To be Argued by:
JENNIFER A. JUENGST
(Time Requested: 30 Minutes)

APL-2020-00165
Suffolk County Clerk's Index No. 623373/17
Appellate Division–Second Department Docket No. 2018-06959

Court of Appeals

of the

State of New York

HUNTERS FOR DEER, INC. and MICHAEL LEWIS,

Respondents,

– against –

TOWN OF SMITHTOWN,

Appellant.

BRIEF FOR APPELLANT

MATTHEW V. JAKUBOWSKI
TOWN ATTORNEY
JENNIFER A. JUENGST, ESQ.
ASSISTANT TOWN ATTORNEY,
TOWN OF SMITHTOWN
Attorney for Appellant
P.O. Box 9090
99 West Main Street
Smithtown, New York 11787
Tel.: (631) 360-7570
Fax: (631) 360-7719

Date Completed: January 12, 2021

DISCLOSURE STATEMENT PURSUANT TO 22 NYCRR §500.1(f)

The Town of Smithtown is a municipal corporation formed and operated pursuant to the laws of the State of New York. As such, it does not have any parent corporations, subsidiaries or affiliates.

STATEMENT OF RELATED LITIGATION

There are no actions or proceedings pending in any court of this State related to this appeal at the time of filing this Brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

THE COURT'S JURISDICTION OVER THIS APPEAL

Jurisdiction over this appeal is conferred upon this Court by Article 6, §3(b)(6) of the New York Constitution and CPLR §5602(a)(1)(i). This is an appeal from the decision and order of the Appellate Division, Second Department, by a vote of 4-0 that finally determined the action, which originated in the Supreme Court, and which is not appealable as of right.

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW INCLUDING REFERENCES TO THE RECORD

This appeal presents the following questions of law which are of statewide importance, having a direct impact upon how municipalities will conduct their duty to provide for the safety of their inhabitants in close proximity to persons using a bow and arrow unquestionably capable of killing or injuring its residents. References to "[R- #]" are to locations in the Record where the issue was raised.

1. Does the Environmental Conservation Law bar local governments from regulating the use of bows when their use presents a danger to the general public or nearby residents? [R- 10, 13, 54, 57, 64].
2. Is the danger posed to the safety and welfare of residents from the use of firearms, including bows, in densely populated areas a matter that affects the state as a whole? [R. 54, 55, 57, 67].

3. Is there a preemptive conflict between a town's public safety firearm ordinance (adopted pursuant to state Town Law §130[27)]) establishing a minimum 500 foot discharge setback for bows and the Environmental Conservation Law §11-0931 which sets shorter discharge setbacks for the use of bows (150 feet for long bow; 250 feet for cross bow) when used to hunt wildlife? [R- 10-13, 55-56, 61, 64-65; August 19, 2020 Order of the Appellate Division at p. 2 -3 [R - 75-76]; Justice Santorelli decision of May 21, 2018, at pp. 4-5][R- 6-7].
4. In adopting Town Law §130(27) did the Legislature evidence an intent to limit the authority of local governments to determine what implements constitute firearms for purposes of regulating their safe use in close proximity to the general public within their jurisdictions? [R- 46, 61; August 19, 2020 Order of the Appellate Division at pp. 2 - 3] [R - 75-76].
5. Did the Appellate Division misapply the rule of *in pari materia* when it construed two separate state acts that touch upon the same subject matter but have different purposes? [August 19, 2020 Order of the Appellate Division at p. 3][R- 76].

PRELIMINARY STATEMENT

On November 19, 2020, the Court of Appeals issued an Order [R-73] in favor of the Defendant-Appellant, TOWN OF SMITHTOWN, (hereinafter, "Town" or "Defendant") pursuant to Article 6, §3(b)(6) of the New York State Constitution and CPLR § 5602(a)(1)(i), granting the Town leave to appeal from the Decision and Order of the Appellate Division, Second Department, dated August 19, 2020 ("August 19, 2020 Order")[R-74].

This appeal raises an issue of statewide importance involving whether a local public safety code relating to the discharge of firearms in the Town is preempted by the hunting provisions contained in New York Environmental Conservation Law and its regulations. As the current law stands in the Second Department, the sport of hunting has been held to be more important than public health and safety in the Town of Smithtown.

The controversy involves whether the Town's 500 foot discharge setback for discharging any firearm as defined under the Town's code, is preempted by lower setbacks in the state law regulating long bows and cross-bows. The state's setbacks for long bow and cross-bow were reduced by a 2014 amendment from 500 feet to 150 feet and 250 feet respectively. Hence, the Town's 500 foot setback is more restrictive than the state's, but reasonable given the unavoidable fact that

the Town of Smithtown is a densely populated suburb in which people are permitted to discharge firearms.

In its November 19, 2020 Order, the Court of Appeals granted the Town's request for a stay allowing for the enforcement of the Town's 500 foot discharge setback pending a determination of this appeal.

The Town was successful below in obtaining a trial court order [R-3] denying the Respondents' motion for summary judgment and granting the Town's cross-motion dismissing the Respondents' complaint. [R-9]. The complaint sought an order vacating and annulling the Town's firearms provision (Chapter 160 "Firearms" subsection 5, of the Smithtown Town Code). The Appellate Division, Second Department reversed the trial court in the decision and order of August 19, 2020 mentioned above.

The statutes involved on this appeal are Chapter 160 - "Firearms", sub. 5, of the Town Code of the Town of Smithtown (hereinafter "TC §160-5"); New York Environmental Law ECL §11-0931(4)(a)(2)(hereinafter "ECL 11-0931(4)(a)(2)") and Town Law §130(27).

In their complaint the Plaintiffs asserted that the Town's setback limit is invalid because the state's ECL barred municipalities from legislating more restrictive discharge limits than the state. In this case the Town's longer setback of 500 feet is more restrictive than the State's setbacks of 150 feet for long bows and

250 feet for crossbows. Until 2014 when the ECL was amended, the setbacks for all bows was 500 feet.

