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Memorandum

To: , Supervisor,
 , , , and , Town Board Members

From: David F. Slottje
 Helen Holden Slottje

Copy: , Attorney for the Town

Date: January 27, 2011

Re: Relationship of Contemplated Zoning Amendment
 Prohibiting High-Impact Industrial Uses to State Preemption
 of Regulation of Oil, Gas and Solution Mining Activities

Facts: The Town Board of the Town of is considering adopting an amendment to the Town's existing zoning law (Town of Zoning Law, Local Law of No.) so as to specifically prohibit as a permitted land use within the Town "High-Impact Industrial Use," as that term is defined in the contemplated amendment (the "Amendment," or the "Contemplated Amendment").

The New York State Oil, Gas and Solution Mining Law (ECL, Article 23) provides, at Section 23-0303 [2] thereof, that:

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. (Emphasis added.)

Incident to adoption of the Contemplated Amendment, certain activities sometimes or often engaged in by people or companies in the oil, gas, or solution mining industries, along with other activities falling within the definition of "High-Impact Industrial Use" set forth in the Amendment, would be prohibited in the Town of .

Issue Presented: Accordingly, you have asked for our analysis and opinion as to whether the Town's ability to adopt and enforce the Amendment, with respect to activities engaged in by people or companies in the oil, gas or solution mining industries, is legally preempted by the aforesaid ECL 23-0303 [2].

Conclusion and Summary: For the reasons set forth below, and subject to the matters contained herein, it is our opinion that a New York court should hold that the Town's ability to adopt and enforce the Amendment prohibiting High-Impact Industrial Use as a permitted land use in the Town, in so far as the same may thereby prohibit activities (falling within the definition of "High-Impact Industrial" activities) engaged in by people or companies in the oil, gas, or solution mining industries, is **not** preempted by ECL 23-0303 [2] (the "Section 23-0303 Supersession Language").

There is no New York case law directly on point interpreting whether the Section 23-0303 Supersession Language acts to preempt a validly enacted zoning law or amendment which otherwise would have the effect of prohibiting oil, gas or solution mining activities as a permitted land use within a municipality.

However, the Section 23-0303 Supersession Language is very similar to the supersession language formerly contained in the provision of the ECL pertaining to the mining of minerals.¹ A Court of Appeals² decision³ and its progeny have interpreted the minerals mining ("mining") context supersession language as preempting **only** laws which regulate the **operations** of the mining industry, and as **not** preempting general land

¹ Mining of minerals, on the one hand, and oil, gas, and solution mining, on the other, are covered by separate statutes. See ECL Title 27 (ECL 23-2701 et seq.), and ECL Article 23 (ECL 23-0101 et seq.).

² The Court of Appeals is New York State's highest court.

³Matter of Frew Run Gravel Products, Inc. v. Town of Carroll, 71 N.Y.2d 126 (1987) ("Frew Run").

use laws that have the incidental effect of **prohibiting** mining activities, whether within only certain land use districts, or within the entirety of the municipality. Specifically, the Frew Run line of cases holds that the mining context supersession language does not preempt appropriately⁴ drafted zoning laws, because such laws are not 'laws relating to the extractive mining industry,' but are instead laws which seek to regulate land use generally.

We believe that the same analysis should obtain with respect to judicial interpretation of the Section 23-0303 Supersession Language, and that accordingly an appropriately drafted and properly enacted zoning amendment prohibiting High-Impact Industrial Use activities as a permitted use, which has the incidental effect of prohibiting people and companies in the oil, gas or solution mining industries from conducting such activities in a municipality, should not be preempted by the Section 23-0303 Supersession Language.

Discussion and Analysis: A legislative intent to preempt can be implied by declaration of a state policy or by the comprehensive and detailed nature of the regulating scheme established by statute, or in the alternative can be evidenced by an express statutory provision. Where an express supersession clause exists, then determination of the scope of the preemption created thereby turns solely on the proper construction of the statutory provision⁵.

There is no New York case law directly on point interpreting whether the oil, gas and solution mining suppression language (the above-defined Section 23-0303 Supersession Language) acts to preempt a validly enacted zoning law or amendment which otherwise would have the

⁴ By “appropriately” drafted, we mean laws that regulate land use generally, as opposed to laws that regulate mining *operations* or *processes*. *Matter of Hunt Bros. v. Gleason*, 81 N.Y. 2d 906 (1993).

