STATE OF NEW YORK: SUPREME COURT:
APPELLATE DIVISION: THIRD DEPARTMENT

NORSE ENERGY CORP. USA,

Plaintiff-Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Defendant-Respondents.

-and-

DRYDEN RESOURCES AWARENESS COALITION, by its President, Marie McRae,

Proposed Intervenor-Cross-Appellant

BRIEF OF ASSEMBLYWOMAN BARBARA LIFTON AS *AMICUS CURIAE*

Appellate Division
Third Department
Index No. 515227

By: Jordan A. Lesser, Esq.
Attorney for Barbara Lifton, Assemblywoman
Amicus Curiae
New York State Assembly
555 Legislative Office Building
Albany, NY 12248
Phone: (518) 455-5444
Mobile: (985) 228-0021
Fax: (518) 455-4640
lesserj@assembly.state.ny.us

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INTEREST OF AMICUS CURIAE

Assemblywoman Barbara Lifton has represented the 125th New York Assembly District, comprising Tompkins and most of Cortland Counties since 2002. The Assemblywoman submits this amicus brief to provide the Court with information about state law regarding the zoning authority of municipalities with respect to establishment of permissible uses within zoning districts. The Assemblywoman has looked at this issue for several years and sponsors a bill in the NY State Assembly which seeks to clarify current law via NY Court of Appeals case law precedent, and codify the recent Supreme Court rulings on appeal today. She was granted amicus curiae status in the case below, *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (2012), and submitted an influential brief which helped the court rule favorably for New Yorkers to retain zoning authority over oil, gas and solution mining.

The Assemblywoman has heard from many local municipal officials, and has seen growing statewide concern, about the need for home rule authority over where and if natural gas drilling may take place in a community. She is concerned about the possibility of state law compelling gas drilling in neighborhoods where such activity is in contravention of zoning regulations or a comprehensive plan. Such preemption of home rule authority is, however, not supported by NY case law. The Assemblywoman's role as a public representative, along with significant public interest in the outcome of this litigation, and the question of upholding long-standing legal principles which allow a community to decide its own course of development and foster its own identity, character, and livelihood as a valid exercise of police power, compels the Assemblywoman to file this brief as special assistance to the court.

INTRODUCTION

Since 2008, the NYS Department of Environmental Conservation (DEC) has been working on an update to the 1992 Generic Environmental Impact Statement governing the state Oil, Gas and Solution Mining Regulatory Program. Until this regulatory review has been completed, no DEC permits will be issued to allow High-Volume Hydraulic Fracturing (HVHF) of low permeability shale formations to move forward in New York. Some would have this court and all residents of New York believe that such delay is unreasonable, yet many unanswered questions about the process and effects of HVHF remain. By the State's own admission, in relation to fracturing fluid:

> Toxicity testing data is quite limited for some chemicals, and less is known about their potential adverse effects…. there is little meaningful information one way or the other about the potential impact on human health of chronic low level exposures to many of these chemicals, as could occur if an aquifer were to be contaminated as the result of a spill or release that is undetected and/or unremediated.[1]

Recognizing the many concerns about human health and the effects of heavy industrialization of a community's landscape, regardless of agricultural, residential or recreational land use values, municipalities across New York, including the Town of Dryden, have enacted land use plans which restrict heavy industry or oil and gas drilling. Health, safety and welfare concerns leading to a restrictive zoning ordinance have long been upheld by New York courts.

[1] N.Y. DEP'T ENVTL. CONSERV., *Draft Supplemental Generic Environmental Impact Statement (dSGEIS)* at 5-75 (proposed Sept. 2011), *available at* http://www.dec.ny.gov/energy/75370.html

SUMMARY OF ARGUMENT

The authority for municipal governments to enact local laws relating to their property, affairs and government, as well as for the "protection, order, conduct, safety, health and well-being of persons or property therein," stems from Article IX of the NY Constitution.[2] Known as municipal "police power," this ability for local governments to protect local citizens and property is a key component of home rule, and, at the direction of the Constitution, the legislature has codified such authority in the "Statute of Local Governments."[3] The power to adopt, amend and repeal zoning regulations was expressly granted to local governments.[4] Furthermore, Article IX of the Constitution requires that a post-facto limitation of a power authorized under the Statute of Local Governments pass both houses and be signed by the governor in two consecutive calendar years.[5] Accordingly, the Town of Dryden's zoning regulations are duly authorized and ECL §23-0303(2) can have no effect upon limitation of zoning power, as the 1981 amendment of the law was not passed during regular session in two consecutive years.

