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ZONING AND LAND USE PLANNING

Marcellus Shale “Gas Rush” Raises Local Zoning Issues

Whether local municipalities will be able to determine the location of wells—or other issues relating to horizontal drilling or hydraulic fracturing—will be decided in the courts.

The Marcellus Shale is a black shale formation extending deep underground from Ohio and West Virginia northeast into Pennsylvania—and across New York’s Southern Tier. Although the Marcellus Shale is exposed at the ground surface in some locations in the northern Finger Lakes area, it is as deep as 7,000 feet or more below the ground surface along the Pennsylvania border in the Delaware River valley. Geologists estimate that the entire Marcellus Shale formation contains between 168 trillion to 516 trillion cubic feet of natural gas—a highly significant figure, given that New Yorkers use about 1.1 trillion cubic feet of natural gas a year.¹

The Marcellus Shale formation is receiving a growing amount of attention now as the “gas rush” takes hold due to the proximity of high natural gas demand markets in New York, New Jersey and New England; the construction of a natural gas pipeline (known as the Millennium Pipeline) through New York’s Southern Tier; and recent enhancements to gas well development technology, specifically horizontal drilling and hydraulic fracturing (also known as “fracking”).²

Last year, the Division of Mineral Resources of New York’s Department of

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Environmental Conservation (DEC) completed a draft Supplemental Generic Environmental Impact Statement (SGEIS) relating to the Marcellus Shale; the comment period has ended and the DEC is now evaluating the many comments it received before it issues a final SGEIS.³ The

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federal Environmental Protection Agency, which submitted a comment letter on the draft SGEIS in which, among other things, it indicated that it was “particularly concerned about the potential risks associated with gas drilling activities in the New York City watershed and the reservoirs that collect drinking water for nine million people,”⁴ held hearings on hydraulic fracturing in Binghamton in mid-September.

Moreover, the New York Senate has overwhelmingly passed S8129B, which would suspend the issuance of new permits for the drilling of a well that utilizes the practice of hydraulic fracturing for the purpose of stimulating natural gas or

oil in the Marcellus Shale formation; at the time of this writing, Assembly action was expected.

One of the issues that is undoubtedly going to have to be resolved by the courts is whether local governments can regulate the Marcellus Shale drilling sites through zoning. The recent decision by the supreme court of Pennsylvania in *Huntley & Huntley Inc. v. Borough Council of the Borough of Oakmont*⁵ may help shed some light on this question.

The Pennsylvania Rule

This case arose after Huntley & Huntley Inc., an engineering company involved in the oil and gas industry in Pennsylvania, sought to extract natural gas from residential property in the Borough of Oakmont in Allegheny County. After the firm obtained a permit from the Pennsylvania Department of Environmental Protection approving the drilling of the well at that location, the borough sent it a letter that stated that, under the borough’s zoning ordinance, drilling for natural gas was not permitted in a residential district. Huntley asserted that the proposed use had to be allowed as a conditional use under the borough’s zoning code and, in the alternative, that the borough was preempted from restricting the location of the operation by §602 of the Pennsylvania Oil and Gas Act, which stated, “[n]o ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act.”⁶

The Pennsylvania supreme court reasoned

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that §602's reference to "features of oil and gas well operations regulated by this act" pertained to technical aspects of well functioning and matters ancillary thereto (such as registration, bonding and well site restoration), rather than the well's location. It then examined whether the borough's zoning restrictions accomplished the same purposes "as set forth" in the law.

It found that intent underlying the borough's ordinance included serving police power objectives relating to the safety and welfare of its citizens, encouraging the most appropriate use of land throughout the borough, conserving the value of property, minimizing overcrowding and traffic congestion, and providing adequate open spaces. The court noted that there was "some overlap" between these goals and the purposes set forth in the Oil and Gas Act, most particularly in the area of protecting public health and safety. However, it found, the most salient objectives underlying restrictions on oil and gas drilling in residential districts appeared to be those pertaining to preserving the character of residential neighborhoods and encouraging "beneficial and compatible land uses." The court then concluded that the zoning ordinance served different purposes from those enumerated in the Oil and Gas Act, and, therefore, that its overall restriction on oil and gas wells in residential districts was not preempted by that law.⁷

It should be noted what the court did not hold. It stated that its decision did not mean that "any and all regulation of oil and gas development" would be permissible simply because it is zoning legislation. In particular, the court stated that it was not suggesting that a municipality could permit drilling in a particular district but then make that permission subject to conditions addressed to features of well operations regulated by the Oil and Gas Act.⁸

New York Law

The law in New York is not as clear, and requires first examining the decision issued about three decades ago by the supreme court, Erie County, in *Matter of Envirogas Inc. v. Town of Kiantone*.⁹

Here, Envirogas Inc., objected to a portion of the Town of Kiantone's zoning ordinance that provided that no oil or gas well could be constructed in the town without prior payment of a \$2,500 compliance bond and a \$25 permit fee. The court found that the business of Envirogas, and all other gas producers operating within New York State, was governed by state statutes¹⁰ and regulations,¹¹ adding that ECL 23-0303(2) specifically provided that, "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."

