The following statements are from the June 14th, 2011 agenda meeting: Linda Adams, Caroline Town Board; Bill Podulka, ROUSE; Attorney David Slottje, Community Environmental Defense Council, Inc; Attorney Guy Krogh, on behalf of the Caroline Town Board.

Attachment 1: Linda Adams

June 14, 2011 Caroline Board Meeting

We are going to hear at least 3 versions of what NY State means by "regulation."

1) Last week Bill Podulka shared with us **regulate** does not include bans & prohibition. He is of the opinion local government can therefore ban gas development now.

2) The second version you'll hear concerning **regulate** … might include bans. If gas regulation and gas bans are preempted by Environmental Conservation Law article 23, there are groups that want to change current law. Most of these changes recognize that no single industry can be singled out or targeted. Therefore categories and classifications of activities are being researched to capture a set of activities. Phrases like "Heavy Industry" are used to pool together a group of similar things (including gas drilling) all these activities would be banned.

3) The third definition of **regulate** is the simplest to understand, the definition that my resolution is based on: local government cannot regulate – they cannot prohibit – they cannot ban gas development. The State has preempted our power to take such action.

I had hoped to find a court case documenting what **regulate** means in article 23. Last week the Board asked for such case law decision(s) from ROUSE and other groups. To date there is no definition. Until this question of jurisdiction is defined either by the State or a court decision, and the appeals process has run its course……..It is not possible to write law to an unknown precedent.

Doing so burdens Caroline with risk, very expensive legal suites, it is not possible to know how lengthy they would be, nor how many law suites to anticipate. As discussion takes place you'll hear the words "if", "maybe", "could", "some day", not the sort of language needed to base decisions upon. The resolution as proposed is based on current law. Caroline will be able to revise its position as the State and courts sort this all out.

-Linda

Attachment 2: Bill Pudolka (Please note attachment 3 is a letter from ROUSE submitted to the Town Board in hard copy form and is not a part of this document.)

Bill Podulka

Remarks to Caroline Town Board on

"Resolution Clarifying the Town of Caroline's Role Regarding Gas Development

Based on Current Environmental Conservation Law"

June 14, 2011

I am Bill Podulka, a Caroline resident living on Caroline Depot Road. I am also chair of ROUSE, Residents Opposing Unsafe Shale-Gas Extraction.

I am opposed to this resolution because it is *premature*, tying the board's hands before all the facts are in, and *anti-democratic*, cutting off the voices of the many people you see here. I ask the resolution's sponsors to reconsider their rash move and withdraw it; failing that I ask the rest of the board to vote against this resolution.

You will be hearing from much more eloquent and impassioned speakers than I. There will no doubt be many statements for and against gas drilling as passions run high on this issue. But that's not the issue today. Some day that **will** be the main issue in front of the Board, but **today** the issue is whether it is clear that towns are so preempted by state law that all they can do is protect their roads and mitigate problems caused by surface runoff.

This view of state preemption comes from the wording of Environmental Conservation Law 2303 Section 2, which states that state law supersedes local laws in regard to **regulation** of the oil, gas, and solution mining industries, except for local government jurisdiction over local roads and certain rights under real property tax law. But there are other things a town can do that are NOT regulation. Specifically, part of the argument you will hear tonight is that prohibition of an activity (not allowing it to occur at all) is not the same thing as regulating an activity (setting conditions such as how far away, how tall, or what kind of cement is used.)

Preemption

There is case law regarding mineral mining that holds that prohibition is not regulation. So it's not a good use of everyone's time here to state over and over again, " towns can't regulate,

towns can't regulate"; we're not claiming that towns **can** regulate. The other side needs to show the legal basis for claiming that prohibition *is* regulation, and is therefore preempted.