Issue was joined by the Town on December 18, 2017, with the filing and service of a verified answer [R- 44-46] denying the material allegations in the complaint and asserting affirmative defenses.

On or about March 23, 2018, the Plaintiff moved for summary judgment seeking an order declaring TC §160-5 invalid on the ground that it is preempted by ECL 11-0931(4)(a)(2) which controls discharge limitations of firearms and bows used for hunting. [R- 47-51].

On or about April 9, 2018, the Town cross-moved for summary judgment [R- 52-58] seeking an order denying the Plaintiffs' motion and dismissing the action and on the grounds that the Town Code does not regulate hunting and that the establishment of discharge distances for purposes of public safety is a permissible exercise of the town's police power granted pursuant to Article 9 of New York's Constitution and New York State Town Law §130(27). Town Law §130(27) is the state enabling legislation that specifically grants Smithtown, and other local governments, the authority to enact local laws promoting public safety in areas where the discharge of firearms is being conducted in populated areas and therefore, hazardous.

By its May 21, 2018, Order, the Supreme Court, Suffolk County (Santorelli, J.), denied the Plaintiffs' motion and granted the Town's cross-motion dismissing the complaint.[R-3].

Following service of Justice Santorelli's May 21, 2018 order, the Plaintiffs filed a notice of appeal dated May 31, 2018. [R-2]. On October 2, 2018, the Plaintiffs filed their appellate brief and the Record on Appeal with the Clerk of the Second Department of the Supreme Court of the State of New York. The Town filed a brief in opposition and the appeal was fully submitted to the Second Department on May 22, 2019.

By its August 19, 2020 Order, the Appellate Division, Second Department reversed the May 21, 2018 Order, denied the Town's cross-motion for summary judgment dismissing the complaint and granted the Plaintiffs' motion for summary judgment declaring Town Code Chapter 160 invalid as applied to the discharge setback of a bow, and remitted the matter to the trial court for the entry of a judgment declaring Chapter 160 of the Town Code invalid as applied to the discharge setback of a bow and arrow. Upon information and belief, no judgment in this matter has been entered in the Office of the Clerk of Suffolk County, New York.

For the reasons argued in this Brief, Appellant seeks an Order of this Court reversing the Second Department's August 19, 2020 decision and upholding the

trial court's decision of May 21, 2018, on the grounds that the state law does not bar the Town from imposing a discharge setback that is more restrictive than the state's where TC §160-5 is a reasonable restriction on the use of firearms (including bow), serves a legitimate governmental purpose of protecting public health and safety, has only an incidental effect on hunting and in no way operates to bar hunting in Smithtown.

STATEMENT OF RELEVANT FACTS

In 1967 the Town of Smithtown adopted Chapter 160 entitled, "Ordinance Regulating the Discharge of Firearms in the Town of Smithtown" to its Town Code. Since 1967, the Town's definition of 'Firearm' has included "a bow and arrow." The only amendment to the Town's definition of firearm occurred in 1990 when an implement known as a "bludgeon" was removed.

The purpose of Chapter 160 is found at TC §160-3 which states, "[t]he purpose of this chapter is to prohibit any person from discharging a firearm in those areas of the Town of Smithtown in which such activity may be hazardous to the general public or nearby residents." In addition to defining prohibited areas as all areas in the town "except those areas as stipulated under TC §160-5, entitled "Exceptions," Town Code §160-4 also deemed the discharge of firearms to be hazardous to the general public.

TC §160-5 - "Exceptions" was amended in 1990 to read as follows:

> Landowners may discharge firearms on their own property, and also firearms may be discharged upon a landowner's property by others with the written consent of the landowner, provided that such discharge of firearms does not violate the provisions of the Environmental Conservation Law.

[TC §160-5 (amended 1-9-1990)].

In 2012, the Town amended §160-5 again. It is this version that the Appellate Division invalidated in its August 19, 2020.

TC §160-5 reads,

> Firearms may be discharged upon one's own property and the property of another with the written consent of the landowner, provided that any such discharge of firearms does not occur within five hundred feet from a dwelling, school or occupied structure, or a park, beach, playground or any other place of outdoor recreational or non-recreational activities; and further provided that any such discharge of firearms does not violate the provisions of the New York State Environmental Conservation Law.

[TC §160-5 (Amended 2-23-2012)].

In 2014, the State Legislature amended ECL §11-0931(4)(a)(2)[L. 2014 C.55, Part EE] as part of a State Budget Bill. Submitted with Appellant's Brief is a Compendium containing relevant portions of the legislative history and the Bill Jacket Supplement for L. 2014, Ch. 55. The amendment to the discharge setback for long bows consisted of a reduction from 500 feet to 150 feet and the amendment to the discharge setback for crossbows consisted of a reduction from 500 feet to 250 feet.

The legislative history of the passage of the setback reductions makes clear that the safety of the general public or nearby residents was not a concern of those supporting the amendments. [Compendium to Appellant's Brief]. Judicial notice may be taken of material that is part of the public record. Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 217 (2d Cir. 2004). This Court can take judicial notice of legislative history. Castellano v. Bd. Of Trustees of Police Officers' Variable Supplements Fund, 937 F.2d 752, 754 (2d Cir. 1991).

Nothing in the Governor's 2014 State of the State report, Executive Budget Report, Preliminary Report on the State Fiscal Year 2014-15 Enacted Budget, NYS Executive Budget Memorandum In Support, NYS Senate Majority Coalition Finance Committee/Counsel Staff Analysis, NYS Assembly Ways and Means Committee Yellow Book Review and Analysis, NYS Finance Democratic Conference Staff Analysis; correspondence from Audubon New York, the Nature Conservancy, New York State Conservation Council, Inc., State of New York Conservation Fund Advisory Board, or the testimony of the former DEC Commissioner, Joseph Martens, demonstrates any consideration was given by the supporters of the amendments for the safety of people living, working or playing nearby. [Compendium to Appellant's Brief].