The NY Court of Appeals has previously ruled on local zoning authority in relation to the state regulatory program for the extractive mining industry, which contained statutory language analogous to ECL §23-0303(2) at issue in this case.[6] In *Frew Run Gravel Products, Inc. v. Town of Carroll*,[7] the Court of Appeals addressed the issue of preemption of local zoning by the Mined Land Reclamation Law (MLRL), which states that it "shall supersede all other state and local laws relating to the extractive mining industry."[8] Yet the Court held that local zoning regulations

[2] N.Y. CONST. art. IX, §2(b)(3); §2(c)(ii)(10).
[3] *Id* at §2(b)(1).
[4] *See* NY STAT. LOCAL GOVT. §10(6).
[5] N.Y. CONST. art. IX, §2(b)(1).
[6] *See* NY ENVTL. CONSERV. LAW §23-2703(1) [as originally enacted, L 1974, ch 1043].
[7] 71 N.Y. 2d 126 (N.Y. 1987).
[8] *See* NY ENVTL. CONSERV. LAW §23-2703(1) [as originally enacted, L 1974, ch 1043].

were part of a comprehensive land use plan and did not relate to regulation of the mining process itself, which was the sole purpose of the MLRL.[9] In fact, the Court notes that placing such a restriction on the home rule zoning powers of a municipality would "drastically curtail" the grant of such authority under the Statue of Local Governments, and would overreach in its interpretation of the law with no record of legislative intent to do so.[10] Faced with nearly-identical language in ECL §23-0303(2) regarding oil, gas and solution mining, this compelling precedent establishes that municipalities retain their zoning powers, which regulate land use generally and do not affect state regulatory policy for resource extraction. Both courts below, in the *Anschutz* and *Middlefield* cases, found this MLRL precedent binding in their interpretation of ECL §23-0303(2), and found that the Oil, Gas and Solution Mining Law (OGSML) did not preempt valid exercise of municipal zoning authority.

Importantly, there is no requirement that a locality allow for extraction of some, or all, of its natural resources, as long as such a limitation is a valid exercise of police powers.[11] In revisiting the MLRL, the Court of Appeals held that a town can completely zone out any extractive industry, despite the presence of a coveted resource, if the land use ordinance is a reasonable exercise of its police powers to prevent harm to the property and rights of residents and benefits the interests of the community at large.[12] NY courts have continually upheld an unfettered right for home rule and local control over land use practices, including in the cases of first instance now on appeal. The Town of Dryden must, accordingly, have such a right as a reasonable exercise of its police power with respect to oil, gas and solution mining within its jurisdiction.

[9] Frew Run Gravel Prod., Inc. v. Town of Carroll, 71 N.Y. 2d 126, 133 (N.Y. 1987).
[10] *Id* at 134.
[11] Gernatt Asphalt Prod. Inc., v. Town of Sardinia, 87 N.Y. 2d 668, 684 (N.Y. 1991).
[12] *Id.*

Finally, there is no right to drill for natural gas in this situation, as a right only vests "when substantial work is performed and obligations are assumed *in reliance on a permit legally issued*."[13] The mineral lease interests acquired by the corporate Appellant in the Town of Dryden were secured before DEC even decided whether HVHF permitting would be authorized in New York. While the regulatory process for HVHF is ongoing, and no permits have been issued, there is no legal or vested right to use HVHF anywhere in New York State.

ARGUMENT

I. ARTICLE IX OF THE NY CONSTITUTION AUTHORIZES MUNICIPAL ZONING AUTHORITY

As directed by the NY Constitution via the revised Article IX passed in 1963, the legislature promulgated the Statute of Local Governments in 1964.[14] Article IX provided for enactment of broad allocations of power to local governments relating to their property, affairs and government.[15] Amongst the express powers identified by the Constitution, is the ability for municipalities to pass local laws for the "protection, order, conduct, safety, health and well-being of persons or property therein."[16] This authority, known as "police power," is a critical element of municipal home rule, and, indeed, is codified by the NY State Legislature. Under the Statute of Local Governments, the legislature specifically conferred to cities, villages, and towns the power to adopt, amend, and repeal zoning ordinances.[17]

[13] Preble Aggregate v. Town of Preble, 263 A.D.2d 849, 851 (N.Y. App. Div. 1999). (emphasis added)
[14] *See* N.Y. CONST. art. IX, §2(b)(1).
[15] *Id* at §2(b)(2).
[16] *Id* at §2(c)(ii)(10).
[17] *See* STAT. LOCAL GOVT. §10(6).

