



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Digital Commons @ Touro Law  
Center**

---

Scholarly Works

Faculty Scholarship

---

2014

## **Land Use Law Update: The Court of Appeals Issues a Victory for Home Rule in Wallach v. Town of Dryden and Cooperstown Holstein Corp. v. Town of Middlefield**

Sarah Adams-Schoen  
sadams-schoen@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>

 Part of the [Land Use Law Commons](#)

---

### **Recommended Citation**

28 Mun. Law. 43

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

# Land Use Law Update: The Court of Appeals Issues a Victory for Home Rule in *Wallach v. Town of Dryden* and *Cooperstown Holstein Corp. v. Town of Middlefield*

By Maureen T. Liccione and Sarah Adams-Schoen

In the midst of the often heated controversy swirling around the issue of hydraulic fracturing (commonly referred to as “hydrofracking” and “fracking”), the Court of Appeals recently issued a straightforward ruling, which focused on long-established precedent concerning the right of municipalities to regulate mining land uses, rather than focusing on the contentious economic or environmental issues surrounding the fracking debate.



Maureen T. Liccione

*Wallach* and *Dryden* were two appeals brought on behalf of gas and oil interests that sought to overturn two Third Department rulings rejecting challenges to the upstate towns of Dryden’s and Middlefield’s zoning enactments, which banned fracking operations within their boundaries.<sup>1</sup> Appellants Norse Energy Corp. USA and Cooperstown Holstein Corporation asserted that the towns lacked the authority to proscribe fracking because the text of section 23-0303(2) of the Environmental Conservation Law (ECL), which is the supersession clause in the Oil, Gas and Solution Mining Law (OGSML), demonstrated that the state legislature intended to preempt local zoning laws that curtailed energy production.

On June 30, 2014, a 5-2 majority of the Court of Appeals affirmed the Third Department in a single opinion authored by Judge Graffeo. The majority applied Article IX of the State Constitution,<sup>2</sup> which is the “home rule” provision, the Municipal Home Rule Law,<sup>3</sup> and the Court’s holdings in *Frew Run Gravel Products v. Town of Carroll*<sup>4</sup> and *Matter of Gernatt Asphalt Products v. Town of Sardinia*<sup>5</sup> to arrive at the conclusion that “the Oil, Gas and Solution Mining Law (“OGSML”) does not preempt the home rule authority vested in municipalities to regulate land use.”<sup>6</sup>

New York State Constitution Article IX is the provision that grants local governments the authority to regulate land use and provides that “every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law...except to the extent that the legislature shall restrict the adoption of such local law.”<sup>7</sup>

According to the majority, the OGSML is not such a restriction on the adoption of zoning laws because it only supersedes “all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries” and not the designation of areas in which mining is either permitted or prohibited.<sup>8</sup> Since zoning does not regulate mining or the mining industry, but rather designates the *areas* where mining is permitted, the Court found that local zoning laws do not constitute regulation of the industry and are therefore not covered by the OGSML supersession clause.



Sarah Adams-Schoen

This language in the OGSML is virtually identical to language in the Mined Land Reclamation Law (MLRL) considered by the Court in *Frew Run* 25 years ago.<sup>9</sup> In *Frew Run*, the Court of Appeals held that the MLRL’s prohibition against “local laws relating to the extractive mining industry” did not preempt local zoning laws. The *Frew Run* Court had interpreted this language in conjunction with municipal home rule powers and concluded that “local laws that purported to regulate the ‘how’ of mining activities and operations were preempted whereas those limiting ‘where’ mining could take place were not.”<sup>10</sup> Thus, it would seem that the only path the Court could have taken to strike Dryden’s and Middlefield’s zoning laws would have been to overrule *Frew Run*.

In the authors’ opinion, the Court’s analysis conforms to traditional concepts of municipal zoning authority. Practically speaking, zoning laws have always regulated where businesses, such as retail stores, banking, and gas stations may be located, but not how they operate (e.g., hours of operation and labor policies).<sup>11</sup> No basis in law exists for treating zoning related to extractive mining processes differently.

What then of the Towns of Dryden’s and Middlefield’s absolute ban on mining via their zoning laws? Weren’t they regulation of mining?

Not according to the majority. While the local ordinance in *Frew Run* delineated the zoning districts in which mining was banned, the local law under consideration in *Gernatt*, the other case upon which

Judge Grafeo's opinion relied, eliminated mining as a permitted use anywhere in the town borders. In *Gernatt*, the Court of Appeals, relying on *Frew Run*, ruled that an absolute mining ban was a reasonable use of a town's police and zoning powers.<sup>12</sup>

Relying on *Gernatt*, Judge Grafeo upheld the two towns' actions:

Manifestly, Dryden and Middlefield engaged in a reasonable exercise of their zoning authority as contemplated in *Gernatt* when they adopted local laws clarifying that oil and gas extraction and production were not permissible uses in any zoning districts....