However, at the Joint Legislative Hearing on January 29, 2014, Senator Liz Krueger raised her concerns with Commissioner Martens about allowing crossbows to be treated "the same way as longbows, as opposed to guns." [Compendium containing a copy of page 91 of the hearing transcript]. She asked the Commissioner, "[a]re you not concerned about allowing these to be used within 150 feet of where people and children live? *Id.* The Commissioner's response was, "[a]ll I can tell you, Senator, is that I have been reassured by my staff, many of which are very knowledgeable about crossbows and longbows, that 150 feet is a safe distance, that the arrows lose their force long before the 150 yards." He then corrects his testimony to reflect that he meant 150 feet. *Id.* trans. pp. 91-92. The Senator advises the Commissioner of her understanding that some bows "are enormously powerful and can go far farther than 50 yards." *Id.* trans.p. 92. Senator Krueger ends her questioning of the Commissioner with a request that he produce some research about crossbows to "assure us that we wouldn't be putting children at risk." *Id.* The Commissioner agrees to her request and states, "[o]bviously I would share your concerns."

Although the amendments to ECL §11-0931(4)(a)(2) reflect an adjustment to 250 foot setback for crossbows, the legislative history nonetheless, reflects little if any concern for the safety of members of the general public. Moreover, as evidenced by the 2014 amendment to ECL §11-0103(25) the phrase "hunting

related incident" remained defined as "the injury to or death of a person caused by the discharge of a firearm, crossbow or longbow . . ." This is an irrefutable acknowledgement by the Legislature that bows can kill or injure people. No other amendments prior to or after 2014 evidence any intent by the State to manage the safety of the general public or residents within striking distance of those using any type of bows.

The Town of Smithtown does not regulate the hunting of wildlife in any part of its code. Nonetheless, after the 2014 amendment to the ECL, the Plaintiffs viewed the Town's firearm ordinance as interfering with the state's authority over hunting because 1) it includes the term 'bow and arrow' in its definition of firearm; and 2) it still requires a 500 foot setback for the discharge of firearms.

In 2017, the Plaintiffs challenged the Town's 2012 amendment on the grounds that the Department of Environmental Conservation (hereinafter "DEC") holds exclusive regulatory authority over hunting and the discharge of bows in New York. [R-10]. Plaintiffs alleged in the complaint that the Town's 500 foot setback for all firearms is inconsistent with the state law regulating bows and as such the town's ordinance defeats the state law's purpose of "providing a detailed and comprehensive statewide regulatory framework for the management of wildlife populations, including by means of hunting." [R-11].

The Plaintiffs' motion for summary judgment was denied by the trial court on the grounds that 1) the state did not preempt the entire field of regulating the discharge of firearm as towns are expressly authorized to regulate firearms pursuant to Town Law §130(27); 2) there is no conflict preemption between the state laws and the town ordinance because the state laws do not allow anything that the town ordinance prohibits; and 3) the Plaintiffs failed to rebut the presumption that the town ordinance is a valid exercise of its rule making authority.

The Plaintiffs appealed to the Appellate Division, Second Department which reversed the trial court's decision. The Second Department held that notwithstanding the authority provided to Smithtown under N.Y. Town Law §130(27) to regulate the discharge of firearms, the Town's 2012 amendment restricting the discharge setback on all firearms, including a bow, to 500 feet from a dwelling, school or occupied structure, or a park, beach, playground or any other place of outdoor recreational or non-recreational activities was invalid as applied to a bow.

Despite the fact the term "firearm" as defined in ECL regulation 6 NYCRR 180.3[a] as applying only to the ECL, and the fact that the term is not defined in Town Law §130(27) which authorizes towns to regulate the discharge of firearms, the Second Department held that the Town did not have the authority to include a bow in its definition of firearm in the Town Code. The Second Department ruled

that when the two different state statutes are analyzed together, it can be inferred that the Legislature intended the term "firearm" to exclude a bow, and therefore, the Town could not rely on Town Law 130(27) to adopt a stricter setback standard for bows than the state's setbacks in ECL §11-0931(4)(a)(2).

Despite the fact that ECL 11-0931(4)(a)(2) and Town Law 130(27) have very different purposes and treat different subject matter, the Second Department reasoned that it was proper to apply the construction principle of *in pari materia* to both state statutes because they each use the "same terminology to regulate the same subject matter." Citing no basis for doing so, the court erroneously found that the 500 foot setback mentioned in Town Law §130(27) "refers to" the 500 foot setback in ECL 11-0931(4). [R- 76]. The court also relied on 6 NYCRR 180.3[a] which defines a firearm for the limited purposes of enforcing ECL Art. 11, but erroneously applied it to Town Law §130(27). As a result according to the Second Department, there is conflict preemption between the two state statutes, the Town is not entitled to rely on Town Law §130(27) to enforce the 500 foot rule as to the discharge of a bow within the Town's jurisdiction or to define firearm as including a bow. This ruling effectively eviscerated Town Law §130(27) as applied to the Town and stripped Smithtown of its constitutional authority to police the safety of its residents.

As demonstrated below, the Second Department erroneously applied the principle of *in pari materia* to two state statutes that address vastly different concerns even though they each touches upon the use of firearms and bows. Just as in DJL Restaurant Corp. v. City of New York, 96 N.Y.2d 91 (2001)(zoning regulation limiting location for adult entertainment businesses selling alcohol had only a tangential impact or incidental effect and therefore was not preempted by ABC Law controlling alcohol sales), TC §160-5 does not apply to the regulation of hunting and its effect on the discharge of bows by hunters is incidental. There is no bar to licensed hunting in Smithtown but the distance of a bow setback is different and necessary to protect the general public where the state law is silent.

The State's wildlife management laws and hunting regulations do not afford the Department of Environmental Conservation complete autonomy over matters of health and safety of the general public on a statewide basis. Moreover, neither of the state laws involved in this matter expressly or impliedly bar the Town from including bows in its definition of firearms. Accordingly, the State's ECL does not preempt the authority granted to Smithtown by the Legislature under Town Law §130(27) to adopt the longer, more restrictive setback of 500 feet for the discharge of bows within the town's jurisdiction. The Second Department's decision and order must be reversed and the trial court's decision and order

dismissing the complaint must be reinstated and a judgment entered in the Town's favor dismissing the complaint.

