New York State

Court of Appeals

IN THE MATTER OF MARK S. WALLACH, AS CHAPTER 7 TRUSTEE FOR NORSE ENERGY CORP. USA,

Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents.

APL-2013-00245

MOTION BY APPELLANT FOR RENEWAL AND REARGUMENT TO THE NEW YORK STATE COURT OF APPEALS

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August 6, 2014

NEW YORK STATE
COURT OF APPEALS

In the Matter of MARK S. WALLACH,
as Chapter 7 Trustee for Norse Energy Corp. USA,

Appellant,

against

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents.

APL-2013-00245

NOTICE OF MOTION FOR RENEWAL AND REARGUMENT

PLEASE TAKE NOTICE, that upon the attached Affirmation of Thomas S. West, Esq., dated August 5, 2014, together with a copy of the (1) Opinion of the New York State Court of Appeals in this matter, decided June 30, 2014 (the "Opinion"); and (2) other exhibits annexed hereto, the Appellant will move this Court at Motion Term, on the 8th day of September, at 10 a.m., at the New York State Court of Appeals, Court of Appeals Hall, 20 Eagle Street, Albany, New York 11207-1095, for an Order granting the Appellant's motion for renewal and reargument from the Opinion, which affirmed the Opinion and Order of the Appellate Division, Third Department, decided and entered May 2, 2013 (the

"Appellate Decision"), which affirmed the Decision and Order of the Supreme Court, Tompkins County (Rumsey, J.), entered on February 22, 2012, granting summary judgment to Respondents and dismissing the Verified Petition and Complaint, and for such other and further relief as this Court deems just and proper.

Dated: August 6, 2014

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NEW YORK STATE
COURT OF APPEALS

In the Matter of MARK S. WALLACH,
as Chapter 7 Trustee for Norse Energy Corp. USA,

Appellant,

against

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents.

APL-2013-00245

AFFIRMATION OF THOMAS S. WEST, ESQ.
IN SUPPORT OF MOTION BY APPELLANT
FOR RENEWAL AND REARGUMENT

THOMAS S. WEST, ESQ., duly affirms subject to the penalties of perjury pursuant to Rule 2106 of the New York Civil Practice Law and Rules ("CPLR"):

1. I am an attorney duly admitted to practice law in all courts of the State of New York and the founding partner of The West Firm, PLLC, located at 677 Broadway – 8th Floor, Albany, New York.

2. I am the attorney for Appellant, Mark S. Wallach, as Chapter 7 Trustee for Norse Energy Corp. USA (hereinafter, "Norse") and am fully familiar with the facts and circumstances of this case.

3. I make this Affirmation in support of Norse's motion for renewal and reargument from the Opinion of this Court, decided on July 30, 2014, a true and accurate copy of which is annexed hereto and incorporated herewith as Exhibit A. I base this Affirmation upon my personal familiarity with this case, as I have been the lead attorney on this case since its inception and am fully familiar with all of the arguments that have been put forth leading up to the Opinion.

MOTION FOR RENEWAL

4. Pursuant to Rule 2221(e) of the CPLR, Norse seeks renewal based upon a recent district court decision from Colorado which applies persuasive precedent from the Colorado Supreme Court relative to the question of conflict preemption under an Oil and Gas Conservation Act that is very similar to New York's Oil, Gas and Solution Mining Law ("OGSML") and has the very same policy underpinnings of providing for greater ultimate recovery, protecting correlative rights, and preventing waste.

5. Specifically, in *Colorado Oil and Gas Ass'n. v. City of Longmont*, Case # 13CV63 (D. Ct., Boulder County. Colo.) (hereinafter, "*Longmont*"), the district court applied the rationale in both *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992), and *Bd. of County Commr's, La Plata Cty. v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045 (Colo. 1992), in holding that the City of Longmont's ban on hydraulic fracturing and the storage and disposal of resulting waste was

conflict preempted under the state's Oil and Gas Conservation Act. A true and accurate copy of the *Longmont* case is annexed hereto and incorporated herewith as Exhibit B.

6. The Colorado district court stated that the ban was an "ultimate regulation" that had extraterritorial effect and directly conflicted with all of the policy goals of the Colorado statutory scheme: that is, the city's prohibition (1) banned production, while the statute contemplated development and production; (2) "cause[d] waste," rather than prevented waste; and (3) "impair[ed] the correlative rights of owners," rather than protecting those rights. Applying the rationale in *Voss*, the Colorado district court found that "[t]here [was] no way to harmonize Longmont's fracking ban with the stated goals of the Oil and Gas Conservation Act." Exh. B, at 16. Thus, the court found that "the state interest in production, prevention of waste and protection of correlative rights, on the one hand, and Longmont's interest in banning hydraulic fracturing on the other, present[ed] mutually exclusive positions." Exh. B., at 16.

7. Finding the operational conflict to be "obvious and patent on its face," the district court granted summary judgment to petitioners and invalidated the article of the city's municipal charter imposing the ban. Exh. B, at 17.

8. Significantly, Norse relied on *Voss* in arguing before this Court (and the lower courts) that the zoning amendment adopted by the Town of Dryden

("Town") on August 2, 2011, banning all oil and natural gas development (the "Town Prohibition"), is conflict preempted by the OGSML. Attached hereto and incorporated herewith as Exhibits C, D and E, respectively, are the relevant portions of Norse's main briefs before this Court, the Appellate Division, Third Department, and the Supreme Court (Rumsey, J.) discussing conflict preemption, including the *Voss* decision.

9. The rationale and result in *Longmont* provide further support for Norse's position that municipal-wide drilling bans are in direct operational conflict with oil and gas conservation statutes, like the OGSML, that contemplate development and production and seek to provide for greater ultimate recovery, prevent waste and protect the correlative rights of all mineral owners.

10. *Longmont* was decided just recently, on July 24, 2014, and this decision was the impetus for Norse to seek renewal before this Court. In addition, because Norse is seeking renewal based on this decision, and this decision is directly pertinent to the issue of conflict preemption, Norse is also seeking reargument because the question of conflict preemption was squarely before this Court and the Court declined to address that issue. *See infra,* ¶¶ 11-21.

MOTION FOR REARGUMENT

11. Pursuant to 22 N.Y.C.R.R. § 500.24, Norse moves for reargument urging this Court to address and decide the question of whether the Town Prohibition is conflict preempted by the OGSML.

12. The Opinion was decided on June 30, 2014, and mailed to Norse. The *Longmont* case, however, was only very recently decided on July 24, 2014. Given that *Longmont* provided the basis for Norse to seek renewal/reargument, and given the statewide importance of the conflict preemption question and the far-reaching ramifications to New York's energy self-sufficiency and the rights of mineral owners across New York State, Norse respectfully requests that this Court grant Norse's motion for reargument of the conflict preemption question, despite that this request slightly exceeds 30 days from the date of the Opinion. *See* 22 N.Y.C.R.R. § 500.24(b).

13. The question of conflict preemption was expressly: (1) raised in the Verified Petition and Complaint (Record on Appeal ["R."] 67); (2) argued before both lower courts (*see* Exhs. D and E); (3) decided by the Appellate Division, Third Department, in the Appellate Decision (R. 6), and (4) argued before this Court (*see* Exh. C).

14. In its Opinion, this Court did not address the question of conflict preemption, stating, instead in a footnote: "In Frew Run, we found that the

preemption issue was a matter of statutory construction and not a search for implied preemption because the Legislature had included an express supersession clause within the Mined Land Reclamation Law, the relevant statutory scheme (see Frew Run, 71 NY 2d at 130-131)." Exh. A, at 10, n.3.

15. Respectfully, this Court erred by failing to address and decide the conflict preemption issue simply because the OGSML contains an express supersession provision.

16. As Norse argued and as the Appellate Division, Third Department, recognized, both this Court's preemption precedent and federal preemption precedent, demonstrate that an express preemption clause in a statute does not foreclose an implied preemption analysis. R.18 (Appellate Decision, stating "[w]hile the existence of an express preemption clause in a statute supports a reasonable inference that the Legislature did not intend to preempt other matters, it does not, as respondents suggest, entirely foreclose any possibility of implied preemption (*see Freightliner Corp. v. Myrick*, 514 U.S. 280, 287–288, 115 S.Ct. 1483, 131 L.Ed.2d 385 [1995]; *Drattel v. Toyota Motor Corp.*, 92 N.Y.2d 35, 48–49, 677 N.Y.S.2d 17, 699 N.E.2d 376 [1998]; *Matter of Office of Attorney Gen. of State of N.Y.*, 269 A.D.2d 1, 7, 709 N.Y.S.2d 1 [2000]"). *See also* Exh. C, at 58; Exh. D, at 35-36; (all stating the same and providing authority relative to the same). Notably, there was no cross-appeal from that determination.

17. Accordingly, given the statewide importance of this matter and the impact of the Opinion on New York's energy policy and the rights of mineral owners across New York State, Norse respectfully requests that this Court grant Norse's motion for reargument and decide the conflict preemption question.

18. As was pointed out in briefing before this Court, a total ban on oil and gas development within a municipal boundary amounts to a direct conflict with the policies of the OGSML that seek to promote the greater ultimate recovery of the resource, prevent waste of the resource and protect the correlative rights of all mineral owners. As the Colorado courts have repeatedly found interpreting a similar statute with nearly identical purposes, a total ban on oil and gas development is in direct conflict with these statutory policies and must fall based upon conflict preemption principles.

19. As stated by the Colorado Supreme Court in its detailed and comprehensive analysis:

> Oil and gas are found in subterranean pools, the boundaries of which do not conform to any jurisdictional pattern. As a result, certain drilling methods are necessary for the productive recovery of these resources. . . [I]t is often necessary to drill wells in a pattern dictated by the pressure characteristics of the pool, and because each well will only drain a portion of the pool, an irregular drilling pattern will result in less than optimal recovery and a corresponding waste of oil and gas. . . . Moreover, an irregular drilling pattern can impact on the correlative rights of the owners of oil and gas interests in a common source or pool by exaggerating production in one area and

depressing it in another. Because oil and gas production is closely tied to well location, Greeley's total ban on drilling within the city limits could result in uneven and potentially wasteful production of oil and gas from pools which underlie the city but extend beyond the city to land where production is not prohibited by a total drilling ban. Greeley's total ban, in that situation, would conflict with the Oil and Gas Conservation Commission's express authority to divide a pool of oil or gas into drilling units and to limit the production of the pool so as to prevent waste and to protect the correlative rights of owners and producers in the common source or pool to a fair and equitable share of production profits . . . . In our view, the state's interest in the efficient and fair development and production of oil and gas resources in the state, including the location and spacing of individual wells, militates against a home-rule city's total ban on drilling within the city limits . . . .

The extraterritorial effect of the Greeley ordinances also weighs in favor of the state's interest in effective and fair development and production, again based primarily on the pooling nature of oil and gas. Limiting production to only one portion of a pool outside the city limits can result in an increased production cost, with the result that the total drilling operation may be economically unfeasible. Greeley's total drilling ban thus affects the ability of nonresident owners of oil and gas interests in pools that underlie both the city and land outside the city to obtain an equitable share of production profits in contravention of one of the statutory purposes of the Oil and Gas Conservation Act. . . .

We conclude that the state's interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is sufficiently dominant to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits. Because oil and gas pools do not conform to the boundaries of local government, Greeley's total ban on drilling within the city limits substantially impedes the interest of the state in fostering the

> efficient development and production of oil and gas resources in a manner that prevents waste and that furthers the correlative rights of owners and producers in a common pool or source of supply to a just and equitable share of profits.

Voss, 830 P.2d at 1067-68.

20. This Court never mentioned this persuasive analysis from the high court of a sister oil and gas jurisdiction having a statutory scheme analogous to the OGSML and motivated by nearly identical policy objectives.

21. Accordingly, Norse respectfully urges this Court to grant reargument to decide the conflict preemption question.

CONCLUSION

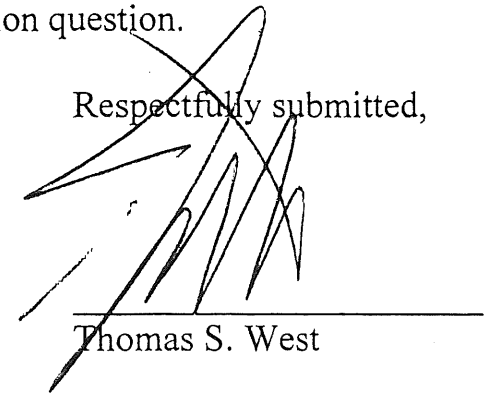
22. Resolving the question of whether drilling bans like the Town Prohibition present operational conflicts with the OGSML and its policies is a matter of vital importance not only to oil and gas lessees like Norse, but also to every landowner in the State of New York. A landowner's oil and gas estate is a valuable cognizable property interest; and this interest is obliterated – both territorially and extraterritorially – by drilling bans, like the Town Prohibition. *See* Exh. B, at 14-16; *Voss*, 830 P.2d at 1067. This Court's Opinion, which sanctions this result based on express preemption and fails to address in any meaningful manner the conflict preemption arguments that were before this Court, may lead to takings claims against municipalities that enact broad-based bans on all drilling and

development. *See* http://online.wsj.com/news/article_email/merrill-matthews-anti-fracking-laws-vs-property-rights-1406848564-lMyQjAxMTA0MDAwNDEwNDQyWj.

23. Given the far-reaching effects of this Court's Opinion, Norse respectfully urges this Court to grant renewal and reargument, and address and decide the outstanding conflict preemption question.

Dated: August 6, 2014

Respectfully submitted,



Thomas S. West

EXHIBIT A

State of New York
Court of Appeals

Andrew W. Klein
Chief Clerk and
Legal Counsel to the Court

Clerk's Office
20 Eagle Street
Albany, New York 12207-1095

Decided June 30, 2014

No. 130

In the Matter of Mark S. Wallach, as Chapter 7 Trustee for Norse Energy Corp. USA,
Appellant,
v.
Town of Dryden et al.,
Respondents.

Order affirmed, with costs.
Opinion by Judge Graffeo.
Chief Judge Lippman and Judges Read, Rivera and Abdus-Salaam concur.
Judge Pigott dissents in an opinion in which Judge Smith concurs.

State of New York

Court of Appeals

Remittitur

HON. JONATHAN LIPPMAN, *Chief Judge, presiding.*

No. 130
In the Matter of Mark S. Wallach,
as Chapter 7 Trustee for Norse
Energy Corp. USA,
Appellant,
v.
Town of Dryden et al.,
Respondents.

Appellant in the above entitled appeal appeared by The West Firm, PLLC; respondents appeared by EARTHJUSTICE; and the amici curiae appeared by Knauf Shaw, LLP; Cynthia Feathers, Esq.; Lally & Misir, LLP; Sidley Austin, LLP; Whiteman Osterman & Hanna, LLP; Office of the Manhattan Borough President; Hodgson Russ, LLP; Columbia Environmental Law Clinic; Tooher & Barone, LLP; David Slottje, Esq., Joran Lesser, Esq., New York State Assembly; Levene Gouldin & Thompson, LLP; Katherine Sinding, Esq., the Natural Resources Defense Council.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Read, Rivera and Abdus-Salaam concur. Judge Pigott dissents in an opinion in which Judge Smith concurs.

The Court further orders that this record of the proceedings in this Court be remitted to Supreme Court, Tompkins County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Andrew W. Klein, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 30, 2014

State of New York
Court of Appeals

No. 130
In the Matter of Mark S. Wallach, as Chapter 7 Trustee for Norse Energy Corp. USA,
Appellant,
v.
Town of Dryden et al.,
Respondents.