A. US Supreme Court case law upholds the validity of local government power to enact zoning ordinances

At the turn of the twentieth century, land use regulations were a relatively new concept first addressed by the US Supreme Court in *Village of Euclid v. Amber Realty Co.*[18] Following the onset of the industrial revolution, the Court noted that "with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands."[19] Reflecting the need for flexibility over regulation of land use in its review of the constitutionality of restrictive local zoning measures, the Court held that "it is not easy to find a sufficient reason for denying the [zoning] power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated."[20] Accordingly, the Supreme Court upheld the extension of municipal police power to allow for restrictive zoning practices, as a valid method for the prevention of injury to people and property, despite the possibility that such zoning might alter the course of industrial development. Indeed, the court went so far as to say that "[i]n a changing world it is impossible that it should be otherwise."[21] The Town of Dryden's use of restrictive zoning is a similarly valid exercise of local police power.

[18] 272 U.S. 365 (1926).
[19] *Id* at 386.
[20] *Id* at 390.
[21] *Id* at 387.

B. The NY Constitution requires legislation seeking to curtail local government powers to pass in two consecutive calendar years

Article IX of the NY Constitution authorizes the home rule powers of local governments, which the legislature codified in the Statute of Local Governments. Just as Article IX compels the legislature to bestow localities with clearly-enumerated authorities, it also details the constitutional procedure for revoking or limiting a duly-granted power.[22] The requirements for repealing, diminishing, impairing or rescinding a home rule power already granted under the Statute of Local Governments ensures that local police powers, including zoning, are not wantonly altered. A law which seeks to abrogate these powers can do so "only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year."[23] This standard sets a difficult threshold to overcome and ensures that the sanctity of home rule authority is taken seriously. ECL §23-0303(2) was passed once and enacted only once, in 1981. The fact that the law was not subsequently re-enacted indicates that there was no legislative intent for this law to constrain local zoning authority as a part of the state regulatory program over the oil, gas and solution mining industries. Even if there was such an intent, the failure to comply with Article IX's procedural requirements for limiting zoning authority means that ECL §23-0303(2) cannot have any effect over municipal land use planning.

The issue before the court is distinguishable from that in *Wambat Realty Corp. v. State of N.Y.* which held that the double enactment procedure of Article IX "was not, however, designed as a rigid impenetrable barrier to ordinary legislative enactments in matters of State concern."[24] The Adirondack Park Agency Act in that case had clear legislative intent to affect development

[22] *See* N.Y. CONST. art. IX, §2(b)(1).
[23] *Id.*
[24] Wambat Realty Corp., v. State of NY, 41 N.Y.2d 490, 492 (N.Y. 1977).

and curtail local zoning authority, as the state's interest in conservation and preservation necessarily requires preemption over inconsistent land use priorities. ECL §23-0303(2) lacks such clear intent, and in the absence of express language to this effect, the protections of the double enactment provision of Article IX are triggered "to afford protection from hasty and ill-considered legislative judgments."[25] The Town of Dryden's zoning regulations must be upheld by this Court, accordingly.

II. MUNICIPAL HOME RULE POWERS ARE NOT PREEMPTED BY ECL §23-0303(2)

A. NY case law supports local zoning control over extractive industries with state regulatory programs

In this case of first impression, now on appeal, the Court was asked to determine if the Town of Dryden's zoning ordinance prohibiting oil and gas drilling is superseded by the state oil, gas and solution mining program.[26] In its plain language interpretation of ECL §23-0303(2), the trial court found that "there remains an absence…of a clear expression of legislative intent to preempt local zoning control over land use concerning oil and gas production."[27] The ruling, hinging on judicial analysis of the phrase "relating to the regulation of the oil, gas and solution mining industries," found compelling precedent in the MLRL with nearly-identical language to ECL §23-0303(2). As originally written, the MLRL states that it "shall supersede all other state and local laws relating to the extractive mining industry."[28] In *Frew Run Gravel Prods. v. Town*

