

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ALAN J. CHWICK, THOMAS G. FESS, and
EDWARD L. BOTSCH

**VERIFIED ANSWER AND
OBJECTIONS IN POINT
OF LAW**

Index No. 08-13564

- against -

Hon. Kenneth A. Davis

LAWRENCE W. MULVEY, as Comissioner of the Nassau
County Police Department, the NASSAU COUNTY
POLICE DEPARTMENT, and the COUNTY OF NASSAU

Return Date: 11/3/08

Respondent.

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Respondents, appearing herein by their attorney, LORNA B. GOODMAN, Nassau
County Attorney, by Ryan Singer, Deputy County Attorney, hereby submit this Verified Answer
and Objections in Point of Law in response to the Petition.

1. Deny knowledge or information sufficient to form a belief as to the truth of the
allegations as set forth in paragraph "1."
2. Deny knowledge or information sufficient to form a belief as to the truth of the
allegations as set forth in paragraph "2."
3. Deny knowledge or information sufficient to form a belief as to the truth of the
allegations as set forth in paragraph "3."
4. Deny knowledge or information sufficient to form a belief as to the truth of the
allegations as set forth in paragraph "4."
5. Deny knowledge or information sufficient to form a belief as to the truth of the
allegations as set forth in paragraph "5."
6. Deny knowledge or information sufficient to form a belief as to the truth of the
allegations as set forth in paragraph "6."

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "7."

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "8."

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "9."

10. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "10."

11. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "11."

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "12."

13. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "13."

14. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "14."

15. Deny the allegations as set forth in paragraph "15" and respectfully refer all questions of law to the Court.

16. Deny the allegations as set forth in paragraph "16" and respectfully refer all questions of law to the Court.

17. Deny the allegations as set forth in paragraph "17" and respectfully refer all questions of law to the Court.

18. Deny the allegations as set forth in paragraph "18" and respectfully refer all questions of law to the Court, but aver that Penal Law Article 400 sets forth a framework for the licensing of firearms.

19. Deny the allegations as set forth in paragraph "19" and respectfully refer all questions of law to the Court.

20. Admit the allegations as set forth in paragraph "20."

21. Admit the allegations as set forth in paragraph "21."

22. Admit the allegations as set forth in paragraph "22."

23. Admit the allegations as set forth in paragraph "23."

24. Admit the allegations as set forth in paragraph "24."

25. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "25."

26. Deny the allegations as set forth in paragraph "26."

27. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "27."

28. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "28"

29. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "29."

30. Deny the allegations as set forth in paragraph "30" and respectfully refer all questions of law to the Court.

31. Deny the allegations as set forth in paragraph "31" and respectfully refer all questions of law to the Court.

32. Deny the allegations as set forth in paragraph “32” and respectfully refers all questions of law to the Court.

33. Deny the allegations as set forth in paragraph “33” and respectfully refer all questions of law to the Court.

34. Deny the allegations as set forth in paragraph “34” and respectfully refer all questions of law to the Court.

35. Deny the allegations as set forth in paragraph “35” and respectfully refer all questions of law to the Court.

36. Deny the allegations as set forth in paragraph “36” and respectfully refer all questions of law to the Court.

37. Deny the allegations as set forth in paragraph “37” and respectfully refer all questions of law to the Court.

38. Deny the allegations as set forth in paragraph “38” and respectfully refer all questions of law to the Court.

39. Deny the allegations as set forth in paragraph “39” and respectfully refer all questions of law to the Court.

40. Deny the allegations as set forth in paragraph “40” and respectfully refer all questions of law to the Court, and further aver that the local ordinances challenged by Petitioners is a valid exercise of the County’s police power and is not an alteration of the “scheme established by the state legislature for regulating handguns.”

41. Deny the allegations as set forth in paragraph “41” and respectfully refer all questions of law to the Court.

42. Deny the allegations as set forth in paragraph "42" and respectfully refer all questions of law to the Court.

43. Deny the allegations as set forth in paragraph "43" and respectfully refer all questions of law to the Court.

44. Deny the allegations set forth in paragraph "44" and respectfully refer all questions of law to the Court.

45. Deny the allegations set forth in paragraph "45" and aver that, pursuant to Local Law 9-2008, amending the Nassau County Deceptively Colored Handgun Law ("Nassau Handgun Law"), Petitioner's brown J.P. Sauer 1930 pistol does not fall under operation of the Nassau Handgun Law.

46. Deny the allegations set forth in paragraph "45" and aver that, pursuant to Local Law 9-2008, amending the Nassau Handgun Law, Petitioner Chwick's brown J.P. Sauer 1930 pistol does not fall under operation of the County Handgun Law.

47. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "47" but aver that the Nassau Handgun Law applies to any handgun within Nassau County, irrespective of the residency of its owner.

48. Deny the allegations as set forth in paragraph "48" and respectfully refer all questions of law to the Court.

49. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "49" but aver that Penal Law Article 400 is the sole authority for the issuance of handgun dealer licenses.

50. Deny the allegations as set forth in paragraph "50" and respectfully refer all questions of law to the Court, but aver that, pursuant to Local Law 9-2008, amending Local Law

5-2008, blued guns, brown guns, and gold-plated commemorative guns no longer fall under operation of the Nassau Handgun Law.

51. Deny knowledge or information sufficient to form a belief as to the allegations as set forth in paragraph "51" but aver that, pursuant to Local Law 9-2008, amending Local Law 5-2008, blued guns no longer fall under operation of the Nassau Handgun Law.

52. Deny the allegations as set forth in paragraph "52" and aver that, pursuant to Local Law 9-2008, amending Local Law 5-2008, blued guns, brown guns, and gold-plated commemorative guns no longer fall under operation of the Nassau Handgun Law.

53. Deny the allegations as set forth in paragraph "53."

54. Deny the allegations as set forth in paragraph "54" and aver that, pursuant to Local Law 9-2008, amending Local Law 5-2008, blued guns no longer fall under operation of the Nassau Handgun Law.

55. Deny knowledge or information sufficient to form a belief as to the allegations as set forth in paragraph "55" and aver that, pursuant to Local Law 9-2008, amending Local Law 5-2008, "blued" guns no longer fall under operation of the County Handgun Law.

56. Deny the allegations as set forth in paragraph "56."

57. Deny the allegations as set forth in paragraph "57" and aver that, pursuant to Local Law 9-2008, amending Local Law 5-2008, brown guns no longer fall under operation of the Nassau Handgun Law.

58. Deny knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraph "58."

59. Deny the allegations as set forth in paragraph "59" and aver that, pursuant to Local Law 9-2008, amending Local Law 5-2008, brown guns no longer fall under operation of the Nassau Handgun Law.

60. Deny the allegations as set forth in paragraph "60" and aver that, pursuant to Local Law 9-2008, amending Local Law 5-2008, gold-plated guns no longer fall under operation of the Nassau Handgun Law.

61. Deny the allegations as set forth in paragraph "61" and respectfully refer all questions of law to the Court.

62. Deny the allegations as set forth in paragraph "62" but aver that the Nassau Handgun Law bans the possession of "deceptively colored handguns" inside one's home.

