97 A.D.3d 1062
Supreme Court, Appellate Division, Third Department, New York.

In the Matter of Theodore W. RICKET, Appellant–Respondent,
v.
Paula A. MAHAN et al., as Members of the Town Board of the Town of Colonie, et al., Respondents,
and
John H. Cunningham, Individually and as Commissioner of Public Works of the Town of Colonie, Respondent–Appellant.

July 26, 2012.

Synopsis

Background: Town resident brought action for declaratory judgment and Article 78 proceeding for review of town board resolutions appointing two public officers. The Supreme Court, Albany County, McNamara, J., dismissed the action, except that it modified term of town's Personnel Officer. Parties cross-appealed. The Supreme Court, Appellate Division, Kavanagh, J., 82 A.D.3d 1565, 919 N.Y.S.2d 588, reversed. The Supreme Court, Albany County, McNamara, J., dismissed the action. Parties cross-appealed again.

Holdings: The Supreme Court, Appellate Division, Third Department Kavanagh, J. held that:

[1] resident had standing to challenge local law relating to position of town public works commissioner, and

[2] town was within its discretion in not requiring that public works commissioner possess a specific license or engineering degree.

Affirmed.

West Headnotes (5)

[1] **Towns**
Rights and remedies of taxpayers

Town resident had standing to challenge local law providing that public works commissioner need only be a resident of the county, not a resident of the town, and that no specific license or education was required for one to hold that position, where the commissioner played a formidable role in local government, administering, directing, and controlling the divisions of water, sewer, environmental services, highway, and engineering, such that the local law creating the position had appreciable public significance beyond the immediately affected parties, and not conferring standing on taxpayers of the town would effectively insulate the provision from meaningful judicial scrutiny.

1 Cases that cite this headnote

[2] **Action**
Persons entitled to sue

Generally, standing requires a showing of an injury in fact, distinct from that of the general public, that falls within the zone of interests promoted or protected by the pertinent regulation or statute.

1 Cases that cite this headnote

[3] **Municipal Corporations**
Nature and scope in general

Common-law taxpayers may challenge important governmental actions, despite such parties being otherwise insufficiently interested for standing purposes, when the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action.

Cases that cite this headnote

[4] **Municipal Corporations**
Local legislation

Unlike general laws, there is no requirement that a local law be consistent with a special law and may, in a given circumstance, supersede a special law.

Cases that cite this headnote

[5] **Public Employment**
Particular cases and contexts in general
Towns
Appointment or election, qualification, tenure, and removal of officers or employees

Town was within its discretion in not requiring that appointee for public works commissioner possess a specific license or engineering degree, where appointee was selected based on administrative experience and qualifications for the duties of the office, and the appointee was not required to practice engineering while holding the office. McKinney's Town Law § 64(21–a) (2); McKinney's Education Law § 7202.

Cases that cite this headnote

Attorneys and Law Firms

****273** Tabner, Ryan & Keniry, LLP, Albany (William J. Keniry of counsel), for appellant-respondent.

Michael C. Magguilli, Newtonville (Rebekah Nellis Kennedy of counsel), for respondents.

O'Connor, O'Connor, Bresee & First, P.C., Albany (Justin O'C. Corcoran of counsel), for respondent-appellant.

Before: PETERS, P.J., SPAIN, MALONE JR., KAVANAGH and GARRY, JJ.

Opinion

****274** KAVANAGH, J.

***1062** Cross appeals from a judgment of the Supreme Court (McNamara, J.), entered October 5, 2011 in Albany County, which dismissed petitioner's application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to, among other things, review two determinations of respondent Town Board of the Town of Colonie enacting Local Law No. 15 (2011) of the Town of Colonie and appointing respondent John H. Cunningham to the office of Commissioner of Public Works.

