At a Motion Term of the New York State Supreme Court, Broome County, held in the City of Binghamton, New York, on July 27, 2012.

PRESENT: HON. FERRIS D. LEBOUS
Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF BROOME

ELVIN JEFFREY, VESTAL GAS COALITION, ARENA HOTEL CORPORATION, NELSON HOLDINGS LTD., and BINGHAMTON-CONKLIN GAS COALITION STEERING COMMITTEE,

Petitioners,

-vs-

MATTHEW T. RYAN, in his official Capacity as Mayor, City of Binghamton, and The CITY COUNCIL, CITY OF BINGHAMTON,

Respondents.

DECISION, ORDER & JUDGMENT

Index No.: CA2012-001254
RJI No.: 2012-0695-M

APPEARANCES:

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FERRIS D. LEBOUS, J.S.C.

Procedural Background

Petitioners filed this combined Article 78 and Declaratory Judgment (CPLR §3001) action seeking to invalidate Chapter 250 of the City of Binghamton Code of Ordinances, entitled "Prohibition of Gas and Petroleum Exploration and Extraction Activities, Underground Storage of Natural Gas, and Disposal of Natural Gas or Petroleum Extraction, Exploration, and Production Wastes," which was adopted as Local Law 11-006 on December 21, 2011 by the Binghamton City Council and signed by Mayor Ryan on December 22, 2011. On June 19, 2012, Petitioners moved for summary judgment. Petitioners argue that this local law is a zoning law that was required to be referred to the Broome County Planning Board prior to enactment, that it is superseded by Environmental Conservation Law §23-0303, or alternatively, that it is a moratorium and that the requirements for a moratorium have not been met and thus the law is invalid.

Respondents have opposed Petitioners' motion for summary judgment, and have cross-moved to dismiss the petition. Respondents claim that the law was enacted pursuant to their police powers, and not as a zoning law. Respondents maintain that because it was enacted pursuant to the City's police powers, GML §239-m is not applicable, and the City was not required to refer the local law to the Planning Board prior to enactment; that Local Law 11-006 is not a moratorium; and that it is not superseded by ECL §23-0303. Respondents also make procedural arguments that the summary judgment motion was premature as they have not had an opportunity to file an answer to the petition. Respondents have also cross-moved to dismiss the petition on the grounds that the Petitioners do not have standing, and that the statute of

limitations has expired.

Discussion

The basic facts of this case are not contested, rather it is the legal conclusions to be drawn from the facts that are contested.

According to the Petition, Petitioner Elvin Jeffrey, a property owner in the City of Binghamton, "wished to preserve the opportunity to lease some or all of his land for natural gas exploration and extraction" and opposed Local Law 11-006. (See, Petition, paragraph 1). Petitioner Vestal Gas Coalition is an unincorporated group of landowners from Vestal, a town adjoining the City of Binghamton. Their goal is to foster natural gas exploration. They claim that Local Law 11-006 adversely affects their ability to obtain a natural gas lease for their members. (See, Petitioner, paragraph 2).

Petitioner Arena Hotel Corporation owns the Holiday Inn Binghamton. This Petitioner claims that the passage of Local Law 11-006 will have a detrimental effect on their business as they have had a significant amount of business as a result of the natural gas exploration and extraction activities that are occurring in neighboring Pennsylvania. (See, Petition, paragraph 3). Petitioner Nelson Holdings Ltd. owns an 11 acre parcel in the City of Binghamton which is zoned I-3 Heavy Industrial pursuant to the City of Binghamton zoning regulations. (See, Petition, paragraph 4). The Nelson Petitioners have argued that due to this property being zoned heavy industrial, gas extraction, exploration, and storage would be a permitted use by special permit assuming DEC's issuance of regulations permitting gas exploration and extraction in New York State. While the zoning law provisions for "heavy industrial" do not by definition permit

property owners to automatically engage in gas exploration, drilling or storage, Petitioner Nelson would be able to apply to the zoning board of appeals for a special permit authorizing such use on this property.

