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LEGISLATIVE IMMUNITY OF LOCAL Elected OFFICIALS

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The Law Office of Douglas H. Zamelis
June 30, 2011

Local governments in New York throughout the Marcellus Shale play are responding to the prospect of large scale natural gas development within their corporate limits and proponents of the natural gas industry predictably have opposed the adoption of local zoning and police power laws intended to regulate the exploration, development, and production of natural gas facilities. As more and more municipal governments exercise the broad authority granted to them by the New York State Constitution, the Statute of Local Governments, the Municipal Home Rule Law, and the Town Law, proponents of the natural gas industry have issued threats that local legislators who vote to adopt local laws to regulate natural gas facilities could be subject to personal liability in lawsuits brought by natural gas lessees and lessors. Such threats find no support in the law, as it is well established that federal, state, regional, and local legislators are entitled to absolute immunity from civil liability for their legitimate legislative activities.

A proceeding pursuant to Article 78 of the Civil Practice Law and Rules is the proper vehicle for seeking review of the procedures followed in the adoption of a statute, law, or ordinance. Save the Pine Bush v. City of Albany, 70 NY2d 193, 202, (1987); see also, Highland Hall Apartments, LLC v. New York State Div. of Housing and Community Renewal, 66 AD3d 678, 681, (2nd Dept. 2009)). However, where the substance of the law, "its wisdom and merit" (Voelckers v. Guelli, 58 N.Y.2d 170, 177, (1983)), or its constitutionality is challenged, then the proper procedure is to commence an action for a declaratory
Any action or special proceeding for or against a town, ... or to enforce any liability created, or duly enjoined upon it, or upon any of its officers or agents for which it is liable, or to recover damages for any injury to any property or rights for which it is liable, shall be in the name of the town. The town board of any town may authorize and direct any town officer or officers to institute, defend or appear, in any action or legal proceeding, in the name of the town, as in its judgment may be necessary, for the benefit or protection of the town, in any of its rights or property. It shall be the duty of any officer or officers so authorized and directed to institute said action or legal proceeding or to defend or appear therein, and the reasonable and necessary expense of such action or proceeding, or defense or appearance shall be a town charge.

As discussed herein, local elected representatives have no personal liability in such proceedings and actions, nor do they do place their personal and family fortune at risk for the defense of such proceedings and actions when they take office, for if they did, the wisdom of any person seeking election to local office would have to be seriously questioned.

Beyond the Article 78 proceeding and declaratory judgment action is the specter of a civil rights action brought pursuant to 42 U.S.C. § 1983. In the context of land use, § 1983 provides protection against municipal actions which violate a landowner's rights under the Just Compensation Clause of the Fifth Amendment or the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Frequently cited in this context is the 1996 decision of New York's highest court, the Court of Appeals, where the Town of Orangetown's liability was affirmed for violating a developer's constitutionally protected property rights by revoking approvals after the developer had invested considerable sums and acquired "vested rights" by making substantial alterations to the project site in reliance on such approvals. Town of Orangetown v. Magee, 88 N.Y.2d 41 (1996). It should be noted that it was the Town of Orangetown that was held liable not the individual elected representatives, and in that case the approvals were revoked for political purposes after the developer had successfully acquired vested rights.
Forty U.S.C. § 1983 provides in pertinent part that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

While municipal governments are clearly subject to potential liability under § 1983, individual local legislators, such as Town Board members, are not because they are protected by absolute legislative immunity for their legitimate legislative acts.

The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law. This privilege "has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries" and was "taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." Tenney v. Brandhove, 341 U.S. 367, 372 (1951). The United States Constitution, the constitutions of many states, and the common law thus protected legislators from liability for their legislative activities. See U.S. Const., Art. I, § 6; Tenney, supra, at 372-375. Recognizing this venerable tradition, the United States Supreme Court first held that state and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities. Tenney, supra (state legislators); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (regional legislators).

In 1998 the United States Supreme Court decided Bogan v. Scott-Harris, 523 U.S. 44 (1998). In Bogan, the Supreme Court reviewed the long standing common law, the legislative history of § 1983, and its previous decisions concerning absolute legislative immunity. In an opinion by Justice Thomas, the Supreme Court determined that:

Because the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are likewise absolutely immune from suit under § 1983 for their legislative activities (emphasis added). Bogan at 49.

Justice Thomas elaborated that "Absolute immunity for local legislators under § 1983 finds support not only in history, but also in reason" citing Tenney at 376, and that:
The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. See Spallone v. United States, 493 U.S. 265, 279 (1990) (noting, in the context of addressing local legislative action, that "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process"); see also Kilbourn v. Thompson, 103 U.S., at 201-204 (federal legislators); Tenney, supra, at 377 (state legislators); Lake Country Estates, 440 U.S., at 405 (regional legislators).

Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. See Tenney, supra, at 377 (citing "the cost and inconvenience and distractions of a trial"). And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability. See Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982). Bogan at 52.

The United States Supreme Court's decision in Bogan finds support for legislative immunity specifically in New York law when it references that:

New York's highest court, for example, held that municipal aldermen were immune from suit for their discretionary decisions. Wilson v. New York, 1 Denio 595 (1845). The court explained that when a local legislator exercises discretionary powers, he is "exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done." Id., at 599. These principles, according to the court, were "too familiar and well settled to require illustration or authority." Id., at 599-600. Bogan at 50.

Both the United States Supreme Court and New York Court of Appeals have confirmed that the principle of legislative immunity protects local elected officials from personal liability in suits for damages for deprivation of constitutionally protected rights under the color of law when acting within the sphere of legitimate legislative activity. New York municipalities are statutorily authorized to adopt zoning regulations and local laws for the protection of health, safety, and public welfare, and the adoption of such local laws for such purposes is undoubtedly within the sphere of legitimate legislative activity. Therefore, municipal officials who vote on whether to adopt such local laws, including laws regulating natural gas facilities, enjoy absolute immunity from personal liability under 42 U.S.C. § 1983.
TO: MICHAEL WRIGHT, ESQ.
    VICTOR MEYERS, ESQ.
    DEBORAH GOLDBERG, ESQ.
    JOHN HENRY, ESQ.

RE: COOPERSTOWN HOLSTEIN CORP. V. TOWN OF MIDDLEFIELD
    INDEX NO. 011-0930

DATE: FEBRUARY 24, 2012

Enclosed herein please find a copy of the Decision and Order with respect to the above-entitled action.

Please be advised that the original Decision and Order has been mailed to the Otsego County Supreme Court Clerk for filing this date.

Thank you.

Encl.
STATE OF NEW YORK
COUNTY OF OTSEGO         SUPREME COURT

Present: Hon. Donald F. Cerio, Jr.
          Acting Supreme Court Justice

COOPERSTOWN HOLSTEIN CORPORATION, Plaintiff,

v.

TOWN OF MIDDLEFIELD, Defendant.

DECISION AND ORDER

Index No. 2011-0930

This matter comes on before the Court upon Plaintiff's Notice of Motion for summary judgment dated October 28, 2011, seeking a declaration of this court that Defendant Town of Middlefield’s Zoning Law pertaining to Gas, Oil, or Solution Drilling or Mining and the ban on Gas, Oil or Solution Drilling or Mining within the Town of Middlefield is void as being preempted by New York State Environmental Conservation Law §23-0303. Defendant submitted a Notice of Cross-Motion dated December 5, 2011, opposing the relief requested by Plaintiff and seeking dismissal of Plaintiff’s complaint.

On December 13, 2011, the parties, including counsel on behalf of Amici, appeared in Madison County Supreme Court and were heard.

By Decision and Order of this court dated January 11, 2012, Amici Curiae application of EARTHJUSTICE, on behalf of Brewery Ommegang; Village of Cooperstown; Otsego 2000, Inc.; Natural Resources Defense Council, Inc.; Theodore Gordon Flyfishers, Inc.; Riverkeeper, Inc., and; Catskill Mountainkeeper, and that of the Town of Ulysses, were granted.

Supplemental submissions by and on behalf of Plaintiff, Defendant and EARTHJUSTICE were subsequently received by this court on or about January 20, 2012, in conformity with this Court’s earlier directive with respect thereto.

The following reflects the Decision and Order of this Court:

Brief History

The Town of Middlefield, Otsego County, New York, enacted a zoning law on June 14, 2011, which became effective on June 28, 2011, entitled “A Local Law Repealing the Town of Middlefield Zoning Ordinance and Adopting the Town of Middlefield Zoning Law.”
(Defendant’s Notice of Cross-Motion, Exhibit 1). Article V of the Zoning Law entitled “General Regulations Applying to All Districts” and in particular, Subsection A entitled “Prohibited Uses,” as is relevant here, specifically states that, “Heavy industry and all oil, gas or solution mining and drilling are prohibited uses...” Zoning Law Article II, Subsections B(7) and B(8) define the terms “Heavy Industry” and “Gas, Oil, or Solution Drilling or Mining,” as are relevant here, as follows:

Gas, Oil, or Solution Drilling or Mining: The process of exploration and drilling through wells or subsurface excavations for oil or gas, and extraction, production, transportation, purchase, processing, and storage of oil or gas, including, but not limited to the following:

i. A new well and the surrounding well site, built and operated to produce oil or gas, including auxiliary equipment required for production (separators, dehydrators, pumping units, tank batteries, tanks, metering stations, and other related equipment;

ii. Any equipment involved in the re-working of an existing well;

iii. A water or fluid injection station(s) including associated facilities;

iv. A storage or construction staging yard associated with an oil or gas facility;

v. Gas pipes, water lines, or other gathering systems and components including but not limited to drip station, vent station, chemical injection station, valve boxes.

Heavy Industry: a use characteristically employing some of, but not limited to the following: smokestacks, tanks, distillation or reaction columns, chemical processing or storage equipment, scrubbing towers, waste-treatment or storage lagoons, reserve pits, derricks or rigs, whether temporary or permanent. Heavy industry has the potential for large-scale environmental pollution when equipment malfunction or human error occurs. Examples of industry include, but are not limited to: chemical manufacturing, drilling of oil and gas wells, oil coal mining, steel manufacturing...

Therefore, it is evident that defendant has, by the enactment of the June 2011 zoning law, effectively banned oil and gas drilling within the geographical borders of the township.

Plaintiff had previously executed two (2) oil and gas leases with Elanco Land Services, Inc., on February 22, 2007, and March 8, 2007, with respect to property owned by plaintiff situate in the Town of Middlefield, Otsego County, New York. Plaintiff has asserted that the purpose of such leases will be frustrated by the enforcement of the above-referenced zoning law as enacted in June 2011 by the defendant and seeks to declare such law void. (Huntington Affidavit dated October 26, 2011, ¶¶ 6-11).

Plaintiff seeks relief upon the ground that New York State Environmental Conservation Law
§23-0303(2) (ECL) preempts any regulations emanating from local authorities with respect to the regulation of gas, oil and solution drilling or mining, and that defendant's zoning law is thereby preempted by exclusive state jurisdiction. The defendant, on the other hand, asserts that no preemption has occurred by operation of ECL §23-0303(2), that the Town of Middlefield's zoning law is valid and that oil and gas drilling is prohibited within the township pursuant to law.

Plaintiff's reliance upon New York State ECL §23-0303(2) is premised upon the supersession language contained within the statute, itself. This particular statute, as enacted in 1981 (L.1981, c. 846), reads as follows:

The provisions of this article shall supercede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries, but shall not supercede local government jurisdiction over local roads or the rights of local governments under the real property law. (Emphasis added).

Thus, the plain language of the zoning law as enacted by defendant and the above-referenced provision of the Environmental Conservation Law frame the question of law to be addressed by this court. Specifically, did the State of New York, by the enactment of ECL §23-0303(2), prohibit local municipalities from enacting legislation which may impact upon the oil, gas and solution drilling or mining industries other than that pertaining to local roads and the municipalities' rights under the real property law? This Court finds the answer to this question to be in the negative.

Legal Analysis

In assessing the interplay between local regulation and the extent of state preemption as contained within ECL §23-0303(2) this court must look to the legislative intent and the legislative history of the particular enactment to discern the scope of such preemption. With respect to preemption the first issue to be addressed is the identification of the manner by which preemption is manifested, if at all, by the statutory language employed by the enabling legislation. More precisely, is preemption manifested by expressed or implied statutory language or, rather, by operation of conflict preemption. Here, it is clear to this court that the legislature chose to expressly address preemption within the body of the statute itself. The question which next arises, then, is to what extent does preemption apply.

In considering this question this court has examined the legislative history of, first, Article 3-A of the Conservation Law and, second, the successor provisions of Article 23 of the Environmental Conservation Law. Such an examination of the legislative history is both appropriate and necessary in determining what the intent of the legislation was at the time of the enactment of ECL §23-0303(2), nearly twenty years after the enactment of the original legislation in 1963, as well as what the “natural and obvious sense” of the language means. (See McKinney's Cons Laws of NY, Book 1, Statutes §91-94).
1963 Legislation

The policy of the state, at the time of original enactment of Article 3-A of the Conservation Law in 1963, was set forth in the enacted legislation as follows:

§70. Declaration of policy. It is hereby declared to be in the public interest to foster, encourage and promote the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected, and to provide in similar fashion for the underground storage of gas. (L.1963, Ch. 959).

