

Expert Analysis

## Will Fracking Become the Exception To the Rule of Local Zoning Control In New York State?

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Middlefield and Dryden, two towns in upstate New York, have successfully applied the brakes to exploratory drilling for natural gas, thus far. On May 2 the Appellate Division, 3rd Department, upheld two state Supreme Court decisions banning fracking within the boundaries of those towns, in *Norse Energy Corp. v. Town of Dryden* and *Cooperstown Holstein Corp. v. Town of Middlefield*.

How did the towns accomplish the ban, and are they on solid legal ground? Also, what, if anything, can or should the state do to further enhance the development of natural gas?

Drilling for natural gas, which has gone on for decades in the west, has recently expanded rapidly in the east, largely due to a technique known as hydraulic fracturing, or hydrofracking.<sup>1</sup> For property owners, leasing land used for gas drilling has created an economic boon. In addition, these drilling operations could bring jobs to a perennially economically depressed portion of upstate New York,<sup>2</sup> and unlocking more domestic gas resources could lessen the nation's dependence on foreign energy sources.

At the same time, hydrofracking has heightened concerns about contamination of well water, air pollution and hazardous waste, as well as other environmental concerns.

New York has a longstanding tradition of upholding the rights of municipalities to control land use within their boundaries, but should fracking be looked at differently? Should energy independence be the primary criteria for allowing fracking in New York State? Does economic opportunity for an economically depressed upstate New York justify carving out an exception or making allowances?

While oil and gas exploration and development have traditionally been within the purview of the states, local governments in New York have long enjoyed rights to control land use within their borders, a tradition rooted in the state's constitution<sup>3</sup> and in statute.

***For now, unless the Court of Appeals reverses the Appellate Division, which is unlikely, or carves out an exception for hydrofracking, it appears that towns in New York state may ban gas drilling within their borders if they choose to do so.***

Thus, it should not have come as a surprise when Middlefield and Dryden, two towns in upstate New York faced with the prospect of hydrofracking operations, did what any town in New York has the right to do: control the use of land within their boundaries. In June 2011 the town of Middlefield enacted a local zoning law prohibiting oil and gas mining and drilling.

Cooperstown Holstein Corp., a company that owned oil and gas leases for parcels of land within the town, sued the town. They also sought a declaration that the zoning law was preempted by the Oil and Gas and Solution Mining Law, found in N.Y. Env't Conserv. Law § 23-0301. In deciding that the zoning law was not preempted by the supersession clause of Section 23-0301(2), the Supreme Court denied Cooperstown's petition, and the company appealed.

In early May, the Appellate Division affirmed the Supreme Court's decision declaring the zoning law valid.<sup>4</sup>

The Appellate Division decision followed a ruling in Feb. 21, 2012, in *Anschutz Exploration Co. v. Town of Dryden*, 35 Misc. 3d 450 (N.Y. Sup. Ct., Tompkins County 2012), in which Justice Phillip Rumsey said the OGSML does not preempt local restrictions banning gas drilling within the boundaries of the municipality.

Similarly, on Feb. 24, 2012, in *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc. 3d 767 (N.Y. Sup. Ct., Otsego County 2012), acting Supreme Court Justice Donald F. Cerio ruled that the OGSML does not preempt a municipality from enacting a land use regulation within its geographic jurisdiction. Furthermore, a municipality may permit or prohibit gas drilling in conformity with statutory authority.

For now, unless the Court of Appeals reverses the Appellate Division, which is unlikely, or carves out an exception for hydrofracking, it appears that towns in New York state may ban gas drilling within their borders if they choose to do so. It is unlikely New York's highest court will reverse the Appellate Division, as case law, the New York Constitution and statutes explicitly support local government control over land use.

Two statutes, aided by judicial interpretation and the New York Constitution, support the type of bans enacted by Dryden and Middlefield: the OGSML, set forth in Section 23-0301, and the Mined Land Reclamation Law, set forth in ECL Article 23, Title 27. The OGSML contains the following statement:

The provisions of this article [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.<sup>5</sup>

The New York Court of Appeals, in *Frew Run Gravel Products v. Town of Carroll*, 71 N.Y.2d 126 (1987), held that a similar supersession provision in the MLRL, ECL Article 23, Title 27, did not preempt local zoning ordinances. The court considered the following supersession provision of the MLRL:

For 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 local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.<sup>6</sup>

The language of the two supersession clauses is almost identical.

