Hydraulic Fracturing and Local Government: Battle in the Shale Fields

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Introduction

Recent years have seen a rapid increase in disputes between state and local governments regarding the authority to regulate hydraulic fracturing, also known as "fracking." These battles have resulted in court cases and new state statutes. While the general principle is that state law supersedes local law, many states have ceded home rule authority or other broad-based powers to local governments. The question then becomes whether these grants of authority include the power to override state regulation of fracking. Sometimes local regulation may not explicitly conflict with state law but may interfere with state goals. Does state law override local regulation?

This article reviews recent case law, recent statutory enactments, and recent research to ascertain whether state law overrides all local regulation, or whether some areas of local control remain with respect to fracking. To summarize, laws vary significantly among states, but the general answer appears to be that local governments retain the authority to regulate "where" these activities occur, while states control "how" the activity occurs. Local authority primarily manifests itself as traditional zoning and land use regulatory control; however, outright bans are generally considered to both exceed the zoning authority and to interfere with the common state goals to prevent waste and protect correlative rights.

Local Government Responses to Hydraulic Fracturing

A recent study surveyed local governments to determine which policies were being used to address fracking concerns.[1] The authors surveyed 285 communities in Colorado, Louisiana, North Dakota and Pennsylvania, and received 139 responses. Table 1, opposite, reproduces a portion of the table in the study and lists the policies surveyed and the percentage of local governments using that policy. As indicated, 54% of the responding communities reported no policy, even though 40% of the communities had experienced fracking within the past 5 years, and 63% of the communities reported fracking in adjacent communities. The most used policies were (1) restrictions on locations of industrial land use; (2) fencing and landscaping for fracking sites and (3) restrictions on road use for vehicles associated with fracking. The first two policies clearly fall within a jurisdiction's zoning authority, while the third is a relatively common local ordinance. The vast majority of the surveyed activities encompass zoning and local land use regulation. Only 3% of responding jurisdictions imposed moratoria, while none reported a ban.

As indicated, most municipalities had no formal responses to fracking, with relatively small percentages having adopted specific policies. Somewhat surprisingly, local governments were much more likely to state that they had not adopted policies due to "other" reasons as opposed to "legal" considerations (approximately 7 times more likely on average). For example, 21 communities did not adopt a moratorium for "legal" reasons, with 81 not adopting for "other" reasons. Similarly, 20 communities did not adopt restrictions on fracking activities near schools, or near water supply reservoirs, for "legal" reasons, while 74 and 73 communities, respectively, did not adopt such policies for "other" reasons.

Despite these assertions about the reasons for not adopting fracking policies, a majority–52% of local governments–felt that they had a "poor" chance of having the authority to enforce regulations on fracking. And fully 50% of communities viewed their budgetary capacity to address fracking hazards as poor.

TABLE 1

LOCAL GOVERNMENT RESPONSES TO FRACKING (IN ORDER OF PREVALENCE)[2]

No policy	54%
Restrictions on locations of industrial land use	30%
Fencing and landscaping requirements for fracking sites	30%
Restrictions on road use for vehicles associated with fracking	29%
Special use permit requirements for drilling sites	26%
Setback requirements for compressor stations associated with fracking activities	25%
Enhanced performance standards for fracking activities adjacent to residential areas (e.g., noise, dust)	22%
Other zoning restrictions on fracking activities	22%
Minimum building setback requirements for new development in areas with fracking	20%
Zoning for drilling byproduct disposal	16%
Setback requirements for fracking waste disposal facilities	16%
Restrictions on disposal of drilling byproducts (e.g., waste water, tailings or drilling sludge)	15%
Impact fees for areas where fracking will occur/is occurring	14%
Low-density zoning in areas with fracking	13%
Restrictions on fracking activity near schools	13%
Setbacks for new pipelines associated with fracking activities	13%
Restrictions on fracking activity near water supply reservoirs	11%
Watershed protection ordinance protecting water supply from fracking activity	10%
Special hazard ordinance for fracking activity	9%
Environmental impact statement for fracking sites	8%
Stringent conditions on drilling permits (such as water well monitoring)	8%
Moratorium on fracking	3%
Citizens' Bill of Rights	1%

Statutory Provisions

A few states have passed statutory provisions that specifically address local regulation of oil and gas activities. 52 Oklahoma Statutes Annotated Section 137.1, passed in 2015, allows local governments to "enact reasonable ordinances, rules and regulations concerning road use, traffic, noise and odors" related to oil and gas operations. However, the ordinances cannot be inconsistent with the state rules on oil and gas operations. Reasonable setbacks and fencing requirements may also be established. A local government may not effectively ban oil and gas operations through these regulations. The statute also excepts areas within the one-hundred-year floodplain from these provisions, allowing reasonable regulation by the local government within the floodplain. The Oklahoma statute appears to preserve most local government land use authority as applied to fracking, but perhaps not all traditional zoning authority.

