To be Argued by:
Nicholas S. Cortese, Esq.
(Time requested: 20 minutes)

APL No. APL-2022-00118
Appellate Division, Third Department Docket No. 534539
St. Lawrence County Clerk's Index No. EFCV-21-161083

Court of Appeals

of the

State of New York

ST. LAWRENCE COUNTY and RENEE COLE, in her capacity as the duly elected Treasurer for the County of St. Lawrence,

Plaintiffs-Appellants,

– against –

CITY OF OGDENSBURG, OGDENSBURG CITY SCHOOL DISTRICT, JEFFREY M. SKELLY, in his official capacity as Mayor of the City of Ogdensburg, and STEPHEN JELLIE, in his official capacity as the City Manager for the City of Ogdensburg,

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS CITY OF OGDENSBURG, JEFFREY M. SKELLY, AND STEPHEN JELLIE

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RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

The Defendant City of Ogdensburg is a municipal corporation organized under the laws of the State of New York. It has no parents, subsidiaries or affiliates. Defendants Jeffrey M. Skelly, as Mayor of the City, and Stephen Jellie, as City Manager are individuals to whom this rule does not apply.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

QUESTIONS PRESENTED

Question 1: Did a majority of the Appellate Division, Third Department, correctly affirm the ruling of Supreme Court (Farley, J.), which granted the motion of Defendants-Respondents the City of Ogdensburg, Mayor Jeffrey M. Skelly and City Manager Stephen Jellie (collectively, the "City") dismissing the Verified Petition/Complaint of Petitioners-Appellants St. Lawrence County and County Treasurer Renee Cole (collectively, the "County")?

Answer: *Yes.* In affirming Supreme Court's dismissal of the Verified Petition/Complaint, the Third Department majority properly held that the City's amendments to its Charter enacted via Local Law No. 2-2021 affected a valid transfer to the County of the City's former delinquent real property tax collection and enforcement authority without unconstitutionally impairing the County's powers.

Question 2: Is the County entitled to the relief it requests pursuant to CPLR article 78?

Answer: The Third Department did not answer this question, but the County acknowledges in its brief to the Court that such relief is "unnecessary" [County's Br. at 41]. The City agrees that it is unnecessary, and that it is improper under the present circumstances.

PRELIMINARY STATEMENT

The Defendants-Respondents City of Ogdensburg, Jeffrey M. Skelly, in his capacity as Mayor of the City of Ogdensburg and Stephen Jellie, in his capacity as the former City Manager of the City of Ogdensburg (hereinafter collectively referred to as the "City") submit this brief in opposition to the appeal of Plaintiffs-Appellants St. Lawrence County and Renee Cole, in her capacity as Treasurer of St. Lawrence County (hereinafter collectively referred to as the "County") from a Decision, Order and Judgment of the St. Lawrence County Supreme Court (Farley, J.), entered December 13, 2021, which granted the City's motion to dismiss the County's Verified Petition/Complaint and declared valid and enforceable the City's Local Law No. 2-2021. On appeal, the Appellate Division, Third Department, in a Memorandum and Order entered August 11, 2022, affirmed Supreme Court's Order and Judgment by a 3-2 majority.

The Local Law, among other things, amends the City Charter to transfer to the County the City's former authority to enforce and collect delinquent City real property taxes (hereinafter the "Charter Amendments"). The validity of the Charter Amendments is the only disputed issue remaining in this matter (*see* Point III, *infra*). The City agrees with the County that, to the best of its knowledge, this issue is one of first impression in this State.

The County believes that Charter Amendments (1) violate article IX, § 2 (d) of the New York State Constitution, which states, in relevant part, that "a local government shall not have power to adopt local laws which impair the powers of any other local government"; (2) violate MHRL § 10 (5), which is identical to the above Constitutional provision; and (3) are inconsistent with relevant provisions of the Real Property Tax Law (hereinafter the "RPTL").

Regarding the constitutional question, as Supreme Court correctly held, and the Third Department majority affirmed, even if the City's Charter Amendments were to cause an increase in the City's administrative responsibilities and associated costs, such an outcome might, at most, have an effect on the County's day-to-day operations. However, as the County and Third Department dissent incorrectly argue, additional administrative and/or operational inconvenience – whether perceived or actual – does not amount to an unconstitutional impairment of the County's statutory powers to develop budgets, manage employees, enact appropriate legislation or exercise any authority that the State has vested in counties, generally. Inasmuch as MHRL § 10 (5) is a reiteration of the constitutional prohibition against local legislation that impairs the powers of other local governments, the analysis and conclusions are the same as above.

Additionally, and significantly, MHRL §§ 10 (1) (ii) (a) (8) & (9) expressly provide that all cities have the ability to adopt local laws related to the levy,

collection and administration of "local taxes authorized by the legislature", and may do so as long as the local law in question is "not inconsistent with the provisions of the constitution or not inconsistent with any general law. . . whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law".

Finally, with respect to the County's allegations that the Charter Amendments are inconsistent with article 11 of the RPTL, its language clearly indicates otherwise. Specifically, RPTL § 1102 (6) (b) notes that cities are not tax districts and, thus, have no power to enforce their own delinquent real property taxes, if "the county enforces delinquent taxes pursuant to the city charter". In other words, the RPTL expressly contemplates that a city may amend its charter to abrogate its status as an RPTL article 11 tax district and transfer to a county the authority to enforce and collect delinquent city real property taxes, which is precisely what the City's Charter Amendments do. To conclude otherwise would impermissibly render the language of RPTL § 1102 (6) (b) superfluous.

