The Billion Dollar Question—Are Municipalities Preempted Under New York State Law from Using Their Zoning Powers to Control Hydraulic Fracturing for Natural Gas?

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A huge legal battle is brewing in the Southern Tier of New York State over whether municipalities can use their zoning powers to control where natural gas drilling occurs using hydraulic fracturing methods. The battle pits small, cash-strapped municipalities against wealthy, international corporations interested in extracting natural gas from rich deposits contained in the Marcellus and Utica Shale located deep under the Southern Tier. The outcome of this battle could have significant effects on municipal home rule powers in the State.

Although many municipalities and their citizens are embracing natural gas drilling and the promises of millions of dollars in royalties, taxes, jobs, clean energy, energy independence, and the other significant economic benefits that it brings, other municipalities have not been so welcoming. Dozens of municipalities across the State have adopted zoning bans or moratoria on natural gas drilling within their borders. Many of these municipalities consider hydraulic fracturing for natural gas to be a heavy industrial use that conflicts with their comprehensive plans or be an inappropriate land use within their communities. They are also concerned that their water supplies could be affected adversely by the chemicals used during the hydraulic fracturing process and that their community character could be altered detrimentally as thousands of new gas wells are drilled each year across the Southern Tier and State. They are further concerned with the potential impacts on their local roads from millions of new heavy truck-trips that will be needed during the hydraulic fracturing process.

In reacting to the municipalities' position, the drilling industry has fought back, challenging these zoning bans in two lawsuits filed in the State Supreme Courts in Tompkins and Otsego Counties.[1] In these suits, the plaintiffs seek to protect their investment of millions of dollars in lucrative gas leases for the right to extract billions of dollars in rich natural gas deposits. Clearly, the stakes are high. It is now up to the courts to resolve the standoff.

For the first time, these courts will be asked to determine whether a municipality has the legal authority to use its zoning laws to prohibit natural gas drilling within its borders or whether its constitutionally guaranteed and legislatively delegated zoning authority is preempted by the Environmental Conservation Law ("ECL"). Specifically, ECL 23-0303(2) provides that: "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."[2] The plaintiffs argue that this section of the ECL was intended to preempt *all* municipal laws related to natural gas drilling, including zoning laws. In contrast, the Towns argue that ECL 23-0303(2) was not intended to preempt generally applicable zoning laws which regulate land uses. Given its statewide import, it is anticipated that the New York Court of Appeals will ultimately decide the issue.

This Article addresses the relative merits of the arguments on both sides of the issue and posits that a plain reading of ECL 23-0303(2) together with a review of analogous case law under the Mined Land Reclamation Law support the conclusion that a municipality's land use powers are not preempted.

I. Summary of the Parties' Arguments

To support their position under ECL 23-0303(2), the plaintiffs argue that the plain language of the statute limits the local regulation of natural gas drilling to only two areas: local roads and property taxes. They argue that a total ban on natural gas drilling falls outside of these limited exceptions and, thus, constitutes impermissible regulation of the industry within the meaning of the statute. Noting that only one New York court has interpreted this supersession provision, the plaintiffs rely extensively on *Matter of Envirogas, Inc. v. Town of Kiantone*,[3] where the Erie County Supreme Court invalidated a town's zoning ordinance which imposed, among other things, a $25 permit fee and a requirement to post a $2,500 compliance bond prior to construction of any gas well within the Town, on the ground that it was superseded under section 23-0303(2). The plaintiffs assert that the *Envirogas* case confirms that the supersession provision was intended to preempt all local regulation of the natural gas industry, including local zoning laws.

The plaintiffs also argue that the doctrine of implied or conflict preemption bars municipalities from using their zoning powers to prohibit natural gas extraction. They contend that the New York State Department of Environmental Conservation ("DEC") has created a comprehensive scheme of regulations governing the natural gas industry and, therefore, municipalities are foreclosed

from using their zoning authority to otherwise interfere with the State's regulatory program. They argue that if all municipalities throughout the State could ban natural gas drilling, it would conflict directly with the intention of the Legislature to promote the efficient use of the State's natural resources.

