

To Be Argued By: Deborah Goldberg
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 RESPONDENTS TOWN OF DRYDEN AND
TOWN OF DRYDEN TOWN BOARD**

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Question 1:

Pursuant to its constitutionally guaranteed and statutorily delegated home rule powers over land use planning and zoning, *see* N.Y. Const. art. IX § 2(c)(ii)(10); N.Y. Stat. Local Gov'ts § 10(6); N.Y. Town L. § 261, the Town of Dryden adopted an amendment to its Zoning Ordinance to clarify that oil and gas exploration and production were heavy industrial uses of land that had never been permitted in any zoning district and thus were prohibited uses within Town borders. Should this Court read the Oil, Gas and Solution Mining Law (“OGSML”), which supersedes only those local laws “relating to the regulation of the oil, gas and solution mining industries,” N.Y. Env'tl. Conserv. L. (“ECL”) § 23-0303(2), as a clear expression of legislative intent to preempt the Zoning Ordinance, which relates to an entirely different subject matter—land use, generally—thereby abrogating powers to regulate land use through zoning expressly delegated to towns in the Statute of Local Governments and the Town Law?

Answer 1:

No. The Appellate Division, Third Department, correctly found nothing in the language, statutory scheme, or legislative history of the OGSML indicating an intent to usurp the authority traditionally delegated to

municipalities and held that the OGSML does not expressly preempt a locality's right to enact a zoning ordinance that regulates land use generally and designates oil and gas mining as a prohibited use within municipal borders. *See* Record on Appeal ("R.") at 16, 18.

Question 2:

Does the OGSML implicitly preempt the Town of Dryden's Zoning Ordinance, even though the Zoning Ordinance's regulation of land use does not conflict with the policies of the OGSML or its regulation of oil and gas activities, operations, and processes?

Answer 2:

No. The Appellate Division, Third Department, correctly held that, because zoning ordinances that effect a ban on drilling do not conflict with the policies of the OGSML, and the two distinct regulatory schemes may harmoniously coexist, the OGSML does not implicitly preempt the Zoning Ordinance. *See* R. at 19–20.

PRELIMINARY STATEMENT

Appellant Norse Energy Corp. USA (“Appellant”) asks this Court to impute to the New York Legislature the intention to exalt oil and gas development above all other land uses. Appellant would have this Court rule that the OGSML grants drillers an entitlement unique in the history of this state—the right to conduct heavy industrial operations throughout municipal territory, regardless of neighboring property interests or other local concerns. According to Appellant, the industry has the right to place oil and gas wells and their toxic waste next to family homes, outdoor cafes, and dairy farms in zoning districts that otherwise would be reserved for residential, commercial, and agricultural uses—and local residents have no voice in the matter.

As Respondents Town of Dryden and Town of Dryden Town Board (“Respondents”) demonstrate below, Appellant’s express and implied preemption claims are unsupported by the language, history, or purposes of the OGSML. The extreme and unprecedented right that Appellant asserts also is flatly inconsistent with this Court’s unequivocal statement that:

[a] municipality is not obliged to permit the exploitation of any and all natural resources within the town . . . 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

Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 87 N.Y.2d 668, 684 (1996).

Appellant has not challenged the reasonableness of the Zoning Ordinance as an exercise of the Town of Dryden’s police powers. Appellant thus may not “seek[] to protect . . . mineral owners and their lessees,” Brief of Appellant Norse Energy Corp. USA (“App. Br.”) at 4, at the expense of other landowners in Dryden and the general public.

By contrast with Appellant, Respondents seek no extraordinary privilege but rather invoke their traditional home rule powers to protect the public health, safety, and general welfare through a comprehensive land use plan and related zoning that designates permitted and prohibited uses within town borders.¹ In asserting their constitutionally guaranteed and legislatively delegated authority, Respondents do not strive to regulate technical aspects of the oil and gas industry, which they freely acknowledge is the prerogative of the State.² R. 495–96. Respondents therefore can exercise their zoning power consistently with state regulation of industrial

¹ This Court repeatedly has acknowledged that “[o]ne of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances.” *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 96 (2001); see *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 745 (1977) (characterizing zoning “as a vital tool for maintaining a civilized form of existence for the benefit and welfare of an entire community”) (internal quotation marks and citation omitted); *Thomas v. Town of Bedford*, 11 N.Y.2d 428, 433 (1962) (“In any area of even moderate density, comprehensive and balanced zoning is essential to the health, safety and welfare of the community.”).

² The trial court invalidated and severed subsection 2104(5) of the Zoning Ordinance, which purports to regulate the enforcement of permits rather than clarifying land use prohibitions, see R. 45–46, but neither party appealed that ruling, and it is not in issue here.

operations, activities, and processes—just as towns throughout New York exercise their zoning power consistently with state regulation of extractive mining under the Mined Land Reclamation Law (“MLRL”). Because there is no need to read the OGSML as an abridgement of authority conferred by the Statute of Local Governments and the Town Law, the trial court properly granted, and the Appellate Division unanimously affirmed, summary judgment in favor of Respondents on Appellant’s express and implied preemption claims.

Contrary to Appellant’s dire prediction, *see* App. Br. at 61, there is no evidence that reaffirming the decisions below will “wholly discourage, in fact, preclude, oil and gas development.” Even Appellant’s supporters admit that more than 40 towns have passed resolutions favoring shale gas development in New York. *See* Brief of Amici Curiae The Business Council of New York State, Inc., Clean Growth Now, National Association of Royalty Owners, NARO-NY and the Joint Landowners Coalition of New York, Inc. 26 (filed Oct. 17, 2012) (“Br. of Pro-Drilling Amici”), <http://www.jlcnny.org/site/attachments/article/1374/Brief%20BC%20CGN%20NARO%20JLC%20101712.pdf> (providing map). Moreover, the oil and gas industry has thrived under longstanding dual regimes in other states, including states that permit localities to enforce outright bans on drilling, such as

Oklahoma.³ Because Appellant thus lacks any basis in law or fact for its claim that local zoning is incompatible with state regulation of the oil and gas industry, this Court should affirm the Appellate Division decision in its entirety and hold that the OGSML does not preempt local zoning, either expressly or by implication.

COUNTERSTATEMENT OF THE FACTS

Since the late 1960s, land use in the Town of Dryden has been governed by a Comprehensive Plan (adopted in 1968 and amended in 2005) and a Zoning Ordinance (adopted in 1969 and amended from time to time) that never contemplated oil and gas development or related activities as permitted uses. R. 122, 474, 484–85. Indeed, the heavy industrialization associated with such uses is inconsistent with the core goal in the 2005 plan, which 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.” Town of Dryden Comprehensive Plan 32 (Dec. 8, 2005), *available at* <http://dryden.ny.us/Downloads/CompPlanFull.pdf>. When drillers nevertheless began to lease mineral rights for intensive shale gas development in the Town, R. 79, the citizens of

³ The City of Tulsa, Oklahoma—home state of Appellant’s predecessor in interest—prohibited drilling for more than a century until 2010, *see, e.g., Tulsa City Officials Urged to Put Possible Oil Drilling Info Online*, May 20, 2009, <http://www.mobilitytechzone.com/news/2009/05/20/4190333.htm> (noting that Tulsa first prohibited drilling in 1906), and now regulates the industry extensively, *see* Tulsa, Okla. Code of Ordinances tit. 42-A, <http://library.municode.com/index.aspx?clientId=14783>, under the authority of the Oklahoma Supreme Court, *see Vinson v. Medley*, 737 P.2d 932, 936 (Okla. 1987) (“A city is empowered to enact zoning laws to regulate the drilling of oil-and-gas wells with a view to safeguarding public welfare.”).

Dryden urged their Town Board to amend the Town’s Zoning Ordinance to clarify that the use of land for activities related to oil and gas exploration and extraction was not permitted within Town borders, R. 119–471, 473–74. On August 2, 2011, the bipartisan Town Board unanimously adopted the requested amendment, which clarified the existing Zoning Ordinance by explicitly describing oil and gas uses (which never were previously permitted) as Prohibited Uses. R. 44, 70–72, 111, 474–75.

On September 16, 2011, one of the drillers that had leased mineral rights in Dryden—Anschutz Exploration Corporation (“Anschutz”)—sued Respondents, alleging that the OGSML preempted the Zoning Ordinance. R. 63–109. The Supreme Court rejected that claim, R. 35–62, and Anschutz appealed, R. 24–25. Anschutz then assigned two leases and its claims in this litigation to Appellant for \$10.00 (ten dollars), and Appellant was substituted for Anschutz for purposes of the intermediate appeal. *See* App. Br. at 5 n. 2. Appellant now is liquidating its assets under Chapter 7 of the Bankruptcy Code and seeks to have the bankruptcy Trustee prosecute the appeal in this Court. *See* Appellant’s Mot. for Substitution of Party 1 (filed Nov. 6, 2013).

