

IOGA of NY Files Amicus Curiae Brief In Lawsuit Challenging The Town Of Avon's Efforts To Regulate The Natural Gas Industry

By Daniel A. Spitzer and Charles W. Malcomb

On June 28, 2012, the Town of Avon (the "Town") enacted a Local Law placing a moratorium and prohibition on "gas and petroleum exploration and extraction activities" within the Town. One of the energy producers impacted by the moratorium—Lenape Resources, Inc.—commenced a lawsuit in Supreme Court, Livingston County in November 2012. This suit challenges the Town's actions on a variety of grounds, most importantly whether municipalities may use their zoning or police powers to regulate—or prohibit—oil and natural gas development.

Because scattered, disorganized, and unpredictable local regulation of the oil and gas industry would have significant negative impacts on its members, IOGA of NY authorized its legal counsel, Hodgson Russ LLP, to submit an amicus curiae, or "friend of the court" brief on its behalf to call the Court's attention to important facts and legal arguments demonstrating that such local regulation is prohibited by State law. While not a party to the lawsuit, IOGA of NY's role as a statewide trade association representing a wide spectrum of industry participants necessitated its participation in the litigation.

IOGA of NY's amicus brief explained the importance of this case is to its members, and discussed the detailed regulatory framework that has been established by the State to regulate the oil and gas industry, through legislative act and implementing regulations. Of primary

significance, the brief explains that the State has specifically preempted all local regulation of the oil and natural gas industry and that any local regulation—including siting and location regulations—would directly undermine the regulatory framework the State has created. This truth has been historically recognized by the Department of Environmental Conservation ("DEC") through its practices and past responses to improper local regulatory efforts.

In defense of its improper regulation, the Town argues that there is a difference between regulating the "how" versus the "where" of oil and natural gas activities. The Town claims that there is room for local control because the State only regulates the "how" and leaves the "where" to municipalities. But that view fails to understand the State's regulatory system, whereby the State has absolute responsibility for regulating the "where" of natural gas development. Specifically, DEC oversees spacing, location, and pooling requirements, all of which direct "where" development activities will occur. This fact was clearly demonstrated to the Court in IOGA of NY's papers.

Continued on page 2

In This Issue


From the Executive Director	5
Ensuring Equitable Property Taxation	7
Editorial Boards Hearing	9
Understanding Energy Markets	11
New York Legal Update	13
Frack Attack	14
DEC Request for Input	18
Welcome New Members	21
The Power of Partnership	23
Positive Approach to Development	25
Prices	26
33rd Annual Summer Meeting	Back Cover



Continued from page 1

Additionally, IOGA of NY's amicus brief squarely addressed recent court decisions that allowed local regulation by explaining that those courts ignored the express prohibition of local regulation in the State's Oil and Gas Law as well as the reality of how resources are regulated under that law, and instead improperly relied upon an inapplicable provision of the State's Mined Land Reclamation Law. Those decisions are currently on appeal before the Appellate Division, Third Department, and IOGA of NY has also filed amicus briefs with the appellate court in those matters.

In response to the lawsuit, the Town and the DEC moved to dismiss Lenape's claims. The Court heard oral argument on the motions to dismiss on February 4, 2013. After argument, the Court accepted IOGA of NY's amicus brief, but did not issue a decision on the merits of the case at that time. The matter is currently pending, and the parties are awaiting a decision from the Court. The Court could, among other things, (1) issue a decision that addresses the main issue of the case and determine whether municipalities may use their zoning or police powers to prohibit oil and gas exploration and extraction activities within their borders; (2) wait until the Town's moratorium expires and deem the matter moot, thus avoiding the need to reach the merits of the case; or (3) deny the motions to dismiss and require further legal proceedings (e.g., discovery, trial) on some of the claims in the suit. It should also be noted that if the

Appellate Division, Third Department issues a decision on the appeals before a decision is rendered in this case, the Court is likely to look to the Third Department's ruling as persuasive precedent. 



Daniel A. Spitzer

Daniel A. Spitzer is a partner in Hodgson Russ's Environment & Energy Practice Group. He represents numerous clients in the oil and gas industry on issues ranging from real estate and permitting to environmental law compliance. Dan can be reached at dspitzer@hodgsonruss.com.



Charles W. Malcomb

Charles W. Malcomb is an associate in Hodgson Russ's Environment & Energy Practice Group and focuses his practice on counseling clients in the oil and gas industry on permitting and environmental compliance. Chuck can be reached at cmalcomb@hodgsonruss.com.