Don't worry, I'll leave the heavy duty legal analysis to an actual lawyer, David Slottje. I've heard that you can always find one lawyer to take your side, but I want everyone to know that many lawyers agree with the analysis David will present, and that town lawyers in Ulysses, Ithaca and Dryden, as well as other towns and cities in New York, agree so much that they are drafting ordinances banning industries like gas drilling. *Indeed, one such ordinance is being voted on in Ulysses tonight and another will be considered by Dryden tomorrow night.*

Home Rule Bills

So why are there Home Rule bills in the State Assembly and Senate? Some say that the existence of these bills proves that towns are preempted. That's a good sound-bite, but inaccurate. As the bills state, their purpose is to *clarify* the role of municipalities in governing gas development, because some local government officials are *confused* about whether local laws are preempted by state law. Clarifying legislative intent is telling towns what powers they already have, **not** giving them new powers.

Resolution

Which, finally, brings us to the "clarifying" resolution being considered tonight. The Town Board does not need this resolution to tell itself what it can and can't do. And in response to the claim made last week that the proponents of the resolution were just trying to save us time from barking up the wrong tree—how we spend our time really isn't your decision, it's our decision. And rest assured: we *will* keep pressuring on the local level as well as the state level, and we *will* bring our petition to the Town Board, regardless of tonight's outcome. The crime is that the effect of this resolution, whether intentional or not, is to stifle the voice of the people of this town, as expressed most directly in the petition drive currently under way in Caroline.

I have talked to Town Board members and heard comments like, "Well, there are some who want gas drilling yesterday and some who don't want it ever." The implication is that the town is evenly divided. Nothing could be further from the truth. Because we have been bringing the petition around, our group has a sense of what the community feels. In many residents, there is a sense of despair and inevitability about the prospect of gas drilling. You should see how

people's eyes light up with hope when we tell them a ban is legal. For those who give us an answer (and there are very few undecideds), 80%–four out of five–support the petition. With such overwhelming support, is it not your **DUTY** to explore every legal option? Don't Caroline residents deserve to have their Town Board leave no stone unturned before giving up on them?

Conclusion

This resolution is premature because it closes and locks doors before the Town Board even knows what is behind them. It is anti-democratic because it doesn't just ignore the will of the people, it stomps on it. Please don't pass this resolution.

Attachment 4: Attorney David Slottje

[Draft of Remarks to be delivered June 14, 2011 to the Caroline Town Board by David Slottje.]

Good evening. My name is David Slottje. I'm an attorney with Community Environmental Defense Counsel. Community Environmental Defense Counsel is a pro bono, public interest law firm. Pro bono means that we work for free.

I am speaking here tonight on behalf of Residents Against Unsafe Shale-Gas Extraction – or ROUSE. The members of ROUSE and other Caroline residents have so far collected the petition signatures of over nine hundred Townspeople who are concerned about the negative community impacts that typically accompany unconventional gas drilling techniques. These Signature collecting efforts are continuing, and plans are being made to make formal presentation of the petition to this Board in the future.

I am here tonight to make respectful request that you not pass the Resolution that has just been introduced. We believe that the Resolution's underlying assumptions are seriously mistaken, and that as a result the Resolution itself is fatally flawed.

(Parenthetically, I would like to note that we DO accept the acknowledgement contained in the Resolution that the Town – and by extension, the Town Board – has a fiduciary responsibility in this matter. However, *we* believe that that fiduciary responsibility extends not just to the protection of local roads, but as well to the protection of ALL of the Town's assets, including the rural residential character that so many Caroline residents hold dear. A fiduciary duty, by the way, is the absolute highest duty recognized by the law, and means in essence that the person charged with such a duty must protect the interests of those to whom the

duty is owed, over and above the fiduciary's own self interest. I want to say that again. A fiduciary duty is the highest duty recognized by the law, and means that the person charged with such a duty must protect the interests of those to whom the duty is owed, over and above the fiduciary's own self interest.)

All right, on to the parts of the Resolution we think are mistaken.

We have been told that the sponsors of the Resolution believe that it is "neutral," in the sense that it supposedly seeks to preserve a neutral interpretation of ECL 23-0303(2), the Preemption Statute that is referenced at the first paragraph of the Resolution.

