New York Fracking Outlook Still Gloomy

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Lots of folks love New York, to borrow from the Empire State’s long-standing tourism slogan. But New York does not always reciprocate. That is certainly the case with the energy industry. A case in point is the interminable “moratorium” upon fracking, as imposed by the state’s governor. Given his recent reelection, said executive policy is unlikely to change.

Yet there is more bad news for proponents of fracking within New York State, this time from the latter’s judicial branch. Most recently, New York’s highest state court upheld local zoning laws prohibiting fracking, finding this particular municipality’s promulgation of what the town characterized as “zoning” ordinances to be a legitimate exercise of authority and not in conflict with the state’s overriding scheme of energy industry regulation.

As a ruling of New York’s highest tribunal, this case represents the law, as presently constituted. To be sure, subsequent legislative revision might change the underlying conditions, which should lead to a different judicial outcome at some future date. Nevertheless, this is now the paramount case effectively banning fracking within New York State, and it must be understood. Moreover, appreciating the instant case, both for its legitimate points, and, arguably, its misconceptions about controlling state law, is essential to mapping out a strategy whereby the energy industry and landowners can work to foment legislative change necessary to undo this judicial decision, and thereby clear the way toward tapping the untold riches that lie beneath New York’s soil.

FRACKING CASE DRIVES ORIGINAL PROMOTER BROKE

This troublesome case is entitled Wallach v. Town of Dryden. Its underlying facts are straightforward enough.

This readership is all too familiar with the stunning growth of fracking, a proven technology for extracting previously unreachable formations of natural gas and oil. Fracking is, quite plainly, revolutionizing the energy industry and roiling the markets, as the United States suddenly finds itself on the verge of energy independence. Fracking unleashes incredible resources right here under US soil, creates jobs, and provides newfound wealth for US landowners fortunate enough to be situated above bountiful formations, such as the Marcellus Shale in the US Northeast. To be sure, fracking is not without its critics.
and opponents, a point we shall return to momentarily.

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As the fracking boom opened in the early 2000s, Norse Energy Corp. acquired oil and gas leases from landowners who sit astride the Marcellus Shale along what is commonly referred to as New York’s “Southern Tier,” the region that borders neighboring Pennsylvania. Undoubtedly, New Yorkers observed the economic boom fracking had brought to the Keystone State—in particular, the hefty royalties being paid out to landowners. But exploration companies such as Norse encountered obstacles. One was New York’s aforementioned and still-standing moratorium on issuing permits for fracking operations. Another, and the key to the instant case, was local opposition, in the form of local zoning laws that out-and-out prohibited fracking within certain municipalities.

One such jurisdiction was the town of Dryden. Residents were concerned that their rural farming community was going to be turned upside down by fracking operations and all that went with such vigorous economic activity. Opponents of fracking, some local and others from distant locales, descended upon this rural community and convinced the town elders to enact new zoning ordinances that out-and-out made fracking an illegal use of land within the township’s borders. While the opponents legislated the ban into being in the guise of “zoning” law, their true intent and effect was simply to ban fracking in Dryden. Certainly, that was the unvarnished result of the new ordinances.

While the opponents legislated the ban into being in the guise of “zoning” law, their true intent and effect was simply to ban fracking in Dryden. Naturally, Norse went to court to overturn these new zoning restrictions. But not surprisingly, the company fell upon hard times. After all, it had all these leaseholds lying fallow until drilling could commence. Running out of cash, it was forced to file for Chapter 7, the liquidation statute of the federal Bankruptcy Code.

As we have often discussed on these pages, in a Chapter 7 case a trustee is appointed with the task of maximizing the debtor’s assets, in order to make the best possible recovery for the latter’s creditors. Wallach became Norse’s trustee and inherited the lawsuit. More to the point, it was imperative for him to continue the lawsuit, for, if he succeeded, drilling could begin, and all of Norse’s leases would become quite valuable on the open market.

Writing for the New York State Court of Appeals, Judge Victoria Graffeo neatly summarized the precise legal issues. The trustee’s assertion was that the statewide energy policy of New York, as exemplified in its oil and gas statutes, required a uniform approach. Therefore, energy policy could not be subject to contradictory regulations promulgated by “a mélange of the State’s 932 towns.”

