

**New York State Socy. of Professional Engrs., Inc. v  
City of New York**

2009 NY Slip Op 31964(U)

August 7, 2009

Supreme Court, New York County

Docket Number: 101179/09

Judge: Eileen A. Rakower

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SCANNED ON 8/12/2009  
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN A. RAKOWER**

PART 5

Index Number : 101179/2009  
SOCIETY OF PROFESSIONAL ENGIN

vs  
CITY OF NEW YORK

Sequence Number : 002

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2, 3

4, 5

Cross-Motion:  Yes  No AUG 12 2009

Upon the foregoing papers, it is ordered that the motion

**FILED**  
COUNTY CLERK'S OFFICE  
NEW YORK

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 8/7/09

  
HON. EILEEN A. RAKOWER

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
THE NEW YORK STATE SOCIETY OF  
PROFESSIONAL ENGINEERS, INC., et al.,

Index No.  
101179/09

- against -

**FILED**

**DECISION  
and ORDER**

AUG 12 2009

THE CITY OF NEW YORK, et al.

Mot. Seq.  
002 & 003

**COUNTY CLERK'S OFFICE  
NEW YORK**  
Defendants

-----X  
HON. EILEEN A. RAKOWER

Plaintiffs, the New York State Society of Professional Engineers, Inc. ("Plaintiffs") commenced this action seeking a judgment declaring that New York City Local Law 39 of 2008 ("Local Law 39") is unconstitutional on its face, and an order removing New York City Department of Buildings ("DOB") Commissioner Robert LiMandri from his position and enjoining him (and any other person who does not possess of New York State Professional Engineering License) from serving in the capacity of DOB Commissioner.

Presently before the court is a motion by the City of New York ("City") to dismiss the action for failure to state a claim, pursuant to CPLR §3211(a)(7). The City submits an affirmation and a memorandum of law in support of its motion. Annexed to the affirmation as exhibits are copies of DOB Executive Order #7/08; a stipulation dated 2/6/09, whereby Plaintiffs withdrew their motion for a preliminary injunction; and the NYLS' New York City Bill Jacket for Local Law 39.

Plaintiffs have cross-moved for summary judgment. In support of their cross-motion and in opposition to the City's motion, Plaintiffs have submitted a statement of material facts as to which they contend there is no dispute, and a memorandum of law. Annexed to the statement of material facts as exhibits are copies of a 1991 court decision from New York Supreme Court, Albany County; and an affidavit of Joel A. Miele, Sr., a Professional Engineer and former DOB Commissioner.

The City has submitted a memorandum of law in reply.

The parties are in agreement that no issues of fact are presented, and that the only question before the court is whether Local Law 39 is constitutional on its face.

Local Law 39 originated in the New York City Council as Int. 755-A, a proposed local law which would amend Chapter 26 of the New York City Charter to enable an individual who is not a licensed professional engineer or a registered architect to serve as DOB Commissioner. In addition, Int. 755-A expressly provided that the DOB Commissioner was authorized to delegate any duties to the First Deputy Commissioner.<sup>1</sup> Int. 755-A was passed by the City Council, and was signed into law by Mayor Michael Bloomberg on September 3, 2008, at which time it became Local Law 39.

The practice of engineering is defined in Title VIII of the New York State Education Law (“Title VIII”). Specifically, §7201 defines the practice of engineering as follows:

Performing professional services such as consultation, investigation, evaluation, planning, design or supervision of construction or operation in connection with any utilities, structures, buildings, machines, equipment, processes, works, or projects wherein the safeguarding of life, health and property is concerned, when such service or work requires the application of engineering principles and data.

Education Law §7202 forbids individuals from engaging in the practice of engineering or using the title “professional engineer” without being licensed or otherwise authorized by law.

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<sup>1</sup>The City notes that this provision is redundant of §1101 of the City Charter, which provides that

“Any head of a department... may... by instrument in writing filed in the department designate any deputy to possess any of the powers and exercise such of the duties of the head of the department and for such times and under such conditions as such head of a department may specify.”

