SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF TOMPKINS
----------x

ANSCHUTZ EXPLORATION CORPORATION,

Petitioner-Plaintiff,

-against-

TOWN OF DRYDEN AND TOWN OF DRYDEN TOWN BOARD,

Index No. 2011-0902
Phillip R. Rumsey, Justice

Respondents-Defendants,

for Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules, Declaratory Judgment, and Injunctive Relief.

----------x

MEMORANDUM OF LAW *AMICI CURIAE* OF NATURAL RESOURCES DEFENSE COUNCIL, INC.; BREWERY OMMEGANG; THEODORE GORDON FLYFISHERS, INC.; RIVERKEEPER, INC.; and CATSKILL MOUNTAINKEEPER IN SUPPORT OF RESPONDENTS-DEFENDANTS

EARTHJUSTICE
Deborah Goldberg
Bridget Lee
156 William St., Suite 800
New York, NY 10038-5326
212-791-1881

Attorneys for *Amici*

Dated: October 31, 2011
New York, New York

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONS

STATUTES

ORDINANCES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In this case of first impression in New York courts, business, sporting, and environmental organizations unite as friends-of-the-court ("*Amici*") in support of the Town of Dryden's effort to protect its clean water and quiet community character from the adverse impacts of the oil and gas industry. On the other side, Petitioner-Plaintiff Anschutz Exploration Corporation ("Petitioner") asks this Court to hold that it is entitled to conduct its heavy industrial operations without regard for comprehensive land use planning laws democratically adopted by Dryden and other municipalities in New York. According to Petitioner, the Town's collective effort to preserve its rural character by removing oil and gas operations and activities from the scope of permitted uses within the municipality is preempted by the state Oil, Gas and Solution Mining Law ("OGSML"). *Amici* maintain, to the contrary, that the law of this State recognizes the delegated power of localities to regulate the land use within their borders for protection of the public health and welfare. Like many states throughout this nation with extensive oil and gas reserves, New York harmonizes that local zoning authority with state regulation of the industry's operations, activities, and processes, allowing both the industry and quiet communities to flourish. For those reasons, *Amici* urge this court summarily to reject Petitioner's preemption claims and to uphold the Town of Dryden's resolution of August 2, 2011, the associated zoning amendments, and the Town's Zoning Ordinance (collectively, the "Zoning Provisions"), which bar the use of land in the municipality for oil and gas development and infrastructure.[1]

[1] For the reasons stated by the Town of Dryden, the claims asserted pursuant to Article 78 of the New York Civil Practice Law and Rules ("Article 78") should be dismissed, and this case should proceed solely as declaratory judgment action. Because Petitioner has not even addressed the relevant elements of a claim for a preliminary or a permanent injunction – much less demonstrated that Petitioner has satisfied that standard – Petitioner's claim for injunctive relief should be deemed abandoned and dismissed by the Court.

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Amici are the Natural Resources Defense Council, Inc.; Brewery Ommegang; Theodore Gordon Flyfishers, Inc.; Riverkeeper, Inc.; and Catskill Mountainkeeper. Their individual Statements of Interest are annexed as Exhibit A to the Affirmation of Deborah Goldberg, dated October 31, 2011, which has been submitted in support of *Amici*'s motion for leave to file this Memorandum of Law *Amici Curiae* in Support of Respondents-Defendants. Collectively, *Amici* represent a diverse array of interests: business, sporting, and environmental; national, regional, and local; for-profit and non-profit. Notwithstanding their very different missions – and different positions with respect to the role of gas in New York's energy policy – *Amici* are united in their concern for local communities that wish to protect their rural character and unsullied natural resources from the adverse impacts of heavy industry, including oil and gas development. They share an interest in this case because they know that municipalities cannot protect the health, safety, and welfare of their citizens – including the clean water needed for award-winning ales, fly-fishing, or drinking water – if they cannot exercise their State-delegated zoning powers to define the permissible uses of land within their borders. *Amici* urge this Court to recognize that the challenged Zoning Provisions are consistent not only with the State of New York's approach to mining but also with the practice in many other states actively promoting oil and gas development. Because state regulation of industrial operations, activities, and processes plainly can and already does coexist with local regulation of land use, *Amici* urge this Court to reject Petitioner's preemption claim and to uphold the Town of Dryden's Zoning Provisions.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the factual statements set forth in the affidavits submitted by the Town of Dryden in support of its motion for summary judgment.

ARGUMENT

I. State Law Does Not Preempt the Town of Dryden's Zoning Amendments.

This case presents a significant issue of first impression in New York – whether the OGSML preempts the Town of Dryden's Zoning Provisions, which prohibit a variety of land uses related to natural gas and petroleum development.[2] As *Amici* demonstrate below, section 23-0303(2) of the New York Environmental Conservation Law ("ECL") does not expressly preempt the Zoning Provisions, because they are land use regulations that only incidentally affect the oil and gas industry. Moreover, this Court need not reach the doctrine of implied preemption, which in any event does not preclude enforcement of the Zoning Provisions. Accordingly, the Town's use of local land use law to prohibit oil and gas operations and activities within its borders should be upheld as a valid exercise of delegated zoning power.

A. The Express Preemption Clause in the OGSML Does Not Apply to Local Land Use Ordinances Exercising Only Incidental Control over Gas Development Operations.

The New York Court of Appeals never has interpreted the express preemption clause of the OGSML, ECL § 23-0303(2), but it repeatedly has interpreted a parallel provision of the Mined Land Reclamation Law ("MLRL"), ECL § 23-2703(2), both in its original form and as amended in 1991. Consistently, the Court of Appeals has held that the MLRL does not preempt town zoning provisions that regulate the use of land, as opposed to regulating mining activities, processes, or operations. *See Frew Run Gravel Products v. Town of Carroll*, 71 N.Y.2d 126, 134 (1987); *see also Hunt Bros. v. Glennon*, 81 N.Y.2d 906, 909 (1993). The Court has reaffirmed that holding, even when the zoning provisions eliminated mining as a permitted use throughout the entire locality. *See Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 690 (1996).

[2] A declaratory judgment action raising the same issue currently is pending in the Supreme Court, Otsego County. *See Cooperstown Holstein Corp. v. Town of Middlefield*, No. 20110930 (Sup. Ct. Otsego County filed Sept. 15, 2011).

The reasoning of this State's highest court in *Frew Run*, *Hunt Bros.*, and *Gernatt* applies equally to the express preemption provision of the OGSML.

1. The Court of Appeals Consistently Has Upheld Town Zoning Power Against Express Preemption Claims under the MLRL.

The leading case on the express preemption provision of the MLRL is *Frew Run.* In that case, a local landowner obtained a state permit to conduct a sand and gravel operation in a district of the Town of Carroll zoned exclusively for agricultural and residential uses. When the Town attempted to enforce its zoning ordinance, the landowner sued, citing the following provision of the MLRL:

> For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.

71 N.Y.2d at 129 (quoting the original version of ECL § 23-2703(2)). Notwithstanding the statutory language stating that the MLRL shall supersede "all" other local laws relating to the extractive mining industry, with a narrow exception for heightened reclamation regulations, the Court of Appeals upheld the Town's zoning restriction.[3] *Id.* at 130–34.

As a preliminary matter, the Court noted that it was unnecessary "to search for indications of an implied legislative intent to preempt" local law, because the MLRL contained an express supersession clause. *Id.* at 130. The Court had only to "look to the plain meaning of the phrase 'relating to the extractive mining industry' as one part of the entire Mined Land Reclamation Law, to the relevant legislative history, and to the underlying purposes of the

[3] As *Amici* demonstrate below, *see* section I(A)(2) *infra*, the supersession clause of the OGSML contains almost identical language, and it is subject to the same analysis. *See* ECL § 23-0303 ("The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries . . . .").

supersession clause as part of the statutory scheme" to interpret that clause. *Id.* at 131 (citations omitted). Applying each of those criteria, the Court rejected the landowner's preemption claim.