The term “waste” as set forth in §70 was defined in §71(1) as follows:

“Waste” means (a) physical waste, as that term is generally understood in the oil and gas industry, (b) the inefficient, excessive or improper use of, or the unnecessary dissipation of reservoir energy, (c) the locating, spacing, drilling, equipping, operating, or producing of any oil or gas well or wells in a manner which causes or tends to cause reduction in the quality of oil or gas ultimately recoverable from a pool under prudent and proper operations, or which causes or tends to cause unnecessary or excessive surface loss or destruction of oil or gas, (d) the inefficient storing of oil or gas, and (e) the flaring of gas produced from an oil or condensate well after the conservation department has found that the utilization thereof, on terms that are just and reasonable, is, or will be within a reasonable time, economically feasible.

The thrust of the above provisions of Article 3-A of the Conservation Law of 1963 have remained, in effect, unchanged throughout the years and are presently found at ECL §23-0301 and §23-0101(20), respectively.

The ensuing provisions of Article 3-A, as enacted in 1963, fail to specifically address therein any land use issues which would otherwise be the subject of a local municipality’s zoning authority as an exercise of its police powers. This court’s review of this legislation finds that the various provisions of Article 3-A focused the conservation department’s efforts on matters such as spacing units, integration of oil and gas pools and fields, oil and gas leases as well as the plugging of old wells, which are all regulatory in nature.

Of the various documents comprising the legislative history of the 1963 enactments, as submitted to this court by counsel, is the April 15, 1963, memorandum from the Conservation Commissioner in support of this legislation. This legislation would make the Conservation Department “responsible for the administration of oil and gas operations in the state” and, in particular, the “regulation thereof on public and private lands.” The April 23, 1963, “REPORT
TO THE GOVERNOR ON LEGISLATION" from the Department of Audit and Control, while taking no position with respect to passage of the legislation, noted in the "summary" that the legislation would pertain to "the conservation of oil and gas with the regulation of oil and gas on both public and private lands." The "summary" further noted that "[t]he bill prohibits waste of oil or gas, very broadly defining the term 'waste.' Notice to the department is required prior to commencing drilling or storage at existing fields" and, under certain circumstances, the need for a permit. The "summary" also addressed the department's powers pertaining to "regulation, investigation and supervision. Additional regulatory provisions are granted with respect to new oil or natural gas pools or field..." This correspondence identifies both the state's declared policy and the permitting process and regulations pertaining to extraction of gas and oil.

Of further importance to this court's interpretation is the "Memorandum in Support" of the original 1963 legislation, authored by Edgar S. Nelson, Executive Director, New York State Petroleum Council, dated April 24, 1963. Mr. Nelson, while addressing the industry's efforts to prepare a "comprehensive geological and geophysical study of [New York State] lands, particularly the deeper horizons" with respect to oil and gas drilling, expressed his support for the legislation as such would provide the Conservation Department "regulatory powers pertaining to the determination and establishment of proper well spacing units and well locations, regulation of the drilling and plugging of wells, furnishing of well drilling information to the department, approval of voluntary and/or compulsory integration and utilization in new oil and gas pools and fields, under prescribed conditions... The Department is empowered to make an early determination as to all the lands believed underlaid by a pool and shall fix the proper size drilling units and well locations. This uniform distribution of wells will permit a sooner definition of the limits and characteristics of the pool or field. It will also permit the Department to determine earlier the proper method of operation. In addition, the earlier widespread development of an entire pool permits all owners to share in the production from the pool at an earlier date and will bring about a more equitable distribution of oil and gas." Mr. Nelson's support of the legislation was premised upon the state's oversight of the industry's activities based upon geologic and geophysical assessments of the subsurface existence of oil and gas pools and fields so as to maximize utilization of these natural resources and to prevent waste from the inefficient and ineffective installation of wells impacting such pools or fields. The thrust was to establish a statewide management system for the utilization of these resources so as to encourage oil and gas drilling in the state in a uniform and productive fashion.

The posture of Mr. Nelson was consistent with that of H. Ames Richards, Jr., Vice President of Fremont Oil Corporation, evidenced in his letter dated January 18, 1963, to Senator Elisha T. Barrett. The attached draft "Legislative Brief" recognized that much of the proposed New York State legislation was similar to the recommendations made by the Interstate Oil Compact Commission, of which New York State was a member. Of significance to this court was Mr. Richards' recognition that such proposed legislation would "authorize the Conservation Department to provide for orderly drilling in new fields in accordance with sound geological and engineering principles. To this end, the department is authorized to establish well spacing units of a size and shape that can be economically and efficiently drained by one well." Such
expression serves to confirm the state’s interest in developing this particular resource utilizing
“sound geological and engineering principles” and “orderly drilling in new fields” thus
addressing the manner and method by which such drilling should occur so as to avoid wasting
these natural resources.

1978 Legislation

The 1978 amendments to Article 23, and in particular §23-0301 thereof, replaced the phrase
“foster, encourage and promote” as contained in the original 1963 version with the word
“regulate.” This same legislation also amended Energy Law §3-101(5) to “foster, encourage and
promote the prudent development and wise use of all indigenous state energy resources
including, but not limited to, on-shore oil and natural gas, off-shore oil and natural gas, natural
gas from Devonian shale formations, small head hydro, wood, solar, wind, solid waste, energy
from biomass, fuel cells and cogeneration...,” thus statutorily and departmentally dividing these
two disparate responsibilities. These amendments effectively transferred the promotion of
energy to the Energy Office while concomitantly continuing regulation of the oil, gas and
solution mining industry with the Department of Environmental Conservation.

The historical commentary coexistent with the amendments demonstrates the legislative intent to
permit the state to “conduct a coordinated long range campaign for developing the State’s
indigenous State resources and to insure effective regulation of gas and oil development and
production.” (Enclosed “10-Day Bill Budget Report on Bills” as provided by Senator Martin S.
Auer to Counsel to the Governor, Hon. Judah Gribetz, dated June 7, 1978). Another enclosure of
Senator Auer’s June 7, 1978, correspondence was from the Energy Office which, in
recommending approval of the legislation, stated that:

Responsibility for promoting energy resource development in New York State is shared
by many agencies, including DEC which also has regulatory responsibilities over those
same resources. Necessary development activities have proceeded in a haphazard fashion,
if at all. The development of potentially significant and economic state energy resources –
Lake Erie natural gas; on-shore oil and gas; Atlantic natural gas and oil; natural gas from
Devonian shale formations; small head hydro; wood; solar; wind; solid waste; energy
from biomass; cogeneration – would benefit from a focused approach given a high
priority by State government. Further, a centralized development function would aid the
State in joining federal, regional and local interests in joint development functions. (June

Thus, the amendment recognized the need to centralize promotion of the state’s energy resources
under the authority of a single administrative body, i.e., the Energy Office, while streamlining the
regulatory function of the Department of Environmental Conservation. However, no reference
was made in the legislation, itself, nor any correspondence in support of the legislation,
pertaining to the impact or preemption by the state of local municipal land use management nor
had such reference been made since the enactment of the original legislation in 1963.
1981 Legislation

In 1981 the State of New York amended various provisions of the state finance law, the environmental conservation law, the real property tax law, the agriculture and markets law and the tax law. The legislative Memorandum supporting the ACT (S.6455-B/A.8475-B) states, in relevant part, that the purpose of the amendment is:

[Relation to promoting the development of oil and gas resources in New York and regulating the activity of the industry; repealing provisions of the environmental conservation law relating thereto and making appropriations to the department of environmental conservation and the state board of equalization and assessment for carrying out certain provisions of this act.

PURPOSE OF THE BILL:

To promote the growth and proper regulation of oil and natural gas resources in New York State by:

a) establishing new fees to fund additional regulatory personnel for the industry and to provide a fund to pay for past and future problems which resulted by the industry's activities.
b) establish a uniform method of real property taxation for oil and gas lands.
c) clarify the impact of oil and natural gas development for farmers who have committed their lands to Agricultural District Treatment.
d) create an advisory board to advise the Commission on oil and natural gas matters.

JUSTIFICATION

Due to the energy crisis, the Governor and Legislature have made it clear that it is important to promote the development of domestic energy supplied, including NYS's resources of oil and natural gas. The recent growth of drilling in the State has exceeded the capacity of DEC to effectively regulate and service the industry. The industry will benefit from the expeditious handling of permits and improved regulation and it is therefore equitable that the industry provide increased support for the services it requires. (Emphasis added.

It was at this point in the history of this legislation that the supersession clause as contained within ECL §23-0303(2) was enacted. As is evident from a reading of the legislative Memorandum which acknowledged that promotion and regulation were considered separate and distinct activities (divided between the Energy Office and the Department of Environmental Conservation), the regulation component, itself, as set forth in ECL §23-0303(2), specifically dealt with the activity of the industry, i.e., method and manner of drilling and the like, rather than
the broader component of the development of this natural resource.

The Governor's approval of the aforesaid ACT, as set forth in his "Memorandum filed with Senate Bill Number 6455-B," confirms that the amendment would provide Department of Environmental Conservation with funding for its "expanded regulatory program" as well as enhanced civil and criminal penalties. The Memorandum then addressed the "possible adverse environmental impact of oil and gas development" and the fund's ability to address such issues as "the abatement of dangerous oil and gas-related accidents." There is no language contained within the legislative history which serves to support plaintiff's claim that the supersession clause enacted was intended to impact, let alone diminish or eliminate, a local municipality's right to enact legislation pertaining to land use.

Therefore, this court finds no support within the legislative history leading up to and including the 1981 amendment of the ECL as it relates to the supersession clause which would support plaintiff's position in this action. Neither the plain reading of the statutory language nor the history of ECL §23-08303(2) would lead this court to conclude that the phrase "this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries" was intended by the Legislature to abrogate the constitutional and statutory authority vested in local municipalities to enact legislation affecting land use. (New York State Constitution, Article IX, §2(c)(ii)(10); Municipal Home Rule Law §§10(1)(ii)(a), 11 and 12; Statute of Local Governments §§10(6) and (7), and; Town Law §261). Rather, the "natural and most obvious sense" of the word "regulation" in this statute, taken in conjunction with the legislative history of this body of law as well as its definition as "an authoritative rule dealing with details or procedure" (Merriam-Webster Dictionary), convincingly demonstrates that the legislature's intention was to insure state-wide standards to be enacted by the Department of Environmental Conservation as it related to the manner and method to be employed with respect to oil, gas and solution drilling or mining, and to insure proper state-wide oversight of uniformity with a view towards maximizing utilization of this particular resource while minimizing waste. Clearly, the state's interests may be harmonized with the home rule of local municipalities in their determination of where oil, gas and solution drilling or mining may occur. The state maintains control over the "how" of such procedures while the municipalities maintain control over the "where" of such exploration.  

Further, decisional law of this state also supports the finding that municipalities are not preempted by ECL §23-0303(2) from enacting local zoning ordinances which may, and in some circumstances such as the instant zoning law, do, prohibit oil, gas and solution drilling or mining. In the Matter of Frew Run Gravel Products, Inc., v. Town of Carroll, 71 NY2d 126, 1987, the Court of Appeals, while addressing the breadth of the supersession clause of the Mining Land

Reclamation Law (MLRL), ECL §23-2703(2), found that the zoning regulations of the Town of Carroll did not frustrate the state’s “purposes of the statute...to foster a healthy, growing mining industry’ and to ‘aid in assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition.’” (Id. at 132). The Court of Appeals found that the supersession clause contained therein (which is strikingly similar to that contained in ECL §23-0303(2)) preempted the local municipality from establishing regulations pertaining to the methods of mining as such regulations were exclusively the province of the state while at the same time permitting the municipality, by exercise of its constitutional and statutory authority, to “regulate land use generally.” (Id at 131). Here, no less can be said about ECL §23-0303(2) as the preemption does not apply to local regulations addressing land use which may, at most, “incidentally” impact upon the “activities” of the industry of oil, gas and solution drilling or mining.

The Court of Appeals decision In the Matter of Gernatt Asphalt Products, Inc., v. Town of Sardinia, 87 NY2d 668,681-682 (1996), confirmed the Frew Run holding that the supersession clause of the MLRL drew a distinction between the manner and method of mining and local land use regulations:

Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the type of regulatory provisions the Legislature foresaw as preempted by Mind Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities. In Frew Run, we concluded that nothing in the plain language, statutory scheme, or legislative purpose of the Mine Land Reclamation Law suggested that its reach “was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands” and in that in the absence of a clear expression of legislative intent to preempt local control over land use, the statue could not be read as preempting local zoning authority. (Internal citations omitted).  

Similarly, here, the defendant’s Zoning Law is an exercise of the municipality’s constitutional and statutory authority to enact land use regulations even if such may have an incidental impact upon the oil, gas and solution drilling or mining industry. The Zoning Law does not conflict with the state’s interest in establishing uniform policies and procedures for the manner and method of the industry or does it impede implementation of the state’s declared policy with respect to these resources.

