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# A Sitting Duck: Local Government Regulation of Hunting and Weapons Discharge in the State of New York

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## ARTICLE

# A Sitting Duck: Local Government Regulation of Hunting and Weapons Discharge in the State of New York

GARY E. KALBAUGH\*

### I. INTRODUCTION

On March 31, 2014, the New York State Legislature significantly modified New York's Environmental Conservation Law.<sup>1</sup> The Environmental Conservation Law imposes limitations on the discharge of longbows.<sup>2</sup> A longbow is defined by New York's Department of Environmental Conservation as "a longbow,

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1. N.Y. ENVTL. CONSERV. LAW § 11-0931(2), (4) (McKinney 2014). Environmental Conservation Law, § 8, 2014 N.Y. Laws 94-96. The changes became effective on April 1, 2014. *Id.* at 105.

2. It also imposes limitations on the discharge of a firearm and crossbow. N.Y. ENVTL. CONSERV. LAW § 11-0931(4)(a)(1)-(2). Firearm is defined by Department of Environmental Conservation regulations as

any rifle, pistol, shotgun or muzzleloading firearm which by force of gunpowder, or an airgun [using ammunition no smaller than .17 caliber and producing projectile velocities of 600 feet per second or more] . . . that expels a missile or projectile capable of killing, wounding or otherwise inflicting physical damage upon fish, wildlife or other animals.

N.Y. COMP. CODES R. & REGS. tit. 6, § 180.3(a) (2014). A crossbow is defined by Department of Environmental Conservation regulations as "a bow and string, either compound or recurve, that launches a bolt or arrow, mounted upon a stock with a trigger that holds the string and limbs under tension until released." *Id.* § 2.3(a)(1).

recurve bow or compound bow which is designed to be used by holding the bow at arm's length, with arrow on the string, and which is drawn, pulled and released by hand or with the aid of a hand-held trigger device attached to the bowstring.”<sup>3</sup>

Before the 2014 amendment, longbows could not be discharged in such a way that an arrow passes over a road or within 500 feet of a dwelling, except with the consent of the owner of such dwelling.<sup>4</sup> The 2014 amendment reduced this 500-foot setback to 150 feet, making New York's rule generally consistent with that of neighboring states.<sup>5</sup> This is a radical difference: a circle with a 500 foot radius has an area of slightly over 18 acres while a circle with a 150 foot radius has an area of slightly over 1.6 acres.<sup>6</sup>

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3. *Id.* § 2.4(a)(3).

4. *See* N.Y. ENVTL. CONSERV. LAW §§ 11-0931(4)(a)(1)-(2), (4)(b)(1) (McKinney 2014). There are a variety of exceptions, such as programs sponsored by public schools, target ranges, and over water while hunting migratory birds. *Id.* § 11-0931(4)(b)(2)-(4). Since these are outside of the scope hereof, they are not further discussed.

5. *See* Environmental Conservation Law, § 8, 2014 N.Y. LAWS 95. *See also* N.Y. ENVTL. CONSERV. LAW § 11-0931(4)(a)(2). New Jersey and Pennsylvania have state laws imposing 150-foot rules. *See, e.g.*, N.J. STAT. ANN. § 23:4-16(d)(2) (West 2014); 34 PA. CONS. STAT. § 2505(c)(2) (2008). Connecticut has no state law distance specified. In the case of Connecticut, though the Commissioner of the Department of Energy and Environmental Protection has the statutory authority to impose a specified setback requirement by rule, the Commissioner has only done so with respect to firearms, and there is no state-level discharge distance requirement with respect to longbows. *See* CONN. AGENCIES REGS. § 26-66-1(d) (2013); CONN. GEN. STAT. § 26-66(13) (1988).

It is prohibited to hunt with, shoot, or carry a loaded firearm within 500 feet of any building occupied by people or domestic animals, or used for storage of flammable material . . . unless written permission for lesser distances is obtained from the owner and carried. Landowners, their spouse, and lineal descendants are exempt from this restriction, providing any building involved is their own. *The 500 foot zone does not apply to bowhunting.*

*Hunting Laws and Regulations*, CONN. DEPT OF ENERGY & ENVTL. PROT., [http://www.ct.gov/deep/cwp/view.asp?a=2700&q=556896&deepNav\\_GID=1633](http://www.ct.gov/deep/cwp/view.asp?a=2700&q=556896&deepNav_GID=1633) (last visited Feb. 11, 2015) [hereinafter *Connecticut Hunting Laws and Regulations*] (emphasis added), archived at <https://perma.cc/4YLY-CGMH?type=source>.

6. The area of a circle is equal to pi multiplied by the square of the radius or  $\pi r^2$ . This equation is derived from the proof of Archimedes. *See* ARCHIMEDES, THE WORKS OF ARCHIMEDES 91-98 (T.L. Heath trans., Cambridge University Press 1897).

## II. NEW YORK'S GENERAL LAW PROVISIONS REGULATING DISCHARGE OF A LONG BOW

### A. New York's Regulation of Wildlife

New York's Environmental Conservation Law proclaims the State's title to wildlife:

The State of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership. Any person who kills, takes or possesses such fish, game, wildlife, shellfish, crustacea or protected insects thereby consents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition.

The Environmental Conservation Law vests a state agency, the Department of Environmental Conservation, with the authority to promulgate rules and regulations to carry out the purposes of the Environmental Conservation Law.<sup>7</sup> This mandate includes the regulation of hunting and discharge of firearms, longbows, and crossbows.<sup>8</sup>

### B. New York's Historical Regulation of Discharge of a Long Bow

Historically, New York State did not have a specified distance requirement with respect to the discharge of a firearm, let alone a longbow.<sup>9</sup> In 1949, the Legislature amended the Environmental Conservation Law to impose the 500-foot setback requirement with respect to firearms discharged within Rockland County.<sup>10</sup> In the following years the counties to which the requirement applied were gradually expanded so that, by 1957, when the requirements were made equally applicable to a

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7. N.Y. ENVTL. CONSERV. LAW § 3-0101.

8. *See id.* § 11-0701.

9. *See generally* Environmental Conservation Law, § 1(4)(b), 1957 N.Y. LAWS 466-67. Connecticut still maintains no state-level distance rule with respect to discharge of a longbow. *See generally Connecticut Hunting Laws and Regulations, supra* note 5.

10. Environmental Conservation Law, § 1(b), 1949 N.Y. LAWS 1436-37.

discharge of a longbow, the 500-foot setback requirement applied generally throughout the State.<sup>11</sup> The addition of longbows to the 500-foot setback rule was upon a recommendation by the Joint Legislative Committee on Revision of the Conservation Law. In proposing a bill to add longbows to the 500-foot setback rule, the Joint Legislative Committee explained:

This bill is intended not only as a safety measure but also in consideration of the objections of resident landowners to having wild game, particularly deer, shot in close proximity to dwellings. Some hunters offend resident landowners and abuse their hunting privileges by taking advantage of the easy targets offered by semi-tame deer and small game pets in hunting season. The bill, while not seriously curtailing the opportunities for hunting by bow, should create a better feeling between archers and landowners.<sup>12</sup>

For over fifty years, the 500-foot setback for discharge of a firearm applied equally to the discharge of a longbow until, as noted above, in 2014 the setback for discharge of a longbow was reduced to 150 feet from a dwelling.

This change, recommended by New York State's Department of Environmental Conservation, was motivated by, among others, the occurrence of only two reported bow hunting injuries in the State of New York, both due to self-inflicted accidental cuts while handling arrowheads,<sup>13</sup> the experience of neighboring states with

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11. Environmental Conservation Law, § 1(4)(b), 1957 N.Y. LAWS 466-67.

