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Case Law Update
2012 Land Use Planning Cases

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Municipal Immunity To Zoning

- *Town of Fenton v. Town of Chenango, 91 A.D.3d 1246* (3rd Dept. 2012)

  FACTS: The Town of Chenango has a wastewater discharge pipe to the Chenango River, and the Town of Fenton (as well as the Town of Chenango) both take water from an aquifer. The river has become dry over the years because of diversion of water through river channels and the riverbed moved. The previous location for outflow at the river was not sufficient to carry the effluent. Fenton objected to Chenango's relocation of the discharge pipe closer to the aquifer, and attempted to subject Chenango's relocation of the discharge pipe to Fenton's aquifer protection local law. DEC granted Chenango a permit to discharge in the new site. Fenton eventually purchased the property on which the extended discharge pipe was placed.

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Law

- Municipalities are exempt from zoning when they are acting in their official capacity
- A balancing test of the following factors must be considered to determine the above:
  - the nature and scope of the instrumentality seeking immunity
  - the kind of function or land use involved
  - the extent of the public interest to be served thereby
  - the effect local land use regulation would have upon the enterprise concerned
  - the impact upon legitimate local interests
  - the applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, . . . alternative methods of providing the needed improvement[,]
  - intergovernmental participation in the project development process
  - an opportunity to be heard (citing *Matter of County of Monroe [City of Rochester]*, 72 N.Y.2d at 343)
  - * Realistically, one factor in the calculus could be more influential than another or may be so significant as to completely overshadow all others, but no element should be thought of as ritualistically required or controlling

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Arguments

Fenton's Arguments:

- Fenton owns the land and Chenango is trespassing
- Fenton's aquifer protection law is a health, safety and welfare law, not a zoning law

Chenango's Arguments:

- The River moved, therefore, the boundary of the two towns has moved, making the area where the discharge pipe is situated in the Town of Chenango
- DEC provided a permit for the discharge
- Chenango is acting in its capacity as a Town and is exempt from Fenton's local laws

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Decision

- Chenango wins
- These are co-equal municipalities feuding over uses that are important to both towns
- DEC allowed the discharge and post-construction testing failed to reveal any negative impact on the aquifer
- Fenton did not follow the proper procedure under ECL 15 to purchase the property as a buffer

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Preemption

- *Town of North Elba v. Grimditch, 98 A.D.3d 183 (3rd Dept. 2012)*

  FACTS: Mr. Grimditch built a boathouse in the waters of Lake Placid adjacent to his lakefront property. He and his children (who owned a property near his and also were building boathouses) were trying to beat regulations that were approved by the Adirondack Park Agency. He did not obtain a building permit from the Town of North Elba. The Town issued a stop work order. Mr. Grimditch claimed he did not need a building permit because the Navigation Law Section 30 preempts the Town's enforcement of the zoning code. Mr. Grimditch also claimed that a boathouse is not a building as defined by the State Building Code. The Supreme Court vacated all preliminary injunctions, Mr. Grimditch completed the boathouses and the parties moved for summary judgment, which Supreme Court granted, Mr. Grimditch, based on the *Higgins v. Douglas*, (304 A.D.2d 1051 (2003)). Town was sanctioned for bringing the case.

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Law

- Where the State holds title to land under navigable water in its sovereign capacity, its paramount authority “is not limited to regulation in the interest of navigation but extends to every form of regulation in the public interest”
- There used to be a distinction between tidal and non-tidal waters but it was determined to be impractical in New York because of the abundance of inland lakes and streams and, as a result, common law has developed such that the State owns the land under tidal waters
- The major inland lakes that have been judicially recognized as being owned by the State in its sovereign capacity include Lake George, Cayuga Lake, Oneida Lake, Keuka Lake and Canandaigua Lake
- The common-law meaning of “navigable waters” reflects the State’s sovereign ownership of the land under water, as opposed to the proprietary ownership as a riparian owner
- This should not be confused with the definition of navigable under the Navigation Law (the ability to support transportation)

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Analysis

- The Navigation Law does not preempt local zoning
- By its terms, the Navigation Law applies “to navigation and the use of navigable waters of the state”
- A review of the Navigation Law by the Court did not reveal any express provision conferring exclusive jurisdiction over every form of regulation to the State
- It is not the exclusive statute controlling the placement of docks and other similar structures in the navigable waters of the state, nor is it a permitting statute
- It is meant to give OGS the authority to ensure that structures are not placed in lakes that would interfere with “free and direct access” to the waters from another person’s property
- As a general rule, nontidal waters, with the exception of those that courts have deemed to be owned by the State in its sovereign capacity, are owned by the riparian owners
- Deeds show the land goes to the center of Lake Placid

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Decision

- Supreme Court is overturned
- Lake Placid, while governed by the Navigation Law, is not owned by the State so zoning applies
- Local zoning applies and so does the State Building Code
- What happens to the finished Boat House???

