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Michelle L. Kennedy*

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ESSAY

THE EXERCISE OF LOCAL CONTROL OVER GAS EXTRACTION

*Michelle L. Kennedy**

INTRODUCTION

Town boards in Upstate New York are confronting legal questions regarding the application of local land use and zoning laws to natural gas extraction operations. The process of natural gas extraction, including drilling operations, wastewater treatment, compressor stations, pipelines and heavy truck traffic, has the potential to industrialize upstate New York's rural landscape. If towns are preempted under state law from enforcing zoning laws against the oil and gas industry, the character of residential and agricultural districts stands to be compromised. Existing economies that are heavily reliant upon tourism and historic preservation, risk devastation. This essay thus argues, in favor of uniform enforcement of local zoning laws without special treatment for the oil and gas industry.

The exploration, extraction, and production of natural gas in New York is anticipated to occur in close proximity to various population centers.[1] The underground shale formations known as the Marcellus and Utica Shales have been targeted for gas exploration in New York's Western, Central and Southern Tier regions.[2] Through a process known as hydraulic fracturing, fissures are created in the

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1. Sarah Hoye & Steve Hargreaves, *'Fracking' Yields Fuel, Fear in Northeast*, CNN (Sep. 3, 2010, 7:06 AM) http://www.cnn.com/2010/US/09/02/fracking/index.html.

2. Tony Ingraffea, Presentation, Shale Gas Plays in New York: Information for an Informed Citizenry (Oct. 6, 2010), http://www.otsego2000.org/.

shale to allow methane gas to escape and travel to the surface through a well.[3] High volume horizontal hydraulic fracturing, unlike conventional vertical wells, utilizes up to five million gallons of water per gas well.[4] This water is mixed with chemicals and lubricant gels to substantially extend the underground draw area beyond what a conventional vertical well could reach.[5] The horizontal reach of this type of unconventional well may extend thousands of feet below ground.[6]

Once pressure within a well is released, ten to forty percent of the fracking fluids rise to the surface wellhead with the captured gas.[7] This rising wastewater is referred to as "flowback."[8] The rest of the fracking fluids remain underground.[9] The flowback has high salinity,

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3. *See Hydraulic Fracturing Research Study*, OFF. OF RES. AND DEV., ENVTL. PROT. AGENCY, 1 (June 2010), http://www.epa.gov/safewater/uic/pdfs/hfresearchstudyfs.pdf [hereinafter *EPA Research Study*]; *see also* James L. Northrup, *Potential Leaks from High Volume Hydro-Fracking of Shale*, OSTEGO 2000, 3 (Sep. 8, 2010), http://63.134.196.109/documents/10nov11_edit_NorthrupEPAFinal9-12-10.pdf.

4. *Scoping Materials for Initial Design of EPA Research Study on Potential Relationships between Hydraulic Fracturing and Drinking WaterResources*, OFF. OF RES. AND DEV., ENVTL. PROT. AGENCY, 3 (Mar. 2010), http://yosemite.epa.gov/sab/sabproduct.nsf/0/3B745430D624ED3B852576D400514B76/$File/Hydraulic+Frac+Scoping+Doc+for+SAB-3-22-10+Final.pdf [hereinafter *EPA Scoping Materials*].

5. Letter from Dr. Ronald E. Bishop to Bur. Of Oil & Gas Reg., NYSDEC Div. of Min. Resources (Dec. 2, 2008), *available at* http://www.occainfo.org/documents/Scope_dSGEIS_Comments_001.pdf.

6. Ingraffea, *supra* note 3, at 20.

7. Ian Urbina, *Gas Wells Recycle Water, But Toxic Risks Persist,* N.Y. TIMES, Mar. 2, 2011, at A1.

8. *EPA Research Study, supra* note 4, at 2; *see* Ian Urbina, *Regulation Lax as Gas Wells' Tainted Water Hits Riverss,* N.Y. TIMES, Feb. 27, 2011, at A1.