STATEMENT OF FACTS

Prior to September 2021, the City of Ogdensburg had long managed the collection and enforcement of delinquent City real property taxes according to a series of special provisions in its City Charter [R: 124-129]. Indeed, the tax collection and enforcement scheme in the City's former Charter provisions was

unique, and varied considerably from the enforcement procedures set forth in the RPTL. For example, the former Charter provisions obligated the City to collect and enforce City *and* County taxes [R: 128] (*compare* RPTL § 904), and stated that the City's tax liens "shall be prior and superior to all other liens and encumbrances" [R: 126] (*compare* RPTL § 914 ["All tax liens of tax districts which become liens against a parcel of real property in the same calendar year shall rank on a parity"]). To further ensure the priority of its tax liens, the City also had a practice of making the County whole for the unpaid balance of County taxes on properties within the City, even though the former Charter did not expressly provide for such an arrangement [R: 124-129].

Because the City also enforced its delinquent taxes pursuant to its Charter well before 1993, when the current version of RPTL article 11 was enacted, the City had the ability to enact an RPTL article 11 opt out local law in order to continue its exclusively Charter-based enforcement scheme (*see* RPTL § 1104 [2]), and did so prior to the statutory deadline of July 1, 1994. (*see* Ogdensburg City Code, former § 199-43 [available at https://ecode360.com/8441267] [last accessed February 9, 2023]). During the intervening years, however, the Charter's collection and enforcement structure, which required the City to collect and enforce delinquent County taxes, as well as its own taxes, became operationally impractical and largely

unnecessary. This prompted the City on September 13, 2021, to introduce Local Law No. 2-2021.

The Local Law amended certain provisions of the City Charter and repealed its opt out local law [R: 130-134], thereby absolving the City of its unnecessarily broad, exclusively Charter-based delinquent tax enforcement authority in favor of the procedures set forth RPTL article 11, which, by its own terms, clearly indicates that a city abrogates its status as an article 11 tax district if the city's charter provides that the county is responsible for enforcing delinquent city real property taxes (*see* RPTL § 1102 [6] [b]).

More specifically, the Charter Amendments included changes to section C-80, which deleted the former Charter section and replaced it with the requirement that "[t]he County shall be responsible for the enforcement of delinquent City taxes in accordance with Article 11 of the [RPTL]" [R: 133], and section C-81, which borrows language from RPTL § 936 and requires the County to make the City whole for delinquent taxes the County is unable to collect [R: 133-134], and the deletion of section C-83, which previously set forth the manner in which the City would collect and remit County taxes back to the County [R: 134].

On September 27, 2021, after a duly noticed public hearing at which no members of County government, nor any other member of the public spoke in favor

of or against the Charter amendments, the City Council unanimously adopted Local Law No. 2-2021, which became effective on January 1, 2022 [R: 117, 134].

In response, on November 17, 2021, the County commenced by order to show cause [R: 85-87] the instant hybrid action/proceeding seeking a declaratory judgment that the Local Law violates the New York State Constitution (hereinafter referred to as the "Constitution") insofar as it allegedly impairs the powers of the County, and violates provisions of the MHRL and the RPTL. The County's Verified Petition/Complaint also seeks relief pursuant to CPLR article 78 sounding in mandamus to compel the City to continue to enforce their own delinquent real property taxes, as well as prohibition to prevent the City from doing otherwise [R: 31-51].[1]

On December 2, 2021, the City moved to dismiss the County's Verified Petition/Complaint pursuant to CPLR 3211 (a) (2) and (a) (7) [R: 113-114] on the grounds that (1) the Charter Amendments' transfer to the County of delinquent City real property tax enforcement authority is substantively constitutional and is not

[1] On December 2, 2021, the Ogdensburg City School District submitted a Verified Answer to the County's Verified Petition/Complaint, together with cross-claims against the City [R: 96-112]. The cross-claims alleged, among other things, that the School District is entitled to a declaratory judgment requiring the City to continue to collect and enforce delinquent school taxes on the District's behalf pursuant to RPTL article 13 [R: 107-109]. Subsequently, the City Council chose to rectify this issue by enacting Local Law 1-2022, which further amends the City Charter to reaffirm the City's continuing tax collection and enforcement obligations to the School District. Both the Third Department majority and dissent agreed that this subsequent Charter amendment rendered moot the School District's claims against the City [R: 207, 216]. The County does not dispute the Third Department's mootness determination in its appeal to this Court.

inconsistent with any relevant provision of State law; and (2) the County's requests for article 78 relief sounding in mandamus and prohibition were, for a variety of reasons, unavailable as a matter of law under the circumstances of this case [R: 115-123].

After oral argument [R: 16-30], St. Lawrence County Supreme Court (Farley, J.) issued a Decision, Order & Judgment entered December 13, 2021, which, among other things, granted the City's motion to dismiss the County's Verified Petition/Complaint. In its decision, the court agreed with the City's position that the Charter Amendments do not offend the Constitution, inasmuch as they do not impair the powers of the County, and are not inconsistent with any relevant provision of the MHRL or RPTL [R: 6-14]. Accordingly, the court issued a declaration in the City's favor deeming the Charter Amendments to be constitutional and valid. As a consequence of its holding, the court summarily dismissed the County's claims for article 78 relief as well [R: 12].

The County then appealed Supreme Court's Decision, Order & Judgment to the Appellate Division, Third Department [R: 3]. In a Memorandum and Order entered August 11, 2022 the Third Department, by a 3-2 majority, affirmed Supreme Court's determination and upheld the validity of the Charter Amendments [R: 204-210]. In so doing, the majority provided an appropriately straightforward analysis of how the language of the RPTL permits the transfer of delinquent tax enforcement

authority from the City to the County, and requires the County to make the City whole for unpaid City real property taxes:

> By adopting Local Law No. 2, the City amended its charter by deleting the provisions requiring the City to enforce the payment of delinquent taxes, leaving the County with that obligation under RPTL article 11.. . . As a consequence of the amendment, the City is no longer a "tax district" for purposes of RPTL article 11 (*see* RPTL 1102 [6]) and the County treasurer becomes the enforcing officer (*see* RPTL 1102 [3] [a] [i]). As such, the County treasurer is statutorily required to credit the City for unpaid delinquent taxes upon the return at the end of the fiscal year (*see* RPTL 936). This outcome is neither an expansion nor impairment of the County's powers but simply a consequence of the statutory structure outlined in RPTL articles 9 and 11.

