

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF OTSEGO

COOPERSTOWN HOLSTEIN CORPORATION, NOTICE OF MOTION

Plaintiff,

Index No.: 20110930

RJI No.:

-vs-

TOWN OF MIDDLEFIELD,

Defendant.

Hon. Kevin M. Dowd

OCT 31 2011

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RECEIVED  
OTSEGO SUPREME  
COUNTY COURT

**Motion By:**

Levene, Gouldin & Thompson, LLP on behalf of plaintiff.

**Date, Time & Place of Hearing:**

*Chenango* November 18, 2011 at 9:30 a.m.  
Otsego County Courthouse  
~~193 Main Street~~ West Park Place  
~~Cooperstown, NY~~ Norwich, NY.

**Supporting Papers:**

Affidavits of Gregory H. Sovas and Jennifer Huntington

**Relief Demanded:**

Summary judgment declaring the provisions of the Zoning Law pertaining to Gas, Oil, or Solution Drilling or Mining and the ban on Gas, Oil or Solution Drilling or Mining within the Town of Middlefield to be void by reason of being preempted by ECL Sec. 23-0303.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b), answering Affidavits, if any, are required to be served upon the undersigned at least seven (7) days before the return date of this motion.

Dated: October 28, 2011

LEVENE GOULDIN & THOMPSON, LLP

*Michael R. Wright*

By: Michael R. Wright, Esq.

Attorneys for Plaintiff

Office Address:

450 Plaza Drive  
Vestal, NY 13850

Mailing Address:

P.O. Box F-1706  
Binghamton, NY 13902-0106

Telephone: (607) 763-9200

Fax: (607) 763-9211

TO: Cheryl A. Roberts, Esq.  
Rapport Meyers LLP  
Attorneys for Defendant  
436 Union Street  
Hudson, NY 12534



wells drilled per year, the storage of natural gas in some 25 active underground storage reservoirs, the solution mining of salt, and the leasing of state lands, among other responsibilities.

6. Currently, I am the President of XRM, LLC, an environmental consulting firm. I am also a Governor's Appointee to the New York State Oil, Gas and Solution Mining Advisory Board, Governor's Appointee to the Legal and Regulatory Affairs Committee of the Interstate Oil and Gas Compact Commission; and a member of the Air and Water Management Association, the Independent Oil and Gas Association of New York (the oil and gas industry trade association in New York), the Pennsylvania Oil and Gas Association, and the Independent Petroleum Association of America. Additionally, I am a Director and Principal of Lake Country Frac Water Specialists, and the primary consultant to the Twin Tiers Landowners Coalition.

7. I was the primary author of the Amendments to the New York's Oil, Gas and Solution Mining Law in 1981, and was responsible for implementation of those amendments. The 1981 Amendments address specifically the role of municipalities concerning oil and gas exploration and development.

8. Because of my public service, I am personally familiar with the legislative intent and purpose of the oil and gas program, how New York's Oil, Gas and Solution Mining Law was implemented, and how the Department interprets and enforces the provisions of the law.

9. I have reviewed The Town of Middlefield Zoning Law (the "Zoning Law"), enacted on or about June 14, 2011, which seek to prohibit all natural-gas exploration and extraction activities in the Town of Middlefield.

10. For the reasons set forth herein, the Zoning Law is preempted in accordance with ECL §23-0303(2) of the Environmental Conservation Law ("ECL"). I therefore submit this affidavit in support of Cooperstown Holstein Corporation's motion for summary judgment declaring the provisions of the Zoning Law pertaining to Gas, Oil, or Solution Drilling or Mining and the ban on Gas, Oil, or Solution Drilling or Mining within the Town of Middlefield to be void by reason of being preempted by ECL § 23-0303.

#### **NEW YORK'S OIL, GAS AND SOLUTION MINING LAW**

11. New York's Oil, Gas and Solution Mining Law first became effective in 1963.

Codified in Article 23 of the ECL, it was enacted to appropriately regulate in a uniform manner across New York the development, production and utilization of oil and gas resources in order to prevent waste and protect the correlative rights of all landowners and the general public. The 1963 law was based upon recommended statutory language from the Interstate Oil Compact Commission (now Interstate Oil and Gas Compact Commission), a multi-state government agency comprised of producing states Congressionally authorized to ensure that the nation's oil and natural gas resources are conserved and maximized while protecting health, safety and the environment, of which New York State is a member.

