It is impossible today to pick up the paper or listen to the news without reading or hearing the words “Marcellus Shale” or “high volume hydraulic fracturing.” In New York the debate has been whether to allow the process of horizontal high volume hydraulic fracturing (“hydrofracking”) for the extraction of natural gas from the Marcellus Shale formation. The process involves vertically drilling down to the shale, then horizontally through the shale and injecting millions of gallons of water, sand, and chemical additives (“fracking slick”) into the shale formation. This creates fissures in the shale that release natural gas. Currently, the New York Department of Environmental Conservation (DEC) is studying the impacts of hydrofracking on the environment through the State Environmental Quality Review (SEQR) process. Many states, including most recently Pennsylvania, have already approved the process and are experiencing its related effects. This article examines the local authority municipalities have to deal with hydrofracking, and specifically how municipalities can use that local authority to mitigate and remediate the effects of this activity.

I. INTRODUCTION

An essential component of the community planning process is ensuring the viability of a community after the economic boom of any type of development, including natural gas development. Municipalities must plan for the activities and impacts associated with pre-drilling, during drilling, and post-drilling. A mu-
municipality should strive to mitigate and remediate all impacts from hydrofracking that may affect its infrastructure, including but not limited to local roads that are impacted by heavy truck traffic. This can be done through land use controls such as comprehensive planning, laws of general applicability, road use regulations and agreements, and host community agreements.

The ability of local governments to use their zoning authority to enact local laws and ordinances addressing hydrofracking is under scrutiny, and some aspects of the uncertainty are currently making their way through the New York court system. At issue is the language of the Oil, Gas and Solution Mining Law, Environmental Conservation Law § 23-0303(2), and whether local governments are preempted from enacting laws that essentially ban hydrofracking within their jurisdiction. Two cases addressing this question were recently decided by trial courts, and in each case the court upheld the municipalities’ authority to enact local laws banning the use of land for hydrofracking. Both cases are expected to continue their way through the appeals process.

II. HYDROFRACKING MEETS THE MUNICIPAL HOME RULE AND STATE PREEMPTION

The question of first impression presented in Anschutz Exploration Corp. v. Town of Dryden\(^2\) and Cooperstown Holstein Corp. v. Town of Middlefield\(^3\) is whether a municipality can exercise its police powers to enact local zoning ordinances that ban the use of land for hydrofracking, given the wording of a provision in New York’s Environmental Conservation Law (ECL). Specifically, the plaintiffs claim that ECL § 23-0303(2) preempts a municipality from enacting such an ordinances. ECL § 23-0303(2) states:

The provisions of [Mineral Resources Article 23 of the ECL] 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.]

**PLAINTIFF’S PERSPECTIVE**

In *Dryden*, the plaintiff is an energy company with millions invested in gas leases within the town and has claimed economic injury as a result of the zoning ban. In *Middlefield*, the plaintiffs are landowners within the town who have leased their land and as such expect to collect natural gas royalties, which they will be denied if the drilling ban is upheld.

Plaintiffs in each case argue that the preemption language in ECL § 23-0303(2) is an express preemption of the local zoning powers. Plaintiffs point to certain New York statutory construction rules and assert that because the legislature has allowed for exceptions from the preemption language by allowing for the regulation of local roads and laws dealing with real property taxes, then in fact a local law essentially banning hydrofracking is preempted because the legislature could have made a similar exception for it but chose not to.

Additionally, the plaintiffs argue that implied preemption is evidenced by the legislative history of ECL § 23-0303(2), suggesting that the state sought to occupy the field of regulating oil, gas and solution mining. Affidavits were submitted in each case noting the legislative history of ECL § 23-0303(2). Plaintiffs allege the legislative history calls for a uniform regulation of oil and gas drilling within the state in an effort to maximize energy recovery and protect mineral owners, not a regulatory scheme left to municipalities.

Plaintiffs cite *Envirogas, Inc. v. Town of Kiantone*,\(^4\) In *Envirogas*, the Town of Kiantone had a local law requiring all oil and gas companies to post a $2,500 compliance bond and a $25 permit fee. The plaintiffs in that case sought to invalidate this requirement, arguing the preemptive nature of ECL § 23-0303(2). The court held that this type...
of local regulation was preempted because the requirements of the local law are “unique to oil and gas well drilling operations and do not apply to any other business or land use.” The local laws directly related to the regulation of the industry, and therefore were expressly preempted. It was clear that the state sought to regulate this specific area of the oil, gas, and solution mining industry because the DEC had promulgated regulations on the exact issue, bonding.

DEFENDANTS’ PERSPECTIVE

Defendants argue that ECL § 23-0303(2) does not preempt the right of a municipality to exercise its zoning power to protect the health, safety, and welfare of the community, consistent with New York’s Municipal Home Rule Law. Defendants note that a similar supersession clause in a different section of the ECL has been interpreted by the courts to not preempt local governments’ authority to enact zoning ordinances banning certain mining processes. In Frew Run Gravel Prods. v. Town of Carroll, the court interpreted preemption language in the Mined Land Reclamation Law (MLRL). In its original form, before the Frew Run decision prompted legislative amendments, this section of the MLRL stated, “[f]or the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry.”

