

ZONING AND LAND USE PLANNING

Decision May Signal End Of Fracking Before It Digs In

By
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The New York Court of Appeals has ruled that local governments in New York may ban hydrofracking and other oil and gas production activities within their municipal boundaries through the adoption of local zoning laws. In two appeals, *Matter of Wallach v. Town of Dryden* and *Cooperstown Holstein v. Town of Middlefield*,¹ the court found that local governments may do so because the supersession clause in the statewide Oil, Gas and Solution Mining Law (OGSML) does not preempt the home rule authority vested in municipalities to regulate land use.²

As a practical matter, given what appears to be significant local opposition to fracking throughout the state, the court's decision is likely to doom efforts to expand fracking in New York to any meaningful extent.³ From a land use law perspective, the court's decision was a resounding reaffirmation of the well-established constitutional and statutory principle of local control over land use; given that it arose in the context of one of the most controversial issues facing New York's politicians, businesses and citizens today, it very well may be recognized in the future as one of the most important zoning law rulings that the court has issued in many, many years.



Background

Natural gas, primarily methane, is found in shale deposits (such as the Marcellus Shale formation, which covers a vast area across sections of a number of states, including New York) that are buried thousands of feet below the surface and that can be extracted through the combined use of vertical and horizontal drilling and hydraulic fracturing—commonly referred to as hydrofracking or, simply, fracking. To access the natural gas, a well is drilled vertically to a location just above the target depth, at which point the well becomes a horizontal tunnel in order to maximize the number of pathways through which the gas may be removed.

The process of fracking then can begin. Fracking involves the injection of large amounts of pressurized fluids (water and chemicals) to stimulate or fracture the shale formations, causing the release of the natural gas.⁴

In 2006, Norse Energy, through its predecessors, began acquiring oil and gas leases from landowners in the upstate town of Dryden for the purpose of exploring and developing natural gas resources. The town board took the position that gas extraction activities were prohibited in Dryden because those operations fell within the catch-all provision of its zoning ordinance that precluded any uses not specifically allowed. Nevertheless, the town board decided to engage in a “clari-

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fication” of the issue. After holding a public hearing and reviewing a number of relevant scientific studies, the town board unanimously voted to amend its zoning ordinance in August 2011 to specify that all oil and gas exploration, extraction and storage activities were not permitted in Dryden. The amendment also purported to invalidate any oil and gas permit issued by a state or federal agency.

In adopting the amendment, the town board declared that the industrial use of land in the “rural environment of Dryden” for natural gas purposes “would endanger the health, safety and general welfare of the community through the deposit of toxins into the air, soil, water, environment, and in the bodies of residents.”

A month later, Norse went to court, asserting that Dryden lacked the authority to prohibit natural gas exploration and extraction activities because Section 23-0303(2) of the Environmental Conservation Law (ECL)—the supersession clause in the OGSML—was intended to preempt local zoning laws that curtailed energy production. In response, Dryden moved for summary judgment, seeking a declaration that its zoning amendment was a valid exercise of its home rule powers.

The Supreme Court, Tompkins County, granted Dryden’s motion and declared the amendment valid with one exception—it struck down the provision invalidating state and federal permits. The Appellate Division, Third Department, affirmed, rejecting Norse’s claim that the OGSML preempted Dryden’s zoning amendment.

A similar situation occurred in the upstate Town of Middlefield, which includes a portion of the Village of Cooperstown. As in Dryden, there had been no oil or gas presence in Middlefield until 2007, when Cooperstown Holstein Corporation (CHC) executed two leases with a landowner to explore the possibility of developing natural gas resources through fracking.