Education Law §7201 defines the practice of architecture as follows:

[The] rendering or offering to render services which require the application of the art, science, and aesthetics of design and construction of buildings, groups of buildings, including their components and appurtenances and the spaces around them wherein the safeguarding of life, health, property, and public welfare is concerned. Such services include, but are not limited to consultation, evaluation, planning, the provision of preliminary studies, designs, construction documents, construction management, and the administration of construction contracts.

Education Law §7302 forbids individuals from engaging in the practice of architecture or using the title “architect” without being licensed or otherwise authorized by law.

It is undisputed by the parties that some of the powers and duties of the DOB Commissioner (as set forth in §645 of the City Charter) entail the practice of engineering. Plaintiffs allege that Local Law 39 is thus facially unconstitutional in that it is both preempted by, and violative of, Title VIII.

The City asserts that Plaintiffs’ facial challenge must fail, because, at a minimum, Local Law 39 is capable of being applied constitutionally. Specifically, the City argues that, since a non-engineer DOB Commissioner is empowered to delegate engineering responsibilities to his or her First Deputy, Local Law 39 poses no constitutional problems. Moreover, the City notes that, even though Plaintiffs do not interpose an as-applied challenge to Local Law 39, the current operational structure of DOB is perfectly constitutional, in that it does not run afoul of the Education Law. Specifically, the City notes that, by Executive Order dated October 28, 2008, current DOB Commissioner Robert D. LiMandri (a non-engineer) appointed Fatma Amer (a professional engineer) First Deputy Commissioner, and simultaneously delegated to her “primary responsibility and ultimate authority... for the technical interpretation of the City’s Construction and Building Codes and for the Zoning Resolution.”

It is well settled that a party attempting to have a legislative enactment declared unconstitutional must overcome a “strong presumption of validity” and must

overcome that presumption beyond a reasonable doubt (*see Fenster v. Leary*, 20 N.Y.2d 309, 314 [1967]). This presumption applies in equal force to local legislation (*see Robert E. Kurzius v. Upper Brookville*, 51 N.Y.2d 338, 344 [1980]). Further,

A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment. In other words, the challenger must establish that no set of circumstances exists under which the Act would be valid.

(*Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 [2003]) (citations and internal quotations omitted).

Article IX, §2(c) of the New York State Constitution explicitly grants local governments the power to “adopt and amend local laws not inconsistent with the provisions of this constitution or any general law....” This power is further codified in §10 of the Municipal Home Rule Law. These provisions vest broad powers in local governments to regulate matters of public health, safety, and the general welfare of their citizens (*see People v. Lewis*, 295 N.Y. 42, 49 [1945]; *New York State Club Assoc. v. City of New York*, 69 N.Y.2d 211, 217 [1987]).

While the State Constitution and Municipal Home Rule Law confer broad police powers upon local governments, the power of the State Legislature is “supreme and transcendent” (*Brown v. Board of Trustees*, 303 N.Y. 484, 488 [1952]). Accordingly, local laws may be preempted by State legislation where either (1) a local government’s law directly conflicts with a State statute; or (2) when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility - either by explicitly stating its intention to occupy the field, or by implication, where there exists a “comprehensive and detailed regulatory scheme” in the subject field of regulation (*see DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91, 95 [2001]).

Applying the foregoing principles to the case at bar, the court finds that Plaintiffs have failed to sustain their burden, and that Local Law 39 is a valid legislative enactment pursuant to the police powers conferred upon the City by the New York State Constitution and the Municipal Home Rule Law. Plaintiffs’ argument that Local Law 39 is preempted by the State Education Law is unavailing, as nowhere

in Local Law 39 does the City attempt to either redefine the practice of engineering, or permit individuals to engage in the practice of engineering without the necessary licensure and/or authorization, as delineated by the State Legislature. Local Law 39 can be followed without running afoul of any State legislation by having a DOB Commissioner who is not an engineer delegate all engineering-related duties to the First Deputy, who is a licensed engineer. Not only is this arrangement a conceivable constitutional application of Local Law 39, it is in fact the present arrangement at DOB.

Wherefore it is hereby

ORDERED that the City's motion is to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that Plaintiffs' cross-motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 7, 2009

  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
AUG 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK