SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

ALAN J. CHWICK,
THOMAS G. FESS,
and EDWARD L. BOTSCH,

Petitioner,

SUBMISSION DATE: 11/3/08
INDEX No.: 13564/08

-against-

MOTION SEQUENCE # 1

LAWRENCE W. MULVEY,
as Commissioner of the Nassau
County Police Department,
the NASSAU COUNTY POLICE DEPARTMENT,
and the COUNTY OF NASSAU,

Respondents.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	XX
Answering Papers.....	X
Reply.....	
Briefs: Plaintiff's/Petitioner's.....	X
Defendant's/Respondent's.....	

Proceeding pursuant to, *inter alia*, CPLR Article 78 by the petitioners Alan Chwick, Thomas G. Fess and Edward L. Botsch for an order: (1) permanently enjoining the respondents from enforcing Nassau County Miscellaneous Laws, Title 69, Local Law 5-2008, as amended; and (2) for, in effect, a declaration that Local Law 5-2008, as amended, is: (i) unconstitutional under the Second Amendment to the United States Constitution and/or violative of New York Civil Rights Law § 4; (ii) void as unduly vague, both facially and "as applied" to the petitioners; and (iii) pre-empted by relevant State Law enactments governing the regulation and

licensing of handguns.

In May of 2008, the Nassau County Legislature enacted Local Law 5-2008, which, in sum, prohibits the possession of "deceptively colored handguns" (*see*, County of Nassau, Miscellaneous Laws, Title 69, Local Law, 5-2008[1][b], *et seq.*, as amended, Local Law 9-2008).

The statement of legislative intent accompanying the foregoing enactment reveals that the law was primarily created to: (1) protect police officers who might assume that a "deceptively" colored handgun is a toy; and (2) prevent injury or death to children or others who might similarly mistake such a weapon for a toy (Local Law 5-2008, § 2; Pet., Exh., "9" Tr., 37-69).

In part, the subject Local Law, as amended, defines a deceptively colored handgun as "any handgun which has a substantial portion of its exterior surface colored any color other than black, brown, grey, silver, nickel or army green" (Local Law, § 3[b]). The Local Law further states that "[a] substantial portion of the exterior surface of a handgun shall be considered colored any color * * * [other than those listed above] if such color is used alone or as the predominate color in combination with other colors in any pattern * * *" (Local Law § 3[b]). Section 3[c] defines the term "substantial portion of the exterior surface of a handgun" as either (1) "at least twenty five percent of the entire surface area of the handgun"; or (2) "the exterior surface of either the receiver or the slide of a handgun".

However, the Local Law excepts from its reach, handguns which

are: (1) substantially plated with gold; (2) shaded blue by virtue of a so-called "bluing" process designed to limit rust or corrosion; (3) guns which qualify as antique firearms, as defined by Penal Law § 265; and (4) guns whose handles are "composed of ivory, colored so as to appear to be composed of ivory, composed of wood, or so colored as to appear to be composed of wood" (Local Law 5-2008, § 1[b], 6[c]). Pursuant to section 6, it is unlawful to possess a deceptively colored handgun, which possession constitutes a misdemeanor punishable by a fine of not more than $1000.00 and "imprisonment of not more than one year or both" (Local Law 5-2008, § 5).

The Local Law also provides in substance, that within 30 days after the law's effective date, any one who possesses a hand gun covered by its provisions must turn the gun in to the County Police Commissioner to be disposed of; or (2) alternatively, must modify its appearance to conform with the law or face potential criminal liability (Local Law 5-2008, § 6[a]). Subdivision 7 of the Local Law authorizes the Commissioner of Police to make and promulgate rules and regulations necessary to carry out its provisions.

By *pro se* verified petition filed July, 2008, the petitioners Alan J. Chwick, Thomas G. Fess and Edward L. Botsch commenced the within proceeding pursuant to CPLR article 78 for judgment permanently enjoining enforcement of, and/or striking down, the subject local law.