The Court first examined the plain meaning of the express preemption clause and explained:

> [W]e cannot interpret the phrase "local laws relating to the extractive mining industry" as including the Town of Carroll Zoning Ordinance. The zoning ordinance relates not to the extractive mining industry but to an entirely different subject matter and purpose . . . . The purpose of a municipal zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally.

Id. Although the Town's land use regulation "inevitably" exerted incidental control over the sand and gravel operation, the Court of Appeals found that the "incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the 'extractive mining industry' which the Legislature could have envisioned as being within the prohibition of the statute . . . ." *Id.* (citations omitted); *cf. DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 97 (2001) ("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 . . . .") (citations omitted).

The plain meaning of the clause was consistent with the purposes of the MLRL, the Court continued, as evident from the legislative history and the statute as a whole. The twin purposes of the statute were to foster mining by eliminating a confusing and costly patchwork of local ordinances regulating extractive operations and to protect the environment by establishing basic land reclamation standards. Rejecting the idea that the statute was meant to preempt local land use controls, the Court commented that "nothing suggests that its reach was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and

reclamation of mined lands." 71 N.Y.2d at 133. The Court therefore refused "drastically [to] curtail the town's power to adopt zoning regulations granted in subdivision (6) of section 10 of the Statute of Local Governments (L 1964, ch 205) and in Town Law § 261," as the landowner had urged. *Id.* The Court concluded:

> By simply reading ECL 23-2703(2) in accordance with what appears to be its plain meaning – i.e., superseding any local legislation which purports to control or regulate extractive mining operations excepting local legislation prescribing stricter standards for land reclamation – the statutes may be harmonized, thus avoiding any abridgement of the town's powers to regulate land use through zoning powers expressly delegated in the Statute of Local Governments § 10(6) and Town Law § 261. This is the construction we adopt.

Id. at 134 (citation omitted).

The Court of Appeals reaffirmed this construction six years later in *Hunt Bros.* *See* 81 N.Y.2d at 909. In *Hunt Bros.*, a sand and gravel mine operator challenged the power of the Adirondack Park Agency ("APA") to require an APA permit in addition to the state permit that the operator had obtained, alleging that section 23-2703 of the MLRL preempted the agency's rules. The Court rejected the claim, stating:

> In *Matter of Frew Run Gravel Prods. v Town of Carroll* (71 NY2d 126, 131), we held that this supersession clause does not preclude local zoning ordinances that are addressed to subject matters other than extractive mining and that affect the extractive mining industry only in incidental ways. Such local laws do not "frustrate the statutory purpose of encouraging mining through standardization of regulations pertaining to mining operations" (*id.*, at 133). Thus, only those laws that deal "with the actual operation and process of mining" are superseded (*id.*, at 133).

Id. Finding that the APA was charged broadly with regulating development in the Adirondack Park region, as opposed to regulating matters "relating to the extractive mining industry," the Court that held the supersession clause did not deprive the agency of all jurisdiction to regulate the mine operator. *Id.*

In its 1996 decision in *Gernatt*, the Court of Appeals endorsed – for a third time – the distinction crafted in *Frew Run* between "zoning ordinances and local ordinances that directly regulate mining activities." 87 N.Y.2d at 681. The Court explained:

> Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the *type* of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities . . . .

Id. at 682 (citations omitted). Applying that distinction, the *Gernatt* Court held that the MLRL did not preempt zoning amendments completely banning mining in the Town of Sardinia, even though they "eliminated mining as a permitted use in *all* zoning districts." *Id.* at 681 (emphasis in original). The Court explicitly rejected the petitioner's argument that a ban necessarily conflicts with the statutory purpose to foster mining. *See id.* at 683. In no uncertain terms, the Court stated: "At bottom, petitioner's argument is that if the land within the municipality contains extractable minerals, the statute obliges the municipality to permit them to be mined somewhere within the municipality. Nothing in the MLRL imposes that obligation on municipalities . . . ." *Id.* The Court added:

> A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.

Id. at 684 (denying exclusionary zoning claim) (citations omitted).

2. The Reasoning of *Frew Run, Hunt Bros.*, and *Gernatt* Applies Squarely to the Preemption Clause of the OGSML.

Anschutz claims that the OGSML expressly preempts the Zoning Provisions adopted by the Town of Dryden because the statutory supersession clause applies to "*all* local municipal regulation of the oil and gas industry," with only limited exceptions. Petitioner-Plaintiff's

Memorandum of Law in Support of Verified Petition and Complaint ("Pet. Mem.") at 7–8 (emphasis in the original). That argument is no more persuasive as applied to the OGSML than it was when applied to the MLRL in *Frew Run*, *Hunt Bros.*, and *Gernatt*. Petitioner points to nothing in the text, purposes, or legislative history of the OGSML's supersession clause that would foreclose enforcement of the Zoning Provisions.

First, the plain language of the OGSML's supersession clause does not preclude local land use regulation. The clause provides that "[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," ECL § 23-0303(2), just as the MLRL consistently has provided that "this title shall supersede all other state and local laws relating to the extractive mining industry." ECL § 23-2703(2). Like the OGSML, the MLRL interpreted in *Frew Run* expressly listed exclusions from the scope of the general supersession language. *Compare* ECL § 23-0303 (excluding regulation of local roads and real estate taxes) *with* 71 N.Y.2d at 132–34 (interpreting the original version of ECL § 23-2703(2), which excluded heightened reclamation standards and requirements). *Frew Run* never suggested that the listed exclusions in the MLRL were evidence of legislative intent to bar regulation of land use, generally.[4] Rather, the Court harmonized the Statute of Local Governments and the Town Law with the MLRL and concluded that "incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment . . . which the Legislature could have envisioned as being within the prohibition of the statute . . . ." *Id.* at 131; *see also Gernatt*, 87 N.Y.2d at 681 ("[Z]oning

[4] Clearly, the listing of exclusions in a supersession clause is not dispositive of the clause's scope, as Petitioner insists. *See* Pet. Mem. at 8. Rather, the Court of Appeals followed the principles of statutory construction set forth in sections 370, 391, and 398 of McKinney's Consolidated Laws of New York, Book 1, Statutes. *See Frew Run*, 71 N.Y.2d at 134. Collectively, those provisions ensure that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed [legislative] intent to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

ordinances are not the *type* of regulatory provision the Legislature foresaw as preempted . . . .") (emphasis in original).[5] The Court's reasoning applies equally to the language of the OGSML.

This conclusion is consistent with the purposes and policy underlying the OGMSL, which are apparent upon an examination of the entire statute and the legislative history leading to its enactment. *See Frew Run,* 71 N.Y.2d at 131–32 (reaching the same conclusion with respect to the MLRL). The relevant purposes of the OGSML are described in the legislative declaration of policy as follows:

> 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 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 . . . .

ECL § 23-0301. This statement is far less detailed as to land use than was the declaration of policy in the MLRL when *Frew Run* was decided, which provided in pertinent part:

> The legislature hereby declares that it is the policy of this state to foster and encourage the development of an economically sound and stable mining and minerals industry, and the orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs compatible with sound environmental management practices. The legislature further declares it to be the policy of this state to provide for the wise and efficient use of the resources available for mining. . . ; to encourage productive use including but not restricted to: . . . forests . . . crops . . . grazing . . . , [and] the establishment of recreational, home, commercial, and industrial sites . . . .

Laws of 1974, ch. 1043 (former ECL § 23-2703(1)). Unlike the OGSML, the MLRL specified in detail the range of land uses to be encouraged, including "recreational, home, commercial, and

[5] Indeed, in 1991, the Legislature confirmed and codified the *Frew Run* Court's interpretation of the supersession clause in the MLRL, when it amended ECL § 23-2703(2) expressly to permit local zoning. As the Court of Appeals recognized following the amendment, a locality may completely ban mining within its borders. *See Gernatt*, 87 N.Y.2d at 681–83. Only when mining is *allowed* by special use permit does the legislation limit what localities may do. *See* ECL § 23-2703(2)(b) (limiting conditions that may be placed on special use permits). The OGSML should be interpreted consistently with the Court of Appeals' decision in *Frew Run*, as affirmed by the Legislature.

industrial" uses routinely addressed by local zoning ordinances. Nevertheless, the *Frew Run* Court held that the statute's supersession clause should not be read to "preclude the town board from deciding whether a mining operation – like other uses covered by a zoning ordinance – should be permitted or prohibited in a particular zoning district." 71 N.Y.2d at 133. The OGSML also should be read to allow the Town of Dryden to make similar land use decisions.