> With hydrofracking, a well can produce over a million gallons of wastewater that is often laced with highly corrosive salts, carcinogens like benzene and radioactive elements like radium, all of which can occur naturally thousands of feet underground. Other carcinogenic materials can be added to the wastewater by the chemicals used in the hydrofracking itself.... the wastewater, which is sometimes hauled to sewage plants not designed to treat it and then discharged into rivers that supply drinking water, contains radioactivity at levels higher than previously known, and far higher than the level that federal regulators say is safe for these treatment plants to handle. *Id.*

9. *EPA Research Study, supra* note 4, at 2.

contains heavy metals, chemical additives, and radioactive material.[10] Initially, the fracking fluids are stored at the well site in open pits or tanks.[11] Neither the gas industry, nor the New York State Department of Environmental Conservation ("DEC") have been able to identify a final repository for the flowback fluids.[12] Over time, the lining of open pits, in particular, may corrode and result in leaks that contaminate groundwater.[13] In the Western United States, the flowback would be transmitted to the U.S. Environmental Protection Agency ("EPA") regulated underground injection wells.[14] The geology in New York and Pennsylvania under EPA regulations does not allow for such injection wells.[15] Currently, there are also no plants in New York capable of properly treating the flowback through dilution or other means.[16] The recycling and reuse of the flowback fluids is in the research and development stage.[17]

Questions regarding the public health effects and long-term environmental consequences associated with this form of industrialization remain largely unanswered. Both the U.S. House of Representatives and Senate have introduced legislation – the Fracturing Responsibility and Awareness Act ("FRAC Act") – to grant the EPA regulatory control over hydraulic fracturing under the Safe Drinking Water Act and to require public disclosure as to the chemical composition of fracking fluids.[18] Prompted by nationwide concerns over water contamination and its effect on human health, the EPA has commissioned a study on the potential adverse risks to

10. *See* Urbina, *Regulation Lax*, *supra* note 9.

11. *See* Stephen Penningroth, *The Shale Gas Industry: Risks to Human Health and the Environment* (May 21, 2010), http://fli.hws.edu/marcellus/gas_wells_back_to_democracy_talk17_june_2010.pdf .

12. Louis Allstadt, *Safer Drilling – What Would It Look Like* (Dec. 8, 2010), http://shaleshockmedia.org/2010/12/18/safer-drilling—what-would-it-look-like-lou-allstadt.

13. *Id.*

14. *Id.*; *see generally Technical Program Overview: Underground Injection Control Regulations*, OFF. OF WATER, ENVTL. PROT. AGENCY, 25 (Dec. 2002), *available at* http://www.epa.gov/safewater/uic/pdfs/uic_techovrview.pdf.

15. Allstadt *supra* note 13; Ingraffea, *supra* note 3.

16. Allstadt, *supra* note 13; *see also* Urbina, *Regulation Lax*, *supra* note 9 (explaining that treatment plants are not able to fully dilute the produced radioactive wastewater before discharging into rivers that supply drinking water).

17. *See* Allstadt *supra* note 13; *see also* Urbina, *Gas Wells*, *supra* note 8.

18. Fracturing Responsibility and Awareness of Chemicals (FRAC) Act of 2009, H.R. 2766, S. 1215 111th Cong. (2009).

drinking water posed by hydraulic fracturing.[19] The scope of the EPA study will encompass the full "life cycle" of hydraulic fracturing operations.[20] New York State, by Executive Order, has tasked the DEC to broaden their investigation of high volume hydraulic fracturing to include public health impacts and has extended the DEC's investigation, report, and public comment review period until July of 2011.[21]

Although high volume horizontal hydraulic fracturing is still under consideration by the DEC and the EPA, fracturing of vertical wells has been permitted in New York under the Generic Environmental Impact Statement ("GEIS") completed by the DEC in 1992.[22] Recently, vertical drilling operations have intensified in rural, upstate New York.[23] Vertical wells, while of lesser concern than high volume hydraulic fracturing, also pose risks to the environment.[24] Vertical wells are hydraulically fractured with substantially less volumes of water, but still the water is laced with toxic chemicals.[25] The Delaware River Basin Commission ("DRBC") has jurisdiction over water quality and water use in the Delaware River's watershed, which overlaps the Marcellus Shale in the far eastern counties of Pennsylvania and southern New York.[26] Two environmental groups, the Damascus Citizens for Sustainability and the Delaware Riverkeeper Network, filed a lawsuit in federal court in Trenton, N.J.

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19. *EPA Research Study*, *supra* note 4.

20. *EPA Scoping Materials*, *supra* note 5 (noting a study of the "life cycle" of hydraulic fracturing requires investigation from the early stage of exploration, through extraction, production and transmission to final well plugging and abandonment.)

21. NY Exec. Order No. 41, N.Y. COMP. CODES R. & REGS. tit. 9, § 41 (2010).

22. Dep't of Envtl. Conservation, FINDINGS STATEMENT, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT (GEIS) ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM, 4 (Sept. 1992), http://www.dec.ny.gov/docs/materials_minerals_pdf/geisfindorig.pdf.