A review of the various provisions contained within Article 23 of the Environmental Conservation Law pertaining to OGSML clearly demonstrates the state’s interest in regulating the “activities,” i.e., the manner and method, of the industry. For example, ECL §23-501 entitled

2Significantly, Gernatt Asphalt also stands for the proposition that a municipality may ban a particular activity, such as mining, in furtherance of its land use authority. (Id at 683).
"Well permits" requires a well permit to be issued to allow the applicant to "drill, deepen, plug back or convert a well for production of oil or gas." (ECL §23-501(1)(b)(3). This section also pertains to "statewide spacing" for gas wells and sets forth a comprehensive listing of depths of drilling and sizes for various pools at various times. (ECL §23-501(1)(b)(1). ECL §23-0503 entitled "Well spacing in oil and natural gas pools and fields" provides that a permit shall be issued by the DEC "conforms to statewide spacing." ECL §23-0901 addresses "compulsory integration and unitization in oil and natural gas pools and fields" which, as with the other examples set forth above, pertain to geologic and geophysical aspects of the activities or manner and method of oil, gas and solution drilling or mining. No specific nor inferential reference is made within these various provisions pertaining to land use legislation being preempted by these provisions. Therefore, as the Gernatt Asphalt Court found with respect to the MLRL supersession clause, the OGSML supersession clause preempts local regulation solely and exclusively as to the method and manner of oil, gas and solution mining or drilling, but does not preempt local land use control. Such distinct interests are easily harmonize as the local land use controls do not frustrate the state's interest in regulating the method and manner of such industry activities and therefore do not interfere with the state's declared policy as set forth at ECL §23-0301.

Therefore, it is evident that the supersession clause contained with ECL §23-0303(2) does not serve to preempt a local municipality such as defendant from enacting land use regulation within the confines of its geographical jurisdiction and, as such, local municipalities are permitted to permit or prohibit oil, gas and solution mining or drilling in conformity with such constitutional and statutory authority.

Conclusion

Therefore, upon the facts and circumstances herein, and relevant statutory and decisional law of this state, it is

ORDERED, that plaintiff's motion for summary judgment declaring the Town of Middlefield Zoning Law as enacted on June 14, 2011, to be void is DENIED, and it is

ORDERED, that defendant's cross-motion seeking to dismiss the plaintiff's complaint is GRANTED.

Enter.

DATED: February 24, 2012
Wampsville, New York

Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice
County of Otsego
TO: Michael Wright, Esq., Attorney for Plaintiff
    Victor Meyers, Esq., Attorney for Defendant
    Deborah Goldberg, Esq., Attorney for Amici EARTHJUSTICE
    John Henry, Esq., Attorney for Amici Town of Ulysses
    Christy Bass, Chief Court Clerk Otsego County Supreme Court
February 21, 2012

Paula M. Nichols
Chief Court Clerk
Tompkins County Supreme Courts
P.O. Box 70
Ithaca, New York 14850

RE: ANSCHUTZ EXPLORATION CORPORATION v. TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD
Tompkins County Index No. 2011-0902; RJI No. 2011-0499-M

Dear Ms. Nichols:

Enclosed herewith please find, for filing and entry, the Court’s Decision, Order, and Judgment in regard to the above-referenced matter.

Very truly yours,

[Signature]

HON. PHILLIP R. RUMSEY
Supreme Court Justice

PRR:sh
cc: Thomas S. West, Esq. (Sent via email: twest@westfirmlaw.com)
Yvonne E. Hennessey, Esq. (Sent via email: yeh@westfirmlaw.com)
Mahlon R. Perkins, Esq. (Sent via email: mperkin3@tweny.rr.com)
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George A. Mathewson, Esq. (Sent via email: gmath35@bluefrog.com)
Jordan A. Lesser, Esq. (Sent via email: lesseri@assembly.state.ny.us)
At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Tompkins County Courthouse, in the City of Ithaca, New York, on the 4th day of November, 2011.

PRESENT: HONORABLE PHILLIP R. RUMSEY
JUSTICE PRESIDING.

STATE OF NEW YORK
SUPREME COURT COUNTY OF TOMPKINS

ANSCHUTZ EXPLORATION CORPORATION,

Petitioner-Plaintiff,

For a Judgment Pursuant to Articles 78 and 3001 of the Civil Practice Law and Rules,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents-Defendants

DECISION, ORDER AND JUDGMENT
Index No. 2011-0902
RJI No. 2011-0499-M

APPEARANCES:

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PHILLIP R. RUMSEY, J. S. C.

In this case of first impression, the court is asked to determine whether a local municipality may use its power to regulate land use to prohibit exploration for, and production of, oil and natural gas. The controversy arises from the proposed use of high-volume hydraulic fracturing (hydrofracking) to obtain natural gas from the Marcellus black shale formation which underlies the southern portion of New York State. The Town of Dryden is located in the Marcellus shale region.\(^1\) In effect to prohibit hydrofracking, the Dryden Zoning Ordinance was amended on August 2, 2011 to ban all activities related to the exploration for, and production or storage of, natural gas and petroleum (the Zoning Amendment). Petitioner-plaintiff (Anschutz) owns gas leases covering approximately 22,200 acres in the Town – representing over one-third of its total area – that were obtained prior to enactment of the Zoning Amendment and has invested approximately $5.1 million in activities within the Town.\(^2\) It commenced this hybrid CPLR article 78 proceeding / declaratory judgment action against the Town of Dryden and the Town of Dryden Town Board (collectively the Town) on September 16, 2011 seeking invalidation of the Zoning Amendment on the basis that it is preempted by the Oil, Gas and Solution Mining Law (OGSML). The Town timely answered and moved for dismissal of the

\(^1\) While the focus is currently on the Marcellus shale formation, hydrofracking may also be used to recover natural gas from the Utica shale formation, which underlies much of southern and western New York – including the Town of Dryden – at depths below the Marcellus shale.

\(^2\) The facts regarding Anschutz’s activity within the Town were taken from the document entitled, “Affidavit of Pamela S. Kalstrom,” dated September 15, 2011, which was not executed in the manner required of an affidavit because it contains an acknowledgment rather than the required jurat. However, it has been considered, inasmuch as the error in execution does not affect a substantial right of a party (see CPLR 2001; Matter of Smith v Board of Stds. & Appeals of City of N.Y., 2 AD2d 67 [1956]; Federal Natl. Mtge. Assoc. v Graham, 67 Misc 2d 735 [1971]; see also Krug v Offerman, Fallon, Mahoney & Cassano, 245 AD2d 603 [1997]).

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article 78 proceeding and for summary judgment declaring the Zoning Amendment valid.

In light of the high degree of public interest in hydrofracking, the court received several inquiries about the procedure for filing amicus curiae briefs. All who contacted chambers were referred to *Kruger v Bloomberg*, 1 Misc3d 192 (2003) and were advised that, absent consent from the parties, a motion would be necessary. Motions seeking leave to file an amicus curiae brief were timely filed by George A. Mathewson, Esq. and Assemblywoman Barbara Lifton. In addition, a motion for leave to intervene was timely filed by Dryden Resources Awareness Coalition (DRAC). Prior to the return date, the court notified the parties and the non-party movants that the motions for leave to file amicus briefs and to intervene would be considered on submission. Inasmuch as the proposed intervenor would be entitled to participate in all aspects of the case as a party if the motion to intervene were ultimately to be granted, counsel for DRAC was permitted to participate in oral argument on the merits of the petition and the Town’s motions.

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1 Two additional untimely attempts were made – only days prior to the scheduled return date of November 4, 2011 – to file motions for leave to submit amicus briefs. By two separate letter decisions dated November 2, 2011, the court declined to sign the proposed orders to show cause submitted (1) on November 1, 2011 by Earthjustice, on behalf of Natural Resources Defense Council, Inc., Beverly Ommegang, Theodore Gordon Flyfishers, Inc., Riverkeeper, Inc. and Catskill Mountainkeeper, and (2) on November 2, 2011 by the Town of Ulysses (see generally *Hurrell-Harring v State of New York*, 14 NY3d 833 [2010], citing Rules of Ct of Appeals [22 NYCRR] § 500.23[a][1][iii] [illustrating that the Court of Appeals denies untimely filed motions for leave to file amicus briefs]). The Town thereafter attempted to place the brief by the Town of Ulysses before the court, notwithstanding the court’s rejection of the Town of Ulysses’s untimely motion, by filing a Supplemental Memorandum of Law that is substantially identical to the amicus curiae brief proposed by the Town of Ulysses. It has not been considered by the court.
MOTIONS FOR LEAVE TO FILE AMICUS CURIAE BRIEFS

The court has considered the following criteria in deciding whether to permit the filing of amicus curiae briefs: (1) whether the applications were timely; (2) whether each application states the movant’s interest in the matter and includes the proposed brief; (3) whether the parties are capable of a full and adequate presentation of the relevant issues and, if not, whether the proposed amici could remedy this deficiency; (4) whether the proposed briefs identify law or arguments that might otherwise escape the court’s consideration or would otherwise be of assistance to the court; (5) whether consideration of the proposed amicus briefs would substantially prejudice the parties; and (6) whether the case involves questions of important public interest (see Kruger, 1 Misc 3d at 198; see also Rules of Ct of Appeals [22 NYCRR] § 500.23[a][4]). No one factor is dispositive. Mathewson and Lifton both filed timely motions which indicated their interest in this proceeding/action and included their respective proposed briefs. Although the parties have very capably advanced their respective positions, there is no prejudice to them in permitting the proposed amici to be heard on this case of first impression involving a matter of important public interest (see Kruger, 1 Misc 3d at 196, citing Colmes v Fisher, 151 Misc 222, 223 [1934]; Matter of Alfred Condominium v City of New York, 2010 WL 7762750 [2010]). Accordingly, the motions should be granted to the extent that the movants present arguments related to the issues in controversy. On that basis, Lifton’s motion for leave to file an amicus curiae brief is granted. With respect to the arguments advanced by Mathewson, both parties correctly note that Points II – IV in his proposed brief are wholly unrelated to the
matters at issue in this proceeding/action; therefore, his motion for leave to file an amicus curiae brief is granted only to the extent that the court will consider the argument raised in Point I of his brief.

THE MOTION TO INTERVENE

DRAC identifies itself as an unincorporated association which has approximately 71 individual members who are residents or landowners in the Town of Dryden. It timely moved to intervene and submitted a proposed answer, affidavits from its president and five additional members, and a memorandum of law. Its motion is opposed by the parties. Inasmuch, as noted below, the court has granted the Town's motion to dismiss the article 78 proceeding, DRAC must show that it is entitled to intervene in the action under the more demanding standards applicable to actions set forth in CPLR article 10.

A party is entitled to intervene as of right only upon a showing that the representation of its interests by the parties is inadequate and that it may be bound by the judgment; both elements must be present (see CPLR 1012[a][2]; St. Joseph's Hosp. Health Ctr. v Department of Health of State of N.Y., 224 AD2d 1008 [1996]; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1012:3, pp. 156 – 157). Here, DRAC members have shown no substantial interest in the outcome of the action unique from those of any other resident or landowner in the Town of Dryden. As noted by the Town, it is the proper party to defend the Zoning Amendments which it enacted (see St. Joseph's Hosp. Health Ctr.). The Town has met

Points II and III allege that various practices associated with hydrofracking that might be allowed by the OGSML render it unconstitutional, while Point IV argues that the draft Supplemental Generic Environmental Impact Statement related to hydrofracking currently under consideration by the DEC violates the equal protection clauses of the New York and United States Constitutions.
that duty by capably advancing its position (see Matter of Spangenberg, 41 Misc 2d 584, 588 [1963]). Moreover, DRAC’s submissions do not materially add to the defense advanced by the Town (see Matter of Mayer, 110 Misc 2d 346 [1981]). Accordingly, DRAC is not entitled to intervene as of right.

With respect to permissive intervention pursuant to CPLR 1013, “[w]hile the only requirement for obtaining an order permitting intervention under this section is the existence of a common question of law or fact, the resolution of such a motion is nevertheless a matter of discretion” (Matter of Pier v Board of Assessment Review of the Town of Niskayuna, 209 AD2d 788, 789 [1994]). The factors noted above also weigh in favor of exercising the court’s discretion to deny permissive intervention. Accordingly, DRAC’s motion to intervene is denied.\(^5\)

The court will, however, grant DRAC amicus curiae status for the purpose of considering the arguments presented in its brief (see Matter of Pace-O-Matic, Inc. v New York State Liq. Auth., 72 AD3d 1144 [2010]; Kruger, 1 Misc 3d at 196).

**THE ARTICLE 78 PROCEEDING**

Enactment of the Zoning Amendment was a legislative act (see Long Island Pine Barrens Soc., Inc. v Suffolk County Legislature, 31 Misc 3d 1208[A], 2011 NY Slip Op 50534[U] [2011]; see also Matter of Durante v Town of New Paltz Zoning Bd. of Appeals, 90 AD2d 866 [1982]). Unlike challenges directed to the procedures followed in the enactment of an ordinance, challenges to the substantive validity of a legislative act may not be maintained in an article 78 proceeding (see Matter of Save the Pine Bush v City of Albany, 70 NY2d 193, 202 [1987];

\(^5\) In light of the determination that DRAC should not be permitted to intervene, the court need not consider the parties’ arguments that it lacks standing.
Matter of Frontier Ins. Co. v Town Bd. of Town of Thompson, 252 AD2d 928 [1998]; Long Island Pine Barrens Soc., Inc.). Inasmuch as Anschultz challenges only the substantive validity of the Zoning Amendment – and not the procedures utilized in its enactment – the Town’s motion seeking judgment dismissing that part of the petition and complaint which seeks relief under CPLR article 78 must be, and hereby is, granted.

THE TOWN’S MOTION FOR SUMMARY JUDGMENT (PREEMPTION ANALYSIS)

The Marcellus shale formation extends northeast from Ohio and West Virginia, through Pennsylvania, into southern and central New York. Geologists have long known that the entire formation contains vast quantities of natural gas – as much as 489 trillion cubic feet, or over 400 years supply for New York at its current level of use – however, the depth of the formation and the tightness of the shale made extraction difficult and expensive. Recent enhancements to the techniques of horizontal drilling and hydrofracking have made recovery of natural gas from the Marcellus shale formation economically viable. As a result, interest in gas production through the use of hydrofracking has, in recent years, increased dramatically throughout the Marcellus region.

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To access natural gas using these techniques, a vertical well bore is drilled to a depth just above the target gas-bearing formation. The well bore is then extended horizontally within the gas-bearing rock for up to several thousand feet. Multiple horizontal wells may be drilled laterally from the same vertical bore. After drilling, the horizontal wells are subjected to hydrofracking by pumping fluid into the rock formation at high pressure to create fractures in the rock, thereby increasing the quantity of gas that will flow into the well. The hydrofracking fluid consists of water to which various compounds are added to make the process more effective, such as a propping material, or “proppant,” – like sand – which consists of particles that will remain after the hydrofracking process is complete to hold the fractures open; a gel to carry the proppant into the fractures; a biocide to prevent the growth of bacteria that could damage well piping or plug the fractures; and various other agents intended to ensure that the proppant remains in place or to prevent corrosion of the pipes in the well. Many of the compounds used are toxic. Hydrofracking requires large volumes of water – as much as one million or more gallons for each well – most of which is recovered as waste that must be handled, transported and disposed of properly. Tanker trucks transport water to the well sites and thereafter remove waste fluid. As many as 200 truck loads may be required to supply the water necessary to hydrofrack a single well.

Because hydrofracking may involve the risk of contaminating ground and surface water supplies, it has become extremely controversial. Beginning in 2009, many Town residents requested that the Town Board take action to ban hydrofracking within its jurisdiction and a petition containing 1,594 signatures was presented to the Town Board on April 20, 2011
requesting such a ban (see Affidavit of Mary Ann Sumner, sworn to October 13, 2011, ¶2).7 The Zoning Amendment was enacted in response to those requests (see id., ¶¶ 2, 3, 15; Affidavit of Mahlon R. Perkins, sworn to October 2011, ¶ 13) to, in relevant part, add the following new section to Article XXI of the Town’s Zoning Ordinance:

“Section 2104. Prohibited Uses.

(1) Prohibition against the Exploration for or Extraction of Natural Gas and/or Petroleum.

No land in the Town shall be used: to conduct any exploration for natural gas and/or petroleum; to drill any well for natural gas and/or petroleum; to transfer, store, process or treat natural gas and/or petroleum; or to dispose of natural gas and/or petroleum exploration or production wastes; or to erect any derrick, building or other structure; or to place any machinery or equipment for any such purposes.

(2) Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Materials.

No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production materials.

(3) Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Wastes.

No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production wastes.

(4) Prohibition against Natural Gas and/or Petroleum Support Activities.

No land in the Town shall be used for natural gas and/or petroleum support activities.

7 According to the 2010 Census, the population of the Town of Dryden was 14,435 on April 1, 2010 (see http://2010.census.gov/2010census/popmap/index.php (site last accessed February 21, 2012).
Invalidity of Permits.

No permit issued by any local, state or federal agency, commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town.”

(See Minutes of Special Town Board Meeting August 2, 2010, p. 14; see also petition and complaint, ¶ 17; answer, ¶ 17). 8

Anschutz asserts two separate causes of action seeking declaratory judgment that the Zoning Amendment is invalid – first, that it is expressly preempted by the supersedeure clause of the OGSML set forth in ECL 23-0303 and, second, that it is preempted because it impermissibly conflicts with the substantive provisions of the OGSML that directly regulate gas production.

The OGSML contains the following express supersede clause:

“The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.” (ECL 23-0303[2] [emphasis supplied]). This provision was last amended more than thirty years ago, long before the potential use of hydrofracking to recover natural gas from the Marcellus shale in New York could have been anticipated. Determining whether it preempts enactment of zoning ordinances that regulate where – or whether – operations related to gas production may occur is a matter of first impression, requiring statutory interpretation without consideration of the disparate public opinions about hydrofracking. The Court of Appeals has held that a similar

8 The Zoning Amendment also amended Appendix A (Definitions) of the Zoning Ordinance by adding definitions for Natural Gas, Natural Gas and/or Petroleum Exploration, Natural Gas and/or Petroleum Exploration and Production Materials, Natural Gas and/or Petroleum Production Wastes, Natural Gas and/or Petroleum Extraction, and Natural Gas and/or Petroleum Support Activities (see Minutes of Special Town Board Meeting August 2, 2010, pp. 13 – 14).
supersession clause contained in the Mined Land Reclamation Law (Environmental Conservation Law article 23, title 27; herein MLRL) did not preempt local zoning ordinances (see Matter of Frew Run Gravel Prods. v Town of Carroll, 71 NY2d 126 [1987]). In light of the similarities between the OGSML and the MLRL as it existed at the time of Matter of Frew Run, the court is constrained to follow that precedent in this case.

In Matter of Frew Run, the Court of Appeals considered the following supersede provision of the MLRL:

"For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein."

(ECL 23-2703[2], as enacted by the Laws of New York, 1976, Chapter 477 [emphasis supplied]).

It began its analysis by noting that where, as here, a statute contains an express supersession clause, resolution of the issue turns on proper construction of the clause by interpreting the plain meaning of the text in light of the relevant legislative history and the underlying purposes of the statute. It held that the zoning ordinance did not relate to the extractive mining industry but to an entirely different subject, i.e., land use. The Court itself later concisely summarized its holding in Matter of Frew Run as follows:

"In Frew Run, we distinguished between zoning ordinances and local ordinances that directly regulate mining activities. Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the type of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities. In Frew Run, we concluded that nothing in the plain language, statutory scheme, or legislative purpose of the Mined Land Reclamation Law suggested that its reach was
intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands' (id., at 133 [emphasis added]), and that in the absence of a clear expression of legislative intent to preempt local control over land use, the statute could not be read as preempting local zoning authority.”

(Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668, 681 – 682 [1996]

The primary language of the two supersede clauses is nearly identical. The MLRL provides that “[f]or the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry” (emphasis supplied), while the OGSML provides that “[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries” (emphasis supplied).

Inasmuch as both statutes preempt only local regulations “relating” to the applicable industry, they must be afforded the same plain meaning – that they do not expressly preempt local regulation of land use, but only regulations dealing with operations (see Matter of Frew Run, 71 NY2d at 131, 133). Neither supersede clause contains a clear expression of legislative intent to preempt local control over land use and zoning. Notably, the MLRL law was amended in 1991 to codify the holding of Matter of Frew Run and, in 1996, the amended supersession clause was

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9 Cf. Matter of Envirogas v Town of Kiantone, 112 Misc 2d 432 (1982), affd 89 AD2d 1056 (1982), lv denied 58 NY2d 602 (1982) (zoning ordinance providing that no oil or gas well could be constructed without prior payment of a $2,500 compliance bond and $25 permit fee did not relate to land use and was preempted by the OGSML because it directly conflicted with the permit procedure administered by the DEC).
construed by the Court of Appeals in Matter of Gernatt to permit a complete ban on mining activities within a municipality. Yet, even in light of this legislative and judicial activity regarding the preemptive scope of the MLRL, there remains an absence from the OGSML— as enacted in 1976 and amended in 1981 to add the supersede clause— of a clear expression of legislative intent to preempt local zoning control over land use concerning oil and gas production.

Anschutz’s attempts to distinguish the language of the two supersession clauses are unavailing. It argues that the two clauses are different because the MLRL only preempts “local laws,” while the OGSML provides for preemption of “local laws and ordinances,” and that by use of the additional term “ordinances,” the OGSML necessarily preempts zoning ordinances, such as the Zoning Amendment, where the MLRL does not. Its argument exalts form over substance. Towns are empowered to enact zoning regulations through two different procedures— by ordinance, pursuant to Town Law §§ 261, 264 and 265, and by local law, pursuant to the Statute of Local Governments § 10(6) and the Municipal Home Rule Law (see Matter of Pete Drown, Inc. v. Town Bd. of Town of Ellenburg, 229 AD2d 877 [1996], lv denied 89 NY2d 802 [1996]; Yoga Socy. of N.Y. v. Incorporated Town of Monroe, 56 AD2d 842 [1977], appeal dismissed 42 NY2d 910 [1977]; Rice, 2012 Supp Practice Commentaries, McKinney’s Cons Laws of NY, Book 61, Town Law § 264, 2012 Supp Pamph, at pp. 63 – 64). Whether a substantive zoning provision is a law or an ordinance is determined solely by the procedure utilized in its enactment. The distinction between laws and ordinances in the area of land use regulations is not significant; indeed, the terms are often used interchangeably (see e.g. Matter of Gernatt, 87 NY2d at 681 – 682 [refers to zoning ordinances as land use laws having an
incidental effect on the extractive mining industry)). Thus, it would be illogical to conclude that
the matter of preemption turns on whether a zoning regulation is enacted as a local law or as an
ordinance.

Anschutz also argues that the OGSML is not susceptible to the distinction made by the
Court of Appeals when it determined that the MLRL preempts only local laws relating to
operations, i.e. laws governing “how” are preempted, but not those governing “where.” In that
regard, it notes that the supersedure provisions of the MLRL and the OGSML contain different
specific exceptions. The OGSML excepts only local government jurisdiction over local roads
and rights regarding real property taxation. Anschutz contends that if the supersedure clause
preempted only regulation of operations – the “how” – then the exception for local government
jurisdiction over local roads would be unnecessary because regulation of roads does not affect
operations.10 Its argument overlooks the fact that hydrofracking depends upon transport of
equipment, supplies and large volumes of hydrofracking fluid and waste by truck. Regulation of
local roads to restrict or regulate heavy truck traffic, or to require repair of damage caused by
such traffic, would plainly relate to operation of gas wells by directly affecting access to well
sites or other areas of operation and by imposing additional burdens or costs. Accordingly,
because regulation of local roads affects operations, the fact that the supersedure clause contains
the exception for jurisdiction over local roads does not support the conclusion that the
Legislature intended to preempt local zoning power not directly concerned with regulation of

10 Taxation of oil and gas economic units is governed exclusively by Real Property Tax
Law article 5, title 5 (RPTL 590 et seq.), enacted concurrently with the 1981 amendment of the
OGSML (see RPTL 594).
Nor is the court able to discern any meaningful difference in the purposes of the two laws – both provide for statewide regulation of operations with the primary goal of encouraging efficient use of a natural resource, and the supersede provisions of both were enacted to eliminate inconsistent local regulation which had impeded that goal. The legislative history and purpose of the MLRL were summarized by the Court of Appeals as follows:

"The purposes of the statute are 'to foster a healthy, growing mining industry' and 'aid in assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition' (Mem of Governor Wilson, June 15, 1974, filed with Assembly Bill 10463-A, Governor's Bill Jacket, L 1974, ch 1043). The policy of the State, the Legislature has declared, is 'to foster and encourage the development of an economically sound and stable mining and minerals industry' (ECL 23-2703 [1]). To further this policy, the Mined Land Reclamation Law was enacted to 'establish the badly needed guidelines which would allow for the utilization of the state's vast mineral resource based in a manner compatible with wise resource management' and to eliminate '[r]egulation on a town by town basis [which] creates confusion for industry and results in additional and unfair costs to the consumer' (Mem of Department of Environmental Conservation in support of Assembly Bill 10463-A, May 31, 1974, Governor's Bill Jacket, L 1974, ch 1043). Thus, one of the statute's aims is to encourage the mining industry by the adoption of standard and uniform restrictions and regulations to replace the existing 'patchwork system of [local] ordinances' (id.)."

(Matter of Frew Run, 71 NY2d at 132).

