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“Municipal Control Over Mining in New York”, by John W. Caffrey and Inga L. Fricke

Summary
This article by John W. Caffrey and Inga L. Fricke contains methods for using local land use regulations to control mining activities in communities. Communities may want to regulate mining because of noise, dust, heavy truck traffic, and visual impacts. Even though local regulations that directly regulate mining are preempted by New York’s Mined Land Reclamation Act (“MLRA”), communities still have several tools they can use to indirectly regulate mining. The article outlines the NY case law on mining and suggests many strategies municipalities can take: conditional zoning, land use restrictions, utilizing the SEQRA comment period, participation in the DEC permitting process, citizen suits, and regulation of smaller mines outside the scope of the MLRA.

Article
Municipal Control Over Mining in New York
By: John W. Caffry and Inga L. Fricke*

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INTRODUCTION

There are currently almost 2,500 mines with current operating permits in the State of New York, in nearly every county. The New York State Department of Environmental Conservation ("DEC") receives approximately 150 new mining permit applications each year, and approximately 500 permit renewal, modification and/or final reclamation inspection applications. According to DEC’s Mined Land database, the great majority of these mines are aggregate mines, either sand and gravel pits, or hard rock quarries producing crushed stone.
While mines can provide essential products, they can also create significant adverse impacts such as noise, dust, heavy truck traffic and visual impacts. Mines resulted in the loss of over 2000 acres of wetlands in New York from the mid-1980's to the mid-1990's. With so much mining activity occurring in so many different locations, it is not surprising that conflicts often arise between would-be miners and the communities in which they seek to locate their mines.

New York State law limits the extent to which municipalities may restrict or regulate mining operations proposed to be undertaken within their borders. Although municipalities may not directly regulate most mining operations and/or reclamation of mine sites, they do retain a significant measure of authority to exclude mines or control the location of mining through the enactment of local laws and ordinances, such as zoning ordinances, that incidentally affect mining projects. This article explores the extent of permissible local regulation of mining in New York.

1. **Overview of New York State Law and Major Court Rulings**

New York’s Mined Land Reclamation Law (“MLRL”), Environmental Conservation Law (“ECL”) Article 23, Title 27, governs virtually all extractive mining activity in the state, including hard rock quarries, sand and gravel pits, and topsoil stripping operations. The MLRL and its implementing regulations establish detailed rules governing the operation of mines throughout the state. These rules are meant to be the sole source of law governing the operation and reclamation of mines, and are specifically intended to supersede all other state and local laws directly regulating mining activity.
Not all laws impacting mines have been preempted by the MLRL, however. Each provision of each state or local law affecting mines must be individually evaluated to determine whether it remains valid and enforceable despite the MLRL’s preemptive language. Practically speaking, most zoning provisions that affect mining are not preempted, and may be fully enforced by municipalities. Many others may be only partially preempted.

In 1987, the Court of Appeals ruled in *Frew Run Gravel Products, Inc. v. Town of Carroll* that the MLRL does not supersede other laws that may have an incidental effect upon mining, such as zoning ordinances, if they have purposes other than the regulation of mining. This is so even if the "incidental" effect blocks the opening of a proposed mine.

In *Frew Run*, the prospective mine operator sought to locate its mine in a zoning district in which gravel mining operations were prohibited. The applicant argued that the preemptive language of the MLRL prohibited the municipality from applying its zoning ordinance in such a manner as to prevent the development of the proposed mine. The Court of Appeals disagreed, holding that because the zoning ordinance sought to regulate land use generally, and was not established specifically to regulate mining, it was not preempted by the MLRL. In arriving at this decision, the Court appeared to be reluctant to construe the MLRL as overriding the traditional land use controls which are the province of municipalities.

In 1991, the Legislature codified the *Frew Run* decision in amendments to the MLRL ("the 1991 Amendments"). The 1991 Amendments provided in part that the supersession clause of ECL § 23-2703(2) does not prevent local governments from:

1. 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
2. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts...; or
3. enacting or enforcing local laws or ordinances regulating mining or the reclamation of mines not required to be permitted by the state.\textsuperscript{xii}

In 1993, following the adoption of the 1991 Amendments, the Court of Appeals reaffirmed the \textit{Frew Run} holding in the case of \textit{Hunt Brothers, Inc. v. Glennon}.\textsuperscript{xiii} In \textit{Hunt Brothers}, the Court ruled that the MLRL did not supersede the Adirondack Park Agency’s land use planning powers under the Adirondack Park Agency Act.\textsuperscript{xiv} Declining to broaden the scope of the MLRL’s supersession clause, the Court held that "only those laws that deal 'with the actual operation and process of mining' are superceded."\textsuperscript{xv}

Accordingly, despite the fact that the MLRL’s preemption clause appears to give DEC the exclusive power to regulate the operation of mines,\textsuperscript{xvi} municipalities retain broad authority to enact zoning ordinances and other land use controls which regulate the location and certain off-site impacts of mines, including prohibiting mining entirely, either within designated zoning districts, or throughout the entire municipality. The extent and limitations of this authority are examined in greater detail below.