ARGUMENT

The question presented in this case is whether the Legislature clearly expressed an intention to revoke traditional local land use powers, when it authorized the State to regulate the oil and gas industries.⁴ Simply invoking the State’s undisputed right to restrict home rule, as Appellant does, *see* App. Br. at 30, fails to address the question whether the State exercised that right when enacting the OGSML. To answer that question, this Court must decide whether the OGSML evinces the “clear expression of intent to preempt” local land use authority that is required to limit constitutionally protected and legislatively delegated zoning powers. *See Gernatt Asphalt*, 87 N.Y.2d at 682 (concluding that “in the absence of a clear expression of legislative intent to preempt local control over land use, the statute could not be read as preempting local zoning authority”); *Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 71 N.Y.2d 91, 97 (1987) (noting that the intent to preempt must be “clearly evinced”). “[I]t is not enough that the State

⁴ New York’s Constitution and statutes long have recognized extensive home rule powers, including the traditional authority of municipalities to control the use of land within their borders. Article IX of the New York Constitution directs the Legislature to secure to every local government the power to adopt laws relating to the “government, protection, order, conduct, safety, health and well-being of persons or property” within the locality, as long as the State Legislature has not restricted adoption of such laws, and the local laws are not inconsistent with state constitutional provisions or any general law on the *same* subjects. N.Y. Const. art. IX § 2(c)(ii)(10). Pursuant to that constitutional mandate, the Legislature enacted a series of statutes establishing a wide range of local powers, including the right to protect their community’s physical and visual environment, *see* N.Y. Mun. Home Rule L. § 10(1)(ii)(a)(11) and (12), by exercising zoning and planning powers, *see* N.Y. Stat. Local Gov’ts § 10(1), (6), and (7); N.Y. Town L. § 261.

enact legislation dealing with a certain issue. There must rather be a clear expression of intent ‘to exclude the possibility of varying local legislation’” *Zagoreos v. Conklin*, 109 A.D.2d 281, 292 (2d Dep’t 1985) (citations omitted). Because the OGSML does not satisfy the “clear expression” requirement, Appellant’s preemption claims fail.

Both the Supreme Court and the Appellate Division understood that the OGSML could not be found to supersede Dryden’s Zoning Ordinance in the absence of a clear expression of legislative intent to preempt local land use control. *See* R. 16 (Appellate Division), R. 48 (Supreme Court). Both courts carefully examined the statute as a whole, in light of its history and purposes, and found the requisite expression lacking. *See* R. 12–16, 48–53. As the Appellate Division stated:

We find nothing in the language, statutory scheme or legislative history of the statute indicating an intention to usurp the authority traditionally delegated to municipalities to establish permissible and prohibited uses of land within their jurisdictions. In the absence of a clear expression of legislative intent to preempt local control over land use, we decline to give the statute such a construction

R. 16; *see* R. 48 (setting forth the Supreme Court’s opinion that “there remains an absence from the OGSML—as . . . amended in 1981 to add the supersedure clause—of a clear expression of legislative intent to preempt local zoning control over land use concerning oil and gas production”), 53 (“That the OGSML does not

contain a clear expression of legislative intent to preempt local zoning authority . . . is further apparent when it is compared to state statutes that indisputably preempt the local zoning power.”) (internal citations omitted). For the reasons set forth below, this Court also should hold that, because the OGSML lacks a clear expression of intent to preempt local land use regulation, the statute does not divest municipalities of their power to enforce zoning restrictions.

POINT I

THE OGSML DOES NOT EXPRESSLY PREEMPT THE TOWN OF DRYDEN’S ZONING ORDINANCE.

Although this case presents the Court of Appeals’ first opportunity to determine whether the OGSML’s regulation of the oil and gas industry expressly preempts local regulation of land use through zoning, the Court need not look far for guidance in approaching that question. On three prior occasions, this Court has addressed express preemption claims with respect to a closely analogous statute—the MLRL—and on each occasion, the Court has declined to find that state regulation of the mining industry superseded local land use regulation. The Court first ruled that the 1974 enactment of the MLRL did not supersede local zoning, *see Frew Run Gravel Products v. Town of Carroll*, 71 N.Y.2d 126, 134 (1987), and, after the Legislature codified that ruling in a 1991 amendment of the statute, the Court twice rejected preemption claims, *see Gernatt*, 87 N.Y.2d at 690 (upholding local power, even though the challenged ordinance altogether

eliminated mining as a permitted use); *Hunt Bros. v. Glennon*, 81 N.Y.2d 906, 909 (1993) (upholding land use controls by a park agency that operated like a zoning body). In this case of first impression, the Court’s decisions in *Frew Run*, *Hunt Bros.*, and *Gernatt* regarding the scope of the MLRL’s preemption clause offer the most persuasive authority available for interpretation of the OGSML’s parallel and similarly worded provision.⁵ As Respondents show below, the reasoning of those precedents fatally undermines Appellant’s express preemption claim.

A. This Court Consistently Has Upheld Local Land Use Regulation Against Express Preemption Claims Under the MLRL.

The leading case on the express preemption provision of the MLRL is *Frew Run*. In that case, a local landowner obtained a state permit to conduct a sand and gravel mining operation in a district of the Town of Carroll zoned exclusively for agricultural and residential uses. When the Town attempted to enforce its zoning ordinance, the landowner sued, citing the supersession provision of the MLRL, which provided:

⁵ Appellant correctly perceives that *Frew Run* and its progeny pose a serious obstacle to an express preemption claim under the OGSML. To counteract the weight of that authority, recognized by every New York court to consider such a claim, Appellant devotes an entire point to its contention that “MLRL Precedent Is Irrelevant to the OGSML Express Preemption Analysis.” App. Br. at 47. In cases of first impression, however, this Court commonly looks for similar cases from which to draw implications for the new set of facts, *see, e.g., Georgitsi Realty, LLC v. Penn-Star Ins. Co.*, 21 N.Y.3d 606, 609 (2013) (consulting two cases for guidance regarding the meaning of a term that the Court had not previously interpreted), and Appellant identifies no cases more closely analogous to this one than those decided under the MLRL. Moreover, by repeatedly citing *Frew Run* when convenient to support its own argument, *see* App. Br. at 53, 56, Appellant recognizes the relevance of the case.

For the purposes stated herein, this article shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this article 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.

R. 635–36.⁶ Although the statute plainly stated that the MLRL shall supersede “all” other local laws relating to the extractive mining industry, except those imposing heightened reclamation regulations, this Court upheld the zoning restriction. *See Frew Run*, 71 N.Y.2d at 130–34.

To reject the preemption claim, this Court had only to look “to the plain meaning of the phrase ‘relating to the extractive mining industry’ as one part of the entire Mined Land Reclamation Law, to the relevant legislative history, and to the underlying purposes of the supersession clause as part of the statutory scheme.”

Id. at 131 (citations omitted). Examining the plain meaning of that phrase, the Court explained:

[W]e cannot interpret the phrase “local laws relating to the extractive mining industry” as including the Town of Carroll Zoning Ordinance. The zoning ordinance relates not to the extractive mining industry but to an entirely different subject matter and purpose The purpose of a municipal zoning ordinance in dividing a governmental

⁶ Pages 635 through 647 of the Record on Appeal set forth the original MLRL, N.Y. L. 1974, ch. 1043. The first two pages of Chapter 1043 (pages 2666 and 2667) are reproduced out of order, appearing respectively as R. 636 and R. 635.

area into districts and establishing uses to be permitted within the districts is to regulate land use generally.

Id. Although the Town’s land use regulation “inevitably” affected the sand and gravel mining operation, the Court found that the “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 ‘extractive mining industry’ which the Legislature could have envisioned as being within the prohibition of the statute” *Id.* (citations omitted); *see DJL Rest. Corp.*, 96 N.Y.2d at 97 (“Local laws of general application—which are aimed at legitimate concerns of a local government—will not be preempted if their enforcement only incidentally infringes on a preempted field”) (citations omitted).

That the plain meaning of the supersession clause was consistent with the purposes of the MLRL, the *Frew Run* Court continued, was evident from the legislative history and the statute as a whole. The twin purposes of the statute were to foster mining by eliminating a confusing and costly patchwork of local ordinances regulating extractive operations and to protect the environment by establishing basic land reclamation standards. Rejecting the idea that the statute was meant to preempt local land use controls, the Court commented that “nothing suggests that its reach was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands.” *Frew Run*, 71 N.Y.2d at 133. The Court therefore refused “drastically [to]

curtail the town’s power to adopt zoning regulations granted in subdivision (6) of section 10 of the Statute of Local Governments (L 1964, ch 205) and in Town Law § 261,” as the landowner had urged. *Id.* The Court concluded:

By simply reading ECL 23-2703 (2) in accordance with what appears to be its plain meaning—i.e., superseding any local legislation which purports to control or regulate extractive mining operations excepting local legislation prescribing stricter standards for land reclamation—the statutes may be harmonized, thus avoiding any abridgement of the town’s powers to regulate land use through zoning powers expressly delegated in the Statute of Local Governments § 10 (6) and Town Law § 261. This is the construction we adopt.

