**To be argued by: Deborah Goldberg**
**Time Requested: 20 minutes**

**Appellate Division Case No. 515227**

# New York Supreme Court

## 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 RESPONDENTS-DEFENDANTS-RESPONDENTS**
**TOWN OF DRYDEN AND TOWN OF DRYDEN TOWN BOARD**

**EARTHJUSTICE**
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**Dated: December 20, 2012**

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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Q1. When the language, purposes, and legislative history of the New York Oil, Gas and Solution Mining Law ("OGSML"), which regulates technical industrial operations, can be harmonized with constitutionally guaranteed and legislatively delegated home rule powers over local land use, does the OGSML expressly preempt the zoning amendment adopted by the Town of Dryden (the "Zoning Amendment"), which clarifies that facilities associated with oil and gas development are prohibited uses under the Town's Zoning Ordinance?

A1. The Supreme Court correctly held that the OGSML does not expressly preempt the Zoning Amendment. *See* Record on Appeal ("R.") 26–33.

Q2. When there is no conflict between the Zoning Amendment and the purposes and provisions of the OGSML, does the OGSML implicitly preempt the Zoning Amendment?

A2. The Supreme Court correctly held that the OGSML does not implicitly preempt the Zoning Amendment. *See* R. 32 n.13.

## COUNTERSTATEMENT OF THE NATURE OF THE CASE

This case is an effort by appellant Norse Energy Corp. USA ("Appellant") to exempt itself from comprehensive land use planning undertaken by the Town of Dryden and its Town Board (collectively, "Respondents") and to strip them of their power to determine whether or where heavy industrial oil and gas facilities may operate within Dryden's borders. Appellant "seeks to protect property rights of mineral owners and their lessees," Brief of Petitioner-Plaintff-Appellant Norse Energy Corp. USA ("App. Br.") at 1, at the expense of other Dryden residents and the community as a whole, whose interests are safeguarded by the Town's comprehensive plan and associated zoning. Toward that end, Appellant contends that Dryden's Zoning Amendment is expressly preempted by the OGSML, even though the New York Court of

Appeals repeatedly has held that a similar law – the Mined Land Reclamation Law ("MLRL") – can and must be harmonized with local land use authority. Appellant also maintains that the Zoning Amendment conflicts with the OGSML, and therefore is preempted by implication, notwithstanding the Zoning Amendment's consistency with the policy and purposes of the state statute and the coexistence of locally regulated land use and state-regulated oil and gas activities throughout numerous hydrocarbon-rich areas of this nation. Because neither the express nor the implied preemption claim has merit, the court below properly awarded summary judgment in favor of Respondents.

Respondents now urge this Court to reaffirm their constitutionally guaranteed and legislatively delegated home rule powers, which authorize them 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 the Town of Dryden. Respondents do not purport to regulate technical aspects of the oil and gas industry, which they readily acknowledge is the prerogative of the State. R. 453–54. Because Respondents can exercise their zoning power consistently with state regulation of industrial operations, activities, and processes, this Court should uphold the trial court's determination that the OGSML does not preempt Dryden's Zoning Amendment, either expressly or by implication.[1]

With respect to Appellant's claim that the supersession clause in the OGSML expressly preempts the Zoning Amendment, the Supreme Court stated:

> The Court of Appeals has held that a similar supersession clause contained in the Mined Land Reclamation Law (Environmental Conservation Law article 23, title 27; herein MLRL) did not preempt local zoning ordinances (see Matter of Frew Run Gravel Prods. v. Town of Carroll, 71 NY2d 126 [1987]). In light of the

[1] The trial court invalidated and severed subsection 2104(5) of the Zoning Amendment, which attempted to regulate the enforcement of permits, rather than clarifying land use prohibitions. R. 37–38. Neither party has contested that ruling on appeal.

> similarities between the OGSML and the MLRL as it existed at the time of Matter of Frew Run, the court is constrained to follow that precedent in this case.

R. 24–25. In so ruling, the trial court correctly noted that "[t]he primary language of the two supersedure clauses is nearly identical," (remarking that "both statutes preempt only local regulations 'relating' to the applicable industry," meaning "only regulations dealing with operations") and that "[n]either supersedure clause contains a clear expression of legislative intent to preempt local control over land use or zoning." R. 26.[2] Moreover, the court found itself "unable to discern any meaningful difference . . . in the respective legislative histories, purposes, or regulatory schemes of the two statutes." R. 38. The court contrasted the OGSML with other statutes that do contain clear expressions of legislative intent to preempt local zoning, such as the laws regulating the siting of hazardous waste facilities or group homes. R. 32–33. For those reasons, as is further explained in Point II below, the trial court's rejection of Appellant's express preemption claim should be affirmed by this Court.