[25] *Id*.
[26] *See* Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458 (N.Y. Sup. Ct. 2012).
[27] *Id* at 462.
[28] *See* NY ENVTL. CONSERV. LAW §23-2703(1) [as originally enacted, L 1974, ch 1043].

of Carroll,[29] the Court of Appeals addressed whether a town's zoning ordinance, which excluded gravel mining from certain districts, was preempted by MLRL state regulations relating to the extractive mining industries. To reach a conclusion, the Court looked to whether the town zoning ordinance was the type of regulation intended to be preempted by the MLRL provision. Application of a plain language reading of the statute led the Court to hold that "we cannot interpret the phrase 'local laws relating to the extractive mining industry' as including the … Zoning Ordinance."[30] The Court found that the zoning ordinance did not relate to the regulation of the mining industry, but rather to an entirely different subject matter and purpose for the regulation of land use generally.[31] Acknowledging that land use planning may result in "incidental control over any of the particular uses or businesses" in a municipality, the Court none-the-less held that supersession of zoning authority was not contemplated by the legislature as the type of local law relating to the extractive mining industry regulated under the MLRL.[32] Only local laws that conflict with the actual operations and process of extractive mining would violate the purpose of the MLRL to streamline mining operations through standardized state-wide regulation.[33] Additionally, the Court notes that construing this preemption language so broadly would be a severe curtailment to codified zoning authority granted in the Statute of Local Governments and Town Law §261.[34]

Similarly, ECL §23-0303(2), at issue before this Court, provides that the OGSML "shall supersede all local laws or ordinances relating to the regulation of the oil, gas, and solution

[29] 71 N.Y. 2d 126 (N.Y. 1987).
[30] *Id* at 131.
[31] *Id.*
[32] *Id.*
[33] *Id* at 133.
[34] *Id*.; *See* NY STAT. LOCAL GOVT. §10(6) (enacted 1964); NY TOWN LAW §261.

mining industries."[35] Yet proper construction of this statutory provision must include an analysis of whether Dryden's zoning ordinance "relates to the regulation" of the industry or has the alternate intent of general land use control. Following the methodology in *Frew Run*, which received treatment as compelling precedent by the Supreme Courts below, the Appellate Division must similarly uphold the unfettered right for municipalities to use zoning ordinances as a vital element of their police power. Absent clear legislative intent to contrary, zoning authority must remain sacrosanct under ECL §23-0303(2) just as it is under the MLRL.

B. Legislative history of the state oil, gas and solution mining program indicates no intent to preempt municipal zoning authority

In *Cooperstown Holstein Corp. v. Town of Middlefield*, a case concerning preemption of ECL §23-0303(2) decided mere days after *Anschutz*, the trial court performed an extensive review of the legislative history concerning enactment of the state's oil, gas and solution mining programs. A careful look was justified as "both appropriate and necessary in determining what the intent of the legislation was at the time of the enactment."[36] Distilling down its review, the Supreme Court found that the original 1963 oil and gas law's "thrust was to establish a statewide management system for the utilization of these resources so as to encourage oil and gas drilling in the state in a uniform and productive fashion."[37] Subsequently, the 1978 amendments "recognized the need to centralize promotion of the state's energy resource under the authority of a single administrative body… [h]owever, no reference was made in the legislation, itself, nor any correspondence in support of the legislation, pertaining to the impact or preemption by the

[35] NY ENVTL. CONSERV. LAW §23-0303(2) (enacted 1981).
[36] Cooperstown Holstein Corp., v. Town of Middlefield, 35 Misc.3d 767, 771 (N.Y. Sup. Ct. 2012).
[37] *Id* at 773.

state of local municipal land use management."[38] And with the promulgation of the 1981 law, including section 23-0303(2), the Memorandum of Support clarifies that the purpose of the bill is to "promot[e] the development of oil and gas resources in New York and regulat[e] the activity of the industry" including "a fund to pay for past and future problems which resulted by the industry's activities" as "[t]he recent growth of drilling in the State has exceeded the capacity of DEC to effectively regulate and service the industry."[39] As the court concludes based on its substantive review of the legislative history, there is no indication that the 1981 amendments are intended to preempt, diminish or replace the authority of a municipality to enact legislation dictating permissible land uses within its jurisdiction.[40] Convincingly, the court demonstrated that ECL §23-0303(2), through both its legislative history and plain language statutory interpretation, does not abrogate municipal zoning authority.