In contrast, the Towns argue that their constitutionally guaranteed and legislatively delegated zoning powers cannot be usurped or superseded without an express statement to do so. They contend that ECL 23-0303(2) contains no such expression, and the plain meaning of the term "regulation" in that section limits the scope of preemption to local laws that relate to the operations of the natural gas industry. Zoning laws, they contend, do not "regulate" or relate to gas drilling operations. Instead, they relate to land uses in general, an entirely different matter. Furthermore, the Towns assert that the Court of Appeals' interpretation of a nearly identical supersession provision contained in the Mined Land Reclamation Law[4] is controlling,[5] and requires the conclusion that the zoning laws at issue are not preempted.

The parties' positions are discussed in more detail below.

II. Preemption Under ECL 23-0303(2)

An analysis of the plaintiffs' preemption claims must begin with a local government's legislatively delegated authority to adopt zoning laws governing permissible and impermissible land uses within its borders. Indeed, the Towns argue that because the Legislature has set forth a comprehensive statutory scheme under which local governments are vested with the authority to regulate land uses, their zoning authority cannot be preempted absent a clear expression to do so and ECL 23-0303(2) contains no such expression.[6]

A. Constitutional and Statutory Authority of Municipalities to Enact Zoning Laws

The New York State Constitution provides that "every local government shall have the power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law…except to the extent that the legislature shall restrict the adoption of such a local law."[7] Implementing this express grant of authority, the Legislature enacted the Municipal Home Rule Law, which provides that a municipality may enact local laws for the "protection and enhancement of its physical and visual environment" and for the "protection, order, conduct, safety, health and well-being of persons or property therein."[8] Most importantly, the Legislature delegated to every local government the authority to adopt, amend, and repeal generally applicable zoning laws and to "perform comprehensive or other planning work relating to its jurisdiction."[9] Moreover, the General City, Town and Village Laws grant municipalities the express authority to regulate land use within their jurisdiction by defining zoning districts and determining which uses will be permitted therein and which uses will not.[10]

As the Court of Appeals has repeatedly emphasized, "[o]ne of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances."[11] In that same vein, local governments spend significant amounts of time, effort, and resources on developing comprehensive plans outlining the zoning and planning goals for the future of their communities.[12] Taken together, these powers leave local land use matters in the hands of municipalities—those individuals who know their communities best and can best determine what land uses will serve the public health, safety, and general welfare of their citizens.[13] Because the "inclusion of [a] permitted use in [a zoning] ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood,"[14] New York courts have consistently held that a municipality's home rule authority includes the power to zone out certain uses of land in order to serve the public health, safety, or general welfare of the community.[15]

In these cases, the Towns of Dryden and Middlefield determined that the extraction of natural gas poses a significant threat to their residents' health, safety, and welfare and, thus, should not be a permitted use within their Towns, absent further studies and data concluding that these uses will not detrimentally affect their ground water supply, community character, roads, agriculture, or local tourism, among other things.[16]

B. Express Preemption

Although municipal home rule powers are construed very broadly, any local law must be consistent with the Constitution and the general laws of the State.[17] Where the Legislature has expressly preempted an area of regulation, a local law governing the same subject matter must yield."[18] Indeed, as the Court of Appeals has held,

> The preemption doctrine represents a fundamental limitation on home rule powers. While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies the untrammeled primacy of the Legislature to act…with respect to matters of State concern. Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field.[19]

Notably, however, the fact that State and local laws touch on the same subject matter does not automatically lead to the conclusion that the State intended to preempt the entire field of regulation.[20]

As noted above, the plaintiffs assert that the Legislature has expressly stated its intent in ECL 23-0303(2) to preempt a municipality's zoning authority over natural gas drilling. Specifically, section 23-0303(2) 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*; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."[21] Relying on the maxim of statutory construction that the expression of one thing necessarily implies the exclusion of all others,[22] the plaintiffs argue that the Legislature's choice to exclude local roads and real property taxation from the preemption leads to the conclusion that, by failing to include an exception for zoning authority, the Legislature intended section 23-0303(2) to preempt it. Notwithstanding this position,[23] the Dryden and Middlefield cases will likely turn, instead, on the courts' interpretation of the scope of the phrase "regulation of the oil, gas and solution mining industries."[24]

1. The Plain Language of ECL 23-0303(2)

When determining the preemptive scope of ECL 23-0303(2), the courts must start with the plain language employed by the Legislature[25] and must construe the phrase "relating to the *regulation* of the oil, gas and solution mining industries."[26]

The Towns argue that the term "regulation" is defined as "an authoritative rule dealing with details or procedure."[27] Thus, under the plain language of section 23-0303(2), a local law is not expressly preempted unless it relates to the details or procedures of natural gas drilling. This is consistent with New York law generally which draws a distinction between local laws that regulate the operation of a business or enterprise and those that govern land uses in general.[28] Generally applicable zoning laws, such as those challenged in these cases, do not relate to the details or procedures of the natural gas drilling industry in any way. Instead, they identify land uses that are permissible and impermissible within the municipality.

