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What the Frack?! How Local Zoning Laws Keep Dangerous Mining Techniques off Our Property

*Matter of Norse Energy Corp. USA v. Town of Dryden.*¹

INTRODUCTION

The question of first impression addressed in *Matter of Norse Energy Corporation USA v. Town of Dryden* is whether a municipality can enact zoning laws that ban the use of land for hydraulic fracturing (“hydrofracking”) given that the Oil Gas and Solutions Mining Law (“OGSML”), potentially preempts a municipality from enacting such ordinances.² Relying on precedent, the New York Court of Appeals held that local governments are not preempted by the OGSML from enacting land use laws that ban hydrofracking because such a law does not relate to the regulation of the oil, gas, or solutions mining industry.³ The court supported its decision using prior cases dealing with similar fact patterns, as well as the legislative history behind the preemption clause found in the OGSML. Future lawmakers attempting to protect their own local environments must refrain from abusing the large amount of discretion involved in hydrofracking bans, and must make laws that have general applicability and do not infringe on the rights of mining companies. The decision in *Dryden* represents both hurdles and encouragement for keeping people healthy and safe while working to extract valuable resources.

FACTS AND HOLDING

In August of 2011 the town of Dryden, located in Tomkins County, New York, amended a zoning ordinance to ban all activities related to the exploration for, and the production or storage of, natural gas and petroleum.⁴ This ordinance was amended due to the town’s concern about the environmental effects of removing natural gas through the process of

¹ *Matter of Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 25 (N.Y. 2013).

² Charles Gottlieb, *New York Zoning Law and Practice Report 2* (2012).

³ *Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 38 (N.Y. 2013).

⁴ *Id.* at 27-28.

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“hydraulic fracturing”⁵ Anschutz Exploration Corporation, the predecessor in interest to current petitioner Norse Energy Corporation, commenced a proceeding pursuant to article 78 of the New York Code Civil Practice Law and Rules, which allows a petitioner to contest an administrative result such as an amendment to a zoning ordinance.⁶ The action was filed on the grounds that the OGSML preempted the zoning amendment.⁷ In February of 2012 the New York Supreme Court granted Dryden’s motion for summary judgment, stating that the OGSML does not preempt the zoning amendment.⁸ Norse appealed.⁹

The instant case is an appeal by Norse Energy Corporation.¹⁰ The central issue of this appeal is whether the amendment made by the town of Dryden to a zoning ordinance is preempted by the OGSML.¹¹ The majority affirmed the judgment of the Supreme Court after an explanation of Norse’s arguments attempting to show how the OGSML both expressly and implicitly preempted the town of Dryden from passing a zoning ordinance to ban all activities related to the exploration for, and the production and storage of, natural gas and petroleum.¹² The majority held that the OGSML does not preempt — either expressly or impliedly — a municipality’s power to enact a local zoning ordinance that bans all activities related to the exploration for and the production and storage of natural gas and petroleum.¹³

⁵ *Id.*

⁶ *Id.* at 28.

⁷ *Id.* Found in the Environmental Conservation Law 23-0301 et seq., but referred to in this paper as (OGSML).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 28.

¹¹ *Id.* at 30.

¹² *Id.* at 38.

¹³ *Id.*

INSTANT DECISION

Justice Peters authored the court’s decision with Justices Stein, Spain, and Gerry concurring.¹⁴ The court provided two main holdings and addressed each separately.

First, the court held that OGSML does not *expressly* preempt a municipality from passing a local zoning ordinance banning all activities related to the exploration for or the production or storage of natural gas or petroleum.¹⁵ The court emphasized that although the oil industry may feel some effects from the zoning ordinances, the ordinances do not fall under the express preemption found in the OGSML, which prohibits local governments from passing legislation “relating to the regulation of the oil, gas and solution mining industries.”¹⁶

The justices reasoned that the New York Constitution gives local governments the power to adopt and amend local laws.¹⁷ The local legislature uses that power to create zoning laws to regulate land use.¹⁸ The court continued by explaining that the doctrine of preemption arises when, as seen in the case with the OGSML, a legislative act contains a direct preemption clause.¹⁹ The court stated that, when interpreting a statute, the reader must give effect to the intent of the legislature.²⁰ The plain meaning of the preemption clause of the OGSML prohibits local governments from passing any laws relating to the regulation of the oil, gas, and solution mining industries.²¹ The court noted that because the OGSML does not define the word “regulate,” the court used the standard dictionary meaning to define the word as, “an authoritative rule dealing with details or procedure.”²² The court found that, when viewed in the light of the plain meaning of the preemption

¹⁴ *Id.* at 28.

