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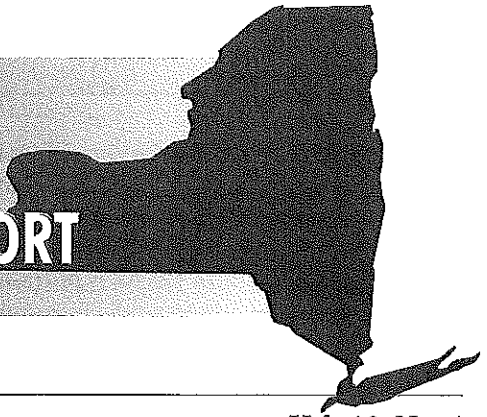

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NATURAL GAS PRODUCTION AND MUNICIPAL HOME RULE IN NEW YORK

Michael E. Kenneally and Todd M. Mathes[1]

I. Introduction

"Marcellus shale" has quickly become a significant topic of conversation amongst planners throughout New York State's Southern Tier and beyond. Marcellus shale is a Middle Devonian age black shale that underlies much of New York, Pennsylvania, and West Virginia, as well as portions of Ohio and other adjacent states, and which contains a potentially significant energy reserve in the form of natural gas. The Marcellus shale "play," as the formation is commonly referred to, has recently become important because there are many large, sophisticated businesses which have an interest in obtaining and developing mineral leasehold interests throughout the play, and because it is expected that once the investment necessary to develop the play begins, direct and indirect fiscal impacts will have a transformational effect on rural economies and associated land use patterns.

While geologists have apparently been aware for quite a while that the Marcellus shale play contained natural gas, interests in developing the play have historically been tempered because estimates of the volume of recoverable gas contained in the play were low, and technologies to develop the play were either not fully developed or too expensive to deploy given the estimated return. In 2008, however, estimates of recoverable natural gas in the Marcellus shale play were made at between 50 and 489 trillion cubic feet (TCF)—enough natural gas to meet domestic demand for between 2 and 21 years.[2] Additionally, technologies involving hydrofracturing and directional drilling have recently been developed to enable the establishment of productive well-heads within the play.

To put the 2008 estimates of recoverable natural gas contained within the Marcellus shale play in context, the current annual rate of natural gas consumption in the United States is 23 TCF.[3] Additionally, the wellhead value of even just 50 TCF may be as high as $1 trillion to domestic energy reserves.[4]

While natural gas development activity is by no means new to New York or other states within the Marcellus shale play, the level and scope of activity anticipated with development of the play are.[5] As a result,

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and at the direction of Governor Paterson, the New York State Department of Environmental Conservation is currently producing a supplement to the Generic Environmental Impact Statement (GEIS) which underlies the Department's oil, gas and solution mining regulatory program. The supplemental GEIS is being prepared in accordance with the State Environmental Quality Review Act (SEQRA), and it is expected that by summer 2010, the Department will begin reviewing and issuing permits to allow production of the portion of the Marcellus shale play in New York.

Where Marcellus shale natural gas wells will be hydro-fractured first, however, remains an open question. Numerous environmental and citizen groups are intensely focused on the propriety of hydraulic fracturing and horizontal well drilling technologies, and the focus of some has evolved into opposition to development of the Marcellus shale play due to their perception of potentially significant environmental impacts which could arise from exploration and production within the play. The concerns range from localized, site-specific impacts, such as noise and aesthetics, to regional and cumulative impacts such as the potential degradation of air and water quality, and impacts which may result from roadway usage by the significant number of heavy trucks needed to drill and fracture a new well.

Most of the environmental issues are being analyzed through the supplemental GEIS process, and the purpose of this article is neither to discuss nor analyze the same. Instead, the remainder of this article is intended to address a purely legal question likely to be confronted by the New York courts as municipalities begin to respond to the natural gas industry's investment in New York through the exercise of various different land use control mechanisms: to what extent, if any, may a municipality exercise its municipal home rule powers to govern activity associated with development of the Marcellus shale play?

II. Overview of Supersession and Constitutional Issues

Oil, gas and solution mining, including development of the Marcellus shale play, is regulated in New York pursuant to Article 23 of the Environmental Conservation Law (ECL) and its implementing regulations, 6 N.Y.C.R.R. Part 550. ECL § 23-0303(2) contains a supersession provision which, at first blush, may be viewed as totally precluding a municipality from governing any natural gas development activity which may occur within its municipal boundaries. Specifically, ECL § 23-0303(2) provides that the State's oil, gas and solution mining regulatory program "supersede[s] 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." (Emphasis supplied.)