The petitioners primarily contend that the subject Local Law: (1) is preempted by applicable State law enactments which allegedly

and fully, occupy the field of handgun regulation (Pet., ¶¶ 30-50 *see*, Penal Law §§ 265, 400, *et seq.*); (2) is unconstitutionally vague and ambiguous (Pet., ¶¶ 50-61); and (3) violates the Second Amendment to Federal Constitution and New York State Civil Rights Law § 4 (Pet., ¶¶ 62-66).

In further support of the petition, petitioner Chwick, a Nassau county resident, advises that he lawfully possesses two duly registered handguns, to wit: (1) a Kel-Tec, model P32 pistol, the substantial portion of which is a pink polymer color; and (2) a J. P. Sauer [& Sohn], Model 1930 pistol with a brown-colored lower frame, which is allegedly a family heirloom and valuable collector's piece, brought back by Chwick's father from World War II (Pet., ¶¶ 3-4; Exhs., "1" "3").

Petitioner Fess - a resident on Monroe County who attends sanctioned target shooting competitions in Nassau and Suffolk County - possesses a duly registered Glock, Model 20 pistol with a refinished slide piece styled in a multi-colored woodland camouflage pattern containing shades of brown, tan, green and black (Pet., ¶¶ 5-10; Exh., "3") (The petitioners have advised that co-petitioner Botsch is no longer a party to the proceeding)(Pets' Reply at 1, fn 1).

Contemporaneously with the submission of their verified petition, the individual petitioners sought a temporary restraining order predicated on the theory that absent an immediate stay of the law's enforcement, they would be subject to potential criminal liability by virtue of their continued possession of handguns which

they claim qualified as "deceptively colored". However, during the pendency of that application, that parties entered into a stipulation by which the County agree, *inter alia*, to suspend its enforcement of the local law pending the disposition of this proceeding (Ans., Exh., "C," Tr. at 6-8).

The matter is now before this Court for review and resolution of the claims and assertions advanced by the petitioners. The petition should be dismissed. Preliminarily, while it is true, as the respondents assert, that a proceeding pursuant to CPLR Article 78 generally does not lie to challenge the validity of a legislative enactment (*New York City Health and Hospitals Corp. v. McBarnette*, 84 NY2d 194, 203-204 [1994]; *Press v. Monroe County*, 50 NY2d 695, 702 [1980] *see, Council of City of New York v. Bloomberg*, 6 NY3d 380, 388 [2006]; *Timber Point Homes, Inc. v. County of Suffolk*, 155 AD2d 671, 674), "courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal, making whatever order is necessary for its proper prosecution" (*Matter of First Nat. City Bank v. City of New York Fin. Admin.*, 36 NY2d 87, 94, [1975]; CPLR 103[c]).

To the extent there is any technical infirmity in the petition by virtue of the statutory challenge advanced therein, the Court will construe that branch of the petition as requesting relief within the context of an appropriately framed action for declaratory relief (*e.g., Press v. Monroe County, supra,* at 702; *Matter of Ames Volkswagen v. State Tax Comm.*, 47 NY2d 345, 348 [1979]; *Hudson*

Valley Oil Heat Council, Inc. v. Town of Warwick, 7 AD3d 572, 574; *Janiak v. Town of Greenville*, 203 AD2d 329, 331; *Anonymous v. Peters*, 189 Misc.2d 203, 206-207 [Supreme Court, Nassau County 2001]; CPLR 103[c]).

Turning then to the merits of the dispute, the respondents initially contend that the camouflaged Glock weapon on which petitioner Fess' claims are predicated, is exempt from the reach of the statute, thereby undermining his claims of potential injury and alleged standing in the matter (Resp. Ans.,¶¶87-89, 107-108). The Court agrees.

Although the camouflaged, slide portion of the Fess Glock handgun is pattered with brown, green, tan and black colors (Pets' Exh., "3"), the only color which would arguably be prohibited by the law, is the tan component of the pattern, which: (1) constitutes, at most, perhaps 25% of the top or slide part of the handgun; and (2) is therefore not a "predominate" color component of the weapon, as defined by section 3[b].

Nor does the Fess weapon fall within the definitions contained in section 3[c]. Section 3[c] - which is framed in the alternative - defines the term "substantial portion of the exterior surface of a handgun" in the alternative, as *either:* (1) at least twenty five percent of the *entire* surface area of the handgun; *or* - separately, and with no qualifying requirements or reference to percent of composition - (2) "the *exterior surface* of either the receiver or the slide of a handgun" [emphasis added].