Specifically, New York’s Oil, Gas, and Solutions Mining Law (OGSML) contained a “supersession clause” that acted to preempt any contrary local zoning law, such as Dryden’s prohibition. Naturally, the town argued to the contrary, stating that its zoning laws were a proper exercise of “home rule,” a right given to the town by state law. From this beginning, battle was joined.

LEGAL ANALYSIS AGREES THAT LOCAL ZONING LAWS CAN BAN FRACKING

New York’s highest state court commenced its analysis with the latter point, the scope of municipal authority bestowed upon the state’s many political subdivisions. The source of this authority was nothing less than the New York State Constitution, which provides that local governments have the power to enact local laws, as long as they are not inconsistent with the state’s general statutes. This power is commonly referred to as New York’s “home rule” provision. This is augmented by legislative authorization to localities to promulgate zoning designed to protect the health, safety, and general welfare of those communities.
New York’s courts have long recognized land-use regulation as one of the “core powers of local governance.” Judge Graffeo observed that it is beyond question that towns and villages may enact zoning ordinances proposed to enhance or preserve the quality of life in their localities. This authority includes permission to promulgate land-use restrictions aimed at developing or preserving a balanced, cohesive community, accounting for regional needs and requirements.

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At the same time, noted the court, municipalities cannot pass laws in conflict with New York’s Constitution or other statewide statutes. Under the doctrine of preemption, state law reigns supreme over any contrary local ordinance. It is for the state legislature to make law for matters of concern to the state as a whole, and contradictory local laws must yield to their preeminence.

The issue then became the existence, and, more so, the clarity, of the overriding state law. The trustee argued that New York’s legislature had in the OGSML clearly articulated its intention to preempt contrary local zoning law. Fracking advocates looked to that body’s “supersession clause,” which stated that the OGSML superseded all local laws relating to the regulation of oil and gas industries and operations. This clause compelled the Court of Appeals to more closely examine the impact of this supposed legislative preemption.

Notably, we do not write on a blank slate, opined Judge Graffeo. Existing precedent called for the reach of the supersession clause to be established via a three-part inquiry. The first prong of the test was the plain language of the proviso itself; second, the supersession clause had to be viewed in light of the pertinent statutory scheme as a whole; and the third prong called for an examination of the clause’s legislative history. Only by this tripartite analysis, said the tribunal, could the legislature’s true intent be gleaned.

Naturally, the court first turned to the plain language of the OGSML’s supersession clause itself. And, in doing so, the Court of Appeals dealt the pro-fracking camp its first setback. Ascribing what it called a “natural reading” to the statute, the court found that it was plainly written to apply to actual oil and gas mining activities. According to the court, the straightforward meaning of the clause was to discourage, and, if necessary, preempt any contrary local law that purported to regulate the oil and gas industry itself.

In contrast, Dryden’s zoning ordinances were directed at regulating the use of the land, and not actual oil and gas operations themselves. The saving grace of the municipality’s land-use law was that its purported design was to restrict or prohibit certain land uses within the town boundaries. The tribunal deemed this to be a permissible exercise of “home rule” and not at all in conflict with the supersession clause’s supremacy over the energy industry. Admittedly, noted the court, such zoning restrictions would impact oil and gas operations such as those at issue here, but any such influence was “incidental,” held the court, and did not fall within the scope of the OGSML’s prohibition against local interference.

In reaching the above conclusion, the Court of Appeals rejected the trustee’s reading of the supersession clause as too broad, and otherwise turned aside any other arguments as to the law’s alleged true meaning. Thus, the town of Dryden prevailed upon the first leg of the test. It was time to move on to the next prong, a weighting of the supersession clause against the entire statutory scheme of New York’s oil and gas law.

To appreciate the entirety of this body of state law, the Court of Appeals first stated the law’s fourfold purposes: to regulate the development and utilization of natural resources in such a manner as to prevent waste; to authorize oil and gas operations in such a manner as to provide for the greater ultimate recovery of the state’s oil and gas resources; to protect the correlative rights of landowners and the general public; and, finally, to regulate the underground storage of such of these natural resources that are
in the supersession clause leads to the conclusion that a local zoning prohibition against fracking operations somehow equates to the waste of the state’s natural resources. Thus, the court ultimately held that the trustee failed to satisfy the second prong of the overall test. The pro-fracking parties were now down to their last argument.

