

No. APL-2020-00165

To be argued by:
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State of New York
Court of Appeals

HUNTERS FOR DEER, INC., and MICHAEL LEWIS,

Plaintiffs-Respondents,

v.

TOWN OF SMITHTOWN,

Defendant-Appellant.

**BRIEF FOR AMICUS CURIAE NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION**

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INTEREST OF AMICUS CURIAE

The New York State Department of Environmental Conservation (DEC) submits this brief as amicus curiae in support of plaintiffs Hunters for Deer, Inc., and Michael Lewis. In this suit, plaintiffs challenge an ordinance adopted by defendant Town of Smithtown that, among other things, prohibits the discharge of a long bow¹ for any purpose within 500 feet of any dwellings. While Town Law § 130(27) authorizes designated suburban towns, including Smithtown, to regulate the discharge of a “firearm,” a long bow is not a “firearm” within the meaning of the statute. And Environmental Conservation Law (ECL) §§ 11-0701(2)(a) and 11-0931(4)(a)(2) expressly authorize hunting in the State by long bow beyond the shorter setback distance of 150 feet. Smithtown’s ordinance—which effectively bans hunting in nearly all of Smithtown—thus conflicts with, and is preempted by, state law.

¹ A long bow is any hand-drawn bow and arrow. *See* 6 N.Y.C.R.R. § 2.4(a)(3). It is often referred to colloquially as a bow and arrow.

DEC has a strong interest in the outcome of this suit because it administers and enforces the State's hunting laws, including the setback restrictions at ECL § 11-0931(4)(a)(2). The purpose of any setback restriction is to protect public safety by preventing potential hunting accidents. In 2014, the Legislature reduced the setback for the discharge of a long bow from 500 feet to 150 feet in order to promote effective deer management in suburban areas. At the same time, the Legislature determined that this shorter discharge setback would adequately protect public safety. Smithtown's ordinance upsets the State's judgment that a 150-foot discharge setback for long bows sufficiently protects public safety while accommodating the State's interest in wildlife management. Because Smithtown's ordinance impedes this important state policy, this Court should affirm the Second Department's preemption ruling.

QUESTION PRESENTED

1. Whether a long bow is not a "firearm" within the meaning of Town Law § 130(27), and thus that statute does not authorize Smithtown to regulate the discharge of long bows.

2. Whether a local ordinance prohibiting the discharge of a long bow within 500 feet of any dwellings is preempted by state law that comprehensively regulates hunting and expressly authorizes licensed hunting by long bow beyond the shorter discharge setback distance of 150 feet.

STATEMENT OF THE CASE

A. Statutory Background

Article 11 of the ECL, commonly known as the Fish and Wildlife Law, comprehensively regulates hunting across the State. The law sets forth requirements for obtaining various hunting licenses, *see, e.g.*, ECL § 11-0703, as well as the privileges afforded to holders of such licenses, *see, e.g., id.* § 11-0701.² “A hunting license entitles the holder to hunt wildlife” subject to the provisions of the Fish and Wildlife Law. *Id.* § 11-0701(2)(a). Thus, licensed hunters are entitled to take deer by long bow in Suffolk County during a statutorily defined season. *See id.* § 11-0907.

² For the Court’s convenience, we attach copies of ECL §§ 11-0701, 11-0931, Town Law § 130, and Smithtown Town Code § 160 in an addendum to this brief.

Licensed hunters must, however, comply with the restrictions set forth in the Fish and Wildlife Law. *See* ECL § 11-0703. One of those restrictions is that a long bow may not be discharged within 150 feet “from a dwelling house, farm building or farm structure actually occupied or used, school building, school playground, public structure, or occupied factory or church.” *Id.* § 11-0931(4)(a)(2). The corresponding setback distance for firearms is 500 feet, and for crossbows³ it is 250 feet. *Id.* These setback provisions do not restrict an owner or lessee of a dwelling with respect to that dwelling, nor do they restrict resident family members or others acting with the owner’s or lessee’s consent. *Id.* § 11-0931(4)(b). But such persons must comply with the setbacks with respect to “any other dwelling house”—*i.e.*, neighboring houses—as well as farm buildings or farm structures actually occupied or used, schools, playgrounds, public structures, and occupied factories and churches. *Id.*

³ A crossbow is different from a long bow. Unlike a long bow, where the archer must maintain the bow’s draw manually, a crossbow uses a locking mechanism to maintain the bow’s draw, thus requiring less exertion, and shoots arrow-like projectiles called bolts by depressing a trigger. *See* ECL § 11-0901(4)(b)(9); 6 N.Y.C.R.R. § 2.3(a)(1).

The statewide setback restriction for firearms originated in 1956. *See* L. 1956, ch. 559. The statute at that time read:

No person other than the owner or lessee of a dwelling house or his immediate family actually residing in such house, or a person in his employ, or a person who is a guest in such house or acting with the consent of such owner or lessee, shall discharge a firearm within five hundred feet thereof.

ECL former § 245(4)(b).⁴ In 1957, the Legislature amended this statute to cover the discharge of a long bow in addition to that of a firearm. *See* L. 1957, ch. 466.

In 1963, the Legislature expanded the list of structures to which the setback restriction applied, including farm buildings, school buildings, school playgrounds, and occupied factories and churches. *See* L. 1963, ch. 453. The 1963 legislation was intended to protect the public, especially in densely populated suburban areas. As the Conservation Department (DEC's predecessor agency) explained in its memorandum in support of the bill:

With the expansion of suburban communities and the high concentrations of hunters that often occur in such

⁴ The setback restriction in ECL former § 245(4)(b) existed even before 1956, but applied only to Rockland, Putnam, Westchester, and Nassau Counties.

localities, indiscriminate or careless shooting near occupied dwellings, schools, factories, etc. has become a problem. The existing prohibition has been effective with respect to dwellings. Extending it to apply to schools and other establishments as provided in this bill should help to meet the problem on a broader scale.

Bill Jacket, L. 1963, ch. 453.

In 2014, the Legislature reduced the setback restriction for long bows to 150 feet, and also affirmatively authorized the use of crossbows for hunting, subject to a setback restriction of 250 feet. *See* L. 2014, ch. 55, pt. EE, § 8. The purpose of this change, which the Legislature included in the 2014-15 budget, was to expand hunting opportunities in the State. The Memorandum in Support of the bill explained that the reduced setback for long bows “would maintain a safe distance for engaging in the sport while making available for hunting more lands in suburban areas, which would increase hunting opportunities, and help manage locally over-abundant deer populations.” *Mem. in Support of 2014-15 New York State Executive Budget*, at 12. Assemblyman Sweeney, who was Chair of the Assembly Committee on Environmental Conservation and represented parts of Suffolk County, echoed this sentiment during a hearing on the budget, explaining that the setback

reduction “offers adequate safety and increased opportunity to manage and harvest wildlife.” Joint Legislative Hearing, 2014-15 Executive Budget on Environmental Conservation, Tr. (Hearing Tr.) at 318 (Jan. 29, 2014).

At that same hearing, Senator Krueger expressed concern about the original proposal to use the same 150-foot setback for the discharge of a crossbow. Hearing Tr. at 90-91. Crossbows are more powerful than long bows, and previously were not permitted for hunting in the State. The Legislature’s concern for this public safety issue led it to adopt a 250-foot setback for crossbows, compared to a 150-foot setback for long bows. *See* Assembly Ways & Means Comm., Summary of Recommended Changes to the Executive Budget, at 57-2 (Mar. 31, 2014). The Legislature preserved the 500-foot setback for firearms.

The discharge setback restrictions in ECL § 11-0931(4)(a)(2) apply statewide. Nonetheless, certain towns are statutorily authorized to further restrict, or prohibit, the discharge of *firearms*. Town Law § 130(27) permits designated suburban towns, including Smithtown, to “prohibit[] the discharge of firearms in areas in

which such activity may be hazardous to the general public or nearby residents.” Such local ordinances “may be more, but not less, restrictive than any other provision of law.” Town Law § 130(27). The Town Law does not define the term “firearm” or expressly incorporate the Penal Law definition of firearm, found at Penal Law § 265.00(3). The Town Law does, however, expressly refer to the setback restriction in ECL § 11-0931(4)(a)(2), providing that “[t]hirty days prior to the adoption of any ordinance changing the five hundred foot rule, a notice must be sent to the regional supervisor of fish and game of the environmental conservation department, notifying him of such intention.” Town Law § 130(27). And, as noted, ECL § 11-0931(4)(a)(2) distinguishes “firearms” from “long bows.” Thus the Town Law uses the term “firearm” in a way that does not include long bows.

B. Factual Background

Smithtown is a populous suburban town in Suffolk County. It is one of the towns explicitly authorized by Town Law § 130(27) to restrict the discharge of firearms. Smithtown has exercised that authority by adopting an ordinance broadly prohibiting the

discharge of “firearms” anywhere in the town. *See* Smithtown Town Code § 160-4.

