

## Dryden and Middlefield Fracking Bans Tested

By **Peter Mantius**, on November 11th, 2011

**Natural Resources News Service** | **2 comments**

Tweet < 8

Recommend < 49



DRYDEN, N.Y. — Landslide elections here and in the neighboring town of Caroline Nov. 8 put to rest any doubts that hydrofracking opponents have the upper hand politically in this Finger Lakes community.

But those lopsided victories will ring hollow unless the Town of Dryden prevails in court against Anschutz Exploration Corp.

In August, the Dryden town board banned oil and gas exploration and development within its borders, where the Colorado company has spent \$5.1 million leasing and developing 22,000 acres. Local residents were split on the wisdom and validity of the ban, and it became the central issue in fall political campaigns.

On the Friday before pro-ban Democrats swept the elections, lawyers for Anschutz asserted to Tompkins County Supreme Court Justice Phillip R. Rumsey in Ithaca that Dryden lacked the legal authority to ban local oil and gas exploration and development. Thomas West, an Albany attorney representing Anschutz, argued that the 1981 state law assigning regulatory authority over such activities to the state Department of Environmental Conservation supersedes all local laws, including zoning ordinances.



Thomas West

To rule otherwise, West said, would be to violate the Legislature's intent to streamline energy development in the state and to protect the economic rights of property owners who seek to cash in on their underground natural resources.

"This case will decide the energy policy of this state," West declared. His opponents did not disagree.

West was alluding to series of local bans and moratoriums recently enacted by more than a dozen municipalities in and around the Finger Lakes region and to the fact that the 1981 law empowering the DEC had never faced so many head-on challenges.

Dryden's attorney, Mahlon R. Perkins, conceded that the law preempts local governments from regulating how oil and gas companies operate. "'How,' but not 'where' or 'if,'" Perkins told Judge Rumsey. Otherwise, a gas company could drill a well next to a church or a school.

While a town cannot regulate Anschutz's operations, it can ban them, Perkins said. The statute in question, Section 23-0301 of the Environmental Conservation Law, does not explicitly express an intent to usurp local zoning powers provided under the state's home rule law, he added.

But a ban is regulation, West countered, and to draw a distinction between the two is sophistry.

Judge Rumsey has not said when he will rule on the Anschutz bid to have the Dryden ban declared null and void. Both sides vow to appeal if they do not like his ruling.

The court case comes as New York State is poised to allow high-volume hydrofracking of its rich Marcellus Shale natural gas deposits in 2012. The DEC is in its third year of developing regulations for the controversial process.

Opponents point to a host of problems in neighboring Pennsylvania, where drillers have been allowed to frack the Marcellus for several years. After environmental regulators in New York City expressed alarm about the threat fracking posed to its public water supplies, the DEC banned fracking in the New York City and Syracuse watersheds, angering many outside those special zones of protection.

State Sen. Michael Nozollino has written a letter to the DEC urging the agency to extend its fracking ban to the Finger Lakes watershed, part of which falls within his

...ing the agency to ensure no mining ban in the Finger Lakes region, part of the ... district. In the absence of any official response to that plea, fracking opponents have galvanized throughout the Finger Lakes region and beyond.

In Dryden, Incumbent Dryden Town Supervisor Mary Ann Sumner won nearly 60 percent of the vote, while anti-gas drilling Democrats claimed two other open town board seats. "You can't get these kinds of numbers without Republican and Independents joining Democrats against fracking," says Barbara Lifton, a Democratic state Assembly member from Ithaca.



Mary Ann Sumner

Seventy miles to the east, Sustainable Otsego, headquartered in Cooperstown, has promoted several local fracking bans and recruited a slate of 11 local candidates to run under its name. Seven of them won Nov. 8.

