Supreme Court

State of New York
Appellate Division – Third Department

COOPERSTOWN HOLSTEIN CORP.
Appellant,

-against-

TOWN OF MIDDLEFIELD,
Respondent.

Otsego County Index No.: 2011-0930

NORSE ENERGY CORP. USA,
Appellant,

-against-

TOWN OF DRYDEN and
TOWN OF DRYDEN TOWN BOARD,
Respondents.

Tompkins County Index No.: 2011-0902
A.D. No. 515227

BRIEF OF AMICUS CURIAE
NEW YORK FARM BUREAU

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BRIEF OF AMICUS CURIAE NEW YORK FARM BUREAU

INTRODUCTION

New York farmers will be greatly affected by the outcome of this litigation and by any state action regarding natural gas exploration and production in the Marcellus Shale in New York. Much of the land where drilling will occur is owned by farmers. The economic and environmental impact of high-volume hydraulic fracturing ("HVHF") to harvest shale gas will be deeply felt by farm families and businesses. Without gas leases and

royalties from subsurface natural gas, many farms cannot thrive or even survive. HVHF is not just about exploiting shale gas, but also about protecting other natural resources implicated by the exploration and production process. New York Farm Bureau ("NYFB") advocates that HVHF be done in an environmentally safe way that protects the environment.

NYFB not only has an interest in HVHF, it also has extensive relevant expertise, and it seeks to assist this Court by offering insights on one aspect of this litigation not focused upon by the parties: the express intent of the state statute governing gas mining to fully protect the rights of all landowners. That intent should be honored in interpreting the supersession clause found in the statute. The rights of landowners are to a large extent the rights of farmers, who seek to take advantage of the economic potential of natural resources deep beneath their soil, while ensuring environmentally sound mining operations. NYFB also seeks to focus greater attention on the primary flaws in the reasoning of the Supreme Court decisions challenged in both the Towns of Dryden and Middlefield cases, by advancing these arguments:

(1) All authority for the regulation of the gas and oil industry rests in the state, and municipalities retain only jurisdiction over roads and real

property taxes. Express preemption language, proscribing local laws "relating to the regulation" of the gas mining industry, is broad. Under fundamental principles of statutory construction, local laws banning natural gas mining within a municipality are therefore preempted.

(2) If there is any ambiguity in the preemption language, the Legislature's expression of the intent to fully protect the rights of all landowners should be among the considerations guiding judicial interpretation of the preemption provision. Those rights include farmers' power to derive income from leases with natural gas companies.

(3) Under well-established law, great weight should be given to proof offered by the plaintiffs in both HVHF cases being reviewed by this Court regarding how the law on natural gas mining was interpreted, for decades, by the agency charged with administering and enforcing it. The agency realized that the law was designed to prevent municipalities from extinguishing landowners' mineral rights.

(4) *Matter of Frew Run Gravel Prods. v. Town of Carroll*, 71 NY2d 126 (1987), is distinguishable. The zoning law there did not aim to regulate town sand and gravel operations, and it resulted only in "incidental control" of such operations, which were allowed to continue in certain zoning districts. In contrast here, the subject ordinances have one goal and one

effect: to prohibit gas mining activities throughout the defendant towns so that HVHF cannot be used there. The control exerted in the cases at bar is not "incidental." It is complete and devastating. If allowed to stand, the instant bans will have an enormous impact on HVHF in New York—as bans in dozens of other municipalities are allowed to stand—and on the future of both energy resources and the agricultural industry in our state.

(5) *Matter of Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 87 NY2d 668 (1996), is distinguishable. The preemption clause at issue in that case authorized local laws banning mining. There is no such provision in the instant case.

NYFB'S INTEREST AND EXPERTISE

Agriculture is New York's most important industry, and NYFB is the voice of agriculture in the state. With almost 25,000 member families, NYFB is the state's largest general farm advocacy organization. A non-governmental organization, NYFB is dedicated to serving and strengthening agriculture in the state, meeting the needs of New Yorkers who make their livelihood in rural regions of the state, and addressing economic and public policy issues facing farmers.

