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Environmental Law

Not in my backyard? Article 10 and the siting of electric generating facilities

The proposal to locate a waste-to-energy facility on the former Seneca Army Depot in the Town of Romulus in Seneca County has reignited interest in New York State's uneven approach to local control over the siting of "locally undesirable land uses." There has been a string of court decisions confirming local authority to use zoning to restrict or outright prohibit mining, oil and gas drilling, and landfills and other solid waste management facilities from locating within the boundaries of towns. Consequently, the revelation that local authority over this particular facility may be preempted by a state law giving the Public Service Commission authority over siting, took many by surprise, including the developer.

The developer had begun the process of seeking local approval from the Town of Romulus, but has since withdrawn that application. Swift and vehement local opposition to siting the facility within Romulus, or anywhere in Seneca County, was suddenly undermined by the announcement, leaving many to ask why the siting of this facility may be treated differently than other solid waste handling facilities.

The short answer is that the state Legislature has always been able to control the scope and extent of local authority over siting, but has acted on an industry-by-industry basis to preempt or allow local control. To be sure, local restrictions on the way mining is conducted, natural gas and oil are recovered, or landfills and other solid waste facilities are operated are rarely allowed. However, indirect but broad control over the siting of such uses through zoning has been permitted, sometimes expressly and in other instances as a result of judicial interpretation of a statute.

By RONALD G. HULL
Daily Record Columnist

As a result, local authority over siting has been fostered, resulting in a town-by-town patchwork of regulation and an ongoing debate about whether this approach is sustainable or in the public interest. The town-wide prohibitions over oil and gas exploration came to a head in a case involving the Town of Dryden decided by the Court of Appeals in 2014.

While the majority of the Court upheld the authority of the town, two judges dissented, coming to the conclusion that an outright, town-wide prohibition, "creating a blanket ban on an entire industry" went "above and beyond zoning" and instead regulates those industries, which is exclusively within the purview of the state. The majority disagreed, and prevailed, finding that where the Legislature has allowed zoning authority to co-exist with state regulation of an industry, it is permissible to use zoning to altogether prohibit activities that will "alter and adversely affect the deliberately cultivated, small town character" of a community.

However, under the preemption doctrine, local control must yield to "the untrammeled primacy of the Legislature to act with respect to matters of State concern." Consequently, it is the prerogative of the Legislature to dictate whether local governments may act. In 2011, the Legislature did exactly that with respect to the siting of major electric generating facilities.

The preemption of local authority is set forth in a portion of the Public Service Law designated "Article 10." This law authorizes the Public Service Commission to create a Siting Board that decides, through a Certificate of Environmental Compatibility and Public Need, where major electric generating facilities can be built. An electric generating facility qualifies as "major" if it will have the capacity to generate 25 megawatts or more of electricity.

Significantly, Article 10 focuses solely on the output of electricity and does not differentiate based on how the power is generated. Solar, wind, gas, oil, coal or burning solid waste all appear to be subject to the PSC's sole jurisdiction, if the planned output of electricity is at least 25 megawatts. Thus, although burning waste to generate electricity serves a hybrid purpose — combining a means of waste disposal with the generation of power — and one may question which is the dominant purpose, Article 10 appears to avoid any ambiguity or balancing of motives by using intended output of electricity as the sole criteria for preemption.

The siting process under Article 10

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is not an easy one, and the Siting Board must include two ad hoc members (out of a total of seven) who reside within the municipality where the facility is proposed to be located; however, Article 10 is intended to provide a one-stop forum and a unified proceeding which preempts local authority. Section 172 of the Public Service Law expressly provides that no municipality may require an approval, consent, permit, certificate "or other condition" for the construction or operation of a major electric generating facility.

The Legislature could, in its discretion, amend any of the other statutes regulating mining, gas and oil recovery or solid waste management, to provide for clear preemption of local authority, including the power to ban or restrict the location of certain industries through zoning. Except for Article 10, the Legislature has shown no inclination to do so.

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