Id. at 134 (citation omitted). In 1991, the Legislature confirmed and codified the *Frew Run* Court’s interpretation of the supersession clause in the MLRL, when it amended ECL § 23-2703(2) expressly to permit local zoning.

This Court extended its holding in *Frew Run* when it decided *Hunt Bros.* in 1993. *See* 81 N.Y.2d at 909. In *Hunt Bros.*, a sand and gravel mine operator challenged the power of the Adirondack Park Agency (“APA”) to require an APA permit in addition to the state permit that the operator had obtained, alleging that the MLRL preempted the agency’s rules. The Court rejected the claim, stating:

In *Matter of Frew Run Gravel Prods. v. Town of Carroll* (71 NY2d 126, 131), we held that this supersession clause does not preclude local zoning ordinances that are addressed to subject matters other than extractive mining and that affect the extractive mining industry only in incidental ways. Such local laws do not “frustrate the statutory purpose of encouraging mining through

standardization of regulations pertaining to mining operations” (*id.*, at 133). Thus, only those laws that deal “with the actual operation and process of mining” are superseded (*id.*, at 133).

Id. Finding that the APA—like “a local planning board and a local zoning entity”—was charged broadly with regulating development in the Adirondack Park region, as opposed to regulating matters “relating to the extractive mining industry,” the Court held that the MLRL did not deprive the agency of all jurisdiction to regulate the mine operator. *Hunt Bros.*, 81 N.Y.2d at 909 (citing *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 491 (1977)).

In its 1996 decision in *Gernatt*, this Court endorsed—for a third time—the distinction crafted in *Frew Run* between “zoning ordinances and local ordinances that directly regulate mining activities.” 87 N.Y.2d at 681. The Court explained:

Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the *type* of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities

Id. at 681–82 (citations omitted). Applying that distinction, the *Gernatt* Court held that the amended MLRL, which allowed localities to “determine permissible uses *in zoning districts*,” ECL § 23-2703(2) (emphasis added), did not preempt zoning amendments completely banning mining in the Town of Sardinia, even though

they “eliminated mining as a permitted use in *all* zoning districts,” *Gernatt*, 87 N.Y.2d at 681 (emphasis in original).

The *Gernatt* Court explicitly rejected the argument that a ban necessarily conflicts with the statutory purpose to foster mining. *See id.* at 683. In no uncertain terms, the Court stated: “At bottom, petitioner’s argument is that if the land within the municipality contains extractable minerals, the statute obliges the municipality to permit them to be mined somewhere within the municipality. Nothing in the MLRL imposes that obligation on municipalities” *Id.* As the courts below correctly recognized in upholding Dryden’s Zoning Ordinance, and as Respondents demonstrate below, nothing in the OGSML imposes an obligation on local governments to permit the mining of oil and gas within municipal borders.

B. The Reasoning of *Frew Run*, *Hunt Bros.*, and *Gernatt* Applies Squarely to the Preemption Clause of the OGSML.

As this Court stated in *Frew Run*, Appellant’s express preemption claim “turns on the proper construction of [the OGSML’s supersession clause],” as reflected in “the plain meaning of the phrase ‘relating to the [regulation of the oil, gas and solution] mining industry’ . . . as one part of the entire [OGSML], to the relevant legislative history, and to the underlying purposes of the supersession clause as part of the statutory scheme.” 71 N.Y.2d at 131 (interpreting the supersession clause of the MLRL). An examination of those features of the OGSML confirms that its supersession clause does not preclude local zoning

authority any more than the parallel provision did in the MLRL. Consequently, there is no reason for this Court to depart from its persuasive analysis in *Frew Run* and its progeny.

The similarities between the supersession clauses of the MLRL and the OGSML are striking on their face. Both provisions consist of a general rule that describes the subject matter of the preempted local regulation, followed by exceptions that identify elements of the otherwise preempted subject matter that remain under local control. The OGSML provides:

The 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.

ECL § 23-0303(2). The general rule of the MLRL was broader than that of the OGSML, preempting “all other state and local laws relating to the extractive mining industry” in any way—not just those relating to the “regulation” of the industry—yet this Court found no indication of any intent (much less a clear expression of intent) to preempt local land use laws. Likewise, the narrower prohibition of the OGSML’s general rule does not preclude local zoning.

The second clause of the OGSML’s supersession provision lists exceptions from the scope of the general rule, *see* ECL § 23-0303(2) (excluding regulation of local roads and real property taxes), as did the second clause of the MLRL

interpreted in *Frew Run*, see R. 637 (excluding heightened reclamation standards and requirements). According to Appellant, the OGSML’s listing of specific exceptions related to industrial activities implies that all other regulations are prohibited, including regulations relating to the different subject of land use.⁷ See App. Br. at 33–34. The *Frew Run* Court could not have reached its holding had it adopted Appellant’s reasoning.

Instead, the Court concluded that the “incidental control resulting from the municipality’s exercise of its right to regulate land use through zoning is not the type of regulatory enactment . . . which the Legislature could have envisioned as being within the prohibition of the statute”⁸ *Frew Run*, 71 N.Y.2d at 131; see also *Gernatt*, 87 N.Y.2d at 681 (“[Z]oning ordinances are not the *type* of regulatory provision the Legislature foresaw as preempted”). By reading the general rule of the supersession provision to cover only extractive mining activities

⁷ Under Appellant’s argument, mining operators would be allowed to strew trash all over their property or ignore stormwater pollution resulting from land clearance, notwithstanding local laws prohibiting that conduct, see Town of Dryden Zoning Ordinance § 901, available at http://dryden.ny.us/Planning-Department/ZoningLaw/Zoning_Ordinance_Amendments_adopted_7_19_2012.pdf; Town of Dryden Stormwater Management, Erosion and Sediment Control Law, available at http://www.dryden.ny.us/Stormwater_Forms/Ground_Disturbance_Packet/Final_SW_Const_Law.pdf, because neither of those subjects is specifically listed as an exception from the general preemption rule.

⁸ The Court reached this conclusion even though the MLRL’s exceptions clause explicitly stated that the only type of zoning ordinance outside the scope of the general rule was one that imposed stricter land reclamation standards or requirements. The plain language of the OGSML—which is silent on zoning in both the general rule and the exceptions clause—thus provides all the more reason not to interpret that statute as preempting local land use regulation.

and operations, this Court was able to harmonize the MLRL with state statutes conferring local zoning powers and to give full effect to both. *See Frew Run*, 71 N.Y.2d at 134. Likewise, the OGSML can be harmonized with state statutes conferring local zoning powers, giving effect to both, by reading the general rule of its supersession provision to cover only oil and gas mining activities and operations. This Court thus should interpret the language of the OGSML not to curtail Dryden’s power to regulate land use under the Statute of Local Governments and the Town Law. *See Consol. Edison Co. of N.Y. v. Dep’t of Env’tl. Conserv.*, 71 N.Y.2d 186, 195 (1988) (“If by any fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted.”) (internal quotation marks and citations omitted); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed [legislative] intention to the contrary, to regard each as effective.”).

The legislative history of the OGSML supports the lower courts’ interpretation of the plain language of the supersession clause. That history may be found in the bill jacket for Senate Bill 6455-B, which amended the OGSML and was enacted into law as Chapter 846 of the Laws of 1981 (the “1981 Amendments”). R. 488–521. This Court readily can determine that nothing in the bill jacket so much as mentions zoning, planning, land use regulation, or other

quintessentially local functions protected by constitutional and statutory home rule provisions. The bill jacket's lone reference to supersession does no more than restate the provision's general rule, *see* R. 499 ("The existing and amended oil and gas law would supersede all local laws or ordinances regulating the oil, gas, and solution mining industries."), which is consistent with the decisions below that the OGSML preempts regulation of industrial operations, while leaving local control of land use intact.

The rest of the bill jacket reveals the purposes of the 1981 Amendments. As the Governor recognized in his Memorandum approving Senate Bill 6455-B, before the statute's amendment, the Department of Environmental Conservation ("DEC") had been "unable, with existing funding and powers, to fulfill its regulatory responsibilities under the Environmental Conservation Law." R. 497. As the industry expanded, that regulatory vacuum created acute problems for municipalities, which faced serious impacts from industrial activity but received none of the protection promised under state law. Having no other choice, local governments had filled the void by adopting their own rules for oil and gas operations, using their own staff to administer the programs, and exacting a

variety of payments from industry to finance local expenses.⁹ The 1981 Amendments sought to change that dynamic.