The purposes of the OGSML can be satisfied even when the Town of Dryden's zoning provisions are given full effect. The Town is not attempting "to regulate the development . . . of oil and gas" any more than the Towns of Sardinia or Carroll or the APA were attempting to regulate mining. The towns and the APA left regulation of extractive activities, processes, and operations to the State, while exercising State-delegated powers to determine permitted land uses within their borders. *See Gernatt*, 87 N.Y.2d at 682 ("[T]he distinction is between ordinances that regulate property uses and ordinances that regulate mining activities."); *Hunt Bros.*, 81 N.Y.2d at 909 (acknowledging that "only those laws that deal with the actual operation and process of mining are superseded") (internal quotation and citation omitted); *Frew Run*, 71 N.Y.2d at 133 ("[N]othing suggests that [the MLRL's] reach was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands."); *cf. Hawkins v. Town of Preble*, 145 A.D.2d 775, 776 (3d Dep't 1988) (finding preemption because a bar on mining below the water table is "an express limitation of the mining process"). Because the Town of Dryden's regulation of property uses does not conflict with the OGSML's regulation of oil and gas activities, operations, or processes, there is no basis for concluding that the Legislature intended to preempt the challenged Zoning Provisions.[6]

[6] There is an additional reason not to interpret the OGSML's supersession clause to reach local zoning authority. The New York Constitution requires that any legislation that would diminish or impair a power conferred by the Statutes of Local Governments be reenacted during a subsequent term of the legislature. N.Y. CONST., art. IX, § 2(b)(1). The Statute of Local Governments expressly confers upon local governments the authority to regulate the

Finally, Petitioner has identified nothing in the legislative history of the OGSML inconsistent with *Amici*'s interpretation of its plain language and declared purposes. Instead, Petitioner asks this Court to credit the personal opinions of a consultant with a financial stake in the oil and gas industry, who has been induced to share 30-year-old recollections of what he "was told" about the statute before its amendment in 1981 and what a now-deceased "senator and advocate for the oil and gas industry" supposedly said on a telephone call afterwards. Affidavit of Gregory H. Sovas, sworn to on Sept. 12, 2011, ¶¶ 11, 17–18. Such unadorned hearsay is not competent evidence, *Brocco v. Mileo*, 170 A.D.2d 732, 733 (3d Dep't 1991), and even documented post-enactment statements of a legislator (unlike the unverifiable report of an oral communication) are irrelevant to the question of legislative intent, *see McKechnie v. Ortiz*, 132 A.D.2d 472, 475 (1st Dep't 1987) ("To give this law the expansive reading now urged by appellants based on the postenactment statements of the bill's sponsor would be inconsistent with basic legislative principles."); *Civil Serv. Employees Ass'n v. County of Oneida*, 78 A.D.2d 1004, 1005 (4th Dep't 1980) ("[P]ostenactment statements or testimony by an individual legislator, even a sponsor, is irrelevant and was properly excluded.).[7] The opinions Mr. Sovas

---

land use within their jurisdiction. N.Y. Statute Local Gov'ts § 10(6). "Seemingly, therefore, any law that would impair the power of a local government to establish zoning regulations, including ECL § 23-0303(2), would be subject to the re-enactment requirement of Article IX, § 2(b)(1) of the Constitution." Michael E. Kenneally & Todd M. Mathes, *Natural Gas Production and Municipal Home Rule in New York*, 10 N.Y. ZONING L. & PRACTICE REPORT, No. 4, Jan./Feb. 2010, at 3. The OGSML supersession clause was enacted in 1971 and amended in 1981, each by single enactment. *See id.* The framework established by the Constitution and the Statute of Local Governments suggests that the intent of the Legislature in enacting the OGSML was not to impair local zoning authority.

[7] The letter from the Department of Environmental Conservation to the Mayor of the City of Olean, dated March 28, 1984 (attached as Exhibit A to Mr. Sovas's affidavit), adds no weight to his opinions. "Rather, where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations." *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270, 285 (2009) (internal quotation and citation omitted). Moreover, post-enactment statements of administrative agencies are no more relevant than those of legislators. *See Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 587 n.2 (1998) ("[L]ittle weight should be accorded to the postpassage opinions of the Department of Insurance and the Workers' Compensation Board concerning the reach of the legislation."). Moreover, the letter states that the City of Olean sought "to regulate the drilling and maintenance of oil and gas wells" and to require that well operators "file indemnity bonds

deserve no credence, even if he drafted the OGMSL amendments. "When the Legislature enacted the statutes and when the Governor signed them into law, they stood for what their words manifested and not the inner thoughts of a draftsman or adviser." *People v. Graham*, 55 N.Y.2d 144, 151 (1982); *In re Daniel C.*, 99 A.D.2d 35, 41 (2d Dep't 1984) ("[T]there is no necessary correlation between what the draftsman of the text of a bill understands it to mean and what members of the enacting legislature understand.") (internal quotation and citations omitted). This Court therefore may not rely on Mr. Sovas's account of the Legislature's intent in amending the OGSML in 1981.

Only one court – a trial court – has directly addressed the import of that amendment. *See Envirogas v. Town of Kiantone*, 112 Misc. 2d 432 (Sup. Ct. Erie County 1982), *aff'd mem.*, 89 A.D.2d 1056 (4th Dep't 1982).[8] The provisions challenged in *Envirogas* were financial requirements imposed on "oil and well drilling *operations*," *Envirogas*, 112 Misc. 2d at 434 (emphasis added), as opposed to land use measures governing the location of oil and gas development. In evaluating the petitioner's preemption claim, the court reasoned that "where a State law expressly states that its purpose is to supersede all local ordinances then the local government is precluded from legislating *on the same subject matter* unless it has received 'clear and explicit' authority to the contrary." *Id.* at 433 (emphasis added). The court then noted that

---

or public liability insurance for the benefit of the City." The City's ordinance therefore constituted the regulation of oil and gas operations, activities, and processes, which is preempted by the OGSML. The letter has no bearing on the Town of Dryden's Zoning Provisions, however, which govern land use rather than industry conduct.

[8] The Appellate Division affirmed without opinion. Even if the trial court's opinion were inconsistent with *Amici*'s interpretation of the OGSML (and it is not), the Fourth Department decision would not be binding on courts of the Third Department. Contrary to Petitioner's claim that "[t]he affirmance by the Forth [sic] Department and the denial of leave to appeal by the New York Court of Appeals confirms that the *Envirogas* decision is, indeed, controlling precedent," Pet. Mem. at 11, the Court of Appeals consistently has held that "denial of a motion for leave to appeal is not equivalent to an affirmance and has no precedential value." *Franklin v. Miner*, 7 N.Y.3d 735, 735 (2006); *Jackson v. Smith*, 3 N.Y.3d 667, 667 (2004) ("The Court of Appeals restates the rule that denial of a motion for leave to appeal is not equivalent to an affirmance and has no precedential value."); *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 297–98 (1929) ("A denial of a motion for leave to appeal is not equivalent to an affirmance of the order thus withdrawn from review. It does not give to the order the value of a precedent.").

the newly amended OGSML covered the same subject matter as the local law, addressing the Town's concerns by enabling municipalities to seek compensation for damages and authorizing the Department of Environmental Conservation ("DEC") to impose financial security requirements.[9] *Id.* at 434–35. On that basis, the court concluded: "Since the State Legislature clearly intended ECL article 23 to supersede and preclude the enforcement of all local ordinances *in the area of oil and gas regulation*, respondents' actions are arbitrary and capricious and contrary to law." *Id.* at 435 (emphasis added). The decision in *Envirogas*, like those in *Frew Run*, *Hunt Bros.*, and *Gernatt*, thus recognized that local legislation "in the area of oil and gas regulation" is preempted by state law "on the same subject matter." *Id.* at 433, 435. The *Envirogas* court was not asked to adjudicate a state preemption claim against a local law *on a different subject matter* – namely, land use, generally – and the decision should not be read to bar or abridge zoning powers expressly delegated to towns.

