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COURT OF APPEALS

STATE OF NEW YORK

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BALDWIN UNION FREE SCHOOL DISTRICT,  
ET AL.,

Respondents,

-against-

No. 9

COUNTY OF NASSAU (AND TWO OTHER  
MATTERS),

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 7, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: Number 9, matter of  
2 Baldwin v. County of Nassau.

3 Okay, counselor, do you want any rebuttal  
4 time?

5 MR. ROSENBERG: Yes, two minutes, Your  
6 Honor, please.

7 CHIEF JUDGE LIPPMAN: Two minutes. Sure,  
8 go ahead. You're on.

9 MR. ROSENBERG: May it please the court, my  
10 name is Ronald J. Rosenberg, and I have the distinct,  
11 high honor of being able to represent the County of  
12 Nassau and its elected officials in connection with  
13 this appeal from the Appellate Division's erroneous  
14 determination, which deprived Nassau County of its  
15 Home Rule rights, as afforded to it by the state  
16 legislature in the late 1930s.

17 CHIEF JUDGE LIPPMAN: Is the Common Sense  
18 law, as you call it, is it inconsistent with state  
19 law, general or special?

20 MR. ROSENBERG: It is not inconsistent with  
21 the general law. In fact, its express purpose and  
22 its express language is to make it consistent with  
23 the real property tax law, and make it - - - the  
24 County of Nassau to have the same policies with  
25 regard to refunds as sixty - - -

1 JUDGE SMITH: But isn't inconsistent with  
2 the special law?

3 MR. ROSENBERG: It is inconsistent with the  
4 County Guaranty Statute that was requested by the  
5 County in 1948 at the Home Rule message by the  
6 County, under the constitution that then existed that  
7 restricted the legislature from even passing special  
8 laws without the - - -

9 JUDGE SMITH: But isn't it - - -

10 MR. ROSENBERG: - - - County's request.

11 JUDGE SMITH: - - - isn't it clear under  
12 the constitution that if you're passing a tax - - - a  
13 tax ordinance or a tax legislation, you have to be  
14 consistent with state law, general or special?

15 MR. ROSENBERG: No, Your Honor. You have  
16 to be consistent with the general law of New York.  
17 And in 1930 - - - when the County became an  
18 alternative form of county government in the 1930s,  
19 the County was expressly given, by the state  
20 legislature, the full power to administer, levy and  
21 plan taxes. It's found in 103 of the County - - -

22 JUDGE SMITH: But haven't we held that the  
23 - - - a general power to do something isn't a power  
24 to supersede state law?

25 MR. ROSENBERG: Your Honor, it's not

1 superseding a state law that the County wasn't given  
2 by the state legislature the power to supersede. In  
3 Section 151 of the County Charter, it expressly  
4 provides the County, by the state legislature, with  
5 respect to special laws, the power to supersede any  
6 law that does not apply to all counties alike. It's  
7 in the statute itself, and it provides for the  
8 mechanism by which it is to be done, and also  
9 provides that if it's not expressly followed or  
10 explicitly followed - - -

11 JUDGE SMITH: But - - -

12 MR. ROSENBERG: - - - it doesn't affect the  
13 validity.

14 JUDGE SMITH: - - - what section are you  
15 referring to now?

16 MR. ROSENBERG: 151, Your Honor.

17 JUDGE SMITH: 151 of the County Charter?

18 MR. ROSENBERG: Yes. And you can find that  
19 at AC-211.

20 JUDGE GRAFFEO: Why does the County want to  
21 change the system? What was the purpose in passing -  
22 - -

23 MR. ROSENBERG: It - - -

24 JUDGE GRAFFEO: - - - the new Common Sense  
25 Law?

1 MR. ROSENBERG: Okay, well, the reason why  
2 was to change the insan - - -

3 JUDGE GRAFFEO: To save the County money?  
4 Is that the bottom line?

5 MR. ROSENBERG: It saves the County over  
6 800 million dollars a year - - - 80 million dollars a  
7 year, excuse me - - -

8 CHIEF JUDGE LIPPMAN: But prospectively,  
9 right?

10 MR. ROSENBERG: Prospectively only. Yes,  
11 Your Honor. And it brings it in line with the other  
12 sixty counties of the state, in which - - - all this  
13 is doing is allowing - - - when the courts have  
14 subsequently determined that there's a tax refund to  
15 be made, to the extent that any taxing authority  
16 receives the overpayment, they have to return their  
17 share, it's credited against the next thing.

18 It's the same way sixty of the sixty-two  
19 counties of the state do it.

20 CHIEF JUDGE LIPPMAN: Well, we understand  
21 why the County would want to do this. The question  
22 is, can it do it, in light of the specific act that  
23 the state legislature has passed?

24 MR. ROSENBERG: Yes.

25 CHIEF JUDGE LIPPMAN: Why are you able to

1 do it? Because of that particular provision that  
2 you're - - -

3 MR. ROSENBERG: Yes, if you look at - - -

4 CHIEF JUDGE LIPPMAN: - - - citing?

5 MR. ROSENBERG: - - - 151, which provides  
6 that, "In adopting a local law, changing or  
7 superseding any provision of an act of the state  
8 legislature, which provision does not, in terms and  
9 in effect, apply alike to all counties, the county  
10 legislature shall specify the chapter, number," et  
11 cetera, et cetera - - -

12 JUDGE SMITH: You - - - you read that as a  
13 grant of power. Can't it be read just as a  
14 specification of procedure in those cases in which  
15 the - - - for those cases in which the power already  
16 exists?