No. 131
Cooperstown Holstein Corporation,
Appellant,
v.
Town of Middlefield,
Respondent.

OPINION

Case No. 130:
Thomas S. West, for appellant.
Deborah Goldberg, for respondents.
Town of Ulysses et al.; Office of the Manhattan Borough President et al.; New York Farm Bureau; Washington Legal Foundation; Independent Oil and Gas Association of New York, Inc.; American Petroleum Institute et al.; Joint Landowners Coalition of New York, Inc.; Vicki Been et al.; Brewery Ommegang Ltd. et al.; Dryden Resources Awareness Coalition; Community Environmental Defense Council, Inc.; Barbara Lifton; American Planning Association et al., amici curiae.

Case No. 131:
Scott R. Kurkoski, for appellant.
John J. Henry, for respondent.
Town of Ulysses et al.; New York Farm Bureau; Independent Oil and Gas Association of New York, Inc.; American Petroleum Institute et al.; Brewery Ommegang, Ltd. et al.; Joint Landowners Coalition of New York, Inc. et al.; American Planning Association et al., amici curiae.

GRAFFEO, J.:

We are asked in these two appeals whether towns may ban oil and gas production activities, including hydrofracking, within municipal boundaries through the adoption of local zoning laws. We conclude that they may because the supersession clause

in the statewide Oil, Gas and Solution Mining Law (OGSML) does not preempt the home rule authority vested in municipalities to regulate land use. The orders of the Appellate Division should therefore be affirmed.

I.

Matter of Wallach v Town of Dryden

Respondent Town of Dryden is a rural community located in Tompkins County, New York. Land use in Dryden is governed by a comprehensive plan and zoning ordinance. The underlying goal of the comprehensive plan is to "[p]reserve the rural and small town character of the Town of Dryden, and the quality of life its residents enjoy, as the town continues to grow in the coming decades." Despite the fact that oil and gas drilling has not historically been associated with Dryden, its location within the Marcellus Shale region has piqued the interest of the natural gas industry.

The Marcellus Shale formation covers a vast area across sections of a number of states, including New York, Pennsylvania, Ohio and West Virginia. Natural gas -- primarily methane -- is found in shale deposits buried thousands of feet below the surface and can be extracted through the combined use of horizontal drilling and hydrofracking. To access the natural gas, a well is drilled vertically to a location just above the target depth, at which point the well becomes a horizontal tunnel in order to maximize the number of pathways through which the gas

may be removed. The process of hydraulic fracturing -- commonly referred to as hydrofracking -- can then commence. Hydrofracking involves the injection of large amounts of pressurized fluids (water and chemicals) to stimulate or fracture the shale formations, causing the release of the natural gas (see generally U.S. Dept. of Energy, Natural Gas from Shale: Questions and Answers [Apr. 2013], available at http://www.energy.gov/sites/prod/files/2013/04/f0/complete_brochure.pdf [accessed June 18, 2014]).[1]

In 2006, petitioner Norse Energy Corp. USA (Norse), through its predecessors, began acquiring oil and gas leases from landowners in Dryden for the purpose of exploring and developing natural gas resources.[2] The Town Board took the position that gas extraction activities were prohibited in Dryden because such operations fell within the catch-all provision of its zoning ordinance that precluded any uses not specifically allowed. Nevertheless, the Town Board decided to engage in a "clarification" of the issue. After holding a public hearing and

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[1] There remains an ongoing public debate about the potential environmental and safety risks associated with shale gas production. Currently, there is a statewide moratorium on "high-volume hydraulic fracturing combined with horizontal drilling" pending further study of the associated environmental impacts (9 NYCRR 7.41 [Executive Order No. 41]; see also 9 NYCRR 8.2 [Executive Order No. 2]).

[2] Norse has since initiated bankruptcy proceedings and Mark S. Wallach, as bankruptcy trustee, has been substituted as the petitioner. For ease of reference, petitioner in this case will continue to be referred to as Norse.

reviewing a number of relevant scientific studies, the Town Board unanimously voted to amend the zoning ordinance in August 2011 to specify that all oil and gas exploration, extraction and storage activities were not permitted in Dryden. The amendment also purported to invalidate any oil and gas permit issued by a state or federal agency. In adopting the amendment, the Town Board declared that the industrial use of land in the "rural environment of Dryden" for natural gas purposes "would endanger the health, safety and general welfare of the community through the deposit of toxins into the air, soil, water, environment, and in the bodies of residents."

A month later, Norse commenced this hybrid CPLR article 78 proceeding and declaratory judgment action to challenge the validity of the zoning amendment. Norse asserted that Dryden lacked the authority to prohibit natural gas exploration and extraction activities because section 23-0303 (2) of the Environmental Conservation Law (ECL) -- the supersession clause in the Oil, Gas and Solution Mining Law (OGSML) -- demonstrated that the State Legislature intended to preempt local zoning laws that curtailed energy production. In response, Dryden moved for summary judgment, seeking a declaration that the zoning amendment was a valid exercise of its home rule powers.

Supreme Court granted Dryden's motion and declared the amendment valid with one exception -- it struck down the provision invalidating state and federal permits. The Appellate

Division affirmed, rejecting Norse's claim that the OGSML preempted Dryden's zoning amendment (108 AD3d 25 [3d Dept 2013]). We granted Norse leave to appeal (21 NY3d 863 [2013]).

Cooperstown Holstein Corporation v Town of Middlefield

Respondent Town of Middlefield, which includes a portion of the Village of Cooperstown, is located in Otsego County, New York, and its principal industries are agriculture and tourism. Its land use is regulated by a master plan and zoning ordinance. Similar to Dryden, there has been no oil or gas presence in Middlefield until 2007, when plaintiff Cooperstown Holstein Corporation (CHC) executed two leases with a landowner to explore the possibility of developing natural gas resources through hydrofracking.

Although the Town claimed that its zoning ordinance already prohibited natural gas exploration on the basis that it was not listed as a permissible land use, it undertook a lengthy and detailed review of the issue in 2011. After commissioning a study to weigh the impacts that hydrofracking would have on Middlefield and conducting public meetings, the Town Board, by a unanimous vote, amended its master plan to adopt a zoning provision classifying a range of heavy industrial uses, including oil, gas and solution mining and drilling, as prohibited uses. The Town Board reasoned that the "Cooperstown area is known worldwide for its clean air, clean water, farms, forests, hills, trout streams, scenic viewsheds, historic sites, quaint village

and hamlets, rural lifestyle, recreational activities, sense of history, and history of landscape conservation," and concluded that industrialization, such as hydrofracking, would "eliminate many of these features" and "irreversibly overwhelm the rural character of the Town."

CHC promptly brought this action to set aside the zoning law, contending that it was preempted by the supersession provision in the OGSML. CHC and Middlefield each moved for summary judgment. Supreme Court denied CHC's motion and granted Middlefield's cross-motion to dismiss the complaint, upholding the legality of the zoning law (35 Misc 3d 767 [Sup Ct, Otsego County 2012]). The Appellate Division affirmed (106 AD3d 1170 [3d Dept 2013]), and we granted CHC leave to appeal (21 NY3d 863 [2013]).

II.

On appeal, Norse and CHC, supported by several amici curiae, press their contention that Dryden and Middlefield (collectively, the Towns) lacked the authority to proscribe hydrofracking and associated natural gas activities within their town boundaries. They assert that the energy policy of New York, as exemplified by the statewide OGSML, requires a uniform approach and cannot be subject to regulation by a melange of the State's 932 towns. They maintain that the OGSML contains a supersession clause that expressly preempts all local zoning laws, like those enacted by the Towns, which restrict or forbid

oil and gas operations on real property within a municipality. The Towns, joined by other amici curiae, respond that the courts below correctly concluded that they acted within their home rule authority in adopting the challenged local laws. They urge that the ability of localities to restrict the industrial use of land with the aims of preserving the characteristics of their communities and protecting the health, safety and general welfare of their citizens implicates the very essence of municipal governance. They further contend that, when analyzed under the principles set forth in our precedent, the OGSML and its supersession clause do not extinguish their zoning powers. Unlike our dissenting colleagues, we believe that the Towns have the better argument.

Our analysis begins with a review of the source of municipal authority to regulate land use and the limits the State may impose on this power. Article IX, the "home rule" provision of the New York Constitution, states that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law" (NY Const, art IX, § 2 [c] [ii]). To implement this constitutional mandate, the State Legislature enacted the Municipal Home Rule Law, which empowers local governments to pass laws both for the "protection and enhancement of [their] physical and visual environment" (Municipal Home Rule

Law § 10 [1] [ii] [a] [11]) and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein" (Municipal Home Rule Law § 10 [1] [ii] [a] [12]). The Legislature likewise authorized towns to enact zoning laws for the purpose of fostering "the health, safety, morals, or the general welfare of the community" (Town Law § 261; see also Statute of Local Governments § 10 [6] [granting towns "the power to adopt, amend and repeal zoning regulations"]). As a fundamental precept, the Legislature has recognized that the local regulation of land use is "[a]mong the most significant powers and duties granted . . . to a town government" (Town Law § 272-a [1] [b]).

We, too, have designated the regulation of land use through the adoption of zoning ordinances as one of the core powers of local governance (see DJL Rest. Corp. v City of New York, 96 NY2d 91, 96 [2001]). Without question, municipalities may "enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of [the community]" (Trustees of Union Coll. in Town of Schenectady in State of N.Y. v Members of Schenectady City Council, 91 NY2d 161, 165 [1997] [internal quotation marks and citation omitted]). And we have repeatedly highlighted the breadth of a municipality's zoning powers to "provide for the development of a balanced, cohesive community" in consideration of "regional needs and requirements" (Matter of Gernatt Asphalt

Prods. v Town of Sardinia, 87 NY2d 668, 683 [1996]; see also Udell v Haas, 21 NY2d 463, 469 [1968] ["Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence."]).

That being said, as a political subdivision of the State, a town may not enact ordinances that conflict with the State Constitution or any general law (see Municipal Home Rule Law § 10 [1] [i], [ii]). 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 untrammeled primacy of the Legislature to act with respect to matters of State concern" (Albany Area Bldrs. Assn. v Town of Guilderland, 74 NY2d 372, 377 [1989] [internal quotation marks, ellipses and citation omitted]). But we do not lightly presume preemption where the preeminent power of a locality to regulate land use is at stake. Rather, we will invalidate a zoning law only where there is a "clear expression of legislative intent to preempt local control over land use" (Gernatt, 87 NY2d at 682).

Aware of these principles, Norse and CHC do not dispute that, absent a state legislative directive to the contrary, municipalities would ordinarily possess the home rule authority to restrict the use of land for oil and gas activities in furtherance of local interests. They claim, however, that the State Legislature has clearly expressed its intent to preempt zoning laws of local governments through the OGSML's

"supersession clause," which reads:

> "The provisions of this article [i.e., the OGSML] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law" (ECL 23-0303 [2] [emphasis added]).

According to Norse and CHC, this provision should be interpreted broadly to reach zoning laws that restrict, or as presented here, prohibit oil and gas activities, including hydrofracking, within municipal boundaries.

We do not examine the preemptive sweep of this supersession clause on a blank slate. The scope of section 23-0303 (2) must be construed in light of our decision in Matter of Frew Run Gravel Prods. v Town of Carroll (71 NY2d 126 [1987]), which articulated the analytical framework to determine whether a supersession clause expressly preempts a local zoning law. There, we held that this question may be answered by considering three factors: (1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history. The goal of this three-part inquiry, as with any statutory interpretation analysis, is to discern the Legislature's intent.[3] Before applying the tripartite test to

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[3] In Frew Run, we found that the preemption issue was a matter of statutory construction and not a search for implied preemption because the Legislature had included an express supersession clause within the Mined Land Reclamation Law, the relevant statutory scheme (see Frew Run, 71 NY2d at 130-131).

the supersession clause at issue, it is necessary to discuss Frew Run in more detail as that precedent bears directly on the outcome of these cases.

At issue in Frew Run was the validity of the Town of Carroll's zoning ordinance establishing a zoning district where sand and gravel operations were not permitted. A company seeking to open a sand and gravel mine in the town challenged the zoning law, arguing that it was preempted by the supersession clause in the statewide Mined Land Reclamation Law (MLRL), which, at the time, provided:

> "For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein" (ECL 23-2703 [former (2)] [emphasis added]).

We rejected the mining company's contention that the clause preempted the land use restriction, explaining that the plain language of the phrase "local laws relating to the extractive mining industry" did not encompass zoning provisions. Instead, we held that the zoning law "relates not to the extractive mining industry but to an entirely different subject matter and purpose . . . the use of land in the Town of Carroll" (Frew Run, 71 NY2d at 131 [internal quotation marks and citation omitted]). Drawing a distinction between local regulations addressing "the actual operation and process of mining" and

zoning laws regulating land use generally, we concluded that only the former category was preempted by the MLRL's supersession clause (id. at 133). In effect, local laws that purported to regulate the "how" of mining activities and operations were preempted whereas those limiting "where" mining could take place were not (see id. at 131).

We further determined that our plain language construction of the supersession clause in Frew Run was consistent with the MLRL as a whole and its legislative history -- the second and third factors. We noted that the binary purposes of the MLRL were "to foster a healthy, growing mining industry" and to "aid in assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition" (id. at 132 [internal quotation marks and citation omitted]), and that the legislative history reflected a goal of promoting the "mining industry by the adoption of standard and uniform restrictions and regulations to replace the existing patchwork system of local ordinances" (id. [internal quotation marks, brackets and citation omitted]). From the statutory scheme and legislative history, we discerned that the "sole purpose" of the supersession clause was to prevent localities from enacting ordinances "dealing with the actual operation and process of mining" because such laws would "frustrate the statutory purpose of encouraging mining through standardization of regulations pertaining to mining operations" (id. at 133). In

contrast, zoning laws restricting the location of mining operations within a town fell outside the preemptive orbit of the clause because "nothing in the Mined Land Reclamation Law or its history . . . suggests that its reach was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands" (id.).

Guided by these principles, we now apply Frew Run's three-part inquiry to the OGSML's supersession clause.

(1) Plain Language

The first factor in assessing whether a supersession provision preempts local control over land use requires us to examine the words of the clause itself. And because the text of a statutory provision "is the clearest indicator of legislative intent" (Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 [2006]), this factor is most important.

The operative text of the OGSML's supersession clause is quite close to the provision we analyzed in Frew Run, preempting local laws "relating to the regulation of the oil, gas and solution mining industries" (ECL 23-0303 [2]; compare ECL 23-2703 [former (2)] [preempting local laws "relating to the extractive mining industry"]). Based on the similarities between the two state statutes, we decline the invitation of Norse and CHC to ascribe a broader meaning to the language used in the OGSML. To the contrary, the distinction we drew in Frew Run applies with equal force here, such that ECL 23-0303 (2) is most

naturally read as preempting only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries. Plainly, the zoning laws in these cases are directed at regulating land use generally and do not attempt to govern the details, procedures or operations of the oil and gas industries. Although the zoning laws will undeniably have an impact on oil and gas enterprises, as in Frew Run, "this incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the [oil, gas and solution mining industries] which the Legislature could have envisioned as being within the prohibition of the statute" (Frew Run, 71 NY2d at 131).