23. Cooperstown Chamber of Commerce, Final Position Statement, *Hydrofracking for Shale Gas in Otsego County* (Feb. 14, 2011), *available at* http://cooperstownchamber.org/pdfs/hydrofracking.pdf.

24. Bishop, *supra* note 6.

25. *Id.*

26. Bill Holland, *Watershed Regulator Sued over Three Gas Wells, US Lawmakers Chime In*, PLATTS (Feb. 2, 2011, 5:43 PM), http://www.platts.com/RSSFeedDetailedNews/RSSFeed/NaturalGas/6798982.

after the DRBC allowed certain vertical wells to be drilled without DRBC review and approval and despite a Basin-region moratorium.[27]

Given the imminence of a new phase of industrialization and the associated environmental costs posed by both vertical and horizontal hydraulic fracturing, town board meetings have become a local venue for residents to voice their concerns and frustrations. Accordingly, town boards and their counsel search for guidance as to what control, if any, may be exercised by local government. This essay argues that local laws of general applicability which incidentally impact the oil and gas industry are not precluded by state law. Part I of this essay compares the statutory construction of Article 23, Title 3, Section 2 of New York's Environmental Conservation Law ("ECL-23"), upon which the oil and gas industry have relied to argue in favor of preemption,[28] with similar statutory language in New York's Mined Land Reclamation Law ("MLRL").[29]

Part I of this essay studies two seminal decisions issued by the New York State Court of Appeals, *Frew Run Gravel Products v. Town of Carroll*[30] and *Gernatt Asphalt Products v. Town of Sardinia*.[31] In both cases, the New York State Court of Appeals determined that local zoning laws were not laws related to the extractive mining industry, although zoning had an incidental impact

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27. *See Groups File Federal Gas Drilling Lawsuit Against DRBC Delaware River Basin Commission Served Notice*, DAMASCUS CITIZENS, http://www.damascuscitizens.org/DRBC-lawsuit.html (last viewed on Mar. 24, 2011) (noting that the groups, in reliance upon expert reports, argue that vertical wells "grandfathered in" by the DRBC threaten the public water supply); *see also* Kevin Zwick, *Federal Lawsuit Filed Against DRBC*, WAYNE INDEPENDENT (Feb. 7, 2011, 4:07 PM), http://www.wayneindependent.com/news/x1371481659/Federal-lawsuit-filed-against-DRBC.

28. Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126, 129-30 (N.Y. 1987).

29. N.Y. ENVTL. CONSERV. LAW §§ 23-2701-23-2723 (McKinney 2010); N.Y. ENVTL. CONSERV. LAW §§ 23-0301-23-0313 (McKinney 2010). The MLRL is a separate statute under Environmental Conservation Law, Article 23, Title 27 governing the extraction of solid minerals. The extraction of solid minerals is regulated under the Mined Land Reclamation law, Article 23, Title 27 of the Environmental Conservation Law. Solubles and gases are regulated under Article 23, Title 3 of the Environmental Conservation Law.

30. *Frew Run*, 71 N.Y.2d 126.

31. 87 N.Y.2d 668 (N.Y. 1996).

on the industry.[32] Therefore, the local zoning laws were not preempted under the MLRL by the state's regulation of mining.[33]

Part II of this essay studies the leading case on the preemptive scope of the Pennsylvania Oil and Gas Act over natural gas extraction. The Pennsylvania Supreme Court, like the New York Court of Appeals in *Frew Run* and *Gernatt*, decided that local zoning laws are not preempted by state regulation of the oil and gas industry.

Part III of this essay surveys lower New York State court decisions under the MLRL that uphold zoning laws and local protection of environmentally sensitive areas. Finally, Part IV of this essay concludes by asserting that the preemptive scope of ECL-23 should be interpreted by the courts consistent with case precedent under the MLRL. This interpretation supports the application of local land use and zoning laws to natural gas extraction operations.

I. CASE PRECEDENT FROM THE NYS COURT OF APPEALS UNDER THE MINED LAND RECLAMATION LAW ON THE ISSUE OF PREEMPTION

Court decisions under the MLRL outline the parameters of local control over the extraction of solid minerals. Without a body of state case law related to the extraction of oil and gas, decisions under the MLRL may prove the most determinative in terms of how New York State courts will interpret the preemptive scope of ECL-23.[34] Other than one lower court case, which held that a town could not require gas drillers to post bonds,[35] there are no other court decisions interpreting the meaning of ECL-23. Thus, the cases interpreting the MLRL are the closest body of case law that attorneys have to reference.

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32. *Gernatt Asphalt*, 87 N.Y.2d at 681-82; *Frew Run*, 71 N.Y.2d at 131.