12. After its enactment, in the 1970s, New York experienced many problems with the regulatory program for the oil and gas industry. This situation arose because of major state budget cuts in the 1960s and the resultant reduction in oil and gas staff. As a consequence, many local municipalities began their own regulatory initiatives to monitor and enforce regulations on the oil and gas industry. This local regulation of the oil and gas industry created many problems, including, for example: (1) safety concerns resulting from untrained local staff going onto well sites; (2) the significant costs to hire proper professional petroleum engineering staff that was often too burdensome for local municipalities; (3) a patchwork of local regulation, which resulted in differing requirements for drilling not based on geology; (4) financial security at both the local and state levels; (5) conflicts between municipal boundaries and setbacks; and (6) exorbitant local taxation.

13. In response to these problems, in 1980, as the then Bureau of Mineral Resources in the New York State Department of Environmental Conservation (the "Department"), my staff and I presented a comprehensive legislative proposal to mitigate a number of problems in both the regulation and the economic development of the oil and gas industry.

14. One of the important provisions for the Department was the imposition of new fees to enable the Department to hire additional state staff to oversee the industry. These additional fees allowed the Department to hire the staff necessary to monitor and enforce all aspects of oil and gas exploration and development and allowed us to address the problems noted above relative to local regulation. To overcome the problems associated with patchwork of conflicting local requirements and to implement the policy objectives of the ECL regarding the full recovery of the resource and

the protection of correlative rights, the legislation included the following provision:

The provisions of this article shall supercede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local government under the real property tax law.

15. This provision was codified at ECL §23-0303(2). It was meant to be a broad, all encompassing directive that would limit the regulation of oil, gas and solution mining industries to the exclusive jurisdiction of the state through the Department.

16. By its plain language, the statute's express exclusion of two discrete subject areas (i.e., roads and property taxes) renders all other matters that are related or subject to the oil, gas and solution mining industry, including when and where drilling is permissible in a particular area, within the scope of this supersedure provision.

17. The primary negotiators of the legislative proposal were Frank Murray, who was in the Governor's Office and is now with NYSERDA ("New York State Energy Research and Development Authority"), Assembly Majority Leader Dan Walsh who later became the President of the Business Council and now retired, and Senator Jess Present, a long-term senator and advocate for the oil and gas industry in western NY (who has since passed away). There was no question about legislative intent (by the Governor's Office, the Department represented by me as the Chief of the Bureau of Mineral Resources, and the Assembly) that the supersedure clause eliminated the right of municipalities to regulate *any* aspect of the oil and gas development including the right to zone oil and gas wells.

18. Shortly after passage of the bill, the issue of zoning was raised to me again, and I called Senator Present to confirm our "Democratic" view of the supersedure clause with regard to zoning. The Senator unequivocally agreed that the law was intended to and did preempt local zoning.

19. There was never any consideration or intent to allow a local government to extinguish the mineral rights of any landowner by zoning out oil and gas development. On the contrary, the supersedure provision strengthened the right of the landowner to recover his mineral

resources beneath his property unfettered by any local regulation that was inconsistent with the provisions, policy, and mandates of the New York Oil, Gas and Solution Mining law.

20. The Town of Middlefield enacted an ordinance which repealed its existing zoning ordinance and enacted a new local law, The Town of Middlefield Zoning Law.

Zoning Law Article II, B(7) Definitions provides:

Gas, Oil, or Solution Drilling or Mining: The process of exploration and drilling through wells or subsurface excavations for oil or gas, and extraction, production, transportation, purchase, processing, and storage of oil or gas, including, but not limited to the following:

- i. A new well and the surrounding well site, built and operated to produce oil or gas, including auxiliary equipment required for production (separators, dehydrators, pumping units, tank batteries, tanks, metering stations, and other related equipment;
- ii. Any equipment involved in the re-working of an existing well;
- iii. A water or fluid injection station(s) including associated facilities;
- iv. A storage or construction staging yard associated with an oil or gas facility;
- v. Gas pipes, water lines, or other gathering systems and components including but not limited to drip station, vent station, chemical injection station, valve boxes.

