

# NY High Court Hears Fracking Preemption Cases

June 26, 2014

Earlier this month the New York State Court of Appeals heard oral argument in *Matter of Norse Energy USA v. Town of Dryden* and *Cooperstown Holstein v. Town of Middlefield*, in which the Court has been asked to decide whether the New York State Oil, Gas and Solution Mining Law (“OGSML”)[1] preempts local zoning regulations banning high-volume hydraulic fracturing (“fracking”).

The Towns argue that OGSML neither expressly nor impliedly preempts municipal zoning authority.[2] The relevant portion of the OGSML states the following:

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.[3]

The Towns argue that statute only preempts regulations directly related to the oil and gas mining industry. As such, the Town maintains that the Court should construe the OGSML preemption clause as it did the supersession clause of the Mined Land Reclamation Law (“MLRL”) in *Few Run Gravel Products, Inc. v. Carroll*.**[4]** In *Few Run*, the Court held that the MLRL did not preempt the Town of Carroll’s Zoning Ordinance which established a zoning district in which sand and gravel mining was prohibited.[5] The MLRL preemption clause at issue in that case stated the following:

For the 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.[6]

The *Few Run* Court found that the regulation of land use through zoning was not an “enactment relating to the ‘extractive mining industry.’”[7] In other words, while regulations pertaining to the “actual operation and process of mining” are preempted, general land use controls are not.[8] The MLRL supersession clause was later amended to specifically provide, among other things, that local zoning regulation was not preempted.[9] Following its amendment, the Court of Appeals held that a local zoning law that prohibited mining altogether within a municipal boundary was also not preempted by the MLRL.[10]

The Towns argue that so long as localities do not directly regulate the technical aspects of oil and gas operations, they are authorized to regulate land use within their municipal boundaries, including adoption of local ordinances that completely ban oil and gas drilling.

Appellants contend that the OGSML preempts local land use regulations both expressly and through conflict preemption principles.[11] The statute, Appellants argue, is clear that all local laws other than those regulating “local roads or the rights of local governments under the real property tax law” are preempted.[12] Since zoning laws regulate where drilling may occur and are not included within the narrow exceptions expressly provided in the statute, they too therefore are preempted. Moreover, if OGSML’s supersession clause is only intended to apply to the technical aspects of drilling, then the statutory exceptions for local road and property tax would be superfluous.[13] The narrow exceptions to the broad supersession clause, Appellants assert, distinguishes this case from those in which the Court interpreted the MLRL as permitting local zoning bans.[14]

Appellants further argue that OGSML provides comprehensive regulations for the oil and gas industry, including regulations regarding well location.[15] Thus, zoning regulations that would regulate where fracking wells could be located must be preempted. Appellants also argue that local regulation would result in resource waste and diminish correlative rights.[16]

During oral argument before the Court of Appeals, counsel for Town of Dryden seemed to acknowledge that banning underground horizontal extraction piping associated with fracking would “relate to the industry” and be preempted by OGSML whereas a ban on drilling at the surface relates to local land use and thus would not be preempted.[17] The Justices inquired, since preemption concerns both state energy policy and the municipalities’ fundamental right to zoning, whether it is an issue to be answered by a clear articulation of the legislature.

In both *Matter of Norse Energy USA* and *Cooperstown Holstein*, the Appellate Division Third Department held that the OGSML did not preempt local zoning regulation.[18] It would not be surprising if the Court of Appeals finds that localities may not ban subsurface drilling operations within their municipal boundaries but may prohibit surface well drilling through their delegated zoning authority. In doing so, the Court would send this issue back to the Legislature to decide whether to amend the legislation with an explicit preemption clause.

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[1] ECL 23-0301 *et. seq.*

[2] See *generally* Brief of Respondents Town of Dryden and Town of Dryden Town Board (“Respondents Br.”).

[3] ECL § 23-0303(2).

[4] Respondents Br. at 11-36.

[5] 71 N.Y.2d 126 (1987)

[6] *Id.* at 129.

[7] *Id.* at 131.

[8] *Id.* at 133.

[9] See ECL § 23-2703(2)(b).

[10] *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 690 (1996).

[11] Brief of Appellant Norse Energy Corp. USA (“Appellant Br.”) at 31-47; 58-66.

[12] *Id.* at 32.

[13] *Id.* at 37.

[14] *Id.* at 47-49.

[15] *Id.* at 59.

[16] *Id.* at 60.

[17] Court of Appeals Transcript at 52, lines 3-11.

[18] See *Cooperstown Holstein Corp. v Town of Middlefield*, 106 A.D.3d 1170 (3<sup>rd</sup> Dep’t 2013); *Matter of Norse Energy Corp. USA v Town of Dryden*, 108 A.D.3d 25 (3<sup>rd</sup> Dep’t 2013).

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