



**MEMORANDUM**

**TO:** Town of Middlefield **PRIVILEGED AND CONFIDENTIAL**  
**ATTORNEY-CLIENT COMMUNICATION**

**FROM:** Bob Feller

**DATE:** May 12, 2011

**RE:** Local Jurisdiction over Gas Drilling

This memo will discuss the extent to which local government can assert jurisdiction over gas drilling operations in light of the preemption provision contained in Environmental Conservation Law (ECL) §23-0303(2).

General Principles

Preemption of local laws by state law can occur in one of two separate ways – conflict and field preemption. Conflict preemption occurs when a local law is in direct conflict with a state requirement.<sup>1</sup> It is not sufficient that the two requirements address the same area, they must be incompatible.<sup>2</sup>

Field preemption occurs when the state legislature has assumed sole responsibility for regulating in a particular field.<sup>3</sup> This intent can be expressly stated or can be implied.<sup>4</sup> The principal source of preemption of local regulation of gas drilling derives from explicit field preemption.

<sup>1</sup> See DJL Restaurant Corp. v. City of New York, 96 N.Y.2<sup>nd</sup> 91, 95 (2001); Jancyn Mfg. Corp. v. County of Suffolk, 71 N.Y. 2<sup>nd</sup> 91, 96 (1987); Consolidated Edison Co. v. Town of Red Hook, 60 N.Y.2<sup>nd</sup> 99, 107(1983).

<sup>2</sup> Jancyn Mfg. Corp., supra at 97.

<sup>3</sup> DJL Restaurant Corp., supra at 95.

<sup>4</sup> DJL Restaurant Corp., supra at 95.

In specific instances, it is also possible that preemption could occur as a result of an actual conflict in a state and local requirement. In the vast majority of these instances, the local requirement would likely be invalid under the field preemption as well.

The ECL states,

The provisions of this article (Art 23) 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 government under the real property tax law. ECL 23-0303(2) (the Preemption Provision).

In interpreting supersession/ preemption statutes, the courts have followed a three-step approach. First, they look to the plain meaning of the statute. Second, they examine any relevant legislative history. Third, they look to the underlying purposes of the supersession clause as part of the statutory scheme.<sup>5</sup>

The Preemption Provision was enacted in Chapter 846, Laws of 1981. A complete review of the legislative bill jacket was undertaken. No relevant legislative history or information concerning the underlying purposes for the supersession clause was identified. The only statement of purpose is found in ECL §23-0301. That statute states,

§ 23-0301. Declaration of policy.

It is hereby declared to be in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate

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<sup>5</sup> Frew Run Gravel Products, Inc. v. Town of Carroll, 71 N.Y.2<sup>nd</sup> 126, 131 (1987).

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.

This declaration of policy provides little insight into the legislative purposes behind the preemption of local laws and ordinances.<sup>6</sup> Therefore, the interpretation of the Preemption Provision is likely to rely heavily, if not exclusively, on the plain meaning of the statute aided by judicial interpretations of similar language in other statutes.

Plain Meaning. The language in the Preemption Provision is parsed through below for purposes of determining its plain meaning.

#### State vs. Local Requirements

The supersession relates only to local laws and ordinances. Therefore, other state laws that relate to gas drilling are not preempted.<sup>7</sup> This means that gas drilling operations are subject to other state regulations and permits. These would include laws that directly regulate the gas industry (e.g. those related to water pollution control) and those whose impact is less direct (e.g. the State Historic Preservation Act, Freshwater Wetlands Act, Endangered Species Act).<sup>8</sup> Since the New York State Uniform Fire Prevention and Building Code (the Uniform Code) is a state requirement, it would clearly continue to apply.

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<sup>6</sup> The only judicial decision opining on this section held that the DEC's interest in licensing well spacing units in a natural gas field is regulatory only, so that the Department could not represent the owners of land possibly entitled to royalties from extracting the gas. Spence v. Cahill, 300 A.D.2<sup>nd</sup> 992 (4<sup>th</sup> Dept., 2002). This holding does not provide any useful insights into the intent of the preemption provision.

<sup>7</sup> Compare the language in ECL §23-0303(2) to the supersession language in the Mined Land Reclamation Law (ECL §23-2703(2)) which effects the preemption of both local and state laws.

<sup>8</sup>As discussed in this memo, requirements that apply indirectly could very well survive on two alternative theories as well – either they are not laws “relating to the regulation of the oil and gas industry” or their impacts on the industry are only “incidental.”

Although the Uniform Code can be implemented at different levels of government,<sup>9</sup> local implementation would be permissible because it does not violate the basic purposes behind preemption. Preemption is intended to avoid the imposition of local requirements that “(1) prohibit conduct which the State law ... considers acceptable or at least do not proscribe or (2) imposes additional restrictions on rights granted by State law.”<sup>10</sup> Because the standards themselves in the Uniform Code are not preempted, local implementation of the standards should not be affected as it would not violate these principles.

Moreover, as discussed elsewhere in this memo, there is substantial case law in the context of other field preemption situations holding that requirements which have only an “incidental” impact on the affected industry are still enforceable. The implementation of the requirements of the Uniform Code by local government has been held to be “incidental” in the context of the Mine Land Reclamation Law (MLRL), ECL Article 23 Title 27, a statute that has language very similar to the Preemption Provision.<sup>11</sup> This would constitute a second and independent basis to conclude that the implementation of the Uniform Code by local government is not affected by the Preemption Provision.

