SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Application of FELIX PROCACCI, Petitioner, -against- TOWN OF HEMPSTEAD Respondent.	Date Purchased : Index No. _____ PETITION

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU:

The petition of Felix Procacci respectfully shows to this Court as follows:

1. Petitioner Felix Procacci resides at 1165 Barnes St, Franklin Square, New York 11010, located in the County of Nassau.
2. Petitioner is appearing *pro se* on the matter presented in this petition and is fully familiar with the facts and circumstances surrounding them.
3. Respondent TOWN OF HEMPSTEAD (hereinafter referred to as "the Town") is a municipal corporation organized and existing under the laws of the State of New York with its

principal place of business located at One Washington Street, Hempstead, New York, County of Nassau.

4. This proceeding is brought pursuant to Article 78 of the Civil Procedure Law and Rules in the nature of mandamus to compel Respondents to comply with all applicable provisions of New York State General Business Law, New York State Zoning Law, Hempstead Town Zoning Law, the United States Constitution, and the Constitution of the State of New York.

Nature of the Proceeding

5. This proceeding is brought to compel Respondents to rescind the provisions of the Town's Building Zone Ordinance, in § 336G(3) of Article XXXIII, that mandates gasoline station operators provide compressed air at no charge in cases of an emergency. Hereinafter these provisions shall be referred to as the Town's "Emergency Free Air Law". A copy of said law is attached as Exhibit 1.

6. The Town's "Emergency Free Air Law" preempts New York State's General Business Law (GBL) 396-X which allows gasoline service stations to charge for compressed air. A copy of said law is attached hereto as Exhibit 2.

7. The Town's “Emergency Free Air Law” also preempts New York State's zoning law Article 16 § 261, Grant of Power, which does not have any provision to allow a Town to regulate the operation of a business through the use of Zoning Law. A copy of said Grant of Power is attached hereto as Exhibit 3.

8. The Town's “Emergency Free Air Law” also preempts the Town's Zoning law regarding Gasoline Service Stations, Article XXXIII § 330, Legislative Intent, which does not have any provision to allow the Town to regulate the operation of a business through the use of Zoning Law. A copy of said Legislative Intent is attached hereto as Exhibit 4.

The Town Enacted the "Emergency Free Air Law" to Settle Litigation

9. The Town's "Emergency Free Air Law" was enacted as a compromise to settle the litigation of the Town's Law that prohibited payment for compressed air under all circumstances. Hereinafter this law shall be referred to as the Town's "Free Air Law".

10. This fact was made evident during the exchange between Councilman Blakeman and the Plaintiff's lawyer (Erica Dubno) in the "Free Air Law" litigation during the August 7, 2018 hearing on the "Emergency Free Air Law" (see video at https://youtu.be/O2WaQrBwpJQ?t=4144).

11. In the video, Councilman Blakeman says "I thought if we pass this law that would settle the litigation". Erica Dubno responds, "That is correct".

12. In crafting the "Emergency Free Air Law" as part of a legal settlement, the Town's concern was not on land usage, as required by State and Town Zoning laws, but instead on cutting a deal to end the "Free Air Law" litigation.

13. On October 25, 2018, all parties in the "Free Air Law" litigation signed a Stipulation of Discontinuance. A copy is attached hereto as Exhibit 5.

Prelude to the Settlement of "Free Air Law" Litigation

14. On January 2, 2018, Supreme Court Judge Karen V. Murphy issued an injunction of the Town's "Free Air Law". A copy of said injunction is attached hereto as Exhibit 6.

15. The injunction was issued because the court decided the Plaintiffs were likely to prevail on the merits of their third cause of action as pled in their second amended complaint which alleged that the Town's "Free Air Law" preempted New York State GBL 396-X. The Plaintiff's third cause of action is attached hereto as Exhibit 7.

16. Said injunction, in pertinent part, states the following :

> Accordingly, it is this Court's determination to issue an injunction against the Town's enforcement of Resolution 345-2017 that amends BZO 336.G(3) pending the determination of this action based upon plaintiffs' third cause of action as pled in the second amended complaint. Thus, the Court does not reach plaintiffs' additional claims.

17. The Plaintiff's third cause of action (in the "Free Air Law" litigation), in pertinent part, provides :

> 150. Under the doctrine of preemption, a local law is inconsistent with State law -- and cannot stand -- where it prohibits something that would be permissible under State law.
>
> 152. By reason of the forgoing, the Plaintiffs are entitled to a judgment, pursuant to CPLR § 3001, declaring Resolution No. 1007-2016, amending § 336.G(3) of the Building Zone Ordinance of the Town of Hempstead, is arbitrary, unreasonable, discriminatory, confiscatory, void, unconstitutional on its face and as applied to the Plaintiffs, and its enforcement should be enjoined.

18. It follows that the "Emergency Free Air Law" also preempts New York State Law since the "Emergency Free Air Law" still mandates how gasoline stations should provide compressed air, which is governed by New York State GBL 396-X.

"Emergency Free Air Law" Also Violates Zoning Case Law

19. The "Emergency Free Air Law" does not regulate the use and regulation of land and therefore it is an invalid zoning regulation.