33. *Gernatt Asphalt*, 87 N.Y.2d at 683; *Frew Run*, 71 N.Y.2d at 130.

34. *See* Michael E. Kenneally & Todd M. Mathes, *Natural Gas Production and Municipal Home Rule in New York*, 10 N.Y. ZONING L. & PRAC. REP., no. 4, Jan./Feb. 2010 at 1; *see also* Helen Slottje, Community Environmental Defense Council, *Just Say No! Using Local Land Use Control to Prohibit Industrialization* (Dec. 18, 2010) http://shaleshockmedia.org/2010/12/18/just-say-no-using-local-land-use-control-to-prohibit-industrialization-helen-slottje/.

35. *See* Envirogas, Inc. v. Kiantone, 447 N.Y.S.2d 221 (Sup.Ct. Erie County 1982) (finding the state already requires drillers to post bonds and the town's bond requirement was not generally applicable; it was applied only to commercial drillers).

ECL-23 specifies 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."[36]

Many local elected officials have read ECL-23 to preclude local control over drilling for natural gas.[37] However, there are no appellate decisions interpreting the reach of this statute.[38]

A similar provision under the MLRL, ECL § 23-2703, has been interpreted by the New York State Court of Appeals to not preempt local land use regulations, such as zoning despite an incidental impact on mineral extraction.[39] The Court of Appeals' interpretation of Title 27 may be the best evidence as to how the courts will ultimately interpret Title 3 of ECL-23.[40] Originally enacted in 1974,[41] the provisions of the MLRL "expressly superseded 'all other state and local laws relating to the extractive mining industry . . . [except] local zoning ordinances or other local laws which impose stricter

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36. N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2007 & Supp. 2011).

37. *See* SULLIVAN COUNTY (N.Y.), GAS DRILLING TASK FORCE, PREPARING FOR NATURAL GAS DEVELOPMENT: UNDERSTANDING IMPACTS AND PROTECTING PUBLIC ASSETS 17 (2009), *available at* http://www.otsegocounty.com/depts/pln/documents/SullivanCoNaturalGasReport-02-13-09.pdf; *see also* ROBERT AUGENSTEM, S. TIER. E. REG'L. PLANNING BD., OBSERVATIONS CONCERNING THE ROLE OF LOCAL GOVERNMENT IN RELATION TO NATURAL GAS EXPLORATION AND PRODUCTION IN THE MARCELLUS SHALE IN THE SOUTHERN TIER EAST REGION OF NEW YORK STATE, TECHNICAL PAPER #08-07 25-26 ('2008), *available at* http://www.otsegocounty.com/depts/pln/documents/RoleofLocalGovt-NaturalGasExplorationAndProductionSTEReport08-07.pdf.

38. Envirogas, Inc. v. Town of Westfield, 442 N.Y.S.2d 290 (N.Y. App. Div. 4th Dep't 1981) (holding a town could require drillers to post compliance bonds to ensure that the land would be restored). This decision was reached in July of 1981 just before the ECL Article 23 was amended in August of 1981 to include the supersession language now part of the statute. Since the amendment of Article 23, there have been no appellate decisions interpreting the reach of the statute.

39. Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126, 131 (N.Y. 1987).

40. *See* Kenneally & Mathes , *supra* note 35 (discussing the decisions in *Frew Run Gravel* and *Gernatt Asphalt*, suggesting that the similar supersession language may lead to similar interpretations by a court); *see also* Slottje *supra* note 35.

41. *Frew Run*, 71 N.Y.2d at 132.

mined land reclamation standards or requirements than those found herein."[42]

The MLRL establishes a detailed legislative scheme under which the DEC is empowered to regulate the mining of solids, the reclamation of mined lands, and the promulgation and enforcement of standards and regulations for such purposes.[43] Reclamation is defined under the statute as "the conditioning of the affected land to make it suitable for any uses or purposes consistent with the provisions of [the MLRL]".[44]

In *Frew Run*, the New York State Court of Appeals considered whether the preemption language of the MLRL superseded application of a zoning ordinance prohibiting sand and gravel mining in an AR-2 district zoned for agriculture and large lot residential development.[45] The court concluded that the MLRL did not preempt the local zoning ordinance.[46] The *Frew Run* court upheld the Town of Carroll's decision to zone out mining because the Carroll zoning ordinance was not a law "relating to the extractive mining industry."[47] The court found, instead, that zoning law regulated land use generally, and as the MLRL requires that the MLRL supersede all laws related to the extractive mining industry, the court held that the local zoning ordinance was not preempted.[48] The Court of Appeals stated:

> 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

42. Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 681-82 (N.Y. 1996) (quoting ECL § 23-2703[former (2)]).

