To be Argued by:
CHRISTIAN D. KILLORAN
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division – Second Department

Appellate Case No.: 2018-06959

HUNTERS FOR DEER, INC. and MICHAEL LEWIS,

Plaintiffs-Appellants,

– against –

TOWN OF SMITHTOWN,

Defendant-Respondent.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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The Defendant/Respondent's answering Brief misconstrues the seminal issue before the Court; namely that the Town of Smithtown is pre-empted from regulating hunting by virtue of defining a "bow" as a "firearm". Indeed, this is so because New York State has "occupied the field" in this regard, both with respect to the doctrines of "content" and "field" pre-emption. In fact, as the Town readily admits, the Environmental Conservation Law pre-empts the Town from regulating hunting.

Point I: The Clerical Errors Are Fixable and Do Not Otherwise Override the Merits of the Appeal

With respect to "Point I" of the Defendant/Respondent's brief, while the Plaintiff-Appellant readily admits that certain clerical errors may have been overlooked and/or inserted by the Plaintiffs' retained "appeal compilation company", such reasoning is not sufficient to discount the otherwise overwhelmingly meritorious substance of the Plaintiff/Appellants' appeal.

Indeed, at this time, the record is being corrected via a "tip-in" procedure. Specifically, upon presenting the error to "AppealTech" (the Plaintiff/Appellants "appeal compilation company"), the supervising representative responded to plaintiffs' counsel, via an email, in the following manner: "Hi Christian. I reviewed Point I of the respondent's brief. Your appeal is not defective. The issues they raised are not jurisdictional issues. I apologize for Eric's errors (he is no longer with AppealTech), but these are all fixable. First, while the Notification of Case for

has two typos, the important information (i.e.: the appellate case number and the caption (minus the spelling of "deer")) are correct. The form was also properly served on the respondent's counsel on August 31st and according to the docket, respondent's counsel recorded their registration in this case on NYSCEF on September 7th, demonstrating they had all reviewed relevant info. Second, the 5531 must be included with both the Record and Appellant's Brief. Eric included the correct 5531 in the brief. However, as respondent noted, a 5531 from an unrelated matter was accidently included in the Record. This can easily be fixed by what we call a "tip-in". We simply need to request the Court to send us a "return for correction" link so that we can submit the digital version of the corrected Record, and then we need to physically "tip in" the correct 5531 into the paper copies at Court. For simple clerical errors like this, the Court will usually just ask us to correct the error. Sometimes, a stipulation is needed. We will call the clerk to confirm whether they want a stipulation. However, no worries and again, we apologize. We will correct".

Again, at this time, the referenced ministerial errors are being corrected; and in fact, should be corrected in their entirety by the time this Court deliberates upon the substantive merits of this appeal.

Point II: The Plaintiff/Appellants' Claims Were Appropriately Alleged

With respect to "Point II" of the Defendant/Respondent's brief, the arguments set forth therein are wrong. To begin with, a review of the Plaintiffs' original motion papers clearly reveal that the Plaintiffs originally argued that the Town of Smithtown was pre-empted from prohibiting hunting and discharge of a firearm or a bow within the geographic boundaries of the Town of Smithtown.

Specifically, the verified complaint of Michael Tessitore, President of Hunters for Deer, Inc., one of the named plaintiffs, clearly stated:

> * "The Town of Smithtown has enacted a local law, specifically local code "Section 160", therein establishing illegal firearm discharge setbacks and related regulations";
>
> * "Tangentially the New York State Department of Environmental Conservation Law allows hunting on private land, as long as the relevant discharge and other regulatory requirements of the Department of Environmental Conservation, such as licensure, are complied with. Accordingly, the Smithtown local town law, establishing illegal hunting setbacks and discharge requirements, is inconsistent with the New York State law and regulations, and moreover defeats the applicable State law's objective of providing a detailed and comprehensive statewide regulatory framework for the management of wildlife populations, including by means of hunting", and
>
> * "Accordingly, this action which seeks the pre-emption of the Town of Smithtown from legislating and regulating hunting and/or firearm discharge is likely to prevail on the merits". (See: Plaintiff, Michael Tessitore's, Verified Affidavit).