Specifically, the 1981 Amendments revised “the existing law to increase funding, provide an updated regulatory program, and grant the Department of Environmental Conservation additional enforcement powers” R. 497–98. As Gubernatorial advisor Francis J. Murray, Jr., stated:

This bill has three main purposes. First, it imposes fees on the oil, gas and solution mining industries to finance a substantial portion of DEC’s regulatory program in this area. Secondly, it revises and updates many of DEC’s present regulations governing the leasing of lands and the operations of the oil, gas and solution mining industries. Thirdly, it codifies specific offenses under the oil, gas and solution mining law and authorizes the imposition of administrative, civil and criminal sanctions.

R. 493; *see also* R. 491 (noting the sponsors’ view that the bill’s purposes would be served in part by “establishing new fees to fund additional regulatory personnel”). The 1981 Amendments thus responded to “the recent growth of

⁹ Appellant’s supporters admitted as much in the court below, stating:

Three decades ago, New York’s scheme for regulating the oil and gas industry degenerated into a chaotic and tangled mess. Due to a lack of state control of the oil and gas industry, municipalities were free to enact their own ordinances and regulations to oil and gas drilling and development.

New York’s patchwork of oil and gas regulations created a litany of problems: untrained staff entered well sites, creating safety concerns; local municipalities absorbed significant and unsustainable costs to hire professional petroleum engineering staff; . . . and exorbitant local taxation.

See Br. of Pro-Drilling Amici at 22.

drilling in the State,” which had exceeded DEC’s regulatory capacity, R. 491, but nothing about the new funding mechanisms, new operational regulations, or new enforcement provisions required the preemption of local zoning authority.

In support of its contrary argument, Appellant cites a legislative memorandum related to a *different* bill, Assembly Bill 6928. *See* App. Br. at 17 (citing the record in *Cooperstown Holstein Corp. v. Town of Middlefield* (“CHC R.”) at 949, 995). That bill also proposed amendments to the OGSML, but it was not enacted into law. Even if the legislative history of a bill that never passed were relevant to the 1981 Amendments, it would not support Appellant’s preemption claim.¹⁰

The cited memorandum confirms that Assembly Bill 6928 also was responding principally to deficiencies in DEC funding, not the scope of local zoning power. *See* CHC R. 992 (describing the proposed law as “AN ACT [to

¹⁰ Nor can Appellant find support in affirmations of its former counsel, Yvonne Hennessey, *see* App. Br. 6–7, 11–13, 15, whose opinions have no bearing on legislative intent. Likewise, Appellant cannot rely on the legally inadmissible Affidavit of Gregory H. Sovas, with attached exhibit, *see* App. Br. 7, 16–17, 46, 54 (citing R. 100–02), both of which the trial court declined to consider on evidentiary grounds, R. 51 n.12. Mr. Sovas is an industry consultant, who purports to describe what a now-deceased “senator and advocate for the oil and gas industry” said on a telephone call 30 years ago. R. 102. Such unadorned hearsay is not competent evidence, *Brocco v. Mileo*, 170 A.D.2d 732, 733 (3d Dep’t 1991), and post-enactment statements, even of a sponsor, are irrelevant to the question of legislative intent, *see Civil Serv. Emps. Ass’n v. Cnty. of Oneida*, 78 A.D.2d 1004, 1005 (4th Dep’t 1980). As the trial court noted, the affidavit is not part of the legislative history and its contents are irrelevant to the question of “pure statutory interpretation” presented in this case. R. 51 n.12. The affidavit was included in the intermediate appellate record only because Respondents expected Appellant to contest the evidentiary ruling. Because Appellant did not do so, it waived its appeal of that ruling, and this Court should disregard the affidavit and exhibit.

amend state law] in relation to the creation of a natural resources *fund*; . . . in relation to a *fee* to be paid for producing oil and gas, . . . and making an *appropriation* to [DEC] for carrying out certain provisions of the act”) (emphasis added). Those deficiencies left the agency without the “technical expertise required to administer and enforce” the OGSML and prompted local governments to fill the vacuum with “diverse attempts to regulate the oil, gas and solution mining activities.” *Id.* at 995. The bill proposed to address the “concerns of local government” about costs they absorbed in the absence of financing for DEC, by proposing new funding mechanisms that would allow the State to fulfill its responsibilities for oversight of the “oil, gas and solution mining regulatory program.” *Id.* To ensure a reliable source of revenue to cover residual costs that the industry imposed on municipalities, while avoiding duplicative state and local fees on drilling operations, “local taxing authority remain[ed] unaffected,” *id.* at 993. Both the bill and supporting memorandum were completely silent on the continued exercise of traditional zoning powers, however, and thus add no support for Appellant’s claim that the 1981 Amendments were intended to preempt local land use control.

Until this case, only one court—a trial court—had discussed the import of the 1981 Amendments. *See Envirogas v. Town of Kiantone*, 112 Misc. 2d 432 (Sup. Ct. Erie County 1982), *aff’d mem.*, 89 A.D.2d 1056 (4th Dep’t 1982). The

provisions challenged in *Envirogas* were financial requirements imposed on “gas and oil well drilling operations,” including both a permit fee and a compliance bond. 112 Misc. 2d at 432, 434. In evaluating the plaintiff’s claim that the OGSML preempted the local law, the court reasoned that “where a State law expressly states that its purpose is to supersede all local ordinances then the local government is precluded from legislating *on the same subject matter . . .*” *Id.* at 433 (emphasis added). The court then noted that the newly amended OGSML covered the same subject matter as the local law—funding to cover costs imposed by the oil and gas industry—addressing the Town’s concerns by enabling municipalities to seek compensation for damages and authorizing DEC to impose financial security requirements. *Id.* at 434–35. On that basis, the court concluded: “Since the State Legislature clearly intended Article 23 of the ECL to supersede and preclude the enforcement of all local ordinances *in the area of oil and gas regulation*, [r]espondents’ actions are . . . contrary to law.”¹¹ *Id.* at 435 (emphasis added).

The decision in *Envirogas*, like those in *Frew Run*, *Hunt Bros.*, and *Gernatt*, thus recognized that local legislation “in the area of oil and gas regulation” is preempted by state law “on the same subject matter.” *Id.* at 433, 435. The

¹¹ Indeed, the OGSML contains a second supersession provision that applies specifically to fees. See ECL § 23-1901(2) (“This title shall supersede all other laws enacted by local governments or agencies concerning the imposition of a fee relating to circumstances described in this title.”). Small wonder that the *Envirogas* court found the Town of Kiantone’s fee preempted.

Envirogas court was not asked to adjudicate a state preemption claim against a local law *on a different subject matter*—namely, land use, generally. *Envirogas* thus should not be read to bar or abridge zoning powers legislatively delegated to towns.

The foregoing analysis of the text and legislative history of the OGSML is consistent with its underlying purposes and policy, which can be fulfilled even if Dryden’s Zoning Ordinance is upheld, just as local land use regulation could be enforced without undermining the purposes and policy of the MLRL. The declaration of policy in the MLRL when *Frew Run* was decided provided in pertinent part:

The legislature hereby declares that it is the policy of this state to foster and encourage the development of an economically sound and stable mining and minerals industry The legislature further declares it to be the policy of this state to provide for . . . reclamation of affected lands; to encourage productive use including but not restricted to: . . . the establishment of recreational, home, commercial, and industrial sites

R. 635. The MLRL thus recognized the role of the State not only in fostering mining but also in providing for reclamation and encouraging productive “recreational, home, commercial, and industrial” land uses ordinarily addressed by localities. *Id.* Notwithstanding the statutory language suggesting that the *State* would address land use concerns, the *Frew Run* Court held that the MLRL’s supersession clause should not be read to “preclude the town board from deciding

whether a mining operation—like other uses covered by a zoning ordinance—should be permitted or prohibited in a particular zoning district.” 71 N.Y.2d at 133. The *Gernatt* Court came to the same conclusion, even with respect to a ban on mining. See 87 N.Y.2d at 681–83.

