Municipal Lease of Mineral Rights

- Marcellus Shale has sparked statewide discussion of natural gas development issues
- Legal Issues for municipal leases
  - Seismic testing
  - Authorization for municipal leases
  - Permitted locations for natural gas production activities
  - Regulate use of roads
  - Ethics for municipal legislators
- NYS Law is unsettled.

Home Rule Powers of Local Governments

- NYS Constitution, Article IX, sections 1& 2. Bill of Rights for local governments.
  - Local governments are given the power under the NYS Constitution to manage, care and use their property and roads.
  - "For when a home rule challenge is brought, the powers the locality is seeking to protect are not suffered at the will of the state legislature, but directly and specifically guaranteed by the Constitution." *Town of Black Brook vs New York, 41 NY2d 486*.

Seismic testing

- Seismic testing
  - Vibroseis trucks
  - Dynamite in shot holes
- Testing locates faults, fractures, and helps industry decide where to drill.
- Vibroseis “Thumper trucks.” Sound waves are sent underground.

Seismic Testing

- There are competing legal issues attached to seismic permits.
  - Vibroseis trucks send sound waves underground spherically. Geological data can be obtained for strata directly under the road as well as under adjacent property.
  - The resulting seismic test data has economic value.
    - Municipality may own road in fee
    - Municipality may only have a right of way easement
    - Municipality typically does not own all property adjacent to roads.
  - May a municipality require a permit for seismic testing on municipal highway?
  - May a municipality allow seismic testing under roads and adjacent property?
- See attached legal opinion of Mary Welsh, Esq., 2008.

Seismic Testing

- Seismic testing is not specifically addressed by NY courts or legislature.
- Every local government shall have the power to adopt . . .local laws ...relating to the following subjects,... (6) The acquisition, care, management and use of its highways…" *NYS Constitution, Art IX sect 2(6)*
- State Legislation
  - No improvements, entrances, connections, works, structures, obstructions, crossings, pipes, wires, etc shall be placed on a county highway "except in accordance with the terms and conditions of a work permit issued by the County superintendent . . ." *Highway Law section 136.1.*
  - "The County superintendent shall establish regulations governing the issuance of highway work permits." *Highway Law section 136.2.*
  - Town Superintendent is responsible for maintenance of town roads. *Highway law section 140.*
  - Municipalities may be liable for obstructions on roadways. Does this create obligation to regulate? (No civil action against Town for obstruction on highway without written notice. *Town Law section 65)*
- With an expansive reading of home rule rights, municipalities have the authority and right to issue seismic testing permits on their highways.

Seismic Testing

- Municipal Seismic permit.
  - Imposition of a permit fee
  - Acknowledgment that operations on the municipal highway are not exclusive
  - Agreement that the company agrees to repair any damage to the highway, shoulders, culverts, bridges, drainage ditches, sewer pipes, water pipes, utility lines or other appurtenances.
  - Representation that the municipality makes no warranty of ownership in fee to the roadway.
  - Representation that the company must verify title to the roadway.
  - Representation that the highway permit does not grant access or permission for seismic testing on property abutting the highway.
  - Indemnification and proof of insurance.

Authorization for Lease of Mineral Rights

Municipality may enact local law relating to its "property affairs or government . . ." *NY Const Art IX, sect 2 (c).* The local law may not be inconsistent with the NYS Constitution or any general state law.

- NYS law states that County real property "may be leased for a term not exceeding five years upon such terms and conditions as may be prescribed by the Board . . ." *NYS County Law section 215.4.* Is this a general law of the state which would preclude long term gas leases?
  - Charter County: Section 215 does not apply to inconsistent provisions of a county charter. *NYS County Law section 2.*
  - Non Charter County: "It seem clear that neither section 214 nor 215 is a general law under the home rule definition." *1992 NY Op Atty Gen 1001.*
- County by local law may decide that property can be leased for natural gas development for a period longer than five years.
  - "In addition to the method of alienation of County real property authorized by the County Law section 215, Broome County may, with the authorization of the County Legislature, sell or lease county property no longer required for public use without public advertisement or bidding." *Broome County Charter & Code, Chapter 28, section 5*.

Authorization for Lease of Mineral Rights

- NYS Laws allows a city to lease city real estate. *General City Law § 23* and *Second Class City § 37* . Section 37 provides that "In case of a proposed sale or lease of real estate or of a franchise, the ordinance must provide for a disposition of the same at public auction to the highest bidder." These are considered special laws. Consequently the city has home rule powers allowing it to determine how to lease real property. *1980 NYCPTR-347; 1981 NYCPTR 365.*
- NYS law allows a Town to lease town property. *Town Law Section 64.2* Town "may, upon the adoption of a resolution, convey or lease real property in the name of the town, which resolution shall be subject to a permissive referendum."