⁵ *Frew Run*, pp. 130,131; *Matter of the People of the State of New York v. Applied Card Systems, Inc.*, 11 N.Y. 3d 105 (2008), cert. den'd by *Cross Country Bank, Inc. v. New York*, 129 S. Ct. 999 (2009).



effect of prohibiting oil, gas or solution mining activities as a permitted land use within a municipality.⁶

However, in Frew Run the Court of Appeals had occasion to interpret the scope of preemption intended by the supersession language formerly contained in the provision of the ECL pertaining to mining, which read in pertinent part as follows:

... this title shall supersede all other state and local laws relating to the extractive mining industry;[...]⁷ (the "Mining Law Supersession Clause").

Frew Run involved the question of whether the Mining Law Supersession Clause was intended to preempt a town zoning law provision which established a zoning district where a sand and gravel mining operation was explicitly not a permitted use.

Observing that the question before it involved an express supersession clause, the Court noted that there was therefore no requirement to examine the Legislature's declaration of a State policy, or how comprehensive and detailed the regulatory scheme established by the

⁶ Indeed, we were able to find only a single reported case addressing any application of ECL Section 23-0303: Envirogas, Inc. v. Town of Kiantone, 447 N.Y. 2d 221 (1982) ("Envirogas"). Envirogas was an Erie County Supreme Court (i.e., trial level court) decision involving a local law that was styled as a 'zoning' law, but which fit squarely within the supersession language definition of (preempted) laws regulating oil and gas operations. (The law in question provided that no well could be constructed in the Town without prior payment of a \$2,500 compliance bond and a \$25 permit fee.) Envirogas does not speak to the question presented in this Memorandum, since that case clearly involved a local law regulating the drilling industry, rather than a zoning law regulating land use generally.

⁷ ECL 23-2703 (former, i.e., pre-1991 amendment) clause (2). Additional text had followed after the semi-colon in this version of ECL 23-0303 [2]:

provided, however, that nothing in this title shall be construed to prevent any local government from enacting land zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.

That additional text dealt with a subject separate and distinct from the Mining Law Supersession Clause (that subject being restoration and reclamation of mineral mined lands), and is not relevant to the subject of this Memorandum.



statute might be, in order to divine any implied legislative intent to preempt⁸. Rather, because an express supersession clause existed, determination of the scope of the preemption created thereby turned solely on the proper construction of the particular statutory preemption provision.⁹

The Court proceeded to frame the issue before it as “whether the Town of Carroll Zoning Ordinance [...] is the sort of local law contemplated by the Legislature in this supersession provision.”¹⁰ Finding the answer, said the Court, required looking “to the plain meaning of the phrase ‘relating to the extractive mining industry’ [...], to the relevant legislative history, and to the underlying purposes of the supersession clause as part of the statutory scheme.”¹¹

Turning to the statute’s plain meaning, the Court held that the language should be read “in its natural and most obvious sense,”¹² and applying that standard stated that

[w]e cannot interpret the phrase “local laws relating to the extractive mining industry” as including the Town of Carroll Zoning Ordinance. The zoning ordinance relates not to the extractive mining industry but to an entirely different subject matter and purpose: i.e., ‘regulating [...] the use of land in the Town [...]’. The purpose of a municipal zoning ordinance in [...] establishing uses to be permitted [...] is to regulate land use generally.¹³

Further, the Court held that while “[i]n this general regulation of land use, the zoning ordinance inevitably exerts an incidental control over any of the particular uses or businesses which, like sand and gravel operations, [...]”¹⁴ may or may not be allowed, this

⁸ Frew Run, p. 130.

⁹ Frew Run, p. 131.

¹⁰ Frew Run, p. 131.

¹¹ Frew Run, p. 131.

¹² Frew Run, p. 131.

¹³ Frew Run, p. 131.

¹⁴ Frew Run, p. 131.



incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the "extractive mining industry" which the Legislature could have envisioned as being within the prohibition of the [mining law supersession] statute.¹⁵

The Court then observed that its conclusion in this regard was consistent with the purposes and policy considerations underlying the Mining Law Supersession Clause, as revealed by the Court's examination of the entire mining statute and the legislative history leading to its enactment.

