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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-Defendant-Respondent.

-and-

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

Proposed Intervenor-Cross-Appellant.

BRIEF OF AMICI CURIAE TOWN OF ULYSSES, ET AL.

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PRELIMINARY STATEMENT

Amici Curiae Town of Ulysses et al. (collectively, the "Amici")[1] respectfully submit this brief with respect to the above-referenced appeal.[2]

In this declaratory judgment action, Plaintiff Norse Energy Corp. USA ("Plaintiff")[3] sought below to void a local law of Defendant Town of Dryden ("Dryden"), adopted pursuant to its constitutionally guaranteed and legislatively delegated zoning powers, determining that the exploration for, extraction, storage, treatment, and disposal of natural gas and/or petroleum is not a permitted use of land in Dryden. Plaintiff argues that all of Dryden's land use powers are superseded by Environmental Conservation Law ("ECL") § 23-0303(2), which preempts a municipality's regulation of the operations of oil and gas extraction.

Supreme Court below correctly rejected Plaintiff's claims and reaffirmed the constitutionally guaranteed right of a local municipality to create and preserve its own community character through generally applicable land use planning and zoning laws. Indeed, the Amici respectfully submit that there is no basis in ECL 23-0303(2) to find preemption of a municipality's land use powers. Under Plaintiff's view, the oil and gas industry can dictate the location of any drilling and other related heavy industrial uses within a municipality without regard to local zoning laws or ordinances. Such a result disregards the State's longstanding

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[1] The Amici on this brief include the Town of Ulysses, City of Ithaca, City of Oneonta, Town of Alfred, Town of Ancram, Town of Camillus, Town of Carlisle, Town of Caroline, Town of Chatham, Town of Claverack, Town of Copake, Town of Danby, Town of Dewitt, Town of Elbridge, Town of Enfield, Town of Geneva, Town of Gorham, Town of Highland, Town of Ithaca, Town of Jerusalem, Town of Kirkland, Town of Lansing, Town of Livingston, Town of Lumberland, Town of Marcellus, Town of Meredith, Town of Middlesex, Town of Middletown, Town of Milo, Town of New Hartford, Town of Mendon, Town of Otisco, Town of Otsego, Town of Owasco, Town of Potsdam, Town of Rush, Town of Sennett, Town of Skaneateles, Town of Springfield, Town of Summit, Town of Tusten, Town of Wales, Town of Westmoreland, Town of Woodstock, Village of Cayuga Heights, Village of Dundee, Village of Freeville, Village of Honeoye Falls, Village of Prospect, Village of Saugerties, Village of Sharon Springs, Village of Trumansburg, Association of Towns of the State of New York, New York Conference of Mayors, and New York Planning Federation.

[2] In an order dated November 16, 2012, this Court granted the Amici leave to appear as amici curiae on this appeal and file this brief for the Court's consideration.

[3] Plaintiff Norse Energy Corp. USA was substituted as the Plaintiff on this appeal after it succeeded to the leasehold interests of the original Plaintiff Anschutz Exploration Corporation.

municipal land use home rule principles and is unsupported by the language of ECL 23-0303(2), which preempts only local regulation of the *operations* of the oil and gas industry, not local land use laws that govern whether and where such operations may take place within a municipality's borders. Since the statute does not supersede a municipality's power to control local land use matters, Supreme Court properly upheld a municipality's right to make its own zoning decisions and the order below should be affirmed.

STATEMENT OF INTEREST

The Amici are cities, towns, and villages located throughout upstate New York and associations of towns, mayors, and expert planners that are particularly concerned with the impacts of this Court's decision on local land use powers throughout the State. Municipalities spend significant amounts of time, effort, and resources on developing a comprehensive plan, pursuant to the General City, Town, or Village Law, outlining the zoning and planning goals for the future of their communities. These plans generally are crafted with the help and input of expert planners and the resources provided by the Association of Towns of the State of New York or New York Conference of Mayors, which have significant expertise in formulating these foundational planning documents.

As New York courts have repeatedly recognized, the use of these powers is paramount to promoting principles of smart growth and creating sustainable communities. The State's zoning powers have been delegated to local municipalities because they are in the best position to determine what land uses should be permissible or prohibited. If this Court were to reverse the court below and accept Plaintiff's contention in this action—that generally applicable municipal zoning ordinances are superseded by the ECL solely for property within the municipality owned or leased by a corporation in the oil and gas industry—municipalities throughout the State would

be deprived of the express authority that was delegated to them by the Legislature and derived from the New York State Constitution to determine what types of land uses best serve the needs and interests of their residents. This would be a significant abrogation of local governments' home rule authority, and is not supported under any reasonable interpretation of ECL 23-0303(2).