As noted above, only one court has interpreted the supersession clause contained in ECL 23-0303(2). In *Matter of Envirogas, Inc. v. Town of Kiantone*,[29] the petitioner challenged a zoning ordinance which imposed a $25 permit fee and a requirement to post a $2,500 compliance bond prior to construction of any gas well within the Town.[30] The Court struck down the ordinance, specifically noting that ECL 23-0303(2) made it clear that the supersession provision "pre-empts not only inconsistent local legislation, but also any municipal law which purports *to regulate gas and oil well drilling operations*, unless the law relates to local roads or real property taxes which are specifically excluded by the amendment."[31] Clearly, the Court recognized *in that case* that Kiantone did not adopt a generally applicable land use restriction, but instead impermissibly enacted a regulation which interfered with the *operations* of the natural gas industry in violation of ECL 23-0303(2).[32]

Dryden and Middlefield have asserted that, unlike the zoning ordinance in *Envirogas*, their zoning laws do not regulate the operations of natural gas drilling. They do not impose duplicative fees, area and bulk restrictions, or other conditions applicable only to the natural gas industry. Instead, the challenged laws adopted by Dryden and Middlefield are generally applicable zoning regulations merely identifying the land uses that are permissible and impermissible in their Towns. As such, they argue that the Court's holding in *Envirogas* is distinguishable and should not control.

The legislative history underlying ECL 23-0303(2) does not provide a clear indication of the scope of the preemption intended by the Legislature. Indeed, other than a passing reference to the supersession language in a memorandum from the Division of Budget, the bill jacket is silent on the preemption issue.[33] To supplement this dearth of legislative history, the plaintiffs attempt to rely on an interpretation of section 23-0303(2) by a former employee of DEC who asserts that the section was intended to preempt local zoning laws. In response, the Towns argue that the interpretation of the ECL does not require reliance upon DEC's "knowledge and understanding of underlying operational practices or…an evaluation of factual data and inferences to be drawn therefrom," but instead is a question of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent." As a result, DEC's interpretation of section 23-0303(2) is not entitled to deference.[34] Thus, regardless of DEC's alleged interpretation, the courts are tasked with determining, as a matter of law, whether the Legislature, by its chosen language, clearly expressed an intent to preempt a municipality's zoning authority to control natural gas drilling.

In addition, the Towns argue that when the Legislature has intended to supersede the local zoning laws, it has done so expressly. For example, in ECL 27-1107, the Legislature expressly declared that municipalities were prohibited from requiring "any approval, consent, permit, certificate or other condition *including conformity with local zoning or land use laws and ordinances*, regarding the operation of a [hazardous waste treatment, storage, and disposal] facility."[35] The Legislature has also expressly preempted local zoning laws related to the siting of major electric generating facilities.[36] Had the Legislature intended to preempt zoning laws under ECL 23-0303(2), it could have done so easily.[37] Its failure to expressly preempt local zoning laws appears to lead to the conclusion that the Legislature did not intend ECL 23-0303(2) to preempt such laws.

2. New York Courts' Interpretation of the Analogous Supersession Clause of the Mined Land Reclamation Law

Although the interpretation of ECL 23-0303(2) is a matter of first impression, the phrase "relating to the regulation" has been repeatedly construed by New York courts in the context of the supersession provision in the Mined Land Reclamation Law ("MLRL").[38] In the Court of Appeals' landmark decision in *Matter of Frew Run Gravel Prods. v. Town of Carroll*,[39] the Court was asked to consider whether the MLRL supersession provision—ECL 23-2703(2)—was "intended to preempt the provisions of a town zoning law establishing a zoning district where a sand and gravel operation is not a permitted use."[40] At that time, the MLRL supersession provision provided that it "shall supersede all other state and local laws *relating to the extractive mining industry*."[41] Notably, this language is nearly identical to that contained in ECL 23-0303(2).

