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Court Fires First Shot in Local Authority Battle Over the Development of the Marcellus Shale in New York

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Client Advisory
February 24, 2012 by Telisport W. Putsavage, Andrew D. Weissman and Guy P. Lander

In a closely watched dispute with statewide ramifications for the development of the shale formations in New York, an upstate trial court issued a decision of first impression in a major battle over the largest natural gas formation ever sought to be developed in New York that could prevent drilling for natural gas in many parts of the state, and potentially provide a template for efforts to stop shale development in other parts of the country. With over sixty New York municipalities having enacted various forms of prohibitions on drilling, and millions of dollars invested in leases that may expire before development is ever permitted, this battle promises to involve many interests in a long struggle.

On February 21, in *Anschutz Exploration Company v Town of Dryden*, Tompkins County Supreme Court Justice Phillip Rumsey held that the New York Oil, Gas and Solution Mining Law ("OGSML"), Article 23 of the New York Environmental Conservation Law, does not preempt enactment of local zoning restrictions that prohibit oil and gas drilling or disposal of drilling-related waste in some or all of a municipality.

The potential development of the Marcellus shale formation in New York has been the subject of intense scrutiny and debate. In 2010 the New York State Department of Environmental Conservation ("DEC"), which has regulatory authority over the conduct of oil and gas activity in New York, issued a moratorium on development until a supplemental environmental impact statement was prepared examining the potential impacts of development. The DEC's draft *Supplemental Generic Environmental Impact Statement on Horizontal Drilling and High-Volume Hydraulic Fracturing in the Marcellus Shale and Other Low-Permeability Gas Reservoirs ("SGEIS")* generated a firestorm of testimony and written comments. More than 45,000 comments were submitted to DEC by the January 11, 2012 deadline, and an estimated six thousand people attended four DEC public hearings on the draft SGEIS and regulations proposed to govern Marcellus development. These comments are now being assessed by DEC as it prepares the final SGEIS and regulations.

In the Town of Dryden, the Town Board enacted the oil and gas amendment to the town zoning ordinance in response to a petition from almost 1,600 town residents (out of a population of approximately 16,500 people) requesting such action. Anschutz Exploration, which holds leases on approximately 22,000 acres in the town, brought a combined Article 78 proceeding/declaratory judgment action seeking a determination that the zoning ordinance amendment was preempted by the OGSML.

The clause of the OGSML at issue reads:

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.

Read expansively, this clause could be interpreted as limiting local jurisdiction to laws pertaining to roads and real property taxes. The Court concluded to the contrary, stating that the town's zoning ordinance did not "relate to the regulation of the oil, gas and solution mining

industries." Instead, in the Court's judgment, the zoning ordinance constitutes the regulation of land which has only "incidental" impact on oil and gas drilling and therefore should not be construed as regulating the oil and gas industry.

In reaching this conclusion, The Court was heavily influenced by the New York Court of Appeals 1987 decision in *Frew Run Gravel v Carroll,* in which a mine operator sought to establish that localities could not assert zoning jurisdiction over the location of mines. In that case the Court of Appeals, New York's highest court, interpreted a similar preemption provision in the New York Mined Land Reclamation Law ("MLRL"), Title 27 of ECL Article 23, which at that time stated:

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 ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.

In this 1987 decision, the Court of Appeals held that preemption of "all other state and local laws relating to the extractive mining industry" did not limit local government's authority to preclude mining in some or all of a municipality, since such an ordinance would not regulate the extractive mining industry and in fact had only an "incidental" impact on such industry.

Subsequently, in *Gernatt Asphalt Products v. Town of Sardinia*, the Court of Appeals in 1996 again addressed MLRL preemption following the statute's amendment in 1991. The Court of Appeals held that a zoning ordinance that completely prohibited mining in the municipality was not preempted. In so holding, the Court presaged the battle over Marcellus drilling in stating that

A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damages to the rights of others and to promote the interests of the community as a whole.

The Court in *Anschutz* examined the differences in the OGSML and MLRL preemption clauses and found that they did not justify reaching a different conclusion with respect to the OGSML. In its view, the differences in language in references to "ordinances" and "local laws" were meaningless. It also examined the differences in the exemptions between the statutory provisions, and found that they stemmed from differences between the development of oil and gas and mining, and therefore did not provide any basis for distinguishing the preemptive text in the two statutes.

The Court also contrasted the OGSML and MLRL provisions with Title 11 of Article 27 of the ECL, which governs the siting of hazardous waste facilities. The Court found that Title 11 contains a clause expressly preempting local zoning authority, as an example of the Legislature's ability to enact a broad preemption provision if that is the desired outcome. Other articles of the ECL, such as Article 33 governing pesticides, also contain more sweeping preemption provisions.

This could have an impact in other states where Marcellus development opponents are seeking to preserve local zoning authority, as it continues a pattern from at least two other states. The Court in *Anschutz* pointed to decisions of the highest courts of Pennsylvania and Colorado which arrived at similar outcomes. In *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, the Pennsylvania Supreme Court held that the Pennsylvania Oil and Gas Act does not preempt local zoning. In *Bowen/Edwards Associates, Inc. v Board of County Commissioners of La Plata County*, the Colorado Supreme Court held that the Colorado Oil and Gas Conservation Act did not preempt local zoning authority to forbid drilling in a zoning district, but held in *Voss v. Lundvall Bros., Inc.*, that a municipality could not prohibit drilling throughout its entirety,

The *Anschutz* case is one of two actions challenging zoning ordinances prohibiting oil and gas development. Given the enormous interest and significant investments at stake, expectations are that one of these actions will ultimately reach the Court of Appeals. Should the Court of Appeals follow the template of *Frew Run* and *Gernatt* discussed above, it would appear that the *Anschutz* holding will be upheld. Given the

enormous pressure to develop the Marcellus shale formation, if *Anschutz* is affirmed, it would not be surprising to see the New York Legislature revisit the OGSML preemption clause in what would be a highly charged battle.

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