Danby Town Board
Minutes of Regular Meeting
June 6, 2011

Present:

Councilpersons: Leslie Connors, Kathy Halton, Dan Klein, Dylan Race

Excused:

Supervisor: Ric Dietrich

Others Present:

Town Clerk: Pamela Goddard
Bookkeeper: Laura Shawley
Public: Robert Roe, Steve Selin, Anne Klingensmith, Gay Garrison, Ted Crane, Eric Banford, Tony Serviente, Rick Lazarus, Heide and Ross Horowitz, Bob Chase, Don Barber, Bill Furniss, Kathie Berghorn, Jennifer Tiffany, Marie Terlizzi, Ben Altman, Randi Ingells, James Reagan, Frank Kruppa, Melinda Carlson, Matt McGill, Skott Freedman, Steve Jones, Ronda Roaring, Joel Gagnon, Susan Franklin, and others.

The Regular Meeting of the Danby Town Board was preceded by a Q&A session between members of the public, the Town Board, and the Town Attorney at 6:15pm.

Halton opened up the discussion with an update on the status of the Road Use Laws. The Board answered several questions from citizens, to the best of its ability. Questions included clarification about the purpose and power of Road Use Agreements, the status of a road assessment, differentiation between standard local traffic and large scale/industrial uses, and enforcement. Shawley, Assistant to the Highway Superintendent, added information about the Highway Department in relation to such Road Use Agreements.

Ben Altman gave a brief introduction to the proposed Aquifer Protection Ordinance. He described the process by which it has been drafted. It is based on the aquifer study previously undertaken as part of the Danby Comprehensive Plan. The study found that Danby's aquifers are shallow, thin, and unprotected in some areas. Two issues should be considered in Central Danby: quantity of water and contamination. The Ordinance is further based on a hierarchy of sensitivity, with suggestions regarding which areas need heavier protection. The draft is under review and revision. In Altman's view, there is no conflict between this ordinance and any potential ban on heavy industry. These measures have similar objectives and could support each other.

Attorney Guy Krogh arrived at 6:43 to answer questions. He gave a positive opinion of the Aquifer Protection Ordinance. Aquifer protection has a long enforcement history in NYS and is within the realm of permitted land use regulations at the Town level. He said that this particular ordinance was well directed. It only needs some due process "tweaking."

Krogh gave an overview of the background for the powers and limitations of zoning ordinances, particularly in relation to State and Federal preemption rights. Regulations can not take away substantial rights of property. All zoning has to balance the greater good of the community against individual rights. Seeking a variance is a right not a privilege. There was a question regarding neighborhood impacts after the granting of a variance. Harmony in the neighborhood is one of the standards which can be considered.

There was a question of state preemption in relation to aquifer protection and any possible ban on gas drilling. Guy described the proposed Aquifer Protection Ordinance as a, "Tool in a tool box." The more tools a municipality has, the better off it will be. One of the advantages of a permitting system is that it, "Puts your foot in the door relative to an environmental review." Krogh went on to describe

the challenges of state and federal preemption of zoning. He urged the Town to use as many defensible legal options as possible in order to uphold the desired goal. No one method may be totally effective.

When asked whether amplifying Home Rule provisions at the State level would change his response, Krogh stated that amplified Home Rule would change things substantially. He was particularly enthusiastic about the Home Rule bill sponsored by Lifton.

Krogh was asked whether he has any potential conflict of interest with respect to gas leases. Krogh stated that he has no financial interest in leases or oil/gas rights. He advises clients who are both in favor of and against leases. Krogh further talked about the importance he places on the ethics of impartiality. He stated that he makes an effort not to appear to be on one side or the other.

Krogh remarked that there is a wide range of municipal responses to the probable industrialization of the rural countryside. In Krogh's opinion, doing nothing was the second worst course of action. The worst is doing the wrong thing, e.g. something not well thought out. He thought that some ideas were good and some were problematic. More analysis needs to be done, particularly in regards extractive and solution mining. In relation to the question of law suits and the permitting process, Krogh stated that it was better to have ordinances in place prior to drilling permits being issued. The problem is, "What you ban with." A battery of issues need to be examined to see how close you can go without crossing the line.

Krogh was asked about his interactions with other municipal attorneys in Tompkins County. He stated that he has contacted other attorneys on these issues. He has not been part of the formal collaboration process, but has asked to, "Be at the table." They are working to get up to speed with each other.

Krogh was asked whether a municipal moratorium could be effective. His general conclusion is that it is near impossible, but possible. He spoke about the importance of taking steps to update the Comprehensive Plan and Zoning. A municipal moratorium to give time to update these things might be possible. Krogh spoke to the level of specificity which should be included in a Comprehensive Plan and Zoning. Prohibited activities should concrete and should be spelled out carefully. It is possible to differentiate between industries based on impacts but to ban an industry outright can be problematic. Krogh stated that, "If you do it right, you've got a shot."