Moreover, an analysis of the plaintiff attorney's "Affirmation & Memoranda in Support of Plaintiffs' Complaint", clearly supports the argument that the Town

of Smithtown should be pre-empted from legislating in the field of hunting, as well as the discharge of bows. (See: "Attorney Affirmation & Memoranda in Support of Plaintiffs' Complaint").

Indeed, the Plaintiff/Appellant herein re-asserts the validity of its argument.

In fact, within the Plaintiff/Appellants' original response to the Defendant/Respondent's cross-motion, the Plaintiff/Appellants pointed out that while the Town of Smithtown could regulate the discharge of "firearms" pursuant to Town Law, it was improper to include a "bow" within its definition of what a "firearm" actually was. Moreover, from the inception of the Plaintiffs' complaint, the encompassing doctrine of pre-emption was always alleged.

As such, it is disingenuous for the Defendant/Respondent to claim that the arguments of "pre-emption" were not properly alleged by the Plaintiff/Appellant within the subject pleadings.

Point III: A Bow Is Not A Firearm and The State Has Occupied The Field Relating to "Setbacks"

With respect to "Point III" of the Defendant/Respondent's brief, the arguments set forth therein fail for several reasons.

First, the issue regarding the permissible discharge distances for bows is not a novel consideration. In fact, this issue has been decidedly opined upon by the Attorney General's Office (See: N.Y. Op. Att'y Gen 326 (1976); See also: "A Sitting Duck: Local Government Regulation of Hunting and Weapons Discharge in

the State of New York", Pace Environmental Law Review, Volume 32, Issue 3, Summer 2015, dated October 2015, and authored by Professor Gary E. Kalbaugh,) and moreover is evidenced by the comprehensive and sophisticated regulatory edifice surrounding "bow" discharge and "bow hunting".

Indeed, it cannot be stated that the State has merely "touched" upon this area, as it has prescribed direct regulations concerning "bow" discharge and has moreover created an entire licensing structure regarding "licensing" for "bow" hunters. As such, the State has clearly evidenced a comprehensive and detailed regulatory scheme in an effort to govern "bow discharge" and "bow hunting".

Further, despite the Defendant/Respondent's contention, the fact remains that there is no inconsistency with regard to any legislation promulgated from New York State regarding the definitions of a "bow" and a "firearm". In fact, the State is clear in this regard, and the State has distinctly defined the meaning of each instrument. As such, the only definitional inconsistency emanates from the Town of Smithtown itself, which impermissibly legislates a "bow" as a "firearm", and moreover does so in an obvious and subversive attempt to not only circumvent the State's regulatory structure, but also to negatively impact the legal rights of every "bow" hunter within the State of New York.

Lastly, the Defendant/Respondent's argument that a "bow" should be considered a "firearm" because none of the State's promulgated definitions of a

"firearm" do not explicitly state that a "bow" is not a "firearm" remains ludicrous. Indeed, to adopt such logic, the Court would have to accept the argument that anything could constitute a firearm, since the legislation did not directly state that it was not. In fact, upon analyzing the State's respective definitions of each instrument, it remains clear that a "bow" is elementally incapable of meeting the definition of a "firearm", just as a "firearm" is elementally incapable of meeting the definition of a "bow".

Point IV: The Doctrine of Pre-Emption Applies To the Regulation Of A Bow And Its Discharge

With respect to "Point IV" of the Defendant/Respondent's brief, the Defendant/Respondent continues to attempt to avert the fundamental point. Indeed, the issue is not whether the Town of Smithtown has the capacity to regulate a "firearm" (it may), the issue is whether the Town of Smithtown may define a "bow" as a "firearm", and therefore by extension, regulate the permissible scope of its use. As stated, a "bow" is not a "firearm", a point to which Judge Santorelli fatally overlooked, and moreover a point to which the Town of Smithtown fails to appreciate as a pre-emptive bar from regulating upon a bow's classification and use.