Construing this supersession clause according to the plain meaning of the phrase "relating to the extractive mining industry," the Court of Appeals concluded that the Town of Carroll Zoning Ordinance—a law of general applicability—was not expressly preempted because the "zoning ordinance relate[d] not to the extractive mining industry but to an entirely different subject matter and purpose: i.e., regulating the location, construction and use of buildings, structures, and the use of land in the Town."[42] Specifically, the Court held:

> The purpose of a municipal zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally. In this general regulation of land use, the zoning ordinance inevitably exerts an incidental control over any of the particular uses or businesses which, like sand and gravel operations, may be allowed in some districts but not in others. But, this incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the "extractive mining industry" which the Legislature could have envisioned as being within the prohibition of the statute ECL 23-2703(2).[43]

Thus, the Court concluded that, in limiting the MLRL's supersession to those local laws "relating to the extractive mining industry," the Legislature intended to preempt only "[l]ocal regulations dealing with the *actual operation and process of mining*."[44] By interpreting the scope of ECL 23-2703(2) in such a way, the Court avoided the concomitant impairment of local authority over land use matters that would have inevitably resulted had it accepted the petitioner's argument that section 23-2703(2) was intended to preempt a town zoning law.[45] Indeed, the Court noted:

> To read into ECL 23-2703(2) an intent to preempt a town zoning ordinance prohibiting a mining operation in a given zone, as petitioner would have us, would drastically curtail the town's power to adopt zoning regulations granted in subdivision (6) of section 10 of the Statute of Local Governments and in Town Law § 261. Such an interpretation would preclude the town board from deciding whether a mining operation—like other uses covered by a zoning ordinance—should be permitted or prohibited in a particular zoning district. In the absence of any indication that the statute had such purpose, a construction of ECL 23-2703(2) which would give it that effect should be avoided.[46]

Following the Court of Appeals' decision in *Frew Run*, the Legislature amended ECL 23-2703(2) to expressly codify the Court's holding.[47] Had the Legislature disagreed with the Court's interpretation of the phrase "relating to the extractive mining industry" in *Frew Run*, this amendment gave it ample opportunity to overrule the Court and add a provision expressly preempting all zoning laws. That the Legislature declined to do so appears significant.[48]

In light of the amendment to section 23-2703(2), the Town of Sardinia, a rural community located in western New York, amended its zoning law to eliminate mining as a permitted use throughout the Town.[49] Petitioner, the owner and operator of three mines within the Town, challenged the amendments on various grounds, including that the Town's authority to eliminate mining as a permitted use was superseded by ECL 23-2703(2). Specifically, the petitioner argued that the Court of Appeals' holding in *Frew Run* only left "municipalities with the limited authority to determine in *which* zoning districts mining may be conducted but not the authority to prohibit mining in *all* zoning districts."[50]

The Court, however, rejected the petitioner's attempt to limit the municipality's home rule authority.[51] Instead, the Court reaffirmed its holding in *Frew Run* that the MLRL supersession clause was intended to preempt only those local laws that regulated the operations of mining.[52] Although the Court recognized that local land use laws had an incidental effect on the mining industry, it held that "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."[53]

Recognizing the primacy of local control over land use matters, the Court further noted 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."[54]

Undoubtedly, the holdings in *Frew Run* and *Gernatt* have continuing vitality today and are applicable to the question of statutory interpretation presented in the Dryden and Middlefield cases. Based on these cases, the Towns argue that they are only preempted from regulating the actual operations, processes, and details of natural gas drilling, not from adopting generally applicable zoning laws that determine what land uses are permissible or impermissible within their borders.

C. Implied Preemption

Alternatively, the plaintiffs in the Dryden and Middlefield cases argue that, even if the courts were to conclude that the Legislature has not expressly preempted a municipality's home rule authority to adopt zoning bans on gas drilling, the Legislature has impliedly evidenced its intent in State policy to preempt these laws in favor of promoting the development of natural gas to maximize its recovery and protect the correlative rights of the mineral owners across the State.[55]

ECL 23-0301 provides the Legislature's statement of policy underlying the statewide regulation of the natural gas industry. Specifically, section 23-0301 declares that it is

> 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.[56]

The plaintiffs argue that this statement of policy indicates that the Legislature intended to promote the viability of natural gas drilling in New York and discourage waste by preempting local attempts to ban the practices. In response, the Towns argue that the Legislature's declaration of policy specifically recognizes the interplay that must occur between the rights of owners of natural gas properties and the rights of all other landowners and the general public. In order to fully protect the rights of both, as ECL 23-0301 states, the Legislature likely did not intend to wholly supersede local zoning laws.