All of the Petitioners opposed this local law.

To determine the exact nature of this local law it is necessary to review its enactment by the City Council. At a Work Session of the Binghamton City Council held on November 21, 2011, David F. Slottje, Esq., counsel for Respondents, made a presentation to the City Council requesting that they pass a law, drafted by Attorney Slottje, banning activities associated with the drilling for natural gas, and gas exploration. (See, "Transcript of City Council Work Session November 21, 2011 Part 3" which is part of Exhibit "O" to the Memorandum of Law in Support of Petitioner's Verified Article 78 Petition, dated May 30, 2012). In this transcript Mr. Slottje explains to the City Council why he believes a law banning gas drilling and exploration would survive a legal challenge. On page 5 of that transcript Mr. Slottje stated,

> It's [the local law being proposed] a moratorium in the sense of having a finite period. It's like a sunset clause. 24 months. It is not literally a moratorium because this is not literally a zoning ordinance. This is a police power ordinance. But it quacks like a duck and walks like a duck. So, you can absolutely think of it in terms of being a moratorium.

On December 5, 2011 the City Council held another work session where the proposed law banning gas drilling and exploration was discussed. Mr. Slottje addressed the council, as did Mr. Kenneth Frank, Esq., Corporation Counsel for the City of Binghamton. Mr. Frank stated his concerns with regard to the local law, and advised the City Council that the time limit in the proposed local law made it a moratorium. In Mr. Frank's opinion the Council was not seeking to

stop gas drilling and exploration so that the Council could investigate the impacts of it on the community, or so that DEC could issue regulations and the City review them to determine the impact on the community, and therefore it would not be appropriate for the Council to enact a moratorium. Mr. Frank was adamant that the Council should pass a law not a moratorium.

Despite Respondents' protestations to this Court to the contrary, it is quite clear that even they thought this would be a moratorium. At the December 5, 2011 Working Session of the Binghamton City Council Mr. Slottje stated,

> This is for a two-year period, if you decide to pass this, there will be a de facto moratorium within the City on essentially gas drilling, both extraction activities, disposal of waste activities, and so on . . . It's a temporary two-year law . . . (See, Memorandum of Law in Support of Petitioner's Verified Article 78 Petition, dated May 30, 2012, Exhibit "P,""Transcript of December 5, 2011 City Council Worksession" page 1).

At this same meeting Helen H. Slottje, Esq. stated about the proposed law, " . . . the idea here is to give the City some time to figure out exactly what it wants to do about this industry. But in the meantime, put a halt on it . . ." *Id.*

Mr. Slottje also stated that the two year limitation in the law was so it would be, politically, more acceptable and easier for the members of the Council to pass. *Id.* at page 6. In fact this transcript shows that there may not have been support on the Council for a ban on gas drilling and exploration without a time limit placed on the duration of the ban. *Id.*

The law passed with the provision that it expires within 24 months after enactment (on December 31, 2013) unless sooner repealed.

Analysis

Procedural Issue

Respondents argue that Petitioners' motion for summary judgment is premature, as they have not had an opportunity to file an answer to the petition, and that pursuant to CPLR §3212(a) a motion for summary judgment can only be made after issue has been joined.

However, under certain circumstances it is appropriate for the court to grant a motion for summary judgment prior to Respondents formally answering the petition (*Matter of Thomas Giorgio v. Bucci*, 246 A.D.2d 711, 713 (3rd Dept., 1998), *lv to appeal denied* 91 N.Y.2d 814 (1998) held that in an Article 78 proceeding where the parties had apprised the court of all relevant arguments there was no requirement that the court grant leave to serve an answer). In *Matter of Davila v. New York City Housing Authority*, 190 A.D.2d 511, 512 (1st Dept. 1993), *lv. to appeal denied* 87 N.Y.2d 801 (1995) the court stated the following:

> As for respondents' contention that the trial court improperly ruled on the merits of the petition without allowing respondents to serve an answer, respondents clearly informed the trial court of their relevant arguments to dismiss the petition. Thus, it was not necessary under CPLR 7804(f) to grant respondents leave to serve an answer to the petition following denial of the motion to dismiss. (citations and quotations omitted).