Municipality as Property Owner Lease of Mineral Rights

- Even if a municipality may authorize a long term gas lease, surface operations may not be conducted on park land.
  - "It is a well established principle of municipal law that property owned by a municipality and dedicated to park purposes is held in trust for the public and cannot be alienated by sale or lease. . . " *NYCPTR Opn 77-430*.
  - See also *Parks and Recreation Law section 15.09.* When state funds have been used to purchase parkland, the land may not be alienated.

Municipality as Property Owner Lease of Mineral Rights

- A municipality may not alienate parkland by sale or lease. May it, however, allow extraction of natural gas under the park.
  - "A municipality may enter into a gas pooling or spacing unit agreement whereby municipal parklands are used in such pool . . .so long as any actual drilling is done on nonparkland." *NYCPTR Opn 77-430.*
  - Possible with horizontal drilling. Consequently there will be actual drilling activity under the surface of the park.
    - This decision by the NYS Comptroller was prior to the widespread use of horizontal drilling.
    - Very likely that this decision also involved a conventional gas play.

Municipality as Property Owner Lease of Mineral Rights

- Watershed Protection and Flood Prevention Act (Public Law 83-566, as amended).
  - "works of improvement" primarily involve dams. *16 USC, section 1002, 1005*
  - Local organizations that undertake these projects include "any state, political subdivision thereof, soil or water conservation district . . . " *16 USC, section 1002*

Municipality as Property Owner Lease of Mineral Rights

- Watershed Protection and Flood Prevention Act (Public Law 83-566).
  - Conditions for federal assistance, include maintaining the area in accordance with federal regulations, *16 USC, section 1004.*
  - Compliance with federal regulations is monitored by National Resources Conservation Service (NRCS). As an example, Broome County has been told to remove a portion of a parking lot, and to let the grass grow to a certain height on a play field.
  - Assume no natural gas development activities.

Conflicts of Interest

- The mixture of politics, possible conflicts of interest, and large sums of money are the classic ingredients found in a growing number of federal prosecutions against public officials. *Bond, Schoeneck & King PLLC, Informal Memo, March 31, 2009.*
- Similar situations:
  - Attorney General investigation into practices of Wind Power Companies in upstate NY
  - Headline-FT Worth Star Telegram– "Most on Ft Worth council collect money from gas leases"

Conflicts of Interest

- Applicable statutes
  - NYS General Municipal Law, section 800 et seq
  - NYS Public Officers Law, Article 4.
  - State lobbying act, NYS Legislative Law Article, 1-A
  - Federal mail fraud statute: 18 USC sections 1341 et seq
  - Local Municipal Ethics Law.

Lobbying Act

- Article 1-A, NYS Legislative Law, sections 1-a, et seq.
  - Stricter prohibition regarding gifts than General Municipal Law and some local Ethics Laws.
  - No gifts to "public officials…" *NYS Legislative Law, sections 1-m.*
  - Public officials include officers and employee "whether paid or unpaid…" *NYS Legislative Law, sections 1-c.*
  - The term gift includes "anything of more than nominal value . . ." *NYS Legislative Law, sections 1-c.*

Federal Mail Fraud Act

- 18 USC section 1341, et seq
  - One of the governments chief weapons to fight corporate fraud.
  - Criminal action includes participation in "any scheme or artifice to defraud…" *18 USC section 1341*.
  - Scheme or artifice to defraud "includes a scheme or artifice to deprive another of the intangible right of honest services." *18 USC section 1346.*
    - "Honest services" is subjective standard.
    - State officials have been indicted under this section.

Federal Mail Fraud Act

- Federal prosecutors have charged public officials with failure to provide "honest services."
  - a legislator has a fiduciary relationship with citizens requiring "full disclosure of the potential motivation behind, and material information relevant to his official acts, including full disclosure of conflicts of interest, which would provide citizens . . .with the information necessary to evaluate his motivations for official acts."
    USA vs Joseph L Bruno, Indictment, 09-CR-29 (ND NY)

Conflicts of Interest

- If Municipal Legislature/Board/Council considers natural gas issues such as municipal leases, road ordinances, noise ordinances, etc. then legislators should:
  - Disclose real property holdings, interest in natural gas leases, negotiations or intent to negotiate, other interests connected to the industry, etc.
  - Disclose meetings to discuss private business
  - Conduct public business on municipal property
  - Recuse themselves from deliberations and votes on natural gas issues.
  - Accept no gifts from natural gas industry companies.