New York has a long history of oil and gas development, with tens of thousands of wells drilled here since the late 1800s. For more than a decade,

NYFB has been integrally involved in such activities. The organization has consistently advocated for the development of natural gas resources to protect agricultural operations. Further, it has urged that such development be done in an environmentally safe way, protecting both land and water resources. Water is a particularly precious resource for New York's farmers. It is a bedrock need for agricultural production. Farmers depend on a clean source of water for their families, their livestock, and their crops.

NYFB was among the few entities working with landowners involved in the Trenton-Black River, a deep oil and natural gas formation in western and southern New York. The organization has also been actively involved in the current HVHF debate. This debate arose after sophisticated techniques developed in the last 15 years made it possible to economically extract shale gas from rock formations of low natural permeability found deep below the earth's surface. Such modern techniques can be used to tap into shale gas reserves in the portion of the massive Marcellus Shale located in the Southern Tier of western New York. HVHF in the Marcellus Shale could revitalize the region's economy and provide power to our state for decades to come.

Through HVHF, huge volumes of chemically treated water are pumped under very high pressure into wells to crack underground shale and

thereby release gas trapped inside. A single well can recover gas from hundreds of acres of surrounding land. Often horizontal wells are used. They typically start out as vertical wells, and at a designated depth, the direction of the bore hole is altered to more closely align with the surface of the earth. When used for shale formations, such wells enable drillers to intersect a maximum number of the shale's natural vertical fractures. Horizontal drilling also reduces the number of wells needed, the costs, and the disturbance of the surface.

Environmentalists have expressed concerns about hazards to groundwater posed by the chemicals used in HVHF and about other issues. In 2008, the state placed a moratorium on HVHF, so that the state Department of Environmental Conservation ("DEC") could undertake a comprehensive review of the issue and promulgate a regulatory framework. NYFB's Deputy Director of Public Policy was appointed to the DEC HVHF Advisory Panel. The panel is charged with: (1) developing recommendations to ensure that DEC and other agencies can properly oversee, monitor, and enforce HVHF activities; (2) developing recommendations to avoid and mitigate impacts to local governments and communities; and (3) evaluating the current fee structure and other revenue streams to fund government oversight and infrastructure related to HVHF.

In addition, in every major proceeding involving HVHF in the Marcellus Shale, NYFB has participated. The organization has been actively involved in the drafting of DEC's draft Supplemental Generic Environmental Impact Statement ("dSGEIS"). During the drafting process, NYFB has been a leading advocate for the protection and proper usage of water resources used in the drilling process.

NYFB's 2012 priorities include drilling in New York's Marcellus Shale to stimulate economic recovery needed by farm families and others, while ensuring strict state oversight of extraction and production to protect the land, as well as ground and surface water. In advancing that priority, NYFB leaders testified at a DEC hearing in November 2011, voicing support for natural gas drilling in the Marcellus Shale, advocating for protection of agricultural water and land resources, and opining that the dSGEIS combines the toughest environmental standards in the country with the promise of tens of thousands of new jobs upstate.

In December 2011, the NYFB President wrote to Governor Cuomo to express concerns about the delay in a deadline for comments on the dSGEIS for Marcellus Shale drilling. A January 2012 letter to DEC from NYFB commented on DEC's most recent dSGEIS, noting the economic potential of HVHF, but cautioning that DEC must ensure plentiful water resources by

monitoring operations, and by demanding disclosure of the chemical content of the fluid used.

At the heart of this HVHF litigation are two provisions of the state statute that authorizes oil and gas drilling, as set forth below.

OIL, GAS AND SOLUTION MINING LAW ("OGSML")

ECL § 23-0301. Declaration of policy.

> 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, and to provide in similar fashion for the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells.

ECL § 23-0303. Administration of article.

> 2. The provisions of this article shall supersede all local laws 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.