63. Deny the allegations as set forth in paragraph "63" and respectfully refer all questions of law to the Court.

64. Deny the allegations as set forth in paragraph "64."

65. Deny the allegations as set forth in paragraph "65" and respectfully refer all questions of law to the Court.

66. Deny knowledge or information sufficient to form a belief as to the allegations as set forth in paragraph "66" and respectfully refer all questions of law to the Court.

67. Deny the allegations as set forth in paragraph "67" and respectfully refer all questions of law to the Court.

68. Deny the allegations as set forth in paragraph "68" and respectfully refer all questions of law to the Court.

69. Deny the allegations as set forth in paragraph "69" and respectfully refer all questions of law to the Court.

70. Deny the allegations as set forth in paragraph “70” and respectfully refer all questions of law to the Court.

71. Deny the allegations as set forth in paragraph “71” and respectfully refer all questions of law to the Court.

72. Deny the allegations as set forth in paragraph “72” and respectfully refer all questions of law to the Court.

73. Deny the allegations as set forth in paragraph “73” and respectfully refer all questions of law to the Court.

74. Deny knowledge or information sufficient to form a belief as to the allegations as set forth in paragraph “74.”

PRELIMINARY STATEMENT

75. Petitioners bring this Article 78 proceeding requesting that the Court strike down Title 69 of the Miscellaneous Laws of Nassau County (“Nassau Handgun Law”), which bans “deceptively colored handguns,” as defined by that statute. Petitioners claim that the Nassau Handgun Law is invalid because it (1) is pre-empted by New York State law (specifically, Articles 265 and 400 of the Penal Law), which Petitioners claim occupies the entire field of handgun regulation; (2) effects an unconstitutional taking of property; (3) is vague and ambiguous; and (4) runs afoul of the Second Amendment, particularly in light of the United States Supreme Court’s recent holding in District of Columbia v. Heller.

76. As a preliminary matter, an Article 78 proceeding is an improper vehicle for Petitioners’ challenge to the Nassau Handgun Law, and should instead be deemed by the Court to be an action for a declaratory judgment.

77. Petitioners' claims fail on the merits. Courts have consistently held that local regulation of weapons which goes beyond that of Article 265 of the Penal Law is a valid exercise of the police power conferred to municipalities pursuant to Article IX, §2(c) of the New York State Constitution and §10 of the Municipal Home Rule Law. Moreover, Penal Law Article 400 speaks only to the licensing of individuals to possess and carry handguns, and the Nassau Handgun Law adds no additional restrictions on, or qualifications to, obtaining a pistol license.

78. Petitioners' taking claim also fails, since the Nassau Handgun Law is a lawful exercise of the County's police power and is not arbitrary. Nor is the Nassau Handgun Law impermissibly vague, as it gives citizens fair notice of the conduct which is prohibited.

79. As for Petitioners' Second Amendment argument, District of Columbia v. Heller is wholly distinguishable from the case at bar as it involved an outright ban on handguns. Here, by contrast, the Nassau Handgun Law merely regulates the external appearance of handguns by prohibiting colorings which could lead to their being mistaken for toys. Further, the Heller decision explicitly affirmed the power of the government to place reasonable regulations upon the right to keep and bear arms, including the power to regulate "dangerous and unusual weapons."

STATEMENT OF MATERIAL AND PERTINENT FACTS

80. On May 28, 2008, the Nassau County Legislature passed Local Law 5-2008, prohibiting the possession of "deceptively colored handguns." A copy of Local Law 5-2008 is annexed hereto as "Exhibit A." The purpose of the law was twofold: (1) to protect the safety of law enforcement officers who might mistake a deceptively colored handgun for a toy; and (2) to prevent injury or death to individuals – particularly children – who might mistake deceptively colored handguns for toys. See Local Law 5-2008, §2.

81. Local Law 5-2008 defined a “deceptively colored handgun” as

Any handgun which has a substantial portion of its exterior surface that is plated with gold or colored any color other than black, grey, silver, steel, nickel or army green if such other color is used either alone or as the predominant color in combination with other colors in any pattern; provided, however, that a handgun shall not be deemed to be a deceptively colored handgun merely because its handle is plated with gold or composed of ivory, colored so as to appear to be composed of ivory, composed of wood, or colored so as to appear to be composed of wood.

Id. at §3(b).

82. Local Law 5-2008 further defines “substantial portion of the exterior surface of a handgun” to mean: “(1) at least twenty five percent of the entire exterior surface area of a handgun; or (2) the exterior surface of either the receiver or the slide of a handgun.” Id. at §3(c).

83. On or around September 17, 2008, the Nassau County Legislature passed Local Law 9-2008, which amended the Nassau Handgun Law. A copy of Local Law 9-2008 is annexed hereto as “Exhibit B.” Most significant to the present dispute, Local Law 9-2008 defined a “deceptively colored handgun” as

any handgun which has a substantial portion of its exterior surface colored any color other than black, brown, grey, silver, steel, nickel or army green. A substantial portion of the exterior surface of a handgun shall be considered to be colored any color other than black, grey, silver, steel, nickel, or army green if such other color is used either alone or as the predominant color in combination with other colors in any pattern; provided, however, that a handgun shall not be deemed to be a deceptively colored handgun merely because (1) a substantial portion of the exterior surface is plated with gold; or (2) a substantial portion of the exterior surface is a shade of blue resulting from the process of “bluing,” designed to provide limited resistance to rust and corrosion; or (3) its handle is composed of ivory, colored so as to appear to be composed of ivory, composed of wood, or colored so as to appear to be composed of wood.

Local Law 9-2008, §1.

84. Under the Nassau Handgun Law, any person who is in possession of a deceptively colored handgun is guilty of a misdemeanor punishable by a fine of not more than \$1,000 and/or imprisonment not to exceed one (1) year. See Local Law 5-2008, §§4(b) and 5.

85. Petitioners own firearms which they claim fall under the operation of the Nassau County Handgun Law and would thus subject them to criminal liability if enforced. Petitioners Chwick and Botsch are Nassau County residents, while Petitioner Fess is a resident of Monroe County who claims that he frequently travels in and through Nassau County to attend gun competitions. Pursuant to a stipulation entered into by Petitioners Chwick and Botsch and Respondents on July 25, 2008, enforcement of the Nassau Handgun Law is being held in abeyance as to Nassau County residents who possessed handguns that would fall under the operation of the Handgun Law prior to June 25, 2008 during the pendency of instant proceeding. See Transcript of Proceedings held before the Honorable Kenneth A. Davis on July 25, 2008, annexed hereto as "Exhibit C," at 4:18. Under the current law as amended by Local Law 9-2008, Petitioner Chwick's pink Kel-Tec pistol is the only firearm owned by the Petitioners subject to the Nassau Handgun Law.

**FIRST AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW:**

AN ARTICLE 78 PROCEEDING IS AN IMPROPER FORM FOR THIS ACTION

86. As a preliminary matter, it should be noted that an Article 78 proceeding is an improper vehicle for Petitioners to challenge the validity of a legislative act such as the Nassau Handgun Law. See Press v. County of Monroe, 50 N.Y.2d 695, 702 (1970). Accordingly, pursuant to CPLR §103(c), the Court should view Petitioners' challenge as an action for a declaratory judgment against Respondents. See id.; see also National Amusements, Inc. v.

County of Nassau, 156 A.D.2d 566, 567 (2nd Dept. 1989), Amrhein v. Signorelli, 153 A.D.2d 28, 31 (2nd Dept. 1989).