In Frew Run, the Court of Appeals held that the Town of Carroll’s zoning law, which banned mining in certain districts of the town, was of general applicability and was enacted for the purpose of “regulating the location, construction and use of buildings, structures, and the use of land in the Town of Carroll.” The Frew Run court stated that the ban regulated the use of land, and in doing so incidentally impacted the mining industry, and did not directly regulate the industry. The defendants in Dryden and Middlefield affirm that this type of incidental regulation is not the type of regulation that is preempted by the similar ECL § 23-0303(2).

Defendants assert that there is no mention of preemption in the legislative history of the bill. Defendants contest the legislative history affidavits presented by the plaintiffs as not persuasive or controlling because they were drafted in response to the litigation, and therefore do not express the intent of the legislature at the time the bill was enacted.

Defendants distinguish the Envirogas case by arguing that the local law enacted by the Town of Kiantone was a regulation of the industry and not a law of general applicability. Furthermore, preemption was obvious in Envirogas because the DEC had bonding regulations already in place.

The Dryden and Middlefield cases were both filed in September 2011. Dryden was filed in Tompkins County and Middlefield in Otsego County, both of which lie within the jurisdiction of the Third Department of the Appellate Division. In each case the Supreme Court upheld the municipal power to ban the use of land for hydrofracking.

THE ANSCHUTZ EXPLORATION CORP. V. TOWN OF DRYDEN DECISION

The Dryden court relied on the Court of Appeal’s decision in Frew Run, and stated that ECL § 23-0303(2) and MLRL § 23-2703(2) (the statute interpreted in Frew Run) are nearly identical, and therefore

[inasmuch as both statutes preempt only local regulations “relating” to the applicable industry, they must be afforded the same plain meaning—that they do not expressly preempt local regulation of land use, but only regulations deal with operations. [Citation omitted.] Neither supersede clause contains a clear expression of legislative intent to preempt local control over land use and zoning.]

In essence, the court held that local governments are not preempted by ECL § 23-0303(2) from enacting land use laws that ban the process of hydrofracking, because such a law does not relate to the regulation of the oil, gas and solution mining industry, but rather to the local government’s authority to enact land use and zoning laws, which may incidentally affect the industry.

Regarding the statutory construction of the exception for local roads, the court stated that the exception proves that land use laws are not preempted. The court explained that the proper interpretation of the local-road exception is that ECL § 23-0303(2) sought only to preempt local laws that relate to oil, gas and solution mining operations (identified as local laws relating to the “how” drilling should occur, not “where”). The court stated:

Regulation of local roads to restrict or regulate heavy truck traffic, or to require repair of damage caused by such traffic, would plainly relate to operation of gas wells by directly affecting access to well site or other areas of operation and by imposing additional burdens and costs. Accordingly, because regulation of local roads affects operations, the fact that the supersede clause contains the exception for jurisdiction over local roads does not support
the conclusion that the Legislature intended to preempt local zoning power not directly concerned with regulation of operations.\textsuperscript{13}

Following this logic, local roads are excepted from preemption because they deal with the direct regulation of oil and gas wells, and if not carved out of the preemption language, would result in a land use control device taken away from local governments, an unintended result. Therefore, because zoning laws do not relate to the actual operation of wells (the “how,” for instance, the regulation of roads), but instead relates to the land use scheme of the town (the “where”), they are not preempted by ECL § 23-0303(2).

The court did not find any legislative history showing intent to maximize the recovery of oil and gas, regardless of other considerations, or that the law preempted local zoning.\textsuperscript{14} The court was unable to identify any provision within the Oil, Gas and Solution Mining Law (OGSML) that sought to regulate land use concerns (e.g., noise, traffic, community character, industrial development), which are traditionally left to the locality. Instead, the provisions of the OGSML all concern the technical operation of oil and gas drilling to ensure efficient recovery and avoid waste, proving that the intent of the law is not to preempt local zoning.\textsuperscript{15}

While searching for a clear expression of legislative intent behind ECL § 23-0303(2), the court compared it to other New York laws, such as those concerning the siting of industrial hazardous waste facilities and community residential facilities. In each example the laws clearly expressed their intent to preempt local land use and zoning. The court held that such a clear expression could have been used in ECL § 23-0303(2), but was not.\textsuperscript{16}

In response to Plaintiff’s argument that a ban on the process of hydrofracking represents exclusionary zoning, the court relied on \textit{Germatt Asphalt Prods., Inc. v. Town of Sardimia}, which stated:

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.\textsuperscript{17}

The \textit{Dryden} court held that the OGSML “does not preempt a municipality’s authority—through the exercise of its zoning power—to completely ban operations related to oil and gas production within its borders.”\textsuperscript{18}

The court then examined relevant case law from Pennsylvania and Colorado. In Pennsylvania, prior to recent legislation preempting local government’s land use authority, the Pennsylvania Oil and Gas Act empowered local governments to enact zoning regulations, so long as they did not impose “conditions, requirements or limitations on the same features of oil and gas well operations regulated by [the Oil and Gas Act] or that accomplish the same purpose as set forth in [the Oil and Gas Act].”\textsuperscript{19} The Pennsylvania Supreme Court held that local zoning laws that ban the process of hydrofracking serve a different purpose than laws that are aimed at the efficient production of natural gas.\textsuperscript{20} Local zoning laws include land use and development ordinances that regulate “where” drilling can occur and not “how” drilling should occur.