PROTECTING ALL LANDOWNERS

Thus, in setting forth the intent of the OGSML, ECL § 23-0301 declares that the rights of "all landowners" must be "fully protected." Such preamble is relevant in interpreting the preemption clause found in § 23-

0303. When a statute is not free from ambiguity, the preamble may be an aid to interpretation. McKinney's Statutes, at § 122. The opening declaration of a statute often illuminates the purpose, general spirit, and intent of an enactment; and courts should adopt the construction that furthers that purpose. *Id.*, at § 96, Comment.

The landowners invoked in the statutory declaration of intent are largely farmers—the largest holders of land in upstate New York, including in the Marcellus Shale region. The gas industry has heavily invested in leasing activities, gas exploration, and production. Gas drilling has allowed farms to stay in business, expand their working acreage, and preserve grasslands.

As owners of large tracts of land in the Marcellus Shale region, New York farmers have much to gain financially from the development of natural gas beneath their land. Farmers constitute a large percentage of New Yorkers who have entered into lease agreements with natural gas drilling companies. In recent years, there has been a substantial increase in the level of gas leasing activity in the state, as demands for such resource continue to rise. A gas lease is a contract between a landowner and a gas company granting the company exploration and development rights to subsurface gas deposits in return for royalties representing the landowner's share of the

income yielded by wells. Local land owners can band together to form negotiating groups. Income generated from gas leases can mean the difference between failure and survival to struggling farmers.

Environmental fears have fueled action by many towns seeking to stymie the gas industry's use of HVHF once the state's current moratorium is lifted, as well as to thwart traditional drilling methods. The bans on natural gas mining being enacted in a number of municipalities could have a devastating impact on farmers and other landowners, all of whom are meant to be "fully protected" under the OGSML. To be fully protected, farmers must be permitted to reap the rewards of recovering subsurface minerals. That statutory goal would be subverted if local governments could extinguish the mineral rights of farmers and other landowners by simply zoning out gas development and banning activities that state law permits, encourages, and regulates.

Effective shale gas mining cannot be limited by town boundaries. To lawfully drill a well, an energy company has to piece together units of hundreds of acres; the deeper the well, the greater the acreage the driller must control. *See* ECL §§ 23-0501; 23-0901. Often the underground gas reservoir that a well pulls from runs beneath the properties of several different landowners, who may be located in different municipalities. Wells

must be located based on geology and environmental concerns—not municipal boundaries. Town bans on HVHF would not only be destructive to the rights of landowners, they would also result in waste, not the greater ultimate recovery of oil and gas envisioned by the statutory scheme. ECL §§ 23-0301; 23-0101 (20).

For all these reasons, NYFB urges this Court to recognize that the state possesses the sole authority to regulate exploration and drilling operations for gas and oil in the state, and that such authority has been contravened by local laws enacted in the Towns of Dryden and Middlefield.

LOCAL LAWS

The Town of Dryden zoning ordinance states:

Section 2014. Prohibited Uses.

(1) Prohibition against the Exploration for or Extraction of Natural Gas and/or Petroleum.

No land in the Town shall be used to conduct any exploration for natural gas and/or petroleum; to drill any well for natural gas and/or petroleum; to transfer, store, process or treat natural gas and/or petroleum; or to dispose of natural gas and/or petroleum exploration of production wastes; or to erect any derrick, building or other structure, or to place any machinery or equipment for any such purposes.

The ordinance also prohibits the use of town land for the storage, treatment, and disposal of natural gas and/or petroleum exploration and production

materials and wastes, or support activities for natural gas and/or petroleum. See subdivisions (2) to (4).

The Town of Middlefield banned oil and gas drilling anywhere in the Town. Article V of the Zoning law provides: "Heavy industry and all oil, gas or solution mining and drilling are prohibited uses." Heavy industry is defined to encompass drilling of oil and gas wells. Gas, oil or solution drilling or mining means the process of exploration and drilling through wells or subsurface excavations for oil or gas; and the extraction, production, transportation, purchase, processing, and storage of oil and gas. *See* Zoning Law, Article II, Subsections B (7) and B (8).

At the heart of the instant debate is the question of whether such local bans on natural gas mining are laws "relating to the regulation" of such mining. NYFB respectfully urges that such laws not only "relate" to the regulation of natural gas mining, they *constitute* regulations of such mining and thus are preempted, as set forth below.