Nevertheless, Norse and CHC, relying on the secondary clause in the OGSML's supersession provision -- preserving "local government jurisdiction over local roads or the rights of local governments under the real property tax law" (ECL 23-0303 [2]) -- contend that the operative text cannot be limited to local laws that purport to regulate the actual operations of oil and gas companies. They submit that the secondary clause's exemption of local jurisdiction over roads and taxes makes sense only if the preemptive span of the operative text is broader than we have allowed because roads and taxes are not associated with "operations." Consequently, they argue that there would have

been no need for the Legislature to exclude them from the operative language if supersession was limited to local laws aimed at oil and gas operations.

We find this textual argument misplaced because local regulation of roads and taxes can fairly be characterized as touching on the operations of the oil and gas industries and would have been preempted absent the secondary savings clause. The State Legislature's decision to preserve "local government jurisdiction over local roads" was appropriate given the heavy truck and equipment traffic typically associated with oil and gas production, including water and wastewater hauling. Local laws dictating the number of daily truck trips or the weight and length of vehicles bear directly on industry operations and would otherwise be preempted absent the secondary clause. Similarly, the preservation of "the rights of local governments under the real property tax law" must be read in conjunction with section 594 of the Real Property Tax Law, which allows municipalities to impose taxes on oil and gas businesses. Because these special taxes are based on the level of production, they can be viewed as affecting the operations of the oil and gas industry, such that it was reasonable for the Legislature to carve out an exception from the preemptive scope of the operative text. We are therefore unpersuaded by the claim of Norse and CHC that the plain language of ECL 23-0303 (2) as a whole supports preemption

of the Towns' zoning laws.[4]

Indeed, it is instructive to compare the OGSML's supersession clause to other statutes that clearly preempt home rule zoning powers. Unlike ECL 23-0303 (2), such provisions often explicitly include zoning in the preemptive language employed by the Legislature (see e.g. ECL 27-1107 [prohibiting municipalities from requiring "any approval, consent, permit, certificate or other condition including conformity with local

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[4] Norse and CHC also assert that we should not follow Frew Run because of a difference between the language used in the supersession clause in that case and the OGSML's supersession provision. They point out that the savings portion of the MLRL clause discussed in Frew Run explicitly preserved the ability of municipalities to enact "local zoning ordinances" (ECL 23-2703 [former (2)]) and contend that, had the Legislature intended to reserve local zoning powers in the OGSML's supersession clause, it would have similarly included those powers in the secondary exemption language. But Norse's and CHC's position does not withstand closer scrutiny. The savings clause in Frew Run did not broadly protect all local zoning laws; rather, it reserved only "local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found [in the MLRL]" (ECL 23-2703 [former (2)] [emphasis added]). In Frew Run, we explained that although the preemptive reach of the operative text precluded any local law purporting to regulate the operations of *mining* activities, the limited carve-out allowed municipalities to adopt more stringent requirements for distinct *reclamation* operations, a result that was "consistent with the statute's over-all aim of protecting the environment" (Frew Run, 71 NY2d at 133). Contrary to the suggestion of Norse and CHC, we did not uphold the town's zoning restriction in Frew Run based on the secondary savings clause -- it did not fall within that provision because it was not aimed at reclamation projects. Rather, we held more generally that the preemptive text simply did not encompass the zoning law in the first place. So too with the operative portion of the OGSML's supersession provision.

zoning or land use laws and ordinances" for the siting of hazardous waste facilities]; Mental Hygiene Law § 41.34 [f] ["A community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances."]; Racing, Pari-Mutuel Wagering and Breeding Law § 1366 ["Notwithstanding any inconsistent provision of law, gaming authorized at a location pursuant to this article shall be deemed an approved activity for such location under the relevant city, county, town, or village land use or zoning ordinances, rules, or regulations."]).

Further, the legislative schemes of which these preemption clauses are a part typically include other statutory safeguards that take into account local considerations that otherwise would have been protected by traditional municipal zoning powers (see e.g. ECL 27-1103 [2] [g] [requiring the Department of Conservation to consider the "impact on the municipality where the facility is to be sited in terms of health, safety, cost and consistency with local planning, zoning or land use laws and ordinances"]; Mental Hygiene Law § 41.34 [c] [allowing municipalities a means of objecting to the placement of community residential facilities]; Racing, Pari-Mutuel Wagering and Breeding Law § 1320 [2] [mandating the consideration of local impacts and community support in the siting of gaming facilities]). Norse and CHC are unable to point to any comparable measures in the OGSML that account for the salient

local interests in the context of drilling and hydrofracking activities.

In sum, the plain language of ECL 23-0303 (2) does not support preemption with respect to the Towns' zoning laws.

(2) Statutory Scheme

The second factor relevant to discerning whether a supersession clause preempts local zoning powers involves an assessment of the clause's role in the statutory framework as a whole. We therefore turn to the OGSML -- article 23 of the Environmental Conservation Law.

The stated purposes of the OGSML are fourfold: (i) "to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste"; (ii) "to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had"; (iii) to protect the "correlative rights of all owners and the rights of all persons including landowners and the general public"; and (iv) to regulate "the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells" (ECL 23-0301).

In furtherance of these goals, the OGSML sets forth a detailed regime under which the New York State Department of Environmental Conservation is entrusted to regulate oil, gas and solution mining activities and to promulgate and enforce

appropriate rules. In particular, the Department is empowered to "[r]equire the drilling, casing, operation, plugging and replugging of wells and reclamation of surrounding land in accordance with the rules and regulations of the department" (ECL 23-0305 [8] [d]); enter and plug or replug abandoned wells when the owner has violated Department regulations (ECL 23-0305 [8] [e]); compel operators to furnish the Department with a bond to ensure compliance (ECL 23-0305 [8] [k]); order the immediate suspension of drilling operations that are in violation of Department regulations (ECL 23-0305 [8] [g]); require operators to file well logs and samples with the Department (ECL 23-0305 [8] [i]); grant well permits for oil and gas drilling (ECL 23-0501); issue orders governing the appropriate spacing between oil and gas wells to promote efficient drilling and prevent waste (ECL 23-0503); oversee the integration of oil and gas fields to prevent waste (ECL 23-0701, 23-0901); execute leases on behalf of the State for oil and gas exploration and production (ECL 23-1101); and issue permits for underground storage reservoirs (ECL 23-1301).

Based on these provisions, it is readily apparent that the OGSML is concerned with the Department's regulation and authority regarding the safety, technical and operational aspects of oil and gas activities across the State. The supersession clause in ECL 23-0303 (2) fits comfortably within this legislative framework since it invalidates local laws that would

intrude on the Department's regulatory oversight of the industry's operations, thereby ensuring uniform exploratory and extraction processes related to oil and gas production. Similar to the scope of the MLRL in Frew Run, we perceive nothing in the various provisions of the OGSML indicating that the supersession clause was meant to be broader than required to preempt conflicting local laws directed at the technical operations of the industry.

And contrary to the position advanced by Norse and CHC, we see no inconsistency between the preservation of local zoning authority and the OGSML's policies of preventing "waste" and promoting a "greater ultimate recovery of oil and gas" (ECL 23-0301), or the statute's spacing provisions for wells (see ECL 23-0501, 23-0503). Waste is used as a term of art in the OGSML meaning, among other things, the "inefficient, excessive or improper use of, or the unnecessary dissipation of reservoir energy" and the "locating, spacing, drilling, equipping, operating, or producing of any oil or gas well or wells in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable" (ECL 23-0101 [20] [b], [c]). The OGSML's overriding concern with preventing waste is limited to inefficient or improper drilling activities that result in the unnecessary waste of natural resources. Nothing in the statute points to the conclusion that a municipality's decision not to permit drilling equates to waste. The OGSML's

related goal of ensuring a "greater ultimate recovery" and its well-spacing provisions -- designed to limit the number of wells that may be drilled into an underground pool of oil or gas -- are likewise directly related to the concept of waste prevention and do not compel a different result. As the Appellate Division below aptly observed in the Dryden case:

> "the well-spacing provisions of the OGSML concern technical, operational aspects of drilling and are separate and distinct from a municipality's zoning authority, such that the two do not conflict, but rather, may harmoniously coexist; the zoning law will dictate in which, if any, districts drilling may occur, while the OGSML instructs operators as to the proper spacing of the units within those districts in order to prevent waste" (108 AD3d at 37).

Consequently, our interpretation of the OGSML's supersession clause is consistent with the overarching statutory structure.[5]

(3) Legislative History

The third and final factor for review in deciding whether the supersession clause preempts local zoning powers

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[5] Norse and CHC also claim that the OGSML's policy of protecting correlative rights (see ECL 23-0301) militates in favor of a broader reading of the supersession clause. But the concept of correlative rights -- under which "each landowner is entitled to be compensated for the production of the oil or gas located in the pool beneath his or her property regardless of the location of the well that effects its removal" -- is not synonymous with the right to drill (Matter of Western Land Servs., Inc. v Department of Envtl. Conservation of State of N.Y., 26 AD3d 15, 17 [3d Dept 2005]). Moreover, our reading of the supersession clause is in accord with ECL 23-0301's stated purpose of ensuring the rights of the "general public."

requires that we examine the OGSML's legislative history.

The roots of the OGSML extend back to the Interstate Compact to Conserve Oil and Gas, a multi-state agreement created in 1935 and sanctioned by Congress to address the national problem of overproduction of oil and gas pools and the resulting waste caused by unchecked, unspaced and inefficient drilling. In 1941, New York joined the Interstate Compact, whose sole purpose was "to conserve oil and gas by the prevention of physical waste thereof from any cause" (ECL 23-2101 [codification of the Interstate Compact]). More than 20 years later, in conjunction with New York's participation in the Interstate Compact, the State Legislature enacted a comprehensive statutory framework for promoting the conservation of oil and gas resources -- the forerunner to the OGSML -- in section 70 et seq. of the former Conservation Law (L 1963, ch 959). As originally enacted, the statute's stated policy was, in part, "to foster, encourage and promote the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste" (former Conservation Law § 70).[6]

In 1978, the State Legislature amended the OGSML to

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[6] In 1972, the relevant portions of the Conservation Law were replaced with the Environmental Conservation Law, and section 70 et seq. of the Conservation Law was recodified at section 23-0101 et seq. of the Environmental Conservation Law (L 1972, ch 664, § 2). A year later, the statutory regime was denominated the OGSML by the Legislature (L 1973, ch 922, § 2; see also ECL 23-0102).

modify its policy by replacing the phrase "to foster, encourage and promote the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste" with "to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste" (ECL 23-0301, as amended by L 1978, ch 396, § 1 [emphasis added]). The legislation also transferred the task of encouraging and promoting the prudent development of New York's energy resources to the Energy Law (see Energy Law § 3-101, as amended by L 1978, ch 396, § 2) for the purpose of establishing "the Energy Office as the State agency primarily responsible for promoting the development of energy resources" and removing "such promotional responsibilities from the Department of Environmental Conservation which would, however, retain regulatory responsibilities over such resources" (Governor's Program Bill Mem, Bill Jacket, L 1978, ch 396).

Subsequently, the supersession clause at issue was adopted by the State Legislature in 1981 in conjunction with amendments to various statutes such as the Finance Law, the ECL and the Real Property Tax Law (L 1981, ch 846). The 1981 amendments also imposed new drilling fees (see ECL 23-1903, as added by L 1981, ch 846, § 14), created monetary sanctions for violations of the OGSML (see ECL 71-1307, as added by L 1981, ch 846, § 17), and set up an oil and gas fund. The legislative

history reflects that, prior to the amendments, the Department of Environmental Conservation had been unable "to effectively regulate and service the industry" because recent growth in drilling had exceeded the Department's capabilities (Sponsor's Mem, Bill Jacket, L 1981, ch 846). Explaining that the Department was finding it difficult to fulfill its "regulatory responsibilities" under its existing funding and powers, Governor Hugh Carey confirmed that the amendments were needed to provide the Department with the monies required to implement its "updated regulatory programs" as well as "additional enforcement powers necessary to enable it to provide for the efficient, equitable and environmentally safe development of the State's oil and gas resources" (Governor's Approval Mem, Bill Jacket, L 1981, ch 846). The legislative history, however, sheds no additional light on the supersession clause, referencing it only once with no elaboration (see Budget Report on Bills, Bill Jacket, L 1981, ch 846 ["The existing and amended oil and gas law would supersede all local laws or ordinances regulating the oil, gas, and solution mining industries."]).

Nothing in the legislative history undermines our view that the supersession clause does not interfere with local zoning laws regulating the permissible and prohibited uses of municipal land. Indeed, the pertinent passages make no mention of zoning at all, much less evince an intent to take away local land use powers. Rather, the history of the OGSML and its predecessor

makes clear that the State Legislature's primary concern was with preventing wasteful oil and gas practices and ensuring that the Department had the means to regulate the technical operations of the industry.

In sum, application of the three Frew Run factors -- the plain language, statutory scheme and legislative history -- to these appeals leads us to conclude that the Towns appropriately acted within their home rule authority in adopting the challenged zoning laws. We can find no legislative intent, much less a requisite "clear expression," requiring the preemption of local land use regulations.

III.

As a fallback position, Norse and CHC suggest that, even if the OGSML's supersession clause does not preempt all local zoning laws, it should be interpreted as preempting zoning ordinances, like the two here, that completely prohibit hydrofracking. In their view, supported by the dissent, it may be valid to restrict oil and gas operations from certain residential areas of a town -- much like the zoning law in Frew Run -- but an outright ban goes too far and cannot be seen as anything but a local law that regulates the oil and gas industry, thereby running afoul of the supersession clause. But this contention is foreclosed by Matter of Gernatt Asphalt Prods. v Town of Sardinia (87 NY2d 668 [1996]), our decision following Frew Run.

In Gernatt -- decided after the Legislature had codified Frew Run's holding in an amendment to the MLRL's supersession clause -- the Town of Sardinia amended its zoning ordinance to eliminate all mining as a permitted use throughout the town. A mining company challenged the zoning law under the MLRL's supersession clause and, in an argument mirroring the one advanced by Norse and CHC, asserted that Frew Run left "municipalities with the limited authority to determine in which zoning districts mining may be conducted but not the authority to prohibit mining in all zoning districts" (Gernatt, 87 NY2d at 681 [emphasis in original]). We squarely rejected this cramped reading of Frew Run, reiterating that "zoning ordinances are not the type of regulatory provision the Legislature foresaw as preempted by the Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities" (id. at 681-682 [emphasis omitted]). We held that nothing in Frew Run or the MLRL obligated a town that "contains extractable minerals . . . to permit them to be mined somewhere within the municipality" (id. at 683). Put differently, in a passage that has particular resonance here, we explained:

> "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" (id. at 684).

Manifestly, Dryden and Middlefield engaged in a reasonable exercise of their zoning authority as contemplated in Gernatt when they adopted local laws clarifying that oil and gas extraction and production were not permissible uses in any zoning districts. The 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. And contrary to the dissent's posture, there is no meaningful distinction between the zoning ordinance we upheld in Gernatt, which "eliminate[d] mining as a permitted use" in Sardinia (id. at 683), and the zoning laws here classifying oil and gas drilling as prohibited land uses in Dryden and Middlefield. Hence, Norse's and CHC's position that the town-wide nature of the hydrofracking bans rendered them unlawful is without merit, as are their remaining contentions.

IV.