II. \textit{Zoning Ordinances Governing the Location of Mining Activity}

1. \textit{Permissible Regulation}

1. \textit{Prohibition Within Zones}

It is permissible for municipalities to dictate the location of mines by prohibiting mining
activity in certain zones and allowing it in others.\textsuperscript{xvii} For instance, mines may be banned in all zones except industrial zones or special resource extraction zones. Alternatively, they may be allowed in most zones, but expressly prohibited in residential or business zones.\textsuperscript{xviii} So long as the ordinance can be construed as a valid effort to control land use, rather than an attempt to control particular mining activities and procedures, the MLRL's preemptive provision has no impact on the local ordinance.

The \textit{Frew Run} decision, described above, was the first case to definitively affirm municipalities' right to use their zoning authority to dictate in which zones mines will be permitted or prohibited within their borders. The Legislature’s codification of this holding in the 1991 Amendments removed any lingering doubt as to municipalities' authority in this regard.

A number of cases have revisited the issue and reaffirmed this authority. In \textit{Preble Aggregate, Inc. v. Town of Preble},\textsuperscript{xix} for example, the Appellate Division, Third Department, upheld a local law which prohibited all mining in a particular zone:

A municipality retains general authority to regulate land use and to regulate or prohibit the use of land within its boundaries for mining operations, although it may not directly regulate the specifics of the mining activities or reclamation process. Control over permissible uses in a particular zoning area is merely incidental to a municipality's right to regulate land use within its boundaries.\textsuperscript{xx}

If the rezoning is an otherwise valid exercise of the municipality's lawful authority to govern land use within its borders, a zoning change which eliminates mining from certain districts is not preempted by the MLRL.\textsuperscript{xxi}

2. \textbf{Town-wide Prohibition}

\textit{Frew Run} made it clear that municipalities have the authority to create zoning ordinances
of general applicability that have an incidental effect on mining. However, the question still remained whether this authority to control land use within specified zones would be extended to permit municipalities to ban mining from within their borders altogether.

In 1992, the Fourth Department addressed this issue in the case of *Valley Realty Development Co. v. Town of Tully*. In that case, the Town rezoned the sole district which had permitted mining, effectively eliminating mining activity from its borders completely. The Fourth Department upheld the rezoning because it found a substantial relationship between the elimination of the sole mining district in the town and the municipality’s valid interest in protecting the public health, safety and general welfare.

Four years later, in 1996, the Court of Appeals confirmed the Fourth Department's holding in *Valley Realty*. In *Gernatt Asphalt Products v. Town of Sardinia*, the prospective mine operator applied for a permit to conduct mining operations on a new 400 acre site. Concerned about the impact that this newest mine would have on the community, the Town of Sardinia amended its existing zoning ordinance and eliminated mining as a permitted use throughout the town. The Court determined that neither the MLRL, the 1991 Amendments, the legislative history of those 1991 Amendments, nor the Court’s decision in *Frew Run*, limited a municipality's power to govern land use, even if that meant eliminating mining from within its borders entirely.

The *Gernatt* court found that municipalities are not obligated to permit the exploitation of all of their natural resources. So long as the exclusion is reasonable and is designed to protect the rights of residents and to promote the interests of the community as a whole, the rezoning will be upheld. There is nothing improper, according to the *Gernatt* decision, about a municipality's exclusion of industrial uses such as mining from its borders.
3. Conditional Zoning

A municipality may also establish a zoning ordinance which restricts mining activity solely to certain zones under one or more forms of conditional zoning. For example, a zoning ordinance may allow mines in only certain zones and only by special use permit or site plan review.

In the case of Town of Throop v. Leema Gravel Beds, Inc., for example, the Town brought suit to enjoin a mining operation that was being conducted in contravention of local laws which required the operator to obtain a zoning permit, as well as to undergo site plan review and approval. The operator argued that such conditional zoning provisions were preempted by the MLRL. The Appellate Division, Fourth Department, decided in the Town's favor, finding that the local laws at issue were "addressed to subject matter other than extractive mining and ... affect the extractive mining industry only in incidental ways," and were therefore not preempted.

