To Be Argued By: Alan J. Pierce
Time Requested: 15 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

ST. LAWRENCE COUNTY and RENEE COLE, in her capacity as the duly elected Treasurer for the County of St. Lawrence,

Plaintiffs-Appellants,

vs.

CITY OF OGDENSBURG, OGDENSBURG CITY SCHOOL DISTRICT, JEFFREY M. SKELLY, in his official capacity as Mayor of the City of Ogdensburg, and STEPHEN JELLIE, in his official capacity as the City Manager for the City of Ogdensburg,

Defendants-Respondents.

Case No. 534539
St. Lawrence County Index No.: EFCV-21-161083

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Respectfully:
Counsel for Appellants:

Counsel of Record:
Stephen D. Button, Esq.
COUNTY ATTORNEY
48 Court Street
Canton, New York 13617
Tel: 315-379-2269

Appellate Counsel:
Alan J. Pierce, Esq.
John L. Murad, Jr., Esq.
HANCOCK ESTABROOK, LLP
100 Madison St., Suite 1800
Syracuse, New York 13202
Tel: 315-565-4500
apierce@hancocklaw.com

Dated: April 15, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In their Brief Defendants-Respondents City of Ogdensburg, Jeffrey M. Skelly, and Stephen Jellie (collectively "the City") make several important admissions and concessions:

1. this is a "hybrid action/proceeding" that seeks not only Article 78 relief in the form of mandamus and prohibition, but also properly seeks a declaratory judgment that Local Law 2 of 2021 is invalid. City Brief at 1, 2 ("the County commenced this hybrid action for declaratory judgment and proceeding pursuant to CPLR Article 78");

2. the issue is whether "Local Law 2 validly transferred the City's former delinquent real property tax *collection and enforcement* authority to the County," not just "foreclosure" as held by Justice Farley ("the Local Law as limited, by its own language, to the County's purported "foreclosure responsibility." Stated differently, and contrary to the assumptions of both the County *** and City *** *the Local Law by its terms does not concern collection powers* or duties of either the City or County with respect to City real property taxes. (R7-8) (Emphasis supplied). City Brief at 1-2;

3. "[t]he County's primary objections [to Local Law 2] appear to be issues of first impression in this State." *Id*. at 2;

4. appears to concede that "upholding the City's Charter Amendments would open the door for cities across the state to enact charter amendments of their own that shift delinquent tax collection and enforcement authority to counties, which would, in turn, cause counties to incur increased administrative and financial costs." *Id*. at 2-3.

5. the only authority cited by the City (Brief at 4, 26-27) for this unprecedented transfer of real property tax collection and enforcement from the City to the County is RPTL § 1102(6)(b), which is simply a definition, not a substantive statutory provision in the Uniform Delinquent Tax Enforcement Act" (" 'Tax district' means: *** a city, other than a city for which the county enforces delinquent taxes pursuant to the city charter") that has never been cited in any case found in Westlaw.

COUNTERSTATEMENT OF FACTS

Very little needs to be stated here because the County's Brief contains a detailed and accurate recitation of the relevant facts. It is not, as the City argues, a "wide-ranging factual recitation, [in which the] County spills a great deal of ink recounting and describing events, documents and statutes that are irrelevant to the issues on appeal." City Brief at 5.

What is important is the City acknowledges (*Id*. at 5) that before the adoption of Local Law 2

> the City was responsible for collecting its own taxes, as well as taxes levied by the County [R: 124-125, 128-129]. The former Charter provisions also obligated the City to enforce and collect delinquent City and County taxes by placing tax liens on delinquent properties within the City and conducting tax foreclosure sales to recoup the unpaid taxes. *** [T]he City also had a practice of making the County whole, or crediting the County for unpaid County taxes within the City, whether or not the City was able to actually collect the taxes, even though the former Charter did not expressly provide for such an arrangement [R: 124-129]. *Id.* at 5-6.

What the City omits is that these procedures in the City Charter were in place ever since the enactment of the RPTL. In early 2021 the City sought the County's consent for the County to assume the obligations that the City later imposed on the County by Local Law 2 because the County would not agree to do so voluntarily.

POINT I

THE SCHOOL DISTRICT'S DISPUTE APPEARS TO BE MOOT

While this issue may be moot it is not clear that it is. The Charter change the City's references as mooting the School District involvement occurred after the Judgment and appeal, and expressly states that the City's obligation to collect

and enforce on behalf of the School District will be retained by the City. However, the City's argument here is that their other Charter amendments shifted that responsibility to the County, essentially turning the City into a pass-through entity on the debt and enforcement. This is an inconsistent and contradictory position under the law.

