INDEX NO. 493/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

HUNTER SPORTS SHOOTING GROUNDS, INC.,

Plaintiff,

- against -

BRIAN X. FOLEY, STEVE FIORE-ROSENFELD, KEVIN T. MCCARRICK, KATHLEEN WALSH, CONNIE KEPERT, CAROL BISSONETTE, and TIMOTHY P. MAZZEI, Constituting the Town Board of the Town of Brookhaven and the COUNTY OF SUFFOLK, as a Necessary Party pursuant to Civil Practice Law and Rules 1001(a),

Defendants.

DECISION AFTER TRIAL

PLAINTIFF'S ATTORNEY:
LAW OFFICES OF ANDREW L. CRABTREE, P.C.
225 BROAD HOLLOW ROAD - SUITE 303
MELVILLE, NEW YORK 11747
631-753-0200

ATTORNEY FOR THE TOWN DEFENDANTS:
MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
990 STEWART AVENUE - SUITE 300
GARDEN CITY, NEW YORK 11530
516-741-6565

ATTORNEY FOR DEFENDANT COUNTY OF SUFFOLK:
DENNIS BROWN
SUFFOLK COUNTY ATTORNEY
BY: JOHN PETROWSKI
H. LEE DENNISON BUILDING - 5TH FLOOR
100 VETERANS MEMORIAL HIGHWAY
HAUPPAUGE, NEW YORK 11788
631-853-4049

This matter was tried before the undersigned without a jury beginning on January 30, 2019 through February 5, 2019. On consent of the parties, the original date for post-trial briefs was adjourned from April 5, 2019 to June 14, 2019. The Court has received post-trial submissions of the plaintiff HUNTER SPORTS SHOOTING GROUNDS, INC. ("HSSG"), defendants BRIAN X. FOLEY, STEVE FIORE-ROSENFELD, KEVIN T. MCCARRICK, KATHLEEN WALSH, CONNIE KEPERT, CAROL BISSONETTE, and TIMOTHY P. MAZZEI, Constituting the Town Board of the Town of Brookhaven ("Town"), and defendant COUNTY OF SUFFOLK ("County"). There has been significant pre-trial motion and appellate practice in connection with this matter, as well as related matters in both the civil and criminal courts in relation to this trap and skeet shooting range.[1]

[1] *See Hunter Sports Shooting Grounds, Inc. v Foley*, 120 AD3d 759 (2d Dept 2014) and *Hunter Sports Shooting Grounds, Inc. v Foley*, 73 AD3d 702 (2d Dept 2010). *See also* this Court's prior Orders of June 21, 2012 at 2012 NY Misc LEXIS 3117, and

HSSG pleads eleven (11) causes of action:

The First Cause of Action alleges and asserts that as a result of the long-standing use of the subject property as a trap and skeet range, all of which predates the Town's enactment of its noise ordinance, HSSG is afforded the protection of a pre-existing, non-conforming use.

The Second Cause of Action alleges and asserts that the implementation and enforcement of the noise ordinance constitutes an unlawful exercise of police power allegedly denying a reasonable rate of return, and according to the complaint, destroys the property's economic value and constitutes a confiscatory taking.

The Third Cause of Action alleges an administrative taking of a vested property interest as a result of the enactment of the Town noise ordinance and that the summonses issued in violation of the ordinance are of no legal force or effect.

The Fourth Cause of Action is in the nature of declaratory relief allegedly as a result of arbitrary enforcement due to community pressure without due process and that all violations are null and void, and a specific declaration that the Town's noise ordinance is void as against the property.

The Fifth Cause of Action alleges a Public Interest Immunity alleging the Town's noise ordinance to be in conflict with the County's noise ordinance and that the balancing of the public interest favors the County's use of the property.

The Sixth Cause of Action is in the nature of preemption and Municipal Home Rule Law violation.

October 6, 2011 at 2011 NY Misc LEXIS 5097. There were additional proceedings in the Supreme Court, Appellate Term, Second Department (*People v Hunter Sports Shooting Grounds, Inc.*, 47 Misc 3d 139[A] [2d Dept App Term 2015]) arising from an Order of the District Court of Suffolk County, Sixth District (Flanagan, J.), rendered on December 10, 2012. *See also Matter of Long Is. Pine Barrens Soc'y v County of Suffolk*, 55 AD3d 610 (2d Dept 2008), an appeal of an Order and judgment of the Supreme Court, Suffolk County (Weber, J.), dated May 2, 2007.

The Seventh Cause of Action asserts an exemption within Brookhaven Town Code §§ 50-6 (A) and 50-7 (B) for municipally-sponsored events and public assembly activities.

The Eighth Cause of Action asserts a void for vagueness argument based upon the language of the Town ordinance and the definitions and provisions set forth therein.

The Ninth Cause of Action seeks the limitation protection of the Town ordinance pursuant to Town Noise Ordinance Section, which only permits enforcement against one violation in any two-hour period.

The Tenth Cause of Action attacks the facial sufficiency of two specific accusatory instruments pursuant to CPL 100.15 and 170.35 (1) (a).

The Eleventh Cause of Action alleges the necessity of the inclusion of the County as a necessary party, pursuant to CPLR 1001 (a), as held by the Hon. Gary J. Weber in an Order dated May 8, 2007.

In reaching its determination herein, the Court is mindful of its prior rulings and the rulings and findings made in the prior actions and proceedings as set forth in footnote one and herein below.

By way of limitation, and for the purpose of clarification and in conformance with the rules of this Court, HSSG's counsel as part of Court Exhibit "1," has submitted a Proposed Order corresponding to his various causes of action and seeks relief on HSSG's First, Second, Third, Fourth, Fifth, Sixth and Seventh Causes of Action. The Eighth, Ninth and Tenth Causes of Action are therefore dismissed. The Eleventh Cause of Action has been rendered moot, the County having appeared and participated in the proceedings pursuant to the Order dated May 8, 2007 (Weber, J.).

The County acquired title to the real property at issue herein in two separate transactions – one by condemnation and filing of the Oaths of Commissioners on or about May 17, 1963, and the other by deed dated February 16, 1965 (Exhs. "21" & "22").[2] After the acquisition of the property by the County, various licensees have operated a trap and skeet shooting range on certain real property located within the Town of Brookhaven and owned by the County of

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[2] "Exh. __" refers to exhibits entered into evidence during the trial of this action.

Suffolk. In 1987, the Town enacted a noise ordinance which, among other things, authorized the imposition of fines upon entities that emit sound in excess of 65 decibels. In 2006, HSSG began operating the trap and skeet shooting range. In November and December 2006, the Town commenced a series of proceedings in the Sixth District Court, Suffolk County, alleging that HSSG was in violation of the Town's noise ordinance.

HSSG commenced this action in the Supreme Court, Suffolk County, against the members of the Town Board of the Town of Brookhaven for, among other things, a judgment declaring that the Town's actions in enforcing the noise ordinance against it were unconstitutional, and that the noise ordinance was unlawfully and improperly applied to HSSG. As discussed, in a prior Order, the Supreme Court directed that the County be joined as a necessary party. HSSG subsequently filed an amended complaint that named the County as an additional defendant, but did not assert any causes of action against the County.

HSSG's causes of actions as pleaded and developed during the course of the trial may be categorized as follows:

Category One: Exemption from the Town noise ordinance as a result of the use as a shooting sports facility for a significant period of time prior to the enactment of Chapter 50 of the Town Code concerning "Noise Control," comprised of the First Cause of Action.

Category Two: An administrative taking by the unlawful exercise of a police power resulting in a denial of HSSG's right to a reasonable rate of return on its investment in the facility, as pleaded in the Second Cause of Action, as well as an administrative taking as a result of the enactment of the noise ordinance and its enforcement by the issuance of summonses, seeking to have the enforcement mechanism declared of no legal force and effect, as pleaded in HSSG's Third Cause of Action.

Category Three: A declaratory application in the nature of an Article 78 proceeding alleging both arbitrary enforcement of the noise ordinance in the nature of an as applied constitutional argument which seeks a declaration that the Town's noise ordinance is void and prohibited from application to the property in question, as pleaded in HSSG's Fourth Cause of Action.

Category Four: HSSG asserts what it characterizes as a "Public Interest Immunity" alleging that the Town's noise ordinance conflicts with the County's noise ordinance and that the County's ordinance is controlling as set

forth in HSSG's Fifth Cause of Action. HSSG also asserts that as a result of the Municipal Home Rule Law and the delegation by the State Legislature to the County of management of the County's parks, the County's noise ordinance is therefore controlling, as set forth in the Sixth Cause of Action.

The remaining causes of action, namely the Seventh, Eighth, Ninth, Tenth and Eleventh Causes of Action are each hereby **DISMISSED**. With respect to the Seventh Cause of Action, there was neither argument nor proof that the activities of HSSG constitute an event or a public assembly within the meaning of the Brookhaven Town Code (*see* Brookhaven Town Code §§ 50-6 [A], 50-7 [B]). The Eighth and Ninth Causes of Action were resolved and rendered moot as a result of this Court's Order dated June 21, 2012, which found the Town's noise ordinance constitutional and a valid exercise of the Town's police power as written and the Town's acquiescence to the one violation per two hour period provision of the ordinance.[3] The Tenth Cause of Action concerning the sufficiency of the accusatory instruments in the Sixth District Court was resolved under the Criminal Procedure Law within the lawful jurisdiction and purview of the local criminal court. The Eleventh Cause of Action was rendered moot by the appearance and full participation of the County as a defendant in this proceeding.

CATEGORY ONE:

HSSG argues that the historic use of the property as a shooting range for decades would exempt the facility from the noise ordinance in question. The prior use theory would certainly be applicable and pertinent if the Town were to enact a zoning ordinance that prohibited the use of the property as a shooting range. Land use regulation is subject to a different analysis than the exercise of a legitimate police power in the form of a noise ordinance as set forth in further detail herein.