However, Smithtown has defined the term “firearm” more broadly than does state law. The Smithtown ordinance defines “firearm” as “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, a BB gun, a slingshot and *a bow and arrow.*” Smithtown Town Code § 160-2 (emphasis added). Smithtown’s ordinance thus, at a minimum, prohibits the use of long bows.⁵ The ordinance provides an exception for the discharge of “firearms” on “one’s own property,” or on another’s property “with the written consent of the landowner.” *Id.* § 160-5. But such discharge may not be “within 500 feet from a dwelling, school or occupied structure, or a park, beach, playground or any other place of outdoor recreational or nonrecreational activities.” *Id.* Under Smithtown’s ordinance,

⁵ It is unclear whether Smithtown also views a crossbow as a kind of “bow and arrow,” although crossbows are not generally referred to as such. The use of crossbows is not at issue here, however.

then, the 500-foot setback restriction applies even to an owner's or lessee's own dwelling.

Thus, while state law expressly authorizes long bow hunting subject to a 150-foot setback, and imposes no required setbacks on an owner's or lessee's own dwelling, or a resident family member or someone else acting with the owner's or lessee's consent as to that dwelling, Smithtown's ordinance prohibits long bow hunting within 500 feet of *any* dwellings, with no exceptions.

C. Procedural History

In November 2017, plaintiffs Hunters for Deer, Inc., and Smithtown resident Michael Lewis brought this suit against Smithtown. Plaintiffs sought a declaration that Smithtown's firearm ordinance is invalid because it is inconsistent with state law. (Record on Appeal [R.] 10-11.) Plaintiffs moved for summary judgment. (R. 47.) Supreme Court, Suffolk County (Santorelli, J.), denied plaintiffs' motion, holding that state law did not preempt Smithtown's ordinance. (R. 3-8.) The Second Department unanimously reversed. *Hunters for Deer, Inc. v. Town of Smithtown*, 186 A.D.3d 682 (2d Dep't 2020). (R. 74-76.)

The Second Department held that state law preempts Smithtown's ordinance. As the court explained, Smithtown's "ordinance seeks to prohibit the discharge of a bow and arrow in circumstances where, under State law, discharge of a bow and arrow is allowed." (R. 75.) Specifically, the town ordinance prohibits the discharge of a bow and arrow within 500 feet of any dwellings. State law, by contrast, expressly permits hunting with a long bow if the hunter complies with the restrictions set forth in the ECL, which include the setback requirement of only 150 feet (and no setback at all with respect to the hunter's own dwelling). (R. 75.) The court rejected Smithtown's argument that Town Law § 130(27) expressly authorized it to enhance safety by imposing a more restrictive requirement. As the court explained, § 130(27) permits Smithtown to adopt prohibitions and more restrictive requirements regarding firearms, but does not extend the same authority to the town with respect to long bows. Given the distinction between a "firearm" and a "long bow" in other areas of New York law, including the ECL, the court held that a bow and arrow is not a "firearm" within the meaning of the Town Law. (R. 76.)

Smithtown moved for leave to appeal, which this Court granted on November 19, 2020. (R. 73.)

ARGUMENT

The Second Department, in a well-reasoned and unanimous decision, correctly held that Smithtown’s firearm ordinance is invalid as applied to the discharge setback of a long bow. The ordinance prohibits the discharge of a “firearm” within 500 feet of any dwellings, and includes long bows within its definition of firearm. *See* Smithtown Town Code §§ 160-2, 160-4. But while the Legislature has expressly delegated to Smithtown the authority to regulate the discharge of a firearm, *see* Town Law § 130(27), the Legislature did not give Smithtown similar authority over long bows.

And without such legislative authority, Smithtown’s ordinance as applied to the discharge of a long bow is preempted by state law. ECL § 11-0701(2)(a) expressly authorizes licensed hunters to hunt wildlife so long as they comply with restrictions set forth in the ECL, including a 150-foot setback for long bow hunting under ECL § 11-0931(4)(A)(2). Smithtown’s 500-foot setback far

exceeds that state-mandated setback. Because Smithtown’s municipal ordinance prohibits what state law expressly allows, it is inconsistent with state law. This Court therefore should affirm the decision below.

POINT I

TOWN LAW § 130(27) AUTHORIZES SMITHTOWN TO REGULATE THE DISCHARGE ONLY OF FIREARMS, NOT LONG BOWS

As the Second Department correctly held, Town Law § 130(27) does not authorize Smithtown to adopt more restrictive (*i.e.*, shorter) setback distances for long bows. Nothing in the Town Law suggests that the term “firearm” was intended to cover long bows. While the Town Law does not define the term “firearm,” the Fish and Wildlife Law—in the context of setback restrictions—expressly distinguishes firearms from long bows. *See* ECL § 11-0931(4)(a)(2). DEC’s regulations do the same. *Compare* 6 N.Y.C.R.R. § 180.3, *with id.* § 2.4(a)(3). And Town Law § 130(27) incorporates by reference the setback requirements contained in the ECL provision, providing that “[t]hirty days prior to the adoption of any ordinance changing the five hundred foot rule, a

notice must be sent to the regional supervisor of fish and game of the environmental conservation department, notifying him of such intention.” Town Law § 130(27).

Indeed, the Legislature enacted Town Law § 130(27) in 1966, just nine years after the Legislature added the long bow-specific discharge setback to the ECL. *See* L. 1966, ch. 376. Construing these statutes as in pari materia, the only plausible inference is that the Legislature in 1966 viewed “firearms” as excluding long bows. *See Matter of Albany Law School v. New York State Off. of Mental Retardation & Dev. Disabilities*, 19 N.Y.3d 106, 121 (2012) (citation omitted) (“Statutes that relate to the same subject are in pari materia and should ‘be construed together unless a contrary intent is clearly expressed by the Legislature.”); McKinney’s Cons. Laws of New York, Statutes § 222 (“A statute is to be construed with reference to earlier statutes in pari materia.”).

The legislative history of Town Law § 130(27) further confirms that the term “firearm” was not intended to include long bows. The Sponsor’s Memorandum in support of the 1966 legislation described the discharge of firearms in densely populated

suburban areas as “a very serious menace to public safety.” Bill Jacket, L. 1966, ch. 376, at 4. The use of long bows for hunting did not implicate the same public safety risk. In fact, before enacting the 1966 legislation, the Legislature considered and rejected a bill that would have authorized the identified towns to regulate hunting. DEC’s predecessor agency, the Conservation Department, opposed the bill because such hunting regulations would conflict with state law, and the bill was amended to omit any reference to authority to regulate hunting. *See id.* at 7, 13. If the term “firearm” in Town Law § 130(27) were interpreted to include long bows, the statute would in effect give Smithtown the very authority to regulate hunting that the Legislature had rejected.

Moreover, Smithtown’s argument that “firearm” for purposes of the Town Law includes a long bow is inconsistent with the meaning that state law has ascribed to “firearm” since at least the early 1900s. Penal Law former § 1896, enacted in 1909, prohibited the making and disposing of “dangerous weapons,” applicable to “a slungshot, billy, sandclub or metal knuckles,” as well as to a “*gun, revolver, pistol or other fire-arm* or any air-gun, spring-gun or other

instrument or weapon in which the propelling force is a spring or air.” (Emphasis added.) Penal Law § 265.00(3) now defines “firearms” as pistols, revolvers, and assault weapons, as well as shotguns and rifles of specified lengths and weapons made by altering a shotgun or rifle. Neither of these statutory definitions of “firearm” would cover a long bow. Nor would dictionary definitions of “firearm.” *See, e.g.*, Merriam-Webster.com (defining firearm as “a weapon from which a shot is discharged by gunpowder”).

Thus, while Smithtown has express authority under the Town Law to adopt a greater setback distance for the discharge of a “firearm” than the 500-foot setback under state law, it does not have that same authority with respect to the discharge of a long bow.

POINT II

TO THE EXTENT SMITHTOWN’S ORDINANCE IMPOSES A GREATER SETBACK RESTRICTION ON THE USE OF LONG BOWS, IT IS PREEMPTED BY STATE LAW

Because Town Law § 130(27) does not affirmatively authorize Smithtown to regulate the discharge of long bows, Smithtown’s ordinance—insofar as it adopts a more restrictive setback distance for long bows—is preempted by state law. The ordinance prohibits

the discharge of a long bow within 500 feet of *any* dwellings, as well as specified other buildings and outdoor areas. *See* Smithtown Town Code §§ 160-2, 160-4. Because this setback distance is greater than the 150-foot setback under ECL § 11-0931(4)(A)(2), and ECL § 11-0701(2)(a) expressly authorizes licensed hunters to hunt wildlife so long as they comply with restrictions set forth in the ECL, including the setback restrictions, Smithtown’s ordinance prohibits what state law expressly allows and thus is inconsistent with, and preempted by, state law.

While “[t]he home rule provisions of the Constitution and the legislation implementing them list several subjects about which local governments are given the power to legislate,” including public safety, that power is not unbounded. *Matter of Council of City of N.Y. v. Bloomberg*, 6 N.Y.3d 380, 392-93 (2006); *see also Garcia v. New York City Dep’t of Health & Mental Hygiene*, 31 N.Y.3d 601, 617 (2018). A local law must be consistent with state law relating to a matter of state concern. *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 60 N.Y.2d 99, 107-08 (1983).