The same outcome is likely with respect to the local requirements associated with ECL Article 36 – Participation in Flood Insurance Programs. That statute requires local governments that are in areas of special flood hazard to use their zoning powers to establish standards for land use and

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<sup>9</sup> Executive Law §381.

<sup>10</sup> Jancyn Mfg. Corp., supra at 97.

<sup>11</sup> Town of Parishville v. Contore Co., Inc., 237 A.D.2<sup>nd</sup> 67, 69 (3<sup>rd</sup> Dept., 1998); Town of Cortlandt v. Santucci, 163 Misc.2<sup>nd</sup> 483, 495 (S.Ct. Westchester County, 1994).

building within those areas, consistent with the requirements of the national flood insurance program. Local governments must also require a local floodplain development permit for projects in those areas. Even though these requirements are implemented by local law, the standards are dictated by the national program and therefore will not be subject to preemption.<sup>12</sup>

### Local Laws and Ordinances

The terms of the Preemption Provision relate only to local laws and ordinances. Where a local law establishes the need for a permit or similar approval, generally there is authority to impose permit conditions on the approval.<sup>13</sup> A condition that is imposed on such approval is not explicitly covered by the Preemption Provision as it is neither a local law nor an ordinance. However, case law holds that the same standard for preemption would apply to any requirement whose authority is derived from a local law or ordinance.<sup>14</sup> Further discussion of use of permit conditions is provided below.

### Relating to the Regulation of the Oil, Gas and Solution Mining Industries.

The interpretation of the phrase “related to the regulation ...” has been addressed frequently in decisions related to the scope of the preemption under the MLRL. These decisions are highly instructive for our purposes as the preemption language in the MLRL insofar as it relates to regulation of extractive mining activities is almost identical to the Preemption Provision.<sup>15</sup>

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<sup>12</sup> The DEC expresses its view in its Draft Supplemental Generic Environmental Impact Statement (SGEIS) that these local permits would be required the Preemption Provision notwithstanding (Draft SGEIS at §8.1.1.4.).

<sup>13</sup> See e.g. Town Law §§ 274-a(4) and 274-b(4).

<sup>14</sup> Hoffay v. Tift, 164 A.D.2<sup>nd</sup> 94, 97 (3<sup>rd</sup> Dept., 1990).

<sup>15</sup> Prior to the 1991 statutory amendments, the statute explicitly permitted local regulation of reclamation activities. Therefore, pre-1991 amendment judicial decisions which examine the validity of local control over reclamation do not represent comparable circumstances to the Preemption Provision and are not considered in this memo.

In relation to mining activities, before the 1991 statutory amendments, the MLRL statute read, “... this title shall supersede all other state and local laws relating to the extractive mining industry.” (ECL §23-2703(2)). The Preemption Provision reads, “...the provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries.” (ECL §23-0303(2)).

Therefore, it is obvious that the relevant language, though not identical, is very similar. This author does not perceive any sound basis for finding the scope of the preemption language in the MRLR to be any less restrictive. Hence, any type of local requirement not preempted by the MLRL provision should similarly be valid in the context of natural gas operations. However, as a cautionary note, there is virtually no caselaw interpreting the Preemption Provision.<sup>16</sup>

In 1991, the MLRL was amended in response to the Frew Run decision. It made explicit the right of municipalities to adopt zoning laws which designate mining as either a permitted or prohibited use. It also made explicit the right of municipalities to adopt laws of general applicability so long as such laws did not regulate mining activities that were regulated by the state. Finally, although it acknowledged the right of municipalities to implement a special use permit system, it limited the types of conditions that could be imposed.<sup>17</sup>

With respect to the right to establish permitted, conditionally permitted and prohibited uses in particular zones and the right to adopt local laws of general applicability, the legislation codified

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<sup>16</sup> The only reported case that addresses ECL §23-0303(2) is Envirogas, Inc. v. Town of Kiantone, (112 Misc. 2<sup>nd</sup> 432 (S.Ct. Erie County, 1982) which did not address the question of local regulation but rather only opined on the propriety of a bonding requirement and a permit fee.

<sup>17</sup> The conditions are limited to ingress and egress to public thoroughfares controlled by local government; routing of mineral transport vehicles of roads controlled by local government; and imposing the same conditions imposed by DEC with respect to setbacks, dust control and hours of operation. ECL §27-0303(2)(b)(i), (ii) and (iii).

the holding in Frew Run.<sup>18</sup> It is less certain whether the statutory amendment codified the limits on permit conditions in the then-existing law. Rather than codify the general principle in case law holding that such conditions could not regulate the industry, the legislature chose to exhaustively list those areas where conditions could be imposed. It is unclear whether designated areas are truly exhaustive of the permit conditions that would have survived scrutiny under then-existing law or whether the Legislature wanted to provide a bright line test to limit or avoid future litigation.

Therefore, judicial decisions that address the right of localities to zone or to adopt non-zoning laws of general applicability are instructive for our analysis whether they pre-date or post-date the statutory amendment. On the other hand, decisions that post-date the amendment which address the validity of permit conditions may be of limited value in the analysis of the Preemption Provision.

The analysis in this memo will also examine MLRL cases and those arising in other areas of regulation where field preemption has been found. Even though the statutes in the non-mining cases do not have language that is virtually identical to the Preemption Provision, they do serve to reinforce the principles that are common to field preemption situations.

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<sup>18</sup> Town of Parishville, supra at 69; Valley Realty Development Corp. v. Jorling, 217 A.D.2<sup>nd</sup> 347, 351 (4<sup>th</sup> Dept. 1995). See also, Weinberg, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 17 1/2, ECL 23-2703, 1995 Pocket Part at 142).