"TO REGULATE" ENCOMPASSES TO BAN

Lines cannot be drawn between whether a law is regulatory or prohibitory; a regulation may take the form of a prohibition. See *Ferguson, Attorney General of Kansas v. Skrupa, DBA as Credit Advisors*, 372 US 726, 732 (1963). The government's police power to regulate for public

health, safety, and welfare encompasses the authority to completely ban an activity, including by the use of zoning laws. To regulate implies a power of restriction and restraint. *Cronin v. People*, 82 NY 318, 321 (1880). Inherently, regulations set limits and at least partially prohibit something. Chester James Antieau, States' Rights under Federal Constitutions, at §§ 2.00, 2.06. Forbidding an entire sphere of action or use is merely the ultimate restriction or regulation. *Id.*

Thus, the power to regulate includes not only the narrower power to control the mode and manner of operations, but also the greater power to completely prohibit a given activity. The Court of Appeals has recognized that the meaning of "regulate" includes banning a given activity. In *Gernatt Asphalt Prods. v. Town of Sardinia, supra*, at 675, 682 (1996), the court stated that the Town of Sardinia, had taken "steps to regulate the expansion of mining within its borders." Such regulation included a ban on sand and gravel mining anywhere in the town. Thus, a ban is a form of regulation, the court implicitly recognized.

In considering the validity of a local regulation, the salient question is not whether a regulation encompasses a ban. It clearly does. Instead, the relevant inquiry is whether the local law violates the constitutional guarantee of due process or the supremacy of superseding state or federal laws. A

given regulation must be reasonably related to the public welfare to comply with due process requirements governing the police power. *See People v. Cook*, 34 NY2d 100, 109 (1974); *Defiance Milk Prods. Co. v. Du Mond*, 309 NY 537 (1956); Antieau, *supra*, at § 2.00; McQuillin, Municipal Corporations, 3rd ed revised, §§ 15.20, 24.09, 25.34.

Zoning is simply one form of police power. *See* Vol 83, Am Jur 2d, Zoning and Planning, § 6; Vol 12, NY Jur 2d, Building, Zoning, and Land Controls, § 132. State legislatures confer zoning and other police powers upon local governments. *DJL Rest. Corp. v. City of NY*, 96 NY2d 91 (2001). Article IX, § 2 (c) (ii) of the State Constitution provides that every local government shall have the power to adopt local laws not inconsistent with the constitution or any general law—except to the extent that the legislature shall restrict adoption of such a local law. The Municipal Home Rule Law implements article IX (§ 10 [1] [ii] [11]-[12]).

It does not matter if the local laws in the cases at bar meet due process requirements. The laws are invalid because they violate the express supremacy of state laws. Local laws thwarting state will cannot be legitimized simply by calling them zoning laws, rather than some other form of police power regulation. Preemption can occur, as here, when a state legislature has assumed full regulatory responsibility in a field by expressly

articulating its intent to occupy the field. *DJL Rest. Corp. v. City of NY*, *supra*. A local law regulating the same subject matter is deemed inconsistent if it prohibits conduct the State law allows. *Id.*

STATUTORY CONSTRUCTION PRINCIPLES APPLY

Under familiar rules of statutory construction, a prohibition against all local laws "relating to the regulation of the oil, gas and solution mining industries" must encompass local zoning laws banning gas mining. Statutory language is generally construed according to its natural and ordinary sense, not by resorting to an artificial or forced construction. McKinney's Statutes, § 94. If there is nothing to indicate a contrary intent on the part of lawmakers, terms of general import ordinarily are to receive their full significance. *Id.* at § 94, Comment.

The dictionary is a valuable resource; dictionary definitions may be useful in determining the sense with which a word was used in a statute. *Id.* at § 234. Webster's Third New International Dictionary states that to "relate" means to have a logical connection, and a "regulation" is a rule or order with the force of law issued by government. A zoning ordinance that bans an activity has a logical connection to the regulation of that activity. Indeed, such an ordinance in actuality *is* a regulation of that activity; it is the ultimate form of regulation. The natural and ordinary meaning of regulation

obviously encompasses far more than merely dictating a means or method of operation. Thus, local laws prohibiting gas mining are impermissible regulations.

