SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF TOMPKINS

ANSCHUTZ EXPLORATION CORPORATION,

Petitioner-Plaintiff,

For a Judgment Pursuant to Articles 78 and 3001 of the Civil Practice Law and Rules,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents-Defendants.

Index No. 2011-0902

RJI No. 2011-0499-M

Hon. Phillip R. Rumsey

RESPONDENTS-DEFENDANTS'
MEMORANDUM OF LAW

PRELIMINARY STATEMENT

The facts in this hybrid proceeding are undisputed. The procedural history of the Zoning Amendments are more fully set forth in the affidavit of Mary Ann Sumner filed with the Respondents-Defendants' motion for summary judgment.

The real issues in this case are whether, under the statutory authority found in the Statute of Local Governments and the Town Law, a town can prohibit the kinds of land use which are the subject of the Zoning Amendments and whether the language of ECL 23-0303(2) supersedes the power given to the town to regulate land use.

For reasons set forth herein, the Respondents-Defendants believe that a town may use its power to regulate land use and prohibit the kinds of activities involving the use of land which are the subject of the Zoning Amendments.

THE CPLR ARTICLE 78 PROCEEDING

The adoption of the Zoning Amendments was a legislative act. Matter of Durante v. Town of New Paltz, 90 A.D. 2d 866 (3d Dept 1982). A legislative act is evidenced by its general applicability, indefinite duration and formal adoption. Janiak v. Town of Greenville, 203 A.D. 2d 329 (2d Dept 1994). A challenge to a legislative act may not be maintained in a CPLR Article 78 proceeding. Matter of Frontier Insurance Company v. Town Board of the Town of Thompson, 252 A.D. 2d 928 (3d Dept 1998), East Suffolk Development Corp. v. Town Board of the Town of Riverhead, 59 A.D. 3d 661 (2d Dept 2009) and Kamhi v. Town of Yorktown, 141 A.D. 2d 607 (2d Dept 1988), affd 74 N.Y. 2d 423 (1989).

Since this hybrid proceeding is also a declaratory judgment action, that part of the Verified Petition and Complaint which seeks relief pursuant to CPLR Article 78 should be dismissed since the Court can grant full relief to the parties in the context of the action for a declaratory judgment (See CPLR 3001).

THE PRESUMPTION OF VALIDITY

The adoption of a zoning ordinance by a town and the adoption of amendments to the zoning ordinance are legislative acts, Matter of Durante, 90 A.D. 2d 866, 867. As such, they are cloaked with a presumption of constitutional legitimacy, and a party challenging a particular provision bears a heavy burden of proof, McGowan v. Cohalan, 41 N.Y. 2d 434, 436 (1977) (internal citations omitted), and as legislative acts, zoning ordinances (and amendments) are invested with an exceedingly strong presumption of constitutionality, rebuttable only upon a demonstration of unconstitutionality beyond a reasonable doubt. See Marcus Associates, Inc. v.

Town of Huntington, 45 N.Y. 2d 501, 505 (1978), Town of Huntington v. Park Shore Country Day Camp of Dix Hills, Inc., 47 N.Y. 2d 61, 65 (1979), and Matter of Durante, 90 A.D. 2d 866, 867 citing Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y. 2d 338, 344 and cases cited therein. The party who attacks a zoning ordinance has a heavy burden of showing that the regulation assailed is not justified under the police power of the state by any reasonable interpretation of the facts, Shepard v. Village of Skaneateles, 300 N.Y. 115, 118 (1949) and Rodgers v. Village of Tarrytown, 302 N.Y. 115 (1951).

If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control, Shepard, 300 N.Y. at 118 and Rodgers, 302 N.Y. at 121 both citing Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926). That is precisely this case, where a local decision determining that certain heavy industrial outdoor factories are a prohibited use of land should not be disturbed.

Respondents-Defendants respectfully suggest to the Court that the Petitioner-Plaintiff has not met its heavy burden to rebut the strong presumption of constitutional validity.

Petitioner-Plaintiff claims that through either the concepts of express preemption or conflict preemption that the Zoning Amendments are invalid, unlawful and unenforceable.

THE EXPRESS PREEMPTION CLAIM

Petitioner-Plaintiff relies on the following language of ECL 23-0303(2) in its claim that there is express preemption:

> "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."

This provision was part of Chapter 846 of the laws of 1981 (herein the 1981 Amendment).