The OGSML’s declaration of policy provides as follows:

It is hereby declared to be in the public interest 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; 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, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected

ECL § 23-0301. The OGSML thus seeks to “regulate” (but not to foster) the industry, and the statute identifies no role for the State in encouraging productive land uses.¹² Reconciling the purposes of the OGSML with local land use

¹² For a detailed discussion of the OGSML’s subsidiary objectives (preventing waste, providing for a greater ultimate recovery, and protecting the correlative rights of owners and the rights of landowners and the general public), see Point II(A), *infra*. Appellant suggests that the “unique” statutory objectives and “terms of art” in the OGSML distinguish its statutory scheme from “any other, including the MLRL.” App. Br. at 7. Of course, every statute has “unique” objectives and defines terms specific to the covered subject, because the Legislature does not waste its time passing laws that duplicate prior enactments. The differences in statutory schemes do not preclude courts interpreting one law from relying on cases interpreting another. Indeed, Appellant urges this Court to do exactly that in citing *Ames v. Smoot*, 98 A.D.2d 216 (2d Dep’t 1983) (relating to pesticide application), *Lansdown Entertainment Corp. v. NYC Department of Consumer Affairs*, 74 N.Y.2d 761 (1989) (relating to alcohol consumption), and *Anonymous v. City of Rochester*, 13 N.Y.3d 35 (2009) (relating to curfews), see App. Br. at 42, 62, none of which involved either mining or a zoning ordinance, unlike this Court’s precedents under the MLRL.

regulation therefore is even easier than it was when the *Frew Run* Court interpreted the MLRL.

The Town of Dryden is not attempting “to regulate the development . . . of oil and gas” any more than the Towns of Sardinia or Carroll or the APA were attempting to regulate gravel extraction. The towns and the APA left regulation of extractive activities, processes, and operations to the State, while exercising State-delegated powers to determine permitted land uses within their borders. *See Gernatt*, 87 N.Y.2d at 682; *Hunt Bros.*, 81 N.Y.2d at 909 (acknowledging that “only those laws that deal with the actual operation and process of mining are superseded”) (internal quotation marks and citation omitted); *Frew Run*, 71 N.Y.2d at 133. The Town of Dryden similarly has avoided regulation of oil and gas activities, processes, or operations and has restricted local regulation to land use and zoning, consistent with the purposes of both the OGSML and the Zoning Ordinance. Reading the supersession clause of the OGSML in light of its language, history, and purposes, this Court therefore should find that local zoning is not the type of regulation that the Legislature intended to preempt.

C. Appellant Fails to Distinguish this Court’s Precedents.

Appellant attempts to avoid application of *Frew Run* and its progeny by offering tortured distinctions between the language, history, purposes, and regulatory scheme of the MLRL and those of the OGSML. For good reason, the

courts below were “unable to discern any meaningful difference” between the two statutes. R. 59; *see* R. 16 n. 8. This Court, too, should reject Appellant’s attempt to exalt linguistic form over substance, to rewrite the legislative history and purposes, and to ascribe doctrinal significance to geological features of minerals.

Appellant distorts the plain meaning of the MLRL in arguing that it “applied only to ‘local laws’ and, most significantly, explicitly *excepted* from supersession ‘local zoning ordinances,’ thus actually inviting local zoning.” App. Br. at 48.

The supersession clause of the MLRL at issue in *Frew Run* provided:

[T]his article shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this article 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.

R. 635, 637 (emphasis added). The express terms of this clause bar local regulation of the extractive mining industry, except with respect to “zoning ordinances or *other* local laws” imposing heightened reclamation requirements.

The Legislature’s use of the term “other” signaled that it regarded zoning ordinances as a species of the more general category “local laws.” To parse the clause as Appellant does—“inviting” adoption of any and all zoning ordinances, while superseding only local laws (as if ordinances and local laws were wholly

distinct instead of overlapping concepts), *see* App. Br. 48–49—impermissibly reads the word “other” out of the statute.¹³

The MLRL’s supersession clause therefore must be understood as this Court construed it, as preempting all local laws related to extractive mining, except local laws (including zoning ordinances) that impose stricter land reclamation requirements than those in the MLRL. *See Frew Run*, 71 N.Y.2d at 132–33 (“[T]he Legislature intended in ECL 23-2703(2) to prohibit any local regulation pertaining to actual mining activities, but not to preclude more stringent local laws pertaining to reclamation.”).¹⁴ The MLRL never gave localities *carte blanche* to pass any and all zoning ordinances (even those regulating actual mining activities) and cannot be distinguished from the OGSML on that basis.¹⁵ The textual analysis in the *Frew Run* line of precedents applies squarely to the OGSML because, like

¹³ As Appellant recognizes, the Court may not adopt an interpretation of the statute that renders its language mere surplusage. *See* App. Br. at 37 (citing *Criscione v. City of New York*, 97 N.Y.2d 152, 157 (2001) (“We have recognized that meaning and effect should be given to every word of a statute.”) (internal quotation marks and citation omitted); *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104 (2001) (same)).

¹⁴ It was the clarity of the intent to allow stricter reclamation laws that prompted stakeholder opposition to the MLRL, as Appellant notes. *See* App. Br. at 54. There was no opposition to the MLRL on the grounds that it preserved local power to regulate land use, just as there was no opposition to the OGSML on that ground. The absence of such opposition is not evidence that either statute preempted zoning, and neither statute does.

¹⁵ Nor is it true that the MLRL “affirmatively recogniz[ed] local zoning authority to determine permissible land uses” in zoning districts, as Appellant claims. App. Br. at 56. The MLRL did not include the language alluded to by Appellant at the time that *Frew Run* was decided. That language was added when the Legislature codified the decision in *Frew Run*, making express what this Court found implicit in the original statutory terms—that supersession of *all* local laws relating to the extractive mining industry did *not* preempt local zoning. Appellant’s interpretation of the MLRL thus distorts not only its language but also its history.

the MLRL, the OGSML broadly preempts all local regulation of industrial activities (whether through zoning ordinance or other local law), with narrow express exceptions.

The core distinction for purposes of this case is not Appellant’s contrived division between zoning ordinances and local laws but the difference between regulation of extractive industry operations (whether surface mining or oil and gas development) and regulation of land use.¹⁶ *See Frew Run*, 71 N.Y.2d. at 131 (“The zoning ordinance relates not to the extractive mining industry but to an entirely different subject matter and purpose”); *accord Gernatt*, 87 N.Y.2d at 682 (“[T]he distinction is between ordinances that regulate property uses and ordinances that regulate mining activities”); *Hunt Bros.*, 81 N.Y.2d at 909 (“[W]e held that this supersession clause does not preclude local zoning ordinances that are addressed to subject matters other than extractive mining”). Both the MLRL and the OGSML regulate technical aspects of the affected industry in considerable (although necessarily different) detail; neither regulates land use generally. Thus, as long as localities do not attempt to regulate oil and gas operations (other than in the two excepted areas of local roads and real property

¹⁶ Which dictionary one chooses to consult for the meaning of “regulation,” *see* App. Br. at 22–23 (complaining about the Appellate Division’s use of the Merriam-Webster On-Line Dictionary), has no effect on the fundamental difference between regulation of the industry and regulation of land use.

taxes), they are free to implement their comprehensive land use plans, including prohibitions on heavy industrial uses.

The OGSML’s two exceptions from state preemption of industrial operations—for local government jurisdiction over local roads and real property taxes—are consistent with this reading.¹⁷ Prior to the 1981 Amendments, DEC was inadequately funded to oversee technical oil and gas operations, and individual towns that were forced to fill the regulatory void covered their costs by imposing local fees and financial assurance requirements on industry operations within their borders. *See supra* Point I(B) (describing legislative history). When the Legislature finally funded DEC to do its job, the amended statute withdrew from localities the authority to demand fees and bonds but protected their ability to recover costs imposed by oil and gas operations by preserving their right to tax industry under the Real Property Tax Law.

Similarly, the Legislature preserved local jurisdiction over local roads, even though municipal limitations on street excavations and the size and weight of vehicles directly regulate oil and gas operations, which require numerous vehicular trips and disruptive construction of new access roads and pipelines. *See* DEC,

¹⁷ Appellant makes much of the fact that the OGSML uses the term “jurisdiction” when identifying the scope of power over industry operations reserved to localities, whereas the MLRL specifies the scope of local jurisdiction without using that term. *See* App. Br. at 48–49. The distinction is one without a difference. The supersession provisions of both statutes have exceptions clauses that carve out an area of permitted regulation of the affected industry; neither statute precludes local power over zoning.

Revised Draft Supplemental Generic Env'tl. Impact Statement on the Oil, Gas and Solution Mining Regulatory Program 6-302 (Table 6.60) (2011) (estimating the use of nearly 1,800 heavy truck trips per horizontal shale gas well), available at http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisch6b0911.pdf.

Allowing municipalities to regulate industry operations on local roads saved municipalities substantial costs and shielded the Legislature from charges that it was conferring special treatment on oil and gas vehicles not afforded to other businesses—an objection that had been raised against tax provisions in the 1981 Amendments. R. 496, 501. The OGSML's supersession clause thus allows municipalities to regulate oil and gas activities in two defined areas, and no others, but there is nothing in the text of the OGSML, any more than there was in the MLRL, to suggest that the Legislature intended to preempt local regulation of land use.