B. The Doctrine of Implied Preemption Does Not Preclude Enforcement of the Town of Dryden's Zoning Provisions.

The Court of Appeals repeatedly has indicated that, "[w]hen dealing with an express preemption provision . . . it is unnecessary to consider the applicability of the doctrines of implied or conflict preemption." *People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 113 (2008); *see Frew Run*, 71 N.Y.2d at 130. Rather, the express clause governs. *Frew Run*, 71 N.Y.2d at 130 ("[W]e deal here with an express supersession clause (ECL 23-2703 [2]). The appeal turns on the proper construction of this statutory provision."). Even if the doctrines of implied or conflict preemption did apply in this case, however, they would not bar the adoption of local land use laws, such as the Town of Dryden's Zoning Provisions.

[9] Indeed, the OGSML contains a second supersession provision that applies specifically to fees. *See* ECL § 23-1901(2) ("This title shall supersede all other laws enacted by local governments or agencies concerning the imposition of a fee relating to the circumstances described in this title."). Small wonder that *Envirogas* found the Town of Kiantone's fee preempted or that DEC contested the fee imposed by the City of Olean.

Under the doctrines of implied or conflict preemption, a court must "search for indications of an implied legislative intent to preempt in the Legislature's declaration of a State policy or in the comprehensive and detailed nature of the regulatory scheme established by the statute." *Id.* *Amici* have demonstrated above, *see supra* section I.A, that the declaration of policy in the OGSML is consistent with a legislative intent to preempt regulation of oil and gas activities, operations, and processes, while preserving local power to regulate land use. The same consistency holds for the regulatory scheme established by the statute.

The OGSML contains detailed provisions governing oil, gas, and solution mining operations, including the issuance of well drilling permits, the production and storage of oil and gas, and fees that may be imposed on permit holders, but it does not serve as a land use planning law, and it does not convert DEC into a land use planning agency.[10] The extensive powers granted to DEC, *see* ECL § 23-0305, do not include the authority to direct wells into or away from particular municipalities, and DEC does not plan the location, scale, or pace of development. The industry proposes the locations of wells and the contours of spacing units, which DEC reviews only to ensure that they satisfy the policy objectives of the statute, namely, efficient recovery of the resource and fair compensation to all holders of mineral rights, including those who do not choose to lease the surface of their land for industrial operations. *See id.* § 23-0503(2)–(3)(a).

[10] Here, again, the intent of the OGSML mirrors the intent of the MLRL. Curiously, when Mr. Sovas was still a DEC employee, he strenuously protested against the idea that DEC was a land use agency. *See* Gregory H. Sovas, Director, Division of Mineral Resources, DEC, Presentation at Albany Law School's Environmental Forum: *Sustainable Development and Mining, Perspectives on New York's Mined Land Reclamation Law* 4 (Apr. 17, 1998), *available at* http://www.dec.ny.gov/docs/materials_minerals_pdf/albanyla.pdf ("It is important to recognize that DEC is not a land use agency, and that the authority remains at the local government level. It has always been our position that localities need to determine appropriate land uses and that DEC, even if we believe that a site may not be zoned properly, will not interfere in those decisions."); *id.* at 8 ("DEC is not a land use agency, and we must abide by the local zoning whether we agree or not."); *id.* at 10 ("DEC does not want conflicts with local governments and does not have an interest in siting mines in areas where the locals don't want them."). A copy of Mr. Sovas's presentation is annexed hereto as Exhibit A. These statements do not bind this court, of course, but they do have a bearing on Mr. Sovas's credibility.

Contrary to Petitioner's claim, *see* Pet. Mem. at 13, the fact that the State promotes recovery of oil and gas does not mean that the Town of Dryden must allow the industry to operate within its borders. The Court of Appeals rejected precisely that argument in *Gernatt*. *See* 87 N.Y.2d at 684 ("A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.") (citations omitted). Nothing in the OGSML suggests that the State seeks "to maximize recovery," as Petitioner contends, Pet. Mem. at 13, by forcing quiet rural towns enjoying clean air and water to sacrifice the comprehensive planning that protects their community character and to surrender their land to noisy and dirty heavy industry. Because the Town of Dryden is not imposing restrictions on oil and gas operations or activities in addition to or in conflict with the OGSML, but rather is regulating the location of heavy industry, the Town's Zoning Provisions should be upheld against Petitioner's implied preemption claim.[11] *Cf. DJL Rest. Corp.*, 96 N.Y.2d at 97 (finding that the Alcoholic Beverage Control Law did not preempt New York City's Amended Zoning Resolution because the Resolution "applies not to the regulation of alcohol, but to the *locales* of adult establishments") (emphasis in original); *Schadow v. Wilson*, 191 A.D.2d 53, 56 (3d Dep't 1993) (upholding a special use permit

[11] Petitioner cites *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 97 (1987), and *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 217 (1987), for the proposition that "[i]nconsistency exists where a local enactment 'prohibit[s] what would have been permissible under State law,'" Pet. Mem. at 12–13, but *New York State Club Ass'n* explicitly rejects that contention. The Court of Appeals remarks:

> Indeed, plaintiff goes too far when it asserts, . . . that Local Law No. 63 is inconsistent with *Power Squadrons* because activity which arguably would be permitted under State decisional law is prohibited by the local law. As we stated in *People v Cook* (34 NY2d 100, 109, *supra*): "This statement of the law is much too broad. If this were the rule, the power of local governments to regulate would be illusory."

69 N.Y.2d at 221. As *Frew Run*, *Hunt Bros.*, and *Gernatt* establish, even a DEC permit (express state permission) to mine is not inconsistent with local zoning laws regulating land use within municipal borders.

requirement because "it regulates land use generally, i.e., the location of mining operations in the Town, not the mining activity itself").

II. Throughout the Nation, State Oil and Gas Laws Exist in Harmony with Local Zoning Provisions that Govern the Use of Land for Oil and Gas Development.

Like New York, a number of other oil- and gas-producing states regulate the industry's operations while leaving the regulation of land use in the hands of individual localities. In states where preemption challenges have been asserted against such local land use laws, courts have upheld zoning ordinances that have only incidental effects on gas development, like the one adopted by the Town of Dryden. Plainly, the industry is booming in many areas nationwide under precisely the division of regulatory authority urged by *Amici* in this case.

For example, Pennsylvania's Oil and Gas Act includes express language preempting municipal ordinances that regulate the industry's operations. The statute provides:

> Except with respect to ordinances adopted pursuant to . . . the Pennsylvania Municipalities Planning Code, . . . all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.

58 Pa. Cons. Stat. § 601.602.

Like the New York Court of Appeals in *Frew Run*, *Hunt Bros.*, and *Gernatt*, the highest court in Pennsylvania has held that the Commonwealth's preemption provision applies where a locality attempts to regulate "technical aspects of well functioning and matters ancillary thereto (such as registration, bonding, and well site restoration), rather than the well's location." *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 223 (2009); *see also Penneco Oil Co. v. County of Fayette*, 4 A.3d 722 (Pa. Commw. Ct. 2010) (holding that

county zoning ordinance was not preempted by Pennsylvania's Oil and Gas Act where ordinance did not attempt to regulate technical aspects of gas development operations).

