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New York Court Strikes Blow Against Fracking

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This week the New York State Court of Appeals upheld the right of municipalities to ban hydraulic fracturing for natural gas within their borders. In *Norce Energy Corp. USA v. Town of Dryden* and *Cooperstown Holstein Corporation v. Town of Middlefield*, the Court of Appeals held that towns and other municipalities may ban hydraulic fracturing, also known as fracking, through the use of their zoning laws. The decision by the Court of Appeals is a serious blow to the possibility that fracking will be used in New York State.

The energy companies that sought to overturn the local zoning laws argued that they had been preempted by New York State's **Oil, Gas and Solution Mining Law**. That statute specifically states that it "supersede[s] all local laws or ordinances relating to the regulations of the oil, gas and solution mining industries". The Court of Appeals rejected the idea that this law superseded local zoning laws banning fracking based on prior decisions which had interpreted a similar statute as only preempting local laws that dealt with the operation of mining activity, not the location.

According to the Court of Appeals, the language used within the statute, as well as the overall context of the law, and legislative history, did not support the finding that this provision meant to supersede a locality's ability to control zoning within its borders. Further, the Court of Appeals asserted that to invalidate a land use law passed by a municipality there is a high burden placed on any challenge arguing preemption because of the traditional role played by municipalities in regulating zoning.

The Court of Appeals' decision is a major setback for the possibility of fracking within New York State. The Court of Appeals has given the green light to municipalities to ban

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fracking within their borders, and has taken the decision as to whether to allow fracking in New York State out of the hands of the state government. In addition, given the controversial nature of fracking, it is unlikely that the state legislature will pass laws clarifying that it intended to preempt a locality's ability to ban fracking within its borders, and the possibility of fracking in New York State seems less likely now than ever.

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