

MEMORANDUM

TO: Mayor Norman Rosenblum
FROM: Susan Chana Lask, Esq.
DATE: February 22, 2016
RE: Proposed Local Law D-Shelter Animal Sales

Law at Issue: No pet store shall sell dogs or cats unless they are from an animal shelter or rescue.

(PROPOSED LOCAL LAW D OF 2016- A Proposed Local Law to Amend Chapter 156, Dogs and Other Animals, of the Code of the Village of Mamaroneck, to add new Article VI Prohibition on Sales of Commercially Bred Dogs and Cats)

Rationale: Proposed Law D will protect animals and consumers. Although sentient beings, puppies and kittens are deemed “products” put into the stream of commerce. This is a consumer fraud issue because unsuspecting consumers purchase animals from Pet Stores that misrepresent the source of the dog and their health history. This law protects consumers and animals alike. It will help end the suffering animals endure by their inhumane breeding in Puppy Mills while giving shelter animals a chance to find homes and protection and protect consumers from purchasing defective “products” for thousands of dollars while they pay thousands more in vet bills and have to burden our court systems with cases against Pet Stores for the fraud.

I. Introduction

Puppies and kittens are deemed products that are sold commercially for retail sale in pet stores. As products, they can be defective with genetic disorders harming the animals and causing them pain. Consumers unknowingly purchase these defective products put into our stream of commerce by puppy Mills that Pet Store purchase these unfit products from. Consumers either return the pet to the place of purchase, abandon the pet at a shelter or in the streets or the pet store will abandon the pet to a shelter or the streets because they can not sell defective or “unfit for sale”. Also, pet stores will even kill these “defective” animals or torture them more with unlicensed surgeries to profit from their plight and sell them to your citizens¹. In turn, shelters spend money to hold the animals or destroy them at a cost to taxpayers.

Municipalities have an interest in protecting both the animals and consumers from personal and economic harm. The intent of this proposed law clearly protects animals, consumers and taxpayers by eliminating defective products from pet stores by prohibiting sales other than shelter animals. That prevents animals from being brought into the town from unknown origins, such as out of state Puppy Mills that may have different breeding, inoculation and other health regulations that this state and town may have.

¹ Richard Doyle, formerly of Best Breeds Puppies and Kittens of this Village’s performed illegal surgeries on his pet store animals leading to 5 counts of animal cruelty and witness tampering.
<http://www.poughkeepsiejournal.com/story/news/local/southern-dutchess/2015/10/07/accused-raising-sick-puppies-local-pet-shop-closes/73543140/>

Proposed Law D seeks to curb the problems that it believes are created by mass-breeding; specifically, abandonment and mistreatment of animals. The Law's goal is to reduce the supply of mass-bred animals, and this effort to reduce supply is rationally related to the Village's interest in reducing the number of mass-bred animals that are abandoned, mistreated, or that end up in animal shelters and rescues. Hence, those shelter animals will be saved by being sold in Pet Stores.

II. The Law Supporting Passing Proposed Law D

A. The State's Puppy Mill Bill Was Signed to Permit Exactly What Proposed Law D is to Regulate

In the area of companion animal welfare, this state was long known as a Home Rule State that preempted any locality from passing companion animal welfare laws. That changed in 2014 when Governor Cuomo signed the Puppy Mill Bill permitting localities to pass and enforce their own animal welfare laws.

That law emanated from Assemblywoman Rosenthal's efforts who state on her website at http://assembly.state.ny.us/mem/Linda-B_Rosenthal/story/57138/ that:

"Legislation A.740-A/S.3753-A, by Assembly member Rosenthal and Senator Grisanti will finally allow local governments the authority to protect consumers from the sale of puppy mill dogs and move our community in a long overdue step in the humane direction toward eliminating puppy mills as a source for companion animals," according to Dr. Andrew Kaplan, DVM, City Vet Care and The Toby Project.

...

The bill was also supported by the New York State Conference of Mayors and Municipal Officials, the New York State Association of Counties and the New York State Association of Towns."

And the HSUS confirms this right to localities on that same website that:

"New York's municipalities deserve the right to effectively regulate the puppy mills and high volume pet breeders within their jurisdictions. This legislation will empower local governments to crack down on large-scale commercial puppy mills that continue to put profit before animal welfare," said Brian Shapiro, New York State Director for The Humane Society of the United States.