Thus, “when the State has acted upon a subject, and in so acting has evidenced a desire that its regulations should pre-empt the possibility of varying local regulations,” municipalities are powerless to adopt ordinances that are inconsistent with state law. *People v. Cook*, 34 N.Y.2d 100, 109 (1974). Such inconsistency arises when a local law conflicts with state law, for example by prohibiting conduct that “the State law specifically allows.” *Matter of Lansdown Entertainment Corp. v. New York City Dep’t of Consumer Affairs*, 74 N.Y.2d 761, 764 (1989). And “[w]hen the State has created a comprehensive and detailed regulatory scheme with regard to the subject matter that the local law attempts to regulate, the local interest must yield to that of the State in regulating that field.” *People v. Diack*, 24 N.Y.3d 674, 677 (2015).

As the Second Department correctly held, Smithtown’s firearm ordinance conflicts with state law and is therefore preempted. Under the Fish and Wildlife Law, licensed hunters are entitled to hunt wildlife, subject to the restrictions set forth in that statute. ECL § 11-0701(2)(a). State law thus affirmatively authorizes licensed hunters to hunt by long bow, so long as they

comply with the 150-foot setback restriction. *See id.* §§ 11-0907, 11-0931(4)(a)(2). And even the 150-foot setback restriction does not apply to an owner's or lessee's own dwelling, or a resident family member or another acting with the owner's or lessee's consent as to that dwelling (so long as the hunter remains 150 feet away from neighboring houses, as well as farm buildings or farm structures actually occupied or used, schools, playgrounds, public structures, and occupied factories and churches). *See id.* § 11-0931(4)(b). In conjunction with the 150-foot setback, the ECL § 11-0931(4)(b) exception meaningfully allows for hunting by long bow in many suburban areas.

Because Smithtown's ordinance prohibits what state law permits, the ordinance directly conflicts with state law. *See Matter of Lansdown Entertainment*, 74 N.Y.2d at 764. The ordinance broadly prohibits the discharge of a long bow in the town. *See* Smithtown Town Code § 160-2. And while the ordinance creates an exception for the discharge of a long bow on one's own property or on another's property with the consent of the landowner, such discharge must not be within 500 feet of *any* dwellings, with no

exceptions. *Id.* § 160-5. Smithtown’s 500-foot setback effectively prohibits hunting in areas where it is expressly permitted, and deemed safe, by state law. This inconsistency is fatal to the validity of the ordinance as applied to the discharge setback of a long bow.

While Smithtown argues that the ECL does not preempt it from adopting greater setback distances (App. Br. at 15-27), preemption is largely a matter of legislative intent, *see, e.g., Consol. Edison*, 60 N.Y.2d at 106-08, and here the State “has evidenced a desire that its regulations should pre-empt the possibility of varying local regulations,” *Cook*, 34 N.Y.2d at 109. Specifically, the State has expressed in three ways its intent to impose a ceiling on discharge setback distances for long bows, beyond which localities are not authorized to go.

First, the ordinance “is plainly in tension with” the express language of the Fish and Wildlife Law. *Matter of Council of City of N.Y.*, 6 N.Y.3d at 393. The State’s statutory scheme expressly authorizes a licensed hunter to hunt deer by long bow subject to a 150-foot discharge setback requirement, *see* ECL §§ 11-0907, 11-

0931(4)(a)(2), and the ordinance's 500-foot discharge setback directly conflicts with that express authorization.

Second, when the Legislature intended to permit towns to adopt greater setback distances, it explicitly provided authority to do so. In Town Law § 130(27), the Legislature authorized identified specific towns, generally highly populated towns in denser suburban areas, to prohibit the discharge of “firearms” and enact ordinances “more, but not less, restrictive than any other provision of law.” The statute even mentions the State’s 500-foot setback, providing that “[t]hirty days prior to the adoption of any ordinance changing the five hundred foot rule, a notice must be sent to the regional supervisor of fish and game of the environmental conservation department, notifying him of such intention.” Town Law § 130(27). This explicit delegation of authority to certain towns to increase the setback restriction for the discharge of firearms—which, as demonstrated *supra* Point I, do not include long bows—confirms that the ECL setback provision was not intended to authorize localities to increase the discharge setback for long bows. *See Flores v. Lower E. Side Serv. Ctr., Inc.*, 4 N.Y.3d 363, 369 (2005)

(when “Legislature knows how to” use specific statutory language but chooses not to do so, it is presumed that Legislature intentionally omitted that language).

Third, ECL § 11-0931(4)(a)(2) represents the Legislature’s policy judgment that a 150-foot setback sufficiently serves the State’s interest in public safety while also promoting the State’s interest in wildlife management. As we previously explained *supra* at 5, the primary purpose of the State’s setback restriction is to prevent hunting accidents. That is apparent from the statute’s earlier legislative history. *See* Bill Jacket, L. 1963, ch. 453. And the Legislature considered public safety when it reduced the setback to 150 feet in 2014, although Smithtown asserts otherwise (*see* App. Br. at 9). The Legislature viewed 150 feet as “a safe distance” from buildings for the discharge of a long bow by licensed hunters. Mem. in Support of 2014-15 New York State Executive Budget, at 12. By contrast, the Legislature’s concern for safety led it to adopt a longer setback—250 feet—for the discharge of crossbows, which it determined were more dangerous. *See* Hearing Tr. at 90-91;

Assembly Ways & Means Comm., Summary of Recommended Changes to the Executive Budget, at 57-2.

While a 150-foot setback restriction for long bows sufficiently serves the State’s interest in safety, a greater setback would impair the State’s interest in wildlife management. The stated rationale for the 2014 amendment was to “increase hunting opportunities[] and help manage locally over-abundant deer populations.” Mem. in Support of 2014-15 New York State Executive Budget, at 12. Overabundant deer populations in suburban areas, including Long Island, create a host of problems—for humans, the ecosystem, and the deer population itself. *See generally* DEC, Management Plan for White-Tailed Deer in New York State, 2021-2030 (May 2021), https://www.dec.ny.gov/docs/wildlife_pdf/deerplan21.pdf. To address this problem and to promote effective wildlife management, the Legislature reduced the setback for the discharge of a long bow to 150 feet. As the Chair of the Assembly Committee on Environmental Conservation recognized, this distance “offers [both] adequate safety and increased opportunity to manage and harvest wildlife.” Hearing Tr. at 318.

If the 150-foot setback were merely a floor, rather than a ceiling, then municipalities across the State could enact greater setbacks (like Smithtown's)—or even prohibit the discharge of a long bow altogether. Such ordinances would impair the State's interest in wildlife management and defeat the purpose of the 2014 amendment. The Legislature could not have intended to pass a law so easily defeated by local action. Thus, ECL § 11-0931(4)(a)(2) must create a regulatory ceiling, and municipalities must defer to the judgment of the State that a 150-foot setback properly serves the State's interests in both public safety and wildlife management.

Finally, an additional reason for concluding that Smithtown's ordinance is preempted by state law is that the ordinance impinges on a field that is comprehensively regulated by the State. *See Diack*, 24 N.Y.3d at 677. As multiple opinions by the Attorney General have recognized, hunting and wildlife management are areas of substantial state concern. *See, e.g.*, 1953 Op. Att'y Gen. 151; 1947 Op. Att'y Gen. 169; 1935 Op. Att'y Gen. 324. Determining a safe setback distance for hunting thus falls to the State, not municipalities. Indeed, for this reason, an opinion of the

Comptroller expressly concludes that towns (other than those covered by Town Law § 130[27]) may not prohibit the discharge of firearms or adopt a greater setback than that required under state law. 1971 Op. Comptroller 70-780. The Court should reach the same result here with respect to the discharge of a long bow.

While the direct conflict between Smithtown's ordinance and state law is sufficient to resolve this appeal, plaintiffs are also correct that the State has occupied the field of hunting regulation. Consequently, Smithtown must "tailor its ordinance to ensure that its impact upon the preempted field is merely incidental." *Matter of Lansdown*, 74 N.Y.2d at 763-64. Smithtown's ordinance fails that test. It effectively prohibits bow hunting of deer, which is the only form of big game hunting permitted in Suffolk County. *See* ECL § 11-0907. Moreover, inconsistent municipal ordinances like Smithtown's create a patchwork of hunting regulations that both confuse the public and interfere with the State's enforcement of its own laws. The effect of such ordinances, therefore, is to "defeat the purpose and operation of the State regulatory scheme." *Consol. Edison*, 60 N.Y.2d at 106 n.3.

In sum, Smithtown's firearm ordinance conflicts with state law by prohibiting otherwise permissible bow hunting and impairing the State's substantial interest in wildlife management. The ordinance also impermissibly impinges on the State's comprehensive hunting regulations. The Second Department thus correctly held that the ordinance is preempted.

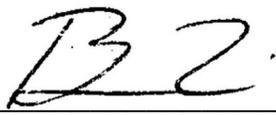
CONCLUSION

This Court should affirm the Second Department's decision holding that state law preempts Smithtown's setback restriction as applied to the discharge of a long bow.

Dated: Albany, New York
November 23, 2021

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Beezly J. Kiernan, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains **4,698** words, which complies with the limitations stated in § 500.13(c)(1).



Beezly J. Kiernan

ADDENDUM

McKinney's Consolidated Laws of New York Annotated
Environmental Conservation Law (Refs & Annos)
Chapter 43-B. Of the Consolidated Laws (Refs & Annos)
Article 11. Fish and Wildlife (Refs & Annos)
Title 7. Hunting, Fishing and Trapping Licenses (Refs & Annos)

McKinney's ECL § 11-0701

§ 11-0701. Definitions of licenses and privileges of licensees

Effective: April 1, 2014

[Currentness](#)

1. A hunting license:

a. entitles a holder who is twelve or thirteen years of age to hunt wildlife, except big game, as provided in title 9 of this article subject, specifically, to the provisions of [section 11-0929](#) of this article. It entitles such holder to possess firearms as provided in [section 265.05 of the penal law](#). A holder who is twelve or thirteen years of age shall not hunt with a crossbow.

b. entitles a holder who is fourteen or fifteen years of age to hunt wildlife, including wild deer and bear, as provided in title 9 of this article, subject, specifically, to the provisions of [section 11-0929](#) of this article. It entitles such holder to possess firearms as provided in [section 265.05 of the penal law](#).

2. a. A hunting license entitles the holder to hunt wildlife subject to the following:

(1) a holder who is eighteen years of age or older may hunt wildlife as provided in title 9 of this article,

(2) a holder who is sixteen years of age or older may hunt wildlife, except big game, as provided in title 9 of this article, and

(3) a holder who is between the ages of sixteen and eighteen may hunt big game pursuant to the provisions of title 9 of this article while the holder is accompanied by a parent, guardian or person over the age of eighteen as required by [section 11-0929](#) of this article.

A holder may take fish with a longbow as provided in titles 9 and 13 of this article.

b. A special antlerless deer license is applicable to the hunting of wild antlerless deer in a special open season fixed pursuant to [subdivision 6 of section 11-0903](#) of this article in a tract within a Wilderness Hunting Area and entitles the holder of a hunting license to hunt antlerless deer in such special open season, as provided in title 9 of this article if he or she has on his or her person while so hunting both his or her hunting license and his or her special antlerless deer license.

3. A bowhunting privilege when included on a hunting license entitles a holder:

(1) who is between the ages of twelve and sixteen years to hunt wild deer and bear with a longbow during the special archery season and during the regular season, as provided in title 9 of this article, subject to the provisions of [section 11-0929](#) and [subdivision 3](#) of [section 11-0713](#) of this article;

(2) who is eighteen years of age or older to hunt wild deer and bear with a longbow, as provided in title 9 of this article, in a special longbow season; and

(3) who is sixteen or seventeen years of age to exercise the same privileges subject to the provisions of [section 11-0929](#) and [subdivision 3](#) of [section 11-0713](#) of this article.

4. A fishing license entitles the holder to take fish by angling, spearing, hooking, longbow and tipups, to take frogs by spearing, catching with the hands or by use of a club or hook, and to take bait fish for personal use, as provided in titles 9 and 13 of this article, except that such license shall not entitle the holder to take migratory fish of the sea or to take fish from the waters of the marine district.

5. A non-resident bear tag entitles a person who has not been a resident of the state for more than thirty days who also possesses a hunting license to hunt bear during the regular open season therefor or in an open season fixed by regulation pursuant to [subdivision eight](#) of [section 11-0903](#) of this article. It entitles a non-resident holder who also possesses a hunting license with bowhunting privilege to hunt bear with a longbow during the open bear season. It entitles a non-resident holder who also possesses a hunting license with muzzle-loading privilege to hunt bear with a muzzleloader during the open bear season.

6. A seven-day fishing license entitles the holder to exercise the privileges of a fishing license for the seven consecutive days specified in the license.

7. A one-day fishing license entitles the holder to exercise the privileges of a fishing license on the day specified on the license.

8. A trapping license entitles the holder to trap beaver, otter, fisher, mink, muskrat, skunk, raccoon, bobcat, coyote, fox, opossum, weasel, pine marten and unprotected wildlife except birds, as provided in title 11, subject to the provisions of [section 11-0713](#) of this article.

9. A muzzle-loading privilege when included on a hunting license entitles a holder who is fourteen years of age or older to hunt wild deer and bear with a muzzle-loading firearm or crossbow, as provided in title 9 of this article, in a special muzzle-loading firearm season.

Credits

(L.1972, c. 664, § 2. Amended L.1973, c. 416, § 2; L.1975, c. 95, § 1; L.1976, c. 918, § 1; L.1977, c. 142, §§ 1, 2; L.1977, c. 198, § 1; L.1977, c. 415, § 1; L.1977, c. 646, § 1; L.1978, c. 208, § 1; L.1979, c. 160, §§ 19, 20; L.1979, c. 431, § 1; L.1980, c. 169, § 1; L.1980, c. 694, § 1; L.1981, c. 114, § 3; L.1985, c. 123, § 1; L.1986, c. 559, § 1; L.1991, c. 450, §§ 1 to 5; L.1991, c. 581, § 1; L.1992, c. 171, § 1; L.1993, c. 57, §§ 79 to 86; L.1993, c. 237, § 1; L.1994, c. 470, §§ 1, 2; L.1995, c. 108, §§ 3, 4; L.2002, c. 82, pt. F, §§ 5 to 17, eff. Oct. 1, 2002; L.2008, c. 344, § 1, eff. July 21, 2008; L.2009, c. 59, pt. KK, § 1, eff. Oct.

1, 2009; L.2009, c. 59, pt. LL, § 1, eff. Oct. 1, 2009; L.2010, c. 483, §§ 6, 7, eff. Oct. 1, 2010; L.2011, c. 25, § 1, eff. Aug. 15, 2011; L.2013, c. 58, pt. R, §§ 1, 1-a, eff. Feb. 1, 2014; L.2014, c. 55, pt. EE, §§ 17, 21, eff. April 1, 2014.)

McKinney's E. C. L. § 11-0701, NY ENVIR CONSER § 11-0701

Current through L.2021, chapters 1 to 612. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Environmental Conservation Law (Refs & Annos)
Chapter 43-B. Of the Consolidated Laws (Refs & Annos)
Article 11. Fish and Wildlife (Refs & Annos)
Title 9. Hunting (Refs & Annos)

McKinney's ECL § 11-0931

§ 11-0931. Prohibitions on the use and possession of firearms

Effective: April 1, 2014

[Currentness](#)

1. No person except a law enforcement officer in the performance of his official duties shall use in hunting or possess in the fields or forests or on the waters of the state for any purpose:

a. the apparatus known as a silencer;

b. any automatic firearm, or any firearm which has been converted to an automatic type, or any firearm which has a built-in mechanical adjustment which will permit it to function as an automatic arm; or

c. any auto-loading firearm of a construction to contain more than six shells in the magazine and chamber combined, except

(1) such a firearm using twenty-two caliber rim-fire ammunition, or

(2) such a firearm which has been altered so as to reduce its capacity to not more than six shells at one time in the magazine and chamber combined, or

(3) an auto-loading pistol having a barrel less than eight inches in length.

d. An automatic firearm is defined as one which will continue to fire as long as the trigger is held back. An auto-loading firearm is defined as one which reloads itself after each shot and requires that the trigger be pulled back for each shot.

2. No crossbow or firearm except a pistol or revolver shall be carried or possessed in or on a motor vehicle unless it is uncocked, for a crossbow or unloaded, for a firearm in both the chamber and the magazine, except that a loaded firearm which may be legally used for taking migratory game birds may be carried or possessed in a motorboat while being legally used in hunting migratory game birds, and no person except a law enforcement officer in the performance of his official duties shall, while in or on a motor vehicle, use a jacklight, spotlight or other artificial light upon lands inhabited by deer if he or she is in possession or is accompanied by a person who is in possession, at the time of such use, of a longbow, crossbow or a firearm of any kind except a pistol or revolver, unless such longbow or crossbow is unstrung or such firearm or crossbow is taken down or securely fastened in a case or locked in the trunk of the vehicle. For purposes of this subdivision, motor vehicle shall mean every vehicle or

other device operated by any power other than muscle power, and which shall include but not be limited to automobiles, trucks, motorcycles, tractors, trailers and motorboats, snowmobiles and snowtravelers, whether operated on or off public highways. Notwithstanding the provisions of this subdivision, the department may issue a permit to any person who is non-ambulatory, except with the use of a mechanized aid, to possess a loaded firearm in or on a motor vehicle as defined in this section, subject to such restrictions as the department may deem necessary in the interest of public safety. Nothing in this section permits the possession of a pistol or a revolver contrary to the penal law.

3. No person shall discharge a firearm in a “restricted area” established pursuant to [section 11-0321](#), contrary to the terms of the restriction prohibiting or restricting such discharge.

4. a. No person shall:

(1) discharge a firearm, crossbow or long bow in such a way as will result in the load, bolt, or arrow thereof passing over a public highway or any part thereof;

(2) discharge a firearm within five hundred feet, a long bow within one hundred fifty feet, or a crossbow within two hundred fifty feet from a dwelling house, farm building or farm structure actually occupied or used, school building, school playground, public structure, or occupied factory or church;

(3) use a firearm or a long bow for the hunting of migratory game birds in Larchmont Harbor, specifically those portions bounded by the following points of land:

BEGINNING AT A POINT KNOWN AS UMBRELLA POINT ON THE EAST SHORE OF LARCHMONT HARBOR THEN PROCEEDING IN A NORTHERLY DIRECTION TO CEDAR ISLAND; THENCE NORTHWESTERLY TO MONROE INLET; THENCE NORTHEASTERLY TO DELANCY COVE BEING IN THE TOWN OF MAMARONECK; THENCE IN A SOUTHWESTERLY DIRECTION FROM DELANCY COVE TO GREACEN POINT; THENCE RUNNING THE AREA BETWEEN DELANCY COVE AND THE WEST SHORE OF SATANS TOE NORTHEAST; THENCE SOUTHEAST THEN ALONG THE WEST SHORE OF SATANS TOE SOUTHWEST AND THEN SOUTH TO THE SOUTHERLY POINT OF SATANS TOE TO EDGEWATER POINT.