**SECOND AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW:**

**PETITIONERS BOTSCH AND FESS LACK STANDING TO CHALLENGE THE
NASSAU HANDGUN LAW**

87. In order to establish a cause of action for declaratory relief under CPLR §3001, Petitioners must demonstrate that there is a justiciable controversy. See Cherry v. Koch, 126 A.D.2d 346, 350 (2nd Dept. 1987). Where an action seeks a judicial declaration that a criminal statute is unconstitutional, the plaintiff must show either that he or she has been arrested, prosecuted or threatened with prosecution under the statute, or that they at least have some reasonable fear (going beyond mere speculation) that they will be prosecuted in the future. Id.

88. The Petition alleges that Petitioner Fess owns a Glock Model 20 pistol with a woodland camouflage patterned slide and a black frame. (See Petition at ¶7; Petitioners' Ex. 3) It is further alleged that Petitioner Fess, a resident of Monroe County, is affected by the Nassau Handgun Law in that he frequently attends shooting competitions in Nassau and Suffolk Counties.

89. Even if this Court were to find that Petitioner Fess is a proper party despite the fact that he has not appeared in this action either *pro se* or by counsel (see Ex. C at 2:18), the Nassau Handgun Law as amended does not affect Petitioner Fess. The woodland camouflage pattern which comprises the slide of the Glock Model 20 is brown, tan, green and black. Out of these colors, tan is the only color which, by itself, might be prohibited under the Nassau Handgun Law. However, Petitioner Fess' woodland camouflage Glock does not fall under operation of the Nassau Handgun Law, as the tan coloring on Petitioner Fess' Glock constitutes only a small portion of the pattern, which otherwise utilizes permissible colors. Since the tan

coloring is not used “either alone or as the predominant color in combination with other colors in any pattern,” Local Law 9-2008, Petitioner Fess’ handgun is not prohibited by the Nassau Handgun Law.

90. Petitioner Botsch alleges that he is the owner of a gold-plated Sigarms model P-226 pistol commemorating the lives of members of the Port Authority Police Department who were killed in the line of duty during the September 11, 2001 attacks. A photograph of the handgun is attached to the Petition as Exhibit 4.

91. Under the Nassau Handgun Law as amended by Local Law 9-2008, “a handgun shall not be deemed to be a deceptively colored handgun merely because... a substantial portion of the exterior surface is plated with gold...” Local Law 9-2008, §1. As the remainder of Petitioner Botsch’s Sigarms P-226 is colored black, Petitioner Botsch’s handgun is not covered by the Nassau Handgun Law.

92. Accordingly, Petitioners Fess and Botsch have failed to allege that, under the Nassau Handgun Law, they have suffered either an actual or reasonably imminent harm that would confer standing upon them to bring the instant challenge.

**SECOND AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW:**

**THE NASSAU HANDGUN LAW IS A VALID EXERCISE OF THE POLICE POWER
CONFERRED UPON THE COUNTY PURSUANT TO THE NEW YORK STATE
CONSTITUTION AND MUNICIPAL HOME RULE LAW AND IS NOT PREEMPTED
BY STATE LAW**

93. Article IX, §2(c) of the New York State Constitution explicitly grants local governments the power to “adopt and amend local laws not inconsistent with the provisions of this constitution or any general law....” This power is further codified in §10 of the New York Municipal Home Rule Law. These provisions vest broad police powers in local governments to regulate matters of public health, safety, and the general welfare of their citizens. People v.

Lewis, 295 N.Y. 42, 49 (1945); New York State Club Assoc. v. City of New York, 69 N.Y.2d 211, 217 (1987); Penny Lane/E. Hampton v. County of Suffolk, 191 A.D.2d 19, 24 (2nd Dept. 1987).

94. While the State Constitution and Municipal Home Rule Law confer broad police powers upon local governments, “the power of the State Legislature over municipal corporations is, of course, ‘supreme and transcendent.’” Citizens for a Safer Community v. City of Rochester, 164 Misc.2d 822, 833 (Sup. Ct. Monroe Cty. 1994) (quoting Matter of Brown v. Board of Trustees, 303 NY 484, 488 (1952)). Accordingly, local laws may be preempted by State legislation where either (1) a local government’s law directly conflicts with a State statute; or (2) when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility – whether explicitly stating its intention to occupy the field, or by implication. DJL Restaurant Corp. v. City of New York, 96 N.Y.2d 91, 95 (2001) (citations omitted). The State Legislature’s intent to preempt legislation in a particular field may be found where there exists a “comprehensive and detailed regulatory scheme” in that field. Id.

95. However, it is well settled that the mere fact that a local law touches upon matters addressed by State law does not render the local law invalid. People v. Ortiz, 125 Misc. 2d 318, 328 (Crim. Ct., Bronx Cty. 1984) (citing Wholesale Laundry Bd. of Trade v. City of New York, 17 A.D.2d 327 (1st Dept. 1962); People v. Cook, 34 N.Y.2d 100 (1974); People v. New York Trap Rock Corp., 57 N.Y.2d 371 (1982)). Were a local law to be declared invalid simply because it prohibited conduct that was not proscribed by State law, “the power of local governments to regulate would be illusory,” since “[a]ny time that the State law is silent on a subject, the likelihood is that a local law regulating that subject will prohibit something permitted elsewhere in the state.” Cook, 34 N.Y.2d at 109.

96. Petitioners contend that, “[t]aken together, Penal Law Article 400 and aspects of Penal Law Article 265 set forth a comprehensive and detailed regulatory scheme that regulates every aspect of the possession, dealing, registration, and licensing of handguns throughout the State,” which evinces the State Legislature’s “continuing intent to occupy the field of handgun regulation....” (Petition at ¶19).

97. Respondents do not contest the proposition that Penal Law Article 400 is the exclusive statutory mechanism for licensing handguns in New York State. See O’Connor v. Scarpino, 83 N.Y.2d 919, 920 (1994). However, this observation has little bearing on the case at bar, as the Nassau Handgun Law does not impose additional qualifications, limitations, or procedural requirements upon applicants for pistol licenses or current licensees. Nor does it proscribe any particular model of handgun which can be registered under Article 400. The Nassau Handgun Law requires no mechanical alteration of a handgun’s components, and only addresses the handgun’s aesthetic appearance insofar as it prohibits coloring the firearm in such a manner as to be easily mistaken for a toy. Accordingly, the Nassau Handgun Law does not in any way implicate, much less run afoul of Penal Law Article 400.

98. Penal Law Article 265 is the body of State law which regulates firearms and other dangerous weapons. New York Courts have consistently held that Penal Law Article 265 does not preempt local laws which impose limits on the possession and use of weapons, including firearms. Citizens for a Safer Community, 164 Misc. 2d at 833 (citing People v. Judiz, 38 N.Y.2d 529 (1976); Ortiz; Grimm v. City of New York, 56 Misc. 2d 525 (Sup. Ct. Queens 1968)).