ARGUMENT

GENERALLY APPLICABLE MUNICIPAL ZONING ORDINANCES ARE NOT PREEMPTED UNDER ECL 23-0303(2)

Plaintiff seeks to upset the longstanding constitutional and statutory authority of municipalities to determine which types of land uses shall be permissible within their borders. Simply put, by arguing that a municipality's local zoning authority is preempted by section 23-0303(2) of the Environmental Conservation Law, Plaintiff essentially seeks a total and unique exemption from Dryden's generally applicable zoning ordinance based solely on its status as a corporation in the oil, gas, and solution mining industry. Plainly, such an exemption is not permissible under New York law. See Matter of St. Onge v Donovan, 71 NY2d 507, 515 (1988) (noting "the fundamental rule that zoning deals basically with land use and not with the person who owns or occupies [the property]"); Dexter v Town Bd. of Town of Gates, 36 NY2d 102, 105 (1975) ("it is a fundamental principle of zoning that a zoning board is charged with the regulation of land use and not with the person who owns or occupies it"); Village of Valatie v Smith, 190 AD2d 17, 19 (3d Dept 1993), affd 83 NY2d 396 (1994). Indeed, the Legislature has set forth a comprehensive statutory scheme under which local governments are vested with the authority to regulate land use matters, which cannot be preempted absent a clear expression of an intention to do so. See e.g. Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668,

682 (1996) (emphasizing that "in the absence of a *clear expression* of legislative intent to preempt local control over land use, [ECL 23-2703(2)] could not be read as preempting local zoning authority" [emphasis added]).

A. Constitutional and Statutory Authority of Municipalities to Enact Zoning Laws

The New York State Constitution provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law." NY Const, art IX, § 2(c)(ii). Implementing this express grant of authority to local governments, the Legislature enacted the Municipal Home Rule Law, which provides that a municipality may enact local laws for the "protection and enhancement of its physical and visual environment" and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein." Municipal Home Rule Law § 10(1)(ii)(a)(11), (12).

Most importantly, the Legislature delegated to every local government the authority to adopt, amend, and repeal generally applicable zoning ordinances and to "perform comprehensive or other planning work relating to its jurisdiction." See Statute of Local Governments § 10(6), (7).[4] Moreover, the General City, Town, and Village Law grant municipalities the express authority to regulate land use within their jurisdiction by defining zoning districts and determining what uses will be permitted therein. See e.g. Town Law § 261 ("*For the purpose of promoting the health, safety, morals, or the general welfare of the community*, the town board is

[4] Because the authority to enact zoning regulations was expressly delegated to local governments under the Constitution and Statute of Local Governments, any law that would diminish or impair that authority, including ECL 23-0303(2), may be subject to the re-enactment requirement of Article IX, § 2(b)(1) of the Constitution. See Statute of Local Governments § 2. Notably, although ECL 23-0303(2) was added in 1981, it was not subsequently re-enacted. Because the Legislature is presumed to have known of these procedural requirements at the time it enacted ECL 23-0303(2) in 1981, it cannot have intended that section supersede a local government's constitutionally and statutorily guaranteed authority to enact generally applicable zoning regulations. See Governor's Mem approving L 1964, ch 205, 1964 McKinney's Session Laws of NY at 1953 ("the Statute provides a unique mechanism whereby the Legislature may give more permanency to important home rule powers without the necessity of amending the Constitution").

hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes." [emphasis added]); see also General City Law § 20(24), (25); Village Law § 7-700. As the Legislature emphasized when enacting the Statute of Local Governments, these "are basic powers which should be possessed by local governments . . . [and] which the Legislature would want local governments to have and exercise in order . . . to perform their functions responsibly and consistently with the principles of home rule." Mem of Off for Local Govt, 1964 McKinney's Session Laws of NY at 1850; see also Governor's Mem approving L 1964, ch 205, 1964 McKinney's Session Laws of NY at 1953.

As the Court of Appeals has repeatedly emphasized, "[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 NY2d 91, 96 (2001); see also Udell v Haas, 21 NY2d 463, 469 (1968) ("Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems."). Local governments spend significant amounts of time, effort, and resources on developing comprehensive plans, outlining the zoning and planning goals for the future of their communities according to the identifiable features of the lands and natural resources specific thereto in accordance with their statutory and constitutional powers . See e.g. Town Law § 272-a(1)(b) ("Among the most important powers and duties granted by the legislature to a town

government is the authority and responsibility to undertake town comprehensive planning and to regulate land use for the purpose of protecting the public health, safety and general welfare of its citizens."); Village Law § 7-722(1)(b); Udell, 21 NY2d at 469 ("[T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll."). Taken together, these powers rightfully leave local land use matters in the hands of local governments—those individuals who know their communities best and can best determine what uses will serve the public health, safety, and general welfare of their citizens. See Kamhi v Town of Yorktown, 74 NY2d 423, 431 (1989) ("a town's planning needs with respect to its neighborhood parks and playgrounds are 'distinctively' matters of local concern"); Adler v Deegan, 251 NY 467, 485 (1929) (Cardozo, J., concurring) ("A zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting, as it does, the density of population, the growth of city life, and the course of city values."); see also Zahara v Town of Southold, 48 F3d 674, 680 (2d Cir 1995) ("decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government").