Additional questions were asked about posting weight limits on roads, what the most useful next steps would be, class action suits, and further clarification of state pre-emption rights.

The Regular meeting of the Danby Town Board was opened at 7:45

Privilege of the Floor

Frank Kruppa introduced himself. He is the new Public Health Director for Tompkins County and a new resident of Danby.

James Reagan spoke about an incident at the Oasis Dance Club. In mid-May there was a disturbance by a large crowd of people at 2am. Reagan and Ingells, the next door neighbors, were very concerned and contacted the police over the incident. Reagan stated that things seem to be out of control, and that disturbances seem to be the worst in the 13 years that he and his partner have been living next door to the bar. Reagan said that he would like to go on record requesting that these problems be kept in mind should the Oasis approach the Town for a variance of any kind in the future.

Distribution of Attorney Comments

There was a short discussion to authorize the release of Attorney Guy Krogh's comments, to be distributed to the Town and Planning Boards. Krogh suggested that they be included in the meeting minutes, to facilitate communication.That memo is included as Appendix A of these minutes.

RESOLUTION NO. 60 OF 2011 - AUTHORIZE DISTRIBUTION OF ATTORNEY COMMENTS

Resolved, that that written comments from the Town Attorney shall be distributed to the Town and Planning Boards of the Town of Danby, and

Further Resolved, that those comments shall be included in the minutes of the June 6 Town Board meeting.

Moved by Halton, Second by Race. The motion passed.
In Favor: Connors, Halton, Klein, Race

Fun Day Parade

Goddard presented a resolution on behalf of Sue Beeners and the Danby Fun Day committee.

RESOLUTION NO. 61 OF 2011 - CLOSING OF NY STATE ROUTE 96B FOR PARADE ON JULY 9, 2011

Resolved, that the Town Board of the Town of Danby, in compliance with Section 1604, Paragraph 2, of the Vehicle and Traffic Law, which authorizes a Town to close a road for a parade, is officially closing New York State Route 96B on Saturday July 9, 2011 from 10:30am to 11:55am, from the intersection of East Miller and West Miller Roads to the intersection of Bald Hill Road; and it is

Further Resolved, that the Town Board approves the extension of this time period, from 10:15 am to 12:15pm, if the Danby Fire Department deems such extension necessary to facilitate the safe movement of the Parade participants; and it is

Further Resolved, that there will be a detour route from the West Miller Road intersection with Route 96B to Comfort Road, to Lieb Road, to the Bald Hill Road intersection with Route 96B.

Moved by Race, Second by Connors. The motion passed.
In Favor: Connors, Halton, Klein, Race

Highway Barn Insulation

Highway Department Assistant, Laura Shawley gave an update on the project to insulate the Town Highway Barn. Three quotes received - each in the $30,000 range. As they are under the $35,000 threshold, this project does not need to go out to bid. Shawley requested authorization to award the bid to Westbrook Enterprise. This company has done previous work for the Highway Department and is familiar with the structure.

RESOLUTION NO. 62 OF 2011 - AUTHORIZE BID FOR HIGHWAY BARN INSULATION

Resolved, that that the Town Board of the Town of Danby authorizes the award of a bid of up to $33,000 for highway barn insulation, to be expended out of the Fund Balance.

Moved by Halton, Second by Connors. The motion passed.
In Favor: Connors, Halton, Klein, Race

Land Use Laws

Dan Klein presented a resolution directing the Planning Board to investigate and draft laws related to protections against heavy industrial activity. There was discussion about the intent and wording of the resolution. There was a discussion about whether the Planning Board needed to be designated "lead agency" for this project. Krogh responded to the question, saying that any involved agency can be the lead agency. Lead agency should be the agency that is best positioned to evaluate environmental impacts. He supported the action proposed in the resolution as the best practice for reviewing related zoning ordinances. This should be the first step. In Krogh's opinion there was nothing to be lead agency on until there was an action to move on. This gives the Planning Board all of the authority it needs to review and draft laws for Town Board consideration. Krogh encouraged the Town and Planning Boards to coordinate environmental review at the appropriate time.

There was a discussion about the stipulation that the Planning Board seek unpaid legal advice. There was concern that this would limit the Planning Board efforts. It was agreed that if, or when, the PB has a question for the Town Attorney they can make a request through the Supervisor or Town

Board, as is the usual process. Other sources of free legal advice were discussed, including the Association of Towns, Pace University Municipal Law Center, the DEC, the Attorney General and others.

