

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS.

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

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

Petitioner,

SUBMISSION DATE: 11/3/08
INDEX No.: 13564/08

-against-

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

MOTION SEQUENCE # 1

Respondents.

The following papers read on this motion:

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

Proceeding pursuant to, *inter alia*, CPLR Article 78 by the petitioners Alan Chwick, Thomas G. Fess and Edward L. Botsch for an order: (1) permanently enjoining the respondents from enforcing Nassau County Miscellaneous Laws, Title 69, Local Law 5-2008, as amended; and (2) for, in effect, a declaration that Local Law 5-2008, as amended, is: (i) unconstitutional under the Second Amendment to the United States Constitution and/or violative of New York Civil Rights Law § 4; (ii) void as unduly vague, both facially and "as applied" to the petitioners; and (iii) pre-empted by relevant State Law enactments governing the regulation and

licensing of handguns.

In May of 2008, the Nassau County Legislature enacted Local Law 5-2008, which, in sum, prohibits the possession of "deceptively colored handguns" (see, County of Nassau, Miscellaneous Laws, Title 69, Local Law, 5-2008[1][b], et seq., as amended, Local Law 9-2008).

The statement of legislative intent accompanying the foregoing enactment reveals that the law was primarily created to: (1) protect police officers who might assume that a "deceptively" colored handgun is a toy; and (2) prevent injury or death to children or others who might similarly mistake such a weapon for a toy (Local Law 5-2008, § 2; Pet., Exh., "9" Tr., 37-69).

In part, the subject Local Law, as amended, defines 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, nickel or army green" (Local Law, § 3[b]). The Local Law further states that "[a] substantial portion of the exterior surface of a handgun shall be considered colored any color * * * [other than those listed above] if such color is used alone or as the predominate color in combination with other colors in any pattern * * *" (Local Law § 3[b]). Section 3[c] defines the term "substantial portion of the exterior surface of a handgun" as either (1) "at least twenty five percent of the entire surface area of the handgun"; or (2) "the exterior surface of either the receiver or the slide of a handgun".

However, the Local Law excepts from its reach, handguns which

are: (1) substantially plated with gold; (2) shaded blue by virtue of a so-called "bluing" process designed to limit rust or corrosion; (3) guns which qualify as antique firearms, as defined by Penal Law § 265; and (4) guns whose handles are "composed of ivory, colored so as to appear to be composed of ivory, composed of wood, or so colored as to appear to be composed of wood" (Local Law 5-2008, § 1[b], 6[c]). Pursuant to section 6, it is unlawful to possess a deceptively colored handgun, which possession constitutes a misdemeanor punishable by a fine of not more than \$1000.00 and "imprisonment of not more than one year or both" (Local Law 5-2008, § 5).

The Local Law also provides in substance, that within 30 days after the law's effective date, any one who possesses a hand gun covered by its provisions must turn the gun in to the County Police Commissioner to be disposed of; or (2) alternatively, must modify its appearance to conform with the law or face potential criminal liability (Local Law 5-2008, § 6[a]). Subdivision 7 of the Local Law authorizes the Commissioner of Police to make and promulgate rules and regulations necessary to carry out its provisions.

By *pro se* verified petition filed July, 2008, the petitioners Alan J. Chwick, Thomas G. Fess and Edward L. Botsch commenced the within proceeding pursuant to CPLR article 78 for judgment permanently enjoining enforcement of, and/or striking down, the subject local law.

The petitioners primarily contend that the subject Local Law: (1) is preempted by applicable State law enactments which allegedly

and fully, occupy the field of handgun regulation (Pet., ¶¶ 30-50 see, Penal Law §§ 265, 400, et seq.); (2) is unconstitutionally vague and ambiguous (Pet., ¶¶ 50-61); and (3) violates the Second Amendment to Federal Constitution and New York State Civil Rights Law § 4 (Pet., ¶¶ 62-66).