At the heart of these cases lies the relationship between the State and its local government subdivisions, and their respective exercise of legislative power. These appeals are not about whether hydrofracking is beneficial or detrimental to the economy, environment or energy needs of New York, and we pass no judgment on its merits. These are major policy questions for the coordinate branches of government to resolve. The discrete issue before us, and the only one we resolve today, is

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. There is no dispute that the State Legislature has this right if it chooses to exercise it. But in light of ECL 23-0303 (2)'s plain language, its place within the OGSML's framework and the legislative background, we cannot say that the supersession clause -- added long before the current debate over high-volume hydrofracking and horizontal drilling ignited -- evinces a clear expression of preemptive intent. The zoning laws of Dryden and Middlefield are therefore valid.

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Accordingly, in each case, the order of the Appellate Division should be affirmed, with costs.

Matter of Wallach, etc. v Town of Dryden, et al.
Cooperstown Holstein Corporation v Town of Middlefield

No. 130 & 131 - EFP - June 24, 2014 - DOWN

PIGOTT, J. (dissenting):

Environmental Conservation Law § 23-0303 (2) states that "[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law" (emphasis supplied). Municipalities may without a doubt regulate land use through enactment of zoning laws, but, in my view, the particular zoning ordinances in these cases relate to the regulation of the oil, gas and solution mining industries and therefore encroach upon the Department of Environmental Conservation's regulatory authority. For this reason, I respectfully dissent.

The zoning ordinances of Dryden and Middlefield do more that just regulate land use, they regulate oil, gas and solution mining industries under the pretext of zoning (see Zoning Ordinance of the Town of Dryden § 2104 [1] [Prohibited Uses: (1) Prohibition against the Exploration for or Extraction of Natural Gas and/or Petroleum] and Zoning Ordinance of the Town of Middlefield, Article II [B] [7] and Article V [a] ["Prohibited Uses: Heavy industry and all oil, gas or solution mining and

drilling are prohibited uses"]).

In Matter of Frew Run Gravel Prods. v Town of Carroll (71 NY2d 126 [1987]) -- a case involving a supersession clause contained in the Mined Land Reclamation Law ("MLRL") (see former ECL 23-2703 [2])[1] -- we made clear that there is a distinction between zoning ordinances that regulate land use and local ordinances that regulate the mining industry. The former, which involve the division of the municipality into zones and the establishment of permitted uses within those zones, relate not to the extractive mining industry, but rather, to the regulation of land use generally (see Frew Run, 71 NY2d at 131).

The ordinances here, however, do more than just "regulate land use generally" (id.), they purport to regulate the oil, gas and solution mining activities within the respective towns, creating a blanket ban on an entire industry without specifying the zones where such uses are prohibited. In light of the language of the zoning ordinances at issue -- which go into great detail concerning the prohibitions against the storage of gas, petroleum exploration and production materials and equipment in the respective towns -- it is evident that they go above and beyond zoning and, instead, regulate those industries, which is

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[1] This statute provided that the MLRL "shall supersede all state and local laws relating to the extractive mining industry, provided, however, that nothing in this title shall be construed to prevent any local government from enacting local ordinances or other local laws which impose stricter mined land reclamation standards or requirements that those found herein."

exclusively within the purview of the Department of Environmental Conservation. In this fashion, prohibition of certain activities is, in effect, regulation.

Unlike the situation in Matter of Gernatt Asphalt Prods. v Town of Sardinia (87 NY2d 668 [1996]) -- which involved a zoning ordinance that eliminated mining as a permitted use in all districts -- the ordinances in these appeals do more than just delineate prohibited uses. Where zoning ordinances encroach upon the DEC's regulatory authority and extend beyond the municipality's power to regulate land use generally, the ordinances have run afoul of ECL § 23-0303 (2).

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For Each Case: Order affirmed, with costs. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Read, Rivera and Abdus-Salaam concur. Judge Pigott dissents in an opinion in which Judge Smith concurs.

Decided June 30, 2014

EXHIBIT B

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80306 (303) 441-3771	
COLORADO OIL AND GAS ASSOCIATION, and COLORADO OIL AND GAS CONSERVATION COMMISSION, **PLAINTIFFS,** **TOP OPERATING CO.,** **PLAINTIFF-INTERVENOR** **v.** **CITY OF LONGMONT, COLORADO,** **DEFENDANT, and** **THE SIERRA CLUB, EARTHWORKS, OUR HEALTH, OUR FUTURE, OUR LONGMONT, and FOOD AND WATER WATCH,** **DEFENDANT-INTERVENORS**	DATE FILED: July 24, 2014
	Case Number: 13CV63 Division 3 Courtroom G

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' Motions for Summary Judgment and the responsive pleadings thereto. The Plaintiffs in this case are the Colorado Oil and Gas Association (COGA), an association of oil and gas operators, the Colorado Oil and Gas Conservation Commission (COGCC or the Commission), a statewide agency created by the Colorado Oil and Gas Conservation Act (the Act) to regulate oil and gas activity in the state, and TOP Operating Company (TOP), an oil and gas operating company with principal holdings in or adjoining the City of Longmont. The Defendants are the City of Longmont, and Defendant-Intervenors, the Sierra Club, Earthworks, Our Health, Our Future, Our Longmont, and Food and Water Watch. The Defendant-Intervenors are groups of citizens who have an interest in environmental matters.

Oral arguments on the motions for summary judgment were heard on July 9, 2014, and the Court took the matters under advisement at that time. Now, after carefully considering the pleadings, the exhibits, the arguments of counsel, and the applicable law, the Court hereby enters the following Ruling and Order:

I. BACKGROUND

Hydraulic fracturing, commonly known as fracking, is a well completion process. After a well is drilled, large quantities of water, along with some sand and chemicals, are injected down the well bore under pressure to create cracks, or fractures, in the formation. This process liberates oil and natural gas in the rock and allows it to flow up the well bore for capture and use to meet energy needs. Hydraulic fracturing makes it possible to get oil and gas out of rocks that were not previously considered a source for fossil fuel. Hydraulic fracturing is "now standard for virtually all oil and gas wells in our state and across much of the country."[1]

In December 2011, the Commission adopted rules regarding operator disclosure and reporting of chemicals used in hydraulic fracturing. It defined hydraulic fracturing as "all stages of the treatment of a well by the application of hydraulic fracturing fluid under pressure that is expressly designed to initiate or propagate fractures in a target geologic formation to enhance production of oil and natural gas." Commission Rule 100. As part of its rule-making, the Commission authored a statement of basis and purpose which states, "Most of the hydrocarbon bearing formations in Colorado would not produce economic quantities of hydrocarbons without hydraulic fracturing." Order lR-114 -Final Hydraulic Fracturing Disclosure Rule, p. 9 of 16.

Hydraulic fracturing has been used in Colorado since the 1970's. Instead of a single, vertically-drilled well common in the 1990's, well pads today have many wells drilled horizontally into different formations. Also, the well locations are moving closer to populated areas.

Many people in Colorado question the health, safety and environmental impacts of fracking. They consider the operations industrial in nature and incompatible with the residential character of neighborhoods. Many people believe that fracking in their communities causes significant health risks as a result of contamination and pollution and the presence of the wells causes property values to decline. In November 2012, the voters of Longmont passed an amendment to the city charter that bans fracking and the storage and disposal of fracking waste within the City of Longmont. That measure is now Article XVI of the Longmont Municipal Charter. Longmont maintains Article XVI is a valid exercise of its home rule police and land use authority.

II. STANDARD OF REVIEW

The purpose of summary judgment is to expedite litigation, avoid needless trials and assure speedy resolution of matters. *Crawford Rehabilitation Services Inc. v. Weissman*, 938 P.2d 540, 550 (Colo. 1997). However, summary judgment is a drastic remedy that may only be granted when the moving party demonstrates to the court that he is entitled to judgment as a matter of law. *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997).

The initial burden of establishing the nonexistence of a genuine issue of material fact rests on the moving party. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712

[1] "Information on Hydraulic Fracturing," an information sheet produced by the Colorado Oil and Gas Conservation Commission, COGA Mot. For Summ. J. Ex. 2.

(Colo. 1987). Once satisfied, the initial burden of production on the moving party shifts to the nonmoving party, but the ultimate burden of persuasion always remains on the moving party. *Id.* If the moving party meets the initial burden, then the non-moving party must show "a triable issue of fact" exists. *Greenwood Trust Co.*, 938 P.2d at 1149. The opposing party may, but is not required to, submit opposing affidavits. *Bauer v. Southwest Denver Mental Health Ctr., Inc.*, 701 P.2d 114, 117 (Colo. App. 1985).

Any doubt as to the existence of a triable question of fact must be resolved in favor of the non-moving party. *Greenwood Trust Co.*, 938 P.2d at 1149. Summary judgment is to be granted only if there is a complete absence of any genuine issue of fact, and a litigant should not be denied a trial if there is the slightest doubt as to the facts. *Pioneer Sav. & Trust, F.A. v. Ben-Shoshan*, 826 P.2d 421, 425 (Colo. App. 1992).

III. APPLICABLE LAW[2]

On June 8, 1992, the Colorado Supreme Court issued two important oil and gas opinions, *Cty. Comm'rs of La Plata Cty v. Bowen/Edwards Assoc. Inc.*, 830 P.2d 1045 (Colo. 1992) and *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992).

BOWEN/EDWARDS

In *Bowen/Edwards,* owners of oil and gas interests challenged regulations enacted by La Plata County, a statutory entity. The regulations stated purpose was:

> to promote the health, safety, morals, convenience, order, prosperity or general welfare of the present and future residents of La Plata County. It is the County's intent by enacting these regulations to facilitate the development of oil and gas resources within the unincorporated area of La Plata County while mitigating potential land use conflicts between such development and existing, as well as planned, land uses.

Bowen/Edwards, 830 P.2d at 1050.

The county regulations required oil and gas operators to comply with an application process before drilling wells. *Id.* The applications were subject to approval by various levels of county government. *Id.* The *Bowen/Edwards* plaintiffs claimed the Colorado Oil and Gas Conservation Act conferred exclusive authority on the Colorado Oil and Gas Conservation Commission to regulate oil and gas activity throughout the state, thereby preempting the county regulations. *Id.* at 1051.

The Court of Appeals found the Colorado Oil and Gas Conservation Act completely preempted local land use regulation of oil and gas activity. *Id.* at 1055. The Supreme Court reversed. *Id.* at 1048.

The Supreme Court noted, "The purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government." *Id.* at 1055. "There are three basic ways by which a state statute can preempt a county

[2] The Court does not find support in Colorado law for (1) the City's argument that Plaintiffs must prove Article XVI is invalid beyond a reasonable doubt, and (2) the Sierra Club's claim based on the public trust doctrine,

ordinance or regulation: first, the express language of the statute may indicate state preemption of all local authority over the subject matter. . . second, preemption may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest . . . and, third, a local law may be partially preempted where its operational effect would conflict with the application of the state statute." *Id.* at 1056-57.

The Court recognized the Commission's authority.

> By law, the Commission has the authority to "promulgate rules and regulations to protect the health, safety and welfare of the general public in the drilling, completion and operation of oil and gas wells and production facilities." Section 34-60-106(11), C.R.S. (1989 Cum. Supp.) The statute further provides that the grant to the Commission of any specific power shall not be construed to be in derogation of any of the general powers granted by the Act. Section 34-60-106(4) C.R.S. (1984 Repl. Vol. 14).

Id. at 1052.

However, the Supreme Court found the Oil and Gas Conservation Act does not expressly preempt any and all aspects of a county's land use authority in areas where there are oil and gas activities. *Id.* at 1058. Instead, the Court found the Act created "A unitary source of regulatory authority at the state level of government over the technical aspects of oil and gas development and production serves to prevent waste and to protect the correlative rights of common-source owners and producers to a fair share of production profits." *Id.*

Considering whether the second form of preemption, implied preemption, exists, the Court stated, "There is no question that the efficient and equitable development and production of oil and gas resources within the state requires uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions and environmental restoration." *Id.* at 1058.[3] However, the Court found, "The state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes." *Id.*

Examining the third form of preemption, the Supreme Court stated, "State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest." *Id.* at 1059. Based on the record before it, the court was unable to determine whether an operational conflict existed between the county regulations and the Colorado Oil and Gas Conservation Act, and remanded the case for the trial court to make that determination "on an ad-hoc basis under a fully developed evidentiary record." *Id.* at 1060. However, the Court also stated:

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[3] This quote is followed by the statement, "Oil and gas production is closely tied to well location, with the result that the need for uniform regulation extends also to the location and spacing of wells." *Bowen/Edwards*, 830 P.2d at 1058. That statement reflects 1992 drilling practices. With today's technology, which makes horizontal drilling possible, well location and spacing are no longer as important as they were in 1992.

> We hasten to add that there may be instances where the county's regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations on land restoration requirements contrary to those required by state law or regulation. To the extent such operational conflicts might exist, the county regulations must yield to the state interest.

Id.

VOSS

Voss v. Lundvall Bros., Inc. involved Greeley, a home rule city. *Voss,* 830 P.2d at 1062. Greeley enacted a land use ordinance that completely banned drilling in its city limits. *Id.* The ordinance was petitioned onto the November 1985 ballot and approved by the electorate at a regular municipal election. *Id.* at 1063. The Supreme Court reviewed the purposes of the Colorado Oil and Gas Conservation Act and the authority of the Commission and concluded, "There is no question that the Oil and Gas Conservation Act evidences a significant interest on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources. . .". *Id.* at 1065-66. The Court also acknowledged the "interest of a home-rule city in land use control within its territorial limits." *Id.* at 1066.

> It is a well-established principle of Colorado preemption doctrine that in a matter of a purely local concern an ordinance of a home-rule city supersedes a conflicting state statute, while in a matter of purely statewide concern a state statute or regulation supersedes a conflicting ordinance of a home-rule city. Our case law, however, has recognized that municipal legislation is not always a matter of exclusive local or statewide concern but, rather, is often a matter of concern to both levels of government.

Id. (internal citations omitted).

In determining whether the state regulatory scheme preempts local ordinances, courts consider four factors: (1) whether there is a need for statewide uniformity of regulation; (2) whether the municipal regulation has an extraterritorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation. *Id.* at 1067 (internal citations omitted).

The Court found the first factor, the need for statewide uniformity, weighed heavily in favor of state preemption. *Id.* The boundaries of the subterranean pools containing oil and gas "do not conform to any jurisdictional pattern." *Id.* The Court found extraterritorial impact also weighed in favor of the state interest. *Id.* Limiting production to only the portion of the pool that does not underlie the city can increase production costs and may make the operation economically unfeasible. *Id.* at 1067-68. The Court determined that regulation of oil and gas development has "traditionally been a matter of state rather than

local control." *Id.* at 1068. Finally, the Court observed, "the Colorado Constitution neither commits the development and production of oil and gas resources to state regulation nor relegates land-use control exclusively to local governments." *Id.*

The Colorado Supreme Court determined that the Greeley ordinance was preempted by state law. The Court stated:

> Because oil and gas pools do not conform to the boundaries of local government, Greeley's total ban on drilling within the city limits substantially impedes the interest of the state in fostering the efficient development and production of oil and gas resources in a manner that prevents waste and that furthers the correlative rights of owners and producers in a common pool or source of supply to a just and equitable share of profits. In so holding, we do not mean to imply that Greeley is prohibited from exercising any land-use authority over those areas of the city in which oil and gas activities are occurring or are contemplated.

Id.

The Court made it clear that it was *not* saying there could be no land use control over areas where there are oil and gas operations; "if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect." *Id.* at 1069. The Court stated it resolved the case based on the "*total ban*" created by the Greeley ordinance. *Id.* (emphasis in the original).