99. Petitioners claim that the fact that Article 265’s ban on “disguised guns” evinces the State Legislature’s intent to completely occupy the field of regulating the appearance of

handguns. (See Petition, ¶34). Penal Law §265.00(20) defines a “disguised gun” as “any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive and is designed and intended to appear to be something other than a gun.” Penal Law §265 clearly speaks to an entirely different class of weapons than those addressed in the Nassau Handgun Law, and proscribes weapons such as “keychain guns,” “pen guns,” “belt buckle guns,” and “cane guns.” See Mem in Support, 1998 McKinney’s Session Laws of NY, at 1798-99.

100. Thus, the Nassau Handgun Law does not conflict with Penal Law §265.00(20) or §265.02(6) by either allowing something the Penal Law forbids or prohibiting something it specifically permits, and instead “merely supplements the Penal Law with additional reasonable requirements.” Ortiz, 125 Misc. 2d at 330 (upholding New York City local law banning possession of knives with 4” blades or longer in public and rejecting defendant’s claim that law was preempted by Penal Law Article 265).

101. Grimm v. City of New York is particularly instructive in this respect. In Grimm, the plaintiffs challenged a New York City law which required individuals to obtain a permit prior to purchasing or possessing a rifle or shotgun (collectively “longarms”), and set forth criteria for obtaining such a permit. Id. at 525. Plaintiffs argued, *inter alia*, that the city law was preempted by Article 265 of the Penal Law, which had in place certain regulations pertaining to longarms, but had no licensure provision. In rejecting plaintiffs’ preemption challenge, the Court found that Article 265,

while [touching] upon the possession of rifles or shotguns by persons under the age of 16 years, aliens, convicted felons and adjudicated incompetents, does not treat so extensively with the subject of the control of such weapons as to evidence any design or intention by the State to pre-empt the entire field.

Id. at 528.

102. Like the local law in Grimm, the Nassau Handgun Law places restrictions on conduct which, while not specifically prohibited by Article 265 of the Penal Code, is not affirmatively permitted by Article 265. Accordingly, the Nassau Handgun Law is a valid exercise of the inherent police power of local governments to promulgate reasonable regulations not inconsistent with the Constitution or Laws of the State of New York that constitutes the very “essence of home rule.” Cook, 34 N.Y.2d at 109.

103. Petitioners also claim that the fact that there is currently a bill pending in the New York State Legislature which expands the Penal Law’s definition of “disguised gun” to include any firearm whose appearance resembles a toy gun. (See Petition, ¶35). However, where the State Legislature has yet to even enact such a bill, it can hardly be said that it is the intent of the Legislature to preclude similar legislation by local governments. Moreover, even if the bill does become law, local efforts to further remedy a problem already addressed by State law are not necessarily preempted. See Judiz, 38 N.Y.2d at 531 (upholding New York City law which criminalized mere possession of a toy gun resembling a real handgun, where Penal Law §265.01(2) required that the prosecution prove intent to use for an unlawful purpose.).

104. Finally, Petitioner’s reliance upon Citizens for a Safer Community v. City of Rochester in support of the proposition that the Nassau Handgun Law is preempted by State Legislation is equally unavailing. Citizens for a Safer Community involved a challenge to a Rochester ordinance which banned the possession and sale of certain semi-automatic weapons and shotguns (based upon, *inter alia*, magazine capacity), as well as the possession and use of air guns and imitation weapons. Id. 164 Misc. 2d at 826. Although finding that both federal and state law preempted the city’s regulation of air guns and imitation pistols based upon 15 U.S.C. §5001(g)(i) and (ii) and the New York State General Business Law, the Court upheld the

regulation on semiautomatic firearms,¹ stating, “Clearly the State has not, either directly or indirectly, regulated all aspects of gun possession and use as to time, place and circumstance.” Id. at 834.

105. In sum, the Nassau Handgun Law falls squarely within the County of Nassau’s regulatory powers pursuant to the New York State Constitution and Municipal Home Rule Law, and is not preempted by State law.

**THIRD AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW:**

THE NASSAU HANDGUN LAW IS CONSTITUTIONAL

A. Presumption of Constitutionality and Petitioners’ Burden of Proof:

106. A party seeking to have a legislative enactment declared unconstitutional must overcome a “strong presumption of validity” and must overcome that presumption by proof beyond a reasonable doubt. Fenster v. Leary, 20 N.Y.2d 309, 314 (1967) (citing Van Berkel v. Power, 16 N.Y.2d 37 (1965)). This presumption applies in equal force to local legislation as it does to acts of the Legislature. Fenster. “Only as a last resort should a court of first instance strike down a legislative enactment on constitutional grounds, and only when it has been shown that the statute is unreasonably arbitrary, and the conclusion of unconstitutionality is inescapable.” Ortiz, 125 Misc. 2d at 321-22 (citing Spielvogel v. Ford, 1 N.Y.2d 558, app dsmd 352 U.S. 957; McKinney’s Cons Laws of NY, Book 1, Statutes, § 150, subd a.).

B. The Nassau Handgun Law does not Effect an Unconstitutional Taking of Property:

107. Petitioners claim that they will be forced to surrender valuable handguns without just compensation or face criminal sanction if the Nassau Handgun Law is enforced. (See Petitioner, ¶¶ 45-46). It should be noted that the Nassau Handgun Law, as modified by Local

¹ The Court did strike down part of the local ordinance on equal protection grounds insofar as it banned certain firearms by name irrespective of magazine capacity, while permitting identical firearms made by a different

Law 9-2008, removes from its applicability the brown handguns and gold-plated handguns owned by Petitioners Chwick and Botsch, respectively, as well as Petitioner Fess' Glock 20 (assuming that he is a proper party to this action). Accordingly, Petitioner Chwick's pink Kel-Tec P32 is the only handgun which remains within the operation of the Nassau Handgun Law.

108. It is well settled that “[l]egislation which has for its object the promotion of the public welfare and safety falls within the scope of the police power and must be submitted to even though it imposes restraints and burdens on the individual.” People ex rel. Darling v. Warden of City Prison, 154 App. Div. 413, 423 (1st Dept. 1913); Grimm, 56 Misc. 2d at 527 (rejecting plaintiffs' claim that New York City licensing requirement for longarms deprived them of property without due process of law); Ortiz, 125 Misc. 2d at 325. “The police power is very broad and comprehensive and in its exercise the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other.” People v. Bunis, 9 N.Y.2d 1, 4 (1961) (citation omitted). Accordingly, so long as “the limitations imposed on individual conduct and on the enjoyment of property are not arbitrary, and are reasonably necessary for the common welfare, they are within the police power.” Ortiz, 125 Misc. at 325 (citing Bunis).

109. Here, the limitation imposed upon an individual's enjoyment of his or her handgun is minimal, particularly in light of the fact that gold-plated handguns, silver-plated handguns, “blued” handguns, and antique handguns are all explicitly exempted from operation of the Nassau Handgun Law. See Local Law 9-2008 §§1, 2. The only limitation imposed by the County on a person's use of his or her handgun is that he or she may not color it in such a manner as would cause it to be mistaken for a toy. Meanwhile, the benefits to the general welfare are substantial, as the Nassau Handgun Law works to prevent the very real danger that a

manufacturer.

deceptively colored handgun might be mistaken for a toy gun by a layperson or a police officer in the line of duty, potentially resulting in death or serious injury.

110. Given the fundamental reasonableness of the Nassau Handgun Law and the minor imposition upon an individual's enjoyment of his or her property, Petitioners cannot demonstrate beyond a reasonable doubt that the law effects an unconstitutional taking.