Since subdivisions 3[c][2] does not qualify its reference to

the exterior surface of the slide or receiver by referring to a proportionate section thereof, the Court reads the phrase "exterior surface" in accord with its plain, textual meaning (*Matter of Theroux v. Reilly*, 1 NY3d 232, 239 [2003], *i.e.*, as a reference to the entire exterior surface of the slide or receiver. Inasmuch as the prohibited, tan color of the Fess weapon is not "prominent;" does not comprise at least 25% of the "entire" surface of the weapon; and does not by itself cover the "exterior surface" of "either the receiver or the slide of a handgun," the gun does not fall within the prohibitions of the Local Law with respect to deceptive coloration.

Similarly, the respondents contend (Ans., ¶¶ 107, 112) - and the petitioners reply papers do not dispute - that Chwick's J. P. Sauer [& Sohn], Model 1930 pistol, is not an illegal weapon under the law as amended, inasmuch as it is finished in brown and blue - colors which are not defined as prohibited under the Local Law, as amended. There is no dispute, however, that Chwick's pink, Kel-Tec, model P32 would fall within the scope of the Local Law's provisions.

With respect to those provisions, the petitioners' first contend that the subject Local Law has been pre-empted by Penal Law Articles 400 and 265, which respectively, govern handgun licensing and contain, *inter alia*, definitions of various firearms and other dangerous weapons.

It is settled that although "[l]ocal governments have been delegated broad powers to enact local legislation consistent with

the State Constitution and general State laws relating to the welfare of its citizens (*see*, N.Y. Const. art. IX, § 2; Municipal Home Rule Law § 10) * * * [t]he doctrine of preemption represents a fundamental limitation on this delegation by prohibiting local legislation in an area that the State has clearly evinced a desire to preempt" (*Ba Mar, Inc. v. County of Rockland*, 164 AD2d 605, 612 *see*, *People v. Judiz*, 38 NY2d 529, 531-532 [1976] *see also*, *DJL Restaurant Corp. v. City of New York*, 96 NY2d 91, 95 [2001]; *Albany Area Builders Ass'n v. Town of Guilderland*, 74 NY2d 372, 376-377 [1989]; *Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 97 [1987]; *People v. De Jesus*, 54 NY2d 465, 468 [1981]).

"Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute," since " 'were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns' " (*Albany Area Builders Ass'n v. Town of Guilderland*, *supra*, at 377, *quoting from*, *Jancyn Mfg. Corp. v County of Suffolk*, *supra*, 71 NY2d at 97 *see*, *Vatore v. Commissioner of Consumer Affairs of City of New York*, 83 NY2d 645, 649 [1994]; *Hertz Corp. v. City of New York*, 80 NY2d 565, 569 [1992]; *Incorporated Village of Nyack v. Daytop Village, Inc.*, 78 NY2d 500, 505 [1991]).

Significantly, "the Legislature need not express its intent to preempt * * * [since][t]hat intent may be implied from the nature

of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area" (*Albany Area Builders Ass'n v. Town of Guilderland, supra*, at 377 *see, Cohen v. Board of Appeals of Village of Saddle Rock*, 100 NY2d 395, 400-401 [2003]; *Vatore v. Commissioner of Consumer Affairs of City of New York, supra*, at 649; *Village of Lacona v. State, Dept. of Agr. and Markets*, 51 AD3d 1319). Accordingly, in considering whether an intent to preempt exists, courts "will examine whether the State has acted upon a subject and whether, in taking action, it has demonstrated a desire that its regulations should preempt the possibility of discordant local regulations" (*Cohen v. Board of Appeals of Village of Saddle Rock, supra*, at 400).

However, the fact that "State and local laws touch upon the same area is insufficient to support a determination that the State has preempted the entire field of regulation in a given area" (*Jancyn Mfg. Corp. v. County of Suffolk, supra*, at 99 *see, Incorporated Village of Nyack v. Daytop Village, Inc., supra*, at 505). Indeed, "Local laws of general application - which are aimed at legitimate concerns of a local government - will not be preempted if their enforcement only incidentally infringes on a preempted field" or tangentially "impact on the State's interests" (*DJL Restaurant Corp. v. City of New York, supra*, 96 NY2d at 96-97; *Incorporated Vil. of Nyack v. Daytop Vil., supra*, at 506).