43. N.Y. ENVTL. CONSERV. LAW §§ 23-2701 - 23-2727 (McKinney 2007 & Supp. 2011).

44. *Id.* § 23-2705.

45. *Frew Run*, 71 N.Y.2d. 126.

46. *Id.* at 133-34.

47. *Id.* at 131 (internal quotations omitted).

48. *Id.*

> Legislature could have envisioned as being within the prohibition of the statute. . . .[49]

The court in *Frew Run* also expressly found that the exception for "stricter" land reclamation standards did not have any bearing on the preemption question.[50]

This narrow interpretation of the express exception in the MLRL has been applied consistently by the courts. *Frew Run* cited *Northeast Mines v. State of New York Dept. of Envtl. Conservation*, in which the Appellate Division, Third Department interpreted the statutory construction of the MLRL to create a specific exception only for ordinances that imposed stricter mined land reclamation standards.[51] The court in *Northeast Mines* reasoned that had the legislature intended to exempt from preemption all provisions within a municipality's zoning ordinance, the preemption language would be ineffective in avoiding competing state and local regulations.[52]

After the *Frew Run* decision, the MLRL was amended in 1991 to clarify its meaning and in effect, codify the *Frew Run* decision.[53] The amended statute reads:

> 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 or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts.[54]

Interpreting the amended statute in *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, the New York State Court of Appeals concluded that the MLRL did *not* preempt the town's authority to determine that

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49. *Id.*

50. *Id.* at 133.

51. *Id.* at 133 (citing Ne. Mines v. Dep't of Envtl. Conserv., 113 A.D.2d 62, 64-65 (N.Y. App. Div. 1985)).

52. 113 A.D.2d at 64-65.

53. Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 682-83 (N.Y. 1996).

54. N.Y. ENVTL. CONSERV. LAW §§ 23-2703(2)(b) (McKinney 2007 & Supp. 2011).

mining should no longer be a permitted use within the Town's limits.[55] The Court in *Gernatt* stated:

> 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.[56]

In reaching its decision, the court did not rely upon the amended language; instead, it reaffirmed *Frew Run*, finding that a zoning ordinance that regulates land use generally is distinguishable from an ordinance that specifically regulates mining activities.[57] Significantly, *Gernatt* expressly found that a municipality may ban mining throughout the entire town through zoning;[58] nothing in the MLRL imposes such an obligation on municipalities to permit this use.[59] The Town of Sardinia in its zoning ordinance could prohibit mining altogether without violating the MLRL.[60]

The court's analysis in *Frew Run* and *Gernatt Asphalt* is applicable to the extractive mining industry because the preemption language of ECL-23 and the MLRL do not materially differ in any respect. The phrase "relating to the regulation of the oil, gas and solution mining industries"[61] in ECL-23 and the phrase "relating to the extractive mining industry"[62] in the MLRL are analogous. Local zoning has the same purpose and effect in both contexts to group compatible uses and to preserve community character and resources.[63] The uniform enforcement of local zoning laws furthers the legitimate purposes of

55. 87 N.Y.2d at 668.
56. *Id.* at 684.
57. *Id.* at 681-82.
58. *Id.* at 683.
59. *Id.*
60. *Id.*
61. N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2007 & Supp. 2011).
62. N.Y. ENVTL. CONSERV. LAW § 23-2703(2) (McKinney 2007 & Supp. 2011).
63. N.Y. TOWN LAW § 263 (McKinney 2003 & Supp. 2011).

local government to protect the safety, health, and well-being of residents and to maintain public order.[64]

II. PENNSYLVANIA'S SUPREME COURT ON THE ISSUE OF PREEMPTION

Section 602 of the Pennsylvania Oil and Gas Act provides:

> Except with respect to ordinances adopted pursuant to the [. . .Municipalities Planning Code and the Flood Plain Management Act], all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which 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. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.[65]

In *Huntley & Huntley, Inc. v. Borough of Oakmont,* a closely contested case before the Supreme Court of Pennsylvania, the court reviewed whether the exclusion of a well from a particular zoning district was preempted by the Pennsylvania Oil and Gas Act.[66] The lease in question was located within a single-family, residential zoning district where mineral extraction was allowed as a "conditional" use.[67] The Pennsylvania Department of Environmental Protection issued a permit, approving the location of the well at the site.[68]

The Pennsylvania Supreme Court in *Huntley* ruled that Section 602 of the Pennsylvania Oil and Gas Act did *not* preempt zoning-based

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64. N.Y. MUN. HOME RULE § 10(1)(ii)(a)(12) (McKinney 1994) (providing the power to enact laws for "[t]he government, protection, order, conduct, safety, health and well-being of persons or property. . . .").

