on appeal, it fails because it is unsupported by the plain text of the Municipal Home Rule Law and the New York State Comptroller and Attorney General opinions that the County relies upon.

### A. The County's Constitutional Arguments Are Unpreserved.

Failing to raise the issue before the Supreme Court, the County now asserts that "[r]equiring the County to guarantee the payment of the Town's demolitions and lawn-mowing charges would impair the powers of the County in violation of the New York State Constitution Article IX, § 2(d) and Municipal Home Rule Law

§ 10(5)" (County Br. p. 42). Because this constitutional claim was never raised before the Supreme Court, it is not preserved for appellate review.

If a party seeks to challenge the constitutionality of a statute or a municipality's actions in accordance with a statute, that constitutional challenge must be raised in the pleadings before the trial court to be preserved for appellate review (*see Matter of Town of Rye v New York State Bd. of Real Prop. Servs.*, 10 NY3d 793, 795 [2008] [taxpayer's constitutional challenge to the statute was not raised in the pleadings before Supreme Court and therefore was unpreserved for appellate review]; *Matter of Lavender v Zoning Bd. of Appeals of the Town of Bolton*, 141 AD3d 970, 974 [3d Dept 2016]).

Here, the County never argued before Supreme Court that the Supreme Court's decision "would impair the powers of the County, in violation the New York State Constitution Article IX, § 2(d)" (County Br. p. 42). Rather, the County only raised one ground in support of its motion to dismiss the Town's petition: "[f]ailure to state a claim" (R. 156).

Because the County's newly raised constitutional argument was not before Supreme Court and is plainly not a part of the record on appeal (R. 152–157), this issue was not preserved for this Court's review.

### B. The Town's Local Laws Are Not Inconsistent With the Municipal Home Rule Law.

First, the County's contention that the Town's local laws impair the powers of the County lacks statutory basis where the Town's local laws are consistent—not inconsistent—with general law. Indeed, the local laws at issue mirror, almost verbatim, the state laws that authorize their enactment (see Town Br. p. 27 [chart]).

Next, the 1986 Opinion of the Office of the State Comptroller does not support the County's claim that the Town's local laws adopted pursuant to State enabling legislation impermissibly impair the County's powers (*see* County Br. p. 42). That opinion concerns a village's adoption of a local law authorizing the levy and collection of delinquent electric charges with annual general taxes.

There, the Comptroller stated: "[a]s a general rule, *in the absence of statutory authority*, unpaid utility charges imposed by a municipality owned utility do not constitute liens against the property served. Moreover, even when such charges do constitute liens against the property, they may not be collected as taxes unless there is a statute which authorizes their collection in that manner" (1986 Op State Comp 120, 1986 NY Comp LEXIS 94, *6 [emphasis added]). In finding that the village's adoption of a local law authorizing the levy and collection of delinquent electric charges with the annual general taxes violated the Municipal Home Rule Law, the Comptroller specifically noted that no <u>state statute</u> provides for the collection of delinquent electric utility charges (*id.*). The Comptroller further opined that even if

the village could levy unpaid utility charges with village taxes, the county would not be required to guarantee their payment "*in the absence of a State statute which expressly authorizes this procedure*" (*id.* [emphasis added]).

This appeal presents the opposite scenario. There are two state statutes, Town Law §§ 64 (5-a) and 130 (16) that specifically authorize the levy and collection of property maintenance and demolition charges as taxes (*see* Town Law § 64 [5-a] ["*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*"] [emphasis added]; Town Law § 130 [16] [g] [providing for assessment of all costs incurred]). Moreover, the wording of Town Law §§ 64 (5-a) and 130 (16) match the provisions of the RPTL that require the County to guarantee and credit these charges as taxes. *See supra* § I.A.

Again, the 1998 Opinion of the Attorney General, No. 98-35 does not support the County's arguments (*see* County Br. p. 44). That opinion concerned a village's interest in adopting a local law for demolition and clean-up of unsafe buildings. Different provisions of the RPTL apply to villages and towns (*compare* RPTL article 9, *with* RPTL article 14 [special provisions relating to villages]). Villages, in contrast to towns, have the authority to commence civil actions to enforce tax liens (*see* RPTL § 1440). Counties are *not* required to collect and guarantee taxes for

villages, though they may voluntarily agree to do so (*see* RPTL § 1442 [1]). In contrast, counties are *required* to collect and guarantee taxes for towns (*see* RPTL § 936).

This distinction makes the 1998 Opinion of the Attorney General 98-35 irrelevant. That opinion merely recognizes that a county may decide not to collect village taxes pursuant to RPTL § 1442 and could base that decision on whether a village assessed property maintenance and demolition charges against real property. The opinion does not stand for the proposition that such charges cannot be assessed as taxes.

In fact, in 2015, the New York Attorney General's Office issued Opinion 2015-3 noting that if a county adopts a local law authorizing the county's collection of delinquent village taxes, then that obligation *applies* to assessed charges for property maintenance and demolition fees (*see* 2015 Op Atty Gen No. 2015-3). That opinion states:

> "We are of the opinion that the County cannot refuse to relevy the remediation costs and pay the amount of cost to the Village. [Section] 1442 of the [RPTL], authorizing a county to adopt a local law providing for the collection of delinquent village taxes, does not authorize a county that has adopted such a local law to choose which unpaid items included in a village tax bill to relevy and collect" (*id*. at 3).

The county could only avoid this obligation by repealing its local law providing for collection of village taxes (*id*.).

The requirements of RPTL § 936 (1)—the section applicable to towns—are mandatory and not permissive. The County is required to guarantee and credit towns for unpaid town taxes. The 1998 Opinion of the Attorney General 98-35, then, provides no support for the County's position.

## CONCLUSION

As the trial court correctly determined, "[i]t would be unwise public policy to discourage a town from taking curative actions against unkempt, and sometimes dangerous, locales. Sustaining [the County's] position would have a chilling effect on such endeavors which help a town's overall well-being" (R. 24). Indeed, "[i]f the rule proposed by the Appellate Division majority were to stand, towns would almost never be able to recoup their costs for maintaining, repairing, or demolishing blighted properties" (*Town of Irondequoit*, 175 AD3d at 850 [NeMoyer, J. and Troutman, J., dissenting]).

This Court should reject the County's arguments as lacking legal support and defying well-established practice, and reverse, on the law, the Appellate Division's Memorandum and Order. In doing so, this Court should affirm the trial court's Decision, Order, and Judgment, which granted the Town's Verified Petition and Complaint; annulled the County's Tax Memo determination; compelled the County to guarantee and credit the maintenance, repair, and demolition charges; judicially decreed that the County is legally obligated to guarantee and credit the maintenance,

repair, and demolition charges; and restrained the County from decreasing the November sales tax distribution to any town.

Dated: Rochester, New York
January 21, 2020

Respectfully Submitted,

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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 [name of word processing system].

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