The legislative history was apparently gleaned by reviewing the Governor's Bill Jacket pertaining to the law. Citing the Memorandum of the Governor and the Memorandum of the Department of Environmental Conservation contained in the Bill Jacket, and examining the policy of the State as articulated by the legislature, the Court concluded that the policy underlying the statute was

to foster and encourage the development of an economically sound and stable mining and minerals industry, and [in furtherance thereof] to establish the badly needed guidelines [...] [to] allow for the utilization of the state's vast mineral resource [...] and to eliminate regulation on a town by town basis which creates confusion for industry and results in additional and unfair costs to the consumer.¹⁶

The Court concluded its analysis by holding that the proper construction of the preemptive phrase "local laws relating to the extractive mining industry" was that "local regulation dealing with the actual operation and process of mining" would be preempted - because otherwise the statutory purpose of encouraging mining, through standardization of regulations pertaining to mining operations, would be frustrated - but that a town's powers to regulate land use through zoning powers, as expressly delegated by the State in Section 10(6) of the Statute of Local Governments and Town Law Sec. 261, were not preempted.

Frew Run was a 1987 case, construing the then current Mining Law Supersession Clause. In 1991, ECL 23-2703[2] was amended, to provide in pertinent part as follows:

¹⁵ Frew Run, p. 131.

¹⁶ Frew Run, p. 132.

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 or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts.¹⁷

Essentially, this language codified the ruling in Frew Run.

Frew Run dealt with a situation where a town had prohibited mining activities in certain zoning districts, but allowed them in other districts.¹⁸ However, there is no question that a town is not preempted from enacting a zoning law or amendment to prohibit mining as a permitted use throughout the entire town. The Court of Appeals so held, in Matter of Gernatt Asphalt Products, Inc. v. Town of Sardinia,¹⁹ a 1996 case.

¹⁷ ECL 23-2703 [2][b.]

¹⁸ The case was brought by a company that wanted to work in one of the districts in which mining had been prohibited.

¹⁹ 87 N.Y. 2d 668 (1996)(“Gernatt”)



Gernatt involved several challenges²⁰ to the Town of Sardinia having amended its zoning law so as to eliminate mining as a permitted use throughout the town, out of the Town Board's concern that further mining might have a "potential adverse effect [...] upon the environment and the Town's source of drinking water, [and] upon the rural and agricultural economy and character of the Town [...]."²¹ The Court upheld the Sardinia zoning amendments, finding that the then-current version of the mining law supersession language, that is, giving effect to the 1991 amendment, did not preempt the Town's authority to determine that mining should not be a permitted use of land within the Town and to enact amendments to the local zoning ordinance in accordance with that determination.

In Gernatt, the Petitioner contended that the Town's outright prohibition on mining was an impermissible regulation of mining that was preempted because it was in conflict with the mining statute's purpose of fostering and encouraging the mining industry in the State. The Court of Appeals rejected this argument, affirming its Frew Run distinction between local ordinances that regulate the actual operation and process of mining (which are accordingly preempted) and zoning ordinances

²⁰ The Petitioner in Gernatt argued that the Town's authority to eliminate mining had been preempted (see discussion above, in the body of this Memorandum), that the amendments had not been enacted in accordance with a comprehensive plan, and that the Town had violated various statutory provisions relating to referral and public notice of the amendments. Additionally, the Petitioner brought a claim that that the amendments eliminating mining as a permitted use in the Town constituted illegal "exclusionary zoning," unconstitutional under Berenson v. Town of New Castle, 38 N.Y. 2d 102 (1975). Berenson involved an attack on an ordinance which prevented the construction of multifamily residences upon open and undeveloped land within the Town at a time when no multifamily residences existed there. The Court made short work of this claim:

We have never held, however, that the Berenson test, which is intended to prevent a municipality from improperly using the zoning power to keep *people* out, also applies to prevent the exclusion of industrial uses. 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 power to prevent damage to the rights of others and to promote the interests of the community as a whole. Id., at 683,684. (emphasis added.)

²¹ Gernatt, p. 685.



which regulate land use generally – which are not preempted by the mining law supersession provision.

Thus the holdings of Frew Run and Gernatt establish well-settled law insofar as they stand for the proposition that the incidental control over mining industry activities resulting from a municipality’s exercise of its right to regulate land use through zoning laws does not amount to prohibited regulation “relating to the extractive mining industry,” even where the effect of the zoning law is to prohibit mining as a permitted use everywhere and anywhere in the municipality.