RESOLUTION NO. 63 OF 2011 - AUTHORIZATION TO UPDATE LAND USE LAWS

WHEREAS, the Town's current land use regulations were not specifically designed to address many of the deleterious impacts that are associated with high-impact industrial activity such as unconventional gas drilling; and

WHEREAS, other municipalities in our region are in the process of considering and evaluating the adoption of land use laws that would prohibit the imposition of burdens, costs, and negative impacts on citizens and property owners that would likely otherwise result from such heavy industrial land uses; and

WHEREAS, the Town Board of the Town of Danby is empowered under the New York State Constitution, the Municipal Home Law Rule, the Statute of Local Governments, and the Town Law to adopt local laws for the protection, safety, health, and well-being of persons and property within the Town, and to enact zoning regulations,

NOW THEREFORE, BE IT

RESOLVED, that the Town Board of the Town of Danby finds it appropriate and necessary to consider adopting land use laws that address the valid planning, zoning, aesthetic, and other community impacts that could otherwise result from such heavy industrial land uses; and

RESOLVED, that the Town Board of the Town of Danby finds it appropriate and necessary to consider adopting land use laws that would prohibit the imposition of burdens, costs, and negative impacts on citizens and property owners that would likely otherwise result from such heavy industrial land uses; and

RESOLVED, that the Town Board of the Town of Danby hereby authorizes the Planning Board of the Town of Danby to draft local laws, for consideration by the Town Board, that addresses land uses that would impose or threaten to impose significant adverse impacts upon the Danby community, including, without limitation, heavy truck traffic, noise, air, and water pollution, the use of significant amounts of groundwater, and the generation of significant amount of wastes; and

RESOLVED, the Town Board of the Town of Danby authorizes the Planning Board to consult with attorneys of the Planning Board's choosing, as it undertakes to draft these local laws for consideration by the Town Board (provided, however, that no such legal consultants shall bill the Town for their services in such regard); and

RESOLVED, the Town Board of the Town of Danby seeks input from its residents concerning the desirability of such heavy industrial land uses. Resident input will be given serious consideration prior to any final decision on the matter by the Town Board.

Moved by Connors, Second by Race. The motion passed.
In Favor: Connors, Halton, Klein, Race

Highway Report

Shawley gave a further report. An oil and stone surface will be applied to the Town Hall parking lot on June 16. This will be done for the same price as was agreed on for last year. Last year's work had not been completed.

There was a discussion of need for mowing equipment. At the current time, Danby needs to borrow equipment from another Town. The proposed equipment has a back and side flail mower and a front loader. The loader can be used as a back-up for filling the biomass boiler as well. There is over $100,000 in the highway equipment fund. The proposed mower/loader would cost approx. $80,000. The Highway Department is requesting authorization to go out to bid for this equipment.

There was a short discussion about the need to mow the sides of the road or not. A citizen had a concern about the current Town mowing policy. There was a counter concern about traffic safety and sight-lines. The Board asked for further information about mowing policies.

RESOLUTION NO. 64 OF 2011 - PERMISSION TO BID FOR MOWING EQUIPMENT

Resolved, that that the Town Board of the Town of Danby authorizes the the Danby Highway Department to send out requests for bids on mowing equipment.

Moved by Connors, Second by Halton. The motion passed.
In Favor: Connors, Halton, Klein, Race

Proposed Amendment to Comprehensive Plan

Klein submitted a draft amendment to the Comprehensive Plan to specifically address concerns about High Volume Hydrofracking for natural gas. It states how this process is incompatible with the Danby Comprehensive Plan. The amendment cites other aspects of the Comprehensive Plan, several studies, and polls of Danby Residents.

There was a discussion of where this might fit into the Comprehensive Plan. There was a suggestion that it might fit in section 2; Economic Growth. Material would need to be added to the appendix. There was an additional suggestion that feedback to the "Rapid Waters" State Forest Management Plan be included in this amendment.

Krogh clarified the process for incorporating an amendment. Two public hearings must be held. The process of amendment analysis should be referred to a "Comprehensive Plan Committee." This could be the Planning Board or another designated committee appointed by the Town Board. This process is governed by State Law Article 16 of the Town Law. This should not be persuasive, it should be a planning tool. Krogh agreed that the wording of this amendment should be specific.

There was preliminary discussion as to whether the Planning Board would take on the task of analyzing this proposed Comprehensive Plan Amendment and whether this should be done prior to drafting other local laws. Krogh advised that an amendment to the Comprehensive Plan should precede proposed zoning changes. Klein stated his understanding that it is possible to talk about specific industries in the Comprehensive Plan. Krogh stated that a Comprehensive Plan needs to balance the needs of the community and if a municipality wants to ban a specific activity it has to be done carefully and correctly.

Klein asked PB Chair for feedback about this process prior to the next Town Board meeting. Roe gave the opinion that industry is already banned in the Comprehensive Plan section 2. This specific industry is prohibited "by omission" in that heavy industry is prohibited in general. Krogh pointed out that this prohibition is based on some assumptions which may not hold up over time. Krogh stated that differentiating and defining aspects of heavy impacts from industry strengthen the Plan. A general ban on "Heavy Industry" may not hold up. Specific wording is needed for this.

Klein stated that this is a draft and is open to changes, modifications, and/or additions. Additional discussion will be held at the next Town Board meeting.

Oasis Incident

The Board held a discussion about the incident at the Oasis Club, as reported by James Reagan. No course of action is needed by the TB at this time. Members of the Board expressed sympathy with the situation.