The third and final prong of the judicial test was whether the legislative history of the supersession clause and its related statutes sustained an argument to overturn Dryden’s zoning laws banning fracking within the town’s borders. Here the tribunal relied upon New York’s rich history of legislation on energy industry regulation.

First, the state’s present oil and gas law framework finds its roots reaching back to 1935. This was the date New York signed on to the Interstate Compact to Conserve Oil and Gas, a multilateral agreement among the states forged during the Great Depression, and aimed at curtailing the overproduction and waste of precious natural resources. In the early 1960s, New York enacted the predecessor to its modern energy laws, this antecedent statutory body likewise devoted to nurturing the development, production, and utilization of oil and natural gas found within the state.

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These are promising words indeed. But disappointment awaited, for the Court of Appeals quickly squashed any optimism out of those observations, as follows. The tribunal made reference to a 1978 amendment to the OGSML, which eliminated such encouraging phraseology. The court instead focused upon the law’s revamped language, which substituted the more ominous directive that state law was intended to “regulate” the energy industry, specifically the development and production of oil and natural gas. While not explicitly stated in the court’s opinion, the court’s desired interpretation is obvious: fostering oil and

Yet found the court, there was nothing to indicate that the supersession clause swept more broadly than that. In fact, declared the high court, to regard the OGSML as something more was to bestow upon it more power than the legislature intended. Given such, the Court of Appeals ruled that municipal zoning laws fall well outside the preemptive reach of the supersession clause. To be quite sure, “we see no inconsistency between the preservation of local zoning laws” and the OGSML’s clear mandates, specifically the directives to prevent waste, and, at the same time, promote the greatest possible recovery of the oil and natural gas reserves.

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Indeed, in a sharp rebuke to the trustee and his allies, the court ruled that nothing extracted. To further these goals, the OGSML puts in place a “detailed regime” in which state regulators are “entrusted to regulate oil, gas, and solution mining activities” by the creation and enforcement of appropriate rules and regulations.

New York’s highest court declared it “readily apparent” that the OGSML focused upon the regulation of “the safety, technical and operational aspects of oil and gas activities across the State.” The supersession law under review “fit comfortably within this legislative framework,” as it assured statewide uniformity in the matter of the exploitation of natural resources, including oil and natural gas. In that respect, the relevant proviso appropriately preempted any local law to the contrary affecting actual drilling and operations in the energy industry.
natural gas development in New York State was cast aside in favor of imposing more regulation, even at the expense of restraining the energy industry from expansion.

Against this subtle background, the Court of Appeals returned to a now-familiar refrain: nothing in the legislative history, wrote Judge Graffeo, undermined the tribunal’s conclusion that the supersession clause cannot be read to preempt local zoning restrictions. Indeed, the court continued, the law’s lengthy history of enactment and modification lacks any reference to municipal zoning laws at all and “much less evince an intent to take away local land use powers.” It was the court’s further ruling that the legislative history proves only that the state lawmakers’ uppermost concern was preventing waste in oil and natural gas development, and assuring that the energy industry’s “technical operations” were overseen via a robust regulatory framework. As such, now on this, the third prong of the judicially crafted test, the trustee had failed yet again to persuade the court that the municipality’s zoning law had to be overturned in light of the state’s preemptive scheme of energy regulation.

Thus, having applied the town of Dryden’s fracking prohibitions against the relevant tripartite test—that of, first, the supersession clause’s plain language; second, the clause’s place in the state’s statutory matrix; and, finally, the statewide proviso’s own legislative history, New York’s highest court ultimately concluded that the municipality’s zoning laws did not conflict with the preemptive state statutory scheme, but rather that the town’s laws fell well within the ambit of “home rule.” In the end, the high court validated the town’s anti-fracking zoning laws as a rightful exercise of local authority, and turned away the trustee and his arguments seeking the zoning law’s ouster.

Certainly, and while that was in fact the tribunal’s final ruling, we cannot depart Wallach without addressing the court’s nearly parenthetical rejection of what it characterized as a “fallback position” offered up by the trustee. Those seeking to overturn Dryden’s comprehensive ban on fracking had further argued that, even if the town had properly exercised its powers to zone for its locality, its exercise of that local authority was excessive.

