UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JWJ INDUSTRIES, INC. and
JEFFREY HOLBROOK,

Plaintiffs,

v. 5:09-CV-0740 (NPM / DEP)

OSWEGO COUNTY,

Defendant.

APPEARANCES OF COUNSEL

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NEAL P. McCURN, Senior U.S. District Court Judge

MEMORANDUM-DECISION AND ORDER

The matter before the court is a civil rights action, filed pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. §1983, in which plaintiffs JWJ Industries, Inc. and Jeffrey Holbrook, an officer and shareholder of JWJ Industries, Inc. (collectively, "plaintiffs") complain of, inter alia, an unconstitutional taking of

their property by the defendant Oswego County ("County") without just compensation, pursuant to the Oswego County Recycling & Solid Waste Local Law. On June 14, 2011, this court issued a memorandum decision and order ("MDO") (Doc. No. 63), finding that portions of the County's 2009 flow control law were unconstitutionally vague as written. The county enacted its revised flow control law on December 15, 2011 (the "2011 law"). The 2011 law became effective on January 1, 2012.

Currently before the court is plaintiffs' application for a temporary restraining order ("TRO") and preliminary injunction ("PI") to enjoin the County from enforcing its 2011 law. Unlike the position it took pursuant to the plaintiffs' 2009 request for TRO and PI, however, the County has consented to refrain from enforcing the 2011 law until plaintiffs' motion can be decided on the merits. This consent allows the court to dispense with consideration of the TRO and decide the matter of the preliminary injunction. For the reasons set forth below, the plaintiffs' motion for preliminary injunction is granted.

## I. Facts and Procedural History

The court assumes familiarity with the facts and procedural history of this case as set forth in the court's previous decisions, and will reiterate only the facts it deems necessary for the purpose of this decision. In its June 14, 2011 MDO, the

court dismissed this action without prejudice, relying on the County to rewrite its flow control law to comply with the requirements set forth in the MDO to insure the constitutionality of the document. The County filed a motion for reconsideration (Doc. No. 72), which the court denied, adhering to its original decision (Doc. No. 78).

The County now maintains that its flow control law is "valid and enforceable." Doc. No. 99, p. 2. Plaintiffs argue that the 2011 law is unconstitutionally vague on its face and as applied to plaintiffs, as it is not clear whether, inter alia, the 2011 law prohibits the JWJ transfer station from accepting construction and demolition ("C&D") debris from within the County. Specifically, plaintiffs allege that the 2011 law is unconstitutionally vague because the following issues are unclear: (1) whether C&D material is recyclable material under the 2011 law; (2) whether a transfer station is a facility which provides for the recovery of recycled materials; (3) whether recyclable materials may be deposited in a transfer station; (4) whether C&D debris is solid waste; and (5) plaintiffs ask "what is the meaning of Section 4(10) of the 2011 law"?

Plaintiffs argue that if the County's interpretation of the 2011 law stands, enforcement of that law will deprive plaintiffs of all economically beneficial use of the permit they hold to operate a transfer station. In addition, plaintiffs allege

that enforcement of the 2011 law will deny Jeffrey Holbrook the opportunity to engage in his chosen occupation or business, and will cause plaintiffs to be subjected to denial of their constitutional rights. Plaintiffs also allege unequal treatment by the County in that the County has authorized a company in direct competition with the plaintiffs, Syracuse Haulers Waste Removal, Inc. ("Syracuse Haulers"), to deliver C&D debris originating in Oswego County to a C&D transfer station operated by Syracuse Haulers in neighboring Onondaga County.

Plaintiffs' permit is governed by the NYS Department of Environmental Conservation ("DEC") regulations set forth in 6 NYCRR Part 360-11. The regulations contain explicit requirements as to the application for a permit (the "Part 360 permit") to operate a transfer station. Plaintiffs' Part 360 permit, issued by the DEC circa 1996, modified in May 2003, and renewed in August 2008, authorizes the JWJ transfer station to accept up to a daily maximum total of 65 ton of C&D debris and municipal solid waste (60 ton per day average) once a roofed structure is built. Until that time, the Part 360 permit authorizes the JWJ transfer station to accept a 60 ton per day maximum (40 ton per day average) of C&D waste. The JWJ transfer station is the only privately owned C&D transfer station in Oswego County, and it has historically accepted waste that is generated both in and out of the county.