Adjournment

The Meeting was adjourned at 8:49pm.

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Pamela S Goddard, Town Clerk

Danby Town Board
Minutes of Regular Meeting
June 6, 2011
APPENDIX I: Comments by Town Attorney

TOD Zoning Q&A & Overview of Unanswered Questions
Presentation on 6/6/11 @ 7pm @ Danby Town Hall
Guy K. Krogh, Esq.

PREEMPTION – This is NOT a simple issue, and NOT just applicable to the ECL. There are tow basic types of preemption, "express" and "implied," and both deserve attention and analyses.

Express Preemption – ECL 23-0303(2) – In solution mining the supersession language is rather direct:

> *"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."*

Note that the law does not say that you cannot interfere with "operations," but that you are superseded from enacting local laws that affect the "solution mining industries."

Contrast this with ECL § 23-2703(2) a declaration of supersession policy for extractive mining/mined lands reclamation laws:

> *"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:*
>
> *a. enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate mining and/or reclamation activities regulated by state statute, regulation, or permit; or*
>
> *b. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts. Where mining is designated a permissible use in a zoning district and allowed by special use permit, conditions placed on such special use permits shall be limited to the following:*
>
> *(i) ingress and egress to public thoroughfares controlled by the local government;*
>
> *(ii) routing of mineral transport vehicles on roads controlled by the local government;*
>
> *(iii) requirements and conditions as specified in the permit issued by the department under this title concerning setback from property boundaries and public thoroughfare rights-of-way natural or man-made barriers to restrict access, if required, dust control and hours of operation, when such requirements and conditions are established pursuant to subdivision three of section 23-2711 of this title;*
>
> *(iv) enforcement of reclamation requirements contained in mined land reclamation permits issued by the state; or*

c. enacting or enforcing local laws or ordinances regulating mining or the reclamation of mines not required to be permitted by the state.

3. No agency of this state shall consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draws its primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined."

These are very, very different clauses – one expressly allows for zoning and one seemingly not. Now note that the statutes use the terms "industry" and "activity" as separate things – 'activity" being basically a reference to operations. Both were amended, one in 1991, the other in 1981, and the Legislature chose different language for these separate activities. Also, the regulatory scheme underlying these different types of mining is also very different. This may lead you to understand that solution and extractive mining are governed by two very different bodies of law.

Now enter the *Envirogas* case (there were actually several *Envirogas* lawsuits arising within the same Town, in each case such Town being a defendant). This case not only recognized a valid exclusionary zoning theory of liability premised upon due process and equal protection, but also noted this direct language differential in these two laws and the underlying purpose of the legislative amendment of the solution mining preemption language:

Petitioner's business, like that of all gas producers operating within New York State, is governed by state statutes (ECL Article 23) and regulations (6 N.Y.C.R.R. § 550 et seq.), which are designed to protect the public, prevent waste and ensure a greater ultimate recovery of oil and gas. For each well it has drilled in Chautauqua County Petitioner has obtained a drilling permit from the Department of Energy Conservation (DEC) and has otherwise complied with all statutory and regulatory requirements. Respondents submit that the amendment to Article 23 does not apply to local areas of concern not specifically addressed by the ECL. They contend, in the alternative, that the permit and bond requirements of Section 4(q) are justified by the exception in the ordinance for "local government jurisdiction over local roads."

*The mere fact that a state regulates a certain area of business does not automatically pre-empt all local legislation which applies to that enterprise (Landfill v. Caledonia, 51 N.Y.2d 679, 683, 435 N.Y.S.2d 966, 417 N.E.2d 78). But where a state law expressly states that its purpose is to supersede all local ordinances then the local government is precluded from legislating on the same subject matter unless it has received "clear and explicit" authority to the contrary. (Robin v. Inc. Vil. of Hempstead, 30 N.Y.2d 347, 350-351, 334 N.Y.S.2d 129, 285 N.E.2d 285). This is so, as the Court of Appeals recently observed, because "the fount of the police power is the sovereign state, (and) such power can be exercised * * * only when and to the degree it has been delegated such lawmaking authority" (citations omitted) (People v. De Jesus, 54 N.Y.2d 465, 466 N.Y.S.2d 207, 430 N.E.2d 1260.*

*Prior to the recent Amendment of the ECL Article 23, local ordinances requiring commercial oil and gas drillers to post compliance bonds as a reasonable means of zoning enforcement were upheld (**Envirogas**, Inc. v. Town of Westfield, 82 A.D.2d 117, 442 N.Y.S.2d 290; see also Town Law, Section 268). But the policy and purpose behind the recent amendment is not left to the imagination. Since the amendment specifically states that it is to "supersede all local laws or ordinances," it pre-empts not only inconsistent local legislation, but also any municipal law which purports to regulate gas and oil well drilling operations, unless the law relates to local roads or real property taxes which are specifically excluded by the amendment.*