Here, Petitioners moved for summary judgment, and Respondents have moved to dismiss the petition. Both Petitioners and Respondents have fully briefed and argued their positions on the issues in this case. The facts of this case are straightforward, and not at issue. The questions presented are all legal in nature. Since the parties have had a full opportunity to present their arguments there is no need to delay this case to permit Respondents to file an answer.

Standing

To have standing to sue, a party must show that it will or has suffered actual harm as a result of the enactment of the law in question. The harm must be real, it cannot be remote or speculative, and in land use cases, the petitioner's harm must be different than the harm to the general public. (See, *Matter of Brunswick Smart Growth, Inc., et al. v. Town of Brunswick*, 73 A.D.3d 1267, 1268, (3rd Dept., 2010); see also, *Association for a Better Long Island, Inc, et al. v. New York State Department of Environmental Conservation, et al.*, 97 A.D.3d 1085 (3rd Dept., 2012)).

Moreover, there is not ". . . any requirement that the harm necessary to confer standing be actual and in the present rather than potential and in the future as long as it is reasonably certain that the harm will occur if the challenged action is permitted to continue." (*Police Benevolent Assn. of N.Y. State Troopers, Inc. v. Division of N.Y. State Police*, 29 A.D.3d 68, 70, (3rd Dept., 2006) [citations and quotations omitted]).

"[Standing] is a threshold issue. If standing is denied, the pathway to the courthouse is blocked . . . The rules governing standing help courts separate the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant. . . Were we to deny standing to all plaintiffs in this action, an important constitutional issue would be effectively insulated from judicial review."*(Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 812, 814, (2003) [citations omitted]).

Prior to the enactment of Local Law 11-006, owners of real property zoned for industrial use in the City of Binghamton could have applied for a special use permit to engage in gas

drilling, exploration or storage. Local Law 11-006 has eliminated the opportunity for these property owners to even apply for a special permit for such use; therefore, these property owners are unquestionably adversely affected by the enactment of Local Law 11-006.

Here, Petitioner Nelson Holdings Ltd. owns real property in the City of Binghamton that is zoned heavy industrial. Given the nature of the activities that are permitted in a heavy industrial zone, assuming DEC approval of gas exploration and extraction, Petitioner clearly would be eligible to apply to the zoning board of appeals for a special use permit to use its property for gas storage, exploration or extraction activities since these activities are similar to the already permitted uses under the zoning code. (See, Affidavit of Kenneth S. Kamlet, Esq., sworn to on July 26, 2012, and Petitioners' Opposition to Respondents' Memorandum of Law In Support of Motion to Dismiss, pages 13-15, which contains a chart showing the permitted uses that exist under the City of Binghamton's zoning regulations which are similar to the activities prohibited by Local Law 11-006). Petitioner Nelson Holdings Ltd. has stated that it had intended to pursue this activity on its property, but due to the enactment of Local Law 11-006, it can no longer do so. Thus, on the facts as presented here, this Petitioner is being prevented from using its property for an activity that, in all likelihood, would have been a permitted use by special permit prior to the enactment of Local Law 11-006. This is real harm to this landowner. Thus, the Court finds that, at the very least, Nelson Holdings Ltd. has standing in this case.

Given that the Court has determined that Nelson Holdings Ltd. has standing, it is not necessary for the Court to reach the issue of whether any of the remaining Petitioners have standing.

