

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

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COOPERSTOWN HOLSTEIN CORPORATION,

Plaintiff,

-against-

TOWN OF MIDDLEFIELD,

Defendant.

Index No. 2011-0930

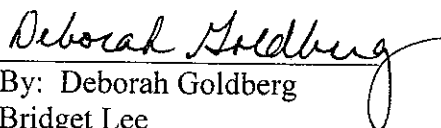
Hon. Donald F. Cerio, Jr.,
Justice

**NOTICE OF MOTION
FOR LEAVE TO FILE
MEMORANDUM OF
LAW *AMICI CURIAE***

-----X
PLEASE TAKE NOTICE that upon the annexed affirmation of Deborah Goldberg, dated November 10, 2011, and Exhibit A annexed thereto, and all prior pleadings and proceedings herein, Brewery Ommegang; Village of Cooperstown; Otsego 2000, Inc.; Natural Resources Defense Council, Inc.; Theodore Gordon Flyfishers, Inc.; Riverkeeper, Inc.; and Catskill Mountainkeeper (collectively, "Proposed *Amici*"), by their undersigned counsel, will move this Court, at 193 Main Street, Cooperstown, NY (or such other location as the Court may specify), on the ___ day of November, 2011 (as determined by Justice Donald F. Cerio, Jr.), at 9:30 A.M., or as soon thereafter as counsel may be heard, for an Order granting them leave to file the accompanying Memorandum of Law *Amici Curiae* and accepting the accompanying Memorandum as filed.

Dated: New York, New York
November 10, 2011

EARTHJUSTICE


By: Deborah Goldberg
Bridget Lee
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New York, NY 10038-5326
212-791-1881
Attorneys for Proposed *Amici*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

-----x

COOPERSTOWN HOLSTEIN CORPORATION,

Plaintiff,

-against-

TOWN OF MIDDLEFIELD,

Defendant.

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Index No. 20110930

Donald F. Cerio, Jr., Justice

**AFFIRMATION OF
DEBORAH GOLDBERG
IN SUPPORT OF
MOTION FOR LEAVE
TO FILE
MEMORANDUM OF
LAW *AMICI CURIAE***

Deborah Goldberg, Esq., hereby affirms under penalties of perjury pursuant to Rule 2106 of the New York Civil Practice Law and Rules (“CPLR”) that the following is true to the best of her knowledge:

1. I am an attorney admitted to practice in the State of New York and the Managing Attorney of the Northeast regional office of Earthjustice, counsel for Brewery Ommegang; Village of Cooperstown; Otsego 2000, Inc.; Natural Resources Defense Council, Inc.; Theodore Gordon Flyfishers, Inc.; Riverkeeper, Inc.; and Catskill Mountainkeeper (collectively, “Proposed *Amici*”) in this matter. I submit this Affirmation in support of the motion of Proposed *Amici* for leave to file the accompanying Memorandum of Law *Amici Curiae* of Brewery Ommegang; Village of Cooperstown; Otsego 2000, Inc.; Natural Resources Defense Council, Inc.; Theodore Gordon Flyfishers, Inc.; Riverkeeper, Inc.; and Catskill Mountainkeeper in Support of Defendant (“*Amici Mem.*”). As is explained below, this Court should grant Proposed *Amici*’s motion because they have provided ample notice to the parties pursuant to Rule 2214 of the CPLR and have satisfied the standards for *amicus* participation set forth in *Kruger v. Bloomberg*, 1 Misc. 3d 192 (Sup. Ct. N.Y. County 2003).

INTERESTS OF PROPOSED *AMICI*

2. The individual statements of interest of Proposed *Amici* are annexed to this Affirmation as Exhibit A. Collectively, Proposed *Amici* represent a diverse array of interests – business, municipal, sporting, and environmental; national, regional, and local; public and private; for-profit and non-profit. Notwithstanding their very different missions and varying positions on gas development in New York State, *Amici* are united in their concern for local communities that wish to protect their rural character and unsullied natural resources from the adverse impacts of heavy industry, including oil and gas development.