20. All the following references to Rathkopf's The Law of Zoning and Planning are attached hereto as Exhibit 8.

21. "The zoning power, as limited by the statutory grant, must operate in relation to the use of land and not for the accomplishment of purposes extraneous to that relation. If safety factors or health measures require zoning controls, they must involve safety and health characteristics which relate to the land under the regulation." (ref: 1 Rathkopf's The Law of Zoning and Planning § 2.25, 4th ed.).

22. "To be valid, a zoning ordinance, or decision thereunder, must further a legitimate object and utilize a method of achieving it authorized by the state zoning enabling act." (ref. 1 Rathkopf's The Law of Zoning § 2.25, 4th ed.).

23. "Courts recognize that the zoning power is merely one category of the more general police power and, as such, is one specifically concerned and limited to regulation of the use of land within a jurisdiction." (ref: 1 Rathkopf's The Law of Zoning and Planning § 2.25, 4th ed.).

24. “A zoning ordinance or decision thereunder will be held ultra vires when it promotes an objective or utilized a method of regulation beyond the purview of the state enabling act.” (ref: 1 Rathkopf's The Law of Zoning and Planning § 2.25, 4th ed.).

25. A zoning restriction “imposed for considerations or purposes not embodied in an enabling act will be held as invalid, not as exceeding the scope of the police power per se, but as an ultra vires act beyond the statutory authority delegated.” (see: 9 Rathkopf's The Law of Zoning and Planning § 2.15 (4th ed.).

26. By preempting New York General Business Law 396-X, New York Town Zoning law, and Hempstead Town Zoning law, the Town of Hempstead is violating the protections provided by the Fourteenth Amendment to the United States Constitution and Article I §11 of the New York State Constitution which provides equal protection under the law. The Fourteenth Amendment to the United States Constitution and Article I §11 of the New York State Constitution are attached hereto as Exhibit 9.

Petitioner Has Standing

27. An unaggrieved Citizen-Taxpayer has standing to Constitutionally challenge a local law (see St. John's Law Review, Issue 1, Volume 39, December 1964, Number 1). Referenced portion is attached hereto as Exhibit 10.

28. The Petitioner is an unaggrieved citizen-taxpayer in this matter but has standing. (see: *Policeman's Benevolent Ass'n v. Board of Trustees*, 21 App. Div. 2d 693, 250 N.Y.S.2d 523, 2d Dep't 1964).

29. "It is well settled that where there is no disputed question of material fact but only an issue of law, the relief here requested may be awarded in a mandamus proceeding" (see: *Matter of Ahern v. Bd. of Supervisors*, 17 Misc. 2d 164, N.Y. Misc. 1959).

30. The Petitioner has standing because the Town, in enacting a law that conflicts with New York State Town Zoning Law, has failed to perform a duty enjoined to it by law.

31. The Petitioner has standing because the Town, in enacting a law that conflicts with Hempstead Town Zoning Law, has failed to perform a duty enjoined to it by law.

Petitioner Has Standing - continued

32. The Petitioner has standing because the Town, in enacting a law that conflicts with New York State GBL 396 X, has failed to perform a duty enjoined to it by law.

33. The Petitioner has standing because the Town, in passing a law that violates the Constitutional right of its citizens to have equal protection under the law, has failed to perform a duty enjoined to it by law.

34. Petitioner has no other remedy at law.

WHEREFORE, Petitioner FELIX PROCACCI respectfully requests an order compelling Respondent TOWN OF HEMPSTEAD, to rescind the "Emergency Free Air Law", Town's Building Zone Ordinance, § 336G(3) of Article XXXIII, based on the overwhelming evidence this Petition provides, that it violates New York GBL 396-X, as stated in the injunction by the Nassau Supreme Court, it violates New York State and Town zoning laws, and zoning case law which show that zoning regulations that do not relate to land usage are invalid.

In addition, the Petitioner requests that said Respondent pay all costs of this legal action because the Respondent acted in bad faith when it enacted the "Emergency Free Air Law" as a compromise in settling litigation of the "Free Air Law".

DATED: Nassau County, New York

November _____, 2018

Respectfully submitted,

_____

Felix Procacci
Pro Se
1165 Barnes Street
Franklin Square, New York 11010
(516) 233-1562

EXHIBIT 1

Town of Hempstead Building Zone Ordinance

Article XXXIII § 336G(3), "Emergency Free Air Law"
Page 1 of 2

Article XXXIII. Gasoline Service Stations

§ 336. Gasoline Service Station District (GSS) regulations.

G. Operation and supervision.

(3) All gasoline service stations shall provide an air compressor capable of inflating automobile tires, which is installed and maintained in a manner that complies with the following conditions:
[Effective 7-29-1978; 4-17-2017]

(a) The air compressor and hoses necessary for the inflation of tires shall be kept in good repair and shall be available to the user, customer or patron at all times the gasoline station is open for business.

(b) Coin-operated or other for-profit air-compressor units are permitted, except that in emergency situations, upon a user, customer or patron's request to the attendant, the station shall provide access to compressed air at no charge during regular business hours.

(c) Each gasoline service station that maintains or possesses a machine used to inflate automobile tires or any other device which contains or utilizes compressed air for a fee charged to the user, customer or patron shall conspicuously post upon the face of each such machine, or if there is inadequate space to permit notice to be posted on the machine, immediately adjacent thereto, a sign the letters of which shall be in red on a white background and be of a font size that is no less than 36 point which states: "IN AN EMERGENCY UPON REQUEST, THE ATTENDANT WILL PROVIDE ACCESS TO COMPRESSED AIR AT NO CHARGE DURING BUSINESS HOURS." The portion of the sign that reads "IN AN EMERGENCY" shall be in boldface text.

