

# Home Rule Upheld in Hydrofracking Case

By David Everett and Robert Rosborough



Members of the Dryden Town Board celebrate their victory. (Photo: Deborah Cipolla-Dennis)

In the latest skirmish in the legal battle over whether municipalities in New York State can use their zoning powers to control where natural gas drilling occurs using hydraulic fracturing methods, the municipalities – and their authority to use their zoning powers to make the local decision whether or where to permit heavy industrial uses, such as natural gas drilling, within their borders – came out on top.

Although many municipalities are embracing natural gas drilling and the promises of millions of dollars in royalties, taxes, clean energy, energy independence, and the other significant economic benefits that it brings, other municipalities have not been as welcoming. As of May 1 of this year, 55 municipalities across the state have adopted zoning bans on natural gas drilling within their borders, while another 105 have imposed zoning moratoria in order to halt the practice for a short period of time.

Many of these municipalities consider hydraulic fracturing for natural gas to be a heavy industrial use that conflicts with their comprehensive plans or is not an appropriate land use for them. They are also concerned that their water supplies could be adversely affected by the chemicals used

during the hydraulic fracturing process, that their community character could be altered detrimentally as thousands of new gas wells are drilled each year across the Southern Tier and other parts of the state, or that local roads could be harmed from millions of new, heavy truck trips needed during the process. The Towns of Dryden and Middlefield are two such municipalities. In response to concerns about the impacts of heavy industrial uses, including natural gas drilling, the two towns enacted zoning laws outlawing hydraulic fracturing within their borders. In order to protect their substantial investments, the drilling industry and a landowner fought back, challenging the zoning bans in two lawsuits filed in the State Supreme Courts in Tompkins and Otsego Counties.

The courts in these cases were asked to determine for the first time whether a municipality has the legal authority to use its zoning laws to prohibit natural gas drilling within its borders, or whether its constitutionally guaranteed zoning authority is preempted by the State Environmental Conservation Law (ECL). Specifically, the industry and landowners argued that the ECL was intended to

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preempt all municipal laws related to natural gas drilling, including zoning laws. In contrast, the towns argued that the statute was not intended to preempt generally applicable zoning laws that merely regulate land uses, not the specific activity of gas drilling. Clearly, the stakes were high.

After the lower courts rejected the industry’s and landowner’s challenge, the Appellate Division, Third Department (one of New York’s intermediate appellate courts), faced the legal issue for the first time in *Norse Energy Corp. USA v. Town of Dryden*, 2013 N.Y. Slip Op. 515227 (3d Dep’t May 2, 2013) and *Cooperstown Holstein Corp. v. Town of Middlefield*, 2013 N.Y. Slip Op. 515498 (3d Dep’t May 2, 2013). Beginning with the principle that local municipalities are granted significant rights under the New York Constitution to determine what is in the best interests of their residents’ health, safety and welfare, the Court emphasized that one of the most fundamental exercises of these rights is to foster productive land use by enacting zoning laws.

Although the Court recognized that a municipality’s exercise of its rights cannot conflict with State law, it nonetheless soundly rejected the industry’s and landowner’s position that the Environmental Conservation Law preempted zoning laws which prohibit natural gas drilling within a municipality’s borders. Addressing the particular provision of the ECL on which the industry and landowner relied – ECL 23-0303(2) – the Court held that it found “nothing in the language, statutory scheme or legislative history of the statute indicating an intention to usurp the authority traditionally delegated to municipalities to establish permissible and prohibited uses of land within their jurisdictions.” Specifically, the Court concluded that the provision, which expressly preempts only those local laws “relating to the regulation of the oil, gas and solution mining industries,” only precludes laws that

deal with the operations of the oil and natural gas industries, not zoning laws that apply to all properties in the municipality, regardless of the type of business conducted.

Indeed, the Court stated:

*“Regulation is commonly defined as ‘an authoritative rule dealing with details or procedure.’ The zoning ordinance at issue, however, does not seek to regulate the details or procedure of the oil, gas and solution mining industries. Rather, it simply establishes permissible and prohibited uses of land within the Town for the purpose of regulating land generally. While the Town’s exercise of its right to regulate land use through zoning will inevitably have an incidental effect upon the oil, gas and solution mining industries, we conclude that zoning ordinances are not the type of regulatory provision that the Legislature intended to be preempted.”* (Citations omitted).

The Court also refused to accept the industry’s and landowner’s contention that local zoning bans on hydraulic fracturing conflict with the policies underlying the provision of the Environmental Conservation Law stating that the State should minimize waste of its natural resources. The Court recognized that this statement of policy “does not equate to an intention to require oil and gas drilling operations to occur in each and every location where such resource is present, regardless of the land uses existing in that locale.” Instead, as the Court acknowledged, the policies require a balancing of the rights of all property owners, including the general public, which is best promoted by allowing municipalities to decide what is in the best interests of their residents.

In sum, in a landmark decision for the rights of municipalities to decide what type of land uses should be permitted and/or prohibited within their borders, the Court held that local municipalities have the constitutional right to protect their community character through the

use of zoning powers. With the Third Department's decision, municipalities were rightfully provided an additional measure of comfort that no specific business concern is entitled to a unique exemption from their generally applicable zoning laws merely because it is part of the oil and gas industry.

Moreover, the Third Department's decision provides municipalities with protection for the countless hours they have spent studying and defining their vision for their future, regardless of whether they decide to allow or forbid hydraulic fracturing within their borders. In essence, by confirming that municipalities have the right to make the local decision regarding what is in the best interests of their residents, the Third Department properly left that decision in the hands of the local officials who know their communities best.

Only one final fight remains in this battle between the right of municipal home rule powers to define community character through zoning and the natural gas industry's contention that these powers are usurped by State Law. This will be in New York's highest appellate court – the Court of Appeals. We anticipate that the industry and landowner in *Norse Energy Corp. USA v. Town of Dryden and Cooperstown Holstein Corp. v. Town of Middlefield* will seek a final review of the third Department's decision from the Court of Appeals. If the Court accepts the case, its decision will, once and for all, finally determine the extent of home rule authority with respect to oil and gas drilling. ■

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*Conference of Mayors and the New York Planning Federation as amici curiae. The Firm also currently represents dozens of municipalities across the southern tier in connection with local road protection programs and a variety of local issues related to natural gas drilling and hydraulic fracturing.*

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