11 The Court of Appeals explained that the MLRL was intended to achieve two different legislative aims – providing statewide standards regulating mining operations and separately permitting stricter local regulation of reclamation to address legitimate local concerns – and that the exception contained in the MLRL for local zoning ordinances imposing stricter standards for reclamation was related only to the second purpose (see Matter of Frew Run, 71 NY2d at 132 – 134). It did not consider the exception when it decided that the plain meaning of the main clause of the supersede provision of the MLRL did not preempt local regulation of land use, but only after it turned to consideration of the purpose and history of the statute (see id. at 131 – 132). Accordingly, that the two supersede provisions contain different exceptions to preemption is not a basis for ascribing different meanings to the nearly identical language of their respective primary clauses.
The legislative history of the 1981 amendments to the OGSML – when the supersede clause was enacted – similarly states that the purpose is to “promote the development of... NYS’s resources of oil and natural gas” (Mem dated July 9, 1981, filed with Senate Bill 6455-B) and “to provide for the efficient, equitable and environmentally safe development of the State’s oil and gas resources” (Mem of Governor Carey dated July 27, 1981, filed with Senate Bill 6455-B). Nowhere in the legislative history provided to the court is there any suggestion that the Legislature intended – as argued by Anschutz – to encourage the maximum ultimate recovery of oil and gas regardless of other considerations, or to preempt local zoning authority.

The OGSML contains the following express statement of its purpose:

“It is hereby declared to be in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected, and to provide in similar fashion for the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells.”

ECL 23-0301. The foregoing provision does not state that it is in the public interest to require –

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12 Anschutz submitted an affidavit by Gregory Sova, who was employed by DEC and its predecessor agency from 1968 until January 2001, in which he provides his opinion regarding the legislative history and purposes of the OGSML and the 1981 amendments thereto and to DEC’s interpretation, implementation and enforcement thereof. It may not be considered, because it is not part of the recognized legislative history (see Matter of Lorie C., 49 NY2d 161, 169 [1980]; McKechnie v Ortiz, 132 AD2d 472, 475 [1987], affd 72 NY2d 969 [1988]; Matter of Morabito v Hagerman Fire Dist., 128 Misc 2d 340, 341 [1985], citing Matter of Lori C.). In addition, even if it is assumed that his affidavit accurately represents DEC’s interpretation of the supersede clause, it is not relevant because the issue in the present case involves one of pure statutory interpretation that does not require reliance upon DEC’s knowledge or understanding of underlying operational practices (see Kurescies v Merchants Mut. Ins. Co., 49 NY2d 451, 459 [1980]; cf. Cortland Regional Med. Ctr., Inc. v Novello, 33 Misc 3d 777, 782 – 783 [2011, Rumsey, J.], quoting Kurescies).
or maximize – development of the oil and gas resources of New York State. Rather, it states that
the purpose of the OGSML is to regulate any development or production of such resources which
may occur in a manner that prevents waste, permits greater ultimate recovery of oil and gas, and
protects the correlative rights of all persons. By interpreting the foregoing provision as
pertaining to regulation of development and production only in locations where such activities
may be conducted in compliance with applicable zoning ordinances governing land use, the
OGSML may be construed in a fashion which avoids any “abridgement of a town’s powers to
regulate land use through zoning powers expressly delegated in the Statute of Local Governments
§ 10(6) and Town Law § 261” (Matter of Frew Run, 71 NY2d at 134).

Nor is any significant difference in the purpose of the two statutes apparent from their
respective regulatory schemes. While the OGSML – unlike the MLRL – contains provisions
which directly affect where operations may be conducted, such as those governing delineation of
pools, well spacing, and integration of units (see ECL 23-0305[8][c]; ECL 23-0501; ECL 23-
0503, ECL 23-0701, 23-0901), they address technical operational concerns and are intended to
further the stated statutory purposes of avoiding waste, providing for greater ultimate recovery of
oil and gas and protecting correlative rights. For example, wells must be spaced to comport with
the geological features of the underlying pool or formation – taking into consideration the type
and depth of the formation and whether there are any field-bounding faults – to allow efficient
recovery of the entire field (see ECL 23-0501[1][b], [2][a]; ECL 23-0503[2], [3][a], [4]). None
of the provisions of the OGSML address traditional land use concerns, such as traffic, noise or
industry suitability for a particular community or neighborhood (see Town Law § 261; Louhal
Props. v Strada, 191 Misc 2d 746, 751 [2002], aff'd on the opinion below 307 AD2d 1029
Thus, zoning regulations do not directly conflict with the provisions of the OGSML that relate to well location. 13

That the OGSML does not contain a clear expression of legislative intent to preempt local zoning authority (see Matter of Gernatt, 87 NY2d at 682) is further apparent when it is compared to state statutes that indisputably preempt the local zoning power (see e.g., ECL, article 27, title 11 [siting industrial hazardous waste facilities]; Mental Hygiene Law § 41.34 [siting community residential facilities]). The OGSML differs from such statutes in two significant respects. First, unlike the OGSML, the intent to preempt local zoning ordinances is clearly expressed in the text of the other statutes. ECL 27-1107 states that local municipalities may not require “conformity with local zoning or land use laws and ordinances” (emphasis supplied). 14 Mental Hygiene Law § 41.34(c) provides that “a community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances” (emphasis supplied), to preclude local governments from excluding group homes from areas zoned for single-family residences (see also Incorporated Vil. of Nyack v Daytop Vil.

13 As the Court of Appeals noted, where, as here, there is an express supersedeure clause, there is no need to consider implied preemption; resolution of such cases turns on proper construction of the supersedeure clause at issue (Matter of Frew Run, 71 NY2d at 130 – 131). Whether there is conflict between the local ordinance and the state statute is considered as part of the process of statutory interpretation, specifically by measuring the effect of the local ordinance against the purpose of the state statute (id. at 133 – 134). Here, no impermissible conflict has been found.

14 It bears noting that although ECL 27-1105(2)(f) originally required denial of an application to construct or operate a hazardous waste facility if it “would be contrary to local zoning or land use regulations in force on the date of the application” (Matter of Washington County Cease v Persico, 99 AD2d 321, 324 – 325 [1984], affd on opinion below 64 NY2d 923 [1985] [emphasis in original]), ECL article 27, title 11 was thereafter amended to expressly preempt local zoning authority (see ECL 27-1105[3][f]; ECL 27-1107; Weinberg, Practice Commentaries, McKinney’s Cons Laws of NY, Book 17 ½, ECL 27-1105).
78 NY2d 500, 506 – 507 [1991] [Mental Hygiene Law § 41.34 expressly withdraws the zoning authority of local governments]; Salkin, 1 NY Zoning Law & Prac § 7:25 [Mental Hygiene Law § 41.34 was designed to preempt local control over planning and zoning decision making]).

Second, these other statutes contain provisions by which the traditional concerns of zoning are required to be considered by the agency charged with deciding whether to issue a permit under state law (see ECL 27-1103[2][b], [c], [g], [h]; Mental Hygiene Law § 41.34[c][5]). As previously noted, the OGSML does not require consideration of such factors prior to issuance of well permits. To ensure that local concerns are considered, these other statutes require advance notice to, and allow participation by, a municipality in which a proposed facility is to be located (see ECL 27-1105[3][c]; ECL 27-1113; Mental Hygiene Law § 41.34[c]). By contrast, the OGSML only requires that notice be provided to a municipality before drilling commences — after a well permit has been granted (see ECL 23-0305[13]). A clear legislative intent to preempt local zoning authority is not apparent from the fact that the OGSML does not specifically provide a mechanism for consideration of local concerns. Rather, by construing the OGSML in accordance with its plain meaning — i.e., as superseding only local regulation of operations — it may be harmonized with those statutes that grant the zoning power to local municipalities (see Matter of Frew Run, 71 NY2d at 134). Under this construction, local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place, while DEC regulates all technical operational matters on a consistent statewide basis in locations where operations are permitted by local law.

The fact that the Zoning Amendment bans all operations related to oil and gas exploration and production anywhere within the Town of Dryden does not compel a different result. In
Matter of Gernatt, the Court of Appeals rejected the argument that if the land within a municipality contains extractable minerals, then the municipality is required to permit them to be mined somewhere. It held that, inasmuch as the MLRL does not restrict the power to zone, a municipality may exercise its zoning authority to completely ban mining within its jurisdiction. In proceeding to determine that the doctrine of exclusionary zoning does not prohibit use of the zoning power to exclude industrial uses – a point not raised in this case – the Court specifically noted that the zoning power may properly be used to limit the use of natural resources, stating that:

“A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.”

(Matter of Gernatt, 87 NY2d at 684 [citations omitted]). In light of the determination that the OGSML – like the MLRL – does not preempt local zoning power to regulate uses of land, there is no rational basis for distinguishing Matter of Gernatt; accordingly, the OGSML does not preempt a municipality’s authority – through the exercise of its zoning power – to completely ban operations related to oil and gas production within its borders.¹⁵

¹⁵ Although the court recognizes that natural gas extraction – unlike gravel mining – does not necessarily affect the surface of the ground directly over the area from where the natural resource is removed, the fact that the boundaries of formations containing gas may not conform to municipal boundaries is not a logical basis for distinguishing Matter of Gernatt. The same considerations about well location and spacing exist wherever there is a boundary between areas where drilling is permitted and where it is not; therefore, it would be illogical to conclude that a municipality may lawfully exclude gas drilling from certain areas of the municipality, but not the entire municipality (cf. Voss v Lundvall Brothers, 830 P2d 1061 [1992]). Moreover, because the location of any boundaries between areas where drilling is a permitted use and where it is prohibited by a local zoning ordinance – whether between different districts within a municipality or between different municipalities – will be known when a well permit application is under consideration, DEC may account for such boundaries to efficiently site wells in any
Finally, while this is a case of first impression in New York State, the issue of the use of the local zoning power to regulate location of natural gas drilling operations has been considered in several decisions by the highest courts of Pennsylvania and Colorado. While they are not binding precedents in this case, it is instructive that both courts reached the same conclusion as this court did by applying New York precedent – that their respective state’s statute governing oil and gas production does not preempt the power of a local government to exercise its zoning power to regulate the districts where gas wells are a permitted use.

Pennsylvania’s Oil and Gas Act specifically empowers local governments to enact zoning regulations, provided that they do not impose “conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act” (Huntley & Huntley, Inc. v Borough Council of the Borough of Oakmont, 600 Pa 207, 212, 964 A2d 855, 858 [2009] [emphasis and quotation omitted]). This language is similar to the supersede provisions of the OGSML and the MLRL, which both preempt only those local laws which regulate operations. In an analysis remarkably similar to that conducted by the Court of Appeals in Matter of Frew Run, the Pennsylvania Supreme Court concluded that the zoning laws serve a different purpose than statutes aimed at efficient production and utilization of a natural resource, i.e., regulation of land use and development (see Huntley, 600 Pa. at 225, 964 A2d at 865). It then adopted the same how-versus-where distinction in concluding that a zoning ordinance prohibiting gas wells in a residential district was not preempted by the Oil and Gas Act. In a case decided the same day, it held that a local ordinance that regulated well operations by the imposition of permitting and bonding areas where drilling is allowed.
requirements and by regulation of operations – similar to the one at issue in Matter of Envirosag, 112 Misc 2d 432 – was preempted by the Oil and Gas Act (see Range Resources v Salem Township, 600 Pa. 231, 964 A2d 869 [2009]). Citing Huntley and Range Resources, Pennsylvania’s intermediate appellate court held that zoning regulations prohibiting gas drilling within the flight path of an airport runway and imposing setback and screening requirements were not preempted by the Oil and Gas Act because they “reflect traditional zoning regulations that identify which uses are permitted in different areas of the locality” (Penneco Oil Co., Inc. v County of Fayette, 4 A3d 722, 733 [2010]).

In a pair of cases that it also decided the same day, the Colorado Supreme Court held that Colorado’s Oil and Gas Conservation Act – which does not contain an express supersedure clause, but contains a purposes clause similar to the OGSML – does not preclude local municipalities from regulating the districts within which gas drilling may occur (see Bowen/Edwards Assoc., Inc. v Board of County Commissioners of La Plata County, 830 P2d 1045 [1992]; Voss, 830 P2d 1061 [1992]). It further held that, inasmuch as gas pools do not conform to municipal boundaries, a zoning ordinance that totally banned all drilling within a local government’s borders would be preempted because it would conflict with the state’s interest in fostering efficient development and production of oil and gas reserves. In New York, however, as previously noted, the Court of Appeals has held otherwise – that a total ban on the extraction of natural resources is permissible where the Legislature has not restricted municipal authority to regulate permissible uses of land (see Matter of Gernatt, 87 NY2d at 682 – 683).16

16 The court does not find Newbury Twp. Bd. of Trustees v Lomak Petroleum (Ohio), Inc., 62 Ohio St. 387, 583 NE2d 302 (1992) instructive in this case. There, the statute at issue was notably different than the OGSML because it permitted a local municipality to prohibit oil or
THE ZONING AMENDMENT'S PROVISION INVALIDATING PERMITS

The Zoning Amendment provides that "[n]o permit issued by any local, state or federal agency, commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town" (Dryden Zoning Ordinance, Section 2104[5]). While the Town may regulate the use of land within its borders – even to the extent of banning operations related to production of oil or gas – it has no authority to invalidate a permit lawfully issued by another governmental entity. Rather, enforcement of the provisions of its Zoning Ordinance relating to the use of land is restricted to those remedies authorized by Town Law § 268 and Municipal Home Rule Law § 10(4)(a), (b). Moreover, by purporting to invalidate permits that may be issued by any state agency – including DEC – this provision relates directly to regulation of the oil and gas industries and, accordingly, is expressly preempted by the OGSML. Thus, it is invalid.