POINT II

THE COUNTY'S REQUESTS FOR MANDAMUS AND PROHIBITION ARE VALID, BUT UNNECESSARY BECAUSE OF THE REQUEST FOR DECLARATORY JUDGMENT

The City spends ten (10) pages of its Brief arguing about whether the County is procedurally entitled to Article 78 relief in the form of mandamus or probation. It is correct that the County Brief addressed these issues as well, but they are unnecessary as forms of relief because it is undisputed that the County asserted a claim for declaratory judgment. The City does not dispute this. City Brief at 1, 7, 20, 28 ("Relevant Legal Standards Pertaining to the City's Motion to Dismiss *the County's Claim for Declaratory Judgment*") (Emphasis supplied).

The County stands by its argument in its Appellant's Brief (at 27-34) that it is entitled to relief in the form of mandamus and prohibition, and nothing more needs be stated here.

Moreover, although not critical it is simply not true that the County "abandoned its mandamus argument on appeal." City Brief at 12-13. It was raised and fully briefed in the trial court (R43-44) and was part of Point C in Appellant's Brief at 27 ("C. The County Is Entitled To Writs Of Prohibition And Mandamus Because Local Law 2 Is Pre-Empted By State Law."). Given its presence in the Appellant's Brief no extensive argument repeating the argument below was needed to preserve the issue in this Court.

Finally, the City claims (Brief at 18-19, fn 2) that "[t]he County raised [a] specific [prohibition] argument for the first time in its *reply affirmation* in opposition to the City's motion to dismiss [compare R: 31-51 with R: 143-146]. To the extent that this argument is property before the Court, this is the first available opportunity that the City has had to submit an argument in opposition thereto." This is meritless. The County did not submit "reply" papers on the City's motion to dismiss. The cite to R31-51 are to pages in the Complaint. The cite to R 143-146 is to the Opposition Affirmation of County Attorney Stephen Button in opposition to the motion to dismiss. The Record is clear on this.

POINT III

THE CITY'S CHARTER AMENDMENTS ARE PREEMPTED BY THE RPTL

This is a case of field preemption as discussed starting at page 21 of the City's Brief. As the City acknowledges:

> field preemption[] occurs "when a local government legislates in a field for which the State Legislature has [expressly or impliedly] assumed full regulatory responsibility" ([*DJL Rest. Corp. v City of New York*, 96 NY2d 91, 95 [2001]). "An implied intent to preempt may be found in a 'declaration of State policy by the State Legislature . . . or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area'" (*Id.*, quoting *Consolidated Edison Co. of N.Y. v Town of Red Hook*, 60 NY2d, at 105). In such cases, "a local government is precluded from legislating on the same subject matter unless it has received 'clear and explicit' authority to the contrary" (*People v De Jesus*, 54 NY2d 465, 469 [1981], quoting *Robin v Incorporated Vil. of Hempstead*, 30 NY2d 347, 350-351 [1972]; *accord DJL Rest. Corp. v City of New York*, 96 NY2d at 95).

As the City acknowledges field preemption can be either express or "implied" from the Legislature's actions. Whether it is considered express or implied preemption here the different way the Legislature has treated cities as opposed to towns and villages in the RPRL shows field preemption. The City has never disputed that towns and villages are treated differently than cities by the Legislature. R36-37, 64-65. Thus, under RPTL § 1442(1) all a village has to do is ask the County to "provide for the collection of delinquent village taxes" and it is done. The City Brief (at 26) acknowledges this unique provision for villages. Similarly, towns "do not have the ability to enforce tax delinquency lien or foreclosure actions." R37; *Matter of Town of Irondequoit v. County of Monroe*, 36 NY3d 177, 181 (2020) (with respect to towns "the County *** has the sole power to foreclose on properties based on tax delinquency ***.").

The City admits that "the RPTL does provide a host of regulations governing several different aspects of the levy, collection and enforcement of local real property taxes ***." City Brief at 23. The City does not answer the fundamental question here: what authority in the RPTL allows it to unilaterally impose upon the County the obligation to assume the City's tax collection and enforcement obligations? It does not answer this question because there is no such provision. The only provision that would allow for this is RPTL §1150,[1] which requires an agreement from the County here. The City sought such an agreement in 2021 from the County, but when the County declined it passed Local Law 2 unilaterally and derogation of section 1150.

Desperate to find some basis for Local Law 2 the City looks to RPTL § 1104 and this Court's recent decision in *Matter of Foreclosure of Tax Liens by City of Schenectady*, 201 AD3d 1 (3d Dep't 2021). This decision has nothing to do with the issue in this case and the City's attempt to unilaterally require the County to collect and enforce the collection of the City's property taxes. It dealt solely with a local homestead extension provision in the City of Schenectady's Charter placing restrictions on the ability of owners of one and two-family solely residential

[1] "Agreements by tax districts. 1. Agreements with other tax districts. All tax districts are hereby authorized to make agreements with one another with respect to any parcel of real property upon which they respectively own tax liens in regard to the disposition of such liens, of the parcel of real property subject thereto and of the avails thereof ***."

buildings to avoid foreclosure that this Court found were inconsistent with RPTL 1111(1)(b) and 1111(3), and therefore superseded and unenforceable under section 1104(1). 201 AD3d at 10.