In the court's view, because the law specifically stated that it was to "supersede all local laws or ordinances," it preempted not only inconsistent local legislation, but also any municipal law that purported to regulate gas and oil well drilling operations, unless the law related to local roads or real property taxes (which were specifically excluded).

The court then rejected the town's contention that its ordinance was valid under the rubric of "jurisdiction over local roads," concluding that if that were permitted, there would be "no limit to the regulations" that the town could impose on oil and gas development.

However, five years later, in *Matter of Frew Run Gravel Prods. Inc. v. Town of Carroll*,¹² the New York Court of Appeals concluded that the state's Mined Land Reclamation Law (MLRL),¹³ which contained preemption language similar to that contained in ECL §23-0302(2), did not preempt a municipality's zoning ordinance when the DEC had issued a permit to operate a sand and gravel mine at a site that lay within a zoning district in which mining was not a permitted use.

Then, in 1996, the Court decided *Matter of Gernatt Asphalt Products Inc. v. Town of Sardinia*.¹⁴ Relying on an amended version of ECL 23-2703(2)(b)¹⁵ as a restatement of the policy in favor of fostering and promoting the mining industry in this state, and contending that the decision in *Frew Run* left municipalities with the limited authority to determine in which zoning districts mining could be conducted but not the authority to prohibit mining in all zoning districts, the petitioner contended that amendments to the zoning ordinance of the Town of Sardinia that eliminated mining as a permitted use in all zoning districts were invalid because they were preempted by the MLRL.

The Court rejected that challenge, stating that notwithstanding the "incidental effect" of local land use laws on the extractive mining industry, "zoning ordinances are not the type of regulatory provision the Legislature foresaw as preempted by the Mined Land Reclamation Law." It concluded that the MLRL did not preempt the town's authority to determine that mining should not be a permitted use of land within the

town, and to enact amendments to the local zoning ordinance in accordance with that determination.

Conclusion

In light of the rulings by the state's highest court regarding extractive mining operations, it appears that an argument can be made that natural gas drilling operations in New York may be subject to at least some local zoning regulation. One thing is certain; given the stakes, it is likely that local zoning ordinances attempting to limit or regulate the gas extraction industry are likely to face significant court challenges. It seems hard to believe that New York courts will find local governments completely powerless here, though the extent to which they will be able to enact zoning ordinances affecting the industry remains to be seen.

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1. See Department of Environmental Conservation (DEC), "Marcellus Shale," available at <http://www.dec.ny.gov/energy/46288.html>.

2. There is a potential windfall to property owners, too. A June 2009 report by the New York State Commission on State Asset Maximization suggested that, depending on the geology, a typical horizontal well in the Marcellus Shale (covering approximately 80 acres) could produce 1.0 to 1.5 billion cubic feet of gas cumulatively over the first five years in service. At a natural gas price of \$6 per million cubic feet, a 12.5 percent royalty could result in royalty income to a landowner of \$750,000 to over \$1 million over a five year period.

3. See <ftp://ftp.dec.state.ny.us/dmn/download/OGdSGEISFull.pdf>.

4. See http://www.epa.gov/region2/spmm/pdf/Marcellus_dSGEIS_Comment_Letter_plus_Enclosure.pdf.

5. 964 A.2d 855 (Pa. 2009).

6. 58 P.S. §601.602.

7. See also, *Board of County Comm'rs of La Plata County v. Bowen/Edwards Assocs. Inc.*, 830 P.2d 1045 (Colo. 1992) (no "clear and unequivocal statement of legislative intent" in state's oil and gas law to preempt local land use rules).

8. The court also ruled that, even though the borough's zoning ordinance was not preempted by the Oil and Gas Act, the borough had improperly denied Huntley a conditional use permit. See also, *Range Resources Appalachia, LLC v. Salem Township*, 964 A.2d 869 (Pa. 2009) (comprehensive and restrictive nature of regulatory scheme is preempted).

9. 112 Misc. 2d 432 (Sup. Ct. Erie Co. 1982).

10. See, e.g., ECL Article 23.

11. See 6 NYCRR 550 et seq.

12. 71 N.Y.2d 126 (1987).

13. ECL 23-2701 et seq.

14. 87 N.Y.2d 668 (1996).

15. The section provides: "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... enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts."