

## Second Trial Court Upholds Local Zoning Authority Over the Development of the Marcellus Shale in New York

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### Client Advisory

March 5, 2012 by Telisport W. Putsavage, Andrew D. Weissman and Guy P. Lander

In the battle over the largest shale formation ever sought to be developed for natural gas in New York, and close on the heels of the initial decision in *Anschutz Exploration Company v. Town of Dryden*,<sup>[1]</sup> a second upstate trial court issued a decision upholding local zoning authority to control the development of the shale formations. On February 24, 2012, Acting Otsego County Supreme Court Justice Donald Cerio, Jr. held in *Cooperstown Holstein Corporation v. Town of Middlefield* that the New York Oil, Gas and Solution Mining Law ("OGSML"), Article 23 of the New York Environmental Conservation Law ("ECL"), does not preempt enactment of local zoning restrictions that prohibit oil and gas drilling or disposal of drilling-related waste in some or all of a municipality. These decisions could, if upheld, prevent drilling for natural gas in many parts of the state. Over sixty New York municipalities have enacted various forms of prohibitions on drilling, and legislative battles over additional limitations continue in a number of municipalities. Because millions of dollars have been invested in leases that may expire before development is ever permitted, this battle promises to involve many interests in a long struggle.

The *Anschutz* action attracted an *amicus curiae* in the form of a local landowner coalition, while this case prompted *amicus* filings by two municipalities and five national and state environmental organizations, something practically unheard of at this stage of litigation. Amicus filings on both sides of the issue will likely multiply as this litigation proceeds. Middlefield is an agricultural town adjoining the east side of Otsego Lake and nearby Cooperstown, whose main hamlet is Cherry Valley. Faced with the prospect of Marcellus drilling, the Middlefield Town Board had repealed the original town zoning ordinance with a new zoning law containing a dual, overlapping prohibition against any oil, gas or solution mining as well as "heavy industry" anywhere in the town. Plaintiff Cooperstown Holstein, which operates a thousand-acre farm and which in 2007 had leased portions of their land for Marcellus exploration, brought an action against the town seeking a declaration that the town law was preempted by the OGSML.

In assessing whether the New York Legislature had preempted the Middlefield law, Acting Justice Cerio delved deeply into the legislature history of the OGSML, both as reflected originally in the Conservation Law and now in the current successor ECL. The decision recounts that the OGSML was enacted in 1963, providing the then-Conservation Department with both a promotional duty and regulatory authority over the oil and gas industry in New York. Reviewing contemporaneous legislative memoranda from the Conservation Commissioner and others, the Court found that the legislation was primarily focused on operational issues related to developing and regulating oil and gas drilling and well operation. The OGSML and other New York statutes were amended in 1978 to assign the promotion function to another agency and to focus the activities of the now-renamed Department of Environmental Conservation ("DEC") on regulation. The Court found that neither of these enactments, nor their supporting history, made any mention of land use or the concerns that would typically be addressed by zoning law, thus in effect finding that the earlier versions of the OGSML had not impliedly preempted local zoning authority. The decision next reviewed the enactment in 1981 of the preemption clause of the OGSML. That clause reads: 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

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local roads or the rights of local governments under the real property tax law. The Court again looked to the legislative history, including the Governor's Memorandum in Support of the bill, which was sponsored by the Governor. It again found that the emphasis was on the operational aspects of oil and gas development, without any intent to address considerations normally associated with zoning and land use.

The Court concluded that in enacting the OGSML the Legislature intended to preempt any local regulation of the operating aspects of the oil and gas industry, but did not reflect any attempt to supplant the longstanding New York State Constitutional and statutory framework supporting local zoning authority in New York. Consequently it found that the Middlefield Zoning Law was not a "local law relating to the regulation of the oil, gas and solution mining industries" and thus was not preempted. The Court stated: Clearly the State's interest may be harmonized with the home rule of local municipalities in their determination of where oil, gas and solution drilling or mining may occur. The State maintains control over the "how" of such procedures while the municipalities maintain control of the "where" of such exploration. As in the *Anschutz* decision, the Court placed heavy emphasis on the New York Court of Appeals 1987 decision in *Frew Run Gravel v Carroll*, which interpreted the preemption provision in the New York Mined Land Reclamation Law ("MLRL"), Title 27 of ECL Article 23. In that decision, the Court of Appeals (New York's highest court) held that preemption of "all other state and local laws relating to the extractive mining industry" did not limit local government's authority to preclude mining in some or all of a municipality, since such an ordinance would not regulate the extractive mining industry and in fact had only an "incidental" impact on such industry. The decision also points to the similar outcome arrived at by the Court of Appeals in *Gernatt Asphalt Products v. Town of Sardinia*, which again addressed MLRL preemption following that statute's amendment in 1991. In *Gernatt* the Court of Appeals held that the MLRL did not preempt a zoning ordinance that completely prohibited mining throughout the municipality.

Considering the *Frew Run* and *Gernatt* holdings, the Court stated that the OGSML and MLRL preemption clauses were "strikingly similar" and that nothing in the legislative history of the OGSML suggested that any different outcome with respect to preemption was justified. As in *Gernatt*, the Court found that the Middlefield law "does not conflict with the state's interest in establishing uniform policies and procedures for the manner and method of the industry." Together with the *Anschutz* decision, New York is now presented with two strong statements of support for the authority of zoning ordinances to prohibit oil and gas development. Appeals, which are of right, are anticipated in both cases. Either appeal would be heard by the Third Department of the Appellate Division, sitting in Albany, the mid-level appellate court most often called upon to interpret and apply the ECL. Given the enormous interest and significant investments at stake, expectations are that one or both of these actions will ultimately reach the Court of Appeals. In light of the significant pressure to develop the Marcellus shale, should the Court of Appeals uphold the *Anschutz* and *Cooperstown Holstein* decisions; it would not be surprising to see the New York Legislature revisit the OGSML preemption clause. In what would surely be a highly charged, well-funded battle, the issue would be whether, as the Court in *Cooperstown Holstein* stated, "the State's interest [in developing and regulating the oil and gas industry] may be harmonized with the home rule of local municipalities in their determination of where oil, gas and solution drilling or mining may occur."

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#### Endnotes

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[1] For a description of the *Anschutz* decision, please see Carter Ledyard & Milburn LLP Client Advisory *Court Fires First Shot in Local Authority Battle Over the Development of the Marcellus Shale in New York*, February 24, 2012.

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