In 2010, respondent Town Board of the Town of Colonie passed a resolution appointing respondent John H. Cunningham, who was not a resident of the Town, to a two-year term as Commissioner of Public Works. Petitioner, a resident of the Town, initiated a proceeding to invalidate the appointment ***1063** on the grounds that Cunningham was not a Town resident, nor did he possess the qualifications for the position as established by the Town Board. Supreme Court dismissed the petition and this Court reversed (*Matter of Ricket v. Mahan*, 82 A.D.3d 1565, 919 N.Y.S.2d 588 [2011]), finding that the relevant local law, as enacted, did not supersede Public Officers Law § 3 or Town Law § 23, which require that a person appointed to a local office reside within the locality at the time of their appointment and during their tenure in office (*id.* at 1566–1567, 919 N.Y.S.2d 588). Accordingly, we concluded that the Commissioner of Public Works must be a town resident (*id.* at 1568, 919 N.Y.S.2d 588) and granted the relief sought in the petition.

Thereafter, the Town Board adopted Local Law No. 15 (2011) of the Town of Colonie, which provided that the Commissioner of Public Works need not be a resident of the Town, but "shall be a resident of the County of Albany" and "no specific license or education is required" for one to hold that position.[1] After the Town Board again appointed Cunningham to the position of Commissioner of Public Works, petitioner commenced this combined CPLR article 78 proceeding and action for a declaratory judgment seeking, among other things, to annul Local Law No. 15, as well as Cunningham's appointment to that position. Respondents answered, asserting affirmative defenses, including a contention that petitioner lacked standing to bring such a proceeding. Although Supreme Court found that petitioner had standing, it dismissed the petition/complaint, finding, among other things, that the Town Board acted within its authority in enacting Local Law No. 15 and in appointing Cunningham to the position of Commissioner of Public Works. Petitioner now appeals, and Cunningham cross-appeals.

[1] [2] [3] We affirm. Initially, we reject Cunningham's contention that petitioner lacked standing to challenge Local Law No. 15. Generally, standing "requires a showing of 'an injury in fact, distinct from that of the general public,' that falls within the zone of interests promoted or protected by the pertinent regulation or statute" (*Matter of Diederich v. St. Lawrence*, 78 A.D.3d 1290, 1291, 911 N.Y.S.2d 218 [2010], *lv. dismissed and denied* 17 N.Y.3d 782, 929 N.Y.S.2d 82, 952 N.E.2d 1077 [2011], quoting *Matter of Transactive Corp. v. New York State Dept. of Social Servs.*, 92 N.Y.2d 579, 587, 684 N.Y.S.2d 156, 706 N.E.2d 1180 [1998]). Common-law taxpayers may, however, "challenge ****275** important governmental actions, despite such parties being otherwise insufficiently interested for standing purposes, when 'the failure to accord such standing would ***1064** be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action' " (*Matter of Colella v. Board of Assessors of County of Nassau*, 95 N.Y.2d 401, 410, 718 N.Y.S.2d 268, 741 N.E.2d 113 [2000], quoting *Boryszewski v. Brydges*, 37 N.Y.2d 361, 364, 372 N.Y.S.2d 623, 334 N.E.2d 579 [1975]; *accord. Matter of Vector Foiltec, LLC v. State Univ. Constr. Fund*, 84 A.D.3d 1576, 1578, 923 N.Y.S.2d 287 [2011], *lv. denied* 17 N.Y.3d 716, 2011 WL 5573976 [2011]). Here, the Commissioner of Public Works plays a formidable role in local government, administering, directing and controlling the divisions of water, sewer, environmental services, highway and engineering (*see* Town of Colonie Code § 34–5).[2] In our view, this local law creating this position has " appreciable public significance beyond the immediately affected parties" (*Matter of Diederich v. St. Lawrence*, 78 A.D.3d at 1292, 911 N.Y.S.2d 218 [internal quotation marks and citation omitted]) and not conferring standing on taxpayers of the Town would, in our view, effectively insulate this provision from meaningful judicial scrutiny (*see Boryszewski v. Brydges*, 37 N.Y.2d at 364, 372 N.Y.S.2d 623, 334 N.E.2d 579; *Leichter v. Barber*, 88 A.D.2d 1029, 1030, 451 N.Y.S.2d 899 [1982]).