The Texas legislature also passed statutory provisions expressly limiting local regulation of oil and gas operations in 2015. Texas Natural Resources Code Section 81.0523 provides for extensive areas of exclusive state jurisdiction and express preemption of local prerogatives in oil and gas regulation. Local governments may regulate certain aboveground activities including "fire and emergency response, traffic, lights, ...noise...[and] reasonable setback requirements." But these local regulations must be "commercially reasonable", and may not "effectively prohibit an oil and gas operation" or be preempted by other state or federal regulation. The term "commercially reasonable" refers to a regulation that allows "a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator and not on an individualized assessment of an actual operator's capacity to act." The Texas statute arguably preserves less traditional local zoning authority than does the Oklahoma statute, but a portion of that authority remains.

Bans

Courts have generally found that zoning power with respect to fracking does not include the power to ban. Section 1 of the Standard State Zoning Enabling Act empowers local governments to "regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence, or other purposes."[3] "Most zoning ordinances . . . seek[] to separate, rather than exclude, incompatible uses."[4] "[A]lthough 'zoning [sic] is a means by which a governmental body can plan for the future–it may not be used as a means to deny the future."[5]

Bans also conflict with state law. Many state regulations on oil and gas seek to prevent waste and protect correlative rights. A ban conflicts with these goals, causing waste of the resource by not allowing withdrawal. In addition, a ban eliminates the correlative rights of owners in the targeted area, denying them a share in the pool.

In 1990, the Colorado Court of Ap-

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peals found that the Colorado Oil and Gas Conservation Act completely preempted local land use regulation of oil and gas activity.[6] The Colorado Supreme Court reversed, finding that the state act exclusively regulates the technical aspects of oil and gas activities, but leaves room for local land use regulation that does not conflict with the state's regulations.[7] On the same day, the Colorado Supreme Court struck down a ban on drilling, finding that a ban conflicted with the state interests in protecting correlative rights and preventing waste.[8] The court distinguished a "*total ban*" from mere regulation.[9] Ten years later, the Colorado Court of Appels again found that state regulation left room for the local government. The court invalidated certain portions of the local regulation, but found that the provisions regulating above-ground structures, access roads, and emergency response costs were valid.[10] The court again distinguished a ban from regulation.[11]

The only state high court to uphold a ban on oil and gas activity is the New York Court of Appeals. The court found that the state's oil and gas statute did not preempt local land use authority,[12] relying heavily on *Frew Run Gravel Products, Inc. v. Town of Carroll.*[13] Although the allowance of a ban represents an outlier opinion, the court succinctly summarized the distinction between state and local regulation of oil and gas regulation, explaining that the local government regulates "where" the activity takes place, but not "how" the activity is conducted.[14]

Finally, the United States District Court for the Southern District of West Virginia recently struck down a Fayette County ban on storage of wastewater in underground injection control (UIC) wells, or temporary storage of wastewater except in certain narrow circumstances.[15] EQT Production Company, a major player in the Marcellus shale fields, argued that the UIC ordinance effectively banned fracking by prohibiting even temporary storage of wastewater at hydraulic fracturing sites.

After finding that EQT had standing due to the uncertainty created by the UIC ordinance as to whether EQT would be able to operate in the county, the court turned to the merits. Fayette County argued that it held plenary power to eliminate hazards to public health and to abate nuisances, and asserted that authority in the ordinance. The court disagreed, finding that the county holds only those powers expressly granted or necessarily implied. The court found that all authority to oversee gas and oil operations in West Virginia lies with the West Virginia Department of Environmental Protection, pursuant to the West Virginia Oil and Gas Act.[16] Even though West Virginia law gives counties the authority to abate nuisances, exercise of that power may not interfere with an area of law that the state has reserved to itself. The court therefore found that the ban, by interfering with state oil and gas regulation, was preempted by state law. In addition, the state UIC program, operated under the federal Safe Drinking Water Act, preempts the ordinance's UIC regulation. Finally, the court noted that public health is a matter of statewide concern and state law is supreme over local law. The county's primary concerns with respect to the UIC well storage revolved around public health.

> Most courts that have addressed the issue of state versus local authority to regulate fracking have concluded that two levels of government share regulatory authority. Most simply, the state holds the authority to regulate "how" hydraulic fracturing may be conducted, while the local government controls "where" the activity occurs.

Hydraulic Fracturing and Home Rule

Recent cases have introduced an additional issue into the conflict between state and local regulation of hydraulic fracturing. Do local governments that hold "home rule" authorities have the authority to supersede state law by banning or placing moratoria on fracking activities?

