Title: The Exercise of Local Control Over Gas Extraction
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Abstract: Environmental Conservation Law, Article 23, Title 3 (hereinafter "ECL-23') is a separate state statute from the Mined Land Reclamation Law (hereinafter "MLRL"). Under the MLRL, the state governs the extraction of SOLID minerals. Under ECL-23, the state governs the extraction of SOLUBLES and GASES, including natural gas. These separate state statutes are constructed similarly. Both contain a preemption clause that indicates a local law must be related to the mining industry before the law is preempted or in other words, does not apply. There is the argument that local laws of general applicability, like zoning, that apply equally to all industries and persons are not laws "related to" the mining industry. This argument has been upheld when the courts have interpreted the MLRL statute.

Other than one lower court case that said a town could not require drillers to post bonds, there are NO other court decisions interpreting the meaning of ECL-23. (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.) The cases interpreting the MLRL are the closest body of case law that attorneys have to reference. The law regarding ECL-23 is "unsettled" - there are NO higher court cases interpreting ECL-23 and, as aforementioned, only one lower court decision. Therefore, towns are well advised to weigh risks carefully. However, the case precedent under the closest body of case law (the cases interpreting the MLRL) weighs in favor of enforcing zoning.

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The Exercise of Local Control Over Gas Extraction
By Michelle L. Kennedy[1]

Our town boards are now confronting legal questions regarding enforcement of local land use and zoning laws in the context of natural gas extraction operations. Article 23, Title 3 of the Environmental Conservation Law (hereinafter "ECL-23") specifies:

> 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]

Many local elected officials have read ECL-23 to preclude local control over drilling for natural gas.[3] There are no appellate decisions interpreting the reach of this statute.[4] A similar provision under the Mined Land Reclamation Law (MLRL) has been interpreted by the courts not to preempt local land use regulations, such as zoning despite an incidental impact on mineral extraction. The courts' interpretation of the MLRL may be the best evidence that we have as to how the courts will ultimately interpret ECL-23.[5] As originally enacted in 1974, 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 mined land reclamation standards or requirements than those found herein.[6]

The MLRL establishes a detailed legislative scheme under which the Department of Environmental Conservation (DEC) is empowered to regulate the mining of solids and the reclamation of mined lands and to promulgate and enforce standards and regulations for such purposes.[7] Reclamation is defined under the statue as the conditioning of the affected land to make it suitable for any uses or purposes consistent with the provisions of the MLRL.[8]

In Matter of Frew Run Gravel Prods. v. Town of Carroll, the New York State Court of Appeals considered whether the preemption language of the MLRL blocked application of a zoning ordinance, which prohibited sand and gravel mining in a zoning district.[9] The Court concluded that the MLRL did not preempt the local zoning ordinance.[10]

The Court in Frew Run upheld the Town of Carroll's decision to zone out mining based on the finding that the Town of Carroll's zoning ordinance was not a law "relating to the extractive mining industry." The Court found, instead, that the zoning law regulated land use generally and, therefore, was not preempted.[11] 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 Legislature could have envisioned as being within the prohibition of the statute.[12]

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. The narrow interpretation of the express exception in the MLRL has been applied, consistently, by the courts. The Court of Appeals in Frew Run cited the Matter of 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.[13] 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.[14]

After the Frew Run decision, the MLRL was amended in 1991 to clarify its meaning and in effect, codify the Frew Run decision. 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.[15]

Interpreting the amended statute, in Matter of 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 mining should no longer be a permitted use within the Town's limits.[16] 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.[17]

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.[18] Significantly, the Court of Appeals in Gernatt expressly found that a municipality may ban mining throughout the entire town; nothing in the MLRL imposes such an obligation on municipalities to permit this use.[19] The Town of Carroll in its zoning ordinance could prohibit mining altogether without violating the MLRL.

