

The URB Insider

A Quarterly Publication of Underwriters Rating Board



New York Court of Appeals Upholds Municipal Hydrofracking Bans

A divided New York Court of Appeals sided with two municipalities on June 30 when it determined local zoning ordinances that ban oil and gas production activities are not preempted by the state's Oil, Gas and Solution Mining Law (OGSML).

In 2011, the town of Dryden, New York passed a zoning ordinance that in pertinent part prohibited all activities related to the exploration, production or storage of natural gas. Norse Energy brought a challenge to the ordinance and argued the OGSML preempts such a local zoning law. Supreme Court's decision was affirmed by the appeals court, holding that mu-

nicipalities have the power to enact such zoning ordinances within their borders.

The Town of Middlefield, New York also adopted a 2011 zoning ordinance that prohibited oil, gas and solution mining and drilling within the town's boundaries. Coopers-town Holstein Corporation brought an action to set aside the zoning law. Again, both Supreme Court and the appellate court upheld the validity of the ordinance.

These two cases were heard together by the Court of Appeals. In an opinion written by Justice Victoria Graffeo, the Court reviewed the power that municipalities retain and if the



New York State Court of Appeals in Albany, New York.

OGSML preempts the municipalities' power to ban oil and gas activities.

The Court examined the difference between local laws that regulate oil and gas activities and those that prohibit certain land uses. The Court of Appeals rejected claims that the OGSML preempts local authorities from banning hydraulic fracturing operations.

To read the case, right click the link below. ♦

Volume 12, Issue 1

Summer, 2014

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[Matter of Wallach v Town of Dryden \(2014 NY Slip Op 04875\)](#)

New York State's Court of Appeals Deals Blow To Albany's Cyberbullying Law in Support of Free Speech

In the case of *People v. Marquan M.*, 2014 NY Slip Op 04881, the New York Court of Appeals found Albany's cyberbullying law unconstitutional in what amounted to a victory for free speech. The law was being used to prosecute the unidentified teenager who anonymously posted sexual information about fellow classmates on a publicly accessible internet website. The Court of Appeals was asked to decide if the statute comported with the Free Speech Clause of the First Amendment.

In 2010, before the state legislature amended the Dignity for All Students Act in 2012, the officials in Albany County decided to tackle the problem of cyberbullying. At that time, the Albany County Legislature adopted the new crime of cyberbullying which was defined in the statute as:

"any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person" (Albany Local Law No. 11 of 2010).

This provision outlawed cyberbullying against any minor or person situated in the county, per the law, and knowingly engaging in this activity was deemed to be a misdemeanor punishable by up to one year in jail and a \$1,000 fine. The statute included a severability clause and became effective in November, 2010.

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

~ First Amendment

A month later, defendant Marguan M., a student at Cohoes High School in Albany County used Facebook to create a page named "Cohoes Flame." He posted photographs of classmates and other adolescents, with detailed descriptions of their alleged sexual practices and predilections, sexual partners and other types of personal information.

Upon investigation, defendant admitted his involvement and was charged under the cyberbullying law. He moved to dismiss, arguing the statute violated his right to free speech. City Court denied the motion

and he plead guilty to one count of cyberbullying while reserving his right to raise constitutional arguments on appeal. County Court affirmed, concluding the local law was constitutional to the extent it outlawed such activities directed at minors. A Judge of the Court of Appeals granted defendant leave to appeal.

Defendant contends the cyberbullying law is overbroad and unlawfully vague. The County concedes that certain aspects of the cyberbullying law are invalid but maintains those portions are severable and the remainder constitutional.

In holding the statute unconstitutional, the Court of Appeals said, "Based on the text of the statute at issue, it is evident that Albany County create[d] a criminal prohibition of alarming breadth." *People v. Marquan M.*, supra, quoting *United States v. Stevens*, 559 US at 474.

Although the Court of Appeals indicated defendant's Facebook communications were repulsive, they found the statute too overly broad and facially invalid under the Free Speech Clause of the First Amendment.

To read the case, right click the link below. ♦

Understanding The Earth Movement Exclusion Clarification

Traditionally, the Earth Movement Exclusion in most policies applied to naturally occurring earth movement, not man-made events. Some insurers made efforts to try to exclude such man-made events. This difference became an issue in New York, in particular, a few years back when the Court of Appeals reviewed its decision in *Pioneer Tower Owners Assn. v. State Farm Fire & Cas. Co.*, 12 NY3d 302 (2009).