12. *Report of the New York State Joint Legislative Committee on Revision of the Conservation Law* 22, Leg. Doc. (1957) No. 11.

13. N.Y. DEP'T OF ENVTL. CONSERVATION, MANAGEMENT PLAN FOR WHITE-TAILED DEER IN NEW YORK STATE 54 (2011), available at [http://www.dec.ny.gov/docs/wildlife\\_pdf/deerplan2012.pdf](http://www.dec.ny.gov/docs/wildlife_pdf/deerplan2012.pdf) (last visited Feb. 11, 2015) [hereinafter WHITE-TAILED DEER MGMT. PLAN], archived at <http://perma.cc/7NTB-J9D3>. However, note that at least one accident has subsequently occurred, an injury of a Massachusetts resident bow hunting in Columbia County, New York from an arrow discharged by his father. See Diane Valden, *Father's Arrow Strikes Son in Copake Hunting Accident*, COLUMBIA PAPER (Oct. 24, 2014), <http://www.columbiapaper.com/2014/10/fathers-arrow-strikes-son-copake-hunting-mishap/>, archived at <http://perma.cc/L6HY-64K3>; *New York Hunting Accidents in Warren, Columbia Counties*, N.Y. OUTDOOR NEWS, Nov. 14, 2014, at 16.

lower setbacks, and the perceived safety of a longbow when compared with a firearm:

Arrows have a much shorter range than projectiles shot from a firearm. The maximum range of an arrow occurs when it is released at a 45 degree angle of elevation, from which it could theoretically travel a couple hundred yards. However, this trajectory is extremely unlikely in any bowhunting situation. Archery shots taken at deer are typically discharged either on a horizontal plane or on a downward trajectory. In these situations, an arrow travels only a short distance before either hitting the target or dropping to the ground. Moreover, most bowhunters prefer to shoot from an elevated position (e.g., tree stands or tree blinds), and arrows are discharged directly towards the ground. Bowhunting also typically occurs at much shorter ranges than firearms hunting (25 yards or less), meaning that the existence of unwanted objects in the field of fire is extremely rare.<sup>14</sup>

Perceived benefits of controlling deer populations include reduction of human injuries due to deer-vehicle collisions,<sup>15</sup> reduction of Lyme Disease, Babesiosis, Rocky Mountain Spotted Fever, and other diseases for which ticks resident on deer are a direct or indirect vector,<sup>16</sup> reduced destruction of agriculture,<sup>17</sup> and mitigation of other negative environmental externalities associated with high deer populations, such as depletion of forest undergrowth and displacement of other wildlife.<sup>18</sup> Strategies other than culling deer, such as contraception or surgical sterilization, have been found to be “ineffective”<sup>19</sup> and can have unintended consequences. In one study at Cornell University, where surgical sterilization of does was attempted at \$1,200 per doe, multitudes of bucks were attracted when the does, rendered

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14. WHITE-TAILED DEER MGMT. PLAN, *supra* note 13, at 54.

15. *See id.* at 54.

16. *See generally* U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, TICKBORNE DISEASES OF THE UNITED STATES: A REFERENCE MANUAL FOR HEALTH CARE PROVIDERS, (2014), available at <http://www.cdc.gov/lyme/resources/TickborneDiseases.pdf> archived at <http://perma.cc/8KFF-4XXD>.

17. WHITE-TAILED DEER MGMT. PLAN, *supra* note 13, at 22.

18. *Id.* at 27-28.

19. *See id.* at 49-52. Surgical sterilization is also prohibitively expensive at \$1,200 per deer. *See id.* at 51.

unable to conceive, remained in estrous indefinitely instead of only during the few weeks otherwise typical and, as a result, continuously attracted bucks in unprecedentedly large numbers, thereby defeating the objectives of the program and causing ecological disruption.<sup>20</sup>

The change from 500 to 150 feet makes bow hunting possible in semi-rural, low-density areas, whereas in recent decades, it was largely only feasible in rural areas due to the 500 foot setback requirements.<sup>21</sup>

### C. Penal Law Restrictions on the Discharge of a Long Bow

In addition to the Environmental Conservation Law, New York's Penal Law section 265.35(3) makes it a class A misdemeanor to "otherwise than in self defense or in the discharge of official duty . . . wilfully discharge[] any species of . . . weapon . . . in a public place, or in any place where there is any person to be endangered thereby."<sup>22</sup> A New York Attorney General opinion, while sidestepping the question of what constitutes a "public place," suggests that a discharge of a weapon in compliance with the Environmental Conservation Law is, *ipso facto*, compliant with Penal Law section 265.35(3).<sup>23</sup> Moreover, regardless of setbacks, a discharge of a firearm or weapon on private property by or with permission of the property holder is not likely to be deemed "a public place."<sup>24</sup>

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20. Jackson Landers, *Trying to Limit the Number of Deer, with Surprising Results*, WASH. POST (Sept. 29, 2014), [http://www.washingtonpost.com/national/health-science/trying-to-limit-the-number-of-deer-with-surprising-results/2014/09/29/3c16f9dc-28a5-11e4-958c-268a320a60ce\\_story.html](http://www.washingtonpost.com/national/health-science/trying-to-limit-the-number-of-deer-with-surprising-results/2014/09/29/3c16f9dc-28a5-11e4-958c-268a320a60ce_story.html), archived at <https://perma.cc/993Y-MG8G?type=source>.

21. For these purposes, the Nassau-Suffolk Regional Comprehensive Plan's definition of "low density" as an area with a maximum of one dwelling per acre has been adopted. See NASSAU-SUFFOLK REGIONAL PLAN. BOARD, THE NASSAU-SUFFOLK REGIONAL COMPREHENSIVE PLAN 51 (1970), available at <http://www.suffolkcountyny.gov/Portals/0/planning/CompPlan/NassSuffRegCPSumr.pdf>, archived at <http://perma.cc/R5SP-YVV6>.

22. N.Y. PENAL LAW § 265.35(3) (McKinney 1974).

23. The context was a parallel limitation on discharge of firearms. "Thus, if the use of firearms is in accordance with the ECL . . . there would be no violation of the Penal Law [section 265.35]." 87-64 N.Y. Op. Att'y Gen. 139-40 (1987).

24. The cases on point involving this provision relate to discharges of a firearm occurring in places other than on private property. See, e.g., *People v.*

### III. THE AUTHORITY OF LOCAL GOVERNMENTS IN NEW YORK STATE

#### A. New York's Local Governance

The State of New York is, for the purposes of municipal governance, divided into counties, cities, towns, and villages, each of which is deemed a “local government.”<sup>25</sup> Although only capable of exercising those powers granted by the State Constitution or legislature,<sup>26</sup> local governments have broad authority in New York State.

#### 1. Counties

The division of New York State into counties dates back to provincial times.<sup>27</sup> A county is a political subdivision of the state and municipal corporation.<sup>28</sup> Like a town, discussed below, a county is an involuntary corporation in that it was not formed by popular action, as are villages and, in practice, cities.<sup>29</sup> Instead, it is created “for convenience and for more expeditious state administration.”<sup>30</sup> Outside of New York City, which encompasses five counties, a county is the largest subdivision in the State. Counties wholly encompassed in cities, such as the five counties comprising New York City, are exceptional in that they do not have self-governance.<sup>31</sup>

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Burden, 968 N.Y.S.2d 263 (App. Div. 2013), *perm. app. denied*, 9 N.E.3d 913 (N.Y. 2014); *People v. Jacobus*, 234 N.Y.S.2d 190 (App. Div. 1962); *Gross v. Goodman*, 19 N.Y.S.2d 732 (Sup. Ct. 1940).