(4) Use of a firearm or a long bow for the hunting of migratory game birds in Udall's Cove, specifically those portions of Little Neck Bay within Nassau and Queens counties lying east of a line running north from the foot of Douglaston Parkway to the shore opposite.

b. The prohibitions contained in subparagraph 2 of paragraph a above shall not apply to:

(1) The owner or lessee of the dwelling house, or members of his immediate family actually residing therein, or a person in his employ, or the guest of the owner or lessee of the dwelling house acting with the consent of said owner or lessee, provided however, that nothing herein shall be deemed to authorize such persons to discharge a firearm within five hundred feet, a long bow within one hundred fifty feet, or a crossbow within two hundred fifty feet of any other dwelling house, or a farm building or farm structure actually occupied or used, or a school building or playground, public structure, or occupied factory or church;

(2) Programs conducted by public schools offering instruction and training in the use of firearms or long bow;

(3) The authorized use of a pistol, rifle or target range regularly operated and maintained by a police department or other law enforcement agency or by any duly organized membership corporation;

(4) The 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.

5. a. No person shall use a rifle for hunting on Long Island or in Westchester County. If a person be found carrying a rifle in the woodlands on Long Island or in Westchester County, that fact shall be presumptive evidence that he is illegally using it for hunting in that area; but this provision does not apply to members of a duly organized target shooting club carrying unloaded rifles to and from the target range.

b. In the counties, or parts of counties, where the use of a rifle other than a muzzle loading firearm is not permitted in the taking of deer, a person afield shall not possess a rifle larger than twenty-two caliber rim-fire other than a muzzle loading firearm during the open season for deer.

c. In the Northern Zone no person, while engaged in hunting with the aid of a dog or while afield accompanied by a dog, shall possess a rifle larger than .22 caliber using rim-fire ammunition or possess a shotgun loaded with a slug, ball or buckshot, or possess a crossbow; but this paragraph does not apply to persons, engaged in coyote hunts with dogs during any open season on coyotes established pursuant to the provisions of [section 11-0903](#) of this title.

6. No person while engaged in hunting deer or bear pursuant to a bowhunting privilege, and no person accompanying him or her or a member of his or her party, while he or she is so engaged during a special longbow season, shall have in his or her possession a firearm of any kind, and no person while engaged in hunting deer or bear pursuant to a muzzle-loading privilege, and no person accompanying him or her or a member of his or her party, while he or she is so engaged during a special muzzle-loading firearm season, shall have in his or her possession a firearm of any kind other than a muzzle-loading firearm.

7. During any open season for deer, a person afield shall not possess shotgun shells loaded with a slug or ball unless he holds a valid license or permit to take deer or bear.

Credits

(L.1972, c. 664, § 2. Amended L.1973, c. 74, § 2; L.1973, c. 400, § 29; L.1974, c. 1067, § 5; L.1976, c. 67, § 1; L.1976, c. 407, § 8; L.1978, c. 97, § 1; L.1982, c. 135, § 12; L.1982, c. 143, § 4; L.1986, c. 157, § 1; L.1990, c. 911, § 68; L.2002, c. 82, pt. F, § 50, eff. Oct. 1, 2002; L.2006, c. 309, § 1, eff. July 26, 2006; L.2010, c. 483, §§ 3, 13 to 15, eff. Oct. 1, 2010; L.2012, c. 58, pt. H, § 6, eff. March 30, 2012; L.2012, c. 58, pt. H, § 7; L.2013, c. 58, pt. R, § 24, eff. Feb. 1, 2014; L.2014, c. 55, pt. EE, §§ 8, 9, eff. April 1, 2014.)

McKinney's E. C. L. § 11-0931, NY ENVIR CONSER § 11-0931

Current through L.2021, chapters 1 to 612. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Town Law (Refs & Annos)
Chapter 62. Of the Consolidated Laws (Refs & Annos)
Article 9. Ordinances and Licenses

McKinney's Town Law § 130

§ 130. Town ordinances

Effective: December 1, 2010

[Currentness](#)

The town board after a public hearing may enact, amend and repeal ordinances, rules and regulations not inconsistent with law, for the following purposes in addition to such other purposes as may be contemplated by the provisions of this chapter or other laws. In order to accomplish the regulation and control of such purposes, the town board may include in any such ordinance, rule or regulation provision for the issuance and revocation of a permit or permits, for the appointment of any town officers or employees to enforce such ordinance, rule or regulation and/or the terms and conditions of any permit issued thereunder, and for the collection of any reasonable uniform fee in connection therewith. The town clerk shall give notice of such hearing by the publication of a notice in at least one newspaper circulating in the town, specifying the time when and the place where such hearing will be held, and in general terms describing the proposed ordinance. Such notice shall be published once at least ten days prior to the day specified for such hearing.

1. Building code. Regulating the manner of construction, alteration, removal and inspection of buildings and structures of every nature and description erected or proposed to be erected in said town, and the materials to be used therefor, and in the case of buildings used for public assemblage requiring such stairways, doors, halls, exits and other facilities as may be necessary for the safety, security and comfort of persons using the same, and prohibiting any construction, alteration, or removal which does not comply with such regulations. Such regulations shall be known as the building code of the town.

2. Plumbing code. Regulating the manner of construction, alteration, removal and inspection of all plumbing and drainage systems in existing or proposed buildings and structures and the materials to be used therefor, and the location of cess-pools and sewer systems, the manner of construction and the materials to be used therefor, and the manner in which connections shall be made with main sewers, drains and water mains, and the materials to be used therefor, and prohibiting any construction, alteration or removal or the use of any materials which do not comply with such regulations. The town board may either adopt the standard plumbing code recommended by the state department of health or may formulate other rules and regulations relating to plumbing. Such regulations shall be known as the plumbing code of the town.

3. Electrical code. Regulating the manner of construction, alteration, removal and inspection of all electrical work in existing or proposed buildings and structures and the materials to be used therefor, and prohibiting any construction, alteration or removal or the use of any materials which do not comply with such regulations. Such regulations shall be known as the electrical code of the town.

3-a. Housing code. Regulating and establishing minimum standards governing the condition, occupancy, and maintenance of dwellings, dwelling units, rooming houses, rooming units and premises; establishing minimum standards governing utilities, facilities, and other physical components and conditions essential to make dwellings, dwelling units, rooming houses, rooming

units, and premises safe, sanitary and fit for human habitation; fixing certain responsibilities and duties of owners, operators, agents, and occupants of dwellings, and dwelling units, rooming houses, and rooming units; authorizing and establishing procedures for the inspection of dwellings, dwelling units, rooming houses, and rooming units, and the condemnation and vacation of those dwellings, dwelling units, rooming houses, and rooming units unfit for human habitation. The provisions of this subdivision shall apply only to one and two family dwellings, provided, however, that nothing herein contained shall be construed to affect the power of a town to enact or adopt local laws, ordinances or regulations, with respect to multiple dwellings, pursuant to the provisions of [section three hundred twenty-nine of the multiple residence law](#).

4. Sidewalks. Regulating the manner of construction, reconstruction and repair of sidewalks, the materials to be used, the grades and the widths thereof and prohibiting any construction, reconstruction or repair which does not comply with such regulations; requiring the owner and occupant of premises abutting on any street where a sidewalk has been laid, to keep the sidewalk in front of such premises, free and clear from snow, ice, dirt and other obstructions and upon default thereof provide for the removal thereof at the expense of the owners of such premises and that such charge shall become a lien upon the premises benefited thereby, until paid.

5. Fire prevention. Regulating the erection of buildings where extrahazardous business is to be carried on and the carrying on of such business: Regulating the attendance in public buildings and the use of aisles as standing room for spectators and the erection of fire escapes on all public buildings: Regulating the construction and use of all heating systems and devices employing heat or fire or conducting smoke for any purpose: Establishing fire limits and prohibiting the erection of frame buildings or structures therein: Preventing and extinguishing fires and regulating conduct thereat: Regulating the use, sale, storage and transportation of fire arms, fire works, explosives and inflammables or prohibiting the use, sale, storage and transportation of any of them: Requiring the deposit of ashes and waste in safe receptacles and places: Prohibiting bonfires in the streets and public places and regulating the manner in which they may be permitted in other places: Requiring the cutting, trimming and removal of brush, grass and weeds and the removal of rubbish and the elimination of fire hazards: Protecting and preserving the property and apparatus of any fire company or department: Regulating the parking of automobiles or other conveyances in the locality of fire houses and hydrants: Providing for punishment for insubordination or disorderly conduct at fires or the wilful neglect or refusal to obey or the attempt to prevent or obstruct the lawful orders of a person in charge of the operations of a fire department or fire company: Preventing damage by fire and protecting property exposed to destruction by fire: Providing for the voluntary destruction either in part or in whole of buildings and property to arrest fire or extinguish the same, and for all other things necessary or helpful for the prevention of fire or the extinguishing thereof and for such other further purposes as shall tend to provide for the general safety of persons and property within the town.