C. The Nassau Handgun Law is not Unconstitutionally Vague

111. Where a Petitioner brings both a facial challenge and an as-applied challenge to a statute for vagueness, the Court's first task is to decide whether the statute is impermissibly vague as applied to the challenger. Where the statute, as applied to the challenger, provides the defendant with adequate notice and the police with clear criteria, the Court's inquiry is at an end. People v. Taylor, 9 N.Y.3d 129, 150 (2007) (citing People v. Stuart, 100 N.Y.2d 412 (2003)).

Where the challenger's actions are plainly within the statute's operation, the court need not "strain to imagine marginal situations in which the application of the statute is not so clear." Id. at 151 (quoting Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 495 (1982)).

112. Here, the only firearm owned by Petitioners that falls under the operation of the Nassau Handgun Law, as amended by Local Law 9-2008, is Petitioner Chwick's Kel-Tec Pistol, the pink frame of which Petitioner Chwick himself acknowledges "encompasses at least 25% of the total surface area of the pistol." (Petition, ¶3). "[W]hen a person of ordinary intelligence should know that the conduct at issue is prohibited by a statute, and there are reasonable standards for enforcement, that person should not benefit from any superfluous discrepancy that is not applicable in that instance." Taylor, 9 N.Y.3d at 151.

113. As Petitioner Chwick's Kel-Tec pistol unambiguously falls within the operation of the Nassau Handgun Law, Petitioner cannot assert a constitutional vagueness claim, and the Court's inquiry is at an end.

114. Even if this Court were to further examine the Nassau Handgun Law in its entirety for vagueness, the law clearly passes constitutional muster. In order to avoid a finding of unconstitutional vagueness, a statute must be sufficiently definite to give a reasonable person subject to it notice of the nature of what is prohibited and what is required of him or her. Ortiz, 125 Misc. 2d at 322 (quoting People v. Byron, 17 N.Y.2d 64, 67 (1966)). However, since the Constitution only requires reasonable precision from drafters of legislation, courts will not strike down a law merely because some marginal cases may arise in which the clarity of the statute is called into question. Ortiz, 125 Misc. 2d at 323 (citing Matter of Patricia A., 31 N.Y.2d 83 (1972); United States v. Harriss, 347 U.S. 612 (1954); Roth v. United States, 354 U.S. 476, 491 (1957); People v. Pagnotta, 25 N.Y.2d 333 (1969)).

115. Petitioners further claim that the "substantial portion" language of the Nassau Handgun Law renders the statute unconstitutionally vague. (See Petition, ¶61). Specifically, they allege that a handgun is barred by the statute if "*any portion* of either the receiver or slide, no matter how small," is a color other than one of the colors deemed permissible in the statute. (Id.)

116. Petitioners incorrectly interpret the Nassau Handgun Law. Section (3)(c) of the Nassau Handgun Law defines "substantial portion of the exterior surface of a handgun" to mean either (1) at 25% of the entire exterior surface area of a handgun; or (2) the exterior surface of either the receiver or the slide of a handgun. Section (b)(3) of the Nassau Handgun Law states that "[a] substantial portion of the exterior surface of a handgun shall be considered to be colored

any color other than black, brown, grey, silver, steel, nickel or army green *if such other color is used either alone or as the predominant color in combination with other colors in any pattern....*” (emphasis added). Contrary to Petitioners’ assertion, a handgun will be deemed deceptively colored based upon the appearance of either its receiver or slide only if the receiver or slide utilizes a prohibited color in isolation, or as the predominant color in a pattern.

D. The Nassau Handgun Law Does Not Violate the Second Amendment or NY Civil Rights Law

117. Finally, Petitioners claim that the Nassau Handgun Law constitutes an unconstitutional infringement upon their right to keep and bear arms under the Second Amendment to the United States Constitution and New York Civil Rights Law §4, in light of the United States Supreme Court’s recent decision in District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

118. The Second Amendment provides: “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” New York Civil Rights Law §4 employs virtually identical language, and has been interpreted by New York Courts to track authoritative federal decisions which construe the Second Amendment. See Moore v. Gallup, 267 A.D. 64, 67 (3rd Dept. 1943) (citations omitted).

119. Heller involved a challenge to a District of Columbia law which criminalized the carrying of unregistered firearms and prohibited the registration of handguns. The D.C. law further required that District residents keep all lawfully owned firearms inoperable by either disassembly or by binding them with trigger lock mechanisms when not located in a place of business or being used for lawful recreational activities. Id. at 2788.

120. In striking down the D.C. firearms law, the Court recognized that the Second Amendment confers an individual right to keep and bear arms unconnected to service in the

militia. Id. at 2799. In so holding, however, the Court noted that “[o]f course the right [is] not unlimited,” id., and that “the Second Amendment right, whatever its nature, extends only to certain types of weapons.” Id. at 2814.

121. Far from declaring open season on local efforts to regulate firearm possession and use, the Supreme Court was careful to emphasize that the right to keep and bear arms is not “a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose.” Id. at 2816. On the contrary, the Court noted that

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or law imposing conditions and qualifications on the commercial sale of arms.

Id. at 2816-17. The Court took care to further note that these regulations are but a few examples of presumptively lawful regulations on possession and use of firearms, and should not be viewed as an exhaustive list of permissible regulations. Id. at 2817, n.26.

122. The Heller decision also emphasized that the protection of the Second Amendment extends only to those weapons “in common use,” and not to weapons that are “dangerous and unusual.” Id.

123. The D.C. law at issue in Heller constituted a *complete ban* on handgun possession, including in one’s own home. The Court recognized that the “inherent right to self-defense has been central to the Second Amendment right,” and that the handgun is the weapon “overwhelmingly chosen by American society for [the] lawful purpose” of self-defense. In imposing such a “severe restriction,” the Court found that the D.C. law would fail any level of constitutional scrutiny, and thus deemed it unnecessary to pass upon the proper level of constitutional scrutiny to be applied in a Second Amendment challenge.

124. Here, by contrast, the Nassau Handgun Law does not ban *any* class of firearm; it merely regulates the aesthetic appearance of a handgun by prohibiting the use of non-traditional coloring which would render the firearm similar in appearance to a toy gun. As stated earlier, the Nassau Handgun Law does not require the owner of a handgun to make any mechanical alterations which would affect the operability of a firearm, nor does it impose additional conditions upon an individual's possession and use of a handgun.

125. Whereas the D.C. law struck down in Heller constituted an outright ban on the preferred weapon of self-defense in this nation, the Nassau Handgun Law does not impinge upon the individual's inherent right of self-defense, and is narrowly tailored to the compelling governmental objective of preventing serious injury or death from accidental shootings.

126. Accordingly, the Nassau Handgun Law does not run afoul of the Second Amendment or New York Civil Rights Law §4.


CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully requested deny the Petition in its entirety, along with such other and further relief as this Court deems just and proper.