We have been told that in the view of the Resolution's sponsors, the Preemption Statute's prohibition against "regulation" of the gas industry precludes, as a matter of law, any and all action (other than road use agreements) by a municipality to attempt to protect itself from the traffic, air pollution, and other deleterious affects that even pro-industry supporters acknowledge invariably accompany unconventional gas drilling.

AND we have been told that the sponsors of this Resolution have developed this belief in the Town's impotence at least in part by relying upon the opinion of a Caroline resident who happens to be an attorney and who has asserted that "reasonable minds can not possibly come to any conclusion other than" his own interpretation with respect to the Preemption Statute.

So since the sponsors' belief that reasonable minds cannot differ with *their* interpretation of the Preemption Statute is their articulated justification for introduction of the Resolution, as well as the basis for their assertion that passage of the Resolution is "neutral," I would like to take just a moment to examine this premise.

It is true that ECL 23-0303(2), the Preemption Statute, by its terms precludes municipalities from ***regulating*** the oil, gas, and solution mining industries, but that is far from the end of a *proper* legal inquiry.

We believe that by "regulating," the Preemption Statute means *regulating the operational processes* of the industry – that is, things like how deep they can drill or

mine, and imposition of insurance and bonding requirements, etc. -- and that although New York state municipalities may not 'regulate' in that manner, they may in fact **prohibit** such industries outright, either through zoning (in towns where zoning exists) or through use of other police powers available to protect the health, safety, and general welfare of residents.

The drilling statute language regarding regulation is almost identical to the language regarding regulation that was previously used in the context of the mineral mining statute, and in *that* context the Court of Appeals -- which is the highest court in the state of New York -- made it clear that the scope of preempted regulation meant *regulation related to operational processes*, and that municipalities absolutely **could** prohibit mining outright, whether in certain zoning districts or throughout an entire town. We believe this same mining statute analysis obtains with respect to the drilling statute, and many, many New York state lawyers agree.

Please keep in mind that our interpretation of the Preemption Statute is not particularly bold, or visionary, or clever, or out-of-the box. This is *not* a situation where we are attempting to create new law, or attempting to overturn a law that we do not agree with, or even trying to distinguish a holding in some lower court case that goes against what we are suggesting.

And no one disputes that the Preemption Statute prohibits local ***regulation*** of the gas industry. But it is simply NOT the case that "reasonable minds cannot possibly disagree" with the opinion (of the sponsors of this resolution) that preemption with respect to *regulation* makes municipalities impotent with respect to the tool of *prohibition,* or any number of other tools potentially available to the Town. To suggest otherwise is simply inaccurate.

The fact is that even as we speak there are towns and municipal lawyers all over the state evaluating the reach of the Preemption Statute, and they most assuredly would not agree that "reasonable minds cannot possibly differ" with respect to this matter.

Other towns and municipal lawyers have already completed their own analysis, and based upon their actions in passing or drafting prohibitions or moratoria, they too most certainly would disagree with the position of the sponsors of this Resolution that towns are powerless (other than with respect to road use agreements).

I mean absolutely no disrespect to the author or authors of the Resolution with what I am about to say, and I apologize in advance if my words appear to be unduly harsh. But this is far too important a topic for me to mince words.

The logical foundation of the Resolution is fatally flawed; the sponsors' underlying belief that their own interpretation of the Preemption Statute is beyond dispute is wrong. Period. There is no other way to say it. In our own Tompkins County alone, numerous municipalities and their experienced lawyers are working to attempt to find ways – at the local level – to protect themselves from the coming storm.

Characterizing this resolution as neutral does not make it so. The width of this Resolution's "not attempt to either encourage or limit gas drilling" language would be laughable were it not so frightening. But make no mistake: Board Members who choose to vote for this Resolution will be taking many, many protective tools out of the Town's hands.

