

CAN MUNICIPALITIES ENACT LOCAL LAWS REGULATING THE OIL AND GAS INDUSTRY

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Anschutz Exploration Corporation v. Dryden and Cooperstown Holstein Corporation v. Town of Middlefield: Can Municipalities Enact Local Laws Regulating the Oil and Gas Industry?

As the controversy surrounding high-volume hydraulic fracturing in the Marcellus Shale and similar formations heats up in New York State, municipalities seeking to ban drilling within their borders are at odds with those defending the state's authority to grant drilling permits within the same boundaries. Two pending cases, *Anschutz Exploration Corporation v. Dryden and Cooperstown Holstein Corporation v. Town of Middlefield*, highlight this tension and may set important precedent in New York by defining municipalities' rights to enact local laws relating to oil and gas drilling.

In *Dryden*, Anschutz Corporation is suing the Town of Dryden, claiming that a resolution passed by the town prohibiting oil and gas drilling within its town limits is unenforceable. The drilling company argues that Article 23 of New York's Environmental Conservation Law pre-empts local ordinances regulating oil and gas development. Article 23 provides that the state will regulate the "development, production, and utilization of natural resources of oil and gas" within New York. A separate provision of Article 23 states: "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."

Anschutz relies upon this language to make its case that only the State Department of Environmental Conservation can regulate oil and gas drilling and accordingly that Dryden's resolution is improper. The town, by contrast, is expected to defend its action by invoking land use authority and the state Constitution's "home-rule" provision of Article IX, Section 2. This law provides municipalities with constitutional authority to enact local laws affecting property, affairs, and government of the town. Attorneys for the parties appeared in New York State Supreme Court in Tompkins County in early November. After hearing arguments, Judge Phillip R. Rumsey reserved decision on the matter.

Attorneys

Daniel Spitzer

Practices & Industries

Environmental

Oil & Gas

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In a separate case filed in New York State Supreme Court in Otsego County, Cooperstown Holstein, a local landowner, seeks to invalidate the Town of Middlefield's June 2011 ban on gas drilling. Like Anschutz in the *Dryden* case, Cooperstown Holstein points to Article 23 of New York's Environmental Conservation Law to argue state pre-emption as a prohibition on local ordinances and laws aiming to regulate oil and gas drilling. The plaintiff also contends that the purported zoning law denies it the economic benefits of the oil and gas leases it had entered into with a drilling company.

The pre-emption provision of Article 23 was enacted in 1981. There has been only one reported case concerning this provision until now. That case, *Envirogas v. Town of Kiantone*, 447 N.Y.S. 2d 221 (Sup. Ct. Erie County 1982), while not directly on point, is relied upon by the plaintiffs in both *Dryden* and *Middlefield*. In *Kiantone*, the court struck down a local ordinance requiring oil and gas drillers to pay a fee for drilling permits. The court reasoned that the ordinance was expressly pre-empted by Article 23 of the Environmental Conservation Law and that its enactment was in excess of the town's authority.

Notably, neither the plaintiff in the *Dryden* case nor the *Middlefield* case has raised the issue of regulatory taking. Under the Fifth Amendment of the United States Constitution, the government may not take "private property . . . for public use, without just compensation." The United States Supreme Court has clarified that regulatory takings, though not physically invasive, are prohibited because they deprive an owner of the economically beneficial use of his property. Arguably, a landowner such as the one in the *Middlefield* case or an oil and gas lessee such as Anschutz in the *Dryden* case might raise a constitutional argument that they are entitled to compensation if municipalities are allowed to prohibit drilling. A taking claim would raise significant issues that are currently unlikely to be considered by the courts in *Dryden and Middlefield*. To determine whether a landowner has been subjected to an unconstitutional taking, courts have considered, among other factors, an individual's "investment-backed expectations" in his property rights. Potentially relevant in such an analysis would be Anschutz's allegation that it spent in excess of \$5,000,000 in acquiring oil and gas leases in the Town of Dryden. A takings analysis in the drilling context would also involve the question of whether oil and gas drilling, or certain types of oil and gas drilling activities, can be prohibited to protect the health and welfare of the community. This could lead to courts reviewing whether there is sufficient evidence that the controversial high-volume hydrofracturing is indeed too dangerous.

Today, over a dozen municipalities in New York, including the City of Buffalo, have enacted some form of anti-fracking law. Also, a home-rule bill, which would spell out municipal authority to zone out oil and gas drilling and give towns a great deal of power to restrict these activities has passed in the New York State Assembly, but was not passed in the Senate. The bill will be re-introduced after the Senate reconvenes in January. Such legislation, if passed and signed into law by the governor, would eliminate the pre-emption issue but would open up the taking question. If *Dryden* prevails, municipalities in the state will have a sound argument that they have the right to enact laws banning drilling within their borders, but may still have to face takings claims. If Anschutz wins, any argument against pre-emption based upon municipal home-rule law would be considerably weakened.

Will these bans pass muster once *Dryden* and *Middlefield* have been decided? These two cases are certainly ones to watch in New York, particularly for municipalities seeking to enact their own local laws with respect to oil and gas drilling.