

March 3, 2012 Presentation to Guilford by Mary Jo Long, Esq.

**Introduction:**

I am going to talk about the legal rights and powers of local government with respect to gas drilling in their communities. First, I am going to review 2 NY Court decisions that were made less than 2 weeks ago that impact on this topic. Then I'm going to go back 4 years and put these cases into perspective and context. I also intend to talk about the takings "threat" that pro-gas drilling spokespersons have been making. And I hope to talk about some other police power and home rule rights that local governments have that are relevant to the incidental aspects and infrastructure of gas drilling.

**The Anschutz v. Town of Dryden and Cooperstown Holstein Corporation v. Town of Middlefield Law Suits Decisions: The Challenges to Towns That Have Implemented Bans:**

Many of you have heard that 2 courts have now ruled that Towns may pass zoning restrictions on heavy industrial activities in their towns which result in banning gas drilling. The decision in Anschutz v. Dryden was made by Judge Rumsey on February 21<sup>st</sup> in favor of the town of Dryden. The decision in Cooperstown Holstein Corp. v. Town of Middlefield was made 3 days later by Judge Cerio on February 24<sup>th</sup>.

In the Dryden case, the plaintiff was a gas drilling company and in the Middlefield case the plaintiff was a landowner with a gas lease. These lawsuits were virtually identical in that they challenged towns who had implemented gas drilling bans through zoning. Both cases asked the Courts to declare that the Town's zoning law was invalid by reason of being pre-empted by ECL 23-0303(2). ECL 23-0303(2) says: "The 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 rights of local governments under the real property tax law."

In the Dryden decision, the Judge describes the activism of the town residents. He says that beginning in 2009 many Town residents asked the Town to ban hydrofracking and got 1,594 signatures which were presented to the Town Board. The Town Board amended its Zoning Ordinance by adding to its list of prohibited uses (1) gas drilling, (2) disposal of gas production wastes, storage and other support activities. Judge Rumsey agreed with the line of cases in the Gravel Mining context. In Frew Run Gravel v. Town of Carroll and Gernatt Asphalt v. Town of Sardinia, the highest Court in NYS had ruled on towns' right to zone out gravel mining. There was very similar language that the DEC's authority over the regulation of gravel and sand mining shall supersede all local laws, and then some exceptions carved out. Judge Rumsey in the Dryden case ruled that the Town of Dryden's powers under Home Rule allows zoning and that zoning is not superseded by the ECL 23-0303(2) which gives the DEC authority "relating to the regulation of the oil, gas and solution mining industries."

In the Middlefield case Judge Cerio spent more time reviewing the legislative history starting with the 1963 Conservation law. His review showed that state oversight of gas drilling was to utilize geological and engineering principles in addressing the manner and method by which

such drilling should occur. He also reviewed additional legislative history from 1978 and 1981 changes in ECL 23-0303. The supersession clause had been added in the 1981 changes. Judge Cerio said the legislative history did not support plaintiff landowner's claim that the supersession clause impacted, diminished or eliminated a local government's right to pass laws about land use. The Judge then reviewed the gravel mining cases, Frew Run and Gernatt Asphalt and concluded that "the Oil, Gas and Solution Mining Law supersession clause does not preempt a local municipality from enacting land use regulation within the confines of its geographical jurisdiction and as such, local municipalities are permitted to permit or prohibit oil, gas and solution mining or drilling." In other words, DEC regulates the operation of gas drilling, e.g. rules about the cement casing and other rules "relating to the regulation of oil and gas industry", while local governments have authority over land use including location, such as zoning areas for residential use, light industrial use, commercial use, and agricultural.

There will probably be appeals. But these judicial decisions are a great victory for local government. People can have more influence over local government than they have over state and federal government. Despite unlimited corporate spending on the political process, people at the local level still were able to mobilize through surveys and petitions, informational meetings, letters to the editors, tabling at events, presenting demands to their town governments, running for office and many ways to show their opinions about this industry. The need to assert our rights to local control will continue to be challenged in the courts and other arenas, but let's celebrate our wins.