For example, a town can PROHIBIT through-truck traffic on certain residential roads and/or on other roads that cannot support heavy trucks. A town can post weight limits on certain roads and prohibit through-trucks that are heavier than the limit. A town may prohibit unregulated pipelines (that is, pipelines not otherwise regulated by the PSC or by FERC). A town may regulate/prohibit disposal of solid wastes. Drilling exploration and production wastes are considered solid wastes for this purpose (due to loop holes). A town may prohibit underground storage of natural gas (unless the storage is associated with a major FERC project). A town may enact and enforce a sanitary code, air pollution laws… I could go on and on.

But before you vote, please understand that if this Resolution is passed, *the Town of Caroline* will NOT be allowed to pass any such laws, at least to the extent that they would seem to fall within this Resolution's admonition against doing anything to "limit gas drilling…"

WHY in the *world* would a Town Board even consider hamstring itself like this? Isn't it this Board's duty to PROTECT the Town? Doesn't the Resolution itself use the term "fiduciary?"

I've touched upon a number of legal issues tonight, and without question there are many more to discuss. But keep in mind that tonight is not about Whether the Town should do something to prepare for the coming onslaught? *That* discussion is for another time.

The question for ***Tonight*** is whether the underlying assumption on the part of the sponsors of this Resolution as to the irrefutability of their interpretation of the Preemption Statute is correct. I have tried to show that it is not, and that by passing this Resolution, those voting in favor will be placing the Town of Caroline in *grave* danger, by unnecessarily tying the Town Board's hands, and removing tools otherwise available to the Town.

My clients are asking that consideration of this Resolution be permanently withdrawn. If the sponsors are

unwilling to withdraw consideration of the Resolution permanently,

then in the alternative we are respectfully requesting that prior to taking **any** vote on the Resolution, the Town Board engage and direct the attorney for the Town - Mr. Guy Krough - to evaluate the merits, and opine as to the validity, of the sponsors' underlying assumptions regarding whether reasonable lawyers can dispute the sponsors' interpretation of the Preemption Statute, and whether passage of this Resolution will or will not unnecessarily leave the Town in a weakened position by taking potentially valuable tools out of the hands of the Town Board.

In evaluating our latter request, we would point out that there are at least two additional weeks before any permits can be issued (vis-à-vis the SGEIS), and that Mr. Krough is by all accounts one of the best lawyers in the County – indeed in the entire State - as to municipal law issues.

So there would seem to be no *good faith* reason not to grant our request in this regard. True, there would be the cost of Mr. Krough's fee in undertaking this analysis, but if there was EVER a time to get something right, it would seem to be this matter, now.

Two last things:

First, thank you very much for your time and attention tonight.
Second, with your permission, I would like to approach and give to each Board Member, the Town Clerk, and the attorney for the Town, a copy of my remarks. I am asking that a copy be included in the official record of this meeting.

Thank you very much, David
Slottje
Community Environmental Defense Council, Inc.

Attachment 5: Attorney Guy Krogh

TOC Solution & Gas Mining Overview of Legal Issues & Unanswered Questions
Presentation on 6/14/11 @ 8pm
Guy K. Krogh, Esq.

INTRODUCTION - Introduction and general opening comments**.**

1. PREEMPTION – Preemption is not a simple issue, and just applicable to the ECL language on solution & gas mining (hereafter "solution" mining). There are two basic types of preemption, "express" and "implied," and both deserve attention and analyses. Express Preemption is borne out for solution mining in Environmental Conservation Law § 23-0303(2), and the language is rather direct:

> *"The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local*

government jurisdiction over local roads or the rights of local governments under the real property tax law."

Note that the law does not say that you cannot interfere with "operations," but that you are superseded from enacting local laws that affect the "solution mining industries." Contrast this with ECL § 23-2703(2) a declaration of supersession policy for extractive mining/mined lands reclamation laws:

"For the purposes stated herein, this title shall supersede 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; or

c. enacting or enforcing local laws or ordinances regulating mining or the reclamation of mines not required to be permitted by the state.

3. No agency of this state shall consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draws its primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or

ordinances prohibit mining uses within the area proposed to be mined."