In further support of the petition, petitioner Chwick, a Nassau county resident, advises that he lawfully possesses two duly registered handguns, to wit: (1) a Kel-Tec, model P32 pistol, the substantial portion of which is a pink polymer color; and (2) a J. P. Sauer [& Sohn], Model 1930 pistol with a brown-colored lower frame, which is allegedly a family heirloom and valuable collector's piece, brought back by Chwick's father from World War II (Pet., ¶¶ 3-4; Exhs., "1" "3").

Petitioner Fess - a resident on Monroe County who attends sanctioned target shooting competitions in Nassau and Suffolk County - possesses a duly registered Glock, Model 20 pistol with a refinished slide piece styled in a multi-colored woodland camouflage pattern containing shades of brown, tan, green and black (Pet., ¶¶ 5-10; Exh., "3") (The petitioners have advised that co-petitioner Botsch is no longer a party to the proceeding) (Pets' Reply at 1, fn 1).

Contemporaneously with the submission of their verified petition, the individual petitioners sought a temporary restraining order predicated on the theory that absent an immediate stay of the law's enforcement, they would be subject to potential criminal liability by virtue of their continued possession of handguns which

they claim qualified as "deceptively colored". However, during the pendency of that application, that parties entered into a stipulation by which the County agree, *inter alia*, to suspend its enforcement of the local law pending the disposition of this proceeding (Ans., Exh., "C," Tr. at 6-8).

The matter is now before this Court for review and resolution of the claims and assertions advanced by the petitioners. The petition should be dismissed. Preliminarily, while it is true, as the respondents assert, that a proceeding pursuant to CPLR Article 78 generally does not lie to challenge the validity of a legislative enactment (*New York City Health and Hospitals Corp. v. McBarnette*, 84 NY2d 194, 203-204 [1994]; *Press v. Monroe County*, 50 NY2d 695, 702 [1980] *see*, *Council of City of New York v. Bloomberg*, 6 NY3d 380, 388 [2006]; *Timber Point Homes, Inc. v. County of Suffolk*, 155 AD2d 671, 674), "courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal, making whatever order is necessary for its proper prosecution" (*Matter of First Nat. City Bank v. City of New York Fin. Admin.*, 36 NY2d 87, 94, [1975]; CPLR 103[c]).

To the extent there is any technical infirmity in the petition by virtue of the statutory challenge advanced therein, the Court will construe that branch of the petition as requesting relief within the context of an appropriately framed action for declaratory relief (e.g., *Press v. Monroe County*, *supra*, at 702; *Matter of Ames Volkswagen v. State Tax Comm.*, 47 NY2d 345, 348 [1979]; *Hudson*

Valley Oil Heat Council, Inc. v. Town of Warwick, 7 AD3d 572, 574; *Janiak v. Town of Greenville*, 203 AD2d 329, 331; *Anonymous v. Peters*, 189 Misc.2d 203, 206-207 [Supreme Court, Nassau County 2001]; CPLR 103[c)).

Turning then to the merits of the dispute, the respondents initially contend that the camouflaged Glock weapon on which petitioner Fess' claims are predicated, is exempt from the reach of the statute, thereby undermining his claims of potential injury and alleged standing in the matter (Resp. Ans., ¶¶87-89, 107-108). The Court agrees.

Although the camouflaged, slide portion of the Fess Glock handgun is pattered with brown, green, tan and black colors (Pets' Exh., "3"), the only color which would arguably be prohibited by the law, is the tan component of the pattern, which: (1) constitutes, at most, perhaps 25% of the top or slide part of the handgun; and (2) is therefore not a "predominate" color component of the weapon, as defined by section 3[b].

Nor does the Fess weapon fall within the definitions contained in section 3[c]. Section 3[c] - which is framed in the alternative - defines the term "substantial portion of the exterior surface of a handgun" in the alternative, as *either*: (1) at least twenty five percent of the *entire* surface area of the handgun; or - separately, and with no qualifying requirements or reference to percent of composition - (2) "the *exterior surface* of either the receiver or the slide of a handgun" [emphasis added].