(d) As used in this section, the term "emergency" shall include a user, customer or patron's financial inability to pay the cost to obtain compressed air under his/her current circumstances.

EXHIBIT 1 - continued

Town of Hempstead Building Zone Ordinance

Article XXXIII § 336G(3), "Emergency Free Air Law"
Page 2 of 2

(e) In making a determination with respect to a situation where an "emergency" is asserted, the following shall create a rebuttable presumption that an emergency exists: (i) a user, customer or patron's claim to the attendant that he/she has no money to pay for the compressed air, at the current time and place; and (ii) if denial of compressed air at no charge would impair the user, customer or patron's ability to safely operate the vehicle, or otherwise endanger the safety or welfare of the user, customer or patron, his/her passengers, if any, and/or other motorists, pedestrians or property.

(f) For purposes of this section, the presence of any of the following conditions shall create a rebuttable presumption that a user, customer or patron's ability to safely operate a vehicle will be impaired:

(i) The tire pressure for one or more tires on the vehicle, as read by an air pressure gauge or tire pressure monitoring system (TPMS), is less than the manufacturer's optimum or recommended pounds per square inch (PSI);

(ii) The existence of a puncture or slow leak in one or more tires; or

(iii) The outward appearance of one or more tires appears deflated.

(4). Penalties for offenses. Notwithstanding any other penalty otherwise prescribed in the Building Zone Ordinance of the Town of Hempstead, any person who violates this section or fails to comply with any of its requirements shall, upon conviction thereof, be guilty of an offense punishable by a fine of not less than $100 and not exceeding $500 or imprisonment for a period not to exceed 15 days, or both, for conviction of a first offense; by a fine of not less than $500 nor more than $1000 or imprisonment for a period not to exceed 15 days, or both, for conviction of a second offense, both of which were committed within a period of five years; and by a fine not less than $1000 nor more than $2,000 or imprisonment for a period not to exceed 15 days, or both, upon conviction for a third or subsequent offense all of which were committed within a period of five years. Each day of noncompliance shall be considered a separate offense.

EXHIBIT 2

New York General Business Law

Section 396-X

Gasoline Stations; Air Pumps Required

New York General Business Law

Sec. 396-X
Gasoline Stations; Air Pumps Required

1. Definition. As used in this section: "dealer" shall mean any person owning or operating a premise or facility with four or more gas dispensing nozzles for the retail sale of motor fuels for use in motor vehicles.

2. Any dealer must provide on the premises where motor fuel is sold at retail for use in motor vehicles a functioning motor driven air compressor capable of inflating automobile tires for use by customers during hours in which such station is open for business.

3. Wilful failure to comply with the provisions of this section shall subject a dealer to a civil penalty of up to twenty-five dollars for each day such failure occurs. If the failure to comply results from the breakdown of the air compressor, the failure to repair within a reasonable time shall constitute wilful conduct. * NB There are 2 396-xs

EXHIBIT 3

New York Consolidated Laws, Town Law - TWN §261

Grant of Power

New York Consolidated Laws, Town Law - TWN § 261. Grant of power; appropriations for certain expenses incurred under this article

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city; provided further, that all charges and expenses incurred under this article for zoning and planning shall be a charge upon the taxable property of that part of the town outside of any incorporated village or city. The town board is hereby authorized and empowered to make such appropriation as it may see fit for such charges and expenses, provided however, that such appropriation shall be the estimated charges and expenses less fees, if any, collected, and provided, that the amount so appropriated shall be assessed, levied and collected from the property outside of any incorporated village or city. Such regulations may provide that a board of appeals may determine and vary their application in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained.

EXHIBIT 4

Town of Hempstead, Building Zone Ordinance (BZO)

Article XXXIII Gasoline Service Stations

§ 330 Legislative Intent

Article XXXIII: Gasoline Service Stations

[Effective 4-14-1974]

Chapter BZ: **Building Zone Ordinance**
└ Article XXXIII **Gasoline Service Stations**

§ 330 **Legislative intent.**

The gasoline service station has become a matter of grave concern to the people and government of the Town of Hempstead. The concern embraces existing and new stations. Current land use controls as practiced have proved inadequate to prevent excess of service station construction, of uses therein, of visual pollution and of abandonment of stations. In combination, these abuses threaten blight for the station themselves, the areas surrounding the station and the Town as a whole. Blight, then, is to be both cured and prevented.

Its status is thus nearly that of a public utility. Its special regulation is, therefore, warranted when its operations conflict with the burden of responsibility placed upon this Town Board by the statutes of the state in the field of land use. The Board, therefore, seeks to formulate a systematic planning approach to the location, design and use of gasoline service stations.

In so doing, it posits the compatibility of the state's Zoning Enabling Act and the control methods hereby promulgated. Compatibility is founded in new comprehensions of the Town's basic power over land use. New concepts involve social amenity, aesthetics, economic safety and public safety in keeping with the rising public expectation that the function of government is to cope with public problems.