HSSG makes certain concessions in its argument that this case does not fit neatly into the category of a traditional administrative taking by zoning ordinance, yet HSSG's argument is premised that the noise ordinance amounts to an administrative taking given the unique quality of the property and its

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[3] That Order was affirmed on appeal by decision of the Second Department dated August 27, 2014 (*see Hunter Sports Shooting Grounds, Inc.*, 120 AD3d 759).

historical use as a shooting facility which long predates the Town Code and any noise ordinance.

A survey of the law involving noise ordinances does not reveal a controlling or guiding precedent to support this theory. The record clearly established that the property was a shooting facility which long predated the noise ordinance. The passage of time alone does not negate the Town's enactment. HSSG alleges that the law is the equivalent of a restrictive zoning provision. The result is the same, however, the Town possesses the authority to enact a noise ordinance if it is non-discrimnatory and contains objective standards and a reasonable noise decibel limit. Chapter 50 of the Brookhaven Town Code meets the necessary criteria for the reasonable exercise of a police power.

> The evaluation of whether a taking has occurred is essentially a factual inquiry, *see id.*, which nevertheless calls "as much for the exercise of judgment as for the application of logic." *Andrus v. Allard*, 444 U.S. at 65. There is therefore no precise rule as to when there has been a taking, and the inquiry involves a weighing of public and private interests. *See Agins v. City of Tiburon*, 447 U.S. at 260-61. There is, however, a "multifactor inquiry generally applicable to nonpossessory governmental activity." *Loretto*, 458 U.S. at 440 (citing *Penn Central*, *supra*). The factors accorded particular significance in this inquiry are: (1) "the economic impact of the regulation on the claimant and, particularly, (2) the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124

(*Sadowsky v New York*, 732 F 2d 312, 317 [2d Cir 1984]).

There is no known reported case and none is cited by counsel that affords a *Penn Central* analysis to the enactment of a municipal noise limitation ordinance. Therefore, HSSG's First Cause of Action is hereby **DISMISSED**.

CATEGORY TWO:

HSSG's position in its Second and Third Causes of Action is that enforcement of the noise ordinance has two distinct effects, to wit: that HSSG is denied a reasonable return on its investment in the facility as a result of what it considers to be an unlawful exercise of police power, and that the ordinance is tantamount to an administrative taking. While similar in nature to the First Cause of Action, HSSG seeks to develop a theory wherein the exercise of the police power in enforcing the noise ordinance is both an administrative taking and a separable deprivation of return on investment which would satisfy one of the factors customarily addressed in the *Penn Central* analysis context.

> In surveying the prior cases, the Court in *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992), noted that there are two categories of regulatory action that demand just compensation: when the regulation causes the property owner to suffer a physical invasion of his property, and when the regulation takes away all economically beneficial uses of the property. Plaintiffs do not fit in either category.
>
> If the takings claim does not fall into one of these two categories, then the Court has previously engaged in an ad hoc, factual determination of the public interest furthered by the regulation. *Id.*

(*SBC Enters. v City of S. Burlington*, 892 F Supp 578, 584 [D Vt 1995]).

Interestingly, HSSG does not seek compensation from the Town; it seeks an exemption from the noise ordinance due to the practical effect HSSG claims enforcement of the noise ordinance will have upon its ability to profitably operate the shooting range. There is no assertion by HSSG that this case is a traditional administrative taking case of either a physical taking or one that would be subject to a *Penn Central* analysis but rather that the violation of a single component of the traditional *Penn Central* ad hoc criteria is sufficient support to preclude the Town's enforcement of its noise ordinance. The current state of the law, however, does not support that assertion. HSSG is not the owner of the property in question but is the owner of a business which operates the shooting range. HSSG seeks no monetary damages under Fifth Amendment just compensation standards. HSSG proffers testimony in support of piecemeal arguments which do not constitute viable causes of action under traditional Fifth

and Fourteenth Amendment case law. There is a category of traditional taking cases as set forth in *Lucas*, when the regulation takes away all economically beneficial uses of the property. The resultant damages are measured in dollars not the judicial invalidation of a statute or ordinance.

> Supreme Court precedent indicates that two categories of regulatory action will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of [his] property—however minor—it must provide just compensation. Second, regulations that completely deprive an owner of 'all economically beneficial uses' of [his] property require just compensation. Outside of these two relatively narrow categories regulatory takings challenges are governed by the standards set forth in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)

(*Kabrovski v City of Rochester*, 149 F Supp 3d 413, 424 [WD NY 2015], citing *Jado Assocs., LLC v Suffolk County Sewer Dist. No. 4 - Smithtown Galleria*, 2014 US Dist LEXIS 88915, at *6 [ED NY 2014]).

HSSG's claim seems to be that enforcement of the noise ordinance deprives them of "all economically beneficial uses of the property." They are not owners of the property and they seek no financial compensation. Rather, they seek to fashion a hybrid theory of liability coupled with a creative remedy in the form of exemption from the Town's lawful noise limitation ordinance. The Town Code Chapter 50 "Noise Control" may have the practical effect of causing summonses to be issued for incidents where the measured noise level is above 65 dBA. This ordinance was enacted on June 16, 1987. HSSG did not obtain its contract with the County until April 26, 2006, some nineteen years after passage of the ordinance.

As will be seen from HSSG's representative's testimony at trial, HSSG was not only aware of the existence of the ordinance, there was a deliberate disregard of the possible consequences of enforcement.

Regardless of the method of analysis, whether a single-prong deprivation of all economically beneficial use which HSSG seems to assert or the *Penn Central* three-part test, the proofs adduced at trial are insufficient to meet

the elemental requirements of either. A potential loss of income as opposed to the rendering of a property valueless relative to the "bare residue of value" standard are two very distinct measures of damages with the former insufficient to support an administrative taking pursuant to the elemental criteria of *Penn Central*.

The Court of Appeals has very clearly stated that statutes or ordinances in effect at the time title of the property is taken by a subsequent owner deprives that new owner of an opportunity to avail itself of the *Penn Central* takings analysis because in the first instance it is not a taking, it is an existing condition which impacts upon the value of the property prior to its purchase. In addition, the allegedly offending statute itself is subject to attack as it has been in this litigation.[4]

> The rule that preexisting regulations inhere in a property owner's title will affect the value of property, but this should furnish ample incentive to the prior owner – the party whose title has been redefined by the promulgation of a new regulation – to assert whatever compensatory takings claim it might have. If a prior owner, whether immediate or not, fails to assert a takings claim, it is this prior owner who might suffer the potential loss because the purchase price of the property will very likely reflect any restrictions inhering in title. *Of course, the parties can condition sale on receipt of the necessary use allowances or prosecution of a takings claim*. Any compensation received by a subsequent owner for enforcement of the very restriction that served to abate the purchase price would amount to a windfall, and a rule tolerating that situation would reward land speculation to the detriment of the public fisc. Additionally, the rule advanced by the dissent would have the effect of unsettling property law and other land-use restrictions throughout the State. The bright-line rule articulated in *Kim* and *Gazza*, which allows for a subsequent purchaser to challenge the validity of previously enacted laws (as opposed to pursuing a

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[4] While HSSG is not an "owner" of the property involved, which is owned by the County, HSSG is a licensee of the County and it is the nature of the licensed business which runs afoul of the Town's noise ordinance.

> compensatory takings claim), will enhance certainty and, to that extent, facilitate transferability of title.
>
> Furthermore, if property owners were permitted to assert compensatory takings claims based on enforcement of preexisting regulations, the traditional takings analysis articulated in *Penn Cent.*, and its inquiry into "the extent to which the regulation has interfered with distinct investment-backed expectations," would be rendered hopelessly circular (*see*, *Penn Cent. Transp. Co. v New York City*, 438 US 104, 124). To illustrate based on the facts of this case: If petitioner's title was defined without regard to the steep-slope restriction, then her investment-backed expectations would include the possibility of winning a compensatory takings lawsuit as a result of the Village's enforcement of the ordinance. However, the success of her compensatory takings lawsuit would depend largely on the extent to which the ordinance interferes with her investment-backed expectations, which would in turn depend on the possible success of the compensatory takings claim, and so on. This inevitable circularity points up the analytical flaw in permitting a subsequent purchaser to assert a compensatory takings claim based on a property interest that has already been defined out of the owner's title

(*Anello v Zoning Bd. of Appeals*, 89 NY2d 535, 540-541 [1997] [emphasis supplied]).

While not the title owner, the analogy here is that HSSG was absolutely aware of the existence of the noise ordinance, and it is uncontroverted that HSSG knew of the existence of the ordinance, was unsure of its applicability to the range, and asserts in this litigation that it was its belief at the time that the ordinance did not apply for the reasons asserted during the testimony of Mark Wroobel.

Faced with this analysis, HSSG seems to argue that the County's use of the land as a trap and skeet range predating the enactment of the noise ordinance enures to HSSG's benefit due to a theory of continuous use by the licensor County to the licensee HSSG.

TESTIMONY OF MARK WROOBEL:

Mark Wroobel ("Wroobel"), the owner of HSSG, testified that he first became involved with the property in question as a patron of the trap and skeet facility that had been operated by others (Tr p56 L20-24).[5] Although a request for proposal was sought by the Town in 2002, Wroobel did not submit a proposal at that time (Tr p57 L17-22). He did however submit a proposal in response to an RFP from the Town in 2005 (Tr p58 L11-12).

Wroobel also testified that he was aware of the existence of both the County and Town noise ordinances and that the range was exempted from the County's noise ordinance (Tr p60 L13 - p61 L3). He claimed that it was his belief that the Town noise ordinance did not apply to the range (Tr p61 L10). Wroobel stated two distinct reasons for this belief: (1) that the range noise would be exempted due to the operation of the facility as a trap and skeet range dating back to the early 1960's; and (2) that the Town's noise ordinance enacted in 1987 had not resulted in any summonses being issued to previous operators of the range from 1987 through 2001 (Tr p61 L11-22). He presumed that as no summonses were issued for all those years he would not have to comply with that portion of the Town ordinance (Tr p62 L7-14). It is unclear how at the time of the 2005 RFP Wroobel was aware that no summonses had been issued by the Town from 1987 to 2001. He was aware that the area around the range was residential in nature (Tr p188 L23-25). Wroobel certainly was aware that noise was an issue prior to his entering into the contract with the County (Tr p200 L9-11). There was certainly controversy and disagreement surrounding the applicability of the County noise ordinance and whether it was controlling. The opinions of the County Attorney and counsel to the Suffolk County Legislature were in conflict and Wroobel acknowledges that he was aware that there were differing interpretations and opinions (Exhibit "L," p119-120). He candidly admits he was aware of the Town noise ordinance, but took the position that it did not apply to the range.