The \textit{Dryden} court noted that in a case decided the same day, the Pennsylvania court invalidated local laws imposing permitting and bonding requirements because they were regulated under the state’s comprehensive act. The court noted that this Pennsylvania case draws similarities to \textit{Envirogas}.\textsuperscript{21} The court distinguished by stating that the bonding requirements in \textit{Envirogas} were held to be preempted by ECL § 23-0303(2) because they were a direct regulation of the industry (relating to the “how” drilling occurs) and preempted by DEC regulations already in place.

Lastly, the court did invalidate one section of the Town of Dryden’s ordinance. The last section of the ordinance states that “[n]o 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.”\textsuperscript{22} The court stated that:

While the Town may regulate the use of land within its borders—even to the extent of banning operations related to production of oil or gas—it has no authority to invalidate a permit lawfully issued by another governmental entity[.].\textsuperscript{23} Moreover, by purporting to invalidate permits that may be issued by any state agency—including DEC—this provision related directly to regulation of the oil and gas industries and, accordingly, is expressly preempted by the OGSML. Thus, it is invalid.\textsuperscript{23}

With that said, the court upheld the remainder of the ordinance.\textsuperscript{24}
THE COOPERSTOWN HOLSTEIN CORP. V. TOWN OF MIDDLEFIELD DECISION

The Middlefield court also upheld municipalities’ ability to enact zoning laws that effectively ban the use of land for hydrofracking. To reach this conclusion, the court conducted a comprehensive historical analysis of ECL § 23-0303(2) to dredge out the legislative history and intent of the bill. The court went back to the first provisions of the law, Article 3-A of the Conservation Laws of 1963, to find the “natural and most obvious sense” of the preemption language. The court then discussed the legislative history, including legislative memos from the 1978 and 1981 legislation amending § 23-0303(2). Through this lens the court determined the legislative intent 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.25

The court viewed this legislative intent in light of a dictionary definition of regulation, “an authoritative rule dealing with details or procedure.”26 This intent, coupled with the fact that the legislative history made no mention of local preemption, allowed the court to hold that “[t]he state maintains control over the ‘how’ of such procedures while the municipalities maintain control over the ‘where’ of such exploration.”27 There was a large emphasis on the legislative intent of the state to minimize waste when extracting natural resources. The corresponding definition of waste led the court to believe that the state sought to regulate the operations of drilling, making it as efficient as possible. The state’s interest can be harmonized with the municipal home rule power allowing local governments to determine “where” drilling can take place, but not “how” drilling operations should take place.

The court then discussed the precedent in Frew Run, which held that municipalities can exercise their home rule authority to “regulate land use generally.”28 To that end, the court cited Gernatt Asphalt Prods. v. Town of Sardina, holding that the supersession language in the MLRL was strictly meant to preempt local governments from regulating the method of mining and that “zoning ordinances are not the type of regulatory provisions 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.”29 In a footnote the court stated that Gernatt Asphalt “also stands for the proposition that a municipality may ban a particular activity, such as mining, in furtherance of its land use authority.”30

Lastly, the court analyzed other provisions in the OGSML. In line with the Dryden court, the Middlefield court found that all other provisions of the OGSML “demonstrate[] the state’s interest in regulating the activities, i.e. the manner and methods, of the industry.”31 Provisions in the OGSML include those concerning permit requirements, spacing for gas wells, depths of drilling, sizes for pools, compulsory integration, etc. The court found this to be evidence that the OGSML regulates the method of drilling operations and not land use.

Thomas West, an attorney for Anschutz, was quoted in the New York Times as saying that the company might appeal, or instead pursue a takings claim against the town.32

Local governments can adopt measures short of an outright ban on hydrofracking to control, mitigate, and remediate its negative effects.

III. EMPOWERING THE MUNICIPALITY: HOW CAN LOCAL GOVERNMENTS ZONE, PLAN, AND PREPARE FOR HYDRAULIC FRACTURING IN NEW YORK?

With the Dryden and Middlefield decisions issued in the lower courts, proposed state legislation circulating, and the DEC going through a review on proposed new regulations as well as on the process of hydrofracking, it is fair to conclude that the State of New York is in flux as to the policies that will regulate hydrofracking. In the meantime, local governments cannot afford to stand idly by, because they will be the first to feel the major impacts. Certainly, the local authority to ban the use of land for hydrofracking may change due to legislative action or judicial rulings. However, through other allowable land use controls, local governments can empower themselves to control, mitigate, and remediate the effects of hydrofracking.
A. COMPREHENSIVE PLAN AND LAWS OF GENERAL APPLICABILITY

To prepare for these impacts, local governments can enact or update already existing comprehensive plans and local laws of general applicability. These mechanisms do not necessarily place an outright ban on hydrofracking but still seek to protect the health, safety, and welfare of the community.