To the west of Dryden, Robert Fitzsimmons and Bo Lapari launched anti-fracking campaigns late - in early September — but nearly pulled off upsets in the Town of Hector, a Seneca Lake wine-growing center. Pledging to ban fracking in Hector, Fitzsimmons came within 20 votes of upsetting 16-year Republican incumbent Ben Dickens as Town Supervisor. Lapari missed winning by 53 votes. One of his victorious opponents, Clifford Yaw, said he would not recuse himself from a fracking ban vote despite the fact that he has leased property to Chesapeake Appalachian, a gas driller.

Further west near Keuka Lake, incumbent Republican Bill Weber narrowly lost his reelection bid in the town of Pulteney. Last year, Weber had angered residents by not decisively opposing Chesapeake's aborted effort to store fracking wastewater in an abandoned Pulteney gas well.

While fracking opponents point to the toll the process could take on their personal property and communities, drilling supporters argue that they have property rights too.

After the court hearing in Ithaca Nov. 4, West said in an interview that if Anschutz loses its bid to block the Dryden ban, he will immediately file a "takings" claim on behalf of the company for its lost investment in Dryden leases.

The "takings" argument is the crux of a suit filed in September by Cooperstown Holstein Corp. against Otsego County's Town of Middlefield, which passed a drilling ban similar to Dryden's in June. According to the suit, the plaintiff has leased nearly 400 acres to a gas drilling company. The economic benefits of those arrangements would be blocked by the ban, the suit says.

The outcome of the Middlefield suit could also have broad implications, because a similar "takings" arguments could be asserted by anyone who has leased property to drillers anywhere within the New York City and Syracuse watersheds, where the DEC has imposed its own fracking ban.

But the rights of property owners and gas companies to profit from gas lease arrangements are not unlimited, drilling opponents argue.

In a recent op-ed piece in the Ithaca Times, Martha Robinson of Dryden wrote: "Anschutz Exploration is owned by Philip Anschutz, the 39th richest man in America, according to Forbes (magazine). He holds leases with 7 percent of Dryden's residents, on about 40 percent of Dryden's land. Who controls Dryden? Who's town is it?"



State Rep. Barbara Lifton

State Rep. Lifton says she does not believe state law intends to grant multinational energy companies – many of them based in foreign countries – the right to dictate land use practices in small New York towns.

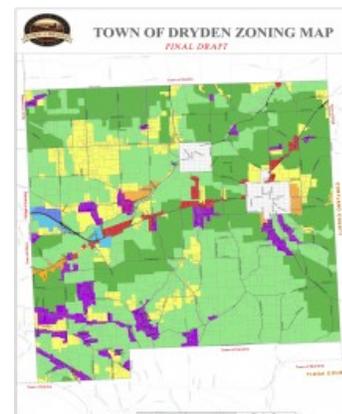
In an amicus curiae brief she filed in the Anschutz case against Dryden, Lifton argues that the home rule law that undergirds local zoning authority comes from Article IX of the New York State constitution and is carefully insulated from "wanton" alteration. In fact, she argues, statutes that seek to diminish the powers granted under home rule must pass in two consecutive sessions of the state General Assembly. The law in question in the Anschutz case does not meet that criteria, she adds.

Many other legal experts believe the Anschutz suit will turn on the court's interpretation of a state mining law that is very similar to the law that pertains to gas drillers. In fact, during the court proceedings in Ithaca Nov. 4, Judge Rumsey asked West if the cases were not "parallel."

In the mining case, New York's highest appellate court held that the state DEC's regulation of mining activity did not interfere with or preempt local zoning ordinances.

To be on the safe side, Lifton introduced legislation in the past session that clarified that home rule law grants local government the right to ban drilling. The bill passed the state Assembly but not the state Senate.

Since then, state Sen. James Seward has introduced a similar bill in the Senate, and Lifton has introduced Seward's bill in the Assembly.