¹⁵ *Id.* at 38 emphasis added.

¹⁶ *Id.* at 31.

¹⁷ *Id.* at 30.

¹⁸ *Id.* at 31.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 32.

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clause, the zoning laws dealt broadly with how land may be used and did not attempt to regulate any of the details or procedure concerning how the mining company ran its actual operations.²³ The court found that the preemption clause and the zoning laws could exist in harmony with each other: zoning laws instruct which counties would or would not allow drilling, while the preemption clause of the OGSML allows companies to handle the details and procedures of the drilling in areas where it is permitted.²⁴

The court addressed the mining company's argument that although the OGSML does not explicitly preempt the local zoning ordinances, it may implicitly preempt them.²⁵ As evidence of implicit preemption of the local zoning ordinances, Norse argued that the local zoning ordinances are in conflict with the policy of the OGSML.²⁶ Norse explained that the policy behind the well spacing provisions in the OGSML was to direct where wells are drilled in order to ensure that maximum resources are recovered with minimum waste; therefore, the zoning ordinances would frustrate that policy.²⁷ The court quickly dismissed this line of reasoning.

The second holding of the court was that the OGSML does not *implicitly* preempt a municipality from passing a local zoning ordinance banning all activities related to the exploration for or the production or storage of natural gas or petroleum.²⁸ The court mentioned that the zoning ordinance is implicitly preempted only if it conflicts with the language or policy of the OGSML.²⁹ The court held that there were no language or policy conflicts between the zoning ordinance and the OGSML.³⁰

²³ *Id.* at 34-35.

²⁴ *Id.* at 36.

²⁵ *Id.* at 36-38.

²⁶ *Id.* at 37-38.

²⁷ *Id.* at 38.

²⁸ *Id.* at 38. Italics added for emphasis.

²⁹ *Id.* at 37.

³⁰ *Id.*

LEGAL BACKGROUND

The New York Constitution gives every local government the power to adopt and amend laws as long as the laws adopted or amended are not inconsistent with the Constitution or any general law relating to property, affairs, or government.³¹ Furthermore, the New York legislature enacted a statute that gives “every city, village or town the power to adopt, amend and repeal zoning regulations.”³² Another statute provided a list of subjects that local governments can create laws concerning.³³ Included in that list is the power to adopt or amend laws relating to the health and safety of citizens and for the protection of a town’s physical and visual environment.³⁴ The New York Constitution and state statutes allow town governments to amend zoning ordinances.³⁵

The power that towns like Dryden have to amend zoning laws in order to protect citizens and the environment may be limited by a preemption clause found in another legislative statute. Preemption represents a “fundamental limitation” on the powers granted to local governments.³⁶ The preemption clause at issue in this case is an express preemption clause found in the OGSML.³⁷ The clause reads, “The provisions of [OGSML] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solutions mining industries.”³⁸ As the court notes in *Dryden*, the primary consideration in statutory interpretation is to give effect to the intent of the legislature.³⁹ In his report, *New York Zoning Law and Practice*, Charles Gottlieb notes that “the provisions of the OGSML all concern the technical operation of oil and gas drilling to ensure efficient recovery and avoid waste, proving the intent of the law is not to preempt local zoning.”⁴⁰ The court in

³¹ NY Const., art. IX § 2 (c).

³² Statute of Local Government § 10 (6).

³³ Municipal Home Rule Law § 10 (1)(ii)(a)(11), (12)

³⁴ *Id.*

³⁵ *Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 29 (N.Y. 2013).

³⁶ *Id.* at 10.

