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.

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

STATEMENT IN REPLY

Respondents, an organized group of sport hunters and the president of the group, seek to defeat the intent of both the state Legislature and the authority of the Town Board of Smithtown to protect the safety of Town residents from the dangers imposed when bows are discharged near homes, schools, beaches, parks or businesses. In opposing this appeal Respondents urge this Court to abandon recognized statutory interpretation, time-honored local authority over matters of public safety and plain common sense and elevate an activity that is essentially a sport over public safety.

Respondents fail to identify any part of the state's Environmental Conservation Law (ECL) that expressly or impliedly empowers the Commissioner of the Department of Environmental Conservation to impose setbacks in any part of the state, including local towns or villages, notwithstanding local authority over matters of public safety when it comes to the use of firearms, including bows. There is no provision in the ECL containing language so broad or general and with such a natural and obvious meaning upon which this Court can conclude that the Legislature intended to eradicate the authority of local government to protect residents from severe injury or death at the hands of even a single person who discharges a bow.

Respondents fail to demonstrate how the 2012 amendment to Town Code §160-5 exceeded the authority granted to it under state Town Law §130(27). The Town's discharge setback of 500' for firearms including bows is a valid exercise of the Town's authority under both Town Law §130(27); Municipal Home Rule Law §10; and N.Y. Constitution Art. IX. While Town Code §160-5 may have the effect of increasing the setback for the use of a bow in Smithtown, it does nothing to eliminate the ability to hunt with a bow in the Town. Respondents fail to demonstrate how enforcing the 500' setback for bows unreasonably increases a burden upon hunters or interferes with the sport of hunting. After all, the state enforced a 500' setback beginning in 1957 and it remained 500' for over fifty years. Even if a burden is found to be imposed, it is far less significant than the increased risk of death or injury to a resident living in a dense suburb such as Smithtown from the reduced setbacks of 150' and 250' feet.

The record and law before this Court weighs heavily in favor of reversing the order and decision of the Appellate Division, Second Department, remitting this case to the Supreme Court, Suffolk County for the entry of an order dismissing the complaint and declaring Town Code §160-5 valid and enforceable within the geographical limits of the Town outside of the existing villages.

ARGUMENT

POINT I.

WHILE THE STATE OCCUPIES THE FIELD OF HUNTING IT CLEARLY DECIDED TO LEAVE THE FIELD OF PUBLIC SAFETY TO LOCAL GOVERNMENT.

The Respondents' contention that the State has impliedly preempted local governments from regulating a bow discharge setback for the purpose of hunting throughout New York fails to acknowledge the reality that: 1) local governments have not had their legislative powers over public safety matters repealed; 2) there is no implied preemption of local authority because of the different purposes of the statutes in question; and 3) hunting in different areas of New York presents different public safety challenges depending on local conditions relating to population density and property lot size which are not within the DEC's statutory charge of managing wildlife.

In addition, Respondents unrealistically insist that discharging a bow is not dangerous because the reported statistics indicate few bow hunting accidents and that the Town cannot regulate bow discharge setbacks because a bow is not technically a firearm. The undisputed fact that bows are permitted by the DEC for the purpose of killing wildlife is sufficient evidence upon which this Court can take judicial notice that if a bow can kill a deer, it can kill a person.

Moreover, there is no irreconcilable conflict between the State's bow 150' (long bow) and 250' (cross bow) setbacks and Smithtown's 500' setback. Prior to 2014 the state's bow setback was 500' - a distance the state imposed for more than five decades. Respondents point to no factual support in the legislative materials for the 2014 ECL amendments demonstrating how the significantly shorter distance is safer for a resident (who may not be aware of a hunter's presence) in the vicinity of someone discharging a bow. It appears to have been simply requested by hunters who wanted a shorter discharge setback for bows for their own undefined reasons.

Respondents rely heavily on the case of *Cohen v. Board of Appeals of Village of Saddle Rock*, 100 N.Y.2d 395, 764 N.Y.S.2d 64 (2003) for their arguments that the State occupies the field of hunting given the detailed statutes and regulations issued for hunting activities and the regulatory scheme is so transcendent that any local attempt to impede the activities regulated must be shunted.