APPLICATION OF *BOWEN/EDWARDS* AND *VOSS* BY THE COURT OF APPEALS

The Colorado Court of Appeals has applied the preemption analysis described above to determine whether local oil and gas regulations are preempted by state law.

In *Town of Frederick v North American Resources Company*, 60 P.3d 758, 760 (Colo. App. 2002), a town ordinance prohibited oil and gas drilling unless the operator first obtained a special permit. To obtain such a permit, the application had to conform to requirements in the ordinance. *Id.* The "requirements included specific provisions for well location and setbacks, noise mitigation, visual impacts and aesthetics regulation, and the like." *Id.* Defendant NARCO obtained a drilling permit from the Colorado Oil and Gas Conservation Commission and drilled a well without applying to the town for the special use permit. *Id.* The town filed suit to enjoin NARCO from operating the well and NARCO counterclaimed for declaratory judgment that the ordinance was unenforceable as preempted by state law. *Id.*

In an order on summary judgment, the trial court found some provisions of the ordinance were invalid because they were in operational conflict with specific rules promulgated by the Colorado Oil and Gas Conservation Commission. *Id.* at 764. However, it also found that some provisions were valid; for example provisions requiring permits for above-ground structures and provisions regarding access roads and emergency response costs were found to be valid. *Id.* The Court of Appeals held that the trial court did not err when it invalidated certain provisions of the Town's ordinance and upheld others. *Id.* at 766.

The Court of Appeals cited *Bowen/Edwards* for the proposition that, "State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest. Under such circumstances, local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest." *Id.* at 761, *Bowen/Edwards*, 830 P.2d at 1059. It also cited *Voss* as follows:

> If a home-rule city, instead of imposing a total ban on all drilling within the city, enacts land-use regulations applicable to various aspects of oil and gas development and operations within the city, and if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect.

Town of Frederick, 60 P.3d at 762, *Voss*, 830 P.2d at 1068-69.

The court cited this *Bowen/Edwards'* language:

> the efficient and equitable development and production of oil and gas resources within the state *requires uniform regulation of the technical aspects of drilling,* pumping, plugging, waste prevention, safety precautions, and environmental restoration. Oil and gas production is closely tied to well location, with the result that the *need for uniform regulation extends also to the location and spacing of wells.*

Town of Frederick, 60 P.3d at 763, *Bowen/Edwards*, 830 P.2d at 1058 (emphasis added by the Court of Appeals) to infer the following:

> The *Bowen/Edwards* court did not say that the state's interest 'requires uniform regulation of drilling' and similar activities. Rather, according to the court, it 'requires uniform regulation of *the technical aspects* of drilling' and similar activities. The phrase 'technical aspects' suggests that there are "nontechnical aspects" that may yet be subject to local regulation

Town of Frederick, 60 P.3d at 763.

The Court of Appeals agreed with the trial court that certain provisions of the ordinance were not enforceable.

> The operational conflicts test announced in *Bowen/Edwards* and *Voss* controls here. Under that test, the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts and requires that the local regulations yield to the state interest.

Id. at 765.

The court concluded, "Thus, although the Town's process may delay drilling, the ordinance does not allow the Town to prevent it entirely or to impose arbitrary conditions that would materially impede or destroy the state's interest in oil and gas development." *Id.* at 766.

Similarly, in *Cty. Comm'rs of Gunnison Cty v. BDS International, LLC,* 159 P.3d 773, 777 (Colo. App. 2006), the trial court issued an order on summary judgment in which it found numerous, but not all, county oil and gas regulations invalid as preempted by state law. The Court of Appeals affirmed the invalidation of county regulations concerning fines, financial guarantees, and access to records because they operationally conflict with state statutes or regulations. *Id.* at 785. It reversed and remanded the remaining county regulations invalidated by the trial court "so that the finder of fact may determine whether those County Regulations that do not, on their face, operationally conflict with state law nonetheless are in operational conflict with state law in the circumstances presented here." *Id.*

In an unpublished opinion, *Town of Milliken v. Kerr-Magee Oil and Gas Onshore LP,* 2013WL1908965, the Court of Appeals found that C.R.S. § 34-60-106(15), part of the Oil and Gas Conservation Act, prohibited the town from imposing fees for safety and security inspections on active oil and gas wells. *Id.* *1. That statute prohibits local governments from imposing inspection fees on oil and gas companies "with regard to matters that are subject to rule, regulation, order, or permit condition administered by the commission" except for "reasonable and nondiscriminatory fee[s] for inspection and monitoring for road damage and compliance with local fire codes, land use permit conditions, and local building codes." *Id.* at *3. The town did not claim its inspections were within the exception in the statute. *Id.* Instead, it claimed its inspections were different from those conducted by the Commission. *Id.* The court stated, "it is irrelevant whether the Commission actually conducts inspections like those performed by the Town's police department. The relevant inquiry is whether the Town's inspections concern 'matters that are subject to rule, regulation, order, or permit condition administered by the commission.'" *Id.*

CASES INVOLVING REGULATIONS THAT PROHIBIT WHAT THE STATE PERMITS

COLORADO MINING ASSOCIATION V. SUMMIT COUNTY

The Colorado Supreme Court discussed preemption again in *Colorado Mining Association v. Cty. Comm'rs of Summit Cty.,* 199 P.3d 718 (Colo. 2009). Summit County invoked its statutory land use authority to adopt an ordinance that banned the use of toxic or acidic chemicals, such as cyanide, in all mineral processing in the county. *Id.* at 721. "The effect of this ordinance is to prohibit a certain type of mining technique customarily used in the mineral industry to extract precious metals, such as gold." *Id.*

The Court noted that the General Assembly decided to allow the Mined Land Reclamation Board ("the Board") to authorize the use of toxic or acidic chemicals, "under the terms of an Environmental Protection Plan designed for each operation sufficient to protect human health, property, and the environment." *Id.* The Court found "Summit County's ordinance would entirely displace the Board's authority to authorize the use of such mining techniques." *Id.* The Court concluded, "Summit County's existing

ordinance is not a proper exercise of its land use authority because it excludes what the General Assembly has authorized. Due to the sufficiently dominant state interest in the use of chemicals for mineral processing, we hold that the MLRA [Mined Land Reclamation Act] impliedly preempts Summit County's ban on the use of toxic or acidic chemicals, such as cyanide, in all Summit County zoning districts." *Id.*

The Court observed, "a patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources." *Id.* at 731.

WEBB V. BLACK HAWK

Last year, the Colorado Supreme Court addressed preemption in the case of *Webb v. City of Black Hawk*, 295 P.3d 480 (Colo. 2013). Black Hawk, a home-rule city, adopted an ordinance that banned bicycling from outside the city into the city; it banned bicycling through the city. *Id.* at 482. C.R.S. § 42-4-109(11) permits local governments to ban bicycles on roads if there is an alternate route, such as a bike path. There were no alternate routes for bicycles in Black Hawk.

The Court applied the four factor test described in *Voss* and concluded that "the regulation of bicycle traffic on municipal streets is of mixed state and local concern. . ." *Id.* at 492. "[W]e next look to determine whether Black Hawk's ordinance conflicts with state law. The test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* at 492. The Court found that Black Hawk's ordinance conflicts with and is preempted by state statute, specifically C.R.S. § 42-4-109(11). *Id.*

"Black Hawk does not have authority, in a matter of mixed state and local concern, to negate a specific provision the General Assembly has enacted in the interest of uniformity. A staple of our home-rule jurisprudence articulates that a municipality is free to adopt regulations conflicting with state law only when the matter is of purely local concern." *Id.* at 493.

IV. ANALYSIS

THE COLORADO OIL AND GAS CONSERVATION COMMISSION REGULATES HYDRAULIC FRACTURING

Longmont argues at length that the Commission does not regulate hydraulic fracturing. The Court is not persuaded. The Commission regulates the oil and gas industry and hydraulic fracturing is a common practice in that industry. Plaintiffs described the state's comprehensive regulatory scheme in their Motions. The Court will not repeat that description here, but suffice it to say that the Court finds there is a comprehensive regulatory structure in place in Colorado to regulate the oil and gas industry.

Longmont complains that the Commission does not issue permits to frack, it does not tell operators whether to frack a well, it does not tell operators how often to frack a well, it does not tell operators how much fracking fluid to use in a well, etc. Instead, these decisions are left to the operators and the professionals who advise them. The Court does not see a problem with this arrangement. The purpose of the agency is to provide oversight of the industry, not to micromanage it.

The Court finds the Commission regulates hydraulic fracturing.[4]

IMPLIED PREEMPTION

As noted above, the *Bowen/Edwards* Court described three ways a state statute can preempt local government regulations: (1) express preemption where the statutory language indicates state preemption of all local authority over the subject matter, (2) implied preemption, where a state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest, and (3) operational conflict preemption.

Plaintiffs urge the Court to find that the state has a dominant interest in the regulation of the technical aspects of oil and gas activity to support an implied preemption analysis.

Plaintiffs maintain that implied preemption applies in this case because hydraulic fracturing involves a technical aspect of oil and gas production, which is a matter of state concern. *Bowen/Edwards* suggests technical conditions are matters of state, not local, interest. The *Bowen/Edwards* court found the Oil and Gas Conservation Act created, "A unitary source of regulatory authority at the state level of government over the **technical** aspects of oil and gas development and production serves to prevent waste and protect the correlative rights of common-source owners and producers to a fair share of production profits." *Bowen/Edwards* , 830 P.2d 1058 (emphasis added). The *Bowen/Edwards* court provided an example of how an operational conflict might occur: "For example, the operational effect of the county regulations might be to impose **technical** conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent such operational conflicts might exist, the county regulations must yield to the state interest." *Id.* at 1060 (emphasis added).

". . . a statute will preempt a regulation where the effectuation of a local interest would materially impede or destroy the state interest. *Bowen/Edwards, supra.* Therefore, a county may not impose **technical** conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed by state law or regulation." *BDS,* 159 P.3d at 779 (emphasis added).

"[T]he local imposition of **technical** conditions on well drilling where no such conditions are imposed under state regulations . . . gives rise to operational conflicts and requires that the local regulations yield to the state interest." *Town of Frederick*, 60 P.3d at 765 (emphasis added).

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[4] Commission rules specific to hydraulic fracturing include: Rule 205A which requires operators to disclose, maintain, and make available a chemical inventory of products used in hydraulic fracturing. The Commission can require testing for water pollution, per Rule 207. Rule 305(c) requires fracking information in Oil and Gas Location Assessment Notices. Rule 305 E requires operators to give landowners notice of hydraulic fracturing operations. Rule 316C requires operators to give the Commission advance notice of fracking operations. Operators are also required to file Completed Interval Reports, which contain details about the hydraulic fracturing operations. Rule 317j requires operators to test well casing in advance to ensure they can withstand the pressures that will be applied during fracking.

There is no definition of "technical" in the Colorado Oil and Gas Conservation Act or in case law. In this context, one could interpret the word "technical" as referring to a matter within the purview of a petroleum engineer, as opposed to other matters that are regulated on oil and gas drilling sites (such as roads or above-ground structures). Hydraulic fracturing is clearly within the purview of a petroleum engineer; it might be a "technical" aspect of oil and gas production that is not subject to local control under the case law. Numerous Commission Rules apply to technical aspects of the hydraulic fracturing process.[5]

Implied preemption can also occur where there is a significant, dominant state interest. "There is no question that the Oil and Gas Conservation Act evidences a **significant interest** on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources. . ." *Voss,* 830 P.2d at 1065-66 (emphasis added).

Rejecting implied preemption, the *Bowen/Edwards* court stated, "The state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes." *Bowen/Edwards,* 830 P.2d at 1058. That statement comments on the state interest in oil and gas activity, generally. No appellate court has determined whether the state interest in hydraulic fracturing, a widely used completion method which generates a great deal of revenue in this state, is sufficiently dominant to give rise to an implied preemption analysis.

This Court is not going to go so far as finding that implied preemption applies in this case, though it recognizes the possibility that implied preemption may apply. Instead, the Court will take the traditional approach of conducting an operational conflict analysis.

OPERATIONAL CONFLICT PREEMPTION

THE FOUR FACTORS

"The purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government." *Bowen/Edwards*, 830 P.2d. at 1055. Courts consider four factors in preemption analysis: (1) whether there is a need for statewide uniformity of regulation; (2) whether the municipal regulation has an extraterritorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation. *Voss,* 830 P2d at 1067.

The first factor, the need for statewide uniformity, weighs in favor of preemption. Just as in *Voss*, the oil and gas reserves that exist today still do not conform to local governmental boundaries. Patchwork regulation can result in uneven production and waste.

The second factor also weighs in favor of preemption because Longmont's ban on hydraulic fracturing has extraterritorial impact. Synergy Resources Corporation (Synergy), an oil and gas producer, drilled a well from a well pad outside the City of

[5] For example, Rule 341 requires operators to monitor pressures during the process.

Longmont. The well bore went under acreage that was both in the City of Longmont and outside the city limits. Because of the fracking ban, Synergy fracked only the portions of the well that did not underlie Longmont. As a result, the Synergy well produced less oil and gas than it would have produced had the entire well been fracked. The oil and gas located under the Longmont acreage remained in the ground because hydraulic fracturing was not used to extract it. The people who would have benefitted from that greater production, the oil and gas company operators and royalty owners, were impacted. If they were not Longmont residents, this would constitute an extraterritorial impact.

The Longmont situation, like the Greeley situation in *Voss,* limits production to only a portion of the reserve.

This extraterritorial impact was described in the affidavit of Synergy's President and CEO, Edward Holloway.

> [T]he inability to hydraulically fracture the portion of the wellbore that passes beneath Longmont's borders causes that acreage to contribute proportionately fewer hydrocarbons than the acreage outside of Longmont. Because proceeds from the well are distributed ratably by acreage, Longmont's ban would cause mineral owners in Longmont acreage to receive a higher percentage of the proceeds than their acreage actually contributes to the production, and simultaneously causes mineral owners outside of Longmont to receive a lesser percentage of the proceeds than their acreage actually contributes to the wells' production. In other words, it impairs the correlative rights of mineral owners outside of Longmont.

COGA Mot. For Summ. J., Ex 7.

The third factor favors preemption because oil and gas activity has traditionally been governed by the Commission, a statewide agency.

The fourth factor does not apply because the Colorado Constitution does not address whether oil and gas activity should be regulated by state or local government.

STATE AND LOCAL INTEREST

The threshold consideration in this case, as it was in *Voss*, is whether Longmont's total ban of hydraulic fracturing and ban on storage and disposal of hydraulic fracturing waste within the City derives from a purely local concern. "It is a well-established principle of Colorado preemption doctrine that in a matter of a purely local concern an ordinance of a home-rule city supersedes a conflicting state statute, while in a matter of purely statewide concern a state statute or regulation supersedes a conflicting ordinance of a home-rule city. *Voss,* 830 P.2d at 1066. Case law recognizes "that municipal legislation is not always a matter of exclusive local or statewide concern but, rather, is often a matter of concern to both levels of government." *Id.*

"In matters of mixed local and state concern, a home-rule municipal ordinance may coexist with a state statute as long as there is no conflict between the ordinance and the

statute, but in the event of a conflict, the state statute supersedes the conflicting provision of the ordinance." *Id.*

The State has an "interest in the efficient development and production of oil and gas resources in a manner calculated to prevent waste, as well as in protecting the correlative rights of owners and producers in a common pool or source to a just and equitable share of the profits of production . . ." *Id.* at 1062. The State's interest in oil and gas production is manifested in the Oil and Gas Conservation Act. *Id.* at 1064

In order to develop a record of local interest, Longmont produced affidavits of various citizens who have concerns about hydraulic fracturing. "In constitutional terms, the local interest outweighs the state interest." Longmont's Resp. at 6. Rod Brueske believes "weak enforcement of regulations. . . will endanger his family and his respiratory health." Shane Davis suffered "major impacts" to his health when he lived near fracking operations in Weld County. Jean Ditslear is aware that fracking "can cause endocrine diseases and cancer." Kaye Fissinger described the following damages that will result from fracking: "water contamination and chemical spills; chemicals and carcinogens emitted into the air in the City; her immune system and overall health will be at risk; and her property values will decrease. Bruce Baizel, Director of Oil and Gas Accountability Project, a program of Intervenor Earthworks, supervised the preparation of a report that indicates more than 60% of the wells in Colorado are not inspected and the number of spills has "significantly increased." Nanner Fisher, a realtor, believes fracking "negatively affects the value of a home."