A municipality may also enact ordinances requiring that mines meet certain specific criteria that apply generally to all land uses in that particular zone, such as compatibility with surrounding land uses or limitations on impacts to the environment. The ability of a local planning board or zoning board of appeals to deny permits to mines based upon these special criteria varies, depending upon the type of permit involved and the particular provisions of the zoning ordinance.

For example, in Schadow v. Wilson, the zoning ordinance at issue provided that a special use permit could be granted only upon a finding that a proposed land use was, inter alia, in harmony with the appropriate development of the adjacent neighborhood and served the public
convenience and welfare. Because these criteria were of general applicability, and were not
intended to only regulate the operation of extractive mining activities within the Town, the Court
held that they were not superseded by the MLRL, and could provide the basis for a denial of a
permit for a mine.

From the decision in Schadow it is apparent that issues such as traffic, pedestrian safety
and a mine’s potential effects upon property values may provide the factual basis for a
municipality's denial of a permit. Similarly, an "undue adverse impact" upon other resources
can be grounds for a denial, as can a determination that the proposed mine will have "a
significant adverse effect upon the environment."

It is also permissible for a municipality to have specific regulations affecting the location
of mines, such as those prohibiting mines within 500 feet of churches or residences, so long as
they do not regulate the operation of a properly sited mine. If the grounds for granting or
denying a special use permit are generally applicable to all permit applications, and are not
specific to mines and mining related activities, local governments are expressly permitted by
ECL § 23-2703(2)(b) to require applicants to obtain such a permit.

Once a municipality decides to issue a special use permit for a mine, the MLRL restricts
the conditions that can be placed on such a permit to the following:

0. ingress and egress to public thoroughfares controlled by the local government;

2. routing of mineral transport vehicles on roads controlled by the local government;

3. requirements and conditions as specified in the permit issued by [DEC] under [the MLRL] 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 [the MLRL]; and

4. enforcement of reclamation requirements contained in mined land reclamation permits issued by the state.**xxxviii**

However, under *Schadow*, these limitations do not apply when a municipality decides to deny the permit outright, as long as the considerations used in denying the permit are not unique to mining activity.**xxxix**

Presumably, in certain circumstances, limitations on mining operations outside of the four listed in ECL § 23-2703(2)(b) can also be enforced in certain cases after a special permit has been approved. If the permit application included certain operating parameters upon which the municipality relied in issuing its approval, such as the volume of materials to be extracted or the hours of operation, the municipality should be able to require that the mine be operated in conformance with those promised parameters, even if they are outside of the limits of ECL § 23-2703(2)(b). While this notion has not as yet been tested in the appellate courts, the applicant should not be permitted to have it both ways and violate the very promises that led to the granting of the permit.

Ironically, the limitations of ECL § 23-2703(2)(b) could lead a municipality to deny a permit application where it otherwise might have granted the permit with conditions. For example, a local board may conclude that a mining project could be made acceptable under the criteria of the zoning ordinance by attaching what would ordinarily be deemed to be appropriate permit conditions on non-mining permits in order to mitigate the potential adverse impacts. However, if such conditions are not among those permitted by the MLRL at ECL § 23-2703(2)(b), and the applicant will not voluntarily agree to modify the project, the municipality may have no choice but to deny the application, if the mine, as proposed, violates the local ordinance.
It should be noted that the limitation on permit conditions set forth in ECL § 23-2703(2)(b) applies expressly only to special use permits, and not to site plan reviews. It remains to be seen whether the courts will extend this limitation to site plan reviews, or whether municipalities whose zoning ordinances provide for site plan reviews instead of special use permits may attach a wider variety of conditions to permits.

4. Specific Land Use Restrictions

Mining projects can also permissibly be affected by any type of non-zoning ordinance that governs land use generally and only indirectly impacts mining. In the case of Seaboard Contracting v. Town of Smithtown, for example, the Appellate Division, Second Department, upheld a “Tree Preservation and Land Clearing Law” that restricted the clearcutting of trees in order to prevent erosion and to provide cover for wildlife because it applied equally to all landowners within the community, despite the fact that it had the incidental effect of prohibiting mining activity. Similarly, in Patterson Materials Corp. v. Town of Pawling, the Second Department upheld a number of local laws regulating timber harvesting and restricting construction-related activities on steep slopes, wetlands and other environmentally sensitive areas, declaring them to be "of general applicability that, at best, would have an incidental burden upon mining."