The trial court also correctly rejected Appellant's implied or conflict preemption claim, finding no inconsistency between the Zoning Amendment and the purposes and provisions of the OGSML. R. 32 n.13. The statutory purposes favoring improved oil and gas recovery and avoidance of wasteful extraction processes can be served even if the Department of Environmental Conservation ("DEC") sites wells in accordance with local zoning. *See* R. 34–35 n.15 ("[B]ecause the location of any boundaries between areas where drilling is a permitted use and where it is prohibited by a local zoning ordinance – whether between different districts within a municipality or between different municipalities – will be known when a well

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[2] The supersedure clause of the MLRL provides in pertinent part: "For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry . . . ." ECL § 23-2703(2). The supersedure clause of OGSML similarly 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 . . . ." ECL § 23-0303.

application is under consideration, DEC may account for such boundaries to efficiently site wells in any areas where drilling is allowed.”). The lower court therefore concluded:

> By interpreting [the statutory purposes] as pertaining to regulation of development and production only in locations where such activities may be conducted in compliance with applicable zoning ordinances governing land use, the OGSML may be construed in a fashion which avoids any “abridgment of a town’s power to regulate land use through zoning powers expressly delegated in the Statute of Local Governments § 10(6) and Town Law § 261” . . . .

R. 31 (citation omitted). As the court further noted, the Zoning Amendment can be harmonized not only with the purposes of the OGSML but also with OGSML provisions regulating the siting of industrial activities, because those provisions address “technical operational concerns.” R. 31. Significantly, the court concluded: “None of the provisions of the OGSML address[es] traditional land use concerns, such as traffic, noise or industry suitability for a particular community or neighborhood . . . .” *Id.* (citations omitted). Because the purposes and provisions of the OGSML and the Zoning Amendment address categorically distinct types of concerns – technical operations as opposed to land use – there is no conflict between them. This Court therefore should affirm the grant of summary judgment in favor of Respondents as to Appellant’s implied preemption claim as well. *See infra* Point III.

## 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) that never contemplated oil and gas development or related activities as permitted uses. R. 101, 453, 463–64. To the contrary, 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 ot 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. 58, the citizens of 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. 98–450, 452–53. On August 2, 2011, the Town Board unanimously adopted the Zoning Amendment, which clarified the existing Zoning Ordinance by explicitly describing the uses never previously permitted as Prohibited Uses. R. 23, 49–51, 90, 453–54.

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 Amendment. R. 42–88. As has been explained above, the Supreme Court, Tompkins County, rejected that claim and granted summary judgment in favor of Respondents. R. 14–41. After filing this appeal on March 29, 2012, R. 3–4, Anschutz assigned two leases and its claims in this litigation to Appellant for $10.00 (ten dollars), and Appellant moved to have itself substituted for Anschutz in this case, *see* App. Br. at 2 n.1. This Court granted the motion on October 5, 2012, *id.*, and Appellant perfected this appeal on October 15.

## ARGUMENT

## POINT I

### PREEMPTION OF MUNICIPAL ZONING PROVISIONS REQUIRES A CLEAR EXPRESSION OF STATE LEGISLATIVE INTENT.

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. Simply invoking the State's undisputed right to restrict home rule, as Appellant does, *see* App. Br. at 12–14, 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 Prods., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 682 (1996) (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 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, which is grounded in constitutional and statutory rules of construction, Appellant's preemption claim fails.

## A. The New York Constitution and State Statutes Protect the Authority of Municipalities to Control the Use of Land within Their Borders.

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. *See* N.Y. Mun. Home Rule L. § 10; N.Y. Stat. Local Gov'ts § 10; N.Y. Gen. City L., art. 2-A; N.Y. Town L. §§ 130(15), 261; N.Y. Village L. § 1-102.

Specifically, the Legislature granted local governments 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), including by exercising zoning and planning powers, *see* N.Y. Stat. of Local Gov'ts § 10(1), (6), and (7); N.Y. Gen. City L. § 20(24) and (25); N.Y. Town L. § 261; N.Y. Village L. § 7-700. In doing so, the Legislature recognized that zoning and planning are among the quintessential functions of local government. *See* N.Y. Town L. § 272-a(1)(a)–(h) (recognizing that the authority to undertake comprehensive planning is "[a]mong the most important powers and duties granted by the legislature"); N.Y. Village L. § 7-722(1)(a)–(h) (same); N.Y. Gen. City L. § 28-a(2)(a)–(h) (same). As New York's highest court has acknowledged, "[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.").[3] This Court therefore should not read the OGSML to upset municipal zoning and planning without finding a "clear expression of legislative intent" to preempt those core home rule powers.

[3] For more detailed accounts of local zoning power, its scope, and its rationale, *see* Brief of Amici Curiae Town of Ulysses, *et al.* ("Towns' Amicus Br.") at 3–7 (citing cases); Brief of Amici Curiae Professors Vicki Been, *et al.* ("Professors' Amicus Br.") at 12–17; Brief of Amicus Curiae NY Businesses ("NY Businesses' Amicus Br.") at 4–5, 9–12; Brief of *Amici Curiae* Catskill Mountainkeeper, *et al.* ("Nonprofits' Amicus Br.") at 13–21.