Dated: Mineola, New York
October 17, 2008

LORNA B. GOODMAN
Nassau County Attorney
Attorney for Respondent

By:


Ryan Singer
Deputy County Attorney
One West Street
Mineola, New York 11501
(516) 571-1764

To: Alan J. Chwick
5 Brunella Street
Freeport, NY 11520

Edward L. Botsch
992 Auburn Street
Franklin Square, NY 11010

Thomas G. Fess
7 Wingate Drive
Rochester, NY 14624

VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF NASSAU) ss.:

RYAN SINGER, an attorney admitted to practice in the Courts of this State, affirms under the penalties of perjury as follows:

I am a Deputy County Attorney in the office of LORNA B. GOODMAN, County Attorney of the County of Nassau, attorney for Respondents herein, and am duly authorized to make this verification pursuant to CPLR 3020(d)(2).

I have read the foregoing Verified Answer and Objections in Point of Law and know the contents thereof to be true based on my knowledge and belief and review of the records maintained and provided to me by Respondents, except as to matters alleged to be upon information and belief and, as to those matters, I believe them to be true. The reason that this verification is made by me and not by the Respondents is that Respondents are governmental entities and an employee on whose behalf a verification can be made pursuant to CPLR 3020(d)(2) by any person acquainted with the facts.

Dated: Mineola, New York
October 17, 2008



RYAN SINGER
Deputy County Attorney

EXHIBIT A

4/17/08

Submitted by the County Executive and introduced by:

LOCAL LAW NO. 5 – 2008

A LOCAL LAW to prohibit deceptively colored handguns in the County of Nassau.

BE IT ENACTED by the County Legislature of the County of Nassau as follows:

Section 1. Short Title.

This law shall be known and may be cited as the “Deceptively Colored Handgun Law” and shall appear in the miscellaneous laws as Title 69.

§ 2. Legislative Intent.

The Legislature of Nassau County hereby finds that deceptively colored handguns pose a danger to law enforcement personnel and the general public. These real guns, when painted with non-traditional handgun colors, resemble toy guns, and can confuse police officers and the general public. Law enforcement officers who sometimes must make split second decisions on the use of force could perceive a deceptively colored real handgun to be a toy and be seriously injured or killed. A child may mistakenly attempt to play with a brightly colored real handgun and seriously injure themselves or others. As such, the legislature declares that the purpose of this local law is to safeguard the public from the unreasonable risk of death and injury that may result when real handguns are mistaken for toys by banning the distribution and possession in Nassau County of deceptively colored handguns.

§ 3. Definitions.

a) The term handgun shall include:

(1) any weapon or device from which a shot can be discharged through the energy of an explosive and which may be fired by the use of a single hand; and

(2) any combination of parts from which a weapon or device described in paragraph (1) of this subdivision can be assembled.

b) The term "deceptively colored handgun" shall include any handgun which has a substantial portion of its exterior surface that is plated with gold or colored any color other than black, grey, silver, steel, nickel or army green. A substantial portion of the exterior surface of a handgun shall be considered to be colored any color other than black, grey, silver, steel, nickel, or army green if such other color is used either alone or as the predominant color in combination with other colors in any pattern; provided, however, that a handgun shall not be deemed to be a deceptively colored handgun merely because its handle is plated with gold or composed of ivory, colored so as to appear to be composed of ivory, composed of wood, or colored so as to appear to be composed of wood.

c) The term "substantial portion of the exterior surface of a handgun" shall mean:

(1) at least twenty five percent of the entire exterior surface area of a handgun; or (2) the exterior surface of either the receiver or the slide of a handgun.

d) The term "deceptive coloring product" shall mean and include any equipment, product, or material that is designed for use in modifying any handgun so as to make it a deceptively colored handgun. Any equipment, product, or material that is held out, offered for sale, or otherwise disposed of based on its utility, alone or in combination with other equipment, products, or materials, in modifying any handgun so as to make it a deceptively colored handgun shall be deemed a deceptive coloring product. Any combination of equipment, products, or materials that are jointly held out, offered for sale, or otherwise disposed of based on their utility, jointly or in combination with other equipment, products, or materials, in modifying any handgun so as to make it a deceptively colored handgun shall be deemed a deceptive coloring product.

§ 4. Violations.

a) It shall be unlawful for any person to dispose of a deceptively colored handgun except as authorized by section 6 of this title. It shall be unlawful for any person to

modify, attempt to modify, or offer to modify any handgun so as to make it a deceptively colored handgun except as authorized by section 6 of this title.

b) It shall be unlawful for any person to possess a deceptively colored handgun or a deceptive coloring product except as authorized by section 6 of this title or for any person to attempt to possess a deceptively colored handgun or a deceptive coloring product except as authorized by section 6 of this title.

§ 5. Penalties. Any person who violates any provision of this title or of any regulations issued pursuant to it shall be guilty of a misdemeanor punishable by a fine of not more than one thousand dollars or imprisonment of not more than one year or both.

§ 6. Exceptions.

a) This title shall not prohibit possession of any deceptively colored handgun by any person who possesses it on the effective date of the local law enacting this title, or by any person who acquires it by inheritance or operation of law after the effective date of this title, provided that, within thirty (30) days, such person either (i) surrenders such deceptively colored handgun to the Commissioner of Police for disposal in accordance with the provisions of section 400.05 of the penal law; or (ii) modifies such handgun to be in conformance with this title. This title shall not prohibit the possession of any deceptive coloring product by any person who possesses it on the effective date of the local law enacting this title, or by any person who acquires it through inheritance or by operation of law after the effective date of the local law enacting this title, provided that within thirty (30) days such person surrenders such deceptive coloring product to the Commissioner of Police for disposal.

b) This title shall not prohibit the possession, modification, use, or disposal of any handgun or deceptive coloring product that is purchased for the use of, sold or shipped to, or issued for the use of, the United States or any department or agency thereof, or any state or any department, agency, or political subdivision thereof when possessed, modified, used or disposed of by an employee or agent of such entity, or by a peace officer or police officer, acting within the scope of his or her duties.

§ 7. Enforcement. The Commissioner of Police may make and promulgate such rules and regulations as are necessary to carry out the provisions of this title.

§ 8. Severability. If any clause, sentence, paragraph, section or part of any section of this title shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy and in which such judgment shall have been rendered.

§ 9. Effective Date. This local law shall take effect immediately.

EXHIBIT B



County of Nassau Inter-Departmental Memo

To: Clerk of the County Legislature
From: County Attorney
Date: 9/22/2008
Subject: LOCAL LAW - ORIG. DEPT. – Police

A LOCAL LAW to amend Title 69 of the Miscellaneous Laws of Nassau County with regard to deceptively colored handguns.

The above-described document attached hereto is forwarded for your review and approval and subsequent transmittal to the County Legislature for inclusion upon their calendar.

LORNA GOODMAN
County Attorney

By: Lisa B. Ross
Deputy County Attorney
Legal Counsel Bureau

Attachments

Submitted by the County Executive and Introduced by

LOCAL LAW NO. 9 - 2008

A Local Law to amend Title 69 of the Miscellaneous Laws of Nassau County in relation to deceptively colored handguns

WHEREAS, the County enacted a local law prohibiting deceptively colored handguns with the intent of prohibiting handguns that could be mistaken for toys; and

WHEREAS, the County has been made aware that there are certain types of handguns currently prohibited by the law which are unlikely to be mistaken for toys, and which therefore should be permitted, now, therefore,

BE IT ENACTED by the Nassau County Legislature as follows:

Section 1. Subdivision (b) of Section 3 of Title 69 of the Miscellaneous Laws of Nassau County is amended as follows:

b) The term "deceptively colored handgun" shall include any handgun which has a substantial portion of its exterior surface colored any color other than black, brown, grey, silver, steel, nickel or army green. A substantial portion of the exterior surface of a handgun shall be considered to be colored any color other than black, brown, grey, silver, steel, nickel, or army green if such other color is used either alone or as the predominant color in combination with other colors in any pattern; provided, however, that a handgun shall not be deemed to be a deceptively colored handgun merely because (1) a substantial portion of the exterior surface is plated with gold; or (2) a substantial portion of the

exterior surface is a shade of blue resulting from the process of "bluing," designed to provide limited resistance to rust and corrosion; or (3) its handle is composed of ivory, colored so as to appear to be composed of ivory, composed of wood, or colored so as to appear to be composed of wood.