We can find no authority suggesting that it is inappropriate to apply the Court of Appeal’s criteria specified in Frew Run and Gernatt to an inquiry regarding interpretation of the Section 23-0303 Supersession Language. Furthermore, it is our opinion that applying the Frew Run and Gernatt criteria to the context of attempting to interpret the scope of the Section 23-0303 Supersession Language is wholly reasonable and appropriate, and as set forth below such application leads us to conclude that the authority of the Town of ☒ to enact and enforce the Contemplated Amendment is not preempted.

As was the case in the context of the mining law, the Section 23-0303 Supersession Language involves express rather than implied supersession, so Frew Run and Gernatt require that determination of the scope of the preemption created thereby turns on the proper construction of the subject statutory provision itself. “Proper construction’ in turn involves looking at the plain meaning of the phrase in question (i.e., “local laws or ordinances relating to the regulation of the oil, gas and solution mining industries;”), to the relevant legislative history, and to the underlying purposes of the supersession clause as part of the statutory scheme.

Accordingly, we look first to the plain meaning of the Section 23-0303 Supersession Language, reading the language in its natural and most obvious sense. That language is **“local laws or ordinances relating to the regulation of the oil, gas and solution mining industries.”** (Recall that in Frew Run, the language before the Court was **“local laws relating to the extractive mining industry.”**) Applying the ‘plain meaning, natural and most obvious sense’ standard to the mining law supersession language, the highest court of New York State held that it could not interpret “local laws relating to the extractive mining industry” as encompassing the town’s zoning ordinance, finding that the zoning ordinance did not ‘relate to’ the exact extractive mining industry, but instead involved an entirely different subject matter and purpose: i.e., regulating the use of land in the town.



Comparing the operative clause in the Frew Run (mining context) case with the operative clause in the Section 23-0303 Supersession Language, the only difference²² is that the text of the Section 23-0303 Supersession Language contains the additional words “the regulation of” between the phrase “relating to” and specification of the industries that are respectively the subject of such clauses.

We do not believe that the fact that the Section 23-0303 Supersession Clause contains the additional words “the regulation of” justifies interpreting the Section 23-0303 Supersession Language – applying the required ‘plain meaning, natural and most obvious sense’ standard – any differently than the Court of Appeals interpreted the (pre-1991) mining law supersession language which did not contain such additional language, and which otherwise was virtually identical. The plain meaning, in its most natural and most obvious sense, of the phrase “local laws and ordinances relating to the regulation of (industry)” is no different than the plain meaning, in its most natural and obvious sense, of the phrase “local laws relating to (industry)”.²³

Accordingly, and for the reasons set forth below, we believe that a New York court considering this question should find, as did the Court of Appeals in the mining law context in its Frew Run decision, that the

²² As was true in the context of ECL 23-2703 [2] prior to the 1991 amendment (see Footnote 7 to this Memorandum), additional text follows the semi-colon after the operative language we have defined to constitute the Section 23-0303 Supersession Language. That additional text reads as follows: “but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.” [ECL 23-0303 [2]]. We believe that that text does not qualify the Section 23-0303 Supersession Law in some manner, but rather simply means what it says, to wit, that laws passed by local governments in furtherance of their jurisdiction over local roads and real property tax law matters are not preempted, whether or not they would otherwise fall within the scope of “local laws ‘relating to the regulation of’ the oil, gas, or solution mining industries.

²³ We believe that evaluating the two phrases side-by-side should lead virtually any reader to conclude that, if anything, “relating to” industry is considerably broader and more encompassing than “relating to regulation of,” since the words “relating to the regulation of” would in fact appear to be more restrictive than the words “relating to.” (Indeed the gist of Frew Run and progeny is that under the circumstances the phrase “relating to” should be read restrictively, as ‘relating to regulation of’ [mining processes and operations].)



phrase “local laws and ordinances relating to the regulation of the oil, gas and solution mining industry” does not encompass a zoning amendment such as the Contemplated Amendment, as that Amendment does not “relate to the regulation of” those industries, but instead involves an entirely different subject matter and purpose: *i.e.*, regulation of the use of land in the [T]own”²⁴ of ☒.