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Area Variances

- *Jonas v. Stackler, et al. 95 A.D.3d 1325 (2nd Dept. 2012)*

  FACTS: Due to a recusal and an absence, only 3 members of ZBA were left to vote on an application for an area variance to construct on property of less than 12 feet above sea level as required by the Village's zoning law (the property was near the ocean). No unanimous agreement could be reached by the ZBA, and the Court was called upon to review the "no" vote (application deemed denied where majority of quorum does not vote to approve application). Three other variances; for lot size, side yard and frontage, were approved. The property owner brought an action against the ZBA, claiming the "denial" was arbitrary and capricious because there was no rationale provided, Supreme Court agreed, annulling the ZBA determination.

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Law

- Local zoning boards have broad discretion in considering applications for area variances
- In reviewing the application for a variance, a zoning board is required to engage in a balancing test "weighing the benefit of the grant to the application against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted"
- The judicial function in reviewing such determination is limited and a reviewing court should refrain from substituting its own judgment for the judgment of the zoning board
- Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused discretion
- When a quorum of the board is present and participates in a vote on an application, a vote of less than a majority of the board is deemed denied

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Analysis

- The fact that no factual findings were provided or articulated does not preclude judicial review
- Where there are no findings, an examination of the entire record can provide a sufficient basis for determining whether the denial was arbitrary or capricious

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Decision

- Supreme Court overruled, ZBA decision stands
  - The ZBA conducted extensive hearings
  - Evidence on both sides was presented
  - Based on all the evidence, the ZBA made its decision
  - The Court will not substitute its judgment for the ZBAs

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Preemption - 2

Anshutz Exploration Corporation v. Town of Dryden, 940 N.Y.S.2d 458, Slip Op 22037 (4th Dept. 2012)

Facts: Town of Dryden, through its power to regulate land use, passed a local law to ban all activities related to the exploration for, and production or storage of, natural gas and petroleum. Petitioner owns gas leases covering one-third of the Town, which were obtained before the local law was passed.

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Law

- Dryden law prohibits exploration for, or extraction of, natural gas and/or petroleum
- Also, “no 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.”
- The Oil, Gas and Solution Mining Law (OGSML - ECL 23-0303[2]) states the following:
  - 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 governmental jurisdiction over local roads or the rights of local governments under the real property tax law.

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Law (continued)

- The Mined Land Reclamation Law (ECL Article 23, Title 27) has similar language and in the *Matter of Frew Run Gravel Prod. v. Town of Carroll* (71 N.Y.2d 126), the Court of Appeals ruled that there is a distinction between zoning ordinances and local ordinances that directly regulate mining activities. Zoning ordinances have the purpose of regulating land use. Even though there is an incidental effect of local land use laws upon the mining industry, zoning ordinances are not the type of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Act. "Nothing in the plain language, statutory scheme, or legislative purpose suggested that its reach was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of land."

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MLRL

- For the purpose stated herein, this title shall supersede all other state and local laws ***relating to the extracting 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 than those found herein

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Analysis

- Inasmuch as both statutes preempt only local regulations "relating" to the applicable industry, they must be afforded the same plan meaning - that they do not expressly preempt local regulation of land use, but only regulations dealing with operations
- The MLRL was amended in 1991 to codify *Frew*, and the amended language was construed by the Court of Appeals in *Matter of Gernatt* to permit a complete ban on mining activities within a municipality
- There is clear preemption language in other forms of state statutes, like ECL, Article 27, Title 11 [siting industrial hazardous waste facilities - "local municipalities may not require conformity with local zoning or land use laws and ordinances"] and Mental Hygiene Law Section 41.34 [siting community residential facilities - "a community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances"]

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Analysis (continued)

- Other statutes contain provision by which the traditional concerns of zoning are required to be considered by the state agency charged with issuing the permit
- OGSML does not require consideration of such factors prior to issuance of a well permit
- Therefore, local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place, while DEC regulates all technical operational matters

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Decision

- Dryden Law upheld, except,
  - “while the Town may regulate the use of land within its borders - even to the extent of banning operations related to the production of oil and natural gas - it has no authority to invalidate a permit lawfully issued by another governmental entity.”

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