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Judges to Weigh Localities' Right to Ban Fracking

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ALBANY - The New York Court of Appeals will weigh the right of local governments to ban the natural gas drilling process of hydraulic fracturing, or hydrofracking.

Without comment, the court on Thursday said it will hear appeals in *Matter of Norse Energy USA v. Town of Dryden* and *Cooperstown Holstein v. Town of Middlefield*.

A court spokesman said oral arguments are likely to take place in May or June.

In each case, identical Third Department panels ruled 4-0 that New York's Oil, Gas and Solution Mining Law and its Environmental Conservation Law provisions that govern mining and other energy extraction, do not preempt localities from establishing zoning ordinances banning hydrofracking, *Norse Energy USA v. Town of Dryden*, 108 AD3d 25 (2013) and *Cooperstown Holstein v. Town of Middlefield*, 106 AD3d 1170 (2013) (NYLJ, May 3).

Third Department Presiding Justice Karen Peters wrote in both cases that she can find nothing in the state laws "indicating an intention to usurp the authority traditionally delegated to municipalities to establish permissible and prohibited use of land within their jurisdictions."

It is unusual for the Court of Appeals to hear cases that were decided unanimously by the court below.

Thomas West of the West Firm in Albany, who helped write the briefs for both Norse Energy and Cooperstown Holstein, said the decision to become involved was "significant."

"The Court of Appeals does not grant leave in a lot of cases, so it is obvious that this is an issue of statewide importance and a novel issue of law that should be decided by our state's highest court," West said.

Opponents of the towns' hydrofracking bans will argue that the Third Department relied too heavily on mining-related statutes and gave insufficient weight to those concerning oil and gas extraction.

West said oil and gas laws require promotion of those resources through scientific innovations like hydrofracking and the protection of the rights of the owners of properties where the drilling is proposed.

"You can't square a municipal ban with those policies," West said Thursday. "We think the Court of Appeals will recognize that."

So far, four appellate judges and four trial court judges have backed the authority of towns to ban fracking within their borders.

West and Cindy Monaco of the West Firm are representing Norse Energy and are collaborating as attorneys for Cooperstown Holstein with Scott Kurkoski and Michael Wright of Levene Gouldin & Thompson of Vestal.

David Everett, John Henry and Robert Rosborough of Whi eman Osterman & Hanna of Albany are defending the Town of Middlefield (See Memorandum).

Everett said Thursday, "Given the statewide importance of the cases, the court's decision to accept the appeal was actually expected."

Deborah Goldberg of the group Earthjustice is representing Dryden.

"As the well-reasoned Appellate Division opinion establishes...both the trial and intermediate appellate court decisions in this case are consistent with longstanding precedents of this Court, which establish the fundamental difference between regulation of industrial mining activities and regulation of land use," Goldberg said in her brief urging the Court of Appeals not to take the cases.

The hydrofracking controversy has caused a bitter divide in the upstate areas sitting atop the Marcellus Shale, a geological formation with rich pockets of underground natural gas.

The relatively new process of hydraulic fracturing has been successful at extracting gas where it was hitherto not economically feasible, but has also raised concerns about potential environmental hazards.

Most environmentalists have lined up in opposition to fracking while energy companies and economic development advocates are in favor, arguing that the practice could revive some economically moribund areas of upstate New York. Many property owners have contended that they should have the right to lease their land.

The state has maintained a moratorium on hydrofracking for more than five years. Despite pressure from both sides, Governor Andrew Cuomo has refused to take a stand either in favor of or against hydrofracking, saying his administration continues to study whether the process is safe to the environment and residents' health.

In the meantime, more than 50 municipalities have banned gas drilling and more than 100 have declared moratoriums on drilling.

Middlefield, in Otsego County, established its ban in June 2011. Dryden, in Tompkins County, banned hydrofracking in August 2011.

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