The MLRL also does not preempt enforcement of a local code requiring a building permit for a structure located at a mine, if the structure is not regulated by DEC as part of the mining plan.
B. Impermissible Regulation

Under no circumstances may a municipality regulate the actual operation of a mine which is subject to the MLRL, such as the steepness of the mine slopes or the depth of excavation.\textsuperscript{xliv} The supersession clause of the MLRL\textsuperscript{xlvi} sweeps aside all such regulation by all entities, both state and local, other than DEC.\textsuperscript{xlvii}

Several cases have examined the extent and limitations of municipalities' authority to regulate mining operations. In Philipstown Industrial Park, Inc. v. Town Board of the Town of Philipstown,\textsuperscript{xviii} for example, the Town enacted a local law designed to require a special use permit for activities designated as "soil extraction operations,"\textsuperscript{xlix} including grading, removal of sand and other materials, and most other types of excavations. The Appellate Division, Second Department, declared the local law to be preempted by the MLRL because the specific criteria to be used in evaluating whether a special permit should be granted, including requiring screening and prevention of sharp declivities, pits and depressions, were within the exclusive purview of the MLRL. The Court held that:

While a locality retains general authority to regulate land use, and has the authority to determine that mining will not be a use within its confines, it may not regulate the specifics of the extractive mining or reclamation process.\textsuperscript{i}

In a number of other cases, the courts have prohibited municipalities from imposing requirements related to setbacks, dust control and suppression, screening, blasting activities or hours of operation.\textsuperscript{ii} For example, in Town of Odgen v. Manitou Sand and Gravel Co., Inc., a local prohibition on using blasting as a method of mining within the town was rejected.\textsuperscript{iii}

The courts have also rejected limitations on the term of the mine's operations to a period of years less than that provided for in the mine's MLRL permit.\textsuperscript{iii} Since this type of restriction is
specifically targeted at regulating the operation of mines, as opposed to just restricting the geographical location of mines within the municipality, it is considered to be preempted by the MLRL and is therefore unenforceable.\footnote{iv}

III. Other Methods of Exerting Control Over Mining Activity

2. State Environmental Quality Review Act (SEQRA)

The State Environmental Quality Review Act ("SEQRA")\footnote{v} provides an additional source of municipal authority to deny an application or impose conditions upon mines that are subject to discretionary local permit review. Since SEQRA is a state law of general applicability, and is not a law relating exclusively to the extractive mining industry, it is not preempted by the MLRL.\footnote{vi} The suggestion that it should be preempted was expressly rejected by the Appellate Division, Third Department, in Sour Mountain Realty, Inc. v. New York State Department of Environmental Conservation.\footnote{vii} In that case, the court ruled that "SEQRA, like a local zoning ordinance, is a law of general applicability and does not regulate actual mining operations, activities or processing and, as such, does not frustrate the MLRL's purposes or conflict with its provisions and is not preempted."\footnote{viii}

DEC generally assumes lead agency status for SEQRA reviews of proposed mines. If the municipality has no local ordinance giving it jurisdiction over the mine, it may nevertheless take the opportunity to voice its concerns about the proposed project during the comment period on the draft environmental impact statement ("EIS").\footnote{x} Involved agencies other than the lead agency may also submit comments.\footnote{ix} The lead agency must respond to all comments made on the EIS, in writing.\footnote{xi} Submitting comments on the EIS, therefore, is a way for the municipality
to bring its concerns to the attention of the lead agency and the applicant, and see that specific responses to those concerns will be issued by the lead agency.

If the municipality has a non-superseded local ordinance requiring a permit for any aspect of the mine, then it will be an involved agency under SEQRA.\textsuperscript{xii} Upon completion of the SEQRA process, each involved agency must make findings regarding the mine's potential environmental impacts.\textsuperscript{xiii} These findings may provide a basis to condition or deny an application.\textsuperscript{xiv}

SEQRA requires that before approving a project such as a proposed mine, agencies, including municipalities, shall impose as permit conditions those mitigation measures deemed necessary to minimize or avoid any adverse environmental impacts identified in the draft EIS to the "maximum extent practicable."\textsuperscript{xv} This requirement applies to all "involved agencies" as well as the "lead agency."\textsuperscript{xvi} These conditions need not necessarily relate to the issues or criteria which gave rise to the agency’s jurisdiction over review of the proposed project in the first place.\textsuperscript{xvii} Thus, municipalities may use SEQRA as a basis to impose permit conditions on a mine, even where the local ordinance in question may not expressly cover a certain issue.