B. The State's 2014 Puppy Mill Bill Lifted Any Preemption and Permits Exactly This Proposed Law D

The "home rule provision" of the New York state Constitution, N.Y. Const. art. IX, § 2, confers broad police power upon local government relating to the welfare of its citizens (**Exhibit "A"**). It's only fundamental limitation is by the preemption doctrine. In part, the home rule provision provides that every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government. N.Y. Const. art. IX, § 2(c)(i).

"Broadly speaking, State preemption occurs in one of two ways--first, when a local government adopts a law that directly conflicts with a State statute and second, when a local

government legislates in a field for which the State Legislature has assumed full regulatory responsibility" *DJL Rest. Corp. v City of New York*, 96 NY2d 91, 95, 749 NE2d 186, 725 NYS2d 622 (2001). Under the doctrine of conflict preemption, a local law is preempted by a state law when a "right or benefit is expressly given . . . by . . . State law which has then been curtailed or taken away by the local law" *Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 97, 518 NE2d 903, 524 NYS2d 8 [1987]. In other words, conflict preemption occurs when a local law prohibits what a state law explicitly allows, or when a state law prohibits what a local law explicitly allows. *Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs*, 74 NY2d 761, 762-763, 543 NE2d 725, 545 NYS2d 82 [1989] [City of New York ordinance that required cabarets to close between the hours of 4:00 a.m. and 8:00 a.m. was preempted, as it conflicted with state law that allowed patrons to remain on the premises consuming alcoholic beverages until 4:30 a.m.]; *Wholesale Laundry Bd. of Trade v City of New York*, 17 AD2d 327, 234 NYS2d 862 [1962], *affd for reasons stated below* 12 NY2d 998, 189 NE2d 623, 239 NYS2d 128 [1963] [local ordinance that provided for a different minimum wage than state law was preempted, as it conflicted with state minimum wage law]).

Notably, it is only when the Legislature has demonstrated its intent to preempt the field, then local ordinances are preempted, regardless of whether they actually conflict with the state law. *Albany Area Builders Ass'n v. Guilderland*, 74 N.Y.2d 372 (N.Y. 1989). In this case, the State's 2014 Puppy Mill Bill specifically lifted the Home Rule (**Exhibit "B"**) so localities can pass this exact law to prevent the sale of companion animals from Puppy Mills that bring into our state that are sick, unfit for sale and drain our resources by committing consumer fraud.

Proposed Law D does not in any way conflict with the 2014 Puppy Mill Bill. With proposed Law D, shelter companion animals are permitted to be sold in Pet Stores and consumers will know exactly what they are purchasing when they purchase a shelter animal that has been cared for and treated by a regulated shelter in this state under our state rules.

C. New York's Federal Court Holds that There is No Preemption of State Law When Simply Regulating the Source of Companion Animals.

Presently, the only source of opposition to Proposed Law D is a misguided reliance by non-legal persons that a preemption exists in Agriculture and Markets Law §407 "Construction with other laws" that:

"Nothing in this article shall be construed to... (b) limit or restrict any municipality from enacting or enforcing any authorized local law, rule, regulation or ordinance of general application to businesses governing public health, safety or the rights of consumers, or (c) limit or restrict any municipality from enacting or enforcing a local law, rule, regulation or ordinance governing pet dealers, as such term is defined in this article, including a law, rule, regulation or ordinance governing the health or safety of animals acquired or maintained by pet dealers, the source of animals sold or offered for sale by pet dealers, and the spay or neuter of such animals; provided, however, that **any such local law**, rule, regulation or ordinance shall be no less stringent than the applicable provisions of this article and **may not result in essentially banning all sales of dogs or cats raised and maintained in a healthy and safe manner.** ... Where a municipality adopts such a local law, rule, regulation or ordinance that is more stringent than the applicable provisions of this article, such municipality shall have sole responsibility for enforcement of such law, rule, regulation or ordinance that is more stringent than the applicable provisions of this

article.” (emphasis added).