The scope of a municipality's ability to exercise its home rule authority over natural gas drilling activity hinges upon how the supersession language contained within ECL § 23-0303(2) should be construed. While the Appellate Divisions, Third and Fourth Department, and perhaps the Court of Appeals will ultimately decide the answer to this question, for practitioners weighing the risk to their municipal clients of exercising such authority before the issue is confronted by the courts, the construction of ECL § 23-0303(2) merits consideration of (1) the fact that municipal home rule powers are statutory *and* constitutional in derivation; (2) rules of express and implied preemption; and (3) the relevance, if any, of the qualifying words contained within ECL § 23-0303(2)—"relating to the regulation." These issues are addressed in turn below.

A. Home Rule and the Constitution

Article IX of the New York State Constitution provides broad authority to local governments to enact local laws relating to their property, affairs or government, and for the protection, order, conduct, safety, health and well-being of persons or property therein.[6] Accordingly, the Constitution di-

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rected the State legislature to enact a "Statute of Local Governments" that confers certain authority upon local governments, and further protected any such conference of authority against future legislative diminution. Specifically, Article IX, § 2(b)(1) of the Constitution requires that any legislation that would diminish or impair a power conferred by the Statute of Local Governments be re-enacted during a subsequent term of the legislature.

The authority of local governments to regulate the use of land within their jurisdiction is one of the powers expressly conferred by the Statute of Local Governments.[7] Seemingly, therefore, any law that would impair the power of a local government to establish zoning regulations, including ECL § 23-0303(2), would be subject to the re-enactment requirement of Article IX, § 2(b)(1) of the Constitution.[8] ECL § 23-0303(2) was enacted in 1971 and amended in 1982, each by a single enactment.

B. Express vs. Implied Preemption

If the re-enactment provision of the Constitution is disregarded by a court in determining whether the exercise of municipal home rule authority over natural gas drilling operations is lawful, the rules of express and implied preemption then become important to the analysis. Simply put, if the State has indicated its intent to preempt a specific subject, a local law regulating that subject will not be given effect—if permitted to operate in a preempted field, such local laws would inhibit the operation of the overriding State law.[9] The Court of Appeals, however, has made it clear that the fact that State and local laws touch upon the same areas is insufficient to support a determination that the State has preempted the entire field of regulation in a given area.[10]

Express preemption occurs when a State law explicitly bars local legislation on a given subject. Importantly, whether addressing federal preemption of state and local laws, or state preemption of local laws, the Court of Appeals has consistently held that, when dealing with an express preemption provision, it is unnecessary to consider the doctrine of implied preemption.[11] Rather, the statute's preemptive scope is determined by its express language. The starting point for such an analysis is the presumption that the intent to preempt must be "clear and manifest."[12]

In the absence of express preemption, however, the State Legislature may indicate its desire to preempt a subject by a declaration of policy, or through the establishment of a comprehensive and detailed regulatory scheme.[13] When resolving questions of implied preemption, courts have examined, among other things, the nature of the subject matter regulated, the purpose and scope of the state legislative scheme, and the need for statewide uniformity in a given subject area.[14]

C. Construction of Express Supersession Language of ECL § 23-0303(2)

ECL Article 23, title 3 expressly supersedes local laws which relate to the regulation of the oil and gas industry, and in the only reported decision addressing this provision of the ECL, the Chautauqua County Supreme Court invalidated a town zoning ordinance which purported to regulate natural gas development activity in the town. In *Envirogas, Inc. v. Town of Kiantone*,[15] the Town of Kiantone adopted a zoning ordinance imposing a $2,500 compliance bond and a $25.00 permit fee requirement on any person wanting to construct an oil or natural gas well.[16] The Court invalidated the zoning ordinance, and in so doing, accurately set forth the rules of supersession/preemption: "[t]he mere fact that a State regulates a certain area of business does not automatically pre-empt all local legislation which applies to that enterprise. 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."[17] The court also went on to specifically find that a recent amendment to ECL Article 23 made it clear that Article 23 preempts "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."[18]