Appellant's effort to avoid application of the *Frew Run* line of precedents by distinguishing the legislative history of the MLRL and OGSML is no more persuasive than its effort to distinguish the language and purposes of the two statutes. Appellant claims that "[t]he supersedure language of the OGSML was added, by amendment, . . . in response to almost two decades of parochial local regulation relating to oil and gas development," whereas "the MLRL's supersedure

provision was included in the initial enactment.” App. Br. at 54. The *Frew Run* Court expressly recognized, however, that:

the Mined Land Reclamation Law was enacted . . . to eliminate “[r]egulation on a town by town basis [which] creates confusion for industry and results in additional and unfair costs to the consumer” (Mem of Department of Environmental Conservation in support of Assembly Bill 10463-A, May 31, 1974, Governor’s Bill Jacket, L 1974, ch 1043). Thus, one of the statute’s aims is to encourage the mining industry by the adoption of standard and uniform restrictions and regulations to replace the existing “patchwork system of [local] ordinances” (*id.*).

71 N.Y.2d at 132. Just as the MLRL could serve its standardizing function without abridging local land use powers, so can the OGSML. Appellant offers no explanation why it should matter if standardizing provisions are enacted as an initial matter or in response to events intervening after a statute’s original passage.

Appellant also fails to explain what difference it makes that the 1981 Amendments followed the energy crisis of the 1970s. *See* App. Br. at 54. The original MLRL stated clearly that one of its purposes was “to foster and encourage the development of an economically sound and stable mining and minerals industry,” R. 635, and it achieved that goal by reasserting the State’s role as the exclusive regulator of that industry (except with respect to land reclamation standards and requirements). Even if “there has never been a sand and gravel crisis in New York State,” App. Br. at 54, there plainly were circumstances

“necessitating the elimination of local control over solid minerals mining,” *see id.*, or the MLRL and its supersession clause never would have been enacted.

Appellant cannot avoid application of the precedents interpreting the MLRL by invoking allegedly “significant distinctions between the two statutes relative to what each actually regulates.” App. Br. at 50. Appellant argues that “the OGSML substantively regulates the ‘where’ of drilling and, therefore, localities may not.” *Id.* According to Appellant, the MLRL does not regulate where mining may occur, so localities may determine the locations of mines. *Id.* Appellant’s argument fails for two reasons.

First, the OGSML does regulate unit size, placement of wellheads, and other aspects of oil and gas well location, but zoning provisions do not purport to address those technical elements of industrial operations. In Appellant’s lingo, *see App. Br.* at 8, 11, both regulatory regimes address the “where” of drilling, but they do so in different and mutually consistent ways. As the Appellate Division recognized:

[T]he 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.

R. 19; *see also* R. 52 (noting that “[n]one of the provisions of the OGSML address[es] traditional land use concerns”). As long as localities do not attempt to

regulate the technical, operational aspects of drilling, their land use measures are not preempted by the OGSML.¹⁸

Second, the MLRL also addresses, and always has addressed, aspects of mine location. From the beginning, permits required under ECL § 23-2711 could not be obtained unless DEC approved a “mined land-use plan,” with a map of the affected land, “an outline of the area of the minerals to be removed,” and a description of the “location” of haulageways. R. 640–43. Permits could be denied if the mine location, or the location of other mine-related facilities, failed to meet statutory requirements.¹⁹ Nevertheless, *Frew Run* held that a mine operator who obtained a state permit could be precluded from using land set off limits to mining by local zoning, because the MLRL’s supersession clause did not preempt land use regulation. The same reasoning applies to the OGSML.

Finally, the “physical differences between the substances regulated by the MLRL and the OGSML,” App. Br. at 55, provide no support for Appellant’s

¹⁸ Were Respondents to adopt technical standards different from those promulgated under the OGSML, such as a provision changing the maximum size of spacing units or extending the minimum depth of primary well casing below the water table, the local requirement would be preempted, even if it were styled as an amendment to the Zoning Ordinance. *Cf. Hawkins v. Town of Preble*, 145 A.D.2d 775, 776 (3d Dep’t 1988) (finding preemption because a bar on mining below the water table is “an express limitation of the mining process”). Dryden’s Zoning Ordinance is, by contrast, a classic example of land use regulation not addressed in the OGSML.

¹⁹ Conversely, the MLRL provided that a permit “shall” be issued following approval of the application. R. 641. Appellant thus cannot distinguish OGSML from the MLRL by pointing to the provision of the OGSML stating that DEC “shall” issue a permit to drill if certain requirements are met. *See* App. Br. at 52.

preemption claim. Contrary to Appellant's suggestion, *see* App. Br. at 42–43, 55–56, both deposits of the solid minerals mined pursuant to the MLRL and reserves of oil and gas developed pursuant to the OGSML may cross the borders of municipalities (or municipal zoning districts), one of which prohibits industrial uses. In neither case would the relevant industry be able to use the land surface for extraction of the resource in the prohibited zone. This Court nevertheless held that local land use control was not preempted by the MLRL. Similarly, nothing about the geology of oil and gas requires preemption of local zoning by the OGSML.

D. The Legislature's Clear Expressions of Intent to Preempt Local Land Use Regulation in Other Contexts Confirm That the OGSML Does Not Preempt Dryden's Zoning Ordinance.

The OGSML contrasts starkly with other statutes clearly evincing a legislative intent to preempt local law. Some of those statutes contain language unmistakably precluding enforcement of local zoning or land use laws. Even those lacking unambiguous supersession clauses do not withdraw local power to regulate land use without ensuring that there are alternative mechanisms for consideration of the interests traditionally protected by zoning. The absence of the requisite provisions or procedures from the OGSML belies any legislative intent to have oil and gas regulation supersede local land use law.

The statute governing siting of industrial hazardous waste facilities is a good example of a law expressly preempting local zoning. In relevant part, it provides:

Notwithstanding any other provision of law, no municipality may, except as expressly authorized by this article . . . require any approval, consent, permit, certificate or other condition *including conformity with local zoning or land use laws and ordinances*, regarding the operation of a facility with respect to which a certificate hereunder has been granted

ECL § 27-1107 (emphasis added). Similarly, state law expressly preempts local power to exclude group homes from residential districts zoned for single families, by providing that “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.” N.Y. Mental Hyg. L. § 41.34(f); *see Inc. Vill. of Nyack v. Daytop Vill.*, 78 N.Y.2d 500, 506–07 (1991) (contrasting Section 41.34 of the Mental Hygiene Law, which expressly preempts local zoning authority, with Section 19.07, which does not).

The Legislature does not lightly curtail longstanding home rule powers to regulate land use. When it does so, it creates alternative mechanisms to ensure State consideration of local interests. For example, in laws governing the siting of major electrical generating facilities, the Legislature has required that a copy of the application be filed with the municipality in which the facility will be located; has secured direct protection for local communities by requiring measures guaranteeing their safety and security, as well as an environmental justice analysis; and has provided for local participation in the regulatory process. *See Pub. Serv.*

L. §§ 164(1)(e), (f), (h), (i), (2)(a); 166(j)–(n); *see also* ECL §§ 27-1105, 27-1113 (providing similar protections when siting hazardous waste facilities); *see also Floyd v. New York State Urban Dev. Corp.*, 33 N.Y.2d 1 (1973) (interpreting Urban Development Corporation Act, which required either compliance with zoning or extensive municipal participation to address local concerns).²⁰ Because the OGSML offers none of these protections for the community, unlike the

²⁰ Appellant cites the Appellate Division decision in *Sunrise Check Cashing & Payroll Services, Inc. v. Town of Hempstead*, 91 A.D.3d 126 (2d Dep’t 2011), *aff’d on other grounds*, 20 N.Y.3d 481 (2013), in support of its argument that any regulation of the location of oil and gas activities also preempts land use regulation. *See* App. Br. at 40–42. Appellant neglects to acknowledge that, on appeal from that decision, this Court declined to reach the preemption issue. Even if the Second Department ruling remained good law, however, the case does not support Appellant’s position, because the Banking Law at issue in *Sunrise Check Cashing* offers express protections for local communities that are absent from the OGSML. The Banking Law states in pertinent part:

If . . . the superintendent shall find that the granting of such application will *promote the convenience and advantage of the area in which such business is to be conducted*, . . . the superintendent shall thereupon execute a license In finding whether the application will promote the convenience and advantage to the public, *the superintendent shall determine whether there is a community need for a new licensee in the proposed area to be served.*

N.Y. Banking L. § 369(1) (emphasis added). Moreover, a license may not be granted without consideration of community needs, economic development plans, and demographic patterns. *See Sunrise Check Cashing*, 91 A.D.3d at 138. Because the state collects factual evidence grounding a specific determination about the community need for a check-cashing establishment in a particular location, the locality cannot make a contrary finding and exclude the licensed business from an approved site. *Id.* at 139. No such determination of community need for oil and gas development in a specific location is required under the OGSML; nor does the statute address economic development and demographic concerns traditionally protected by zoning.

preemptive statutes discussed above, there is no basis for finding in that statute a clear expression of intent to preempt local zoning.²¹

POINT II

THE DOCTRINE OF IMPLIED PREEMPTION DOES NOT PRECLUDE ENFORCEMENT OF THE ZONING ORDINANCE.