By updating the local comprehensive plan, a local government will ensure that the community considers the long-term goals and plans for heavy industry and natural gas drilling. Such a plan should include provisions for environmental effects, historical preservation areas, density, housing, economic development, recreation and open spaces, agriculture, mineral extraction, renewable energy, transportation, and tourism. This is important because the local comprehensive plan is the foundation for all future local laws that may be enacted.

The comprehensive plan and other local planning documents will play a significant role during the permitting process. The state’s draft Supplemental Generic Environmental Impact Statement (SGEIS) states that an applicant seeking a permit would be required to “identify whether the well pad is located in an area where the affected community had adopted a comprehensive plan or other local land use plan and whether the proposed action is inconsistent with such plans.” Thus, if hydrofracking is consistent with local planning documents, this permit requirement is satisfied. However, if the proposed drilling operations are found to be inconsistent, or the local government advises the DEC that the application is inconsistent, the applicant will have to produce additional information.

The additional information serves to help officials analyze whether significant environmental impacts, not covered in the SGEIS, will occur and what mitigation techniques should be employed.

Laws of general applicability that may be enacted include those concerning light, noise, dust and odor pollution, stormwater management regulations, wetland provisions, land use provisions concerning industrial uses, erosion control regulations, identification of Critical Environmental Areas, and tree cutting regulations. If enacted in a timely fashion, these laws will be considered during the permitting process. Local governments should be aware that any local law of general applicability that comes too close to directly regulating hydrofracking, such as noise or light pollution ordinances, may be preempted by ECL § 23-0303(2). Therefore, it is important to make ordinances non-discriminatory and generally applicable.

B. ROADS

Regardless of how the New York appellate courts decide Dryden and Middlefield, it is clear from the express language of the statute that the regulation of local roads is not preempted. Local roads can be significantly impacted by wear and tear from heavy trucks. Local governments will see an unprecedented increase in heavy truck traffic from hydrofracking, resulting in dust, noise, road damage, and community character concerns. Trucks will have to haul drilling equipment, mass amounts of water, and other materials through various municipalities to reach the drill site. It has been estimated that 77 tractor trailer loads are necessary to bring the equipment to one natural gas well site. Approximately 5.6 million gallons of water, and other additives, are used for each well, and delivery trucks may complete up to 1,340 truckloads per well site.

In New York, the Vehicle and Traffic Law (VTL) sets forth local governments’ authority to regulate local roads. Additionally, Road Use Agreements, which are private contracts between a developer and a municipality, allow local governments to step outside the bounds of traditional road use regulations to address concerns that arise from heavy truck traffic.

1. LOCAL ROAD USE REGULATIONS

Municipalities possess only the powers granted to them by the VTL to enact road use regulations. Municipalities must be based on necessity and enacted with a rational basis demonstrating their relation to the municipalities’ police power to protecting the health, safety and welfare of the community. In other words, “local restrictions generally are deemed reasonable only if they pertain to matters of public safety.”

Apart from regulating local traffic control signals, a municipality can establish haul routes for tractor-trailer trucks that weigh more than 10,000 pounds. Such a system would only permit these heavy trucks on haul routes prescribed by the local authority.

Alternatively, a local government has the ability to exclude trucks, commercials vehicles, tractors-trailer combinations, tractor-semitrailer combinations, or tractor-trailer-semitrailer combinations from designated highways. However, this exclusion cannot be construed to prevent the delivery or pickup of merchandise. A town, city, or village can exclude the above-mentioned trucks if they are “in excess of any designated weight, designated length, designated height, or eight feet in width, from high-
ways,” or may “set limits on hours of operations of such vehicles[].”50

Townes have the power to temporarily restrict any vehicle over the gross weight of four tons, or a vehicle with a gross weight over any designated weight limit on a wheel, axle, numerous axles, or per inch width of tire.51 Such a restriction is effective upon posting the limit on the affected roadway and publishing notice within the area.52 A hauler may file a written application for a permit, allowing it to use these prohibited roads, so long as the applicant is “performing essential local pickup or delivery service and . . . a failure to grant such a permit would create hardship.”53 The permit will include prescribed haul routes and any other restrictions or conditions deemed necessary.54

The VTL allows local governments to permit oversized vehicles.55 The local government or permitting authority has the power to include any permit provision it deems necessary including, but not limited to, designated trucking routes.56 However, a permit cannot cost more than ten dollars.57

2. FINANCIAL PERMIT REQUIREMENTS

It is common for a road use permit to require an applicant to post a bond, open an escrow account, or include certificates of deposit.58 Such a financial requirement demonstrates the financial capacity of the applicant and covers any repairs or maintenance needed to restore the road to its original documented condition.59 Likewise, it is not unusual to require a permitted hauler to make certain road repairs deemed necessary.60 It is important that financial requirements use an objective method to determine the amount required. This allows the local governments to enforce financial requirements without discrimination. For example, local governments can base the financial requirements on the number of hauls, time of year, or weight.61