It can be argued that *Cohen* is irrelevant since it is a preemption case involving the field of area variances and whether the state's Village Law preempted local village codes also dealing with area variances. In *Cohen* the field at issue was the same as between the state and local laws; it was the methodology of area variance review that differed causing the conflict in *Cohen.* In adopting

the state's Village Law, the Legislature determined that applicants and zoning boards of appeal across the state would best be served by a uniform method of review.

In the case at bar, on the other hand, there are two different fields of interest: the state's ECL and regulations involving wildlife management and Smithtown's Code which involves to protection of public safety. The different nature of these fields does not lend them to a uniform setbacks. Insisting upon uniformity in this case interferes with the local government's constitutionally protected power to protect its residents.

Nonetheless, *Cohen* is instructive because in confirming this Court's treatment of the preemption issue, the Court reiterated the principle that the inconsistency of a local law with a general law of the state does not automatically result in preemption of the local law. *Kamhi v. Town of Yorktown,* 74 N.Y.2d. 423, at 429-430, 548 N.Y.S.2d 144 (1989)(inconsistency of a local zoning law with a state law of general application is insufficient to trigger state preemption because such an interpretation would render supersession power under Municipal Home Rule Law meaningless). Only when the state's interest is proven to be a superior interest will the local law be preempted. In *Cohen,* the Court held that the need for uniformity in the variance review process - evident from numerous examples in the legislative history of confusion across the state - would help all applicants and

governing boards to understand how and why variances are granted or denied. The Court expressly noted however, that a standard review methodology did not infringe on each localities right to enforce different zoning requirements (i.e., setbacks, height, etc.)

In determining which interest is superior, the court in *Cohen* held that where no express intent to preempt exists, implied intent depends upon the nature of the subject matter being regulated; the scope and purpose of the state legislative scheme and the need for statewide uniformity in a particular field. In the case at bar, Respondents fails to establish that the state's interest in the sport of hunting is a superior interest to local policing of the public's safety from discharged firearms, including bow, or that there is an overarching need for uniformity of setbacks amongst local jurisdictions despite the fact population density can vary significantly between towns. Moreover, the discharge setback is akin to a zoning setback which this court has found to be the type of regulation that should remain with local decision makers because it is directly related to the physical conditions in the jurisdiction.

Express preemption is not an issue in this case and would be questionable in light of the express permission granted to Smithtown under Town Law §130(27) to regulate the discharge setback of firearms where the governing body determines that such activity is hazardous to the general public or residents near the discharge.

There is no language in the ECL that the wildlife management provisions of Article 11 supersede local authority to establish regulations for the purpose of public safety.

In fact the final sentence of Town Law §130(27) stating that prior to any local proposition intended to change the 500' setback, the local body is required to send notice of its intent to the regional supervisor of fish and game in the environmental conservation department. If the state considered the DEC to have sole authority over setbacks, it would not have adopted Town Law §130(27), or in amending the ECL to provide for reduced setbacks, it would have also amended Town Law §130(27). The fact that neither of these procedural steps took place points to the importance of deferring to local government's authority. Additionally, the notice of intent language supports the Town's position that is has local authority over setting the discharge setback, but recognizes that the state may have an interest as well. It does not support the Respondents' interpretation that the state's interest is superior to the Town's interest.

In the case at bar, local authority to provide for public health and safety of people is the superior interest. There is no policy statement anywhere in the ECL that wildlife management is more important to the health and well-being of the state's residents than people not being exposed to the risk of death or injury from the discharge of bows from distances as close as 150 feet for a long bow and 250

feet for a cross bow, or that the risks posed by wildlife are so great, that it is worth the risk of striking a resident from the shorter setbacks. It is for this reason that the Court should find that the Legislature's intent in adopting Town Law §130(27) and not repealing or amending this general law in 2014 when it adopted the ECL amendments was to keep the authority over public safety issues in the hands of local governments that deal with such issues on a day to day basis.