Zoning Law Article II, B(8) Definitions provides:

Heavy Industry: a use characteristically employing some of, but not limited to the following: smokestacks, tanks, distillation or reaction columns, chemical processing or storage equipment, scrubbing towers, waste-treatment or storage lagoons, reserve pits, derricks or rigs, whether temporary or permanent. Heavy industry has the potential for large-scale environmental pollution when equipment malfunction or human error occurs. Examples of heavy industry include, but are not limited to: chemical manufacturing, drilling of oil and gas wells, oil refineries, natural gas processing plants and compressor stations, petroleum and coal processing, coal mining, steel manufacturing. Generic examples of uses not included in the definition of "heavy industry" are such uses as: milk processing plants, dairy farms, garment factories, woodworking and cabinet shops, auto repair shops, wineries and breweries, warehouses, equipment repair and maintenance structures, office and communications buildings, helipads, parking lots, and parking garages and water wells serving otherwise allowed uses of the property. Agriculture and surface gravel and sand mining facilities shall not be considered heavy industry.

Zoning Law Article V - **GENERAL REGULATIONS APPLYING TO ALL DISTRICTS** provides in paragraph A:

Prohibited Uses: Heavy industry and all oil, gas or solution mining and drilling are prohibited uses. Uses not specifically permitted under Article IV of this Local Law are prohibited, except that the Planning Board may find that a use is sufficiently similar to a permitted use as to be included within the definition of that use.

Zoning Law Article V - **GENERAL REGULATIONS APPLYING TO ALL DISTRICTS** provides, in relevant part, in paragraph F, Temporary Uses, subparagraph(1):

Temporary uses may be allowed in any district upon issuance of a permit therefor by the Town Board. Under no circumstances shall any of the activities and/or uses prohibited by this Local Law be construed to be "temporary uses" as such is defined in Article II of the Town of Middlefield Zoning Law.

21. The Zoning Law is clearly preempted under the plain languages of ECL §23-0303(2). Moreover, it is exactly the type of local law or ordinance that the legislature intended to preempt when it amended New York's Oil, Gas and Solution Mining Law in 1981 to add the supersedure provision. Under the statutory and regulatory program within the Department's purview, applications for drilling permits undergo a rigorous environmental, geological, and engineering review and are subject to ongoing state monitoring and regulation oversight. This further validates why local governments need not to be involved in the siting of an oil or gas well (or, as in the case of the Town of Middlefield, prohibition of the siting) and indeed, are without jurisdiction to do so.

22. The Zoning Law also directly conflicts with Article 23 of the ECL and further frustrates the law's purpose by purporting to use zoning principles to prohibit oil and gas drilling within the municipal boundaries of the Town.

23. The purpose and policy objectives of New York's Oil, Gas and Solution Mining Law have been legislatively declared to include: "prevent[ing] waste", providing for the "greater ultimate recovery of oil and gas" and protecting correlative rights. ECL §23-0301. Consistent with this statutory directive, the ECL contains exacting requirements concerning the location and size of geologically-sound spacing units and the location and siting of well pads. ECL §23-0501. As such, any suggestion that municipalities can regulate the location of oil and gas wells or exclude oil and gas extraction in a municipality or any portion thereof based upon zoning principles directly conflicts with and frustrates the purpose of the statutory scheme in the ECL.

24. In short, to interpret the ECL supersedure provision to allow local municipalities to enforce zoning and/or other land use laws as to oil and gas drilling would obviate the collective interest and policy of the state. It would also conflict with statewide spacing requirements and the need to site wells based upon geology and environmental considerations, not municipal boundaries, local zoning, and setbacks.

25. Indeed, one of the reasons for the ECL's broad preemption relative to oil and gas



drilling is because decisions about the size of drilling units and where they are formed must be decided by state professionals through geologic interpretation and not based upon a patchwork of often inconsistent and perhaps, politically driven, local land use policies that could prevent landowners from recovering the mineral resources from beneath their property.