In fact, the Defendant/Respondent's statement that "whether regulating the distance for a rifle or a bow, the Town is permitted to regulate distances to protect the public in densely populated areas", seems to be an argument fabricated from

"thin air". Indeed, nowhere within the Town Law 130 (27) is such a proposition set forth, as the Town of Smithtown is clearly limited to regulating only "firearm" discharge; and since a "bow" is not a "firearm", it remains irrelevant that "firearm" discharge" has been deemed hazardous to the general public. In fact, however, the State has set "discharge setbacks" for bows based upon years of data and safety reports, therein conclusively establishing that 150 feet is deemed as the appropriate safety standard "setback" for every hunter, as well as general public. Indeed, it remains notable that there has never been a second party bowhunting incident on Suffolk County.

Further, Smithtown's Town Code does remain "self-nullifying", since pursuant to its own terms, it cannot conflict with other established laws; and in this case, the State's Environmental Conservation Law clearly provides for a "bow" discharge set-back of 150 feet, as opposed to 500 feet.

Finally, it remains clear that the Town of Smithtown impermissibly regulates "bow" hunting. Specifically, the Town Code improperly increases the permissible "discharge set-back" for bows, which are otherwise clearly manifest within the State's Environmental Conservation Law, from 150 feet to 500 feet. Again, since a "bow" is not a "firearm", this regulation not only violates the doctrines of "pre-emption", but it also makes a mockery of the extensive investigation and rationale undertaken by New York State when the State enacted legislation reducing the

"discharge set back" from 500 to 150 feet. Indeed, the Defendant/Respondent's contention that "it is simply ridiculous to argue that the deer "epidemic" is more dangerous than bow hunting occurring within a range of dwellings" runs directly contrary to the extensive review, findings, and opinion assumed by New York State when it decided to reduce the "discharge set back" to 150 feet for bows. In fact, as stated, New York State directly considered all of the safety issues related to bow hunting within residential areas and concluded that the State's "discharge set-back" reduction was justified. Indeed, New York State's decision was not only due to the myriad of issues associated with an overpopulated deer herd, but also due to the fact that there were no reported incidences of danger, other than hunters themselves cutting themselves on their own equipment. (See: Management Plan for White-Tailed Deer in New York State, available at http://www.dec.ny.gov/docs/wildlifepdf/deerplan2012.pdf).

Moreover, the Defendant/Respondent's attempt to utilize the referenced 1962 New York Attorney General's Opinion convolutes the issue, as such "Opinion" relates to the use of a "firearm" as a hunting apparatus, as opposed to a "bow". Moreover, such "Opinion" seems to relate to "cities" and not "towns". As such, although the Defendant/Respondent's counsel may harbor a personal ill-conceived and/or ignorant perspective regarding the safety of "bow" hunting, his argument simply remains pure "fantasy".

Finally, the Town of Smithtown has in fact had its Code Officers approach and call hunters threatening the issuance of summons, and moreover has informed residential homeowners, interested in managing their own personal properties, that bow hunting may not occur on their private properties, even though a 150 foot "discharge set-back" is maintained. Indeed, in doing so, the Town of Smithtown has essentially prohibited bow hunting within its boundaries because properties affording a 500 foot "setback" are virtually non-existent. As such, this Court's decisive action remains important to settling the question of whether "bow" hunting and "bow discharge" may be regulated by Smithtown's local Town Code, in order to sanctify the efficacy of State Law, protect property rights, protect hunting rights, and perhaps most importantly, pre-empt the future issuance of unlawful citations.

Conclusion

The Town of Smithtown may in fact regulate the discharge of "firearms". Indeed, the Plaintiff/Appellant has never argued that point. However, a "bow" is not a "firearm", and as such, pursuant to the alternating doctrines of "content" and "field" pre-emption, and at least with respect to "bow hunting" and "bow discharge", the Town of Smithtown's Code remains invalid. Notably, if the Town Smithtown simply removed the word "bow" from its classification of "firearms", this matter would not be before this Court. However, the Town of Smithtown has

refused to do so; and as such, the Town of Smithtown's Code remains invalid as presently drafted. Indeed, to hold otherwise would have the effect of rendering the State law a nullity, and lead to a subdividing of the State into jurisdictions with different "bow" discharge and "bow hunting" provisions. (See: Dept. of Environmental Conservation, Declaratory Ruling #11-04 (March 4, 1992).

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Respectfully submitted,

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