ARGUMENT

POINT I.

THE ENVIRONMENTAL CONSERVATION LAW DOES NOT PREEMPT TOWN CODE §160-5 IMPOSING A MORE RESTRICTIVE SETBACK FOR THE DISCHARGE OF A BOW BECAUSE THE TWO STATUTES DO NOT REGULATE THE SAME SUBJECT MATTER.

New York has a statutory obligation to manage all wildlife within the state. [ECL Article 11 (Fish and Wildlife)]. To aid its management, the Legislature adopted a comprehensive scheme regulating the use of firearms, long bows and crossbows for hunting wildlife. Nonetheless, ECL Art. 11 is primarily a set of hunting laws. On the other hand, the matter of restricting people from discharging all types of firearms in a densely populated suburb is an inherently local safety issue. Kamhi v. Town of Yorktown, 74 N.Y.2d 423, 548 N.Y.S.2d 144 (1989). The general policing of firearms, including a bow and arrow, is a matter within the scope of the property, affairs or government of a local government and as such is left to local control pursuant to N.Y. Constitution, article IX, §2(a) &(c) and §3; Municipal Home Rule Law §10 [a](12), and in this case, Town Law §130(27).

It does not matter whether people are hunting on their own land, hunting on another's land with permission, hunting with or without a license or permit, or simply target shooting for non-hunting purposes. Town Code Chapter 160 addresses the discharge of a variety of implements that can be discharged causing injury or death. As such, its requirement imposing a 500 foot discharge setback to all of the types of implements included in the definition of firearms, is reasonably calculated to protect nearby bystanders. In short, ECL and Town Code Chapter 160 do not regulate the same subject matter.

ECL does not expressly or impliedly preempt a town from regulating the use of firearms in its jurisdiction for the purpose of protecting public health and safety.

Some towns and villages in New York are more densely populated than others. There are unquestionably more people living and working in Smithtown, Suffolk County than most towns in Cayuga County. As a result it is reasonable to consider that if a bow is discharged in Smithtown near a home, business, school, etc., there is greater risk of injury, damage or death to a person in Smithtown than a less populated town. Local governments are in a better position than the State to police activities in their communities to meet present and future needs of their inhabitants as conditions change. This is why the Town's Firearms code was adopted in the first place.

Beginning in the 1960s, the aggressive growth of suburban neighborhoods in rural areas of Smithtown where people traditionally discharged firearms and bows in relative safety, significantly increased the risk of injuring residents or damaging property in close proximity.

The Respondents argued below that the need to reduce the deer population requires the unfettered ability to kill deer in accordance with only those regulations imposed by the State. However, the State has never demonstrated that its interest in managing the deer population is so substantial as to override local governments' authority to provide for the safety and welfare of the inhabitants of each municipality in accordance with local conditions (availability of open space, density of buildings and structures, number of inhabitants).

Moreover, it was the Respondents' burden below as the movant for summary judgment on the pleadings to show that TC §160-5 did not bear a reasonable relation to the promotion of the public's health and safety and therefore, was not a valid exercise of the Town's police power. Respondents made no showing that TC §160-5 was not a valid exercise of the Town's authority under Town Law §130(27), Art. IX of New York's Constitution or any other general law.

Unless there is a valid express preemption of local law contained in a State law, a court will not invalidate a local law unless it can be sufficiently established that the state law impliedly preempts the local law. This Court looks to the purpose

or declared policy of a state statute. It also looks to see if the state enactment regulates the field or subject matter so completely that its intention is to prevent varying local legislation of the matter. Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia, 51 N.Y.2d 679, 435 N.Y.S.2d 966 (1980).

This Court has a rich history of upholding those local laws that are shown to relate to a valid governmental purpose, especially public health, safety and welfare and decline to do so where the Legislature has clearly evidenced its intent to preempt a particular field of regulation either expressly or impliedly. *See* Garcia v. New York City Dept. of Health & Mental Hygiene, 31 N.Y.2d 601 81 N.Y.S.3d 827 (2018)(city health code requiring flu vaccines for children attending certain facilities was not preempted by Public Health Law and holding the state law's list of vaccine requirements was not an exclusive list barring local municipalities from including additional vaccines where authority to regulate vaccines has been delegated to the locality); Town of Concord v. Duwe, 4 N.Y.3d 870, 799 N.Y.S.2d 167 (2005)(State has not preempted local legislation of issues related to municipal solid waste); DJL Rest. Corp. v. City of New York, 96 N.Y.2d 91, 725 N.Y.S.2d 622 (2001)(city zoning law regulating adult establishments to certain locations was not preempted by the State's Alcohol Beverage Control Law because thrust of local law was zoning intended to address secondary effects of adult establishments, not regulation of alcohol and impact on adult establishments was incidental if the

establishment also sold alcohol); Incorporated Vil. Of Nyack v. Daytop Vil., 78 N.Y.2d 500, 577 N.Y.S.2d 215 (1991)(local law of general application and adopted to address legitimate concern will not be preempted if enforcement only incidentally infringes on a preempted field); Riley v. Monroe County, 43 N.Y.2d 144, 400 N.Y.S.2d 801 (1977)(waste disposal is a local matter subject to county police power); Monroe-Livingston Sanitary Landfill, *supra.* (State preempts local government in the matter of siting electric generating plants); People v. Diack, 24 N.Y.3d 674, 3 N.Y.S.3d 296 (2015)(local law imposing residency restrictions on registered sex offenders preempted by state's comprehensive statutory and regulatory scheme).