25. N.Y. CONST. art. IX, § 3(d)(2). *See also* N.Y. GEN. MUN. LAW § 2 (McKinney 2014); N.Y. MUN. HOME RULE LAW § 2(8) (McKinney 2014).

26. *Sureway Towing, Inc. v. Martinez*, 779 N.Y.S.2d 109, 111 (App. Div. 2004).

27. *Markey v. Queens Cnty.*, 49 N.E. 71, 72 (N.Y. 1898).

28. *See* N.Y. COUNTY LAW § 3 (McKinney 2014). *See also* *Vill. of Kenmore v. Erie Cnty.*, 169 N.E. 637, 639 (N.Y. 1930).

29. *See Vill. of Kenmore*, 169 N.E. at 639; *Curtis v. Eide*, 244 N.Y.S.2d 330, 332 (App. Div. 1963).

30. *Curtis*, 244 N.Y.S.2d at 332.

31. *See* N.Y. CONST. art. IX, § 1(a).



2015]

A SITTING DUCK

935

## 2. Towns

A town is, like a county, a subdivision of the state, a municipal corporation, and an “involuntary” corporation in that it was not formed by popular action.<sup>32</sup> Towns are subdivisions of counties.<sup>33</sup>

## 3. Cities

A city is a municipal corporation.<sup>34</sup> Cities can only be formed by the state legislature’s approval of a charter.<sup>35</sup> However, unlike a town or county, a city has, in practice, been a voluntary corporation with the charter submitted for approval of the legislature by the initiative of voters in the area.<sup>36</sup> The extent of self-governance differs from city to city since it is dependent on the terms of the city’s charter.

## 4. Villages

A village is a municipal corporation and, similar to a city and unlike a town or a county, it is a “voluntary” corporation in that voters establish villages upon a proposition to incorporate a territory as a village.<sup>37</sup> All villages exist within towns.<sup>38</sup> The

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32. See N.Y. TOWN LAW § 2 (McKinney 2014); *Curtis*, 244 N.Y.S.2d at 332.

33. State law divides towns into two classes, primarily based on population. N.Y. TOWN LAW § 10 (McKinney 2014). This distinction is not relevant for the discussion herein.

34. ST. OF N.Y., DEP’T OF ST., LOCAL GOVERNMENT HANDBOOK 29 (2009), available at [www.dos.ny.gov/lg/publications/Local\\_Government\\_Handbook.pdf](http://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf) [hereinafter LOCAL GOV’T HANDBOOK], archived at <http://perma.cc/6KVV-P34A>. State law formerly divided cities into three classes, based on population. *Id.* at 52. A relic of this can be found in, *inter alia*, N.Y. VEH. & TRAF. LAW § 107 (McKinney 2014). This was abolished in favor of a general regime applicable to all cities, effective in 1924, but maintaining the “second class” cities that were formed before this time as still subject to the second-class city regime. LOCAL GOV’T HANDBOOK, *supra*, at 52-53. The historical distinctions are not relevant for the discussion herein.

35. LOCAL GOV’T HANDBOOK, *supra* note 34, at 51-52. The original charters of two cities, Albany and New York City, precede the existence of New York State. *Id.* at 51. The most recent charter was that of the City of Rye in 1942. *Id.*

36. *Id.* at 51-52. See also *Vill. of Kenmore*, 169 N.E. at 639; *Curtis*, 244 N.Y.S.2d at 332.

37. See N.Y. VILLAGE LAW §§ 2-200, 2-202 (McKinney 2014). See also *Vill. of Kenmore*, 169 N.E. at 639.

Municipal Home Rule Law requires that “any local law adopted by a town board shall be effective and operative only in that portion of such town outside of any village or villages therein except in a case where the power of such town board extends to and includes the area of the town within any such village or villages.”<sup>39</sup>

### 5. Hamlets

Hamlets are unincorporated areas governed by the towns within which they are situated, often coterminous with census designated places.<sup>40</sup> They have no status under state law.

### B. Home Rule

The current constitution dates from 1938, one of five over the history of New York State.<sup>41</sup> Home rule powers, i.e., a high degree of autonomy in local affairs, were provided by New York’s Constitution to cities in 1894, counties in 1938, larger villages in

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38. N.Y. VILLAGE LAW § 2-200(1)(c) (McKinney 1974).

39. N.Y. MUN. HOME RULE LAW § 11(3) (McKinney 2014).

40. See generally LOCAL GOV’T HANDBOOK, *supra* note 34, at 67; *Geographic Terms and Concepts – Place*, U.S. CENSUS BUREAU, [https://www.census.gov/geol/reference/gtc/gtc\\_place.html](https://www.census.gov/geol/reference/gtc/gtc_place.html) (last visited Feb. 11, 2015) [hereinafter *Geographic Terms and Concepts*], archived at <https://perma.cc/3WPH-BCRG?type=source>. The Census Bureau defines a “census designated place” as an area

delineated to provide data for settled concentrations of population that are identifiable by name but are not legally incorporated under the laws of the state in which they are located. The boundaries usually are defined in cooperation with local or tribal officials and generally updated prior to each decennial census. These boundaries, which usually coincide with visible features or the boundary of an adjacent incorporated place or another legal entity boundary, have no legal status, nor do these places have officials elected to serve traditional municipal functions. . . . CDPs must be contained within a single state and may not extend into an incorporated place.

*Geographic Terms and Concepts, supra.*

41. *Schaffer Law Library’s Guide on the New York State Constitution*, ALB. L. SCH., <http://www.albanylaw.edu/media/user/librarypdfs/guides/nyconsti.pdf> (last visited Feb. 11, 2015), archived at <https://perma.cc/4TB9-3BBR?type=pdf>. The others were in 1777, 1821, 1846, and 1894, though major revisions were made at other times. *Id.*

1940, and all villages and towns in 1963.<sup>42</sup> The 1963 revisions required the legislature to enact a home rule law. The home rule law subsequently enacted largely tracks the constitution's home rule provisions,<sup>43</sup> and it contains interpretative guidance stating that the, “[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.”<sup>44</sup> The State constitutional provision required the legislature to enact implementing legislation.<sup>45</sup> The implementing legislation has a special State constitutional status: the legislature can only diminish or repeal a right legislatively granted to local governments by enacting a statute with approval of the governor in two successive legislative sessions.<sup>46</sup>

The State Constitution guarantees that, regardless of the scope of the implementing legislation, “every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution.”<sup>47</sup>

Specifically noted, so long as not inconsistent with the constitution or State law, is the authority of local government to adopt and amend local laws related to “[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein.”<sup>48</sup> The subsequently enacted

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42. See Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOK. L. REV. 321, 329 n.37 (1999). The 1963 amendments were effective in 1964. See 1 PATRICIA SALKIN, *NEW YORK ZONING LAW AND PRACTICE* § 2:04 (2014). See generally Richard Briffault, *Local Government and the New York Constitution*, 1 HOFSTRA L. & POL’Y SYMP. 79, 86-87 (1996).

43. See *McDonald v. N.Y.C. Campaign Fin. Bd.*, 965 N.Y.S.2d 811, 823 (Sup. Ct. 2013), *aff’d*, 985 N.Y.S.2d 557 (App. Div. 2014).