A case from the Supreme Court of Pennsylvania is also instructive. 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.[20]

The closely contested question before the Pennsylvania Supreme Court in Huntley & Huntley, Inc. v. Borough of Oakmont, *et al*. was whether the exclusion of a well from a particular zoning district, was preempted by the Pennsylvania Oil and Gas Act.[21] The lease in question was located within a single-family, residential zoning district where mineral extraction was allowed as a "conditional" use. The Pennsylvania Department of Environmental Protection issued a permit, approving the location of the well at the site.[22]

The Pennsylvania Supreme Court in Huntley ruled that Section 602 of the Pennsylvania Oil and Gas Act did not preempt zoning-based preclusion of oil and gas wells in certain districts.[23] 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.[24] In reaching its decision, the Pennsylvania Supreme Court recognized that the express purposes of the Pennsylvania Oil and Gas Act were distinguishable from those of a land use law. The Court commented that under the Borough's ordinance:

> The 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.[25]

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Envirogas v. Kiantone, decided by the Erie County Supreme Court, addressed the issue of preemption under ECL-23 in a limited context.[26] Envirogas v. Kiantone provides the opportunity for a comparative look at a regulation that did not pass judicial scrutiny in New York under ECL-23. In this case, 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 were held to be arbitrary, capricious and contrary to law, since ECL-23 precludes the enforcement of all local ordinances in the area of oil and gas regulation.[27] 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. The Court noted that ECL §23-1903 contains a fee schedule; funds are reserved by the state, at least in part, for reclamation purposes. 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.[28] Also, 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.[29] All of these findings supported the view that the State intended to preempt such regulations.

There are a series of lower court decisions that provide similar guidance under the MLRL. Specific references follow to give examples of the types of generally applicable land use regulations that may be 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. The Court found that this provision of the zoning ordinance dealt with location, rather than operation, therefore, the ordinance was not preempted by ECL-23.[30] Further, the Appellate Division, Second Department upheld the Tree Preservation and Land Clearing Law of the Town of Smithtown as applicable to mining operations. The Court said:

> An 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*.).[31]

The court added, "Accordingly, 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 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."[32]

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. The Court reasoned that the local laws were laws of general applicability and at best, would have an incidental burden on mining.[33]

In Morrell v. C.I.D. Landfill, Inc., 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. The landfill admitted that it was engaged in mining without such approval. 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 indicates legislative intent to preempt local land use regulations generally, including the town approval requirement.[34]

In Town of Parishville v. Contore Co., the Court 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 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. 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.[35]

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 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.[36] 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.[37] Any legislation that diminishes this power is required to be re-enacted during a subsequent term of the legislature.[38] ECL-23 was adopted in 1972 and amended in 1981, but was not re-enacted. This procedural history

suggests that the legislature did not intend for ECL-23 to preempt local zoning ordinances.

The issue of preemption under ECL-23 has yet to be considered by the New York State 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. The Pennsylvania Supreme Court has determined that a Pennsylvania town could enforce its zoning ordinance against a natural gas drilling operation. Towns 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; still, case precedent under the MLRL and from neighboring jurisdictions may best guide the interpretation of ECL-23.

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[2] ECL §23-0303(2)

[3] *See* Sullivan County Task Force, Preparing for Natural Gas Development: Understanding Impacts and Protecting Public Assets, at pg. 17, dated Feb. 13, 2009, available at http://www.otsegocounty.com/depts/pln/documents/SullivanCoNaturalGasReport-02-13-09.pdf; *see also* Augenstern, Robert, The Role of Local Government in Relation to Natural Gas Exploration and Production in the Marcellus Shale, Southern Tier East Technical Paper #08-07, Southern Tier East Regional Planning Development Board, at pgs. 25-26, dated Aug. 18, 2008, available at http://www.otsegocounty.com/depts/pln/documents/RoleofLocalGovt-NaturalGasExplorationAndProductionSTEReport08-07.pdf.