6. Public dump and dumping ground. Prohibiting and/or regulating the use of any lands within the town as a dump or dumping ground.

7. Use of streets, highways, sidewalks and public places. (a) Regulating the use of streets, highways, sidewalks and public places by pedestrians, animals, motor and other vehicles, including local and interurban street cars; restricting parking of all vehicles therein; regulating parades and public assemblages therein; regulating or prohibiting coasting therein; and, subject to the approval of the department of transportation, requiring railroad companies to employ and maintain competent flagmen and erect gates at any street or highway crossing; prohibiting the deposit of any dirt, filth, waste or rubbish in any street, highway, sidewalk, that part of any waterway within its jurisdiction or public place or encumbering thereof by any encroachment of buildings, structures, excavation or otherwise; regulating the manner in which excavation may be made in or under the streets, highways, sidewalks or public places and requiring an indemnity bond as a condition precedent thereto or the town board may require as the condition precedent thereto, the deposit in cash of such an amount as the board may determine necessary to cover the probable expense to the town of the replacement by the town of the street, highway, sidewalk or public place, and the unexpended balance, if any, shall be refunded to the depositor; providing for the removal of snow and ice therefrom; prohibiting

the use by owners and occupants of property abutting on public streets or grounds of barbed wire or similar fences along the boundaries of such street or grounds.

(b) If the front or other exterior wall of any building erected on or before the first day of January, nineteen hundred forty, in any town encroaches not more than six inches upon any street or highway, no action or proceeding to compel the removal of such wall shall be instituted or maintained by or on behalf of the town, or by or on behalf of any person claiming an easement in or title to the portion of the street or highway on which such wall encroaches, unless such action or proceeding be commenced within the period of one year from the time this act takes effect,¹ and unless within such period a notice of the pendency of such action or proceeding, describing the property on which said building stands and indexed against the owner thereof, be filed in the office of the clerk of the county in which the property lies.

(c) If the front or other exterior wall of any building erected after the first day of January, nineteen hundred forty, in any town encroaches not more than six inches upon any street or highway, no action or proceeding to compel the removal of such wall shall be instituted or maintained by or on behalf of the town, or by or on behalf of any person claiming an easement in or title to the portion of the street or highway on which such wall encroaches, unless such action or proceeding be commenced within the period of one year from the time of the serving of a notice as hereinafter provided, and unless within such period a notice of the pendency of such action or proceeding, describing the property on which said building stands and indexed against the owner thereof, be filed in the office of the clerk of the county in which the property lies. Any person having any interest in the property on which such building stands may serve a notice on the town clerk, town supervisor or on such town officer as the town board shall authorize and direct to defend or appear in any action or legal proceeding against said town, of the town in which said property lies, setting forth a brief description of the property, his interest therein, and the existence of an encroachment on the street or highway. Such notice, together with proof or admission of service thereof, shall be filed in the office of the clerk of the county in which such property lies. The clerk shall index and record such notice as if it were a notice of the pendency of an action and shall collect the usual fees for recording and indexing a notice of the pendency of an action.

(d) If no action be brought within the period hereby limited therefor the owners and encumbrancers of such property shall be deemed to have an easement for the maintenance of the encroaching wall so long as the said wall shall stand, and no longer.

(e) If the front or other exterior wall of any building erected on or before the first day of January, nineteen hundred sixty-five in any town encroaches not more than six inches upon any town street or town highway, the local legislative body of any town may authorize the maintenance of such encroachment by ordinance during the period of time the encroaching wall is in existence; provided, however, that such authorization shall not confer any right or claim to be asserted against such town or the state.

(f) The owner of real property upon which the front or exterior wall of any building thereon encroaches upon any town street or highway, may submit a request, in writing, to the town board of such town for authorization to maintain such front or exterior wall during the time such wall is in existence.

(g) Upon presentation of such request, notice thereof shall be given to the town highway superintendent, who shall recommend to the town board the proposed action on such request. Within thirty days of the presentation of such request, the town board shall determine if the granting of such request shall adversely impact upon the users of the town street or highway. In the event a determination is made that such encroachment does adversely impact upon the use of the town street or highway, such request shall be denied. In the event a preliminary determination is made that such encroachment may have no adverse impact upon the use of the town street or highway, the town board shall within thirty days after the issuance of such preliminary finding, hold a public hearing upon such request, which public hearing shall be conducted upon not less than ten days notice to the public. In addition to such public notice, the owners of property, as determined from the last completed assessment roll, within five

hundred feet of the property as measured from the intersections of the property lines with the town street or highway shall be given notice by certified mail of such public hearing.

(h) If, upon the completion of the public hearing, the town board determines that such front or exterior wall does not interfere or impede the right of the public to use such town street or highway, the town board may grant to the owner of such property a license to continue to maintain such front or exterior wall during the period such wall is in existence; provided however, such town shall have the authority to revoke such license at any time in the event the town board determines that such town street or highway will be improved and as a result of such improvement the front or exterior wall will then impede, interfere with or obstruct traffic or the use of the town street or highway; provided, further, that such license shall not confirm any right or claim against such town. In such event the owner of the property shall be given notice of the proposed action and shall, within the time set forth in the notice, remove such front or exterior wall from the town street or highway.

(i) Upon the abandonment of the building or in the event such building, because of a lack of care enters a state of disrepair, the owner thereof shall remove such front or exterior wall upon notice from the town board.

(j) The authority granted to a town pursuant to paragraphs (f), (g), (h) and (i) of this subdivision may, by local law, be assigned to any department or agency of the town.

7-a. Location and construction of driveways. Regulating the location and manner in which driveway entrances and exits may be constructed by owners and occupants of property abutting on town highways; provided, however, that such regulations shall not deny access from abutting property upon town highways, when such abutting property is a legal lot in accordance with existing statutes and ordinances.

8. Smoke, gases and wastes. Regulating and prohibiting the unnecessary emission of smoke, noxious gases, deposits, dusts, trade wastes and other pollutions from buildings, engines, locomotives and other sources, and regulating, restricting and prohibiting the unnecessary use of bituminous coal within the town or any portion thereof, when such use would affect the public health.

9. Animals. Regulating the keeping of calves; regulating and prohibiting the keeping of swine and mink, restraining the running at large of horses, cattle, sheep, unmuzzled dogs, whether licensed or not, fowls and other animals and authorizing the impounding and sale of the same for the costs of keeping, proceedings and penalty, or the killing of unmuzzled dogs.

10. Malicious mischief. Punishing the wilful and malicious breaking, marring, injuring, removing or defacing of any building or structure, fence, awning, sign board, tree, crop, shrubbery or other property; the tearing down of notices lawfully posted; the removal or alteration or any unlawful interference with stakes set out by engineers, surveyors or otherwise to indicate boundaries or other lines.

11. Peace, good order and safety. Preserving the public peace and good order; preventing and suppressing vice, immorality, disorderly and gambling houses and houses of ill-fame, riots and tumultuous assemblages, unnecessary crowds upon the streets, or in doorways or stairways adjacent thereto, or loitering about such places, preventing unreasonably loud or disturbing noises, determined by the board to be of a character, intensity or duration as to be detrimental to the peace, welfare or good order of the people, and preventing all disorderly, noisy, riotous or tumultuous conduct within the town, disturbing the peace and quiet of the town or any meeting or assembly therein; except when prohibited by reason of the laws of the United States, regulating the use of beaches in or adjacent to the town and regulating swimming and bathing in open water exposed to the public including the

use of underwater diving devices for swimming and fishing, within or bounding the town or such beaches to a distance of fifteen hundred feet from the shore and requiring the owners or operators of any bathing beaches, bath houses or other places charging a fee to the public for the use of any such facilities to provide adequate safeguards for the protection of persons bathing in waters adjacent to such premises; prohibiting profane, vulgar or obscene language or conduct in any street or public place in the town.

12. Amusements. Regulating public dance halls and all places where dancing is permitted; specifying the hours during which such dancing may continue, the supervision thereof, the minimum age of persons allowed to attend, and all other matters relating to the conduct thereof; regulating the conduct of circuses, theatres, pool and billiard parlors, bowling alleys, athletic contests or exhibitions, and all similar places of amusement for money or hire.

13. Beverages and eating places. Regulating all places selling or offering for sale at retail for consumption on the premises any beverage or food stuff; providing for sanitation and cleanliness and the inspection thereof and defining the opening and closing hours and all other matters related thereto.

14. Slaughtering houses and rendering works. Regulating the location, operation, cleaning and removal of slaughter houses, fat, offal or other rendering or reduction works or establishments and unwholesome and noisome buildings or places.

15. Promotion of public welfare. Promoting the health, safety, morals or general welfare of the community, including the protection and preservation of the property of the town and of its inhabitants, and of peace and good order, the benefit of trade and all other matter related thereto, insofar as the same shall not be inconsistent with existing law.