44. N.Y. CONST. art. IX, § 3(c). Previously, the opposite interpretative rule—known as “Dillon’s Rule” due to its association with an Iowa judge who was said to have created it, Judge John Forrest Dillon—applied narrowly construing any grant of power by the State. For the history of this rule and its application in New York State, see Roderick M. Hills, *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647, 653 n. 26 & 27 (2013-14).

45. See N.Y. CONST. art. IX, § 2(a)-(b).

46. *Id.* art. IX, § 2(b)(1).

47. *Id.* art. IX, § 2(c).

48. *Id.* art. IX, § 2(c)(10).

Municipal Home Rule Law contains provisions nearly verbatim restating these constitutional provisions.<sup>49</sup>

The Municipal Home Rule Law was enacted in a context that sought to augment the authority of local government. It clarifies,

[i]t is not the intention of the legislature . . . to abolish or curtail any rights . . . conferred upon or delegated to any local government . . . unless a contrary intention is clearly manifest . . . or to restrict the powers of the legislature to pass laws regulating matters other than the property, affairs or government of local governments.<sup>50</sup>

Moreover, like the constitutional provision it is based upon, the law requires that it be “liberally construed” and that the “powers . . . granted shall be in addition to all other powers granted to local governments by other provisions of law.”<sup>51</sup>

### C. Supersession

The Municipal Home Rule Law grants both towns and villages the right of “supersession.”<sup>52</sup> This authorizes the modification of New York’s Town Law or Village Law, as applicable, “in its application to . . . the property, affairs or government of the town [or village, as applicable] or to other matters [specifically authorized by the Municipal Home Rule Law].”<sup>53</sup> It merely allows a local government to supersede the application of the Town Law or Village Law, as applicable.<sup>54</sup> Since any limitation on a town or village’s ability to regulate hunting, firearms, or weapons, does not derive from the Town

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49. See generally N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(12) (McKinney 2014).

50. *Id.* § 50(3).

51. *Id.* § 51. See *Kamhi v. Town of Yorktown*, 547 N.E.2d 346, 348 (N.Y. 1989).

52. See N.Y. MUN. HOME RULE LAW §§ 10(1)(ii)(d)(3) (for towns), 10(1)(ii)(e)(3) (for villages) (McKinney 2014).

53. *Id.* §§ 10(1)(ii)(d)(3) (for towns), 10(1)(ii)(e)(3) (for villages).

54. See *Kamhi*, 547 N.E.2d at 349 (“When municipalities act within their supersession authority, even local laws that are inconsistent with the Town Law may be valid.”). See also *Rozler v. Franger*, 401 N.Y.S.2d 623, 626 (App. Div. 1978), *aff’d*, 386 N.E.2d 262 (N.Y. 1978); James D. Cole, *Local Authority to Supersede State Statutes*, 63 N.Y. B. J. 34, 34-35 (1991).

2015]

A SITTING DUCK

939

Law or Village Law, with an exception for towns noted below in Part IV(B), a town's or village's ability to supersede the Town Law or Village Law does not impact the question of whether a town or village can regulate hunting, the discharge of firearms, or a weapon beyond the regulations imposed by the State.

#### D. "Occupying the Field"

It is important to consider the extent of local government authority and where State law preempts it. The outer boundary of municipal home rule authority can be approximated as where the state "has demonstrated its intent to preempt an entire field and thereby preclude any further local regulation."<sup>55</sup> In such a case, "local laws regulating the same subject matter will be deemed inconsistent and will not be given effect."<sup>56</sup> The legislature's interest in regulating "matters of statewide importance" has been described as "transcendent."<sup>57</sup>

##### 1. Preemption Generally

In declaring unlawful a portion of a city ordinance prohibiting the carrying or possession of firearms or other weapons in an emergency, the Court noted that a "local ordinance attempting to impose any additional regulation in a field where the state has already acted will be regarded as conflicting with the state law and will be held to be invalid."<sup>58</sup>

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55. *City of New York v. Town of Blooming Grove Zoning Bd. of Appeals*, 761 N.Y.S.2d 241, 242 (App. Div. 2003) (citing *Inc. Vill. of Nyack v. Daytop Vill.*, 583 N.E.2d 928 (N.Y. 1991)), *perm. app. denied*, 799 N.E.2d 619 (N.Y. 2003). *See also* *Ardizzone v. Elliott*, 550 N.E.2d 906, 909 (N.Y. 1989).

56. *Town of Blooming Grove Zoning Bd. of Appeals*, 761 N.Y.S.2d at 242.

57. *Cohen v. Bd. of Appeals of Saddle Rock*, 795 N.E.2d 619, 621 (N.Y. 2003).

58. *People v. Kearse*, 289 N.Y.S.2d 346, 352 (Syracuse City Ct. 1968), *appeal dismissed*, 295 N.Y.S.2d 192 (Onondaga Cnty. Ct. 1968). *See* N.Y. EXEC. LAW § 24(1)(d) (McKinney 2014) (New York's Executive Law now permits, in the event of an emergency where the public is imperiled, the executive authority of a local government to suspend or limit the "sale, dispensing, use or transportation of alcoholic beverages, firearms, explosives, and flammable materials and liquids."); *see also* *People v. Delgado*, 146 N.Y.S.2d 350, 357 (N.Y.C. Magis. Ct. 1955) (finding preemption of New York City ordinance expanding upon state law regulations on the sale of toy guns).

In a case relating to whether Suffolk County, out of concern for the county's water supply, could prohibit septic additives not already prohibited by New York State's Environmental Conservation Law, New York's Court of Appeals noted, "although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with . . . any general law of the State."<sup>59</sup>

The Court of Appeals established that a "local law may be ruled invalid as inconsistent with State law . . . where an express conflict exists between the State and local laws . . . [and] where the State has clearly evinced a desire to preempt an entire field."<sup>60</sup> Similarly, a "comprehensive and detailed statutory scheme" may evidence implied preemption by the State.<sup>61</sup>

An "inconsistency" is found to exist where the local law "(1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not prescribe or (2) imposes additional restrictions on rights granted by State law."<sup>62</sup>

The New York Department of Environmental Conservation's view as to whether a provision in the Environmental Conservation Law preempts local laws on the same subject matter is given special deference, since it is charged with responsibility for the Environmental Conservation Law.<sup>63</sup>

In the context of municipal regulation of discharge of a firearm, the New York State Department of Environmental Conservation has observed:

Clearly, enactment of a local law prohibiting discharge of firearms where a general state law expressly permits such discharge would prohibit an activity specifically permitted by state law. Accordingly, such a law is inconsistent with a

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59. *Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 518 N.E.2d 903, 905 (N.Y. 1987) (citations omitted).

60. *Id.*

61. *Cohen*, 795 N.E.2d at 622.

62. *Jancyn Mfg. Corp.*, 518 N.E.2d at 905 (citations omitted).

63. *See id.* at 903-04.

general law and beyond the authority of the municipality that enacted it.

By enactment of ECL Sec. 11-0931(4)(a)(2) prohibiting discharge of firearms within 500 feet of certain structures . . . the Legislature has shown its intention to occupy the field of regulation in this area and to preempt any inconsistent local enactment. . . . To hold otherwise would have the effect of rendering the State law a nullity, and lead to a subdividing of the State into jurisdictions with different discharge of firearms provisions. . . .