17 MR. ROSENBERG: Only if you want to violate  
18 one of the most fundamental principles of statutory  
19 construction, which is they would provide a procedure  
20 for a right that they didn't have a power to do.

21 JUDGE SMITH: Well, no one - - - no one  
22 disputes that in many cases, under the constitution,  
23 a local government can supersede state law as long as  
24 it's not a general law. But aren't taxes an  
25 exception right there in the constitution?

1                   MR. ROSENBERG: But this is the state  
2 legislature's granting of this authority. And the  
3 fact that - - -

4                   JUDGE SMITH: Actually, even  
5 hypothetically, even if they granted it, if the  
6 constitution says they don't have it, how can they -  
7 - - how can the legislature grant it?

8                   MR. ROSENBERG: The constitution doesn't  
9 say they don't have it. Okay? Because every time  
10 the constitution has been amended, since 1894, one of  
11 the most basic tenets of our constitutional form of  
12 government in this State of New York, is Home Rule.  
13 Each and every time it's been amended for the past  
14 120 years - - -

15                  JUDGE SMITH: I guess what you're really  
16 saying - - -

17                  MR. ROSENBERG: - - - there's been the  
18 savings clause, providing all prior grants of  
19 authority - - -

20                  JUDGE SMITH: So you - - -

21                  MR. ROSENBERG: - - - and each they were  
22 expanding Home Rule rights.

23                  JUDGE SMITH: - - - what you're really  
24 saying, if I understand you, is that the constitution  
25 sets a floor, but the state legislature can give the



1 municipalities more power than the constitution?

2 MR. ROSENBERG: Correct - - - no, no. They  
3 can't give - - - no, I didn't say that.

4 JUDGE PIGOTT: Mr. Rosenberg? Mr.  
5 Rosenberg?

6 MR. ROSENBERG: I'm sorry. I didn't say  
7 that. I didn't say it could give more power than the  
8 const - - -

9 JUDGE SMITH: I didn't mean it to sound  
10 outrageous. It's actually - - - I mean, it's  
11 certainly possible that the constitution says we  
12 hereby give these powers, and implicit in that, is  
13 that if the state legislature wants to give more, it  
14 can?

15 MR. ROSENBERG: No, I didn't say that.

16 JUDGE SMITH: You're not saying that?

17 MR. ROSENBERG: I'm not saying that. And  
18 no - - - no one's contending that. None of our  
19 briefs say that, and there's been no argument to that  
20 effect. No.

21 The constitution's in effect. The 1894  
22 constitution as amended in the 1930 - - - amended as  
23 of 1936, and then the 1938 constitution, there was no  
24 restrictions, as there is in the 1963 revised  
25 constitution, in terms of the new grant of power to

1 the other counties in the state.

2 And remember, Section (a)(2)(c)(2)(8) - - -  
3 I'm sorry, Article IX, Section 2(a)(2)(c)(8) of the  
4 constitution - - - of the '63 revised constitution,  
5 expressly provides that in addition to the powers  
6 already granted to counties, these are the additional  
7 powers granted to the counties - - -

8 JUDGE SMITH: Okay - - -

9 MR. ROSENBERG: - - - that don't have it.

10 JUDGE SMITH: - - - but I mean - - - so  
11 that's got to be in addition to something else in the  
12 constitution?

13 MR. ROSENBERG: No, it's in addition to the  
14 powers previously granted by the legislature - - -

15 JUDGE SMITH: By the legislature.

16 MR. ROSENBERG: - - - under the previous  
17 constitutions.

18 JUDGE SMITH: I see. So you say that that  
19 - - - and that includes Section 151 of the Charter in  
20 your - - -

21 MR. ROSENBERG: Absolutely. Without  
22 question.

23 JUDGE PIGOTT: Mr. Rosenberg, if I  
24 understand it, in 1948, the County amended its Code  
25 and said "the County shall bear all costs associated

1 with erroneous assessments of real property,  
2 including refunds necessitated thereby." Right?

3 MR. ROSENBERG: No, Your Honor. To be more  
4 accurate, I believe, the County requested in a Home  
5 Rule message that the state legislature amend their  
6 administrative code. And the reason why they had to  
7 go to the state legislature, was because it was  
8 inconsistent with the Real Property Tax Law, and they  
9 didn't have the local authority to pass such a  
10 special law.

11 JUDGE PIGOTT: All right. So - - - so you  
12 needed state - - - you needed state authority to do  
13 that?

14 MR. ROSENBERG: Correct.

15 JUDGE PIGOTT: Do you need state authority  
16 to not do that?

17 MR. ROSENBERG: No. If you look at Section  
18 151 that was granted to the County in the 1930s, that  
19 still exists today and is preserved under the express  
20 reservation of powers in the 1963 revised  
21 constitution, it expressly provides - - -

22 JUDGE PIGOTT: I know what it says, because  
23 you said it. But what I'm saying is, if you - - - if  
24 it said what it said then, and you had to go to the  
25 legislature in 1948 to get this done, rather than go



1 the assessing authority had - - -

2 JUDGE PIGOTT: It's close. It's close.

3 MR. ROSENBERG: - - - nothing to do with  
4 it.

5 JUDGE PIGOTT: It's close.

6 MR. ROSENBERG: No, it's not even close.  
7 I'll explain why. I'll tell you why - - -  
8 respectfully, why I say it's not close.

9 JUDGE PIGOTT: I - - - what I want to get  
10 to, though, however it is, all right, you had to go  
11 to the legislature to do whatever you wanted to do.  
12 And for some reason now, you're saying you don't have  
13 to.