These are very, very different clauses – one expressly allows for many types of regulation and one just two. Now note that the statutes use the terms "industry" and "activity" as separate things – 'activity" being basically a reference to operations. Both were amended, one in 1991, the other in 1981, and the Legislature chose different language for these separate activities. Also, the regulatory scheme underlying these different types of mining is also very different. This may lead you to understand that solution and extractive mining are governed by two very different bodies of law. Now enter the *Envirogas* case (there were actually several *Envirogas* cases). This case noted this direct language differential in these two laws and the underlying purpose of the legislative amendments to the solution mining preemption language:

Petitioner's business, like that of all gas producers operating within New York State, is governed by state statutes (ECL Article 23) and regulations (6 N.Y.C.R.R. § 550 et seq.), which are designed to protect the public, prevent waste and ensure a greater ultimate recovery of oil and gas. For each well it has drilled in Chautauqua County Petitioner has obtained a drilling permit from the Department of Energy Conservation (DEC) and has otherwise complied with all statutory and regulatory requirements. Respondents [Respondents here means the Town] *submit that the amendment to Article 23 does not apply to local areas of concern not specifically addressed by the ECL. They contend, in the alternative, that the permit and bond requirements of Section 4(q) are justified by the exception in the ordinance for "local government jurisdiction over local roads."*

*The mere fact that a state regulates a certain area of business does not automatically pre-empt all local legislation which applies to that enterprise (Landfill v. Caledonia, 51 N.Y.2d 679, 683, 435 N.Y.S.2d 966, 417 N.E.2d 78). 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. (Robin v. Inc. Vil. of Hempstead, 30 N.Y.2d 347, 350-351, 334 N.Y.S.2d 129, 285 N.E.2d 285). This is so, as the Court of Appeals recently observed, because "the fount of the police power is the sovereign state, (and) such power can be exercised * * * only when and to the degree it has been delegated such lawmaking authority" (citations omitted) (People v. De Jesus, 54 N.Y.2d 465, 466 N.Y.S.2d 207, 430 N.E.2d 1260.*

Prior to the recent Amendment of the ECL Article 23, local ordinances requiring commercial oil and gas drillers to S64482b66d92c1 *post compliance bonds as a reasonable means of zoning enforcement were upheld (Envirogas, Inc. v. Town of Westfield, 82 A.D.2d 117, 442 N.Y.S.2d 290; see also Town Law, Section 268). But the policy and purpose behind the recent amendment* [this "amendment" refers to the amendments to the solution mining preemption law] *is not left to the imagination. Since the amendment specifically states that it is to*

> *"supersede all local laws or ordinances," it pre-empts 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.* [emphasis added]

I note that the Court used the term "operations" and did not stick to the terms "activity" and "industry" – which detracts from what is otherwise a rater starkly clear ruling. So clear, in fact, it has not been challenged in 30 years. This one word – "operations" - has been seized upon as the basis upon which to interpret this case and label it inapplicable to the preemption analysis, despite the fact that it was a preemption case directly interpreting § 23-0303.

The underlying theory of this "change in law" argument is that the history of extractive mining, where supersession language was interpreted to not preempt a law of general applicability that only had a tangential impact on extractive mining - basically supporting a municipality's home rule authority to regulate in the field of extractive mining - may or will be ultimately applied to the solution mining industry. A relatively new "back-up" corollary theory has emerged, but it too is based in the extractive mining world (mainly, being derived from the *Frew Run* case). This back-up theory states that prohibiting an industry is not the same a regulating that industry. Logically, this makes little sense and I believe that both theories are based upon a stretched reading of the cases, and, more importantly, of the preemption law itself. So, while there is a rational basis to argue for a change in the law, that analysis needs to be more fully examined, principally by finding other preemption cases in other industries and making that analysis. This might occur, but to date, and since 1981, it never has. This may be because everyone has known for 30 years what ECL §23-0303(2) meant, but now that horizontal fracing (a/k/a "fracturing," "fracking", and "frac'ing") creates a new and unforeseen risk, there are new and unseen legal theories sprouting up to try to stop, or at least regulate, such industry or such risks.

