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Expert Analysis

Court of Appeals Finds Local Regulation Of Hydrofracking Not Preempted

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Hydraulic fracturing has been especially controversial in recent years. "Hydrofracking" is the process of drilling wells to inject high pressure fluids into the ground thereby fracturing the bedrock to enhance subsequent extraction of natural gas. While fracking yields major profits for oil and gas companies, some argue that the drilling and production of frack wells imperil the environment, human safety and land values. Local roads may suffer damage from truck traffic that residents often complain increases noise and congests roads. Residents of municipalities where frack wells are installed are also concerned about the potentially hazardous health risks posed by injecting frack fluid into the ground. Many claim that this process contaminates the groundwater while others insist that fracking can be performed safely.

Many private landowners have leased their land to oil and gas companies for the construction of frack wells only to have local governments stop them in their tracks with land use regulations. The two leading cases in New York, *Cooperstown Holstein v. Town of Middlefield*[1] and *Anschutz Exploration v. Town of Dryden*,[2] both involved similar issues relating to the indirect regulation of hydrofracking by way of local land use laws.[3] These lawsuits are now the first two cases on which the Court of Appeals has ruled with respect to land use and hydrofracking.

> Outcomes of two cases show that municipalities may enact zoning laws that will effectively prohibit hydrofracking in specified areas and that no state law preempts them from doing just that.

The oil and gas companies in these cases appealed to the Court of Appeals after the Appellate Division, Third Department, confirmed that local governments had the authority to regulate these activities via local land use laws even though such laws ultimately effected a ban on hydrofracking. The Appellate Division also confirmed that such land use laws were not preempted by New York state law.[4] Specifically, petitioners Norse Energy Corp. USA and Cooperstown Holstein Corporation (CHC) relied on the supersession clause[5] found in the Oil, Gas and Solution Mining Law (OGSML), Environmental Conservation Law §23-0101 et seq., to argue that local governments were preempted from enacting zoning laws that ban oil and gas drilling.

The OGSML, enacted in 1963, lays out the New York State regulatory paradigm for the development, production and use of oil and gas in New York State in an attempt to minimize waste and to protect private property rights.[6] The supersession clause at issue was added in the 1981 amendments of the OGSML and states, "[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; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."[7]

The "home rule" provision of the New York State Constitution grants to municipal governments the authority to regulate land use. The home rule states 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."[8]

After review of both the OGSML language and the related state laws, the Third Department concluded that municipalities had control over "where" oil and gas exploration may take place, while the state maintains

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control over regulating "how" it may take place. This result left the oil companies utterly dissatisfied and prompted an appeal to New York's highest court.

Court of Appeals Opinion

The Court of Appeals granted leave for appeal in both *Cooperstown* and *Dryden* to review "whether towns may ban oil and gas production activities, including hydrofracking, within municipal boundaries through the adoption of local zoning laws."[9] The Court of Appeals affirmed the decisions of the Third Department reasoning that the OGSML does not preempt the home rule authority vested in municipalities to regulate land use.[10] While local law must yield to an inconsistent state law, such preemption will not be assumed where a locality's ability to regulate land use is at issue.

Both Norse and CHC argued that the OGSML's supersession clause should be read "broadly" to encompass zoning laws.[11] The court rejected this position based on the consideration of three factors established from the court's earlier decision in a similar case, *Matter of Frew Run Gravel Prods. v. Town of Carroll*: (1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history.[12]

Examining the OGSML and the relevant local land use laws in light of the Frew Run factors, the court found no preemptive intent of fracking activity. The plain language of the OGSML shows that the statute's concern lies mainly with the prevention of wasteful oil and gas practices and the regulation of the industry's safety, technical and operational aspects. Next, the court noted that the statutory scheme of the OGSML is primarily concerned with New York State Department of Environmental Conservation's " … regulation and authority regarding the safety, technical and operational aspects of oil and gas activities across the State."[13]

Nothing found in the OGSML's statutory scheme gives rise to the idea that the supersession clause was to be interpreted in a broad sense to preempt zoning laws directed at oil industry operations, as Norse and CHC argued. Lastly, in observing the legislative history, the court found that the OGSML was enacted prior to the current controversy over hydrofracking, further leading the court to conclude that there was no intention for this statute to preempt any local zoning laws from working such a ban.[14]

Dissenting Opinion

Judge Eugene Pigott dissented from the court's opinion, stating that while he agreed that municipalities may regulate land use by enacting zoning ordinances, these zoning ordinances in particular relate so closely and directly to the regulation of oil, gas and solution mining industries that they "…encroach upon the Department of Environmental Conservation's regulatory authority."[15]

Believing that the ordinances at issue do more than generally regulate land use, Pigott contended that these ordinances do in fact regulate the oil, gas and solution mining activities, creating a "blanket ban" on the entire industry.[16] Pigott's reasoning for his dissent stems from the actual effects of these land use ordinances on industries, while the majority opinion primarily focuses on policy concerns between state and local governments.

Conclusion

While there is no denying that local zoning laws will impact oil and gas companies in deciding where such operations are permissible, just as in *Frew Run*, the law in New York is that any such impact is merely "incidental control" stemming from a municipality's lawful exercise of its rights in regulating land use through its zoning laws.[17] The Court of Appeals made clear that its decision was necessary in order to determine questions of policy, expressly noting that it was not commenting on the merits of hydrofracking as either a beneficial or detrimental process.

What the outcomes of these two cases show is that municipalities may enact zoning laws that will effectively prohibit hydrofracking in specified areas and that no state law preempts them from doing just that. However, in light of the dissenting opinion, the potentially huge profits at stake and the concerns of the public, we should expect that this battle may continue on a case-by-case basis.

1. *Cooperstown Holstein v. Town of Middlefield*, 106 A.D.3d 1170, 964 N.Y.S.2d 431 (2013).

2. *Anschutz Exploration v. Town of Dryden*, 940 N.Y.S.2d 458 (2012).

3. Ronald Steinvurzel, "Municipalities and Natural Gas Extraction…What the Frack," 247 N.Y.L.J., 99 (2012).

4. Supra note 1 at 1171, 432.

5. N.Y. Envtl. Conserv. Law §23-0303(2).

6. See N.Y. Envtl. Conserv. Law §23-0301.

7. N.Y. Envtl. Conserv. Law §23-0303(2).

8. N.Y. Const., art. IX §2(C)(ii).

9. *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 739, 16 N.E.3d 1188, 1191-92, reargument denied, 24 N.Y.3d 981, 20 N.E.3d 650 (2014).

10. Id. at 739, 1191.

11. Id. at 744, 1195.

12. *Matter of Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126, 524 N.Y.S.2d 25, 518 N.E.2d 920 (1987).

13. Supra note 7 at 750.

14. Id.

15. Id. at 755, 1203.

16. Id. at 726, 1204.

17. Id. at 746, 1197.