15-a. Excavated lands. Any town may adopt an ordinance giving to the appropriate officials of such town, upon the direction of the town board, the right and power to fill in excavated lands and property if, after a hearing, the existence of such lands and property are deemed by the town board to constitute a hazard to public safety and if, after giving thirty days' notice by certified mail addressed to the owner of record of such lands and property at the address shown on the last preceding assessment roll, such excavated lands and property are not filled in by or on behalf of such owner. Where the excavated lands are filled in by the town, the cost thereof shall be assessed against such lands and property by such town officer as may be designated by such ordinance. The town officer so designated shall serve personally or by certified mail upon the owner of such property at the same address a written notice, stating that at a time and place specified therein, he will assess such cost against such property. Such notice shall be served at least eight days previous to the time specified therein. If directed against a corporation, it may be served upon the corporation at its principal place of business, place of business upon an agent of the corporation within the town, or upon the secretary of state. Notice served upon the secretary of state shall be served at least twelve days previous to the time specified therein. At the time and place so specified, he shall hear the parties interested, and shall thereupon complete the assessment, stating therein, the name of each owner and the amount so assessed, and shall return such assessment to the town clerk who shall present the same to the town board. Such town board shall certify such assessment to the board of supervisors who shall cause the amount stated therein to be levied against such property and any uncollected assessment shall be a lien upon the land affected. Such amount shall be levied and collected at the same time and in the same manner as other town taxes, and shall be paid to the supervisor of the town, to be applied in reimbursing the fund from which such cost was defrayed.

15-b. Repealed.

15-c. Screening facilities in the towns of the counties of Nassau, Rockland and Westchester and certain towns in the county of Suffolk required by zoning boards of appeals or zoning ordinances. Any town in the counties of Nassau, Rockland and Westchester and the towns of Huntington, Babylon, Brookhaven, Islip, Southampton and Smithtown in Suffolk county may

adopt an ordinance giving to the appropriate officials of such town, upon the direction of the town board, the right and power to erect, replace, repair or maintain fences, trees, plantings, shrubbery or other screening on land located in such town where such screening facilities are required by direction of a town board of zoning appeals or by zoning ordinance and there is a failure to comply with such direction, and if, after giving thirty days' notice by registered mail addressed to the owner of record of such land at the address shown on the last preceding assessment roll, such fences, trees, plantings, shrubbery or other screening are not so erected, replaced, repaired or maintained by or on behalf of such owner; and the town board may provide for the assessment of all costs and expenses so incurred by the town, in connection with any action taken as above, against the land on which such screening facilities are located.

16. Unsafe buildings and collapsed structures. Providing for the removal or repair of buildings in business, industrial and residential sections that, from any cause, may now be or shall hereafter become dangerous or unsafe to the public; providing as follows:

- a. For an inspection and report by an official duly appointed by the town board;
- b. For a notice to be served on the owner or some one of the owner's executors, legal representatives, agents, lessees or any other person having a vested or contingent interest in same, either personally or by registered mail, addressed to the last known address, if any, of the owner or some one of the owner's executors, legal representatives, agents, lessees or other person having a vested or contingent interest in same, as shown by the records of the receiver of taxes and/or in the office of the county clerk or county register, containing a description of the premises, a statement of the particulars in which the building or structure is unsafe or dangerous and an order requiring same to be made safe and secure or removed; and if such service be made by registered mail, for a copy of such notice to be posted on the premises.
- c. For time within which person served with such notice may commence the securing or removal of buildings or structures;
- d. For the filing of a copy of such notice in the office of the county clerk of the county within which such building or structure is located, which notice shall be filed by such clerk in the same manner as a notice of pendency pursuant to article sixty-five of the civil practice law and rules, and shall have the same effect as a notice of pendency as therein provided, except as otherwise hereinafter provided in this paragraph. A notice so filed shall be effective for a period of one year from the date of filing, provided, however, that it may be vacated upon the order of a judge or justice of a court of record or upon the consent of the town attorney. The clerk of the county where such notice is filed shall mark such notice and any record or docket thereof as cancelled of record upon the presentation and filing of such consent or of a certified copy of such order.
- e. For a hearing before the town board, notice of which and the time and place thereof to be specified in the notice to repair or demolish; served upon the owner and such persons having an interest in the property or structure as is herein prescribed.
- f. For the removal of such building or structure by the town in the event such owner fails or refuses to repair or remove the same within the time provided.
- g. For the assessment of all costs and expense incurred by the town in connection with the proceedings to remove or secure, including the cost of actually removing said building or structure, against the land on which said buildings or structures are located.

17. Regulation of vessels, personal watercraft and specialty prop-craft. Except when prohibited by the laws of this state or of the United States; (1) a. Regulating the speed and regulating and restricting the operation of vessels, personal watercraft and specialty prop-craft and, in the counties of Westchester, Saratoga, Warren and Suffolk the size and horse power of inboard and outboard motors, while being operated or driven upon any waters within or bounding the town to a distance of fifteen hundred feet from the shore except that in Nassau and Suffolk counties, towns may regulate and restrict the speed and regulate and restrict the operation of vessels in all tidal waters upon lands within the geographic boundaries of such town and those tidal waters contiguous with the town to a distance of fifteen hundred feet from shore and not within any other town. With respect to personal watercraft and specialty prop-craft, regulations may include a prohibition of their use provided such prohibition does not prevent access to federally maintained and designated channels and, notwithstanding any other provision of law, such prohibition shall not be adopted unless the town complies with the public hearing requirements and the requirements for signage as set forth in [section forty-six of the navigation law](#).

b. Restricting and regulating the anchoring or mooring of vessels in any waters within or bounding the town to a distance of fifteen hundred feet from the shore.

c. Restricting and regulating the anchoring or mooring of vessels in such waters when used or occupied as living or sleeping quarters and, providing time limits on duration of the stay of such vessels in such waters and requiring inspection and registration of such vessels when so used.

d. Restricting and regulating sewage disposal and garbage removal from said vessels and use of toilets thereon. The term “sewage” as used in this subdivision shall mean all human body wastes.

e. Designating public anchorage area or areas and regulating the use thereof.

(2) The provisions of this subdivision shall not apply to waters within or bounding an incorporated village to a distance of fifteen hundred feet from the shore, jurisdiction with respect to which is vested in the board of trustees of a village by the provisions of [subdivision one of section forty-six-a of the navigation law](#).

(3) *Redesignated (2).*

18. Shellfish. a. Regulating the taking and the manner of taking clams, oysters, scallops and other shellfish from the lands of or from waters over the lands of

(1) a town vested with the title to, or holding a lease on, lands under tidewater in any harbor, bay or creek, and vested with the right of fishing, or

(2) the trustees of the freeholders and commonalty of a town in which such trustees are vested with title to such lands and the right of fishing, provided that such trustees shall file with the town clerk an application in writing therefor.

b. Such ordinance in either case shall not be less restrictive than the environmental conservation law or, where such law authorizes the department to establish lesser restrictions, the regulations made pursuant to such law, and may provide

- (1) that no dredge or scrape shall be used for such purpose except by a lessee upon lands held by such lessee under lease;
- (2) that no dredge or scrape shall be on board of any boat except that of a lessee while upon water covering lands held by such lessee under lease and while navigating between the dock, anchorage or moorage used by such lessee and such leased land;
- (3) that no dredge or scrape shall be on board of any boat while used for taking shellfish from such lands except by a lessee of lands as in this subdivision provided;
- (4) that each person upon a boat upon which there is a dredge or scrape except as in such ordinance permitted by a lessee shall be a violator of such ordinance;
- (5) That no person shall take any shellfish from such lands, except a lessee from lands held by such lessee under lease, unless such person shall have received from the proper and duly constituted authority a written license or permit permitting such person to take such shellfish, and a license or permit granted to any person shall upon such person's conviction of a violation of such ordinance, be terminated and void; and
- (6) that any person making unlawful entries upon such lands may be proceeded against by injunction to restrain a continuing trespass as well as for violation of said ordinance.

c. Such ordinance shall not apply to the use of a dredge or scrape by the owner, the town or such trustees, for the purpose of removing diseased or blighted shellfish from such lands or to any operation by a town or such trustees incident to transplanting shellfish within such town.

19. Trespass. Prohibiting trespass to public and private property, for the purpose of protection and preservation of the property of the town and of its inhabitants and of peace and good order.

20. Hotels, inns, boarding houses, etc. Regulating hotels, inns, boarding houses, rooming houses, lodging houses, associations, clubs or any building or part of a building used in the business of renting rooms, individual or several, and also private sanatoriums, convalescent homes, homes for aged or indigent persons, day nurseries, hospitals, rest homes or any building or part of a building used for similar purposes, containing a total number of beds, cots or similar equipment providing sleeping accommodations for more than five persons; specifying the type of construction, the manner of their running and operation and prescribing regulations assuring proper sanitation, cleanliness and fire protection.

21. House trailer camps, tourist camps and house trailers. Regulating house trailer camps, tourist camps or similar establishments; requiring approval of suitable plans for house trailer camps and tourist camps and prescribing regulations therefor including provision for sewer connection, water supply, toilets, bathing facilities, garbage removal, registration of occupants, inspection of camps. The town board may either adopt the provisions of the sanitary code established by the public health and health planning council or may formulate other rules and regulations relating to house trailer camps, tourist camps or similar establishments not inconsistent with the provisions of such state sanitary code. Regulating the parking, storage or otherwise locating of house trailers when used or occupied as living or sleeping quarters in any part of the town outside an

established house trailer camp, tourist camp or similar establishment; providing time limits on duration of the stay of such house trailers and requiring registration of such house trailers when so used.