However, even in the face of the a comprehensive regulatory scheme evidencing the Legislature's intent to regulate a field, a local law will nonetheless, be upheld if the municipality is specifically empowered to adopt local laws or regulations on a particular matter. People v. De Jesus, 54 N.Y.2d 465, 446 N.Y.S.2d 207 (1981)(referencing analogous situations including an establishment selling alcohol is not exempt from local law requiring smoke alarms or dumping garbage on sidewalks or an ordinance prohibiting disorderliness). In the case at bar, although the Legislature authorized the State to create a comprehensive regulatory scheme for hunting wildlife in New York State, the scheme is limited to

hunting, trapping and taking activities, and not the general activity of discharging firearms in densely populated suburban areas.

Furthermore, clearly Smithtown was authorized by the state Town Law § 130(27) to adopt firearm ordinances to protect the safety of the public. Therefore, under cases like People v. De Jesus, *supra,* and Robin v, Incorporated Vil. Of Hempstead, 30 N.Y.2d 347, 334 N.Y.S.2d 129 (1972), even if ECL Art. 11 and its regulations included far reaching authority to regulate public health and safety (which they do not), Town Law § 130(27) clearly identifies Smithtown as having specific authority to adopt its firearms code provisions for the purposes of protecting the public.

The Town contends that the Second Department ignored the different purposes underlying ECL Article 11 (management wildlife by regulating hunting) and Town Code Chapter 160 (regulating the use of firearms in populated areas) and ignored the import of Town Law 130(27) expressly authorizing the Town to adopt such local laws. In addition, the Second Department erroneously inferred from a regulatory definition that because the term 'firearm' in the ECL does not include a bow, the Town's inclusion of bow and arrow in its definition of firearm was an attempt to avoid the State's authority to provide shorter discharge setbacks for bows. On this faulty basis, the Second Department, held the Town had no authority to include a bow in its definition of firearm and therefore, Smithtown's

ordinance at TC §160-5 purporting to regulate the discharge setback of a bow to 500 feet was inconsistent with state law.

The declared purpose of ECL Article 11 is "the efficient management of the fish and wildlife resources of the state." ECL §11-0303(1). This section further provides that management shall be deemed to include "both the maintenance and improvement of such resources as natural resources" and that to achieve this purpose, the department shall enter into reciprocal and cooperative arrangements with political subdivisions as well as other public agencies and private entities. *Id.*

Town Law §130(7) specifically authorizes certain municipalities to adopt local rules, regulations or ordinances prohibiting the discharge of firearms "in areas in which such activity may be hazardous to the general public or nearby residents … which ordinances, rules and regulations may be more, but not less, restrictive than any other provision of law." It is clear from this language that the purpose of Town Law §130(27) is to provide for the safety of people of Smithtown who are in proximity to those using firearms.

Chapter 160 of Smithtown's Town Code, entitled "Ordinance Regulating the Discharge of Firearms in the Town of Smithtown," states that its purpose is "to prohibit any person from discharging a firearm in those areas of the Town of Smithtown in which such activity may be hazardous to the general public or nearby residents." Town Code Chapter 160, §160-4 provides that because "[t]he

discharge of firearms is deemed hazardous to the general public… [this activity is] prohibited in all areas of the Town of Smithtown except those areas stipulated under §160-5, Exceptions."

Section 160-5 of the Town's Code requires all firearms to be discharged from a distance of at least 500 feet of a dwelling, school or occupied structure, or a park, beach, playground, place of outdoor recreation or non-recreational activities. The Town defines a firearm to include a bow. Town Code §160-2 ("Firearm [i]ncludes . . . a bow and arrow").

Clearly the town's firearm code is consistent with the provisions of the state's enabling legislation at Town Law §130(27) as both statutes allow for the discharge of firearms at a minimum distance of 500 feet from an enumerated list of structures and places. Both Town Law §130(27) and Town Code Chapter 160 expressly address a significant public safety issue – the danger presented by the proximity between people who are involved in the activity of discharging firearms including bow to those who are not.

The fact that ECL §11-0931(4)(a)(2) also refers to the discharge of firearms, long bows and crossbows at distances of 500, 150 and 250 feet respectively from a dwelling house, farm building or farm structure actually occupied or used, school building, school playground, public structure or occupied factory or church, does not evidence the State's intent to exclude local government's police authority so as

to bring the broad scope of local public safety in populated areas such as Smithtown within the State's purpose of efficiently managing wildlife.

Hence despite the fact the Town imposes a more restrictive setback for bows than ECL §11-0931(4)(a)(2), the Town's ordinance §160-5 and its enabling legislation are not in direct conflict with the state law because they address different purposes. The State's shorter setbacks for bows is not related to the protection of public safety. It is intended to provide for more accuracy in the taking of wildlife in furtherance of the State's objective of managing wildlife. The Town ordinance on the other hand is solely intended to provide safer discharge conditions for the protection of human life when people are using bows in proximity to the general public or nearby residents because it presents a hazard to human life and property.

The Appellate Division failed to consider the general spirit and purpose of the statutes involved and to interpret the statutes in a manner to further both of their purposes. Cohen v. Freedman, 185 Misc. 848, 58 N.Y.S.2d 154 (City Ct. N.Y. Co., Spec. Term 1945).

POINT II.

THERE IS NEITHER AN EXPRESS NOR AN IMPLIED INTENT IN THE ECL TO PREEMPT THE TOWN FROM LEGISLATING A MORE RESTRICTIVE DISCHARGE SETBACK FOR BOWS.

Had the State intended to preclude local governments from adopting safety ordinances establishing discharge setbacks for bows, it could have spelled that out in ECL Article 11. The State has been careful to include preemptive language in other Articles of the ECL. The fact that it does not exist in Article 11 is a strong indication that the Legislature did not intend to interfere with local police power involving the discharge of firearms. For instance, Article 17 dealing with water pollution control contains a provision at §17-1017 entitled, "Preemption of Local Law". At subdivision 1 of that section the statute reads that, "[e]xcept as provided in subdivision two of this section, any local law or ordinance which is inconsistent with any provision of this title or any rule or regulation promulgated hereunder shall be preempted."