§ 2. A new subdivision (c) is added to section 6 of such law to read as follows:

(c) This title shall not prohibit possession of any handgun which falls within the definition of "antique firearm" in New York State Penal Law Section 265.00, as such provision may be amended or modified from time to time.

§ 3. Section 7 of such law is amended as follows:

§ 7. Enforcement. The Commissioner of Police may make and promulgate rules and regulations consistent with the provisions of this title.

§ 4. This local law shall be effective immediately.

Submitted by the County Executive and Introduced by

PROPOSED LOCAL LAW NO. – 2008

A Local Law to amend Title 69 of the Miscellaneous Laws of Nassau County in relation to deceptively colored handguns

WHEREAS, the County enacted a local law prohibiting deceptively colored handguns with the intent of prohibiting handguns that could be mistaken for toys; and

WHEREAS, the County has been made aware that there are certain types of handguns currently prohibited by the law which are unlikely to be mistaken for toys, and which therefore should be permitted, now, therefore,

BE IT ENACTED by the Nassau County Legislature as follows:

Section 1. Subdivision (b) of Section 3 of Title 69 of the Miscellaneous Laws of Nassau County is amended as follows:

b) The term “deceptively colored handgun” shall include any handgun which has a substantial portion of its exterior surface [that is plated with gold or] colored any color other than black, brown, grey, silver, steel, nickel or army green. A substantial portion of the exterior surface of a handgun shall be considered to be colored any color other than black, brown, grey, silver, steel, nickel, or army green if such other color is used either alone or as the predominant color in combination with other colors in any pattern; provided, however, that a handgun shall not be deemed to be a deceptively colored handgun merely because (1) a substantial portion of the exterior surface is plated with

gold; or (2) a substantial portion of the exterior surface is a shade of blue resulting from the process of "bluing," designed to provide limited resistance to rust and corrosion; or (3) its handle is [plated with gold or] composed of ivory, colored so as to appear to be composed of ivory, composed of wood, or colored so as to appear to be composed of wood.

§ 2. A new subdivision (c) is added to section 6 of such law to read as follows:

(c) This title shall not prohibit possession of any handgun which falls within the definition of "antique firearm" in New York State Penal Law Section 265.00 as such provision may be amended or modified from time to time.

§ 3. Section 7 of such law is amended as follows:

§ 7. Enforcement. The Commissioner of Police may make and promulgate [such] rules and regulations [as are necessary to carry out] consistent with the provisions of this title.

§ 4. This local law shall be effective immediately.

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: TRIAL TERM 3

COPY

ALAN J. CHWICK, THOMAS G. FESS and
EDWARD L. BOTSCH,

INDEX NO.
13468/08

Plaintiffs,

- against -

LAWRENCE W. MULVEY, as Commissioner of
the Nassau County Police Department,
NASSAU COUNTY POLICE DEPT. & COUNTY OF
NASSAU,

Defendants.

Mineola, New York
July 25, 2008

B E F O R E: HON. KENNETH A. DAVIS
Supreme Court Justice

A P P E A R A N C E S:

ALAN J. CHWICK and EDWARD L. BOTSCH
Plaintiffs pro se

LORNA B. GOODMAN, ESQ.
COUNTY ATTORNEY
NASSAU COUNTY
by: LIORA M. BEN-SOREK
Deputy County Attorney

Lorraine Trezza, RPR
Official Court Reporter

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THE CLERK: Come to order.

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THE COURT: Good afternoon, ladies and

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gentlemen.

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MS. BEN-SOREK: Good afternoon, your Honor.

6

THE CLERK: This is a settlement on the

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order to show cause, Alan Chwick, Thomas Fess and

8

Edward Botsch against the county of Nassau.

9

THE COURT: Who do we have present here?

10

We have Mr. Chwick I recognize from the other

11

day.

12

MR. CHWICK: Yes.

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THE COURT: You are Mr. Botsch?

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MR. BOTSCH: Yes.

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THE COURT: Did I pronounce that correctly,

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sir?

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MR. BOTSCH: Yes.

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THE COURT: Where is Mr. Fess?

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MR. CHWICK: He's not here again because

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he's in Monroe County. We have spoken to him.

21

He understands, but this settlement does cover

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non-county residents as well, so he's already

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covered by this.

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THE COURT: Again, you can't represent non-

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county residents. You can only represent

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2 yourself; likewise, Mr. Botsch can represent
3 himself because neither one of you are attorneys,
4 am I correct?

5 MR. CHWICK: Correct.

6 MR. BOTSCH: That's correct.

7 THE COURT: So this only is as far as you
8 two are concerned at this point. You can't go
9 beyond the two of you.

10 MR. CHWICK: Well, then that kind of
11 changes the stipulation quite a bit.

12 MS. BEN-SOREK: We do have a stipulation
13 that we have come to terms with. I don't know if
14 you want to discuss this on the record or off the
15 record.

16 There was provision for those individuals
17 who may come into Nassau County or pass through
18 Nassau County for the purpose of shooting matches
19 or utilizing the ranges and there was provision
20 that if stopped, if questioned, that they would
21 have to produce certain identification, make
22 representations to the police officers or the
23 inquirers pursuant to the terms of our
24 stipulation.

25 THE COURT: All right. Do you want to

1
2 discuss this off the record or on the record? I
3 will allow you to tell me that.

4 Sir, off the record or on the record?

5 MR. CHWICK: I would prefer to be on the
6 record.

7 THE COURT: Okay. Then we will be on the
8 record. I don't see anything wrong with you as
9 the county unilaterally doing something if you
10 would like. I don't know how that's going to
11 bind anybody else though. I guess it will bind
12 anybody else who might bring an action in Nassau
13 County. That's the only way I can look at it,
14 all right?

15 MS. BEN-SOREK: Very well.

16 THE COURT: All right, so why don't you put
17 it on the record.

18 MS. BEN-SOREK: Okay. This is a
19 stipulation dated as of today, July 25, 2008, by
20 and between Alan J. Chwick and Edward L. Botsch
21 on the one hand, and Nassau County Police
22 Commissioner Lawrence Mulvey, Nassau County
23 Police Department and the County of Nassau by
24 their attorney, Lorna B. Goodman, Nassau County
25 Attorney, by Deputy County Attorney Liora

1
2 Ben-Sorek.