22. Air-ports and flying fields. Regulating air-ports and flying fields, and property or spaces adjacent thereto occupied or used in connection therewith or in the operation thereof for the purpose of the parking or accommodation of automobiles or other vehicles; locating and regulating the flow of vehicular traffic in, to and from such used or occupied spaces; requiring that such used or occupied spaces be kept free of stagnant pools of water and other disagreeable odor producing causes; requiring proper and adequate sanitary facilities, including toilets, water supply, and garbage or waste containers at suitable locations thereon and providing for the proper removal of the contents thereof, and that such spaces be otherwise kept in a clean and sanitary condition; requiring that any such used portions thereof be kept and maintained free from dust by the use of oil or other preventative, or by other means; requiring that the owner thereof adequately police such properties to prevent the commission of crime and/or injury to person or property while thereon.

23. Sand pits, quarries, top soil and other excavations. Regulating the manner of construction on, removal of material from, filling up, draining, cleaning, operating and using any lands or other premises for sand or gravel pits, stone quarries, stripping of top soil, or for other excavation purposes and prohibiting the use of any lands or other premises for the aforesaid purposes which do not comply with such regulations.

23-a. The town board of the town of Southold in the county of Suffolk, is authorized to regulate by ordinance consistent with the provisions of the public health law and any other general law the raising and keeping of ducks within such town.

24. Riding stables and riding academies. Regulating, controlling, or prohibiting riding stables, riding academies, or similar establishments; requiring approval of plans for the construction and location of stables; prescribing regulations for the care of horses; regulating bridle paths and bridle trails; prohibiting or regulating night riding of horses; and otherwise providing for the care and safety of horses and riders.

25. Building lines. Establishing building lines in a public highway or highways and requiring all buildings hereafter erected to be within such lines.

26. Air guns. Regulating or prohibiting the possession, sale and use of air guns, spring guns or other instruments or weapons in which the propelling force consists of springs or air.

27. Firearms. In the towns of Huntington, Babylon, Smithtown, Islip, Brookhaven, Riverhead and Southampton, in the county of Suffolk, in the town of Niskayuna in the county of Schenectady, in the town of Ramapo in the county of Rockland, in the towns of Irondequoit, Greece, Pittsford, Brighton, Penfield, Perinton, Webster and Gates in the county of Monroe, in the town of Colonie in the county of Albany, and in the towns of Vestal and Union in the county of Broome prohibiting 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. Thirty days prior to the adoption of any ordinance changing the five hundred foot rule, a notice must be sent to the regional supervisor of fish and game of the environmental conservation department, notifying him of such intention.

28. Billiard rooms. In towns, subject to a permissive referendum, setting the minimum age of minors to be allowed upon the premises provided, however, that an ordinance shall only allow such minor upon the premises when accompanied by adult supervision as part of an organized youth activity. For purposes of this subdivision an organized youth activity shall not include activities sponsored primarily by persons under eighteen years of age.

29. Loitering. Prohibiting and punishing loitering; provided however, that such ordinance or law shall only prohibit loitering for a specific illegal purpose or loitering in a specific place of restricted public access and shall therein set forth guidelines for application of such prohibitions by law enforcement officers so as to prevent arbitrary or discriminatory enforcement of such prohibitions.

Whenever the constitutionality of any local law, ordinance, rule or regulation of a town is brought into issue upon a trial or hearing of any civil cause of action or proceeding in any court, and the town is not a party to such action or proceeding, notice shall be served upon the town in accordance with [section one thousand twelve of the civil practice law and rules](#).

Credits

(L.1932, c. 634. Amended L.1935, cc. 432, 464, 500, 881; L.1937, c. 495, § 7; L.1938, cc. 309, 402, 646; L.1939, c. 273, § 2; L.1939, c. 338, § 1; L.1939, c. 581, § 1; L.1940, c. 474; L.1941, c. 30, § 7; L.1941, c. 674, § 1; L.1942, c. 85, § 14; L.1942, c. 639, § 1; L.1943, cc. 388, 389, § 1; L.1944, c. 67; L.1944, c. 126, §§ 1 to 9; L.1944, c. 447, §§ 1, 2; L.1946, c. 12, §§ 1, 2; L.1946, c. 21; L.1946, c. 217, § 1; L.1947, cc. 361, 817; L.1948, c. 657; L.1949, c. 371; L.1950, c. 173; L.1950, c. 598; L.1952, cc. 256, 691; L.1953, cc. 120, 578, 579; L.1954, c. 265; L.1955, cc. 111, 396, 465; L.1956, c. 503, § 3; L.1956, c. 575; L.1957, cc. 135, 154, 726; L.1957, c. 925, § 1; L.1959, c. 98; L.1959, c. 832, § 1; L.1959, c. 875; L.1960, c. 796; L.1960, c. 874; L.1962, c. 510; L.1963, c. 230, § 4; L.1963, c. 231; L.1963, c. 551; L.1963, c. 980; L.1964, c. 619; L.1965, c. 551, §§ 1, 2; L.1966, c. 376; L.1966, c. 939, § 2; L.1967, c. 528; L.1968, c. 820; L.1969, c. 345; L.1969, cc. 420, 421; L.1970, c. 344; L.1970, c. 662; L.1970, c. 777, § 1; L.1971, c. 169; L.1971, c. 1074; L.1972, c. 180, §§ 1 to 3; L.1972, c. 821, § 1; L.1973, c. 262, § 1; L.1973, c. 272, § 1; L.1974, c. 292, § 1; L.1975, c. 160, § 1; L.1975, c. 282, § 1; L.1976, c. 316, § 1; L.1977, c. 395, § 1; L.1978, c. 731, § 2; L.1979, c. 159, § 1; L.1980, c. 520, § 1; L.1982, c. 355, § 1; L.1985, c. 171, § 1; L.1986, c. 194, § 3; L.1989, c. 508, § 1; L.1990, c. 456, § 1; L.1993, c. 605, §§ 3, 4; L.1994, c. 660, § 2; L.1995, c. 567, § 1; L.1995, c. 688, § 2; L.2000, c. 415, § 2, eff. Oct. 31, 2000; L.2001, c. 490, § 2, eff. Nov. 21, 2001; L.2003, c. 296, § 3, eff. Jan. 1, 2005; L.2010, c. 58, pt. A, § 83, eff. Dec. 1, 2010.)

Footnotes

1 L.1977, c. 395, eff. July 6, 1977.

McKinney's Town Law § 130, NY TOWN § 130

Current through L.2021, chapters 1 to 612. Some statute sections may be more current, see credits for details.

[HISTORY: Adopted by the Town Board of the Town of Smithtown 1-10-1967. Amendments noted where applicable.]

§ 160-1 Title.

This chapter shall be known as an "Ordinance Regulating the Discharge of Firearms in the Town of Smithtown."

§ 160-2 Definitions.

The following definitions shall govern the interpretation of this chapter unless otherwise expressly defined herein:

FIREARM

Includes 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, a BB gun, a slingshot and a bow and arrow.

[Amended 1-9-1990]

TOWN

Includes all areas within the Town of Smithtown, exclusive of areas wholly within any incorporated village.

§ 160-3 Purpose.

The purpose of this chapter is to prohibit any person from discharging a firearm in those areas of the Town of Smithtown in which such activity may be hazardous to the general public or nearby residents.

§ 160-4 Prohibited areas.

[Amended 12-4-1973]

The discharge of firearms is deemed hazardous to the general public and, therefore, prohibited in all areas of the Town of Smithtown except those areas as stipulated under § 160-5, Exceptions.

§ 160-5 Exceptions.

[Added 10-29-1968; amended 12-4-1973]

A. Firearms may be discharged upon one's own property and upon the property of another with the written consent of the landowner, provided that any such discharge of firearms does not occur within 500 feet from a dwelling, school or occupied structure, or a park, beach, playground or any other place of outdoor recreational or nonrecreational activities; and further provided that any such discharge of firearms does not violate the provisions of the New York State Environmental Conservation Law.

[Amended 1-9-1990; 4-3-2012]

B. Firearms may be discharged on the Nissequogue River only in the area defined as being within 50 feet of the high-water mark of the west bank and northward to Long Island Sound from a line formed by the westerly extension of the southerly boundary line of the Village of Nissequogue to the west bank.

§ 160-6 Posting.

Each area designated as a locality, wherein the discharge of a firearm is deemed prohibited, shall be posted with no fewer than two signs giving notice of such prohibition.

§ 160-7 Penalties for offenses.

[Amended 1-9-1990]

Any person, firm, association or corporation violating any of the provisions of this chapter shall be guilty of an offense punishable by a fine or imprisonment, or both. However, for the purpose of confirming jurisdiction upon courts and judicial officers, such violation shall be deemed to be a misdemeanor, and for such purposes only all provisions of law relating to misdemeanors shall apply to such violation. Notwithstanding the foregoing, any person, firm, association or corporation violating any provision of this chapter shall be subject to a penalty in a sum not exceeding \$250 for the first such violation and in

a sum not exceeding \$500 for any subsequent violation, said penalties to be in addition to any other damages that may be recovered by the Town of Smithtown in any court of competent jurisdiction.