In addition to Town Law §130(27), Municipal Home Rule Law §10 (MHRL), adopted pursuant to a constitutional mandate, provides the Town with express authority to provide for the safety and well-being of persons and property within its jurisdiction. MHRL §10 states in relevant part,

> (1) In addition to the powers granted in the constitution, the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government and, (ii) (a) . . . (12) the government, protection, order, conduct, safety, health and well-being of persons or property therein.

Together Town Law §130(27) and Municipal Home Rule Law §10 make it abundantly clear that local government's power to legislate matters of local public safety is a superior interest over the state's interest in setting setbacks for sport hunting. There are no words in ECL or the hunting regulations to the contrary. Moreover, it is worth repeating that imposing a 500' setback for discharging a bow

is not a bar to bow hunting in Smithtown; and it is not an unreasonable burden for hunters to return to the 500' bow setback that existed for 57 years before the 2014 amendments to ECL.

POINT II.

FROM COLONIAL TIMES, THE OBJECTIVE OF PUBLIC SAFETY HAS BEEN A PARAMOUNT PURPOSE OF FIREARM PROHIBITION LAWS.

There has been a long standing tradition in the United State of enforcing prohibitions against the carrying of dangerous and unusual weapons and using firearms in sensitive places such as schools and government buildings. *See* District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008)(at Points III and IV, the majority reviewed colonial and 19th century treatment of the right to carry and use arms for both organized defense and protection of family, home and property). *Heller* is a Second Amendment case that struck down a local gun ban as unconstitutional because it effectively barred a person's ability to use a gun to for their own protection even in one's own home.

While the case at bar does not involve a Second Amendment issue, *Heller* nonetheless informs us that this country has a long history of legislating public safety issues involving the use and location of dangerous weapons. Examples referenced in the majority decision include a 1783 Massachusetts law prohibiting

Boston residents from bringing into or allowing loaded firearms in a dwelling, stable, barn, out house, warehouse, store, shop or other building so as to avoid danger to firefighters, *id.* 554 U.S. at 50; a New York law providing a fine for firing a gun on New Year's Eve to prevent people who have been drinking liquor from going "House to House, with Guns and other Firearms." *Id.* 554 U.S. at 60; a prohibition and fine for anyone firing a gun or setting off fireworks in Philadelphia without a license from the governor, *id.* 554 U.S. at 61; and a Rhode Island law that provided for a fine for firing a gun in a street or tavern, *id.*

In addition, while it is clear that the aforementioned colonial era laws cited in *Heller* were adopted by state or colonial legislative bodies, the fact they may have been state acts should not be misconstrued as support for the Respondents' position that even in colonial times state or colonial authority preempted acts by counties, districts or towns. As demonstrated in Point III, *infra,* the authority of towns and other jurisdictions smaller than states or colonies to self-govern and legislate local concerns was well established even before the first state constitutions or the federal constitution was adopted.

POINT III.

RESPONDENTS' CRITICISM OF SMITHTOWN'S EXERCISE OF HOME RULE AUTHORITY LACKS ANY CREDIBLE SUPPORT.

This Court is well aware that the right of local self-government has been a founding principle since even before this state or country had a constitution. People ex rel. v. Metropolitan St. Ry. Co., 12 Bedell 417, 174 N.Y. 417, 67 N.E. 69 (1903)(recognizing pre-Magna Carter management of local affairs by local officers chosen from their own citizenry and which customs became law and were transferred to the colonies including New York where they resided at the town level). The *Metropolitan* court's review of the history of local authority and New York's earlier constitutions led it to conclude that by adopting language retaining the principle of local self-government and limited centralized power in the state, the voters of New York were steadfastly committed to keeping control over local affairs.

The current New York Constitution reinforces the principle by affirmatively granting power for local governments to adopt local laws and restricting the state from interfering with matters of local concern except where the Constitution provides. N.Y. Const., Art. IX, §1. In particular, Art. IX §2(c)(10) of the N.Y. constitution and state statutes adopted pursuant its directive, clarify that local affairs involving the government, protection, order, conduct, safety, health and

well-being of people within a town's jurisdiction are matters over which elected town officers have express authority to legislate provided the local law is not inconsistent with the state constitution or any general law relating to its property, affairs or government. *See also* Municipal Home Rule Law §10[1](i)(ii)(a)(11)(protection of physical environment) & (12)(government, protection, order, conduct, safety, health and well-being of persons or property) specifically applicable towns.