Home rule refers to "the ability of a local government to act and make policy in all areas that have not been designated to be of statewide interest through general law, state constitutional provisions, or initiatives or referenda."[17] Home rule powers are unlikely to impact the final decision on preemption, however. Colorado and Ohio courts have engaged in detailed analyses of the impact of home rule on preemption. Both courts ruled that, despite home rule authority, the local governments lacked the authority asserted in the cases. However, both decisions explained that traditional zoning powers could coexist with state control over oil and gas production.

The Ohio Decision: In 2015, the Supreme Court of Ohio considered the influence home rule authority on the legitimacy of regulations imposed by the City of Munroe Falls.[18] Ohio Revised Code Chapter 1509 regulates oil and gas wells and production operations in Ohio. The chapter reserves certain powers to local governments with respect to control public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, as well as to grant permits to operate certain highways within their jurisdictions. However, Ohio Revised Code 1509.02 prohibits local governments from using this authority "in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities..." Most importantly, Chapter 1509 gives the state government "sole and exclusive" authority to regulate the permitting, location, and spacing of oil and gas wells and production operations.

In the Ohio case, Beck Energy Corporation's Chapter 1509 permit included 67 conditions, including 29 conditions referring to "Urban Areas."[19] These conditions included restrictions as to tree trimming, erosion control, noise mitigation, and parking. Five different local ordinances applied to the operation. Although one of those ordinances was a zoning ordinance, the zoning ordinance provisions in question referred to the Munroe Falls ordinance specifically relating to oil and gas drilling. The other four ordinances fell directly under the oil and gas drilling provisions.

The court examined the Home Rule

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Amendment to the Ohio Constitution, pursuant to which municipalities may exercise all powers of local government (functional home rule). In addition, municipalities may enforce local police powers, so long as these powers do not conflict with general laws.[20] These powers give municipalities the "broadest possible powers of self-government in connection with all matters which are strictly local and do not impinge upon matters which are of a state-wide nature or interest."[21] The test applied by Ohio courts to determine when a municipal ordinance must yield to a state statute examines three factors: (1) whether the ordinance is an exercise of the police power, rather than of local government; (2) whether the state statute is a general law; and (3) whether the ordinance is in conflict with the state statute. The court determined that all three factors were met, ruling that the ordinance must yield to the state statute.

Although the court's 4-3 decision rejected the local ordinance in this case, 5 of the 7 justices suggested that a traditional zoning ordinance, as opposed to the ordinance specifically directed towards oil and gas operations presented in the case, would likely have been upheld. Justice O'Donnell filed an opinion concurring in the judgment only, and Justice Kennedy joined that opinion. Justice O'Donnell filed a separate opinion to "emphasize the limited scope of [the] decision."[22] The concurring opinion noted that this case did not present the question of whether the state statute conflicts with local land use ordinances that address traditional zoning issues. Justice O'Donnell suggested that a traditional zoning ordinance that did not conflict with the state statute might be upheld.

The concurring opinion also presented a convincing argument that the terms "location" and "spacing," as used in the state statute, referred to location and spacing on the tract and constituted terms of art in the oil and gas industry.[23] The power to control location and spacing on the larger community scale would therefore be retained by local governments.[24]

Justice Pfeifer's dissenting opinion stated that the home rule amendment would allow zoning ordinances that do not conflict with the state statute. And Justice Lanzinger's dissent, to which Justice Pfeifer joined, opined that "local zoning ordinances can have a place beside the state's statutes regulating oil and gas activities."[25]

The Colorado Decision: The Colorado Supreme Court also recently addressed the question of whether a home rule locality could ban oil and gas activity in *City of Longmont v. Colorado Oil and Gas Association*.[26] The court explained that the key was whether the activity regulated was a matter a local concern where home rule ordinance supersedes state law, or a matter of statewide concern, where state law supersedes a conflicting ordinance. State law also prevails where the matter is one of mixed state and local concern.

The test to categorize whether a matter is of state, local, or mixed concern examines four factors: (1) the need for statewide uniformity of regulation; (2) the extraterritorial impact of local regulation; (3) whether the state or local governments have traditionally regulated the matter; and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation.[27] The last two of these tests were inconclusive; Colorado's state and local governments had long shared the regulation of oil and gas regulation, so the third factor did not indicate exclusive state or local interest. Nor did the state constitution clearly commit the matter to either state or local concern.

