Supreme Court Chambers
Oswego County Court House
25 East Oneida Street
Oswego, New York 13126

Andrew T. Wolfe
Principal Court Attorney

James W. McCarthy, AJSC
Telephone (315) 349-8369
Fax: (315) 349- 8513

Sandra Knowles,
Secretary

24 May 2000

Richard Brickwedde, Esq.
Green & Seifter, Attorneys, P.C.
900 One Lincoln Center
Syracuse, New York 13202.

Andrew Leja, Esq.
Hiscock & Barclay, LLP
Financial Plaza
Post Office Box 4878
Syracuse, New York 13221-4878

Re: *Anton El-Hage, d/b/a ELCO Development v. The Town of Palermo, Patricia Redhead, Supervisor, and the Town of Palermo Planning Board, James Petranszyn, Chairman*

Index No : 99-101

Letter Decision:

The above-referenced matter is before this Court pursuant to: [1] Plaintiff's motion for summary judgment: [a] declaring the Town of Palermo has no jurisdiction under its Site Plan Review Law with regard to the spreading of septage on farmland in an Agricultural District, [b] declaring Local Law No. 2 of 1998 of the Town of Palermo void and unenforceable, and [c] declaring Local Law No. 3 of 1999 of the Town of Palermo void, and [2] Defendants' cross-motion for summary judgment. Oral argument was heard by this Court on April 14, 2000, at which time this Court granted judgment with respect plaintiff's first two causes of action.

Accordingly, this Court's Letter Decision is limited to the plaintiff's motion and defendants' cross motion for summary judgment with respect to Local Law No. 3 of 1999 of the Town of Palermo.

Findings of Fact:

Local Law No. 3 of 1999 of the Town of Palermo [hereinafter "Local Law No. 3], entitled "Local Law Regulating the Disposal, Land Application, and Storage of Medical, Nuclear and Scavenger Waste" was enacted by the Town of Palermo June 22, 1999, following a public hearing. Prior to its passage, the Town Board had enacted a twelve month moratorium on the dumping and/or spreading of medical and/ scavenger waste within the Town [*see*, Local Law No. 2 of 1998 of the Town of Palermo]. By its terms, Local Law No. 3 was intended to:

> ...regulat[e] the discharge, disposal, land application and storage of medical, nuclear

> and scavenger waste, [and was] adopted pursuant to the Town's police power under the Municipal Home Rule Law Sections 130 and 136 of the Town Law for the physical and mental well-being and safety of it citizens and to restrict waste disposal operations within the Town that might otherwise be permitted under federal and state regulations.

Local Law No. 3, §3[a]. More particularly, Local Law No. 3 enacts a licencing requirement for those engaged in the land application and storage of medical, nuclear and scavenger waste [*see*, Local Law No. 3, § 6], provides for an application process and requirements that must be met prior to the granting of a license [*see*, Local Law No. 3, §7], and specifically details the requirements for the storage, discharge and spreading of septage within the Town. [*see*, Local Law No. 3, § 10].

The instant article 78 proceeding challenges the enactment of Local Law No. 3 on the following grounds:

[1] That Local Law No. 3 is void under New York State Constitution article III, § 16 and § 27 of the Municipal Home Rule Law of the State of New York.;

[2] That Local law No. 3 is unconstitutionally vague;

[3] That Local Law No.3 is void under article III, § 15 of the New York Constitution and §20 of the Municipal Home Rule Law of the State of New York;

[4] The law is an invalid exercise of the police powers of the Town;

[5] That the enactment violated The New York State Open Meetings Law [Article 7, New York Public Officers Law]; and

[6] That the Town failed to comply with § 283-a of the Town Law of the State of New York and article 25-AA of the Agriculture and Markets Law of the State Of New York.

Conclusions of Law:

[1] Incorporation by reference:

In support of his motion for summary judgment, plaintiff argues that the incorporation by reference to federal and state law and regulations invalidates Local Law No. 3 insofar as it runs afoul of article III, § 16 of the New York State Constitution and § 27 of the Municipal Home Rule Law of the State of New York.