Wroobel claims that it was his understanding that the County's exemption from the County's noise ordinance "would trump the Town being that they were the larger entity" (Tr p64 L13-16). In sum, he was of the opinion that he would be "grandfathered in" as a prior, non-conforming use, the continuous operation of the facility as a trap and skeet range without "abandonment" and the County exemption from the County's own noise ordinance (Tr p64 L9-12).

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[5] "Tr p__ L__" refers to the transcript of the trial of this action.

Wroobel claimed there was a legal opinion of the then-counsel to the Suffolk County Legislature that in the absence of the County exemption the Town noise ordinance would apply. This parsing of the content of Exhibit "L" by HSSG is somewhat incomplete and out of context.

Exhibit "L" contains the minutes from the March 14, 2002 meeting of the Parks, Sports & Cultural Affairs Committee of the Suffolk County Legislature. There is a stenographic record of the meeting, which states, in part:[6]

> LEG. TOWLE: Forgetting our law for a second, let's pretend Legislator Levy never introduced that law. Would the facility, even though it's at a County location, fall under the jurisdiction of whatever noise ordinances are in place in the Town of Brookhaven?
>
> MR. SABATINO: Yes. Then in the absence of the County legislation which was intended to cover County property, whatever, if any ordinance is in existence in that particular jurisdiction would apply

(Exh. "L," p123).

HSSG proffers this exchange as an opinion of then-legislative counsel to support the position that the County exemption exempts the facility from the Town noise ordinance. While interesting, the assumptions within the question and answer offer little if anything in the way of an opinion as to the facts in existence at the time of this legislative committee meeting in 2002. The Local Law referred to as introduced by then-Legislator Levy was a 1999 enactment to restrict noise levels on all County-owned property without reference to any particular property or general category or classification of property. In his reading of the testimony from the hearing in posing the question to Wroobel at trial, HSSG's counsel failed to read the preceding material which dealt with the necessity of creating a County shooting range exception to the then-existing County noise ordinance. The colloquy in that regard never spoke directly to the applicability of the existing 1987 Town noise ordinance. The implication was that if there was no County noise limit then the Town limit would control by default.

There was no shortage of discussion concerning the 1987 Town noise ordinance during this time period. Exhibit "S," which is the summary of the

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[6] Page numbers within exhibit references are Bates stamp numbers as contained within the individual exhibits.

site tour conducted in November of 2002, certainly addresses the issue that both the County and Town noise ordinances must be addressed in the 2002 RFP (Exh. "S," pSC-56). In addition, the opinions of legislative counsel and discussion within the Suffolk County Legislature certainly put HSSG on notice that the Town noise ordinance was enforceable as against the range property and the trap and skeet shooting activities. Exhibit "X," which is the minutes of the May 13, 2003 General Meeting of the Suffolk County Legislature, at p328 of 443, contains a clear statement that amendment to the County Noise ordinance exempts the range from the County's requirements but not the Town's noise ordinances (Exh. "X," p328 of 443). Chapter 366 of the Suffolk County Code was passed on May 13, 2003, exempting the range from the County Noise Ordinance only. There is no mention of exemption or intent to pre-empt any other more restrictive requirement, namely Chapter 50 of the Town Code limiting noise levels to 65 dBA.

Wroobel knew of this but claimed there were differing opinions at different times. Choosing to accept those opinions which may have favored his position and ignoring those that contradicted it is of no moment. His personal beliefs or actions that were taken by him in the face of the legal opinions offered does not exempt HSSG from the applicability of the Town's noise ordinance.

Wroobel claimed it was his belief that the Town could not issue the County summonses, so therefore they could not issue him summonses (Tr p227 L13-20). This assumption was incorrect as to the Town's authority to issue noise violation summonses. This next level of reasoning is, even if the ordinance applies, the Town's past failure to issue summonses somehow exempts the property from compliance. There is no argument made in the nature of selective enforcement or that there was any discriminatory design to the 1987 noise ordinance enactment. There is no allegation of some alleged disparate treatment or any other impermissible consideration.

There were discussions concerning the mitigation of noise in the form of the construction of a wall. Exhibit "X" at page 335 of 433 contains a statement by Leg. Towle that before the range reopened they would make sure a "full sound abatement plan is in place, as our consultants have recommended" (Tr p224 L12 - p225 L10). Wroobel's response concerning hay bales and sound proofing were not of the scale that was certainly contemplated by the legislature. In Exhibit "X" at page 336 of 433, legislative counsel dealt more directly with the conflict between the County and Town ordinances. "If the County ordinance is modified to exempt this facility and the Town ordinance is still in effect, the Town ordinance would be applicable subject to whatever its provisions are." Counsel to

the legislature continues, "but whoever the vendor would be that would take over the operation of the facility would have to adhere to those Brookhaven restrictions, whatever they are." This is a clear, unequivocal statement of legislative counsel's position and legal opinion concerning the enforceability of the Town's noise ordinance.

It is certainly clearer than the opinion voiced in relation to the County exempting the shooting range from the County's own noise ordinance. There is no indication whether the more general countywide Levy proposal would be more or less restrictive than existing noise ordinances then in effect in the Town. The limited and hypothetical colloquy concerning the countywide general ordinance offers nothing to support HSSG's position that the Town ordinance in effect on December 6, 2005, when the County Legislature authorized the Parks Department to enter into the license agreement with HSSG, was in any way superceded by any existing County exemption. As noted, HSSG and the County executed an agreement in April of 2006, and HSSG commenced operation of the facility on July 15, 2006.

Counsel for HSSG apparently wishes to extrapolate from one statute to the next while legislative counsel's opinion is that the property would be subject to the Town's noise ordinance. However, counsel's opinion, even if properly framed, is not dispositive of the ultimate issue in this case. HSSG has never brought litigation against the County, and the County has never brought litigation against HSSG. HSSG's arguments might be relevant in an inducement action or a contract enforcement action where HSSG theoretically would seek to avoid contractual obligations to the County, but have little or no value in the context of this case. However, the record is replete with public meeting records, RFP documentation, and other significant indicia that the range was and is subject to the Town's noise ordinance. There is no legal justification for this Court carving out an exception and usurping a local legislative function in the face of the lawfully enacted ordinance.

MUNICIPAL HOME RULE LAW:

Wroobel further testified it was his belief that Municipal Home Rule would also protect him from enforcement of any local ordinances (Tr p67 L11-16). The County moves on the legal argument of the assertion of Municipal Home Rule Law (Tr p814 L6-10). Counsel for the County in his post-trial memorandum argues that the Town's noise ordinance impairs the power of the County to operate its parkland and therefore violates Municipal Home Rule Law. The

County recites New York Constitution article IX, § 2 (d), wherein one local government shall not have power to adopt local laws which impair the powers of any other local government, as well as the similar language of Municipal Home Rule Law § 10 (5). The County further supports this argument by citation of Section 10 (1) (ii) (a) (6) empowering local governments to adopt local laws relating to the use of their own property.

In further support of their argument, the County cites County Law § 221, wherein the State Legislature authorized counties to create a County Park Commission which "shall have the supervision and management of all county parks within the County." According to the County's theory, the only limitation upon their authority is that they may enact legislation provided it is not inconsistent with State statutes or restricted by the State legislature (Municipal Home Rule Law §§ 10 [1] [I], [ii]). The County argues that issuing summonses impairs the County's power and authority over County park property. While the authorizing enactments are correctly set forth by the County, nothing contained therein speaks to preemption or exclusion from local municipal requirements.

The Town has not infringed upon or legislated in any way in contradiction or subversion of the County's supervision and management of the park facility. The 1987 enactment, although pre-dated by the conduct of shooting activities at the location, does not prevent or preempt the activity. The noise generated by the activity can be mitigated by re-configuration and reduction and the implementation of noise control methods.

The legislative history of the County's noise ordinance implies that the enactment of Suffolk County Code § 618-5 (C) (4) was intended to exempt and remove the shooting range from "the jurisdiction of such ordinances." However, the statute itself only exempted the shooting range from the County's noise ordinance and made no mention of the Town ordinance. The enactment of that statute had no impact upon the Town ordinance directly or by implication. If the County was of the opinion that they could legislate preemptively against the Town noise ordinance, they could have attempted to do so and thereby crystallize the conflict for judicial review. They did not.

The County further argues that the choice in this matter is binary. The County, by the testimony of Commissioner Philip Berdolt, claims that if the noise ordinance applies, the range will close. That presupposes that there are no intervening measures of mitigation or reduction that can be undertaken. The Commissioner's all or nothing gambit is undermined by the noise studies and remediation, mitigation and reduction suggestions explored prior to HSSG's

signing of the agreement, and further developed on the record herein. If the Commissioner exercises his prerogative and discretion in that regard, that is certainly his right. Is that the only solution to the issue? Certainly not.

The County must concede that there is no express preemption by State or County law and instead argues that the Town's noise ordinance is an unauthorized impairment of the County's management and supervision of parkland. That is a distinction without a difference. In the absence of the direct exemption or preemption by the State Legislature, the County may not assert, invent or imply a State prohibition exists where it does not. The case law citations proffered by the County for the assertion that the management and supervision of the parks may not be impaired by local ordinance enactment do not specifically deal with the use of a police power. The Town's noise ordinance was enacted in 1987 and was not specific to the shooting range but was a Town-wide proscription. HSSG's arguments do not invalidate the Town's noise ordinance or limit its applicability.

