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ZONING AND LAND USE PLANNING

Upstate Courts Uphold Laws Prohibiting Gas Drilling

In landmark rulings issued within a few days of each other in late February, Supreme Court justices in Tompkins¹ and Otsego Counties² have decided that local zoning laws that ban all activities related to the exploration for, and production or storage of, natural gas and petroleum, in one case, and that prohibit “all oil, gas or solution mining and drilling,” in the other, are not preempted by the state’s Oil, Gas and Solution Mining Law (OGSML)³ and that they therefore are enforceable.

The two new decisions, involving municipal efforts to stop “hydrofracking,”⁴ apply longstanding Court of Appeals’ reasoning in analogous contexts.⁵ The Supreme Court opinions are likely to lead more towns and villages throughout the state to consider—and to adopt—similar zoning regulations to limit the ability of oil and gas companies to access natural gas in the Marcellus black shale formation in the state.

The ‘Dryden’ Law

The Tompkins County case, *Anschutz Exploration Corp. v. Town of Dryden*, arose after the Town of Dryden amended its zoning ordinance last August to ban all activities related to the exploration for, and production or storage of, natural gas and petroleum.⁶ Anschutz Exploration Corporation, which owns gas leases covering approximately 22,200 acres in the town—representing over one-third of its total area—that it obtained before the zoning amendment was enacted, brought an action against the town and the town board seeking to invalidate the zoning amendment on the ground that it was preempted by the OGSML. The town moved for summary judgment declaring the zoning amendment valid.

In his decision, Supreme Court Justice Phillip R. Rumsey explained that the OGSML contains an express supersession clause that provides 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.”⁷ The court observed that determining whether the provision preempted enactment of zoning ordinances that regulate where—or whether—operations related to gas production might occur was a matter of first impression.

To analyze the issue, it then turned to the New York Court of Appeals’ decision in *Matter of Frew Run Gravel Prods. v. Town of Carroll*,⁸ and that same Court’s subsequent decision in *Matter of Gernatt Asphalt Prods. v. Town of Sardinia*,⁹ where the Court interpreted a similar supersession

The court rejected Anschutz’s argument that the OGSML was not susceptible to the distinction made by the Court of Appeals when it determined that the MLRL preempted only local laws relating to operations, i.e., laws governing “how” are preempted, but not those governing “where.” In that regard, Anschutz pointed out that the supersession provisions of the MLRL and the OGSML contain different specific exceptions. The OGSML excepts only local government jurisdiction over local roads and rights regarding real property taxation, and Anschutz contended that if the supersession clause preempted only regulation of



Two courts have now ruled that the Oil, Gas and Solution Mining Law’s supersession clause does not serve to preempt a local government from enacting land use regulation that prohibits oil, gas and solution mining or drilling.

clause contained in the Mined Land Reclamation Law (MLRL)¹⁰ as not preempting local zoning ordinances.

As Justice Rumsey noted, the primary language of the two supersession clauses is nearly identical and neither clause contains a clear expression of legislative intent to preempt local control over land use and zoning. The MLRL provides that “[f]or the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry,”¹¹ while the OGSML provides that “[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries.”¹² Justice Rumsey then found that inasmuch as both statutes preempt only local regulations “relating” to the applicable industry, they must be afforded the same plain meaning. He then determined that they do not expressly preempt local regulation of land use, but only regulations dealing with oil, gas and solution mining operations.

operations—the “how”—then the exception for local government jurisdiction over local roads would be unnecessary because regulation of roads does not affect operations.

Justice Rumsey found that that argument overlooked the fact that hydrofracking depends upon transport of equipment, supplies and large volumes of hydrofracking fluid and waste by truck, adding that regulation of local roads to restrict or regulate heavy truck traffic, or to require repair of damage caused by such traffic, “would plainly relate to operation of gas wells by directly affecting access to well sites or other areas of operation and by imposing additional burdens or costs.”

Accordingly, the court declared, because regulation of local roads affects operations, the fact that the supersession clause contains the exception for jurisdiction over local roads did not support the conclusion that the Legislature intended to preempt local zoning power not directly concerned with regulation of gas mining operations.



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Justice Rumsey also found that nothing in the legislative history of the OGSM suggested, as Anschutz argued, that the Legislature intended to encourage the maximum ultimate recovery of oil and gas regardless of other considerations, or to preempt local zoning authority. The court pointed out that the OGSM contains the following express statement of its purpose:

It is hereby declared to be in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected, and to provide in similar fashion for the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells.¹³

In the court's view, this provision does not state that it is in the public interest to require, or to maximize, development of the oil and gas resources of New York State. Rather, it states that the purpose of the OGSM is to regulate any development or production of such resources that may occur in a manner that prevents waste, permits greater ultimate recovery of oil and gas, and protects the correlative rights of all persons. According to the court, interpreting the provision as pertaining to regulation of development and production only in locations where those activities may be conducted in compliance with applicable zoning ordinances governing land use means that the OGSM may be construed in a fashion that avoids any "abridgement of a town's powers to regulate land use through zoning powers" that have been expressly delegated in state law.¹⁴

Interestingly, the court also noted that the issue of the use of the local zoning power to regulate location of natural gas drilling operations had been considered in several decisions by the highest courts of Pennsylvania and Colorado.¹⁵ Recognizing that those decisions were not binding precedents, the court nonetheless found it instructive that both courts reached the same conclusion as it did: that their respective state's statute governing oil and gas production did not preempt the power of a local government to exercise its zoning power to regulate the districts where gas wells were a permitted use.