14 MR. ROSENBERG: Correct. And if I can  
15 explain why? Section 151, when you read it, it says  
16 it only applies to special laws of the legislature.  
17 And it provides the grant of authority. And it says  
18 - - - now how do I know it grants the authority - - -

19 JUDGE ABDUS-SALAAM: Counsel - - -

20 MR. ROSENBERG: - - - in section - - - if I  
21 can just - - -

22 JUDGE ABDUS-SALAAM: - - - counsel - - -

23 MR. ROSENBERG: - - - can I just finish  
24 this one answer, please?

25 JUDGE ABDUS-SALAAM: Yeah, I'm going to ask

1           you about what you're trying to say. Where does it  
2           exactly say that the County has the power - - -

3                     MR. ROSENBERG: In 151 - - -

4                     JUDGE ABDUS-SALAAM: - - - as opposed to  
5           what Judge Smith said, that it's some sort of  
6           procedure?

7                     MR. ROSENBERG: Okay.

8                     JUDGE ABDUS-SALAAM: Where does it  
9           expressly say that they have the power?

10                    MR. ROSENBERG: 151, which I read before,  
11           and 154, says that there's a restriction on the  
12           authority of the cou - - - the legislature to  
13           supersede a state statute now in force or hereinafter  
14           affected. And it cites eight categories of statutes  
15           that they cannot supersede.

16                    So you would have to construe those two  
17           statutes to say the procedure which bestowed the  
18           power in 151 - - -

19                    JUDGE PIGOTT: Of your Charter.

20                    MR. ROSENBERG: - - - the restriction in  
21           154 of our Charter - - - granted by the state  
22           legislature - - - okay - - - doesn't mean anything.  
23           It only says you don't have any power to do any of  
24           this, but if you want to do it just for the fun of  
25           it, you know as like - - - you know, like in

1           preseason, just to see what would happen, here's what  
2           you can do, and here's what you can't do, even when  
3           you're doing something you don't have the authority  
4           to do.

5                        JUDGE PIGOTT:  So you look at - - - you  
6           looked at 151 and 153 and you said - - -

7                        MR. ROSENBERG:  154.

8                        JUDGE PIGOTT:  - - - 154, and you said we  
9           can't hold these people harmless without getting the  
10          state to agree.  So we have to go to the legislature  
11          to get them - - -

12                       MR. ROSENBERG:  Right, because 1 - - -

13                       JUDGE PIGOTT:  - - - to allow us to do  
14          that.

15                       MR. ROSENBERG:  Right,  Because 151 only  
16          gives us the authority to supersede special laws.

17                       JUDGE SMITH:  Your answer, as I understand  
18          it, is back in 1941, you were superseding a general  
19          law, and now you're superseding special law?

20                       MR. ROSENBERG:  Correct.  And we bring  
21          ourselves - - - and it's 1948 - - - we bring  
22          ourselves into line with the general law of New York,  
23          which is Real Property Tax Law Section 726.

24                       JUDGE GRAFFEO:  So maybe I'm  
25          oversimplifying, but you're saying when they wanted

1 to vary from the Real Property Tax Law, which was the  
2 general law of the state, they had to go to the  
3 legislature for spe - - - they had to get a special  
4 bill?

5 MR. ROSENBERG: Correct.

6 JUDGE GRAFFEO: But when you want to come  
7 back into compliance with the rest of the state and  
8 the general law, you don't need to go to the  
9 legislature?

10 MR. ROSENBERG: Right. When we want to  
11 come back home, we don't need - - -

12 JUDGE GRAFFEO: But if I understand the  
13 record, you did go to the - - - you did go back to  
14 the legislature. Can you explain why?

15 MR. ROSENBERG: Well, as this court held -  
16 - -

17 JUDGE GRAFFEO: Was that just to - - -

18 MR. ROSENBERG: - - - yes, sure.

19 JUDGE GRAFFEO: - - - for the heck of it?

20 MR. ROSENBERG: I was anticipating your  
21 question of that. As this court held in the 41 Kew  
22 Gardens Road case, the mere fact that you could also  
23 get the state legislature to pass a law - - - the  
24 state legislature on a Home Rule message, could pass  
25 a law repealing the County Guaranty if it wanted to -



1           - - you don't have to. And that's what this court  
2 held in the 41 Kew Gardens Road case.

3           The mere fact that there's more than one  
4 method, doesn't - - -

5           JUDGE GRAFFEO: Your - - - your posture is  
6 - - -

7           MR. ROSENBERG: - - - deprive you of your  
8 Home Rule.

9           JUDGE GRAFFEO: - - - it's not dispositive  
10 that the state legislature didn't pass the specific -  
11 - -

12           MR. ROSENBERG: Correct. If I could - - -

13           JUDGE GRAFFEO: - - - special act based on  
14 your Home Rule message?

15           MR. ROSENBERG: Yes. If you could just  
16 give me one second, I can actually read you the quote  
17 from the - - -

18           CHIEF JUDGE LIPPMAN: Read us the quote  
19 counselor, because your time is up. Go ahead. But  
20 certainly, read the quote.

21           MR. ROSENBERG: Okay. "Next, a duly  
22 enacted local law is clothed with the presumption of  
23 constitutionality that applies to the state." I'm  
24 sorry.

25           JUDGE PIGOTT: You're one of the first

1 electronic readers we've had.

2 MR. ROSENBERG: Oh, I'm sorry. "Another  
3 aspect of the authority to enact" - - - I quote, Your  
4 Honor - - -

5 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

6 MR. ROSENBERG: I apologize. I should be a  
7 little better at my electronics.

8 CHIEF JUDGE LIPPMAN: It's no problem. Go  
9 ahead.

10 MR. ROSENBERG: "Another aspect of the  
11 authority to enact issues warrants passing comment."  
12 And this is a quote.