In *Huntley*, a gas development company challenged a local zoning ordinance that precluded natural gas drilling in certain districts and under which the company's application for a conditional use permit had been denied. *See* 600 Pa. at 210–11. On appeal, the Pennsylvania Supreme Court upheld the challenged ordinance, holding that the preemption provision of the Oil and Gas Act does not prohibit Pennsylvania municipalities from enacting traditional zoning regulations that identify which uses are permitted in different areas, even if such regulations preclude oil and gas drilling in certain zoning districts. *See id.* at 221–23. The court further concluded that, despite some overlap, the purposes of the zoning ordinance at issue – "preserving the character of residential neighborhoods and encouraging beneficial and compatible land uses" – did not conflict with those of the Oil and Gas Act. *Id.* at 224–26 (internal quotation and citations omitted). The court noted the "the unique expertise of municipal governing bodies to designate where different uses should be permitted in a manner that accounts for the community's development objectives, its character, and the suitabilities and special nature of particular parts of the community."[12] *Id.* at 225 (internal quotation and citation omitted).

In Colorado, Petitioner's home state, courts have drawn the same distinction between the regulation of industrial activities and the regulation of the use of land as has been affirmed by the high courts of New York and Pennsylvania. As in *Huntley*, the Colorado Supreme Court focused on the different purposes of state and local regulation – the state's interest in its regulation of gas

[12] In a companion case, the court reiterated *Huntley*'s how/where distinction, but concluded that because the Township ordinance at issue attempted to establish a comprehensive regulatory scheme relative to oil and gas development, rather than simply regulating the location of well drilling, the ordinance was preempted. *See Range Res.–Appalachia, LLC v. Salem Twp.*, 600 Pa. 231 (2009) (describing an ordinance that required a permit for any drilling-related activities, regulated the location, design, and construction of access roads, gas transmission lines, water treatment facilities, and well heads, established complaint procedures and requirements for site access and restoration, and provided for fines or imprisonment as penalties for violations).

development is centered on the efficient production and utilization of the natural resources in the state, while a municipality's interest in land use control is centered on the orderly development and use of land in a manner consistent with local needs – concluding that Colorado's Oil and Gas Conservation Act did not expressly or impliedly preempt a county's authority to enact land use regulations for oil and gas operations within the county. *See Bd. of County Comm'rs, La Plata County v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045 (Colo. 1992). The court reasoned:

> Given the rather distinct nature of these interests, we reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be clearly and unequivocally stated . . . .
> . . .
> A legislative intent to preempt local control over certain activities cannot be inferred merely from the enactment of a state statute addressing certain aspects of those activities.

Id. at 1057–58. Finding no express or implied preemption, the *Bowen/Edwards* court remanded the question of whether any operational conflict existed between the two regulatory regimes to the trial court for resolution on a fully developed record. *Id.* at 1059–60. Nevertheless, given the court's conclusion that the state's goal of "efficient and equitable development and production of oil and gas resources within the state requires uniform regulation of the *technical aspects* of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration," *id.* at 1058 (emphasis added), and not uniform regulation of the *location* of drilling

operations, it would be fair to conclude that a harmonious application of both regulatory schemes is possible.[13]

In a number of other states, local governmental units exercise authority over land use decisions relating to oil and gas development, and such regulation has not been legally challenged as preempted by state law. California has made explicit the right of localities to exercise control over the location of oil production activities within their borders. *See* Cal. Pub. Res. Code § 3690 ("This chapter shall not be deemed a preemption by the state of any existing right of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities, including, but not limited to, zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection.") In Texas, as in New York, municipalities enjoy home-rule status and may enact and enforce ordinances designed to protect health, life, and property of their citizens. *See* TEX. CONST., art. XI, § 5. Exercising that power of local self-government, municipalities in Texas have adopted zoning ordinances regulating the use of land for oil and gas development. *See*, *e.g.*, Southlake City Code Art. IV, §§ 9.5-221–9.5-299; Code of the City of Fort Worth, Texas § 15-30–15-51. Kansas, New Mexico, Oklahoma, and Wyoming also leave land use regulation to localities, which have adopted zoning provisions governing the permissible locations of oil and gas activities. *See*, *e.g.*, Chanute, Kansas Municipal Code §§ 16.44.010–16.44.120; Wichita, Kansas

[13] When counties have attempted to regulate technical aspects of industry activities that already were governed by a state regulatory scheme, Colorado courts have upheld preemption claims. *See, e.g.*, *Colorado Min. Ass'n v. Bd. of County Comm'rs of Summit County*, 199 P.3d 718 (Colo. 2009) (holding that county ordinance banning a particular technique of mining was preempted by state mining law); *Bd. of County Comm'rs of Gunnison County v. BDS Int'l, LLC.*, 159 P.3d 773 (Colo. App. 2006) (holding that county recordkeeping regulations were preempted on account of operational conflicts with state oil and gas law and rules); *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758 (Colo. App. 2002) (holding that provisions of municipal ordinance regulating technical areas of oil and gas drilling and operations were preempted, but provisions that did not regulate technical aspects of oil and gas operations, such as those governing access roads and fire protection plans, would not be preempted unless they created operational conflict with state laws). Under Colorado law, an ordinance excluding all drilling operations within city limits was found to be preempted, *see Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992), but the New York Court of Appeals' contrary holding in *Gernatt* governs the zoning ordinance adopted by the Town of Dryden.

Code of Ordinances §§ 25.04.010–24.04.240; Code of Dona Ana County § 250-72 (New Mexico); Carlsbad City Code § 56-267(16) (New Mexico), El Reno Code of Ordinances §§ 270-3–270-12 (Oklahoma); Lawton City Code, 2005, § 18-5-1-502(A)(4) (Oklahoma); Code of the City of Evanston §§ 16-1–16-48 (Wyoming); Newcastle Town Code, 1961, § 17-16 (Wyoming).[14] Plainly, the oil and gas industry has thrived in states throughout the nation that allow local zoning to govern land use, while state law governs technical aspects of development.

Harmonizing local zoning authority with state regulation of the gas industry's operations, activities, and processes plainly is the rule, rather than the exception. Given the widespread exercise of such zoning power in states throughout the nation where natural gas extraction is booming, Petitioner's argument that the Town of Dryden's Zoning Provisions will frustrate the efficient recovery of oil and gas in New York is unsupported and unsupportable. Petitioner's preemption claim therefore should be rejected as contrary to the facts and the law.

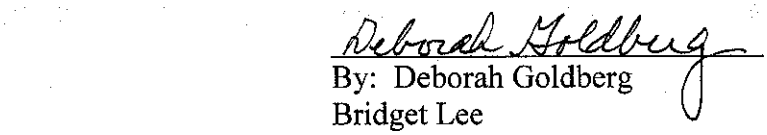
[14] *Amici* recognize that not every state allows for local control of land use decisions relating to oil and gas development. For example, in Ohio, the State retains exclusive authority over the regulation of the location of oil and gas wells. *See* Ohio R.C. § 1509.02.

CONCLUSION

For the foregoing reasons, and the reasons stated by Town of Dryden, the Zoning Provisions challenged in this case should be upheld as a proper exercise of the Town's authority to protect the character of its community and the health and welfare of its inhabitants. The Article 78 petition and Petitioner's claims for injunctive relief should be dismissed, and this Court should grant the Town's motion for summary judgment with respect to the declaratory judgment action.

Dated: New York, New York
October 31, 2011

EARTHJUSTICE



By: Deborah Goldberg
Bridget Lee
156 William St., Suite 800
New York, NY 10038-5326
212-791-1881
Fax: 212-918-1556

Attorneys for *Amici Curiae*

Exhibit A

1998 PRESENTATION BY GEORGE H. SOVAS

Environmental Forum: "Sustainable Development and Mining", Perspectives on New York's Mined Land Reclamation Law
Albany Law School
April 17, 1998

Gregory H. Sovas, Director, Division of Mineral Resources, New York State Department of Environmental Conservation

Introduction

Good afternoon, ladies and gentlemen. My purpose in participating on this distinguished panel today is to give you the Department's perspective on the Mined Land Reclamation Law (MLRL) and how the many facets of this important public policy initiative are implemented.

One of the more interesting outcomes of the implementation of the law is the perception that different interest groups have about DEC: that we run roughshod over local governments, that there is little compliance monitoring and enforcement, that there is no reclamation that is occurring, that the state has conflicting values (demand for materials versus residential neighborhoods), and perhaps the most critical comment: 'DEC has never met a mine it didn't like.'