The town claimed that its zoning ordinance already prohibited natural gas

exploration on the basis that it was not listed as a permissible land use, but it undertook a review of the issue in 2011. After commissioning a study to weigh the impacts that fracking would have on Middlefield and conducting public meetings, the town board voted to unanimously amend its master plan to adopt a zoning provision classifying a range of heavy industrial uses, including oil, gas and solution mining and drilling, as prohibited uses. The town board reasoned that the “Cooperstown area is known worldwide for its clean air, clean water, farms, forests, hills, trout streams, scenic viewsheds, historic sites, quaint village and hamlets, rural lifestyle, recreational activities, sense of history, and history of landscape conservation,” and concluded that industrialization, such as fracking, would “eliminate many of these features” and “irreversibly overwhelm the rural character of the [t]own.”

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CHC brought an action to set aside the zoning law, contending that it was preempted by the supersession provision in the OGSML. The Supreme Court, Otsego County, upheld the legality of the zoning law, and the Third Department affirmed.⁵

The cases reached the Court of Appeals.

The Decision

In its decision, the court first discussed the source of local government authority to regulate land use—and the limits that the state may impose on this power. As the court explained, the “home rule” provision of the New York constitution provides that “every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law ...

except to the extent that the Legislature shall restrict the adoption of such a local law.”⁶ To implement this constitutional mandate, the court noted, the Legislature enacted the Municipal Home Rule Law, which empowers local governments to pass laws both for the “protection and enhancement of [their] physical and visual environment”⁷ and for the “government, protection, order, conduct, safety, health and well-being of persons or property therein.”⁸

Moreover, the court continued, New York law also authorizes towns to enact zoning laws for the purpose of fostering “the health, safety, morals, or the general welfare of the community”⁹—and specifically recognizes that the local regulation of land use is “[a]mong the most significant powers and duties granted...to a town government.”¹⁰

Of course, as the court pointed out, a local government may not enact ordinances that conflict with the state constitution or any general law. It then examined whether the OGSML’s supersession clause bars zoning laws that restrict or prohibit fracking or other oil and gas activities within municipal boundaries. Relying in large measure on its 1987 decision in *Matter of Frew Run Gravel Prods. v. Town of Carroll*,¹¹ which articulated a three-part analytical framework to determine whether a supersession clause expressly preempts a local zoning law, the court ruled that it does not.

First, analyzing the text of the supersession clause, the court found that it was “most naturally read” as preempting only local laws that purported to regulate the actual operations of oil and gas activities, “not zoning ordinances that restrict or prohibit certain land uses within town boundaries.” The court found that the Dryden and Middlefield zoning laws were “directed at regulating land use generally” and did “not attempt to govern the details, procedures or operations of the oil and gas industries.” It acknowledged that they would have an impact on oil and gas enterprises, but declared that this “incidental control” resulting from the

towns' exercise of their right to regulate land use through zoning was "not the type of regulatory enactment relating to the [oil, gas and solution mining industries] which the Legislature could have envisioned as being within the prohibition of the statute."

The court rejected Norse and CHC's argument that there would have been no need for the Legislature to exempt local jurisdiction over roads and taxes in the supersession clause if, as the court found, supersession was limited to local laws aimed at oil and gas operations. In the court's view, local regulation of roads and taxes could "fairly be characterized as touching on the operations of the oil and gas industries" and would have been preempted absent the specific exemption.

The court then looked at the second factor under *Frew Run* relevant to discerning whether a supersession clause preempts local zoning powers: the clause's role in the statutory framework as a whole. It found that the OGSML was concerned with the regulation by the New York State Department of Environmental Conservation (DEC) of the safety, technical and operational aspects of oil and gas activities across the state.

According to the court, the supersession clause in ECL 23-0303(2) fit comfortably within this legislative framework because it invalidated local laws that would intrude on the DEC's regulatory oversight of the industry's operations. The court found nothing in the OGSML indicating that the supersession clause was meant to be broader than required to preempt conflicting local laws directed at the technical operations of the industry.

Finally, the court looked at the OGSML's legislative history, and found "no mention of zoning at all," much less any indication of an intent to take away local land use powers. Rather, it declared, the history of the OGSML and its predecessor statute made clear that the Legislature's primary concern was with preventing wasteful oil and gas practices and ensuring that the DEC

had the means to regulate the technical operations of the industry.