SEQRA also provides a basis for the denial of a zoning application for a proposed mine, if there will be significant unmitigatable adverse impacts, such as visual impacts.\textsuperscript{xviii} In \textit{Lane Construction Corp. v. Cahill}, for example, the Third Department upheld a DEC Deputy Commissioner's decision to deny a mining permit based on his conclusion "that the project's impacts on the historical and scenic character of the community including visual and other impacts on the community cannot be sufficiently mitigated."\textsuperscript{xix} The Deputy Commissioner's decision to deny the permit on SEQRA grounds was upheld despite the absence of specific DEC regulations governing visual impacts of mines, with the Court holding that SEQRA alone
provided adequate authority for the denial. This broad interpretation of the scope of the authority granted by SEQRA should apply to municipalities, as well as to DEC.

B. Participation in the DEC Permitting Process

ECL § 23-2711(3) gives municipalities another avenue to provide input on mining project applications that are under review by DEC. This section of the MLRL requires DEC to notify the “chief administrative officer” of the local government in which a proposed mine is to be located that an MLRL permit application for the mine has been submitted. The municipality may suggest additional limitations on the project that DEC may incorporate into its MLRL permit. If DEC does not agree that these conditions are justifiable, it must provide a written explanation of the reason for its refusal to incorporate them into the permit. The municipality may also participate in any DEC legislative hearing that is held under 6 NYCRR Part 624, or may intervene as a party in the Part 624 adjudicatory hearing, if one is held.

A local zoning ordinance which prohibits or restricts mining will not affect DEC’s permit processing procedures. ECL § 23-2711(2) requires that an application for a mining permit include "a statement by the applicant that mining is not prohibited at that location." However, so long as the applicant does not expressly acknowledge that mining is prohibited at the proposed location, DEC will not look any further into the issue of whether or not a mine will comport with local laws.

Even if the municipality does prohibit mining at the proposed location, either at the time of the application or by a zoning amendment adopted during the pendency of the application, DEC must continue to process the mining permit application as though the mine were a
permitted use. The courts have expressly stated that DEC is obligated to continue processing an application without regard to the existence of local zoning, or its effect on the site.\textsuperscript{lxiv} Neither a municipality's zoning ordinance, nor its land use master plan, are grounds to suspend DEC's processing of an application.\textsuperscript{lxv} Likewise, DEC is under no independent obligation to evaluate the applicability of the local zoning ordinance in determining whether to deem the application complete.\textsuperscript{lxvi}

C. Local Enforcement of the MLRL

Municipalities can enforce the provisions of a DEC-issued MLRL permit in court, and can also redress violations of the conditions of a local permit through their zoning enforcement procedures. ECL § 71-1311(2) contains a citizen suit provision for enforcement of the MLRL by municipalities and private persons. This provision provides that if DEC, acting by the Attorney General, fails to bring suit to enjoin a violation or threatened violation of "any provision of article 23, ... any person who is or will be adversely affected by such violation" may bring a citizen's suit in any court of competent jurisdiction to restrain the violation.\textsuperscript{lxvii} Such relief is available to municipalities as well as to private individuals.\textsuperscript{lxviii}

In addition, as discussed above, municipalities are expressly authorized to attach conditions to special use permits that they issue to mines to enforce certain operating and reclamation requirements contained in MLRL permits issued by the State.\textsuperscript{lxix} A municipality can enforce those conditions through its zoning enforcement procedures independent of the citizen suit provision of the ECL.

D. Small Mines
Very small mines are not within the scope of the MLRL. Mines involving the extraction of 1,000 tons of material per year or less do not need a permit from DEC, and are not regulated by DEC. Therefore, the preemption language of the MLRL does not apply to these mines and municipalities are free to impose their own rules and regulations on their siting and operation, or ban them entirely.

IV. Effect of a DEC Permit on a Municipality’s Zoning Authority

It is within a municipality's authority to deny an application for a special use permit or other necessary local permit despite the fact that the applicant has already obtained a permit from DEC. The courts have repeatedly held that simply having obtained a MLRL permit from DEC does not exempt the mining applicant from obtaining all necessary permits from the municipality, nor does the issuance of a permit by DEC mean that the municipality is required to approve the project. A municipality, therefore, is free to make its own findings and determinations about a proposed mine and whether the requisite local permits should be issued, regardless of whether or not the applicant has obtained a permit from DEC.

As is discussed further at Point VI, below, the existence of a MLRL permit or permit application does not confer on the applicant any vested rights, either in the project or the current zoning designation governing its property, that would oblige the municipality to issue the necessary approvals. Therefore, municipalities must exercise their own jurisdiction regarding proposed mining projects, and need not accede to an applicant's demand that it be given local approvals simply because it has acquired an MLRL permit from DEC.
V. Regulation of Expansion of Pre-existing Mines

Mines which are pre-existing nonconforming uses, and which have not been abandoned, are generally considered to be "grandfathered" under local ordinances and can permissibly expand to their logical limit on the owner's property without being affected by subsequent changes in local zoning ordinances. However, if a municipality does change its zoning ordinance to restrict or eliminate mining activity within its borders, the burden rests on the mining applicant to show that it qualifies as a pre-existing, grandfathered use.