Additionally, "if the State, through its legislative enactments, does not regulate the entire area of activities, a local

law is not preempted merely because it prohibits conduct permitted by state law" (*Citizens for a Safer Community v. City of Rochester*, 164 Misc.2d 822, 833 [Supreme Court, Monroe County 1994] *see also*, *Jancyn Mfg. Corp. v County of Suffolk*, *supra*, at 100; *People v New York Trap Rock Corp.*, 57 NY2d 371, 378 [1982]; *People v. Judiz*, *supra*, 38 NY2d at 531-532 [1976]; *People v. Cook*, 34 NY2d 100, 109 [1974]; *Belle v. Town Bd. of Town of Onondaga*, 61 AD2d 352, 356; *People v. Ortiz*, 125 Misc.2d 318, 329 [New York City Criminal Court 1984]). Indeed, "unless pre-emption is limited to situations where the intention is clearly to preclude the enactment of varying local laws, 'the power of local governments to regulate would be illusory'" (*People v. Judiz*, *supra*, at 532, *quoting from*, *People v Cook*, 34 NY2d 100, 109 [1974]). "Because Local Ordinances carry a strong presumption of validity, the burden in on the challenger to show that an ordinance is preempted" (*Black Car Assistance Corp. v. The County of Nassau*, ___ Misc3d ___, 2007 WL 4473344 at 18 [Supreme Court, Nassau County 2007]; *MHC Greenwood Village NY, L.L.C. v. County of Suffolk*, 18 Misc.3d 312, 319 [Supreme Court, Suffolk County 2007]).

Upon applying these principles to the facts presented, the Court concludes that the challenged Local Law neither infringes upon a preempted field nor is otherwise invalid by virtue of any conflict with existing State-law enactments.

Initially, the Court notes that the petitioners have not identified legislative history or a specific statutory provision which expressly advises that the State intended to preempt the

entire field of handgun regulation "to the exclusion" of all local law enactments (*Zorn v. Howe*, 276 AD2d 51, 54-55 *see, People v. Judiz, supra*, at 532 *see generally, Town of Concord v. Duwe*, 4 NY3d 870, 873 [2005]; *Vatore v. Commissioner of Consumer Affairs of City of New York, supra*, 83 NY2d at 649-650; *Jancyn Mfg. Corp. v County of Suffolk, supra*, 71 NY2d at 98; *People v New York Trap Rock Corp., supra*, at 377).

To the contrary, "[i]n the area of weapon regulation, the courts in this state have upheld local laws limiting possession and use" (*Citizens for a Safer Community v. City of Rochester, supra*, at 833 *see also, People v. Judiz, supra; People v. Ortiz, supra; Grimm v. City of New York*, 56 Misc.2d 525 [Supreme Court, Queens County, 1968]). It has been relatedly concluded that "[c]learly the State has not, either directly or indirectly, regulated all aspects of gun possession and use as to time, place and circumstance" (*Citizens for a Safer Community v. City of Rochester, supra*, at 833 *see also, de Illy v. Kelly*, 6 AD3d 217, 218; *People v. Ortiz, supra*).

To be sure, "Article 265 creates a general ban on handgun possession," while Article 400 of the Penal Law creates "a locally controlled process" which constitutes "the exclusive statutory mechanism for the licensing of firearms in New York State" (*Bach v. Pataki*, 408 F.3d 75, 79-81 [2nd Cir. 2005]; *O'Connor v. Scarpino*, 83 NY2d 919, 920 [1994]). However, the subject Local Law does not legislate in the area of licensing criteria or, by its terms, directly preclude an applicant from registering a handgun pursuant to Penal Law § 400. Moreover, neither Article 265 nor Article 400

prohibits - much less comprehensively addresses - the subject of deceptively colored weapons of the sort at issue here, and thus neither enactment evidences "any design or intention by the State to pre-empt the entire field" relating to such weaponry (*Grimm v. City of New York, supra*, at 528 *cf., People v. Judiz, supra*). When so viewed, the Local Law "does not allow what the State law specifically forbids" (*People v. Ortiz, supra*, at 330), but rather, supplements "the State statute by adding" further restrictions applicable to a narrow species of weaponry not specifically addressed by the Penal Law (*Zorn v. Howe, supra*, 276 AD2d at 56 *see, People v. Judiz, supra*).