3. Proposed *Amici* share an interest in this case because they know that municipalities cannot protect the health, safety, and welfare of their citizens – including the clean water needed for drinking, award-winning ales, or fly-fishing – if they cannot exercise their State-delegated zoning powers to define the permissible uses of land within their borders. Proposed *Amici* urge this Court to recognize that the zoning law challenged by Plaintiff Cooperstown Holstein Corporation (“Plaintiff”) is consistent not only with the State of New York’s approach to extractive mining but also with the current practice in many other states actively promoting oil and gas development. Because state regulation of industrial operations, activities, and processes obviously can, and already does, coexist with local regulation of land use, Proposed *Amici* urge this Court to reject Plaintiff’s challenge and to uphold the zoning law adopted by the Town of Middlefield (“Zoning Law”).

PROPOSED *AMICI* SATISFY THE *KRUGER* STANDARD FOR PARTICIPATION

4. The Supreme Court of the State of New York has not promulgated rules governing participation as *amici curiae*, but some guidance may be found in *Kruger*. As that court recognized, the “function of an “amicus curiae” is to call the court’s attention to law or

facts or circumstances in a matter . . . that might otherwise escape its consideration.” *Kruger*, 1 Misc. 3d at 195–96 (quoting *Kemp v. Rubin*, 187 Misc. 707, 709 (Sup Ct. Queens County 1946)).

5. In their accompanying Memorandum of Law, Proposed *Amici* discuss relevant facts and law that have not been called to this Court’s attention. Specifically, Proposed *Amici* refute Plaintiff’s claim that upholding the Town of Middlefield’s delegated zoning authority will create a “patchwork” of laws unworkable for the oil and gas industry. *See* Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment at 12. Proposed *Amici* do so by demonstrating that local regulation of land use already coexists with state regulation of industrial operations in many states that support oil and gas development. *See Amici Mem.* at 18-24 (documenting the coexistence of local land use laws and state oil and gas regulation in California, Colorado, Kansas, New Mexico, Oklahoma, Pennsylvania, Texas, and Wyoming).

6. Proposed *Amici* also invite this Court’s attention to reported decisions of the high courts of Colorado and Pennsylvania, both of which have affirmed the distinction between regulation of land use and regulation of industrial operations and activities. *See id.* at 19-22. As Proposed *Amici* show, the New York Court of Appeals has adopted the very same distinction in rejecting claims that state law preempts local zoning of extractive mining. *See id.* at 4-13. Although the Colorado and Pennsylvania high court decisions are not precedents binding on this Court, they show that upholding zoning provisions, such as those adopted by the Town of Middlefield, will not defeat the purposes of New York’s Oil, Gas and Solution Mining Law (“OGSML”). The West Firm – co-counsel for Plaintiff – has conceded the relevance of the law and practice of other oil- and gas-producing states by citing a Colorado decision to the court hearing *Anschutz Exploration Corp. v. Town of Dryden et ano.*, Index No. 2011-0902 (Sup. Ct. Tompkins Cty., filed Sept. 16, 2011) (presenting a preemption claim against zoning provisions

adopted by the Town of Dryden). *See* Petitioner-Plaintiff’s Reply Memorandum of Law in Further Support of Verified Petition and Complaint and in Opposition to Respondents’ Summary Judgment Motion 21 (dated Oct. 28, 2011).

7. In addition to calling this Court’s attention to the law of other states, Proposed *Amici* provide a more detailed analysis of the reasoning and application of the leading New York precedents than Plaintiff offers. *See Amici Mem.* at 4-13. The decision in *Kruger* thus militates in favor of accepting the accompanying Memorandum of Law *Amici Curiae*. *See* 132 Misc. 3d at 198 (granting *amicus* status after considering whether the “movant would invite the court’s attention to the law or arguments which might otherwise escape its consideration”).

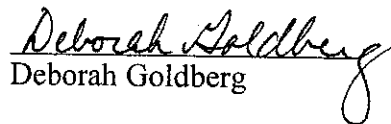
8. In deciding motions for *amicus* participation, the *Kruger* court also considered “whether the case concerns questions of important public interest.” *Id.* This case raises an issue of first impression in New York, and the decision here may influence other courts considering preemption claims under the OGSML. One such claim – against the Town of Dryden – already is pending in the Supreme Court, Tompkins County. Other municipalities that have adopted or are considering adopting provisions designed to regulate the use of land for oil and gas development and infrastructure are closely watching this case – as are many businesses, organizations, and individuals, whether they support or oppose oil and gas development in quiet rural towns. For this reason, too, this Court should grant Proposed *Amici*’s motion for leave to file the accompanying Memorandum.