³⁷ *Id.* at 31

³⁸ ECL 23-0303 (2).

³⁹ *Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 10 (N.Y. 2013).

⁴⁰ Charles Gottlieb, *New York Zoning Law and Practice Report 4* (2012).

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Dryden performed a searching investigation into the intent of the legislature and came to a similar conclusion, stating that “the Legislature’s intention was to ensure statewide standards...in an effort to increase efficiency and reduce waste...and the supersession provision was enacted to eliminate local regulation that impeded that goal.”⁴¹ There is no evidence of legislative intent to use the preemption clause of the OGSML to stop local governments from enacting zoning laws.⁴² The court in *Cooperstown Holstein Corporation v. Town of Middlefield*, a factually similar case to *Dryden*, gave credence to this interpretation of the legislative history of the OGSML preemption clause. The *Cooperstown* court said,

[T]he legislature's intention [by including the preemption clause in the OGSML] was to insure state-wide standards to be enacted by the Department of Environmental Conservation as it related to the manner and method to be employed with respect to oil, gas and solution drilling or mining, and to insure proper state-wide oversight of uniformity with a view towards maximizing utilization of this particular resource while minimizing waste.⁴³

Finally, as Mr. Gottlieb points out in his article, “all other provisions of the OGSML demonstrate the state’s interest in regulating the activities, i.e. the manner and methods, of the industry.”⁴⁴ Provisions in the OGSML include those concerning permit requirements, spacing for gas wells, depths of drilling, sizes for pools and compulsory integration.”⁴⁵ This legislative history indicates that the OGSML has the power to preempt laws concerning how mining operations are performed, but not those regulating where that mining can be done.⁴⁶

⁴¹ Norse Energy Corp. USA v. Town of Dryden, 108 A.D.3d 26 (N.Y. 2013).

⁴² *Id.*

⁴³ *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 728 (2012).

⁴⁴ Charles Gottlieb, *New York Zoning Law and Practice Report* 4 (2012).

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 4.

Other hydraulic fracking cases show how different courts have dealt with preemption clauses in similar factual situations. The court in *Cooperstown Holstein Corporation v. Town of Middlefield*, another case dealing with the preemption clause of OGSML, examined its legislative history in search of intent. The court concluded that the intent of the statute was to ensure statewide standards with a view towards maximizing resource utilization and minimizing waste.⁴⁷ That court found no mention of local preemption and held that the challenged zoning law was not preempted.⁴⁸

While both *Cooperstown* and *Dryden* focus on whether the preemption clause of the OGSML stops a local government from making or amending zoning laws that affect the mining industry, *Envirogas, Incorporated v. Town of Kiantone* held that the preemption clause of the OGSML preempts a local government from passing a law that requires mining companies to pay a compliance bond and permit fee.⁴⁹ Although the court in *Envirogas* held that the law in that case was preempted, that case can be distinguished from *Dryden* and *Cooperstown* because the bond and fees directly affect regulation of the mining industry, while the zoning laws have only indirect effects and none relating to regulation.⁵⁰ The direct versus indirect impact of the law is a key difference between *Cooperstown* and *Dryden* and *Envirogas*.

Another case relied on by the *Dryden* court was *Frew Run Gravel Prods. v. Town of Carrol*.⁵¹ *Frew Run* established that zoning laws were of general applicability and did not directly impact the mining industry.⁵² The town of Carrol was using zoning laws to ban hydrofracking so this decision supports *Dryden*'s proposed use of zoning laws.⁵³

⁴⁷ *Cooperstown Holstein Corp v. Town of Middlefield* 943 N.Y.S.2d 728 (2012).

⁴⁸ *Id.*

⁴⁹ *Envirogas, Inc. v. Town of Kiantone* 447 N.Y.S.2d 223 (1982).

⁵⁰ Charles Gottlieb, *New York Zoning Law and Practice Report* 4 (2012).

⁵¹ *Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 31 (N.Y. 2013).