I note that the Court used the term "operations" and did not stick to the terms "activity" and "industry." This one word has been seized upon as the basis upon which to interpret this case and label it "inapplicable." I think this is a very stretched reading of this case, and of these laws, even though I ultimately hope it is an interpretation that is adopted. However, in law, I do not advise as to what I wish for; instead, I advise as to the current state of the law, and the options and risks attendant upon any choice a client so makes. However, and in truth, nobody has yet overcome the statement "not left to the imagination." This seems quite clear as to its meaning. So, while there is a basis to argue for a change in the law, that analysis needs to be fully examined. As well, since there is not "clear and explicit" authority to regulate solution mining through zoning, there needs to be advice and disclosure of cost and risks, particularly those associated with the lawsuits that may inevitably follow. If a zoning law will result in a lawsuit where damages are claimed in the millions and even winning will cost $100k, does this not warrant a more careful approach and some risk analysis?

Also, the whole theory that the changes in extractive mining law will be ultimately applied to solution mining is an old theory. It has not happened in the last 30 years, so why there is confidence that it will happen now is a bit disconcerting. This legal theory has been recycled six times in Upstate NY for 3 or 4 years now – most recently in the "Zoning Law and Practice Report." This Zoning report article, however, is the best analysis on point I have seen as it expressly recognizes two very salient points that were lacking from every prior analysis: (i) that there is precedent on point – the *Envirogas* cases; and (ii) there is a real difference between extractive mining (e.g., gravel) and solution mining (e.g., natural gas). I raised this distinction and Town Law § 130 as relevant to this question 3 years ago – others raised it last month.

Also, the question is not one of preemption generally – the question of preemption is a question that applies to the whole of a law, as well as to the specific provisions of a proposed regulatory scheme - literally, upon a clause by clause basis. Some cases uphold a law, but decree that a particular clause, system, fee, routine, etc., is preempted and thus unenforceable. See, *Town of Nassau* case. In fact, this case should be studied closely as it shows what is meant by "lawsuit." Here's an except of the procedural history of this zoning-mining case, and it is so complex that even the Judge resorts to footnotes to squeeze everything in:

> *Petitioner Henkel Realty owns a 214 acre parcel of property located in the Town of Nassau. The property is located in the Town's "rural residential" district, where, pursuant to the Town's Land Use Regulations (Local Law 2 for 1986), commercial* ***mining*** *is a permitted use allowable by special use permit and subject to* ***site plan*** *review. In February 2004, petitioner Troy Sand and Gravel submitted applications for a special use permit and* ***site plan*** *approval wherein it sought to establish a 90 acre greywacke quarry on the land owned by Henkel Realty.*
>
> *In September 2004, the Town adopted Local Law 3 of 2004, which imposed a one hundred eighty day moratorium on the acceptance and approval of commercial excavation applications. The Town Board extended the moratorium in January 2005 (Local Law 1 for 2005), July 2005 (Petitioner's Exhibit L), and January 2006 (Local Law 1 for 2006), which extended the moratorium through July 23, 2006. Notably, three days before the expiration of the final moratorium, respondents adopted Local Law 4 for 2006, which, in part, amended the Town's Land Use Regulations to prohibit all commercial excavation in the Town. In August 2006, petitioner Troy Sand and Gravel was notified that, pursuant to Local Law 4 for 2006, its February 2004 application for a special use permit and* ***site plan*** *approval had been rejected by the Town Board (Petitioner's Exhibit AA).*
>
> *In September 2006, petitioner commenced a combined declaratory judgment/Article 78 proceeding wherein it challenged the August 2006 rejection of the special use permit/****site plan*** *review applications which peti-*

tion was later amended to add a challenge to the adoption of Local Law 4 for 2006 (Troy Sand & Gravel Inc. v. Town Board of the Town of Nassau et. al., Rensselaer County Index No. 219221). A companion case was commenced challenging the adoption of Local Law 4 (Hanson et. al v. Town Board of the Town of Nassau, Supreme Court, Rensselaer County, Index 219634). By correspondence dated January 17, 2007 ("So Ordered" by this Court on January 19, 2007) petitioner confirmed the parties' request that this Court resolve, first, the issues raised with respect to the validity of Local Law 4 for 2006 prior to considering the remaining causes of action asserted in the petition. By Decision and Order dated August 31, 2007 and October 19, 2007, this Court determined that Local Law 4 for 2006 was invalid.

