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Hydrofracking Litigation in New York

By Richard Porter

The New York moratorium on hydraulic fracturing (“fracking” or “hydrofracking”) will not expire until May 2015.¹ If the state permits hydraulic fracturing as a means to extract natural gas from the southern tier’s Marcellus Shale formation under Governor Cuomo’s current plan, drilling will be allowed only in communities that agree to the practice.² Municipalities have attempted to use their authority to enact local laws and ordinances prohibiting hydrofracking and have been taken to court by pro-drilling landowners. The chief concern is over the risk of pollution to groundwater hydrofracking poses. This paper is an analysis of the litigation currently taking place in New York, including the causes of action alleged by plaintiffs, the nature of the drilling bans enacted by the defendant municipalities, and the courts’ analysis in the key decisions.

In *Jeffrey v. Ryan*, 37 Misc.3d 1204(A) (Sup. Ct. Broome County 2012), a group of landowners and gas leaseholders challenged the City of Binghamton’s two-year ban on natural gas drilling and development.³ The petitioners filed a hybrid Article 78⁴ proceeding/declaratory judgment⁵ action against the City, arguing that 1) the law was a zoning law that should have first

¹ <http://assembly.state.ny.us/mem/John-T-McDonald-III/story/51278/>

² See Patricia E. Salkin, *New York Zoning Law and Practice* Sec. 11:23.50

³ Local Law 11—006: “Prohibition of Gas and Petroleum Exploration and Extraction Activities, Underground Storage of Natural Gas, and Disposal of Natural Gas or Petroleum Extraction, Exploration, and Production Wastes”

⁴ See CPLR Article 78, *et seq.*, “Proceedings Against Body or Officer”

⁵ See CPLR 3001

been referred to the Broome County Planning Board prior to enactment, 2) the law is superseded by state law,⁶ or 3) alternatively that the law is invalid because it is a moratorium that failed to meet the legal requirements for a moratorium.⁷ The Article 78 cause of action's effectiveness against local ordinances banning natural gas drilling is somewhat limited. The court in *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc.3d 450 (Sup. Ct. Tompkins County 2012) discussed how an Article 78 proceeding might be used by pro-drilling petitioners against local government action: "Unlike challenges directed to the procedures followed in the enactment of an ordinance, challenges to the substantial validity of a legislative act may not be maintained in an Article 78 proceeding." In *Anschutz Exploration Corp.* the court granted the respondent's motion to dismiss the part of petitioner's Article 78 petition challenging the substantive validity of the Town of Dryden's zoning amendment.⁸ However, the petitioner also brought a declaratory judgment action challenging the validity of the zoning amendment, which the court allowed to go forward.⁹ The petitioner's hybrid Article 78/declaratory judgment action in *Jeffrey v. Ryan* partially failed as well because the Article 78 petition was filed outside the four-month statute of limitations.¹⁰ But because the declaratory judgment complaint was timely, the court heard the petitioners' claims that the City's drilling ban was superseded by state law and was a moratorium enacted without meeting the required legal standard.¹¹

It has been easy for pro-drilling groups to obtain standing to challenge local law drilling bans. In *Jeffrey v. Ryan* petitioner Nelson Holdings, Ltd. owned real property within the City zoned as "heavy industrial."¹² Before the passage of Local Law 11-006, Nelson Holdings or any

⁶ See N.Y. Environmental Conservation Law Sec. 23-0303 (McKinney's 2012)

⁷ *Ryan*, 37 Misc.3d at 1.

⁸ *Anschutz Exploration Corp.*, 35 Misc.3d at 456

⁹ *Id.* at 456

¹⁰ *Ryan*, 37 Misc.3d at 5

¹¹ *Id.* at 5

¹² *Id.* at 5

other owner of property zoned as “heavy industrial” could apply for a “special use permit” to use that property for natural gas extraction.¹³ Nelson stated that it had intended to put its property to that use until natural gas extraction was prohibited by Local Law 11-006.¹⁴ The court held this was “real harm” sufficient to prove standing.¹⁵ The standard for a petitioner to claim standing is low in New York state courts.¹⁶ This is evident here, since all Nelson Holdings showed was that it “intended” to purchase special use permits sometime in the future. The court held the standard was met even though Nelson Holdings had not yet purchased special use permits or made an attempt to purchase them. The court did not even discuss whether they had the funds to do so. The standard was met simply because they had intended to sometime in the future purchase these permits and now were unable to do so because of Local Law 11-006.

In an interesting move the *Ryan* petitioners filed for summary judgment before the respondents had filed an answer to the initial claim.¹⁷ The respondents argued this was premature under CPLR 3212(a).¹⁸ But the court permitted this procedural anomaly, citing to Third Department and First Department precedent¹⁹ in holding that it is appropriate in certain circumstances for a court to grant a motion for summary judgment before the respondents have filed an answer.²⁰

¹³ *Id.* at 5

¹⁴ *Id.* at 5

¹⁵ *Id.* at 5

¹⁶ See David E. Siegel, New York Practice Sec. 564 (5th ed. 2011)

¹⁷ *Jeffrey v. Ryan*, 37 Misc.3d 1204(A) at 3

¹⁸ See CPLR 3212(a), “Motion for summary judgment” (Any party may move for summary judgment in any action, after issue has been joined[.])