However, the Colorado court found that a local ban's extraterritorial effects implicated statewide issues.[28] Specifically, because oil and gas in underground pools fail to respect jurisdictional boundaries and drilling locations are driven by highly technical imperatives, a ban, however "local," became a matter of statewide concern.[29]

The court posited that, because a given pool might lie beneath two or more jurisdictions, a ban in one city might encourage bans in other cities. Finding that the Longmont ban conflicted with the state's greater interest in preventing waste and protecting correlative rights, the court struck down the ban. On the same day, the Colorado high court applied a similar analysis to strike down a moratorium on hydraulic fracturing.[30]

The New Mexico Decision: The United States District Court for the District of New Mexico considered an ordinance passed by Mora County that included a Community Bill of Rights.[31] The ordinance purported to allow local regulation to override state and regulation, denied that corporations were persons, and banned hydraulic fracturing in the county. In a decision spanning over 100 pages, the court found the ban to be invalid.

Conclusion

Most courts that have addressed the issue of state versus local authority to regulate fracking have concluded that two levels of government share regulatory authority. Most simply, the state holds the authority to regulate "how" hydraulic fracturing may be conducted, while the local government controls "where" the activity occurs. However, local authority generally does not include the authority to ban or place a moratorium the activity. Traditional land use regulations like zoning that apply uniformly to fracking and other activities appear more likely to withstand challenge than a stand-alone ordinance.[32]

The following activities appear to lie within state control: on-site drilling, oversight of the chemicals used and the production process, prevention of waste, protection of correlative rights, conservation of oil and gas natural resources, safety, and on-site contamination.[33] Local regulations may address noise, light and other visual impacts, road damage, blasting, dust, traffic, compatibility of the activity to nearby property uses, impact of the activity on property values in the area, adequate off-site infrastructure, adequate services (like police and fire protection), affordable housing, general health, safety and welfare of the community, odors, potential groundwater contamination, methane emissions, habitat fragmentation, and degradation of environmentally sensitive areas.[34]

The above listing is a generalized summary. Clearly, specific regulations differ in each state. Municipal attorneys should thoroughly study state oil and gas regulations, as well as local government enabling authority, when determining the policy approaches their locality may take to regulate hydraulic fracturing.

Notes

1. *See* Carolyn G. Loh and Anna C. Oslund, *Local Land Use Planning Responses to Hydraulic Fracturing*, 83 J. Am. Plng. Assoc. 222, 222 (2016).
2. *Id.* at 229.
3. Standardized State Zoning Enabling Act § 1 (Dep't of Commerce 1926) (footnotes omitted), *available at* https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf.
4. Patricia Salkin, American Law of Zoning, § 9.16 (5th ed. 2014).

5. Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Twp., 228 A.2d 169, 178 (Pa. 1967) (*quoting* Nat'l Land & Inv. Co. v. Bd. of Adjustment of Eastttown Twp., 215 A.2d 597, 610 (Pa. 1965)).
6. *See* Bowen/Edwards Assocs., v. Bd. of Cnty. Comm'rs, 812 P.2d 656, 658-59 (Colo. App. 1990).
7. *See* Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs., 830 P.2d 1045, 1048 (Colo. 1992) (*en banc*).
8. *See* Voss v. Lundvall Bros., 830 P.2d 1061, 1064 (Colo. 1992).
9. See *id.* at 1069 (emphasis in original).
10. *See* Town of Frederick v. N. Am. Res. Co., 60 P.3d 758, 760, 764 (Colo. App. 2002).
11. *See id.*
12. *See* Wallach v. Town of Dryden, 16 N.E.3d 1188, 1192, 1193 (N.Y. 2014).
13. *See* 518 N.E.2d 920 (N.Y. 1987).
14. *See id.* at 922.
15. *See* EQT Production Company v. Wender, __ F. Supp.3d __, 2016 WL 3248503 (2016).
16. W.Va. Code § 22-1-1, et seq.
17. Dale Krane et al.., Home Rule in America: A Fifty-State Handbook 2 (2001).
18. *See* State ex rel. Morrison v. Beck Energy Corp., 37 N.E. 3d 128, 134 (Ohio 2015).
19. *Id.* at 37 N.E.3d 132.
20. *See* Ohio Const. art. XVIII, § 3.
21. State ex rel. Hackley v. Edmonds, 80 N.E.2d 769 (Ohio 1948).
22. *Beck Energy*,37 N.E. 3d at 138 (O'Donnell, J., concurring).
23. *Id.* at 140.
24. *Seea id.*
25. *Id.* at 141 (Lanzinger, J., dissenting).
26. *See* 369 P.3d 573 (Colo. 2016).
27. *See id.* at 580.
28. *See id.* at 581.
29. *Id.* at 580.
30. *See* City of Fort Collins v. Colorado Oil and Gas Ass'n, 369 P.3d 586 (Colo. 2016).
31. *See* Swepi, LP v. Mora Cnty., 81 F.Supp.3d 1075 (D. N.M. 2015).
32. *See* Loh and Osland, *supra* note 1.
33. *See* Jesse J. Richardson, Jr., *Local Regulation of Hydraulic Fracturing*, 117 W. Va. L. Rev. 593 (2014).
34. *Id.* ML