[4] Turning to the merits, a local government "shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government" (Municipal Home Rule Law § 10[1][i]; *see Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 429, 548 N.Y.S.2d 144, 547 N.E.2d 346 [1989]; *Matter of Zorn v. Howe*, 276 A.D.2d 51, 54–55, 716 N.Y.S.2d 128 [2000]). A "general law" is defined as "[a] state statute which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages" (Municipal Home Rule Law § 2[5]). A "special law" is one that "in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages" (Municipal Home Rule Law § 2[12]). Unlike general laws, there is no requirement that a local law be consistent with a special law and may, in a given circumstance, supersede a special law (*see Matter of Gizzo v. Town of Mamaroneck*, 36 A.D.3d 162, 165, 824 N.Y.S.2d 366 [2006], *lv. denied* 8 N.Y.3d 806, 832 N.Y.S.2d 488, 864 N.E.2d 618 [2007]; *see also Landmark Colony at Oyster Bay v. Board of Supervisors of County of Nassau*, 113 A.D.2d 741, 743, 493 N.Y.S.2d 340 [1985]).

Public Officers Law § 3(1), as relevant here, provides that an individual may not hold a local civil office who is not "a resident of the political subdivision or municipal corporation of the state for which he [or she] shall be chosen, or within which the ***1065** electors electing him [or her] reside, or within which his [or her] official functions are required to be exercised." Similarly, Town Law § 23(1) requires that every town officer "at the time of his [or her] appointment and throughout his [or her] term of office shall be an elector of the town."[3] However, the Legislature grafted ****276** numerous exceptions onto the residency requirement set forth in these statutes and, as such, exempted various local offices from the requirement that the office holder be a resident (*see* Public Officers Law § 3[11]-[58]; Town Law § 23[2]-[24]). As a result, each statute, in terms of the residency requirement, is a special law which can, in a given circumstance, be superseded by a local legislative enactment (*see* Public Officers Law § 3 [43 (as added by L. 1998, ch. 273)]; Town Law § 23[2]; Municipal Home Rule Law § 10[1][i], [ii][a] [1]). Also, we reject petitioner's contention that the Town can only supersede these statutes after they receive express approval from the Legislature, as neither statute contains such a requirement for the office of Commissioner of Public Works (*see* Public Officers Law § 3; Town Law § 23).

[5] Finally, contrary to petitioner's contention, Cunningham has not engaged in nor was he required to practice engineering while holding this position (*see* Education Law § 7202).[4] This conclusion is borne out not only by the job description for this position set forth in the Town code (*see* Town of Colonie Code § 34–3), but also by an investigation conducted by the Education Department, which determined that Cunningham had not engaged in the practice of engineering while serving in this position. In addition, we note that the individual appointed to the position of Commissioner of Public Works is selected based on "administrative experience and qualifications for the duties of the office" (Town Law

§ 64 [21–a] [2]) and, as such, the Town did not abuse its authority in not requiring that the appointee possess a specific license or engineering degree.

ORDERED that the judgment is affirmed, without costs.

PETERS, P.J., SPAIN, MALONE JR. and GARRY, JJ., concur.

All Citations

97 A.D.3d 1062, 949 N.Y.S.2d 272, 2012 N.Y. Slip Op. 05773

Footnotes

1 Local Law No. 15 by its terms, expressly provided that it superseded those provisions contained in Public Officers Law § 3 and Town Law § 23, which require that such an appointee be a Town resident.

2 The Commissioner of Public Works replaced the Superintendent of Highways, which was abolished by the Town and was an elected position that could only be held by a Town resident (*see Matter of Ricket v. Mahan,* 82 A.D.3d at 1566, 919 N.Y.S.2d 588).

3 "An elector of a town is an individual who may register as a voter therein regardless of whether that person has actually registered" (*Matter of Ricket v. Mahan,* 82 A.D.3d at 1567, 919 N.Y.S.2d 588 [citation omitted]).

4 Although Cunningham's initial appointment expired on December 31, 2011, he was reappointed to a two-year term commencing in January 2012. Accordingly, contrary to respondents' contention, the issue of Cunningham's qualifications is not moot (*see generally Matter of Hearst Corp. v. Clyne,* 50 N.Y.2d 707, 714–715, 431 N.Y.S.2d 400, 409 N.E.2d 876 [1980]).