[4] In Envirogas Inc. v. Town of Westfield, 442 N.Y.S.2d 290 (1981, 4th Dept), the Appellate Division, Fourth Department ruled that a town could require drillers to post compliance bonds to ensure that the land would be restored; however, 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.

[5] *See* Kenneally, Michael E. and Mathes, Todd M., Natural Gas Production and Municipal Home Rule in New York, New York Zoning Law and Practice Report, Vol. 10, No. 4 (January/February 2010); *see also* Presentation by Slottje, Helen, Senior Attorney, Community Environmental Defense Council, Just Say No! Using Local Land Use Control to Prohibit Industrialization Shaleshock Media (posted Dec. 18, 2010) at

http://shaleshockmedia.org/2010/12/18/just-say-no-using-local-land-use-control-to-prohibit-industrialization-helen-slottje/.

[6] ECL §23-2703[former (2)].

[7] New York State Mined Land Reclamation Law, N.Y. Envtl. Conserv. Law §§ 23-2701 – 23-2727.

[8] ECL §23-2705.

[9] Matter of Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126, 131-133 (1987).

[10] *Id*.

[11] Frew Run Gravel Products, supra n. viii, 71 N.Y.2d at 131.

[12] *Id.*

[13] Frew Run Gravel Products, supra n. viii, 71 N.Y.2d at 131-132 (citing Matter of Northeast Mines v. State of New York Dept. of Envtl. Conservation, 113 A.D.2d 62, 64-65 (1985)).

[14] Matter of Northeast Mines v. State of New York Dept. of Envtl. Conservation, 113 A.D.2d 62, 64-65 (1985).

[15] ECL §23-2703[2](b).

[16] Matter of Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 683 (1996).

[17] *Id.* at 684.

[18] *Id*. at 682.

[19] *Id*. at 683.

[20] 58 P.S. §601.602

[21] Huntley & Huntley, Inc. v. Borough of Oakmont, *et al*., 600 Pa. 207, 221-222 (2009).

[22] *Id.* at 210-211.

[23] *Id.* at 223.

[24] Huntley *supra* n. xxi 600 Pa. at 223, n. 10 (citing St Croix, Ltd v. Bath Township, 118 Ohio App. 3d 438 (Ohio Ct. App. 1997) (holding 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)).

[25] *Id.* at 224.

[26] Matter of Envirogas v. Kiantone *et al*., 447 N.Y.S.2d 221 (1982, Sup.Ct. Erie).

[27] *Id*. at 223.

[28] ECL §23-0303(3)

[29] 6 NYCRR §551.4 et seq.

[30] Seaboard Contracting & Material, Inc. v. Smithtown, 147 App. Div. 2d 4, 6-7 (1989, 2d Dept.).

[31] *Id.* at 7-8.

[32] *Id.* at 8.

[33] Patterson Materials Corp. v. Town of Pawling, 264 A.D.2d 510 (1999, 2d Dept.).

[34] Morrell v. C.I.D. Landfill, Inc., 125 App Div 2d 998 (1986, 4th Dept.); *see also* Schadow v. Wilson, 599 N.Y.S.2d 335 (1993, 3d Dept) (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 (ie location of mining opertions in town) rather than mining activity itself); O'Brien v. Town of Fenton, 653 N.Y.S.2d 204 (1997, 3d Dept) (MLRL did not preempt provision of town law which prohibited mining outside of "mining districts" and established criteria for obtaining a designation as a mining district, thereby essentially creating a specially permitted use; MLRL also did not supersede town law's "sunset provision" which eliminated abandoned mines by revocation of mining district classification.)

[35] Town of Parishville v. Contore Co. 667 N.Y.S.2d 453 (1998, 3d Dept).

[36] Village of Euclid v. Amber Realty Co. 272 U.S. 365 (1926).

[37] Stat. of Local Govt. § 10(6)

[38] NYS Constitution Art. IX §2(b)(1)

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