Article III, § 16 provides: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act." N.Y. Con. Art III, §16 (McKinney 1987).

It is well settled that:

> Incorporation by reference is not prohibited in all instances. The purpose of the constitutional prohibition against incorporation by reference is to prevent the Legislature from incorporating into its acts the provisions of other statutes or regulations which affect public or private interests in ways not disclosed upon the face of the act, and which would not have received the sanction of the Legislature if fully understood by it (*People ex rel. Board of Commrs. v. Banks*, 67 N.Y. 568, 576; *see, People ex rel. Everson v. Lorillard*, 135 N.Y. 285, 291; *North Shore Child Guidance Assn. v. Incorporated Vil. of E. Hills*, 110 A.D.2d 826, 829, 487 N.Y.S.2d 867).

Medical Society of the State of New York v. State Department of Health, 83 N.Y.2d 447, 452-453 (1994). Further, "...**where a statute creates rights or duties, or imposes burdens, and the provisions of another statute are referred to as a means of formally executing the provisions of the first statute**, the constitutional proscription is not violated... [citations omitted]." Id . [emphasis added].

In the instant action, Local Law No. 3, § 12 provides that: "[A] All relevant sections of Article 27 of the ECL and 6 NYCRR Parts 360, 364 and 617[1] are deemed to be included within this part of this Local Law, and any violation thereof shall be considered to be a violation of this Local Law." Here, the defendants incorporate by reference approximately three hundred and and seventy three [373] pages of the New York Code of Rules and Regulations as well as an entire section of the State's Environmental Conservation Law, all of which impose substantive as well as procedural burdens and duties. Accordingly this Court find that such reference contrary to the prohibitions of article III, § 16 of the New York State Constitution and § 12 of Local Law No. 3 is hereby striken.

However, it is a well settled rule of statutory construction that:

> A statute may be unconstitutional in one part and valid in another part [footnote omitted], and the unconstitutionality of one part does not necessarily invalidate the entire statute [footnote omitted]. The courts will attempt to save part of the statute, and if valid and invalid provisions are incorporated in the same act and the former, if separable, will be upheld though the latter must fall [footnote omitted]. The invalid part may be severed from the remainder if, after the severance, the remaining portions are sufficient to effect the legislative purpose deducible from the entire act [footnote omitted].

N.Y. Stat. §150[d] (McKinney 1971). Further:

> ... Whether they are so interwoven in a given case presents a question of statutory construction and of legislative intent [footnote omitted]. The resolution of the question depends on the ultimate result sought by the Legislature [footnote omitted], and whether the Legislature, if partial invalidity had been forseen, would have wished the remainder to be enforced alone [footnote omitted]. Frequently in such cases the wishes of the lawmakers are positively stated in the act itself by means of a 'separability' or 'saving' clause, which is simply a declaration that should any part of the act be declared unconstitutional, the remainder shall not be deemed affected thereby. The inclusion of a severability clause in a legislative act raises a presumption that the Legislature intended the act to be divisible.

Id.

In the instant action, the Palermo Town Board clearly evinced its intent that the act be divisible (*see*, Local Law No. 3, § 13 "Severability"). Accordingly, I find that remaining portions of the local law sufficient to effect the Town Board's purpose, and reject plaintiff's argument that Local Law No. 3 is unconstitutional.[2]

[2] Vagueness:

Plaintiff next contends that Local Law No. 3 is invalid insofar as it is unconstitutionally vague. More specifically, the plaintiff alleges that "[s]ubdivsion b of § 7 requires the applicant to provide a stamped site plan approval from the Town Planning Board, but does not indicate the requirements for approval."

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(*see*, N.Y. Comp. Codes R. & Regs. tit. 6, § 360 "Solid Waste Management Facilities", N.Y. Comp. Codes R. & Regs. tit. 6, § 364 "Waste Transporter Permits", N.Y. Comp. Codes R. & Regs. tit. 6, § 617 "State Environmental Quality Review Act" and N.Y. Envtl. Conserv. Law § 27-101, *et seq.* (McKinney 1997) "Waste and Refuse.")