**Now I'm going to go back 4 years because it's important for us to understand how we got this far.** And by "we" I mean activists who wanted some protection from the gas industry which was moving into our area.

In 2008, local governments were being told they have no rights and no say with respect to gas drilling except road laws and even those were discouraged. We were all told, "Don't worry the DEC will take care of everything." My first of many experiences of being told there was nothing towns could do was in April 2008. As an Afton Town Board member, I attended an event about gas drilling for elected officials in Liberty, NY. I arrived just as a Supervisor in a town in Sullivan County was saying they had passed a moratorium on gas drilling. Robert Wedlake, the attorney who was sitting at the speakers table, said "Oh you can't do that." I learned later that Mr. Wedlake represents a landowners coalition. Attorneys who represent some landowners who want gas drilling and attorneys who represent gas drilling corporations, always say "oh, you can't do that". But they are representing their clients who want everyone to shut up and let the regulatory process go forward and issue permits.

That's where we were 4 years ago.

I knew about moratoriums because our Town Board had passed a moratorium, along with several other towns in Chenango County when the NYRI Transmission line was going to go through our County. A Moratorium is a Law that bans an activity, e.g. gas drilling, for a limited period of time, say 6 months, 1 year, 18 months. That period of time is used to study and plan for the thing being put on hold and, if the Town decides to implement a law, they have time to do that before the activity gets started. It's a pause that automatically ends without repealing it.

So, town officials and activists were told we can't do moratoria. I even have a memo from a major environmental group, NRDC, whose attorney Kate Sinding, said municipalities' use of gas drilling moratoria is preempted by DEC regulations.

Activists have gone beyond moratoria and some have demanded that their local governments ban gas drilling. Local activists were told that going for a ban of gas drilling was unrealistic and not allowed by the law. The notion that local communities had a right to have a say in what happens ECONOMICALLY in their community, was ridiculed. But activists went ahead and organized their local communities and claimed the right, through their elected representatives, to have some say when an energy extraction industry moves into our community.

As a result, 49 New York towns have implemented moratoriums. Another 20 towns have gone directly to a ban. These latter towns have *generally* used Zoning powers, and comprehensive plans to prohibit gas drilling as a heavy industrial activity.

### **What are Some Lessons**

Lesson: Question Authority. If people had listened to the lawyers who sat at the head table and told activists and local officials "You can't do that", nothing would have happened. Town governments would never have tried to assert their sovereign rights if people hadn't been insisting on it. Anti gas activists have redefined what is politically possible for local and perhaps statewide communities to claim as their **RIGHT, the right to have some local control over land use**. In 2008 and 2009 Lawyers (who turned out to be representing those who wanted gas drilling to start asap) said Towns had no rights about gas drilling in their communities. Well, they were wrong.

Lesson: It's good that people didn't wait until the DEC issued their SGEIS. In general people are learning not to rely on the permitting or regulatory process. DEC is an unelected body that we cannot vote out of office. Their job is to issue permits, not to decide that it cannot be done safely. They will talk about best practices and carve out special places like the NYC watershed. And the gas companies will follow the rules some of the time and DEC won't make them follow the rules all of the time.

Lesson: These judicial decisions in Dryden and Middlefield broadly reaffirm principles of Home Rule and Local Police Power. Local Governments have Police Powers to preserve health, safety and welfare: NY Municipal Home Rule §10(6). Even municipalities without zoning have land use powers using the MHRL. The distinction made by the Courts is that DEC regulates the operation of the gas industry. A town does not have the right to tell a driller what kind of cement to use in the well's casing, or that a driller can't use benzene in his drilling fluid or declare that flowback fluid that contains benzene is a hazardous material. But local government does have the right to say that benzene cannot be stored in such a way as to enter the sphere of the general community and threaten the community's health, safety, welfare or character – by evaporating benzene into the air from open-pit storage, or compressor stations say, or by bringing it to a local disposal plant, or dumping onto lands, waterways or roads.

There are other aspects of the gas drilling industry that municipalities need to pay attention to.