Hopefully, my presentation will give you a better perspective and understanding about the role of the DEC, and we will dispel at least some of the misconceptions that some of you may have.

Background, the Early years, and Litigation

Here are some of the statistics. There are over 2,500 active mines in the state with 700 being municipally-owned and operated. Approximately 40,000 acres are currently affected by mining and will need to be reclaimed after mining is completed. Over 15,000 acres of land have been reclaimed since the law was enacted in 1975. We currently hold $64 million in financial security to assure reclamation of these lands. We receive about 150 new applications annually, and there are 500 permit renewals, modifications, or final reclamation inspections that need to be done every year. In addition, every one of the eight DEC regions, excluding New York City, has what we refer to as "mining Vietnam." These are applications or cases that have taken on a life of their own, sometimes in process for five years or more, and drain staff resources over time, sometimes without final resolution.

Until this year, we have had only one Mined Land Reclamation Specialist in each one of the eight regions to deal with all of the workload. For your information, each one of the DEC regions is the size of the states of Connecticut and Rhode Island combined, so you can see immediately that the territory that the Specialists have to cover and the workload for each of the regions (approximately 350 mines) is enormous. We did receive an additional four staff for selected regions and continue to work to staff the program commensurate with legislative intent.

As I said, the State's Mined Land Reclamation Law first became effective on April 1, 1975 with three main policies:

- Provide for the wise and efficient use of natural resources and provide for the reclamation of disturbed lands

- Assure satisfaction of economic needs compatible with sound environmental practice

- Foster and encourage an economically sound mining industry

With the new law came an extensive regulatory framework for mining regulation. Permits were issued on a one and three-year basis. Basically the law contained significant detail about how the state would regulate the industry. Primarily this detail, which was usually found in regulation, was included in the legislation because the industry did not trust the DEC and didn't want to give it great latitude in the formulation and promulgation of regulations. The law envisioned a partnership with local governments. At the time, there were only 900 mines and the major thrust of the legislation was to ensure reclamation of mining sites. While the MLRL preceded the passage of the State Environmental Quality Review Act (SEQR) by only one year, there was significant authority within the MLRL for DEC to mitigate environmental impacts and to impose permit conditions. This fact is significant because most of the existing state regulatory permits did not have comprehensive environmental review authority -- the primary reason why SEQR was enacted.

SEQR was passed in 1976 and provided for phased-in implementation for different types of actions. For the first time, the state had authority to review projects comprehensively, and SEQR provided a comprehensive planning tool to assess environmental impacts and to establish mitigation through an environmental impact statement review process. SEQR mandated the DEC to look at projects as a whole and to take a "hard look" at the environmental consequences of an application.

Shortly after the passage of SEQR, the divisions in the DEC were asked to evaluate their application processes and to make changes to ensure that the present permit regulatory schemes were consistent with the law. From that effort in 1980 was born the "life of mine policy."[1] While included in guidance to staff on how to handle permit renewals under SEQR, this guidance provided that mining applications could no longer be reviewed on a one and three-year basis. Rather at the time of initial application, the DEC would need to review the environmental impacts for the entire life of the mining project, in acres. In other words, the review would need to take a "hard look" at the environmental impacts of a project that may stretch over fifty years and affect over hundreds of acres. Therefore, the application for a mining permit was much more complex, and the review undertaken that much more technically and environmentally sophisticated and comprehensive than previously accomplished. Superimposed on the SEQR process shortly after implementation was the Uniform Procedures Act which now mandated time frames for review by state governments. The law was enacted in response to applicants who claimed that delays by the

state made it impossible to plan for projects and to secure necessary financial backing.

Through the period from the early 1980's through the rest of the decade, the partnership between the DEC and local governments deteriorated for a variety of reasons. Local governments enacted local mining laws that made it difficult or even impossible for a mining operator to obtain a permit. The mining industry sued local governments and the DEC and won on the issue that only the state can regulate mining. Later cases led to a court decision that municipalities could enact stricter mined land reclamation standards than the state. This led to another round of litigation that essentially held that a reclamation standard is only a mining standard in disguise. The result was that local mining ordinances were superceded by the MLRL, and many of the local reclamation ordinances were similarly found to be superceded by State law when the mining entity challenged local government. One of the sidelights to the validity of the local ordinances that involved DEC were situations where the local government was "lead agency" under SEQR on the premise that the local government had some permit authority. Thus, DEC was placed in the position of having to review local ordinances to "rule" on their legality before giving "lead agency" to the local government. Out of this dilemma was born the "Lead Agency Policy" [2] which provides that DEC will assert lead agency status under SEQR for all mining applications where mining is the primary objective.

The point of this background and discussion is that no one was happy with the current application and review process: not the local governments who were spending money on costly litigation and who were losing their ability to control mining; not the mining industry who were spending money on litigation but, more importantly, couldn't plan on obtaining approvals for new sources in a timely manner; and not the state who found itself embroiled in litigation from all parties as well as being dragged into conflicts between local governments and the miners. In short, the Legislature was forced to act. While the DEC had proposed changes since 1981, the time had come for wholesale changes to the MLRL.

The 1991 Amendments to the Mined Land Reclamation Law

In 1991, major amendments to the MLRL were passed. Among the more important provisions were the following:

- State (MLRL) supercedes all local laws for mining and reclamation

- Preserves and enhances zoning authority for local governments

- Localities can
  - enact laws of general applicability as long as they do not regulate mining exclusively
  - establish permissible uses in zoning districts, which was really a codification of some of the lawsuits
  - control ingress and egress to a mine site including the use of local roads

- incorporate and enforce limited conditions from the state permit into special use permits

- Establishes formal process for input from the Chief Administrative Officer (CAO) after an application is deemed complete for review

- Enhances public notice provisions

- Imposes annual regulatory fees on private operators - - $1.7 million for the implementation of the MLRL

While we cannot discuss all of the provisions in detail, it is important to note that it was the DEC that insisted on the language about clarifying and enhancing the ability of local governments to zone and to participate more formally in the review process. Particularly important are the provisions under the special use permit authority where local governments can actually enforce some of the conditions from the state's permit.

Local Zoning and DEC Processing of Permits

The 1991 Amendments clarified local government's authority to enact zoning laws and enhanced the ability to participate both formally and informally in the review of mining applications. Furthermore, local governments may enact special use permit authority and enforce conditions from the state permit. It is important to recognize that DEC is not a land use agency, and that the authority remains at the local government level. It has always been our position that localities need to determine appropriate land uses and that DEC, even if we believe that a site may not be zoned properly, will not interfere in those decisions. We do not want conflicts with the localities. We want and need local governments to plan for mineral resources as natural resources just like they would do for any other land use, consistent with the MLRL.

Another area where there may be misconceptions relates to DEC's processing of mining applications under the MLRL. The law requires a statement by the applicant inquiring on the application about whether mining is prohibited at that location by a local government's zoning law. If the applicant affirms that mining is prohibited, the application is deemed "incomplete" and DEC would stop processing it unless and until the prohibition is lifted. I should note that this process is for upstate New York. Long Island is treated differently under the law.

If the applicant states that mining is not prohibited, then DEC is obligated to process the application to a decision, regardless of whether there may be a dispute between the applicant and local government regarding whether it is prohibited or not. There is no explicit provision in the MLRL or the Uniform Procedures Act directing the DEC to stop processing the application. The entire administrative system of the processing of mining applications is found in Technical Guidance Memorandum MLR 92-2[3], available on our website which I'll discuss later (see internet: http://www.dec.state.ny.us/website/dmn). In one case where a court confirmed the

legality of a zoning ordinance prohibiting mining as reflected in Valley Realty Development Co., Inc. v. Town of Tully[4], DEC stopped processing the application. DEC, in reliance upon a court decision upholding a zoning law prohibiting mining, suspended processing of the application. Subsequently, in separate litigation, a reviewing court[5] directed continued processing of the application. Therefore, the Department's implementation of the statute that resulted in the Technical Guidance was confirmed -- the Department must continue processing an application if the applicant states that mining is not prohibited at that location. By way of explanation, while mining was prohibited in the town prospectively, the existing mining application apparently held some non-conforming use rights so that the ordinance did not apply to that location.