The Intervenors submitted an affidavit of a person with knowledge who attests to the serious health, safety, and environmental risks associated with hydraulic fracturing. In addition, the Defendants submitted several articles and other exhibits that support their position that hydraulic fracturing causes serious health, safety, and environmental risks.[6]

The Court is not in a position to agree or disagree with any of these exhibits that support the Defendants' position that hydraulic fracturing causes serious health, safety, and environmental risks .

The Court recognizes that some of the case law described above may have been developed at a time when public policy strongly favored the development of mineral resources. Longmont and the environmental groups, the Defendant-Intervenors, are essentially asking this Court to establish a public policy that favors protection from health, safety, and environmental risks over the development of mineral resources. Whether public policy *should* be changed in that manner is a question for the legislature or a different court.

While the Court appreciates the Longmont citizens' sincerely-held beliefs about risks to their health and safety, the Court does not find this is sufficient to completely devalue the State's interest, thereby making the matter one of purely local interest.

Instead, the Court finds this matter of mixed local and state interest.

[6] The Court will not describe the information in this Order. However, the Court read all the exhibits and the Court observes that there is a significant amount of work being done in this area.

OPERATIONAL CONFLICT ANALYSIS

The Commission argues that Longmont's complete ban of hydraulic fracturing negates the Commission's authority to regulate and permit the "shooting and chemical treatment of wells," as authorized by the Colorado Oil and Gas Conservation Act (the Act). C.R.S. § 34-60-106(2). Hydraulic fracturing involves chemical treatments of wells. The Commission Rules[7] authorize and regulate the storage and disposal of exploration and production waste. *See* Comm'n 900 Series Rules. Longmont's Article XVI bans the storage and disposal of fracking waste within the City of Longmont. The Commission, COGA and TOP cite numerous Commission Rules that they characterize as "in conflict" with Longmont's ban. They are in conflict because the rules contemplate development and production of oil and gas resources; Article XVI's ban on hydraulic fracturing has halted development and production of oil and gas resources in Longmont.

Longmont does not contest the Commission's authority to regulate hydraulic fracturing and the storage and disposal of waste produced in the hydraulic fracturing process. Longmont does not contest the fact that the Commission is charged with fostering production "in a manner consistent with protection of public health, safety and welfare, including protection of the environment and wildlife resources."[8] Instead, Longmont complains that the Commission is not doing its job to Longmont's satisfaction.

> Article XVI does not interfere with the State's interest, which is to foster production while protecting human health and the environment. § 34-60-102(1)(a), C.R.S. (2013). Instead, the State is currently failing to comply with this statutory mandate, because it is failing to regulate fracking or to protect human health and the environment from fracking.

Longmont's Resp. at 5.

The State's interest is codified in the legislative declaration in the Oil and Gas Conservation Act: The General Assembly declared that it is in the public interest to: (I) Foster the responsible, balanced development, production, and utilization of natural resources of oil and gas in the state of Colorado . . . (II) Protect against waste[9] . . . (III) Safeguard, protect and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas . . . C.R.S. § 34-60-102(1)(a)(I), (II), and (III). Further "it is the intent and purpose of this article to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste . . ." C.R.S. § 34-60-102(1)(b). Many cases reiterate these State interests in production of oil and gas resources, prevention of waste, and protection of correlative rights.

The operational conflict in this case is obvious. The Commission permits hydraulic fracturing and Longmont prohibits it. The Commission permits storage and disposal of

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[7] The Court rejects the City's argument that only a statute can preempt a local ordinance. The *Voss* Court stated, "a state statute *or regulation* supersedes a conflicting ordinance. . ." *Voss*, 830 P2d at 779 (emphasis added).

[8] C.R.S. § 34-60-102(1)(a)(I)

[9] Waste is defined in the Colorado Oil and Gas Conservation Act as ". . . operating. . . any oil and gas well or wells in a manner which causes or tends to cause reduction in quantity of oil and gas ultimately recoverable from a pool. . . C.R.S. § 34-60-103(13).

hydraulic fracturing waste and Longmont prohibits it.[10] While Plaintiffs no longer take the position that a ban on fracking is a de facto ban on drilling, various affidavits filed in this case attest to the almost exclusive use of hydraulic fracturing as a well completion process in the Wattenburg Field, the formation underlying Longmont. *See, e.g.*, Affidavit of John Seidle, a petroleum consultant, Ex . 3 to COGCC's Mot. for Sum. J. ("Operators have been fracture stimulating Wattenburg wells for over thirty years and, in my experience, hydraulic fracturing is currently the only completion technology utilized in the Wattenburg field . . ."); Affidavit of Murray Herring, Vice President of TOP Operating Company, Ex. B to TOP's Mot. For Summ. J. ("In accordance with standard industry practice in the Wattenburg Field, TOP plans to use hydraulic fracturing as to the targeted formation(s) in all wells . . . To my knowledge, every economic well in the Wattenburg Field drilled in the last twenty years has been hydraulically fractured.")

"State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest." *Bowen/Edwards*, 830 P.2d at 1059. Here, giving effect to the local interest, banning fracking, has virtually destroyed the state interest in production. The fracking ban has ended production in Longmont. TOP, the primary operator in Longmont and owner of mineral leases in Longmont "will not and cannot economically drill and complete these wells without the ability to conduct hydraulic fracturing operations, which it is currently unable to do in view of Longmont's fracking ban." TOP's Mot. For Summ. J., Ex. B.

Just as the drilling ban in *Voss* substantially impeded "the interest of the state in fostering the efficient development and production of oil and gas resources in a manner that prevents waste" and protects the correlative rights of owners, *Voss*, 830 P.2d at 1068, Longmont's fracking ban has the same effect.[11]

Longmont's ban on hydraulic fracturing prevents the efficient development and production of oil and gas resources. While the Defendants were able to identify some wells in Colorado that produced oil and gas without fracking, it is undisputed that fracking results in efficient production of oil and gas.

Longmont's ban on hydraulic fracturing does not prevent waste; instead, it causes waste. Because of the ban, mineral deposits were left in the ground that otherwise could have been extracted in the Synergy well. Mineral deposits are being left in the ground by all the wells that are not being drilled due to the fracking ban.

Longmont's ban on hydraulic fracturing does not protect correlative rights of owners; it impairs the correlative rights of owners. See COGA Mot. For Summ. J., Ex 7, the affidavit of Synergy's President, Edward Holloway (Because proceeds from the well are distributed ratably by acreage, Longmont's ban causes mineral owners in Longmont to

[10] Plaintiffs also argues that Longmont's ban on storage and disposal of fracking waste is preempted by the Federal Safe Drinking Water Act, which authorizes disposal of oilfield waste associated with hydraulic fracturing by underground injection wells. Since the Court can resolve this issue under state operational conflict preemption law, the Court does not reach the issue of preemption under the Federal Safe Drinking Water Act. The same holds true for the arguments based on the Areas and Activities of State Interest Act.

[11] Longmont urges the Court to distinguish *Voss* based on the "sea change" that has occurred in the manner in which oil and gas wells are drilled today. Longmont maintains current drilling operations are quite different than operations in 1992, when the case was decided. Plaintiffs argue that Longmont is urging the Court to overrule *Voss*, which it cannot do. The Court finds that *Voss* is binding precedent on this Court, and *Voss* is the law this Court must follow.

receive a higher percentage of the proceeds than their acreage actually contributes to the production. It causes mineral owners outside of Longmont to receive a lesser percentage of the proceeds than their acreage actually contributes to the wells' production.)

COGA argued that *Bowen/Edwards* does not apply because this situation involves a total ban, not a regulation. The Court finds a ban is an ultimate regulation, and *Bowen/Edwards* does apply. The *Bowen/Edwards* example of an operational conflict describes the current situation in Longmont:

> "the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells . . ."
>
> Here, the City banned a technical process commonly used to bring wells to production; it imposed the technical condition of no hydraulic fracturing on any oil and gas activity in the City.
>
> ". . . under circumstances where no such conditions are imposed under the state statutory or regulatory scheme"
>
> The Commission and its rules permit hydraulic fracturing. There is no hydraulic fracturing ban imposed under the state statutory or regulatory scheme

"To the extent such operational conflicts might exist, the county regulations must yield to the state interest." *Bowen/Edwards*, 830 P.2d at 1060. This is the law this Court must follow.

There is no way to harmonized Longmont's fracking ban with the stated goals of the Oil and Gas Conservation Act. As described above, the state interest in production, prevention of waste and protection of correlative rights, on the one hand, and Longmont's interest in banning hydraulic fracturing on the other, present mutually exclusive positions. There is no common ground upon which to craft a means to harmonize the state and local interest. The conflict in this case is an irreconcilable conflict.

The *Colorado Mining Association* and *Webb* cases, both Colorado Supreme Court cases, are instructive. They are preemption cases, but not oil and gas cases. In *Colorado Mining Association*, the Colorado Supreme Court found Summit County's ban on a certain type of mining technique was preempted by state law. *Colorado Mining Association,* 199 P.3d at 721. The Court stated "Summit County's existing ordinance is not a proper exercise of its land use authority because it excludes what the General Assembly has authorized." *Id.* In this case, Longmont's Article XVI excludes and prohibits what the General Assembly has authorized through the Colorado Oil and Gas Conservation Commission. The Court stated, "a patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources." *Id.* at 731. The same can be said about this case: Longmont's ban on hydraulic fracturing creates a patchwork of oil and gas extraction methods that inhibits what the General Assembly has recognized as a necessary activity in the Oil and Gas Conservation Act and it impedes the orderly development of Colorado's mineral resources.

In *Webb,* the Colorado Supreme Court examined Black Hawk's ban of bicycles on city streets. *Webb,* 295 P.3d at 482. The Court stated, "The test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* at 492. Here, Longmont's Article XVI forbids hydraulic fracturing which is authorized by the state.. "Black Hawk does not have authority, in a matter of mixed state and local concern, to negate a specific provision the General Assembly has enacted in the interest of uniformity." *Id.* at 493. Similarly, Longmont does not have the authority, in a matter of mixed state and local concern, to negate the authority of the Commission, derived from the Oil and Gas Conservation Act. It does not have the authority to prohibit what the state authorizes and permits.

This Court, like the courts in *Voss, the Town of Frederick*, and *BDS*, finds it can resolve this matter in an order on summary judgment. The operational conflict in this case is obvious and patent on its face. There are no genuine issues of material fact in dispute. There is no need for an evidentiary hearing to determine whether the ban on hydraulic fracturing, as a practical matter, creates operational conflicts.

V. CONCLUSION

Based on the foregoing analysis. the Court GRANTS Summary Judgment in favor of the Plaintiffs and against the Defendants. The Court finds Article XVI of the Longmont Municipal Charter, which bans hydraulic fracturing and the storage and disposal of hydraulic fracturing waste in the City of Longmont, is invalid as preempted by the Colorado Oil and Gas Conservation Act.

COGA, the Commission, and TOP each filed claims for declaratory judgment finding Article XVI of the Longmont Municipal Charter is invalid as a result of operational conflict preemption. Those claims are GRANTED.

VI. STAY OF INJUNCTION

COGA, the Commission, and TOP each requested an order enjoining the City of Longmont from enforcing Article XVI of the Longmont Municipal Charter. The Court GRANTS that request, but STAYS the order during the time permitted for filing a notice of appeal, pursuant to C.R.C.P. 62. If the Defendants seek an order for stay pending appeal, this Court will grant that request.

In other words, there shall be no hydraulic fracturing activity in the City of Longmont until further order of Court, either from this Court or a higher court.

July 24, 2014

D.D. Mallard
District Court Judge

EXHIBIT C

To Be Argued By: Thomas S. West
Time Requested: 20 Minutes

New York State
Court of Appeals

NORSE ENERGY CORP. USA,

Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents.

APL-2013-00245

BRIEF OF APPELLANT NORSE ENERGY CORP. USA

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October 28, 2013

New York State to achieve, the objectives of the OGSML and the Interstate Compact of preventing waste, providing for greater ultimate recovery, and protecting correlative rights. *See Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1067 (Colo. 1992) (finding that a total ban on drilling precludes the ability to prevent waste or protect correlative rights). Thus, the Appellate Decision must be reversed.

POINT IV
THE TOWN PROHIBITION IS CONFLICT PREEMPTED BY THE OGSML AND THE ENERGY LAW

The Appellate Court correctly found that the OGSML's express supersession provision does not foreclose an implied preemption analysis. (*See* R. at 18-19) (and citations therein); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (stating same in context of federal preemption of state law); *accord Doomes v. Best Transit Corp.*, 17 N.Y.3d 594, 602-03 (2011) (evaluating implied preemption, notwithstanding express supersedure language). Likewise, the supersedure language of ECL § 23-0303(2) does not foreclose an implied preemption challenge under an entirely different statute, namely, Energy Law § 3-101(5) and 3-103.[6]

[6] This Court may take judicial notice of the Energy Law, both as part of the legislative history of ECL § 23-0303(2) and by virtue of its being a legislative fact. *See Green*, 96 N.Y.2d at 408 n.2; *Affronti*, 95 N.Y.2d at 720.

The Appellate Court erred, however, in holding that the Town Prohibition "neither conflicts with the language nor the policy of the OGSML" and that municipal-wide drilling bans "may harmoniously coexist" with the OGSML . (*See* R. at 19.) As discussed above, the Town Prohibition presents a multitude of irreconcilable "head-on" conflicts with the OGSML, both as to explicit wellbore location and spacing directives and policy objectives. *See* Point IIB, *supra.*

For example, ECL § 23-0503(2) directs the Department to issue a well drilling permit if the proposed drilling unit (1) conforms to statewide spacing requirements, (2) is of approximately uniform shape with other spacing units in the same field, and (3) abuts other spacing units overlaying the same resource pool, unless there is sufficient distance between units for another unit to be developed. This specific provision, which was carefully crafted to apply uniformly statewide, ensures that wells are drilled and spaced in locations to provide for greater ultimate resource recovery, prevent waste, and protect mineral owners so that they are fully compensated for their pro rata share of well production. It is simply not possible for the NYSDEC to comply with this express statutory mandate if individual localities, like the Town, can "zone out" drilling in entire municipalities.

