

New York Supreme Court Upholds Towns' Fracking Bans

Hydraulic Fracturing News Alert

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In two separate decisions issued last week, the Supreme Court of the State of New York (the state's trial level court) upheld the Town of Dryden's ban on hydraulic fracturing (or fracking) in Tompkins County, and upheld the Town of Middlefield's ban on fracking in Otsego County. (Fracking involves the injection of a mix of water, chemicals and propping agents under high-pressure into subsurface gas bearing formations causing them to fracture, thereby allowing for the release and production of natural gas trapped in those low permeability formations.) Both courts held that while the state has control over *how* drilling operations occur, local governments retain discretion over *where* such activities take place.

On February 21, 2012, in *Anschutz Exploration Corp. v. Town of Dryden*, Index No. 2011-0902, Supreme Court Justice Phillip R. Rumsey held that New York state law does not preclude a municipality from using its police powers to regulate land use and to ban oil and gas exploration and production. The decision is the first in New York to affirm local governmental powers in the controversy over drilling for natural gas in New York's portion of the Marcellus Shale. Geologists estimate that the Marcellus Shale contains as much as 489 trillion cubic feet of natural gas, or more than 400 years' supply for New York at its current level of use.

In August 2011, the Dryden Town Board amended the town's zoning ordinance to ban all activities relating to oil and gas extraction, development and production, and "prohibit the exploration and extraction of natural gas and or petroleum and the storage, treatment or disposal of natural gas exploration and production wastes within the Town." Town of Dryden Resolution No. 126 (2011). Denver-based oil and natural gas company Anschutz Exploration Corporation sued the town, arguing that it exceeded its authority by amending the zoning law to halt natural gas pursuits through the use of fracking. Anschutz had acquired substantial land holdings in the area and invested millions in exploratory drilling activities.

Anschutz alleged that New York's Oil Gas and Solution Mining Law (OGSML) preempted the amended provision of the Dryden ordinance. The OGSML states in pertinent part that "all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries [shall be superseded]; 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). Anschutz unsuccessfully argued that the OGSML supersedes the Dryden Resolution and grants all authority to regulate oil and gas development to the state – and prohibits local government from regulating the activity.

Rejecting Anschutz's arguments, Justice Rumsey held that the OGSML only preempts local regulations relating to the *operations* of the oil and gas industries, and does not expressly preempt local regulation of *land use* and zoning. Justice Rumsey concluded that the ordinance at issue is not a local law relating to regulation of the oil, gas and solution mining industries and, therefore, was not preempted. Among other grounds, Justice Rumsey based his ruling on the Court of Appeals decision in *Matter of Frew Run Gravel Prods. v. Town of Carroll*, 71 NY2d 126 (1987), wherein the court ruled that a local zoning ordinance was not preempted under the supersedure clause of New York's Mined Land Reclamation Law. In a separate ruling, the court struck down the portion of Dryden's zoning ordinance that purported to invalidate permits issued by other agencies that did not comply with the local law.

Justice Rumsey noted that, "[n]one of the provisions of the OGSML address traditional land use concerns, such as traffic, noise or industry suitability for a particular community or neighborhood." According to the decision, "local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place, while [the Department of Environmental Conservation (DEC)] regulates all technical operational matters on a consistent statewide basis in locations where operations are permitted by local law." Justice Rumsey went on to explain that the state has control over *how* drilling operations occur, while local agencies retain discretion over *where* such activities take place.

Two days after the *Dryden* decision, Justice Donald F. Cerio upheld the Town of Middlefield's ban on fracking within Otsego County in *Cooperstown Holstein Corp. v. Town of Middlefield*, Index No. 2011-0930. Middlefield's town board had passed a new zoning law in June 2011 that made heavy industry and all oil, gas or solution mining and drilling prohibited uses. The town's law, and the arguments against it, are almost identical to the *Dryden* case.

In September 2011, dairy farmer Jennifer Huntington sued Middlefield, alleging that the town's ban was preempted by a state law designed to create a uniform regulatory scheme for the oil and gas industry (i.e., the OGSML), and infringed on her private property rights to allow gas drilling on her land.

Justice Cerio disagreed, holding that nothing in the legislative history of the OGSML and its amendments suggested state lawmakers intended to stop towns from barring heavy industry. Although the state has the power to regulate how the industry operates, the town has the right to determine where that industry may operate. Justice Cerio noted that "[m]unicipalities are not preempted ... from enacting local zoning ordinances which may prohibit oil, gas and solution drilling or mining," reasoning that "the OGSML supersession clause preempts local regulation solely and exclusively as to the method and manner of oil, gas and solution mining or drilling, but does not preempt local land use control." Employing logic similar to that used by Justice Rumsey in the *Dryden* decision, Justice Cerio concluded that "[t]he state maintains control over the 'how' of [drilling and mining] procedures while the municipalities maintain control over the 'where' of such exploration."

New York currently has a moratorium on issuing gas drilling permits while the DEC drafts new regulations on fracking. If enacted, the proposed regulations would prohibit fracking within and around the New York City and Syracuse watersheds, the state's 18 primary aquifers, and public and private water supply wells. The public comment period on the proposed regulations ended in January 2012. The state must prepare a final environmental impact statement responding to the comments received on the draft environmental document before it can formally adopt the regulations and begin issuing well permits for fracking operations.

The New York Legislature may weigh in and reinforce the court decisions by allowing local control of fracking. In addition, the EPA is reconsidering its role in regulating gas drilling under federal law. Under the two decisions, town governments may now freely implement restrictive zoning regulations, including a complete ban on fracking operations within their borders. In addition to upholding a complete ban, the decisions also seem to authorize local agencies to take the lesser action of making drilling a conditionally permitted use, provided that such regulations relate to legitimate land use concerns (e.g., traffic, noise, and land use compatibility) and not gas drilling operations.

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