Put one way, the trustee offered that sensible restrictions that kept fracking (or any number of other less-welcome commercial activities) out of a clearly residential area could be deemed logical and desirable under the auspices of home rule: “[B]ut an outright ban goes too far, and cannot be seen as anything but a local law that regulates the oil and gas industry.” A local law so far-reaching inarguably places the municipal law in stark conflict with superseding state authority, alleged the trustee, and therefore cannot be allowed to stand.

Not surprisingly, given the body of its decision already set out, the Court of Appeals rejected this argument out of hand. Its reasoning was that Dryden’s anti-fracking zoning laws were not excessive, but rather a “reasonable exercise” of its home rule authority to zone its locality in a way found most fitting for its population. Notwithstanding this further refutation of the pro-fracking parties’ arguments, New York’s high court, intentional or accidentally, set the stage for what might yet come to pass.

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Judge Graffeo opined that “the heart of these cases” reflects the interrelationship between state and local authority. The instant case was not a referendum on fracking, she declared, and “we pass no judgment on [fracking’s] merits.” Rather, today’s decision is about relative legislative power, and how it is exercised at the comparative state and local levels by popularly elected officials.

In a concise declaration that may have implications far beyond this now-concluded case, New York’s highest court stated that allowing or banning fracking presents “major policy questions for the coordinate branches of government to resolve.” Nothing in today’s decision, cautioned Judge Graffeo, should be deemed to go beyond the limited ruling upholding local zoning laws. Implicitly, “home rule,” in the form of anti-fracking zoning restrictions, could be pushed aside by the preemptive power of overriding state energy law. “There is no dispute that the State Legislature has this right if it chooses to exercise it,” declared the court. While the Court
of Appeals found no basis in the current statutory infrastructure to do so today in Wallach, without question the Court of Appeals’ acknowledgment of superseding statewide authority leaves open, indeed wide open, a far different result should New York’s statutory priorities be reshaped by future lawmakers.

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DISSENT SHOWS FALLACY IN USING ZONING LAWS

Indeed, that last point makes worthy of mention Wallach’s dissent, as authored by Judge Eugene F. Pigott Jr. That eminent jurist was succinct in declaring that the majority had simultaneously misapprehended New York’s supersession law and Dryden’s zoning ordinance. As to the first, he declared the supersession clause, by its very terms, is supreme over all contradictory local laws. Judge Pigott found the town’s so-called zoning laws to be in direct conflict with the provisions of the OGSML, and he advocated their repudiation on that basis.

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Second, and here the good judge did not mince words: “The zoning ordinances of Dryden . . . do more than just regulate land use, they regulate oil, gas and solution mining industries under the pretext of zoning” (emphasis supplied). In Judge Pigott’s considered view, Dryden’s local laws “go above and beyond zoning.” They create “a blanket ban on an entire industry,” largely due to the fact that these laws prohibit fracking outright, without any regard toward the typical zoning ordinances that specify where a certain activity is prohibited. In its final analysis, the dissent declared that Dryden’s laws do not zone; rather, they purport to regulate an entire industry, inarguably something far beyond the domain of local authority.

PATH STILL OPEN

To conclude this writing, we shall take our cue from Judge Pigott’s brevity. Wallach upholds so-called zoning laws that outlaw fracking within a specific municipality as a lawful exercise of “home rule.” Thus, as of now, any locality can clone the Dryden ordinances, and rightly expect their fracking bans to withstand judicial scrutiny. Next, while the dissent did not carry the day, it rightly points out that the majority misread both the state law and the town ordinances at issue herein.

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As to the former, this allegation of misinterpretation might very well be the spur necessary to compel New York’s legislators to revisit the language of that state’s energy laws. And that segues to our final point; the battle now shifts, and rightly so, from the courtroom to the state legislature, where elected lawmakers can clarify and define, in clear terms, New York’s energy policies, including fracking. At the end of the day, what is important is that the will of the people, all of the people of New York State, be enacted into law.

Editor’s note: Recently, a New York state trial judge dealt another blow to the energy industry. The court ruled against the plaintiffs in Joint Landowners v. Cuomo on the basis that they lacked standing, due to state agencies’ inability to complete environmental impact studies necessary before fracking permits could be issued. This case was covered in Sabino, M. (2014, July). New Yorkers fight state delays in resolving fracking controversy. Natural Gas & Electricity, 30(1), 1–6.

NOTES