Statute of Limitations

Challenges to the actions of agencies and officers of state and local government are brought through an Article 78 proceeding. (*Matter of Luczaj v.Bortnik,* 91 A.D.3d 872, 873 (2nd Dept., 2012). An Article 78 must be commenced within 4 months of the action being challenged (CPLR 217(1)). When commenced in relation to the enactment of a law, it must be commenced within 4 months of when the law was enacted. *Id.*

Local Law 11-006 became effective when signed by the Mayor on December 22, 2011. Contrary to Petitioners' claims, their demand that the City Council and the Mayor refer the local law to the Broome County Planning Commission in accordance with GML §239-m does not extend the statute of limitations beyond April 22, 2012 (four months after the statute became effective). (*Matter of Stankavich v. Town of Duanesburg Planning Bd.*, 246 A.D.2d 891(3rd Dept., 1998), where petitioner did not contest the constitutionality or validity of the statute, the action had to be commenced as an Article 78 and, in that particular case, the statute of limitations was 30 days.). Since Petitioners did not file the Article 78 action within the four month time frame, it is barred by the statute of limitations.

That being said, however, the same limitation of time does not apply to the declaratory judgment part of the petition. As stated in *Bunis v. Conway*, 17 A.D.2d 207, 208 (4th Dept., 1962), *app. denied*, 17 A.D.2d 1036(1962), *app. dismissed*, 12 N.Y.2d 882 (1963), and *app. dismissed*, 12 N.Y.2d 645 (1963), "[i]t is the settled law that an action for a declaratory judgment will lie where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" (citations and quotations omitted). Generally, unless a different statute of limitations is specified, the statute of limitations for a declaratory

judgment action is six years, (*Saratoga County Chamber of Commerce v. Pataki* at 815 *supra*). Thus, while it is true that a party cannot get the benefit of the longer statute of limitations by couching an Article 78 in terms of a declaratory judgment action (see, *Long Island Power Auth. Ratepayer Litig.*, 47 A.D.3d 850 (2nd Dept., 2008), *lv. to appeal denied* 10 N.Y.3d 871 (2008)), that is not what happened here.

Petitioners' request for a declaration that the statute is invalid because it is a moratorium that does not meet the legal requirements for a moratorium, is a proper question for a declaratory judgment action. Consequently, the declaratory judgment portion of Petitioners' petition falls within the statute of limitations.

Pre-Emption

Recently two cases have been decided regarding the pre-emption of local laws pertaining to gas explorations, storage and extraction. In those cases, the Honorable Phillip R. Rumsey in *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc.3d 450, and the Honorable Donald F. Cerio, Jr. in *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc.3d 767, in well reasoned, well founded decisions, determined that ECL 23-0303(2) does not supersede local government's rights to regulate the use of the lands within their jurisdictions. This court adopts the reasoning of those cases and holds that Local Law 11-006 is not superseded by ECL 23-0303(2).

Moratorium

Whether or not Local Law 11-006 is a moratorium is the crux of this case. It is clear that a municipality can enact laws pursuant to its police powers to protect the health, safety and

welfare of its citizens, and it does not have to do so through a zoning law. (*Matter of Pete Drown, Inc. v. Town of Ellenburg*, 188 A.D.2d 850 (3rd Dept., 1992), where town enacted a local law prohibiting the operation of a commercial incinerator in the town, the court held that this local law was not a zoning law, rather, it had been enacted pursuant to the town's police powers. Further the town had no obligation to refer the local law to the planning board pursuant to GML 239-m; see also, *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 684 (1996), "[a] municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole" [citations and quotations omitted]).

A municipality is allowed to enact a temporary "stop-gap" measure to ban a particular land use while the municipality is reviewing a comprehensive zoning law (*Matter of Lakeview Apts. Of Hunns Lake v. Town of Stanford*, 108 A.D.2d 914 [2nd Dept., 1985], *appeal discontinued* 65 N.Y.2d 925; *Matter of Mitchell v. Kemp*, 176 A.D. 859 [2nd Dept., 1991]), or where there are new circumstances that need to be addressed by the municipality (*Land Use Moratoria*, James A Coon Local Government Technical Series, New York State Department of State, at pg. 1). Temporarily banning development or certain land uses is the hallmark of a moratorium. For the enactment of the moratorium to be upheld, the municipality must show that it's actions were:

1. in response to a dire necessity;
2. reasonably calculated to alleviate or prevent a crisis condition; and
3. that the municipality is presently taking steps to rectify the problem.