In the *Pioneer* case, the Court of Appeals determined that the Earth Movement Exclusion was ambiguous as it related to intentional earth movement, such as excavation.

Following the *Pioneer* case, another outcome was reached in the 2012 case of *Bentonia Holdings, Inc. v. Travelers Indem. Co.*, 20 NY3d 65. There, the Court of Appeals confronted their holding in *Pioneer* which held that an earth movement exclusion did not unambiguously

apply to excavation. In *Bentonia*, however, the Travelers earth movement exclusion at issue contained reference to excluding earth movement...all whether naturally occurring or due to man made or other artificial causes.

As such, the Court of Appeals held that this language eliminates the ambiguity of the language found in the exclusion in the *Pioneer* case and that the loss caused by excavation is excluded from the policy.

Based on the cases that were working their way through the courts on this issue, URB updated its Earth Movement Exclusion in 2010 to exclude earth movement that was not naturally occurring.

This language was added to the Earth Movement Exclusion by way of a clarification available by adding ML-73, FL-73 or SF-73 to the appropriate policy.

Use of any of these clarification endorsements deletes and replaces the underlying Earth Movement Exclusion in the policy and makes the clarified exclusion applicable instead. The clarified endorsement is broader and intends to remove coverage not only for naturally occurring earth movement but also for earth movement caused by humans, animals or any act of nature.

If your company is seeking to limit its exposure to earth movement and is not using the Earth Movement Exclusion Clarification, perhaps you would like to take a look at it again and consider adopting it for use. All three versions of the Earth Movement Exclusion Clarification are on the URB Forms CD. If you have questions on how to adopt or use any of these clarifications, please feel free to contact us at the URB. ♦

Recently Released Forms

- ♦ SF-124 Ed. 4/14—Roof Surface Actual Cash Value Loss Settlement (Windstorm or Hail)
- ♦ FL-124 Ed. 4/14—Roof Surface Actual Cash Value Loss Settlement (Windstorm or Hail)
- ♦ LS-58 Ed. 4/14—Overspray or Spillage Exclusion
- ♦ LS-79A Ed. 6/14—Exclusion of Snow/Ice Control Operations
- ♦ LS-40 Ed. 7/14—Sexual Misconduct Liability Coverage
- ♦ LS-57 Ed. 7/14—Lead Exclusion

URB Largest Homeowner Zip Codes 2013

All Communities

Rank	County	Community	Zip Code	Earned Premium (\$)
1	Kings	Brooklyn	11234	1,267,218
2	Tompkins	Ithaca	14850	944,919
3	Kings	Brooklyn	11236	739,030
4	Suffolk	Patchogue	11772	671,242
5	Kings	Brooklyn	11230	664,168
6	Suffolk	Bay Shore	11706	651,460
7	Kings	Brooklyn	11235	651,303
8	Nassau	Baldwin	11510	632,901
9	Suffolk	Huntington Station	11746	618,395
10	Fulton	Gloversville	12078	601,721
11	Suffolk	Huntington	11743	598,504
12	Kings	Brooklyn	11229	588,394
13	Bronx	Bronx	10465	578,108
14	Kings	Brooklyn	11204	540,573
15	Chautauqua	Jamestown	14701	530,535
16	Ulster	Kingston	12401	516,843
17	Suffolk	Brentwood	11717	512,128
18	Jefferson	Clayton	13624	510,553
19	Montgomery	Amsterdam	12010	508,636
20	Richmond	Staten Island	10306	496,196
21	St. Lawrence	Gouverneur	13642	495,405
22	Suffolk	Lindenhurst	11757	492,500
23	Richmond	Staten Island	10314	490,794
24	Kings	Brooklyn	11223	488,911
25	Nassau	Elmont	11003	485,853

Upstate Communities

Rank	County	Community	Zip Code	Earned Premium (\$)
1	Tompkins	Ithaca	14850	944,919
2	Fulton	Gloversville	12078	601,721
3	Chautauqua	Jamestown	14701	530,535
4	Ulster	Kingston	12401	516,843
5	Jefferson	Clayton	13624	510,553
6	Montgomery	Amsterdam	12010	508,636
7	St. Lawrence	Gouverneur	13642	495,405
8	Oswego	Oswego	13126	482,890
9	Cayuga	Auburn	13021	443,418
10	Orange	Middletown	10940	427,022

Eastern Mutual's Bill Scrafford Retires and Kent Johnson Becomes President

On June 19, Eastern Mutual's longtime President, Bill Scrafford, was honored at an open house that celebrated his 40 year tenure with company and his retirement, that was effective on June 30.