### B. Municipal Zoning Authority Must Be Upheld, Unless the State Legislature Has Evinced a Clear and Unambiguous Intent to Preempt Local Land Use Regulation.

Both the New York Constitution and the statutes implementing its requirements expressly state that home rule powers "shall be liberally construed." N.Y. Const. art. IX § 3(c) ("Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."); N.Y. Stat. of Local Gov'ts § 20(5) ("Powers granted to local governments by this statute shall be liberally construed."); N.Y. Mun. Home Rule L. § 51 ("This chapter shall be liberally construed."). Under that rule of construction, a party raising a preemption claim against a zoning provision has the burden of demonstrating the "clear expression of legislative intent" to abrogate municipal land use control that was found absent in *Gernatt*. *See* 87 N.Y.2d at 682. Such an expression may be found in the plain language of a supersedure clause or in other statutory provisions (such as mandates to accommodate the needs of affected municipalities) unambiguously indicating preclusion of local control. *See infra* Point II.D. In the absence of the requisite clear expression, however, courts cannot liberally construe home rule powers – as the New York Constitution requires – if they read a statute to preempt that authority. *See* Professors' Amicus Br. at 6–8 (explaining that the constitutional provision mandating liberal construction creates a presumption against preemption, when a statute does not unambiguously supersede local law).

Other principles of statutory construction also militate against concluding that the OGSML supersedes local zoning control, absent evidence that the Legislature unquestionably intended that result. Such a conclusion would imply that the OGSML partially repeals the statutes establishing home rule powers – a practice explicitly disfavored under New York law. *See* N.Y. Stat. § 391 ("Repeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given

effect.”). Only if two statutes are “in irreconcilable conflict with each other,” N.Y. Stat. § 398, will the later in time be deemed to repeal the first. *Id.*; *see Consol. Edison Co. of N.Y. v. Dep’t of Envtl. Conservation*, 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); *see also 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] intent to the contrary, to regard each as effective.”). Because the OGSML can be harmonized with the state statutes authorizing local authority over land use, it should be presumed not to repeal home rule by implication. *See Frew Run Gravel Products v. Town of Carroll*, 71 N.Y.2d 126, 134 (1987) (citing N.Y. Stat. §§ 370, 391, 398); Professors’ Amicus Br. at 8–11. Absent a clear expression of legislative intent to preempt local land use control, which the Supreme Court correctly determined to be missing in this case, *see* R. 26, the supersedure clause of the OGSML may not be interpreted to divest localities of their zoning powers.

## POINT II

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

The New York Court of Appeals has not yet interpreted the express preemption clause of the OGSML, ECL § 23-0303(2), but it repeatedly has interpreted a parallel provision of the MLRL, ECL § 23-2703(2), in both its original and its revised forms. Consistently, the Court of Appeals has held that the MLRL does not preempt town zoning provisions that regulate the use of land, as opposed to regulating technical mining operations, activities, or processes. *See Frew Run*, 71 N.Y.2d at 134; *see also Hunt Bros., Inc. v. Glennon*, 81 N.Y.2d 906, 909 (1993). The Court reaffirmed *Frew Run*’s holding, which was codified by the Legislature in a 1991 amendment of the MLRL, when it rejected a preemption claim against a zoning amendment that

eliminated mining as a permitted use throughout the entire locality. *See Gernatt*, 87 N.Y.2d at 690. The reasoning of this State's highest court in *Frew Run*, *Hunt Bros.*, and *Gernatt* applies equally to the express preemption provision of the OGSML.

### A. The Court of Appeals Consistently Has Upheld Town Zoning Power 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 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 following provision of the MLRL:

> 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.

*Frew Run*, 71 N.Y.2d at 129 (quoting the original version of ECL § 23-2703(2)). Although the statute plainly stated that the MLRL shall supersede "all" other local laws relating to the extractive mining industry, unless they were zoning ordinances or other local laws imposing heightened reclamation regulations, the Court of Appeals upheld the zoning restriction. *Id.* at 130–34.

To reject the preemption claim, the 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 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 operation, the Court of Appeals 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 supersedure clause was consistent with the purposes of the MLRL, the *Frew Run* Court continued, as 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.

The Court of Appeals 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 section 23-2703 of 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," *id*. (citing *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 491 (1977)) – 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.

In its 1996 decision in *Gernatt*, the Court of Appeals 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 MLRL 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." *Id.* at 681 (emphasis in original).

The 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.* The Court added:

> 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 (denying exclusionary zoning claim) (citations omitted). As the court below correctly recognized in upholding Dryden's Zoning Amendment, the same reasoning holds in this case.

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

Appellant's express preemption claim "turns on the proper construction of [the OGSML's supersession clause]," as reflected in its plain meaning, its legislative history, and its "underlying purposes . . . as part of the statutory scheme." *Frew Run*, 71 N.Y.2d at 131 (interpreting the supersession clause of the MLRL). Appellant seeks to distinguish the language,

legislative history, and purposes of the OGSML from those of the MLRL, so as to avoid application of *Frew Run, Hunt Bros.,* and *Gernatt*. As Respondents explain below, there is no material difference between the two statutes' supersession clauses that warrants a departure from those key Court of Appeals precedents.

