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THIRD COURT UPHOLDS LOCAL MUNICIPAL LEGAL AUTHORITY TO BAN GAS DRILLING

Today, Broome County Supreme Court explicitly adopted the "well reasoned, [and] well founded" decisions in the Dryden and Middlefield cases as its own. Thus the *only* three NY state judicial decisions specifically considering the matter (Dryden, Middlefield, and now Binghamton) have unequivocally held (i) New York municipalities wishing to do so have the legal authority to pass local land use laws of general applicability to prohibit gas drilling activities within their municipal borders, (ii) such local laws are NOT 'regulations' within the meaning of ECL 23-0303(2), and (iii) accordingly such local laws are NOT preempted by or otherwise 'illegal' under ECL 23-0303(2).

As you may know, in December, 2011 the City of Binghamton (the "City") passed a two-year prohibition on gas drilling and related activities ("the Two-Year Law"). Unlike virtually any other protective law (whether a moratorium, or some type of ban) of which we are aware that has been passed by a New York municipality in response to the fracking threat, the City's law was enacted *as an aquifer-protection law*, in reliance upon the City's police power authority (that is, the authority to enact laws to protect the health, safety, and welfare of residents, and to protect property within the City).

In April, 2012, several parties including certain landowner coalitions filed suit (specifically, a combination Article 78 Action, and an action for declaratory judgment) challenging the Two-Year Law as invalid. Today (October 2, 2012) the trial court (Hon. Ferris Lebous, Supreme Court, Broome County) issued a decision in this matter.

The crux of the challenge was: (i) that the Two-Year Law was in actuality a *land use* law; (ii) that because the Law was in actuality a land use law, prior to enactment the City ought to have referred the Law to (Broome) County Planning (pursuant to GML 239-m), but failed to do so; (iii) that characterizing the Law as other than a land use law was a ruse, designed to circumvent the time delay that might have accompanied County 239-m review; and (iv) that in any event, enactment of the Law was preempted by the Gas Mining Law [ECL 23-0303(2)].

(The claim that municipalities are preempted and do not have authority to pass protective laws - argument (iv) above - is precisely the argument that the plaintiffs in the Dryden and Middlefield cases made, when attempting to attack the protective laws enacted by those Towns.)

The City 's principal responses were: (i) that the numerous parties bringing the challenge did not have legal standing (that is, were not considered by the law to have a right to bring such a challenge); (ii) that the statute of limitations had passed with respect to the Article 78 action, meaning that bringing such a challenge was time-barred; and (iii) that the legal authority of New York municipalities was not preempted by the Gas Mining Law.

The Court held: (i) that at least one of the individuals bringing the challenge did have standing (and so the Court saw no need to consider whether the landowner coalitions or any of the other parties bringing the challenge had standing); (ii) that the Article 78 action was in fact barred by the statute of limitations, and that the declaratory judgment action was not; and (iii) (though the opinion is internally inconsistent and fuzzy on this next point) that the Two-Year Law was in fact a land use law, and is invalid because certain legal requirements applicable thereto were not followed.

Significantly, the Court *explicitly* held that the Gas Mining Law (which provides that municipalities may not enact laws relating to the 'regulation' of the gas industry) ***did not*** preempt or take away the authority of local governments to pass protective laws "pertaining to gas explorations, storage and extraction." **The Court described the decisions in the Dryden and Middlefield cases as "well reasoned, [and] well founded," explicitly adopted the reasoning of those cases as its own, and explicitly held that the City's Two-Year Law was not superseded (preempted) by the Gas Mining Law.**

So, where are we? On the narrow question of the *specific* (non-land use) enactment mechanism relied upon by the City in connection with passage of its Two-Year Law, the Court found the City's Law was invalid, because (according to the Court) the Law should have been enacted on a different basis.

But on the *broader* question of the City's legal authority to enact a protective law prohibiting gas exploration, extraction, and storage activities, the Court explicitly adopted the "well reasoned, [and] well founded" decisions in the Dryden and Middlefield cases, and specifically held that the City's protective law was NOT preempted by the Gas Mining Law.

So the state of the law in New York on this matter is as follows:

The *only* three NY state judicial decisions specifically considering the matter (Dryden, Middlefield, and now Binghamton) have unequivocally held (i) New York municipalities wishing to do so have the legal authority to pass local land use laws of general applicability to prohibit gas drilling activities within their municipal borders, (ii) such local laws are NOT 'regulations' within the meaning of ECL 23-0303(2), and (iii) accordingly such local laws are NOT preempted by or otherwise 'illegal' under ECL 23-0303(2).

Mayor Ryan of Binghamton is evaluating today's decision, and once he makes a decision regarding next steps and authorizes us to do so, we will share his conclusions with you.

In the meantime, the lawyers working on this case find it is very welcome news indeed that every single New York court considering this matter has recognized and upheld local municipality authority to enact protective laws (including outright prohibitions) regarding gas drilling activities.

For questions regarding this matter, please feel free to contact:
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