Local Law Protection of Roads

- Anecdotal evidence demonstrating need for local laws on road maintenance.
  - Anger over road damage caused by Barnett Shale development. *Headline--Dallas Morning News, August 23, 2008*
  - City of Ft Worth is considering tightening its road ordinance.
  - "Discussions with municipal officials in other areas of the state and the nation experiencing gas development suggests that truck traffic associated with natural gas extraction has a detrimental impact on the pavement life of municipal roads." *Task Force Report for Sullivan County, February 13, 2009, page 12.*

Local Law Protection of Roads

- Horizontal drilling involves large volume water management.
- Damage to roads is allegedly caused by heavy truck traffic to and from a well pad over a short period of time.
- Based on the use of 5,000 gallon water trucks, a 2.5 million gallon horizontal well hydraulic fracture would require approximately 500 truck trips to haul water to the site.
  DEC website, testimony Commissioner Grannis
- This is a conservative estimate which does not include truck traffic for frac tanks, drill rigs, frac equipment, frac waste removal

Local Law Protection of Roads

- Municipalities are enabled by the NYS Legislature to regulate natural gas industry use of roads. *NYS Environmental Conservation Law, 23-0303.2*
- Many issues are nevertheless pre-empted by state regulatory scheme. *NYS Vehicle & Traffic Law section 1604,*
  - Except as otherwise provided in this chapter, a local authority shall have no power to pass, enforce or maintain any ordinance . . . requiring from any owner of a motor vehicle . . . [a] permit for the use of public highways . . . *NYS Vehicle & Traffic Law section 1604,*
  - One exception is Local Law regulating overweight vehicles.

Local Law Protection of Roads

- The NYS Vehicle & Traffic Law restricts the dimensions and weight of trucks on public highways in the state. The NYS Commissioner of Transportation issues permits for vehicles that exceed the limits, but the permits only apply to state highways. *NYS V& T Law section 385.*
- "For any other public highway in any county not wholly included within a city which is not on the state system of highways the authority having jurisdiction over same may issue a similar permit . . . " *NYS V & T Law section 385 (15)*

Local Law Protection of Roads

- Purpose of Local Law is to create a permit process under V & T Law sect 385 to protect municipal roads and bridges from overweight trucks.
- Permit is required from the municipality
- Typical requirements of permit/agreement
  - Description of proposed route with digital record
  - Vehicle insurance to protect roads from accidental damage
  - Liability insurance to protect roads from overuse damage
  - Performance bond to insure compliance.

Local Law Protection of Roads

- Query: Should a Municipality pass a local law directed to all overweight vehicles or just natural gas industry vehicles.
  - Localities in upstate NY passed ordinances for all over weight vehicles. There was immediate backlash from existing industry.
  - Local Law directed at one industry triggers constitutional issues of equal protection.
    - Need rational basis to single out natural gas industry; other wise there will be allegations that the municipality acted arbitrarily or capriciously. *Korotun vs Village of Bayville, 26 AD3d 311, 809 NYS2d 533 (2d Dept 2006).*
    - Municipality may rely on engineering study to examine impact on roads
      - Weight of trucks; Frequency of use in compressed time period.
      - Analysis of typical municipal road beds.
      - Distinguish natural gas industry from other industries
      - Establish rational basis for classification set forth in local law.

Local Law Protection of Roads

- Query: Should the a Municipality pass a local law requiring natural gas industry to pay for enhanced wear and tear on roads? i.e. due to heavy traffic attendant to frac'ing, a road financed by a ten year bond may only have a useful life of five years.
  - Modeled on Barnett Shale community statutes. City of Denton, TX.
  - Requires engineering report on the condition of municipal roads; an evaluation of the impact by the natural gas industry on those roads, a comparison the impact on roads caused by other industries, and a rational formula to calculate the fee per linear mile.
  - Possible illegal impact fee. *See Albany Area Builder Ass'n vs Town of Guilderland, 74 NY 2d 372 (1989).* State has already established a comprehensive scheme for highway funding. Municipality may not create new revenue sources.
- The natural gas industry representatives will object to any fee for enhanced wear and tear on roads.

Local Law Protection of Roads

- Road Maintenance Agreement. Typically a road maintenance agreement is required by local law.
  - Per well, or
  - Municipal wide agreement
  - Digital recording of roads
  - Schedule of traffic
  - Insurance/performance bond protection.