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Since § 12 of Local Law No. 3 has been stricken, this Court need not reach plaintiff's challenge based upon New York General Municipal Law § 27.

It is well settled that:

> [o]nly as a last resort may the court strike down a town ordinance as unconstitutional, for ordinances carry a strong presumption of constitutionality. Although the presumption is rebuttable, one challenging the constitutional validity of an ordinance must demonstrate its unconstitutionality beyond a reasonable doubt (*Lighthouse Shores v. Town of Islip*, 41 N.Y.2d 7).

People v. Frie, 169 Misc.2d 407 (N.Y.Dist.Ct. 1996).

As the defendants correctly point out, section 10 of Local Law No. 3 provides eighteen pages of guidance with respect to the Town's review of applications for a licence to operate and construct a septage storage and/or land application facility to land apply septage. Far from vague, this Court finds that the law, as a whole clearly delineates to an applicant its applicability and the items necessary to file a permit application. Further, the mere fact that "DEC regulations address the same issue in a different way..." does not in and of itself render the law unconstitutionally vague (*see, Russo v. Beckelman*, 204 A.D.2d 160, 162 (1st Dept. 1994):["That the criteria for listing sites on the State Register of Historic Places (9 NYCRR 427.3) may be more specific does not necessarily mean that the City law is insufficiently specific."]).

[3] Violation of New York Municipal Home Rule Law § 20[3] and New York Constitution, article III, § 15:

Plaintiff next contends that "[s]ince the regulation of nuclear waste is substantially different from the regulation of medical waste which is substantially different from the regulation of scavenger waste, Local Law No. 3 is in violation of the State Constitution."

New York Municipal Home Rule Law § 20[3] provides: " Every such local law shall embrace only one subject." N.Y. Mun. Home Rule Law § 20[3] (McKinney 1995). In *Woll v. Erie County Legislature*, 83 A.D.2d 792 (4th Dept. 1981), the Appellate Division, Fourth Department held that: " In determining whether a local law runs afoul of the statute [New York Municipal Home Rule Law § 20[3]], the test is whether there is a necessary or natural connection between the items covered in the local law (*see Burke v. Kern*, 287 N.Y. 203, 214; *Rebeor v. Wilcox*, 58 A.D.2d 186, 192, *affd.* 44 N.Y.2d 279)." *Id.* Upon review of Local Law No.3, this Court finds that it deals with the regulation of several types of solid waste, including their disposal, application and storage, and that accordingly there is "...a necessary or natural connection between the items covered in the local law."

[4] New York Open Meetings Law

Next, the plaintiff argues that prior to the adoption of Local Law No. 3, a meeting took place between Town of Palermo officials and their Town Attorneys and that such meeting was not open to the public in violation of Article 7 of the Public Officers Law of the State of New York.

However, in an opinion of the Committee on Open Government [70-2998 (February 18, 1999)], the committee found that:

> ...even though there is no basis for entry into executive session, the Board may seek and obtain legal advice from its attorney in private pursuant to an assertion of attorney-client privilege, which would remove the communication from the coverage of the Open Meetings Law.... [I]f the Board seeks the legal opinion from its attorney acting in his or her capacity as attorney for the Town, the communication could be accomplished outside the coverage of the Open Meetings Law.

Accordingly, this Court finds that the meeting between the Town Board and its attorney did not violate Article 7 of the Public Officers Law of the State of New York.

[5] Exercise of Police Powers:

Plaintiff next contends that the purpose of Local Law No. 3 was not the "...welfare of the public, but the destruction of a legitimate business under the guise of regulation..." Essentially, the plaintiff argues that Local Law No. 3 was adopted by the Palermo Town Board to prevent the conduct of a lawful business by specifically targeting the plaintiff.