The City returns to the definition of "tax district" in RPTL § 1102(6)(b), and 1102(6)(c) as the sole authority for its Local Law 2. City Brief at 26. We addressed subsection (6)(b) in Appellant's Brief (at 23, 44) and earlier in this Brief (at 2). It bears quoting all of this subsection:

> 6. "Tax district" means:
> (a) a county, other than (i) a county for which the cities and towns enforce delinquent taxes pursuant to the county administrative code, or (ii) a county wholly contained within a city;
> (b) a city, other than a city for which the county enforces delinquent taxes pursuant to the city charter;
> (c) a village, other than a village for which the county enforces delinquent taxes pursuant to section fourteen hundred forty-two of this chapter; or
> (d) a town in a county in which towns enforce delinquent taxes pursuant to the county administrative code.

The City argues that subsection (6)(b) means that the City can unilaterally require the County to collect and enforce the City's real property taxes just by enacting its Local Law 2. That is not what the statute says. This statute presupposes that the "city charter" provision would be agreed to by the County under section 1150. *See* discussion *supra* at 7.

The City's only response to section 1150 is found in a footnote (fn5) on page 27 of its Brief, wherein it argues that an agreement under this section is only "one method by which a transfer of enforcement authority may be accomplished, [but sections 1102(6)(b) and (c)] *** clearly establish that it is far from the 'only way.'" The City alternatively argues that because Local Law "effectively abrogated its status as a tax district pursuant to the language of RPTL § 1102(6)(b) *** City is not eligible to enter into such an agreement with the County." These arguments have no merit.

There are only four (4) "notes of decisions" contained in McKinney's for section 1102. None of them support the City's interpretation of this definition provision. In fact, one of them clearly rebuts the City's reliance on a "definition" in the RPTL as authority for Local Law 2. In *Town of Irondequoit*, 36 NY3d 177, the Court of Appeals rejected Monroe County's reliance on "the definition of "tax" in the general definitions section at the beginning of the RPTL—section 102(20)." *Id*. at 183. Moreover, in determining that the town charges in question fell within the "'unpaid delinquent taxes' subject to section 936" that the County had to "credit [the town]" (*id*. at 183), the Court of Appeals noted the unique RPTL and Town Law provisions "permitting counties—but not towns—to initiate proceedings to enforce the types of liens at issue here." *Id*. at 185. The Court's full discussion of this issue is relevant here:

> Requiring that these charges be credited pursuant to section 936 accords with the overall structure for the enforcement of property tax liens, including *the legislative grant of exclusive authority to counties in RPTL 1123 to commence in rem proceedings to foreclose on real property* to "enforce the payment of delinquent taxes or other lawful charges which have accumulated and become liens against certain property" (RPTL 1123[2][a] [emphasis added]), *permitting counties—but not towns—to initiate proceedings to enforce the types of liens at issue here.* Indeed, Town Law § 64(5–a) directs that these charges "levied" on "real property" are to "be collected in the same manner and at the same time as other town charges" by virtue of *the normal process of levying and collecting town property taxes, in which towns make the first attempt at collection and after which enforcement shifts to the county* (see also Town Law § 130[16][g] [directing "the assessment of all costs and expense incurred ... against the land on which said (unsafe or collapsed) buildings or structures are located"]). It appears that the Legislature, *recognizing that towns have little power to recoup their costs for unpaid real property tax liens, has shifted the risk of loss to counties,* which are in the best position to recover the funds through in rem foreclosure proceedings. The same considerations apply to blighted properties, where the Legislature may have presumed that counties are in a better position to recover charges imposed on real property pursuant to the Town Law.4 Thus, the County was required to credit the maintenance and demolition charges, and its determination to the contrary should have been annulled.

Id. (Emphasis supplied)

What the City really wants is the same authority that the Legislature gave to villages in RPTL § 1442 and to towns as noted in *Town of Irondequoit*, but the Legislature did not give "cities," even a "second-class city" (R35-36) like

Ogdensburg, authority to pass this tax responsibility to the County just by asking or automatically by statute.

POINT IV

SUPREME COURT ERRONEOUSLY DETERMINED THAT LOCAL LAW 2 IS VALID

After a brief discussion of the standard of review on the City's motion to dismiss that actually favors the County (City Brief at 28-29), the City asserts that Local Law 2 does not "impair the powers" of the County under Article IX, § 2(d) of the New York State Constitution and MHRL § 10(5). The sole basis for this argument is that Local Law 2 actually "constitutes an expansion of the County's tax enforcement authority, not an unconstitutional impairment of the County's powers." City Brief at 30. This is like saying "congratulations, we just gave you all of our duties and responsibilities so now you have more power."