FREW RUN IS DISTINGUISHABLE

NYFB urges that a misreading of *Frew Run Gravel Prods. v. Town of Carroll*, *supra*, is at the center of this litigation. At issue in that case was language in the State Mined Land Reclamation Law ("MLRL"), ECL §§ 23-2701 to 23-2727. Those provisions established a scheme under which DEC was empowered to regulate mining and the reclamation of mined lands. With respect to preemption, the MLRL formerly stated:

> 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.

See former ECL § 23-2703 (2).

A Town of Carroll zoning law established a zoning district, AR-2. The stated purpose of such district was to promote the maintenance of agricultural lands, as well as to allow large lot residential development. Sand and gravel operations were not permitted at all in such district. However, such operations were allowed by special permit in the AR-3 district. The petitioner obtained a permit from DEC for a sand and gravel operation

within the AR-2 district, but was denied a town permit. Special Term held that the zoning law was superseded by the MLRL. The Appellate Division reversed, holding that the zoning law was not a "law relating to the extractive mining industry." To the extent that the local law barred gravel and sand operations in the AR-2 zone but allowed such operations elsewhere, it did not purport to regulate an industry but instead to regulate land use generally.

The question, as framed by the Court of Appeals, was whether the MLRL "was intended to preempt provisions of a town zoning law establishing a zoning district where a sand and gravel operation is not a permitted use." *Id.* at 129. The Court of Appeals held in the negative, based on the construction of the express supersession clause. Local laws establishing districts in which some uses are permitted and others are prohibited are not the sort of laws contemplated by the preemption clause, according to the plain meaning of "local laws relating to the extractive mining industry," the legislative history, and the purpose of the preemption clause within the statutory scheme, the *Frew Run* court held.

The subject zoning ordinance related not to the extractive mining industry but to regulating the location, construction and use of buildings, and the use of land. The ordinance divided the town into districts and established

permitted uses in order to regulate land use generally, not to control an industry. *Id.* 131-132. In such regulation, the zoning ordinance inevitably exerted "an incidental control over any of the particular uses or business" that might "be allowed in some districts but not in others," the *Frew Run* court held. *Id.* at 131. Significantly, the local law did not outlaw all sand and gravel operations. *See* Am Jur 2d, *supra*, at § 158; Vol 20, NY Jur 2d, Constitutional Law, § 125 (total prohibition of particular land use must bear more substantial relationship to public welfare than ordinance that merely confines uses to particular districts). Such incidental control was not the type of regulatory enactment envisioned in the supersession clause.

The purpose of the MLRL scheme was to foster and encourage mining by providing statewide regulations, to address environmental concerns through reclamation, and to allow stricter local control of reclamation. Local laws relating to the actual operation and process of mining would frustrate the purpose of encouraging mining through standardized operations, the *Frew Run* court stated. However, there was no demonstrated intent to preempt a zoning ordinance establishing whether mining operations should be permitted or prohibited in a particular zoning district. The laws could be harmonized, avoiding any abridgement of the town's zoning powers, the *Frew Run* court held.

In contrast here, there is no valid way to harmonize the state and local laws. True, there are parallels in *Frew Run* at the cases at bar. Similar language—"relating to mining" or "relating to the regulation of mining"—is found in the MLRL and the OGSML, respectively. Both schemes were meant to replace a patchwork of local laws with a uniform state scheme. Those similarities notwithstanding, there are stark and dispositive differences between *Frew Run* and the instant cases that should dictate reversal here.