In the meantime, in May 2007, the New York State Department of Environmental Conservation issued a permit under the Mined Land Reclamation Law authorizing petitioner to undertake ***mining*** *activities on the Henkel parcel [FN1]. On October 5, 2007, also while the validity of Local Law 4, 2006 was in question, respondents passed a moratorium prohibiting, in part, submission and review of* ***mining*** *applications (Local Law 2 of 2007). Following this Court's October 19, 2007 decision and order concluding that the Local Law was invalid, by correspondence dated October 22, 2007 (Petition, Exhibit RR), petitioners requested that respondents continue to process the February 2004* ***site plan*** *approval and special use permit application in accordance with the Town's Land Use Regulations (Local Law 2 for 1986). Citing the October 2007 moratorium, respondents advised that it was prohibited from processing the applications as requested.*

> *FN1. In a separate proceeding, respondents have challenged the Department's issuance of the permit (Town of Nassau et. al. v. Grannis et. al., Albany Co. Index No. 7367-07).*

Sometime prior to September 2007, TSG began performing "certain activities" including tree removal, on the Henkel parcel. Believing such work to be "clearcutting" as defined by the Town's Land Use Regulations and thus, prohibited, the Town sought, by Order to Show Cause dated September 24, 2007 (Lynch J.), an Order pursuant to Town Law § 268 declaring that the activity was unlawful [FN2].On November 2, 2007, the Town's Code Enforcement Officer issued a "Notice of Violation/Stop Work Order" wherein it advised petitioner that the parcel was being "developed without the required approvals from the Town of Nassau ... in violation of the [Town's Land Use Regulations]" (Petitioner's Exhibit TT).

> *FN2. By Decision and Order dated November 16, 2007, this Court denied the application (Troy Sand and Gravel v. Town Board of the Town of Nassau and Planning Board of the Town of Nassau, Rensselaer County Index No. 219221)*

By Order to Show Cause dated November 15, 2007 (Lynch, J.), petitioner now seeks an Order enjoining enforcement of the November 2, 2007 Notice of Violation/Stop Work Order. Petitioner argues that (1) the Notice of Violation/Stop Work Order is illegal and unenforceable because "[a]ll" provisions of the Town's land use regulations "pertaining to ***mining****", specifically Articles V(E), VI(B)(3) and VI(F), are preempted by the New York State Mined Land Reclamation Law (Petition Paragraph 165, 169); (2) the Notice of Violation/Stop Work Order is illegal and unenforceable because it does not specify the activities that are in contravention of the Town's Land Use Regulations or identify the conditions under which the work may resume (¶¶ 182, 186, 188); and (3) that the Town's Land Use Regulations "in terms of requirement for Special Use Permit and/or* ***Site Plan*** *Review" are preempted and thus, illegal and unenforceable (¶ 193). Respondents counter (1) that the Local Law is not preempted, (2) that the issue is not ripe for review, and (3) that petitioners failed to exhaust their administrative remedies prior to seeking judicial review of the Notice of Violation/Stop Work Order.*

This occurs as preemption, and the related interplay of mining and zoning, are a complex issues. Despite this, I have yet to see anyone that has examined the actual scope of the state and federal preemption questions to see where that preemption line is, or may be, drawn. Knowing when and where you may be skirting the edges would seem a pretty basic question – really a starting point - but as of yet I have not seen this analysis performed.

IMPLIED PREEMPTION: Equally important and as recognized is the field of implied preemption (which the *Envirogas* cases make passing reference to). Basically, it can be summarized as indicated when either or both of the following rules are triggered:

1. A municipality may not adopt laws that are inconsistent with NYS or Federal laws, absent an express and written legislative delegation of authority to do so (an example is the Clean Air Act, which allows more stringent clean air regulations by the States and sets a minimum bar); and

2. Municipalities, even if *not* adopting an inconsistent law, may *not* adopt laws where the State legislature has established by declaration an important State policy (generally, but not always, it needs to be imbued with an important public purpose or necessary State power), *OR* where the State has enacted a detailed or comprehensive regulatory scheme in a particular field.

Since both NYS and the US Federal Government have expressly declared that the development of energy supplies and reserves, including natural gas, etc., are vital to both the economy and national security, and since NYS has extensively regulated in the field of oil, gas, and solution mining (the *list* of regulations is 3 pages long), I personally think it reasonable that the implied preemption question be researched and analyzed. Not everyone agrees (and quite inexplicably, some disagree rather vociferously). Sadly, the analyses so far presented either fail to address the issue of implied preemption, or gloss over it without performing a legal analysis thereof. This is particularly troubling as other states with this distinction between extractive and solution mining, and which have mining rules and public policy purposes very similar to those expressed in writing by NYS, have not allowed zoning to overwrite solution mining preemption laws (and even though they do allow zoning to exclude extractive mining).

TAKINGS: I am not sure that there is a "takings issue" if a zoning amendment is properly adopted and reasonably relates to the proper balancing of uses within the jurisdiction and the neighboring region. However, "takings" law is very squirrely when dealing with commercial or industrial claims that are juxtaposed against valid general zoning prohibitions. Thus, these claims often sift down towards secondary legal analyses, such as substantive due process or equal protection claims (a form of equitable fairness analysis), whether there is a constitutional right in play (such as the First Amendment, a right of association, etc.), and whether there is a vested interest in the use and/or bad faith by the municipality (referred to in the legal world as "special circumstances"). I raised these issues 3 years ago - others raised them last month.

