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ZONING AND LAND USE PLANNING

Court Upholds Local Ordinances Banning Fracking

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In two unanimous landmark decisions, the Appellate Division, Third Department, has affirmed rulings by Supreme Court justices in Tompkins¹ and Otsego Counties² that local zoning laws banning all activities related to the exploration for, and production or storage of, natural gas and petroleum, in one case, and prohibiting “all oil, gas or solution mining and drilling,” in the other, are not preempted by New York’s Oil, Gas and Solution Mining Law (OGSML)³ and, therefore, are enforceable.⁴

The Third Department’s opinions in *Matter of Norse Energy Corp. USA v. Town of Dryden*⁵ and *Cooperstown Holstein Corp. v. Town of Middlefield*⁶—written by Presiding Justice Karen Peters, with Justices Edward Spain, Leslie Stein, and Elizabeth Garry joining both rulings—are a clear affirmation of the power of local municipalities over the activities occurring on the land within and subject to their jurisdiction.

Given the clarity of the rulings, and the number of local governments that expressed interest in the issues by obtaining permission to file amici curiae briefs in one or both of the cases,⁷ it is clear that, unless the Court of Appeals overturns the Third Department or the state Legislature amends the OGSML, fracking⁸ in New York faces significant hurdles—with the power to limit it resting in the hands of local governments.

Background

The *Norse Energy* case arose in August 2011 when the Town of Dryden, in Tompkins County, amended its zoning ordinance to ban all activities related to the exploration for, and the production or storage of, natural gas and petroleum. The predecessor in interest to Norse Energy Corporation, Anschutz Exploration Corporation, a driller and developer of oil and natural gas wells that owned leases covering approximately 22,000 acres of land in the town, brought an action seeking invalidation of the zoning amend-

ment on the ground that it was preempted by the OGSML. The Supreme Court found that the amendment to the zoning ordinance was not preempted by the OGSML, and the dispute reached the Third Department.

Express Preemption

In its decision, the Third Department observed that local governments have the authority to regulate the use of land through the enactment of zoning laws.⁹ It added, quoting the Court of Appeals, that “[o]ne of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances.”¹⁰

As the Appellate Division noted, there is a “fundamental limitation” on local government powers: the doctrine of preemption. It then examined whether the express preemption clause in the OGSML preempted the town’s zoning amendment. The statute’s express preemption, or “supersession clause,” provides that “[t]he provisions of [ECL Article 23] 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.”¹¹

Although the “plain language” of this provision prohibits municipalities from enacting laws or ordinances “relating to the regulation of the oil, gas and solution mining industries,” the appeals court pointed out that the OGSML does not define the word “regulation.” Giving the word its “ordinary and natural meaning” as an “authoritative rule dealing with details or procedure,” it decided that the town’s zoning ordinance did not seek to regulate the details or procedure of the oil, gas, and solution mining industries but, rather,



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simply established “permissible and prohibited uses of land” within the town for the purpose of regulating land generally.

Accordingly, the court held, although the town’s exercise of its right to regulate land use through zoning would inevitably have an incidental effect on the oil, gas, and solution mining industries, zoning ordinances were “not the type of regulatory provision” that the Legislature intended to be preempted by the OGSML.¹²

The court examined the legislative history of the preemption provision, Environmental Conservation Law (ECL) §23-0303(2), and the OGSML. It explained that the statutory scheme governing oil and gas was added to the former conservation law in 1963 “to foster, encourage and promote the development, production and utilization of natural resources of oil and gas...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.”

The court pointed out that the provisions of the law focused on matters that were regulatory in nature, such as well spacing, delineation of pools, and procedures for obtaining permits—but

that they did not address any traditional land use issues that otherwise would be the subject of a local municipality's zoning authority.

When the ECL was amended in 1978, the court continued, the phrase "to foster, encourage and promote the development, production and utilization of natural resources of oil and gas... in such a manner as will prevent waste" was replaced with "to regulate the development, production and utilization of natural resources of oil and gas...in such a manner as will prevent waste." The 1978 legislation, the appellate court added, also amended the state's energy policy to "foster, encourage and promote the prudent development and wise use of all indigenous state energy resources including, but not limited to, on-shore oil and natural gas, off-shore oil and natural gas [and] natural gas from Devonian shale formations."

In the court's view, by these amendments, the Legislature "clearly acknowledged that promotion and regulation were considered separate and distinct activities," as it transferred the promotion of energy to the Energy Office while continuing regulation of the oil, gas, and solution mining industries within the Department of Environmental Conservation (DEC).

Then, in 1981, the Legislature enacted the current OGSMCL preemption clause, intending to "promot[e] the development of oil and gas resources in New York and regulat[e] the activity of the industry," according to the Third Department. The court explained that the DEC was unable to fulfill its "regulatory responsibilities" with its existing funding and powers, and that the governor's memorandum approving the 1981 bill confirmed that the amendments would provide the DEC with funding for its "updated regulatory program" as well as "additional enforcement powers necessary to enable it to provide for the efficient, equitable and environmentally safe development of the State's oil and gas resources."

Accordingly, the court concluded, from the OGSMCL's legislative history, it was "evident" that the Legislature's intention "was to insure uniform statewide standards and procedures with respect to the technical operational activities of the oil, gas and mining industries in an effort to increase efficiency while minimizing waste, and that the supersession provision was enacted to eliminate inconsistent local regulation that impeded that goal." The court found "nothing" in the language, statutory scheme, or legislative history of the OGSMCL indicating an intention to usurp the authority "traditionally delegated to municipalities to establish permissible and prohibited uses of land within their jurisdictions."

