

Literally, A Million Dollar Question

Can (or Will) Local Governments Regulate Fracking?

11.21.2011

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The debate over the benefits and risks associated with hydraulic fracturing (“fracking”), a method of drilling for natural gas, continues to rage in North Carolina. Research shows that several North Carolina counties, including Lee, Chatham, Durham, Granville, Moore and Wake, are sitting on a large amount of natural gas as a result of the large amount of shale rock in the region. The General Assembly approved legislation earlier this year for a nonprofit organization to study this issue and provide a report to the General Assembly next spring. That study is currently underway. The question that continues to loom in the minds of local governments and energy companies alike, is whether any future legislation in North Carolina allowing and/or regulating fracking would permit local governments to restrict fracking in their respective jurisdictions through the use of their zoning and/or police power. Obviously, it is premature to speculate how the General Assembly will address the issue of local regulation, however, many other states and local governments are currently wrestling with this issue in both the court of law and public opinion.

In New York, the Town of Dryden, along with a number of other municipalities, have passed ordinances prohibiting fracking altogether. These prohibitions have resulted in a number of lawsuits. In the case of Dryden, a drilling company named Anschutz

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Exploration Corporation filed suit claiming that the Town of Dryden's ordinance prohibiting fracking under its zoning authority is preempted by state laws regulating gas drilling. In the Dryden case, the parties appear to agree that the Town is preempted under State law from regulating the actual drilling operations. However, the Town takes the position that it retains its zoning and police power authority to determine where, or if, this type of use is allowed within the Town's jurisdictional limits.

Instead of outright bans, other local governments, including some in Pennsylvania, have adopted zoning amendments that regulate the use by only allowing it in certain zoning districts, establishing certain radius and buffer requirements and requiring the user to obtain a special or conditional use permit that requires the applicant to show that the drilling operation would not have an adverse impact on the health, safety and welfare of general public. Many zoning ordinances in North Carolina already have regulations for similar industrial uses such as mining and quarry operations.

As the debate over fracking continues in North Carolina, the issue of local regulation will most likely be at the forefront of the debate. Likely, advocates for the drilling companies will want to see statewide regulations adopted that expressly preempt local governments from regulating the existence and location of drilling operations. On the other hand, local governments will want to retain as much authority as possible to regulate these types of uses in order to protect both the character and the citizens of their respective city or county.

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