First, the plain language of the OGSML's supersession provision does not preclude local land use regulation. The primary clause provides 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," ECL § 23-0303(2), just as the MLRL consistently has provided that "this title shall supersede all other state and local laws relating to the extractive mining industry." ECL § 23-2703(2). Like the OGSML, the MLRL interpreted in *Frew Run* expressly listed exclusions from the scope of the primary supersession language. *Compare* ECL § 23-0303 (excluding regulation of local roads and real property taxes) *with* 71 N.Y.2d at 132–34 (excluding heightened reclamation standards and requirements from the original version of ECL § 23-2703(2)). *Frew Run* never suggested that, by listing only one exclusion, the Legislature intended to have the primary supersession language of the MLRL preclude regulation of land use.[4] Rather, 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 . . . ." *Id.* 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 . . . ."). The Court's reasoning applies equally to the language of the OGSML.

[4] Clearly, the listing of exclusions in a supersession clause is not dispositive of the clause's scope, as Appellant insists. *See* App. Br. at 20. Rather, the Court of Appeals followed the principles of statutory construction described above in Point I. *See Frew Run*, 71 N.Y.2d at 134 (citing N.Y. Stat. §§ 370, 391, 398).

This analysis of the statutory text is consistent with the purposes and policy underlying the OGSML, which are apparent upon an examination of the entire statute and the legislative history leading to its enactment. *See Frew Run*, 71 N.Y.2d at 131–32 (reaching the same conclusion with respect to the MLRL). The relevant purposes of the OGSML are described in the legislative declaration of policy 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. This statement is far less detailed as to land use than was the declaration of policy in the MLRL when *Frew Run* was decided, which 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, and the orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs compatible with sound environmental management practices. The legislature further declares it to be the policy of this state to provide for the wise and efficient use of the resources available for mining . . . ; to encourage productive use including but not restricted to: . . . forests . . . crops . . . grazing . . . , [and] the establishment of recreational, home, commercial, and industrial sites . . . .

R. 615 (N.Y. L. 1974, ch. 1043 (former ECL § 23-2703(1))). Unlike the OGSML, the MLRL specified in detail the range of land uses to be encouraged, including "recreational, home, commercial, and industrial" uses routinely addressed by local zoning ordinances. *Id.* Nevertheless, the *Frew Run* Court held that the statute'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 OGSML also should be read to allow the Town of Dryden to make similar land use decisions.

The purposes of the OGSML can be satisfied even when the Town of Dryden's Zoning Amendment is given full effect. The Town 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 mining. 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 ("[T]he distinction is between ordinances that regulate property uses and ordinances that regulate mining activities."); *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 ("[N]othing suggests that [the MLRL's] reach was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands."); *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"). Because the Town of Dryden's regulation of property uses does not conflict with the OGSML's regulation of oil and gas activities or operations, there is no basis for concluding that the Legislature intended to preempt the challenged Zoning Amendment.

Finally, Appellant has identified nothing in the legislative history of the OGSML inconsistent with Respondents' interpretation of the statute's plain language and declared purposes. Appellant relies heavily on the self-serving and legally inadmissible Affidavit of Gregory H. Sovas, with attached exhibit, *see* App. Br. 17–18 (citing R. 77–88), neither of which

is part of the legislative history and both of which the court below declined to consider on evidentiary grounds. R. 30 n.12.[5] Appellant also cites repeatedly to affirmations of its former counsel, Yvonne Hennessey, *see* App. Br. 17–18, whose personal opinions have no more bearing on the Legislature's intent in enacting the OGSML's supersession clause than do those of Mr. Sovas. The only record evidence legitimately constituting legislative history for that clause, which was first enacted in Chapter 846 of the Laws of 1981 (the "1981 Amendments"), is the bill jacket for Senate Bill 6455-B, the bill enacted into law as the 1981 Amendments. R. 467–500. This Court can readily 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, R. 478 ("The existing and amended oil and gas law would supersede all local laws or ordinances regulating the oil, gas, and solution mining industries."), is consistent with the Supreme Court's decision that the OGSML preempts regulation of industrial operations, while leaving in tact local control of land use.