The plaintiffs also posit that the Legislature has enacted detailed statutory provisions governing the operations of the natural gas industry, which include regulations specifying the permissible location and size of drilling units and the location of well pads.[57] These regulations establish a limit on the number of wells that may be constructed statewide and provide minimum area and setback requirements to ensure adequate protection of the State's natural gas resources, as well as to encourage an efficient yield of these resources.[58] Because the Legislature has recognized the importance of State regulation in these areas, the plaintiffs conclude that the Legislature intended to supersede any conflicting local laws, including zoning laws.

In response, the Towns argue that their zoning laws simply determine where heavy industrial uses may be permitted and are not inconsistent with the State regulations because they only incidentally impact the day-to-day operations of the gas industry.[59] The ECL provisions including those regulating delineation of pools and well spacing units do not appear to contain any provisions indicating that the Legislature intended to wholly preempt a municipality's exercise of its zoning authority. Moreover, as the Third Department has recognized, "[a] necessary consequence of limiting the number of wells is that some people will be prevented from drilling to recover the oil or gas beneath their property."[60]

III. Public Policy Concerns

Significant policy concerns exist on both sides of this issue. As the plaintiffs argue, if the courts determine that Dryden's and Middlefield's zoning laws are not preempted, municipalities throughout the State could similarly enact zoning bans on natural gas drilling which could lead to the waste of the natural resources, contrary to the Legislature's intent,[61] and an impermissible restriction on the rights of individual landowners who desire to profit from those activities. If local governments are permitted to ban drilling, the plaintiffs contend, the natural gas industry, which has invested millions of dollars in gas leases in New York, will lose the value of its investment. In light of this situation, the industry would likely look to invest future dollars in natural gas drilling elsewhere in the country, where it does not face a similar threat. Thus, the plaintiffs argue, local governments should not be permitted to deprive their residents (or others in the State) of this economic boon simply by zoning out hydraulic fracturing and other drilling activities that are amply regulated at the State level.

The Towns, on the other hand, assert that a deprivation of their constitutionally guaranteed and legislatively delegated authority to control land uses within their borders would obviate New York's longstanding history of

promoting local governments' municipal home rule powers.[62] This history extends planning and zoning responsibilities to local governments because local elected officials are the ones most intimately involved with the land use issues that specifically face their municipalities.[63] The Legislature expressly delegated these powers to local governments because it determined those matters should not be handled on a statewide level. Moreover, municipalities expend significant amounts of time, effort, and resources on developing comprehensive plans, outlining the zoning and planning goals for the future of their communities, and extensively rely on those plans in determining what land uses should be permitted within their borders. The Towns contend that this constitutionally guaranteed authority cannot be undermined solely because a natural gas driller owns or leases property within the municipality. Local land use matters, including whether and where to permit heavy industrial uses, should not be determined by DEC or by a private gas drilling company. Thus, the Towns argue that, as a matter of sound public policy, local land use matters cannot be taken out of the hands of those who best know the unique issues facing the municipality.

Clearly, in the *Dryden* and *Middlefield* cases, the courts must weigh not only the proper interpretation of ECL 23-0303(2), but also the significant public policy implications that will result from their decisions. Because both sides have strong policy arguments on their side, it will be interesting to see how extensively the courts rely on those considerations in determining whether ECL 23-0303(2) preempts local zoning laws.

IV. The Supreme Court Rulings

In late February 2012, the first skirmish in this battle went to the Towns. In each case, the Supreme Court upheld the Towns' right to exercise their local land use powers to ban natural gas drilling activities within their borders against the plaintiffs' contention that that authority was preempted by ECL 23-0303(2). Each Court approached the issue slightly differently.

In the *Dryden* case, the Supreme Court focused on the Court of Appeals' decisions in *Frew Run* and *Gernatt* holding that no meaningful difference existed between the supersession provisions in the MLRL and in the language of ECL 23-0303(2) and its legislative history. As a result, the Court concluded that Dryden's zoning ordinance was not preempted by section 23-0303(2).[64] Specifically, the Court rejected the plaintiff's attempts to distinguish the language of section 23-0303(2) from the language of the MLRL supersession provision at issue in *Frew Run.* The Court also held that the Legislature's inclusion of two exceptions for local roads and real property taxes in section 23-0303(2) did not support the conclusion that it "intended to preempt local zoning power not directly concerned with regulation of operations,"[65] especially where section 23-0303(2) did not contain a "clear expression of legislative intent to preempt local zoning authority."[66]