## II. Discussion

As stated above, the court does not need to consider the TRO issue because the County has agreed to abstain from enforcement until the court decides on the merits whether a preliminary injunction will be entered. However, because the standard for granting a temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Procedure are identical, the court sets forth the rules governing both.

### A. Rule 65: Injunctions and Restraining Orders

Temporary Restraining Orders are governed by Rule 65 of the Federal Rules of Civil Procedure ("FRCP") which states in pertinent part that

> The court may issue a preliminary injunction only on notice to the adverse party.
>
> Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

Federal Rules of Civil Procedure Rule 65(a)(1-2) (West 2012).

"The standard for granting a temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Procedure are identical. It is

well established that in order to obtain such relief, the movant must show: '(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir.1979). "Whether injunctive relief should issue or not 'rests in the sound discretion of the district court which, absent abuse of discretion, will not be disturbed on appeal.'" Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir.1990) (quoting Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 755, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986)).

The Second Circuit has deemed the threshold showing of "irreparable harm" to be of particular significance under Rule 65, regardless of the strength of the movant's case on the merits. See, e.g., Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir.1990). Accordingly, "[i]rreparable harm must be shown by the moving party to be imminent, not remote or speculative, and the alleged injury must be one incapable of being fully remedied by monetary damages." Reuters, 903 F.2d at 907. A temporary restraining order, like a preliminary injunction, is an extraordinary remedy that will not be granted lightly. See Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 273 (2d Cir.1986) (holding that a

preliminary injunction is "one of the most drastic tools in the arsenal of judicial remedies"). In Dunkin' Donuts, Inc., 1998 WL 160823, (N.D.N.Y. 1998) the court relied on Tom Doherty Associates, Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 37 (2d Cir. 1995) for the premise that "irreparable harm exists where a party is threatened with the loss of an ongoing business." However, "[w]here there is a 'deprivation of a constitutional right, no separate showing of irreparable harm is necessary.'" Statharos v. New York City Taxi and Limousine Commission, 198 F.3d 317, 322 (2d Cir. 1999).

B. Analysis

In the case at bar, plaintiffs allege an unconstitutional, uncompensated regulatory taking. "The United States Supreme Court has described three categories of regulatory takings: (I) where government requires an owner to suffer a permanent physical invasion of [his] property; (ii) where regulations completely deprive an owner of all economically beneficial use of [his] property"; and (iii) where character of the governmental action ... amounts to a physical invasion." Alexandre v. New York Taxi and Limousine Commission, 2007 WL 2826952 at * 8, n. 11 (S.D.N.Y. 2007) (citing Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538-39 (2005) (internal citations and quotations omitted). Here, plaintiffs argue that enforcement of the 2011law will result in Holbrook being deprived of all

economically beneficial use of the JWJ transfer station permit. Because plaintiffs are alleging a constitutional violation, they do not need to prove irreparable harm at this stage of the proceedings.[1] The court will focus instead on plaintiffs' likelihood of success on the merits, or whether plaintiffs raise "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d at 72.

The court now reiterates the stated law in its previous MDO on the issue of the TRO and preliminary injunction in this action. In United Hauler's Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 127 S. Ct. 1786 (2007), the Supreme Court held that county flow control ordinances that favored a state-created public benefit corporation, by requiring businesses hauling waste in certain counties to bring waste exclusively to facilities owned and operated by this public benefit corporation (**but that treated every private business, whether in-state or out-of-state, in exactly the same way**) [emphasis added], did not discriminate against interstate commerce in violation of the "dormant" aspect of the Commerce Clause. Consequently, this decision served

[1] Although the plaintiffs do not need to prove irreparable harm, the court nonetheless finds irreparable harm, as outlined in detail below.

to "give the [c]ounties a convenient and effective way to finance their integrated package of waste-disposal services." Id. at 346.

At issue here is whether enforcement of the 2011 law, which the County interprets as forbidding C&D debris generated within the boundaries of the County from being delivered to the plaintiff's transfer station, deprives plaintiffs of all economically beneficial use of the JWJ transfer station permit, denies Jeffrey Holbrook the opportunity to engage in his chosen occupation or business, and/or will cause plaintiffs to be subjected to denial of their constitutional rights.