However, the presence of the invalid provision does not require that the entire Zoning Amendment be invalidated because it may be severed without impairing the underlying purpose of the Zoning Amendment (see CWM Chem. Servs., L.L.C. v Roth, 6 NY3d 410, 422 – 425 [2006]; Wiggins v Town of Somers, 4 NY2d 215, 222 [1958], rearg denied 4 NY2d 1045, 1046 [1958]; St. Joseph Hosp. of Cheektowaga v Novello, 43 AD3d 139, 146 [2007], appeal dismissed 9 NY3d 988 [2007], lv denied 10 NY3d 702 [2008]; see also Dryden Zoning

gas well drilling in areas traditionally considered appropriate for such activity based only on health and safety considerations. While acknowledging that municipalities could properly enact zoning regulations based on health and safety concerns, the Court invalidated a local zoning ordinance prohibiting gas wells in all residential districts by substituting its own judgment for that of the town in finding that drilling was appropriate in areas used for agricultural production and zoned residential.
Ordinance § 2101 ["The invalidity of any section or provision of this Ordinance shall not invalidate any other section or provision thereof"]). Accordingly, Section 2104(5) is hereby severed and stricken from the Zoning Amendment and the Dryden Zoning Ordinance.

CONCLUSION

Inasmuch as the court is unable to discern any meaningful difference between the language of the supersede clause of the MLRL – as it existed when Matter of Frew Run was decided – and the OGSML, or in the respective legislative histories, purposes or regulatory schemes of the two statutes, it is constrained to apply Matter of Frew Run and Matter of Gernatt in determining that the Zoning Amendment is not preempted by the OGSML. Accordingly, the Town’s motion for summary judgment is granted, and it is adjudged and declared that the Zoning Amendment – as herein modified by severing and striking Section 2104(5) – is not preempted by the OGSML.

This decision constitutes the order and judgment of the court. The transmittal of copies of this decision, order and judgment by the court shall not constitute notice of entry.

Dated: February 21, 2012
Cortland, New York

[HON. PHILLIP R. RUMSEY]
Supreme Court Justice
The following documents were filed with the Clerk of the County of Tompkins:

- Summons dated September 16, 2011.
- Verified petition and complaint dated September 16, 2011.
- Unsworn "Affidavit" of Pamela S. Kalstrom dated September 15, 2011, with Exhibits A – C.
- Affidavit of Gregory H. Sovas, sworn to September 12, 2011, with Exhibit A.
- Acknowledgment of Service dated September 16, 2011.
- Stipulation dated October 5, 2011.
- Verified answer of respondents-defendants dated October 21, 2011.
- Three volume record filed by respondents-defendants on October 21, 2011.
- Notice of motion by respondents-defendants dated October 21, 2011.
- Affidavit of Mary Ann Sumner, sworn to October 21, 2011.
- Affidavit of Bambi L. Avery, sworn to October 13, 2011.
- Affidavit of Henry M. Slater, sworn to October 12, 2011.
- Affidavit of Sibley Stewart, sworn to October 19, 2011.
- Affidavit of Mahlon R. Perkins, sworn to October 21, 2011, with attached exhibits.
- Notice of motion by George A. Mathewson dated October 26, 2011.
- Application for Permission to File Amicus-Curie [sic] Brief dated October 23,
- Affidavit of George A. Mathewson, sworn to October 24, 2011, with Exhibits 1 – 2.

- Order to show cause dated October 28, 2011.

- Affidavit of Barbara S. Lifton, sworn to October 27, 2011.

- Affidavit of Jordan A. Lesser, sworn to October 27, 2011.

- Brief for Assemblywoman Barbara S. Lifton as amicus curiae dated October 27, 2011.

- Notice of motion by Dryden Resources Awareness Coalition (DRAC) dated October 26, 2011.

- Verified answer of DRAC dated October 26, 2011.

- Affirmation of Alan J. Knauf dated October 26, 2011.

- Affidavit of Marie McRae, sworn to October 26, 2011, with Exhibit A.

- Affidavit of Joseph Wilson, sworn to October 26, 2011.

- Affidavit of Judith Pierpont, sworn to October 26, 2011, with Exhibit A.

- Affidavit of Carlene S. Cortright, sworn to October 26, 2011.

- Affidavit of Deborah Cipolla-Dennis, sworn to October 26, 2011.

- Affidavit of Mitchell Lavine, sworn to October 26, 2011.


- Affirmation of Deborah Goldberg dated October 31, 2011, with Exhibit A.

- Proposed order to show cause filed by the Town of Ulysses on November 2, 2011.

- Memorandum of Law of Proposed Amicus Curiae Town of Ulysses.

- Affidavit of John J. Henry, Esq., sworn to November 1, 2011.

- Affidavit of Roxanne Marino, sworn to November 1, 2011.

- Affidavit of Mahlon R. Perkins, sworn to November 2, 2011.

- Affirmation of Yvonne E. Hennessey in Opposition to Amicus and Intervention Filings dated November 2, 2011, with Exhibit A.

- Letter Decision dated November 2, 2011, declining to sign the proposed order to show cause filed on November 1, 2011.

- Letter Decision dated November 2, 2011, declining to sign the proposed order to show cause filed on November 2, 2011.

- Email memorandum from the court to counsel for petitioner-plaintiff, respondents-defendants, and proposed intervenor dated November 7, 2011 (filed by the court).


Sample Laws:

- Relevant Excerpt from Middlefield Zoning Ordinance
- Relevant Excerpt from Dryden Zoning Ordinance
- Relevant Excerpt from Town of Cherry Valley Land Use Law
- Town of Springfield Law
4.25.11

Town of Middlefield
Local Law No. 1 of the year 2011

Dated: June 14, 2011

A LOCAL LAW REPEALING THE TOWN OF MIDDLEFIELD ZONING ORDINANCE AND ADOPTING THE TOWN OF MIDDLEFIELD ZONING LAW

BE IT ENACTED by the Town Board of the Town of Middlefield as follows:

Section 1. Title of Local Law.

This Local Law shall be known and may be cited as “The Town of Middlefield Zoning Law”.

Section 2. Authorization.

This Local Law is adopted pursuant to Article 16 of the Town Law of the State of New York, Chapter 62 of the Consolidated Laws, and Articles 2 and 3 of the Municipal Home Rule Law, Chapter 36-a of the Consolidated Laws, to protect and promote public health, safety, comfort, convenience, economy, aesthetics and general welfare. It is the intent of the Town Board to supersede the provisions of § 268 of the Town Law, relating to enforcement and remedies, to increase the penalties for violation of this law.

Section 3. Repeal.


Section 4. The Town Of Middlefield Zoning Law is hereby adopted to read as follows:

THE TOWN OF MIDDLEFIELD
ZONING LAW, OTSEGO COUNTY, STATE OF NEW YORK

ARTICLE I - ENACTMENT, TITLE AND PURPOSE

A. Title: This Local Law shall be known and may be cited as “The Town of Middlefield Zoning Law”.

B. Enactment: This Local Law is adopted pursuant to Article 16 of the Town Law of the State of New York, Chapter 62 of the Consolidated Laws, and Articles 2 and 3 of the Municipal Home Rule Law, Chapter 36-a of the Consolidated Laws.
C. **Purpose in View:** This Local Law is enacted to protect and promote public health, safety, comfort, convenience, economy, aesthetics and general welfare of the Town of Middlefield and its citizens and for the following additional purposes: the protection and enhancement of Middlefield’s physical and visual environment; to lessen congestion in the streets; to secure safety from fire, flood, and other dangers; to promote health and general welfare; to prevent overcrowding of land; to avoid undue concentration of population; to protect the environment, to protect surface and ground water resources, to sustain the viability of farmland, and to facilitate adequate provision of transportation, water, sewerage, schools, parks and other public requirements. This Local Law is made with reasonable consideration of the character of the various districts, and their unique suitability for particular uses, with a view to conserving the value of land and buildings and encouraging the most appropriate use of land throughout the Town of Middlefield.

D. **Application of Regulations:** Except as hereinafter provided, no building, structure or land shall hereafter be used or occupied and no building or structure or part thereof shall be erected, moved or altered unless in conformity with the regulations herein specified and to comply with "The Rules and Regulations for the Protection from Contamination of the Public Water Supply of the Village of Cooperstown, County of Otsego", and also in compliance with New York State Department of Environmental Conservation Law, Section 8-0113 State Environmental Quality Review Act.

**ARTICLE II - DEFINITIONS**

A. **Meaning of Words:** Except where specifically defined by this article, all words used in this Local Law shall carry their customary meanings. Words used in the present tense include the future, and plural includes the singular; the word "person" includes a corporation as well as an individual; the word "lot" includes the word "plots" or "parcels"; the term "shall" is always mandatory; and the word "used" or "occupied" as applied to any land or building shall be considered as though followed by the words "or intended, arranged or designed to be used or occupied".

B. **Definitions:**

1. **Accessory Use:** A use customarily incidental and subordinate to the principal use of a building and located on the same lot with such principal use of a building.

2. **Building:** Any structure having a roof supported by columns or by walls and intended for shelter, housing or enclosure of persons, animals or chattel.

3. **Center Line of Road:** A line midway between and parallel to two property lines along any public highway right-of-way. Whenever such property lines cannot be determined, such line shall be considered as being midway between and parallel to the paved or improved surface of the road.

4. **Dock:** A structure for accessing water, extending from the shoreline onto a body of water, no greater in width than 10 feet as situated above the land, uncovered, and extending onto the shore (over dry land) the shortest possible distance for safe usage or 15 feet, whichever is less.

5. **Driveway:** A private access way originating at the edge of a road and continuing to access two or fewer lots.

6. **Dwelling:** A building designed or used primarily as the living quarters of one or two families.
7. **Gas, Oil, or Solution Drilling or Mining:** The process of exploration and drilling through wells or subsurface excavations for oil or gas, and extraction, production, transportation, purchase, processing, and storage of oil or gas, including, but not limited to the following:

   i. A new well and the surrounding well site, built and operated to produce oil or gas, including auxiliary equipment required for production (separators, dehydrators, pumping units, tank batteries, tanks, metering stations, and other related equipment);

   ii. Any equipment involved in the re-working of an existing well;

   iii. A water or fluid injection station(s) including associated facilities;

   iv. A storage or construction staging yard associated with an oil or gas facility;

   v. Gas pipes, water lines, or other gathering systems and components including but not limited to drip station, vent station, chemical injection station, valve boxes.

8. **Heavy Industry:** a use characteristically employing some of, but not limited to the following: smokestacks, tanks, distillation or reaction columns, chemical processing or storage equipment, scrubbing towers, waste-treatment or storage lagoons, reserve pits, derricks or rigs, whether temporary or permanent. Heavy industry has the potential for large-scale environmental pollution when equipment malfunction or human error occurs. Examples of heavy industry include, but are not limited to: chemical manufacturing, drilling of oil and gas wells, oil refineries, natural gas processing plants and compressor stations, petroleum and coal processing, coal mining, steel manufacturing. Generic examples of uses not included in the definition of "heavy industry" are such uses as: milk processing plants, dairy farms, garment factories, woodworking and cabinet shops, auto repair shops, wineries and breweries, warehouses, equipment repair and maintenance structures, office and communications buildings, helipads, parking lots, and parking garages and water wells serving otherwise allowed uses of the property. Agriculture and surface gravel and sand mining facilities shall not be considered heavy industry.

9. **Home Occupation:** An occupation or profession which:

   a. Is customarily carried on in a dwelling unit or in a building or other structure accessory to a dwelling unit, and

   b. Is carried on by a member of the family residing in the dwelling unit, and

   c. Is clearly incidental and secondary to the use of the dwelling unit for residential purposes, and

   d. Conforms to the following additional conditions:

   1) the occupation or profession shall be carried on wholly within the principal building or within a building or other structure accessory thereto;

   2) not more than one (1) person outside the family shall be employed in the Home Occupation;

   3) there shall be no exterior display, no exterior sign (except as permitted in this Local Law), no exterior storage of materials and no other exterior indication of the Home Occupation or variation from the residential character of the principal building;

   4) no offensive, noxious, or injurious noise, vibration, smoke, dust, odors, heat or glare shall be produced;

   5) no articles produced elsewhere may be sold except those incorporated in products being manufactured on the premises or those which are incidental to the services offered.
4.25.11

j. Construction to resist rupture or collapse caused by water pressure or floating debris.
k. Elevation of structures to or above the necessary flood protection elevation.