The court also rejected the argument by Norse and CHC that, even if the OGSML's supersession clause did not preempt all local zoning laws, it should be interpreted as preempting zoning ordinances such as Dryden's and Middlefield's that completely prohibited fracking. The majority decided that this argument was foreclosed by the court's decision in *Matter of Gernatt Asphalt Prods. v. Town of Sardinia*,¹² where it declared that a municipality was "not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole."¹³

The heart of these cases was the relationship between the state and its local government subdivisions, and their respective exercise of legislative power, and not the broader policy issue of whether fracking is beneficial or detrimental.

Conclusion

As the court itself recognized at the conclusion of its decision, the heart of these cases was the relationship between the state and its local government subdivisions, and their respective exercise of legislative power, and not the broader policy issue of whether fracking is beneficial or detrimental to the economy, environment, or energy needs of New York. While acknowledging that the state Legislature could have exercised its right to preempt the home rule capacity of municipalities to pass zoning laws that prohibit fracking and other oil and gas activities to preserve the existing character of their communities, it determined that it had not done so when it had adopted

the OGSML.

In these two cases, the court's powerful declaration of support for local governments' authority over land uses within their borders related to their ability to ban fracking. The principle, however, will undoubtedly be relied upon by municipalities and other proponents of home rule in the defense of other land use regulations. One thing is clear—in the absence of preemptive federal or state legislation, this decision has dealt a devastating blow to the oil and natural gas mining industry in New York.

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1. No. 130 and No. 131 (N.Y. June 30, 2014). Judge Victoria A. Graffeo wrote the majority opinion on behalf of herself and four other Judges; Judge Eugene F. Pigott, Jr., dissented in an opinion in which Judge Robert S. Smith concurred.

2. The OGSML's supersession clause provides:

The provisions of this article [i.e., the OGSML] 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.

Environmental Conservation Law §23-0303(2).

3. There currently is a statewide moratorium on "high-volume hydraulic fracturing combined with horizontal drilling" pending further study of the associated environmental impacts (9 NYCRR 7.41 [Executive Order No. 41]; see also 9 NYCRR 8.2 [Executive Order No. 2]).

4. See generally U.S. Dept. of Energy, Natural Gas from Shale: Questions and Answers, available at http://www.energy.gov/sites/prod/files/2013/04/f0/complete_brochure.pdf.

5. For further background on the Supreme Court and Third Department decisions and the zoning issues they raised, see Anthony S. Guardino, "Court Upholds Local Ordinances Banning Fracking," NYLJ, May 22, 2013; Anthony S. Guardino, "Upstate Courts Uphold Laws Prohibiting Gas Drilling," NYLJ, March 28, 2012; and Anthony S. Guardino, Marcellus Shale "Gas Rush" Raises Local Zoning Issues, Sept. 22, 2010.

6. NY Const, art IX, §2(c)(ii).

7. Municipal Home Rule Law §10(1)(ii)(a)(11).

8. Municipal Home Rule Law §10(1)(ii)(a)(12).

9. See, e.g., Town Law §261; see also Statute of Local Governments §10(6) (granting towns "the power to adopt, amend and repeal zoning regulations").

10. Town Law §272-a(1)(b). The Court of Appeals itself previously has recognized that the regulation of land use through the adoption of zoning ordinances is one of the core powers of local governance, see, e.g., *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91 (2001), and that municipalities may "enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of [the community]." *Trustees of Union Coll. in Town of Schenectady in State of N.Y. v. Members of Schenectady City Council*, 91 N.Y.2d 161 (1997) (internal quotation marks and citation omitted).

11. 71 N.Y.2d 126 (1987).

12. 87 N.Y.2d 668 (1996).

13. The dissent seemingly was persuaded by this argument, declaring that "prohibition of certain activities is, in effect, regulation."