It is settled that a local law is not preempted merely because it prohibits conduct permitted by state law (*Incorporated Village of Nyack v. Daytop Village, Inc., supra*, at 505; *Zorn v. Howe, supra*, 276 AD2d at 53-55). Additionally, the assertedly comprehensive nature of the Penal Law does not alone establish that the field has been occupied with respect to particular subject areas which it addresses (*Zorn v. Howe, supra*, 276 AD2d at 55 *see also, Incorporated Village of Nyack v. Daytop Village, Inc., supra*, at 507; *People v. Judiz, supra*). Indeed, it has been held that "[e]ven though the Penal Law listing of prohibited weaponry is comprehensive, * * * the weight of authority in this State is that the draftsmen of article 265 of the Penal Law did not intend to prevent municipalities from enacting reasonable supplementary legislation" (*People v. Ortiz, supra*, at 330; *see, People v. Judiz, supra; Citizens for a Safer Community v. City of Rochester, supra*).

Nor does the Local Law directly supplant any specific State law enactment governing handguns. While Penal Law § 265.00[20] currently refers to "disguised" weapons - defined, *inter alia*, as a weapon that "is designed and intended to appear to be something other than a gun" - the challenged Local Law addresses a distinct class of weapons implicating unique, underlying policy concerns and objectives, *i.e.*, it is "aimed at the prevention of a particular type of abuse" (*People v. Judiz, supra*, at 532). Accordingly, the fact that Penal Law 265.00 [20] prohibits disguised weapons, does "not mean that local efforts to further control [handgun] use through direct prohibition upon possession itself * * * [are] precluded" (*People v. Judiz, supra*, at 531; *Citizens for a Safer Community v. City of Rochester, supra cf., Zorn v. Howe, supra*, 276 AD2d at 53-55).

Further, the exclusively local, Nassau County applicability of the subject law does not establish that the Local Law is invalid because of an alleged policy generally favoring statewide uniformity with respect weapons regulation. Indeed, a similar objection could have been made to the New York City "toy gun" ordinance which locally criminalized possession of certain toy pistols resembling real guns - an ordinance which the Court of Appeals upheld even though State Law, already expressly addressed and also criminalized the use of imitation or toy pistols (*People v. Judiz, supra see*, Penal Law §§ 265.01 [2], [4]).

Lastly, the fact that a proposed - but as yet unadopted - amendment to the Penal Law relating to deceptively colored handguns,

is now pending before the Legislature (*see*, New York Assembly Bill No. 2868; Pet., ¶ 35), does not alter this conclusion.

The petitioners further assert both "as applied" and facially based claims to the effect that the challenged Local Law is unconstitutionally vague since the provisions defining prohibited exterior colorations are allegedly ambiguous and contradictory (*see*, Pets' Reply Brief at 8).

More particularly, the petitioners argue that sections 3[b] and 3[c] are inconsistent and conflicting with respect to the key definition of what constitutes "a substantial portion of the exterior surface of a handgun" - the language which effectively defines and thereby criminalizes the colored weapons covered by the law (Pet.,¶ 61; Pets' Reply Mem., 8-10; Chwick Aff., ¶ 14). Additionally, and according to the petitioners, there is internal ambiguity in section 3[c], *i.e.*, they argue that 3[c][2] - which refers, without qualification, to the slide or receiver (frame) of a handgun - can allegedly be read to mean either the entire exterior portion of the slide/receiver or "any portion" thereof "no matter how small" (Pet. ¶ 61; Chwick Aff., ¶ 14). The Court disagrees.

