ENVIRONMENTAL LAW

Local Zoning of Hydrofracking - An Overlooked Remedy

By Robert R. Dooley

To date, the focus on hydrofracking has been on the regulations being worked on in Albany. Each meeting discussing hydrofracking seems to turn into a debate. Opinions within communities are sharply divided on the topic. The DEC's regulations will be approved and the regulations will dictate how the controversial drilling technique takes place. Recent State Supreme Court decisions look at the issue from a different angle: local zoning. The decisions held that municipalities are authorized to prohibit hydrofracking in their zoning districts. In other words, the state will say "how" to hydrofrack but the municipalities will have the final say on the "if" and "where."

Both *Cooperstown Holstein Corp. v. Town of Middle Field* (Otsego Supreme Court, Index No.: 2011-0930) and *Anschutz Exploration Corp v. Town of Dryden*, et. al. (Tompkins Supreme Court, Index No.: 2011-0902) involve the preemption language from the Oil, Gas and Solution Mining Law (OGSML) set forth in ECL § 23-0303(2), which states that it "shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries..." Both decisions concluded that the supersession language does not preempt local zoning prohibiting hydrofracking.

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In *Anschutz*, the court drew on the precedent set in *Frew Run Gravel Prods. v. Town of Carroll*, 71 NY2d 126 (1987) where nearly identical issues were at stake. The *Anschutz* Court held that, as in *Frew Run*, the zoning at issue did not relate to the extractive mining industry but to an entirely different subject: land use. The *Frew Run* decision was very particular in specifying that zoning ordinances have the purpose of managing general land use whereas the preemption language was to the specific operation of mining activities. The supersession clause from the OGSML does not provide any intent to preempt local control over land use and zoning. The purpose of the OGSML is not "to encourage maximum ultimate recovery of oil and gas regardless of other considerations, or to preempt local zoning authority." Rather, the preemption language pertains to "regulation of development and production only in locations where such activities may be conducted in compliance with applicable zoning ordinances governing land use..."

Diving more into the legislative intent of the OGSML is *Cooperstown*. Initially, the court looked to Article 3-A of the ECL from 1963 noting that the 1963 legislation failed to address any land use issues which would otherwise fall to a local municipalities zoning authority. A 1963 letter from the "Conservation Commissioner" stated that the legislation would make the "Conservation Department" responsible for oil and gas "operations" and "regulations." 1978 legislation amended ECL § 23-0301 and replaced the phrase "foster, encourage and promote" oil and gas development with "regulate." The "foster, encourage and promote" language was reserved in Energy Law 3-101(5), effectively transferring the promotion of energy to the Energy Office. The court noted that the amendments clearly recognized the need to centralize the promotion of the state's energy resources under one administrative body (the Energy Office) and that the regulatory function should be streamlined through the DEC. Again, there was no reference in the legislation pertaining to the preemption of local municipal land use management.

1981 legislation responded to the energy crisis of the time and promoted the development of domestic energy supplied by New York State. The legislation created the supersession clause as currently contained in ECL § 23-0303(2). Nonetheless, the court found no language supporting the conclusion that the clause was intended to impact, diminish or eliminate a local municipality's right to enact legislation pertaining to land use.

The court concluded that there was no support in the legislative history leading to the 1981 amendment that would support a finding that a municipalities' authority to zone was preempted. "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."

Both decisions largely relied upon on *Frew Run* and *Gernatt* in their opinions. Interestingly, the *Gernatt* decision addresses the question of whether this sort of zoning would qualify as exclusionary zoning. *Gernatt* was another mining case where zoning was passed prohibiting mining and a challenge was made arguing preemption and exclusionary zoning. The preemption argument was dismissed for the reasoning discussed above. Citing *Berenson v. Town of New Castle*, 38 N.Y.2d 102, the plaintiffs argued that the exclusionary zoning was unconstitutional. The *Berenson* exclusionary zoning test, however, was intended to prevent a municipality from improperly using the zoning power to keep *people* out not to keep *industry* out. "A municipality is not obliged to permit the exploitation of any and all natural resources within the town as 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 com-

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munity as a whole." *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 688, 642 N.Y.S.2d 164 (1996).

A possible amendment to the OGSML seems unlikely for political and historical reasons. While a relatively new headline, hydrofracking would not be the first controversy faced by the mining industry. Mining has taken place in New York for nearly a century, if not longer. Natural gas has been mined for decades. Despite the industry's long presence in the state, local zoning has not been preempted. Despite local zoning, mining of one sort or another has taken place in the state. Support of an amendment changing the preemption language to include local zoning is an overtly high risk political step. State legislators would alter a clear precedent from the Court of Appeals coupled with the inherent split in public opinion related to the process. It is much less risky for the State Legislators to continue to allow municipalities to zone consistent with the pulse of its population.

In Suffolk, developers meet with community groups to persuade the active population that projects will be beneficial to the community, paving a pathway for local political support. These developers add stores, gyms, restaurants – even revitalizing abandoned buildings – and we expect this. Why would the state lessen expectations when natural resources are being extracted from under the earth's surface?

A solution to the debate has presented itself through our judiciary. State legislative action seems unlikely. State Executive regulations are inevitable. The decision as to where or if the process is going to occur in a community will rest with the community. With an abundant local source of energy, reducing the dependence on foreign sources, and the potential to improve main street economies the value and power of voicing an opinion to the local representatives in a community must be emphasized. An electorate's conversation with locally elected officials is the most practical way to ensure that a particular community moves forward in the direction of a community's will.

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