Local governments must be careful when requiring the posting of financial bonds to cover road use impacts, because in New York some impact fees have been deemed invalid by the courts.62 In Albany Area Builder’s Association v. Town of Guilderland, the court invalidated a local transportation impact fee imposed by a town that mandated developers seeking a building permit to pay a transportation impact fee for the additional local expenses.63 The court held that the ability to assess transportation impact fees was preempted by Highway Law § 271.64

However, financial requirements in road use permits have not been invalidated by the courts. This follows the principle that local governments possess powers expressly granted to them, powers necessary to carry out their express powers, and those powers implied from the first two.65 For example, when the legislature grants local governments the power to regulate local roads, inherent in that power is a host of others, including creating a permitting system and charging fees in order to carry out the regulation.66

3. ROAD USE AGREEMENTS

Road Use Agreements (RUAs) are an alternative way to protect local roads, and are usually an element of a larger Host Community Agreement.67 RUAs are freely entered into mutual contracts between a developer and the host municipality.68 There is no legal requirement for a developer or gas driller to enter into a RUA, however, once entered into the agreement becomes enforceable.69 Developers and drillers will enter into RUAs to create a positive relationship between themselves and the host community. Furthermore, it opens up a line of communication between the parties that is otherwise absent. It is recommended by the DEC, in the draft SGEIS, that “operators” (natural gas drillers) reach RUAs with local authorities70 and file them with the DEC.71

RUAs are used to mitigate the impacts of proposed development where roads may be damaged from a high volume of heavy trucks. They allow municipalities to require the developer to pay fees, complete pre-development maintenance of roads, maintain and monitor roads during development, and remediate any post development road damage.72 An RUA can include haul routes and should be based on technical support provided by state or municipal engineering reports.73

4. BEST PRACTICES FOR ROAD USE REGULATIONS AND ROAD USE AGREEMENTS

A local government should complete a comprehensive traffic impact study. An impact study completed by an engineering firm will “assess the structural condition of roads, measure[e] response to loads, predict[] remaining life, and calculate[e] required strengthening.”74 Following a comprehensive study, the local government should document the current condition of local roads in manageable segments.75 Documentation should be in the form of video or photography to provide evidence of the pre-development road condition.76

When posting a restriction on truck size or weight, the local government must be careful not to incidentally exclude trucks that are common within
the municipality. For instance, many communities within the Marcellus Shale are rural, and as such rely on agriculture as a large part of their economy. If heavy trucks involved in hydrofracking are regulated or prohibited on local roads, many agricultural trucks will be incidentally affected.

In a report concerning draft road use regulations in Tompkins County, it was recommended that local governments be cautious when applying a single threshold weight limit, because the amount of weight and frequency a road can support changes seasonally. Therefore, to be effective, a single threshold must use the lowest common limit year round to make sure that the roads are protected when most vulnerable.  

C. HOST COMMUNITY AGREEMENTS

Host Community Agreements (HCAs) are contractual agreements that result from collaboration between developers, municipal officials, and the local community. HCAs can address the negative impacts on a host community that often arise from large-scale development. As with RUAs, there is no legal obligation for developers to enter into HCAs, but doing so may be in their best interest to gain community support for the project and bypass potential obstacles that may cause litigation and delay. Further, the HCA is a chance for the developer to improve public relations by showing that they are able to work with the local communities.

For municipal officials, HCAs ease the political pressures faced when deciding to approve a controversial project. When their constituencies accept the project through negotiating a HCA, the political pressure placed on the elected official to follow his or her constituency’s wishes is lifted and coordinated with the desire to encourage economic development.

The benefit of a HCA is most obvious to the community members. It is an opportunity for the community, and citizen groups, to negotiate for things outside of the realm of the traditional land use process, such as impact fees.

When applying HCAs to wind farm developments, Salkin and Spitzer note that the most common provisions include payment to the community relating to the impacts caused by the development. With wind farms, the amount paid for community impacts are dependent on the maximum wattage output. Similarly, with landfill development the impact payments are determined by the amount of waste. To avoid claims of discrimination, and facilitate evenhanded negotiating, it is a best practice to find an objective way to calculate HCA impact payments.

Aside from road use impacts, HCAs are capable of addressing many concerns, including pre-construction work to prepare the community’s infrastructure, maintenance and repairs during development, and remediating impacts post-construction. HCA provisions may also include how complaints are processed and resolved. Some examples include setting up a 24/7 complaint hotline, and the identification of mediation processes that can be employed for all disputes.

There is great potential for the use of HCAs between natural gas drillers and local communities. Due to the large amount of controversy and the polarized views of hyrdofracking, it is important for natural gas companies to gain a certain level of community acceptance. HCAs provide an opportunity for the drilling companies to address the needs and concerns of the community, and ensure that operations run smoothly. Likewise, they are a great opportunity for community members to manage their concerns in ways that land use controls and permitting cannot.