Acknowledging that this is an issue of first impression in this State, the *Dryden* Court also looked to the decisions of the highest courts in Pennsylvania and Colorado that had decided this issue under similar circumstances, noting that although "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."[67]

Although the Supreme Court in the *Middlefield* case looked at the issue slightly differently, focusing extensively on the legislative history underlying ECL 23-0303(2), it reached the same conclusion—"that the supersession clause contained [in] ECL § 23-0303(2) does not serve to preempt a local municipality…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…constitutional and statutory authority."[68] After reviewing the ECL's oil and gas provisions from their enactment in 1963 through the addition of the supersession clause in 1981, the Supreme Court concluded that "no support [exists] 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."[69] The Court also held that the plain meaning of the term "regulation" in section 23-0303(2) demonstrated "convincingly" that the Legislature's intention was to enact statewide standards for "the manner and method to be employed with respect to oil, gas and solution drilling or mining," which the Court found could be "harmonized with the home rule of local municipalities in their determination of where oil, gas and solution drilling or mining may occur."[70]

Although no appeals to the Appellate Division have yet been filed from these decisions at the time of this writing, it is anticipated that the plaintiffs will indeed appeal each decision.

V. Conclusion

In sum, the New York appellate courts may soon be faced with the novel question of whether a municipal zoning law prohibiting natural gas drilling is preempted by ECL 23-0303(2). For now, the Towns have won a decisive victory in the lower courts, which upheld their authority to enact generally applicable zoning ordinances banning natural gas drilling and extraction within their borders. Given the statewide importance of this question to local governments, property owners, and gas drilling companies alike, however, the final decision in these actions may indeed lay with the Court of Appeals.