HSSG and the County have offered several different methods of analysis, none of which fall squarely on point given the *sui generis* aspect of this case. The fundamental request of all of the theories is that the County shooting range operated by its licensee be exempted from a lawfully-enacted Town noise ordinance. Taken individually, none of the analysis falls within the current case law. Combining and borrowing elements of several different theories likewise is an unsuccessful attempt to address a legislative problem in a judicial forum.

The specific problem is that neither the State nor the County has affirmatively stated that a local shooting range is exempt from local noise ordinance limitations. Public recreational activities do occasionally come in conflict with local public laws. In addition, the County argues that a balancing of public interests argument in their favor should carry the day. While no longer controlling, the historical method of analysis of differentiating between proprietary and governmental functions, some of the case law therein is helpful here.

> The legislative act expressly provides that the Commissioner may proceed with the project "notwithstanding any general, special or local law to the contrary which provides for or requires control thereof." It is difficult to avoid the conclusion that the Legislature must have had local zoning ordinances foremost in mind when it adopted that provision; for the Department of Parks would become relatively powerless if its actions

> were to be limited by the provisions of the scores of zoning ordinances adopted by the numerous towns, villages and cities in Westchester County. Having in mind the expressed legislative purpose to permit the County to proceed unfettered by local laws, the ever-expanding need for recreational facilities in the environs of a great metropolitan center, and the fact that certain of such facilities can be provided only by a larger governmental unit such as a County, the court concludes that in the present project Westchester County is action in a governmental capacity and that it may proceed without applying to the town for a special permit

(*Francis Oswald & Cortlandt v Westchester County Park Comm'n*, 234 NYS2d 465 [Sup Ct, Westchester County 1962]). No such authorization by the state legislature exists in relation to this shooting range on a general or specific basis. In the absence of a direct exemption by the state enactment, the local ordinance, in this instance the noise ordinance, applies. The introduction of legislation in the New York State Assembly in 2005 at the behest of HSSG (A6608-A) was a possible and reasonable State legislature solution to HSSG's problem. Unfortunately, the proposal was unsuccessful and did not become law as more specifically discussed hereinafter.

GENERAL BUSINESS LAW § 150:

HSSG also cited General Business Law § 150 as an additional reason for its belief that the Town's 65 dBA noise ordinance did not apply to the trap and skeet facility. Section 150 of the General Business Law provides in its entirety:

> § 150. Shooting ranges
>
> 1. In any action or proceeding commenced against an owner or user of a shooting range where one or more causes of action asserts a claim based on noise or noise pollution resulting from the inherent shooting activity on such shooting range, it shall be an affirmative defense that, at the time of the commencement of the action or proceeding, the shooting range is in

compliance with any applicable noise control laws or ordinances, or, if the applicable noise control laws or ordinances have no legal force and effect against such owner or user or there are no applicable noise control laws or ordinances at the time of the effective date of this section, then the A-weighted sound level of small arms fire on the shooting range does not exceed 90 dB(A) for one hour out of a day, or does not exceed 85 dB(A) for eight hours out of a day measured at, or adjusted to, a distance of one hundred feet outside the real property boundary of the shooting range. An owner or user may move for judgment dismissing one or more causes of action asserted against him on the ground that a cause of action cannot be maintained because of such affirmative defense.

2. Nothing in this section shall in any way limit the rights or remedies which are otherwise available to a person under any other law.

3. Notwithstanding the provisions of subdivisions one and two of this section, no shooting range shall be operated during the period from 10:00 PM until 7:00 AM unless a local law or ordinance specifically authorizes the operation of a shooting range during all or any portion of such time period.

4. For the purposes of this section:

(a) "Shooting range" shall mean an outdoor range equipped with targets for use with firearms and shall include, but not be limited to, all rifle, pistol and shotgun ranges.

(b) "A-weighted sound level" shall mean the sound pressure level measured by the use of an instrument with the metering characteristics and A-weighting frequency response prescribed by sound level meters using the impulse response mode.

(c) "Sound pressure level" shall mean twenty times the logarithm to the base ten of the ratio of the root mean squared pressure of a sound to a

> reference pressure of twenty micropascals. The unit applied to this measure shall be the decibel (dB).
> (d) "Small arms" shall mean projectile firearms of small caliber, including rifles, pistols, and shotguns

(General Business Law § 150).

The clear language of the statute, which became effective November 1, 1994 (General Business Law § 150, as added by L 1994, ch 543, § 1), conditions the decibel levels upon the absence of other applicable noise ordinances in effect at the time of the enactment. The Town's noise ordinance, which became effective in 1987, preempts General Business Law § 150 by the express terms of the statute. Wroobel's beliefs or thoughts do not change the content and plain meaning of the statute.

HSSG's attempts to further bolster Wroobel's beliefs by having him testify as to the opinions of the National Rifle Association ("NRA") and the Sportsmen's Association for Firearms Education ("SAFE"), are no more availing. Defendant's Exhibit "AN" contains a letter from John L. Cushman, President of SAFE, dated March 12, 2005. The content of this correspondence belies HSSG's argument. While Cushman offers certain opinions, they are neither controlling nor accurate as to his own legal conclusions. At the second full paragraph of the letter (Exhibit "AN," p SC-1651), Cushman writes, "[i]n the event Brookhaven Town does have jurisdiction then we are specifically requesting the Town give a similar noise level exemption for the range as the County has already done."

This sentence succinctly sets forth the nature of the legal issue which HSSG faced. HSSG went forward in the face of uncertainty with respect to the lawfully enacted and constitutional noise control statute of the Town. HSSG did so at its peril despite the many inconclusive and inaccurate opinions of third parties, as well as its owner's own beliefs and conclusions. In the absence of a definitive exemption from the Town's noise ordinance by either legislative enactment of the Town or the State of New York, the noise ordinance was and is a legitimate restriction imposed upon the entire Town which includes the trap and skeet shooting facility at issue herein. The recognition of the need for specific state legislative action was pursued by HSSG and its state representatives.

ASSEMBLY BILL A6608A:

Wroobel also testified as to Assembly Bill A6608A, proposed in 2005 by Assemblywoman Virginia Fields ("Bill"). This Bill was intended to grandfather in sport shooting ranges that were in existence prior to the development around the sport shooting range and prior to local noise ordinances. The Bill, dated March 17, 2005, was not passed. Wroobel testified that the "Bill had tremendous support and we truly believed the Bill was going to pass" (Tr p74 L20-24). He also claimed that the Bill was discussed with representatives of the County. These very conversations undermine HSSG's arguments.

In phrasing a question and reading from the minutes of an oral presentation to the County which took place on July 13, 2005, as set forth in "Exhibit AQ" (p SC-1567), counsel read "[i]t was stated that there was huge support for the Bill to pass. It was hoped if the State exempted said facilities, the Town of Brookhaven would have to follow suit." When asked if that was his recollection, Wroobel answered "Yes" (Tr p77 L8-14).

Wroobel testified that he was aware that there were "some talks" between County Executive Levy and Town Supervisor LaValle "regarding the enforcement of the noise law" (Tr p77 L21 - p78 L4). He also testified that he was aware of a memorandum dated May 6, 2005 concerning a site tour (Exhibit "AO"). There was a question set forth within the memorandum authored by the County's representative and a written answer which set forth the status of the noise issue *prior* to the submission of RFP responses, which stated:

> "How can we propose on the concession to operate the Trap & Skeet facility if the Town had not granted an exemption from their noise ordinance?"
>
> And the following answer was supplied:
>
> "Prospective operators are advised to refer to the Hansen Plan and outline in their proposals, the assumptions that were utilized as a foundation for their plan. If they assume the Town will not waive its noise ordinance, their plan must address how they're going to structure the range so that it's in compliance with the Town's noise guidelines."

HSSG, through Wroobel's testimony, acknowledged his awareness of this document, and HSSG's counsel, by his follow-up questions to his reading of this question and answer from the memorandum, sought to characterize it as "at least talk of exempting the range" (Tr p79 L2-17).

It is obvious from the foregoing that the Town's noise ordinance was in effect and that there was no exemption in place, nor was any exemption ever granted by amendment of the Brookhaven Town Code or otherwise. The follow-up questions to this issue only further support the fact that Wroobel knew that there was no exemption prior to his RFP submission and prior to his signing the agreement with the County. The Suffolk County Executive sent a letter to the Town Supervisor, dated September 27, 2004, which states in part, "[a]t this point, we are inquiring as to whether or not the town believes this range falls under their ordinance and if so, whether the town can grant an exception, as did the County (Exhibit "AD"; Tr p79 L18 - p80 L6). Also contained within that letter is the County Executive's reference to a report issued by L.K. McLean Associates, PC that "it will not be possible to construct a sound mitigation measure that meets the Brookhaven Town Code regarding noise control and also provides for a viable trap and skeet shooting range that can be utilized by those who engage in the recreational use of firearms" (Exhibit "AD").

HSSG's decision to disregard the existing 1987 Town ordinance when it was clear there had been no exemption granted was done at its own peril. The agreement between the County and HSSG was fully executed on April 27, 2006. At that time there was no waiver of the Town's noise ordinance or any exemption granted. There is correspondence from the Chief Deputy County Executive to the Brookhaven Town Attorney (Exhibit "BC") that glossed over the existence of the Town's noise ordinance and proffered certain positions that were an obvious attempt to minimize or undermine the effect of the Town ordinance upon the County trap and skeet shooting range.

The Deputy County Executive cites to Section 366-5 (c) (4) of the Suffolk County Code; observes Chapter 50 "Noise Control" of the Town Code does not carve out an exception for shooting sports as the County does; characterizes the Town's approach to noise control as a "case by case" analysis; and then pronounces that the Town's noise ordinance is therefore a "zoning law" and an impermissible regulation of a park allegedly in violation of *Incorporated Village of Lloyd Harbor v Town of Huntington*, 4 NY2d 182 (1958). The Court is unable to find any such argument offered by HSSG or the County in the trial record. This characterization is adopted by the County in its post-trial memorandum unsupported by any testimony or further development of the issue.

