

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF TOMPKINS

ANSCHUTZ EXPLORATION CORPORATION,

Petitioner-Plaintiff,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN
BOARD,

Respondents-Defendants.

BRIEF FOR
ASSEMBLYWOMAN
BARBARA LIFTON AS
AMICUS CURIAE

Index No. 2011-0902

RJI No. 2011-0499-M

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October 27, 2011

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INTEREST OF AMICUS CURIAE

Assemblywoman Barbara Lifton has represented the 125th New York Assembly District, comprising of Tompkins and most of Cortland counties since 2002. The Assemblywoman submits this amicus brief to provide the court with information about state law regarding the zoning authority of municipalities with respect to establishment of permissible uses within zoning districts. The Assemblywoman has looked at this issue for several years and sponsors a bill in the NY State Assembly which seeks to clarify current law via NY Court of Appeals case law precedent.

The Assemblywoman has heard from many local municipal officials, and has seen growing statewide concern, about the need for home rule authority over where and if natural gas drilling may take place in a community. She is concerned about the possibility of state law compelling gas drilling in neighborhoods where such activity is in contravention of zoning regulations or a comprehensive plan. Such preemption of home rule authority is, however, not supported by NY case law. The Assemblywoman's role as a public representative, along with significant public interest in the outcome of this litigation, and the question of upholding long-standing legal principles which allow a community to decide its own course of development and foster its own identity, character, and livelihood as a valid exercise of police power, compels the Assemblywoman to file this brief as special assistance to the court.

ISSUE PRESENTED

Does ECL 23-0303(2) supersede municipal zoning authority over oil, gas and solution mining as part of the state regulatory program?¹

SUMMARY OF ARGUMENT

The authority for municipal governments to enact local laws relating to their property, affairs and government, as well as for the “protection, order, conduct, safety, health and well-being of persons or property therein,” stems from Article IX of the NY Constitution.² Known as municipal “police power,” this ability for local governments to protect local citizens and property is a key component of home rule, and, at the direction of the Constitution, the legislature has codified such authority in the “Statute of Local Governments.”³ The power to adopt, amend and repeal zoning regulations was expressly granted to local governments.⁴ Furthermore, Article IX of the Constitution requires that a post-facto limitation of a power authorized under the Statute of Local Governments must pass both houses and be signed by the governor in two consecutive calendar years.⁵ Accordingly, the Town of Dryden’s zoning regulations are duly authorized and ECL 23-0303(2) can have no effect upon limitation of zoning power, as it was not passed during regular session in two consecutive years.

The NY Court of Appeals has previously ruled on local zoning authority in relation to the state regulatory program for the extractive mining industry, which contained statutory language

¹ See NY ENVTL. CONSERV. LAW §23-0303(2) (enacted 1981) “[t]he 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 right of local governments under the real property tax law.”

² N.Y. CONST. art. IX, §2(b)(3); §2(c)(ii)(10).

³ *Id* at §2(b)(1).

⁴ See NY STAT. LOCAL GOVT. §10(6).

⁵ N.Y. CONST. art. IX, §2(b)(1).

similar to ECL §23-0303(2) at issue in this case.⁶ In *Frew Run Gravel Products, Inc. v. Town of Carroll*,⁷ the Court of Appeals addressed the issue of preemption of local zoning by the Mined Land Reclamation Law (MLRL) which “shall supersede all other state and local laws relating to the extractive mining industry.”⁸ Yet the court held that local zoning regulations were part of a comprehensive land use plan and did not relate to regulation of the mining process itself, which was the sole purpose of the MLRL.⁹ In fact, the court notes that placing such a restriction on the home rule zoning powers of a municipality would “drastically curtail” the grant of such authority under the Statue of Local Governments, and would overreach in its interpretation of the law with no record of legislative intent to do so.¹⁰ Faced with nearly-identical language in ECL 23-0303(2) regarding oil, gas and solution mining, this compelling precedent establishes that municipalities retain their zoning powers which regulate land use generally and do not affect state regulatory policy for resource extraction.

Importantly, there is no requirement that a locality allow for extraction of some, or all, of its natural resources, as long as such a limitation is a valid exercise of police powers.¹¹ In revisiting the MLRL, the Court of Appeals held that a town can completely zone out any extractive industry, despite the presence of a coveted resource, if the land use ordinance is a reasonable exercise of its police powers to prevent harm to the property and rights of residents and benefits the interests of the community at large.¹² NY courts have continually upheld an unfettered right for home rule and local control over land use practices. The Town of Dryden

⁶ See NY ENVTL. CONSERV. LAW §23-2703(1) [as originally enacted, L 1974, ch 1043].