Of course, the Court in Frew Run tested its interpretation of the ‘plain meaning’ of the operative supersession language of the mining law against the purposes and policy considerations underlying that law, as determined by examining the entire statute and the legislative history leading to its enactment.

We have made similar examination with respect to the Section 23-0303 Supersession Clause. Specifically, we have examined the entirety of that law, and copies of the various documents described on Exhibit A attached to this Memorandum, which documents (collectively, the “Legislative History Materials”) we understand to constitute the entire contents of the Bill Jacket regarding enactment of Section 23-0303. Of the Legislative History Materials, only the Division of the Budget’s Report makes any mention of the supersession concept, merely parroting the statute by observing that the law would “supersede all local laws or ordinances regulating the oil, gas and solution mining industries.” Therefore, in our view this language is not sufficient to support a finding that the Legislature intended that land use laws of general application (such as the Contemplated Amendment) be considered to fall within the scope of preempted laws regulating industry.

No doubt the policies underlying the Section 23-0303 Supersession Clause include, among other things, promoting development of domestic energy resources generally, and specifically “promot[ing] the development of oil and gas resources in New York,”²⁵ but in a similar vein the policy underlying the mining law includes “fostering and encouraging the development of an economically sound and stable mining industry and the widely development of domestic mineral resources”²⁶ in the State.

²⁴ See Frew Run, p. 131.

²⁵ See, for example, the title to the Bill itself set forth at the top of the Governor’s Memorandum contained in the Bill Jacket, being Document No. 1 described on Exhibit A attached to this Memorandum.

²⁶ ECL Section 23-2701 [1].



Under the circumstances, we do not believe that use of the words “promote the development of” (the oil, gas, and solution mining industry), rather than using the words “foster and encourage the development of” (the mineral mining industry), somehow justifies interpreting the scope of the Section 23-0303 Supersession Clause as preempting a broader range of local laws than the Court of Appeals held to be preempted (by virtually identical language) in the mineral mining context.²⁷

Had the Legislature wanted to remove or preempt the authority of municipalities to enact any law affecting or touching upon the oil, gas and solution mining industries, it could have simply said that there would be no local governmental jurisdiction over such industries. But it did not.

Accordingly, for the reasons set forth in this Memorandum, we are of the opinion that, assuming the matter is properly presented: (a) a New York court considering this question and applying New York law should find, as did the Court of Appeals in the mining law context in its Frew Run decision, that the phrase “local laws and ordinances relating to the regulation of the oil, gas and solution mining industry” does not encompass a zoning amendment such as the Contemplated Amendment, as that Amendment does not “relate to the regulation of” those industries, but instead involves an entirely different subject matter and purpose: i.e., regulation of the use of land in and by a town; and (b) accordingly, a New York Court applying New York law should hold that the Town’s ability to adopt and enforce the Amendment prohibiting High-Impact Industrial Use as a permitted land use in the Town, in so far as

²⁷ As we consider this matter now in 2011, oil and gas (if not solution) mining may seem to be a higher priority for some than mineral mining. But Section 23-0303 was enacted effective August 26, 1981. (In June of that year, the New York Times and Time magazine, respectively, ran stories announcing a world oil glut; that glut continued at least through 1986.) [Wikipedia: “1980s oil glut.” http://en.wikipedia.org/wiki/1980s_oil_glut] There is no basis for believing that in 1981 the Legislature was aware that Marcellus Shale drilling was even a possibility. Indeed, one of the documents in the 23-0303 Bill Jacket (Document No. 3 on Exhibit A attached to this Memorandum) is a letter (in support of the bill) dated July 14, 1981, from Mr. Harold S. Walker, Jr., Executive Director of the New York Gas Group (a trade group, the members of which included Consolidated Edison, Long Island Lighting Company, NYSEG, Niagara Mohawk, and others.) In his own words, one purpose of Mr. Walker’s letter was to “remind the Legislature that the oil and gas resources of New York state are modest indeed.”

the same may thereby prohibit activities (falling within the definition of “High-Impact Industrial Use” activities) engaged in by people or companies in the oil, gas, or solution mining industries, is **not** preempted by the Section 23-0303 Supersession Language.

[Exhibits A and B attached to this Memorandum are hereby incorporated by the reference for all purposes.]

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