When analyzing takings claims, you must look at more than just condemnation and takings claims. The Courts are now very active in expanding the scope of administrative takings, what is property for takings purposes, and there is a whole body of law under due process/equal protection analyses that are the takings claims applied to commercial and industrial uses. In point of fact, there are NYS cases recognizing substantive due process claims for gas drilling prohibitions and bans. I have yet to see this case or this issue raised or recognized in any takings or other analysis.

Further, “takings” are not related solely to land rights. “Takings” can apply to a battery of property rights, including rights in a permit. For example, and since it is foreseeable that a Court could hold that the level of cost

and investment incurred to obtaining a permit is so high that obtaining a permit is akin to a property right, you are better off dealing with this zoning issue before any permit issues. Some cases have already so held just this in the extractive mining industry, and this body of law logically follows from other permit issuance operations and cases, such as the cost that can be incurred to site a utility, the permit necessary for an airport, a liquor license, etc. While the general rule relative to obtaining a "vested right" (hence, a form of property right) relates to a significant "investment in the ground," certain permits take so long to get and are so expensive that the permit itself is, or becomes recognized as, a property right, and hence becomes protected.

Also, could not a landowner argue that you have taken something from their land that was of value? In perspective, leasing has hundreds of years of history in NYS, and the right to extract minerals from land is an essential right of the landowner – a "hereditament" of the land. Look at viable analogies - if the Town were to prohibit water wells (there is much "environmental" proof of how damaging it is to remove water from aquifers), or if the Town were to prohibit the use of land for grazing or parking (both arguably problematic from public health or environmental perspectives), would not there then arguably be a "taking" claim? Whether you win or lose, facing such a claim will be expensive so it is best to try to write around this problem in any proposed law.

Finally, what is needed is a serious analysis of the bundle of NYS property rights that attach to personal property, lands, and title to land. Summary conclusions are belied by the fact that a mineral estate is a separate and divisible estate in land in NYS, and therefore not *de minimus* right that can or should easily ignored or dismissed by a passing reference to the "rule of capture" (which, ironically, is largely based upon a fox hunting case from over 500 years ago).

EXCLUSIONARY ZONING – I have seen and heard blanket statements that exclusionary zoning only applies to housing and individuals. This is incorrect – it also does not recognize that exclusionary zoning analyses occur under legal terms other than "exclusionary" and "zoning." NYS Case law has recognized exclusionary zoning claims for zoning and zoning impacts/effects that excluded, prohibited, or even over-regulated, schools, theatres, bookstores, playhouses, mines, churches, graveyards, warehouses, and wharves. Exclusionary zoning, as a label, is not so simple either. In commercial and industrial cases the claim sounds in substantive due process and equal protection, and even in other Constitutionally-based claims. One key commercial case addressing exclusionary zoning claims for commercial operations and businesses was *Pittston Warehouse Corp. v. City of Rochester, 528 F. Supp 653*. There the City of Rochester, NY, tried to ban commercial cargo and containers, related trucking impacts, and commercial warehousing due to negative impacts upon residences; it all being based upon the standard public peace and weal zoning justifications. This "exclusionary zoning" case was lost by the municipality because the exclusionary zoning law impermissibly interfered with rights in interstate commerce. Now I query – do you think that the mining, transportation, sale, and use of natural gas might have implications in interstate commerce? The answer here is obvious – is it not? Now, let's query again – why has nobody really examined the problems that these hybrid exclusionary cases advise us about?

HOME RULE: I sure hope home rule provides some relief. However, "home rule" is, like all other municipal powers, derived from the State. It really does have limitations and I have yet to see any proposal that will work or any research that really addresses these legal issues and liabilities. Blanket statements like "you have home rule powers and they support and allow zoning" are simply unpersuasive. Anyone who understands the Constitutional interplay between the home rule references in NYS Constitution Article IX and the underlying grant of power from the sovereign, should understand that the MHRL was merely a codification of a recognized common law power of the municipality and that one of the purposes of the MHRL (and the Statute of Local Governments, for that matter), was to limit, not expand, the power of a municipality *vis a vis* the State. The whole of Article IX is about 5 pages long, and if true "home rule" was therein intended (for example, as does exist in Texas), there'd be no need for thousands of pages of Town, Village, City, County, General Municipal, Local

Finance, Public Officers, Executive, and many other laws, and even more regulations, describing and limiting the power of local governments. Just note too that the ECL is one of such laws.

Here's the problem I wrote about well over a year ago:

> *"Few integrate approaches in any meaningful fashion, and few recognize or reference other authorities supporting regulation in this area, such as Town Law §§ 64 and 130, or various provisions of the Highway Law (for example, the power to regulated town-owned property is rather plenary). As stated, I believe many of these different laws and bases of authority must be intertwined to try to support this type of regulation in the face of certain protected rights, constitutional and otherwise, such as the right to travel and the right to use public highways for commerce. Further, reliance upon multiple bases of authority may be the only way to succeed in the face of several preemption issues pertaining to mining and vehicular regulations at the state and federal levels."*

This leads to the topic of general zoning rules – have they really been examined yet? Has a multi-disciplinary approach been created or researched by any of those now researching in this area of the law?