Even where the Legislature intends to clarify that it does not intend to preempt local authority, it has been careful to do so. For instance, ECL Article 27 - the State's solid waste disposal statute - states at §27-0711 that the state expressly disclaims any State purpose to supersede or preclude the enactment of local ordinances so long as they are consistent with at least the minimum requirements of the regulations promulgated by the statute.

In the case at bar, the Legislature did not evidence an express or implied intent to occupy the field of wildlife management in a manner to exclude local governments from protecting their own inhabitants from the dangers of discharged bows in densely populated areas.

Title 9 of ECL Article 11 unquestionably demonstrates the State's intent to control all aspects of the sport of hunting wildlife throughout the State. The declared purpose of Article 11 governing the state's exercise of fish and wildlife management authority is found at ECL §11-0303. In effect, management of wildlife is achieved through a licensed sport in New York. Subsection 1 states that the purpose is to vest in the department the "efficient management of the fish and wildlife resources of the state." All wild animals are considered resources of the state. According to ECL §11-0303(1), management includes maintenance and improvement of these resources as natural resources. Management shall include entering into cooperative agreements with political subdivisions of the State and with owners or lessees of privately owned lands. *Id.*

Subsection 2 of §11-0303 expands on the purpose of managing wildlife by directing the department to use its powers in a manner that promotes the maintenance of desirable species in ecological balance and leads to the observance of sound management practices giving regard to ecological factors; compatibility with other land uses; recreational purposes of wildlife; requirements of public

safety and the need for adequate protection of private premises and of the persons and property of occupants against abuse of privileges of access to such premises for hunting, fishing or trapping.

On the issue of public safety the State has failed to promulgate implementing regulations aimed at protecting the general public or residents in close proximity to hunters discharging firearms including bows.

Nowhere in Title 9 of ECL Article 11 is there any language indicating that the State's management policies for deer throughout New York that the State would control all matters of public safety (those persons not involved in the sport of hunting but who may be in close proximity to those who are hunting). Nor does the state law exclude local government from providing for the safety of people within its borders when it comes to the use of firearms including bows. To the contrary, cooperation with local governments is expressly intended to be part of the management strategy of the State. See ECL §11-0303 sub.(1) (authorizing the department to enter into reciprocal and cooperative agreements with political subdivisions on matters related to wildlife management). Upon information and belief, the State has not reached out to Smithtown to discuss entering an agreement concerning the use of bows for hunting in the town and there is no evidence of an agreement in the record.

The only other mention of public safety is contained in ECL §11-0931(2) which contains an exception for persons with disabilities from the prohibition of carrying a loaded firearm in a vehicle subject to restrictions "deem[ed] necessary in the interest of public safety." Aside from these two references to public safety, the overwhelming majority of Article 11's provisions deal with specific requirements and practices involved in the sport of hunting, taking and trapping. While safe hunting practices for the well-being of hunters are evident throughout Article 11, there is no evidence in the Record or in the text of the statute to support a finding of implied intent to preclude the town from protecting its residents from dangerous activities.

POINT III.

THE SECOND DEPARTMENT'S HOLDING THAT THE TOWN COULD NOT DEFINE 'FIREARM' TO INCLUDE A BOW WAS BASED UPON A FAULTY INFERENCE BORN OF THE MISAPPLICATION OF THE DOCTRINE OF *IN PARI MATERIA*.

The Second Department erroneously concluded that Town Code §160-5 is impliedly preempted based upon the faulty inference that the Legislature intended the definition of 'firearm' to not include a hunting bow. The inference was arrived at through a misapplication of the rule of construction known as *in pari materia*. When resorted to correctly, the rule allows for consideration of different

parts of a statute or statutes enacted at different times with reference to the same subject matter. McKinney's Statutes §221.

Despite the fact ECL §11-0931(4)(a)(2) and Town Law §130(27) do not address the same subject matter and have different purposes, the Second Department erroneously construed them together. These two state laws are not inconsistent with each other because they were adopted for different purposes. The ECL provision addresses how, when and who can use a variety of hunting implements including firearms and bows and the types of wildlife that can and cannot be taken depending on the implement. The Town Law provision, on the other hand, addresses the discharge setback for all firearms, including bows whenever the activity presents a hazard to the general population or residents. Neither N.Y. Town Law nor Town Code Chapter 160 regulate hunting. Hence, it was error to construe them together to reach a conclusion of conflict preemption in order to invalidate the Town's 500 foot rule.

The Second Department misinterpreted the import of the 500 foot rule in Town Law §130(27). The reference to the "five hundred foot rule" in Town Law §130(27) relates solely to providing notice to the regional supervisor of what is now the Department of Environmental Conservation if the Town wants to change the setback distance. The only rational inference that can be drawn from it is that

the towns and counties listed in §130(27) not only have authority to enforce the 500 foot rule, but also to change the setback in their discretion. The particular sentence reads, "[t]hirty days prior to the adoption of any ordinance changing the five hundred foot rule, a notice must be sent to the regional supervisor of fish and game of the environmental conservation department notifying him of such intention." This sentence does nothing more than alert the DEC that the Town is considering a change in the setback. In fact §130(27) expressly provides towns and counties with the power to impose more restrictive setbacks

Interestingly, it was the State, not the Town that changed the setbacks. The State amended the ECL in 2014 to reduce the hunting setbacks for bows at a time when the ECL, the Town Law and the Town Code were consistent in that they all required a setback of 500 feet for all firearms and bows.

In addition the Second Department erroneously expanded and applied the State's regulatory definition of 'firearm' to both Town Law 130(27) and Smithtown's firearm ordinance at Chapter 160 of the Town Code. Courts are barred from expanding the operation of statutes and their regulations beyond the bounds of legislative intent. (McKinney's Statutes §73 [current through L. 2019, ch. 758 and L. 2020, chs. 1-242]. The state's regulatory definition found at 6 NYCRR 180.3 expressly states that it only applies to the state's Fish and Wildlife

Law (ECL, Article 11) and the regulations of Title 6. There was no basis for the Second Department to apply the ECL definition of firearm to N.Y. Town Law or Town Code Chapter 160. The Town was within its right to define the term firearm as including a bow for purposes of public safety. The fact that the regulatory definition of 'firearm' does not mention a bow is irrelevant. In fact, Plaintiff-Respondent concedes that the regulatory definitions are dicta. See Plaintiff's Attorney's Affirmation in Opposition to Defendant's Cross Motion to Dismiss" dated April 18, 2018 [R-60].