It is intended, therefore, to conserve property values, create a more attractive economic and business climate and encourage the most appropriate use of land throughout the Town. Thereby, the public health, safety, morals, general welfare and amenity of the Town of Hempstead will be protected and promoted.

EXHIBIT 5

Stipulation of Discontinuance of "Free Air Law"
Page 1 of 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

WILLIAM McCABE, individually and on behalf of all others similarly situated; SERVICE STATION VENDING EQUIPMENT, INC.; JAMES SATURNINO, individually and on behalf of all others similarly situated; EKAM SINGH CATTRY, individually and on behalf of all others similarly situated; GASOLINE & AUTOMOTIVE SERVICE DEALERS ASSOCIATION, LTD., individually and in a representative capacity; and LONG ISLAND GASOLINE RETAILERS ASSOCIATION, INC., individually and in a representative capacity,

Plaintiffs-Petitioners,

v.

THE TOWN OF HEMPSTEAD; ANTHONY J. SANTINO, as the Supervisor of the Town of Hempstead; DOROTHY L. GOOSBY, as a Member of the Hempstead Town Board; GARY HUDES, as a Member of the Hempstead Town Board; EDWARD A. AMBROSINO, as a Member of the Hempstead Town Board; BRUCE A. BLAKEMAN, as a Member of the Hempstead Town Board; ERIN KING SWEENEY, as a Member of the Hempstead Town Board; ANTHONY P. D'ESPOSITO, as a Member of the Hempstead Town Board; and JOHN E. ROTTKAMP, as the Commissioner of the Department of Buildings of the Town of Hempstead,

Defendants-Respondents.

----------X

STIPULATION OF DISCONTINUANCE

Index No. 6892/2016

COUNSEL:

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the respective parties herein in the above entitled action, that whereas no party hereto is an infant or incompetent person for whom a committee has been appointed and no person not a party has an interest in the subject matter of the action, the above entitled action and all claims by the Plaintiffs-Petitioners as against the Defendants-Respondents, are hereby

discontinued with prejudice without costs to either party as against each other. This Stipulation may be filed without further notice with the Clerk of the Court. This Stipulation may be executed in counterpart. A facsimile and/or email of this stipulation shall be deemed an original for purposes of filing in this court.

Dated: Hempstead, New York
October ~~August~~ 26, 2018

WILLIAM McCABE, et al.

By: Erica T. Dubno

ERICA T. DUBNO, Esq.
Fahringer & Dubno
Attorneys for Plaintiffs-Petitioners
767 Third Avenue, Suite 3600
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(212) 319-5351

TOWN OF HEMPSTEAD, et al.

By: Joseph E. Macy

JOSEPH E. MACY, Esq.
Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.
Attorney for Defendants-Respondents
100 Garden City Plaza, Third Floor
Garden City, New York 11530
(516) 222-6200

EXHIBIT 6

Court Ordered Injunction of Town's "Free Air Law"
Page 1 of 5

Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

WILLIAM McCABE, individually and on behalf of all others similarly situated; SERVICE STATION VENDING EQUIPMENT, INC., et. al.,

Plaintiffs-Petitioners,

-against-

THE TOWN OF HEMPSTEAD, et. al.,

Defendants-Respondents.

Index No. 6892/2016

Motion Submitted: 11/1/17
Motion Sequence: 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	X
Defendant's/Respondent's.....	X

Plaintiffs move this Court by Order to Show Cause for an Order enjoining defendants from enforcing any provision of Resolution No. 345-2017, which amended Section 336.G(3) of the Town's Building Zone Ordinance, on the grounds that enforcement thereof violates plaintiffs' constitutional rights, will cause plaintiffs irreparable harm, subjects them to criminal charges, and tends to render the judgment sought in this declaratory judgment action ineffectual, and granting plaintiffs leave to file a second amended complaint. Defendants' opposition was heard on the Order to Show Cause, and defendants oppose the relief requested by plaintiffs.

On September 26, 2017, the Court determined to grant leave to plaintiffs to file a second amended complaint, but the Court struck the provision temporarily restraining defendants from enforcing any provision of the 2017 Resolution pending the hearing and determination of the instant motion.

The second amended complaint seeks, *inter alia*, declarations that Resolution Nos. 1007-2016 and 345-2017 enacting and amending Section 336.G(3) of the Town's Building Zone Ordinance (BZO) are illegal, invalid, null, void and unconstitutional, that the State of New York has preempted the field on the issue, and for preliminary and permanent injunctions restraining the defendants from enforcing those Resolutions against plaintiffs and any other gasoline service stations located in the Town.

Resolution 345-2017 provides in relevant part that "coin-operated or other for profit air compressor units are prohibited," that air "shall be provided at no charge to the user, customer or patron, at all times that the gasoline service station is open for business," and there is language requiring a gauge displaying the pounds per square inch also included in the Town's 2017 amendment to BZO 336.G(3). The amendment became effective on October 1, 2017.[1] Even as amended, plaintiffs contend that BZO Section 336.G(3) "still suffers from all other objectionable aspects of the 2016 Resolution which render it fatally deficient," that the Town "is still abusing and misusing its zoning laws," by banning and criminalizing the possession and operation of coin-operated air machines that are "standard throughout New York State and allowed under New York State Law."