Endnotes

1. *See Anschutz Exploration Corp. v. Town of Dryden,* Sup. Ct., Tompkins Co., Rumsey, J., Index No. 2011-0902. The authors submitted an *amicus curiae* brief in this lawsuit on behalf of the Town of Ulysses in support of the Defendant, Town of Dryden. *See also Cooperstown Holstein Corp. v. Town of Middlefield*, Sup. Ct., Otsego Co., Cerio, Jr., A.J., Index No. 2011-0930. The authors submitted an *amicus curiae* brief in this lawsuit on behalf of the Town of Ulysses in support of the Defendant, Town of Middlefield.
2. ECL 23-0303(2).
3. 112 Misc. 2d 432 (Sup Ct, Erie County 1982), *aff'd,* 89 A.D.2d 1056 (4th Dep't 1982), *lv. denied,* 58 N.Y.2d 602 (1982).
4. Environmental Conservation Law 23-2703(2) (ECL).
5. *See Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668 (1996); *Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987).
6. *See e.g. Gernatt Asphalt Prods.*, 87 N.Y.2d at 682 (emphasizing that "in the absence of a *clear expression* of legislative intent to preempt local control over land use, [ECL 23-2703(2)] could not be read as preempting local zoning authority" [emphasis added]).
7. N.Y. Const, art IX, § 2(c)(ii).
8. Municipal Home Rule Law § 10(1)(ii)(a)(11), (12).
9. *See* Statute of Local Governments § 10(6), (7).
10. *See e.g.* Town Law § 261 ("For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."); *see also* General City Law § 20(24), (25); Village Law § 7-700.
11. *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 96 (2001); *see also Udell v. Haas*, 21 N.Y.2d 463, 469 (1968).
12. *See e.g.* Town Law § 272-a(1)(b) ("Among the most important powers and duties granted by the legislature to a town government is the authority and responsibility to undertake town comprehensive planning and to regulate land use for the purpose of protecting the public health, safety and general welfare of its citizens."); Village Law § 7-722(1)(b); *Udell*, 21 N.Y.2d at 469 ("[T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.").
13. *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 431 (1989) ("a town's planning needs with respect to its neighborhood parks and playgrounds are 'distinctively' matters of local concern"); *Adler v. Deegan*, 251 N.Y. 467, 485 (1929) (Cardozo, J., concurring) ("A zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting, as it does, the density of population, the growth of city life, and the course of city values."); *see also Zahara v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995) ("decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government").
14. *Matter of North Shore Steak House v. Board of Appeals of Inc. Vil. of Thomaston*, 30 N.Y.2d 238, 243 (1972).
15. *See e.g. Gernatt Asphalt Prods.*, 87 N.Y.2d at 683-684 (upholding the Town's determination that mining was not a permitted use of land within its borders); *Matter of Iza Land Mgt. v. Town of Clifton Park Zoning Bd. of Appeals*, 262 A.D.2d 760, 761-762 (3d Dep't 1999) (upholding the exclusion of heavy industrial uses from the Town because of "the potential adverse and/or harmful impact" of such uses to the Town's residents); *Thomson Indus. v. Incorporated Vil. of Port Wash. N.*, 55 Misc. 2d 625, 632 (Sup. Ct., Nassau Co. 1967) ("The defendant village may certainly exclude from its industrial district any uses which constitute a danger or nuisance to other properties within the district or within the village."), *mod. on other grounds,* 32 A.D.2d 1072 (2d Dep't 1969), *aff'd,* 27 N.Y.2d 537 (1970); *see also e.g. Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-389 (1926) (upholding an exercise of local zoning authority to preclude all industrial uses).
16. *See generally* United States Environmental Protection Agency, Draft Report, Investigation of Ground Water Contamination Near Pavillion, Wyoming (Dec. 2011) (concluding that hydraulic fracturing operations in Wyoming likely lead to significant contamination of the ground water supply), *available at* http://www.epa.gov/region8/superfund/wy/pavillion/EPA_ReportOnPavillion_Dec-8-2011.pdf; New York State Department of Environmental Conservation, Revised Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (2011) (hereinafter, "DEC Revised SGEIS"), *available at* http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf; Michelle L. Kennedy, *The Exercise of Local Control Over Gas Extraction*, 22 Fordham Envtl. L. Rev. 375 (2011).
17. *See* N.Y. Const, Art IX, § 2(c); *see also Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96 (1987) ("although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State"); *New York State Club Assn. v. City of New York*, 69 N.Y.2d 211, 217 (1987), *aff'd,* 487 U.S. 1 (1988).
18. *Jancyn Mfg. Corp.*, 71 N.Y.2d at 97 (citations omitted); *see also Incorporated Vil. of Nyack v. Daytop Vil.*, 78 N.Y.2d 500, 505 (1991).
19. *Albany Area Bldrs. Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989).
20. *See Jancyn Mfg. Corp.*, 71 N.Y.2d at 99.
21. ECL 23-0303(2) (emphasis added).
22. Statutes § 240 ("The maxim *expressio unius est exclusio alterius* is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.").
23. This argument would be more compelling, however, had the Court of Appeals not impliedly rejected it in *Matter of Frew Run Gravel Prods. v. Town of Carroll* (71 N.Y.2d 126 [1987]) and its progeny.
24. ECL 23-0303(2).
25. *See Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 356 (2006); *Theroux v. Reilly*, 1 N.Y.3d 232, 239 (2003) ("When interpreting a statute, we turn first to the text as the best evidence of the Legislature's intent."); *Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000) ("Of course, the words of the statute are the best evidence of the Legislature's intent."); *see also e.g. Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126, 131 (1987) (noting that where the court faced an express supersession clause, the matter turned on the proper statutory construction of the provision).
26. ECL 23-0303(2).
27. Merriam-Webster's Collegiate Dictionary, at 1049 (11th ed. 2004); *see also id.* (defining "regulate" as "to govern or direct according to rule"); Black's Law Dictionary (9th ed. 2009) (defining "regulation" as "[t]he act or process of controlling by rule or restriction").
28. *See Matter of St. Onge v. Donovan*, 71 N.Y.2d 507, 516 (1988) ("Nor may a zoning board impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located."); *Louhal Props. v. Strada*, 191 Misc. 2d 746, 751 (Sup. Ct., Nassau Co. 2002) ("Applicable case law draws a dichotomy between those regulations that directly relate to the physical use of land and those that regulate the manner of operation of a business or other enterprise."), *aff'd,* 307 A.D.2d 1029 (2d Dep't 2003).