⁷ 71 N.Y. 2d 126 (1987).

⁸ See NY ENVTL. CONSERV. LAW §23-2703(1) [as originally enacted, L 1974, ch 1043].

⁹ *Frew Run Gravel Prod., Inc. v. Town of Carroll*, 71 N.Y. 2d 126, 133 (1987).

¹⁰ *Id.* at 134.

¹¹ *Gernatt Asphalt Prod. Inc., v. Town of Sardinia*, 87 N.Y. 2d 668, 684 (1991).

¹² *Id.*

also must have such a right as a reasonable exercise of its police power with respect to oil, gas and solution mining within its jurisdiction.

Finally, there is no right to drill for natural gas in this situation, as a right only vests “when substantial work is performed and obligations are assumed *in reliance on a permit legally issued.*”¹³ All mineral lease interests acquired in the Town of Dryden were done with the expectation of issuance of a valid NY Department of Environmental Conservation (NYDEC) permit. While the regulatory process for high-volume hydraulic fracturing (HVHF) is ongoing, and no permits have been issued, there is no legal or vested right to use HVHF anywhere in New York State.

ARGUMENT

I. ARTICLE IX OF THE NY CONSTITUTION AUTHORIZES MUNICIPAL ZONING AUTHORITY

As directed by the NY Constitution via the revised Article IX passed in 1963, the legislature promulgated the Statute of Local Governments in 1964.¹⁴ Article IX provided for enactment of broad allocations of power to local governments relating to their property, affairs and government.¹⁵ Amongst the express powers identified by the Constitution, is the ability for municipalities to pass local laws for the “protection, order, conduct, safety, health and well-being of persons or property therein.”¹⁶ This authority, known as “police power” is a critical element of municipal home rule, and, indeed, is codified by the NY State Legislature. Under the Statute of

¹³ *Preble Aggregate v. Town of Preble*, 263 A.D.2d 849, 851 (N.Y. App. Div. 1999). (emphasis added)

¹⁴ See N.Y. CONST. art. IX, §2(b)(1).

¹⁵ *Id* at §2(b)(2).

¹⁶ *Id* at §2(c)(ii)(10).

Local Governments, the legislature specifically conferred to cities, villages, and towns the power to adopt, amend, and repeal zoning ordinances.¹⁷

A. US Supreme Court case law upholds the validity of local government power to enact zoning ordinances

At the turn of the twentieth century, land use regulations were a relatively new concept first addressed by the US Supreme Court in *Village of Euclid v. Amber Realty Co.*¹⁸ Following the onset of the industrial revolution, the court noted that “with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands.”¹⁹ Reflecting the need for flexibility over regulation of land use in its review of the constitutionality of restrictive local zoning measures, the court held that “it is not easy to find a sufficient reason for denying the [zoning] power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated.”²⁰ Accordingly, the Supreme Court upheld the extension of municipal police power to allow for restrictive zoning practices, as a valid method for the prevention of injury to people and property, despite the possibility that such zoning might alter the course of industrial development. Indeed, the court went so far as to say that “[i]n a changing world it is impossible that it should be otherwise.”²¹ The Town of Dryden’s use of restrictive zoning is a similarly valid exercise of local police power.

¹⁷ See STAT. LOCAL GOVT. §10(6).

¹⁸ 272 U.S. 365 (1926).

¹⁹ *Id* at 386.

²⁰ *Id* at 390.

²¹ *Id* at 387.

B. The NY Constitution requires legislation seeking to curtail local government powers to pass in two consecutive calendar years

Article IX of the NY Constitution authorizes the home rule powers of local governments, which the legislature codified in the Statute of Local Governments. Just as Article IX compels the legislature to bestow localities with clearly-enumerated authorities, it also details the constitutional procedure for revoking or limiting a duly-granted power.²² The requirements for repealing, diminishing, impairing or rescinding a home rule power already granted under the Statute of Local Governments ensures that local police powers, including zoning, are not wantonly altered. A law which seeks to abrogate these powers can do so “only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year.”²³ This standard sets a difficult threshold to overcome and ensures that the sanctity of home rule authority is taken seriously. In the case at issue today, ECL 23-0303(2) was passed once and enacted only once, in 1981. The fact that the law was not subsequently re-enacted indicates that there was no legislative intent for this law to constrain local zoning authority as a part of the state regulatory program over the oil, gas and solution mining industries. Even if there was such an intent, the failure to comply with Article IX’s procedural requirements for limiting zoning authority means that ECL 23-0303(2) cannot have any effect over municipal land use planning. The issue before the court is distinguishable from that in *Wambat Realty Corp. v. State of N.Y.* which held that the double enactment procedure of Article IX “was not, however, designed as a rigid impenetrable barrier to ordinary legislative enactments in matters of State concern.”²⁴ The

²² See N.Y. CONST. art. IX, §2(b)(1).