- In *Frew Run*, the purpose of the zoning law was a general land use regulation, allowing for establishment of districts and permitting specified uses in some districts, but not others. Here the Towns of Dryden and Middlefield were not concerned with developing a general land use plan to permit certain uses in some districts, but not others. They had one goal: a complete ban on natural gas mining.
- In *Frew Run*, the issue was if state preemption applied where the town allowed the subject operations to apply in some zones, but not others. Here the issue is if preemption applies where the towns imposed complete bans on natural gas mining.
- In *Frew Run*, it was found acceptable for local laws to result in "incidental control" over a business that was allowed in some

districts, but not others. Here what is at issue is not "incidental control," but instead a complete prohibition of gas mining in the Marcellus Shale throughout two towns—and many other towns that have similarly usurped state authority.

- In *Frew Run*, at issue was the regulation of sand and gravel mining, whereas in the cases at bar, the issue is the regulation of a resource which by its nature cannot be effectively extracted if drilling is controlled based on municipal boundaries.
- In this case, unlike in *Frew Run*, the preemption provision allows local governments to keep control only over roads and real property taxes, thus indicating that the state enjoys exclusive control over all other matters relating to HVHF, not just operations. Otherwise, there would have been no reason to spell out the two distinct, non-operations elements over which municipalities could reign.

GERNATT ASPHALT IS DISTINGUISHABLE

In 1991, the MLRL was amended, codifying *Frew Run*, revising the scope of preemption, and removing the provision on local laws and reclamation:

> For 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 or enforcing

> local zoning ordinances or laws which determine permissible uses in zoning districts. ECL 23-2703 (2) (b).

Consistent with that pronouncement, the Town of Sardinia enacted a zoning ordinance eliminating mining as a permitted use throughout the Town, except that existing mining operations continued as a nonconforming use. *See Gernatt Asphalt Prods., Inc. v. Town of Sardinia, supra.*

The Court of Appeals found that the zoning law was consistent with the amended state preemption provision allowing local towns to determine whether mining should be a permitted use in the town. Obviously, the right to determine permissible uses assumes the right to also determine impermissible uses. Thus, the amended statute clearly authorized municipalities to completely ban mining within the town.[1]

Far from supporting defendants' positions, *Gernatt Asphalt* highlights why the very different preemption clause in the case at bar was violated. The OGSML does not state that local laws on mining can be enacted to determine permitted—and thus also prohibited—uses. Instead, it only allows local laws on roads and real property taxes. The cases are thus significantly distinguishable.

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[1]Moreover, a municipality is not obliged to permit exploitation of any natural resources within the town if limiting the use was a reasonable exercise of police power to protect community interests, the *Gernatt* court found. That observation, however, is of no moment where, as here, a state law preempts a local law banning exploitation of certain natural resources.

It is true that the *Frew Run* and *Gernatt Asphalt* courts speak of the distinction between regulating general land use and regulating an industry. Such a distinction has meaning when applied to the facts in those cases, but not here. In *Frew*, neither the purpose nor the effect of the zoning law was to prohibit all sand gravel and operations. In *Gernatt*, the preemption clause clearly allowed local zoning bans on sand and gravel operations. Neither such situation exists in the cases at issue in the appeals before this Court.

Using a land use zoning/industry regulation dichotomy to legitimize local laws that manifestly undermine the supremacy of state laws is sheer sophistry. Whether called a land use law or an industry regulation, the reality is the same: the local regulations impermissibly target and shut out entire industries that state law permits, encourages, and exclusively controls.

***DJL REST. CORP.* IS ILLUMINATING**

DJL Rest. Corp. v. City of NY, *supra*, is also enlightening because it affirms how essential the element of "incidental control" was to the *Frew Run* holding. The plaintiffs there contended that a New York City zoning resolution regulating the location of adult establishments was preempted by the state Alcohol and Beverage ("ABC") Law. The City contended that the local law was one of general application. Its thrust was zoning, not the

regulation of alcohol. The law applied across the board to all adult establishments, whether or not they sold alcoholic beverages.

Alleviating the secondary effects of adult establishments was the goal of the law. Any impact on those establishments that happened to sell alcoholic beverages was merely incidental to the land use scheme. While there was no express preemption provision, the ABC Law comprehensively regulated virtually all aspects of the sale and distribution of liquor. As in *Frew Run*, the zoning law was directed at distinct activities and established uses permitted within zoning districts.