The decision to grant or deny a request for preliminary injunctive relief rests in the sound discretion of the trial court (***Butt v. Malik***, 106 AD3d 849, 850 [2d Dept 2013]; ***Matter of 1650 Realty Assoc., LLC v. Golden Touch Mgt., Inc.***, 101 AD3d 1016, 1018 [2d Dept 2012]; ***Arcamone-Makinano v. Britton Property Inc.***, 83 AD3d 623 [2d Dept 2011]). The existence of factual disputes will not preclude the granting of a preliminary injunction (***Matter of 1650 Realty Assoc., LLC, supra***; ***Arcamone-Makinano, supra***).

A party seeking preliminary injunctive relief "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*see* ***Nobu Next Door, LLC v. Fine Arts Housing, Inc.***, 4 NY3d 839, 840 [2005]; ***Doe v. Axelrod***, 73 NY2d 748, 750 [1988]; ***Glauber v. G&G Quality Clothing, Inc.***, 134 AD3d 898, 899 [2d Dept 2015]). The moving party must make this demonstration by clear and convincing evidence (***S.J.J.K. Tennis, Inc. v. Confer Bethpage, LLC***, 81 AD3d 629 [2d Dept 2011]). Thus, the purpose of a

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[1] The earlier Resolution 1007-2016 required that the air be provided at no charge twenty-four hours a day, seven days a week, for 365 days per year. By Short Form Order dated January 5, 2017, this Court determined that plaintiffs met the test for preliminary injunctive relief based upon a violation of the Open Meetings Law.

preliminary injunction is to maintain the *status quo* pending determination of the action (***Matter of 1650 Realty Assoc, LLC, supra***; ***Arcamone-Makinano, supra***).

The Court turns its attention the third cause of action alleged in the second amended complaint sounding in preemption.

Presently, General Business Law (GBL) § 396-x, entitled "Gasoline stations; air pumps required," reads in pertinent part as follows:

> Any dealer must provide on the premises where motor fuel is sold at retail for use in motor vehicles a functioning motor driven air compressor capable of inflating automobile tires for use by customers during hours in which such station is open for business. Willful failure to comply. . . shall subject a dealer to a civil penalty of up to twenty-five dollars for each day such failure occurs

While the GBL is silent on the issue as to whether a fee may be imposed for the air, the 2017 Resolution adopted by the Town requires that the air be provided at no charge, i.e., for free. In fact, it is in this silence that other municipalities have determined to require gasoline service stations to provide free air to motorists at all times when the station is open for business, as emphasized by the defendants in opposition to the instant motion.

Plaintiffs have submitted two letters in support of their application, one from the New York State Department of Motor Vehicles (DMV) dated August 21, 1985, and the other from the Office of the Town Attorney dated November 8, 1991. The DMV letter advises inspection stations that an air pump must be maintained for public use, but that "[t]he pump may be free or require payment." The Town Attorney's letter is addressed to plaintiff McCabe, and it advises that "it is the opinion of this office as well as the Town of Hempstead Building Department that coin-operated machines installed in gasoline service stations within the Town of Hempstead which provide air are not in violation of Article 33, Section 336 (G)(3) of the [BZO] as long as such machines provide for free air during the hours that the station is open for business."

Although this State's legislature has remained silent on the issue of whether a fee may be charged for the air, the Court notes that the most recent Assembly and Senate bills that have been introduced, but not enacted, specifically state that a "reasonable fee may be charged when such tire inflation service is provided using a coin-operated or credit card device-operated air machine" (***S06641*** [June 9, 2017]; ***A08280*** [June 6, 2017]).

The purpose of the Assembly's bill is stated in the annexed memorandum in support of the legislation "to clarify that service stations that are required to provide tire inflation services for use by customers during hours in which such station is open for

business may charge a reasonable fee when the service is provided using a coin-operated or credit card device-operated air machine" (***Memorandum, A08280***).

The justification for the legislation as stated in that Memorandum reads as follows in pertinent part:

> Section 396-x of the General Business Law . . . mandate[s] that any motor fuel dealer must provide on the premises for use in motor vehicles a functioning motor driven air compressor capable of inflating automobile tires for use by customers during hours in which such station is open for business. In order to comply with the law, *most service stations use coin-operated or credit card device-operated air machines*. In this way, stations assure that these machines are maintained in good working condition and are repaired in a timely manner. This bill clarifies that a reasonable fee may be charged by service stations for tire inflation service that are provided using a coin-operated or credit card device-operated air machine

(emphasis added) (***Memorandum, A08280***).

In contrast, the earlier Assembly bill introduced on January 26, 2017 (***A03058***), and which is cited by defendants, contained language that the dealers must make the air "available at no cost to customers," and that there also be "a gauge for measuring air pressure, and water, for use in servicing any motor vehicle," almost identical to the language contained in the Town's amendment to Section 336.G(3).

Notably, the "no cost" and gauge requirement language contained in the January 26, 2017 Assembly bill was stricken from the two later versions of the bills introduced in the Assembly and Senate in June 2017. The fact that the more recent bills introduced by the Assembly and Senate delete the near-identical language to that contained in the amendment enacted by the Town is significant to this Court, in that it signals the State's recent intent to "occupy the field" (***Willow Woods Manufactured Homeowner's Association, Inc. v. R & R Mobile Home Park, Inc.***, 81 AD3d 930, 933 [2d Dept 2011]).