²³ *Id.*

²⁴ *Wambat Realty Corp., v. State of NY*, 41 N.Y.2d 490, 492 (1977).

Adirondack Park Agency Act in that case had clear legislative intent to affect development and curtail local zoning authority. ECL 23-0303(2) lacks such clear intent, and in the absence of express language to this effect, the protections of the double enactment provision of Article IX are triggered “to afford protection from hasty and ill-considered legislative judgments.”²⁵ The Town of Dryden’s zoning regulations must be upheld by this court, accordingly.

II. NY Court of Appeals case law supports local zoning control over extractive industries with state regulatory programs

NY Court of Appeals case law has repeatedly found that localities retain the right to enact zoning ordinances which exclude extractive industries, even with a preemptive state regulatory program in place. This right is held by cities, towns, and villages as a part of their police powers which allow for local governments to control the temporal, spatial, and community characteristics for land use and development in their jurisdiction.

A. Zoning does not relate to the state regulation of extractive industries

The Mined Land Reclamation Law (MLRL) had very similar language to ECL 23-0303(2) at issue in this case. As originally written, the MLRL “shall supersede all other state and local laws relating to the extractive mining industry.”²⁶ In *Frew Run Gravel Prods. v. Town of Carroll*,²⁷ the Court of Appeals addressed whether a town’s zoning ordinance which excluded gravel mining from certain districts was preempted by MLRL state regulations relating to the extractive mining industries. To reach a conclusion, the court looked to whether the town zoning ordinance was the type of regulation intended to be preempted by the MLRL provision.

²⁵ *Id.*

²⁶ See NY ENVTL. CONSERV. LAW §23-2703(1) [as originally enacted, L 1974, ch 1043].

²⁷ 71 N.Y. 2d 126 (1987).

Application of a plain language reading of the statute led the court to hold that “we cannot interpret the phrase ‘local laws relating to the extractive mining industry’ as including the ... Zoning Ordinance.”²⁸ The court found that the zoning ordinance did not relate to the regulation of the mining industry, but rather to an entirely different subject matter and purpose for the regulation of land use generally.²⁹ Acknowledging that land use planning may result in “incidental control over any of the particular uses or businesses” in a municipality, the court none-the-less held that supersession of zoning authority was not contemplated by the legislature as the type of local law relating to the extractive mining industry regulated under the MLRL.³⁰ Only local laws that conflict with the actual operations and process of extractive mining would violate the purpose of the MLRL to streamline mining operations through standardized state-wide regulation.³¹ Additionally, the court notes that construing this preemption language so broadly would be a severe curtailment to codified zoning authority granted in the Statute of Local Governments and Town Law §261.³²

Similarly, ECL 23-0303(2) at issue before this court “shall supersede all local laws or ordinances relating to the regulation of the oil, gas, and solution mining industries.”³³ Yet proper construction of this statutory provision must include an analysis of whether Dryden’s zoning ordinance “relates to the regulation” of the industry or has the alternate intent of general land use control. Following the methodology in *Frew Run*, this court must similarly uphold the unfettered right for municipalities to use zoning ordinances as a vital piece of their police power. Absent

²⁸ *Id* at 131.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id* at 133.

³² *Id.*; See NY STAT. LOCAL GOVT. §10(6) (enacted 1964); NY TOWN LAW §261.

³³ NY ENVTL. CONSERV. LAW §23-0303(2) (enacted 1981).

clear legislative intent to contrary, zoning authority must remain sacrosanct under ECL 23-0303(2) just as it is under the MLRL.

Only one case directly involving ECL 23-0303(2) has come before the New York courts. *Matter of Envirogas, Inc. v. Town of Kiantone* dealt with the issue of supersession of a town ordinance which required an additional \$2,500 compliance bond and \$25 permit fee payable to the town prior to oil and gas production.³⁴ The Erie County Supreme Court held that this type of local law, which directly regulates oil and gas operations is expressly preempted by ECL 23-0303(2).³⁵ As bonding and permit fees are under the scope of the state regulatory program, a town law regulating the same subject matter is superseded. Yet note, importantly, that the holding in *Envirogas* illustrates what type of local oil and gas regulations are in impermissible conflict with state law. An express ordinance with intent to control the industry is struck down, but this situation is distinguishable from zoning ordinances that regulate land use generally, such as in the Town of Dryden. Without clear intent to override local zoning law, ECL 23-0303(2) cannot be construed to infringe upon the validly-delegated lawmaking authority of local zoning powers.

