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Home Rule

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prohibited, because it is not an acceptable exercise of the village's "supersession authority" as contained in section 10 of the Municipal Home Rule law.³⁵

SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

Salvador v. State³⁶
(decided November 3, 1994)

Plaintiffs sought declaratory judgment in alleging that the Laws of 1987, chapter 617,³⁷ the Laws of 1979, chapter 599,³⁸ and the 1987 amendment to Environmental Conservation Law [hereinafter ECL] section 17-1709(3)³⁹ were promulgated in violation of their right to self government pursuant to the home rule provisions of New York Constitution, article IX.⁴⁰ The

35. N.Y. MUN. HOME RULE LAW § 10 (McKinney 1994).

36. 205 A.D.2d 194, 618 N.Y.S.2d 142 (3d Dep't 1994).

37. 1987 N.Y. Laws 617. Chapter 617 states in pertinent part throughout that the Lake George Park Commission has the ability to contract for, establish, and maintain facilities and utilize various lands and parks as well as amend, adopt, and repeal numerous rules and regulations relating to environmental conservation.

38. 1979 N.Y. Laws 599. Chapter 599 states:

The discharge of sewage or treated sewage effluent from any public sewerage system, owned, maintained or operated by a municipality or public authority, into the drainage basin of Lake George is hereby prohibited . . . [f]or the purposes of this subdivision, discharge shall include sewerage or treated sewage effluent entering or within the drainage basin of Lake George through runoff, seepage, percolation, spray irrigation and ground and spring water flow.

Id.

39. 1987 N.Y. Laws 617, § 10 (current version at N.Y. ENVTL.

CONSERV. LAW § 17-1709(3) (McKinney 1995)).

40. N.Y. CONST. art. IX, § 2 (c). Section 2 (c) states in relevant part:

In addition to powers granted in the statute of local governments or in any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this

Appellate Division, Third Department affirmed the lower court's finding that the issues in dispute were of state concern and, consequently, there was no violation of the home rule provisions.⁴¹ In addition, the court denied the plaintiffs' assertions that ECL section 43-0125(2)(a)⁴² and its implementing regulations violated their right to equal protection⁴³ and that the enactment of chapter 617 of the Laws of 1987 resulted in a taking of property in violation of due process⁴⁴ under the Federal Constitution.⁴⁵

The plaintiffs have owned, operated, and resided at Dunham's Bay Lodge located on Lake George within the Town of Queensbury, Warren County, since 1973.⁴⁶ They asserted

constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government

Id.

41. *Salvador*, 205 A.D.2d at 198, 618 N.Y.S.2d at 144.

42. N.Y. ENVTL. CONSERV. LAW § 43-0125(2)(a) (McKinney 1987).

Section 43-0125(2)(a) provides:

Dock, wharf and mooring fees. The owner of a dock, wharf or mooring within the park used for non-commercial residential purposes shall pay an annual fee of twenty-five dollars. The owner of a dock or wharf within the park used for commercial purposes shall pay an annual fee of two dollars and fifty cents per linear foot for each such dock. The owner of a mooring used for commercial purposes shall pay an annual fee of fifty dollars for each mooring. New docks constructed for commercial use after the effective date of this section shall pay a first time fee of five dollars per linear foot and two dollars and fifty cents per linear foot annually thereafter.

Id.

43. U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "[N]o state shall . . . deny to any person within its jurisdiction equal protection of the laws." *Id.*; N.Y. CONST. art I, § 11. This provides in pertinent part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." *Id.*

44. U.S. CONST. art. 1, § 6. Section 6 provides: "No person shall be deprived of life, liberty or property without due process of law." *Id.*

45. *Salvador*, 205 A.D.2d at 197, 618 N.Y.S.2d at 145.

46. *Id.* at 196, 618 N.Y.S.2d at 143.

ownership of the underwater land upon which their docks, bulkheads, boat house, bathing beach, and boat-servicing utilities and amenities are located.⁴⁷ In July 1988, defendant Lake George Park Commission and plaintiffs entered into an agreement requiring plaintiffs to pay \$2,552.50 in annual fees for the commercially usable dock space which they owned (1,201 linear feet), pursuant to title 6, section 645-2[f],⁴⁸ [i][2],⁴⁹ and 645-

47. *Id.* at 194, 618 N.Y.S.2d at 142. In addition, plaintiffs claim that these items represent “inspected capital improvements” included in the value of the property. *Id.* at 197, 618 N.Y.S.2d at 143.