G. Otsego Lake/Susquehanna River Shoreline Protection Area: No building or structure (excepting docks or erosion controls, which shall require review and approval by the Planning Board) shall be erected within 100 feet of the shoreline of Otsego Lake or the Susquehanna River. No existing building or structure within 100 feet of the shoreline of Otsego Lake or the Susquehanna River shall be modified in such a way as to increase the size of the footprint defined by its exterior foundation walls. A building or structure within 100 feet of Otsego Lake or the Susquehanna River may be destroyed and reconstructed so long as it does not exceed its original footprint and so long as its reconstruction does not increase the existing nonconformity with this Local Law in any regard. No building or structure within five hundred (500) feet of the shoreline shall be erected or existing building altered unless and until a site plan showing such proposed development is approved by the Town Planning Board and a building permit therefor issued. No new construction within one hundred (100) feet of Otsego Lake or the Susquehanna River shall be greater than 25 feet in height. There shall be no point discharges into Otsego Lake or the Susquehanna River nor into any waterway flowing into Otsego Lake or the Susquehanna River. Also, not more than thirty percent (30%) of the trees six (6) inches or more in diameter at breast height within 500 feet of the shoreline may be cut over any 10-year period. No cutting of any vegetation may take place within twenty (20') feet of the shoreline except that up to thirty percent (30%) of the shore front may be cleared of vegetation on any individual lot. These standards do not prevent removal of dead, dying, diseased, or rotten trees or vegetation, or other vegetation presenting safety or health hazards.

ARTICLE V - GENERAL REGULATIONS APPLYING TO ALL DISTRICTS

A. Prohibited Uses: Heavy industry and all oil, gas or solution mining and drilling are prohibited uses. Uses not specifically permitted under Article IV of this Local Law are prohibited, except that the Planning Board may find that a use is sufficiently similar to a permitted use as to be included within the definition of that use.

B. Principal Buildings per Lot: There shall only be one (1) principal building per lot, except that where a sufficiently large parcel exists, up to three principal buildings may be established, provided each structure has in identifiable land area which satisfies the lot area and yard requirements of the district regulations applying to the district in which they are located.

C. Exceptions to Lot Area, Height, and Yard Regulations:

1. Substandard Lots: Any lot recorded prior to October 30, 1975, whose area, or frontage on a public street is less than that specified in this Local Law, may be considered as complying with such requirement and no variance shall be required provided that:
   a. Such lot does not adjoin another undersized lot in common ownership.
   b. Such lot has a minimum area sufficient to provide for proper operation of a well and septic tank system if such are required, and
   c. Minimum required side yard widths, or rear yard depths required for such lots shall be reduced to not less than one half those required in the district.

2. Height Exceptions: The height regulations within the district regulations shall not apply to the following types of structures:
Resolution No. ___ (2011)


_________________________ offered the following resolution and asked for its adoption:

WHEREAS, the Town Board adopted certain amendments to the Town of Dryden Zoning Ordinance on August 3, 2011, which amendments became effective August 19, 2011, and

WHEREAS, such amendments added definitions to Appendix A of such Ordinance pertaining to natural gas and/or petroleum exploration and extraction and added a new section, 2104: Prohibited Uses, which section clarified the Zoning Ordinance’s prohibition of the use of land in the town for natural gas and/or petroleum exploration and extraction, and

WHEREAS, as a result of such amendments the town is the subject of a lawsuit which seeks to declare such amendments invalid, and

WHEREAS, the town has been in the process of revising its zoning regulations and has held a public hearing on a proposed local law which would establish revised zoning regulations and incorporate the substance of such amendments, and

WHEREAS, it is now determined to be desirable to adopt the previously proposed local law provisions as amendments to the existing zoning ordinance in order to preserve such amendments in the form they were originally adopted in August 2011, now therefore,

BE IT RESOLVED as follows:

1. The Zoning Ordinance, Town of Dryden, Tompkins County, New York, originally adopted in 1969, as amended from time to time, is hereby further amended as follows:

   ARTICLES I, II, III, IV, V, VI, VII, VII-A, VIII, IX, X, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXII, XXIII and XXIV are hereby repealed.

2. Appendix A of such Zoning Ordinance as originally adopted in 1969, as amended from time to time, is hereby further amended by deleting therefrom all the definitions except for “Commercial Development Design Guideline,” “Residential ‘Design Guidelines’” and those definitions adopted August 3, 2011, effective August 19, 2011 pertaining to “Natural Gas,” “Natural Gas and/or Petroleum Exploration,” “Natural Gas and/or Petroleum Exploration and Production Materials,” “Natural Gas Exploration and/or Petroleum Production Wastes,” “Natural Gas and/or Petroleum Extraction,” and “Natural Gas and/or Petroleum Support Activities,” which definitions are hereby incorporated into a new ARTICLE III as hereinafter provided.

3. ARTICLE XXI of such Zoning Ordinance as originally adopted in 1969, as amended from time to time, is hereby amended by repealing Sections 2100 – Interpretation, 2101 – Validity, 2101 – Repealer (apparently misnumbered) and 2103 – Effective Date, leaving only Section 2104 – Prohibited Uses, which was adopted August 3, 2011, effective August 19, 2011, and which is hereby re-numbered to be Section 502: Prohibited Uses.

4. There is hereby adopted the following amendment to such Zoning Ordinance, which in its entirety with the aforesaid amendments in Sections 1, 2 and 3 above shall read as follows:
Section 502: Prohibited Uses

A. Prohibition against the Exploration for or Extraction of Natural Gas and/or Petroleum.

No land in the Town shall be used: to conduct any exploration for natural gas and/or petroleum; to drill any well for natural gas and/or petroleum; to transfer, store, process or treat natural gas and/or petroleum; or to dispose of natural gas and/or petroleum exploration or production wastes; or to erect any derrick, building, or other structure; or to place any machinery or equipment for any such purposes.

B. Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Materials.

No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production materials.

C. Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Wastes.

No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production wastes.

D. Prohibition against Natural Gas and/or Petroleum Support Activities.

No land in the Town shall be used for natural gas and/or petroleum support activities.

E. Invalidity of Permits.

No permit issued by any local, state or federal agency, commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town without a Use Variance.
Town of Cherry Valley
Land Use Law

Adopted as Local Law _____ of 2011
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Article 4. Land Use and Lot Dimension Standards

Section 4.01 Permitted Land Uses

1. Development shall be subject to the Land Subdivision and Site Plan laws of the Town of Cherry Valley. All land use activities within the Town shall require site plan review and approval before being undertaken, except the following:
   
   a. Construction of one or two-family dwelling and ordinary accessory structures, and related land use activities.
   b. Landscaping or grading which is not intended to be used in connection with a commercial or industrial land use reviewable under the provisions of the Site Plan Law.
   c. Ordinary repair or maintenance or interior alterations to existing structures or uses.
   d. Exterior alterations or additions to existing commercial structures which would not increase the square footage of the existing structure by more than twenty-five percent (25%), and having a cost value of less than ten thousand ($10,000.00) dollars. All additions to single family and two-family dwelling units shall be exempt from site plan review.
   e. Structural and nonstructural agricultural or gardening uses not involving substantial timber cutting.
   f. Signs under ten (10) square feet.
   g. The sale of agricultural produce and temporary structures related to sale of agricultural produce.
   h. Garage, lawn and porch sales not exceeding three consecutive days. If such sales take place more often than three (3) times in any calendar year, site plan approval will be required.

2. All agricultural, commercial and residential uses, except those uses that are expressly prohibited in this district shall be permitted provided all lot sizes, setbacks or other requirements of this Local Law are met.

3. Mineral extraction operations shall be permitted pursuant to the New York State Mined Land Reclamation Law and the Town of Cherry Valley Site Plan Law including such mining operations that extract less than one thousand (1000) tons or seven hundred and fifty (750) cubic yards of minerals per year.

4. A major subdivision, as defined in the Cherry Valley Land Subdivision Law is subject to mandatory planning by a professional planner. All major subdivision applications must be accompanied by a subdivision plan prepared by a professional planner. Upon submission a presentation of the initial sketch shall be made pursuant to Article 3.1 of the Cherry Valley Land Subdivision Law. The major subdivision shall be designed by the professional planner to create a lot layout that will be consistent with the objectives of the Town of Cherry Valley Comprehensive Plan. The Planning Board will only consider for approval the plan prepared by a professional planner.
5. Any person uncertain of the applicability of this Local Law to a given land use activity may apply in writing to the Board of Appeals for an interpretation of the law.

Section 4.02 Prohibited Uses
Beginning on the effective date of this Local Law, the following activities and/or uses shall be prohibited:

i. Heavy industry and high-impact industrial uses as defined in this Local Law;

ii. It shall also be unlawful for any person to produce, store, inject, discard, discharge, dispose, release, or maintain, or to suffer, cause or permit to be produced, stored, injected, discarded, discharged, disposed, released, or maintained any deleterious substance, anywhere within the Town.

Section 4.03 Lot Areas, Setbacks and Other Dimensions
1. Lots shall be of sufficient size to accommodate buildings and individual sanitary sewage disposal systems designed in accordance with the New York State Health Department Sanitary Code and shall require the approval of the Otsego County Department of Health.

2. Lots shall not be less than one (1) acre and shall have a minimum road frontage of at least two hundred (200) feet. All lots should be of sufficient width and depth to accommodate a residence with setbacks of at least twenty-five (25) feet from side and rear lot lines and seventy-five (75) feet from the street centerline.

Article 5. General Land Use Regulations
The provisions in this article apply to all uses in all districts of the Town.

Applications for approval for any use within the Town shall demonstrate that the proposed use is in conformance with the following Sections 5.01 through 5.10.

Section 5.01. Residential and Agricultural Area
Activities other than residential and agricultural functions may be permitted in the Agricultural/Residential land use area as long as these activities do not alter the essential residential or agricultural character of the neighborhood, as established in Section 1.04 (Community Development Objectives), by external changes obviously unrelated to residential or agricultural uses.

Section 5.02. Principal Building per Lot

1. There shall be only one principal building per lot, except that, where a sufficiently large parcel exists, additional principal buildings may be established provided each such
Section 8.05. Non-Conforming Buildings or Structures

1. Alterations. A non-conforming building or structure shall not be enlarged, extended, or have exterior alterations beyond the limits of the original building or structure, unless such enlargement, extension, or alteration shall be in accordance with this Local Law.

2. Reconstruction. A non-conforming building may be reconstructed to its original dimensions, subject to Site Plan Review pursuant to the Site Plan Law of Cherry Valley. The purpose of Site Plan Review is to provide the Planning Board the opportunity to reduce the level of non-conformance of the building. In no case shall the level of non-conformance be increased. This section does not provide any modification of this Article as to discontinuance, removal, modification, or extension of a non-conforming use.

Section 8.06. Existing Natural Gas Drilling Leases and Wells.

New “Heavy Industry” uses, as defined elsewhere in this law, shall be prohibited in the Town of Cherry Valley beginning on the effective date of this Local Law. The definition of “Heavy Industry” in this law includes the exploration for natural gas; extraction of natural gas; natural gas processing facilities; exploration for crude oil; extraction of crude oil; oil refineries; coal mining; and coal processing. For the purposes of this provision of this Local Law, and solely for the ease of drafting and reading, all those uses and activities shall be referred to collectively as “gas, oil and coal extraction”.

Any leases of property for the purpose of allowing gas, oil or coal extraction, or any gas, oil or coal extraction operations which are being presently conducted on land in the Town as of the effective date of this law, shall be subject to the following:

A. Existing Leases:

1. Where a lease which allows gas, oil or coal extraction has been executed and where no substantive gas, oil or coal extraction activity has substantively commenced as of the effective date of this Local Law, then this Local Law shall apply in full effect and shall operate to prohibit all such activities. The existence of a lease under the circumstances described in this paragraph shall convey no vested right upon either party to the lease.

B. Existing Gas, Oil and Coal Extraction Operations

1. Where a lease which allows gas, oil, or coal extraction has been executed, and where substantive gas, oil or coal mining extraction activity is occurring as of the effective date of this law, and those activities are being conducted pursuant to valid permits issued by the New York State Department of Environmental Conservation or other regulating agencies, in that case the activity shall be considered a non-conforming use and shall be allowed to continue.

2. Upon the depletion of any gas or oil well or coal mine which is allowed to remain in operation pursuant to this provision, or upon any other termination of the gas, oil or coal
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Protection of Rural Environment Local Law of the Town of Springfield June 2011

Town of Springfield Local Law No. ___ of 2011

Protection of Rural Environment Local Law of the Town of Springfield

Be it Enacted by the Town Board of the Town of Springfield, Otsego County, New York, as follows:

I. Title

This Local Law shall be known as the "Protection of Rural Environment Local Law of the Town of Springfield", adopted as Town of Springfield Local Law No. ___ of 2011.

II. Enactment

This Local Law is adopted and enacted pursuant to the authority and power granted by Municipal Home Rule Law of the State of New York, Articles 2 and 3, and pursuant to Article 2 of the New York State Statute of Local Governments.