Preliminarily, it has been held that "[w]here the State has delegated the power to exercise the police power to a municipality * * * its ordinances are entitled" to "an exceedingly strong presumption of constitutionality", which plaintiffs must overcome beyond a reasonable doubt (*People v. Judiz, supra*, at 531; *People v. Ortiz, supra*,125 Misc.2d at 321; *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville*, 51 NY2d 338, 344 [1980];

Dalton v. Pataki, 5 NY3d 243, 255 [2005]; *LaValle v Hayden*, 98 NY2d 155, 161 [2002]). Further, and in general, when "determining the constitutionality of the statute, the court must attempt to read it in a manner which renders it constitutional and enforceable" (*Anonymous v. Peters, supra*, 189 Misc.2d at 214 *see generally, People v. Santorelli*, 80 NY2d 875, 876 [1992]; *Alliance of American Insurers v. Chu*, 77 NY2d 573, 584-585 [1991]; McKinney's Cons Laws of NY., Book 1, Statutes § 150[c]).

With these concepts in mind, and turning to the petitioners' vagueness claim, it has been observed that "due process requires that a civil statute or administrative regulation contain 'a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms' " (*Pringle v. Wolfe*, 88 NY2d 426, 435 [1996], *quoting from, Foss v. City of Rochester*, 65 NY2d 247, 253 [1985] *see also, People v. Taylor*, 9 NY3d 129, 150-151[2007]; *Town of Concord v. Duwe, supra*, 4 NY3d at 874; *County of Nassau v. Canavan*, 1 NY3d 134, 138 [2003]; *People v. Stuart*, 100 NY2d 412, 420 [2003]; *People v. Jang*, 17 AD3d 693, 694).

On the other hand, "[t]he failure to define each term in a criminal statute does not render the statute void for vagueness" (*People v. Garson*, 6 NY3d 604, 617 fn 7 [2006]). Nor will "imprecise language * * * render a statute fatally vague so long as that language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices'" (*People v. Foley*, 94 NY2d 668, 681 [2000], *quoting from,*

People v Shack, 86 NY2d 529, 538 [1995]; *United States v Petrillo*, 332 US 1, 8 [1947] *see also, People v. Kozlow*, 8 NY3d 554, 560 [2007]; *Ulster Home Care, Inc. v. Vacco*, 96 NY2d 505, 509 [2001]).

"As the term implies, an as-applied challenge calls on the court to consider whether a statute can be constitutionally applied to the defendant under the facts of the case" (*People v. Stuart*, *supra*, at 421). In contrast, when "pursuing a facial challenge, the defendant must carry the 'heavy burden' of showing that the statute is impermissibly vague in *all* of its applications" (*People v. Stuart*, *supra*, at 421 *quoting from*, *Matter of Wood v Irving*, 85 NY2d 238, 244-245 [1995][emphasis in original]), *i.e.*, the challenger must show that the statute is "'invalid *in toto* - and therefore incapable of any valid application"' (*People v. Stuart*, *supra*, at 421, *quoting from*, *Village of Hoffman Estates v Flipside*, 455 US 489, 495, fn5 [1982]; *Steffel v Thompson*, 415 US 452, 474 [1974]).

Significantly, where as here, a court is confronted with "both a facial and as-applied argument," the Court must first "decide whether the assailed statute is impermissibly vague as applied to the defendant. If it is not and the statute provides the defendant with adequate notice and the police with clear criteria, that is the end of the matter" (*People v. Stuart*, *supra*, at 422 *see also*, *Town of Concord v. Duwe*, *supra*; *People v. Taylor*, *supra*, at 150; *People v. Rubin*, 96 NY2d 548, 551 [2001]; *Ulster Home Care, Inc. v. Vacco*, *supra*, at 510).

Applying the foregoing principles to the facts presented, supports the respondents' assertion that the subject local law is

not impermissibly vague as applied to the petitioner Chwick and his Kel-Tec, model P32 pistol. To the contrary, the foregoing weapon falls within the law's applicable and plainly crafted provisions relating to deceptively colored finishes and/or surface areas. Specifically, a review of the record - including the high quality color picture annexed as an exhibit to the petition (Pet., Exh., "2") - clearly establishes that the weapon's pink coloration is both "predominate" in its impact, as well as in its overall coverage of the weapon's exterior surface area - coverage which plainly and materially exceeds 25% thereof (*cf.*, Pet., ¶ 4; Exh., "2").