This Court repeatedly has indicated that, “[w]hen dealing with an express preemption provision . . . it is unnecessary to consider the applicability of the doctrines of implied or conflict preemption.” *People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 113 (2008); *see Frew Run*, 71 N.Y.2d at 130. Rather, the express clause governs. *Frew Run*, 71 N.Y.2d at 130 (“[W]e deal here with an express supersession clause The appeal turns on the proper construction of this statutory provision.”). Even if this Court considers the doctrine of implied or conflict preemption, upon finding that the OGSML’s express supersession clause does not preempt local land use regulation, that doctrine would not bar the adoption and enforcement of the Town of Dryden’s Zoning Ordinance.

²¹ Appellant’s argument that the MLRL “establishes a partnership with localities relative to mine location” and seeks to balance interests in “matters traditionally within the control of local governments,” App. Br. at 55, thus undermines its preemption claim. Those features of the 1974 statute would have offered *more* evidence of preemptive intent than provisions of the OGSML, which does not provide for local government participation in the siting process or accommodate traditionally local land use concerns. Given that the MLRL nevertheless was found not to preempt local land use regulation, there is still less reason to find that the OGSML does so.

Under the doctrine of implied or conflict preemption, a court must “search for indications of an implied legislative intent to preempt in the Legislature’s declaration of a State policy or in the comprehensive and detailed nature of the regulatory scheme established by the statute.” *Id.* As a matter of both law and practice, however, the Zoning Ordinance is compatible with the purposes and regulatory provisions of the OGSML. This Court therefore should affirm the decisions below, rejecting Appellant’s implied preemption claim.

A. The Declaration of Policy in the OGSML Is Consistent with Local Regulation of Land Use.

The OGSML declares it to be “in the public interest to *regulate* the development, production and utilization of natural resources of oil and gas in this state” ECL § 23-0301 (emphasis added). The statute provides that regulation should be designed to “prevent waste” and that the regulated development should allow “greater ultimate recovery” of the resources and protect “the correlative rights of all owners and the rights of all persons including landowners and the general public.” *Id.* All of these subsidiary purposes can be fulfilled even if Dryden’s Zoning Ordinance is fully enforced.

Contrary to Appellant’s contention, *see* App. Br. at 58, respect for local land use regulation is not inconsistent with the declared policy of the OGSML. As defined in the OGSML, preventing “waste” means avoiding “inefficient, excessive or improper use of, or the unnecessary dissipation of reservoir energy” as well as

imprudent or improper operations that cause “unnecessary or excessive surface loss or destruction” of the resource. *Id.* § 23-0101(20)(b)–(c). The statutory definition reflects its origination early in the development of oil and gas law.

Historically, ownership of such resources was governed by the common-law principle of “law of capture,” which held that the first person to reduce subsurface oil or gas to physical possession became the owner of same regardless of whether the product was in fact extracted from beneath the surface of that person’s property Thus, the only way to protect one’s interest in the minerals beneath his or her land was to drill a well. This resulted in the drilling of excessive wells, which, in turn, created considerable waste.

W. Land Servs., Inc. v. Dep’t of Envtl. Conservation, 26 A.D.3d 15, 16–17 (3d Dep’t 2005); *see Wagner v. Mallory*, 169 N.Y. 501, 505 (1902) (describing the rule of capture). Waste resulted because excessive drilling in the “pool” or “reservoir” where the oil or gas collected after migrating from source rock depleted the subsurface pressure required for flow to the surface and thereby reduced the “quantity of oil or gas ultimately recoverable.” ECL § 23-0101(20)(b)–(c); CHC R. 923. The OGSML therefore *limited* the number of wells that could be drilled to protect the reservoir pressure; nothing in the statute requires additional drilling where local communities do not want it.

Moreover, the pressure concerns addressed by the early OGSML do not arise in modern oil and gas development from shale or other low-permeability formations, where the resource is trapped in the source rock and released from

small pores only by fracturing. *See* CHC R. 923. Waste nevertheless occurs in production from shale when poorly constructed wells allow hydrocarbons to migrate into groundwater or when wells are rushed into production before there is infrastructure to collect and transport extracted gas, leading drillers to vent or flare usable product.²² *See id.* In either case, a policy directing that oil and gas not be dissipated, lost, or destroyed *in areas where development is authorized* is not a command immediately to develop every last molecule of the resource wherever it can be found; nor does it mean that local municipalities have no say about whether and where heavy industry may locate within their borders. *See Gernatt*, 87 N.Y.2d at 684.

The interest in protecting correlative rights also derives from an era of conventional oil and gas development. When a conventional pool underlies the land of multiple property owners, the migratory resources under one owner's land can be extracted from a vertical well drilled on another's property, yielding an unfair windfall for the first driller. *See Sylvania Corp. v. Kilbourne*, 28 N.Y.2d 427, 433 (1971) (citing precedent recognizing the need to secure to landowners

²² Indeed, the venting of gas has been understood as the classic example of waste for more than a century. *See, e.g., Ohio Oil Co. v. State of Indiana*, 177 U.S. 190 (1900) (upholding state law prohibiting the escape of gas from a well into the open air). Wasteful flaring of \$100 million of gas per month has prompted 10 class action lawsuits in the Bakken Shale region of North Dakota. *See* Clifford Krauss, *Oil Companies Are Sued for Waste of Natural Gas*, N.Y. Times, Oct. 17, 2013, http://www.nytimes.com/2013/10/18/business/energy-environment/oil-companies-are-sued-over-natural-gas-flaring-in-north-dakota.html?_r=0.

equitable apportionment of the “migratory” gas under their land). To counteract the perverse incentive for each owner to drill, when multiple wells would lower the reservoir pressure and reduce the ultimate recovery, the Legislature developed a system for limiting drilling and protecting the correlative rights of landowners who lost the right to develop their own wells. *See* N.Y. Comp. Codes R. & Regs. tit. 6, § 550.3(ao) (defining correlative rights so as to prevent drilling of “unnecessary wells”); *see also Samson Resources Co. v. Corp. Comm’n*, 702 P.2d 19, 22 (Okla. 1985) (noting that “correlative rights are those rights which one owner possesses in a common source of supply in relation to those rights possessed by other owners in the same common source of supply”) (internal quotation and citation omitted).

That system—a combination of unitization, voluntary and compulsory integration, and compensation for forced pooling—has carried over to the development of unconventional plays, such as shale, notwithstanding the inapplicability of the system’s original rationale. Although there is no risk of losing shale gas if a vertical well is drilled on neighboring land, operators still are permitted to create drilling units encompassing land from multiple owners, who then are compensated from profits after production. The correlative rights of all owners within a unit thus are protected, *where development is authorized to proceed* and if extraction is profitable. Under the OGSML, however, the State must protect “the rights of all persons, including landowners and the general

public,” not only the correlative rights of mineral owners within a drilling unit.

The law therefore should not be read to force development where communities do not want it, regardless of adverse impacts on small town quality of life or neighboring property values.

B. The Declaration of Policy in the Energy Law Is Consistent with Local Regulation of Land Use.

Appellant notes that although the OGSML declares it to be in the public interest to “regulate” oil and gas production, the Energy Law declares that state policy is to “foster, encourage and promote” such development. *See* App. Br. at 13–14 (citing Energy Law § 3-101(5)). Because the Legislature plainly recognized the difference between “regulation” and “encouragement,” and because this Court previously found that state “regulation” of mining does not preempt local land use controls, Appellant now seeks to invoke the policies of the Energy Law in support of its implied preemption claim. *See id.* at 58. Because Appellant did not raise that claim in its Verified Petition and Complaint, R. 67–77, it is precluded from raising the claim on appeal. Even if this Court permits Appellant to add a belated preemption claim under the Energy Law, however, the Zoning Ordinance does not conflict with the policies of the Energy Law any more than it conflicts with those of the OGSML.

In *Frew Run* and its progeny, this Court repeatedly has affirmed that local land use regulation is *not* preempted by the MLRL, even though that statute *does*

declare that it is state policy to “foster and encourage” the mining industry. ECL § 23-2703(1). The similar policy invoked Appellant thus does not support its claim that Dryden’s Zoning Ordinance is preempted by the Energy Law.