Bill had graduated from Hope College in Holland, Michigan in 1974 and joined Eastern Cooperative Insurance Company in September of that year. Five months later, his predecessor retired and Bill became the managing officer of the company. Bill managed the transition in the office from manual output of policies to digital filing systems and automated rating and writing of policies.

Bill credits mentors such as Frank Becker, Jr., Ted Curren, Henry Pellerin and Jim Lichtel who he says helped him tremendously during his career. He also credits the assistance received by New York Insurance Association (NYIA) over the years and two experiences of working to change legislation stand out in his mind. The first is the successful efforts to allow assessment cooperatives and advance premium cooperatives to write boiler and machinery coverage. The second is the expansion of the management expense cap to allow for computer system upgrades, which was an initiative of Bill's that he felt would assure the future success of the domestic mutual companies.



Retiring President, William Scrafford, and incoming President, Kent Johnson, at Eastern Mutual's Open House that feted Scrafford on his retirement on June 19, 2014.

In addition to his work at Eastern, Bill has served as Chairman of the New York Insurance Alliance (predecessor to NYIA), Chairman of Guilderland Mutual Reinsurance Company, Chairman of the Emergency Reserve Fund and ventured into local politics for five years as Westerlo Town Justice.

Over the years, Bill's hobby has been building furniture in his wood shop. In retirement, he is expanding the scope of his project to fixing up an 1890's home he has purchased in his community, that he intends to subsequently sell. Both he and his wife, Jane, have been active in their church for years, and Bill intends to be more active in the future. He and Jane also plan to travel to the western part of the United States and to Alaska, as well.

Kent Johnson is Bill Scrafford's successor at Eastern Mutual. He graduated from Rensselaer Polytechnic Institute (RPI) in 1982 with a Bachelor of Science Degree in Computer Science and later received a Master of Science

in Computer Science from Union College in 1987. Kent has lived in the Capital District since arriving as a freshman at RPI.

Kent began his career as a software engineer at Schlumberger in Latham and GE Fanuc in Albany from 1982-1994. In 1994, he started working at RPI in the IT Services Department. His title when he left RPI was Associate Director, IT Infrastructure. Kent began working at Eastern Mutual in April, 2013 as Executive Vice President. He currently holds his agent and broker licenses. He has had a prior affiliation with Eastern as a member of their Board of Directors since 2000.

Kent has been an active member in the New York Capital Region chapter of the Association of Contingency Planners, serving on their Board of Directors, as their information director and as their program director.

Kent and his wife have been married for over 25 years and have three children. They are big hockey fans and roller coaster enthusiasts.

Kent says he looks forward to leveraging his IT background to manage Eastern in an increasingly digital world. Kent is excited to be managing Eastern Mutual and looks forward to continuing his career doing so.

Best wishes to Bill for a happy retirement, and good luck to Kent as he leads Eastern Mutual forward. ♦

In The News

Congratulations to Erie and Niagara Insurance Association of Williamsville, New York on being one of the Top Work Places in 2014, according to the Buffalo News. The company is ranked at No. 11 out of the 20 top small companies.

Buffalo News teamed up with a company known as Workplace Dynamics to survey employees of large, medium and small companies to determine the best places to work. Employees were asked 25 questions about whether they feel appreciated, the level of frustration at their workplace, are they paid fairly, do they have flexibility to balance work and personal life, and many others. What emerged from Western New York companies is a pretty positive picture, according to the newspaper. ♦

The URB Insider

Published Quarterly by
Underwriters Rating Board
2932 Curry Road
Schenectady, N.Y. 12303
Phone: 518-355-8363 Fax: 518-355-8639

Published for friends and affiliates of URB

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