In support of its contrary argument, Appellant cites a legislative memorandum related to a *different* bill, Assembly Bill 6928, which also proposed amendments to the OGSML but never was enacted into law. *See* App. Br. at 17 (citing page 995 of the record on appeal in *Cooperstown Holstein Corp. v. Town of Middlefield* ("CHC R.")). Even if the legislative history

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[5] Mr. Sovas is a consultant with a financial stake in the oil and gas industry, 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. 81. Such unadorned hearsay is not competent evidence, *Brocco v. Mileo*, 170 A.D.2d 732, 733 (3d Dep't 1991), and post-enactment statements 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) ("[P]ostenactment statements or testimony by an individual legislator, even a sponsor, is irrelevant and was properly excluded.). 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. 30 n.12. Respondents agreed to include the defective affidavit in the appellate record only because they expected Appellant to contest the trial court's evidentiary ruling. Because Appellant has not done so, it has waived its appeal of that ruling. This Court should exclude the inadmissible affidavit and exhibit, and all citations to them should be stricken.

of a bill that was never passed were relevant to the 1981 Amendments, it would not support Appellant's preemption claim. The cited memorandum makes it clear that the bill was responding to deficiencies in DEC funding, *see* CHC R. 992, which left the agency without the resources or "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. Assembly Bill 6928 proposed to address the legitimate "concerns of local government" about costs shifted to them in the absence of financing for DEC, by proposing new funding mechanisms to support state oversight of the "oil, gas and solution mining regulatory program." *Id.* To ensure a reliable source of revenue for munipalities, without authorizing duplicative state and local fees on drilling operations, "local taxing authority remain[ed] unaffected," *id.* at 993, but the bill and supporting memorandum were silent on the continued exercise of local home rule powers. Assembly Bill 6928 thus adds no support for Appellant's claim that the 1981 Amendments were intended to preempt local land use control.

Only one court – a trial court – has directly addressed 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 preemption claim in that case, 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, addressing the Town's concerns by enabling municipalities to seek compensation for damages and

authorizing DEC to impose financial security requirements.[6] *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." *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 *Envirogas* court was not asked to adjudicate a state preemption claim against a local law *on a different subject matter* – namely, land use, generally – and the decision should not be read to bar or abridge zoning powers expressly delegated to towns.

**C. Appellant Fails to Distinguish the Court of Appeals 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 court below was "unable to discern any meaningful difference" between the two statutes with respect to any of those parmeters. R. 38. 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.

[6] 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.

Appellant distorts the plain meaning of the MLRL in arguing that "it does *not* supersede local 'zoning ordinances,' whereas the OGSML states the contrary . . . ." App. Br. at 4.[7] The supersession clause of the MLRL at issue in *Frew Run* provided:

> [T]his 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.

71 N.Y.2d at 129 (quoting the original version of ECL § 23-2703(2)) (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 zoning ordinances are a species of the more general category "local laws." To parse the clause as Appellant does – permitting 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. 21–22 – impermissibly reads the word "other" out of the statute.[8]

The MLRL's supersession clause therefore must be understood as the Court of Appeals 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

[7] Appellant also claims that "the MLRL also expressly affirms local zoning control, i.e., the right 'to determine permissible uses in zoning districts.'" App. Br. at 5. The MLRL did not include the language quoted 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 the Court of Appeals found implicit in the original statutory terms – that supersedure 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.

[8] As Appellant recognizes, the Court may not adopt an interpretation of the statute that renders its language mere surplusage. *See* App. Br. at 21 (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); *Kahmi v. Planning Bd. of Town of Yorktown*, 59 N.Y.2d 385, 391 (1983) ("Our task in interpreting the statute is to give effect to the intent of the Legislature, construing words by giving them their natural and ordinary meaning and construing the various parts of the statute in a manner seeking to harmonize the whole and avoid rendering any part surplusage.") (citation omitted)).

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."). The MLRL never gave localities *carte blanche* to pass any and all zoning ordinances, as Appellant claims, *see* App. Br. at 23, and cannot be distinguished from the OGSML on that basis. The textual analysis in the *Frew Run* line of precedents applies squarely to the OGSML because, like the MLRL interpreted in *Frew Run*, 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.[9] *See id.* 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

[9] In its decision rejecting Appellant's preemption claims, the Supreme Court employed a shorthand characterization of this core distinction, referring to "laws governing '*how*'" operations are conducted and "those governing '*where.*'" R. 28 (emphasis added). Because the distinction between laws addressing "technical operational concerns" and those addressing "traditional land use concerns," R. 31, obviously applies to the OGSML, Appellant repeatedly attacks the shorthand terminology as if it were an independent ground for the decision below, *see* App. Br. at 1–6, 10–11, 17, 25–28, 35, 37. The how/where terminology admittedly is confusing, because, as the trial court acknowledged, R. 31, the location and spacing of wells are two of many "technical operational concerns" – "how" considerations. The fundamental difference between those concerns and "traditional land use concerns," *id.* – the "where" considerations – nevertheless remains sound. Indeed, Appellant admits that location, spacing, and unitization rules "are based on sound geologic and environmental considerations, not the Euclidian planning principles on which local zoning ordinances are typically based." App. Br. at 5. This Court therefore may abandon the how/where shorthand and reject Appellant's effort to elevate its significance, while affirming the legitimacy of the underlying substantive distinction. As the court below recognized, that distinction has been endorsed repeatedly by the New York Court of Appeals and as well as courts of other states. R. 35–36 (citing *Huntley & Huntley, Inc. v. Borough of Oakmont*, 964 A.2d 855 (Pa. 2009); *Bd. of Cnty. Comm'rs of La Plata Cnty. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045 (Colo. 1992)).