[R: 209].

With two justices dissenting, the County thereafter appealed as of right to this Court [R: 220].

STANDARD OF REVIEW

In its opening brief to this Court, the County misstates the standard of review applicable to the City's motion to dismiss the Verified Petition/Complaint. It is generally the case that "[o]n a motion to dismiss pursuant to CPLR 3211(a) (7) for failure to state a claim, [courts] afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the nonmoving party the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory" (*Graven v Children's Home R.T.F., Inc.*, 152 AD3d 1152, 1153 [3d Dept 2017] [internal quotation marks and citations omitted]). However,

where, as here, a motion to dismiss a declaratory judgment cause of action is predicated solely on a question of law or statutory interpretation, rather than on disputed issues of fact, "the motion to dismiss for failure to state a cause of action should be taken as a motion for a declaration in the defendant's favor and treated accordingly" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011 [internal quotation marks, brackets and citations omitted]; *see Dodson v Town Bd. of Town of Rotterdam*, 182 AD3d 109, 112-113 [3d Dept 2020]).

Here, there are no disputed questions of fact. The only question for the Court to resolve on appeal is a purely legal one, namely, whether the City's Charter Amendments are constitutional, valid and enforceable. Under these circumstances, the Court owes no deference to the County's pleadings, and it is respectfully submitted that the Court should – as Supreme Court and the Third Department previously have done – decide the case on the merits and issue a decision declaring the rights of the parties vis a vis the Charter Amendments (*see e.g. Hoffman v City of Syracuse*, 2 NY2d 484, 487 [1957] ["Since . . . no questions of fact are presented . . . the Appellate Division was quite right in ruling that a judgment declaring the rights of the parties should be made."]).

ARGUMENT

POINT I

THE CHARTER AMENDMENTS DO NOT UNCONSTITUTIONALLY IMPAIR THE EXERCISE OF ANY OF THE COUNTY'S POWERS AND DO NOT VIOLATE THE MUNICIPAL HOME RULE LAW

A. The Charter Amendments do not Unconstitutionally Impair the County's Statutory Authority to Govern its own Affairs

From the outset of the instant litigation, the County has argued in bald, conclusory fashion that the City's Charter Amendments violate article IX, § 2 (d) of the New York State Constitution [R: 48-50], which states, in relevant part, that "a local government shall not have power to adopt local laws which impair the powers of any other local government", and MHRL § 10 (5), which is identical to the above Constitutional provision. Indeed, at no point in these proceedings has the County offered a single, specific citation to any statutory authority from which it derives one or more "powers" that the Charter Amendments supposedly "impair". The County's opening brief to this Court is no exception, inasmuch as the County's analysis is little more than a recitation of the position of the Third Department dissent, which agrees with the County's conclusions on this issue. However, it is respectfully submitted that the dissent's constitutional impairment analysis is itself incomplete and inaccurate.

Central to the dissent's analysis is a lengthy exposition on the term "impair". The dissent began by opining that in order for the term to not be rendered

superfluous, it must "mean something other than to 'repeal[ ], diminish[ ] . . . or suspend[ ]'" [R: 215, quoting NY Const, art IX, § 2 (b) (1)] "or to 'restrict'" [R: 215, quoting NY Const, art IX § 3 (a)], inasmuch as "impair" is used in the Constitution alongside those other terms. Accordingly, because the term is not defined within the Constitution, the dissent looked to a number of dictionary definitions to discern a meaning of "impair" that does not duplicate the meaning of the aforementioned, related terms. After doing so, the dissent concluded that, in the present context, "to impair a power within the meaning of the NY Constitution, article IX, § 2 (d) and [MHRL] § 10 (5) is to weaken that power" [R: 215].

Even assuming, *arguendo*, that the above definition of "impair" is appropriate here, the dissent notably failed to undertake the other half of the analysis, that is, to discern an appropriate definition of the term "power", which is also not defined in the Constitution. Utilizing the same guidance from dictionary definitions that the dissent used to define "impair", "power" in the legal/governmental context is uniformly defined as the "legal or official authority, capacity, or right" to do something (Merriam-Webster Online Dictionary, power, [https://www.merriam-webster.com/dictionary/power]; *see* Cambridge Dictionary, power, [https://dictionary.cambridge.org/us/dictionary/english/power] ["an official or legal right to do something"]; The Britannica Dictionary, power, [https://www.britannica.com/dictionary/power] ["the right to do something: legal or

official authority to do something"]; Macmillan Dictionary, power, [https://www.macmillandictionary.com/us/dictionary/american/power_1] ["official or legal authority to do something"]).

Combining the definition of "impair" developed by the Third Department dissent and the definition of "power" established above, it is submitted that the phrase "impair the powers of any other local government" within article IX, § 2 (d) of the Constitution and MHRL § 10 (5) means to weaken a government's legal authority, capacity or right to do a particular thing.

With this complete definition in mind, it becomes clear that the dissent's conclusion that the Charter Amendments "impair[] [the County's] power to fully control its own affairs, such as its budget and its workforce, by weakening that power" is, for several reasons, inaccurate [R: 216]. First, and tellingly, the dissent, like the County, provides no legal citations that support its conclusion. Rather, the legal authority cited by the dissent stands only for the proposition that the County has the power to "adopt and amend local laws . . . relating to its property, affairs or government" (NY Const, art IX, § 2 [c] [i]; *accord* MHRL § 10 [1] [i]). There is nothing in the Record before this Court indicating that the Charter Amendments weaken the County's lawmaking authority in any way, because they do not. In any event, it is common knowledge that no local government has the authority to "fully control its own affairs", inasmuch as the powers of all local governments, including

Counties, are circumscribed by the State Legislature (*see* County Law § 3 ["A county is a municipal corporation . . . formed for the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as may be imposed or conferred upon it by law."]).