## Uses of the Zoning Power – Generally

There are two principles established by the relevant MLRL case law. First, preemption only extends to requirements that regulate the industry, as opposed to those that regulate land use generally or regulate other legitimate targets of the police power. Second, preemption does not defeat local requirements whose impact is only incidental to the industry.

In the context of the MLRL, the courts have consistently drawn a distinction between the regulation of land use on the one hand and regulation of particular commercial and industrial operations on the other.<sup>19</sup> This same distinction has been made in many other contexts as well.<sup>20</sup> Therefore, where state law effects a field preemption of local laws regulating particular commercial or industrial endeavors, the courts have repeatedly held that the zoning power may still be exercised.<sup>21</sup> They have articulated the principle that separate levels of regulatory oversight can consistently co-exist.<sup>22</sup> Only where there is a clear legislative intent to preempt the use of the zoning power will the courts disallow zoning requirements.<sup>23</sup>

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<sup>19</sup> Frew Run Gravel Prods., Inc., supra at 131 (Holding that the zoning ordinance relates 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"); See also, Gernatt Asphalt v. Sardinia, 87 N.Y. 2<sup>nd</sup> 668 (1996); Hunt Bros. v. Glennon, 81 N.Y. 2<sup>nd</sup> 906 (1993); and Schadow v. Wilson, 191 A.D. 2<sup>nd</sup> 53 (3<sup>rd</sup> Dep't. 1993).

<sup>20</sup> DJL Rest Corp., supra (Holding that, even though the ABC Law preempts local regulation of the sale and distribution of liquor, local zoning laws are not preempted); Village of Nyack v. Daytop Vil., 78 N.Y. 2<sup>nd</sup> 500 (1991) (Holding that state has sole authority for licensing and regulating operators of residential substance abuse facility but that operators must still comply with local zoning); Sunrise Checking v. Town of Hempstead (2010 NY Slip Op 31005, S.Ct. Nassau) (Holding that Banking Law does not preempt local zoning requirements related to location of check-cashing establishments).

<sup>21</sup> Frew Run Gravel Products, Inc., supra; DJL Rest. Corp., supra; Village of Nyack, supra; Sunrise Checking, supra.

<sup>22</sup> Schadow, supra; Village of Nyack, supra; Jancyn Mfg. Corp., supra; DJL Rest. Corp supra.

<sup>23</sup> Gernatt Asphalt, supra.

## Use of Zoning Power – Establishing Zones with Permitted and Prohibited Uses

Zoning authority permits local government to establish zones and to establish uses that are permitted and prohibited within each of those zones.<sup>24</sup> Even though it has been argued that the designation of a use as a prohibited one town-wide constituted improper exclusionary zoning, the courts have thus far not extended this concept to commercial and industrial uses.<sup>25</sup> It has also been held that a municipality does not have an obligation to permit the exploitation of any natural resource within its borders if not doing so is a reasonable exercise of police powers to prevent damage to the rights of others and to promote the interests of the community.<sup>26</sup> Therefore, under the right circumstances, a municipality could use zoning to make gas drilling a prohibited use in all zones.<sup>27</sup>

If the prohibition of gas drilling deprived the land owner of a reasonable return on investment in the property, an inverse takings claim might result.<sup>28</sup> However, prior to pursuing any such claim, a land owner would have to apply to the zoning board of appeals (ZBA) for a use variance.<sup>29</sup> In such a proceeding, the land owner would have to demonstrate that none of the permitted uses in the zone would allow for a reasonable return on investment.<sup>30</sup>

Because moratoria are stop gap zoning measures, it also would follow that a municipality could impose a temporary moratorium on gas drilling pending an update of its comprehensive plan or

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<sup>24</sup> DJL Rest. Corp., supra at 97; 12 N.Y. Jur. 2d Buildings §129

<sup>25</sup> Gernatt Asphalt, supra at 683-84.

<sup>26</sup> Gernatt Asphalt, supra at 669.

<sup>27</sup> See Gernatt Asphalt, supra and Matter of Valley Realty Development v. Town of Tully, 187 A.D.2<sup>nd</sup> 963, 964 (4<sup>th</sup> Dept., 1992). It is important to note that although a use could be prohibited in all zones, a municipality could only do so if such action was consistent with its comprehensive plan and if it followed the proper procedures to implement the necessary zoning laws.

<sup>28</sup> Penn. Cent. Transp. Corp. v. New York City, 438 U.S. 104 (1978).

<sup>29</sup> Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

<sup>30</sup> See e.g., Town Law §267-b(2)(b). Parallel provisions exist in the Village and General City Law.

of its zoning law implementing that plan. Such moratoria have been successfully imposed on mining uses.<sup>31</sup>

However, a municipality cannot put restrictions on a permitted use or define a permitted use in such a way as to constitute impermissible regulation in a preempted field. Thus, a zoning law that made mining above the water table a permitted use and mining below the water table a prohibited use was found invalid.<sup>32</sup> In the context of gas drilling, an analogous situation would occur if a zoning law established vertical drilling as a permitted use in a particular zone but prohibited horizontal drilling in that same zone.

#### Use of Zoning Power – Other Zoning Requirements

Short of prohibiting a use, the zoning power has also been used to ensure that permitted uses are developed in an appropriate way. The most common land use tools for this purpose are site plan review and special use permitting (see Town Law §§274-A, 274-B). In some cases, municipalities have adopted permit requirements that are specific to mining operations (e.g. excavation and blasting permits). Zoning laws invariably also have area/bulk standards (e.g. setback requirements) and will often have other requirements of general applicability (e.g. performance standards). The issue is to what extent these tools and requirements can be used in the context of gas drilling operations.