48. *N.Y. COMP. CODES R. & REGS. tit. 6, § 645-2[f](1988)*. Section 645-2[f] provides:

Class A marina means any facility located in whole or in part within the park which provides services or berthing places for vessels by engaging in any of the following:

- (1) the sale of marine products or services, except for such sale as part of a dry land facility which does not quick launch vessels or regularly service vessels berthed on the waters of Lake George;
- (2) the sale, lease rental or charter of vessels of any type;
- (3) the operation of a boat launch;
- (4) the offering of rides, instruction or water-based recreation for a fee;
- (5) the operation of a quick launch facility servicing the waters of Lake George regardless of the location where the vessels are stored; or
- (6) the storage, berthing or mooring of two or more motorized vessels and/or non-motorized vessels 18 feet in length or more not registered to the owner of the property, regardless of remuneration or profit, except:
 - (i) the use of residential or association docks, wharfs or moorings by the owner of the facility, the owner’s family or the owner’s gratuitous guest, or such use by a person as part of the single family residential rental of a residence or a residential unit which includes the use of a dock, wharf or mooring;
 - (ii) docks, wharfs and moorings used as an accessory use to a hotel, motel, inn, housekeeping cottage, campground or recreational vehicle park, used exclusively by registered guests;
 - (iii) docks, wharfs and moorings used as an accessory use to a restaurant, used exclusively by patrons while dining at such restaurant; and
 - (iv) docks, wharfs and moorings used exclusively by persons engaged in the sale of fishing products or the sale and service of SCUBA products. The exceptions provided herein shall

7.6,⁵⁰ of the New York Code Rules and Regulations and ECL section 43-0125[2][a].⁵¹ For the years 1988, 1989, 1990, and 1991, the plaintiffs paid the full annual fees, but in 1992 requested a recalculation of the fee which would exclude from it the submerged land upon which their docks were located.⁵² The Lake George Park Commission refused to do so on the grounds that ECL section 43-0125(2)(a) does not distinguish between privately and publicly owned lands.⁵³ Plaintiffs then initiated this action against the "State, the Legislature, the Department of Environmental Conservation [hereinafter DEC], the Commission, the Comptroller [hereinafter collectively referred to as the State], and the Town."⁵⁴ Plaintiffs sought an article 78 proceeding/declaratory judgment and, further, requested the annulment of the 1988 fee agreement with the Commission and the refund of fees paid from 1988 to 1991.⁵⁵ The lower court dismissed the plaintiffs' complaint for failure to state a cause of action on the grounds that the subject matter of the complaint was

not apply to facilities which are otherwise engaged in any of the services or activities set forth in paragraphs (1) - (5) of this subdivision.

Id.

49. N.Y. COMP. CODES R. & REGS. tit. 6, § 645-2[i][2] (1988). Section 645-2[i] provides that:

Commercial dock, wharf or mooring means a dock, wharf or mooring which is:

- (1) used as or is an accessory use to a commercial use;
- (2) a Class A marina; or
- (3) a Class B marina. The use of any portion of an association or residential dock, wharf or mooring as a commercial dock, wharf or mooring shall render the entire structure or complex commercial.

Id.

50. N.Y. COMP. CODES R. & REGS. tit. 6, § 645-7.6(a). Section 645-7.6(a) provides: "No person shall use or construct a dock, wharf or mooring on the waters of the park without paying the fee required by this section." *Id.*

51. N.Y. ENVTL. CONSERV. LAW § 43-0125(2)(a).

52. *Salvador*, 205 A.D.2d at 197, 618 N.Y.S.2d at 143.

53. *Id.*

54. *Id.*

55. *Id.*

indeed a State concern and, therefore, the home rule provision of the New York Constitution was not violated.⁵⁶

The first, second, third, and sixth causes of action asserted by the plaintiffs charged that the enactment of chapter 617 of the Laws of 1987 and chapter 599 of the Laws of 1979 were in violation of the New York Constitution's home rule provision's right to self government.⁵⁷ Plaintiff objected, generally, to the enactment of chapter 617 of the 1987 Session Laws, titled "Lake Park Commission - Trust Fund," and, specifically, to section ten, an amendment to ECL section 17-1709(3).⁵⁸

56. *Id.*

57. *Id.*

58. N.Y. ENVTL. CONSERV. LAW § 17-1709(3). Section 17-1709(3) provides:

The discharge of sewage or treated sewage effluent into the drainage basin of Lake George is hereby prohibited except as follows:

- (a) Subsurface sewage disposal facilities with a design capacity of one thousand gallons per day or less are permitted to discharge within the basin provided said facilities are designed, constructed, operated and maintained in accordance with all applicable laws, regulations and permits issued pursuant thereto.
- (b) Subsurface sewage disposal facilities with a design capacity of greater than one thousand gallons per day are permitted to discharge within the basin provided that such facilities:
 - (i) discharge treated sewage effluent to land of ground water;
 - (ii) are designed to meet best technology available;
 - (iii) are in compliance with a valid state pollutant discharge elimination system (SPDES) permit;
 - (iv) are designed to meet existing needs only; and
 - (v) are designed, operated and maintained in accordance with applicable laws and regulations.
- (c) The commissioner shall prepare a technical manual describing the best technologies available for sewage disposal facilities within the Lake George basin, which shall include, but not be limited to, specifications for the design, construction, maintenance and monitoring of such facilities and performance standards for nutrient removal. The commissioner shall complete the manual within eighteen months of the effective date of this subdivision and shall notice completion of the manual in the state register and the environmental notice bulletin.

Id. See 1987 N.Y. Laws 617.