

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF OTSEGO

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COOPERSTOWN HOLSTEIN CORPORATION,

Plaintiff,

-against-

TOWN OF MIDDLEFIELD,

Defendant.

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**NOTICE OF  
CROSS-MOTION**

Index No. 20110930

Hon. Donald F. Cerio, Jr.

Cross-Motion by:

Defendant Town of Middlefield

Time, date and place of the  
Cross-motion:

2:00 p.m., December 13, 2011, Courthouse, 138 N.  
Court Street, Wampsville, New York

Papers submitted in support of the  
Cross-motion:

Affirmation of Cheryl A. Roberts, Esq. with exhibits  
and Memorandum of Law in Support of Cross-Motion  
and in Opposition to Plaintiff's Motion for Summary  
Judgment

Nature and object of the  
Cross-motion:

(a) Summary judgment pursuant to CPLR § 3212  
dismissing the Complaint;

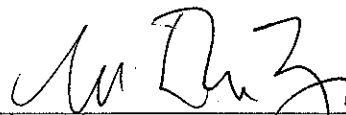
(b) Such other and further relief as the court deems  
just and proper.

Nature of the action:

Declaratory judgment

Dated: December 5, 2011

RAPPORT MEYERS LLP



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By: Victor M. Meyers, Esq.  
Attorneys for Defendant  
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(518) 828-9444

TO: LEVENE, GOULDIN & THOMPSON, LLP

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF OTSEGO

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COOPERSTOWN HOLSTEIN CORPORATION,

Plaintiff,

-against-

TOWN OF MIDDLEFIELD,

Defendant.

**AFFIRMATION IN SUPPORT  
OF DEFENDANT'S CROSS-  
MOTION FOR SUMMARY  
JUDGMENT AND IN  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

Index No. 20110930

Hon. Donald F. Cerio, Jr.

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STATE OF NEW YORK            )  
  )SS.:  
COUNTY OF COLUMBIA        )

CHERYL A. ROBERTS, an attorney duly admitted to practice law in the State of New York, affirms under penalty of perjury:

1. I am of counsel to the firm of Rapport Meyers LLP, attorneys for the defendant Town of Middlefield (hereinafter "Middlefield" or the "Town"), and I submit this affirmation in support of the Town's motion for summary judgment and in opposition to the plaintiff's motion for summary judgment in the above-referenced matter.

2. As attorney for the Town, I am fully familiar with the matters set forth herein based upon my knowledge of and involvement with enactment of Town Local Law No. 1 of the year 2011

adopted by the Middlefield Town Board on June 14, 2011, filed with the Town Clerk on June 14, 2011, and filed with the New York State Department of State on June 28, 2011 (the "Zoning Law"), and adoption by the Town of Amendments to its Master Plan on June 14, 2011, filed with the Town Clerk on June 14, 2011, and the Otsego County Planning Board on July 1, 2011 (the "Master Plan Amendments"). Copies of the Zoning Law, the New York State Department of State Local Law Filing Form for the Zoning Law and the Middlefield Town Board Public Hearing and Meeting Minutes, dated June 14, 2011 are attached hereto as Exhibit "1." Copies of the Master plan Amendments and proof of filing with Otsego County Planning Board are attached hereto as Exhibit "2."

3. The Zoning Law bans certain heavy industrial uses within the Town, including gas and oil drilling and solution mining. Exemptions from the definition of "heavy industry" include, among other industries, milk processing plants, dairy farms, wineries and breweries, agriculture, and gravel and sand mining. *See* Exhibit "1."

4. Adoption of the Zoning Law and Master Plan Amendments were specifically intended to protect the Town's community character, open space, farmland, and visual, cultural, historic and natural resources. Middlefield Town Board Meeting Minutes; Resolution Adopting Negative Declaration Determination of Significance; and Negative Declaration (the "Neg Dec"), dated May 24, 2011, attached hereto as Exhibit "3."

5. The Town is a rural community whose predominant land uses are agriculture, forests, and low density residential development. Town of Middlefield, Land Use Analysis: Heavy Industry and Oil, Gas or Solution Mining and Drilling, GreenPlan, Inc., (the "LUA"), dated May 10, 2011, at 4, attached hereto as Exhibit "4." The Town's economy, based upon agriculture, forestry, health care and tourism, is heavily dependent upon maintenance of the existing community character. *Id.*

6. As of the date of adoption of the Master Plan Amendments and enactment of the Zoning Law, there were no operating heavy industries, oil, gas, or solution mining and drilling operations in the Town. *See* Exhibit “4” at 4.

7. The Town Board adopted the Zoning Law and Master Plan Amendments after considering hundreds of pages of written and oral testimony presented by Town residents and interests groups; the LUA; and memoranda submitted to the Town Board from the Town Planning Board. Town Board Meeting Minutes, dated November 9, 2010, December 14, 2010, December 27, 2010, January 11, 2011, and February 8, 2011, attached hereto as Exhibit “5”; Town Board Public Hearing Record, dated March 8, 2011, attached hereto as Exhibit “6”; Town Board Special Meeting Transcript, dated May 10, 2011, attached hereto as Exhibit “7”; Memoranda from Neal Newman and Henry Weil, Co-Chairs of Town Planning Board, dated January 9, 2011 and February 8, 2011, attached hereto as Exhibit “8.”