Accordingly, it was error to invalidate the town's regulation of bows for purposes of public safety on the basis of a definition that is inapplicable to Town Law §130(27) or its firearm ordinance.

The Second Department's statutory interpretation of firearm as excluding a bow also violates a basic canon of construction which is to read a statute as a whole. When the hunting and licensing portions of ECL Article 11 are read together, they demonstrate that the state considers bows as hunting implements with the same or similar capability of killing or wounding wildlife. If this were not the case, the State would have no reason to issue licenses and permits for bow hunting or to mention them at all in Article 11.

Article 11's multiple references to long bows, crossbows, and other types of bows are peppered throughout both Titles 7 and 9 which deal strictly with licensing and hunting qualifications; not public safety. Reading these titles together evidences a clear intent that the State considers long bows and crossbows to be implements for hunting similar to pistols, shotguns, muzzle-loading firearms. It specifically provides hunting privileges for bows on the licenses issued by the Department of Environmental Conservation.

Hunting licenses are defined in ECL §11-0701. ECL §11-0701 (1)(a) bars a person of 12 or 13 years old from hunting with a crossbow. A holder of hunting license may take fish with a longbow. ECL§11-0701(2)(a)(3). A bow hunting privilege is provided for on a hunting license under certain conditions. ECL§11-0701(3). A person 18 years or older can hunt wild deer with a longbow. ECL§11-0701(3)(2). A hunting license can include a privilege to hunt with a muzzle-loading firearm or a crossbow. ECL §11-0701(9).

Prohibitions against taking wildlife are contained in ECL §§11-0901 and 11-0931 dictate that wild deer and bear can only be taken by "gun, crossbow or by long bow" and sometimes only by shotgun or long bow and sometimes only by long bow. Other provisions of ECL 11-0901 dictate the types of implements that can or cannot be used to take different types of fish and wildlife. The use of

firearms, limited gauge shotguns, long bows and crossbows are expressly permitted under this section pursuant to varying conditions.

Despite its title, "Prohibitions on the use and possession of firearms," ECL§11-0931 expressly addresses the permitted use and carrying of crossbows, longbows in addition to limited types of firearms (pistols and revolvers). The ECL provision also includes mandatory rules for the use of crossbows and longbows along with firearms when certain conditions are met, i.e., no discharge over a public highway, *id.* subd. (4)(a)(1); and different discharge setbacks for firearm, long bow and cross bow. *Id.* subd. (4)(a)(2)]. Hence, ECL Art. 11 clearly considers bows as a type of firearm.

Following the interpretation rule of *ejusdem generis* (identifying a class of objects using a general word does not limit that class to only the same identical objects, but can include others of the same kind or class), the fact that the Legislature repeatedly groups together firearms, longbows, crossbows, shotguns, muzzleloading firearm in a variety of combinations throughout the statute supports a finding that the State used the term 'firearm' in a generic manner followed by more specific implements such as bows, all used for the purpose of killing or wounding wildlife.

This is not a case where the law only describes one thing – in this case, one particular hunting instrument - so that the maxim *expressio uniu est exclusion*

alterius applies - leading to the reasonable inference that what is omitted was intended to be excluded. The State's repeated clustering of hunting instruments together throughout the hunting Titles of ECL Art. 11 demonstrate that none of them were intended to be excluded from the operation of the state law.

To argue as the Respondents do that the Legislature did not intend to treat bows in the same spirit as firearms is illogical given the irrefutable and acknowledged fact they are capable of injuring or killing wildlife and people. Under these circumstances, to disallow a municipality to adopt public safety ordinances for the discharge of bows and firearms as part of a general public safety ordinance is not supported by a proper and reasonable interpretation of these statutes.

In applying a faulty interpretation of the term 'firearm', the Appellate Division's decision effectively abrogated Town Law §130(27) where there was no legal basis to do so. Even if Town Law §130(27) is considered a special law (which it is not), it cannot be repealed by implication unless the two statutes are so inconsistent that they cannot stand together. McKinney's Statutes §396 (current through L. 2019, ch. 758 and L. 2020, chs. 1-199). Since both state laws have different purposes, they are not inconsistent and as such, Town Law §130(27) provided Smithtown with sufficient authority to require a 500 foot setback for all bows used in the Town.

The Town's purpose and motive in 2012 for setting the discharge distance for its firearm definition section (§160-2) was a lawful exercise of its constitutional authority and statutory home rule powers aimed at keeping people safe when they are in proximity to others discharging bows.

POINT IV.

SMITHTOWN'S SETBACK OF 500 FEET AS APPLIED TO THE DISCHARGE OF BOWS IS A VALID EXERCISE OF HOME RULE POWER UNDER N.Y. CONST. ART. 9, Sec. 2 [c].

The Home Rule principle adopted in N.Y. Const., art. 9, Sec. 2 [c][i] provides Smithtown with the necessary constitutional authority to adopt and amend legislation relating to its property, affairs and government so long as the local enactment is not inconsistent with New York's Constitution or any general law. Local governments are also authorized to adopt and amend legislation not inconsistent with the state constitution or general laws even if it does not relate to the property, affairs or government, if it has to do with the "government, protection, order, conduct, safety, health and well-being of persons or property" in the local jurisdiction and the State Legislature has not restricted the adoption of such a local law. N.Y. Const., art. 9, sec. 2[c][ii]; Jancyn Mfg. Corp. v. County of Sufffolk, 71 N.Y.2d 91, 524 N.Y.S.2d 8 (1987)(no exclusive jurisdiction found for

a state law regulating cesspool additives where state law adopted after local law with the same purpose contained no superseder clause, and imposed no direct control or enforcement at the local level).