Only one case directly involving ECL §23-0303(2) has come before the New York courts prior to *Anschutz* and *Middlefield*. *Matter of Envirogas, Inc. v. Town of Kiantone* dealt with the issue of supersession of a town ordinance which required an additional $2,500 compliance bond and $25 permit fee payable to the town prior to oil and gas production.[41] The Erie County Supreme Court held that this type of local law, which directly regulates oil and gas operations is expressly preempted by ECL §23-0303(2).[42] As bonding and permit fees are under the scope of the state regulatory program, a town law regulating the same subject matter is superseded. Yet note, importantly, that the holding in *Envirogas* illustrates what type of local oil and gas regulations are in impermissible conflict with state law. An express ordinance with intent to

[38] *Id* at 775.
[39] *Id* at 775, 776.
[40] *Id* at 777.
[41] 112 Misc.2d 432, 434 (N.Y. Sup. Ct. 1982).
[42] *Id* at 433.

control the industry is struck down, but this situation is distinguishable from zoning ordinances that regulate land use generally, such as in the Town of Dryden. While land use laws can be harmonized with the state oil, gas and solution mining program, local regulation of operational and technical processes are in conflict with the intent of state law. Under this reading, ECL §23-0303(2) cannot be construed to infringe upon the validly-delegated lawmaking authority of local zoning powers.

C. ECL §23-0301 does not indicate that the state oil, gas and solution mining program preempts local zoning authority

Appellants, and Amici in support of Appellants, in their reliance on ECL §23-0301 (Declaration of policy), point to language concerning "development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had" and the concept of correlative rights as an indication that the state regulatory program is intended to allow mineral resource extraction over all other land uses.[43] Yet, a better understanding of the development of the law of oil and gas in New York State indicates that the correlative rights doctrine is not intended to foster primacy for fossil fuel extraction in contravention of traditional land use protections. Case law from the Appellate Division, Third Department, documents the historical governance of the common law principle of "rule of capture" over oil and gas resources.[44] This archaic rule of law, designed to encourage development in the vast, untamed, and seemingly limitless wilderness of the nascent United States allowed for any person who could exploit subsurface minerals into physical possession to rightfully own the materials, regardless of whether the resources came from under their property or the property of another. Accordingly, every landowner was forced to drill a well in order to claim the mineral resources beneath their

[43] *See* NY ENVTL. CONSERV. LAW §23-0301 (1981).
[44] Western Land Serv. v. NYSDEC 26 A.D.3d 15, 16 (N.Y. App. Div. 2005).

land, leading to excessive wells and considerable waste.[45] To provide for "greater ultimate recovery of oil and gas" and "prevent waste," New York established well spacing units and replaced the "rule of capture" with the concept of "correlative rights."[46] Because landowners might be unable to drill a well directly on their own property due to spacing laws, correlative rights ensure pro rata compensation for any oil and gas removed from their mineral estate, regardless of the location of the well.[47] Oil and gas policy encouraging "greater ultimate recovery" is enhanced by spacing laws and the correlative rights doctrine, yet "greater" recovery does not mandate "maximum" recovery of mineral resources over all other land use management.

Neither the concept of "waste" nor of "correlative rights" imply any sort of hierarchical land use scheme imposed by the state preempting local zoning authority in favor of oil and gas extraction as the highest and best use of land. Simply, these two principles, which are now ingrained into the law dictating technical operation of oil and gas wells, do not expressly or impliedly speak to an intent to abrogate New York's longstanding municipal zoning protections, and to hold otherwise, and allow heavy industry unfettered access to every community across the state, regardless of risks to a local environment or economy, would create a dangerous precedent. Interpreting "waste" and "correlative rights" as part of the OGSML's regulation of the technical operations of mineral extraction is consistent with rulings of the courts below, which found "[n]owhere in the legislative history provided to the court is there any suggestion that the Legislature intended… to encourage the maximum ultimate recovery of oil and gas regardless of

[45] *Id.*
[46] *Id* at 17.
[47] *Id.*

other considerations, or to preempt local zoning authority."[48] Additionally, ECL §23-0301 also declares that oil and gas development be conducted in such a manner that "the rights of all persons including landowners and the general public may be fully protected." Many landowners and their municipal boards may decide that HVHF poses too much of a risk, or is incompatible with their community character, and local zoning control is vital to ensure their rights are, indeed, "fully protected." [49]