Second, the dissent's position is incorrect to the extent it opines that the Charter Amendments impair the County's powers to develop and manage its budget and workforce because they impose "an unfunded mandate onto the County" [R: 216]. To the contrary, the Charter Amendments effectively make the County the only governmental entity capable of foreclosing on tax liens for unpaid real property taxes levied by the City, whereas prior to the Charter Amendments, that authority belonged to the City, not the County [R: 124-129]. Accordingly, the Charter Amendments hardly impose an unfunded mandate on the County, inasmuch as it is possible for the County to mitigate or altogether eliminate any potential economic impact through tax foreclosure sales and other available judicial and transactional remedies.

Third, the dissent makes the observation that what is increased by the Charter Amendments is not the County's authority to enforce delinquent real property taxes, as the City has consistently argued, but "the obligations that the County must fulfill with its own revenue and resources" [R: 215-216]. Assuming, without conceding, that this observation has merit, what the dissent is describing is the creation of a new

governmental *duty* to act, rather than the alteration of governmental *power* or *authority* to act. This distinction is critical, inasmuch as the creation of a governmental duty and the alteration of a governmental power are necessarily separate concepts.

Using the same rules of statutory construction that the dissent used as an aid to discern a definition of "impair" (*see supra* and R: 215), in order for the term "duty" not to be rendered superfluous, it must be given "a distinct and separate meaning" from the term "power" (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 231), inasmuch as both terms are used in tandem in multiple statutory and constitutional provisions addressing local governmental authority (*see e.g.* NY Const, art IX, § 2 [c] [1]; Statute of Local Governments § 10 [1]; County Law § 3). Relying on dictionary definitions of "duty", as the term is not defined in the Constitution, the Statute of Local Governments or the County Law (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 234), "duty" is defined as "a moral or legal obligation" to do something (Merriam-Webster Online Dictionary, duty, [https://www.merriam-webster.com/dictionary/duty]; *see* Macmillan Dictionary, duty [https://www.macmillandictionary.com/us/dictionary/american/duty] [same definition]). This definition lies in stark contrast to the definition of "power", which, again, is the "legal or official authority, capacity, or right" to do something

(Merriam-Webster Online Dictionary, power, [https://www.merriam-webster.com/dictionary/power]).

Simply put, a governmental power is something that *can* be done or exercised, because the law vests the government with the authority to do it, whereas a governmental duty is something that *must* be done or complied with, because the law imposes an obligation on the government to do it. To be sure, the imposition of a new duty to act, such as a legal obligation to follow certain procedural requirements or meet certain standards, may prompt a local government to choose to exercise its powers in a particular manner in order to properly discharge the duty. However, it cannot be credibly argued that a government's exercise of its decision-making power/authority to comply with a legal duty/obligation is tantamount to an impairment or a weakening of the government's statutorily-granted power to make such decisions, in general. As Supreme Court aptly observed in its Decision, Order & Judgment:

> The County's additional argument – shifting the administrative burdens and associated costs to the County for enforcement of City taxes 'impairs' County operations – misses the point. Article IX, § 2 (d) concerns only impairment of the powers of a local government, not whether the action of one local governmental body imposes additional costs, burdens, or inconveniences upon another. Whether the Local Law affects the operations of the County simply is not germane to the question before the Court.

[R: 9 (emphasis in original)].

Stated another way, the County's impairment argument has nothing to do with how the Charter Amendments might weaken its legal authority to act, in the abstract (*i.e.*, impair its powers). Rather, the argument complains about the purportedly inconvenient administrative and financial choices the County may have to make as a result of its new duty/obligation to enforce delinquent City real property taxes, which the Charter Amendments validly transfer to and impose upon the County in accordance with the language of RPTL article 11 (*see* Point II, *infra*).

Finally, setting aside the dissent's flawed statutory analysis and viewing the circumstances from a practical perspective, the County's impairment argument reads as somewhat disingenuous in light of its current delinquent tax enforcement responsibilities. As the County acknowledges, it has, for decades, handled delinquent tax enforcement for every town and village in St. Lawrence County [R: 35]. The County also states on its website that the City of Ogdensburg is the only city in the county (*see* "St. Lawrence County Municipalities" [https://stlawco.org/Departments/CountyClerk/MunicipalityListing] [last accessed February 9, 2023]). Thus, it follows that, prior to the enactment of the City's Charter Amendments, the County already had been collecting and enforcing delinquent taxes without issue for *every* municipality in the county *except* the City of Ogdensburg.

Accordingly, there can be no doubt that County has the proper technology and staff in place to handle delinquent tax enforcement for numerous local governments

other than itself. This reality reinforces Supreme Court's conclusion, in which the Third Department majority joined, that handling such enforcement for properties within the City is, at most, an administrative inconvenience that the County would prefer to avoid, rather than an unconstitutional impairment of the County's statutorily granted powers to govern [R: 9, 209].

B. The MHRL Does not Prohibit the City's Adoption of the Charter Amendments

In addition to finding the Charter Amendments to be constitutional, the Third Department majority also correctly affirmed Supreme Court's holding that they do not violate the MHRL [R: 9-10]. While it is true that MHRL § 10 (5) states, as article IX § 2 (d) of the Constitution does, that "a local government shall not have power to adopt local laws which impair the powers of any other public corporation", the MHRL also expressly provides that all cities have the ability to adopt local laws related to the levy, collection and administration of "local taxes authorized by the legislature" (MHRL §§ 10 [1] [ii] [a] [8] & [9]), and may do so as long as the local law in question is "not inconsistent with the provisions of the constitution or not inconsistent with any general law. . . whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law" (MHRL § 10 [1] [ii]; *see also* NY Const art IX § 2 [c] [8] [providing a virtually identical authorization]).