The processing of mining permit applications under the Uniform Procedures Act is handled exactly the same way as any other state permit. If a local government and an applicant have a dispute over zoning, that dispute can be handled after the state completes its regulatory responsibilities under the state law, in accordance with the Uniform Procedures Act and the State Environmental Quality Review Act. Technical Guidance Memorandum MLR 92-2 addresses the processing of a state permit application when there may continue to be a dispute at the local level. First, the applicant is advised through a letter after the application has been deemed complete, and the CAO has responded that mining is prohibited:

> Your application for a NYSDEC Mined Land Reclamation permit has been deemed complete; however, the Chief Administrative Officer of the local government ... has advised the Department that mining is prohibited at that location.
>
> Please be advised that if a permit is issued by the Department, this does not relieve you of the responsibility for obtaining other permits, approvals, lands, easements, rights-of-way that may be required for this project....
>
> An opportunity exists within the Uniform Procedures Act to suspend the time frames under which the Department must make a decision on permit issuance or denial. If you choose to explore this option, the processing of your permit application will be suspended for six months in order for you to resolve the matter of local prohibition with the local government. If not resolved at the end of the six-month period, the Department will make a decision based on the merits of the application.

Secondly, a letter is sent to the CAO responding to the comments that were formally submitted and also informing the CAO that a letter has been sent to the applicant notifying him of the conflict with the local government and that the applicant has been further advised that he needs to obtain all other approvals, presumably at the local level, before he can commence mining:

> The Department has received your comments regarding the ..... Mined Land Reclamation Permit application that mining is prohibited at that location due to local zoning ordinances or laws. The Department will process to permit issuance or denial solely based upon the contents of the application and all coordinated technical and environmental reviews.
>
> The prohibition has been noted and a letter advising the applicant of this prohibition has been sent by the Department. The applicant has been advised that if a permit is issued by the Department, he/she is not relieved of the obligation of obtaining all necessary local permits,

approvals, lands, easements and rights-of-way that may be required for this project.

Finally, if and when a permit is issued to an applicant, Uniform Procedures Act permits contain sixteen general conditions in addition to site and permit- specific conditions. General condition number 8 states that "permittee is responsible for obtaining any other permits, approvals, lands, easements and rights-of-way that may be required for this project."

One further point needs to be made with regard to lead agency. The Department has continued to assert lead agency status for all mining operations consistent with Department policy. If the Department asserts that it will be lead agency and the local government objects, any involved agency or the project sponsor may appeal to the Commissioner (6NYCRR §617.6(b)(5). The Commissioner must use the specific criteria contained in the SEQR Regulations, 6NYCRR§617.6(b)(5)(v), to make a decision on lead agency. The primary reasons for DEC continuing to assert lead agency are that (1) only the state can have a mining or reclamation law, (2) the impacts from mining are generally regional, but in some cases, these mines could be of statewide or even international importance, and (3) the greatest expertise for comprehensive environmental review is at the state (DEC) level. Because the state is bound by the Uniform Procedures Act time frames, the application review process is significantly more efficient. As a general rule, local governments are more than happy to have DEC be the lead agency so that they don't have to deal with public opposition to proposed mining projects.

MLRL and SEQR

The key document of a mining application is the Mined Land Use Plan (MLUP) required under the statute and regulations. The Mined Land Use Plan is comprised of two parts -- the mining plan, and the reclamation plan. The mining plan must describe in detail the operations of the mine, including the mining methods, sequence of mining, equipment, location of stockpiles, buildings, blasting techniques and frequencies, and the hours of operation. The mining plan must include mitigation measures to ameliorate any environmental impacts to the greatest extent practicable. The reclamation plan needs to identify the final reclamation objective of the land after mining is completed at the site. The plan would also include any plans for concurrently reclaiming acreage as mining progresses. DEC's review of the plan ensures that (1) the reclamation objective can be achieved for the type of mining, and (2) the manner in which the site will be reclaimed. It is also important to note that an environmental impact statement (EIS) can be substituted for a Mined Land Use Plan. While the corollary is not entirely true, the MLUP is a substantive document containing significant information for environmental review and can and often does act as a stand alone document in lieu of an EIS.

The Mined Land Reclamation Law as amended gives the Department very extensive authority to mitigate environmental impacts and to impose permit conditions and to negotiate with applicants. As I said previously, the industry distrusted DEC in 1974 (not that they trust us now) to the extent that the law contains great detail about the mining and environmental review process. The law allows the DEC to impose conditions on permits without relying on the authority of the

SEQR for issues such as noise, dust control, blasting, hours of operation, erosion and sedimentation plans, berms, buffers and setbacks, and reclamation. These potential environmental impacts are identified in the MLRL and in the rules and regulations under 6NYCRR Parts 420-425. Our imposition of conditions using the MLRL has been upheld in the courts[6].

Because of the extensive authority in the MLRL and the ability of the staff to work with the mining industry to incorporate mitigation measures in the Mined Land Use Plan, a substantial number of negative declarations are issued under SEQR, meaning that an EIS was not required by the Department. I have heard from staff on many occasions that there would be no more substantive information gained through an environmental impact statement that would not be obtained directly under the MLRL. An EIS is required when there is a potential for significant adverse environmental impacts. Most likely, there would be a legislative and sometimes adjudicatory public hearings held on the project. While one could view the high number of negative declarations as positive evidence that the mining industry is planning their operations to avoid or mitigate significant environmental impacts, some of the public and local governments take the approach that the consequence is limited public involvement in the review of mining applications. As usual, there is some truth to both arguments.

The State Environmental Quality Review Act must be read in conjunction with the MLRL, supplemental to the authority of the MLRL. Recall that the MLRL was passed only a year before SEQR, so many of the same arguments that were made for comprehensive planning for mining were also brought forward in SEQR. The major role for SEQR in the review of mining applications is to incorporate the review of those offsite impacts that could result from a mining operation that were not specifically identified in the MLRL. The primary example is truck traffic where material is being hauled on roads that need to be reviewed to ensure that they are capable of sustaining the traffic and are the most appropriate routes to avoid impacts to residences, schools, and other areas of local significance. Other common issues that may be subjected to review under SEQR include offsite noise, dust, and sometimes visual impacts. In determining whether an environmental impact statement is required, the lead agency must decide whether an action may have a significant effect on the environment requiring the preparation of an EIS. Not wanting a mine in a particular location is not a substantive issue without some further environmental impact justification. Where there is no zoning, DEC is forced to face the public ire because the Department is viewed as the entity "giving" a permit to an applicant for a location which we have little or nothing to say about its siting. The public needs to focus its attention on its local officials to ensure that prospective zoning and planning are accomplished in our communities.

The Mined Land Reclamation Law and the State Environmental Quality Review Act give DEC a powerful combination of authority and responsibility in the comprehensive review of mining applications. What we continue to want and need is local government comprehensive planning and zoning, including the prohibition of mining if the community believes that is in their best interests. Prohibiting mining, however, has consequences for increased costs and does not address the real issue of planning for non-renewable mineral resources as natural resources.

What Have I Told You About Perceptions

At this point, it's my turn to summarize some of the things that I have told you so that you will leave here with a better understanding of the DEC and at least have a better comfort level in the mining application review process. First, DEC must process a mining permit under the Uniform Procedures Act to a decision if the applicant states that mining is not prohibited at that location. Second, DEC is not a land use agency, and we must abide by the local zoning whether we agree or not. Third, the issuance of a state permit does not mean that a miner can ignore the zoning or special use permit requirements of the locality. Fourth, DEC will not process an application for a permit when the applicant states that mining is prohibited. Fifth and perhaps most important, the success of the implementation of the MLRL is dependent on proper local planning and zoning, and in that regard, the MLRL is different from other DEC regulatory programs. Hopefully, I have conveyed why and how DEC processes mining permits, and that it is important for DEC to establish a clear and consistent regulatory framework for implementation of the MLRL.