The Court of Appeals was called upon to construe similar language contained in the Mined Land Reclamation Law [ECL 27-2703(2)] (MLRL). In Frew Run Gravel Products, Inc. v. Town of Carroll, 71 N.Y. 2d 126 (1987) the language before the Court was:

> "For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements that those found herein."

In Frew Run Gravel the Court decided the proper construction of the quoted statutory provision by looking to the plain meaning of the phrase "relating to the extractive mining industry," the relevant legislative history, and to the underlying purposes of the supersession clause as part of the statutory scheme, Frew Run Gravel, 71 N.Y. 2d at 131.

The Court could not interpret the phrase "local laws relating to the extractive mining industry" as including the Town's zoning ordinance. The Court held that the zoning ordinance related not to the extractive mining industry but to an entirely different subject matter and purpose: regulating the use of land. Frew Run Gravel, 71 N.Y. 2d at 131.

Accordingly, by its express and similar language ECL 23-0303(2) should be interpreted as superseding only those local laws or ordinances "relating to the regulation" of the oil and gas industry.

This construction finds support in the legislative history contained in the bill jacket. There is only one sentence of 23 words regarding the preemption issue and that is found in the Budget Report on Bills (see Perkins affidavit and bill jacket attached). The 1981 Amendment supersession language and the bill jacket cannot be said to contain a clear and manifest

legislative intent to supersede the zoning power of the town. In the absence of a clear expression of legislative intent to preempt local control over land use, the supersession language should not be read as preempting local zoning authority, Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y. 2d 668 (1996), Frew Run Gravel, 71 N.Y. 2d at 133.

The last area of inquiry – the underlying purposes of the supersession clause as part of the statutory scheme – also leads to the conclusion that the Zoning Amendments do not relate to the actual operation and process of oil and natural gas exploration and extraction, and therefore do not frustrate the standardization of state regulations pertaining to the oil and gas industry. See Frew Run Gravel, 71 N.Y. 2d at 133.

Matter of Envirogas, Inc. v. Town of Kiantone, 112 Misc. 2d 432 [Sup Ct Erie Co (1982)], affd 89 A.D. 2d 1056 (4th Dept 1982), mot lv to appeal den 58 N.Y. 2d 602 (1982) is easily distinguishable. That case was decided after the 1981 Amendment and before Frew Run Gravel, and involved a town zoning ordinance requirement of a compliance bond and a permit fee before an oil or gas well could be constructed. Both of those items were also required by state regulations. The present Zoning Amendments only relate to the issue of land use, and do not address applications, permits, bonds or technical requirements which were locally imposed as in Matter of Envirogas, Inc. The holding in that case also relates to inconsistent local legislation and "any municipal law which purports to regulate gas and oil well drilling operations" Envirogas, 112 Misc. 2d 432, 434 (emphasis added).

The MLRL supersession clause before the Court in Frew Run Gravel [ECL 23-0303(2)] had an exception to the express supersession language. The exception allowed local zoning ordinances to impose stricter mined land reclamation standards than found in the MLRL. Even though this was the only listed exception to the supersession language, the Court of Appeals, in looking at the plain meaning of the phrase "relating to the extractive mining industry," found that

the town could also regulate where the land use (mining activity) was permitted, Frew Run Gravel, 71 N.Y. 2d 126, 133.

Similarly, the 1981 Amendment [ECL 23-0303(2)] lists two exceptions: jurisdiction over local roads and local rights under the Real Property Tax Law. Following the reasoning and holdings of Frew Run Gravel and Gernatt Asphalt Products, Inc. it is apparent that there was and still is no clear ascertainable legislative intent to usurp the land use power given to towns in Statute of Local Government 10(6) and Town Law 261.

There is no inherent inconsistency in the Zoning Amendments and the state's regulation of the application process, the issuance of permits, the operation of oil and gas wells, and all the other attendant features of the regulatory scheme. Clearly, if the legislature had intended to expressly withdraw the zoning authority from local governments, it could have expressly done so in the 1981 Amendment. See Village of Nyack v. Daytop Village, Inc., 78 N.Y. 2d 500 (1991). As the Court held in Village of Nyack, and the same is true in the present case, having examined the statute, the legislative history, and the applicable regulations, one simply cannot conclude that the legislature intended the aspirational language of the declaration of policy to trump local efforts to regulate the location of facilities through application of zoning laws, Village of Nyack, 78 N.Y. 2d 500, 507.