Significantly, the Third Department has previously interpreted these provisions to "specifically permit[] a [City] to enact a local law concerning taxes *even though such an enactment may relate to affairs other than its own*. The only limitation is that the State Legislature must not have restricted the adoption of such a local law" (*County of Rensselaer v City of Troy*, 102 AD2d 976, 976 [3d Dept 1984] [emphasis added] [internal citation omitted]).

Here, the City's Charter Amendments deal with the collection and enforcement of delinquent City property taxes, which taxes are indisputably authorized by the Legislature. Furthermore, as discussed in detail above (*see* Point I.A., *supra*), the Charter Amendments are not inconsistent with the Constitution's or the MHRL's restriction on local laws that impair the powers of other municipal governments. Further still, the fact that the Amendments shift the enforcement of unpaid City taxes to the County is, on its face, permitted by the MHRL and the Constitution because the MHRL allows Cities to pass laws concerning taxes that may affect the affairs of a County government (*see Rensselaer County v City of Troy*, 102 AD2d at 976). Thus, it is further submitted that the City's Charter amendments are valid, and not contrary to the provisions of the MHRL.

POINT II

THE CHARTER AMENDMENTS ARE NOT INCONSISTENT WITH ARTICLE 11 OF THE RPTL

As established above, both Supreme Court and the Third Department majority correctly determined that the City's Charter Amendments do not unconstitutionally impair the powers of the County (*see* Point I.A., supra), or violate the MHRL (*see* Point I.B., supra). Thus, the Charter Amendments are valid and enforceable so long as they do not run afoul of RPTL § 1104 (1), which expressly states that the provisions of RPTL article 11 (*i.e.*, the Uniform Delinquent Tax Enforcement Act) "shall supersede any *inconsistent* general, special or local law" ([emphasis added]; *see generally Matter of City of Schenectady [Permaul]*, 201 AD3d 1, 11 [3d Dept 2021]).

As relevant here, the City amended section C-80 of its Charter, which deleted the former Charter section and replaced it with the requirement that "[t]he County shall be responsible for the enforcement of delinquent City taxes in accordance with Article 11 of the [RPTL]" [R: 133]. The City also amended section C-81, which now requires the County to make the City whole for delinquent taxes the County is unable to collect [R: 133-134].

It is submitted that these amendments are not inconsistent with any provision of RPTL article 11. To the contrary, they are fully consistent with the statutory scheme, inasmuch as article 11 clearly indicates that a City can, by a simple charter

amendment, abrogate its status as an article 11 tax district, thereby eliminating its ability to collect and enforce delinquent City real property taxes (*see* RPTL § 1102 [6] [b]). This, in turn, shifts such authority to the County by default, and necessarily requires the County to make the City whole for taxes that remain unpaid after expiration of the annual warrant (*see* RPTL § 936; *see also* Point II.C., *infra*). As the Third Department majority correctly noted, "[t]his outcome is neither an expansion nor impairment of the County's powers but simply a consequence of the statutory structure outlined in RPTL articles 9 and 11" [R: 209].

Notably, even the dissent at least partially agrees with the statutory authority upon which the City relied to enact the Charter Amendments, stating that "[w]e do not disagree that the definition [of "tax district" in RPTL § 1102 (6) (b)] contemplates the sort of arrangement that the City seeks" [R: 214-215 n 5]. Despite this, the dissent and the County argue that the transfer of delinquent tax enforcement authority to the County cannot be accomplished through a charter amendment because (1) the City repealed its local law opting out of an exclusively Charter-based delinquent tax enforcement scheme in favor of subjecting itself to the provisions of RPTL article 11 (*see* RPTL §§ 1104 [2], 1106 [1]); (2) the dissent and County believe that the only way for the City to accomplish such a transfer of authority under article 11 is to enter into an agreement pursuant to RPTL § 1150; and (3) that RPTL § 936 does not require the County to make the City whole for unpaid delinquent City

real property taxes. However, as is discussed in detail below, the dissent's and the County's positions on these issues are contradicted by the language of the RPTL and other relevant legal authority.

A. The City's Repeal of its RPTL article 11 opt out Local Law Allows, Rather than Prohibits, the City from Transferring its Delinquent Tax Collection and Enforcement Authority to County

Section 1104 of the RPTL provides that "[t]he provisions of [RPTL article 11] shall apply to all counties, cities, towns and villages in this state" unless the municipality enforced the collection of its delinquent taxes pursuant to procedures set forth in, among other things, a city charter on January 1, 1993, and adopted a local law on or before July 1, 1994 opting out of the procedures in article 11 in favor of continuing to collect and enforce delinquent taxes pursuant to the charter procedures "as . . . may from time to time be amended" (RPTL §§ 1104 [1], [2]). Because the City enforced its delinquent taxes pursuant to its Charter well before 1993, the City had the ability to enact an opt out local law pursuant to RPTL § 1104 (2) in order to continue its exclusively Charter-based enforcement scheme, and apparently believed at the time that such an enactment was in its best interests (*see* Ogdensburg City Code, former § 199-43 [https://ecode360.com/8441267] [last accessed February 9, 2023]).

Thereafter, for nearly three decades, the City continued to enforce its own delinquent real property taxes, as well as the County's, pursuant to Charter

provisions that existed outside of the procedures set forth in RPTL article 11 [R: 124-129], which was inapplicable to the City due to its opt out local law. Over time, however, the Charter's collection and enforcement structure became operationally impractical in light of the City's limited resources and administrative infrastructure, especially as compared to the County's. This prompted the City, as a part of the Charter Amendments, to additionally enact a repeal of City Code § 199-43, the section that codified the City's RPTL article 11 opt out local law [R: 134].