13 CHIEF JUDGE LIPPMAN: Go ahead.

14 MR. ROSENBERG: "The property owners argued  
15 strongly that there could be no implied authority for  
16 the City to act because of the state's legislature's  
17 failure after many years of effort by the City to  
18 enact express authorization authorizing legislation.  
19 This contention is neither persuasive nor pertinent,  
20 because as we have noted, it is the independent,  
21 express municipal Home Rule authority from which  
22 Local Law number 63 derives its efficacy."

23 CHIEF JUDGE LIPPMAN: Okay, counsel.  
24 You'll have your rebuttal. Let's hear from your  
25 adversary.

1 MR. ROSENBERG: Thank you very much, Your  
2 Honor.

3 CHIEF JUDGE LIPPMAN: Thank you counsel.  
4 Counselor?

5 MR. YAFFE: May it please the court, my  
6 name is David Yaffe. I represent the school  
7 districts.

8 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

9 MR. YAFFE: The County Charter - - -

10 CHIEF JUDGE LIPPMAN: What's wrong with - -  
11 -

12 MR. YAFFE: - - - does not - - -

13 CHIEF JUDGE LIPPMAN: What's wrong with the  
14 Common Sense Law?

15 MR. YAFFE: Everything. The County Charter  
16 does not enumerate any specific subject areas of  
17 local lawmaking power, but rather contains a general  
18 grant of lawmaking power in 150(1). 151 is what Mr.  
19 Rosenberg's talking about. That is the procedure for  
20 abrogating a special law. 154 contains eight  
21 enumerated areas that are forbidden.

22 CHIEF JUDGE LIPPMAN: So translate that  
23 into - - -

24 MR. YAFFE: So - - -

25 CHIEF JUDGE LIPPMAN: - - - what's wrong

1 with - - -

2 MR. YAFFE: Okay, so what's - - -

3 CHIEF JUDGE LIPPMAN: - - - what they did?

4 MR. YAFFE: - - - wrong with that? This  
5 court has consistently, for more than eighty years,  
6 said that local lawmaking authority must be - - - if  
7 there is a grant of such power, there must be an  
8 express, enumerated, delegation. There was no  
9 enumerated delegation of power in 150(1). It was  
10 general with seven ar - - - eight areas that were  
11 enumerated - - -

12 JUDGE PIGOTT: The way Mr. - - - the way  
13 Mr. Rosenberg seemed to describe it, if I'm - - - if  
14 - - - I'll use an analogy I'm more familiar with.  
15 Let's assume for a minute that the state speed limit  
16 is fifty-five miles an hour - - - make it sixty-five  
17 miles an hour. All right? Some town/city/village,  
18 whatever says, you know, we've got an area that, you  
19 know, our people can go faster. So we're going to  
20 Albany and say, can we - - - can we increase the  
21 speed limit on this road from seventy-five to eighty.  
22 And they say yes.

23 So now you've got it. And then they say,  
24 you know, this was not a good idea. So we're going  
25 to go back. Do you think they have to go back to

1 Albany to get it reduced back to sixty-five?

2 MR. YAFFE: That - - -

3 JUDGE PIGOTT: Or can they do it on their  
4 own?

5 MR. YAFFE: Well, under that scenario, that  
6 - - - that would depend on whether the issue of  
7 driving on roads within a particular municipality is  
8 a matter of local concern as opposed to statewide  
9 concern. And - - -

10 JUDGE GRAFFEO: So why is it, in this case,  
11 when the County wants to come back into compliance  
12 with real property tax law 726, they can't do that at  
13 the local level, they have to come back to the state  
14 legislature?

15 MR. YAFFE: I have multiple responses to  
16 that. First of all - - -

17 JUDGE GRAFFEO: Isn't that the issue here?

18 MR. YAFFE: No. It isn't. Because they  
19 don't have the fundamental lawmaking authority to  
20 affect taxation and education. But they are not  
21 bringing the County into alignment with a general  
22 law. Mr. Rosenberg is referring to 726 - - -

23 JUDGE GRAFFEO: Why don't you explain that  
24 point?

25 MR. YAFFE: 726 is a special law. It does

1 not apply to every county or town in the State of New  
2 York.

3 JUDGE GRAFFEO: Sixty counties follow it,  
4 right?

5 MR. YAFFE: No, they don't.

6 JUDGE GRAFFEO: I thought there's only  
7 Nassau and one other - - -

8 MR. YAFFE: 726 - - -

9 JUDGE GRAFFEO: - - - county and doesn't.

10 MR. YAFFE: - - - does not apply to Nassau  
11 County with a population of roughly 1.3 million. It  
12 does not apply to Suffolk County, with a population  
13 of 1.5 million. And it does not apply to New York  
14 City, with a population of 8 million. It doesn't  
15 apply to more than half the residents - - -

16 JUDGE PIGOTT: Yeah, but that - - - but  
17 that mean - - - it's a general law for everybody  
18 else.

19 MR. YAFFE: It - - -

20 JUDGE PIGOTT: You have special laws to  
21 take care of you.

22 MR. YAFFE: No, it can - - - it can - - -  
23 with all due respect, a general law applies  
24 consistently throughout. This - - - 726 cannot morph  
25 in - - -

1 JUDGE SMITH: So if a law applies in sixty-  
2 one of the sixty-two counties, it's not general?

3 MR. YAFFE: It's a special law.

4 JUDGE PIGOTT: No, yours is the special  
5 law. Nassau is the special law.

6 MR. YAFFE: Ours is the special law. The  
7 County Guaranty is a special law. 726 - - -

8 JUDGE PIGOTT: 726 is a general - - -

9 MR. YAFFE: - - - is also a special law.

10 JUDGE PIGOTT: - - - is a general law that  
11 applies in my county and all the counties that I'm  
12 familiar with. And it's always the same. I mean,  
13 the assessing unit is really important, because  
14 they're the ones that, of course, decide, you know,  
15 how much your house is going to be worth. And that's  
16 what determines the taxes.