III. THERE IS NO LEGAL REQUIREMENT OR VESTED RIGHT FOR NATURAL RESOURCE EXTRACTION

A. Complete zoning exclusion of extractive industry is valid

Following the *Frew Run* decision, the legislature amended the MLRL in 1991 to expressly state that the statute would not prevent enactment or enforcement of local zoning

³⁴ 112 Misc.2d 432, 434 (N.Y. Sup. Ct. 1982).

³⁵ *Id* at 433.

ordinances.³⁶ In a subsequent challenge to the MLRL, the NY Court of Appeals reaffirmed its previous ruling that zoning which regulates land use generally was not the type of regulation the legislature sought to preempt under the MLRL.³⁷ Critically, the court also addressed whether a town could *completely* zone out an industrial use as an exercise of their police powers. Noting that the “primary goal of a zoning ordinance . . . is to provide for the development of a balanced, cohesive community which will make efficient use of the Town’s available land,” the court refused to extend the concept of exclusionary zoning, evidenced when an ordinance improperly excludes specific groups of people, to apply to the exclusion of industrial uses.³⁸ Judge Simons held that “[a] municipality is not obligated 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.”³⁹ Even if a zoning ordinance prevents the operation of new mines there is “no vested right to have the existing zoning ordinance continue unchanged if the Town Board has rationally exercised its police power and determined that a change in the zoning was required for the well-being of the community.”⁴⁰ Sardinia was concerned with potential negative environmental impacts, as well as the effects upon community character, the local agricultural economy, and issues of future growth in the face of expanded mining operations.⁴¹ Here, the Court of Appeals has upheld municipal police power, as long as the rational basis test is satisfied. Accordingly, the Town of Dryden’s zoning ordinance must be viewed as a valid use of home

³⁶ See N.Y. ENVTL. CONSERV. LAW §23-2703(2) (enacted 1991).

³⁷ *Gernatt Asphalt Prods. Inc., v. Town of Sardinia*, 87 N.Y.2d 668, 681-82 (1996).

³⁸ *Id.* at 683-84.

³⁹ *Id.* at 684.

⁴⁰ *Id.*

⁴¹ *Id.* at 685.

rule, exercised by the Town Board in light of legitimate concerns about large-scale gas operations in the community.

B. No vested right to drill using high-volume hydraulic fracturing exists in NY

Other legal challenges to zoning control over resource extraction in NY have sought to allege that there is a “vested right” to mine or drill. In *Preble Aggregate, Inc., v. Town of Preble*, the appellant mining company alleged that they had acquired a vested right to mine, despite a prohibitive zoning ordinance.⁴² This claim was made based upon the plaintiff’s expenditures in excess of \$240,000 to obtain the required permits; yet outlay of capital alone is insufficient to secure a vested right.⁴³ Rather, a property owner only acquires a vested right to complete a project when “substantial work is performed and obligations are assumed in reliance on a permit legally issued.”⁴⁴ Here, the gravel company made efforts and expenditures with the mere expectation of receiving a DEC permit, despite their knowledge of the restrictive zoning ordinance and the possibility that their mine would be fully precluded from operation.⁴⁵ The plaintiff failed to show that enforcement of the zoning law would be inequitable, despite their investment, and failed to show that they had acquired a vested right in reliance on a valid state permit.⁴⁶

In New York State, accordingly, there can be no vested right to hydrofrack in lieu of a “permit legally issued.” Simply, the process has not been authorized in New York, and despite expenditures on lease agreements and regional operations, these activities are undertaken with

⁴² 263 A.D.2d 849, 851 (N.Y. App. Div. 1999).

⁴³ *Id.*

⁴⁴ *Id.*, quoting *Matter of Lefrak Forest Hills Corp. v. Galvin*, 40 A.D.2d 211, 218.

⁴⁵ *Id.*

⁴⁶ *Id.* at 851 -52.

only an expectation of a future permit. This precatory activity on behalf of the oil and gas industry does not secure a vested right to drill when faced with a prohibitive zoning ordinance.

CONCLUSION

For the reasons stated above, Assemblywoman Barbara Lifton urges that the Town of Dryden's zoning ordinance be upheld as a valid exercise of home rule police power.

Dated: October 27, 2011
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