To beat supersession, you need a well supported and a carefully integrated and crafted law that will pit important public policy issues and state and federal legislative declarations against each other. For example, it is indisputable that the federal and state governments have granted express powers to local governments to protect certain aspects of the environment – in NYS, for example, watersheds, erosion, water pollution, aquifers, and CEAs are possible avenues to overcome supersession. There are others. For those that say it will not work, I would counter that these things are deserving of protection anyway, and if there is a chance you can regulate drilling or its potential impacts with these tools, all the better.

All this and I have only yet addressed express preemption. There are two other very important aspects of the preemption question. First, the question of preemption is a question that applies to the whole of a law, as well as to the specific provisions of any proposed regulatory scheme - literally, upon a clause by clause basis. Second, of importance is implied preemption, which, generally, arises when either or both of the following rules are triggered:

1. A municipality may not adopt laws that are inconsistent with NYS or Federal laws, absent an express and written legislative delegation of authority to do so (an example is the Clean Air Act, which allows more stringent clean air regulations by the States and sets a minimum bar); and

2. Municipalities, even if *not* adopting an inconsistent law, may *not* adopt laws where the State legislature has established by declaration an important State policy (generally, but not always, it needs to be imbued with an important public purpose or necessary State power), *OR* where the State has enacted a detailed or comprehensive regulatory scheme in a particular field.

Since both NYS and the US Federal Government have expressly declared that the development of energy supplies and reserves, including natural gas, etc., are vital to both the economy and national security, and since NYS has extensively regulated in the field of and solution mining, this issue needs a closer look.

2. TAKINGS: Takings law is very squirrely when dealing with commercial or industrial claims, and often sift down towards secondary legal analyses, such as substantive due process or equal protection claims (a form of equitable fairness analysis), whether there is a constitutional right in play (such as the First Amendment, a right of association, etc.), and whether there is a vested interest in the use and/or bad faith by the municipality (referred to in the legal world as "special circumstances"). Also, courts are now very active in expanding the scope of administrative takings and what is "property" for takings purposes. In point of fact, there are NYS cases recognizing takings-based substantive due process claims for gas drilling prohibitions and bans. Further, "takings" are not related solely to land rights. "Takings" can apply to a battery of property rights, including rights in a permit. For example, since it is foreseeable that a Court could hold that the level of cost and investment incurred to obtaining a permit is so high that obtaining a permit is akin to a property right, the loss of rights in the permit itself can become a taking (and this has occurred in many fields, including liquor licenses and mining permits – yes – *mining permits*). Also, could not a landowner argue that you have taken something from their land that was of value? Is the right to extract minerals from below the surface similar to the right to extract minerals from the surface, for example to grow crops? Further, and in perspective, gas leasing has hundreds of years of history in NYS, and the right to extract minerals from land is an essential right of the landowner – a "hereditament" of the land. What is needed is a serious analysis of the bundle of NYS property rights that attach to personal property, land, and title to land. Summary conclusions on this topic are belied by the fact that a mineral estate is a separate and divisible estate in land in NYS, and therefore not *de minimus* right that can or should easily ignored or dismissed by a passing reference to the "rule of capture" (which, ironically, is largely based upon a fox hunting case from over 500 years ago).

3. HOME RULE: Home Rule is not a panacea – its powers are often misstated or misunderstood. “Home rule" is, like all other municipal powers, derived from the State. It really does have limitations and NYS is a limited home rule state. If NYS were a true "home rule state,” I doubt NYS would have seen the need for thousands of pages of Town, Village, City, County, General Municipal, Local Finance, Public Officers, Executive, and many other laws, and even more regulations, describing and limiting the power of local governments. As is predicable – a key legal area for challenging the use of home rule powers is – yes, preemption. This, then, is just one more area where preemption analyses need to be performed.