extractive mining . . . ."). Both the MLRL and the OGSML regulate technical aspects of the affected industry in considerable (although different) detail; the MLRL interpreted in *Frew Run* did not purport to regulate land use, and neither does the OGSML. 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 taxes), they are free to implement their comprehensive land use plans, including prohibitions on extractive 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.[10] Prior to the enactment of the 1981 Amendments, individual towns were imposing varying local fees and financial assurance requirements on industry operations within their borders. *See Envirogas*, 112 Misc. 2d 432. To standardize those requirements, while ensuring that municipalities retained some means of financing costs imposed by oil and gas operations, the Legislature withdrew from localities the authority to demand fees and bonds but affirmed the local right to tax industry under the Real Property Tax Law.[11] Similarly, the Legislature preserved local jurisdiction over local roads – even though municipal limitations on street excavations and the size and weight of vehicles directly and substantially affect oil and gas operations, which require numerous vehicular trips and disruptive construction of new access roads and pipelines. *See* DEC, *Revised Draft Supplemental Generic Envtl. Impact Statement on the Oil, Gas and Solution Mining Regulatory Program* 6-302 (Table 6.60) (estimating the use of

[10] Appellant makes much of the fact that the OGSML uses the term "jurisdiction" when identifiying the scope of regulatory power reserved to localities, whereas the MLRL specifies the scope of local jurisdiction without using that term. *See* Ap. Br. at 19, 22. The distinction is one without a difference. Both statutes carve out an area of permitted regulation of the affected industry; neither statute precludes local power over zoning.

[11] Notably, the OGSML did *not* provide a mechanism for compensating individual residents protected by local zoning, including property owners and businesses whose investment would be impaired by nearby drilling. For this reason, too, preserving local land use power is consistent with the purposes of the OGSML, which aims to protect the rights of "all persons," not merely those party to oil and gas leases.

nearly 1,800 heavy truck trips per horizontal well), *available at* http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisch6b0911.pdf. 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 and purposes of the MLRL and OGSML is no more persuasive than its effort to distinguish the statutory language. 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," but that "[t]here is nothing comparable in the history of MLRL, as its supersedure provision was included in the initial enactment." App. Br. at 32–33. 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. The OGSML therefore may be harmonized with the Zoning Amendment and may not be read to abrogate the Town of Dryden's land use powers. *See id.* at 134.

Finally, the allegedly "crucial differences in the nature of the tangible substances regulated by the MLRL and the OGSML," App. Br. at 33, provide no support for Appellant's

preemption claim. Contrary to Appellant's suggestion, *see* App. Br. at 34, 38, 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 heavy 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. The Court of Appeals 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. *See also infra* Point IV.

**D. The Legislature Knows How to Preempt Local Zoning, When It Wishes to Do So.**

The OGSML contrasts starkly with other statutes clearly evincing a legislative intent to preempt local law. Some of those statutes contain provisions expressly precluding enforcement of local zoning or land use laws. In other statutes, the clear expression of intent to preempt appears in mandates that state agencies take local concerns into account. Both categories of those statutes demonstrate that the Legislature understands how to effectuate preemption when it intends to do so, and the absence of comparable provisions and mandates in the OGSML thus belies any legislative intent to have oil and gas regulation supersede local comprehensive land use plans and associated zoning.

The statute governing siting of industrial hazardous waste facilities, ECL §§ 27-1101 *et seq.*, is a good example of a law expressly preempting local zoning. The section of that law entitled "Powers of Municipalities," 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, the 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) (comparing Section 41.34 of the Mental Hygiene Law, which expressly preempts local zoning authority, with Section 19.07, which does not).

The second category of preemptive statutes includes those that directly accommodate local interests by imposing duties to ensure that community needs are considered in state decision-making. For example, in laws governing the siting of hazardous waste facilities and major electrical generating facilities, the Legislature has required notice of siting applications, has secured direct protection for local communities, and has provided for local participation in the regulatory process.[12] *See*, *e.g.*, ECL §§ 27-1105, 27-1113; Pub. Serv. L. § 164(1)(e), (h), (2)(a); *id.* § 166(j)–(n). Banking Law provisions governing the licensing of check-cashing businesses offer other protections. That 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*.

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[12] Appellant's admission 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 33–34, 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 does not preempt local land use regulation, there is still less reason to find that the OGSML does so.

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 & Payroll Servs. v. Town of Hempstead*, 91 A.D.3d 126, 138 (2d Dep't 2001). Because the state collects factual evidence grounding a specific determination about the community need for a check-cashing establishment in the particular location identified in the application, 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. Because the OGSML offers no protections for community land use concerns, unlike the preemptive statutes discussed above, there is no basis for finding a clear expression of legislative intent to have the OGSML preempt local zoning.

## POINT III

## THE DOCTRINE OF IMPLIED PREEMPTION DOES NOT PRECLUDE ENFORCEMENT OF THE ZONING AMENDMENT.

The Court of Appeals 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 (ECL 23-2703 [2]). The appeal turns on the proper construction of this statutory provision."). Even if the doctrine of implied or conflict preemption did apply in this case, however, it would not bar the adoption of local land use laws, such as the Town of Dryden's Zoning Amendment.