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<sup>31</sup> The practitioner should keep in mind that all of the basic requirements that are necessary to sustain any moratorium would still have to be met.

<sup>32</sup> Hawkins v. Town of Preble, 145 A.D. 2<sup>nd</sup> 775 (3<sup>rd</sup> Dep't, 1988). See also Northeast Mines Inc. v. State Dep't of Environmental Conservation and the Town of Smithtown, 113 A.D. 2<sup>nd</sup> 62 (3<sup>rd</sup> Dep't, 1985) (holding invalid a local ordinance that prohibited gravel excavation to a depth authorized under the DEC permit).

## Special Use Permits

A special use permit is a vehicle for zoning authorities to ensure that permitted uses are implemented in a way that protects public health, safety and welfare. The courts have upheld local special use permit requirements for mining operations so long as the criteria for granting the permit principally relate to the regulation of land use and do not impact mining in any but an incidental way.<sup>33</sup>

However, it is important to note that courts have uniformly held that the inclusion of a use in a zoning law as a special permit use is tantamount to a legislative finding that the permitted use is in harmony with a community's general zoning plan and will not adversely affect the neighborhood.<sup>34</sup> Designation as a special permit use results in a strong presumption in favor of that use.<sup>35</sup> As a result, an applicant's burden to demonstrate entitlement to a special use permit is relatively light.<sup>36</sup> If an applicant demonstrates compliance with the standards in the local law for issuing special use permits, the board is obligated to issue the permit.<sup>37</sup>

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<sup>33</sup> Beyer v. Town of Lowville, 61 A.D.3<sup>rd</sup> 1422 (4<sup>th</sup> Dept. 2009), Town of Riverhead v. T.S. Haulers, 275 A.D.2d 771 (2<sup>nd</sup> Dept., 2000); Town of Throop v. Leema Gravel Beds, Inc. 249 A.D.2<sup>nd</sup> 970 (4<sup>th</sup> Dept. 1998); Matter of Cipperly v. Town of East Greenbush, 262 A.D.2<sup>nd</sup> 764, 765 (3<sup>rd</sup> Dept., 1990); Matter of Schadow, supra.

<sup>34</sup> Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead, 98 N.Y.2<sup>nd</sup> 190, 195 (2002); Wegmans Enterprises, Inc. v. Lansing, 72 N.Y.2<sup>nd</sup> 1000 (1988); Robert Lee Realty Co. v. Village of Spring Valley, 61 N.Y.2<sup>nd</sup> 892 (1984); North Shore Steakhouse, Inc. v. Board of Appeals of the Village of Thomaston, 30 N.Y.2d 238 (1972); Hudson Resources, Inc. v. Venditto, 282 A.D.2<sup>nd</sup> 676 (2<sup>nd</sup> Dept., 2001); See also Volume 61 McKinney's Consolidated Laws of New York, Practice Commentaries to Town Law §274-b.

<sup>35</sup> Cove Pizza, Inc. v. Hirshon, 61 A.D.2<sup>nd</sup> 210 (2<sup>nd</sup> Dept., 1978)

<sup>36</sup> See North Shore Steak House, supra at 244; Old Court International, Inc. v. Gulotta, 123 A.D.2<sup>nd</sup> 634 (2<sup>nd</sup> Dept., 1986); Wegmans Enterprises, Inc., supra.

<sup>37</sup> C.B.H. Properties, Inc. v. Rose, 205 A.D.2<sup>nd</sup> 686 (2<sup>nd</sup> Dept. 1994); McDonald v. City of Ogdensburg ZBA, 101 A.D. 2<sup>nd</sup> 900 (3<sup>rd</sup> Dept. 1984). The only exception is where the application is the subject of a final environmental impact statement and the board makes negative findings pursuant to 6 NYCRR 617.11, notwithstanding its conclusion that all criteria in the local law have been met.

Nonetheless, where a use is permitted by special permit it is not “as of right” and there is no entitlement to the permit.<sup>38</sup> There have been situations where municipalities concluded that the criteria for issuing special use permits have not been met and denied the permit on that basis. Such a denial of a special use permit has been held to not constitute a regulation of the industry.<sup>39</sup> Therefore, if permitting criteria are valid and the failure to meet the criteria is adequately supported on the record, a denial will not fail because of field preemption.

Although existing case law supports the position that municipalities can establish a special use permit requirement for gas drilling operations, they should do so only in zones where such operations are generally compatible with desired land use patterns. Where gas drilling is subject to a special use permit, the expectation is that it will be granted, with or without conditions. Given the presumptions discussed above, only where specific sites in these zones present atypical problems, it is likely that the municipality will have an adequate basis to deny the permit.<sup>40</sup>

In summary, municipalities must be careful to ensure that the criteria for issuing special use permits are related to land use concerns and that they do not address matters that would constitute regulation of the industry. Where the approval criteria are appropriate, the special use permit will be found valid on its face.<sup>41</sup>

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<sup>38</sup> Matter of Wegmans Enterprises, supra at 1001; Matter of Cipperly, supra at 765.

<sup>39</sup> Matter of Schadow, supra at 56.

<sup>40</sup> To provide a sound basis for imposing conditions or denying an application, it makes sense to include either qualitative or quantitative criteria that would address the impact of natural gas drilling on locations or uses of concern. For example, if a special use requirement is adopted in a commercial zone, it might establish criteria that would address proximity to schools or churches in that zone.