⁵² *Id.*

⁵³ *Id.*

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A final case relied on by the *Dryden* court was *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*.⁵⁴ *Gernatt* showed that, within their police powers, towns like Dryden have the ability to reject requests to exploit natural resources as long as the rejection serves to protect the rights of others and promote the interests of the community as a whole.⁵⁵

Both the legislative history and relevant case law show that the courts consider zoning laws made by local governments to be of general applicability, not affecting regulation of the mining industry and also so zoning laws will not fall within the reach of the preemption clause of the OGSML.⁵⁶

COMMENT

The process of hydraulic fracturing can be an efficient way to extract natural energy sources, but it comes with a high environmental price tag. In general, hydraulic fracturing or “fracking” is the use of fluid and materials to create fractures in rock formations to stimulate production from new and existing oil and natural gas wells.⁵⁷ These fractures create paths to extract fluids, such as oil and natural gas, from reservoir formations at a higher rate of speed.⁵⁸ The reason for the widespread use of the fracking process is to help extend the life of existing wells and to increase production.⁵⁹ Fracking also allows companies to extract energy from previously unreachable sources.⁶⁰ In total, hydraulic fracturing can produce up to 300,000 barrels of natural gas per day.⁶¹

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See generally Dryden

⁵⁷ Pennsylvania Department of Environmental Protection, *Hydraulic Fracturing Overview*, (2010) available at <http://fracfocus.org/hydraulic-fracturing-how-it-works/hydraulic-fracturing-process>

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Sierra Crane-Murdoch, *Unpacking health hazards in fracking's chemical cocktail*, High Country News, Feb 21, 2011 available at <http://www.hcn.org/issues/43.3/unpacking->

Unfortunately the practice of hydrofracking also carries a risk of polluting the environment around well sites.⁶² Truck traffic can become very heavy on the roads around well sites; an average of 400 tanker trucks may be needed to bring water to and from each well.⁶³ The total amount of water used to fracture each well can be between 1 and 8 million gallons.⁶⁴ The substance that is shot into the wells to create the fractures is known as “fracking fluid,” which, along with water, includes sand and over 40,000 gallons of other chemicals per well.⁶⁵ These “other chemicals” could be any of 600 different chemicals including lead, uranium, mercury, methane, and formaldehyde.⁶⁶ These chemicals can leak into ground water, and tests have shown methane concentrations 17 times higher in drinking water near fracking sites than in normal wells.⁶⁷ Only 30% to 50% of wastewater is removed, and the method of disposal is to let the wastewater sit in waste pits while harmful volatile organic compounds (VOCs) are released into the air.⁶⁸ While hydraulic fracking provides an efficient method of extracting oil and natural gas, these benefits must be weighed against the costs it will impose on the health and safety of the people living near the sites.

The internal logic of the Court’s decision in *Dryden* is that because the OGSML preempts only laws that relate to the regulation of the actual process of extracting oil and natural gas, laws of general applicability such as zoning laws, which have only an incidental effect on the oil and mining industries, would not be preempted.⁶⁹ The *Dryden* court leaned on the precedent set in *Matter of Frew Gravel Producers v. Town of Carrel* and *Matter of Gernatt Asphalt Producers v. Town of Sardinia*, which established that land use laws were of general admissibility and therefore could not be preempted.⁷⁰ With that precedent in place, the job of local politicians and

health-hazards-in-frackings-chemical-cocktail.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 26 (N.Y. 2013).

⁷⁰ *Id.* at 32.

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town boards who have the power to enact land use laws is to write zoning laws that broadly regulate land use and avoid specific regulation of how the mining industry performs its operations.

Local governments are under pressure to perform a balancing act between two crucial interests. On one hand, local governments must do all they can to protect the health, safety, and well-being of the citizens of their towns. On the other hand it is also a priority for local governments to encourage the economic welfare of their citizenry. If people cannot make a living working in the town, then they will likely move elsewhere in search of income. These two goals of local governments seem to be at odds when the hydraulic fracturing of underground shale deposits, which can create an economic surge for people in small cities and towns in the form of land leases, has been proven to contaminate local drinking water because of the chemicals used in the process. What the court has done by allowing local governments to control where hydrofracking is to put them in the position of appearing to favor one landowner over another. The court is apparently trusting local governments to wield this power wisely.

The court in *Cooperstown* explained that the decision to allow local governments to ban hydrofracking using zoning laws was summed up in the quote, “The state maintains control over the ‘how’ of such procedures while the municipalities maintain control over the ‘where’ of such exploration.”⁷¹ It is not hard to imagine city officials using the veil of ‘controlling the where’ to hide other motives for banning or allowing hydrofracking in certain areas. For example, passing zoning laws that allow hydrofracking on land that belongs to friends or family of government decision makers would be allowed under the ruling in *Dryden*, as long as the rationale proves that there is no danger to health and safety.

The opposite situation could also cause problems if, for example, if a municipal government used its zoning laws to prevent hydrofracking on a safe plot owned by someone out of favor with the current government. That landowner would have no option but to accept the zoning law because

⁷¹ *Cooperstown Holstein Corp v. Town of Middlefield* 943 N.Y.S.2d 729 (2012).

municipal governments have the final determination on where these hydrofracking operations may take place. The cases suggest that although there may be potential problems with the decision, the danger from a few incidents of abuse is outweighed by the municipality's interest in being able to protect the health and safety of its residents.⁷²

Another message this decision sends to local lawmakers is one of caution. In an effort to protect people from the potential dangers of hydrofracking, local lawmakers must oppose mining and drilling companies using only broadly worded laws that pertain to land use and that do not infringe on methods of drilling operations. For instance, a lawmaker might be tempted to appease both sides of the issue by not banning hydrofracking outright but by instead passing laws that keep wells a certain distance from residential homes. This type of law would be preempted by the OGSML because it is related to how the operations are run. The OGSML explicitly lays out provisions allowing for laws concerning permit requirements, spacing for wells, depth of drilling, size of waste pools, and similar issues to be preempted, so any lawmaker trying to play both sides would find that strategy blocked.⁷³ The decision in *Dryden* will impact lawmakers' decisions on how they write zoning laws, and will also make lawmakers more cautious when dealing with any law affecting the mining industry. Laws concerning light, noise, dust, and odor pollution will also have to be written broadly and must affect the mining industry, only incidentally, in the same fashion as zoning laws in order to avoid automatic preemption by the OGSML and other laws with similar provisions.

Despite the tradeoffs, the court came to an appropriate decision in this matter. The instant decision puts the power to protect a city or town from dangerous environmental consequences in the hands of the people who live there. In other words, who better to fight hard for the interests of a local community than the people who live and work in that community every day? Local governments are in a better position to take the temperature of their own communities than state or federal governments or out-of-state mining corporations. Local governments are also often smaller and have more

⁷² See generally *Dryden*

⁷³ Charles Gottlieb, *New York Zoning Law and Practice Report 5* (2012).

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nimble decision-making abilities, so that laws to protect areas in need will go into effect in time to actually preserve the area in question.

Local governments must not interpret this decision as saying that the only way to fight hydrofracking is through the use of zoning laws. The court's holding indicated that no law of general applicability was preempted by the OGSML.⁷⁴ Local governments therefore are behooved to create a list of tools for fighting the environmental impact created by hydrofracking. Having a plan and knowing which tools to use in certain situations gives local governments options. For example, if it is not practical or possible to restrict hydrofracking by rezoning land and forbidding the practice, then local governments can look to other laws of general applicability in order to prevent mining companies from drilling. These other laws may include those restricting light, noise, pollution, dust, odor, or tree cutting as long as the law does not attempt to regulate the mining process. The court has given local governments a toolbox of options, and it is up to individual leaders to use these tools to protect their communities.

The court deserves praise for leaving intact the provision of the OGSML that excludes the jurisdiction of roads from preemption. The express language of the OGSML clearly indicates that regulation of roads by local governments is not preempted.⁷⁵ This decision gives breathing room to communities who are in desperate need for the economic boost provided by allowing land leases to hydrofracking companies. Such communities may decide that enough residents need the added income and allow hydrofracking in certain areas, despite the potential environmental implications. Because the OGSML does not stop local governments from regulating road use, a community can reap the economic benefits of hydrofracking while still limiting truck and equipment traffic on roads near the drilling sites. Heavy truck traffic can destroy local roads and pass on a costly upkeep bill to local taxpayers.⁷⁶ However, because the court in *Dryden* did not alter the OGSML provision exempting road regulation from preemption, communities can

⁷⁴ Norse Energy Corp. USA v. Town of Dryden, 108 A.D.3d 26 (N.Y. 2013).