Section 3(a) of Art. 9 of the state constitution explicitly establishes that the Legislature may still adopt enactments that deal with matters outside the scope of the property, affairs or government of a local government. It is the Town's contention that the local ordinance on discharging a bow in the Town of Smithtown is a matter sufficiently related to the property, affairs and government of the Town and as such is not subject to the overriding authority of the Legislature to affect or nullify the Town's enactments.

The Department of Environmental Conservation, the agency charged with wildlife management under ECL Article 11, does not have a substantial interest in policing the daily safety of the residents of the Town of Smithtown. Smithtown's public's safety is the primary interest of local police or public safety officers on a day to day basis. Given the number of residents, schools, houses, buildings, etc., in the occupied areas of the town, it is reasonable to conclude that local police or public safety officers know these areas of the Town and therefore, are in a better position to enforce local safety laws as opposed to DEC Enforcement Officers whose enforcement powers are limited to state lands and whose knowledge of the towns' neighborhoods, business districts, commercial areas, outside of public lands

and Wildlife Management Areas, can reasonably be expected to be far more limited.

The contention asserted in the Plaintiffs' lawsuit that discharging bows is a safe activity is not credible given DEC's acknowledgment that discharging a bow can injure or kill a person. A more reasonable interpretation of the Legislature's intent by including numerous restrictions on the use of bows in the hunting provisions of Titles 7 and 9 of ECL Article 11 is to make a dangerous activity as safe as possible. Moreover, despite the conclusory and unsupported comments about bow safety by Plaintiffs, the fact that the Legislature adopted shorter setbacks for long bows and crossbows is not incontrovertible proof that the discharge of bows is a safe activity in settings where the general public is within striking distance. They were more likely shortened to aid the sport given a glaring absence in the public record of statements demonstrating the amendment of the setbacks would promote public safety.

Town Law 130(27), on the other hand, continues to bear a reasonable relationship to the Town's concern for public safety, while ECL 11-0931(4)(a)(2) bears a reasonable relationship to the state's concern for effective wildlife management through the sport of hunting, taking and trapping while allowing for local regulation of public safety.

Therefore, it appears that the discharge reductions adopted by the State relate solely to increasing the efficacy of using bows as one of the state's wildlife management tools. Which brings us to the ultimate issue - did the Legislature, in adopting shorter setbacks under state law for bows in 2014, intend to elevate the effectiveness of hunting over the importance of public safety?

The invalidation of the Town's firearm ordinance, insofar as it applies to bows, appears to support this untenable conclusion by the Second Department and must be reversed. Courts are obligated to avoid construing statutes in a manner that tends to sacrifice or prejudice the public interests. McKinney's Statutes §143(current through L. 2019, ch. 758 and L. 2020, chs. 1-199). Therefore, it must be presumed that the Legislature did not intend to increase the hazards to the general public by adopting reduced setbacks and such an intention should not be imputed. Statewide Roofing, Inc. v. Eastern Suffolk Bd. Of Co-op Educ. Services, 173 A.D.2d 514, 661 N.Y.S.2d 922(Sup. Ct. Suff. Co. 1997).

Similarly, courts should interpret a statute in a manner to give force to the whole act in a manner that does not work an injustice. Lincoln Park Lanes v. State Liquor Authority, 36 A.D.2d 188, 319 N.Y.S.2d 741 (1971). The record demonstrates no injustice to hunters if they are to abide by the 500 foot setback in Smithtown. Plaintiffs-Respondents are of the position that the increased nuisance from an abundance of deer in populated areas justifies the increased risk to people

faced with the reality that bows may be discharged closer than permitted before 2014. When ECL Article 11 is looked at as a whole, it clearly defines strategies for achieving the management of wildlife by killing them despite the fact there are other methods currently being deployed in the field (such as contraception) as part of studies addressing the overabundance issue. It is not however, a public safety law.

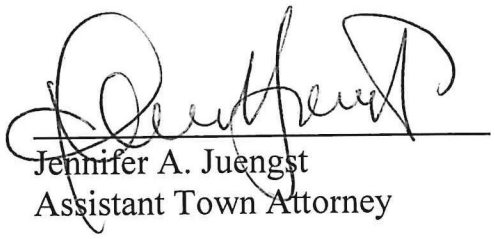
While there is little disagreement that the deer population in suburbs such as Smithtown has increased, this increase alone does not justify making discharge setbacks a priority over public safety. Unfortunately, that is the result of the Second Department's August 19, 2020 Order. The Second Department ignored established law of this Court as well as recognized rules of construction and interpretation and as a result its ruling seriously jeopardizes the health and safety of the Town's residents. It results in a serious injustice to the general public as the preservation of human life is given a lower priority than the management of wildlife.

Accordingly, it is necessary to interpret ECL 11-0931(4)(a)(2), in a manner that is not limited to the literal words therein, but that allows for the discharge of bows from 150 feet (long bow) and 250 feet (crossbow) where local laws provide for the same practice, but not where local laws lawfully require longer setbacks. The state's management of wildlife must yield to public health and safety.

CONCLUSION

For all of the reasons cited in Appellant's Brief, the Town respectfully requests that the Court of Appeals reverse the decision and order of the Appellate Division, Second Department, dated August 19, 2020, substitute an order that Town Code § 160-5 is fully enforceable and remitting this matter to the Supreme Court for the entry of a judgment declaring Town Code §160-5 to be valid, together with such other and further relief as this Court may deem just and proper.

Dated: Smithtown, New York
January 12, 2021



Jennifer A. Juengst
Assistant Town Attorney

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 2010 Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 8,739 words.

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On January 15, 2021

deponent served the within: **Brief for Appellant**

upon:

KILLORAN LAW, P.C.
Attorney for Respondents
132-13 Main Street
Westhampton Beach, New York 11978
Tel.: (631) 878-8787

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on 15th of January, 2021

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Queens County
Commission Expires Apr. 20, 2021

Job# 300158