That exact language was found NOT to preempt localities from passing this law. Recently, in *New York Pet Welfare Ass'n v. City of New York*, 2015 U.S. Dist. LEXIS 153549 (E.D.N.Y. Nov. 12, 2015), the Federal Court dismissed just such a case by pet Store that contended New York General Business Law 753-d "prohibits jurisdictions from adopting local ordinances which 'essentially result in the banning of all sales of dogs or cats raised and maintained in a healthy and safe manner . . .'" (quoting N.Y. Gen. Bus. § 753-d). The court recited in relevant part that N.Y. Gen. Bus. § 753-d provides:

“Nothing in this article shall be construed to . . . limit or restrict any municipality from enacting or enforcing a local law, rule, regulation or ordinance governing pet dealers, as such term is defined in this article, including a law, rule, regulation or ordinance governing the health or safety of animals acquired or maintained by pet dealers, the source of animals sold or offered for sale by pet dealers, and the spay or neuter of such animals; provided, however, that any such local law, rule, regulation or ordinance shall be no less stringent than the applicable provisions of this article and **may not result in essentially banning all sales of dogs or cats** raised and maintained in a healthy and safe manner.” (emphasis added).

The EDNY held that “The last clause of the statute prohibits local jurisdictions from enacting laws that result in the banning of all sales of dogs or cats raised and maintained in a humane manner. Local Law 5 does not ban the sale of *all* dogs and cats—pet stores are explicitly authorized to obtain animals from certain USDA Class A licensees. Therefore, Local Law 5 does not conflict with N.Y. Gen. Bus. §753-d and is not preempted.”

Likewise, proposed Law D does not prohibit the sale of *all* dogs and kittens², it simply regulates where they should come from. Whether from USDA licensees or shelters, a locality has a Constitutional right to regulate their animals

D. Every Federal Case in 2015 Confirms that Localities Have a Constitutional Right to Regulate Animal Welfare.

Every Federal case in 2015 has dismissed pet store cases arguing against similar laws. In Rhode Island we have *Perfect Puppy, Inc. v. City of E. Providence*, 807 F.3d 415 (RI Dist Ct, Dec. 8, 2015), in New York is *New York Pet Welfare Ass'n v. City of New York*, 2015 U.S. Dist. LEXIS 153549(EDNY, Nov. 15, 2015), in Arizona is *Puppies 'N Love v. City of Phoenix*, 2015 U.S. Dist. LEXIS 97561(AZ Dist Ct., July 24, 2015 and in Florida we have *Maryeli's Lovely Pets, Inc. v. City of Sunrise*, 2015 U.S. Dist. LEXIS 98451(Fla Dist Ct, June 24, 2015).

Those cases all hold that the U.S. Constitution allows states and localities to create their own laws regulating health and safety for animals and citizens. “There is a "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985). Also, the AWA explicitly permit additional local legislation related to animal welfare. 7 U.S.C. § 2143(a)(8) (“[AWA] shall not prohibit any State

² Florida’s appellate court in *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011 (Fla.App. 2 Dist.,2005) held that an ordinance is not unconstitutional if does not preempt the sale of a product. Similarly, here we are not prohibiting the sale of the product, we are just regulating its source based on the rationale to prevent defective products in our stream of commerce.

(or a political subdivision of such state) from promulgating standards in addition to those standards promulgated by the Secretary under paragraph (1)."); 7 U.S.C. § 2145(b) ("The Secretary is authorized to cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any State, local, or municipal legislation or ordinance on the same subject."). State and local sovereigns have authority to create laws concerning animals, even where the legislation bans activity that is otherwise authorized by the AWA. *DeHart*, 39 F.3d at 722-23 (upholding ordinance that banned ownership of dangerous and wild animals); *Kerr v. Kimmell*, 740 F. Supp. 1525, 1529-30 (D. Kan. 1990) (concluding that the AWA did not preempt state licensing scheme for sale and breeding of dogs); *Am. Canine Found. v. Sun*, 2007 U.S. Dist. LEXIS 90004, 2007 WL 4208358, at *5 (N.D. Cal. Nov. 27, 2007) (finding that the AWA did not preempt local ordinance that required a mandatory spaying and neutering program); *Mo. Pet Breeders*, 2015 U.S. Dist. LEXIS 66248, 2015 WL 2448332, at *5 (upholding ordinance allowing pet stores to sell only animals obtained from Class A licensees who possess no more than five female breeding animals, noting that "[a]n ordinance is not preempted merely because it will hurt local businesses economically").