(See, *Matter of Belle Harbor Realty Corp. v. Kerr*, 35 N.Y.2d 507, 512, (1974) ". . . a municipality may not invoke its police powers solely as a pretext to assuage strident community

opposition [it must meet the three requirements set forth above] . . . When the general police power is invoked under such circumstances it must be considered an emergency measure and is circumscribed by the exigencies of that emergency," see also, *Charles v. Diamond*, 41 N.Y.2d 318 (1977); and *Land Use Moratoria*, pg. 3).

In the matter before this Court, Respondents have failed to provide any evidentiary proof that would provide a justification, based upon the health and safety of the community, for the banning of gas exploration, storage and extraction. Instead of proof, Respondents have produced only conclusions. Respondents have not explained how, if the activities that are banned by the law are such a grave threat, that threat will suddenly no longer exist on December 31, 2013 when the law expires. Respondents clearly are not relying on the anticipated regulations from the New York Stated Department of Environmental Conservation to alleviate any health and safety threats that may be posed by this activity, as this local law clearly states in its findings that regulations that relate to gas exploration and extraction are incapable of protecting the health and safety of the residents. The two year "sunset" renders Respondents' claims that the law is solely an exercise of their police powers illusory. This activity cannot be so detrimental that it must be banned, but only for two years, particularly when it is clear that the City is not engaging in any investigation, studies or other activities in the interim in order to determine if there is a way to alleviate any harm to the people of the city from this future activity.

Local Law 11-006's inclusion of a "sunset" provision leads to no other rational conclusion except that this law is a moratorium. The City Council's bare conclusion in its Findings of Fact that this law was enacted pursuant to the police power cannot change the true

character of this law. The comments made at the Binghamton City Council worksessions clearly show that even the drafters of the law believed it was a moratorium, as well as Corporation Council and some of the members of the council.

The Court recognizes that the issue of gas exploration, extraction and storage is a controversial issue currently being debated throughout the state, and that there may be fierce opposition to gas exploration, extraction and storage by some members of the community. However, the City cannot just invoke its police power solely as a means to satisfy certain segments of the community. Rather, the city must satisfy the well established legal requirements that show a dire emergency; that the moratorium is reasonably calculated to alleviate a crisis; and that they are taking steps to solve the problem. (*Matter of Belle Harbor Realty Corp. v. Kerr*, 35 N.Y.2d *supra).*

In this case, there is no other conclusion that the Court can reach, however, than that Local Law 11-006, fails to meet the criteria for a properly enacted moratorium. First, there has been no showing of a dire need. There can be no showing of dire need since the New York State Department of Environmental Conservation has not yet published the new regulations that are required before any natural gas exploration or drilling can occur in this state. Since there are no regulations, no permits are being granted. Second, since the DEC is not yet issuing permits, there is also no crisis nor a crisis condition that could possibly be shown by the City at this time. Finally, the City clearly did not enact this law so that it could take steps to study or alleviate any problems that may be caused by gas drilling, exploration or storage. Consequently, the Court is constrained to hold that Local Law 11-006 is invalid.

Now, therefore, it is hereby

ORDERED AND ADJUDGED, that Respondents' motion to dismiss is granted to the extent that Petitioners' Article 78 cause of action is dismissed, and the motion is otherwise denied, and it is further

ORDERED AND ADJUDGED, that the petition and motion for summary judgment are granted to the extent that the court declares Local Law 11-006 invalid for the reasons stated herein.

This constitutes the order and judgment of the Court.

ENTER

Dated: October 2, 2012
At Binghamton, New York

s/ Ferrs D. Lebous
Hon. Ferris D. Lebous, J.S.C.