It should be noted that the court rejected the provision of the Dryden zoning amendment invalidating permits issued by any local, state or federal agency, commission or board "for a use which would violate the prohibitions of this section or of this Ordinance." The court explained that although the town could regulate the use

of land within its borders—even to the extent of banning operations related to the production of oil or gas—it had no authority to invalidate a permit lawfully issued by another governmental entity. Moreover, the court declared, by purporting to invalidate permits that may be issued by any state agency, this provision related directly to regulation of the oil and gas industries and, accordingly, was expressly preempted by the OGSM. Nonetheless, the court found this portion of the town's amended zoning law to be severable, and it upheld the portions challenged by Anschutz.

The 'Middlefield' Law

Acting Supreme Court Justice Donald F. Cerior, Jr., reached the same conclusion in *Cooperstown Holstein Corp. v. Town of Middlefield*. In this case, the town adopted a zoning law which stated that "Heavy industry and all oil, gas or solution mining and drilling are prohibited uses," effectively banning oil and gas drilling within the town's geographical borders. The court found nothing in the OGSM's supersession clause that indicated that the phrase, "this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries" was intended to abrogate "the constitutional and statutory authority vested in local municipalities to enact legislation affecting land use."

Rather, the court continued, the Legislature's intention was to insure state-wide standards relating to the manner and method to be employed with respect to oil, gas and solution drilling or mining, and to insure proper state-wide oversight of uniformity with a view towards maximizing utilization of this particular resource while minimizing waste. The court found that the state's interests could be harmonized with the home rule of local municipalities in their determination of where oil, gas and solution drilling or mining may occur. As the court concluded, "[t]he state maintains control over the 'how' of such procedures while the municipalities maintain control over the 'where' of such exploration."

Conclusion

Two courts have now ruled that the OGSM's supersession clause does not serve to preempt a local government from enacting land use regulation that prohibits oil, gas and solution mining or drilling. Given the magnitude of the issues—and the dollars—involved, one can expect that there will be appeals. Whether these decisions will stand up to further judicial review remains to be seen. However, for local governments and others that are opposed to hydrofracking, the first two decisions on the enforceability of zoning laws banning gas drilling operations are very encouraging.

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 1. *Anschutz Exploration Corp. v. Town of Dryden*, 2012 N.Y. Slip Op. 22037 (Sup. Ct. Tompkins Co. Feb. 21, 2012).

2. *Cooperstown Holstein Corp. v. Town of Middlefield*, No. 2011-0930 (Sup. Ct. Otsego Co. Feb. 24, 2012).

3. Environmental Conservation Law ("ECL") §23-0303.

4. Hydraulic fracturing or "hydrofracking" is a process used to extract natural gas from gas shale deposits. The process consists of pumping large quantities of a water/chemical mixture and sand into a well under high pressure to create fractures that release the natural gas from the rock.

5. See Anthony S. Guardino, "Marcellus Shale 'Gas Rush' Raises Local Zoning Issues," NYLJ, (Sept. 22, 2010).

6. The zoning amendment added the following Section 2104 to Article XXI of the town's zoning ordinance:
 "Prohibited Uses.

- (1) Prohibition against the Exploration for or Extraction of Natural Gas and/or Petroleum.

- "No land in the Town shall be used: to conduct any exploration for natural gas and/or petroleum; to drill any well for natural gas and/or petroleum; to transfer, store, process or treat natural gas and/or petroleum; or to dispose of natural gas and/or petroleum exploration or production wastes; or to erect any derrick, building or other structure; or to place any machinery or equipment for any such purposes.

- (2) Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Materials.

- "No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production materials.

- (3) Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Wastes.

- "No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production wastes.

- (4) Prohibition against Natural Gas and/or Petroleum Support Activities.

- "No land in the Town shall be used for natural gas and/or petroleum support activities.

- (5) Invalidity of Permits.

- "No permit issued by any local, state or federal agency, commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town."

7. ECL §23-0303(2) (emphasis supplied).

8. 71 N.Y.2d 126 (1987).

9. 87 N.Y.2d 668 (1996) (interpreting a 1991 amendment to the Mined Land Reclamation Law, which codified the Court's earlier holding in *Matter of Frew Run*, to permit a municipality to completely ban extractive mining activities within its borders).

10. ECL Article 23, Title 27.

11. Emphasis supplied.

12. Emphasis supplied.

13. ECL §23-0301.

14. Statute of Local Governments §10(6); Town Law §261.

15. See *Huntley & Huntley Inc. v. Borough Council of the Borough of Oakmont*, 964 A.2d 855 (Pa. 2009); *Voss v. Lundvall Brothers*, 830 P.2d 1061 (Colo. 1992); *Bowen/Edwards Assoc. Inc. v. Board of County Commissioners of La Plata County*, 830 P.2d 1045 (Colo. 1992).