<sup>41</sup> In Riverhead the court upheld the special use permit requirement as it did not address actual operations and processes of mining. In Schadow, the court held that the standards for issuing special use permits for soil mining constituted the type of incidental control that do not subject them to preemption.

Examples of local laws establishing standards for special use permitting schemes for mining operations that have been upheld on judicial review are attached in Exhibit A. Examples that have been held preempted are attached in Exhibit B. If a municipality has any doubt about whether any of its criteria would withstand scrutiny, it should express its desire for the remaining criteria to survive by including a severability clause in the local legislation.

#### Extraction, Blasting and Similar Permits

Municipalities have also adopted local laws that require a permit specific to mining operations and have imposed performance standards which only apply to mining operations.<sup>42</sup> Such approaches have generally not been successful as they invariably are found to amount to a regulation of the mining industry.<sup>43</sup> A similar outcome could be expected for permits specific to the gas drilling industry.

#### Site Plan Review Requirements

Courts have upheld local laws that impose site plan review requirements on mining operations.<sup>44</sup> Examples of such laws are attached in Exhibit C. However, given that such review focuses on the arrangement, design and layout of the use, there is greater likelihood that its implementation would run afoul of the Preemption Provision than would be the case for a special use permit requirement.

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<sup>42</sup> Unlike special use permits which have issuance criteria applicable to all special uses, these permits relate only to mining operations and have issuance criteria that are similarly specific.

<sup>43</sup> Northeast Mines Inc., supra; Matter of Briarcliff v. Town of Cortlandt, 144 A.D.2<sup>nd</sup> 457, 458 (2<sup>nd</sup> Dept., 1988), wherein the court held that the excavation permit regulated the type of mining and was therefore preempted.

<sup>44</sup> Town of Throop, supra; Troy Sand & Gravel Co., Inc. v. Town of Nassau, 2008 Slip Op 50246 (S.Ct. Rensselaer, 2008).

### Bulk and Area Requirements and Other Performance Standards

No cases were identified that addressed the preemption of local area/bulk requirements.<sup>45</sup>

However, the provisions of Town Law §269 may be significant in deciding this question. That statute states,

Whenever the regulations made under authority of this article (Article 16 - Zoning and Planning) require a greater width or size of yards or courts, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standard than are required in any other statute or local law, ordinance or regulation, the provision of the regulations made under authority of this law shall govern. (Emphasis added)

This statute explicitly addresses conflicts between local area/bulk requirements and other standards in “any other statute or local law, ordinance or regulation.” Because the reference includes standards imposed by state statute, it could reasonably be read to include ECL Article 23 and any rules promulgated under the authority of that statute. In essence, it could be argued that Town Law §269 carves out an exception to the field preemption resulting from the Preemption Provision and that any actual conflict is not subject to the doctrine of conflict preemption as well because the conflict lies between two state statutes, rather than between a state statute and a local law. However, no cases or other authorities were identified that interpreted the impact of Town Law §269 in the present context.<sup>46</sup>

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<sup>45</sup> It is worth noting that ECL §23-2703(2)(b)(iii) only permits setback conditions that are established by DEC permit conditions. However, this would not necessarily be the result under the Preemption Provision which does not contain the limiting language that was put in the 1991 MRLR amendments.

<sup>46</sup> It is worth mentioning that at least one case held that a town could not impose setback requirements in addition to those imposed by DEC. (Philipstown Industrial Park v. Town Board of Philipstown, 274 AD 2<sup>nd</sup> 525, 528 (2<sup>nd</sup> Dept. 1998)). However, the 1991 amendments to the MLRL specifically provide that any setback requirements in a local

Based on the analysis in this memo, it is likely that bulk/area zoning requirements that do not conflict with state regulation and only incidentally impact the gas drilling industry would be upheld. What is uncertain is the interplay between the Preemption Provision and Town Law §269 in situations where the local requirement may be more stringent or different than a requirement imposed by the New York State Department of Environmental Conservation (DEC).

As an example, the draft SGEIS proposes setbacks from water supplies but is silent on setbacks from property lines.<sup>47</sup> A setback requirement in a local zoning law might survive challenge if analysis shows that its impact on the industry is incidental. The more problematic case would occur where the required setback would substantively impact operations or make them infeasible. If such were the case, the conflict would first be addressed within the context of an area variance application. If the issue is still unresolved after that proceeding, it is likely that the final outcome would hinge on judicial interpretation of Town Law §269.

#### Conditions Imposed on Permits and Other Entitlements.

As discussed above, local laws and ordinances that were found to regulate the extractive mining industry or to impact it in more than an incidental way were held preempted.<sup>48</sup> Conversely, local laws that don't regulate the mining industry or impact it in more than an incidental way were

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permit must be as specified in the DEC permit (ECL §23-2703(2)(b)(iii)) and hence the court did not need to consider the impact of Town Law §269. There is no such limit in the Preemption Provision and hence it is possible that in a similar situation involving a gas drilling facility, the outcome might be different.

<sup>47</sup> Draft SGEIS at §7.1.12.

<sup>48</sup> Seaboard Contracting & Materials, Inc., supra; Patterson Materials Corp., supra.

held to be valid on their face<sup>49</sup> Whenever a local law is facially valid, any permit conditions will be subject to a further analysis to determine whether the law is valid as applied.

As stated earlier in this memo, even though permit conditions are not “local laws or ordinances,” those whose authority derives from local laws or ordinance will be subject to the same preemption test.<sup>50</sup> That test similarly would examine whether the permit condition regulates the gas drilling industry or impacts it in more than an incidental way. Where the condition does not meet this second test, a court will find the condition to be an invalid application of the permitting scheme.<sup>51</sup>

For example, a scheme involving a special use permit might require a finding that the use is generally compatible with the surrounding neighborhood. Such a permit standard is likely to be found valid on its face. However, if the land use board imposes a condition that sets the hours of operation of a gas drilling operation in order to find compatibility, that condition would be found preempted as applied as it constitutes regulation of the industry.<sup>52</sup>

In the context of mining, conditions that relate to the periods of use of the access roads, outdoor noise, emission of dust and other factors incidental to comfort, peace, enjoyment, health or safety of the surrounding area would be valid applications of the permitting authority if they are justified by the record.<sup>53</sup> However, a condition that prohibits blasting or restricts mining to mechanical means is an invalid application of the zoning law as it regulates the techniques of

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<sup>49</sup> See e.g. Philipstown Industrial Park supra at 527.

<sup>50</sup> Hoffay v. Tift, supra at 97. This would include permit conditions arising out of special use permits, site plan reviews and other permit schemes established through local law or ordinance.

<sup>51</sup> Patterson Materials v. Town of Pawling, 264 A.D. 2<sup>nd</sup> 510, 512 (2<sup>nd</sup> Dept., 1999).

<sup>52</sup> Charlton Services v. Town of Glenville, 142 Misc.2<sup>nd</sup> 313 (S.Ct. Schenectady Cty., 1988).

<sup>53</sup> Hoffay supra at 97.

mining.<sup>54</sup> A condition that establishes hours of operation also was held invalid as an attempt to regulate the mining industry.<sup>55</sup> Examples of permit conditions and/or performance standards for mining operations that have been held invalid as applied are set forth in Exhibit D.

If there is a question about whether a condition will be preempted, the board should express its intent in that eventuality. Specifically, the board should determine whether the criteria for issuing the approval can be met in the absence of such a condition. If in the board's judgment they can not, it should express its intent to deny the permit in the event that a court holds the condition preempted.

There are two possible exceptions to this treatment – conditions attached to the grant of variances and those attached to findings issued by an involved agency under the State Environmental Quality Review Act (SEQRA) (ECL Article 8) after an action has been the subject of final environmental impact statement (EIS).

Two cases that arise out of the Alcoholic Beverage Control (ABC) Law may provide some basis to distinguish between conditions on approvals for uses that are permitted under zoning (e.g. special use permits) and conditions on variances which relate to prohibited uses. It is well settled that the regulatory scheme under the ABC Law is intended to preempt the field of regulating the distribution and sale of alcoholic beverages.<sup>56</sup> Among other things, the ABC Law establishes

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<sup>54</sup> Town of Ogden v. Manitou Sand Gravel Co., 252 A.D.2<sup>nd</sup> 964 (4<sup>th</sup> Dept. 1998).

<sup>55</sup> Charleston Services v. Glenville, 142 Misc. 2<sup>nd</sup> 313, 314 (S.Ct. Schenectady, 1988). In this case, the court held that while the town was free to deny the special use permit, it could not impose conditions on operations. In the 1991 amendments, municipalities were given the right to include in their permits the requirement that the operation conform to the operating hours set by DEC. However, municipalities still may not set their own operating hours.

<sup>56</sup> See, Matter of Lansdown Entertainment Corp., supra 762-763; People v. De Jesus, 54 N.Y.2d 465, 469 (1981); see generally, New York State Moreland Commission on the Alcoholic Beverage Control Law.

the times when alcoholic beverages may be sold and the times when patrons at establishments may remain on premises consuming alcoholic beverages<sup>57</sup> The courts have struck down local laws that restrict the hours allowed for serving alcoholic beverages<sup>58</sup> and local laws that restrict the hours during which patrons can remain on the premises of permitted establishments.<sup>59</sup>

However, a lower court held that a condition restricting operating hours, imposed as a condition of approving a use variance, was not preempted by the ABC Law.<sup>60</sup> The court reasoned that the prior decisions striking down similar permit conditions only addressed requirements that were imposed as a result of local laws or ordinances. The variance (unlike other approvals such as special use permits and site plan approvals) is not a creature of local law but rather of state statute. The court also reasoned that by approving the variance, the ZBA was permitting a use that was otherwise illegal and that, pursuant to Town Law §267-b(4), it was entitled "... to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property . . . for the purpose of minimizing any adverse impacts such variance may have on the neighborhood or community."<sup>61</sup> The court was clearly influenced by the fact that the variance authorizes a use that is otherwise prohibited and hence it was willing to provide a broader interpretation of municipal authority.<sup>62</sup> The practitioner should be cautioned that the cited case is very tentative authority to support the imposition of such conditions in the context of the approval of a use variance. It has no precedential value and can only be used for the persuasive value of its reasoning.

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<sup>57</sup> ABC Law §106.

<sup>58</sup> DeJesus, supra at 471.

<sup>59</sup> This is true for requirements that are explicit in local laws and ordinances as well as conditions imposed for local approvals. Matter of Lansdown Entertainment Corp., supra.

<sup>60</sup> Town of Richmond v. BSD Soto, Inc., 2005 NY Slip Op 50357, (SCt Ontario County, 2005).

<sup>61</sup> Town of Richmond, supra.

<sup>62</sup> Town of Richmond, supra

If a ZBA concludes that a condition it needs to impose in order to make the findings necessary to grant a variance is likely to be preempted, it would be advised to state that it does not believe it has the authority to impose the necessary condition and deny the variance instead. Alternatively, it can grant the variance with the explicit finding that its condition is essential to making the necessary findings and that, if a court of competent jurisdiction finds that it lacks the authority, it can no longer make the findings and instead denies the variance.

No case has been identified that deals with the extent of valid permit conditions in the context of SEQRA findings. However, as SEQRA is a state statute, it could be argued that any SEQRA condition an involved local agency attaches to its approval is not preempted (regardless of its impact on the affected industry) because the authority for such condition does not derive from any local law or ordinance.

#### Use of Other Police Powers

Municipalities may regulate pursuant to police powers other than zoning. Local laws of general applicability that exercise these powers which are aimed at legitimate concerns of local government will not be preempted if their enforcement only incidentally infringes on a preempted field.<sup>63</sup> Some such local laws have been contested in the context of mining operations. In Seaboard, the court upheld the Tree Preservation and Land Clearing Law finding that it was a response to indiscriminate and unregulated cutting of trees that had caused problems with erosion, loss of top soil, sedimentation and a diminution in the production of oxygen, cover

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<sup>63</sup> Seaboard Contracting and Material, Inc. v. Town of Smithtown, 147 A.D.2<sup>nd</sup> 4, 7-8 (2<sup>nd</sup> Dept. 1989).

for wildlife and wind and noise insulation. It held that the law was a reasonable response to these problems and that any impact on mining operations was incidental.<sup>64</sup>

In Patterson Materials, three local laws exercising non-zoning authority of the Town of Pawling were at issue. These laws effected the regulation of the harvesting of timber and construction on steep slopes, in wetlands and in other sensitive environmental areas. The court found that they were laws of general applicability with incidental impact on mining. It thus held that they were facially valid.<sup>65</sup>

The text of both the Smithtown and Pawling local laws is in Appendix E to this memo.

The issue has also come up in the context of fields other than mining where local regulation of those fields is preempted by state law. A City of Rochester law prohibited patronizing establishments selling liquor after 2 A.M. In a challenge to the law, the court held that this prohibition conflicted with the comprehensive scheme established by the ABC Law and was preempted. But the court noted that other types of local regulation that had only an incidental impact would be valid. This included laws that required smoke alarms, forbade the dumping of refuse and prohibited disorderliness.<sup>66</sup>

In another case, the question raised was whether a local historic preservation law could require a gas company to relocate a meter. In the tariff approved by the Public Service Commission, the gas company was granted authority to determine the location of its meters. The court held that,

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<sup>64</sup> Seaboard Contracting and Materials, Inc., supra at 7-8.

<sup>65</sup> Patterson Materials Corp., supra at 512.

<sup>66</sup> People v. DeJesus, supra at 471; People v. Hardy, 47 N.Y.2<sup>nd</sup> 500, 505 (1979)

although there was implied field preemption, the local law did not constitute regulation of the industry and its impact on the industry was only “incidental.” Thus the local law was not preempted and could be applied.<sup>67</sup>

Although not tested, there are other local laws of general applicability, such as a noise control law, that might survive. Ultimately, these laws would be judged by whether their impact is incidental to the industry and whether they actually conflict with the state regulatory scheme.<sup>68</sup>

### SEQRA

The State drafted a GEIS with respect to natural gas drilling. That GEIS is being supplemented to address the impacts from high volume and horizontal hydrofracking. DEC took the position that applications that conformed to the original GEIS did not require further SEQRA compliance. The agency is taking the same position with respect to the SGEIS.<sup>69</sup> Conversely, the DEC concedes that applications which do not conform or those that are carved out for individual review will require further SEQRA compliance.<sup>70</sup>

Even in those instances where DEC agrees that further SEQRA review is required, a local government may not always have an approval role that would entitle it to “involved agency status.” A local government (or one of its land use boards) would be an involved agency only

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<sup>67</sup> City of Buffalo v. National Fuel Corp., 1 Misc. 3<sup>rd</sup> 857 (Buffalo City Court, 2003).

<sup>68</sup> The draft SGEIS indicates an intent to provide a very basic regulatory regime to address visual and noise impacts and those to community character. Although it indicates that applicants should review local laws and plans pertaining to these impacts, it expresses the opinion that the local requirements would be preempted (See draft SGEIS at §§7.9, 7.10, 7.12 and Table 8.1). Notwithstanding, a carefully crafted local law might survive judicial scrutiny. Minimally, the existence of such law would require an applicant to take its terms into account in the DEC permitting process.

<sup>69</sup> See Draft SGEIS at 1.4.3.

<sup>70</sup> The DEC has indicated that applications in the New York City and Syracuse watersheds will be handled on a case-by-case basis, not through the general conditions in the SGEIS.

where it required a discretionary approval, typically a special use permit or site plan approval.<sup>71</sup> They would also be involved agencies where the zoning prohibited drilling and the applicant applied for a use variance or where an area variance was needed. There also may be situations under some non-zoning local laws of general applicability where a permit or similar discretionary approval is required.

Further SEQRA compliance may not be limited to those situations identified by DEC.

Both the GEIS and the SGEIS are drafted on the assumption that gas drilling operations will not require any discretionary local approvals.<sup>72</sup> As a consequence, the GEIS and SGEIS arguably have not adequately addressed land use impacts. 6 NYCRR §617(d)(3) and (4) recognize the need for further SEQRA compliance if a proposed action was not addressed or not adequately addressed in the generic EIS and so it is could be maintained that the introduction of a local permit requirement would trigger further SEQRA review.

Unfortunately, there is no good precedent for determining whether a local permitting authority could insist upon additional SEQRA compliance in those situations where the application conforms to the GEIS or SGEIS.<sup>73</sup> The answer to this question is likely only to be resolved through litigation. To preserve this source of authority until the question is settled it is recommended that, whenever there is a discretionary local approval, a municipality assert the need for additional SEQRA compliance, notwithstanding DEC's position.

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<sup>71</sup> A building permit is a non-discretionary approval and hence the issuing agency is not considered a jurisdictional agency for SEQRA purposes.

<sup>72</sup> See Draft SGEIS at 1.4.3. and 3.2.1.4.

<sup>73</sup> That determination would be made according to criteria set forth in 6 NYCRR 617.10(d).

Whenever a separate SEQRA determination is needed on an individual application, a local government with approval authority could vie for the position of lead agency. However, the Draft SGEIS indicates that DEC would seek lead agency designation to the extent practicable.<sup>74</sup> If there is a dispute over lead agency status, the DEC Commissioner would set the lead agency based on criteria in rule.<sup>75</sup>

In those instances where a further SEQRA determination is needed, local government can influence the determination made by DEC by designating critical environmental areas. If an application affected the designated area, a specific examination of the impacts would be required in the SEQRA determination<sup>76</sup>

Where further SEQRA compliance is needed, a negative declaration would fully satisfy this requirement. On the other hand, where a positive declaration is issued, although the drafting of the EIS would be the sole responsibility of the lead agency, all involved agencies independently would be required to make findings pursuant to 6 NYCRR 617.11(c) and (d). Only where positive findings are made could the project be approved. Any of the involved agencies could attach conditions if it finds that they are necessary in order to make positive findings.

### Proprietary Actions

The above analysis addresses situations where the local government is acting exclusively as a regulator. Where the proposed activity will impact municipal property, the municipality may have a separate basis to impose requirements. The Attorney General has opined that even where

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<sup>74</sup> Draft SGEIS at 3.4.1.4.

<sup>75</sup> 6 NYCRR 617.6(b)(5).

<sup>76</sup> 6 NYCRR 617.14(g).

the operation of certain industries are to field preemption, a municipality does have the right to control activities on its own property.<sup>77</sup>

The Preemption Provision preserves local jurisdiction over local roads. DEC envisions that this jurisdiction would be used to address matters such as repair and maintenance of roads; route selection; control over hours various roads could be used; coordination of needs with local emergency management agencies and highway departments; provision for advance public notice for detours or road/lane closures; provision for off-road parking and delivery areas; and the use of rail or temporary pipelines to move water to and from well sites.<sup>78</sup> However, as owners of these public roads, municipalities may also have authority to impose more extensive requirements with respect to drainage and runoff that supplements or exceeds DEC requirements.

Stormwater conveyed by municipal roads may discharge, directly or indirectly, into the waters of the state. If pollutants are transported via this route, the municipality has responsibility under the Federal Clean Water Act and ECL Article 17 for pollutants that have the potential to violate water quality standards in those receiving waters.<sup>79</sup> In such a situation, a municipality arguably could place conditions on gas drilling operations relating to runoff and drainage that are reasonably necessary to avoid such violations even where such conditions might be more stringent than some aspect of DEC's regulation.

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<sup>77</sup> OAG 2003-13. The opinion cites Town Law §64(3) which charges the town board with the management, custody and care of all town lands, buildings and property. It also cites N.Y. State Const., art. IX, §2(6) and MHRL §10(1)(ii)(a)(6) for the proposition that town board are authorized to adopt local laws relating to the care, management and use of its property.

<sup>78</sup> Draft SGEIS at §7-11.

<sup>79</sup> As required by the Federal Clean Water Act, DEC subjects municipalities in urban areas to a point source discharge permitting scheme for stormwater using its infrastructure (the so-call "MS4" program). However, regardless of whether a municipality is subject to this scheme, both state and federal laws forbid any municipality from causing or contributing to a violation of water quality standards in any receiving water.

## Summary and Conclusion

Although there is little case law interpreting the Preemption Provision, based on a very similar provision in the MLRL and on other cases which address the viability of zoning requirements in the context of state preemption, it is highly likely that local zoning authority is unimpaired. In order to exercise such authority, the municipality will need to comply with all requirements associated with establishing or amending zoning laws, including SEQRA.

The case law also suggests that localities can exercise some control over land use impacts of gas drilling operations in ways that are more sophisticated than by merely prohibiting or permitting the use. Under properly crafted local laws, municipalities can establish special use permit requirements. They may also be able to apply site plan review requirements, area and bulk requirements and land use performance standards. Municipalities may also exercise authority under non-zoning police powers by enforcing laws of general applicability. The touchstone to the assertion of any municipal authority is that it not involve a requirement regulating the gas drilling industry itself and that any impact on that industry be no more than incidental. There may be some limited exceptions to this constraint but they are not well tested.

The extent of local jurisdiction will be influenced by scope of the state's regulation. Local regulations will have a greater chance of surviving in subject areas where the state has not established standards or requirements. In the context of the development of the state requirements, there also may be opportunities to influence state decision makers to reserve certain authority to local government or, alternatively, to make compliance with certain local

requirements a part of the state approval process. Minimally, it appears the draft SGEIS will require applicants to consider and take local requirements into account. Therefore, even if the requirements are preempted, there may be value in having them as there is some chance they will impact the DEC permit approval process.

Municipalities should also consider requirements that are tied to property rights they have.

Where the municipality acts in a proprietary rather than a regulatory capacity, it may be able to impose requirements that are more extensive. The most obvious example of this approach would be with respect to the control of runoff and drainage on municipally-owned roads.