Recognizing the preemptive effect of ECL Sec. 11-0931(4), some municipalities have sought and obtained specific statutory authority to restrict discharge of firearms. Town Law Sec. 130(27) lists towns which may, upon 30-days notice to the Department of Environmental Conservation, restrict discharges in areas where such activity may be hazardous to the general public or nearby residents.<sup>64</sup>

## 2. Preemption of Penal Law

New York's Penal Law is where the only other relevant state-level restrictions on the discharge of a firearm or weapon reside.<sup>65</sup> In an Appellate Division case, evaluating whether Nassau County could lawfully prohibit pistols with an exterior substantially comprised of any color other than black, grey, silver, steel, nickel, or army green, owners of pistols of various colors, including a gold pistol commemorating Port Authority officers killed in the September 11, 2001 attacks, claimed that the State had preempted the field via the pistol licensing requirements in section 400.00 of the Penal Law.<sup>66</sup> The court noted, "conflict preemption occurs when a local law prohibits what a State Law explicitly allows, or when a State Law prohibits what a local law

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64. New York State Department of Environmental Conservation, Declaratory Ruling #11-04 (March 4, 1992); *see also* Vill. of Lacona v. N.Y. Dep't of Agric. & Mkts., 858 N.Y.S.2d 833, 834 (App. Div. 2008) (The Commissioner of Agriculture and Markets ordered a village not to apply a village ordinance found to be in conflict with the Environmental Conservation Law).

65. *See supra* Part II(C).

66. *Chwick v. Mulvey*, 915 N.Y.S.2d 578, 581 (App. Div. 2010).

explicitly allows.”<sup>67</sup> It further noted, “the Legislature’s enactment of a comprehensive and detailed regulatory scheme in an area in controversy is deemed to demonstrate an intent to preempt local laws.”<sup>68</sup> Because of the detailed regulatory edifice already in existence at the state-level, Nassau County’s local law was deemed invalid.<sup>69</sup>

#### IV. MUNICIPAL AUTHORITY TO REGULATE HUNTING OR THE DISCHARGE OF A FIREARM OR LONGBOW

##### A. Authority to Regulate Hunting

The question arises as to whether the state has “occupied the field” with respect to the regulation of hunting. The New York Attorney General has consistently held that local governments cannot restrict or otherwise regulate hunting since this power is exclusively vested with the state.<sup>70</sup> New York State’s preeminence in the area of hunting is so strong that even an ordinance restricting hunting “except where permission in writing is granted by the owner of the land upon which hunting is to take place” was considered invalid by the New York Attorney General.<sup>71</sup>

Additionally, though Municipal Home Rule Law grants counties the authority to enact legislation for the “protection or preservation of game, game birds, fish or shell fish,” this authority is explicitly limited to “county-owned lands,” implying that outside of where a local government is acting in its proprietary capacity as landowner, the state has “occupied the field” with respect to the regulation of hunting.<sup>72</sup> Arguably, this is due in part to the State of New York’s detailed, prescriptive

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67. *Id.* at 584.

68. *Id.* at 585 (citations omitted).

69. *Id.* at 587.

70. N.Y. Op. Att’y Gen. 326 (1976) (“Control, regulation and licensing of hunting and fishing is a function reserved exclusively to the State . . .”). See also 84-66 N.Y. Op. Att’y Gen. 170 (1984); State Compt. Op. No. 8408 (1956); N.Y. Op. Att’y Gen. 169 (1947); N.Y. Op. Att’y Gen. 324 (1935).

71. N.Y. Op. Att’y Gen. 48 (1969).

72. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(b)(7) (McKinney 2014).



regime with respect to the regulation of hunting that has strict licensure requirements for hunters,<sup>73</sup> in addition to regulating seasons,<sup>74</sup> the discharge of a firearm or longbow,<sup>75</sup> and the species that can be hunted.<sup>76</sup>

The hunting of wildlife within the State of New York requires possession of a valid basic hunting license.<sup>77</sup> With respect to the hunting of deer, a basic hunting license only allows the holder to participate in the regular firearms season held throughout the State above Westchester County,<sup>78</sup> and, exclusively in Suffolk County, a special firearms season held in January.<sup>79</sup> Participation in this special firearms season is unique in that the Department of Environmental Conservation rules require a special permit to be issued by the relevant town based on quotas established by the Department of Environmental Conservation.<sup>80</sup>

Obtaining the basic hunting license requires successful completion of a minimum ten-hour Department of Environmental Conservation-approved hunter safety education course<sup>81</sup> and

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73. See N.Y. ENVTL. CONSERV. LAW § 11-0701 (McKinney 2014).

74. See generally *id.* § 11-0901.

75. See *supra* Parts II(B), (C).

76. N.Y. ENVTL. CONSERV. LAW § 11-0901(10) (McKinney 2014).

77. See *id.* §§ 11-0703(6)(a), 11-0713(3)(a)(3), 11-0901(13).

78. See *id.* §§ 11-0903(7); N.Y. COMP. CODES R. & REGS. tit. 6, § 1.24 (2015). See also *id.* § 1.11(D)(1). Although recent amendments to the Environmental Conservation Law allow for the establishment of a January weekday shotgun season in Westchester County, no implementing regulations have been proposed by the Department of Environmental Conservation. N.Y. ENVTL. CONSERV. LAW §§ 11-0903(7)(A) & (B).

79. N.Y. ENVTL. CONSERV. LAW § 11-0903(7)(c), (h); N.Y. COMP. CODES R. & REGS. tit. 6, § 1.24 (2014).

80. N.Y. COMP. CODES R. & REGS. tit. 6, § 1.24(e), (g)-(i) (2014). Note that municipalities have the ability to sponsor special culling operations in January that are based on a different provision of law allowing for aggrieved property owners or municipalities to cull a specified number of deer based on special application to the Department of Environmental Conservation for a Deer Management Assistance Permit. In 2010, the most recent year for which data is available, private hunting was more than five times more effective than combined culling with Deer Management Assistance Permits and Deer Damage Permits (another category of culling permit). See WHITE-TAILED DEER MGMT. PLAN, *supra* note 13, at 23.

81. N.Y. ENVTL. CONSERV. LAW § 11-0713(3)(a)(3) (McKinney 2014). See also *New York Hunter Education Course*, N.Y. DEP'T OF ENVTL. CONSERVATION, [http://www.register-ed.com/programs/new\\_york/123](http://www.register-ed.com/programs/new_york/123) (last visited Feb. 13, 2015)

payment of a fee.<sup>82</sup> A holder of the basic hunting license *would not* be permitted to bowhunt without taking an additional minimum eight-hour Department of Environmental Conservation-approved bowhunter education class<sup>83</sup> and paying a fee for a “bowhunter privilege.”<sup>84</sup> Therefore, to bowhunt in New York State, a total minimum of eighteen hours in education is required, along with payment of the fees for the basic license and for the bowhunter privilege.

With the prescriptive regime regulating hunting and its preemption of local government hunting regulations, we turn to the question of whether local government can, instead, regulate the discharge of a weapon beyond existing state law.

## B. Authority to Regulate Firearms Discharge

While commentary is uniform regarding the non-authority of a local government in New York to regulate hunting, being within the exclusive province of state law, the question arises as to whether a local government can regulate the discharge of a firearm.

### 1. Definition of “Firearm”

No definition of “firearm” is provided in New York State’s laws related to local government.<sup>85</sup> In other contexts, New York State’s definition of “firearm” can be divided into two categories. One is the Penal Law’s definition of a “firearm” as any pistol, revolver, sawed off rifle or shotgun, or rifles and shotguns with specified characteristics that are deemed to be military style.<sup>86</sup>

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(“Minimum course time: 10 hours.”), *archived at* <https://perma.cc/W9DJ-MXCQ?type=source>.

