

### ZONING AND LAND USE PLANNING

# Using Restrictive Covenants To Regulate ‘Fracking’

As New York State appears to be moving toward allowing oil and gas companies to extract natural gas through high-volume hydraulic fracturing, known colloquially as “fracking,”<sup>1</sup> local governments throughout the state continue to consider how, if at all, they may regulate the process in their own communities. Whether municipalities may regulate drilling through zoning—and if so, to what extent—is something that courts likely will have to decide.<sup>2</sup> The recent decision by the Supreme Court, *Sullivan County, in Weiden Lake Property Owners Ass’n v. Klansky*<sup>3</sup> suggests, however, that there may be another alternative: restrictive covenants.

State law authorizes local authorities to impose conditions as an incident of a site plan approval, variance, special permit, or other land use approval.<sup>4</sup> Moreover, town and village governments can require that applicants for variances, permits, or other relief actually record land-use conditions in the form of private covenants and easements—including conservation easements<sup>5</sup> and open space easements<sup>6</sup>—to ensure that

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the conditions are complied with. The *Weiden Lake* decision upheld the applicability of restrictive covenants to bar a property owner’s lease of drilling rights to an oil company.

The *Weiden Lake* case involved the Weiden Lake Community, a residential subdivision located in the Town of Tusten, in upstate Sullivan County. Each real estate parcel in the community consisted of between two acres and 100

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acres. The community also contained an approximately 70-acre body of water known as Weiden Lake, which was for the exclusive benefit of property owners and members of the Weiden Lake Property Owners Association Inc. (POA). The POA was formed in 1999 for the

purpose of overseeing and managing the community and maintaining the Weiden Lake and dam.

The POA brought an action seeking a declaration prohibiting the exploration and drilling for natural gas and other hydrocarbons on, in, or under lands owned by a homeowner within the community under a lease between the homeowner and the Cabot Oil and Gas Corporation; the five-year lease authorized Cabot to “explore for, drill for, produce and market oil, gas and other hydrocarbons.” The POA argued that each parcel in the community, including the lot owned by the defendant homeowner, was subject to protective covenants running with the land that appeared on the Weiden Lake Subdivision—Phase I, Final Plat, filed on Nov. 9, 1999, in the Sullivan County clerk’s office; on the Weiden Lake Subdivision—Phase II, Final Plat, filed on Oct. 17, 2000, in the Sullivan County clerk’s office; and on the deeds issued by the original developer.

The POA pointed in particular to two protective covenants: covenant (b), which provided that the property “shall be used for single family homes, of not less than 1,000 square feet of living space; agricultural and/or recreational use only,” and covenant (o), which provided that “[n]o commercial fishing enterprise or fee based boat launch-

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ing facilities or any other commercial uses will be allowed on the premises.” The POA asserted that these covenants prohibited the use of the homeowner’s property for the commercial uses of exploration, drilling, production, and marketing of oil, natural gas, and other hydrocarbons.

In the court’s view, when read in conjunction with the first restriction to single family residential, agricultural, and recreational uses, the general ban in covenant (o) of “any other commercial uses” had to be construed to mean all other commercial uses. Additionally, the court noted, the covenants did not restrict the prohibited uses to lots with lake frontage; rather, the words “on the premises” enlarged the prohibition to encompass more than the lake and lakefront areas commonly used in commercial fishing and boating operations and suggested a ban “on any commercial use of the entire premises.”

The defendant homeowner asserted that the purpose of the POA was to protect the assets of the corporation, which were the lake and the dam, and that because his property was between one to two miles from Weiden Lake, any activity by Cabot would have no impact on the lake or the dam. The court found that the covenants restricted all parcels in the subdivision, regardless of their proximity to the lake or the dam.

The court emphasized that the covenants had been filed in the Sullivan County clerk’s office, as set forth in the subdivision plats and the prior deeds in the chain of title of the defendant homeowner’s deed, and that the defendant homeowner’s deed referenced the subdivision plat. The court found that both the defendant homeowner and Cabot were on record notice of the restrictive covenant against commercial uses on the property. Accordingly, it ruled that the POA had shown by clear and convincing evidence, namely the clear and unambiguous language of the cov-



Weiden Lake in Sullivan County

enants prohibiting the commercial use of the homeowner’s property, set forth in the filed and recorded subdivision plats, and the prior recorded deeds in the homeowner’s chain of title, as well as the reference to the subdivision plat in the homeowner’s deed, that it was entitled to summary judgment declaring that the covenants prohibited the use of the homeowner’s property for the uses set forth in the lease between the homeowner and Cabot, including exploration, drilling, production, and marketing of oil, natural gas, and other hydrocarbons. The court therefore permanently enjoined the defendants from exploring, drilling, producing, and marketing oil, natural gas, and other hydrocarbons from the homeowner’s property.

#### Other Means of Regulation

The *Weiden Lake* decision makes clear that the owner of property that is subject to a restrictive covenant that prohibits certain activities on the property, and subsequent owners who take title with notice of the covenant, are bound by the restrictions. Since municipalities

are authorized to impose conditions as an incident of a site plan approval, variance, special use permit, or other land use approval, and may require that such conditions be memorialized in recorded restrictive covenants, local governments in New York may be able use such covenants as an effective means to regulate oil and gas drilling in their communities.