Protecting the health and welfare of domestic animals is a legitimate governmental interest; indeed, courts around the country have so held. *See e.g.*, *Kerr v. Kimmell*, 740 F. Supp. 1525, 1529 (D. Kan. 1990) ("The court finds that a legitimate local public interest is served by the stated purposes of the Act, i.e., quality control and humane treatment of animals."); *Perfect Puppy, Inc.*, 2015 U.S. Dist. LEXIS 41965, 2015 WL 1474560 at *4 ("There can be little dispute that promoting the humane treatment of animals is a legitimate local interest."); *Mo. Pet Breeders Ass'n v. Cnty. of Cook*, No. 14 C 6930, 2015 U.S. Dist. LEXIS 66248, 2015 WL 2448332, at *7 (N.D. Ill. May 21, 2015) ("The ordinance's breeder-size limitations are plausibly designed to reduce the number of animals sold in Cook County that are obtained from mass-breeding facilities. This restriction is rationally related to a legitimate government interest, even if it does not include all animals from mass-breeding facilities.")

III. Conclusion

Proposed Law D is not unconstitutional and this State lifted any preemption in 2014. Enacting laws is an expected function of elected town officials. This law is valid, rational and proper for its purpose to protect the public, animals and citizens alike. Finally, the Village should not fear a lawsuit. First, the Village and its officials are Immune from personal liability and a lawsuit would only enforce the law.

EXHIBIT A

New York Consolidated Laws Service The Constitution of the State of New York Article IX Local Governments

§ 2. Powers and duties of legislature; home rule powers of local governments; statute of local governments

(a) The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.

(b) Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature:

(1) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article. A power granted in such statute may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year.

(2) Shall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b), except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in *the judgment of the governor* constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.

(3) Shall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.

(c) In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:

(1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees, except that cities and towns shall not have such power with respect to members of the legislative body of the county in their capacities as county officers.

- (2) In the case of a city, town or village, the membership and composition of its legislative body.
 - (3) The transaction of its business.
 - (4) The incurring of its obligations, except that local laws relating to financing by the issuance of evidences of indebtedness by such local government shall be consistent with laws enacted by the legislature.
 - (5) The presentation, ascertainment and discharge of claims against it.
 - (6) The acquisition, care, management and use of its highways, roads, streets, avenues and property.
 - (7) The acquisition of its transit facilities and the ownership and operation thereof.
 - (8) The levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature.
 - (9) The wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or services for it.
 - (10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.
- (d) Except in the case of a transfer of functions under an alternative form of county government, a local government shall not have power to adopt local laws which impair the powers of any other local government.
- (e) The rights and powers of local governments specified in this section insofar as applicable to any county within the city of New York shall be vested in such city.

3753--A

Cal. No. 455

2013-2014 Regular Sessions

I N S E N A T E

February 13, 2013

Introduced by Sens. GRISANTI, ADDABBO, AVELLA, BALL, BRESLIN, DILAN, ESPAILLAT, GOLDEN, HOYLMAN, KRUEGER, LAVALLE, RITCHIE, SAVINO, SERRA-NO, SQUADRON -- read twice and ordered printed, and when printed to be committed to the Committee on Agriculture -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the agriculture and markets law and the general business law, in relation to the preemption of local laws; and to repeal section 400-a of the agriculture and markets law and section 753-e of the general business law relating thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 400-a of the agriculture and markets law is REPEALED.

S 2. Section 407 of the agriculture and markets law, as added by chapter 259 of the laws of 2000, is amended to read as follows:

S 407. Construction with other laws. Nothing in this article shall be construed to (A) limit or restrict agents or officers of societies for the prevention of cruelty to animals or the police from enforcing other provisions of article twenty-six of this chapter or any other law relating to the humane treatment of or cruelty to animals, (B) LIMIT OR RESTRICT ANY MUNICIPALITY FROM ENACTING OR ENFORCING ANY AUTHORIZED LOCAL LAW, RULE, REGULATION OR ORDINANCE OF GENERAL APPLICATION TO BUSINESSES GOVERNING PUBLIC HEALTH, SAFETY OR THE RIGHTS OF CONSUMERS, OR (C) LIMIT OR RESTRICT ANY MUNICIPALITY FROM ENACTING ANY LOCAL LAW, RULE, REGULATION OR ORDINANCE GOVERNING PET DEALERS, INCLUDING THE SOURCE OF ANIMALS OFFERED FOR SALE BY PET DEALERS, WHETHER SPAYING OR NEUTERING OF SUCH ANIMALS IS REQUIRED BEFORE SALE, AND THE HEALTH OR SAFETY OF ANIMALS MAINTAINED BY PET DEALERS PROVIDED, HOWEVER, THAT NO SUCH LOCAL LAW, RULE, REGULATION OR ORDINANCE SHALL BE LESS STRINGENT

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets

[] is old law to be omitted.