Pursuant then, to sections 3[b], and 3[c], which both define, *inter alia*, the phrase "substantial portion" of a handgun's surface area pink is: (1) a prohibited color; (2) it is also the "predominate" color in the weapon's exterior pattern, since it comprises the majority of the weapon's entire surface finish; and (3) in accord with subdivisions 3[c][1],[2], it obviously exceeds 25% of the surface area of the entire weapon - and indeed, covers the entire lower potion/receiver of the weapon, and more. The Court discerns no conflicting provisions - and none have been expressly identified by the petitioners - which otherwise state or imply that Chwick's Kel-Tec handgun could, at the very same time, be viewed as legally colored and thereby exempt from the reach of the Local Law.

When so viewed, the applicable portions of the Local Law are not vague or ambiguous with respect to their particular and specific application to Chwick's weapon, but instead, "'convey[] sufficiently definite warning as to the proscribed conduct when measured by

common understanding and practices'" (*People v Shack, supra*, 86 NY2d at 538; *see also, People v. Foley, supra*, 94 NY2d at 681). Nor do these provisions of the local law, as applied to Chwick, leave the authorities with "arbitrary rather than proper standards for enforcement" (*People v. Stuart, supra*, at 424, fn 10 *see, Town of Concord v. Duwe, supra*, 4 NY3d at 874-875; *County of Nassau v. Canavan, supra*, 1 NY3d at 138-139). Notably, the Court notes that the petitioners have not addressed the respondents' "as applied" analysis in their reply submissions.

As noted previously (*see*, this decision, *supra*, at 5-6), the Court also disagrees with the petitioners' additional theory that there is internal ambiguity in section 3[c], *i.e.*, that 3[c][2] - which refers, without qualification, to the slide or receiver (frame) of a handgun - can allegedly be read to mean all or "any portion" of the slide or receiver "no matter how small" (Pets' Reply, at 9-10; Pet. ¶ 61; Chwick Aff., ¶ 14). In any event, where as here, "a person of ordinary intelligence should know that the conduct at issue is prohibited by a statute" that individual "should not benefit from any superfluous discrepancy" not implicated by the specific factual circumstances presented (*People v Taylor, supra*, at 151).

In light of the above, the petitioners' alternative claim of facial invalidity similarly fails, since when "there exists at least one constitutional application of the statute, it is not invalid on its face" (*People v. Stuart, supra*, at 422; *People v. Nelson, supra*, at 308).

Lastly, the petitioners' reliance on the recent United States Supreme Court holding in *District of Columbia v. Heller*, ___US__,128 S.Ct. 2783 [2008] - and by extension - New York Civil Rights Law § 4, is misplaced. In *Heller*, the Court engaged in a detailed textual analysis of the Second Amendment and concluded, *inter alia*, that the amendment created a constitutionally protected "individual right to possess and carry weapons in case of confrontation" and for home self defense (*Heller, supra*, at 2797, 2822).

The flawed statute in *Heller*, however, differs materially from the local law at issue here, since a determinative consideration which influenced the Court was that the fact that the challenged enactment, among other things "totally" and "absolutely" banned all handgun possession within the District of Columbia (*Heller, supra*, at 2817-2818, 2822 *see, People v. Ferguson*, ___Misc3d___, 2008 WL 4694552 at 3-4 [New York City Criminal Court 2008]).

Nor, in any event, did the *Heller* Court preclude all limitations upon the individual use of handguns, but rather and to the contrary, was careful to observe that its holding in no way precluded the imposition of otherwise lawfully permissible restrictions upon the possession and use of firearms (*Heller, supra*, at 2816, 2817, fn 26).

The Court has considered the petitioners' remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the petition is denied and it is declared that the Nassau County Local Law No 5-2008, as amended, is not

unconstitutional to the extent reviewed herein, and it is further,

ORDERED that the proceeding is dismissed on the merits.

The foregoing constitutes the decision and order of the Court.

Dated: DEC 18 2008

HON. KENNETH A. DAVIS J.S.C.