65. 58 PA. STAT. ANN. § 601.602 (West 1996).

66. Huntley & Huntley, Inc. v. Oakmont, 600 Pa. 207, 220-22 (2009).

67. *Id.* at 210-11.

68. *Id.* at 211.

preclusion of oil and gas wells in certain districts.[69] The court, on the other hand, noted that an ordinance to increase specific setback requirements contained in the Oil and Gas Act may not survive a legal challenge.[70] In reaching its decision, the *Huntley* court recognized that the express purposes of the Pennsylvania Oil and Gas Act were distinguishable from those of a land use law.[71] The Court commented that under the Borough's ordinance, "[T]he most salient objectives underlying restrictions on oil and gas drilling in residential districts appear to be those pertaining to preserving the character of residential neighborhoods . . . and encouraging beneficial and compatible land uses."[72]

In New York, local governments under "municipal home rule" have the power to enact laws that protect the visual and physical characteristics of an area.[73] Under both "municipal home rule"[74] and Town Law[75] in New York, towns have the power to adopt zoning laws to preserve the character of an area and maintain public order. These purposes may lead to an incidental impact upon a heavy industry, such as the oil, gas and solution mining industries. Thus, the reasoning of the courts in *Frew Run, Gernatt*, and *Huntley* is transferable to the study of local control over natural gas extraction in New York State.[76]

III. SURVEY OF NEW YORK STATE LOWER COURT DECISIONS ON PREEMPTION

Envirogas v. Kiantone, decided by the Erie County Supreme Court, addressed the issue of preemption under ECL-23 in a limited context.[77] *Envirogas* provides an example of a local regulation that

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69. *Id.* at 223.

70. *Id.* at 223 n.10 ("[H]olding that, where the state oil and gas statute prescribed a specific setback distance for oil wells relative to habitable structures, localities were precluded from increasing those distances through zoning" (citing St Croix, Ltd v. Bath Township, 118 Ohio App. 3d 438 (Ohio Ct. App. 1997))).

71. 600 Pa. at 223-25.

72. *Id.* at 224 (internal quotations and citation omitted).

73. N.Y. MUN. HOME RULE § 10(1)(ii)(a)(11) (McKinney 1994).

74. *Id.* § 10(ii)(a)(11)-(12).

75. N.Y. TOWN LAW § 261 (McKinney 2003 & Supp. 2011).

76. *See* discussion *supra* Parts I and II.

77. Envirogas, Inc. v. Kiantone , 447 N.Y.S.2d 221 (Sup.Ct. Erie County 1982).

did not pass judicial scrutiny in New York under ECL-23.[78] In this case, the *Envirogas* court held that enforcing a local ordinance under which no oil or gas well could be constructed in the town without prior payment of a $2,500 compliance bond and a $25 permit fee was arbitrary, capricious, and contrary to law, since ECL-23 precludes the enforcement of all local ordinances in the area of oil and gas regulation.[79] In *Envirogas*, the town attempted to target the oil and gas industry with a specific regulation, as opposed to a prohibition or a land use law of general applicability.[80] The court noted that ECL § 23-1903 contains a fee schedule[81] and that funds are reserved by the state for well plugging and reclamation purposes.[82] Under ECL § 23-0303, entitled "Administration of Article," towns may apply to the state oil and gas fund for reimbursement of monies expended on repairs to municipal land or property, upon sufficient proof of damage.[83] Further, under 6 NYCRR § 551.4 et seq., the owner of a gas well must post bonds to guarantee performance with the state's well plugging and abandoning requirements.[84] These findings indicated to the court that the State intended to preempt such specific regulations.[85] Furthermore, ECL § 23-1903(2) explicitly specifies that all other laws enacted by local governments or agencies concerning the imposition of a fee relating to regulation and reclamation are superseded.[86]

A series of lower court decisions provide similar guidance under the MLRL.[87] Specific references follow to give examples of the types of generally applicable land use regulations that may be

78. *Id.*

79. *Id.* at 223.

80. 447 N.Y.S.2d 221.

81. N.Y. ENVTL. CONSERV. LAW § 23-1903(1)(b) (McKinney 2003 & Supp. 2011).

82. 447 N.Y.S.2d at 222 (citing N.Y. COMP. CODES R. & REGS. tit. 6, § 551.4(a) (2011) (providing "[t]he owner of an oil and gas well or of a solution mining well must file with the department and continuously keep in force financial security payable to the department to guarantee the performance of his or her well plugging and abandoning obligations").