GENERAL ZONING AND PLANNING – Sadly, there is no serious NYS analysis to date that I know of addressing general and specific powers of zoning in relation to solution mining. While many rely upon U.S. Supreme Court cases arising in other states, or memorandums written in Texas or Colorado, which have dissimilar laws (for example, Texas Home Rule Powers are significantly broader than in NYS), and so draw parallels and conclusions, these again are unpersuasive – or maybe just incomplete. A serious analysis of zoning law must recognize the dozens of U.S. Supreme Court (and other) cases that point out that zoning is the balancing of all interests in a community (and even it its surrounding regions) - residential, recreational, business, commercial, and industrial (etc.). If this basic tenant of zoning is to be disregarded by the favoring of some uses and the banning of others, then there is a very different body of case law that should be examined. To my knowledge, this has not yet been done.

The actual common law zoning standard is that the primary goal of zoning is to provide for the development of a balanced, cohesive community that will make efficient use of land in a manner as to balance the residential, commercial, and industrial needs of a community and its surrounding region; referred to by one Court as the need to "provide in an orderly fashion for actual public need for various types of residential, commercial and industrial structures." *See, Valley View Vil. v. Proffett, 221 F.2d 412 (federal citation); Berenson v. New Castle, 38 NY2d 102 (NYS citation)).*

You need to know that zoning is a limited power - it has legal boundaries. It is judicially deemed in derogation of the common law - that body of law that supports the battery of rights enshrined in both the NY and US Constitutions (here, principally property rights). Therefore, zoning must bear a reasonable and rational relationship to some valid public purpose, and because it is contrary to and impinges upon basic property rights, it is always narrowly construed and presumed suspect when it reaches too far from its valid underlying purpose, generally described as part of the government's "police power" (note further that the "police power" is, in itself, a further limiting concept as it points to the distinction between a legislative enactment and an administrative act).

I have no difficulty if Danby opts to adopt a well written and defensible zoning law to address this issue, just do it in a non-exclusionary manner that shows it is part of a process of Town-wide zoning and planning updates. It is best to first update your Comprehensive Plan as zoning enactments, without being in conformance with, or in furtherance of, a comprehensive plan, are and remain at risk of invalidation. When it comes to mining, the Comprehensive Plan should be specific, and specifically updated to address this new potential industry and modern industrial impacts. A comprehensive plan the merely recites an aversion to heavy industry, or proclaims

a love of farming, open spaces, and nature, particularly where that language is 2-50 years old, will not generally or successfully support a whole new battery of regulations arising mainly from an industry that was developed, literally invented, in the past 5 or so years (mainly, horizontal fracturing). Just be careful here!

SOME ISSUES HIDING IN THE WINGS – A PARTIAL LIST:

Other NYS and federal preemption issues;
Divisible load and heavy haul permitting;
ICC permits;
Rights in commerce relating to the rights of local delivery;
Constitutional and other rights to travel;
Rights and rights of use in public highways;
Property rights;
The Contract Clause of the NYS and Federal Constitutions;
The Commerce Clause of the NYS and Federal Constitutions;
Substantive and procedural due process concerns;
Equal Protection analyses;
Takings, condemnation, eminent domain and administrative takings law;
Etc.

CONCLUSION - In short, all the variations upon the zoning case law can be boiled down to a simple compound question - "does the regulation regulate the use and impacts upon the land, is it facially neutral, and is it fair." When zoning departs from regulating uses of and impacts to land, as opposed to the running or regulating of the business itself, then it is suspect. When zoning discriminates between businesses or uses that have equivalent land use impacts, it becomes suspect. When zoning is unfair, it becomes suspect. This is not that difficult a starting point for any analyses, but knowing this is the starting point does take some real experience in municipal and administrative law.

In short, I have some research, some knowledge, some experience in this field. I have not yet done comprehensive research yet and cannot answer all questions. To my knowledge nobody has, and those who have come closest, in my opinion, have been very cautious in their regulatory approaches.

I am here more to pose questions – to get you to think not only about how we can do this, but how we can do this better than everyone else and not be the target of the early lawsuits - those that will pick off the laws that are easy to beat - the “low hanging fruit.” I also want to educate about some of the risks and liabilities. For example, there appears to be a natural tension between the fiscal abilities and responsibilities of a town government and the need to do something in light of the upcoming potential industrialization of the countryside. While doing nothing is in my view unwise, it is not as unwise as doing something that is wrong (or unenforceable, or not well documented and researched).

Sure you can put a blindfold on, be spun about in a dark room, throw a dart, and maybe hit the dartboard; but with so much at stake it seems wiser to know what you can do, and to aim properly.