¹⁹ *Matter of Thomas Giorgio v. Bucci*, 246 A.D.2d 711 (3d Dep’t 1998), *lv. to appeal denied* 91 N.Y.2d 814 (1998) (in an Article 78 proceeding where the parties had apprised the court of all relevant arguments there was no requirement that the court grant leave to serve an answer); *Matter of Davila v. New York City Housing Authority*, 198 A.D.2d 511, 512 (1st Dep’t 1993), *lv. to appeal denied* 87 N.Y.2d 801 (1995) (not necessary to grant respondents leave to serve an answer to the petition where respondents clearly informed the trial court of their relevant arguments to dismiss the petition)

²⁰ *Jeffrey v. Ryan*, 37 Misc.3d 1204(A) at 3

The *Jeffrey v. Ryan* decision is important because the court decided local governments cannot pass a moratorium to prohibit hydraulic fracturing. The court explained that a municipality may enact a moratorium under its police power to protect the health, safety, and welfare of its citizens.²¹ However, for a moratorium to be upheld, the municipality must show that its actions were: “1. in response to a dire necessity; 2. reasonably calculated to alleviate or prevent a crisis condition; and 3. that the municipality is presently taking steps to rectify the problem.”²² Here the court struck down Local Law 11-006 because the City failed to prove that banning gas exploration is justified based on the health and safety of its citizens and the city was not investigating whether there was any way to alleviate harm to the people of the city from this activity.²³ The City was not responding to a “dire need” because the state Department of Environmental Conservation had not yet published the new regulations required before natural gas exploration or drilling can occur.²⁴ Finally, the city did not enact this law so that it could take steps to study or alleviate problems that may be caused by gas drilling, exploration, or storage.²⁵ The court in this case narrowly interpreted a municipality’s police powers to conclude that they could not be used to ban natural gas extraction.

Another important part of the *Jeffrey v. Ryan* decision was that it joined two other trial court decisions in holding certain town laws prohibiting natural gas extraction were not superseded by state law.²⁶ Recently the Third Department affirmed the holdings in *Cooperstown Holstein Corp. v. Town of Middlefield* and *Anschutz Exploration Corp. v. Town of Dryden*. In

²¹ *Id.* at 7

²² *Id.* at 7

²³ *Id.* at 7

²⁴ *Id.* at 7

²⁵ *Id.* at 7

²⁶ See *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc.3d 767 (Sup. Ct. Otsego County 2012) (ECL 23-0303 did not supersede town ordinance prohibiting natural gas extraction); *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc.3d 450 (Sup. Ct. Tompkins County 2012) (ECL 23-0303 did not supersede town zoning amendment prohibiting natural gas extraction)

Norse Energy Corp. USA v. Town of Dryden, 2013 WL 1830800 (3d Dep’t 2013) and *Cooperstown Holstein Corp. v. Town of Middlefield*, 2013 WL 1830659 (3d Dep’t 2013) the Third Department also approved the trial courts’ use of the Court of Appeals decision *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126 (1987) as binding precedent.

In *Frew Run* the Court of Appeals interpreted a supersession clause in the Mined Land Reclamation Law,²⁷ which stated that: “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.”²⁸ The issue was whether the town zoning ordinance was “related to the extractive mining industry.” The Court found that the plain meaning of the phrase “local laws relating to the extractive mining industry” did not include the town zoning ordinance because the zoning ordinance concerned “an entirely different subject matter and purpose: i.e., ‘regulating the location, construction and use of buildings, structures, and the use of land in the Town.’”²⁹ In other words, the MLRL preempts only “local regulations dealing with the actual operation and process of mining.”³⁰ The Court explained that since local zoning ordinances affect the mining industry only in incidental ways, they are not preempted by state law.³¹

The Third Department adopted this reasoning to decide in *Cooperstown Holstein Corp.* and *Norse Energy Corp., USA* that ECL 23-0303 does not preempt a local government’s ability to enact a zoning ordinance prohibiting natural gas mining or drilling within its borders.³² Under

²⁷ See N.Y. Environmental Conservation Law Sec. 23–2701 *et seq.* (McKinney’s 2012) (“MLRL”)

²⁸ *Id.*

²⁹ *Frew Run Gravel Products, Inc.*, 71 N.Y.2d at 131.

³⁰ *Id.* at 131

³¹ *Id.* at 131

³² *Norse Energy Corp. USA*, 2013 WL 1830800 at *7; *Cooperstown Holstein Corp.*, 2013 WL 1830659 at *1.

ECL 23-0303 state law “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.”³³ In this instance the Third Department focused on the phrase “relating to the regulation of” and found that the town zoning ordinances did not relate to the regulation of natural gas extraction: “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 by [ECL 23-0303].”³⁴

It is likely the Court of Appeals will hear this issue sometime in the future. If the state's highest court agrees with the Third Department, pro-drilling groups will have turn to other arguments to challenge local government ordinances prohibiting hydrofracking. If the Court of Appeals disagrees with the Third Department, this could open the door to hydrofracking as a means to extract natural gas. In any instance the litigation is still in its beginning stages with more cases sure to come.

³³ See N.Y. Environmental Conservation Law Sec. 23-0303 (McKinney's 2012)

³⁴ *Norse Energy Corp. USA*, 2013 WL 1830800 at *3