83. N.Y. ENVTL. CONSERV. LAW § 23-0303(3) (McKinney 2007 & Supp. 2011).

84. tit. 6, § 551.4 (a), (b)(1).

85. *Envirogas*, 447 N.Y.S.2d at 223.

86. N.Y. ENVTL. CONSERV. LAW § § 23-0303(2) (McKinney 2003 & Supp. 2011)

87. *See* discussion *supra* notes 77-87 and accompanying text.

permitted should the courts interpret ECL-23 consistent with the MLRL.

In *Seaboard Contracting & Material, Inc. v. Smithtown*, the Town of Smithtown amended its zoning ordinance to situate mining operations in districts designated for heavy industry.[88] The Appellate Division, Second Department found that this provision of the zoning ordinance dealt with location, rather than operation, and therefore the ordinance was not preempted by ECL-23.[89] Further, the court upheld the Tree Preservation and Land Clearing Law of the Town of Smithtown as applicable to mining operations.[90] The court stated:

> [A]n examination of the legislative purpose underlying the ordinance indicates that the town determined that the indiscriminate and unregulated cutting of trees had caused unnecessary problems of erosion, loss of top soil, sedimentation on roadways and a diminution in the production of oxygen, cover for wildlife and wind and noise insulation. On its face, this ordinance does not constitute an impermissible limitation upon the plaintiff's right to conduct sand mining operations within the town. The ordinance was a reasonable response to concerns involving the welfare of the community, and any impact upon mining operations appears to be incidental rather than as a result of a covert design to circumvent the comprehensive plan for mining set forth in the New York State Mined Land Reclamation Law (ECL §23-2701 *et seq.*).[91]

The court added,

> [A]ccordingly, the Tree Preservation and Land Clearing Law of the Town of Smithtown (Town of Smithtown Code ch 44A) is facially constitutional since it applies equally to all landowners within the community. Further, we conclude

88. Seaboard Contracting & Material, Inc. v. Town Smithtown, 147 A.D.2d 4, 5 (N.Y. App. Div. 2d Dep't 1989).

89. *Id.* at 6-7.

90. *Id.* at 8.

91. *Id.* at 7-8.

> that it was enacted as a proper exercise of the town's legislative function for legitimate objectives in furtherance of the town's health and general welfare.[92]

In *Patterson Materials Corp. v. Town of Pawling,* the Appellate Division, Second Department upheld local town laws that imposed various regulations on the harvesting of timber and restricted construction-related activities occurring on steep slopes, wetlands, and other environmentally sensitive areas.[93] Here, the court reasoned that the local laws were, "laws of general applicability that, at best, would have an incidental burden on mining."[94]

In *Morrell v. C.I.D. Landfill*, private plaintiffs were granted an injunction under Town Law § 268 in order to prevent a landfill from continuing its mining activities until it obtained town approval pursuant to the town's zoning ordinance.[95] The landfill admitted that it was engaged in mining without such approval.[96] The Appellate Division, Fourth Department found that although the MLRL "provides for preemption of local laws relating to the extractive mining industry" nothing in the provision evinces any legislative intent to preempt local land use regulations generally, including a town approval requirement.[97]

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92. *Id.* at 8.

93. Patterson Materials Corp. v. Town of Pawling, 264 A.D.2d 510, 511 (N.Y. App. Div. 2d Dep't 1999).

94. *Id.* at 512.

95. Morrell v. C.I.D. Landfill, Inc., 125 A.D.2d 998, 999 (N.Y. App. Div. 4th Dep't 1986).

96. *Id.*

97. *Id.* (internal citations omitted); *see also* O'Brien v. Fenton, 653 N.Y.S.2d 204 (N.Y. App. Div. 3d Dep't 1997) (holding MLRL did not preempt provision of town law which prohibited mining outside of "mining districts" and establishing criteria for obtaining a designation as a mining district, thereby essentially creating a specially permitted use and that MLRL did not supersede town law's "sunset provision" which eliminated abandoned mines by revocation of mining district classification); Schadow v. Wilson, 599 N.Y.S.2d 335 (N.Y. App. Div. 3d Dep't 1993) (holding authority of zoning board of appeals to deny application for special use permit was not preempted by MLRL, since town zoning ordinance, which empowered board to grant or deny special use permit for soil mining operation in town and prescribed standards to be considered in deciding whether to grant such permit, constituted type of incidental control which is not subject to state law, in that ordinance regulated land use generally (i.e. location of mining operations in town) rather than mining activity itself)