82. N.Y. ENVTL. CONSERV. LAW § 11-0715(3) (McKinney 2014).

83. *Id.* §§ 11-0713(3)(b)(1), 11-0901(13) (McKinney 2014). *See also New York Bowhunter Education Course*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, [http://www.register-ed.com/programs/new\\_york/125](http://www.register-ed.com/programs/new_york/125) (last visited Feb. 13, 2015) (“Minimum course time: 8 hours.”), *archived at* <https://perma.cc/5VEP-GN8L?type=source>.

84. N.Y. ENVTL. CONSERV. LAW § 11-0715(3)(a)(5) (McKinney 2014).

85. I.e., N.Y. County Law, N.Y. General Municipal Law, N.Y. Municipal Home Rule Law, N.Y. Town Law, and N.Y. Village Law.

86. N.Y. PENAL LAW § 265.00(3) (McKinney 2014).

2015]

*A SITTING DUCK*

945

This definition, although explicitly imported into some contexts outside of the Penal Law, is narrower than the ordinary meaning of firearm,<sup>87</sup> and therefore, is not assumed to apply to the matters discussed herein.

The other category of the “firearm” definition manifests differently in state laws and regulations but, unlike the Penal Law’s definition, shares the same general principal of being inclusive of all shotguns and rifles. One example is provided by New York’s General Business Law,<sup>88</sup> which imports the Federal definition of “firearms” as:

(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device [such as a bomb, grenade, or missile].<sup>89</sup>

## **2. Historical Municipal Authority to Regulate Firearms**

Since 1870, the Village Law granted villages the explicit authority to regulate or prevent the discharge of firearms.<sup>90</sup> A nearly identical provision existed in the Town Law beginning in 1919.<sup>91</sup> However, in 1972, as part of a comprehensive revision of the Village Law, this explicit authority was removed in its entirety.<sup>92</sup> In 1976, this authority was restored for one village, the Village of Green Island.<sup>93</sup>

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87. BLACK’S LAW DICTIONARY 710 (9th ed. 2009).

88. N.Y. GEN. BUS. LAW § 895(4) (McKinney 2014).

89. 18 U.S.C. § 921(a)(3)-(4) (2012). Rules promulgated by New York State’s Department of Environmental Conservation define “firearm” for purposes of the fish and wildlife provisions of the Environmental Conservation Law along largely similar lines, but also include air guns that fire projectiles at 600 feet per second or more and use at least .17 caliber ammunition. N.Y. COMP. CODES R. & REGS. tit. 6, § 180.3(a)-(b) (2014).

90. See 1909 N.Y. Laws 4464; 1897 N.Y. Laws 394; 1870 N.Y. Laws 685.

91. 1919 N.Y. Laws 816.

92. 1972 N.Y. Laws 3431.

93. N.Y. VILLAGE LAW § 20-2003 (McKinney 2014). Green Island’s unique authority as a village to regulate firearms discharge is possibly due to the Town of Green Island and the Village of Green Island’s coterminous nature. See Casey McNulty, *History, PRIDE GREEN ISLAND* (Feb. 22, 2005),

### 3. Present Municipal Authority to Regulate Firearms

Today, any county, town, city, or village has the explicit authority to “regulate the storage, possession and display of firearms, ammunition and explosives.”<sup>94</sup> However, this is strictly limited in its application, and in effect only delegates authority to regulate commercial or other association-sponsored displays due to a statutory exclusion of authority to regulate “personal possession, use or ownership of firearms or ammunition.”<sup>95</sup> Additionally, towns—and towns only—are granted authority to regulate the possession, sale, and use of air guns,<sup>96</sup> and specified towns<sup>97</sup> may prohibit the discharge of firearms “in areas in which such activity may be hazardous to the general public or nearby residents, and providing for the posting of such areas with signs giving notice of such regulations, which ordinances, rules and regulations may be more, but not less, restrictive than any other provision of law.”<sup>98</sup>

State Attorney General opinions on the subject vary. Construing the City of Rye’s general authority, the State Attorney General, in a 1972 opinion, stated:

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<http://www.villageofgreenisland.com/history/>, archived at <https://perma.cc/KK7A-F39L?type=source>. See also LOCAL GOV’T HANDBOOK, *supra* note 34, at 68 (“Five villages – Green Island in Albany County, East Rochester in Monroe County, and Scarsdale, Harrison and Mount Kisco in Westchester County – are coterminous with towns of the same name. A coterminous town-village is a unique form of local government organization. The town and village share the same boundaries and the governing body of one unit of the coterminous government may serve as the governing body of the other unit . . .”). With the village government in Green Island acting as the governing body of the coterminous government unit, it would not have the authority to regulate the discharge of a firearm, authority that the town otherwise could potentially have enforced, outside of the specific legislative grant in Section 20-2003 of the New York Village Law.

94. N.Y. GEN. MUN. LAW § 139-d(1) (McKinney 2014).

95. *Id.* § 139-d(2).

96. N.Y. TOWN LAW § 130(26) (McKinney 2014).

97. The towns are Huntington, Babylon, Smithtown, Islip, Brookhaven, Riverhead, Southampton, Niskayuna, Ramapo, Irondequoit, Greece, Pittsford, Brighton, Penfield, Perinton, Webster, Gates, Colonie, Vestal, and Union. N.Y. TOWN LAW § 130(27) (McKinney 2014).

98. *Id.*

[A]n ordinance which prohibited the discharge of firearms except by law enforcement officers would likely constitute a reasonable exercise of the police power if its operation were restricted to certain densely populated areas or areas where the discharge of firearms would be hazardous to the general public or to nearby residents.<sup>99</sup>

A subsequent 1976 informal opinion noted that whereas “a village may not prohibit the carrying of a firearm, shotgun, rifle or air gun within the village[,]” it could, “by a fair, just and reasonable statute, prohibit the discharge of firearms within the village or within densely populated areas thereof.”<sup>100</sup> The Attorney General added a proviso that “such prohibition, in order to be fair, just and reasonable, would have to apply to all persons and could not except . . . the owners of property or licensees of such owners.”<sup>101</sup> Additionally, the law could not “amount to municipal control and regulation of hunting under the guise of exercise of the police power.”<sup>102</sup>

On the other hand, a 1964 New York Attorney General opinion is unequivocal in stating:

[T]he general subject of conservation, hunting, and the use of firearms is a matter of state concern. . . . Since the provisions of Conservation Law . . . permit the discharge of any firearms in any area outside of 500 feet from . . . specified buildings, the action of a town board in increasing such limit . . . would be inconsistent with the Conservation Law.<sup>103</sup>

A further reminder was provided in 1969 that “a town may not restrict hunting within its confines in the absence of specific legislative authority therefor.”<sup>104</sup> It noted that the towns permitted by section 130(27) of New York’s Town Law to restrict

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99. N.Y. Op. Att’y Gen. 215 (1972). It is important to note that the opinion was issued in the context of a city, the powers of which are dependent on the terms of its charter, and therefore, not directly applicable to counties, towns, and villages.