17 And what the County wants to say is that's  
18 fine. You know, we'll - - - we'll bear that burden,  
19 but, you know, when we make a mistake and you get  
20 more money than you should have, you're saying to the  
21 general taxpayers, all the taxpayers of Nassau  
22 County, you've got to pay the Union Free School  
23 District the money even though they're not entitled  
24 to it because of this law. And they want to say we  
25 want to go back to the, what I would consider, a

1           general law, 726, which says that the respective  
2           taxing units, not the assessing unit, should be  
3           responsible for the overtax.

4                   MR. YAFFE: Well, 726 has been held to be a  
5           special law by the Second Department in the New York  
6           Telephone case, as is 556. And they do not - - - 726  
7           and 556 do not apply - - -

8                   JUDGE PIGOTT: So are there no general  
9           laws? I mean - - -

10                   MR. YAFFE: There are general laws.

11                   JUDGE PIGOTT: - - - it seems - - -

12                   MR. YAFFE: These particular ones are  
13           special.

14                   JUDGE PIGOTT: But does that mean, just as  
15           this happened, if - - - if any county goes to the  
16           legislature and says I want to be treated differently  
17           from the speed limit under the V&T, all of a sudden  
18           1190 becomes a special law?

19                   MR. YAFFE: You have to look at the law - -  
20           - the - - - you have to look at the state law that's  
21           being upended by the local law.

22                   JUDGE PIGOTT: Traffic Law Section 1190,  
23           which talks about speed limits.

24                   MR. YAFFE: Okay, so, I mean, I'm not  
25           familiar with that, but I'll accept that that's a



1           general law.

2                   JUDGE SMITH:  So but you're - - - are you  
3           stating the proposition that if there's a general law  
4           and then the legislature later carves out one county  
5           as an exception, that both laws are then special?

6                   MR. YAFFE:  Yes.  But my argument doesn't  
7           turn on that issue.

8                   JUDGE SMITH:  Your argument doesn't turn on  
9           that?

10                   MR. YAFFE:  Because we get to the more  
11           fundamental issue of what the constitution says,  
12           which is general or special, when you're dealing with  
13           taxation, with a local law upending taxation, it has  
14           to comply with both special and general laws.

15                   CHIEF JUDGE LIPPMAN:  That's your bottom  
16           line argument?

17                   MR. YAFFE:  That's my bottom line on that.

18                   CHIEF JUDGE LIPPMAN:  Okay.

19                   JUDGE SMITH:  And you're saying that County  
20           Charter 151 is not a grant of power?

21                   MR. YAFFE:  No, it's a gen - - -

22                   JUDGE SMITH:  Is that the key difference  
23           between you?  He reads County - - - Section 151 as a  
24           grant of power, you read it as a procedural - - -

25                   MR. YAFFE:  Correct.  It's a general grant

1 of power. The bill jacket which we've referred to in  
2 our papers, raised the concern that it was not  
3 enumerating any specific grant of power.

4 CHIEF JUDGE LIPPMAN: So if he's right, he  
5 wins as to your interpretation; if you're right, you  
6 win?

7 MR. YAFFE: Not entirely, because that's  
8 only one issue. That only goes to the taxation  
9 issue. Then we have the public education issue,  
10 which the constitution prohibits a local law that  
11 affects - - -

12 CHIEF JUDGE LIPPMAN: That's - - - that's  
13 the alternative ground for you?

14 MR. YAFFE: Yes it is.

15 JUDGE PIGOTT: That affects?

16 MR. YAFFE: That affects the maintenance  
17 and administration of public education. And here,  
18 what's happening is, the County is upending a law,  
19 now req - - - which protects school districts and  
20 their voter-approved budgets, and now is requiring  
21 the school districts to take millions of dollars away  
22 from that and pay these refunds.

23 JUDGE PIGOTT: Well, they're saying - - -  
24 yeah, they're saying, you know, when you overcharge  
25 somebody, you've got to give it back.

1 MR. YAFFE: Yes, but the issue is, does  
2 that affect education or not? Does it affect - - -

3 JUDGE PIGOTT: It may affect it in a good  
4 way.

5 MR. YAFFE: - - - does it affect the  
6 maintenance of education? Whether it's good or bad  
7 is not the issue. The issue is whether it affects  
8 it.

9 JUDGE SMITH: Anything that takes - - -

10 MR. YAFFE: And - - -

11 JUDGE SMITH: - - - anything that takes a  
12 lot of money away from a school district affects  
13 education.

14 MR. YAFFE: Yes. And - - -

15 JUDGE SMITH: So you're saying it's all  
16 forbidden?

17 MR. YAFFE: Yes, it is. It's forbidden.

18 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
19 you.

20 MR. YAFFE: Thank you.

21 CHIEF JUDGE LIPPMAN: Let's hear from your  
22 - - - Ms. Battle?

23 MS. BATTLE: Yes, may it please the court.  
24 My name is Catherin Battle, and I represent the  
25 respondents in proceeding number 2 on this appeal.