⁷⁵ N.Y. Env'tl. Conserv. Law § 23-0303(2)

⁷⁶ Charles Gottlieb, New York Zoning Law and Practice Report 6 (2012).

lessen the damage by creating restrictions on the size of trucks used, the number of trucks using a road and the weight each truck may carry. By keeping that provision, this decision has allowed local governments to be flexible and attempt to meet the needs of all members of the community.

This decision is important, not only for its effect on the community of Dryden, but also for what it means to other communities facing similar dilemmas involving hydrofracking. A *New York Times* article published shortly after the decision in Dryden came down quoted Katherine Nadeau, the water and natural resources program director for Environmental Advocates of New York, as saying, “[t]he ruling w[ill] energize dozens if not hundreds of cities and towns concerned with industrial gas drilling.”⁷⁷ The article also spoke of a “nationwide battle” playing out as energy companies move to drill in densely populated areas.⁷⁸ The victory in this case will give ammunition to opponents of the hydrofracking process as they continue to find ways to prevent problems associated with overuse of the process.

The next step in the life of this case could be an appeal. According to a list of new filings released by the clerk’s office of the New York Court of Appeals, Norse Energy has been given leave to appeal the ruling of the Dryden case by the Supreme Court of Tompkins County.⁷⁹ The most likely course of an appeal in this case would involve a takings claim against the town of Dryden.⁸⁰ Federal takings claims are based on the Fifth Amendment to the United States Constitution, which provides: “[N]or shall private property be taken for public use without just compensation.”⁸¹ Norse and others making a taking clause argument want the court to say that, by passing zoning laws outlawing fracking, towns like Dryden are “taking” property

⁷⁷ Mireya Navarro, *New York Judge Rules Town Can Ban Gas Hydrofracking*, *New York Times*, Feb. 21, 2012 available at <http://www.nytimes.com/2012/02/22/nyregion/town-can-ban-hydrofracking-ny-judge-rules.html>

⁷⁸ *Id.*

⁷⁹ Court of Appeals Clerk’s Office, *Court of Appeals New Findings*, (2013) available at <http://www.courts.state.ny.us/ctapps/Filings/2013/IID3613.pdf>.

⁸⁰ Mireya Navarro, *New York Judge Rules Town Can Ban Gas Hydrofracking*, *New York Times*, Feb. 21, 2012 available at <http://www.nytimes.com/2012/02/22/nyregion/town-can-ban-hydrofracking-ny-judge-rules.html>.

⁸¹ U.S. Const. amend. V.

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owned by mining companies because the land is now useless for their intended purposes.

The most powerful argument in support of Norse's takings claims comes from the Supreme Court's decision in *Doland v. City of Tigard*. Doland owned a store and wanted to redevelop the site. The City of Tigard issued her a permit to expand, but it was subject to the condition that Petitioner dedicate a part of her property to the city to be used as a pedestrian/bicycle pathway.⁸² The city justified their request because the pathway would help prevent some flooding that would occur from a nearby creek with the expansion and it would also offset some traffic demands.⁸³ Doland says the dedication is a taking of her property. The court held that a land use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land.⁸⁴ Here, Doland lost property rights such as the ability to exclude people from her property and the city could not show that recreational visitors walking on the land was sufficiently related to the city's legitimate interest in reducing flooding problems along the creek. Norton would most likely use the "denying economically viable use of land" language from *Doland* in their pursuit of an illegal takings claim.