100. N.Y. Op. Att’y Gen. 326 (1976).

101. *Id.*

102. *Id.*

103. N.Y. Op. Att’y Gen. 126 (1964).

104. N.Y. Op. Att’y Gen. 48 (1969).

the discharge of firearms had specific legislative authorization to do so.<sup>105</sup>

Moreover, in *Richmond Boro Gun Club, Inc. v. City of New York*, a United States Magistrate Judge recommended, in the context of a ban by the City of New York of some semi-automatic rifles deemed by the city to be military style, that this “statute was not intended to preempt the entire field of regulations concerning the personal possession of weapons.”<sup>106</sup>

As noted above, New York State Village Law explicitly grants only one village the right to limit discharge of a firearm beyond the restrictions in state law.<sup>107</sup> Whether other villages have the general authority to do so for firearms or other weapons is not explicitly addressed. At least one resource states, in the context of an effort by the Village of Watkins Glen to ban the discharge of firearms within its boundaries, “because the Watkins Glen regulation prohibits what the [Department of Environmental Conservation] regulations allow, it is inconsistent with the regulations, and therefore invalid.”<sup>108</sup>

Although New York Attorney General opinions have experienced some variation on this topic, the Legislature appears to have expressed an intent to “occupy the field” with respect to the discharge of a firearm due to the Legislature’s removal of explicit plenary authority to regulate the discharge of firearms from all villages save for one and its limited grant of authority to

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105. *Id.*

106. *Richmond Boro Gun Club, Inc. v. City of New York*, No. 92-CV-0151(RR), 1995 WL 422014, at \*6 (E.D.N.Y. Feb. 23, 1994), *mooted by* 896 F. Supp. 276 (E.D.N.Y. 1995), *aff’d*, 97 F.3d 681 (2d Cir. 1996). The Magistrate also noted that New York’s Penal Code sections 265.00 and 400.00 did not preempt the field. *Id.* at \*7. However, note that this was in the context of a city, the powers of which are dependent on the terms of its charter, and therefore, not directly applicable to counties, towns, and villages.

107. The Village of Green Island in Albany County. *See* N.Y. VILLAGE LAW § 20-2003 (McKinney 2014).

108. N.Y. Op. Att’y Gen. 171 (1984) (citations omitted). However, note that this opinion of the Attorney General is potentially distinguishable since the subject was a portion of a wildlife area directly regulated by the Department of Environmental Conservation that fell within the boundaries of the Village of Watkins Glen.

2015]

A SITTING DUCK

949

regulate the discharge of firearms to just twenty specified towns and one village.<sup>109</sup>

### C. Case Study: The Town of Huntington

In the case of the Town of Huntington, which is one of twenty towns with the limited authority to regulate the discharge of a firearm beyond state law, the definition of “firearm” has been expansively defined to “[i]nclude[] a weapon which acts by the force of gunpowder or from which a shot is discharged by the force of an explosion, as well as an air rifle, an air gun and a longbow.”<sup>110</sup> Applying this broad definition, the Town of Huntington has prohibited any discharge of a “firearm” anywhere within the Town of Huntington, excluding the four incorporated villages contained within the Town’s boundaries.<sup>111</sup> Although there are some exemptions, such as for law enforcement,<sup>112</sup> an exemption for the owner or lessee of a dwelling house or guests or family members was removed in 1974.<sup>113</sup>

The Town of Huntington’s code provides a potential example of municipal overreach since the town’s expansive definition of “firearm” goes well beyond the authorizing Town Law provision that appears to use firearm in its generic sense, as a weapon expelling a projectile using gunpowder.<sup>114</sup> The inclusion of a longbow in the Town of Huntington’s definition of “firearm” is not

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109. First, only the discharge of firearms may be prohibited; and second, only where “such activity may be hazardous to the general public or nearby residents” and after “posting of such areas with signs giving notice of such regulations.” N.Y. TOWN LAW § 130(27) (McKinney 2014).

110. Town of Huntington, N.Y. Code § 109-1 (2014).

111. *Id.* § 109-2. The villages are Asharoken, Huntington Bay, Lloyd Harbor, and Northport. *Incorporated Villages, TOWN OF HUNTINGTON*, <http://www.huntingtonny.gov/content/13747/13825/default.aspx> (last visited Feb. 11, 2015), *archived at* <https://perma.cc/7ZYM-F76E?type=source>.

112. Town of Huntington, N.Y. Code § 109-3(A), (B) (2014).

113. The former Town of Huntington Code section 109-3(E) was deleted by Town of Huntington Ordinance Number 74-CE-20 (June 25, 1974). *Id.* § 109-3.

114. *See, e.g.*, 18 U.S.C. § 921(a)(3) (2012) (the Federal definition of firearm includes “(A) any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; [or] (B) the frame or receiver of any such weapon”). The Town of Huntington’s definition of “firearm” is so broad as to arguably prohibit the release of a flare by a mariner in distress within Town of Huntington waters.

consistent with this conventional meaning of firearm or any definition in use in federal or state law.<sup>115</sup> Moreover, since the Town of Huntington contains large bodies of water such as Huntington Bay, prohibiting the discharge of a “firearm,” such as a shotgun discharging shotgun shells, can hardly be said to be “hazardous to the general public,”<sup>116</sup> if in compliance with existing state law requirements.<sup>117</sup> Finally, the Town’s code contains no reference to New York Town Law’s requirement of “posting of such areas with signs giving notice of such regulations.”<sup>118</sup>

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115. See *supra* Part IV(B).

116. The Federation Internationale Sportives de Chasse, International Shooting Sports Foundation, National Rifle Association, National Shooting Sports Foundation, and the National Sporting Clay Association all recognize 900 feet as a conservative outer bound distance most types of shells discharged from a shotgun can travel. *Shotgun Range Safety Distances*, THE SHOOTING ACADEMY, <http://www.shooting-academy.com/media/Shotgun%20Safety%20Distances.pdf> (last visited Feb. 11, 2015), archived at <https://perma.cc/2Z3Y-3EQD?type=pdf>. Theoretically, a shotgun shell loaded with 00 buck shot could go as far as approximately 2,250 feet. *Id.* Use of such shot on the water is highly improbable. At its most narrow point, Huntington Bay is about 6,000 feet wide. See *No Discharge Zone Map – Greater Huntington - Northport Bay Complex, NY*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/region02/water/ndz/greaterhuntington.html> (last updated Sept. 15, 2014), archived at <https://perma.cc/22KT-W4YE?type=source>.

117. Note that state law provides an exception to the rule prohibiting discharge of a firearm within 500 feet of a dwelling with respect to shotguns:

[t]he discharge of a shotgun over water by a person hunting migratory game birds if no dwelling house, farm building or farm structure actually occupied or used, school building, school playground, or public structure, factory or church, livestock or person is situated in the line of discharge less than five hundred feet from the point of discharge.

N.Y. ENVTL. CONSERV. LAW § 11-0931(4)(b)(4) (McKinney 2014).

118. N.Y. TOWN LAW § 130(27) (McKinney 2014). How such posting would be done in a body of water is not clear. The one case on record in the Town of Huntington involved discharge of a firearm on land and, other than noting the explicit authority of Huntington to regulate discharge of firearms pursuant to New York Town Law section 130(27), the primary recorded decision (a denial of the defendant’s motion to dismiss) did not address the propriety of Huntington’s broad prohibition on firearms discharge over the entire territory of the Town (excluding the four incorporated villages within its boundaries), the lack of posting by the Town as required by section 130(27), or the Town’s definition of the term “firearms” to include instruments such as “longbows” that appear to exceed the scope of the term “firearm” as used in section 130(27). *People v.*



2015]

A SITTING DUCK

951

Note that there are no comparable provisions to section 130(27) of New York's Town Law in any of the state laws applicable to villages,<sup>119</sup> or to counties.<sup>120</sup> This lends itself to a conclusion that if only specified towns have a (limited) statutory authority to regulate the discharge of a firearm beyond the state's existing regulations; villages and counties have no such authority.<sup>121</sup>

#### D. Restriction of Hunting or Firearms Activities Through Zoning Authority

At least one Second Department case finds that a town has the authority to impose, during a site plan approval, a condition that only shotguns be used on the property because "[t]he record indicates that the respondent [town] found that restrictions necessary to dispel the danger posed to adjacent land owners from stray bullets because even the least powerful rifles are capable of firing bullets in excess of the length and width of the property in question."<sup>122</sup> There is support for the proposition that, in its zoning authority, a municipality could, where stray bullets from a rifle may endanger adjacent properties due to the dimensions of the property on which they would be discharged, approve a site plan for a private hunting preserve conditioned on shotguns being the only firearms discharged onsite.<sup>123</sup>

In another Second Department case, a gun club was in compliance with a town's existing zoning ordinance because the

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White, No. HUTO 16-01, slip op. at 1-2 (Suffolk Dist. Ct. June 14, 2001) (order denying motion to dismiss).