ASCERTAINING LEGISLATIVE INTENT

In this matter the Court is asked to consider the affidavit of an industry consultant as to the intent of the legislature. For the reasons set forth below the court should give no consideration to this post-enactment statement made more than 30 years after the legislature adopted the 1981 Amendment to ECL 23-0303(2).

Where a statute is ambiguous, as in this matter, the intent of the legislature is to be ascertained by the Court. The Sovas affidavit contains the opinion of a former employee of the executive branch of state government as to the intent of the legislature in passing the 1981 Amendment. A post-enactment affidavit may not be consulted to ascertain the intent of the legislature even if the affidavit is by the bill's sponsor McKechnie v. Ortiz, 132 A.D. 2d 472, 475 (1st Dept 1987) citing Civil Service Employee's Association v. County of Oneida, 78 A.D. 3d 1004, 1005 (4th Dept 1980) lv app denied 53 N.Y. 2d 603 (1981). See also In the Matter of Delmar Box Co., Inc, 309 N.Y. 60 (1955). Clearly the Sovas affidavit cannot be read to ascertain the intent of the legislature.

Post-enactment statements are not considered part of the legislative process and are not entitled to consideration as legislative history. Matter of Lori C. 49 N.Y. 2d 161, 169 (1980)

The Bill Jacket is also of no help in ascertaining the intent of the legislature. (See Perkins affidavit.)

THE CONFLICT PREEMPTION CLAIM

Petitioner-Plaintiff has suggested that under the concept of conflict preemption the town is barred from exercising its statutorily given power to regulate land use in connection with oil and natural gas exploration and extraction. The intent to preempt must be clear and manifest. People v. Applied Card Systems, Inc., 11 N.Y. 3d 105, 113 (2008) cert. denied 129 S. Ct. 999 (2009). When dealing with an express preemption provision, it is unnecessary to consider the applicability of the doctrines of implied or conflict preemption. People v. Applied Card, 11 N.Y. 3d at 113, Frew Run Gravel, 71 N.Y. 2d 126, 131.

The Court of Appeals in Frew Run Gravel was also faced with resolving a preemption claim and a detailed legislative and administrative scheme regulating mining and reclamation of mined lands. The Court held that the supersession clause of ECL 23-2703(2) was an express supersession clause, Frew Run Gravel, 71 N.Y. 2d at 131. The supersession clause in ECL 23-0303(2) is no less an express supersession clause.

Respondents-Defendants assert there is no clear and manifest intent by the legislature to preempt the zoning power given to the town in Statute of Local Governments 10(6) and Town Law 261.

THE INCIDENTAL EFFECT

One of the most significant functions of a town is to enact and enforce local zoning regulations. The purpose of a zoning ordinance in establishing uses is to regulate land use generally. See DJL Restaurant Corp. v. City of New York, 96 N.Y. 2d 91, 96 (2001). By regulating land use, a zoning ordinance inevitably exerts an incidental control over any particular uses or businesses which may be allowed. DJL Restaurant Corp., 96 N.Y. 2d 91, 97 citing Frew Run Gravel and Gernatt Asphalt Products, Inc.. Separate levels of regulatory oversight can coexist, Village of Nyack, 78 N.Y. 2d 500, 507. State statutes do not necessarily preempt local laws having only "tangential" impact on the State's interests. Local laws of general application – which are aimed at legitimate concerns of a local government – will not be preempted if their enforcement only incidentally infringes on a preempted field. DJL Restaurant Corp., 96 N.Y. 2d 91, 97. Clearly that is the case here where a town, through its zoning power, after a deliberative process, determined that a particular use of land in the town should be prohibited. See Gernatt Asphalt Products, Inc., 87 N.Y. 2d 668, 683.

CONCLUSION

The Respondents-Defendants respectfully request that the Court dismiss that part of the Verified Petition and Complaint which seeks relief pursuant to CPLR Article 78, grant the Respondents-Defendants' motion for summary judgment and declare that the Amendments to the Zoning Ordinance are effective, valid and constitutional.

Respectfully submitted,

Mahlon R. Perkins, PC
Attorneys for Respondents-Defendants
11 South Street
P. O. Box 27
Dryden, NY 13053
(607) 844-9111