Since subdivisions 3[c][2] does not qualify its reference to

the exterior surface of the slide or receiver by referring to a proportionate section thereof, the Court reads the phrase "exterior surface" in accord with its plain, textual meaning (*Matter of Theroux v. Reilly*, 1 NY3d 232, 239 [2003], i.e., as a reference to the entire exterior surface of the slide or receiver. Inasmuch as the prohibited, tan color of the Fess weapon is not "prominent;" does not comprise at least 25% of the "entire" surface of the weapon; and does not by itself cover the "exterior surface" of "either the receiver or the slide of a handgun," the gun does not fall within the prohibitions of the Local Law with respect to deceptive coloration.

Similarly, the respondents contend (Ans., ¶¶ 107, 112) - and the petitioners reply papers do not dispute - that Chwick's J. P. Sauer [& Sohn], Model 1930 pistol, is not an illegal weapon under the law as amended, inasmuch as it is finished in brown and blue - colors which are not defined as prohibited under the Local Law, as amended. There is no dispute, however, that Chwick's pink, Kel-Tec, model P32 would fall within the scope of the Local Law's provisions.

With respect to those provisions, the petitioners' first contend that the subject Local Law has been pre-empted by Penal Law Articles 400 and 265, which respectively, govern handgun licensing and contain, *inter alia*, definitions of various firearms and other dangerous weapons.

It is settled that although "[l]ocal governments have been delegated broad powers to enact local legislation consistent with

the State Constitution and general State laws relating to the welfare of its citizens (see, N.Y. Const. art. IX, § 2; Municipal Home Rule Law § 10) * * * [t]he doctrine of preemption represents a fundamental limitation on this delegation by prohibiting local legislation in an area that the State has clearly evinced a desire to preempt" (*Ba Mar, Inc. v. County of Rockland*, 164 AD2d 605, 612 see, *People v. Judiz*, 38 NY2d 529, 531-532 [1976] see also, *DJL Restaurant Corp. v. City of New York*, 96 NY2d 91, 95 [2001]; *Albany Area Builders Ass'n v. Town of Guilderland*, 74 NY2d 372, 376-377 [1989]; *Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 97 [1987]; *People v. De Jesus*, 54 NY2d 465, 468 [1981]).

"Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute," since " 'were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns'" (*Albany Area Builders Ass'n v. Town of Guilderland*, *supra*, at 377, quoting from, *Jancyn Mfg. Corp. v County of Suffolk*, *supra*, 71 NY2d at 97 see, *Vatore v. Commissioner of Consumer Affairs of City of New York*, 83 NY2d 645, 649 [1994]; *Hertz Corp. v. City of New York*, 80 NY2d 565, 569 [1992]; *Incorporated Village of Nyack v. Daytop Village, Inc.*, 78 NY2d 500, 505 [1991]).

Significantly, "the Legislature need not express its intent to preempt * * * [since] [t]hat intent may be implied from the nature

of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area" (*Albany Area Builders Ass'n v. Town of Guilderland, supra*, at 377 *see, Cohen v. Board of Appeals of Village of Saddle Rock*, 100 NY2d 395, 400-401 [2003]; *Vatore v. Commissioner of Consumer Affairs of City of New York, supra*, at 649; *Village of Lacona v. State, Dept. of Agr. and Markets*, 51 AD3d 1319). Accordingly, in considering whether an intent to preempt exists, courts "will examine whether the State has acted upon a subject and whether, in taking action, it has demonstrated a desire that its regulations should preempt the possibility of discordant local regulations" (*Cohen v. Board of Appeals of Village of Saddle Rock, supra*, at 400).

However, the fact that "State and local laws touch upon the same area is insufficient to support a determination that the State has preempted the entire field of regulation in a given area" (*Jancyn Mfg. Corp. v. County of Suffolk, supra*, at 99 *see, Incorporated Village of Nyack v. Daytop Village, Inc., supra*, at 505). Indeed, "Local laws of general application - which are aimed at legitimate concerns of a local government - will not be preempted if their enforcement only incidentally infringes on a preempted field" or tangentially "impact on the State's interests" (*DJL Restaurant Corp. v. City of New York, supra*, 96 NY2d at 96-97; *Incorporated Vil. of Nyack v. Daytop Vil., supra*, at 506).

