



KAPLAN KIRSCH ROCKWELL

VIA ECF

May 4, 2015

The Honorable Sandra J. Feuerstein
United States District Court
P.O. Box 9014
100 Federal Plaza
Central Islip, New York 11722

Re: *FOEHA v. Town of East Hampton*, 15 Civ. 2246 (SJF) (ARL) (“Town Action”)

Dear Judge Feuerstein:

We represent the Town of East Hampton, defendant in the Town Action, and write to oppose the letter motion by Plaintiffs seeking to consolidate the Town Action with *FOEHA v. FAA*, 15 Civ. 441 (SJF) (ARL) (“FAA Action”).

Pursuant to FRCP Rule 42(a), the Court may consolidate cases that present common questions of fact or law. Conversely, the Court also has broad discretion to *deny* consolidation, even if there are common questions of law or fact, when consolidation will not promote judicial economy, will prejudice the parties, will delay one of the cases, or will result in confusion. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-1285 (2d Cir. 1990). For example, in *Aerotel, Ltd. v. Verizon Communications, Inc.*, 234 F.R.D. 64 (S.D.N.Y. 2005), Judge Griesa denied consolidation when the differences between the two cases outweighed the overlapping issues.

The Town believes that consolidation is not warranted both because it will not promote judicial economy or assist the parties and because there are no common issues of fact or law that can be more efficiently addressed in a consolidated proceeding.

First, the Town believes the motion is premature. Plaintiffs appear to agree. Their letter only informs the Court of their intention to seek consolidation at a later date, after the May 14, 2015 hearing on Plaintiffs’ TRO request and further asks that briefing on such a motion take place *after* the TRO hearing.

The Town agrees that a motion to consolidate is premature while the Court addresses Plaintiffs’ request for a TRO, particularly since neither case is at issue (and the FAA has just sought an additional extension of time to respond to the complaint in the FAA Action). The respective defendants, the Town and the Federal Aviation Administration (FAA), may seek to dismiss either case on jurisdictional or other threshold grounds particular to each case. At this point, the Town respectfully submits that it is simply premature to determine whether there are common issues of law or fact that merit consolidation.

Second, the Town opposes consolidation for the simple reason that based on the complaints there are no common issues of law or fact and consolidation would not serve judicial economy. The lack of common questions of law or fact is apparent from the face of the complaints.

Thus, the Town Action involves a constitutional challenge to three local laws enacted by the Town on April 16, 2015. Plaintiffs claim those local laws are preempted by federal law pursuant to the Supremacy Clause and violate the Commerce Clause.

The Plaintiffs in the FAA Action, in contrast, challenge two actions by the FAA. (Many, but not all, of the Plaintiffs are the same in the two cases.) First, those Plaintiffs claim the FAA lacked the authority in 2005 to settle litigation brought by a community organization, in which the FAA agreed that it would not enforce certain federal grant obligations of the Town after December 31, 2014. None of the Plaintiffs nor the Town was a party to that litigation or the settlement agreement. Second, Plaintiffs claim that the FAA's interpretation of a statute which the FAA administers – the Airport Noise and Capacity Act, 49 U.S.C. §§ 47524-47533 (ANCA) – is incorrect as a matter of law. The FAA interpretation was articulated in a letter to a Member of Congress in 2012.

The validity of a 2005 settlement agreement between the FAA and a third-party and the validity of the FAA's 2012 construction of a statute which it administers do not raise common issues of fact or law with the constitutionality of local laws which the Town adopted in 2015. The cases arise from different facts arising at different times. The cases raise different issues and are controlled by different legal principles. The FAA Action challenges the FAA's authority to settle cases and interpret the statutes it administers, while the Town Action challenges the constitutionality of legislative actions by a local government. There are no common facts or legal principles that could be more efficiently adjudicated in a consolidated proceeding.

The only apparent connection is an artificial construct of Plaintiffs. They allege that one of the reasons that the Town's local laws are unconstitutionally unreasonable is because they violate ANCA (which the FAA has interpreted not to apply here), and federal grant obligations (which the FAA has determined are not enforceable here). Even if Plaintiffs were to prevail in one or both of their arguments in the FAA Action that would not make the local laws unconstitutional because the question of compliance with laws is independent of whether the laws are preempted.

If Plaintiffs were to prevail in the FAA Action, that would allow the FAA to take whatever enforcement action it decides may be warranted. That decision is not a determination of whether the local laws adopted by the Town are constitutional under the Supremacy or Commerce Clauses; it is simply a decision on the propriety of FAA actions taken years ago. Whatever the Court ultimately decides about the FAA's conduct in the FAA Action, it is not deciding whether the Town's actions are reasonable, nonarbitrary, or discriminatory in a constitutional sense. Conversely, the issue in the Town Action – whether the local laws are constitutional – does not affect any of the issues presented in the FAA Action. The two cases simply raise different issues, arising from different facts, against different defendants, and controlled by different laws.

Because of those differences, consolidation would not serve the interests of judicial economy or efficiency. Consolidation would not reduce the amount of briefing or fact finding. The parties in

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each case would have to establish different material facts and argue different legal principles. In fact, consolidation would unnecessarily complicate the two cases. Consolidation would create the potential for confusion and unnecessary briefing because all of the parties in both cases would be permitted to brief issues that are not presented in their separate cases. Moreover, there is a risk of unnecessary delay to the cases while the court adjudicates issues unique to one case only or resolves motions to dismiss applicable to only one of the cases.

For the foregoing reasons, the Town respectfully requests that the Court deny Plaintiffs' Motion to Consolidate the Town Action and the FAA Action or, in the alternative, to delay addressing the issue until defendants in each case have responded to the Complaints so the Court can better assess whether consolidation will serve any useful purpose.

Sincerely,



W. Eric Pilsk

cc: Lisa Zornberg, Esq.
Eric Bregman, Esq.