It is well settled that:

> Statutes are presumed to be constitutional, and that presumption can only be rebutted by proof beyond a reasonable doubt (*see, Maresca v. Cuomo*, 64 N.Y.2d 242, 250, *lv. dismissed* 474 U.S. 802, 106 S.Ct. 34; *Hotel Dorset Co. v. Trust for Cultural Resources of City of N.Y.*, 46 N.Y.2d 358, 370; *Montgomery v. Daniels*, 38 N.Y.2d 41, 54). A local ordinance is cloaked with the same strong presumption of constitutionality (*Town of Huntington v. Park Shore Country Day Camp of Dix Hills*, 47 N.Y.2d 61, 65, *rearg. denied* 47 N.Y.2d 1012; *Marcus Assoc. v. Town of Huntington*, 45 N.Y.2d 501, 505). In *Lighthouse Shores v. Town of Islip*, 41 N.Y.2d the rule was stated as follows:
>
> "The exceedingly strong presumption of constitutionality applies not only to enactments of the Legislature but to ordinances of municipalities as well. While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality" (*Lighthouse Shores v. Town of Islip, supra, at* 11).
>
> Judicial review of a challenged statute or ordinance is limited to determining whether, "any state of facts, known or to be assumed, justify the law" (*Matter of Malpica-Orsini*, 36 N.Y.2d 568, 571). **Thus, it need only be determined whether the ordinance in question is a reasonable measure for achieving valid goals of the municipality.**

Bobka v. Town of Huntington, 143 A.D.2d 381, 383 (2nd Dept. 1988)[emphasis added].

In the instant action, this Court finds that the plaintiff has failed to demonstrate, beyond a reasonable doubt, that the real purpose of Local Law No. 3 was the destruction of his "legitimate business" through the guise of regulation. Here, the Town argues that the law was passed to protect the public health and safety from "... unregulated waste dumping and/or spreading into or near the Town's water resources." Further, the municipality has simply regulated, rather than prohibited the acts covered in the local law. Accordingly, this Court finds that the Town of Palermo validly exercised its police power in the enactment of Local Law No. 3.

[6] § 283-a of the Town Law of the State of New York and article 25-AA of the Agriculture and Markets Law of the State Of New York.

Lastly, the plaintiff argues that "...Local Law # 3, unreasonably restricts farm practices in contravention of the purposes of Article 25-AA of the AML." In support of his argument, plaintiff attaches a letter from The State of New York Department of Agriculture and Markets, in which the Department:

> ...concludes that Local Law No. 3 of 1999 as applied to the Gristwood farm operation unreasonably restricts a farm operation in an agricultural district by imposing standards ... which are more restrictive than DEC requirements... [Further], [i]f steps to comply are not taken, the Department may take appropriate action to enforce the provisions of subdivision 1 of section 305-a of the Agriculture and Markets Law.

Pursuant to the Appellate Division, Third Department's decision in *Matter of the Town of Butternuts v. Davidsen*, 259 A.D.2d 866(3rd Dept. 1999), the Department of Agriculture and Markets is

empowered to issue an order [*see*, N.Y. Ag. & Mar. Law § 36 (McKinney 1991) and to commence an action [*see*, N.Y. Ag. & Mar. Law § 305[2] (McKinney 1991)] to require a town's compliance with the provisions of the New York Agriculture and Markets Law. To the date of this decision, no action has been taken by the Department of Agriculture and Markets.

At this juncture, this Court finds that the plaintiff has an adequate remedy available to it with respect to alleged violations of the Agriculture and Markets Law, and has failed to exhaust this remedy before seeking the assistance of this Court. Accordingly, plaintiff's remaining challenge to Local Law No. 3 of 1999 of the Town of Palermo is dismissed.

Insofar as this Court has dismissed plaintiff's challenges to Local Law No. 3 in their entirety, defendants cross motion for summary judgment dismissing the instant proceeding is **GRANTED**.

The foregoing constitutes the Letter Decision of this Court. Counsel for the Defendants is to prepare an Order consistent herewith.

Enter:

Dated: 5/24/00

Hon. James W. McCarthy
Acting Justice, Supreme Court