While the Court is cognizant of the fact that the bills have not been signed into law, the recognition by the Legislature that "most service stations use coin-operated or credit card device-operated air machines" (***Memorandum, A08280***) establishes to this Court's satisfaction that plaintiffs have demonstrated a likelihood of success on the merits of their third cause of action. For the same reason, the Court finds that the balance of equities favors plaintiffs.

The Court further finds that the submitted minutes of the March 29, 2016 Town meeting clearly and convincingly establishes the danger of irreparable economic injury, as recounted by the various gasoline station owners who spoke at the meeting, and who also re-emphasized that the machines are labeled to state that free air is available, and

thus, the motorist need only ask the attendant in order to access it. As a result of that labeling, free air continues to be provided to those requiring it to inflate their vehicles' tires.

Accordingly, it is this Court's determination to issue an injunction against the Town's enforcement of Resolution 345-2017 that amends BZO 336.G(3) pending the determination of this action based upon plaintiffs' third cause of action as pled in the second amended complaint. Thus, the Court does not reach plaintiffs' additional claims.

Plaintiffs have already posted a bond in the sum of $10,000.00, as directed by this Court pursuant to its earlier Short Form Order dated January 5, 2017.

The foregoing constitutes the Order of this Court.

Dated: January 2, 2018
Mineola, NY

Karen V. Murphy
J.S.C.

ENTERED

JAN 03 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

EXHIBIT 7

Plaintiff's Third Cause of Action from the "Free Air Law" Litigation
Page 1 of 2

As and For a Third Cause of Action

145. The Plaintiffs repeat the allegations of paragraphs 1 through 144 above, as if fully set forth herein.

146. The Resolution is not justified by public safety concerns, which are fully accommodated by the existing state law that preempts the field on this issue.

147. Municipalities, in general, have the authority to adopt local laws to the extent that they are not inconsistent with the State constitution or a general State law.

148. The Town Board does not have the authority to regulate services in an industry that is already heavily regulated by the State.

149. There is a need for statewide uniformity regarding heavily regulated businesses like gas stations.

150. Under the doctrine of preemption, a local law is inconsistent with State law -- and cannot stand -- where it prohibits something that would be permissible under State law.

EXHIBIT 7 - continued

Plaintiff's Third Cause of Action from

the "Free Air Law" Litigation
Page 2 of 2

151. The original law enacted back in 1978, requiring free air, and the Resolution, which adds more draconian restrictions on the original law, are both preempted by New York's General Business Law § 396-x.

152. By reason of the forgoing, the Plaintiffs are entitled to a judgment, pursuant to CPLR § 3001, declaring Resolution No. 1007-2016, amending § 336.G(3) of the Building Zone Ordinance of the Town of Hempstead, is arbitrary, unreasonable, discriminatory, confiscatory, void, unconstitutional on its face and as applied to the Plaintiffs, and its enforcement should be enjoined.

EXHIBIT 8

References to Rathkopf's
The Law of Zoning and Planning § 2:15 (4th ed.)
Page 1 of 4

1 Rathkopf's The Law of Zoning and Planning § 2:15 (4th ed.)

Rathkopf's The Law of Zoning and Planning | September 2018 Update
Arden H. Rathkopf, and Daren A. Rathkopf, Edward H. Ziegler, Jr.

Chapter 2. Constitutional and Legislative Limitations on Zoning
Edward H. Ziegler, Jr. ♦

I. Legislative Limitations

§ 2:15. Zoning regulates the use of land—
Restrictions on manner or operation of use

References

Zoning enabling acts authorize not only regulation of the location of a land use, but also authorize restrictions on the use of land at an allowed location, such as lot size, setback, yard, and height requirements, in order to prevent possible harmful off-site impacts and to render the land use more compatible with adjacent or nearby properties.[1] Similarly, zoning enabling acts usually authorize the imposition of site-specific restrictions or conditions on a land use in connection with the grant of a variance[2] or special exception[3] in order to mitigate the negative impacts of a land use upon neighboring property and the community. Also, enabling acts may authorize the imposition of site-specific restrictions or conditions in connection with rezoning of land,[4] site plan review,[5] or subdivision approval.[6]

In all of the above contexts, restrictions or conditions imposed on a land use must, to satisfy due process, be reasonably related to promoting some legitimate public purpose.[7] However, beyond this due process issue, and even assuming that the governmental body involved has authority under enabling legislation to impose restrictions or conditions on a land use in a particular context, there remains the ultra vires issue of whether the restriction or condition imposed reasonably relates to the objects and purposes of the enabling legislation. While zoning enabling statutes generally are held to authorize a variety of types of land use restrictions, courts have held that a zoning enabling statute does not delegate plenary police power to a municipality.[8] In this regard, a zoning restriction imposed for considerations or purposes not embodied in an enabling act will be held invalid, not as exceeding the scope of the police power per se, but as an ultra vires act beyond the statutory authority delegated.[9]

Zoning restrictions and conditions on an owner's proposed use of land which directly relate to the physical use of land, such as regulation in regard to fences, building height and appearance, landscaping, traffic access, open space, and lot size, etc., and which are designed to render the owner's use of land compatible with nearby properties are, no doubt, related to the "objects" and "purposes" of regulation authorized and delegated by a zoning enabling statute. However, the above referred to ultra vires issue may arise where a zoning restriction or condition is directed at controling some aspect of the manner or operation of an owner's use which is only tangentially related, if at all, to the authorized "objects" and "purposes" of a zoning enabling act. A number of state court decisions have ruled that "a zoning enabling act authorizes as the proper object of regulation only *the use of land itself* and therefore have held zoning controls on the details of an owner's operation ultra vires." [10]