3 Whereas Mr. Chwick is one of the
4 petitioners in the above captioned special
5 proceeding and is the sole affiant in connection
6 with a proposed order to show cause which was
7 submitted to this court on July 23, 2008, and
8 whereas Mr. Botsch who is present in court today
9 but was not present on July 23rd is also one of
10 the petitioners in the above captioned special
11 proceeding yet has not submitted any affidavit or
12 gone on record with regard to the order to show
13 cause.

14 Whereas hearing to determine whether the
15 proposed order to show cause should be granted
16 was held on July 23, 2008, was adjourned and
17 continued on this date, July 25, 2008.

18 Whereas the parties to the stipulation seek
19 a temporary resolution as to the disposition of
20 Mr. Chwick's Kel-Tec, K-e-l - T-e-c, new word, P
21 like Peter, 32 pistol, serial number 07384, and
22 his JP Sauer, S-a-u-e-r, model 1930 pistol,
23 serial 181119, and with regard to Mr. Botsches'
24 firearm which is a Sig Arms, S-i-g A-r-m-s,
25 model P like Peter, 226 pistol, serial number

1
2 U760840, until the final disposition of this
3 petition in consideration of the mutual promises
4 Mr. Chwick, Mr. Botsch and the county agree as
5 follows:

6 The enforcement of Nassau County Local Law
7 5-2008 shall be held in abeyance until
8 disposition of this proceeding, this petition,
9 only for those Nassau County residents who
10 possess valid permits to carry firearms and
11 possess firearms that would be banned under Local
12 Law 5-2008 prior to June 25, 2008.

13 With respect to non-Nassau County
14 residents, the enforcement of Local Law 5-2008
15 shall be held in abeyance until the disposition
16 of this petition so long as such individual
17 produces a valid gun permit, the firearm or
18 firearms in the plural in the individual's
19 possession are legal, and in either that person's
20 county of residence or where their gun permit was
21 issued, such individual makes a representation
22 that all such firearms which otherwise would be
23 banned pursuant to Nassau County Local Law 5-2008
24 were obtained prior to June 25, 2008, and the
25 individual makes a representation that the

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firearms are to be used for the limited and sole purpose of competition in shooting matches, and that they acknowledge that any false statement would be subject to criminal prosecution.

With respect to gun dealers located in Nassau County who may currently possess, stock or store firearms which would be banned under the provisions of Local Law 5-2008 are prohibited from selling, giving or distributing such firearms to any Nassau County resident or for use in Nassau County until disposition of this petition.

That is the entire agreement between the parties, and we ask that the court adopt this and so order it.

THE COURT: Miss Ben-Sorek -- did I pronounce that correctly?

MS. BEN-SOREK: Yes, sir.

THE COURT: Do you have authorization from the county to enter into this stipulation?

MS. BEN-SOREK: Yes. I have spoken with the Chief Executive Deputy County Attorney Ruth Marcovitz, Bureau Chief of General Investigation, Esther Miller, and they have provided me with the

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authority to make this representation.

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THE COURT: Did you need any further
authority from anyone else to do that?

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MS. BEN-SOREK: No. This was also in
conjunction with the conversation that they held
with the police department as well.

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THE COURT: Let's swear the petitioners in
also at this time.

9

10

(Alan Chwick and Edward Botsch sworn in.)

11

THE CLERK: Please state your name and
address for the court reporter.

12

13

MR. CHWICK: Alan J. Chwick, C-h-w-i-c-k,
5 Brunella Street, Freeport, New York, 11520.

14

15

MR. BOTSCH: Edward L. Botsch, B-o-t-s-c-h,
992 Auburn, A-u-b-u-r-n, Street in Franklin
Square, New York, 11010.

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THE COURT: Let me begin by asking both of
you, you do recognize that you have a right to be
represented by counsel in this matter?

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20

21

MR. CHWICK: Yes, sir.

22

MR. BOTSCH: Yes.

23

THE COURT: You don't wish to have counsel,
is that correct?

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MR. CHWICK: We couldn't have, so the

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answer would be correct.

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THE COURT: Why do you say you couldn't have, sir?

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MR. CHWICK: We had a counsel who was supposed to represent us. At the last moment because of personal issues he had to step aside and we had to rewrite the proposal to come pro se, so hopefully, in the future, there will be one of record for the future.

10

11

THE COURT: Have you discussed any portion of this settlement with an attorney?

12

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MR. CHWICK: I did brief it briefly through the person who has obviously been helping me, and he is in agreement that as long as I read through the stipulation which I did, and I was comfortable with the wording which I was, that, yes.

14

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THE COURT: How about you, Mr. Botsch?

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MR. BOTSCH: Likewise, same.

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THE COURT: You spoke to someone also or not?

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23

MR. BOTSCH: I talked through Alan with the same person we were dealing with.

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THE COURT: Is there any portion of that

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2 agreement or that stipulation that you do not
3 understand?

4 MR. CHWICK: I understand all of it, sir.

5 THE COURT: What about you?

6 MR. BOTSCH: Likewise, I understand all of
7 it.

8 THE COURT: Do you have any questions of
9 Miss Ben-Sorek or myself?

10 MR. CHWICK: At this time, no, other than
11 that I gather because I don't know the system as
12 a lay person, that it then proceeds, of course,
13 to the Article 78 itself, so but up until now,
14 no, I do understand.

15 THE COURT: Do both of you fully agree to
16 be bound by this stipulation?

17 MR. CHWICK: Yes, sir.

18 MR. BOTSCH: Yes, sir.

19 THE COURT: All right. Then there's
20 nothing further today unless you have something
21 to add for the record?

22 MS. BEN-SOREK: No, your Honor. I just
23 wanted to inquire as far as the date by which the
24 county needs to respond to the petition, we would
25 request 60 days.

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THE COURT: How much time do they have? Is it 30 days?

MR. GOODSTEIN: Off the record.

(Colloquy.)

THE COURT: How much time do you need to respond, counsel?

MS. BEN-SOREK: Maximum 60 days.

THE COURT: 60 days is a long time.

MS. BEN-SOREK: 45.

THE COURT: Is 45 days agreeable to you?

MR. CHWICK: I have no problem with 45 days.

THE COURT: What about you, sir?

MR. BOTSCH: Likewise, no problem.

THE COURT: You have 45 days to respond to the petition. There doesn't seem to be any rush now or any urgency right now since it's not going to affect these two gentlemen, correct?

MR. BOTSCH: That's correct.

MR. CHWICK: Correct.

MS. BEN-SOREK: 45 days from today.

THE COURT: 45 days from today so that would make it -- let's come up with an exact date so there's no misunderstanding here.

1
2 THE CLERK: September 9.

3 THE COURT: September 9. You have until
4 September 9 to respond to the petition, okay.

5 MS. BEN-SOREK: Very well, your Honor.

6 THE COURT: Anything else, ladies,
7 gentlemen?

8 MS. BEN-SOREK: No, your Honor.

9 MR. BOTSCH: No, sir.

10 MR. CHWICK: No, sir.

11 THE COURT: Good luck to all of you.

12 MR. BOTSCH: Appreciate it.

13 MR. CHWICK: Thank you.

14
15 So ordered: _____

16 Dated: _____

17 * * *

18 C E R T I F I C A T I O N :

19
20 I, Lorraine Trezza, do hereby certify the foregoing is
21 a true and correct transcript of the within proceeding.

22
23 Lorraine Trezza
24 Lorraine Trezza, RPR
25 Official Court Reporter