8. Prior to recommending adoption of the Zoning Law and Master Plan Amendments on February 8, 2011, *see* Exhibit “5,” the Town Planning Board held a public hearing on the land use impacts of natural gas drilling and discussed the matter at several meetings. Town Planning Board Public Hearing Record dated February 3, 2011, attached hereto as Exhibit “9”; Town Planning Board Meeting Minutes, dated July 14, 2010, October 13, 2010, December 2, 2010, January 6, 2011, February 3, 2011, March 3, 2011, and May 5, 2011, attached hereto as Exhibit “10.”

9. The Town Board also considered the likely adverse impacts to Middlefield from the so-called, “boomtown” impacts from natural gas drilling. *Energy Boomtowns & Natural Gas: Implications for Marcellus Shale Local Governments & Rural Communities*, attached hereto as Exhibit “11.”

10. No facts in this matter are in dispute. The question pending before the Court is strictly a matter of law and appropriate for resolution by a motion for summary judgment.

11. The Town enacted the Zoning Law and Master Plan Amendments pursuant to authority provided to local governments in Article IX, § 2(c)(ii)(10) of the New York State Constitution, which is codified in three laws: Municipal Home Rule Law §§ 10(1)(ii)(a)(11),(12); Statute of Local Governments §§ 10(6); and (7); and Town Law §261.

12. Contrary to plaintiff's claim, § 23-0303(2) of Article 23 of the Environmental Conservation Law, also known as the Oil, Gas and Solution Mining Law ("OGSML"), does not expressly preempt the Town's constitutionally derived authority to zone a land use within its borders, nor does the OGSML preempt the Town's authority by implication through its regulatory scheme.

13. By its plain meaning, § 23-0303(2) of the ECL "regulates" how one may conduct oil and gas drilling, not whether or where this activity can occur. Section 23-0303(2) of the ECL provides in its entirety: "[t]he provisions of this article shall supersede all local laws or ordinances relating to the *regulation* of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." (emphasis added).

14. A parallel provision of the ECL regulating hard rock mining has been interpreted as not preempting local zoning authority either expressly or by implication. *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 NY2d 126 (1987); *Gernatt Asphalt Product., Inc. v. Town of Sardinia*, 87 NY2d 668, 682 (1996); *Northeast Mines, Inc. v. NYS Dept. of Env'tl Conservation*, 113 AD2d 62, 65 (3d Dept 1985), *appeal dismissed*, 67 NY2d 917 (1986), *appeal denied*, 68 NY2d 612 (1986).

15. Nothing in the legislative history of the OGSML suggests that the legislature intended to take the drastic step of preempting a local municipality's zoning authority. OGSML Bill Jacket, attached hereto as Exhibit "12."

16. The plaintiff may not rely upon the recollections of Gregory Sovas, a former executive branch employee and current oil and gas lobbyist, to divine the Legislature's intent where the Legislature itself was silent, especially where the after-the-fact statements of the lobbyist are prepared in anticipation of litigation. *Golden v. Koch*, 98 Misc2d 972 (Sup. Ct. NY County 1979), *rev'd on other grounds*, 73 AD2d 575 (1st Dept 1979), *aff'd*, 49 NY2d 690 (1980); *McKechnie v. Ortiz*, 132 AD2d 472, 475 (1st Dept 1982).

17. The regulatory scheme of §23-0301 of the ECL which protects the "correlative rights" of all owners whose property is underlain by oil and gas and whose rights may be placed at risk by gas extraction efforts on an adjoining or nearby property, does not preempt local zoning laws by implication, as the section of law also "fully protects . . . the rights of all persons including landowners and the general public." The Department of Environmental Conservation's mandatory integration and spacing rules, designed to protect the correlative rights of all owners, can co-exist with Middlefield's Zoning Law so that together the State and local laws protect the correlative rights of property owners, while also fully protecting the rights of all persons including landowners and the general public.

18. For the foregoing reasons, and upon the Memorandum of Law in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, the Town hereby respectfully requests that this Court deny plaintiff's motion and grant the Town's cross-motion for summary judgment dismissing the Complaint.

WHEREFORE, the defendant respectfully requests that this Court deny plaintiff's motion and grant defendant's motion for summary judgment dismissing the Complaint, together with such other and further relief as the Court deems just and proper.

Dated: Hudson, New York  
December 1, 2011



CHERYL A. ROBERTS



STATE OF NEW YORK : COUNTY OF COLUMBIA

MARIA BRUHMULLER, being duly sworn, deposes and says: I am not a party to this action, am over 18 years of age and reside in the State of New York.


On December 5, 2011, I served a true copy of the annexed **CROSS-MOTION FOR SUMMARY JUDGMENT, AFFIRMATION OF CHERYL A. ROBERTS WITH EXHIBITS, AND MEMORANDUM OF LAW** in the following manner: by mailing the same in a sealed prepaid envelope via **UPS Next Day**, addressed to the last known address of the addressee(s) as indicated below:

LEVENE, GOULDIN & THOMPSON, LLP  
Attorneys for Plaintiff  
Michael R. Wright, Esq.  
450 Plaza Drive  
Vestal, NY 13850

THE WEST FIRM, PLLC  
Co-Counsel for Plaintiff  
677 Broadway, 8<sup>th</sup> Floor  
Albany, NY 12207

  
\_\_\_\_\_  
MARIA BRUHMULLER

Sworn to before me on  
December 5, 2011.

  
\_\_\_\_\_

NANCY A. GEISLER  
NOTARY PUBLIC, State of New York  
No. 01GE4739736  
Qualified in Columbia County  
Commission Expires 2/28/2014