The MLRL says, “[f]or the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry,” while the OGSML says, “[t]he provisions of this article shall super-sede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries.”

Both statutes have language that preempts local regulation pertaining to a particular industry. Neither statute expressly preempts local regulation of land use, and neither statute demonstrates legislative intent to preempt local control over land use and zoning.

Preemption of local laws by state laws can occur in one of two ways: conflict and field preemption. When a local law directly conflicts with a state requirement, conflict preemption occurs.<sup>7</sup> In addition to the local law and the state requirement addressing the same area, both the local law and the state requirement must be incompatible.<sup>8</sup> Field preemption occurs when the state legislature has assumed the sole responsibility for regulating a particular field.<sup>9</sup>

With respect to gas drilling or the contro-versial procedure of hydrofracking, a municipality’s ability to ban drilling is derived from field preemption. As oil and gas exploration is within the traditional purview of the states, there is no doubt the state has embraced its regulatory role in both the OGSML and MLRL sections examined above. Controlling land within your own borders, however, remains the prerogative of local government.

Middlefield and Dryden have done nothing more than use zoning ordinances to exercise appropriate jurisdiction over their respective towns. It is entirely within their purview to do so, and their actions are not preempted by state statute. Moreover, the Court of Appeals has expressly ruled that zoning ordinances are not the type of regulation the legislature envisioned as preempted by MLRL.

In *Frew Run*, the Court of Appeals also held that zoning ordinances are not the type of regulatory provision that the legislature foresaw as preempted by the MLRL. The court distinguished between the regulation of how property may be used (*i.e.*, the local zoning ordinance and the regulation of mining activities). Just 11 years later, the Court of Appeals again examined the supersession clause of the MLRL with *Gernatt Asphalt Products Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 681-82 (N.Y. 1996), and noted differences between the methods related to mining schemes and local zoning ordinances:

Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the type of regulatory provisions the legislature foresaw as preempted by Mind Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities.

Dryden and Middlefield both relied on these authorities, and thus, are on solid legal footing. The Court of Appeals distinguished between a town regulating property use and a town regulating mining, and found no impediment to a town regulating property use.<sup>10</sup> The two towns say their bans were not enacted for the purpose of regulating natural gas development, or hydrofracking, but rather are part of a comprehensive land use plan designed to protect the public health, safety and general welfare of local communities.

***The towns of Middlefield and Dryden say their bans were not enacted for the purpose of regulating natural gas development, or hydrofracking, but rather are part of a comprehensive land use plan designed to protect the public health.***

***Considering the differences in how each state addresses local home rule and responds to protecting the environment, the legitimacy of local bans will continue to be debated.***

Since the towns take the position that their purpose was not to regulate natural gas development, the zoning bans are not subject to the preemption provisions. While the Legislature enabled the state to regulate mining activities, local control allows a municipality to say land may not be used for a particular purpose. The legislative intent behind the mining law was to prevent local governments from regulating, but not from proscribing how a town might use its land.

Only when there is a clear legislative intent to preempt the use of zoning power will the courts disallow a zoning requirement, and neither the OGSML nor the MLRL preempt local zoning power to regulate the use of land. Thus, in New York state, a municipality is free to ban operations related to oil and gas production within its borders. New York jurisprudence has long supported the right of local municipalities to adopt zoning laws so long as they do not explicitly regulate mining activity. Towns are free to use zoning ordinances to ban mining activity even while recognizing an incidental effect on the oil, gas drilling or mining industry.

As the use of hydraulic fracturing for oil and gas development of shale reserves gains in popularity around the country, local bans on hydraulic fracturing will continue to be fiercely debated.<sup>11</sup> With the recognition that large oil and gas reserves across the United States present unique economic opportunities for the country's energy future, many states with large shale gas reserves have adopted or are adopting rules and regulations to directly govern hydraulic fracturing.

To date, local bans have been enacted in seven states: Colorado, Maryland, New Jersey, New York, North Carolina, Pennsylvania and West Virginia. In New York state, environmental safeguards are in place, in addition to the enactment in March 2013 of legislation that will extend the moratorium on high volume hydraulic fracturing until 2015. This follows previous moratoriums enacted in 2010 and 2011. The moratorium aims to facilitate additional health and environmental impact assessments. Commenting on the five-year-old moratorium, New York State Health Commissioner Nirav Shah said there is no timetable for completing a public health analysis of the technology for Gov. Andrew Cuomo, who will decide whether the state will allow it.<sup>12</sup>

Following the May 2 Appellate Division decisions upholding Dryden and Middlefield's right to use local zoning ordinances to ban fracking, New York's highest court may take up the issue. Considering the varying amounts of shale gas reserves across the states, and considering the differences in how each state addresses local home rule and responds to protecting the environment, the legitimacy of local bans will continue to be debated. New York may be unique among the states.