9. Finally, before filing Proposed *Amici*’s motion, I consulted with counsel for both parties to this case. Counsel for the Town of Middlefield has consented to the filing of Proposed *Amici*’s Memorandum of Law. Counsel for Plaintiff denied consent to the filing of the Memorandum.

10. Because Plaintiff has not consented to the filing of Proposed *Amici's* Memorandum of Law, Proposed *Amici* have moved this Court for leave to file their Memorandum. Counsel for both parties have agreed to accept electronic service of Proposed *Amici's* motion papers, and such counsel were served electronically with the Notice of Motion and proposed Memorandum of Law *Amici Curiae* on November 10, 2011.

11. The Clerk of this Court has informed us that Plaintiff's motion for summary judgment will not be heard on the originally scheduled date of November 18 and that Justice Cerio will fix a later hearing date for that motion. In accordance with the Clerk's directions, the foregoing Notice of Motion has left blank the return date for Proposed *Amici's* motion for leave to file their Memorandum of Law, with the understanding that Justice Cerio also will supply the return date for that motion. The parties will have received more than the eight days' notice of Proposed *Amici's* motion provided for in Rule 2214(b) of the CPLR and will have ample time for response, including a response to the arguments raised in the Memorandum, without any delay of the proceedings.

WHEREFORE Proposed *Amici* respectfully request that this Court grant their Motion for Leave to File Memorandum of Law *Amici Curiae* and accept their Memorandum as filed.


Deborah Goldberg

Dated: New York, New York
November 10, 2011

Exhibit A

STATEMENTS OF INTEREST OF PROPOSED *AMICI CURIAE*

Brewery Ommegang is a \$30,000,000+ annual business that has operated in the Town of Middlefield for 14 years. The internationally-recognized quality of its award-winning ales utterly depends on a reliable source of clean water, untainted by industrial pollutants. Brewery Ommegang located in Middlefield in 1997 for several reasons, with the primary reason being readily available and plentiful amounts of clean water.

The Brewery's water, taken from multiple wells on its 140-acre property, is clean and unfiltered. The wells tap into the primary aquifer underlying Middlefield, and the Brewery uses more than 1,000,000 gallons per year. If its water were to be contaminated, the Brewery could be forced to move its business elsewhere. Its Master Brewer and Quality Control chemist agree that even if Brewery Ommegang wished to do so, it could not remove many of the toxic chemicals commonly used in hydro-fracking, should they were to be released into the Brewery's water supply.

Brewery Ommegang's highly stable workforce has chosen employment with it in part because of the quiet, rural character of its location. The Brewery has invested significantly in the Town as well as in training its people and developing its own infrastructure. Brewery Ommegang is in the middle of a carefully planned long-range growth program and is investing heavily in both infrastructure and personnel.

The Town in which the Brewery is located has a productive economy based on sustainable businesses, including agriculture, tourism, and recreation, as well as limited light manufacturing, such as the Brewery. As a community, Middlefield has long maintained its clean and quiet ambience by strictly limiting industrial development within the Town borders through careful land use planning.

Brewery Ommegang has an interest in this case because the preemption challenge filed against local bans on gas development and infrastructure threatens to undermine the longstanding power of towns to use zoning to protect community character. We strongly support the zoning provisions adopted by Dryden and Middlefield as essential to the Towns' abilities to regulate land use generally and to protect the health, safety, and welfare of local residents and sustainable businesses.