In the Third Department dissent's view, this repeal is fatal to rest of the Charter Amendments because "the City became bound [to follow] RPTL article 11 procedure" and enacted a local law inconsistent with that procedure (*see* Point II.B., *infra*), whereas if the City had not repealed the article 11 opt out law, it "would be permitted to amend the enforcement procedure in its charter" pursuant to RPTL § 1104 (2) [R: 212-213]. The City did not, however, repeal its article 11 opt out law by mistake. Contrary to the dissent's perspective, it is the City's position that it *had to* repeal the opt out local law and subject itself to the procedures of RPTL article 11 in order to ensure that the Charter Amendments would have their intended effect, namely, to validly transfer to the County the authority to collect and enforce delinquent City real property taxes.[2]

[2] With regard to the Third Department majority's statement that "[t]he City was statutorily authorized to [amend its charter] pursuant to RPTL 1104 (2), which recognizes that a city charter 'may from time to time be amended'" [R: 209], as the City notes above, it actually repealed its

The City derives its authority to enact the Charter Amendments from the RPTL article 11 definition of the term "tax district" (*see* RPTL § 1102 [6]), and its application within the article. Broadly stated, a municipality that is a "tax district" for purposes of RPTL article 11 has the authority to designate an official of the municipality to serve as an "enforcing officer", who is empowered to enforce delinquent tax liens on behalf of the tax district (*see* RPTL §§ 1102 [3], [6]; 1122, 1123, 1124, 1160). Because article 11 only permits "enforcing officers" of "tax districts" to enforce delinquent tax liens (*see* RPTL § 1160), it follows that if a municipality is not an article 11 tax district, it lacks the ability to independently enforce its own tax liens. Under such circumstances, when local real property taxes go unpaid, the municipal official responsible for collecting property taxes "shall make and deliver to the county treasurer an account . . . of all taxes listed on the tax roll which remain unpaid[.] . . . [Subsequently t]he county treasurer shall, if satisfied that such account is correct, credit him [or her] with the amount of such unpaid delinquent taxes" (RPTL § 936 [1]).

As the definition of "tax district" specifically relates to the City, RPTL § 1102 (6) (b) notes that cities are not tax districts if "the county enforces delinquent

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article 11 opt out local law (*see* RPTL § 1106 [1]) as part of the Charter Amendments [R: 134], thus rendering RPTL § 1104 (2) inapplicable to the City. However, for all of the reasons stated in this Point II.A., and in the City's brief in general, the Third Department majority's conclusions are correct, even if this discrete aspect of its rationale may not be.

taxes pursuant to the city charter". In other words, the RPTL expressly contemplates that a city may amend its charter to abrogate its status as an RPTL article 11 tax district and transfer to the county the authority to enforce and collect delinquent city real property taxes. It is submitted that this is precisely what the City accomplished when it enacted the Charter Amendments [R: 133-134].

Ironically, if the City had not also repealed its RPTL article 11 opt out law in conjunction with the Charter Amendments and made itself subject to article 11 procedures, as opposed to following an exclusively Charter-based enforcement scheme, any amendment to the Charter purporting to transfer the City's delinquent tax enforcement authority to the County would have been without effect.

Substantiation for this conclusion is found in an advisory opinion issued in 1972 by the former State Board of Equalization and Assessment (now the State Board of Real Property Tax Services). To the best of the City's knowledge, aside from the prior holdings in this case, this advisory opinion is the only authority of any kind that directly speaks to the ability of a city to shift tax collection and enforcement responsibilities to a county, though the opinion was issued in response to a somewhat different set of circumstances (*see* 2 Ops Counsel SBEA No. 100, 1972 WL 19610 [Nov. 15, 1972]). In any event, the statement in the SBEA opinion most relevant to this case is that "[a] city charter cannot be amended to require the county to collect and enforce taxes *according to procedures established by the city* [because t]he

county's collection and enforcement activities are governed by the Real Property Tax Law" (1972 WL 19610 at *1 [emphasis added]).

In the present context, the City interprets this statement to mean that a city cannot amend its charter to require a county to collect and enforce its delinquent taxes according to special procedures that the city creates outside the context of RPTL article 11, because a county is obligated to follow article 11 collection and enforcement procedures. Thus, here, if the City had not repealed its article 11 opt out local law, the City would have been unable to transfer delinquent tax enforcement authority to the County via a simple Charter amendment, because such an amendment would create a special requirement that exists outside of RPTL article 11, which the County would not be bound to follow.

However, by repealing the opt out law and subjecting itself to the provisions of RPTL article 11, the City gained the benefit of the article 11 definition of "tax district" (which did not apply to it at all prior to the enactment of the Charter Amendments) and the exception thereto, which indicates that a city can abrogate its status as a tax district by passing a simple charter amendment requiring a county to enforce delinquent taxes in accordance with article 11 procedures. This is exactly what the Charter Amendments do. As amended Charter section C-80 states, "[t]he county shall be responsible for the enforcement of delinquent City taxes in accordance with Article 11 of the [RPTL]." Accordingly, it is submitted that the

City's repeal of its RPTL article 11 opt out local law is a key reason why the Charter Amendments are valid and enforceable, rather that a key reason why they are not, as the Third Department dissent suggests.

B. The Charter Amendments are not Inconsistent with RPTL § 1150, which Provides for an Optional Intermunicipal Agreement that may be used to Apportion Delinquent Tax Rights and Obligations Between Tax Districts

The focal point of the Third Department dissent's opinion that the City's Charter Amendments are inconsistent with RPTL article 11 and, thus, invalid, is RPTL § 1150, which states, in relevant part, that

> [a]ll tax districts are hereby authorized to make agreements with one another with respect to any parcel of real property upon which they respectively own tax liens in regard to the disposition of such liens . . . and to make agreements for the disposition of the proceeds of real property upon which tax liens have been extinguished by agreement

(RPTL § 1150 [1]). The dissent and the County argue that this section provides the exclusive mechanism by which a city and a county can agree to a delinquent tax collection and enforcement arrangement whereby the county handles these responsibilities on a city's behalf. This conclusion is flawed in several respects.

While the City acknowledges that the County has provided some evidence that cities and counties have previously used RPTL § 1150 (1) agreements to apportion delinquent tax enforcement authority between themselves, there is no indication in section 1150 or anywhere else in RPTL article 11 that such an agreement is the only mechanism by which this can be accomplished, or that it is

even the appropriate mechanism under the present circumstances. Indeed, the word "city" is not even used in section 1150. Moreover, section 1150 (1) authorizes only "*tax districts* . . . to make agreements with one another" (emphasis added). Because the City's Charter Amendments abrogate the City's status as a tax district pursuant to the language of RPTL § 1102 (6) (b) and the operation of that language throughout article 11, it is submitted that the City is not even eligible to enter into a section 1150 (1) agreement with the County.[3]

Additionally, the dissent's conclusion that, due to the existence of RPTL § 1150, the Charter Amendments are "inconsistent" with RPTL article 11 is itself inconsistent with multiple tenets of statutory construction. For example, if a section 1150 (1) agreement were the only way the City could transfer delinquent tax collection and enforcement authority to the County, that would render the language of RPTL § 1102 (6) (b) superfluous, as there could be no "city for which the county enforces delinquent taxes pursuant to the city charter". As Supreme Court correctly

[3] The City would, however, be eligible to enter into an RPTL § 1150 (2) agreement with the County, which indicates that the Legislature may have contemplated the scenario that exists in this case. Section 1150 (2) allows for an agreement, significantly narrower in scope than an 1150 (1) agreement, between an article 11 tax district and a municipality, such as the City, that is not also a tax district. Specifically, section 1150 (2) states that when any "person" – a "person" includes "an individual, a corporation (including a foreign corporation and a *municipal corporation*) . . . which may lawfully own property in the state (RPTL § 1102 [5] [emphasis added]) – "*other than a tax district* has any right, title, interest, claim, lien or equity of redemption in any parcel which is the subject of a tax lien, the tax district owning the tax lien may agree with such person that . . . the rights of such person shall be released in exchange for a fixed sum or for a share of the proceeds to be obtained upon the sale of such parcel by such tax district" (emphasis added).

held [R: 11-12], this would violate the tenet that "meaning and effect should be given to all [of a statute's] language, if possible, and words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning" (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 231).

The dissent's conclusion is also inconsistent with the idea that "[t]he maxim *expressio unius est exclusio alterius* is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 240).

Similar to RPTL § 1102 (6) (b), which addresses when cities are article 11 tax districts and when they are not, section 1102 (6) (c) establishes both the general rule and the exception for villages, stating that a village is a tax district, unless it is "a village for which the county enforces delinquent taxes pursuant to [RPTL § 1442]". The obvious distinction between the two subsections, however, is that the Legislature has created a specific statutory procedure that a village must follow in order to transfer delinquent tax enforcement authority to a county, and has expressly cross-referenced that procedure in RPTL § 1102 as the means by which a village may abrogate its status as a tax district. The Legislature easily could have created a similarly specific procedure by which a city could achieve the same objective (such

as a section 1150 agreement, for example) and cross-referenced it in section 1102, but it did not. Rather, the plain language of section 1102 (6) (b) allows for a city to abrogate its status as an article 11 tax district if its charter requires a county to enforce delinquent city real property taxes on its behalf.

In light of these differences, the maxim *expressio unius est exclusio alterius* dictates that the Legislature's inclusion of the cross-reference to the requirements of RPTL § 1442 in the definition of when a village is, and is not, an article 11 tax district (*see* RPTL § 1102 [6] [c]), and the exclusion of a similar cross-reference to any statutory procedures or requirements in the definition of when a city is, and is not, a tax district (*see* RPTL § 1102 [6] [b]) must have been intentional. Thus, it is submitted that the Legislature did not intend to require a city to follow any special procedure, other than the procedure to amend the city's charter, to abrogate its status as an article 11 tax district and transfer delinquent tax enforcement authority to the county (*cf. Town of Aurora v Village of E. Aurora*, 32 NY3d 366, 372-373 [2018]). Accordingly, the City's Charter Amendments are valid, inasmuch as they are not inconsistent with RPTL § 1150 or any other provision of RPTL article 11.

C. The Third Department Majority Correctly Held that the County is Required to Make the City Whole for its Unpaid Delinquent Taxes Pursuant to RPTL § 936

The Third Department dissent's final argument against the validity of the Charter Amendments attacks amended Charter § C-81, which requires the County

to make the City whole for "any City taxes [that] remain unpaid or uncollected upon the thirty-first day of December succeeding the delivery of the warrant" [R: 133]. This Charter section relies upon the language of RPTL § 936 (1), which states that "[u]pon the expiration of his warrant, each [RPTL article 9] collecting officer shall make and deliver to the county treasurer an account . . . of all taxes listed on the tax roll which remain unpaid[.] . . .The county treasurer shall, if satisfied that such account is correct, credit him with the amount of such unpaid delinquent taxes. Such return shall be endorsed upon or attached to the tax roll."

The dissent's position appears to be that the County is not required to make the City whole pursuant to RPTL § 936 because the return that a local collection officer must deliver to the county treasurer is supposedly done after the expiration of "a county warrant [to collect taxes]", rather than a warrant issued by a city, which is what City Charter § C-71 requires [R: 124, 210-211]. While it is true that, as the dissent points out, RPTL § 904 (1) discusses the county tax warrant, it is respectfully submitted that the dissent's additional observation that "the warrant subject to RPTL article 9 procedure is a county warrant" [R: 210] is an overstatement.

In general, article 9 governs the procedure by which non-delinquent taxes are collected in all municipalities that handle the collection of real property taxes, not just counties, and RPTL § 936 is no exception. Significantly, the term "warrant" is not defined in RPTL article 9 at all, much less as a reference to a county's tax

warrant, nor is the term defined in the RPTL's general definitions section (*see* RPTL § 102). Accordingly, it cannot be assumed, that the phrase "his warrant" – which is how section 936 refers to the warrant of a local tax collecting officer – means "the collecting officer's warrant issued by the county", as the dissent appears to believe. Rather, it is submitted that the more natural interpretation is that "his warrant", as expressed in RPTL § 936, refers to whatever written authority a municipality's collection officer possesses to extend and collect the real property taxes that he or she is legally authorized to collect.