In addition, Exhibit "BC" continues suggesting the Statute of Local Governments (which may also be cited as the Municipal Home Rule Law) § 10 (3), presumably although not specifically stated in Exhibit "BC," that grants of specific power shall not operate to restrict the meaning of a general power or to exclude other powers comprehended by general grant. The Court is unable to find any specific grant of a general power which "comprehends" noise control as concerns the shooting sports. While the County Law § 221 speaks to general management and supervision of Parks, noise control is dealt with in other statutes and is either deferential to local enactments or limited to County facilities only. Therefore, while both the State and County legislatures have spoken to the issue of noise and shooting ranges, neither has expressly or impliedly preempted the Town's ordinance.

MODIFICATIONS OR IMPROVEMENTS TO DIMINISH SOUND:

Wroobel candidly admits that "sound mitigation was one of the factors that we had to look at and make mention in our answering the RFP" (Tr p86 L9-16). Exhibit "AM" is the proposal submitted by HSSG. The petitioner was hopeful that the County could wield its influence and convince the Town to exempt the property from the Town's noise ordinance and stated that "we're prepared to proceed in any case." This is an absolute acknowledgment that they were prepared to go forward with or without the waiver. Wroobel claimed, "this is just an answer to the request for proposal" (Tr p88 L16-25). When questioned on cross-examination about his statement that "he was prepared to proceed," Wroobel stated he was just replying to the RFP requirements (Tr p245 L5-16). Again, disregarding the applicability of the Town noise ordinance was done at HSSG's peril. Wroobel was aware that the County Executive was reaching out to the Town Supervisor to determine whether or not the Town would waive its noise ordinance (Tr p246 L2-14). After discovering he was the only bidder, Wroobel knew during his negotiations with the County that the County had reached out to the Town to discuss the waiver of the Town's noise ordinance. HSSG, through its representative, chose to ignore the danger of the Town enforcing its noise ordinance against the range. He offered that he did not think the County would enter into a contract to do something illegal (Tr p256 L1-10). Perhaps most telling of the information available to HSSG at the time of the RFP and contract negotiations is the summary of the concerns of other interested individuals, one of whom queried: "How can we submit an RFP if the Town has not agreed to waive its noise ordinance?" An excellent question and one which was discussed and published to prospective applicants. For HSSG to claim ignorance of the possibility of the applicability of the Town noise ordinance strains credulity. There

was no waiver of the ordinance by the Town and HSSG was aware of that fact from several sources. Wroobel testified about his meeting with a County representative in or about April of 2006, and reaffirmed that he intended to reach out to the Town to get a definite statement as to their intention regarding enforcement of the noise ordinance (Tr p706 L5-20).

The need for mitigation in the event the Town did not waive its noise ordinance was contemplated by the RFP. The necessity for a wall to mitigate sound in accordance with the Hansen report was clearly set forth in the RFP. However, Wroobel, in that same testimony, stated that he was not going to build a wall . . . it was merely addressing specific line items in the request for proposal. Wroobel also claimed that the Pine Barrens Act would have prevented the building of the wall (Tr p89 L1-12). This is somehow offered as justification for ignoring the need for sound abatement in the event the Town did not exempt the property from its noise ordinance. Wroobel is saying that the priority was to get the contract regardless of what obligations would be imposed. It was as if ignoring the dangers was without possible future consequences.

This self-imposed ignorance cannot insulate HSSG from compliance with the Town ordinance. Perhaps the most significant aspect of Wroobel's testimony is in reference to his own words at the oral presentation to the County contained in Exhibit "AQ." When asked about his own statements as recorded in that Exhibit that he was prepared to build a wall to help with the noise problem, Wroobel's explanation at trial was that, "my main focus at the time was to be awarded the bid and to move forward because we truly didn't believe, going back to the Town's ordinance, that it would apply and nor did I truly believe a range – a wall would completely bring the range into compliance as stated in some of the studies. There was no guarantee that a wall would work" (Tr p91 L12-23).

When confronted with the specter of the failure of the proposed Assembly Bill, Exhibit "AQ" also reflects that HSSG, by Wroobel, was prepared to build a wall and work with the range designer to ensure the noise levels fell within the Town's requirements (Tr p92 L8-21). Wroobel went on to testify that the cost of the wall would exceed the profitability of the range (Tr p98 L18-25).

Wroobel goes further and argues should the activity of a shooting range cease at the facility, he and others would be responsible for reclamation services in the approximate amount of $7,000,000. It would seem that the County and Wroobel are significantly motivated to keep this facility functioning so as to avoid the legal effects of an abandoned facility that would trigger costly Federal remediation and reclamation requirements (Tr p110 L3 - p112 L25).

Wroobel also testified that given the schedule of fines within the Town's noise ordinance that the cost of the fines would exceed the profit made at the facility. Wroobel testified that HSSG would lose $1,000,000 in the current value of previous improvements made of $400,000 to $500,000, and future revenue of approximately $450,000 should the license not be extended and the range were required to close (Tr p139 L22 - p141 L6). Wroobel claims that fewer than twenty residents have complained about the noise level and that the range is frequented by thousands of visitors who shoot at the facility (Tr p175 L1 - p176 L1).

TESTIMONY OF CHRISTOPHER MENGE:

HSSG called Christopher Menge ("Menge"), an acoustical consultant, who testified that he specializes in community noise issues and was called upon by HSSG's counsel to determine possible noise abatement measures for HSSG's facility. The consultant testified as to his educational background and work experience in the field of community noise issues, including noise analysis and abatement design. Menge testified as to his professional approach concerning the comparison of a community's reaction to a noise-generating activity to achieve a level which would result in a low level opposition response by the affected community. He stated that the intent of his approach was "to get the sound levels down so that the response would be only a minimal, modest response from a typical community" (Tr p310 L17-19).

Menge's approach, as evidenced by the examples he cited, was a combination of regulating the noise generating source as well as mitigation by sound interruption to achieve an acceptably low level of community response. Menge testified that he took no measurements of his own but had visited the site and reviewed the three separate studies conducted by Hansen, McClean and Thalheimer. Menge testified that the 65 dBA level set forth in the Town ordinance was "a typical noise level that might be set for a community" (Tr p317 L20-21). He further testified that there is a difference between intermittent noise and constant noise. The testimony included the restatement of the noise levels at the high end of the spectrum in the "mid-to-upper seventies, sometimes above 80 decibels, dB(A)" (Tr p320 L2-8). Menge was unable to offer an opinion as to the criteria used in the modeling construct for the Thalheimer report or the variables incorporated therein (Tr p322 L11 - p324 L25). It was Menge's conclusion that the Thalheimer noise mitigation recommendations concerning the construction of a wall were questionable (Tr p325 L3-24). Menge concluded that the wall as

proposed by Thalheimer would not be sufficient to stop all noise emissions exceeding the 65 decibels (Tr p326 L22 - p327 L4).

An interesting point made by Menge was the reference to the Thalheimer report that:

> The direction that the weapon is pointing and there is a big difference between the amount of sound that is produced in front of the muzzle as compared with the sound behind it and that difference is over 20 decibels

(Tr p 328 L11-15).

Menge's testimony that the different noise levels created as a variable of the direction in which a shotgun is fired during the sporting clay activity was very clear. Unfortunately, there is no distinction in the record or in any of the reports differentiating between sporting clay decibel readings and trap and skeet decibel readings. The question remains open as to redirection of the line of fire as a method of mitigation. No research or testimony in that regard has been proffered in this record applying the theory of redirection to the physical layout of the shooting range and whether the shooting positions could be reconfigured and redirected.

Menge's testimony as to the efficacy of a wall was dependent upon the current configuration of the various shooting stations. Whether or not the elimination of the sporting clays and/or the relocation of the trap and skeet position would achieve compliance with the noise ordinance is left unexplored upon this record. Menge's testimony acknowledges a 20 decibel difference for a weapon discharged either toward or away from a location. An effective proposed wall design was assumed by Menge to have a goal of a 15 decibel reduction. Facing the weapons away from a location would achieve the 15 decibel reduction with a 33% reserve.

Menge explained that the sound levels have different frequency components and reducing the higher frequency sound levels will make the noise itself less startling to the receiver (Tr p 334 L13 - p337 L6). Menge was careful to distinguish between the use of the term frequency, meaning the pitch or quality of a single event versus the term meaning the number of distinct noise events that occurred (Tr p337 L18 - p338 L9).

Menge opined that a barrier in the form of a 20 to 30 foot high wall, 2100 feet in length, constructed of concrete placed along the Gerard Road property line would be required to effectively address the community noise issue due to the type of sound produced by the trap and skeet range. He estimated the cost as between two and three million dollars (Tr p343 L14 - p346 L17).

Upon cross-examination, Menge candidly admitted that he never inspected the interior of the location and had visited the site on one occasion the day before he testified. He further admitted that the facility was not operating the day of his visit and that he personally heard no gunshots emanate from the facility (Tr p351 L5-7). Menge testified that individual shooting station sheds would be an alternative to noise control possibly as effective as the wall he proposed. He did not, however, prepare or research the particulars of a shed alternative. His rough estimate which he admitted was a guess was of little assistance to the Court (Tr p364 L16-20). Menge was also candid in his admission that his experience with sheds as a method of noise abatement was restricted to fixed position target shooting ranges where the line of fire was in a single direction (Tr p377 L11 - p378 L1).

TESTIMONY OF PHILIP BERDOLT:

Philip Berdolt, the Commissioner of the Suffolk County Parks Department ("Berdolt"), was called by the County. He testified as to the general history of the facility in question and its acquisition by the County. Berdolt explained that the facility was operated by licensees of the County since in or about 1982 (Exh. "23"). There were additional agreements and extensions with a licensee from 1983 through 2005. The agreement between the County and the licensee, Northeast Guns, Inc., the last operator before HSSG, was terminated by letter dated September 28, 2001 (Exh. "32"). HSSG's first agreement with the County was for the period May 1, 2006 through December 31, 2015, with two additional five-year option periods of January 1, 2016 through December 31, 2020 and January 1, 2021 through December 31, 2025 (Tr p392 L5-10). As of 1962, there were no homes constructed in the area of the range as depicted in an aerial photograph (Exh. "29"). Another aerial photograph taken in 1984 shows three residences in the area of the range (Exh. "30"). Another map, dated 1987, shows three homes in the upper right hand quadrant of an aerial photograph (Exh. "A"). A 1994 photograph depicts eleven homes in the area of the facility (Exh. "31").

Berdolt testified that HSSG has fully complied with its obligations under the terms of the license agreement (Tr p400 L11-16). Berdolt, as Commissioner, has exclusive authority to terminate the license agreement should the operator, HSSG, not be in compliance with all applicable statutes and ordinances, and would be compelled to do so if the range is held subject to the Town's noise ordinance pursuant to the terms of the license agreement (Exh. "BD"; Tr p402 L5 - p403 L2).

Berdolt testified as to the importance of the range's continued operation because of the large number of residents who frequent the facility, as well as the revenue generated by its operation (Tr p403 L18-25). The County would lose approximately $100,000 per year in revenue were the range to cease operations (Tr p404 L1-10). Berdolt also testified that the land is not suitable for any other use due to the lead content (Tr p404 L11-18). In addition, were operations to cease, it is the County's position through Berdolt's testimony that the lead would be required to be removed from the property at a cost in the range of $1,700,000 to $7,000,000 dependent upon the specifications for removal and disposal (Tr p404 L24 - p405 L24).

On the issue of relocation of the range to an alternative site, Berdolt testified that a study was commissioned and that no suitable alternative site was found (Tr p406 L6-18). He further testified that in 2004 the County had invested $500,000 in noise mitigation and lead reclamation (Tr p407 L8-24; Exh "AT"). Berdolt also testified that the County as well as all predecessor licensees would be looked to for the remediation required should operations at the facility cease (Tr p409 L18 - p410 L1).

Upon cross-examination by the Town's counsel, Berdolt testified that between 2001 and 2006 the facility was "under renovation" (Tr p412 L12-15). He testified that the prior licensee had been terminated and that the County was looking for somebody else to run the property (Tr p412 L16-20). It was Berdolt's belief that if the County ceased shooting activities at the facility then the Suffolk County Health Department would have the responsibility for the remediation and cleanup of the facility (Tr p420 L12 - p421 L1). He also testified that he had no knowledge of any soil testing ever having been conducted at the facility (Tr p421 L2-12). Berdolt's direct testimony concerning the unavailability of alternative sites was contradicted by Exhibit "17," which identified three potential alternative sites that required additional study. This evidence strongly suggests that there was never any further study done in relation to these identified alternatives.

Berdolt confirmed upon cross-examination by counsel for HSSG that a finding by a court of competent jurisdiction and the exhaustion of the appeals process in favor of the Town's position that the noise ordinance was enforceable against the facility and the County would compel the County to terminate the contract (Tr p434 L11-19). Berdolt opined under cross-examination by HSSG's counsel that the three alternative sites would still be faced with construction costs, new community concerns, Pine Barren's restrictions, and reclamation and remediation issues similar to those at the existing facility (Tr p440 L8 - p441 L2).

TESTIMONY OF KARL JANHSEN:

Karl Janhsen ("Janhsen") testified that he is a certified public accountant and a certified valuation analyst (Tr p446 L2-11). He was engaged for two purposes: (1) to determine the effect that the funding of a wall would have on the business entity HSSG; and (2) to determine the effect on HSSG if it were required to pay for remediation of the grounds at the facility due to lead contamination (Tr p448 L19 - p449 L3). Janhsen arrived at an average net income including normalization of executive compensation of $116,000 for the three tax years 2015, 2016 and 2017 (Tr p450 L17 - p451 L9).

Janhsen opined that HSSG, given the remaining term of the license agreement, could not afford to invest $750,000 in the construction of a wall or other sound mitigation. Given the income assumptions and duration of the current contract period of two years, or an extension of another five for a total of seven years, would be an insufficient time horizon to obtain a loan or pay the cost of construction either directly to contractors or to a lender from income given the available revenue (Tr p453 L7 - p456 L5). Janhsen testified that HSSG could not afford a wall at a cost of $450,000 (Tr p457 L15-17).

TESTIMONY OF NICK GIBBONS:

The County called Nick Gibbons, a Principal Environmental Analyst ("Gibbons"), who testified that he had twenty years experience in the field of environmental analysis (Tr p463 L21-23). He explained that HSSG is required to periodically recycle lead off the surface of the site (Tr p466 L4-10). Gibbons summarized the capital expenditures made by the County from 2001 to 2006, the time between the two most recent licensees for which the range was not operational but intended to be reopened (Tr p469 L4-14). He explained that the lead accumulated on site as a result of the long-term use of the facility as a

shooting range would be reclassified should the range permanently cease operation. The applicability of the CERCLA and RCRA programs would in the event of a closing reclassify the onsite lead as hazardous waste (Tr p470 L7 - p471 L4).

On the issue of relocation, Gibbons candidly testified that of the three possible alternative sites for the range, he had no knowledge of any additional action taken by the County to further explore the three alternatives (Tr p474 L16 - 25).

TESTIMONY OF STEVEN LEVY:

Steven Levy, the former Suffolk County Executive ("Levy"), was called to testify. Levy served in that position from 2004 through 2011 (Tr p519 L23-25). Levy was aware of the noise ordinance issue with the Town and, as discussed, corresponded with the Town Supervisor by letter dated September 27, 2004 (Exh. "AD") to gauge whether the Town would seek to enforce its noise ordinance upon the re-opening of the range (Tr p525 L6-22).

Levy testified that in the absence of an injunctive ruling by a court of competent jurisdiction, the County took the position that they would have to wait and see the extent to which the Town enforced the ordinance on a quantitative basis (Tr p528 L8-16). Levy's opinion regarding the operation of the range even if the Town enforced the noise ordinance by the issuance of summonses was that it is not illegal to operate the facility with a noise ordinance in effect (Tr p530 L12 - p531 L2).

There were documents referred to during Levy's testimony by counsel for the Town which established that the subject of noise emanating from the shooting facility was a subject of discussion between and among residents in the area of the shooting range and County officials in the 1990's (Exhs. "BR," "BS," "BT," "BU," "BV," "BW"), and a resolution concerning the reopening of the range conditioned upon noise abatement (Exh. "R"). Levy also concluded during his testimony that a memo dated April 11, 2006 (Exh. "CA"), indicated the County was not going to implement any noise mediation improvements prior to the re-opening of the range (Tr p573 L1-5). Further, language was to be removed from the contract referring to the approval of the Town of Brookhaven and the specifics related to the Town's noise ordinance provisions. This document memorialized a meeting between Wroobel, his counsel Mr. Crabtree, and John Cushman. (Exh. "CA").

Levy testified that the position of the County at that time was that there were pre-exiting use and preemption arguments to be asserted by the County and the licensee. Levy also candidly admitted that if the Town was going to enforce its ordinance, the County was not going to spend money on mitigation (Tr p574 L14-23). In a memorandum dated July 14, 2005, there was a recognition from the County contract officer that a major obstacle to obtaining a successful bidder to operate the range was the existence of the Town's noise ordinance (Exh. "AR"). In an e-mail dated July 25, 2005 from Ron Foley to Paul Sabatino, he claims Wroobel and HSSG have a team of lawyers ready to go to the Town on the pre-exisiting use issue (Exh. "AS"; Tr p589 L8 - p591 L7). In another e-mail dated August 8, 2005 (Exh. "AU"), Colleen Hoffmeister notified Ronald Foley, Suffolk County Parks Commissioner, that Wroobel is prepared to undertake the legal battle against the Town's noise ordinance. There were additional conversations between the Deputy County Executive Jeff Szabo and the new Brookhaven Town Supervisor Brian Foley wherein the Town wanted a writing concerning the County's position on the inapplicability of the Town's noise ordinance to the shooting range (Exh. "CA"). In April 2006, the interaction between the County and the Town was still the subject of discussion.

TESTIMONY OF JOHN LAVALLE:

Former Brookhaven Town Supervisor John LaValle ("LaValle") was called to testify and represented his familiarity with the location of the range and the fact that noise complaints had been brought to his attention at board meetings as well as through correspondence. He was aware of the County's intention to re-open the range in or around 2005 and that Town officials were monitoring the progress of the re-opening (Tr p662 L6-16). He was aware of the County's position that they were exempt from the noise ordinance (Tr p663 L18-24).

The Town was concerned with the adjoining residents' quality of life and testified that the Town had upgraded the Town's own shooting range and expected others to do the same (Tr p668 L13-22). His term as Town Supervisor ended December 31, 2005 (Tr p684 L15-23). LaValle testified that he was very clear in correspondence with the County that the Town would not grant a waiver of the noise ordinance (Tr p691 L1-25).

The Town had invested several million dollars in upgrades to its own shooting trap and skeet range and provided the County with information that would assist them in complying with the noise ordinance. LaValle testified that the amounts allocated by the County for noise reduction were woefully

inadequate based upon the Town's actual experience at its own range (Tr p692 L6 - p693 L11). LaValle testified that the Town range had been entirely reconfigured and rebuilt to address safety and noise concerns (Tr p696 L18 - p697 L16).

TESTIMONY OF ERICH THALHEIMER:

The Town called Erich Thalheimer ("Thalheimer") to testify. Thalheimer testified that he has been an acoustical consultant for 35 years, as well as an avid competitive shooter with significant experience in connection with noise studies and the shooting sports (Tr p741 L19 - p742 L11). In discussing the Town's statutory level of 65 dBA, he stated that is the point of inflection where people will start to become annoyed by noise in a community sense (Tr p744 L7-17). Thalheimer set forth the scope of his engagement on behalf of the Town to quantify the noise emanating from the shooting range in question and to evaluate the significance of those noise levels and mitigation steps which could be undertaken (Tr p745 L3-17). He, together with an assistant, undertook noise level measurements on the 18th and 19th of February 2017 (Tr p746 L7 - p747 L13). The data gathering and modeling undertaken by Thalheimer was thoroughly explained as to both long term (background) noise and short term noise data, together with the isolation of shotgun reports by a method which provides data noise levels at any position within the calculation area, not just the 13 receptor points from which readings were taken (Tr p748 L5 - p749 L1).