Steps for the Future

Now it is time to talk about what DEC is doing or is planning to do in the future.

Model Ordinance

One of the more disappointing aspects of the passage of the 1991 Amendments was that there was little or no recognition on the part of local governments to understand their respective role and the potential that exists within the MLRL to participate, both formally and informally, in the review and in the ultimate enforcement of some permit conditions under a special use zoning permit. We had fully expected that the local government organizations or at least some of the municipalities would adopt the authority to require special use zoning permits and enforce certain conditions from the state permit consistent with the MLRL.

The law allows, and DEC encourages, local governments to enact and enforce local laws regulating mining and reclamation for mines not regulated by the state, i.e., mines of less than a thousand tons removed in twelve calendar months. Many of the complaints that DEC receives , including many from local government officials, deal with these small mining operations where a state permit may not be required or where the level of proof of violation is both difficult and time-consuming. To that end, the DEC has been working on a model ordinance that could be adopted by local governments establishing a regulatory program for the sub-jurisdictional mines and enacting the authority to require special use zoning permits consistent with the MLRL, as set forth under ECL §23-2703(2).

Surficial Geology and Mine Location Maps

The Division of Mineral Resources maintains a current database of all the mines in the state. This database includes all the mines subject to our jurisdiction since 1975 when the law was first

enacted. The New York State Geological Survey has prepared and digitized the surficial geology of the State of New York. This data gives an indication of the types of subsoils and geology throughout the state. The data can be used as a general guide to where potential sources of sand and gravel and other hard rock minerals can be found. Using one of the geographic information systems programs, these geologic mineral types can be displayed on a county basis. Then using our database, we can superimpose the existing mining locations on the geologic mineral types, giving an indication as to where mines are in operation, where supplies in economic quantities exist, and potentially where new mine applications can be expected. Remember, minerals can only be mined where they are found in nature. Therefore, it is incumbent upon local governments to plan for these resources and to zone accordingly. We have begun a program to produce these maps for the county environmental management councils in the hope that they will encourage the county and the towns to zone appropriately. While we continue to have some technical problems in the production of the maps, they are impressive and give a real indication of future areas for which mining may be proposed.

Open Space Plan

Whether you support mining or not, you need to recognize that mines are open space. In many respects, these open spaces will be kept that way for many years into the future. I should add that mines do provide sanctuary for wildlife. It is not uncommon to see deer, foxes, and a number of other wildlife species on the property. These mines should be looked upon as opportunities for the future. The reclamation objective becomes that much more important when the mine is now or will be surrounded by development in the future. For those mines with water access, such as some along the Hudson River, open space and access to waterways is extremely important as our chances of securing public access to these waterways continues to diminish over time. In the guide, "Local Open Space Planning - A Guide to the Process,"[7] there is a chapter on 'Open Space Resources to be Conserved' which includes planning for mineral resources written by the Division of Mineral Resources. We hope to see some forward thinking about the ultimate use of mines as open space and public access by local governments, regional planning agencies, and of course, the state.

DEC and DMN Website

Perhaps the most exciting development in recent years is the Internet. It is changing the way all of our business is done. At DEC, we have established a website (http://www.dec.state.ny.us) that contains a significant amount of information about the Department, and work is continually being done to upgrade our efforts. The Division of Mineral Resources has completed work on a rather extensive site at http://www.dec.state.ny.us/website/dmn. There are approximately seventy pages of information on our programs including our entire mined land database. Thus, anyone can download all of the mine locations and use these in a geographic information system. There is extensive information on numbers and sizes of mines, educational and public information on mining and uses of minerals, and links to the mined land law and regulations. We are hoping that the public makes good use of the site, and we will continue to enhance the information and

expand our site. We look forward to feedback from the public, local governments, and the industry on what they would like to see.

Conclusion

The siting of mines is difficult, costly, and time-consuming. The experiences here in New York are no different from the siting of mines in all parts of the Nation. We have to balance the demand for products and the use of these minerals in public works projects with the negative impacts of siting mines in proximity to residential development, for example. We need to improve the public perception of mining and of the role of DEC. After all these years, we still have conflicts with local governments and adjacent homeowners on issues of noise, traffic, hours of operation, and blasting, to name a few. Many of these conflicts would diminish if the locals undertook comprehensive zoning in their communities. DEC does not want conflicts with local governments and does not have an interest in siting mines in areas where the locals don't want them. Unfortunately, as I have continually said, DEC is not a land use agency.

I want to state for the record that our mining staff have done and continue to do unbelievably good work given our responsibilities and workload. But we recognize that DEC, and specifically the Division of Mineral Resources, needs to improve. Hopefully we can do that with new staff. We need to provide technical assistance to small operators, especially on reclamation techniques. We need to provide more and better public information on mining and the DEC's role in the regulation of the industry. We need to think about incentives for local governments to plan for minerals as natural resources. We need to continue to encourage concurrent reclamation. In short, we need to foster a better relationship with local governments and the public. I am confident that we can continue to improve our service to all. Today I hope that I have given you an inkling about what we do, how we do it, and maybe even improved the perceptions that you may have had about the DEC and the Division of Mineral Resources.

1. Memorandum to Mined Land Reclamation Specialists titled "POLICY ON MINING PERMIT RENEWALS," from Greg Sovas, Chief, Bureau of Mineral Resources; March 30, 1981.

2. Memorandum to Staff titled "GUIDANCE ON LEAD AGENCY: MINING PERMITS," from Marc Gerstman, Greg Sovas, and Lou Concra: January 18, 1989.

3. Memorandum to Staff titled "Technical Guidance Memorandum MLR-92-2, Implementation of the New Mined Land Amendments in Regard to Permit Processing," from Gregory H. Sovas, Director, Division of Mineral Resources, Lou Concra, Director, Division of Regulatory Affairs and Ann Hill DeBarbieri, Director, Division of Legal Affairs; May 4, 1992.

4. Valley Realty Development Co., Inc. v. Town of Tully, 187 A.D. 2d 963, 590 N.Y.S. 2d 375 (4th Dept. 1992), lv. den. 81 N.Y. 2d 880, 597 N.Y.S. 2d 930.

5. Valley Realty Development Co., Inc. v. Jorling, 217 A.D.2d 349, 634 N.Y.S.2d 899 (4th Dept. 1995).

6. Mid-Hudson Preservation Alliance, Inc. v. Sterman, DEC, and Stissing Valley Farms, Inc. (Index #01-97-ST7478), Sup. Ct. 1997.

7. See pages 41-43, "Local Open Space Planning, A Guide to the Process," New York State Department of Environmental Conservation, Office of Natural Resources, 1994.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

AVI ALLISON, being duly sworn, deposes and says:

On the 31st day of October, 2011, I served a true and correct copy of the foregoing Memorandum of Law of *Amici Curiae* Natural Resources Defense Council, Inc.; Brewery Ommegang; Theodore Gordon Flyfishers, Inc.; Riverkeeper, Inc.; and Catskill Mountainkeeper, with Exhibit A, upon Anschutz Exploration Corporation, the Town of Dryden, and the Town of Dryden Town Board by electronic mail, upon consent of the parties, to each of the addressees listed below.

Mahlon R. Perkins, Esq.
Mahlon R. Perkins, P.C.
11 South Street
P.O. Box 27
Dryden, NY 13053
mperkin3@twcny.rr.com
Attorney for Respondents-Defendants

Thomas S. West, Esq.
Yvonne E. Hennessey, Esq.
The West Firm
677 Broadway, 8th Floor
Albany, NY 11207-2996
twest@westfirmlaw.com
Attorneys for Petitioner-Plaintiff

Avi Allison

Sworn to before me this 31st
day of October, 2011.

Deborah Goldberg
Notary Public

DEBORAH GOLDBERG
Notary Public, State of New York
No. 31-4951179
Qualified in New York County
Commission Expires May 22, 2015