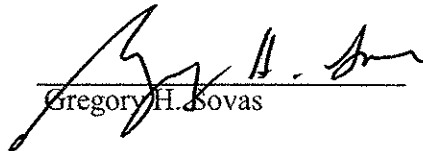
26. To reach a contrary conclusion would bring back the problems the 1981 amendments to New York's Oil, Gas and Solution Mining Law was meant to eliminate; namely, a patchwork approach to energy resource development and enforcement in the state.

27. It would also run counter to the Department's long-standing interpretation of §23-0303(2).

28. For over thirty years, the Department interpreted ECL §23-0303(2) to completely preempt local municipalities from regulating the oil and gas industry, whether through zoning or other local laws and ordinances putatively based on public health, safety and welfare.

29. By way of example, the Department has a long-standing history of sending letters to local municipalities asserting the exclusive jurisdiction over oil and gas exploration and development and reminding local municipalities of ECL §23-0303(2)'s broad preemptive scope. A true and accurate copy of one of the many letters is attached hereto as Exhibit "A".

30. For the foregoing reasons, I urge this Court to grant the Town of Middlefield's motion for summary judgment and issue an order and judgment declaring the provisions of the Zoning Law pertaining to Gas, Oil, or Solution Drilling or Mining and the ban on Gas, Oil, or Solution Drilling or Mining within the Town of Middlefield to be void by reason of being preempted by ECL § 23-0303 petition.

  
Gregory H. Sovas

Sworn to before me this  
24<sup>th</sup> day of October, 2011.

  
Notary Public

**DIANE MEROLLA**  
Notary Public, State of New York  
No. 01ME6012637  
Qualified in Saratoga County  
Commission Expires Aug. 31, 2014

New York State Department of Environmental Conservation  
50 Wolf Road, Albany, New York 12233-0001



Henry G. Williams  
Commissioner

March 28, 1984

The Honorable William O. Smith  
Mayor of the City of Olean  
Olean Municipal Building  
Olean, New York 14760

*Oil & Gas  
Local  
Authority*

Dear Mayor Smith:

This Department recently became aware of the City of Olean's proposed ordinance to regulate the drilling and maintenance of oil and gas wells within the City limits and regulating strip mining and pit mining within the City limits. Among other things, this ordinance requires mining and well operators to obtain permission from the City to operate a mine or well within the City's borders and to file indemnity bonds or public liability insurance for the benefit of the City.

The New York State Mined Land Reclamation Law and its regulations [ECL Article 23, Title 27 and 6 NYCRR Parts 420-426] permit local governments to regulate the mining industry, provided the local requirements are at least as strict as the State requirements. With respect to regulation of the oil and gas industry, however, I respectfully draw your attention to subdivision 2 of §23-0303 of the Environmental Conservation Law which states:

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.

Hence, only the State, through the Department of Environmental Conservation, has the authority to regulate the oil and gas industry, except as to matters concerning local roads and real property taxation. See *Envirogas, Inc. v. Town of Kiantone*, 112 Misc. 2d 432, 447 N.Y.S.2d 221 (Sup.Ct., Erie Co., 1982), *aff'd* 454 N.Y.S.2d 694 (4th Dept., 1982). The Department's regulations concerning the oil and gas industry are contained in Parts 550-558 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York. I also draw your

attention to ECL 23-0305.13, which requires every person granted a permit to drill to give notice by certified mail to any local government affected and to any landowner whose surface rights will be affected by drilling operations of the location of the drilling site before starting those operations.

In summary, then, while it has the power to regulate the mining industry at least as strictly as is those provided for in State law and regulations, the City of Olean is without statutory authority to regulate any of the matters set forth in the proposed ordinance pertaining to oil and gas wells.

If you have any questions on this matter, please do not hesitate to contact me.

Sincerely yours,



Charles E. Sullivan, Jr.  
Senior Attorney

cc: William J. O'Reilly, Esq.  
bcc: G. Sovas  
J. Corr  
J. Spagnoli  
L. Nelson  
B. McGranahan