Importantly, however, and for the reasons explained more fully below, the court's decision in *Envirogas*, like ECL § 23-0303(2), acknowledges that the qualifying language—"relating to the regulation"—may be relevant to determining the scope of the supersession. And, again, the parameters for construing the supersession language of ECL § 23-0303(2) include the Constitutional requirement that the powers conferred upon local governments under Article IX (and by extension the Statute of Local Governments) be liberally construed, and by

the requirement that express preemption language be determined by the language itself—express preemption language should not to be expanded because of a comprehensive and detailed regulatory scheme. Accordingly, by its express language, ECL § 23-0303(2) may be viewed as superseding only those local laws "relating to the regulation" of the oil and gas industry.

This construction of ECL § 23-0303(2) finds further support in its legislative history. The express supersession clause that appears in the current version of ECL § 23-0303 was added by Chapter 846 of 1981, a comprehensive amendment to Article 23 of the ECL.[19] Other than a passing reference to the supersession language in a memo from the Division of Budget, the bill jacket is silent on the preemption issue, and neither the text of the law itself nor the bill jacket can be said to contain a "clear expression" of a legislative intent to supersede local home rule or zoning power beyond what was provided in the law itself.

A distinction between the impermissible regulation of activity associated with an industry and the permissible regulation of land uses has been recognized in other relevant case law. Specifically, case law surrounding excavation mining pursuant to ECL Article 23, title 27, and a set of recent decisions by Pennsylvania's highest court concerning natural gas development activity are instructive, since, as set forth below, each of the cases involved a statutory delegation of authority which expressly superseded local laws.

New York Case Law:

In *Frew Run Gravel Products, Inc. v. Town of Carroll*,[20] the Town of Carroll, located in Chautauqua County,[21] had enacted a zoning ordinance which provided, among other things, that a sand and gravel mine was not an allowed land use in the Town's AR-2 zoning district. At the time of the Court's decision, sand and gravel mining was regulated pursuant to ECL Article 23, title 27, and the supersession language then contained in title 27 was very similar to the supersession language in ECL § 23-0303(2) which is currently applicable to natural gas development activity. ECL § 23-2703(2) provided that the Mined Land Reclamation Law superseded all "local laws relating to the extractive mining industry."

While the Supreme Court (the same court that decided *Envirogas*, *supra*) determined that ECL § 23-2703(2) did totally preclude the exercise of municipal home rule powers to govern sand and gravel mining activity, the Appellate Division reversed and the Court of Appeals upheld the Appellate Division's decision. As explained by the Court of Appeals, its decision was based at least in part on its plain-meaning interpretation of the statutory phrase "relating to the extractive mining industry," and its conclusion that the town's zoning ordinance "relate[d] not to the extractive mining industry but to an entirely different subject matter and purpose: i.e., 'regulating the location, construction and use of buildings, structures, and the use of land in the Town[.]'"[22] As the Court explained further, in the absence of any indication that the purpose of the statute was to curtail a municipality's power to regulate land uses within its municipal boundaries, it is the Court's role to harmonize the ECL with municipal home rule powers.

Following the Court's decision in *Frew Run Gravel Products*, the Legislature amended ECL § 23-2703(2) to essentially codify its understanding of the Court's decision. The amended supersession language expressly prohibited local laws relating to the extractive mining industry, but expressly excluded from its preemptive scope local zoning laws which determine permissible uses in zoning districts.[23]

In light of the amendment to ECL § 23-2703(2), the Court of Appeals was called upon, in *Gernatt Asphalt Products v. Town of Sardinia*,[24] to determine whether ECL Article 23, title 27 preempted a town zoning law that eliminated mining as a permitted use in all zoning districts of the Town. Finding that the amendments to ECL § 23-0703 were in accord with the Court's distinction between zoning laws and laws that "relate to the regulation" of the mining industry, the Court rejected the argument that the Mined Lands Reclamation Law preempted a local government's authority to determine that mining should not be a permitted use of land within the town. Importantly, the Court refrained from judicially broadening the express preemption provision of ECL § 23-2703(2).

