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# **Municipal Zoning Bans on Natural Gas Drilling and Related Lawsuits**

**Association of Towns of the State of New York  
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Corning, New York**

One Commerce Plaza  
Albany, New York 12260  
P 518.487.7600  
F 518.487.7777  
[www.woh.com](http://www.woh.com)

**David R. Everett, Esq.**

Can a municipality use zoning to ban gas drilling as a land use?

- Over a dozen municipalities have adopted (or are considering adopting) zoning bans prohibiting natural gas drilling operations.
- Some municipalities classified natural gas drilling operations as a heavy industrial use and prohibited it.
- Two municipal zoning bans have been challenged in court.

WHITEMAN  
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- (1) Anschutz Exploration Corp. v. Town of Dryden (Sup. Court Tompkins County) (September 2011)
  - Anschutz is a driller of natural gas wells who holds oil and gas leases covering 22,200 acres in the Town.
  - Anschutz has invested \$4.7 million in acquiring leases and \$400,000 in geological assessments and seismic evaluations.
  - Town amended its Zoning Ordinance to expressly prohibit the exploration and extraction of natural gas and petroleum in the Town.

(2) Cooperstown Holstein Corporation v. Town of Middlefield  
(Sup. Court Otsego County) (September 2011)

- Holstein owns and leases almost 400 acres of land in the Town to natural gas drilling companies.
- Town enacted a new zoning law which prohibited heavy industrial users (including oil, gas or solution mining and drilling) in the Town.
- Holstein argues that the ban denies it the economic benefits of its leases and the right to market its mineral rights.

## Plaintiffs' Arguments from Dryden and Middlefield Cases:

- (1) Express Preemption under ECL § 23-0303(2):
  - State law expressly supersedes all local laws relating to the regulation of gas drilling, except roads and real property taxes.
  - A zoning ban impermissibly regulates whether gas drilling is permissible or not in a municipality.
  - State Legislature gave municipalities control over roads and taxes only. This implies that the Legislature intended State law to supersede all other matters including zoning. If the Legislature wanted municipalities to control drilling through zoning, the Legislature would have said so in the statute.
  - The purpose of the Oil, Gas and Solution Mining Law was to provide uniform regulation of gas drilling across the State. Ad hoc zoning bans across the State frustrate this purpose.

WHITEMAN  
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- State Legislature never intended to allow municipalities to extinguish mineral rights of property owners.

(2) Conflict Preemption under ECL Article 23:

- Municipalities may not exercise its police powers by adopting local laws that are inconsistent or in conflict with general State law.
- ECL Article 23 creates a detailed statutory framework concerning the location and size (spacing units) of well pads. Zoning bans conflict with these State laws.
- Decisions about where gas drilling units are formed must be decided by the State based on geology and environmental considerations not by municipalities through a patch work of inconsistent zoning laws.
- NYSDEC has allegedly interpreted Article 23 to completely preempt municipalities from regulating gas drilling through zoning or other local laws.

## Municipalities' Potential Arguments:

- (1) Municipalities have the legal authority to adopt zoning to regulate land uses (like gas drilling).
  - Article IX, Section 2 of the New York State Constitution provides broad “home rule” authority for municipalities to adopt local laws that:
    - Relate to the “property, affairs or government of the local government”
    - Are not inconsistent with the Constitution and general State laws

WHITEMAN  
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- Statute of Local Governments confers to local governments the rights to:
  - Adopt zoning regulations
  - Comprehensively plan
- Zoning authority also found in Municipal Home Rule Law, Town Law, Village Law and General City Law

(2) When determining the scope of the express preemption under ECL § 23-0303, the courts look to the:

(a) Plain language of the statute:

- ECL § 23-0303 expressly preempts all local laws “relating to the regulation of the oil, gas and solution mining industry”.
- But zoning regulations do not “relate to the regulation” of natural gas drilling. Zoning relates to local land use and is not expressly preempted.

(b) Legislative history of the statute:

- The legislative history does not indicate that the Legislature intended to preempt local zoning powers.

(c) Purpose of the supersession language:

- ECL § 23-0303 prevents a patch work of differing municipal regulations related to the operations of gas drilling.
- Zoning regulates land uses; it does not regulate the operation of gas drilling or frustrate the purpose of the supersession provision.

WHITEMAN  
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(3) Article IX, Section 3 of the New York State Constitution reserves to the State Legislature the ability to legislate on matters other than “property, affairs or government” of a local government.

- Sometimes referred to as “matters of State concern”.
- ECL § 23-0303 is a general State law covering a matter of State concern “relating to the regulation of the oil, gas and solution mining industry.”
- Zoning is a local concern, not a State concern.
- Zoning relates to local land uses and is not inconsistent with ECL § 23-0303.

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- (4) Courts have examined preemption language in the sand and gravel mining context and upheld a municipality's right to ban mining through zoning powers.
  - The Court's treatment of the mining industry set an important precedent for the gas drilling industry.

- Similarities Between Mining and Natural Gas Drilling:
  - Both industries involve almost identical statutory preemptions of local government regulation
  - Both industries extract non-renewable natural resources from the ground for the benefit of the citizens of the State
  - Both industries are regulated as mineral resources under Article 23 of the ECL
  - Both industries are regulated by NYSDEC through Statewide standardized regulations
  - Both industries have similar environmental impacts: truck traffic, noise, water impacts, aesthetics, etc.
  - Both industries require the acquisition of some type of an ownership or leasehold rights in the land

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- Interpreting Almost Identical Preemption Statutes--

- (1) Mined Land Reclamation Law (1974-1991):

“This title shall supersede all other State and local laws relating to the extractive mining industry”. ECL § 23-2703

- (2) Oil, Gas and Solution Mining Law (1972-present):

“This article shall supersede all other local laws or ordinances relating to the regulation of the oil, gas and solution mining industries.” ECL § 23-0303

WHITEMAN  
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Frew Run Gravel Products, Inc. v. Town of Carroll, 71 N.Y.2d 126  
(1987)

- A sand and gravel mine challenged the Town's zoning code which permitted mining only in certain areas of the Town.
- The Court of Appeals held:
  - (1) The supersession of all "local laws relating to the extractive mining industry" was not intended to preempt the Town's zoning law establishing zoning districts where mining was permitted or prohibited.

WHITEMAN  
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- (2) Zoning laws relate not to the regulation of the mining industry but to the regulation of land uses generally—an entirely different subject matter.
- (3) By regulating land use a zoning ordinance inevitably exerts an incidental control over any of the particular uses or businesses which may be allowed in some districts but not others.
- (4) Local laws of general application – which are aimed at legitimate concerns of a local government – will not be preempted if their enforcement only incidentally infringes on a preempted field.

WHITEMAN  
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- (5) There is nothing in State law that was intended to preempt the Town's zoning law.
- (6) Allowing such an intent would drastically curtail the Town's Municipal Home Rule Law powers to adopt zoning laws in the best interest of the Town.
- (7) The purpose of the mining preemption was to prevent local governments from enacting laws that would conflict and frustrate the State's encouragement of mining through standardized regulations. Zoning laws do not conflict with this purpose.

WHITEMAN  
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Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668 (1996).

- Sardinia's zoning law prohibited mining anywhere in the Town. A mining company challenged the ban.
- The mining company argued that if land within the Town contained extractable minerals, State law obliges the Town to permit them to be mined somewhere in the Town.
- Court of Appeals held:
  - (1) the State law does not preempt the Town from adopting a zoning law that bans mining as a land use in the Town.
  - (2) a Town is not obliged to permit the exploitation of any and all natural resources within the Town as a permitted use if limiting the use is a reasonable exercise of its police powers to prevent damage to its citizens and to promote the interests of its community.

## Final Thoughts:

- The battle lines have been drawn.
- Whether or not a municipality can adopt zoning bans related to natural gas drilling is now in the hands of the courts.
- Lower court decisions could be issued by the end of 2011.
- Appeals likely.

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## Comments or questions?

**Contact:**

**Dave Everett [deverett@woh.com](mailto:deverett@woh.com)**

**Whiteman Osterman & Hanna LLP  
One Commerce Plaza, Suite 1900**

**Albany, N.Y. 12260**

**518-487-7743**

**[www.woh.com](http://www.woh.com)**