The **Village of Cooperstown** New York is partially located in the Town of Middlefield New York. Cooperstown is a major, national and international tourist destination in the United States. It is inextricably interconnected with the overall environmental and economic condition of the State of New York. The Village of Cooperstown, and the surrounding area, has hundreds of millions of dollars of long-term investment at risk of collapse if hydrofracking comes to New York State. The economic devastation to our historic Village and our world class attractions – the National Baseball Hall of Fame and Museum, The Farmers' Museum, the Fenimore Art Museum, the Glimmerglass Festival, the historic Otesaga Resort Hotel, Bassett Healthcare Network, and Otsego Lake – would be incalculable. The Village has long maintained its clean and quiet ambience by strictly limiting industrial development within its borders through careful land use planning. The Village has an interest in this case because the preemption challenge filed against local bans on gas development and infrastructure threatens to undermine the longstanding power of towns to use zoning to protect community character. We strongly support the zoning provisions adopted by Middlefield and the right to home rule as essential to the Towns' ability to regulate land use generally and protect the health, safety, and welfare of local residents and sustainable businesses.

Otsego 2000, Inc. is a 501(c)(3) organization founded almost 30 years ago to protect the environmental, scenic, cultural, and historic resources of the Otsego Lake region and northern Otsego County. Otsego 2000 is located in Village of Cooperstown, New York, portions of which are in the Town of Middlefield. Otsego 2000 is located on historic Lake Otsego, the headwaters of the Susquehanna River, one of the oldest and most significant river systems in the United States. Otsego Lake is memorialized in the writings of James Fenimore Cooper as “Glimmerglass Lake” and is now nationally and internationally recognized as historically and culturally significant.

The region is home to the Glimmerglass Historic District, the Lindesay Patent Historic District, Glimmerglass State Park, the Fenimore Art Museum, the Farmers’ Museum, Glimmerglass Opera, the Baseball Hall of Fame, the New York State Historical Association, and more than two thousand structures listed in or eligible for the State and National Registers of Historic Places. The region is also home to significant and increasingly rare remaining examples of intact farms and agrarian landscapes dating back to the earliest beginnings of settlement of New York State. It also boasts environmental resources of immense value including pristine trout streams, wetlands, woodlands, and endangered species habitats. Finally the region supports numerous organic and conventional dairy farms and farming operations including breweries and robust farmers’ markets. In summary, the entire region is directly dependent on clean water, air, and land for its economic base.

Enormous resources have been dedicated to the preservation of this historic region through investment of both private and government funds over many decades. All of these resources, investments, and future economic benefits are now threatened through heavy industrialization under current proposals to install gas extraction operations on virtually every

square mile of leased land in Middlefield and throughout our county. The importance of Home Rule with regard to protection of the resources of the region cannot be overstated. It has long been accepted that Home Rule powers are critical to preserving community character as well as the health and safety of the region's many visitors and residents.

For all of these reasons, Otsego 2000 vigorously supports the Town of Middlefield's zoning law prohibiting heavy industrial uses. Otsego 2000 also strongly supports the right of Middlefield to exercise its constitutional and statutory Home Rule and police powers to protect its citizens, and its priceless environmental and historic resources, for this generation and all those to come.

Natural Resources Defense Council, Inc. ("NRDC") is a national, not-for-profit membership organization – headquartered in New York – committed to the preservation, protection, and defense of the environment, public health, and natural resources. With over 30,000 members in New York State, NRDC long been active for more than four decades on environmental and land use issues affecting New York's local communities – including watershed protection, brownfields redevelopment, smart growth and zoning.

NRDC is currently a central stakeholder in addressing New York's most visible and controversial environmental challenge in recent years: the issuance of state permits to undertake industrial, hydraulic fracturing for natural gas ("fracking"). Two senior attorneys at NRDC were recently appointed as members of the New York State Department of Environmental Conservation's "High-Volume Hydraulic Fracturing Advisory Panel," which is charged with, among key tasks, "developing recommendations to avoid and mitigate impacts to local governments and communities."

NRDC is also taking a leading role in preparing detailed legal and technical comments on the State's newly released 1,500-page Draft Supplemental Generic Environmental Impact Statement, proposed rules, and draft water permits relating to fracking. The final EIS, regulations, and water permits will directly impact the legal rights of the Town of Dryden and other localities around the State where gas drilling is proposed. Additionally, NRDC is working to advance new bills in the New York State Legislature governing regulation of wastewater and other aspects of the fracking process. NRDC strongly believes that upholding New York's jurisprudential tradition of recognizing robust municipal authority to zone or exclude harmful industrial uses is essential to giving localities the right to protect themselves, to the extent deemed necessary by each community, from the potential adverse land use, community character and other environmental impacts of natural gas fracking.