III. THERE IS NO LEGAL REQUIREMENT OR VESTED RIGHT FOR NATURAL RESOURCE EXTRACTION

A. Complete zoning exclusion of extractive industry is valid

Following the *Frew Run* decision, the legislature amended the MLRL in 1991 to expressly state that the statute would not prevent enactment or enforcement of local zoning ordinances.[50] In a subsequent challenge to the MLRL, the NY Court of Appeals reaffirmed its previous ruling that zoning which regulates land use generally was not the type of regulation the legislature sought to preempt under the MLRL.[51] Critically, the Court also addressed whether a town could *completely* zone out an industrial use as an exercise of their police powers. Noting that the "primary goal of a zoning ordinance … is to provide for the development of a balanced, cohesive community which will make efficient use of the Town's available land," the Court refused to extend the concept of exclusionary zoning, evidenced when an ordinance improperly

[48] Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458, 464 (N.Y. Sup. Ct. 2012).
[49] Such land use ordinances validly enacted through delegated zoning powers are a critical component of American democracy, allowing for land use decisions to be made at the local level by those who best understand their community, not as a "fickle whim of a municipal board" as has been suggested by Appellants.
[50] *See* N.Y. ENVTL. CONSERV. LAW §23-2703(2) (enacted 1991).
[51] Gernatt Asphalt Prods. Inc., v. Town of Sardinia, 87 N.Y.2d 668, 681-82 (N.Y. 1996).

excludes specific groups of people, to apply to the exclusion of industrial uses.[52] Judge Simons held that "[a] municipality is not obligated 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 powers to prevent damage to the rights of others and to promote the interests of the community as a whole."[53] Even if a zoning ordinance prevents the operation of new mines there is "no vested right to have the existing zoning ordinance continue unchanged if the Town Board has rationally exercised its police power and determined that a change in the zoning was required for the well-being of the community."[54] Sardinia was concerned with potential negative environmental impacts, as well as the effects upon community character, the local agricultural economy, and issues of future growth in the face of expanded mining operations.[55] Here, the Court of Appeals has upheld municipal police power, as long as the rational basis test is satisfied.

Both the *Anschutz* and *Middlefield* cases noted this compelling precedent, and found no rationale to prevent a municipality from completely excluding an incompatible land use from its comprehensive plan. Accordingly, the Town of Dryden's amended zoning ordinance must be viewed as a valid use of home rule, exercised by the Town Board in light of legitimate concerns about large-scale gas operations in the community.

B. No vested right to drill using high-volume hydraulic fracturing exists in NY

Other legal challenges to zoning control over resource extraction in NY have claimed a "vested right" to mine or drill. In *Preble Aggregate, Inc., v. Town of Preble*, the appellant mining

[52] *Id* at 683-84.
[53] *Id* at 684.
[54] *Id.*
[55] *Id* at 685.

company alleged that they had acquired a vested right to mine, despite a zoning ordinance barring mining.[56] The vested right claim was made based upon the plaintiff's expenditures in excess of $240,000 to obtain the required permits; yet outlay of capital alone is insufficient to secure a vested right.[57] Rather, a property owner only acquires a vested right to complete a project when "substantial work is performed and obligations are assumed in reliance on a permit legally issued."[58] Here, the gravel company made efforts and expenditures with the mere hope of receiving a DEC permit, despite its knowledge of the restrictive zoning ordinance and the possibility that its mine would be fully precluded from operation.[59] The plaintiff failed to show that enforcement of the zoning law would be inequitable, despite its investment, and failed to show that it had acquired a vested right in reliance on a valid state permit.[60] In its holding, the Appellate Division, Third Department, reaffirmed the core principle of general municipal authority to regulate land use within its boundaries, upholding the zoning ordinance as a valid exercise of delegated land use powers, and stating that "[a] municipality retains general authority to regulate land use and to regulate or prohibit the use of land within its boundaries for mining operations, although it may not directly regulate the specifics of mining activities … [c]ontrol over permissible uses is a particular zoning area is merely incidental to a municipality's right to regulate land use within its boundaries."**[61]**

As recently as May of 2012, the Appellate Division, Third Judicial Department, reviewed the concept of vested rights with respect to natural resource extraction. Here, Cobleskill Stone Products sought to expand its mining operation to adjacent land, despite a recently-enacted