The *DJL Rest.* court emphasized the minor, collateral effect of the zoning law on activities regulated by the state alone. To describe the local laws, it used the *Frew Run* characterization, "incidental control," as well as the terms "incidentally infringes," "tangential impact," and a "merely peripheral" requirement. *DJL Rest.* thus helps to clarify the contours of *Frew Run.* A general land use plan law may happen to have an incidental, secondary impact on a state-controlled industry without running afoul of supersession principles.

However, where a state exclusively controls an industry, local laws may not forbid it—absent a *Gernatt Asphalt*-like provision specifically inviting municipalities to enact such laws. In *DJL Rest.*, the zoning law's

goal was to regulate adult establishments, but there was a minor impact on those establishments that happened to dispense alcoholic beverages. In contrast in the cases under review, the entire thrust of the Dryden and Middlefield laws is to regulate gas mining by banning it. Clearly, at issue was not an "incidental impact" on an activity as the collateral result of a general land use scheme.

Indeed, in one of the decisions now under review, the trial court unknowingly highlighted why the local ban on gas mining was not *Frew Run*-like and violated the state preemption clause. It was revealed that Town of Dryden residents urged the town board to take action to ban hydrofracking, a petition containing many signatures was presented to the board, and the town enacted the zoning law. *See Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc 3d 450, 465 (Sup Ct, Tompkins Co 2012).[2] Thus, the purpose of the ban was not to implement a general land use plan, permitting specified uses in some districts but not others. It was to acquiesce in citizens' fears and demands by totally outlawing gas mining and thus HVHF. Moreover, regardless of subjective intent, the impact of the local law is not merely incidental, it is complete; and it is preempted by state command. Similarly, the goal of the Town of Middlefield was to completely

[2]Norse Energy has been substituted for Anschutz Exploration Corp. as the plaintiff-appellant in the appeal from that decision.

ban natural gas mining and thus forbid what the state allowed. Thus, the reliance upon *Frew Run* by the challenged decisions is misguided.

In invoking *Frew Run*, the court in *Anschutz Exploration Corp. v. Town of Dryden, supra*, inaptly found that the preemption clause prohibited local regulations about the *operation* of oil and gas drilling, but not local land use laws banning HVHF. The *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc 3d 767 (Sup Ct, Otsego Co 2012), also emphasized *Frew Run* in erroneously finding that the state preemption clause referred only to the *manner and method* of drilling. As set forth above, in both decisions, Supreme Court succumbed to the superficial parallels between *Frew Run* and the instant HVHF cases. The challenged analysis is clearly at odds with natural meaning of "relating to the regulation" of the natural gas industry.

SHORT SHRIFT GIVEN TO DEC PRACTICE

As stated at the outset of this brief, if there is any ambiguity in the supersession language, then the declaration of legislative intent, including the objective of fully protecting the rights of all landowners, must help guide the interpretation of "relating to the regulation." Another critical guide to statutory interpretation was treated dismissively by the courts below. That was error. Under well-established principles, if a statute is ambiguous, there

is great value in proof regarding how it has long been interpreted by the agency responsible for administering it.

Yet the motion courts in the cases at bar gave short shrift to such proof. DEC's long-time Mineral Resources Bureau and Division chief, Gregory H. Sovas, revealed that for more than three decades, the Department had interpreted ECL § 23-0303 (2) in a way that advances the central goal of fully protecting the rights of all landowners, including their mineral rights. DEC's position has been that such statutory provision completely preempts local municipalities from regulating the oil and gas industry, whether through zoning or other local laws and ordinances. *See* Norse Energy Record, at 72-73, 79. He further stated that the agency often sent letters to local municipalities asserting exclusive jurisdiction over oil and gas exploration and development and reminding them of the broad preemptive scope of the provision. *See id.*, at 79.

Sovas, the primary author of the OGSML 1981 amendments at issue here, explained the reason for such agency action: the preemption provision was not intended to allow a local government to extinguish the mineral rights of any landowner by zoning out oil and gas development. Instead, that provision strengthened the rights of landowners to recover mineral resources beneath their property, unfettered by local regulations inconsistent with state

policy. *See id.*, at 73, 76. Sovas made statements to similar effect in an October 24, 2011 affidavit. *See* Cooperstown Holstein Record, at 50-53.