The limits of grandfathered approval are to be determined on a case-by-case basis. Changes in the volume of mining, hours of operation, or types of equipment used are generally considered to be grandfathered. However, adding new uses to a mine, such as manufacturing asphalt or mixing cement, might be considered to be changes in use and may not be included, depending upon the terms of the applicable local ordinance. A change from sand and gravel mining to hard rock mining, for example, might also be a change in use, requiring a new permit.

VI. Rezoning: Takings and Vested Rights Claims

Municipalities are frequently faced with claims that a local ordinance permitting mining may not be amended to prohibit mining or more stringently control its location because an applicant has a right to mine its property. Frequently, such arguments are couched as either a claimed vested right in the zoning as it existed at the time that the applicant purchased its property.
property, or else that the rezoning constitutes an unconstitutional taking of the applicant's property. However, so long as the municipality's rezoning efforts were procedurally proper, and there remains another economically viable use of the property, such arguments are not likely to succeed.

Vested rights are only acquired once substantial construction has been undertaken and the property owner has made substantial expenditures on the project pursuant to a lawful permit. In Preble Aggregate the Appellate Division, Third Department, addressed the issue of whether applicants have a vested right in zoning that permits mining activity. In that case, more than a year after the applicant had filed its application for a MLRL permit with DEC, the Town adopted a local law prohibiting all mining in the area of a proposed mine. By that time, the applicant had expended over $240,000 in furtherance of its permit application, expenditures which were made in reliance on the old zoning code which permitted mining on the property.

Nevertheless, the Court rejected the applicant's argument that it had a vested right to mine, finding that it had willingly proceeded with its permitting efforts despite the Town's objections thereto and that it:
failed to show that it had effected substantial changes and incurred substantial expenses to further development pursuant to a legally issued permit, or that its activities in furtherance of its pursuit of the required permits -- notwithstanding the existence of the Local Law -- were such that enforcement of the amended law would be inequitable (citations omitted).\textsuperscript{lxxxviii}

Therefore, \textbf{Preble Aggregate} confirms that applicants are not entitled to continuance of the zoning that previously existed, even at the time that they initiated the MLRL application process. Within limits, municipalities are free to amend their zoning ordinances long after a new mine has been proposed.

In the recent case of \textit{Briarcliff Associates, Inc. v. Town of Cortlandt},\textsuperscript{lxxix} the Appellate Division, Second Department, held that the applicant did not have a valid constitutional takings claim against a municipality for rezoning its property to prohibit mining thereon. Briarcliff Associates purchased a small emery mine with the intention of converting the parcel into a large crushed stone quarry. Some three years later, the town rezoned the parcel to a residential designation which prohibited mining, and also excluded heavy trucks on the single town road leading to the property. The Second Department concluded that this was not a taking of the applicant's property interest because the land still had some economically viable potential for use as a residential development. This was so despite the fact that the applicant was prohibited from using the parcel for what it considered to be its most economically productive use, aggregate mining.\textsuperscript{xc}

Therefore, a municipality is well within its authority to rezone a piece of property or deny a necessary permit or approval, even if the prospective operator is pursuing a mining permit pursuant to the zoning currently in effect, or has already obtained a mining permit from DEC, so long as the actual construction of the project has not proceeded so far as to create vested rights,
and so long as another economically viable use of the property remains.

VII. Conclusion

There are many actions which a municipality can permissibly take in order to minimize what may be regarded as the adverse impacts of unrestricted mining within its borders. While the MLRL preempts a municipality from regulating the technical aspects of the operation of a mine, the Court of Appeals and lower courts have unquestionably upheld the traditional powers of municipalities to determine appropriate land uses within their borders through the enactment of zoning ordinances. Even to the extent of a complete ban on all mining within their borders, municipalities are free to enact, apply and enforce zoning ordinances which restrict the location of mining activity, or which reserve to the municipality discretionary authority to review and evaluate impacts of mining activity within particular districts. Municipalities may also employ SEQRA and additional local ordinances for similar purposes. Moreover, opportunities exist for municipalities to participate directly in the MLRL permitting process in order to ensure that their concerns are taken into account by DEC.