1                   Initially, I would take issue with the  
2                   County's contention that the - - - when the coun - -  
3                   - when the County Guaranty was passed in 1948, that  
4                   it aligned the County with state law at that time. I  
5                   would direct Your Honors' attention to page 634 of  
6                   the record in this matter. And according to the  
7                   legislative history, it clearly indicates that the  
8                   Guaranty was passed with the idea of spreading the  
9                   cost of tax refunds equally across all taxpayers of  
10                  the County, and it would not be borne by particular  
11                  residents in particular school districts.

12                  JUDGE SMITH: Well, but why is that  
13                  inconsistent with saying it conformed to the rest of  
14                  the state?

15                  MS. BATTLE: Well, according to the  
16                  legislative history, at that time, in 1948, that was  
17                  - - - that was in conformity with the general law.  
18                  So my point is that the County's whole argument that  
19                  the reason that the County Guaranty had to be passed  
20                  by a state - - - a state law, because it did not only  
21                  - - - it was contrary to the general law of the  
22                  state, that argument has no basis in the record.

23                  JUDGE PIGOTT: Well, let me ask you about  
24                  that, because in most counties, the assessing unit is  
25                  smaller, it's not the county. The county's rarely

1 the assessing unit. It's usually the town, or the  
2 village or the city.

3 Nassau County decided they wanted to do it.  
4 So they - - - now they're assessing. And what they,  
5 then said is, and we - - - and we will bear the risk  
6 of over-assessment if that's what it is. And now  
7 they want to change that.

8 MS. BATTLE: Correct.

9 JUDGE PIGOTT: So they are different?

10 MS. BATTLE: Yes, I would con - - - I think  
11 we all concede that in Nassau County that it's  
12 different than in the rest of the state. However,  
13 that determination was made by the state legislature  
14 that tax refunds should be treated differently, and  
15 Nassau County - - -

16 CHIEF JUDGE LIPPMAN: Why isn't it common  
17 sense that it shouldn't be treated like that?

18 MS. BATTLE: Respectfully, Your Honor, I  
19 think that determination is for the state  
20 legislature, not this court. I think it's up to the  
21 state legislature to decide if, in fact - - -

22 CHIEF JUDGE LIPPMAN: But you're not  
23 contending - - - you're saying from a policy  
24 perspective, that's up to the legislature. But  
25 what's your view of this? Does the County have a

1 right to feel aggrieved by - - -

2 MS. BATTLE: I think the - - -

3 CHIEF JUDGE LIPPMAN: - - - by holding the  
4 bag, essentially, on any - - -

5 MS. BATTLE: - - - the County went to the  
6 state legislature, not on Home Rule message, as the  
7 County alleges. But they did go to the state  
8 legislature, and they requested this. Under the - -  
9 -

10 CHIEF JUDGE LIPPMAN: So now they - - -  
11 your basic position, now you can't get it back - - -  
12 they can't get it back?

13 MS. BATTLE: Yes. And Your Honors, I would  
14 submit that the two issues that are most important  
15 here is that this is - - - this loc - - - this law  
16 relates to taxation and education. And therefore it  
17 is not a local law.

18 CHIEF JUDGE LIPPMAN: On those two grounds,  
19 they just can't go there on their own?

20 MS. BATTLE: Correct, Your Honor.

21 JUDGE PIGOTT: Well, it's not just that. I  
22 mean, it's villages too, right, and the town, aren't  
23 they?

24 MS. BATTLE: Villages are not included in  
25 this, but towns are. But the predominant monetary

1 impact here will fall on school districts.

2 JUDGE PIGOTT: Right, that's always - - -

3 MS. BATTLE: And the taxpayers in those  
4 school districts.

5 JUDGE PIGOTT: That's always true. But - -  
6 - and when you say the taxpayers, what you're saying  
7 is the taxpayers of - - - of one school district is  
8 going - - - is going to suffer the loss of revenue  
9 from people who don't live in that school district?

10 MS. BATTLE: That's correct, Your Honor.  
11 And the state legislature had - - - has clearly  
12 stated, when they enacted the Guaranty in 1948, that  
13 those costs should be borne equally by all county  
14 taxpayers.

15 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
16 counsel.

17 MS. BATTLE: Thank you, Your Honors.

18 CHIEF JUDGE LIPPMAN: Let's hear from Ms.  
19 Liccione, for the Town of North Hempstead.

20 MS. LICCIONE: Yes, Your Honor.

21 CHIEF JUDGE LIPPMAN: What's your position,  
22 counsel?

23 MS. LICCIONE: Well, Your Honor, my  
24 position is slightly different from my co-counsel.

25 CHIEF JUDGE LIPPMAN: Go ahead.

1 MS. LICCIONE: The RPTL is a general law,  
2 and I think where the confusion arises is 2006 of the  
3 RPTL says that this law shall not repeal prior  
4 existing laws. So that's the catchall savings clause  
5 at the end. It's still a general law. And the fact  
6 that the Local Law 18 - - - as I like to call it - -  
7 - is inconsistent with the RPTL is obvious in the  
8 most fundamental sense.

9 RPTL Section 712 says that a school  
10 district has no - - - in a special assessing unit,  
11 which is Nassau County - - - has no right to  
12 intervene in a tax certiorari case. Local Law 18  
13 makes no sense at all, frankly, because it says that  
14 a school district is mailed notice, but it gives no  
15 right to intervene.