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 Amendment is compatible with the purposes and regulatory provisions of the OGSML. This Court therefore should affirm the decision below, rejecting Appellant's implied preemption claim.

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

In 1981, the Legislature amended the OGSML's declaration of policy, which originally stated:

> It is hereby declared to be in the public interest 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; 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 . . . .

R. 534 (N.Y. L. 1963, Ch. 959, § 70 (emphasis added)). After enactment of the 1981 Amendments, "promoting" recovery no longer was a stated legislative objective of the OGSML. Rather, the statute provided: "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 . . . ." ECL § 23-0301 (emphasis added). The regulation of oil and gas development (but not land use) was intended to prevent waste, to allow "greater" recovery, and to protect the rights of all persons and the general public (not only those of mineral owners).

Contrary to Appellant's contention, *see* App. Br. at 35, respect for local zoning is not inconsistent with prevention of waste. 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 in the early stages of the development of oil and gas law. As this Court has recognized:

> 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). Waste resulted because excessive drilling in the "pool" or "reservoir" where the oil or gas collected after migrating from source rock depleted the sub-surface pressure required for flow to the surface and thereby reduced the "quantity of oil or gas ultimately recoverable." ECL § 23-0101(20)(b)–(c); *see* CHC R. 923. Those pressure concerns do not arise in 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 might occur from development of such reserves if, for example, wells were constructed improperly or gas were unnecessarily vented or flared during the development process. *See id.* In either case, a policy directing that oil and gas not be dissipated, lost, or destroyed *where development is authorized* is not a command to develop every 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 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. To counteract the perverse incentive for

each owner to drill, when multiple wells would lower the reservoir pressure and reduce the recovery, the Legislature developed a system for limiting drilling and protecting the correlative rights of affected landowners. That system – a combination of unitization, compulsory integration, and compensation – has carried over to the development of unconventional plays, such as shale, notwithstanding the inapplicability of the system's original rationale. Under the OGSML, correlative rights must be protected, *if* development takes place. The OGSML protects the rights of all persons, including the general public, however, so the law should not be read to force development where communities do not want it, regardless of adverse impacts on small town quality of life or economies.[13] *See* Nonprofits' Amicus Br. at 5–13 (describing community character impacts); NY Businesses' Amicus Br. at 14–33 (describing threats to local businesses).

Finally, Appellant's argument that the Zoning Amendment is preempted by the OGSML because it conflicts with the policies supporting the Energy Law, *see* App. Br. at 29–30, 39, is unavailing. As Appellant would have it, *see id.* at 30, the policy declared in section 3-101(5) of the Energy Law – "to foster, encourage and promote the prudent development and wise use of all indigenous energy resources" – is a mandate to "maximize" oil and gas recovery, irrespective of any other considerations. The policies underlying the Energy Law cannot be imputed to the OGSML and, moreover, the Energy Law cannot be interpreted as Appellant suggests.

Even if the policies supporting the Energy Law were relevant to the preemption claim here, Appellant singles out one policy to the exclusion of others that are equally significant. The Energy Law expressly provides that it is the policy of New York State:

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[13] Thus, waste is not promoted and correlative rights are not violated when oil and gas resources remain underground, as Appellant insists, *see* App. Br. at 7. Rather, the reserves are husbanded for future generations, who are always free to lift local bans on oil and gas development. If preventing "waste" or respecting correlative rights required "maximizing" production, as Appellant claims at least 25 times, drillers could not decide to forgo development of leased land or abandon unprofitable leases. *See* CHC R. 923–24.

> 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, 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 an ethic of conservation rather than waste of precious fuels is not consistent with unbridled development of gas reserves. Therefore, like the petitioner in *Gernatt*, Appellant cannot insist that Respondents permit resource extraction within the Town of Dryden.

Second, the legislative history of Senate Bill No. 9021 (1978), CHC R. 818–36, which revised the policy statements in the Energy Law and OGSML, does not support Appellant's analysis. The memoranda submitted in support of the bill expressly recognize that one of its key purposes was to *remove* DEC's responsibility to promote energy development and to transfer it to a newly formed Energy Office. For example, one memorandum states:

> Purpose of the Bill:
>
> To establish the Energy Office as the State agency primarily responsible for promoting the development the development of energy resources; *to remove such promotional responsibilities from the Department of Environmental Conservation which would, however, retain regulatory responsibilities over such resources . . . .*
>
> Summary of Provisions of the Bill:
>
> This bill gives the Energy Office prime responsibility for promoting the development of indigenous energy resources . . . . Also, *the bill removes from the Department of Environmental Conservation such promotional responsibilities.*

*Id.* at 823 (emphasis added); *see id.* at 827, 828. The State Department of Commerce agreed:

> It is our opinion that the subject bill places in the appropriate agency (State Energy Office) responsibility for the development of all indigenous state energy resources.
>
> The separation of regulatory authority for such action (assigned to the Department of Environmental Conservation) from the development responsibilities (State Energy Office) is appropriate and recognizes the vast difference between the two responsibilities.

