

# Fracking and Zoning Law in Virginia

by James A. Howard II



**The western portion of the** Commonwealth of Virginia contains portions of the Marcellus/Utica Shale Shield/Appalachian Natural Gas Plug, which contains valuable oil and natural gas deposits.<sup>1</sup> The Marcellus Shale, also referred to as the Marcellus formation, has been described as a middle-Devonian-age black, low density, carbonaceous (organic rich) shale that occurs in the subsurface.<sup>2</sup> The Utica shale is another rock unit thicker than the Marcellus, more geographically extensive and has already shown that it can be of commercial value, and this rock unit with enormous commercial potential is a few thousand feet below the Marcellus.<sup>3</sup>

In other areas of the country, a technology known as fracking has been developed to extract the valuable oil and natural gas from the shale formations. Fracking involves drilling a deep vertical well, then a horizontal well into layers of rock sandwiched in between impermeable layers of shale.<sup>4</sup> Drillers use explosives to pop small perforations in the sides of pipes placed in the

horizontal well, then blast down millions of gallons of water mixed with sand to pulverize the rock and open up fractures, enabling the oil and gas to escape.<sup>5</sup>

There are environmental risks with fracking. Applications for drilling permits have been filed in a number of areas of western Virginia.

This article will address the issue of whether, and to what extent, the Commonwealth of Virginia and/or its cities and counties can control drilling for oil and natural gas and fracking.

## **The Stage is Set—The New York Experience**

On June 30, 2014, the State of New York's highest court held that towns may ban fracking regardless of state law.<sup>6</sup> This decision created much media interest.<sup>7</sup> On appeal, the energy companies argued that the energy policy of New York, as exemplified by the state law, required a uniform approach and could not be subject to regulation by a mélange of the state's 932 towns.

The appellate court held for the towns, noting with approval the following legal principles. The Court noted the legislature had authorized towns to adopt zoning laws for the purpose of fostering the health, safety, morals, and general welfare of the community, and that, as a funda-

mental precept, the legislature had recognized that local regulation of land use is among the most significant powers and duties granted to a town government.

The Court noted, however, that as a political subdivision of the state, a town may not enact ordinances that conflict with the state constitution or any general law, and that under the preemption doctrine, a local law promulgated under a municipality's home rule authority must yield to an inconsistent state law as a consequence of the untrammelled primary power of the legislature to act with respect to matters of state concern.

The Court continued that it did not lightly presume preemption where the preeminent power of a locality to regulate land use is at stake, but, rather, the Court would invalidate a zoning law only where there is a clear expression of legislative intent to preempt local control over land use.

The Court concluded that the towns acted appropriately within their home rule authority in adopting the challenged zoning laws, and the Court added it could find no legislative intent, much less a requisite "clear expression," requiring the preemption of local land use regulations. The Court further cited the rule that a municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.

The question then reduces itself as to whether the same result would obtain under Virginia law. To examine this, Virginia law and the comprehensive plans and zoning ordinances of two affected Virginia counties, Frederick and Rockingham, will be examined.

### Virginia Law

In an attorney general's opinion dated January 11, 2013, it was opined that although a local governing body may adopt a zoning ordinance that places restrictions on the location and siting of oil and gas wells that are reasonable in scope and consistent with the Virginia Gas and Oil Act<sup>8</sup>, a local governing body cannot ban altogether the exploration for, and the drilling of, oil and natural gas within the locality's boundaries.<sup>9</sup> However, it is noteworthy that that opinion did not disclose any consideration of, or discussion concerning, the ruling of the Supreme Court of Virginia in *Resource*

*Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15, 380 S.E.2d 879 (1989). That case involved the issue of whether the governing body of a locality could prohibit by an ordinance the operation of privately owned and operated debris landfills.

The Court concluded that a locality was expressly authorized by VA. CODE ANN. § 15.1-486 to adopt a zoning ordinance to prohibit a specific use of land. The Court further concluded that since the language of VA. CODE ANN. § 15.1-486 was sufficient to allow a local

governing body to prohibit the use of property for landfills altogether, the language was also sufficient, by necessary implication, to permit a local governing body to prohibit the use of property for that purpose by a private person or entity. Whether, in a given case, the enforcement of a prohibition against the private ownership or operation of a landfill would be found unreasonable and discriminating would depend on the circumstances, continued the Court.

In light of the arguable conflict or uncertainty in Virginia law as to whether, as ruled upon by the New York court, localities may ban fracking, a review of the appropriate plans and zoning ordinances is indicated.

### Virginia Statutes

VA. CODE ANN. § 45.1-381 authorizes the governor to execute with other states an interstate compact to conserve oil and gas. Of particular interest is the Virginia Gas and Oil Act, *supra*, Sections 45.1-361.1, et seq. of the Code of Virginia.

VA. CODE ANN. § 45.1-361.5 provides that no county, city, town or other potential subdivision of the commonwealth shall impose any condition, or require other local license, permit, fee, or bond to perform any gas, oil, or geological operations which varies from or is in addition to the requirements of this chapter. The section continues that, however, no provision of this chapter shall be construed to limit or supersede the jurisdiction and requirements of other state agencies, local land-use ordinances, regulation of general programs, or VA. CODE ANN. §§ 58.1-3712, 58.1-3712.1, 58.1-3713, 58.1-3713.3, 58.1-3741, 58.1-3742 and 58.1-3743.