Brine Spreading on roads will likely be a matter of public concern which town boards can prohibit. The gas industry wants to dispose of its waste on our roads and it is being promoted as a low-cost ice melter and dust control agent. The cumulative impact of repeated use of briney industrial waste can poison your drinking water sources and make your land sterile. Towns have the right to ban this.

Pipelines and compressor stations will be another area of municipal concern. Pipelines are regulated by the Public Service Commission in NYS and by FERC for interstate pipelines. The compressor stations are particularly obnoxious because they emit fugitive fumes and smells and their noise is a constant vibration that can affect health. Local building codes and noise ordinances can be enacted.

Dealing with drilling fluids and other waste associated with gas & oil production. By federal law gas wastes are not hazardous waste, it is solid waste. However, state law has delegated power to municipalities with regard to Solid Waste Management. ECL 27-0711 says “counties, cities, towns & villages may enact local laws regulating solid waste so long as such local laws are at least as stringent as the state regulations.”

ECL 19-0709 “Counties, cities, towns & villages may pass air pollution laws that comply with at least the minimum applicable state requirements”.

All of that is hard work and requires findings to justify the law as well as writing laws that are of general application. But there are lawyers out there who will help you. The Community Environmental Defense Council has been one of the hardest working law firms advising local governments. That is David and Helen Slottje. There are also Albany law firms like Whiteman, Osterman & Hanna who have stepped up to represent local governments. I advise you to seek attorney advice before passing any laws.

### **What about the less successful attempts to protect townspeople**

Not all towns have been as successful in getting their town boards to act. A year ago my Town of Afton reversed itself and revoked the Road Protection Law that we passed a few months before. I had advocated for a Road Protection Law and our Town Attorney, Jim Downey, prepared several drafts, various towns people came and made statements and asked questions. Our town attorney attended a Town Board meeting and we asked more questions. The Board asked for changes and our attorney made those changes. And we passed a law. Then other town's people came to Town Board meetings and asked more questions and made more statements and the Board agreed to get another lawyer opinion. And what we learned was very disturbing. I bring this up so that other towns will learn from our mistakes. We learned that there must be an environmental impact assessment before we could pass the law. The local newspaper said we revoked it “because the Town Board decided it targeted drilling companies unfairly, leaving other businesses with heavy truck traffic for fuel, septic, garbage and propane alone.” That was not accurate nor was the assertion that I wrote the Road Preservation Law. But we had not followed the SEQRA process which was a prerequisite. It was required to be done *before the law was passed*. So, the Board needed to correct that problem and accordingly we revoked the law. The attorney who advised us made other suggestions to improve the road law.

I had hoped that Afton Town Board would make those changes and pass an improved Road Protection Law. But they did not.

For towns to pass laws, such as road preservation laws, or moratoria, or other protections for the town, there is a learning curve when a new situation happens. That's true if it's any new technology coming to our community including unconventional gas drilling. I have seen 6 or 7 variations of Road Preservation Laws and each municipal lawyer learns from the previous efforts to craft road protection laws. But Towns are passing road protection laws and that will pay for itself in giving local government more right to protect their roads and the taxpayers who don't want to pay for the damage that gas drilling causes. On a similar note, lawyers are taking trainings and sweating because separating subsurface rights from surface rights in land changes real estate law, trusts and estates law, tax and accounting matters, and many others. Separating the surface estate from the subsurface and arguing over which is dominant will keep courts busy for a long time.

### **The Threats: We'll Sue You and Other Efforts at Intimidation**

The pro-gassers have threatened to sue town board members. I saw Sue Dorsey, VP of a Landowners Coalition, stand up and point to each Plymouth Town Board member and say we will sue you, and you and you. And these threats have been made to members of other town boards. They have been concerned about personal liability for actions they take as board members. Elected officials have legislative immunity for the votes they take and those threats are groundless.

There are also lawsuit threats that passing laws that stop gas drilling will be a "taking" and it will cost the Town taxpayers loads of money.