**Peter Mantius**

Peter Mantius is a reporter in New York. He covered business, law and politics at *The Atlanta Constitution* from 1983-2000. He has also served as the editor of business weeklies in Hartford, CT, and Long Island. He is the author of *Shell Game* (St. Martin's Press 1995), a nonfiction book on Saddam Hussein's secret use of a bank office in Atlanta to finance billions of dollars in arms purchases from Western countries before the 1991 Persian Gulf War.

[Natural Resources News Service](#) Tags: [Anschutz Exploration Corp.](#), [anti-fracking](#), [Barbara Lifton](#), [Ben Dickens](#), [Bill Weber](#), [Bo Lapari](#), [Chesapeake Appalachian](#), [Clifford Yaw](#), [Cooperstown](#), [Cooperstown Holstein Corp.](#), [Department of Environmental Conservation](#), [drilling ban](#), [drilling moratorium](#), [Dryden](#), [environment](#), [Environmental Conservation Law](#), [Finger Lakes watershed](#), [fracking](#), [gas companies](#), [gas driller](#), [gas drilling](#), [gas drilling ban](#), [gas leases](#), [General Assembly](#), [Hector](#), [home rule](#), [hydraulic fracturing](#), [hydrofracking](#), [Ithaca](#), [James Seward](#), [Judge Rumsey](#), [Keuka Lake](#), [lawsuit](#), [local bans](#), [local zoning ordinances](#), [Mahlon R. Perkins](#), [marcellus shale](#), [marcellus shale drilling](#), [Martha Robinson](#), [Mary Ann Sumner](#), [Michael Nozolio](#), [Middlefield](#), [moratorium](#), [new york](#), [New York City](#), [New York City watershed](#), [new york state](#), [New York State Department of Environmental Conservation](#), [ny dec](#), [Otsego County](#), [Philip Anschutz](#), [property owners](#), [Pulteney](#), [Robert Fitzsimmons](#), [Seneca Lake](#), [Sustainable Otsego](#), [syracuse](#), [Syracuse watershed](#), [Thomas West](#), [Tompkins County](#), [Tompkins County Supreme Court](#), [Tompkins County Supreme Court Justice Phillip R. Rumsey](#), [zoning](#) —

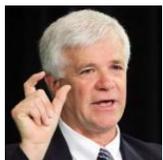
**You may also like:**



[Marcellus Shale: The Real Price of Compulsory Integration In New York](#)



[New York Wine and Tourism Industry Prepares To Battle Hydrofracking](#)



[DEC Opens Eighty Percent of N.Y. to Fracking](#)



[Local N.Y. Environmentalists Fight Fast Tracking of Water Bill as Increased Marcellus Gas Drillin ...](#)

Like 1 person liked this.

**Showing 2 comments**

Sort by popular now



**Tonya Engst**

As a Dryden resident, I'd rather figure out a way to pay that 5 million than suffer the life-changing effects of having my neighborhood drilled. Nobody with common sense would have leased that land for this type of use AND nobody with common decency would have asked for such a lease - should have been zoned against years ago. Industrializing an area dotted with home daycares, community centers, b&b's, organic farms, self-employed who work at home, retired folks at home, etc. makes no sense. This is not some wilderness - this is right next to homes and businesses. This is not conventional drilling - this is a new form that is vastly, vastly more destructive, even if there are no accidents.

2 months ago 1 Like

Like Reply



**Cicero**

As Attorney West stated, " ... if Anschutz loses its bid to block the Dryden ban, he will immediately file a "takings" claim on behalf of the company for its lost investment in Dryden leases." The leases cost the Company about five million dollars, an easy to prove damage amount and the Town took their entire value, a taking under Article V of the US Constitution that must be compensated. The problem is the Town of Dryden doesn't have five million dollars. The Town Board risked a huge liability that could double or triple town taxes for several years to pay.

[2 months ago](#)

[Like](#) [Reply](#)

[Subscribe by email](#)  [RSS](#)

**Add New Comment**

[Login](#)



### Reactions



Trackback URL