Estimates project the Marcellus Shale formation in New York contains enough natural gas to fuel the state's energy needs for decades to come. Some geologists have estimated that the entire Marcellus Shale formation could contain from 168 trillion to over 500 trillion cubic feet of natural gas. New York uses about 1.1 trillion cubic feet of natural gas a year.<sup>13</sup> Many of us grew up in a world where we questioned the adequacy of energy supplies. We are now entering a world of relatively cheap and abundant energy. The United States is becoming a global energy leader and leading exporter in gas production.

Whether the Court of Appeals can and should ignore the changes taking place on a global scale, and whether New York should and could be responsible for its own energy needs and those of many other states will likely be answered in due course.

## NOTES

- <sup>1</sup> Using water at high pressure, hydrofracking can break rocks deep underground. In using this technique, drilling begins vertically and then continues horizontally, opening a larger land area to well placement and allowing for the extraction of more product.
- <sup>2</sup> The New York State Division of Local Government Services classifies the following 14 counties as members of the Southern Tier: Allegany, Broome, Cattaraugus, Chautauqua, Chemung, Chenango, Cortland, Delaware, Otsego, Schoharie, Schuyler, Steuben, Tioga and Tompkins. These are the counties of New York state west of the Catskill Mountains and east of Pennsylvania.
- <sup>3</sup> Neither the plain reading of the statutory language nor the history of ECL Section 23-0303(2) would lead this court to conclude that the phrase “this article shall supersede all local laws or ordinances relating to the regulation of the oil and gas and solution industries” was intended by the Legislature to abrogate the constitutional and statutory authority vested in local municipalities to enact legislation affecting land use. *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc.3d 767, 777 (N.Y. Sup. Ct., Otsego County 2012); citing N.Y.S. Const. Art. IX, § 2(c)(ii)(10).
- <sup>4</sup> *Cooperstown Holstein Corp. v. Town of Middlefield*, No. 515498, 2013 Slip Op. 03148 (N.Y. App. Div., 3d Dep’t May 2, 2013), relying upon *Norse Energy Corp. v. Town of Dryden*, No. 515227, 2013 N.Y. Slip Op. 03145 (N.Y. App. Div., 3d Dep’t May 2, 2013).
- <sup>5</sup> ECL Section 23-0303(2).
- <sup>6</sup> ECL Section 23-2703(2).
- <sup>7</sup> May 12, 2011, Memorandum of Bob Feller to Town of Middlefield re: Local Jurisdiction over Gas Drilling, citing *DLJ Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 95 (N.Y. App. Div., 2d Dep’t 2001); *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96 (N.Y. App. Div., 2d Dep’t 1987); *ConEd Co. v. Town of Red Hook*, 60 N.Y.2d 99, 107 (N.Y. App. Div., 2d Dep’t 1983).
- <sup>8</sup> May 12, 2011, Memorandum of Bob Feller to Town of Middlefield re: Local Jurisdiction over Gas Drilling, citing *Jancyn Mfg. Corp. v. County of Suffolk*, *supra* at 97.
- <sup>9</sup> May 12, 2011, Memorandum of Bob Feller to Town of Middlefield re: Local Jurisdiction over Gas Drilling, citing *DLJ*, *supra* at 95.
- <sup>10</sup> *Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (N.Y. App. Div., 2d Dep’t 1987).
- <sup>11</sup> For example, Pennsylvania’s Act 13, enacted in 2012, contains a section restricting the ability of municipalities to control the location of gas drilling within their boundaries. Several municipalities, among other plaintiffs, filed a lawsuit challenging Act 13’s preemption of local zoning ordinances. Lower Pennsylvania courts sided with the municipalities, and the lawsuit has proceeded on an expedited basis to the Pennsylvania Supreme Court, where oral argument was heard in October 2012, but a decision has not yet been issued.
- <sup>12</sup> See [nysfrackingunplugged.wordpress.com](http://nysfrackingunplugged.wordpress.com).
- <sup>13</sup> See <http://www.dec.ny.gov/energy/46288.html>.



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