He found that the isolated short term noise levels for the gunfire reports at 12 of the 13 receptor locations exceeded the 65 dBA level up to 87 dBA (Tr p749 L2-20). The concept of directivity as emanating from gunfire and the downrange nature of the noise was thoroughly explained (Tr p749 L21 - p750 L7). Likewise, the concept of subjective audibility was explained by Thalheimer, including the gradations of sound categories as perceived by the listener, the majority of which were found to be significantly audible relative to the background noise (Tr p750 L8 - p751 L17).

Thalheimer then explained his opinion regarding the mitigation options which would be available to lessen the impact of the findings upon the affected community, to wit: limiting hours of operation in cooperation with the community; reorientation of the shooting positions' directivity away from the noise receptors in the community (given the significant movement of the shooter during some of the shooting activities reorientation would not be effective short of cessation of such activities); and noise pathway controls (either shooting sheds or

noise walls). Thalheimer testified that shooting sheds could be configured to accommodate the sporting clays, and that the Addieville, Rhode Island shooting range is "a superb sporting clay" facility utilizing sheds (Tr p752 L5 - p757 L10).

The L.L. Bean Company sporting clay facility in Freeport, Maine was cited as an example of the effective use of sheds in the sporting clay context (Tr p758 L7 - p759 L6). Thalheimer candidly admitted that he had no measurement data for either the Addieville, Rhode Island or Freeport, Maine facilities, but that the CADNA-A computer modeling could be employed to assist in that determination and sheds could reduce detectible sound levels by 5 to 15 decibels (Tr p761 L9-24).

Of the available mitigation methodologies, he testified that an 1880 foot long wall, 12 feet in height, in a north-south orientation would be an effective method of controlling the noise given the residential development to the west of the range and really no sensitive receptor towards the east (Tr p763 L20 - p765 L2). Thalheimer testified that there are 14 alternative shooting ranges in the New York metropolitan area, which are located in New York, New Jersey, Pennsylvania and Connecticut (Tr p765 L3 - p767 L1).

Thalheimer explained the signal-to-noise ratio in relation to the subjective characterizations of discreet noise events (Tr p769 L25 - p771 L9). He further testified that the noise ordinance involved does not take into account any subjective characterization of the noise and is limited to the dBA level only (Tr p775 L12-16). Whether or not noise mitigation steps could be taken to address the specific findings of Thalheimer is a general opinion of a shed reduction of 5 to 15 dBA as testified to at trial. His testimony during cross-examination, while referring to his written report, suggested a 5 to 10 decibel reduction with no specific correlation as to the type of shooting activity or the originating point of the gunshot (Tr p792 L1 - p795 L2).

ADMINISTRATIVE TAKING (VALUE OF THE LAND):

Another factual concern is that HSSG is not the title owner of the property, nor is it contemplated that HSSG will ever become the title owner of the property. HSSG creatively argues that given the lengthy history of the property's use as a shooting range, coupled with the environmental concerns of significant lead reclamation and potential CRCLA liability to all historical owners, tenants and licensees of the property, neither the County nor HSSG wishes to discontinue current operations which might trigger any reclamation obligations.

A common theme in all administrative takings cases is that the property "value" would diminish as a result of the restrictive zoning enactment or denial to "a mere residue of its value." HSSG here is a licensee; the land in question is County parkland. It cannot be developed for any purpose. It is a repository of significant lead contamination, the extent of which has not been definitively tested or quantified. This round peg cannot fit into this square hole. HSSG's license is not a real property right. HSSG admits that its only injury would be that it would have to close and cease operations because the County would not allow it to operate in violation of the Town's noise ordinance. Its alternative arguments are that the cost of fines and or mitigation would negate the financial viability of the company. The agreement between HSSG and the County requires HSSG to comply with all laws and ordinances. As developed in this record, an ongoing violation of the Town's noise ordinance would cause the County to cancel the agreement according to the Park's Commissioner's testimony.

LAW IN EFFECT AT THE TIME THE INTEREST IS ACQUIRED:

> The *corpus juris* of this State comprises constitutional law, statutory law and common law. To the extent that each of these sources establishes binding rules of property law, each plays a role in defining the rights and restrictions contained in a property owner's title. Therefore, in identifying the background rules of State property law that inhere in an owner's title, a court should look to the law in force, whatever its source, when the owner acquired the property (*see*, *Matter of Gazza v New York State Dept. of Envtl. Conservation*, 89 NY2d 603 [decided today] [enforcement of preexisting statutory wetlands restriction not a taking]; *Matter of Anello v Zoning Bd. of Appeals*, 89 NY2d 535 [decided today] [enforcement of preexisting steep-slope ordinance not a taking])

(*Kim v City of New York*, 90 NY2d 1, 8 [1997]).

> In the context of a newly enacted restriction, three scenarios are posited in the case law, the first two of which are per se rules. There are "two discrete categories of regulatory action ... [that are]

compensable without case-specific inquiry into the public interest advanced in support of the restraint." (*Lucas v South Carolina Coastal Council*, 505 US 1003, 1015 [1992].) "The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property ... no matter how minute the intrusion, and no matter how weighty the public purpose behind it." (*Supra*; *see*, *Matter of Gazza v New York State Dept. of Envtl. Conservation*, 89 NY2d 603, 616 [1997].) Petitioner does not make a claim of this sort. "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." (*Lucas v South Carolina Coastal Council*, *supra*, 505 US, at 1015; *see*, *Matter of Gazza v New York State Dept. of Envtl. Conservation*, 89 NY2d, at 616-617.) Otherwise, when a regulation deprives a landowner only of some economically beneficial or productive use of his land, "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests'." (*Lucas v South Carolina Coastal Council*, *supra*, 505 US, at 1016, quoting *Agins v City of Tiburon*, 447 US 255, 260 [1980]; *see*, *Matter of Gazza v New York State Dept. of Envtl. Conservation*, 89 NY2d, at 616; *Federal Home Loan Mtge. Corp. v New York State Div. of Hous. & Community Renewal*, 87 NY2d 325, 335 [1995]; *Manocherian v Lenox Hill Hosp.*, 84 NY2d 385, 392 [1994]; *Seawall Assocs. v City of New York*, 74 NY2d 92, 107, n 6 [1989], *cert denied sub nom. Coalition for Homeless v Seawall Assocs.*, 493 US 976 [1989].) A determination whether this third manner of taking has occurred must be fact specific, and requires a balancing of " '[t]he economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations' " or other impairment of "noneconomic interests in land" against the public interests advanced by the State in support of the regulation. (*Lucas v South Carolina Coastal Council*, *supra*, 505 US, at 1019-1020, n 8, quoting *Penn Cent. Transp. Co. v New York City*, 438 US 104, 124 [1978]; *see*, *Matter of Gazza v New*

York State Dept. of Envtl. Conservation, 89 NY2d, at 617-618; *Rochester Gas & Elec. Corp. v Public Serv. Commn.*, 71 NY2d 313, 324 [1988].)

(*Countryman v Schmitt*, 176 Misc 2d 736, 739-740 [Sup Ct, Monroe County 1998]).

The concept of a prior, non-conforming use is only relevant if there is a zoning regulation which prohibits such use. Therefore, in order to find that HSSG possesses a vested, non-conforming use protected by the Fourteenth Amendment, the Court must conclude as a preliminary matter that the municipal ordinance is a zoning ordinance. If, on the other hand, the municipal ordinance is merely a valid exercise of the Town's police powers to protect the health, safety and welfare of the residents, HSSG's use of their property cannot serve as a basis for establishing a constitutionally protected property interest.

There are a number of competing and unusual conflict issues present herein as between the Town and the County. The County has enacted an ordinance exempting shooting facilities from its own noise ordinance. The County argues that with respect to the management of parkland, the State of New York has delegated the control of the park facilities to the County. The County in effect has attempted by this noise exemption ordinance to insulate itself from the effects of the Town's noise ordinance under the umbrella of this general management delegation from the state. Conflicts as direct as these between competing municipal enactments are traditionally resolved by the state legislature. There are ten towns which comprise the County of Suffolk, there is no portion of the County which exists outside the boundaries of one of these towns.

In the case at bar, the Court is faced with several issues for which there is disparate precedent; however, there is no four-square precedent for a case involving a long-term, pre-existing, non-conforming use, where a county has passed an ordinance exempting a county-owned shooting range facility from noise limitations over which the county has jurisdiction. Here, a Town ordinance exists and the County facility is operated by a private vendor for a recreational purpose where the vendor's activity violates the Town's noise ordinance. Of additional interest and worth noting is that the nearest competitor for the County trap and skeet range is a similar Town-owned facility less than ten miles away.

Most of the noise ordinance conflicts between municipalities or governmental agencies involves the issue of aircraft engine noise where federal

regulation preempts locally legislated noise limits. In addition, in the case before the Court, there are no legal claims of nuisance by any private landowners as parties against the operator of the facility or the County. It is the Town who has enforced its noise ordinance which bans sounds above 65 dBA by the issuance of summonses based upon sound meter readings at various points adjacent to the boundary of the shooting facility. A content neutral decibel level restriction has been held to be constitutional.

In general, when there is a conflict between local governmental entities, there is a balancing test which serves to resolve the conflict. In a case involving a Suffolk County Government fleet fueling facility, the Second Department adopted the "balancing of public interests" approach:

> As to the Town's cause of action predicated on the County's violation of the Riverhead Town Code and failure to procure the requisite Town approvals and permits, there is a conflict between the Town's regulations and the County's statutory authority to construct and utilize the fueling facility. This conflict must be resolved with a "balancing of public interests" analytic approach (*Matter of County of Monroe [City of Rochester]*, 72 NY2d 338, 341, 533 NYS2d 702, 530 NE2d 202 [1988])

(*Town of Riverhead v County of Suffolk*, 39 AD3d 537, 539 [2d Dept 2007]).