IV. CONCLUSION

With the fate of hydrofracking in New York in the hands of the legislature, the DEC, and the courts, it is important that local government officials and planners be prepared for any policy that is produced. Regardless of the outcome, municipalities must empower themselves to protect their community from the impacts of hydrofracking. Through updating the local comprehensive plans, updating and enacting laws of general applicability, preparing road use regulations and entering into road use agreements, and utilizing opportunities to negotiate host community agreements, local governments can best ensure successful natural gas extraction while protecting their community.

NOTES

2. Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458 (Sup 2012). [Editor’s note: This case was summarized in Volume 12, No. 5 of this newsletter.]
3. Cooperstown Holstein Corp. v. Town of Middlefield, 2012 WL 1068841 (N.Y. Sup 2012). [Editor’s note: This case is summarized in the “Recent Cases” section of this issue.]

5. Envirogas, supra n. 4, 112 Misc.2d at 434.

6. It is worth noting that after the Frew Run decision was handed down, the legislature amended the ECL provision to codify the court’s interpretation. “The amended supersession language expressly prohibited local laws relating to the extractive mining industry, but expressly excluded from its preemptive scope local zoning laws which determine permissible uses in zoning districts.” Michael E. Kenneally and Todd M. Mathes, Natural Gas Production and Municipal Home Rule in New York, N.Y. Zoning Law and Practice Report, Vol. 10 No. 4 (2010).


9. See Frew Run, supra n. 8, 71 N.Y.2d at 131.

10. See Frew Run, supra n. 8, 71 N.Y.2d at 131.


20. Huntley & Huntley, supra n. 19, 964 A.2d at 858.

21. Envirogas, supra n. 4 at 434.


25. Cooperstown Holstein Corp., supra n. 3.

26. Cooperstown Holstein Corp., supra n. 3.

27. Cooperstown Holstein Corp., supra n. 3.

28. Cooperstown Holstein Corp., supra n. 3.

29. Cooperstown Holstein Corp., supra n. 3 (citing Gernatt Asphalt Prods. v. Town of Sardina, 87 N.Y.2d 668, 681-682 (1996)).

30. Cooperstown Holstein Corp., supra n. 3.

31. Cooperstown Holstein Corp., supra n. 3.


33. N.Y Town Law § 272-a(3); N.Y. Village Law § 7-722(3); N.Y. Gen. City Law § 28-a(4).

34. N.Y Town Law § 272-a(11); N.Y. Village Law § 7-722(11); N.Y. Gen. City Law § 28-a(12).


36. NYS DEC Draft SGEIS, supra n. 35.

37. NYS DEC Draft SGEIS, supra n. 35.


42. N.Y Veh. & Traf. Law § 1604.

43. See People v. Grant, 306 N.Y. 258, 117 N.E.2d 542 (1954); see also Peconic Ave. Businessmen’s Ass’n v. Town of Brookhaven, 98 A.D.2d 772, 773, 469 N.Y.S.2d 483 (2d Dep’t 1983).


46. N.Y. Veh. & Traf. Law §§1660(a)(10), 1640(a)(10). An exception to this power is that this provision “shall not be construed to prevent the delivery or pickup of merchandise or other property along the highways from which such vehicles and combinations are otherwise excluded.”

47. N.Y. Veh. & Traf. Law §§1660(a)(10), 1640(a)(10).


49. N.Y. Veh. & Traf. Law §§1660(a)(17), 1640(a)(5).


52. N.Y. Veh. & Traf. Law § 1660(a)(11) (this exclusion remains in effect until the sign is removed at the direction of the town board); see Dibble v. Town of Ripley, 124 Misc. 2d 951, 478 N.Y.S.2d 751 (Sup 1984).


54. N.Y. Veh. & Traf. Law § 1660(a)(11).


56. N.Y. Veh. & Traf. Law §§385(15)(a), (d); Southern Tier East Regional Planning and Development Board, Technical Supplement Considerations for Protection of Town Highways 5 (2010).