In sum, *Frew Run Gravel Products*, and to a lesser degree *Gernatt*, are both important to the future debate concerning the preemptive scope of ECL Article 23, title 3. It is, nevertheless, important to keep in mind that the regulation of natural gas development activity under ECL Article 23, title 3 is different than the regulation of excavation mining activity under Article 23, title 27. While ECL Article 23 contains a directive to the Department of

Environmental Conservation that the State's mineral resources should be developed, excavation mining typically involves a permit applicant who must own or control the mineral resource to be extracted and who requests a permit to develop the mineral resource of its own volition. Natural gas permit applicants, on the other hand, need not control the entire permitted resource area since the State's oil, gas and solution mining regulatory program includes a unitization process pursuant to which the Department regulates not just the location of wells through the establishment of required setbacks, but also well spacing throughout the State.[25]

The actual methodology of extracting the resource could also have vastly different consequences to land use patterns. Excavation mining in a particular zoning district will be readily apparent at the ground surface, whereas directional drilling technologies may enable the natural gas industry to undertake activity at significant depths below the surface of the earth without significant or noticeable surface disturbance.

Pennsylvania Case Law:

Two decisions issued on February 19, 2009 by Pennsylvania's highest court are also illustrative of the difference between a local ordinance which impermissibly regulates natural gas development activity, and one which is permissible because it relates not to the regulation of the industry, but to the control of land uses within the municipality's jurisdictional boundaries. In *Range Resources Appalachia, LLC v. Salem Township*,[26] the Pennsylvania Court was asked to determine whether § 602 of the Pennsylvania Oil and Gas Act preempted Salem Township's zoning ordinance which regulated natural gas development activity. As stated by the Court, the preemptive scope of § 602 "is not total in the sense that it does not prohibit municipalities from enacting traditional zoning regulations that identify which uses are permitted in different areas of the locality." The Court's conclusion was based, at least in part, on the fact that § 602 was limited to "features of oil and gas well operations," meaning "the 'technical aspects of well functioning and matters ancillary thereto (such as registration, bonding, and well site restoration).'" Accordingly, since the Salem Township zoning ordinance required a municipal permit for all drilling-related activities; regulated the location, design, and construction of access roads, gas transmission lines, water treatment facilities and well heads; established a procedure for residents to file complaints regarding surface and ground water contamination; allowed the Township to declare drilling a public nuisance and to revoke or suspend a permit; and established requirements for site access and restoration, the Court invalidated the zoning ordinance.

On the other hand, in *Huntley & Huntley v. Borough Council of Borough of Oakmont*,[27] the Court was asked to determine whether § 602 of the Pennsylvania Oil and Gas Act preempted the Borough of Oakmont's decision to zone-out natural gas well drilling operations. Similar to the New York Court of Appeals' decision in *Frew Run Gravel Products*, the Pennsylvania Court concluded that the scope of the preemption question implicated by the Borough of Oakmont's decision to zone-out natural gas well drilling operations "distilled to whether the location of a gas well in a particular area of the Borough is a feature of gas well operations that the Act addresses." Although gas well locations are restricted pursuant to § 601.206 of the Act through the inclusion of certain setback requirements, the Court held that the preemptive scope of the Act did not prohibit municipalities from regulating which types of land uses are appropriate within their municipal boundaries. Accordingly, unlike the Salem Township's Zoning Ordinance, the Borough of Oakmont's prohibition was upheld.

III. Conclusion

The relevance of the qualifying language contained in ECL § 23-0303(2)—"relating to the regulation"—may ultimately boil down to whether or not Article IX of the Constitution, § 10 of the Statute of Local Governments, municipal legislation enacted pursuant to the Municipal Home Rule Law, and ECL Article 23, title 3 can be harmonized. While distinguishing facts and law exist, in reading a statute similar to ECL Article 23, title 3, the Court of Appeals has previously recognized that to preempt local zoning laws would "drastically curtail" a local government's power to adopt zoning regulations as provided for in the Statute of Local Governments, and such a curtailment should only occur under a circumstance in which the legislature's preemptive intent is absolutely clear.[28] A plain-meaning interpretation of the statute may, therefore, support the argument that while municipalities in New York may not regulate the industry within the scope of the State's regulatory program, municipalities may continue to regulate land use or other matters in-

volving public health, safety and welfare which fall outside of the State's regulatory program.