Sovas' statements about how the subject provisions were interpreted and implemented by DEC resonate as to the statutory declaration regarding the rights of landowners. His revelations are pertinent and illuminating, under well-established principles of statutory construction. Judicial construction of an ambiguous statute is often aided by the way the statute is interpreted by those administering it. A long course of action by executive or administrative officers—such as the 30-year period here—may be entitled to great weight, unless manifestly wrong. McKinney's Statutes, § 93, Comment; § 129.

Case law is in accord with such principles. In a case of ambiguity, the construction given to a statute by the agency responsible for its administration is entitled to significant weight, especially where such construction has been in place for a long time. *See Matter of Lezette v. Board of Educ., Hudson City School Dist.*, 35 NY2d 272 (1974); *People v. Newman*, 32 NY2d 379 (1973), *cert den* 414 US 1163 (1974); *Matter of Chin v. New York City Board of Standards and Appeals*, 97 AD3d 485 (1st Dept 2012); *Matter of Board of Educ. of City School Dist. of City of NY v. Mills*, 250 AD2d 122 (3rd Dept 1998), *lv den* 93 NY2d 803 (1999).

When a statute is susceptible to more than one reasonable interpretation, judicial deference should be accorded an agency's interpretation. *Matter of O'Brien v. Spitzer*, 7 NY3d 239 (2006); *Matter of Golf v. New York State Dept. of Social Services*, 91 NY2d 656 (1998); *Matter of County of Albany v. Hudson River-Black River Regulating Dist.*, 97 AD3d 61, 66 (3rd Dept 2012).

The *Anschutz* court was incorrect in indicating that proof of how DEC interpreted and administered the subject provisions was irrelevant and in finding the meaning of "relating to the regulation" purportedly plain yet unnaturally narrow. *See Anschutz v. Dryden, supra*, at 469 n 12. Arguably, "relating to the regulation" is susceptible to two interpretations. The most natural obvious interpretation is the one advanced by plaintiffs—"relating to the regulation of the gas industry" encompasses and thus precludes a local ban on such activity.

An alternate construction calls for the relevant phrase to be given an extremely narrow reading, to refer only to *partial* prohibitions, that is restraints on the method or manner of gas drilling, but not to include a *total* prohibition of such activity. While some of Sovas' statements about the intent of the law were not part of legislative history, they help to explain the agency's three-decade policy and thus are far more than "anecdotally of

interest," as labeled by the *Cooperstown* court. *Cooperstown v. Middlefield, supra*, at 778 n 1.

CONCLUSION

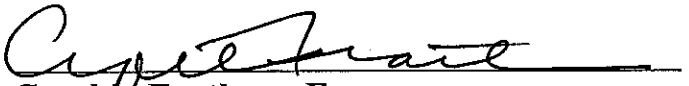
The subject of HVHF has spawned a volatile mix of emotion, politics, and science, but the instant dispute must be resolved based on objective, fundamental concepts of statutory construction, preemption, and case analysis. NYFB respectfully urges that the language of the ECL is clear. Local laws banning natural gas drilling are preempted. If there is any ambiguity in the meaning of "relating to the regulation," then the interpretation of that phrase should be guided, inter alia, by the legislative purpose of fully protecting the rights of all landowners, as well as by decades of interpretation of the OGSML by DEC, consistent with such purpose.

This case is very different from *Frew Run* and *Gernatt Asphalt.* By banning natural gas and other mining, the challenged local laws do not have an incidental impact. They have the purposeful and devastating impact of shutting out an entire industry in two municipalities, in violation of the supremacy of state laws on the subject. Sustaining the bans in those municipalities would have a far-reaching impact on gas mining, agriculture, and principles of preemption in New York State. The state's paramount

interest must transcend parochial concerns. For these reasons, the orders appealed from should be reversed.

Dated: October 3, 2012
Glens Falls, NY

Respectfully submitted,



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