*Id.* at 836. The legislative history thus recognizes a distinction between promotion of development and regulation of development – only the latter of which remains the function of DEC under the OGSML.

The Legislature enacted the supersession clause of the OGSML only three years later, providing that the provisions of article 23 of the ECL supersede local laws or ordinances relating to the "*regulation* of the oil, gas and solution mining industries." ECL § 23-0303(2) (emphasis added). Consistently with the 1978 reallocation of administrative functions, the 1981 Amendments assured DEC the authority to *regulate* those industrial activities, operations, and processes but did *not* charge DEC with promoting oil and gas development. In interpreting the supersession clause, this Court therefore should recognize that promoting such development is not the legislative purpose or policy underlying the OGSML, ECL § 23-0303(2). Because the Zoning Amendment does not conflict with the OGSML's actual purpose and policy, Appellant's implied preemption claim fails.

### B. OGSML Provisions Governing the 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.[14] The extensive powers granted to DEC, *see* ECL § 23-0305, do not include the authority to direct wells into or away from particular municipalities, and DEC does not undertake statewide or even regional land use planning for oil and gas development. The operator, not the State, proposes a spacing unit in its application for a drilling permit, *see* ECL § 23-0501(2)(a), as Appellant admits. *See* App. Br. at 38. Each application is considered independently – not on a statewide basis – 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). Contrary to Appellant's suggestion that the Zoning Amendment leaves drillers no choice but to paint themselves into a corner, *see* App. Br. at 38, operators can plan the size and shape of spacing units to conform to local zoning laws and then proceed 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. The Court of Appeals rejected precisely that argument in *Gernatt*. *See* 87 N.Y.2d at 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

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[14] Here, again, the intent of the OGSML mirrors the intent of the MLRL. Curiously, when Mr. Sovas was still a DEC employee, 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."). These statements do not bind this Court, of course, but they do have a bearing on Mr. Sovas's credibility.

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 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 addition to or in conflict with the OGSML, but rather is regulating the use of land, the Town's Zoning Amendment should be upheld against Appellant's conflict preemption claim.[15] *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 IV

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

Appellant insists that "if municipal drilling bans like the [Zoning Amendment] are upheld, no prudent operator will ever hereafter invest in developing New York's oil and gas resources . . . ." App. Br. 7; *see id.* at 28, 39. This assertion not only is irrelevant to the legal

[15] Appellant cites *Jancyn Mfg. Corp.*, 71 N.Y.2d at 97, and *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 217 (1987), for the proposition that "[i]nconsistency exists where the local enactment 'prohibit[s] what would have been permissible under State law,'" App. Br. at 14, but *New York State Club Ass'n* explicitly rejects that contention. The Court of Appeals remarks:

> Indeed, plaintiff goes too far when it asserts . . . that Local Law No. 63 is inconsistent with *Power Squadrons* because activity which arguably would be permitted under State decisional law is prohibited by the local law. As we stated in *People v Cook* (34 NY2d 100, 109, *supra*): "This statement of the law is much too broad. If this were the rule, the power of local governments to regulate would be illusory."

69 N.Y.2d at 221. As *Frew Run*, *Hunt Bros.*, and *Gernatt* establish, even a DEC permit (express state permission) to mine is not inconsistent with local zoning laws regulating land use within municipal borders. The same is true for a gas drilling permit.

issue presented in this case but also is flatly contradicted by the practice in other states.[16] 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); *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").[17] The City of Tulsa, Oklahoma – Anschutz's home state – 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, under the authority of the Oklahoma Supreme Court, *see Vinson v. Medley*, 737 P.2d 932, 936 (Okla.

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[16] Even if the assertion were true, whether the interest in attracting oil and gas investment 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.

[17] 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 local bans "make it impossible . . . to comply wth the objectives of the OGSML." App. Br. at 37. 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 III.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.

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.").

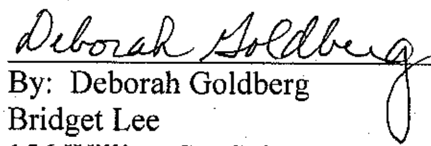
Those prohibitions, and other local regulation of the oil and gas industy, *see* Nonprofits' Amicus Br. at 23–25, plainly do not defeat investment in any of those states. Where profitable reserves exist, the industry accommodates itself to the local controls, just as it accommodates itself to varying state regulations of technical operations. Thus, as a matter of both law and practice, the OGSML may be harmonized with – and does not conflict with – local land use laws, including Dryden's Zoning Amendment. This Court therefore should reject Appellant's express and implied preemption claims.

## CONCLUSION

For the reasons stated above, this Court should affirm the lower court's award of summary judgment in favor of Respondents.

Dated: New York, New York
December 20, 2012

EARTHJUSTICE



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