Local bans on all oil and gas development also make it impossible for the NYSDEC to comply with the objectives of the OGSML. Local bans, like the Town Prohibition, preclude the NYSDEC from issuing drilling permits for locations where drilling *should* occur (i.e., based on the geophysical properties of the underlying resource and environmental conditions relating to surface location in order to maximize recovery, prevent waste and protect correlative rights). Importantly, the OGSML directs that drilling is to occur in a manner that prevents waste, defined in the OGSML to include "locating . . . [a] well [ ] in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable . . . ." ECL § 23-0101(20)(c). Yet, ensuring waste is precisely what the Town Prohibition does – i.e., it prohibits wells from being located in the ideal location to provide for greater ultimate resource recovery and, in fact, precludes any recovery whatsoever, resulting in the ultimate in waste and the total destruction of correlative rights. This, of course, is in direct conflict with the OGSML.

Moreover, municipal bans like the Town Prohibition also patently conflict with the Energy Law. Energy Law § 3-101(5) articulates the statewide goal "to foster, encourage and promote the prudent development [ ] of all indigenous state energy resources including . . . natural gas from

Devonian shale formations." Energy Law § 3-103 directs that "every agency of the state must conduct its affairs [ ] to conform to the state energy policy . . . ." If the Appellate Decision is allowed to stand, every municipality in New York could ban all oil and gas development – a result that plainly would conflict with (1) the "promotion" directive of the Energy Law, (2) all of the objectives of the OGSML (*i.e.*, provide for greater ultimate recovery, prevent waste, protect mineral owners' correlative rights), (3) the NYSDEC's implementation of the explicit location-based directives of the OGSML, and (4) the NYSDEC's ability to act in a manner that conforms with the Energy Law's policy to promote the development of indigenous natural gas resources.

The policy implications of the Appellate Decision are severe, as there could not be a starker example of local control that will wholly discourage, in fact, preclude, oil and gas development. The Town Prohibition, in one fell swoop, wiped out a more than $5.1 million investment of one operator. This begs the question: what prudent operator would ever invest in oil and gas development in New York if, after the fact, municipalities could, based upon a 3-2 majority vote, enact broad-based drilling bans that obliterate the operator's entire property interest? The answer is obvious: municipal-wide

bans on oil and gas activity cannot be squared with the directive, policies, or goals of the OGSML or the Energy Law.

In the end, even if the Town Prohibition is not "regulation" *per se*, so as to come within the supersedure provision of ECL § 23-0303(2), a point that Norse vigorously disputes, the Town Prohibition *still* conflicts with the express directives of the OGSML relative to spacing and wellbore location and the fundamental goals of the Energy Law and the OGSML. The Town Prohibition, at *best,* frustrates the NYSDEC's ability to comply with the mandates of the OGSML and Energy Law; and, at *worst,* stands as an insurmountable obstacle to meeting the objectives of both statutes. In either instance, the Town Prohibition is in conflict with New York's general laws and, therefore, is conflict preempted. *See Lansdown Entm't Corp. v. N.Y.C. Dep't of Consumer Affairs*, 74 N.Y.2d 761, 764-65 (1989) (finding direct conflict between local ordinance and State law; stating "assuredly a local law which conflicts with the State law must [ ] be preempted"); *Anonymous v. City of Rochester*, 13 N.Y.3d 35, 51 (2009) (Graffeo, J., concurring) (stating that local curfew ordinance contradicted the Family Court Act and was thus invalid); *Cohen v. Bd. of Appeals of Saddle Rock*, 100 N.Y.2d 395, 400 (2003) (finding local variance regulation preempted; stating in the critical area of overlap, the Legislature prevails).

Finally, two courts that have considered the propriety of municipal bans on oil and gas activity otherwise permitted by state law have invalidated those bans. *See Voss,* 830 P.2d at 1068; (CHC R. at 904-05); *Northeast Natural Energy, LLC,* Civ. Action No. 11-C-411, Slip Op. at 8-9. The *Voss* case involved a comprehensive state regulatory regime very similar to the OGSML and a local drilling ban comparable to the Town Prohibition. Colorado's high court concluded that the local ban was fundamentally at odds with Colorado's goals and policy objectives of preventing waste, providing for greater ultimate recovery, and protecting correlative rights – *i.e.*, the very same goals and policy objectives of the OGSML. Specifically, the Colorado Supreme Court observed:

> Oil and gas are found in subterranean pools, the boundaries of which do not conform to any jurisdictional pattern. As a result, certain drilling methods are necessary for the productive recovery of these resources . . . . [I]t is often necessary to drill wells in a pattern dictated by the pressure characteristics of the pool, and because each well will only drain a portion of the pool, an irregular drilling pattern will result in less than optimal recovery and a corresponding waste of oil and gas. Moreover, an irregular drilling pattern can impact on the correlative rights of the owners of oil and gas interests in a common source of supply by exaggerating production in one area and depressing it in another. . . . *Because oil and gas production is closely tied to well location, [a municipality's] total ban on drilling . . . could result in uneven and potentially wasteful production . . . . [The] total ban, in that situation, would conflict with the [state agency's] express authority to divide a pool of oil or gas into drilling units and to limit the production of the pool*

> *so as to prevent waste and to protect the correlative rights of owners . . . In our view, the state's interest in the efficient and fair development and production of oil and gas resources in the state, including the location and spacing of individual wells, militates against a home-rule city's total ban on drilling within city limits.*

Voss, 830 P.2d at 1067 (emphasis added); *see also id.* at 1067 n.3 (quoting state law, defining "waste" in a manner identical to that in ECL § 23-0101[20][c]). Given the factual realities of oil and gas development (which are largely the same regardless of where the reserves are located), and the identical goals and policy objectives pursued by the New York and Colorado oil and gas regimes, the Colorado Supreme Court's reasoning in *Voss* – while not binding on this Court – is particularly compelling and appropriate here.

The Appellate Court did not mention *Voss* or *Northeast Natural Energy, LLC,* notwithstanding that Norse discussed both cases in its briefing. Given the Appellate Court's heavy reliance on MLRL precedent in its express preemption analysis, it appears that this flawed reasoning was implicitly carried over into the implied preemption analysis.

Finally, to the extent the Appellate Court rested its finding of no conflict preemption on the policy to "protect the rights of all persons... including the general public" in ECL § 23-0301, its rationale is also

misguided. The Appellate Court failed to acknowledge the Legislature's express articulations that the comprehensive statewide scheme under the OGSML is intended to, and does, protect the general public through extensive regulatory controls. (*See* R. at 20); (CHC R. at 1046.) Nor did the Appellate Court address the conundrum of how the policy to "protect correlative rights" could be squared with municipal-wide drilling bans, like the Town Prohibition, that indisputably obliterate correlative rights, not only territorially but potentially beyond the municipality's boundaries as well. In short, the Appellate Court's reasoning and result cannot be squared with the directives or policies of the OGSML or Energy Law.

In sum, the Town Prohibition conflicts with the language and policies of both the OGSML and Energy Law §§ 3-101(5) and 3-103. Accordingly, the Town Prohibition is conflict preempted and, therefore, invalid, and the Appellate Decision must be reversed. *See, e.g., Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 107-08 (1983); 25 N.Y. Jur. 2d, *Counties, Towns & Mun. Corps.*, § 351.

CONCLUSION

For all of the foregoing reasons, Norse respectfully requests that this Honorable Court reverse the Appellate Decision and grant summary judgment in Norse's favor.

Dated: October 28, 2013
Albany, New York

THE WEST FIRM, PLLC

By: _____

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EXHIBIT D

To be argued by: Thomas S. West
Time requested: 20 minutes

Supreme Court

State of New York
Appellate Division – Third Department

NORSE ENERGY CORP. USA,

Petitioner-Plaintiff-Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD

Respondents-Defendants-Respondents.

- and –

DRYDEN RESOURCES AWARENESS COALITION, by its President, Marie McRae,

Proposed Intervenor-Cross-Appellant.

Tompkins County Index No.: 2011-0902

BRIEF OF PETITIONER-PLAINTIFF-APPELLANT NORSE ENERGY CORP. USA

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development tends to be less surface-intensive and of far shorter duration than solid mineral extraction, thus having far fewer implications for traditional land use concerns.

The bottom line is that the objectives of the OGSML (and Energy Law) cannot be achieved – and, in fact, are frustrated – by disparate local regulations like the Town Prohibition. Thus, the lower court erred in concluding that there was no conflict and that the statutory goals of the OGSML could be met by interpreting "regulation of the [ ] industries" in ECL 23-0303(2) to be limited to the "how" but not the "where" of oil and gas drilling. *See* R. 30-31, Decision at 17-18. Local zoning ordinances like the one at issue here do not merely incidentally impact the activities of the oil and gas industry; they completely destroy them by prohibiting the activity altogether and thereby obliterating the underlying mineral interests (which have value only if the resource can be extracted). In short, local zoning ordinances like the Town Prohibition make it impossible for the Department to comply with, and for New York State to achieve, the OGSML's objectives of preventing waste, maximizing recovery, and protecting correlative rights. *See Voss,* 830 P.2d at 1067 (finding that a total ban on drilling precludes the ability to prevent waste or protect correlative rights). Thus, the Decision must be reversed.

POINT III

THE COURT BELOW ERRED IN FAILING TO FIND THE TOWN PROHIBITION CONFLICT PREEMPTED UNDER ECL ARTICLE 23

A. The Express Supersedure Language in ECL § 23-0303(2) Does Not Foreclose An Implied Preemption Challenge

The lower court apparently believed that the express supersession language in ECL § 23-0303(2) foreclosed an implied preemption challenge to the Town Prohibition. *See* R. 25, 32, Decision at 12 & 19 n.13. As a result, the court did not specifically evaluate Plaintiff-Appellant's conflict preemption argument and, instead, evaluated the "conflict" issue as part of

the statutory construction process relative to the question of express preemption. *See* R. 32, *id.* at 19 n.13. The court erred on this ground as well, both as to approach and result.

It is well-established that the preemption doctrine is not limited to express preemption, but also includes implied preemption (*i.e.*, conflict and field preemption). *See Albany Area Builders Ass'n,* 74 N.Y.2d at 377. Contrary to the lower court's approach, the OGSML's express supersedure clause (ECL § 23-0303[2]) does not foreclose a conflict preemption analysis under that statute. *See Geier v. American Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (stating same in context of federal preemption of state law); *accord Doomes v. Best Transit Corp.,* 17 N.Y.3d 594, 602-03 (2011) (recent Court of Appeals' case evaluating implied preemption notwithstanding express supersedure language). Likewise, the supersedure language of ECL § 23-0303(2) certainly does not foreclose an implied preemption challenge under an entirely different statute, namely, Energy Law § 3-101(5). And, this Court may take judicial notice of Energy Law § 3-101(5), both as part of the legislative history of ECL § 23-0303(2) and by virtue of its being a legislative fact. *See Green,* 96 N.Y.2d at 408 n.2; *Affronti,* 95 N.Y.2d at 720. Thus, the lower court erred in failing to expressly address conflict preemption principles, and the question of conflict preemption under both the OGSML and Energy Law is properly before this Court.

B. The Town Prohibition Conflicts with New York State Law And, Therefore, Is Conflict Preempted

As discussed above, the Town Prohibition presents a multitude of irreconcilable "heads-on" conflicts with the OGSML, both as to explicit wellbore location and spacing directives and policy objectives. *See* Point IIC, *supra.* First and foremost, the express provisions of the OGSML plainly would allow some wells to be drilled in the Town, but the Town Prohibition precludes that. More specifically, the substantive provisions of the OGSML are comprehensive

and express as to "where" drilling is to occur. For example, ECL § 23-0503(2) directs the Department to issue a well drilling permit if the proposed drilling unit (1) conforms to statewide spacing requirements, (2) is of approximately uniform shape with other spacing units in the same field, and (3) abuts other spacing units overlaying the same resource pool, unless there is sufficient distance between units for another unit to be developed. This specific provision, which was carefully crafted to apply uniformly Statewide, ensures that wells are drilled and spaced in locations that maximize resource recovery, prevent waste, and protect mineral owners so that they are fully compensated for their pro rata share of well production. It is simply not possible for the Department to comply with this express statutory mandate if individual municipalities, like Defendants-Respondents, can exercise local zoning authority to enact bans on all drilling in entire towns.

Local bans on all oil and gas development also make it impossible for the Department to comply with the objectives of the OGSML. Local bans, like the Town Prohibition, preclude the Department from issuing drilling permits for locations where drilling *should* occur (i.e., based on the geophysical properties of the underlying resource and environmental conditions relating to the surface location in order to maximize recovery, prevent waste and protect correlative rights). Although the lower court ignores it, the definition of "waste" in the OGSML includes "locating . . . [a] well [ ] in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable . . . ." ECL § 23-0101(20)(c). Yet, that is precisely what the Town Prohibition does – i.e., it prohibits wells from being located in the ideal location to provide for maximum resource recovery (and the prevention of waste and the protection of correlative rights). It defies common sense, and certainly frustrates the goals of the OGSML, for the Department to essentially say "Based on all of the geophysical data, your wells should be drilled

at locations X, Y and Z to maximize recovery and prevent waste," only to have a local zoning board come in and say "You cannot drill at locations X, Y or Z, or anywhere at all, because we have zoned oil and gas activity out of our jurisdiction altogether." Oil and natural gas resources are where they are because of geology, not political boundaries. Effectively recovering those resources – meeting the goals of the OGSML – requires that wells be drilled where the geophysical data says they should go. In the end, sweeping bans such as the Town Prohibition are the very ultimate in waste and cannot be squared with the Department's mandates under the OGSML.

Consider the hypothetical where an operator holds oil and gas leases in adjoining municipalities A and B. Municipality B has a drilling prohibition. Municipality A does not. Based on the geologic orientation of the play, the operator begins laying out units in municipality A in accordance with the spacing directives in ECL § 23-0503(2) that the units be of uniform shape and abut other spacing units overlaying the same resource pool. The operator lays out the units so that they are of the same shape and have no gaps. As the operator approaches the border of municipality A and municipality B, it finds that the acreage that is left in municipality A is not itself large enough to constitute a spacing unit or is of irregular shape because the proper geologic orientation of the wellbore does not parallel municipal boundaries. The drilling ban in municipality B does not allow wellbore placement anywhere on the surface of municipality B; nor does it allow for subsurface penetration of any resource pool underlying the surface of lands located in municipality B. As a result, the "left-over" acreage in municipality A cannot be incorporated into a spacing unit, and a well cannot be drilled on this acreage to effectively capture the underlying resource pool which extends below the subsurface of municipality B (*i.e.*, even if the drill site is located on land in municipality A). In other words, this acreage in

municipality A cannot be developed. Thus, the ban in municipality B obliterates not only the *totality* of the operator's property interest in municipality B, but also destroys correlative rights outside municipality B, such as those of the operator and its lessors relative to the left-over acreage in municipality A. Accordingly, municipal bans, such as the Town Prohibition, directly conflict with the language and policies of the OGSML.

Moreover, municipal bans like the Town Prohibition patently conflict with the Energy Law. Energy Law § 3-101(5) articulates the Statewide goal "to foster, encourage and promote the prudent development [ ] of all indigenous state energy resources including . . . natural gas from Devonian shale formations." If the Decision is allowed to stand, every municipality in New York could ban all oil and gas development – a result that plainly would conflict with *both* the "promotion" directive of the Energy Law and all of the objectives of the OGSML (*i.e.*, maximize recovery, prevent waste, protect property owners' correlative rights). The policy implications of this are severe, as there could not be a starker example of local control that will wholly discourage, in fact, preclude, development. The Town Prohibition, in one fell swoop, wiped out a more than $5.1 million investment. This begs the question: what prudent operator would ever invest in oil and gas development in New York if, after the fact, municipalities could, based upon a 3-2 majority vote, enact broad-based drilling bans that obliterate the operator's entire property interest? The answer is obvious: municipal-wide bans on oil and gas activity cannot be squared with the directive, policies, and goals of this State's OGSML or Energy Law.