The New York Court of Appeals has ruled that a municipal board, where appropriate, may impose “reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property” and that are aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit. These conditions typically relate to fences, safety devices, landscaping, screening, and access roads relating to period of use, screening, outdoor lighting and noises, and enclosure of buildings and relating to emission of odors, dust, smoke, refuse matter, vibration noise, and other factors incidental to comfort, peace, enjoyment, health or safety of the surrounding area.<sup>7</sup>

Although restrictive covenants are an effective tool to ensure compliance with a condition of a land use approval, their enforceability has been circumscribed by the courts. For instance, the Court of Appeals has held that “the law has long favored free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them.”<sup>8</sup>

Courts also have invalidated covenants imposed by municipal boards as a means of regulating activities that are subject to a comprehensive state regulatory scheme. For example, in *People v. Amerada Hess Corp.*,<sup>9</sup> the defendants were charged with violating a town building zone ordinance by permitting the sale of alcoholic beverages at their gas station, in violation of covenants and restrictions affecting the Gasoline Service Station District property in the town. The defendants argued that, notwithstanding the restrictive covenants, they had received a New York State Liquor Authority Grocery Chain Wine Product license and therefore could sell alcohol at the station.

The court agreed with the defendants. It pointed out that the town could not directly regulate the sale of alcoholic beverages in gasoline station convenience stores; the “elaborate and detailed regulatory scheme laid out in the Alcoholic Beverage Control Law,” the court said, in conjunction with the law’s declared goal to “regulate and control the manufacture, sale and distribution within the state of alcoholic beverages,” demonstrated that the state had preempted the regulation of establishments selling alcoholic beverages.<sup>10</sup> The court then decided that the town could not regulate indirectly what it could not regulate directly, and it ruled that the restrictive covenants barring the gas station from selling alcoholic beverages was not “a valid exercise of zoning power.”

Although the court agreed with the town that it had the authority to enact local laws affecting the safety, health,

and well-being of persons and property in the town, it explained that a local law to that effect could not contradict a state general law. Thus, the covenant against selling alcoholic beverages was found to be preempted by New York state law.

Analysis of whether a similar “preemption” argument can be used to prohibit municipalities from imposing covenants that seek to regulate local oil and gas operations is likely to focus, in the first instance, on the preemption language of the Oil, Gas and Solution Mining Law (OGSML),<sup>11</sup> which, with limited exceptions, appears to supersede all local laws or ordinances relating to the regulation of the gas, oil, and solution mining industries. Next, it will require an examination of two decisions by the New York Court of Appeals that interpreted the state’s Mined Land Reclamation Law (MLRL),<sup>12</sup> which contains similar preemption language to the OGSML.<sup>13</sup>

In the first decision, *Matter of Frew Run Gravel Prods. Inc. v. Town of Carroll*,<sup>14</sup> the Court concluded that the state’s MLRL did not preempt a municipality’s zoning ordinance where the DEC had issued a permit to operate a sand and gravel mine at a site that lay within a zoning district in which mining was not a permitted use. In the second decision, *Matter of Gernatt Asphalt Products Inc. v. Town of Sardinia*,<sup>15</sup> the Court stated that notwithstanding the “incidental effect” of local land use laws on the extractive mining industry, zoning ordinances were “not the type of regulatory provision the Legislature foresaw as preempted” by the MLRL. In *Gernatt Asphalt*, the Court concluded that the MLRL did not preempt a town’s authority to determine that mining should not be a permitted use of land within the town and to enact amendments to the local zoning ordinance in accordance with that determination.<sup>16</sup>

### Conclusion

As set forth in *Weiden Lake*, privately imposed restrictive covenants have been recognized as an acceptable method of

regulating or even prohibiting oil and gas drilling operations. However, a question still remains as to whether a municipality can require such a restrictive covenant as a condition of a land use approval. Given the tension between statewide regulation of fracking and other energy exploration techniques on the one hand, and local control over land uses through enforceable restrictive covenants and zoning limitations on the other, this question is likely to be answered by the courts in the near future.

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1. See New York State Department of Environmental Conservation (DEC) revised draft Supplemental Generic Environmental Impact Statement dated Sept. 7, 2011, available online at <http://www.dec.ny.gov/data/dmn/rdsgseisfull0911.pdf>.

2. See Anthony S. Guardino, “Marcellus Shale ‘Gas Rush’ Raises Local Zoning Issues,” NYLJ, Sept. 22, 2010, at 5.

3. 2011 N.Y. Slip Op. 51581U (Sup. Ct. Sullivan Co. Aug. 18, 2011).

4. See, e.g., New York State Town Law §§274-a, 274-b, and 267-b; Village Law §§7-712-b, 7-725-a, and 7-725-b.

5. See, e.g., Code of the Town of East Hampton §193-4-50.C(1).

6. See, e.g., Code of the Town of Southampton §330-47.C.

7. *St. Onge v. Donovan*, 71 N.Y.2d 507 (1988).

8. *Witter v. Taggart*, 78 N.Y.2d 234 (1991).

9. 196 Misc. 2d 426 (D. Ct. Nassau Co. 2003), aff’d, 3 Misc. 3d 134A (App. Term 2d Dept., May 20, 2004).

10. See, e.g., 1980 Op. Atty Gen (Inf) 186.

11. ECL 23-0102 et seq.

12. ECL 23-2701 et seq.

13. ECL 23-0303(2).

14. 71 N.Y.2d 126 (1987).

15. 87 N.Y.2d 668 (1996).

16. Courts also have rejected restrictive covenants on public policy grounds. For example, the Court of Appeals found that public policy prohibited enforcement of a restrictive covenant against a community residence for mentally disabled adults. *Crane Neck Association Inc. v. New York City/Long Island County Services Group*, 61 N.Y.2d 154 (1984). Of course, decades earlier, the U.S. Supreme Court struck down the infamous *Levittown* restrictive covenant. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).