The court takes note of the dissent in United Haulers, written by Justice Alito and joined by Justices Stevens and Kennedy, which took exception to the majority decision, viewing it as contrary to decades of case law precedent, in which "[t]he dormant Commerce Clause has long been understood to prohibit the kind of discriminatory legislation upheld by the Court in this case." Id. at 370. Justice Alito compares the United Haulers decision to the conflicting decision the Court reached in C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994) ("Carbone"). In Carbone, the Court invalidated Clarkstown's flow control ordinance "because any legitimate local interests served by the ordinance could be accomplished through nondiscriminatory means." United Haulers, 550 U.S. at 357. This court considers the decision in Carbone in its evaluation of the case at

bar because there is now a Carbone II wending its way through the federal court. In C & A Carbone, Inc. v. County of Rockland, 2010 WL 3825740 (S.D.N.Y. 2010) ("Carbone II"), plaintiff Carbone stated that before Rockland County enacted its flow control law in 2008, Carbone received roughly one-third of its inbound waste from Rockland County. "By directing this waste to Carbone's competitor, Defendants have ... effectively 'legislated Carbone out of business,'" Carbone proffered that the defendants enacted the law for that purpose. 2010 WL 3825740 at * 3; fn 6. The district court held that "[w]hile Carbone does not have a right to compete free from flow control laws, it does have the right to be treated the same as every other private business with respect to flow control laws." Id. at * 7 (citing United Haulers for the premise that "the flow control laws at issue did not discriminate against interstate commerce because they 'benefit a clearly public facility, while treating all private companies *exactly the same*'" (emphasis in original)).

Here, as in Carbone II, plaintiffs assert that the County is overtly trying to put them out of business by preferring an out-of-county competitor, and in addition to the claims brought in their original complaint, they now complain of an equal protection violation, i.e., selective enforcement of the 2011 law by the County, in violation of the Constitution, and, the court notes, contrary to the

holding in United Haulers. The court also finds, based on Holbrook's affidavit and the history of this case, that the County's enforcement of the 2011 law is imminent if a preliminary injunction does not enter, and could potentially result in the loss of plaintiffs' business.

Upon finding the 2008 flow control law unconstitutionally vague, the court ordered the County to revisit its flow control law and clarify the language, to allow plaintiffs and potential similarly situated parties to know exactly what was expected and required of them to conform to the waste management laws of the County. The court, perhaps too optimistically, expected the parties to confer in good faith to reach a consensus and arrive at a law that would be clear, unambiguous, and would avoid the need to reopen this case. That did not happen. Plaintiffs assert that they requested a copy of the proposed law on December 1, 2011. On December 15, 2011, before the plaintiffs had an opportunity to view the proposed law, the County enacted the 2011 law, which became effective on January 1, 2012. On December 27, 2011, at 3:26 p.m., the clerk of the Oswego County Legislature emailed a copy of the law to counsel for the plaintiffs.

In the revised law, the County reversed its position taken in the 2008 flow control law whereby C&D materials were permitted to be delivered to the JWJ transfer site. The 2011 law, based on the County's interpretation of same, now

forbids C&D materials to be delivered to the JWJ transfer site. Although plaintiffs point to several sections of the law that refutes this interpretation, the County's stance on this issue is that despite plaintiffs holding a valid NYS DEC that allows them to accept C&D materials from both inside and outside the County, the County's 2011 law forbids delivery of C&D materials generated inside Oswego County to JWJ's transfer station.

Plaintiffs counter that the 2011 law is unconstitutionally vague, and that its enforcement will condone the county's unequal treatment of plaintiffs and others similarly situated, deprive Holbrook of his constitutional right to engage in his chosen business or profession, and result in an unconstitutional taking of Holbrook's property without just compensation. The court finds that plaintiffs, in their second amended complaint and in their application for TRO and PI, adequately plead a likelihood of success on the merits of their equal protection claim and that the 2011 law is, again, unconstitutionally vague. Although, as stated supra, a separate showing of irreparable harm is not needed when deprivation of a constitutional right is alleged, the court finds that plaintiffs have adequately pleaded irreparable harm where, as here, a party is threatened with the loss of an ongoing business. See Tom Doherty Associates, Inc. v. Saban Entertainment, Inc., 60 F.3d at 37. Accordingly, the court enters a preliminary

injunction in this matter, enjoining enforcement of the 2011 law until such time as this case is decided on its merits.

## III. Conclusion

For the reasons set forth supra, that portion of plaintiffs' motion (Doc. No. 101) requesting a temporary restraining order is DENIED as moot. Plaintiff's motion for preliminary injunction is hereby GRANTED.

SO ORDERED.

April 13, 2012

Neal P. McCurn
Senior U.S. District Judge