16 JUDGE PIGOTT: That's true statewide. I  
17 went through a lot of that when I was County  
18 Attorney. And the fact of the matter was, the towns  
19 that - - - the heavy - - - the school districts,  
20 which get most of the money, are not told when  
21 somebody objects to their assessment. So they maybe  
22 two or three years down the road in their budgeting,  
23 find out that the assessment was - - - they were  
24 over-assessed, let's say, to the tune of 100,000  
25 dollars. And now there's a hole in the budget that



1           they've already spent coming forward. And I think  
2           there was an amendment that said they were entitled  
3           to notice.

4                   MS. LICCIONE: Well, they get notice at the  
5           tax certiorari phase, but not at the administrative  
6           proceeding stage.

7                   JUDGE PIGOTT: Right, and - - -

8                   MS. LICCIONE: Which I think is what you're  
9           talking about.

10                   JUDGE PIGOTT: - - - and the reason for  
11           that is that they're not - - - they're not an  
12           interested party in the sense that you got the  
13           assessor, who's the one that's got to respond why he  
14           thinks this house or this business is worth whatever  
15           it is. And they just have to sit on the side and  
16           watch and not like it. But that's what it goes.

17                   MS. LICCIONE: Your Honor, and it's even  
18           worse for the town, because most of the towns in the  
19           state where there are towns - - - New York City and  
20           Suffolk and Tompkins County are different - - - but  
21           you're a town, the whole RPTL is written assuming  
22           that your town is the assessing unit.

23                   JUDGE PIGOTT: Yeah, but don't you - - -  
24           you see the point, though, in terms of equity - - - I  
25           hate to bring that in - - - where all of - - - all

1           you guys are saying, you know, if you over-assess,  
2           that's your problem. You know, we - - - we're going  
3           to spend the money that we want to spend, and if you  
4           - - - if there's a reduction in the assessment, we've  
5           spent our money and you can't get it back from us,  
6           right?

7                         MS. LICCIONE: Your Honor, I would  
8           respectfully disagree with respect to the towns.  
9           Because if the common sense law really wanted to make  
10          any sense, it would have pa - - - and be consistent  
11          with the RPTL, it would have passed on the assessing  
12          obligation to the towns.

13                        JUDGE PIGOTT: Well, you could - - -

14                        MS. LICCIONE: That's the way it works in  
15          Suffolk, and - - -

16                        JUDGE PIGOTT: You could have asked for  
17          that, and you didn't. I mean, at least Nassau didn't  
18          in 1948.

19                        MS. LICCIONE: Exactly.

20                        JUDGE PIGOTT: But, I mean, the eighty  
21          million dollars isn't - - - you know, isn't going to  
22          the county executive's pocket. In other words,  
23          they're going to - - - they're going to take it away  
24          from parks, sheriff, environmental planning, central  
25          police services, whatever the services that the

1 County provides for all of the cou - - - all of the  
2 county, including the villages, towns and school  
3 districts, they're going to have to cut back because,  
4 at least in your view, you're getting money that you  
5 shouldn't have gotten because of the assessment.

6 MS. LICCIONE: Well, Your Honor, but it's  
7 the County that's making the mistakes. And it's the  
8 County that has the dysfunctional system, that's - -  
9 -

10 JUDGE PIGOTT: But you're willing to - - -  
11 you're willing to live with their mistakes if they  
12 help you. And if they don't, you want to say, well,  
13 I'm not paying it back.

14 MS. LICCIONE: No, Your Honor, for this to  
15 be - - - to make any sense, and to be consistent, and  
16 to be constitutional, then the assessing obligation  
17 would have to come back to the towns.

18 Your Honor, if I could just - - -

19 CHIEF JUDGE LIPPMAN: But the bottom line  
20 is, who bears the price in the end?

21 MS. LICCIONE: Well, the taxpayer does.  
22 And actually, the fundamental unfairness that will  
23 result here is if you happen to live in a part of the  
24 County, let's say, that has in it, a lot of  
25 industrial buildings, where the County makes the most

1 expensive mistakes, you're going to get hit harder  
2 than anyone else.

3 JUDGE PIGOTT: Yeah, but if the Baldwin  
4 School District - - - not that they would ever do  
5 this - - - decides, I'm - - - we're going to spend a  
6 hundred million dollars that we want to spend on our  
7 school district, and the one thing we can be sure of  
8 is that whatever happens, everybody - - - not just -  
9 - - not just our students, not just our parents in  
10 the school district, but everybody in the town - - -  
11 in the County's going to help fund that.

12 MS. LICCIONE: Your Honor, and if you look  
13 at the legislative history, that's exactly what the  
14 County wanted. If you look at the letters from Mr.  
15 Caroll during the case administration that are in our  
16 compendium, they said we want to support our smaller  
17 school districts. That's exactly what they wanted.

18 But I'm arguing for - - -

19 CHIEF JUDGE LIPPMAN: Okay - - -

20 MS. LICCIONE: - - - the towns - - -

21 CHIEF JUDGE LIPPMAN: Judge Smith, last  
22 question.

23 JUDGE SMITH: I - - - I guess - - - I'm  
24 still not sure I understand the point you started  
25 with, which is you say the RPTL is a general law.

1 MS. LICCIONE: Yes, Your Honor.

2 JUDGE SMITH: And you say that the Local  
3 Law 18 is inconsistent with it, and therefore you  
4 don't have to worry about whether they're entitled to  
5 supersede special laws, they're superseding a general  
6 law.

7 MS. LICCIONE: Exactly, Your Honor.

8 JUDGE SMITH: And you're - - - and it's  
9 inconsistent, you say, because of the notice  
10 provision?

11 MS. LICCIONE: Well, that's one of the  
12 areas in which it's inconsistent.

13 JUDGE SMITH: Okay, it is - - - but it's  
14 broadly consistent with the state law, isn't it, in  
15 that the - - - in other counties, over-assessments  
16 are not general - - - over-assessments of school  
17 district taxes are not generally a county charge.