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iii. www.dec.state.ny.us/website/dmn


v. See ECL § 23-2701 et. seq.

vi. 6 NYCRR Parts 420-425.

vii. ECL § 23-2703(2). DEC is the agency charged with regulating mining operations pursuant to the MLRL. ECL § 23-2709.


ix. Id., at 131.

x. Id., at 133-34.

xi. Laws of 1991, Ch. 166, § 228. This was part of a 250-page budget bill with 406 sections, only eleven of which related to mining. It appears that the mining industry agreed to certain amendments to the legislation, as a trade-off for higher mining program fees payable to DEC, which were also contained in the bill.

xii. ECL § 23-2703(2). In a letter to Governor Cuomo dated June 7, 1991 that urged approval of the amendments, the principal lobbying group for New York's mining industry, the Empire State Concrete and Aggregate Producers Association, Inc. (“ESCAPA”), while conceding that municipalities retained the power to zone property, asserted that the 1991 Amendments preempted "all other types of zoning controls which go beyond merely designating permissible uses ... such as floating zones and aquifer and mining overlay districts ... as do other typical special use provisions, such as consideration of neighborhood character ..." and that "... site plan review would also be superceded." ESCAPA letter to Hon. Mario M. Cuomo, June 7, 1991, pp. 5-6. These predictions did not hold up in subsequent court decisions.


xiv. Executive Law §§ 800-820.

xv. Hunt Brothers, supra at 909, quoting Frew Run, supra, at 133.

xvi. See ECL §§ 23-2703(2), 23-2709; ESCAPA letter, supra.

xvii. ECL § 23-2703(2)(b); Frew Run, supra.

xviii. The Court of Appeals has recognized that a municipality may properly protect residential areas


xxi. The enactment of a moratorium while a municipality considers changes to its zoning law is a valid exercise of a municipality's power, provided its restrictions are reasonable and are related to the public health, safety, or general welfare of the community. See Cellular Telephone Co. v. Village of Tarrytown, 209 A.D.2d 57 (2d Dept. 1995), app. den., 86 N.Y.2d 701 (1995); Dune Associates, Inc. v. Anderson, 119 A.D.2d 574 (2d Dept. 1986). Therefore, a moratorium enacted in contemplation of changes which would affect the location of mining activity should not be preempted.


xxiii. Id., at 964.

xxiv. Gernatt, supra, at 682-683.

xxv. Id.; See Village of Savona, supra. See also Town of Washington v. Dutchess Quarry & Supply Co., Inc., 250 A.D.2d 759 (1998), app. den., 93 N.Y.2d 810 (1999)(zoning ordinance which prohibited mining in all zones except small scale mining (less than 1000 tons or 750 cubic yards per year) in agricultural districts upheld because it banned all large-scale commercial mining evenly throughout the town and was consistent with the town's comprehensive plan); Vineyard Estates, Inc. v. Town of Lloyd, No. 55-96-02110 (Sup. Ct., Ulster Co. 1997).

xxvi. Gernatt, supra. See also Hunt Brothers, supra, at 909 (under the Adirondack Park Agency Act, Executive Law Article 27, there are no as-of-right uses in any land use area but the Court of Appeals found that the Act was not preempted); Town of Washington, supra; Schadow v. Wilson, 191 A.D.2d 53 (3d Dept. 1993).

xxvii. Town of Riverhead v. T.S. Haulers, Inc., 275 A.D.2d 774 (2d Dept. 2000) (applicant must abide by local zoning regulations requiring special use permit for mining, despite the fact that DEC permit had already been issued); Frew Run, supra, at 130 (ordinance provided no zones in which mines were allowed as-of-right).


xxix. Id., at 971, quoting Hunt Brothers, supra, at 909. See also Town of Ogden v. Manitou Sand & Gravel Co., Inc., 252 A.D.2d 964 (4th Dept. 1998), app. den., 92 N.Y.2d 819 (1999); (zoning ordinance requiring a special exception permit from the Town was not preempted by the MLRL, despite the fact that the special exception permit requirement stemmed from the rezoning of the property from a district in which mining was permitted as-of-right to one in which mining was prohibited without a special exception permit after the mine was first proposed.)
xxx. Hunt Brothers, supra, at 909; Schadow, supra, at 57.

xxxi. Schadow, supra, at 56-58.

xxxii. Id., at 57-58.


xxxiv. See Hunt Brothers, supra, at 909 (Adirondack park Agency Act held not superseded; Act requires all land uses to have no “undue adverse impact.” Executive Law § 809(10)(e)).


xxxvi. Id., at 6-7.

xxxvii. See Hunt Brothers, supra; Schadow, supra.

xxxviii. ECL § 23-2703(2)(b). In a case that pre-dated the 1991 Amendments, one court ruled that the town’s specifications concerning hours of operation affected the operation of the mine and held that the condition was preempted by the MLRL. Charlton Suburban Services, Ltd. v. Town of Glenville, 142 Misc. 2d 313 (Sup Ct., Schenectady Co. 1988).

xxxix. Schadow, supra. See also Charlton Suburban Services, supra.

xl. The authority to issue special use permits is given by Town Law § 274-b while site plan review is authorized by Town Law § 274-a.

xli. In upholding the denial of a special use permit, the Appellate Division, Third Department, stated in dicta in Schadow, supra, at 56, that the limitations were applicable only to special use permits.

xlii. Seaboard Contracting, supra, at 8.

xliii. Patterson Materials, supra, at 512.


xlv. Hoffay v. Tifft, 164 A.D.2d 94 (3d Dept. 1990) (local ordinance impermissibly delineated mine truck routes and specified hours of operation and use of particular equipment); Hawkins v. Town of Preble, 145 A.D.2d 775, 776 (3d Dept. 1988) (zoning ordinance prohibiting mining below the water table is an "express limitation of the mining process" and is superseded by the MLRL). See also Northeast Mines v. New York State Department of Environmental Conservation, 113 A.D.2d 62 (3d Dept. 1985) (zoning ordinance regulating the depth of excavation is superseded by the MLRL).

xlvi. ECL § 23-2703(2).

xlvii. See Hunt Brothers, supra.
xlviii. 247 A.D.2d 525 (2d Dept. 1998).

xlix. Id., at 525.

l. Id., at 527.


lii. Town of Ogden, supra.

liii. See Town of Ogden, supra; Gernatt, supra.

liv. See Briarcliff Associates, supra.

lv. ECL Article 8; 6 NYCRR Part 617.

lvi. See Hunt Brothers, supra, at 909.


lviii. Id., at 923 (citations omitted).

lix. 6 NYCRR § 617.9(a).

lx. 6 NYCRR § 617.3(e).

lxi. 6 NYCRR § 617.9(b)(8).

lxii. 6 NYCRR § 617.2(s).

lxiii. 6 NYCRR § 617.3(e).


lxv. ECL § 8-0109(8).

lxvi. 6 NYCRR § 617.3(e).

lxvii. Lane Construction, supra; Town of Henrietta, supra; 6 NYCRR § 617.3(b).

lxviii. See Lane Construction, supra; Wal-Mart, supra.

lxix. Lane Construction, supra, at 610.

lxx. Id. The Deputy Commissioner's denial was also based, in part, on a finding that the project's potential noise impacts would violate SEQRA. Matter of Lane Construction Company, NYSDEC, Decision of the Deputy Commissioner, June 26, 1998.
lxxi. ECL § 23-2711(3).

lxxii. Id.

lxxiii. ECL § 23-2711(2). See Valley Realty Development Co. v. Jorling, 217 A.D.2d 349 (4th Dept. 1995) (holding that DEC must continue the permit process and declare the permit application complete even though mining is prohibited by local ordinance).

lxxiv. Valley Realty, supra.


lxxvi. There is a statutory exception for mining in Nassau and Suffolk Counties which prohibits DEC from processing an application for a mining permit within counties with populations of one million or more which draw their primary drinking water from a designated sole source aquifer if a local law prohibits mining. ECL § 23-2703(3).


lxxviii. See Town of Cortlandt, supra.

lxxix. ECL § 23-2703(2)(b)(iii) and (iv).

lxxx. ECL § 23-2711(1).


lxxxii. See Town of Riverhead, supra (town authorized to permanently enjoin defendant from operating mine despite the fact that DEC mining permit had been issued); Voorheesville Sand & Stone Co., Inc. v. Town of New Scotland, 136 A.D.2d 849 (3d Dept. 1988) (town was within its authority to require a special use permit notwithstanding the fact that the applicant already had a DEC permit); Town of Throop, supra (town's authority to issue a stop work order against a mining operating under a MLRL permit, and to obtain a preliminary injunction to enjoin further mining in violation of provisions of the local laws, upheld). See also Frew Run, supra; Town of Washington, supra; Town of Parishville, supra.

lxxxiii. Hoffay, supra. See also Syracuse Aggregate Corp. v. Weise, 51 N.Y.2d 278 (1980).


lxxxv. Id.

lxxxvi. Town of Cortlandt, supra; Hunt Brothers, supra.

lxxxviii

. Preble Aggregate, supra, at 851.


xc. Id., at 491-492. See also Clearwater Holding, Inc. v. Town of Hempstead, 237 A.D.2d 400 (2d Dept. 1997).