The analysis involved for the enforcement of noise ordinance violations as between a municipality and a private entity involving a pre-existing, non-conforming use is also useful for the *Monroe* balancing of public interest formula. In a case involving a drag racing facility located in Westhampton, New York, the Second Department addressed the pre-existing, non-conforming use of a private facility that created a noise ordinance violation:

> Contrary to the defendants' contentions, the mere fact that the racetrack constitutes a pre-existing non-conforming use under the zoning ordinance does not preclude the Town from seeking to enforce other provisions within the code to the extent that they constitute legitimate exercises of its police powers to protect the public health, safety, and welfare (*see, Goldblatt v Town of Hempstead*, 369 US 590). Insofar

> as Southampton Town Code § 267-6 imposes reasonable limitations upon the days and hours during which races may be conducted, it is a proper exercise of the Town's police powers (*see*, *Matter of Borer v Vineberg*, 213 AD2d 828, 830, n 3; *Schacht v City of New York*, 30 Misc 2d 77, 78, *mod on other grounds* 14 AD2d 526). Upon the instant record we find that the court properly weighed the relevant factors in determining to preliminarily enjoin violation of this ordinance (*see*, CPLR 6301; *Flacke v Bio-Tech Mills*, 95 AD2d 916)

(*Town Bd. v 1320 Entertainment, Inc.*, 236 AD2d 387, 388 [2d Dept 1997]).

The trial court in *Town Board of Southampton v 1320 Entertainment, Inc.* further stated:

> The Court is unpersuaded that the apocalyptic scenario proposed by the defendant will come to pass in the event the racetrack is forced to comply with the provisions of a valid noise control ordinance. In weighting the competing interests of the litigants herein, the scale tips toward those homeowners whose combined interests in protecting the economic and quality of life values of their property is strong indeed. The enforcement of the Town Code is unlikely to put the racetrack out of business, but is more likely to force the owners to become more creative in solving a legitimate complaint of its surrounding neighbors. The effort may cost money, but in the grand scheme of things the amount spent will go toward the preservation of the non-conforming use and an abatement of a nuisance upon a residential community

(*Town Bd. of Southampton v 1320 Entm't*, 1995 NYLJ LEXIS 3206, at *16 [Sup Ct, Suffolk County 1995]). Neither HSSG nor the County address the issue concerning the scope of the non-conforming use at the time of the enactment of the ordinance. In addition, this attempted *ad hoc* assertion of pre-existing, non-conforming use by HSSG has avoided any discussion concerning any expansion of the use subsequent to the enactment of the ordinance. Were the Court to concur with HSSG's assertion, the Court would be bound to exempt the activity to

the magnitude and extent of its 1987 status. There has been a substantial investment and expansion of the activity as testified to by Wroobel. The record is, however, devoid of any comparative information other than the investment and expansion as testified to by Wroobel.

IS THIS A ZONING LAW?

The Town's Exhibit "BC" is a letter dated April 26, 2006, from then-Chief Deputy County Executive of the County of Suffolk to then-Town Attorney of the Town of Brookhaven. The correspondence recounts the history of the various ordinances of both the County and the Town concerning noise levels in general and noise levels as concern shooting ranges in particular. In what can only be described as a transformative leap, the County's representative attempts to classify the Town's noise ordinance as a zoning (i.e. land use) regulation.

The motivation for this attempt may be found within the case law differentiating between zoning regulations and legitimate exercises of a municipality's police powers in relation to an existing, non-conforming use. While a zoning ordinance may not go so far as to prohibit the non-conforming use, the reasonable exercise of a police power such as a noise ordinance is permissible.

As set forth in *Maybee v Newfield,* 789 F Supp 86 (ND NY 1992):

> The concept of a prior non-conforming use is only relevant if there is a zoning regulation which prohibits such use. Therefore, in order to find that plaintiffs possess a vested non-conforming use protected by the Fourteenth Amendment, the court must conclude as a preliminary matter that the [municipal ordinance] is a zoning ordinance. If, on the other hand, the [municipal ordinance] is merely a valid exercise of the Town's police powers to protect the health, safety and welfare of the residents plaintiff's use of their property cannot serve as a basis for establishing a constitutionally protected property interest

(*Maybee,* 789 F Supp at 88-89).

In this hybrid scenario where it is a private vendor who is the operator of the County facility, the plaintiff-vendor with the consent of the

defendant-County seeks all of the protections of the County's rights to a balancing test analysis. It would seem both defendants take the position that a private entity who contracts with the municipality is entitled to the imprimatur as a quasi-governmental entity imbued with the governmental protections afforded to the municipality with whom they contracted. This position by way of analysis is apparently adopted by the defendant-County and plaintiff-vendor, but not directly addressed by the defendant-Town.

There are circumstances similar to the case at bar where a larger segment of the population is gaining a benefit from the creation of an airport, and the delegation of the creation and management of the airport is given to the County from the State. The exercise of the County's discretion in furtherance of that delegated purpose is permitted and seemingly cloaked in the imprimatur of the state for achieving that purpose:

> In the instant case, the County is authorized by statute to operate and maintain the airport (General Municipal Law §§ 350, 352 [1]; §§ 355, 356). Such legislation exists, at least in part, to benefit the general public and not just the residents of the municipality in which the airport is located. In performing its functions regarding the planned airport expansion and construction, the County is implementing the purposes for which the statute was created (*see*, *People v Rodriguez*, 115 Misc 2d 866, 868-869).
>
> In conclusion, we declare that Rochester City Code § 115-30 D (7) and City permit requirements do not apply to the expansion of the Greater Rochester International Airport as it affects the terminal building, temporary and permanent parking facilities, runway aprons and the air freight facility. Judgment should be entered accordingly in Monroe County Supreme Court

(*In re County of Monroe's Compliance with Certain Zoning & Permit Requirements etc.*, 131 AD2d 74, 80 [4th Dept 1987]). This Court is not inspired by this record to afford HSSG an exemption from the Town's noise ordinance. This trap and skeet shooting range is neither the type nor magnitude of general use or benefit comparable to a regional airport. Using the *Monroe* criteria as a guide, this conclusion is supported by the record developed herein.

NATURE AND SCOPE OF INSTRUMENTALITY:

This is a long-standing shooting range which activity long pre-dates the 1987 noise ordinance which offers recreation to many local shooting enthusiasts. The noise generated by this activity impacts the adjacent community. Other than noise, there are no other nuisances or complaints voiced against the facility.

KIND OF FUNCTION OR LAND USE:

This legitimate recreational activity enures to the benefit of all who choose to avail themselves of the facility regardless of residency and without restriction.

EXTENT OF PUBLIC INTEREST TO BE SERVED:

The facility is well attended and the participation by the public is sufficient to financially support the operation of the facility in conformance with the contract as between the County and HSSG.

EFFECT OF THE NOISE ORDINANCE UPON THE ENTERPRISE:

The Town's noise ordinance, dependent upon the level and frequency of enforcement, could render the activity financially unviable given the current level of income and expenses. The mitigation solutions proposed by way of construction is not affordable under the current economic circumstances.

IMPACT UPON LEGITIMATE LOCAL INTERESTS:

Recreational shooters would have to frequent one of the other available facilities which provide a forum for this activity.

None of these factors individually nor all of them collectively or in combination are of such significance as to override the Town's legitimate exercise of its local regulatory power concerning noise levels.

QUESTION CONCERNING ALLEGED CESSATION OF PREEXISTING, NON-CONFORMING USE:

In the event the preexisting, non-conforming use should cease for any period of time lengthy enough to support an argument of abandonment, the use cannot be revived once abandoned. Counsel for HSSG alleged that there had been a prior judicial finding by a court of competent jurisdiction that the use had not been abandoned during the time period in question. The Town has not asserted abandonment of a preexisting use as a ground for dismissal of the action and has relied upon the validity and applicability of the Town's noise ordinance. Justice Whelan of this court in the matter of *County of Suffolk v Cent. Pine Barrens Joint Planning and Policy Commn.*, Index No. 21807/2010 (Sup Ct, Suffolk County), which contained an assertion by the respondent Commission that there had been an abandonment of the shooting range facility for a period in excess of one year, found that determination to have been arbitrary and capricious, irrational and an abuse of discretion. In light of that finding and its assertion and citation by the County herein, the Court adopts that finding that there was no abandonment of the shooting range facility by the County that would have precluded the assertion of pre-existing, non-conforming use, and that argument is addressed herein on its merits. The County's activities and actions in support of its continued intention to open the range, provide funding, and select an operator for the facility from 2001 through 2006 compels this Court to likewise conclude that the activity had not been abandoned.

CONCLUSION:

The assertion here by HSSG and the County is that through some combination of the law of preexisting, non-conforming use customarily applied in the zoning prohibition context and/or a theory of preemption by implication of a State delegation of authority over the management and supervision of parkland, that the Town noise ordinance is unenforceable as against this trap and skeet shooting facility. Each of these methods of analysis presupposes certain predicates and elements of which HSSG is lacking. This Court has thoroughly explored the elements and issues presented and concludes that HSSG has not met its burden of proof as to entitlement to an exception from or inapplicability of the Town's noise ordinance.

Therefore, for the reasons set forth herein, this Court concludes that the Brookhaven Town noise ordinance with a violation threshold of 65 dBA is in all respects constitutionally valid as written and applied. There is neither a legal

impediment to its enforcement nor an immunity afforded in favor of the County or its operator/vendor/licensee HSSG, doing business at 165 Gerard Road, Yaphank, New York.

Accordingly, the relief requested by HSSG is in all respects **DENIED**, and the causes of action as set forth herein are hereby **DISMISSED**.

The foregoing constitutes the decision of the Court.

SUBMIT JUDGMENT ON NOTICE

Dated: November 21, 2019

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION **____ NON-FINAL DISPOSITION**