18 MS. LICCIONE: Yes, but with respect to the  
19 towns, it's the most inconsistent, because the towns  
20 across the state do the assessing. And they can be  
21 more accurate, because they're smaller.

22 CHIEF JUDGE LIPPMAN: Okay, counselor,  
23 thank you.

24 MS. LICCIONE: Your Honor - - -

25 CHIEF JUDGE LIPPMAN: No, counsel - - -

1 MS. LICCIONE: Thank you very much.

2 CHIEF JUDGE LIPPMAN: - - - sorry. Your  
3 time is up.

4 MR. ROSENBERG: Okay, I just want to make a  
5 couple of - - -

6 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

7 MR. ROSENBERG: Okay, quick - - - a couple  
8 quick points. First of all, throughout the state,  
9 the towns, do the assessing, except in Tompkins  
10 County, and none of them pay - - - except in Suffolk  
11 County - - - any of the refunds. So the fact that  
12 the assessor does it, is - - - does errors, it's  
13 never been the law in New York that the assessor  
14 bears the - - -

15 CHIEF JUDGE LIPPMAN: But the County of  
16 Nassau has had particular difficulties, right, with -  
17 - -

18 MR. ROSENBERG: I don't - - -

19 CHIEF JUDGE LIPPMAN: - - - assessment.  
20 There's been a constantly, kind of, a bone - - -

21 MR. ROSENBERG: No, no.

22 CHIEF JUDGE LIPPMAN: - - - of contention?

23 MR. ROSENBERG: I don't necessarily agree  
24 with it in the sense that it seems like you're  
25 putting it, which is the County's having a problem



1                   MR. ROSENBERG: - - - 151, 154, 2201, and  
2 also we win - - -

3                   JUDGE SMITH: What about your adversary's  
4 argument that it's actually 150(1), that gives the  
5 power and 151 is just the procedure?

6                   MR. ROSENBERG: Well - - -

7                   JUDGE SMITH: Why - - - why is he wrong  
8 about that?

9                   MR. ROSENBERG: - - - respectfully, with  
10 all his arguments, he wants you to be - - - rewrite  
11 the thing and not apply the plain English.

12                  JUDGE SMITH: Can you be more specific as  
13 to what's wrong with his argument?

14                  MR. ROSENBERG: Because 151 is a separate  
15 standalone statute, and read with 154 - - - there's  
16 nothing in 150 subdivision (1) which says that 151  
17 doesn't provide a grant of power. 154 also says you  
18 can change all special laws except for these  
19 enumerated categories, which it's undisputed this is  
20 not one of them. So therefore, 151 is clear - - -  
21 150 subdivision (1) clearly is not a limitation on  
22 the powers granted in 151 and 154.

23                  I just want to mention one thing about the  
24 inequity of this. In other words, I'm a County  
25 resident my whole life. If I live in a school



1 district like in Hempstead, and I'm a County  
2 taxpayer, the County taxpayer there is subsidizing  
3 the richest school districts, because the County is  
4 picking up the eighty percent that the school  
5 districts would otherwise have to refund.

6 So actually, this is the reverse of Robin  
7 Hood. This is the County taxpayers in the poor areas  
8 of the County subsidizing the rich school districts,  
9 because their county taxes are artificially inflated,  
10 while the school districts' taxes are artificially  
11 deflated.

12 JUDGE SMITH: But assuming it's a bad idea  
13 - - - presumably it was a bad idea back in 1948?

14 MR. ROSENBERG: It was done, as we pointed  
15 out in our brief, because of the improper nature of  
16 the government that was controlled by town-elected  
17 and city-elected officials who - - -

18 JUDGE SMITH: But you would agree with the  
19 principle that no matter how awful it is, the  
20 question for us is not which is a good idea, but who  
21 has the power to fix it?

22 MR. ROSENBERG: Yes. And I just wanted to  
23 say, and under the '63 revision of the constitution,  
24 we also have the power. Sonmax tells you that.  
25 Sonmax involved the City passing a law reducing the

1 in rem procedures from three to one year. And the  
2 question was that under the same section of the  
3 constitution, did they have the power to pass that  
4 local law. And the court said - - - this court said  
5 yes, implying MHRL Section 10.

6 So clearly, there the City's not mentioned  
7 in MHRL Section 10, and the County is only mentioned  
8 with respect to a restriction to comply with legislat  
9 - - - that's the legislature with regard to non-  
10 property taxes. It does not restrict - - -

11 CHIEF JUDGE LIPPMAN: Okay, counselor.

12 MR. ROSENBERG: So either way, we win. And  
13 I just want to say, the County Assessor, if I could  
14 just say one more thing - - -

15 CHIEF JUDGE LIPPMAN: Last seconds,  
16 counselor.

17 MR. ROSENBERG: - - - the County Assessor  
18 was - - -

19 CHIEF JUDGE LIPPMAN: Finish up.

20 MR. ROSENBERG: - - - started in 1938. The  
21 County Guaranty was in '48. It had nothing to do  
22 with why they went to the County Guaranty. They did  
23 it because the towns didn't want to pay the refunds  
24 that had accrued.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 Thanks, counselor.

2 MR. ROSENBERG: Thank you very much, Your  
3 Honors.

4 CHIEF JUDGE LIPPMAN: Thank you all.  
5 Appreciate it.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Baldwin Union Free School District, et al. v. County of Nassau (and two other matters), No. 9 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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