The bottom line is this: even if the Town Prohibition is not "regulation" *per se*, so as to come within the supersedure provision of ECL § 23-0303(2), a point that Plaintiff-Appellant vigorously disputes, the Town Prohibition *still* conflicts with the express directives of the OGSML relative to spacing and wellbore location and the fundamental goals of the Energy Law

and the OGSML, both of which are general laws of the State. The Town Prohibition, at *best,* frustrates the Department's ability to comply with the OGSML and Energy Law mandates; and, at *worst,* stands as an insurmountable obstacle to meeting those objectives. In either instance, the Town Prohibition is in conflict with New York's general laws and, therefore, is conflict preempted. *See Lansdown Entm't Corp. v. New York City Dep't of Consumer Affairs,* 74 N.Y.2d 761, 764-65 (1989) (finding direct conflict between local ordinance and State law; stating "assuredly a local law which conflicts with the State law must [ ] be preempted"); *Anonymous v. City of Rochester,* 13 N.Y.3d 35, 51 (2009) (Graffeo, J., concurring) (stating that local curfew ordinance contradicted the Family Court Act and was thus invalid); *Cohen v. Board of Appeals of Village of Saddle Rock,* 100 N.Y.2d 395, 400 (2003) (finding local variance regulation preempted; stating in the critical area of overlap, the Legislature prevails).

Finally, two courts that have considered the propriety of municipal bans on oil and gas activity otherwise permitted by state law have invalidated those bans. *See Voss,* 830 P.2d at 1068; R. 904-05, *Northeast Natural Energy, LLC,* Civ. Action No. 11-C-411, Slip Op. 8-9 (Cir. Ct., Monongalia Cnty., W.V., Aug. 12, 2011). The *Voss* case involved a comprehensive state regulatory regime very similar to the OGSML and a local drilling ban comparable to the Town Prohibition. Colorado's high court concluded that the local ban was fundamentally at odds with Colorado's goals and policy objectives of preventing waste, maximizing recovery, and protecting correlative rights – *i.e.*, the very same goals and policy objectives of the OGSML. Specifically, the Colorado Supreme Court observed:

> Oil and gas are found in subterranean pools, the boundaries of which do not conform to any jurisdictional pattern. As a result, certain drilling methods are necessary for the productive recovery of these resources . . . . [I]t is often necessary to drill wells in a pattern dictated by the pressure characteristics of the pool, and because each well will only drain a portion of the

> pool, an irregular drilling pattern will result in less than optimal recovery and a corresponding waste of oil and gas. Moreover, an irregular drilling pattern can impact on the correlative rights of the owners of oil and gas interests in a common source of supply by exaggerating production in one area and depressing it in another. ***Because oil and gas production is closely tied to well location, [a municipality's] total ban on drilling ... could result in uneven and potentially wasteful production . . . . [The] total ban, in that situation, would conflict with the [state agency's] express authority to divide a pool of oil or gas into drilling units and to limit the production of the pool so as to prevent waste and to protect the correlative rights of owners ... In our view, the state's interest in the efficient and fair development and production of oil and gas resources in the state, including the location and spacing of individual wells, militates against a home-rule city's total ban on drilling within city limits.***

Voss, 830 P.2d at 1067 (emphasis added); *see also id.,* at 1067 n.3 (quoting state law, defining "waste" in a manner identical to that in ECL § 23-0101[20][c]). Given the factual realities of oil and gas development (which are largely the same regardless of where the reserves are located), and the identical goals and policy objectives pursued by the New York and Colorado oil and gas regimes, the Colorado Supreme Court's reasoning in *Voss* – while not binding on this Court – is particularly compelling and appropriate here.

The lower court rejected *Voss* because it felt constrained by *Gernatt Asphalt.* R. 36, Decision at 23. However, that was in error, because, as already explained, by the time *Gernatt Asphalt* was decided, the MLRL had been amended to include language that the statute did not supersede local zoning control. *See Gernatt Asphalt Prods.,* 87 N.Y.2d at 683 (noting that the 1991 amendment to ECL § 23-2703 "expressly excluded [ ] from its preemptive reach" any restriction on municipal authority to regulate permissible land uses). Moreover, *Frew Run* did not address a municipal-wide ban, and, therefore, beyond involving a markedly different statute, it involved a very different question from that here. *See generally, Frew Run,* 71 N.Y.2d 126.

Troublingly as well, the court wholly ignored *Northeast Natural Energy, LLC,* but then relied on precedent from Pennsylvania as being persuasive. *See* R. 35-36, Decision at 22-23 (citing *Huntley & Huntley, Inc.,* 964 A.2d 855). That, too, was error. At the time *Huntley & Huntley, Inc.* was decided, the supersedure provision of the Pennsylvania Oil and Gas Act confined preemption to "operations." *See* 964 A.2d at 858. Accordingly, that language is eminently distinguishable from the language in ECL § 23-0303(2); therefore, *Huntley & Huntley, Inc.* provides no support for the lower court's Decision. In the end, the Decision cannot be sustained.

In sum, the Town Prohibition conflicts with the language and policies of both the OGSML and Energy Law § 3-101(5). Accordingly, the Town Prohibition is conflict preempted and, therefore, invalid, and the Decision must be reversed. *See, e.g., Consolidated Edison Co.,* 60 N.Y.2d at 107-08; 25 N.Y. Jur. 2d, Counties, Towns & Municipal Corporations, § 351.

CONCLUSION

For all of the foregoing reasons, Plaintiff-Appellant respectfully requests that this Honorable Court reverse the Decision and grant summary judgment in Plaintiff-Appellant's favor and order the relief requested in the Complaint.

Dated: October 15, 2012
Albany, New York

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By: _____

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EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF TOMPKINS

ANSCHUTZ EXPLORATION CORPORATION,

Petitioner-Plaintiff,

-against-

For a Judgment Pursuant to Articles 78 and 3001 of the Civil Practice Law and Rules,

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents-Defendants.

Index No. 2011-0902

PETITIONER-PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION AND COMPLAINT

Respectfully submitted,

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Dated: September 16, 2011
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subsequent history of the *Envirogas* case confirms that it is not an isolated lower court opinion. *See Matter of Envirogas, Inc. v. Town of Kiantone*, 112 Misc. 2d 432, 435 (N.Y. Sup. Ct, Erie Cty), *aff'd* 89 A.D.2d 1056 (4th Dep't), *lv. den.*, 58 N.Y.2d 602 (1982). The affirmance by the Forth Department and the denial of leave to appeal by the New York Court of Appeals confirms that the *Envirogas* decision is, indeed, controlling precedent.

Accordingly, there should be no doubt but that ECL § 23-0303(2) precludes any regulation of the oil and gas industry at the local level, including zoning regulation or other local laws or ordinances putatively based upon public health, safety and welfare. Respondents-Defendants, therefore, acted in excess of their jurisdiction in adopting the Resolution, enacting the Zoning Amendment and interpreting the Zoning Ordinance to prohibit oil and gas extraction, exploration and development in the Town. Anschutz, therefore, respectfully requests that this Court declare the Resolution, Zoning Amendment, and Zoning Ordinance (to the extent that it is interpreted to ban, restrict or regulate oil and gas extraction, exploration and development) to be preempted and, therefore, invalid, unlawful and unenforceable.

POINT II

RESPONDENTS-DEFENDANTS' ATTEMPT TO BAN NATURAL GAS EXPLORATION, DEVELOPMENT AND RELATED ACTIVITIES IMPERMISSIBLY CONFLICTS WITH ECL ARTICLE 23

Express preemption is not the only ground on which Respondents-Defendants' attempt to ban drilling fails. Conflict preemption further refutes any claim that a local municipality, including the Town, may regulate the oil and gas industry through either a zoning amendment or other land use laws.

"[T]he fount of the police power is the sovereign State[.]" *DeJesus*, 54 N.Y.2d at 468. It, therefore, can be exercised by a municipality "only when and to the degree it has been

delegated such lawmaking authority[.]" *Id.* (citing 56 Am. Jur. 2d, Municipal Corporations, Counties and Other Political Subdivisions, § 428). Admittedly, the State Constitutions "home rule" provision (art IX, § 2), upon which Respondents-Defendants rely, "confers broad police power upon local government relating to the welfare of its citizens." *New York State Club Assn. v. City of New York*, 69 N.Y.2d 211, 217 (1987) (citing *De Jesus*, 54 N.Y.2d at 468), *aff'd*, 487 U.S. 1 (1988). Municipal police powers, however, are not unlimited. *See New York State Club Assn.*, 69 N.Y.2d at 217. This legislative power of local government is limited "to the extent that the legislature shall restrict the adoption of such a local law." N.Y. Const, art IX, § 2[c][ii]; *see also DeJesus*, 54 N.Y.2d at 468. The same is true for any purported authority to act under New York Town Law §§ 261, 262, 264 and 265.

Under the doctrine of conflict preemption a "local government . . . may not exercise its police power by adopting a local law inconsistent with constitutional or general law." *See New York State Club Assn.*, 69 N.Y.2d at 217; *see* N.Y. Const, art IX, § 2[c][ii](c). As the Court of Appeals has explained:

> The legislative intent to preempt need not be express. It is enough that the Legislature has impliedly evinced its desire to do so and that desire may be inferred from a declaration of State policy by the Legislature or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area.

Id.; *accord Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126, 133 (1987) (upholding local law only after determining that it would not "conflict with or frustrate" the statute's purpose).

Moreover, an express conflict need not be present. *New York State Club Assoc.*, 69 N.Y.2d at 217 (citing *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 108 [1983]). Inconsistency exists where a local enactment "prohibit[s] what would have been

permissible under State law or impose[s] 'prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws[.]" *Id.* (internal quotations and citations omitted); *see also Jancyn Manufacturing Corp. v. County of Suffolk*, 71 N.Y.2d 91, 97 (1987).

ECL Article 23 authorizes and governs oil and gas development in the State. In doing so, it sets forth the purpose and policy objectives of the State; namely, preventing waste, promoting recovery of the resource and protecting the correlative rights of the landowners. ECL § 23-0301. Consistent with this statutory directive, ECL Article 23 provides a detailed statutory framework with exacting requirements concerning the location and size of drilling units (i.e., spacing units) and the location of well pads. ECL § 23-0501; *see also* Sovas Aff., ¶ 23. Thus, even assuming arguendo that express preemption is not found, the Legislature has impliedly evidenced its intent to preempt local regulation of the oil and gas industry, including local zoning, in favor of promoting the development of the resource to maximize recovery and protect the correlative rights of the mineral owners across the State.

As suggested by the legislative history, the reason for the ECL's broad preemption relative to oil and gas drilling is because decisions about where drilling units are formed must be decided by the State (on a statewide basis) and not based upon a patchwork of often inconsistent and perhaps, politically driven, local land use policies. *See* Sovas Aff., ¶ 25. Only through the application of uniform regulation, applied with consistency on a statewide basis can the ECL's resource development and efficient recovery policy objectives be achieved. *See* ECL § 23-0303(2). To reach a contrary holding here would severely inhibit this objective by completely prohibiting what the State allows and promotes; namely, oil and gas drilling, development and related activities. *Compare* Resolution and Section 2104 of the Zoning

Ordinance ("[n]o permit issued by any . . . state . . . for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed invalid within the Town."). As such, any suggestion that municipalities can regulate the location of oil and gas wells or exclude oil and gas extraction, exploration or development in any portion of a municipality based upon zoning principles directly conflicts with and frustrates the purpose of the statutory scheme in the ECL. The Resolution, Zoning Amendment and Zoning Ordinance (to the extent that it is interpreted to ban, restrict or regulate oil and gas extraction, exploration and development) are, therefore, barred under the doctrine of conflict preemption.

Furthermore, to interpret the ECL supersedure provision to allow Respondents-Defendants to enact and enforce zoning and/or other land use laws prohibiting oil and gas extraction, exploration and development would obviate the collective interest and policy of the State and would prevent landowners from reaping the rewards of having their subsurface minerals recovered. *Id.* It also would conflict with statewide spacing requirements and the need to site wells based upon geology and environmental considerations, not municipal boundaries, local zoning or setbacks. *Id.* at ¶ 24. Indeed, setback requirements do not respect municipal boundaries or, for that matter, zoning districts.

In short, any suggestion that Respondents-Defendants can regulate the location of oil and gas wells by prohibiting oil and gas extraction, exploration and development in the Town directly and impliedly conflicts with and frustrates the purpose of the ECL's statutory scheme. To reach a contrary conclusion would run counter to long-standing Court of Appeals precedent and bring back the problems the 1981 amendment was meant to eliminate; namely, a patchwork approach to energy resource development and enforcement in the State. *Id.* at ¶ 26.

It would also run counter to the Department's long-standing interpretation of ECL § 23-0303(2). *Id.* at ¶ 27. For over thirty years, the Department has interpreted ECL § 23-0303(2) to completely preempt local municipalities from regulating the oil and gas industry, whether through zoning or other local laws and ordinances putatively based on public health, safety and welfare. *Id.* at ¶ 28. By way of example, the Department has a long-standing history of sending letters to local municipalities asserting exclusive jurisdiction over the oil and gas industry and reminding local municipalities of ECL § 23-0303(2)'s broad preemptive scope. *See id.*, ¶ 29 and Exhibit A.

Given the foregoing, the Legislature both expressly and impliedly evidenced its intent to preempt the Resolution, Zoning Amendment and Zoning Ordinance (to the extent that it is interpreted to ban, restrict or regulate oil and gas extraction, exploration and development) as they directly and indirectly conflict with ECL Article 23 and further frustrate the law's purpose by purporting to use zoning principles to prohibit oil and gas drilling within the municipal boundaries of the Town. Anschutz, therefore, respectfully urges this Court to find that Respondents-Defendants acted in excess of their jurisdiction and declare that the Resolution, Zoning Amendment and Zoning Ordinance (to the extent that it is interpreted to ban, restrict or regulate oil and gas extraction, exploration and development) are preempted and, therefore, invalid, unlawful and unenforceable.

CONCLUSION

Based on the plain meaning of the statute, legislative history, including the legislative intent, and the applicable case law, the Resolution, Zoning Amendment and Zoning Ordinance (to the extent that it is interpreted to ban, restrict or regulate oil and gas extraction, exploration and development) are preempted under ECL § 23-0303(2). They also are preempted as they

directly and indirectly conflict with and frustrate the purposes of the statutory and regulatory framework governing oil and gas development in the State.

Anschutz, therefore, respectfully urges this Court to issue an Order: (1) determining that Respondents-Defendants' adoption of the Resolution, enactment of the Zoning Amendment and interpretation of the Zoning Ordinance to prohibit oil and gas extraction, exploration and development were without and/or were in excess of jurisdiction; (2) declaring the Resolution to be invalid, unlawful and unenforceable; (3) declaring the Zoning Amendment to be invalid, unlawful and unenforceable; (4) declaring the Zoning Ordinance (to the extent that it is interpreted to ban, restrict or regulate oil and gas extraction, exploration and development) to be invalid, unlawful and unenforceable; (5) entering a preliminary and permanent injunction enjoining Respondents-Defendants from enforcing or implementing the Resolution, Zoning Amendment, or any interpretation of the Zoning Ordinance that bans, restricts or regulates oil and gas extraction, exploration and development or related activities in the Town; and (6) for such other and additional relief that the Court deems just and appropriate.

Dated: September 16, 2011
Albany, New York

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