



Is your business banned or not? New York towns can decide for you

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The fracking decision. Local governments were recently emboldened by news headlines announcing that our state's highest court, the Court of Appeals, now enables them to pick and choose which businesses can operate within their borders. Haven't you heard that fracking can be banned by New York towns from within their borders? As a result, real estate professionals are cringing at the thought of this increase in power bestowed upon local government to affect business, and real estate professionals are now worried about which businesses can't exist within different areas of the state. So, should professionals advise business owners to kiss the ring of the king (mayor/supervisor) or face the death of their deal when entering a local community? Is there a limit on the power of local governments?

The operative case, involving the towns of Dryden and Middlefield, narrowly speaks on "whether towns may ban oil and gas production activities...within [its] boundaries," but broadly sets forth the great breadth of the home rule authority of "municipalities to regulate land use." Broadly speaking, this case confirms the power bestowed by the legislature on local government through the town law, which authorizes "towns to enact zoning laws for the purpose of fostering 'the health, safety, morals, or the general welfare of the community.'" In fact, a quick glance at the decision in Dryden may cause one to wonder if the court is overruling its recent decision from just last year in Sunrise Check Cashing and Payroll Services, Inc. v. Town of Hempstead, where the same court limited the power of towns to exclude certain businesses from its borders when it ruled that "zoning is concerned with the use of land, not the identity of the user". Specifically, Sunrise Check Cashing is a case that prevented the town of Hempstead from banning check cashing establishments from its borders (See "Commercial space: Municipal use prohibitions prohibited," NYREJ, 5/14/13).

Yet, a closer read of the Dryden case shows how narrow the decision really is and how it shouldn't start a slippery slope of unchecked local governmental power to the point where the real estate market will realize an adverse impact. In fact, the court's decision expressly states that the court only addresses the "discrete issue before us, and the only one we resolve today." The court goes further by setting forth the issue in the case to be limited to only "whether the State Legislature eliminated the home rule capacity of municipalities to pass zoning laws that exclude oil, gas and hydrofracking activities in order to preserve the existing character of their communities." Said otherwise, were the rights of local governments preempted by a statewide law? The court answered that the rights were not preempted and hence limited; the towns could limit hydrofracking from within their borders.

To differentiate, in Sunrise Check Cashing the court looked at the purpose of the zoning ordinance and ruled that the policy grounds underlying the zoning ordinance did not support the existence of the ordinance (i.e. no correlation of negative secondary effects on the surrounding community by

purportedly exploiting younger and lower income people). In contrast, the Dryden case does not discuss the merits of having a zoning regulation concerning fracking on policy grounds, but instead concerns itself with whether the state's statute preempts towns from having rules in the first place. In fact, the court in Dryden acknowledges that "[t]he towns both studied the issue and acted within their home rule powers in determining that gas drilling would permanently alter and adversely affect the deliberately-cultivated, small-town character of their communities," but the issue of whether fracking would actually have such an effect on the town was not part of the case.

So, moving forward, Sunrise Check Cashing maintains its limit on the breadth of a town's power to exclude businesses from its borders and Dryden is limited as a decision only concerning the specific issue of hydrofracking.

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