When Dryden Town Board voted on these zoning changes, in August 2011, pro-gassers publicly "put the Board on notice" "that it will be engaging in knowing prospective violations of constitutional rights, federal, and state law. If the Board enacts the proposed ordinance it may subject the Town not only to litigation costs but also to potentially hundreds of millions of dollars of taking liability, which would ultimately have to be borne by the taxpayers. . . .Whether or not the Board believes it may somehow legally prevail, the Board should weigh the cost to benefit ratio of adopting this ban. Even assuming, for argument only, that the possibility of success were 50-50, can the Board risk the chance of a nine figure liability?"

The Dryden Board was not deterred. As a friend of mine said, "Better sued than screwed" However, when the lawsuit was filed, it was important to note what they did not ask for. Those complaints did not ask for damages nor did they raise a "takings" claim. Not nine figure liability, not hundreds of millions of dollars of taking liability. Although plaintiff Anschutz asserted it had spent \$5.1 million in the Town of Dryden, it did not ask for any damages; they only asked for a declaratory judgment that the Town's law was invalid. If DEC gas drilling permits had been issued on property in Dryden, then most likely the Anschutz would have claimed a taking and asked for damages, but without the permit, they didn't really have a takings claim. So why did they file these lawsuits before they had a permit to drill in the towns they

sued? The lawsuits were filed in early fall 2011, before the November local town board elections. I think the gas corporations were trying to intimidate voters into voting out the officials who had voted for the ban. The people of Dryden re-elected the officials despite the threats from the gas corporations and their supporters. Was the same true in Middlefield?

Saying “you will be sued” or “we will sue you” is easy and costs nothing. People do it all the time and don’t file lawsuits. They hope you will be threatened enough to refrain from action.

What is the Legal Status of Takings Claims?

The Fifth Amendment to the U.S. Constitution provides certain protections to persons. Included in the protections is the phrase “nor shall private property be *taken* for public use without just compensation. This is the “taking” referred to by the anti-ban people. This obligation to compensate for taking private property only applied to the federal government until the 14<sup>th</sup> Amendment to the Constitution expanded the application to state governments as well. Eminent domain is the term most frequently used when a government takes a piece of property: land for a public park, a public road, a public school. The owner of the land is entitled to be paid for the value of the land taken from her.

But what about government, through a zoning law, restricting or prohibiting a particular use of the land? Are governmental laws that restrict the use of the land which affect a profit making opportunity a taking when actual ownership does not change?

The law of takings is

1. All property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community. Mugler v. Kansas, 123 U.S. 623,665 (1887) There is no compensation for limiting a particular use of property. Local governments have police power which is the power to regulate persons and property for the purpose of securing the public health, safety, welfare, comfort, peace and prosperity of the municipality and its inhabitants. Gernatt Asphalt Products v. Town of Sardinia, 87 N.Y.2d 668 (1996) a decision by the highest NY Court, said “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 interest of the community as a whole”
2. A “taking” claim does not apply if the property can be used for other purposes even if those uses are not as profitable, as long as the economic value has not been totally extinguished.
3. Personal property, which includes gas leases, has even less recognition as a taking than real property (which is land).

So, take any threats about taxpayers ending up paying “hundreds of Millions of dollars” with a grain of salt and consider the source.

If towns are going to enact legislation under their police power authority, it is best to act before DEC gas drilling permits are issued in their towns. Any active wells may need special consideration. This, again, is something to discuss with knowledgeable attorneys before you enact any laws.

### **Conclusion**

Lesson: Gas drilling opposition has gotten more people involved in local politics. More people ran for local office in November than I ever remember. In Chenango County, the status quo held but if it was easy to change the status quo, we would have already changed it.

Some towns are dealing with disruption of public meetings. I've attended and know of other town board meetings that were chaotic and intimidating, because the town supervisor allowed it or wanted it. I have also seen other supervisors allow participation from various points of view while limiting the time allowed to speak and confining statements to the period of public comment. Those meetings allowed public participation without descending into chaotic yelling.

The increase in attention and involvement in local government is a good thing. People are challenging the dominance of corporate power and claiming the right, through local government, to make decisions about our community. Democracy is an ongoing project.