III. Purpose

The purposes of this Local Law, which prohibits heavy industry within the Town, are as follows.

It is the purpose of this Local Law to promote the protection, order, conduct, safety, health, and well-being of the residents of Springfield and the lands which lie within the Town's borders.

It is the purpose of this Local Law to protect and enhance the Town's physical and visual environment.

It is the purpose of this Local Law to respond to the present, legitimate concerns of the citizens of the Town about the potential for a huge expansion of natural gas drilling in the Town and about the potential for major portions of the Town and its citizens to be adversely impacted by the drilling and operation of natural gas wells and by the activities associated with their operation.
Protection of Rural Environment Local Law of the Town of Springfield June 2011

It is the purpose of this Local Law to protect the citizens of the Town of Springfield from potential human health hazards presented by natural gas exploration, extraction or processing as evidenced by the recent public statements issued by the medical community.

It is the purpose of this Local Law to uphold and implement the Town of Springfield Comprehensive Plan.

The Town Board of the Town of Springfield, in adopting a comprehensive plan in September 2009, established town policy guiding future growth and development as follows:

A. Maintain the rural, small town and scenic character of Springfield as it grows. The character of Springfield is largely shaped by its open spaces, vibrant farms, woodlands, scenic views, rolling hills, low-density of houses, traditional hamlets, and Otsego Lake.

B. Protect environmental resources including drinking water, watersheds, Otsego Lake, streams and wetlands.

C. Provide quality and up-to-date infrastructure including roads, emergency services and tele-communications and ensure all new infrastructure is rural in scale.

D. Enhance recreational opportunities for all ages and capitalize on Otsego Lake.

E. Promote and protect our historic structures and landscapes.

F. Promote agricultural businesses and local farm products, and protect farmlands.

G. Promote small businesses that provide local jobs, contribute to the tax base and that do not detract from our rural and small town character.

Further, the Town Board, in adopting its comprehensive plan incorporated analysis of natural resources from the Final Generic Environmental Impact Statement on the Capacities of the Cooperstown Region (December, 2002), which established that:

H. Surface water bodies in Springfield, especially Otsego Lake play many critical ecological and cultural roles including providing drinking water, wildlife and plant habitats and recreational uses.
Protection of Rural Environment Local Law of the Town of Springfield June 2011

I. Natural features including limestone bedrock, and other surface and bedrock geology are such that development has the potential to adversely alter surface water and ground water flow patterns, introducing pollutants that can destroy natural ecosystems and groundwater resources. Potential impacts on the area's bedrock include contamination from chemicals or petroleum products, or pollution of aquifers located in bedrock.

J. Bedrock aquifers are limited or absent throughout a significant portion of the Town and developments that rely on wells and aquifers in bedrock are likely to be limited by low yield of water. Further, development may result in inadequate water production as well as degradation of water quality.

K. Unconsolidated aquifers found in valley locations in Springfield are particularly susceptible to ground water contamination because of moderate to high permeability of soils located above these aquifers. Point and nonpoint discharges can impact these aquifers including such pollutant sources as septic systems, fertilizer and pesticide application, and storage, handling, transport, and use of chemicals and petroleum products.

Further, the Town Board, in adopting its comprehensive plan specifically established the following key principles:

L. Maintain the character of rural roads.

M. Protect aquifers from being polluted.

N. Protect public water supplies.

O. Protect streams and streamside vegetation.

P. Reduce traffic impacts.

Q. Ensure that all roads are maintained as rural roads and that all new roads are built to rural road standards.

R. Assess and protect historic resources and landscapes.

S. Ensure that economic development programs and new development efforts are not at cross-purposes with agriculture and farmland protection efforts, and to protect critical farming areas in Springfield.

T. Ensure that new development is consistent in maintaining rural character.
Protection of Rural Environment Local Law of the Town of Springfield June 2011

U. Ensure that the environmental resources of Springfield are protected.

Further, it is the purpose of this Local Law to prohibit those activities related to heavy industry, which may impact wetlands, lakes, streams, groundwater resources, public drinking supplies, public roads, historic landscapes, agriculture, small town character, and the area’s tourism and recreational-based economy. Impacts related to heavy industry that Springfield seeks to avoid include, but are not limited to contaminated water supplies, air pollution, traffic congestion, deterioration of roads and bridges, noise, introduction of industrial uses into non-industrial areas, human and animal illness, and incompatible changes to the rural character of Town.

IV. Definitions

Agriculture - The land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise, including timber operations as defined in AML Article 25-AA (301).

Aquifer – A geologic formation, group of formations, or part of a formation capable of storing or transmitting and yielding ground water to wells or springs.

Comprehensive Plan – A long-range plan intended to guide the growth and development of the Town of Springfield which includes inventory and analysis leading to recommendations for the Town’s land use, future economic development, agriculture, housing, recreation and open space, transportation, community facilities, and community design, all related to the Town’s goals and objectives for these elements and adopted pursuant to New York Town Law 272-a.

Environment - All external conditions and influences in an area including geology, water resources, air quality, plants and animals, agricultural resources, aesthetic resources, historic resources, open space resources, recreational, cultural, and municipal resources, road and transportation systems, visual character and community character.

Natural Gas Exploration, Extraction, or Processing - The exploration for natural gas, the extraction of natural gas from the ground regardless of the extraction method used, and/or the processing of natural gas. This definition shall specifically include, but not be limited to, the extraction method commonly known as hydraulic fracturing. This definition shall also be construed to encompass and include any activity or use of land which facilitates or supports natural gas exploration, extraction, or processing. Examples of activities or uses of land expressly intended to be included in this definition are set forth below.
Protection of Rural Environment Local Law of the Town of Springfield June 2011

• Drilling and/or installation of a new well, regardless of well type;
• Development of a well operations site and associated structures and infrastructure;
• Mixing, storage, treatment, and/or disposal of chemicals, wastewater, proppant or other materials used for, or in connection in any way with, the exploration for or extraction of natural gas;
• Parking, standing and/or storage of any type of vehicle, equipment, and/or materials used for, or in connection in any way with, the exploration for or extraction of natural gas;
• Installation and/or use of pipes, conduits or other material transport or gathering equipment or systems used for, or in connection in any way with, the exploration for or extraction of natural gas.

It is expressly stated that the foregoing examples are not intended to be exhaustive and shall not be construed to limit the meaning, scope or application of this definition or to limit the application of this definition solely to those activities identified in the examples.

Generic Environmental Impact Statement on the Capacities of the Cooperstown Region – An environmental impact statement prepared pursuant to 6 NYCRR Part 617 of the New York State Environmental Conservation Law to examine current conditions of the Cooperstown area and that identifies locations that have environmental sensitivities and limitations for land use and analyzes the area’s capacity for future development.

Heavy Industry – Any use or activity, which generates significant volumes of smoke, odors, noise, or other polluting wastes and is not compatible with other uses in the Town of Springfield. Examples of “heavy industry” which are intended to be included in this definition are: chemical manufacturing; exploration for natural gas; extraction of natural gas; natural gas processing facilities (as defined elsewhere in this Law) and/or compressor stations; exploration for crude oil; extraction of crude oil; oil refineries; coal mining; coal processing; and steel manufacturing. It is expressly stated that the foregoing examples are not intended to be exhaustive and shall not be construed to limit the meaning, scope or application of this definition or to limit the application of this definition solely to the activities identified in the examples.

Generic examples of uses not intended to be included in the definition of “heavy industry” are: milk processing plants; dairy farms; office and communications uses; garment factories; woodworking and cabinet shops; automobile repair shops; wineries and breweries; warehouses; equipment repair and maintenance facilities; helipads; parking lots and parking garages; light manufacturing or light industrial facilities (as defined elsewhere in this Law); agriculture; and surface gravel and sand mining. It is expressly stated that the foregoing examples are not intended to be
exhaustive and shall not be construed to limit the meaning, scope or application of this definition or to limit the application of this definition solely to those activities identified in the examples.

Light Manufacturing And Light Industrial Operations - A facility or use which does not produce high volumes of polluting wastes, is compatible with other uses in its surrounding area or neighborhood, does not require heavy, noisy or otherwise objectionable machinery or transporting equipment, and in addition, meets one of the following descriptions:

i. Light Manufacturing. A use involving the manufacture of a product, subject to compliance with any other applicable ordinances, laws or regulations, in one of the following categories:

A. Food and beverage production, including but not limited to such uses as a dairy processing plant, bakery, and bottling plant.
B. Apparel and other textile products.
C. Furniture and fixtures.
D. Printing and publishing.
E. Electrical and electronic machinery and equipment.
F. Metal fabrication.
G. Mail order distribution center.
H. Warehousing ancillary to the authorized use.

ii. Light Industrial. A facility which manufactures, designs, assembles, or processes a product for wholesale or retail sale.

Non-Conforming Use – A use or activity that was lawful prior to the adoption of this Local Law but that fails by reason of such adoption to conform to the present requirements of the law.

Pollution - The presence in the environment of human-induced conditions or contaminants in quantities or characteristics which are or may be injurious to human, plant, or animal life or to property.

Road – A vehicular access way either currently designated as a Town, County or State Road, or any private platted access way, built to town requirements.
Protection of Rural Environment Local Law of the Town of Springfield June 2011

Waterbody - Any natural or artificial pond, lake, reservoir, or other area which usually or intermittently contains water and which has a discernible shoreline.

Watercourse –
   i. Rivers, streams, brooks and waterways which are delineated on the most recent edition of the United States Geological Survey topographic maps of the Town.

   ii. Any other streams, brooks and waterways containing running water for a total of at least three (3) months a year.

   iii. Lakes, ponds, marshes, swamps, bogs, natural springs and all other bodies of water, natural or artificial, which are fed by or have discharge to another wetland, waterbody or watercourse.

V. Regulation

   A. Beginning on the effective date of this Local Law, it shall be unlawful for any person to conduct any new "Heavy Industry", as the term is defined in this Local Law, within the Town of Springfield.

VI. Enforcement

   A. Upon authorization by the Town Board, the Town may institute an action or proceeding in a court of competent jurisdiction to prevent, restrain, enjoin, correct, or abate any violation of, or to enforce, any provision of this Law.

VII. Non-Conforming Uses

New “Heavy Industry” uses, as defined elsewhere in this Law, shall be prohibited in the Town of Springfield beginning on the effective date of this Local Law. The definition of “Heavy Industry” in this Law (Section IV) includes, but is not limited to the exploration for natural gas; extraction of natural gas; natural gas processing facilities; exploration for crude oil; extraction of crude oil; oil refineries; coal mining; coal processing. For the purposes of this provision of the Law (Section VII), and solely for the ease of drafting and reading, all those uses and activities shall be referred to collectively as “gas, oil and coal extraction".
Protection of Rural Environment Local Law of the Town of Springfield June 2011

Any leases of property for the purpose of allowing gas, oil or coal extraction, or any gas, oil or coal extraction operations which are being presently conducted on land in the Town as of the effective date of this Law, shall be subject to the following:

A. Existing Leases:

1. Where a lease which allows gas, oil or coal extraction has been executed and where no substantive gas, oil or coal extraction activity has substantively commenced as of the effective date of this Local Law, then this Local Law shall apply in full effect and shall operate to prohibit all such activities. The existence of a lease under the circumstances described in this paragraph shall convey no vested right upon either party to the lease.

B. Existing Gas, Oil and Coal Extraction Operations

1. Where a lease which allows gas, oil, or coal extraction has been executed, and where substantive gas, oil or coal mining extraction activity is occurring as of the effective date of this Law, and those activities are being conducted pursuant to valid permits issued by the New York State Department of Environmental Conservation or other regulating agencies, in that case the activity shall be considered a non-conforming use and shall be allowed to continue.

2. Upon the depletion of any gas or oil well or coal mine which is allowed to remain in operation pursuant to this provision, or upon any other termination of the gas, oil or coal extraction activity for a period of more than one (1) year, the non-conforming use status of that activity shall terminate and the activity may not be renewed.

3. Further, no gas, oil or coal extraction activity allowed to remain in operation pursuant to this provision shall be permitted to expand after the effective date of this Local Law.

VIII. Severability

If any specific part or provision or standard of this Local Law, or the application thereof to any person or circumstance, be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this Local Law or the application thereof to other persons or circumstances, and
the Town Board hereby declares that it would have enacted this Local Law, or the remainder thereof.

IX. INTERPRETATION; CONFLICT WITH OTHER LAWS

In their interpretation and application, the provisions of this Local Law shall be held to be minimum requirements adopted for the promotion of the public health, safety, or the general welfare. Whenever the requirements of this Local Law are inconsistent with the requirement of any other lawfully adopted rules, regulations, ordinances or local laws, the more restrictive provisions, or those imposing the higher standards, shall govern.

X. Effective Date

This Local Law shall take effect immediately upon filing with the Office of the Secretary of State of the State of New York, in accordance with the applicable provisions of law, and specifically Article 3, Section 27 of the New York State Municipal Home Rule Law.