4. GENERAL ZONING AND PLANNING – While Caroline does not have zoning, but does have a Comprehensive Plan, there are issues here to address as well. There is no serious NYS analysis to date that I know of addressing general and specific powers of zoning in relation to solution mining. While many rely upon U.S. Supreme Court cases arising in other states, or memorandums written in Texas or Colorado, which have dissimilar laws (for example, Texas Home Rule Powers are significantly broader than in NYS), these analyses are incomplete. A serious analysis of zoning and planning law must recognize the dozens of U.S. Supreme Court (and other) cases that point out that zoning is the balancing of all interests in a community (and even it its surrounding regions) - residential, recreational, business, commercial, *and* industrial. If this basic tenant of zoning is to be disregarded by the favoring of some uses and the banning of others then there is a very different body of case law that should be examined. To my knowledge, this has not yet been done. Imagine, if you will, using home rule to justify banning housing or farming - do you think there would be a legal problem with this? This question is self-answering because the actual common law zoning is that the primary goal of zoning is to provide for the development of a balanced, cohesive community that will make efficient use of land in a manner as to balance the residential, commercial, *and* industrial needs of a community and its surrounding region; referred to by one Court as the need to “provide in an orderly fashion for actual public need for various types of residential, commercial and industrial structures.” *See e.g., Valley View Vil. v. Proffett, 221 F.2d 412 (federal citation); Berenson v. New Castle, 38 NY2d 102 (NYS citation)).*

Also, zoning is a limited power - it has legal boundaries and is judicially deemed in derogation of the common law - that body of law that supports the battery of rights enshrined in both the NY and US Constitutions (here, principally property rights). Therefore, zoning must bear a reasonable and rational relationship to some valid public purpose, and because it is contrary to and impinges upon basic property rights, it is always narrowly construed and presumed suspect when it reaches too far from its valid underlying purpose, generally described as part of the government's "police power" (note further that the "police power" is, in itself, a further limiting concept as it points to the distinction between a legislative enactment and an administrative act). So, like home rule, zoning is not a panacea. Thus, keep in mind that merely because other towns are enacting bans, this does not mean they will work, that they are legal, or that they will survive a challenge. If the mining industry targets the Town with the most poorly supported, researched, or written law, precedent will be set that hurts all other towns and municipalities. If it is your town that is targeted, getting through a federal court action sounding in the deprivation of rights, like due process, will likely cost well over $75,000, win or lose per case. While many want to ban solution mining, how many want a 10-20% property tax increase to pay for such litigation?

Further, most municipal attorneys I know are well aware of this risk and also do not believe that a municipality has the power, under home rule or otherwise, to ban solution mining. However, attorneys are not elected decision makers so their opinions are just that – opinions. As well, however, many such municipal attorneys do personally oppose drilling in its current form, and most support trying to create the circumstances whereby a change in law may occur, whether by surviving a legal challenge in the courtroom or by lobbying in Albany.

4. SOME OTHER ISSUES HIDING IN THE WINGS – A PARTIAL LIST:

Other NYS and federal preemption issues;
Divisible load and heavy haul permitting;
ICC permitting;
Rights in commerce relating to the rights of local delivery;
Constitutional and other rights to travel;
Rights and rights of use in public highways;
Real and personal property rights;
The Contract Clause of the NYS and Federal Constitutions; and
The Commerce Clause of the NYS and Federal Constitutions.

CONCLUSION - In short, I have some research, some knowledge, some experience in this field. I have not yet done comprehensive research and cannot answer all questions. Preemption is the big challenge, and the current state of law in NYS is not encouraging, but there are things you can do to try to protect what it is you value about your home and your Town. I am here to get you to think, to educate myself and others about the risks and liabilities of action *and* inaction. There appears to be a natural tension between the fiscal abilities and responsibilities of a town government and the need to do something in light of the upcoming potential industrialization of the countryside. While doing nothing is in my view unwise, it is not as unwise as doing something that is wrong, illegal, unenforceable, or not well documented and researched.