The court in *Mahler v. Gulotta*, 2001 WL 1537714 (Sup Ct, Nassau Co Aug. 28, 2001), *rev'd on other grounds*, 297 AD2d 712 (2d Dep't 2002) recognized this. In *Mahler* the plaintiff sought a declaration that the Nassau County Legislature had the authority to pass a local law amending section 1607 of the Nassau County Charter (the Charter) which would, in effect, vest zoning authority in the Village of Atlantic Beach. *Id*. at *1. In striking down the local law the trial court rejected exactly the argument made by the City here: "Defendant County argues, and this

court agrees, that *the vetoed legislative action is not*, as the Attorney General contends, *merely a 'transfer of functions' but an impairment of the power* of the defendant Town in violation of Article 9, section 2(d) of the State Constitution." 2001 WL 1537714, at *3 (Emphasis supplied).

The City states that "there is no judicial *or advisory* authority that directly opines on the question of whether a city can shift enforcement and collection of its own delinquent taxes to a county via a charter amendment." City Brief at 34. (Emphasis supplied) While we agree there is no judicial authority we have cited and assert that there is relevant and important "advisory authority" on the issue presented here, and the City acknowledges this in the next sentence of its Brief: "[t]here is, however, at least one advisory opinion issued in 1972 by the former State Board of Equalization and Assessment (now the State Board of Real Property Tax Services), that addresses the ability of a city to shift somewhat different tax collection and enforcement responsibilities to a county ***." *Id*. at 34-35.

The City then argues that the 1972 Opinion of the SBEA, 2 Ops Counsel SBEA No. 100, 1972 WL 19610 (Nov. 15, 1972) "indirectly provides additional support for the City's Charter amendments ***." City Brief at 35. The Opinion belies this assertion. The City again admits that the Opinion states that "[a] city charter cannot be amended to require the county to collect and enforce taxes *according to procedures established by the city*" (2 Op Counsel SBEA No. 100,

1972 WL 19610 at *1). The City claims it escapes this language because "the City is not attempting to require the County to enforce delinquent taxes according to any special procedures established by the Charter itself. Rather, the Charter simply states that '[t]he county shall be responsible for the enforcement of delinquent City taxes *in accordance with Article 11 of the [RPTL]*,' which is entirely consistent with, and does not run afoul of, the SBEA's advisory opinion [R: 133 (emphasis added)]."

First, it is important to note that the City does not attack the logic, relevance, or weight of the SBEA Opinion. Second, its argument proves too much – clearly Local Law 2 is dictating the "special procedures" by which the City is "attempting to require the County to enforce [the City's] delinquent taxes."

Finally, the City attempts to distinguish another advisory authority cited by the County, Comptroller Opinion 86-76. (R82-84) Again, the City admits that the State Comptroller opined that "even if a village could collect unpaid utility bills in the same manner as delinquent village taxes, a local law to that effect it would still violate MHRL § 10(5) if the county were responsible for the collection and enforcement of delinquent village taxes, and for remitting "make whole" payments to the village as a result of the same [R: 84]." City Brief at 36. The City attempts to distinguish this on the grounds that "the utility charges are not legislatively authorized taxes, as real property taxes are." *Id*. As noted earlier, that is exactly

the argument that Monroe County made, *unsuccessfully*, in *Town of Irondequoit*, 36 NY3d at 181. 183. The City's argument fairs no better here.

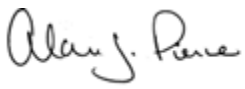
CONCLUSION

For all the foregoing reasons the Judgment appealed from should be reversed, the City's motion to dismiss denied, and Local Law 2 declared invalid and unenforceable, together with such other and further relief as this Court deems just and reasonable.

Dated: April 15, 2022

Attorneys for Plaintiffs-Appellants

Appellate Counsel:
HANCOCK ESTABROOK, LLP



Alan J. Pierce, Esq.
John L. Murad Jr., Esq.

100 Madison St., Suite 1800
Syracuse, New York 13202
Tel: 315-565-4500
apierce@hancocklaw.com

Counsel of Record:
Stephen D. Button, Esq.
COUNTY ATTORNEY
48 Court Street
Canton, New York 13617
Tel: 315-379-2269

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(f)(j) that the foregoing brief was prepared on a computer using 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, and this Statement, is less than 3,806 words.

Dated: April 15, 2022

Attorneys for Plaintiffs-Appellants

HANCOCK ESTABROOK, LLP

By: _____
Alan J. Pierce, Esq.

100 Madison St., Suite 1800
Syracuse, New York 13202
(315) 565-4546
apierce@hancocklaw.com