29. 112 Misc. 2d 432 (Sup. Ct., Erie Co. 1982), *aff'd*, 89 A.D.2d 1056 (4th Dep't 1982), *lv. denied*, 58 N.Y.2d 602 (1982).
30. *See id.* at 432.
31. *Id.* at 434 (emphasis added).
32. *See id.*
33. *See* Bill Jacket, L 1981, ch. 846 ("The existing and amended oil and gas law would supersede all local laws or ordinances regulating the oil, gas, and solution mining industries. Local property tax laws, however, would remain unaffected.").
34. *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980); *see also Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v. Mills*, 4 N.Y.3d 51, 59 (2004) ("this Court is faced with the interpretation of statutes and pure questions of law and no deference is accorded the agency's determination").
35. ECL 27-1107 (emphasis added).
36. *See* Public Service Law § 172(1) ("no state agency, municipality or any agency thereof may…require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility").
37. *See e.g. Rhodes v. Herz*, 84 A.D.3d 1, 14 (1st Dep't 2011); *Matter of Estate of Terjesen v. Kiewit & Sons Co.*, 197 A.D.2d 163, 165 (3d Dep't 1994).
38. *See* ECL 23-2703(2).
39. 71 N.Y.2d 126 (1987).
40. *Id.* at 129.
41. ECL 23-2703(2) (as added by L 1974, ch 1043, § 1) (emphasis added).
42. *Frew Run Gravel Prods.*, 71 N.Y.2d at 131 (internal quotation marks omitted).
43. *Id.* at 131-132.
44. *Id.* at 133 (emphasis added).
45. *Id.*
46. *Id.* at 133-134.
47. *See* L 1991, ch. 166, § 228. As amended, the MLRL supersession provision now reads, in pertinent part: "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: a. enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate mining and/or reclamation activities regulated by state statute, regulation, or permit; or b. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts." ECL 23-2703(2).
48. *See e.g. Falk v. Inzinna*, 299 A.D.2d 120, 122-125 (2d Dep't 2002 (noting that "if the Legislature intended to limit or qualify disclosure under CPLR 3101[i] as did the Court of Appeals in *DiMichel v. South Buffalo Ry. Co.* (80 NY2d 184 [1992 it would have added language to that effect").
49. *See Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 674-676 (1996).
50. *Id.* at 681.
51. *See id.*
52. *See id.* at 682.
53. *Id.* at 681-682.
54. *Id.* at 684.
55. The courts, however, may not be able to reach this argument because the Legislature has, in ECL 23-0303(2), expressly stated its intent to preempt "regulation of the oil, gas and solution mining industries." *See Matter of People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 113 (2008), *cert. denied*, 129 S. Ct. 999 (2009).
56. ECL 23-0301.
57. *See* ECL 23-0501.
58. *See* ECL 23-0501, 23-0503; *see also* DEC Revised SGEIS, at 3-10, 5-22 to 5-23.
59. *See e.g. Jancyn Mfg. Corp.*, 71 N.Y.2d at 97 (*JIJ Realty Corp. v. Costello*, 239 A.D.2d 580, 582 (2d Dep't 1997), *lv. denied*, 90 N.Y.2d 811 (1997).
60. *Matter of Western Land Servs., Inc. v. Department of Envtl. Conservation of State of N.Y.*, 26 A.D.3d 15, 17 (3d Dep't 2005), *lv. denied*, 6 N.Y.3d 713 (2006).
61. *See* ECL 23-0301.
62. *See* N.Y. Const, Art IX, § 1 ("Effective local self-government and intergovernmental cooperation are purposes of the people of the state."); *Lanza v. Wagner*, 11 N.Y.2d 317, 325 (1962) (noting that the "purpose of [the constitutional municipal home rule] provisions is to preserve the principle of home rule for cities, towns and villages"); *Matter of Town of E. Hampton v. State of New York*, 263 A.D.2d 94, 96 (3d Dep't 1999) ("The unquestioned purpose behind the home rule amendment was to expand and secure the powers enjoyed by local governments." [internal quotation marks omitted]).
63. *See e.g.* Town Law §§ 261, 272-a; *see also* General City Law § 20(24), (25); Village Law §§ 7-700, 7-722.
64. *See* __ Misc. 3d __, 2012 N.Y. Slip Op. 22037, *14 (Sup. Ct., Tompkins Co. Feb. 21, 2012). Notably, however, Supreme Court did invalidate a portion of Dryden's zoning ordinance that purported to invalidate a local, State, or federal permit for natural gas drilling as preempted by ECL 23-0303(2) because that section directly related to the regulation of oil and gas industry. *See id.* at *14.
65. *Id.* at *9-10.
66. *Id.* at *11.
67. *Id.* at *13.
68. *Cooperstown Holstein Corp. v. Town of Middlefield*, Index No. 2011-0930, slip op. at 10 (Sup. Ct., Otsego Co. Feb. 24, 2012).
69. *Id.* at 8.
70. *Id.*

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