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[56] 263 A.D.2d 849, 851 (N.Y. App. Div. 1999).
[57] *Id* at 851.
[58] *Id*, quoting Matter of Lefrak Forest Hills Corp. v. Galvin, 40 A.D.2d 211, 218 (N.Y. 1973).
[59] *Id.*
[60] *Id* at 851 -52.
[61] *Id* at 850.

zoning law that banned mining in the area. While the Court recognized that existing quarrying activity could continue as a non-conforming use under a special use permit, after reflecting upon changing circumstances and concerns that may affect a community, the ruling made clear that no vested right exists to have zoning ordinances remain static, as long as the police power was rationally exercised for the well-being of the municipality.[62] Where actual extraction of resources has yet to begin, there is no vested right. Clearly the same principle must be upheld with respect to oil and gas extraction in the Town of Dryden.

In a similar case, Glacial Aggregates LLC, a sand and gravel mining company, spent approximately $500,000 in applying for of a valid DEC mining permit. When a subsequent local zoning ordinance prohibited mining on the parcel that Glacial Aggregates planned to mine, the company alleged a substantive due process violation and sought a non-conforming use designation to begin to operate the mine as a vested right. In its analysis, the Court of Appeals affirmed that a property owner obtains a vested right only "pursuant to a legally issued permit" and through "substantial changes and incurring substantial expenses to further the development."[63] Importantly, the two elements of this test must both be satisfied to validate a vested right for a non-conforming use, with the Court emphasizing that "neither the issuance of a permit nor the landowner's substantial improvements and expenditures, standing alone, will establish the right."[64] The subjective element of expenditures is satisfied only when "[t]he landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless."[65] Applying this test to Norse Energy and the Town of Dryden zoning ordinance, clearly no vested right to drill for

[62] Cobleskill Stone Prod. v. Town of Schoharie, 2012 WL 1948307 (NYAD 3 Dept. 5/31/2012).
[63] *Id* at 136, quoting Town of Orangetown v. Magee, 88 NY2d 41, 47 (N.Y. 1996).
[64] *Id.*
[65] *Id.*

natural gas exists. No valid permit has been issued, and Norse has made no substantial improvements or expenditures to further development.

Addressing property rights deprivation and expenditures, the Court of Appeals notes that "[e]very zoning regulation, because it affects property already owned by individuals at the time of its enactment, effects some curtailment of 'vested' rights, either by restricting prospective uses or by prohibiting the continuation of existing uses."[66] Yet the court finds that in determining if a property interest faces undue deprivation by any particular zoning ordinance, a zoning restriction "almost always imposes substantial loss and hardship" when it prohibits an existing property use, incurring "a loss much greater that that sustained by reason of a prospective use restriction only."[67] Using this balancing test to scrutinize property rights, the court makes clear that restriction of a potential future use of real property does not incur as severe an economic loss for the owner as limitation of an existing use. Accordingly, the lease expenditures of Norse Energy in reliance on the mere possibility of legalization of HVHF in New York State do not reach the threshold of detrimental hardship necessary to uphold a vested right claim in face of a zoning ordinance that curtails a prospective use.[68]

In New York State, accordingly, there can be no vested right to hydrofrack in lieu of a "permit legally issued." Simply, the process has not been authorized in New York, and despite expenditures on lease agreements and regional operations, these activities are undertaken with

[66] People v. Miller, 304 N.Y. 105, 108 (N.Y. 1952).
[67] *Id.*
[68] The Appellant, a sophisticated oil and gas company which understands the nature of business risks, willingly and knowingly acquired leasehold agreements with landowners in Dryden with the full understanding that the procedure of HVHF had not been legalized in NY. Indeed, the predecessor in interest to Norse Energy, Anschutz Exploration Corp., has largely pulled out of New York, as record low natural gas prices have made drilling non-economic across much of the country. Note that existing conventional wells have been voluntarily shut down as well, a sure indication that low gas prices are to blame for the industry's lack of interest in drilling in New York.

only an expectation of a future permit. This precatory activity on behalf of the oil and gas industry does not secure a vested right to drill when faced with a prohibitive zoning ordinance.

CONCLUSION

For the reasons stated above, Assemblywoman Barbara Lifton urges that the Town of Dryden's zoning ordinance be upheld as a valid exercise of home rule police power.

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Albany, New York

Respectfully submitted,

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Jordan A. Lesser, Esq.
Attorney for Barbara Lifton, Assemblywoman
Amicus Curiae
New York State Assembly
555 Legislative Office Building
Albany, New York 12248-0001