In *Town of Parishville v. Contore Co.*, the Appellate Division, Third Department ruled that the town could impose a civil penalty and mandatory injunction compelling the owner and operator of a mine within the town to remove a scale "shack" and truck scales at the mine that had been installed without obtaining a building permit in violation of the town's local ordinance.[98] The court found that the MLRL does not preempt municipal ordinances that only regulate property uses, such as location, construction, and use of buildings and structures.[99]

These cases indicate that based upon the premise that local laws of general applicability are not laws "relating to the extractive mining industry," the lower courts have routinely upheld the enforceability of prohibited uses within zoning districts. The courts have upheld local environmental protections for tree preservation, soil and water conservation, and town permit requirements for construction-related activities on the same premise.[100] The preemption language under ECL-23 that precludes local laws "relating to the regulation of the oil, gas and solution mining industries" suggests no greater carve-out for the oil and gas industry than the extractive mining industry was allowed under the preemption language contained within the MLRL.

CONCLUSION

The cases under the MLRL support the application of local zoning laws to the extractive mining industry. This case precedent is transferrable to the interpretation of ECL-23 and the oil and gas industry. Zoning avoids the risk of loss associated with competing and incompatible uses of land. In 1926, the United States Supreme Court reviewed the constitutionality of zoning ordinances and upheld

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98. Town of Parishville v. Contore Co., 667 N.Y.S.2d 453, 454-55 (N.Y. App. Div. 3d Dep't 1998).

99. *Id.* at 454.

100. *See* Patterson Materials Corp. v. Pawling, 264 A.D.2d 510, 511 (N.Y. App. Div. 2d Dep't 1999) (land use law that restricted construction-related activities in environmentally sensitive areas); *Parishville,* 667 N.Y.S.2d at 454-55 (town requirement for a building permit); *O'Brien*, 653 N.Y.S.2d 204 (mining district classifications); *Schadow*, 599 N.Y.S.2d 335 (location of mining operations within town); Seaboard Contracting & Material, Inc. v. Town of Smithtown, 147 A.D.2d 4, 5 (N.Y. App. Div. 2d Dep't 1989) (land use law for preservation of trees); *Morrell*, 125 A.D.2d at 999 (town approval requirement prior to mining under zoning ordinance)

the authority of local governments to enact zoning ordinances in furtherance of their police powers to protect the health, safety and welfare of their communities.[101] The New York State Legislature, under the Statute of Local Governments, specifically conferred to cities, towns and villages the power to adopt, amend and repeal zoning ordinances.[102] Any legislation that diminishes this power is required to be re-enacted during a subsequent term of the legislature.[103] ECL-23 was adopted in 1972 and amended in 1981, but was not re-enacted. Had the legislature intended to preempt local zoning ordinances, presumably careful attention would have been paid to proper procedure for effectuating such a sweeping change. The actual, procedural history suggests that the legislature did not intend for ECL-23 to preempt local zoning laws.

Sensitive sites including agricultural and historic districts, wetlands, flood zones, and steep slopes are the most easily identified at the local level. Thus, the exercise of local control in the form of generally applicable environmental protections is sensible. Zoning, likewise, serves the legitimate purpose of situating land uses so as to avoid hazards and disturbances.

Despite such practical considerations, the issue of preemption under ECL-23 has yet to be considered by the New York State Court of Appeals and therefore, the preemptive scope of the statute remains unsettled. The New York State Court of Appeals, in interpreting the MLRL, has twice ruled in favor of a town's decision to enforce its local zoning ordinance and preclude mineral extraction in certain districts.[104] The Pennsylvania Supreme Court has determined that a Pennsylvania town could enforce its zoning ordinance against a natural gas drilling operation.[105] Towns in the state of New York are well advised to weigh their options carefully given the uncertainty with respect to the application of the reasoning under the MLRL to ECL-23. Without clarification from the state legislature, however, an understanding of case precedent under the MLRL and from

101. Village of Euclid v. Ambler Realty Co. 272 U.S. 365 (1926).

102. N.Y. STAT. LOC. GOV'T. § 10(6) (McKinney 1994 & Supp. 2011).

103. N.Y. CONST. art. IX, § 2(b)(1).

104. Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 683 (N.Y. 1996); Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126, 131 (N.Y. 1987).

105. Huntley & Huntley, Inc. v. Oakmont, 600 Pa. 207 (2009).

neighboring jurisdictions may best guide the interpretation of ECL-23.