### Frederick County 2030 Comprehensive Plan

The above plan was adopted by the Frederick County Board of Supervisors on July 14, 2011.<sup>10</sup> It is noted that most of Frederick County's land area is rural in character and located west of Interstate 81.<sup>11</sup> The plan continues that the rural areas best exhibit the beauty, view sheds, and tranquility for which the county is known.<sup>12</sup> The primary land uses in the rural areas are agricultural and forestal operations.<sup>13</sup>

### Frederick County Zoning Ordinance

Granted as a permitted use in the RA Rural Areas District is oil and natural gas exploration, provided that the following requirements are met: (1) all requirements of the Code of Virginia, as amended, and all applicable federal, state, and local regulations shall be met; (2) a site plan shall be reviewed and approved meeting all requirements of the Frederick County Code; (3) approval of the site plan and use shall be for ninety days, with subsequent renewals being approved by the board of supervisors.<sup>14</sup>

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Defined as permitted uses in the EM Extractive Manufacturing District are oil and natural gas extraction and/or pumping, including storage of productive produced on the site; no refining is allowed.<sup>15</sup>

### Rockingham County Comprehensive Plan for 2020 and Beyond

This plan was adopted on February 28, 2007.<sup>16</sup> Stated as a vision within Section II of the plan is that in the year 2020 and beyond, Rockingham County will retain the essential historic attributes that make it a great place, including the clean natural environmental resources, the beauty of the farmland and mountains, the harmonious relationship between agricultural and residential land uses, the balanced and vibrant economy, and the diverse yet harmonious society with many different cultures.<sup>17</sup>

### Rockingham County Zoning Ordinance in Effect before October 1, 2014

“Well drilling” is defined in the ordinance as any drilling for the purpose of extracting of any substance except water.<sup>18</sup> § 17-23(m) of the zoning ordinance provides that when, after review of an application and hearing thereon, in accordance with Article VIII, herein the board of supervisors finds as a fact that the proposed use is compatible with surrounding uses, is not detrimental to the character of the adjacent land, is consistent with the intent of this chapter, and is in the public interest, well drilling and related pump station and pipelines may be permitted with a special use permit in Prime Agricultural District A-1.<sup>19</sup> Well drilling and related pumping stations and pipelines is also allowed as a special use in General Agricultural District A-2 (§ 17-27) and Rural Service District RS-7 (§ 17-31).<sup>20</sup>

### Rockingham County Zoning Ordinance in Effect on October 1, 2014

This ordinance was approved by the board of supervisors on April 23, 2014, to go into effect on October 1, 2014.<sup>21</sup>

No definition is given for well-drilling in the new zoning ordinance. Table 17-609, entitled “Land Use and Zoning Table,” as part of Article 6 to Chapter 17, “Zoning,” does not allow as a permitted use, special use, or permitted accessory use in districts A-1 or A-2, or in any zoning district, well-drilling for oil or gas.<sup>22</sup>

### Observations

There appears no reasonable question but that maintaining environmental quality is paramount under the comprehensive plans and zoning ordinances of both counties. Questions of vested right and possible nonconforming use aside, it would appear that the current state of Virginia law, under the *Resource Conservation* case, is such that either county could make fracking unavailable as a use under their zoning ordinances; although it would further appear only Rockingham County has now provided for exclusion of such use. Frederick County, as noted, allows oil and natural gas exploration in the RA district, and oil and natural gas extraction, pumping, and storage in the EM district.

There appears to be no evidence that the Commonwealth of Virginia sought to preempt the local governments’ right to use zoning to prohibit fracking.

### Endnotes:

- 1 See <http://geology.com/articles/marcellus-shale.shtml>.
- 2 Id.
- 3 Id.
- 4 See Forbes, May 5, 2014, at 84, col. 3.
- 5 Id.
- 6 *In the Matter of Mark S. Wallach, as Chapter 7 Trustee for Norse Energy Corp., USA v. Town of Dryden, et al.*, New York Court of Appeals Nos. 130 and 131 (June 30, 2014).
- 7 See, e.g., <http://www.allgov.com/news/controversies/new-york-supreme-court-rules-that-towns-may-ban-fracking-despite-state-law-140702?news=853570>; <http://www.bloomberg.com/news/2014-06-30/n-y-towns-can-ban-fracking-new-york-s-highest-court-rules.html>; <http://online.wsj.com/articles/new-york-towns-and-cities-can-ban-fracking-court-rules>

- 1404145435, the latter article leading that New York State’s highest court struck a blow Monday for home rule and against fracking, deciding that municipalities can use zoning laws to ban the natural gas extraction method that has fueled a U. S. energy boom.
- 8 (Chapter 22.1 of Title 45.1, VA. CODE ANN. §§ 45.1-361.1 through 45.1-361.44 (2002 & Supp. 2012)) and the Commonwealth’s Energy Policy (Chapter 1 of Title 67, VA. CODE ANN. §§ 67-100 through 67-103 (2012))
- 9 2013 Op. Va. Att’y Gen. No. 12-102.
- 10 FREDERICK COUNTY, VA, THE 2030 COMPREHENSIVE PLAN (July 14, 2011).
- 11 (Id., Rural Areas, p. 1).
- 12 Id.
- 13 (Id.)
- 14 FREDERICK COUNTY, VA., ZONING ORDINANCE, art. IV, Part 401, § 165-401.02.
- 15 Id., Part 608, § 165-608.02.
- 16 ROCKINGHAM COUNTY, VA., COMPREHENSIVE PLAN FOR 2020 AND BEYOND (Feb. 28, 2007).
- 17 Id., Section II, p. 2-2.
- 18 ROCKINGHAM COUNTY, VA., ZONING ORDINANCE, (April 23, 2014), § 17-6.
- 19 Id., § 17-23(m).
- 20 Id., §§ 17-27 and 17-31.
- 21 ROCKINGHAM COUNTY, VA., ZONING ORDINANCE, (April 23, 2014).
- 22 Id., art. 6



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