This ultra vires test for zoning restrictions requires that regulation directly relate to the physical use of land. Courts have applied this test to hold invalid the following types of zoning restrictions:

(1) that a concrete plant not operate more than 200 days per year, only during daylight between 8 a.m. and 5 p.m., and that no more than 40 trucks per day should visit the plant; [11]

(2) that a kennel be used only for training "Seeing Eye" dogs; [12]

(3) that a wholesale florist not operate more than a specified number of hours and not have more than a certain number of employees; [13]

(4) that a nursery school be open only during certain hours, with not more than a certain number of students, and fixing the maximum age of students; [14]

(5) that yachts at a boating club not be occupied between 9 p.m. and 7 a.m.; [15] and

(6) that open space of a planned unit development be used in perpetuity for a particular sport or recreation (a golf course). [16]

This "directly related to the physical use of land" ultra vires rule has not always been applied in a narrow or strict sense. [17] In a number of states, including New York and New Jersey, recent court decisions in some cases focus on whether there is a "substantial relationship" between an authorized purpose for

1 Rathkopf's The Law of Zoning and Planning § 2:25 (4th ed.)

Rathkopf's The Law of Zoning and Planning | September 2018 Update
Arden H. Rathkopf, and Daren A. Rathkopf, Edward H. Ziegler, Jr.

Chapter 2. Constitutional and Legislative Limitations on Zoning
Edward H. Ziegler, Jr. [*]

I. Legislative Limitations

§ 2:25. Zoning regulates the use of land—
Zoning is not a grant of plenary police power

References

To be valid, a zoning ordinance, or decision thereunder, must further a legitimate object and utilize a method of achieving it authorized by the state zoning enabling act. In this regard, a zoning enabling act is held to authorize only local regulation of the use of land and is not considered a grant of plenary police power to be used to resolve the myriad social and economic problems that may exist within a community.[1] Courts recognize that the zoning power is merely one category of the more general police power and, as such, is one specifically concerned and limited to regulation of the use of land within a jurisdiction.[2] A zoning ordinance or decision thereunder will be held ultra vires when it promotes an objective or utilizes a method of regulation beyond the purview of the state enabling act. All of the foregoing ultra vires issues already discussed herein reflect this basic principle of zoning law.[3]

An excellent example of this principle is the ruling of the court in DeSena v. Gulde.[4] This was an action by the owner of a vacant parcel of land in Hempstead, Long Island, New York. The village adopted an amendment to the zoning ordinance by which the property, along with adjoining property, was changed from a residential to a light manufacturing district, the amendment being enacted as a result of a master plan prepared by consultants engaged by the village. The area was one populated almost entirely by a minority group. Opposition, to the adoption of the amendment developed both before and after the action of the village board; after adoption of the amendment, the opposition took the form of threats of economic boycott against the merchants of the village, picketing of the village hall and the shopping section, and demonstrations. A delegation of village

merchants urged that the amendment, then in effect, be repealed. Thereafter, at a public hearing scheduled for the purpose of considering a further amendment to the zoning ordinance, the mayor of the village read a statement to the effect that the rezoning to light manufacturing had been adopted after investigation, lengthy public hearings, and the application of experience to the problem of land use within the village, but that because continuing this property in a light manufacturing zone would make merchants throughout the village suffer, would permit shoppers to become intimidated and shop elsewhere, would provoke mass demonstrations, picketing, and so forth, which would result in riots and injury to innocent persons, the Board of Trustees felt that the obligation to prevent riots and injuries outweighed the benefits to the village resulting from the zoning change from residential to light manufacturing. The village board thereupon adopted an amendment re-replacing the same area in a residential district confined to single-family, detached dwellings. The rezoning was invalidated by special term which granted plaintiff's motion for summary judgment, adjudging the amendment to be illegal and void. On appeal, the appellate division said:

> The zoning power, as limited by the statutory grant, must operate in relation to the use of land and not for the accomplishment of purposes extraneous to that relation. If safety factors or health measures require zoning controls, they must involve safety and health characteristics which relate to the land under the regulation. The fear of disorder arising from the threat of picketing and demonstration, and the resultant economic loss, which the appellants considered as bases for the zoning regulation here, are alien to the legitimate objects of zoning. Doubtless there exists authority in the Village Law to meet the problem (cf. Village Law Sec. 9, par. 58-a; Sec. 188-a et seq.), but the power of zoning respondent's land to meet the problem was not open to appellants. [5]

Recently, this ultra vires rule has been applied by courts to inclusionary zoning programs, [6] off-site exactions, [7] and various types of development impact fees. [8]

Footnotes

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EXHIBIT 9

Fourteenth Amendment – Section 1
of the United States Constitution

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

Article I §11
of the New York State Constitution

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

St. John's Law Review

Volume 39
Issue 1 *Volume 39, December 1964, Number 1*

Article 68

May 2013

Unaggrieved Citizen-Taxpayer Has Standing to Constitutionally Challenge a Village Law and Injunctive Relief Is Available in an Article 78 Proceeding

St. John's Law Review

ARTICLE 78 — PROCEEDING AGAINST BODY OR OFFICER

Unaggrieved citizen-taxpayer has standing to constitutionally challenge a village law and injunctive relief is available in an Article 78 proceeding.