Additional language within section 936 requires that once a tax warrant expires, local collecting officers, must "make and deliver to the county treasurer an account . . . of *all* taxes listed on the tax roll which remain unpaid" (RPTL § 936 [1] [emphasis added]), which clearly indicates that the return sent to a county by a local tax collector is a submission for reimbursement of all taxes that the collecting officer is authorized to collect, regardless of the source of that authorization. This conclusion is reinforced by RPTL article 11 – the article at the heart of the instant dispute – which defines the term "delinquent tax" as "an unpaid tax . . . imposed upon real property by or on behalf of a municipal corporation . . . relating to any parcel *which is included in the return of unpaid delinquent taxes prepared pursuant to [RPTL § 936]* or such other general, special, or local law as may be applicable" (RPTL § 1102 [2] [emphasis added]).

As the foregoing makes clear, the definition of "delinquent taxes" (*i.e.*, the very thing the Charter Amendments require the County to collect and enforce on the City's behalf) contemplates that such unpaid taxes will appear on the City's return to the County, which the County then utilizes to make the City whole (*see* RPTL §§ 936 [1]; 1102 [2]). Thus, it is submitted that, as the Third Department majority correctly observed, where, as here, "the county treasurer is statutorily required to serve as [the article 11] enforcing officer [for a city], the city would be made whole upon the return and the county would assume the responsibility of enforcement" [R: 209].

POINT III

THE COUNTY'S REQUESTS FOR RELIEF PURSUANT TO CPLR ARTICLE 78 ARE BOTH INAPPROPRIATE AND UNNECESSARY

The portion of the County's Verified Petition/Complaint that prays for various forms of relief pursuant to CPLR article 78 has gone largely unaddressed by the courts that have ruled on this case. Specifically, the County contended before Supreme Court that it is entitled to mandamus relief compelling the City to continue to collect and enforce its own delinquent real property taxes because the City's enactment of the Charter Amendments somehow amounted to a failure to perform "functions that are dictated to it by law" [R: 43-46]. The County further argued that the City should be "prohibited" from enacting the Charter Amendments because they are purportedly preempted by state law [R: 47-50; 142-146].

It is submitted that the Court can, and should, summarily dismiss these claims because the County's sole objective is to seek a declaratory judgment invalidating the City's Charter Amendments. The County expressly acknowledges this fact in its opening brief to the Court, stating that "these forms of relief are . . . unnecessary because it is undisputed that the County asserted a claim for declaratory judgment" [City's Br. at 41].

The City agrees with the County that article 78 relief is unnecessary in light of the declaratory judgment action, but granting such relief is also prohibited under the present circumstances, as it is well established that "Article 78 proceedings are inappropriate vehicles to test . . . the validity or non-validity of statutes, ordinances, rules or regulations passed by a [local municipality]" *Matter of Clark Disposal Serv. v Town of Bethlehem*, 51 AD2d 1080, 1080 [3d Dept 1976]; *see Lakeland Water Dist. v Onondaga County Water Auth.*, 24 NY2d 400, 407 [1969]; *Matter of Lund v Town Bd. of Town of Philipstown*, 162 AD2d 798, 800 [3d Dept 1990]). Furthermore, regardless of how the Court decides the County's declaratory judgment cause of action, its article 78 claims will be moot, inasmuch as the Charter Amendments will either be deemed constitutional, valid and enforceable, as it is respectfully submitted that they should be, or will be deemed void. In either scenario, addressing the County's article 78 claims on the merits would be redundant

and ultimately fruitless, inasmuch as "the rights of the parties cannot be affected by [such a] determination" (*Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).[4]

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court should affirm the Memorandum and Order of the Appellate Division, Third Department, which upheld Supreme Court's declaration in favor of the City that the Charter Amendments contained in Local Law No. 2-2021 validly transferred to the County the authority to collect and enforce delinquent City real property taxes.

Dated: Binghamton, New York
February 14, 2023

COUGHLIN & GERHART, LLP

By: _____

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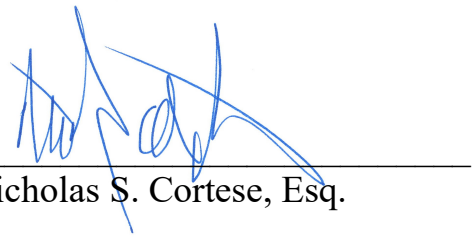
[4] Several other justifications exist for the dismissal of the County's requests for CPLR article 78 relief in the nature of mandamus and prohibition but, in the interest of brevity, they will not be revisited here. Should the Court wish to review these arguments, they are detailed in the City's brief to the Third Department at pp. 11-20.

CERTIFICATION PURSUANT TO 22 NYCRR § 500.13 (c)

The undersigned hereby certifies the total number of words herein, inclusive of point headings and footnotes and exclusive of pages containing the statement of the status of related litigation; the corporate disclosure statement; the table of contents; the table of cases and authorities; and the statement of questions presented, is 8,632.

Dated: February 14, 2023
Binghamton, New York



Nicholas S. Cortese, Esq.

STATE OF NEW YORK)
) ss.:
COUNTY OF MONROE)

AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS DELIVERY

I, **Jeremy Slyck**, of Rochester, New York, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On February 14, 2023

deponent served the within: **BRIEF FOR DEFENDANTS-RESPONDENTS CITY OF OGDENSBURG, JEFFREY M. SKELLY, AND STEPHEN JELLIE**

Upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **three (3)** true copies of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on February 14, 2023

Andrea P. Chamberlain
Notary Public, State of New York
No. 01CH6346502
Qualified in Monroe County
Commission Expires August 15, 2024

Jeremy Slyck

Job #512051