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Regulating Fracking: Zoning and States' Interests

In the August 28, 2012, column in this series, "Natural Gas and Zoning: The Commonwealth Court's Act 13 Decision," David G. Mandelbaum discussed *Robinson Township v. Public Utilities Commission*, holding Act 13's zoning pre-emption to be unconstitutional. He ended by posing the broader question of whether states or municipalities ought to regulate natural gas development.

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In the August 28, 2012, column in this series, "Natural Gas and Zoning: The Commonwealth Court's Act 13 Decision," David G. Mandelbaum discussed *Robinson Township v. Public Utilities Commission*, 52 A.3d 463 (Pa. Commw. Ct. 2012), holding Act 13's zoning pre-emption to be unconstitutional. He ended by posing the broader question of whether states or municipalities ought to regulate natural gas development. The New York courts have held that local regulation (or prohibition) of hydraulic fracturing ("fracking") is not pre-empted by New York state law. The issue Mandelbaum raised last August is framed more clearly now.

The United States is in the midst of an ongoing conversation about whether the federal government should intervene and begin aggressively regulating the fracking process. The argument has been made that fracking may have huge environmental impacts — some of which may cross state lines — that individual states cannot effectively manage.

One result of potentially mismanaged fracking hazards could be widespread bans, or endless moratoria, that put a premature end to shale-gas exploration.

By contrast, proponents of state regulation of fracking claim that not only are the risks likely lower than prognosticated, but benefits and risks are borne on a local level and the citizens of any given location would balance them differently.

However, before even reaching the issue of whether the federal government should step in, there is still an unresolved debate working its way through state courts: Should municipalities or states be in charge of regulating fracking?

On May 2, a unanimous New York appellate court held that New York's Oil, Gas and Solution Mining Law (OGSML) does not pre-empt zoning ordinances of two upstate towns that bar fracking to produce natural gas.

The cases, *Matter of Norse Energy v. Town of Dryden*, No. 515227, 2013 N.Y. Slip Op. 3145 (N.Y. App. Div., 3d Dept., May 2, 2013), and *Cooperstown Holstein v. Town of Middlefield*, No. 515498, 2013 N.Y. Slip Op. 3148 (N.Y. App. Div., 3d Dept., May 2, 2013), were brought by a gas company and a dairy farm, respectively, seeking to strike down bans of gas drilling adopted by the New York towns of Dryden and Middlefield in the summer of 2011, in anticipation of New York finally allowing high-volume fracking in New York state.

In *Norse Energy*, the Appellate Division concluded that the provision in New York's OGSML superseding "all local laws and ordinances relating to the regulation of the oil, gas and solution mining industries" did not preclude a total bar to gas and petroleum activities through a locality's zoning power. The court went further to "conclude that zoning ordinances are not the type of regulatory provision that the legislature intended to be pre-empted by the [OGSML]."

The Appellate Division affirmed the lower courts' holdings in *Norse Energy*, and its companion case, *Cooperstown Holstein*, upholding the right of a local government to ban gas drilling via zoning, noting that the pre-emption language was designed to "ensure uniform statewide standards and procedures with respect to the technical operational activities of the oil, gas and mining industries in an effort to increase efficiency while minimizing waste," not to "usurp the authority traditionally delegated to municipalities to establish permissible and prohibited uses of land within their jurisdictions."

Presiding Justice Karen K. Peters concluded that because the zoning ordinance seeks only to establish permissible and prohibited land uses generally, rather than to regulate the details or procedure of the oil, gas and solution mining industries, the ordinance was not pre-empted by state law.

Opponents of natural gas development see local regulation as an important tool because they regard federal and state regulation as inadequate.

As Deborah Goldberg of Earthjustice, counsel for the town of Dryden, stated: "The oil and gas industry largely has been deregulated at the federal level. While state officials struggle with the decision whether to permit fracking, local officials have stepped in to fill the gap. Today's ruling signals to local officials that they are indeed on solid legal ground."

Of course, one might also say that natural gas development is regulated fairly consistently with other industrial activities under the federal environmental laws, and so the absence of heavy regulatory requirements might be an indication that the activity does not pose untoward environmental risks.

The issues decided in *Norse Energy* and *Cooperstown Holstein* are simultaneously being debated in Pennsylvania among state and local officials, as well as within the judiciary. The conversation about zoning of fracking has intensified after recent decisions regarding Act 13.

Act 13, among other things, authorizes an impact fee assessed by the state in which local governments can share, imposes certain land use and land development requirements on natural gas development (like increased setback requirements) and enhanced protection of water supplies. But it also requires municipalities to conform their municipal regulations to statewide standards. As in New York, Act 13 also includes a pre-emption provision similarly worded to the OGSML.

Proponents of Act 13, including Governor Tom Corbett, suggest that Act 13 as it stands could create uniform and effective fracking regulations, which expedite development and increase safety. By chipping away at the act through cases such as *Robinson Township*, proponents fear that Pennsylvania will be unable to capitalize fully on its natural resources.

The mining laws and recent court decisions from New York and Pennsylvania give municipalities a piecemeal ability to prohibit fracking in certain locations.

Though the courts have based these rulings on municipalities' rights, some may argue that fracking is a

large issue with numerous potential environmental and economic risks, and that regulation of such a substantial resource should be effectuated from a bird's-eye (that is, state or federal) perspective rather than a local one.

Proponents of Act 13 note that fracking regulation remains a hodgepodge of rules, even within a single state. Creating a uniform set of standards for enforcement through a vehicle like Act 13 would allow for uniform regulation and expeditious gas development.

Those opposed to Act 13 argue that Act 13 is unconstitutional because it revokes zoning power reserved to local municipal government. Even some fracking proponents have expressed concern about Act 13 because of the ramifications it could have on businesses traditionally regulated by municipalities. For instance, opponents of Act 13 have suggested the act could allow the state to approve coal portals, washing plants or related activities in neighborhoods that could have negative environmental implications.

Furthermore, opponents of Act 13 may argue that the piecemeal approach is working. Both the negative and positive effects of fracking affect local communities. Municipalities, those opponents say, are most likely to face the immediate pollution risks that accompany fracking and industrial growth, and thus may be better equipped to make decisions for their own communities.

As of May 13, Robinson Township remains on appeal in the Pennsylvania Supreme Court and the Act 13 pre-emption provision unresolved. It is possible that Robinson Township is among a handful of cases lingering in a 3-3 split decision among the six justices. Though Pennsylvania is more fracking-friendly than New York, these most recent New York decisions could spur a decision from Pennsylvania's Supreme Court. •

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