119. Other than the Village of Green Island. See N.Y. VILLAGE LAW § 20-2003 (McKinney 2014).

120. Since cities each merit potentially distinct treatment under state law due to their differing charters, they are outside the scope hereof.

121. The Village of Green Island is the only exception. See N.Y. VILLAGE LAW § 20-2003 (McKinney 2014).

122. *Janiak v. Planning Bd. of Greenville*, 552 N.Y.S.2d 436, 436 (App. Div. 1990).

123. *Id.* at 436-37.

ordinance allowed for “[a]nnual membership clubs, including country, golf, tennis and swim clubs.”<sup>124</sup>

As a general matter, any inference that a county, village, or town has plenary authority to regulate the discharge of a firearm, for example under its zoning authority, is implausible since such a finding would effectively render meaningless New York Town Law’s explicit grant of (limited) authority to regulate firearm discharges beyond state law only to specified towns and one village.<sup>125</sup>

### **E. Restrictions on Discharge of a Long Bow**

Bowhunting has been explicitly permitted in New York State since 1929.<sup>126</sup> There are no resources directly on point regarding the capacity of a local government to limit the discharge of a *longbow* beyond the limitations already in state law. However, it can be reasoned that since the twenty towns and one village referenced above are merely granted explicit authority to regulate firearms discharge beyond the state’s existing regulations,<sup>127</sup> they do not have such explicit authority with respect to longbows. Because the impact on safety with regard to longbows is significantly less than with respect to the discharge of a firearm, it can be assumed that a local government’s capacity to regulate longbows is limited at least to the same extent as its capacity to regulate firearms.

### **F. Policy Considerations**

New York State law preempts a local government’s home rule powers if there is an express conflict with state law or if state law

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124. *Willow Wood Rifle & Pistol Club, Inc. v. Town of Carmel Zoning Bd. of Appeals*, 496 N.Y.S.2d 548, 550 (App. Div. 1985) (internal quotation marks omitted), *perm. app. denied*, 497 N.E.2d 704 (N.Y. 1986).

125. “Statutes will not be construed as to render them ineffective.” N.Y. STAT. LAW § 144 (McKinney 2014). “In the construction of a statute, meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning.” *Id.* § 231.

126. *See* 1929 N.Y. Laws 463.

127. *See supra* Part IV(B).

has implicitly occupied the field.<sup>128</sup> Where the impact of a local government law is limited to activities within its borders, in the absence of state law expressly governing the same matters, a court should lean toward deference to the local government because it is unlikely that the State has implicitly occupied the field on such matter.

However, the regulation of activities with respect to wildlife has effects beyond the boundaries of local government. New York State's claim to all wildlife is based, in part, on their migratory or ranging nature.<sup>129</sup> An individual can have a possessory interest in a domesticized animal due to its confined range. Deer, on the other hand, range at will.<sup>130</sup>

Therefore, a local government's policy to prohibit hunting or the discharge of a firearm or longbow could have significant external effects on neighboring municipalities. For example, suppose Municipality A permitted hunting and Municipality B prohibited hunting. If Municipality A permitted hunting within its boundaries, its efforts to control the deer population—and avoid deer-vehicle collisions, property damage, and the ecological destruction associated with overabundant deer<sup>131</sup>—would be detrimentally impacted or nullified by Municipality B's prohibition of hunting. Municipality B could be functioning as a deer incubator for Municipality A, forcing Municipality A to absorb the externalities of Municipality B's policy.

On the other hand, suppose Municipality A allowed unregulated hunting for the purpose of exterminating all deer in the area and its neighbor Municipality B allowed only hunting within the confines of state law, including educational requirements for hunters and biologically-informed seasonal, temporal, methodological, and numerical limitations on the

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128. For a discussion on preemption, *see supra* Part III(D).

129. N.Y. ENVTL. CONSERV. LAW § 11-0105 (McKinney 2014).

130. One study notes that bucks on average have a home range of 717 acres in the spring, 415 acres in the summer, 907 acres in the fall, and 826 acres in the winter. Andrew Kahl Olson, *Spatial Use and Movement Ecology of Mature Male White-Tailed Deer in Northcentral Pennsylvania* 25, 34 (Oct. 17, 2014) (unpublished M.S. dissertation, University of Georgia) (on file with author).

131. *See supra* Part II(B).

harvesting of deer by hunters,<sup>132</sup> aimed at preserving deer as a common resource for the benefit of the community while keeping the deer population at a level that neutralizes the negative impact of overabundant deer. If Municipality A permitted the unregulated and wanton hunting of the deer population, Municipality B's efforts to maintain a biologically-informed viable and healthy deer population would be undermined because any time deer from Municipality B ranged into Municipality A they could be exterminated without any of the limitations applying in Municipality B.

Therefore, just as the migratory or ranging nature of wild animals provides a rational basis for the state's assertion of proprietary authority over them,<sup>133</sup> their migratory or ranging nature rationally supports state law preemption of the local regulation of hunting.<sup>134</sup>

## V. CONCLUSION

New York State delegates broad authority to local governments. However, the unique nature of migratory and ranging wildlife and the State's assertion of authority with respect to such matters by the enactment of a prescriptive regulatory regime, lends strong support for the view that a local government does not have the authority to regulate hunting. Unless explicitly granted the authority to do so, it also lends credibility to the view that local government does not have the authority to regulate the discharge of a firearm or longbow in New York State—at least when discharged for the purposes of hunting—beyond State law.<sup>135</sup>

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132. Such as provided by New York State's Department of Environmental Conservation with respect to deer hunting. *See* N.Y. COMP. CODES R. & REGS. tit. 6, §§ 1.11, 1.19, 1.21, 1.24, 2.1 (2014). *See generally id.* §§ 1.13, 1.18, 1.20, 1.26, 1.27, 1.30, 2.3, 2.4.

133. N.Y. ENVTL. CONSERV. LAW § 11-0105.

134. For a general discussion on the public policy behind the state asserting authority where a local government's activities have significant detrimental externalities on non-residents or neighboring communities, *see Hills, supra* note 44, at 658-59.

135. If a local government ordinance is not preempted by state law it will generally stand if it was within the local government's powers and has a

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955

For the twenty towns and one village granted the authority to regulate the discharge of a firearm, there is some limited authority to regulate firearms (not longbows) beyond State law.<sup>136</sup> For any other county, town, or village, an ordinance regulating the discharge of a firearm or longbow or otherwise regulating hunting beyond State law would, it seems, be a sitting duck.

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rational basis. *See* *Town of N. Hempstead v. Exxon Corp.*, 421 N.E.2d 834, 834 (N.Y. 1981).

136. Ordinances, such as that enacted by the Town of Huntington, that purport to outlaw any discharge of a firearm or longbow and are otherwise compliant with State law are, when scrutinized in light of State law, overly broad. *See supra* Part IV(C).