59. Technical Supplement Considerations, supra n. 58.
60. See Technical Supplement Considerations, supra n. 58 (this document provides various model Road Use Regulations that mandate financial security in the road use permit).
64. Albany Area Bldrs., supra n. 62.
66. Host Community Agreements for Wind Farm Development, supra n. 63 at 4; City of Buffalo v. Stevenson, 207 N.Y. 258, 260-63, 100 N.E. 798 (1913).
67. Host Community Agreements for Wind Farm Development, supra n. 63 at 2.
68. Herrick on Impacts of Heavy Trucks, supra n. 61.
69. Randall on Protecting Local Roads, supra n. 41 at 6.
70. NYS DEC Draft SGEIS, supra n. 33 at 8-1-1-4.
71. NYS DEC Draft SGEIS, supra n. 33 at 7-109-7-111.
72. Host Community Agreements for Wind Farm Development, supra n. 65 at 3.
73. See Randall on Protecting Local Roads, supra n. 41 at 6; see also Herrick on Impacts of Heavy Trucks, supra n. 61 at 2.
74. Randall on Protecting Local Roads, supra n. 41 at 4.
75. Randall on Protecting Local Roads, supra n. 41 at 6.
76. Randall on Protecting Local Roads, supra n. 41 at 6.
77. Herrick on Impacts of Heavy Trucks, supra n. 41 at 4.
79. Host Community Agreements for Wind Farm Development, supra n. 65 at 2.
80. Nadler on Community Benefit Agreements, supra n. 78 at 590.
81. Nadler on Community Benefit Agreements, supra n. 78 at 590.
82. Nadler on Community Benefit Agreements, supra n. 78 at 591.
83. Nadler on Community Benefit Agreements, supra n. 78 at 591.
84. Nadler on Community Benefit Agreements, supra n. 78 at 591.
85. Host Community Agreements for Wind Farm Development, supra n. 65 at 2.
86. Host Community Agreements for Wind Farm Development, supra n. 65 at 2.
87. Host Community Agreements for Wind Farm Development, supra n. 65 at 2.
88. Host Community Agreements for Wind Farm Development, supra n. 65 at 3.
89. Host Community Agreements for Wind Farm Development, supra n. 65 at 3.
90. Host Community Agreements for Wind Farm Development, supra n. 65 at 3.

OF RELATED INTEREST

Discussion of matters related to the subject of the above article can be found in:
Salkin, American Law of Zoning § 18:55
Salkin, New York Zoning Law and Practice §§18:1 et seq.
Ziegler, Rathkopf’s The Law of Zoning and Planning § 77:5

RECENT CASES

SUPREME COURT, OSWEGO COUNTY, UPHOLDS TOWN’S BAN ON GAS AND OIL DRILLING.

In 2011, the Town of Middlefield enacted a zoning law which effectively banned oil and gas drilling within the township. The Cooperstown Holstein Corporation (CPC) sued for a declaration that the Town’s ban was void because it was preempted by § 23-0303(2) of the Environmental Conservation Law, which provides:

The provisions of this article shall supercede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supercede local government jurisdiction over local roads or the rights of local governments under the real property law.

CPC moved for summary judgment, while the Town moved for dismissal of CPC’s complaint. The Supreme Court, Oswego County, denied the motion for summary judgment and granted the Town’s motion for dismissal.
The court engaged in a lengthy examination of the legislative history of § 23-0303(2), and found no support for CPC’s claim that the supersession clause was intended to abrogate a municipality’s right to enact legislation pertaining to land use. The legislature’s intention in enacting § 23-0303(2), said the court, was to ensure adoption of statewide standards regarding the manner and method to be employed in drilling or mining, and to insure statewide oversight of uniformity with a view to maximizing utilization of resources and minimizing waste.

The state’s interest, continued the court, could clearly be harmonized with the home rule of local municipalities in their determination of where oil, gas and solution drilling or mining may occur. The court cited Frew Run Gravel Products, Inc. v. Town of Carroll, 71 N.Y.2d 126, 524 N.Y.S.2d 25, 518 N.E.2d 920 (1987) in support of its reasoning, noting that the supersession clause at issue in that case, that of the Mining Land Reclamation Law, was “strikingly similar” to that of the ECL, and yet was held not to preempt local land use legislation. The Town’s zoning law did not conflict with the state’s interest in establishing uniform policies and procedures for resource extraction, nor did it impede implementation of the state’s policy. Cooperstown Holstein Corp. v. Town of Middlefield, 2012 WL 1068841 (N.Y. Sup 2012).

This is the second Supreme Court decision to uphold a local ban on oil and gas drilling. See Anschütz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458 (Sup 2012).

### APPELLATE DIVISION, THIRD DEPARTMENT HOLDS THAT AMBIGUITY IN ZONING LAW REQUIRED TOWN TO PERMIT MINING IN AGRICULTURAL DISTRICT.

Subdivisions, Inc. applied to the Town of Sullivan for a special use permit seeking to mine minerals on an 80-acre parcel of land. Several years later, the Town’s Zoning Board of Appeals ruled that “mineral resource uses” were prohibited in agricultural districts under the Town’s zoning law, with or without a special use permit. Subdivisions brought an Article 78 proceeding to challenge that determination. Supreme Court dismissed the application.

On appeal, the Appellate Division, Third Department reversed. The Town argued that inasmuch as mineral resource uses were not listed in the zoning law as permitted uses in agricultural districts, it followed that such uses were prohibited in those districts. The court rejected this conclusion, noting that mineral resource uses were not listed as permissible uses anywhere in the zoning schedule. Therefore, literal application of the Town’s argument would lead to the conclusion that mining or quarrying operations were not permitted anywhere in the Town.

But this, the court continued, was plainly not the case, as evidenced by existing mining/quarrying operations within the Town. Moreover, the Town’s zoning law set forth standards of review to be employed in evaluating applications for special use permits for expressly delineated uses, including mineral resource uses, thus indicating that such uses were both permissible under and contemplated by the zoning law.