Policemen's Benevolent Ass'n v. Board of Trustees[289] involved a proceeding brought by an individual taxpayer and a Patrolmen's Benevolent Association pursuant to Article 78 to obtain a declaration of invalidity of a local village law, and related injunctive relief. The respondents were the board of trustees of the village and the village chief of police. The supreme court granted respondents' motion[290] made before answer, to dismiss the petition as being insufficient on its face on two grounds. First, petitioners failed to show that they were personally aggrieved, thus lacking standing to bring the proceeding. Second, injunctive relief is not available in an Article 78 proceeding.

The appellate division, second department, reversed, holding that the petitioners had standing, and that injunctive relief could be granted in such a proceeding. In holding that the petitioners had standing to challenge the local village law, the court expressly overruled its prior decision in *Ahern v. Board of Supervisors of Suffolk County.*[291] The court in *Ahern* had held that the mere fact that the petitioner was a taxpayer, resident and voter, did not give him the standing to challenge a local legislative act. In the instant case the court stated that "one who is a citizen, resident and taxpayer has standing to bring an Article 78 proceeding such as the one at bar, even though he does not show a personal grievance or a personal interest in the outcome. . . ."[292] The court distinguished the instant case from that of *St. Clair v. Yonkers Raceway, Inc.*,[293] wherein it was held that an unaggrieved citizen-taxpayer lacked standing to challenge the constitutional validity of a state statute. Here, because a *village* law was involved, the court ruled that petitioner had standing.

With respect to the granting of injunctive relief in an Article 78 proceeding, the court saw no reason why it should not be obtainable[294] in the instant case, despite some case law[295] to the contrary.

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[289] 21 App. Div. 2d 693, 250 N.Y.S.2d 523 (2d Dep't 1964).
[290] CPLR 7804(f); CPLR 3211.
[291] 7 App. Div. 2d 538, 185 N.Y.S.2d 669 (2d Dep't 1959).
[292] Policemen's Benevolent Ass'n v. Board of Trustees, 21 App. Div. 2d 693, —, 250 N.Y.S.2d 523, 526 (2d Dep't 1964).
[293] 13 N.Y.2d 72, 192 N.E.2d 15, 242 N.Y.S.2d 43 (1963).
[294] Cases holding that injunctive relief in an Article 78 proceeding is available are: Matter of New York Post Corp. v. Leibowitz, 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957); Matter of O'Reilly v. Grumet, 308 N.Y. 351, 126 N.E.2d 275 (1955).
[295] Gapinski v. Zoning Bd. of Appeals, 3 App. Div. 2d 976, 162 N.Y.S.2d

As a result of *Policemen's Benevolent Ass'n*, the law is, at least in the second department, that an unaggrieved citizen-taxpayer has standing to challenge the validity of a local village law, as well as the action of a county board of supervisors, since the *Ahern* case involved such action by a county board, and was expressly overruled by the instant case insofar as the question of standing is concerned. As to an unaggrieved citizen-taxpayer attacking the validity of a *state* law, the court of appeals case of *St. Clair* is controlling, and the petitioner will be deemed to lack standing to challenge its validity.

Mandamus unavailable to prevent judge X from referring matter to Judge Y.

In *Kahn v. Backer*,[296] the question presented was whether an Article 78 proceeding was properly brought against a justice of the supreme court. The proceeding was instituted in the appellate division,[297] first department, in order to compel the respondent to render a decision on a motion to dismiss a cause of action.[298] The case was on the general jury reserve calendar when the motion was made. Respondent disposed of the motion by referring it to the trial justice. The appellate division held that the respondent had in fact exercised his discretion and that the disposition of the motion in the above manner was the equivalent of a denial of the motion. Proper procedure was to enter an order thereon and to appeal the order.

The court pointed out that an Article 78 proceeding could not be used to challenge a determination made in a civil action, unless it was an order summarily punishing a contempt committed while in the court's presence.[299] The court also held that the disposition of the petitioner's motion, even if erroneous, could not be indirectly reviewed in a proceeding in the nature of mandamus, since the only proper avenue by which one may challenge such a determination is by appeal.[300]

The proceeding in the *Kahn* case was one in the nature of mandamus, which has always been a discretionary remedy. The court points out, relying on well-established case law,[301] that it will

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945 (4th Dep't 1957). The court made a blanket statement in this case that injunctive relief is not appropriate in a proceeding under Article 78, Civil Practice Act.

[296] 21 App. Div. 2d 171, 249 N.Y.S.2d 572 (1st Dep't 1964).

[297] CPLR 506(b)(1).

[298] A motion to dismiss a cause of action is made pursuant to CPLR 3211.

[299] CPLR 7801(2).

[300] CPLR 7801(1).

[301] See, *e.g.*, Walker v. Reidy, 31 Misc. 2d 915, 221 N.Y.S.2d 564 (Sup. Ct. 1961); Lindner v. Frisina, 194 N.Y.S. 2d 843 (Sup. Ct. 1959).