Sec. 2 (b)(2) of Art. IX of the N.Y. constitution limits the state from intruding upon local authority by requiring staunch procedural requirements including legislation only by general law; or a special law on the request of a 2/3 majority of a local legislative body; or the request of its chief executive officer who has the support of a majority of the legislative body; or by a certificate of necessity from the governor stating the emergency necessitating the enactment plus 2/3 of both houses of the Legislature.

The aforementioned history of local government, constitutional and statutory authorities, together with the state's enactment of Town Law §130(27) provide the necessary legal foundation for the Town's 2012 amendment to its local public safety code for discharging firearms within the Town's jurisdiction. As discussed in Point I of this Reply Brief, the necessary elements of preemption – express or implied - do not exist to invalidate Town Code §160-5.

The Respondents assert that the adoption of the 2012 amendments to Town Code §160-5 are not a valid exercise of home rule because the local law is not an "authentic" expression of police power. Respondents' Brief at Point VI, p. 19. They rest their argument on the proposition that bow hunting is not dangerous. The Town did not decide whether bow hunting is dangerous. The Town did not decide that hunting should be barred in Smithtown. The elected officers of the Town decided that discharging any firearm including a bow less than 500 feet from a dwelling or park or school presents an unreasonable risk to its inhabitants. As such, the Town's amendment to Town Code §160-5 is a valid exercise of local authority.

According to the Respondents, the Town's insistence upon the 500' setback will be unsafe for people and deer. They cite the White Tail Deer Management Plan as support for this proposition with no specific reference to what part of that plan they rely on or other independent proof of their contention.

To the contrary, Smithtown's home rule authority is based upon a fair and reasonable consideration of the dangers presented by the discharge of a bow in the confines of a densely populated suburban town. Smithtown is largely a single family residential lot suburb of 111 square miles and home to approximately 116,000 people. Compared to a town like Henderson, New York, with a population of 1,360 within 52 square miles, it is obvious that density plays a more

prominent factor in providing for public safety in Smithtown than Henderson. Most of Smithtown's residential properties have dwellings that could easily be reached by a discharged bow or firearm. Moreover, no special knowledge of weaponry is necessary for this Court or local government officials to appreciate that a person can be seriously injured or killed if struck with a bow from 150 or 250 feet.

Even modest knowledge of this country's history informs us that the bow and arrow was heavily relied upon by individuals for killing animals for food, clothing and habitat as well as for warfare. There is no reason to believe that modern versions of bows which are now constructed of stronger more versatile materials with mechanical devices intended to shoot arrows faster and farther, is any less dangerous to a person 150 feet or 250 feet away who unknowingly crosses into the path of a discharged bow. There is no proof in the record that a discharged bow cannot harm or kill a person. The contention is absurd.

A firearm or bow incident occurring within 500 feet is an accident waiting to happen which the leaders of Smithtown are not willing to risk under circumstances where it clearly presents a danger. For Smithtown, any discharge within 500' that presents a danger to people or property is simply too high of a risk. On this issue, the decision of Smithtown's elected leaders should be respected.

POINT IV.

RESPONDENTS SET FORTH NO CREDIBLE EVIDENCE THAT THE LEGISLATURE ADOPTED THE 2014 ECL AMENDMENTS TO 'FOSTER PUBLIC SAFETY.'

Respondents set out a litany of unsubstantiated assertions in Point II of their brief that when the Legislature adopted the 2014 amendments to ECL, it was fully apprised and understood that bow hunting is safe and that reducing the discharge setback was intended to control deer population, reduce tick-borne illness, reduce automobile-deer hits, that other states had lower discharge setbacks or that contraception as a deer control method has unintended negative consequences.