LBD02345-

THAN THE APPLICABLE PROVISIONS OF THIS ARTICLE OR ESSENTIALLY RESULT IN THE BANNING OF ALL SALES OF DOGS OR CATS RAISED AND MAINTAINED IN A HEALTHY AND SAFE MANNER AND PROVIDED, FURTHER, THAT WHERE A PENALTY MAY BE AUTHORIZED FOR THE VIOLATION OF SUCH A LOCAL LAW, RULE, REGULATION OR ORDINANCE, THE AUTHORIZED PENALTY IN SUCH LOCAL LAW, RULE, REGULATION OR ORDINANCE MAY NOT EXCEED A CIVIL PENALTY OF UP TO FIVE HUNDRED DOLLARS.

WHERE A MUNICIPALITY ADOPTS SUCH A LOCAL LAW, RULE, REGULATION OR ORDINANCE THAT IS MORE STRINGENT THAN THE APPLICABLE PROVISIONS OF THIS ARTICLE, SUCH MUNICIPALITY SHALL HAVE SOLE RESPONSIBILITY FOR ENFORCEMENT OF SUCH SPECIFIC LAW, RULE, REGULATION OR ORDINANCE THAT IS MORE STRINGENT THAN THE APPLICABLE PROVISIONS OF THIS ARTICLE.

S 3. Section 753-d of the general business law, as added by chapter 259 of the laws of 2000, is amended to read as follows:

S 753-d. Construction with other laws. Nothing in this article shall be construed to (A) limit or restrict agents or officers of societies for the prevention of cruelty to animals or the police from enforcing articles twenty-six and twenty-six-A of the agriculture and markets law or any other law relating to the humane treatment of, or cruelty to, animals, (B) LIMIT OR RESTRICT ANY MUNICIPALITY FROM ENACTING OR ENFORCING ANY AUTHORIZED LOCAL LAW, RULE, REGULATION OR ORDINANCE OF GENERAL APPLICATION TO BUSINESSES GOVERNING PUBLIC HEALTH, SAFETY OR THE RIGHTS OF CONSUMERS, OR (C) LIMIT OR RESTRICT ANY MUNICIPALITY FROM ENACTING ANY LOCAL LAW, RULE, REGULATION OR ORDINANCE GOVERNING PET DEALERS, INCLUDING THE SOURCE OF ANIMALS OFFERED FOR SALE BY PET DEALERS, WHETHER SPAYING OR NEUTERING OF SUCH ANIMALS IS REQUIRED BEFORE SALE, AND THE HEALTH OR SAFETY OF ANIMALS MAINTAINED BY PET DEALERS PROVIDED, HOWEVER, THAT NO SUCH LOCAL LAW, RULE, REGULATION OR ORDINANCE SHALL BE LESS STRINGENT THAN THE APPLICABLE PROVISIONS OF THIS ARTICLE OR ESSENTIALLY RESULT IN THE BANNING OF ALL SALES OF DOGS OR CATS RAISED AND MAINTAINED IN A HEALTHY AND SAFE MANNER AND PROVIDED, FURTHER, THAT WHERE A PENALTY MAY BE AUTHORIZED FOR THE VIOLATION OF SUCH A LOCAL LAW, RULE, REGULATION OR ORDINANCE, THE AUTHORIZED PENALTY IN SUCH LOCAL LAW, RULE, REGULATION OR ORDINANCE MAY NOT EXCEED A CIVIL PENALTY OF UP TO FIVE HUNDRED DOLLARS. WHERE A MUNICIPALITY ADOPTS SUCH A LOCAL LAW, RULE, REGULATION OR ORDINANCE THAT IS MORE STRINGENT THAN THE APPLICABLE PROVISIONS OF THIS ARTICLE, SUCH MUNICIPALITY SHALL HAVE SOLE RESPONSIBILITY FOR ENFORCEMENT OF SUCH SPECIFIC LAW, RULE, REGULATION OR ORDINANCE THAT IS MORE STRINGENT THAN THE APPLICABLE PROVISIONS OF THIS ARTICLE.

S 4. Section 753-e of the general business law is REPEALED.

S 5. This act shall take effect immediately.