To What Extent Can Municipalities Regulated Natural Gas Production Operations?
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I. Introduction

A great deal of attention has been devoted recently to the potential to exploit hard to extract natural gas resources from a formation known as the Marcellus Shale. With the use of a technology known as hydraulic fracturing, it has become physically possible to reach this resource.

Exploiting it would likely have a major impact on the economy and provide a large domestic supply of energy. However, there are serious concerns regarding the environmental impacts of hydraulic fracturing and its impact on local government operations and land use patterns.

The New York State Department of Environmental Conservation is taking the lead on setting conditions for hydraulic fracturing that will govern industry operations. However, many local governments are beginning to consider to what extent they can assert jurisdiction as well.

In New York, oil and gas extraction is governed by Article 23 of the Environmental Conservation Law, a law which contains a provision that addresses the interplay between local and state regulatory jurisdiction – ECL §23-0303(2). Up until recently, there was little focus on it, but, with the potential for developing the Marcellus Shale, it has become the center of attention in the debate over local jurisdiction.

This article explores the likely interpretation of this provision and its impact.

II. Preemption

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.[1] It is not sufficient that the two requirements address the same area; they must be incompatible.[2]

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

III. Which Local Requirements Are Likely to Survive

The supersession relates only to <u>local</u> laws and ordinances. Therefore, other state laws that relate to gas drilling are not preempted.[5] Since the New York State Uniform Fire Prevention and Building Code (the Uniform Code) is a state requirement, it would clearly continue to apply. A

similar result could be expected for local floodplain development permits required for the implementation of the flood insurance program.

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.[6]

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.[7]

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.[8] This same distinction has been made in many other contexts as well.[9] 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.[10] They have articulated the principle that separate levels of regulatory oversight can consistently co-exist.[11] Only where there is a clear legislative intent to preempt the use of the zoning power will the courts disallow zoning requirements.[12]

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.[13] 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.[14] 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.[15] Therefore, under the right circumstances, a municipality could use zoning to make gas drilling a prohibited use in all zones.[16]

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.[17] 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 the Zoning Power: 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.[18]

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.[19] Designation as a special permit use results in a strong presumption in favor of that use.[20] As a result, an applicant's burden to demonstrate entitlement to a special use permit is relatively light.[21] 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.[22]

Nonetheless, where a use is permitted by special permit it is not "as of right" and there is no entitlement to the permit.[23] 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.[24] 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.[25]

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.[26]

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.[27] Conversely, local laws that don't regulate the mining industry or impact it in more than an incidental way were

held to be valid on their face[28] 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.[29] 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.[30]

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.[31]

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.[32] 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 mining.[33] A condition that establishes hours of operation also was held invalid as an attempt to regulate the mining industry.[34]

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.

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.[35] 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 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.[36]

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.[37]

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.[38]

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, 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.[39]

IV. Conclusion.

There is little case law interpreting ECL §23-0303(2). This key provision is likely to be at the center of the upcoming controversy concerning local jurisdiction over natural gas extraction operations. A similar provision in the Mine Land Reclamation Law is likely to provide significant guidance on the extent of that jurisdiction.

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

[2] Jancyn Mfg. Corp., supra at 97.

[3] DJL Restaurant Corp., supra at 95.

[4] DJL Restaurant Corp., supra at 95.

[5] 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.

[6] 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.

[7] The only reported case that addresses ECL §23-0303(2) is Envirogas, Inc. v. Town of Kiantone, (112 Misc. 2nd 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.

[8] 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. 2nd 668 (1996); Hunt Bros. v. Glennon, 81 N.Y. 2nd 906 (1993); and Schadow v. Wilson, 191 A.D. 2nd 53 (3rd Dep't. 1993).

[9] 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. 2nd 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).

[10] Frew Run Gravel Products, Inc., supra; DJL Rest. Corp., supra, Village of Nyack, supra; Sunrise Checking, supra.

[11] Schadow, supra; Village of Nyack, supra; Jancyn Mfg. Corp, supra; DJL Rest. Corp supra.

[12] Gernatt Asphalt, supra.

[13] DJL Rest. Corp., supra at 97; 12 N.Y. Jur. 2d Buildings §129

[14] Gernatt Asphalt, supra at 683-84.

[15] Gernatt Asphalt, supra at 669.

[16] See Gernatt Asphalt, supra and Matter of Valley Realty Development v. Town of Tully, 187 A.D.2nd 963, 964 (4th 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.

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

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

[19] Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead, 98 N.Y.2nd 190, 195 (2002); Wegmans Enterprises, Inc. v. Lansing, 72 N.Y.2nd 1000 (1988); Robert Lee Realty Co. v. Village of Spring Valley, 61 N.Y.2nd 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.2nd 676 (2nd Dept., 2001); See also Volume 61 McKinney's Consolidated Laws of New York, Practice Commentaries to Town Law §274-b.

[20] Cove Pizza, Inc. v. Hirshon, 61 A.D.2nd 210 (2nd Dept., 1978)

[21] See North Shore Steak House, supra at 244; Old Court International, Inc. v. Gulotta, 123 A.D.2nd 634 (2nd Dept., 1986); Wegmans Enterprises, Inc., supra.

[22] C.B.H. Properties, Inc. v. Rose, 205 A.D.2nd 686 (2nd Dept. 1994); McDonald v. City of Ogdensburg ZBA, 101 A.D. 2nd 900 (3rd 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.

[23] Matter of Wegmans Enterprises, supra at 1001; Matter of Cipperly, supra at 765.

[24] Matter of Schadow, supra at 56.

[25] 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.

[26] 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.

[27] Seaboard Contracting & Materials, Inc., supra; Patterson Materials Corp., supra.

[28] See e.g. Philipstown Industrial Park supra at 527.

[29] Hoffay v. Tifft, 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.

[30] Patterson Materials v. Town of Pawling, 264 A.D. 2nd 510, 512 (2nd Dept., 1999).

[31] Charlton Services v. Town of Glenville, 142 Misc.2nd 313 (S.Ct. Schenectady Cty., 1988).

[32] Hoffay supra at 97.

[33] Town of Ogden v. Manitou Sand Gravel Co., 252 A.D.2nd 964 (4th Dept. 1998).

[34] Charleston Services v. Glenville, 142 Misc. 2nd 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.

[35] Seaboard Contracting and Material, Inc. v. Town of Smithtown, 147 A.D.2nd 4, 7-8 (2nd Dept. 1989).

[36] Seaboard Contracting and Materials, Inc., supra at 7-8.

[37] Patterson Materials Corp., supra at 512.

[38] People v. DeJesus, supra at 471; People v. Hardy, 47 N.Y.2nd 500, 505 (1979)

[39] City of Buffalo v. National Fuel Corp., 1 Misc. 3rd 857 (Buffalo City Court, 2003).