The case of *Lucas v. South Carolina Coastal Council* also gives Norton's takings claim hope. In *Lucas*, a man bought beachfront property in 1986 when there were no building restrictions on the land.⁸⁵ In 1988, the enactment of the Beachfront Management Act barred the man from building any permanent habitable structures on the land.⁸⁶ The Supreme Court of South Carolina held that total deprivation of beneficial use is the equivalent of a physical appropriation.⁸⁷ It explained that the state must compensate unless it can identify background common law nuisance and property rules that would prohibit the intended construction, and only on such a showing

⁸² *Doland v. City of Tigard* 512 U.S. 374, 380 (1994).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Lucas v. South Carolina Coastal Council* 309 S.C. 426 (1992).

⁸⁶ *Id.*

⁸⁷ *Id.*

would the act not be a taking.⁸⁸ While a ruling from South Carolina is not controlling over the New York courts, the interests of the beachfront property owner seem very similar to the interests of Norse from the decision in *Dryden*. Both the beachfront landowner and Norse legally purchased land intending to make a profit, and in both cases legislation came down that made each purchaser's plan illegal. Norse appears to be on solid legal ground to pursue a takings claim, at least according to the holding of *Lucas*.

The probability of the success of an appeal on a takings claim in this case seems relatively high. A victory on a takings claim represents the next best alternative to a ruling of preemption for Norse. One can assume that the Norse legal team took the risk of attempting to win on the original preemption claim but were able to rest easy knowing that if it failed at least their investment in the leases in the Dryden area would be able to be recouped. While anything could happen in the course of a trial, the precedent from other states and the fact that Norse was an innocent party are strong indicators that a court could find, in the interests of justice, Norse to have a takings claim.

CONCLUSION

Matter of Norse Energy Corporation USA v. Town of Dryden represents a massive victory for those who oppose the process of hydrofracking. The Appellate Division of the Supreme Court of New York affirmed a lower court ruling that neither the express preemption clause found in the OGSML or the legislative history of the law preempted local governments from enacting zoning laws banning the process of hydrofracking.⁸⁹ In the case, Norse Energy Corp. argued that the OGSML banned any local law that relates to the regulation of the oil, gas, and solution mining industries.⁹⁰ The town argued, and a majority of the court agreed, that the zoning ordinance here did not seek to regulate the details or procedure of those industries and therefore was not expressly or implicitly preempted.⁹¹

⁸⁸ *Id.*

⁸⁹ Norse Energy Corp. USA v. Town of Dryden, 108 A.D.3d 38 (N.Y. 2013).

⁹⁰ *Id.* at 37-38

⁹¹ *Id.*

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The reasoning of the court centered on the definition of the word “regulate” as used in the preemption clause of the OGSML. The court determined that laws whose purpose was to regulate should deal with details and procedure of mining operations.⁹² Building on that definition the court reasoned that zoning laws tell the mining companies only where the wells may be drilled and do not affect details or procedure of actual mining operations.⁹³ That definition resulted in a holding that stands for the idea that laws of general applicability, such as zoning laws do not fall into the OGSML’s preemption net of laws that regulate the industry.⁹⁴

Moving forward, local lawmakers are now armed with the ability to use laws of general applicability to prevent, or in some cases allow, hydrofracking depending on the needs and climate of their individual communities.

One unanswered question from this case involves the interests of the mining companies involved. According to Mireya Navarro’s New York Times article, in this case alone, Norse and its predecessor Anschutz had a combined 22,200 acres of land under lease in the town of Dryden alone, totaling more than \$5 million.⁹⁵ That total does not include any of the anticipated profits the companies expected to make from the drilling operations on those pieces of leased land. How do companies deal with this lost investment when, through no fault of theirs, a law was interpreted against them? Because a specific illegal action caused the mining companies to lose out on this opportunity, how, in the interest of justice, can the court ask them to write off \$5 million in expenses and unknown millions in profits? Thomas West, the lawyer representing the mining companies, suggested they were looking into pursuing a takings claim against the town but so far no such

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Mireya Navarro, *New York Judge Rules Town Can Ban Gas Hydrofracking*, New York Times, Feb. 21, 2012 available at <http://www.nytimes.com/2012/02/22/nyregion/town-can-ban-hydrofracking-ny-judge-rules.html>.

action has been initiated.⁹⁶

SCOTT MARTIN

⁹⁶ *Id.*