Moreover, Appellant argues that the State is authorized and required to “maximize recovery” regardless of any other considerations, App. Br. at 60, only by singling out that policy to the exclusion of others that are equally significant. The Energy Law expressly provides that it is the policy of New York State:

1. to obtain and maintain an adequate and continuous supply of safe, dependable and economical energy for the people of the state and to accelerate development and use within the state of renewable energy sources, all in order to promote the state’s economic growth, to create employment within the state, *to protect its environmental values and agricultural heritage, to husband its resources for future generations, and to promote the health and welfare of its people;*

. . . and

6. *to encourage a new ethic among its citizens to conserve rather than waste precious fuels; and to foster public and private initiative to achieve these ends at the state and local levels.*

N.Y. Energy L. § 3-101 (emphasis added). Husbanding resources for future generations and encouraging a conservation ethic are not consistent with unbridled development of gas reserves. *See Sylvania Corp.*, 28 N.Y.2d at 430 (noting the State’s interest in avoiding “wasteful exhaustion of resources”).²³

²³ Indeed, Appellant admits that the purpose of the Interstate Oil and Gas Compact Commission, to which Appellant ascribes the origin of the OGSML, “is to conserve oil and gas by the prevention of physical waste from any cause.” App. Br. at 6 (citing R. at 524–25).

Appellant thus turns the statute on its head in arguing that waste is promoted and correlative rights are violated when oil and gas resources remain underground. *See* App. Br. at 7–8. Rather, the reserves are husbanded for future generations, which are always free to lift local bans on oil and gas development.²⁴ Therefore, like the petitioner in *Gernatt*, Appellant cannot insist that Respondents permit resource extraction within the Town of Dryden. Rather, under the Energy Law as under the OGSML, localities may adopt and enforce zoning provisions that designate permitted and prohibited uses within their borders.

C. OGSML Provisions Governing Industrial Operations Are Consistent with Dryden’s Zoning Amendment.

The OGSML contains detailed provisions governing oil, gas, and solution mining operations, including the issuance of well drilling permits, the production and storage of oil and gas, and fees that may be imposed on permit holders, but it does not serve as a land use planning law, and it does not convert DEC into a land use planning agency. The extensive powers granted to DEC, *see* ECL § 23-0305, do not include the authority to direct wells into or away from particular municipalities, or particular zoning districts, and DEC does not undertake

²⁴ Were there an obligation to develop all available resources, drillers would not be free to forgo development during periods of over-production. *See* CHC R. 923–24. Instead, by conserving precious fuels, the state prevents waste and protects correlative rights, which receive no meaningful protection when unnecessary wells depress prices to the point where drillers operate at a loss.

statewide or even regional planning for oil and gas development.²⁵ The operator, not the State, proposes a spacing unit in its application for a drilling permit. *See* ECL § 23-0501(2)(a). Each application is considered independently—not on a statewide basis or pursuant to a comprehensive land use plan—to ensure that it satisfies the policy objectives of the statute, namely, efficient recovery of the resource and fair compensation to all holders of mineral rights, including those whose rights are forcibly pooled. *See id.* § 23-0503(2)–(3). Operators can plan the size and shape of spacing units to conform to local zoning laws and then conduct their activities in compliance with state rules establishing technical requirements. *See id.* § 23-0503(2), (3)(a).

The fact that the State regulates oil and gas activities and infrastructure does not mean that the Town of Dryden must allow the industry to operate within its borders. This Court rejected precisely that argument in *Gernatt*. *See* 87 N.Y.2d at

²⁵ Before Mr. Sovas became an industry consultant, he worked for DEC, and he strenuously protested against the idea that DEC was a land use agency. *See* Gregory H. Sovas, Director, Division of Mineral Resources, DEC, Presentation at Albany Law School’s Environmental Forum: *Sustainable Development and Mining, Perspectives on New York’s Mined Land Reclamation Law* 4 (Apr. 17, 1998), available at http://www.dec.ny.gov/docs/materials_minerals_pdf/albanyla.pdf (“It is important to recognize that DEC is not a land use agency, and that the authority remains at the local government level. It has always been our position that localities need to determine appropriate land uses and that DEC, even if we believe that a site may not be zoned properly, will not interfere in those decisions.”); *id.* at 8 (“DEC is not a land use agency, and we must abide by the local zoning whether we agree or not.”); *id.* at 10 (“DEC does not want conflicts with local governments and does not have an interest in siting mines in areas where the locals don’t want them.”). If this Court does not rule Mr. Sovas’ testimony inadmissible in this proceeding, these statements should raise serious questions as to his credibility.

684 (“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.”) (citations omitted). Nothing in the OGSML suggests that the State seeks to force quiet rural towns enjoying clean air and water to sacrifice the comprehensive planning that protects their community character and to surrender the quiet enjoyment of their land to a noisy and dirty industry. Because the Town of Dryden is not imposing restrictions on oil and gas operations or activities in conflict with the OGSML’s regulatory scheme, but rather is regulating the use of land, the Town’s Zoning Amendment should be upheld against Appellant’s conflict preemption claim. *Cf. DJL Rest. Corp.*, 96 N.Y.2d at 97 (finding that the Alcoholic Beverage Control Law did not preempt New York City’s Amended Zoning Resolution because the Resolution “applies not to the regulation of alcohol, but to the *locales* of adult establishments”) (emphasis in original); *Schadow v. Wilson*, 191 A.D.2d 53, 56 (3d Dep’t 1993) (upholding a special use permit requirement because “it regulates land use generally, i.e., the location of mining operations in the Town, not the mining activity itself”).

POINT III

STATE OIL AND GAS REGULATION COEXISTS WITH LOCAL LAND USE REGULATION IN MANY STATES.

Appellant’s final argument is framed as a rhetorical 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?” App. Br. 61. This question not only is irrelevant to the legal issue presented in this case but also assumes an answer that is flatly contradicted by practices in other states.²⁶ In fact, several other oil- and gas-producing states permit localities to prohibit drilling within their borders, including California, Illinois, and Texas. *See* Cal. Att’y Gen. Op. No. SO 76-32, 16 (1976), *available at* <ftp://ftp.consrv.ca.gov/pub/oil/publications/prc03.pdf> (opining that the State of California’s approval of an oil or gas well “would . . . not nullify a valid prohibition of drilling or a permit requirement by a county or city in all or part of its territory”); *Tri-Power Resources, Inc. v. City of Carlyle*, 359 Ill. Dec. 781, 786 (Ill. App. Ct. 2012) (holding that non-home-rule units of government in Illinois have the same power as home-rule municipalities to prohibit oil and gas wells within their borders);

²⁶ Even if enforcing local zoning would stop oil and gas investment in its tracks, whether the interest in attracting oil and gas development should trump the interest in preserving rural community character and sustainable local economies is a policy question for the Legislature, not an issue of law for this Court.

Unger v. State, 629 S.W.2d 811, 812 (Tex. App. 1982) (agreeing that, in Texas, a municipality “has full authority both to regulate and prohibit the drilling of oil wells within its city limits”); *see also, supra*, note 3 (describing Tulsa, Oklahoma’s 100-year ban on drilling). Those prohibitions operate notwithstanding state mandates to prevent waste, *see, e.g.*, 225 Ill. Comp. Stat. 725 / 1.1 (prohibiting waste); Tex. Nat. Res. Code Ann. § 85.045 (same), and thus also belie Appellant’s claim that enforceable local bans “plainly would conflict with . . . all of the objectives of the OGSML.” App. Br. at 61.²⁷

Those prohibitions, and other local regulation of the oil and gas industry, plainly do not defeat investment in any of those states. Where profitable reserves exist, the industry accommodates itself to the local controls, just as it accommodates itself to varying state regulations of technical operations. Thus, as a matter of both law and practice, the OGSML may be harmonized with local land use laws, including Dryden’s Zoning Ordinance. This Court therefore should reject Appellant’s express and implied preemption claims.

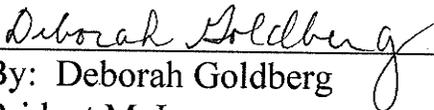
²⁷ To the extent that *Voss v. Lundvall Bros. Inc.*, 830 P.2d 1061 (Colo. 1992), and *Ne. Natural Energy, LLC v. City of Morgantown, W.V.*, No. 11-C-411, Slip Op. 8-9 (Cir. Ct., Monongalia Cnty., Aug. 12, 2011), CHC R. 897–906, hold otherwise, they are inconsistent with the New York Court of Appeals decision in *Gernatt*. Moreover, the decision in *Voss* relied on the need to conform drilling patterns to the “pressure characteristics of the pool,” 830 P.2d at 1067, a consideration that is irrelevant to the unconventional plays underlying small rural towns in upstate New York, including Dryden. *See supra* Point II(A). In West Virginia, unlike in New York, local governments are required “to supplement and complement the efforts of the State by coordinating their programs with those of the State.” CHC R. 902.

CONCLUSION

For the reasons stated above, this Court should affirm the decisions below awarding summary judgment in favor of Respondents.

Dated: New York, New York
December 13, 2013

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