

Hydraulic Fracturing Faces Legal Challenges

By Robert Stout and David Everett

While many municipalities have embraced natural gas drilling by hydraulic fracturing, many others have adopted zoning bans or moratoria on natural gas drilling within their borders. Recent trial court decisions have affirmed the right of municipalities to do so, thus opening the door for others to follow suit.

The Towns of Dryden and Middlefield determined that the extraction of natural gas poses a significant threat to the health, safety and welfare of their residents and thus should not be a permitted land use, absent further studies and data concluding that these uses will not detrimentally affect their groundwater supply, community character, roads, agriculture or local tourism, among other issues. The natural gas industry and property owners unsuccessfully challenged the bans in two lawsuits – *Anschutz Exploration Corp. v. Town of Dryden* and *Cooperstown Holstein Corp. v. Town of Middlefield*.

Each court found that a municipality has the legal authority to use its zoning laws to prohibit natural gas drilling within its borders, and that such authority is not preempted by the New York State Environmental Conservation Law (ECL) 23-0303(2) which provides, in relevant part, “The 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.” The courts rejected the drilling companies’ argument that this provision was intended to preempt all municipal laws related to natural gas drilling, including zoning laws, and affirmed the Towns’ position that it was not intended to preempt generally applicable zoning laws regulating land uses.

In examining the extent of the preemption, the courts construed the phrase “relating to the regulation of the oil, gas and solution mining industries.” The Towns argued that the definition of regulation is “an authoritative rule dealing with details or procedure;” thus a local law is not preempted unless it relates to the details or procedures of natural gas drilling. Generally applicable zoning laws identify land uses that are permissible and impermissible within a municipality – they do not relate to the details or procedures of natural gas drilling.

The plaintiffs, on the other hand, argued that the plain language of the statute limits the local regulation of

natural gas drilling to only two areas -- local roads and property taxes. They noted that only one New York court has interpreted this statute: in *Matter of Envirogas, Inc. v. Town of Kiantone*, 112 Misc 2d 432, Sup Ct. Erie County 1982, the Erie County Supreme Court invalidated a town’s zoning ordinance which imposed, among other things, a \$25.00 permit fee and a requirement to post a \$2,500.00 compliance bond prior to construction of any gas well within the town, on the grounds that it was superseded under Section 23-0303(2). In ruling that the law does not expressly preempt local regulation of land use, but only regulation dealing with operations, the courts rejected this comparison.

The plaintiffs also contended that the New York State Department of Environmental Conservation (DEC) has created a comprehensive scheme of regulations governing the natural gas industry and, therefore, municipalities are foreclosed from using their zoning authority to otherwise interfere with the State’s regulatory program.

The Towns also relied on judicial interpretation of the Mined Land Reclamation Law (MLRL), which originally provided that it “shall supersede all other state and local laws relating to the extractive mining industry.” Notably, this preemption language is nearly identical to the preemption language contained in ECL 23-0303(2). Construing this supersession clause according to the plain meaning of the phrase “relating to the extractive mining industry,” the Court of Appeals concluded that a local zoning ordinance – a law of general applicability – was not expressly preempted because the “zoning ordinance relate(d) not to the extractive mining industry, but to an entirely different subject matter and purpose; i.e., regulating the location, construction and use of buildings, structures and the use of land in the Town.” (See *Matter of Frew Run Gravel Prods. V. Town of Carroll*, 71 NY2d 126 at 131.)

Thus, the Court of Appeals concluded that, in limiting the MLRL’s supersession to those local laws “relating to the extractive mining industry,” the Legislature intended to preempt only “(l)ocal regulations dealing with the actual operation and process of mining.” The Towns of Dryden and Middlefield argued, and the courts agreed, that the Court of Appeals’ interpretation of the MLRL demonstrates that their zoning bans on natural gas drilling are not preempted.

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deemed unacceptable by the Town, the review process was more stringent.

Upon judicial review, the US Court of Appeals 2d ruled that "provisions setting forth a preference...are also preempted because they interfere with the federal government's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law." The Clarkson law, which attempted to push mobile operators towards alternate technologies such as femtocells, was overturned by a lower court, and the US Court of Appeals concurred in overturning the Town's law.

Femtocells do solve a problem for mobile operators and cell phone users who have a coverage problem within their premises, or for a localized outdoor area. As the technology evolves, the limitations of femtocells will be overcome and they will be more closely aligned with the capabilities of a traditional cell tower. At that point, they may become suitable replacements for traditional cell towers -- when this happens, everyone will win. ■

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The ramifications of these decisions are only beginning to play out. Municipalities throughout the state are now free to enact zoning bans and moratoria on natural gas drilling, with close to one hundred having already done so. Since this will deny natural gas companies the ability to extract gas, and restrict the rights of individual landowners to profit from these activities, the industry and private property owners seeking to profit from natural gas leases will continue to fight these restrictions.

Both plaintiffs have filed notices of appeal and appellate briefs are expected shortly. The Towns, while successful at the trial court level in preventing what they viewed as a deprivation of their constitutionally guaranteed and legislatively delegated authority to control land uses within their borders, will have to await review of the Appellate Division for further vindication. ■

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