The Town’s zoning law, said the court, was so poorly written, with respect to identifying the zoning districts in which mineral resource uses were permitted, as to be ambiguous. Such ambiguity had to be resolved in favor of Subdivisions. The court concluded that the ZBA’s ruling was unreasonable and irrational, and annulled the ruling. The court further held that the Town’s Planning Board had the authority to issue special use permits for mining resource uses, although it did not hold that Subdivisions was entitled to such a permit, holding only that the Town’s Planning Board could and should review Subdivisions’ application on the merits and approve or deny it. Subdivisions, Inc. v. Town of Sullivan, 92 A.D.3d 1184, 938 N.Y.S.2d 682 (3d Dep’t 2012).

### APPELLATE DIVISION, FOURTH DEPARTMENT, STRIKES DOWN CONDITIONS IMPOSED ON SITE PLAN APPROVAL BECAUSE OF IDENTITY OF LANDOWNER.

Thad L. Kempisty owned two contiguous properties in the Town of Geddes. Michael Kempisty leased both properties. One property was a half-acre lot on which various family businesses were located, including a motor vehicle dealership and auto repair business. The other property, 1.13 acres in size, was undeveloped. Thad Kempisty had purchased the undeveloped lot with the intent to expand the family business by establishing a vehicle and equipment sales and repair facility thereon.

Kempisty submitted a site plan review application to the Town for his planned use of the undeveloped property. The Town ultimately approved the application, subject to 12 conditions. Condi-
tions three through eight imposed special conditions set forth in the Town Code for motor vehicle service, repair and sales facilities in areas where such uses were required by the zoning ordinances to have a special permit.

Kempisty brought an Article 78 proceeding to challenge the imposition of the conditions on the site plan approval. Supreme Court annulled two of the conditions, but denied further relief and left conditions three through eight in place.

On appeal, the Appellate Division, Fourth Department, modified the Supreme Court’s decision by striking down conditions three through eight. Although the Town Code permitted imposition of such conditions where a special permit was required to engage in the uses Kempisty intended to make of the property, Kempisty’s property was located in a district in which those uses were permitted uses upon site plan review. A special permit was not required. One of the town supervisors admitted as much in an affidavit submitted in the course of the litigation. In the same affidavit, the supervisor stated that conditions three through eight had been imposed in view of “the long and continuing history of non-compliance with Town Code provisions by Thad Kempisty.”

Thus, said the court, it was apparent that conditions three through eight had been imposed because of Kempisty’s alleged history of zoning violations and the acrimonious relations between him and the Town, rather than a need to minimize any adverse impact that might result from his intended use of the property. This ran afoul of the basic principle that conditions imposed on a site plan approval must relate only to the use of the property and not to the person who owns or occupies it. Kempisty v. Town of Geddes, 93 A.D.3d 1167, 940 N.Y.S.2d 381 (4th Dep’t 2012).

APPELLATE DIVISION, THIRD DEPARTMENT, NOTES THAT EMINENT DOMAIN PROCEDURE LAW DOES NOT REQUIRE GOVERNMENT TO OFFER COMPENSATION BEFORE INSTITUTING CONDEMNATION PROCEEDINGS, NOR TO NEGOTIATE IN GOOD FAITH BEFORE ACQUERING PROPERTY.

In 2005 the Village of Saranac Lake commenced proceedings pursuant to the Eminent Domain Procedure Law, seeking easements to access a sewer line that had discharged raw sewage into Lake Flower. The Village also sought immediate access to the properties. Supreme Court granted the Village immediate access and the repairs were made.

Litigation continued as to various matters, and the parties ultimately settled some issues. The Village moved for orders of condemnation and acquisition pursuant to the settlement agreement. Several landowners opposed the motion and cross-moved for, inter alia, costs, counsel fees and sanctions.

Supreme Court issued orders of condemnation, but determined that the Village had made misrepresentations to the court in its application for immediate access to the properties and had not complied with the offer and negotiation requirements of EDPL article 3. The court granted those parts of the cross motions seeking costs and counsel fees. The court reasoned that (1) EDPL 702(B) allows awards of counsel fees and costs if a court determines that the condemnor was not legally authorized to acquire the property; and (2) because it had not complied with EDPL article 3 and had made misrepresentations in its application for immediate access to the landowners’ properties, the Village was not legally authorized to acquire the easements, and thus the landowners were entitled to counsel fees and costs.

On appeal, the Appellate Division, Third Department, affirmed in part and reversed in part. The court noted that, contrary to Supreme Court’s findings, the record showed that the Village had satisfied the requirements of EDPL article 3 by extending written offers of compensation. Although Supreme Court faulted the Village for making the offers two months after the commencement of the instant case, the Appellate Division noted that the EDPL does not require that offers be made prior to the commencement of an eminent domain proceeding. The court went on to say that, contrary to Supreme Court’s finding, there is no requirement that a governmental entity plead or prove, as a prerequisite to the acquisition of property, that it negotiated in good faith with the owner. If a landowner believes an offer of compensation to be inadequate, his or her remedy is to seek additional compensation under EDPL article 5. In re Village of Saranac Lake, 939 N.Y.S.2d 654 (App. Div. 3d Dep’t 2012).