In the absence of a clear expression of legislative intent to preempt local control over land use, it construed ECL §23-0303(2) as preempting only local legislation regulating the actual operation, process, and details of the oil, gas, and solution mining industries, thus avoiding

any abridgment of a town's powers to regulate land use through zoning powers.

Implied Preemption

The Third Department reached the same result with respect to the argument that the town's zoning amendment was impliedly preempted by the OGSMCL, finding that the zoning amendment conflicted with neither the language nor the policy of the OGSMCL. In particular, it rejected the contention that the OGSMCL's directive that wells be drilled and spaced in a manner that maximized resource recovery and minimized waste could not be complied with if municipalities were permitted to enact zoning ordinances banning drilling within their jurisdictions, finding that these provisions did "not address traditional land use considerations, such as proximity to nonindustrial districts, compatibility with neighboring land uses, and noise and air pollution."

The Third Department found that New York's Oil, Gas and Solution Mining Law did not preempt a municipality's power to enact a local zoning ordinance banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders.

According to the Third Department, the OGSMCL's well-spacing provisions concerned "technical, operational aspects of drilling" and were separate and distinct from a municipality's zoning authority, so that the two did not conflict. Simply put, it ruled, zoning laws dictated in which, if any, districts drilling could occur, while the OGSMCL instructed operators as to the proper spacing of the units within those districts to prevent waste.

Finally, the court rejected the argument that municipal zoning ordinances that effected a ban on drilling conflicted with the policies of the OGSMCL, finding nothing in the OGSMCL or its legislative history that suggested that it was New York's policy to "maximize recovery" of oil and gas resources "at the expense of municipal land use decision making." Indeed, the court concluded, the OGSMCL sought to protect the rights of all persons, including landowners and the general public, not just the owners of oil and gas properties—a goal that, it found, was realized when individual municipalities could determine whether drilling activities were appropriate for their respective communities.

Accordingly, it held, the town's decision to amend its zoning ordinance to prohibit fracking did not conflict with the Legislature's intent to ensure that, where oil or gas drilling occurred, the operations were as efficient and effective as possible. Thus, the OGSMCL did not preempt,

either expressly or impliedly, a municipality's power to enact a local zoning ordinance banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders.

Conclusion

Of course, the Third Department's decisions may reach the Court of Appeals. It is worth noting, however, that the Third Department reached the same result that the New York Court of Appeals¹³ reached when the court interpreted a similar supersession provision contained in the Mined Land Reclamation Law (MLRL),¹⁴ holding that the MLRL did not preempt local zoning law ordinances. For now, local governments—including the more than 50 that have enacted local laws prohibiting gas drilling and the scores more that have passed moratoria—have the upper hand.

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1. *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc. 3d 450 (Sup. Ct. Tompkins Co.).

2. *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc. 3d 767 (Sup. Ct. Otsego Co. 2012).

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

4. See Anthony S. Guardino, "Upstate Courts Uphold Laws Prohibiting Gas Drilling," NYLJ (March 28, 2012); Anthony S. Guardino, "Marcellus Shale 'Gas Rush' Raises Local Zoning Issues," NYLJ (Sept. 22, 2010).

5. 2013 N.Y. Slip Op. 03145 (App. Div. 3d Dept. May 2, 2013).

6. 2013 N.Y. Slip Op. 03148 (App. Div. 3d Dept. May 2, 2013). In this case, the town had adopted a zoning law that 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. The Third Department's decision simply affirmed the lower court's judgment for "the reasons set forth in *Matter of Norse Energy Corp. USA v. Town of Dryden*.

7. The local governments and associations that were granted permission to file amici curiae briefs in one or both of the cases include: the Towns of Alfred, Anram, Camillus, Carlisle, Caroline, Chatham, Claverack, Copake, Danby, Dewitt, Elbridge, Enfield, Geneva, Gorham, Highland, Ithaca, Jerusalem, Kirkland, Lansing, Livingston, Lumberland, Marcellus, Meredith, Middlesex, Middletown, Milo, New Hartford, Mendon, Otisco, Otsego, Owasco, Potsdam, Rush, Sennett, Skaneateles, Springfield, Summit, Tusten, Ulysses, Wales, Westmoreland, and Woodstock; the Villages of Cayuga Heights, Dundee, Freeville, Honeoye Falls, Prospect, Saugerties, Sharon Springs, and Trumansburg; the Cities of Ithaca and Oneonta; the Association of Towns of the State of New York; and the New York Conference of Mayors.

8. "Fracking," also known as "hydrofracking" or "hydraulic fracturing," 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.

9. See Municipal Home Rule Law §10 (1)(ii)(a)(11); Statute of Local Government §10(6), (7); Town Law § 261.

10. DJL Rest. Corp. v. City of New York, 96 N.Y.2d 91 (2001).

11. ECL §23-0303(2).

12. It is worth observing that the same statute, in ECL §27-1107, expressly prohibits local municipalities from requiring "any approval, consent, permit, certificate or other condition, including conformity with local zoning or land use laws and ordinances," concerning the operation of hazardous waste facilities. ECL §23-0303(2) does not specifically refer to "local zoning or land use laws and ordinances."

13. *Matter of Germant Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668 (1996); *Matter of Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987).

14. ECL §23-2701.v