NOTES

1. Michael E. Kenneally is an attorney in Counsel's Office of the Association of Towns of the State of New York. Todd M. Mathes is an attorney at Whiteman Osterman & Hanna, LLP.
2. *See* Engelder T., and Lash, G.G., 2008, *Marcellus shale play's vast resource potential creating stir in Appalachia: American Oil and Gas Reporter*, v. 51, n. 6, p. 76-87 (estimating recoverable natural gas at 50 TCF—10% of the total volume estimated to exist within the Marcellus shall play); *see also* Engelder T., 2009, *Marcellus 2008: Report card on the breakout year for gas production in the Appalachian Basin*: Fort Worth Basin Oil & Gas Magazine, v. August 2009, pp. 19-22 (providing a 50% probability of 489 TCF in recoverable natural gas from the Marcellus shall play).
3. *See* U.S. Energy Information Administration—Natural Gas Consumption by End Use, *available at* http://tonto.eia.doe.gov/dnav/ng/ng_cons_sum_dcu_nus_a.htm
4. See Homegrown Energy: The Facts about Natural Gas Exploration of the Marcellus Shale (Independent Oil & Gas Association of New York, 2009).
5. Development of the Marcellus shale play in Pennsylvania is under way. The estimated economic impact of development of the play in Pennsylvania during just 2008 was $2.3 billion in total value added, more than 29,000 jobs, and $240 million in state and local taxes. *See* Considine, Watson, Entler and Sparks, *An Emerging Giant: Prospects and Economic Impacts of Developing the Marcellus Shale Natural Gas Play*. July 24, 2009, The Pennsylvania State University, College of Earth and Mineral Sciences, Department of Energy and Mineral Engineering, State College, PA, *available at* http://www.pamarcellus.com/EconomicImpactsofDevelopingMarcellus.pdf.
6. NYS Constitution Art. IX, §§2(c)(i), 2(c)(ii)(10).
7. *See* Stat. of Local Govt. § 10(6).
8. Notably, however, the Court of Appeals has previously failed to give life to the re-enactment procedure required by Article IX. In *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 393 N.Y.S.2d 949, 362 N.E.2d 581 (1977), the Court of Appeals dismissed the re-enactment language provided by Article IX. Addressing a challenge to the express supersession of local zoning authority by the Adirondack Park Agency Act, the Court in *Wambat* held that the power of the Legislature to act in its usual manner on matters of state concern (i.e., matters other than the property, affairs or government of a local government) is not impaired by the re-enactment language of Article IX, § 2(b)(1).
9. Jancyn Mfg. Corp. v. Suffolk County, 71 N.Y.2d 91, 524 N.Y.S.2d 8, 518 N.E.2d 903 (1987).
10. *Jancyn*, supra n.9, 71 N.Y.2d at 99.
11. People ex rel. Spitzer v. Applied Card Systems, Inc., 11 N.Y.3d 105, 863 N.Y.S.2d 615, 894 N.E.2d 1 (2008), cert. denied, 129 S. Ct. 999, 173 L. Ed. 2d 292 (2009).
12. *Applied Card Systems*, supra n.11, 11 N.Y.3d at 113.
13. *Jancyn*, supra n.9. See also Cohen v. Board of Appeals of Village of Saddle Rock, 100 N.Y.2d 395, 764 N.Y.S.2d 64, 795 N.E.2d 619 (2003). At issue in *Cohen* was a village local law that required a showing of practical difficulty or undue hardship in order to obtain an area variance. The law by its terms "repealed and superseded" the balancing test for an area variance set forth in the New York State Village Law. The Court of Appeals held that the Village Law did in fact preempt the local law, despite express home rule authority to supersede the Village Law. The Court found that the Legislature, by amending the Town Law and Village Law to establish a uniform standard of review for area variance applications, evinced an intent to occupy the field and bring statewide consistency to the variance process.
14. Albany Area Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 547 N.Y.S.2d 627, 546 N.E.2d 920 (1989).
15. *See* Envirogas, Inc. v. Town of Kiantone, 112 Misc. 2d 432, 447 N.Y.S.2d 221 (Sup 1982), judgment aff'd, 89 A.D.2d 1056, 454 N.Y.S.2d 694 (4th Dep't 1982).
16. *Envirogas*, supra n.15.
17. *Envirogas*, supra n.15, 112 Misc. 2d at 433 (citations omitted).
18. *Envirogas*, supra n.15, 112 Misc. 2d at 434.
19. The purpose of the amendments was to provide an efficient and effective regulatory program and increase fees to help fund it. (Governors Mem. approving L. 1981, ch. 846). There are essentially three primary components to the regulatory regime set forth: (1) impose new fees on the oil and gas industry to finance the increased administrative costs of regulating the industry; (2) update existing DEC regulations governing the leasing of lands and the operation of the industry; and (3) codifying offenses for violating the regulatory program and establishing civil, criminal and administrative sanctions. (Mem. from Executive Chamber, Counsel's Office (Francis Murray), Bill Jacket, L. 1981, ch. 846). The statement of legislative policy, as expressly stated in the first section of Chapter 846, was to increase the portion of the costs to be borne by the industry and the operators that are directly affected.
20. Frew Run Gravel Products, Inc. v. Town of Carroll, 71 N.Y.2d 126, 524 N.Y.S.2d 25, 518 N.E.2d 920 (1987).
21. The Town of Kiantone is also located in Chautauqua County, New York.
22. *Frew Run Gravel Products*, supra n.20, 71 N.Y.2d at 131.
23. ECL § 23-2703(2) currently provides that the State's excavation mining regulatory program "[s]upersede[s] 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."

24. Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996).
25. *See* ECL Article 23, titles 5, 7 and 9.
26. Range Resources Appalachia, LLC v. Salem Tp., 600 Pa. 231, 964 A.2d 869 (2009).
27. Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont, 600 Pa. 207, 964 A.2d 855 (2009).
28. *Frew Run Gravel Products*, supra n.20, 71 N.Y.2d at 133.

Court of Appeals Upholds Taking of Private Property for Atlantic Yards Project

In 2006, the Empire State Development Corporation (ESDC) issued a determination pursuant to the Eminent Domain Proceedings Law (EDPL) that it should use its eminent domain power to take various private properties in Brooklyn in order to incorporate them into a proposed land use improvement project known as Atlantic Yards. Atlantic Yards was a planned 22-acre mixed-use development to be undertaken by a private developer. The development was to involve construction of a sports arena to house the NBA Nets franchise; various infrastructure improvements, including access upgrades to the subway transportation hub already present at the site; and numerous high-rise buildings serving both commercial and residential purposes and containing several thousand dwelling units, more than a third of which were to be affordable for low- or middle-income families. In support of its exercise of condemnation power with respect to the properties, ESDC, based on studies conducted by a consulting firm retained by the developer, made findings that the blocks in which the properties were situated possessed sufficient indicia of actual or impending blight to warrant their condemnation for clearance and redevelopment, and that the proposed land use improvement project would, by removing blight and creating in its place mixed-use development, serve a "public use, benefit or purpose" in accordance with the requirement of EDPL § 204(B)(1).

Several owners of properties to be taken initially challenged the condemnation of their properties in federal court, asserting that the condemnation was not supported by a public use and thus violated the Fifth Amendment of the Federal Constitution. They also asserted a pendent state claim, seeking review of the ESDC's determination pursuant to EDPL § 207. The federal court rejected the petitioners' federal claims, and declined to exercise pendent jurisdiction over the state-law claim. The petitioners then brought an action in the Appellate Division, Second Department, alleging that (1) the proposed taking was not for a "public use" but for the benefit of a private party and thus would be in violation of Article I, § 7(a) of the New York State Constitution and EDPL § 207(C)(1); and (2) the condemnation proceeding was not in conformity with the State Constitution for the additional reason that the project it was to advance, although financed with state loans or subsidies, was not limited in occupancy to persons of low income in accordance with the requirement of Article XVIII, § 6 of the State Constitution. In its answer, ESDC, while defending the challenged determination on the merits, sought dismissal of the petition on the ground that it had not been timely brought.

The Appellate Division, although rejecting respondent's contention that the proceeding was time-barred, found for respondent on the merits (Goldstein v. New York State Urban Development Corp., 64 A.D.3d 168, 879 N.Y.S.2d 524 (2d Dep't 2009)). The Appellate Division observed that, while the State Constitution permits the taking of property only for "public use," that language has come to be understood as entailing no more than a dominant public purpose. The court noted that it was well established that the eradication of blight was such a public purpose, and found that ESDC's blight findings were supported by the studies contained in the administrative record. As to the contention that the proposed project, and consequently the condemnation proceeding on its behalf, were not in conformity with Article XVIII, § 6, the Appellate Division held that that provision should be read to apply only to