Theodore Gordon Flyfishers, Inc. ("TGF") is a not-for-profit angling organization, founded on American fly fishing traditions, promoting stream and river protection and self-sustainable salmonid populations through conservation, environmental oversight, activism, catch-and-release practices and education. TGF has been assisting communities throughout the Catskill region for decades handling various issues, including without limitation, environmental conservation. In response to the proliferation of Marcellus Shale development, TGF has become an active voice in the sportsmen/sportswomen community working to identify and propose solutions which mitigate the potential impacts caused by natural gas development on angling, hunting, trapping and other outdoor sporting activities. TGF supports and recognizes the authority for local municipalities to regulate the land use within their borders to protect the character and environmental integrity of their communities.

Riverkeeper, Inc. (“Riverkeeper”) is a member-supported not-for-profit environmental organization existing under the laws of the state of New York, headquartered in Ossining, New York. Riverkeeper’s mission includes safeguarding the environmental, recreational and commercial integrity of the watershed that provides New York City its drinking water. Since 2008, Riverkeeper has been actively involved in advocacy and public education surrounding the issue of shale gas development, and in particular, has fought against any gas drilling that would compromise New York’s clean water. Given the significant threat that shale gas development poses to New York’s clean water, Riverkeeper has expanded its geographic focus beyond the New York City watershed with regard to this issue and has been working to prevent irresponsible gas development in the entire state, particularly in rural communities. Moreover, Riverkeeper is now working, in cooperation with other environmental organizations, including fellow *Amici Curiae* NRDC and Catskill Mountainkeeper, on the preparation of detailed technical comments on DEC’s recently released 1,500-page Draft Supplemental Generic Environmental Impact Statement, proposed regulations, and draft general stormwater permit relating to fracking. Riverkeeper strongly supports the rights of all local communities to utilize their municipal zoning powers to protect their clean water resources from potentially harmful industrial activities including shale gas extraction.

The **Catskill Mountainkeeper** (“CMK”) is a leading non-profit, membership-based organization in New York State dedicated to the protection of the environment and quality of life of local communities throughout the six-county Catskills region. CMK has two offices in the Catskills – one in Youngsville and one in Woodstock – and employs a full-time professional staff working on environmental and sustainable economic development issues.

Over the last several years, CMK has played a key role in the regional and statewide policy debates surrounding proposed natural gas drilling, including the likely significant adverse environmental, health, and infrastructure impacts on localities if New York State's proposed hydraulic fracturing plan moves forward as planned. Among other activities, CMK has organized public meetings, educated public officials, and published detailed newsletters on the natural gas drilling controversy in towns across the Catskills region. And in cooperation with with other non-profit organizations, including *Amici Curiae* NRDC and Riverkeeper, CMK is currently preparing comments on the State's newly released 1,500-page Draft Supplemental Generic Environmental Impact Statement and draft regulations regarding fracking.

CMK also works on other issues directly affecting towns and municipalities in the Catskills, including protection of drinking water, lakes, and streams; traffic congestion; farmland preservation; air quality; and the safeguarding of the overall rural character of the region. Consistent with long-standing New York State law, CMK is strong supporter of the rights of municipalities to pass zoning ordinances to limit heavy industry – including oil and gas extraction – within their borders.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

AVI ALLISON, being duly sworn, deposes and says:

1. I am over eighteen years of age and am not a party to the above action.
2. On the 10th day of November, 2011, I served a true and correct copy of the foregoing proposed Notice of Motion for Leave to File Memorandum of Law *Amici Curiae* and Affirmation of Deborah Goldberg, with Exhibit A, upon Cooperstown Holstein Corporation and the Town of Middlefield by electronic mail, upon consent of the parties, to each of the addressees listed below.

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Attorneys for Plaintiff

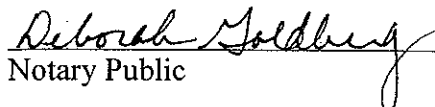
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Avi Allison

Sworn to before me this 10th
day of November, 2011.



Notary Public

DEBORAH GOLDBERG
Notary Public, State of New York
No. 31-4951179
Qualified in New York County
Commission Expires May 22, 2015