Aside from the fact there is no credible proof of what the Legislature understood, whether the Legislature understood bow hunting to be safe, or that it is intended to reduce accidents or control the deer population, is not the issue. The Legislature adopted an amendment that directly interferes with the Town's authority to protect the public from the dangers of discharged bows within 500' of a residence, school, beach or business when doing so presents a danger.

Moreover, the legislative bill jacket and memorandum in support of the 2014 ECL amendments attached as Exhibit D to the Appellant's notice of motion for leave to appeal, stands in stark contrast to the Respondents' description. Taken together the letters, memoranda and testimony depict the reality that hunters and wildlife groups played a significant role in lobbying for the shorter setbacks, but

the danger to people who live, work and play within the discharge buffer was not a paramount concern.

POINT V.

TOWN LAW §130(27)'S AUTHORITY TO PROHIBIT DISCHARGE IS NOT LIMITED TO FIREARMS AS DEFINED BY THE ECL, GEN. OBLIG. LAW OR PENAL LAW.

The authority granted to Smithtown and the other towns enumerated in Town Law §130(27) is broad and is not limited by the term 'firearm.' The obvious purpose of this state law is to allow local governments to prohibit any discharge activity when a local authority determines that it presents a hazard to the general public or nearby residents. In a densely populated suburb such as Smithtown, more people fall into the categories of general public and nearby residents than lower populated areas of the state. Hence, it is a valid exercise of local police power with a legitimate concern for the safety of many residents for the Town to keep the 500' discharge setback for any implement that discharges a projectile that is capable of killing or injuring animals and people.

Together with the fact that Town Law §130(27) allows for the adoption of more restrictive local laws than "any other provision of law," Smithtown's inclusion of the term 'bow' in its definition of firearm is expressly permitted and

constitutes a fair and reasonable connection to Town Law §130(27)'s purpose of upholding the town's authority to protect the public's safety.

The Respondents' reliance upon other statutory definitions of firearm is not controlling since it is the killing and maiming capability of the implement that the Town is concerned with; not the caliber, velocity, explosion or silencing characteristics of a firearm or the draw weight or compression of a bow. An adult or child unwittingly in the path of any discharged firearm, implement or bow may meet the same fatal outcome if struck by accident. Any discharge setback less than 500' raises Smithtown's concerns for its residents.

Contrary to the Respondents' assertion, Smithtown's concern that the reduced setbacks are insufficient is not affected one way or the other by the licensing procedures, training requirements, seasonal restrictions, etc. imposed by the DEC. There is no question that the State is in a better position to regulate hunters' activities. The problem is that the State is not in a better position to protect residents in Smithtown who may be lawfully present 150' or 250' from a discharge bow near their own house, a park, a school, etc.

The DEC is fully cognizant of its regulation limits and that its authority does not reach residents who are not engaged in the activity of hunting but find themselves dangerously close to active hunters in their own neighborhoods. DEC's URL webpage https://www.dec.ny.gov/outdoor/94213.html entitled,

"Avoiding Conflicts Between Hunters and Property Owners" contains statements reminding hunters to be respectful of neighbors, try to address neighbors' concerns and comply with local discharge ordinances. Contrary to the "take no prisoners" attitude of the Respondents, it is noteworthy that the DEC, as the regulating authority over hunting, takes a more conciliatory tone in its published recommendations to hunters in New York. Recognizing the tension between hunters and residents in close proximity to each other, the DEC stresses to hunters that they should not with words or actions increase the conflict with nearby residents.

CONCLUSION

For all of the reasons stated in this reply brief as well as those in Appellant's main brief, the Town of Smithtown respectfully requests that this Court reverse the ruling of the Appellate Division, Second Department, and declare that Smithtown Town Code Sec. 160-5 is valid and enforceable and that this matter be remitted to the Supreme Court, Suffolk County for the entry of a judgment dismissing the complaint and declaring Town Code Sec. 160-5 valid and enforceable, together with such other and further relief as this Court deems just and proper.

Dated: Smithtown, New York
March 19, 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 Microsoft Word.

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Dated: March 19, 2021

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STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
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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 March 19, 2021

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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 19th of March, 2021

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

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