Additionally, "if the State, through its legislative enactments, does not regulate the entire area of activities, a local

law is not preempted merely because it prohibits conduct permitted by state law" (*Citizens for a Safer Community v. City of Rochester*, 164 Misc.2d 822, 833 [Supreme Court, Monroe County 1994] see also, *Jancyn Mfg. Corp. v County of Suffolk, supra*, at 100; *People v New York Trap Rock Corp.*, 57 NY2d 371, 378 [1982]; *People v. Judiz, supra*, 38 NY2d at 531-532 [1976]; *People v. Cook*, 34 NY2d 100, 109 [1974]; *Belle v. Town Bd. of Town of Onondaga*, 61 AD2d 352, 356; *People v. Ortiz*, 125 Misc.2d 318, 329 [New York City Criminal Court 1984])). Indeed, "unless pre-emption is limited to situations where the intention is clearly to preclude the enactment of varying local laws, 'the power of local governments to regulate would be illusory'" (*People v. Judiz, supra*, at 532, quoting from, *People v Cook*, 34 NY2d 100, 109 [1974]). "Because Local Ordinances carry a strong presumption of validity, the burden in on the challenger to show that an ordinance is preempted" (*Black Car Assistance Corp. v. The County of Nassau*, ___ Misc3d ___, 2007 WL 4473344 at 18 [Supreme Court, Nassau County 2007]; *MHC Greenwood Village NY, L.L.C. v. County of Suffolk*, 18 Misc.3d 312, 319 [Supreme Court, Suffolk County 2007])).

Upon applying these principles to the facts presented, the Court concludes that the challenged Local Law neither infringes upon a preempted field nor is otherwise invalid by virtue of any conflict with existing State-law enactments.

Initially, the Court notes that the petitioners have not identified legislative history or a specific statutory provision which expressly advises that the State intended to preempt the

entire field of handgun regulation "to the exclusion" of all local law enactments (*Zorn v. Howe*, 276 AD2d 51, 54-55 see, *People v. Judiz*, *supra*, at 532 see generally, *Town of Concord v. Duwe*, 4 NY3d 870, 873 [2005]; *Vatore v. Commissioner of Consumer Affairs of City of New York*, *supra*, 83 NY2d at 649-650; *Jancyn Mfg. Corp. v County of Suffolk*, *supra*, 71 NY2d at 98; *People v New York Trap Rock Corp.*, *supra*, at 377).

To the contrary, "[i]n the area of weapon regulation, the courts in this state have upheld local laws limiting possession and use" (*Citizens for a Safer Community v. City of Rochester*, *supra*, at 833 see also, *People v. Judiz*, *supra*; *People v. Ortiz*, *supra*; *Grimm v. City of New York*, 56 Misc.2d 525 [Supreme Court, Queens County, 1968]). It has been relatedly concluded that "[c]learly the State has not, either directly or indirectly, regulated all aspects of gun possession and use as to time, place and circumstance" (*Citizens for a Safer Community v. City of Rochester*, *supra*, at 833 see also, *de Illy v. Kelly*, 6 AD3d 217, 218; *People v. Ortiz*, *supra*).

To be sure, "Article 265 creates a general ban on handgun possession," while Article 400 of the Penal Law creates "a locally controlled process" which constitutes "the exclusive statutory mechanism for the licensing of firearms in New York State" (*Bach v. Pataki*, 408 F.3d 75, 79-81 [2nd Cir. 2005]; *O'Connor v. Scarpino*, 83 NY2d 919, 920 [1994]). However, the subject Local Law does not legislate in the area of licensing criteria or, by its terms, directly preclude an applicant from registering a handgun pursuant to Penal Law § 400. Moreover, neither Article 265 nor Article 400