



# Natural Gas and Oil Exploration & NYS Municipal Home Rule Case Law Update

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# Cases of Interest

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- *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc. 3d 450 (Sup. Ct. Tompkins Co. 2/21/2012)
- *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc. 3d 767 (Sup. Ct. Otsego Co. 2/24/2012)
- *Vestal Gas Coalition, et al v. Matthew T. Ryan, in his official Capacity as Mayor, City of Binghamton, City Council, City of Binghamton*, 37 Misc. 3d 1204A (Sup. Ct. Broome Co. 10/2/12)

# Anschutz Exploration

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Town of Dryden Zoning Ordinance – Section 2104

“Section 2104. 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; to transfer, store, process or treat natural gas; or to dispose of natural gas exploration or production wastes; or to erect any derrick, building, or other structure; or to place any machinery or equipment for any such purposes.
- (2) Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Materials.  
No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production materials.
- (3) Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Wastes.  
No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production wastes.
- (4) Prohibition against Natural Gas and/or Petroleum Support Activities.  
No land in the Town shall be used for natural gas and/or petroleum support activities.
- (5) Invalidity of Permits.  
No permit issued by any local, state or federal agency, commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town.”

# Relevant Supersedure Laws

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- Oil, Gas and Solution Mining Law (OGSML) Supersedure Clause, NYS Environmental Conservation Law (ECL), §23-0303(2)
  - “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.”
- Mined Land Reclamation Law (MLRL) Supersedure Clause, ECL §23-2703(2)
  - “For the purposes stated herein, this article shall supersede all other state and local laws **relating to the extractive mining industry**; provided, however, that nothing in this article 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.”\*
  - \* As the MLRL existed and considered in *Frew Run Gravel Prods. v. Town of Carroll*, 71 NY 2d 126 (1987)

# Frew Run Appeal

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- NYS Court of Appeals holding in *Frew Run*, as summarized by the Court of Appeals in *Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 NY 2d 668 (1996)
  - “In *Frew Run*, we distinguished between zoning ordinances and local ordinances that directly regulate mining activities. **Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances** are not the type of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities. In *Frew Run*, we concluded that nothing in the plain language, statutory scheme, or legislative purpose of the Mined Land Reclamation Law suggested that its reach “was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands”, and that in the absence of a clear expression of legislative intent to preempt local control over land use, the statute could not be read as preempting local zoning authority.”

## Anschutz Exploration Conclusions

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- There was no clear expression of any legislative intent to prevent local control over land use and zoning in either the MLRL or the OGSML.
- There is no meaningful difference between the regulatory schemes of the MLRL and the OGSML, therefore the holdings of the *Matter of Frew Run* and *Matter of Gernatt* were applied in determining that the zoning amendment was not preempted by the OGSML.\*
  - \*Note the Court did strike §2104(5) of the zoning amendment that sought to invalidate permits issued by other governmental entities, while upholding all other provisions of the zoning amendment.

## **Cooperstown Holstein Corp. v. Town of Middlefield**

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The Town of Middlefield adopted a zoning law specifically prohibiting:

“Heavy industry” and “Gas, oil or solution drilling or mining” within the geographical borders of the Town.

# Cooperstown Holstein Court on Legislative History

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“Therefore, this court finds no support within the legislative history leading up to and including the 1981 amendment of the ECL as it relates to the supersession clause which would support plaintiff's position in this action. Neither the plain reading of the statutory language nor the history of ECL § 23–0303(2) would lead this court to conclude that the phrase “this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries” was intended by the Legislature to abrogate the constitutional and statutory authority vested in local municipalities to enact legislation affecting land use. (New York State Constitution, Article IX, § 2(c)(ii)(10); Municipal Home Rule Law §§ 10(1)(ii)(a), 11 and 12; Statute of Local Governments §§ 10(6) and (7), and; Town Law § 261). Rather, the “natural and most obvious sense” of the word “regulation” in this statute, taken in conjunction with the legislative history of this body of law as well as its definition as “an authoritative rule dealing with details or procedure” (Merriam–Webster Dictionary), convincingly demonstrates that the legislature's intention was to insure state-wide standards to be enacted by the Department of Environmental Conservation as it related to the manner and method to be employed with respect to oil, gas and solution drilling or mining, and to insure proper state-wide oversight of uniformity with a view towards maximizing utilization of this particular resource while minimizing waste. Clearly, the state's interests 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 over the “where” of such exploration.”

# Vestal Gas Coalition

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- City adopted a local law temporarily (24 months) prohibiting gas and petroleum extraction, exploration and production wastes.
- City claims the local law was neither a zoning law, nor a moratorium, but a police power ordinance.
- Court held that the inclusion of the “sunset” provision in the local law “leads to no other rational conclusion except that this law is a moratorium.”
- The local law did not meet the criteria for adoption of a moratorium “no dire necessity.” The DEC has not yet published the new regulations required before any natural gas exploration can occur.
- The Court did specifically acknowledge and adopt the reasoning in the *Anschutz* and *Cooperstown Holstein* cases as it related to the preemption issue.

## **What's Next?**

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- **The Appeal**
- **Issuance of DEC regulations**
- **Legislative Intervention?**

# NOTES

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