[T]here is no meaningful distinction between the zoning ordinance we upheld in *Gernatt*, which "eliminate[d] mining as a permitted use" in Sardinia, and the zoning laws here classifying oil and gas drilling as prohibited land uses in Dryden and Middlefield.<sup>13</sup>

The opinion was also careful to emphasize that it was passing no judgment on the merits of fracking and noted that "[t]hese appeals are not about whether hydrofracking is beneficial or detrimental to the economy, environment or energy needs of New York."<sup>14</sup> Rather, the Court explained, the appeals are concerned only with "the relationship between the State and its local government subdivisions, and their respective exercise of legislative power."<sup>15</sup>

Writing for the dissent, Judge Pigott took the view, in which Judge Smith concurred, that the zoning laws of "Dryden and Middlefield do more than just regulate land use, they regulate oil, gas, and solution mining industries under the pretext of zoning."<sup>16</sup> The dissent argued that the Dryden and Middlefield ordinances are distinguishable from the ordinances in *Frew Run* and *Gernatt*, because the Dryden and Middlefield ordinances apply to the entire municipality and do more than eliminate fracking as a permitted use by, for example, going into detail concerning prohibitions against gas storage, petroleum exploration, and production materials and equipment.<sup>17</sup>

Rejecting these arguments, the majority reaffirmed that "the regulation of land use through the adoption of zoning ordinances [is]...one of the core powers of local governance,"<sup>18</sup> noting that the Court has "repeatedly highlighted the breadth of a municipality's zoning powers 'to provide for the development of a balanced, cohesive community' in consideration of regional needs and requirements."<sup>19</sup> The majority explained that the Court does not "lightly presume preemption where the preeminent power of a locality to regulate

land use is at stake. Rather, [the Court] will invalidate a zoning law only where there is a 'clear expression of legislative intent to preempt local control over land use.'"<sup>20</sup> And here, following the analytical framework articulated in *Frew Run*, the Court reaffirmed that the OGSML did not contain a clear expression of legislative intent to preempt local control over land use.

## Endnotes

1. Mark S. Wallach, who is the Chapter 7 bankruptcy trustee for Norse Energy Corp. USA, was substituted as the petitioner in the case.
2. N.Y. Const., Art. IX, §2(c)(ii).
3. Municipal Home Rule Law §10(1)(ii)(a)(12).
4. 71 N.Y.2d 126, 524 N.Y.S.2d 25 (1987).
5. 87 N.Y.2d 668, 642 N.Y.S.2d 164 (1996).
6. *Matter of Wallach v. Town of Dryden*, No. 130, NYLJ 1202661419812, at \*1-2 (Ct. of App., Decided June 30, 2014).
7. *Id.* at \*7, citing N.Y. Const., Art. IX, §2(c)(ii).
8. ECL 23-0303(2).
9. See former ECL 23-2703(2).
10. *Wallach*, NYLJ 1202661419812, at \*12, citing *Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126, 131, 524 N.Y.S.2d 25, 27 (1987).
11. See, e.g., *St. Onge v. Donovan*, 71 N.Y.2d 507, 527 N.Y.S.2d 721 (1988); *Sunrise Check Cashing v. Town of Hempstead*, 20 N.Y.3d 481, 964 N.Y.S.2d 64 (2013).
12. *Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 684, 642 N.Y.S.2d 164, 174 (1996).
13. *Wallach*, NYLJ 1202661419812, at \*27 (citation omitted).
14. *Id.*
15. *Id.*
16. *Id.* at \*29 (Pigott, J., dissenting).
17. But see *id.* at \*29-31 (Pigott, J., dissenting).
18. *Id.* at \*8.
19. *Id.* (citations omitted).
20. *Id.* at \*9, citing *Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 682, 642 N.Y.S.2d 164, 172-73 (1996).

**Maureen T. Liccione is a partner of Jaspan Schlesinger LLP, practicing in the Municipal and Litigation Practice Groups. Prior to joining Jaspan Schlesinger LLP, Ms. Liccione served as an Assistant Corporation Counsel for the City of New York and as an attorney at another Long Island firm. She is a member of the Advisory Board of Touro Law Center's Land Use & Sustainable Development Law Institute.**

**Sarah J. Adams-Schoen is a Professor at Touro Law Center and Director of Touro Law's Land Use & Sustainable Development Law Institute. She is the author of the blog Touro Law Land Use (<http://toulawlanduse.wordpress.com>), which aims to foster greater understanding of local land use law, environmental law, and public policy. At Touro Law Center, she teaches, among other things, Environmental Law and Environmental Criminal Law.**