Because the "inclusion of [a] permitted use in [a zoning] ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood" (Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston, 30 NY2d 238, 243 [1972]), New York courts have consistently held that a municipality's home rule authority includes the power to zone out certain uses of land in order to serve the public health, safety, or general welfare of the community. See e.g. Gernatt Asphalt Prods., 87 NY2d at 683-684 (upholding the Town's determination that mining was not a

permitted use of land within its borders); Matter of Iza Land Mgt. v Town of Clifton Park Zoning Bd. of Appeals, 262 AD2d 760, 761-762 (3d Dept 1999) (upholding the exclusion of heavy industrial uses from the Town because of "the potential adverse and/or harmful impact" of such uses to the Town's residents); Thomson Indus. v Incorporated Vil. of Port Wash. N., 55 Misc 2d 625, 632 (Sup Ct, Nassau County 1967) ("The defendant village may certainly exclude from its industrial district any uses which constitute a danger or nuisance to other properties within the district or within the village."), mod on other grounds 32 AD2d 1072 (2d Dept 1969), affd 27 NY2d 537 (1970); see also e.g. Village of Euclid v Ambler Realty Co., 272 US 365, 388-389 (1926) (upholding an exercise of local zoning authority to preclude all industrial uses). Although municipalities need not exercise that authority, and may indeed choose to welcome oil and gas extraction within their borders, as some municipalities in New York have, the fact remains that constitutional home rule authority is sufficiently broad to permit each municipality in New York to make that decision upon its own unique comprehensive plan.

Here, Dryden, based on its unique circumstances, determined that heavy industrial uses, as proposed by Plaintiff, pose a significant threat to its residents' health, safety, and welfare and, thus, should not be a permitted use within the Town. This conclusion is well within Dryden's municipal home rule authority. See generally Michelle L. Kennedy, *The Exercise of Local Control Over Gas Extraction*, 22 Fordham Envtl L Rev 375 (2011).

Given this well-established and longstanding policy in favor of municipal home rule over land use decisions, any legislative attempt at preemption must explicitly usurp local land use powers since the Legislature is presumed to know New York law. See e.g. Easley v New York State Thruway Auth., 1 NY2d 374, 379 (1956) ("Legislatures are presumed to know what statutes are on the books and what is intended by constitutional amendments approved by the

Legislature itself."); Rhodes v Herz, 84 AD3d 1, 14 (1st Dept 2011) (holding that, insofar as the Legislature is presumed to know the status of the law at the time it acts, its failure to include a private right of action in an amendment to article 11 of the General Business Law was purposeful). As shown below, ECL 23-0303(2) contains no explicit general preemption of local land use authority. As such, this Court should reject Plaintiff's attempt to upset the longstanding constitutional and statutory authority of municipalities to determine which types of land uses shall be permissible within their borders.

B. ECL 23-0303(2) Does Not Expressly Preempt Generally Applicable Zoning Ordinances.

Although a local government's municipal home rule powers are construed very broadly, any local law adopted pursuant thereto must be consistent with the Constitution and the general laws of this State. See NY Const, Art IX, § 2(c); see also Jancyn Mfg. Corp. v County of Suffolk, 71 NY2d 91, 96 (1987) ("although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State"). Where the Legislature has expressly preempted an area of regulation, a local law governing the same subject matter must yield "because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe or (2) imposes additional restrictions on rights granted by State law." Jancyn Mfg. Corp., 71 NY2d at 97 (citations omitted); see also Incorporated Vil. of Nyack v Daytop Vil., 78 NY2d 500, 505 (1991). Indeed, as the Court of Appeals has held,

> The preemption doctrine represents a fundamental limitation on home rule powers. While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies the untrammeled primacy of the Legislature to act . . . with respect to matters of State concern.

> Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field.

Albany Area Bldrs. Assn. v Town of Guilderland, 74 NY2d 372, 377 (1989) (internal quotation marks and citations omitted). Notably, however, the fact that State and local laws touch on the same subject matter does not automatically lead to the conclusion that that the State intended to preempt the entire field of regulation. See Jancyn Mfg. Corp., 71 NY2d at 99 ("that the State and local laws touch upon the same area is insufficient to support a determination that the State has preempted the entire field of regulation in a given area").

Plaintiff asserted below that the Legislature has expressly stated its intent to preempt local governments' zoning authority with respect to property owned or leased by oil, gas, and solution mining entities in ECL 23-0303(2). Section 23-0303(2) 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*; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." ECL 23-0303(2) (emphasis added). Contrary to Plaintiff's argument, however, the enactment of a generally applicable zoning ordinance, pursuant to a municipality's home rule authority, does not constitute "regulation" of the oil, gas, and solution mining industries and, thus, is not preempted under ECL 23-0303(2).

1. The Plain Language of ECL 23-0303(2) Establishes that the Legislature Did Not Intend to Preempt Generally Applicable Zoning Ordinances.

When determining the scope of preemption intended under ECL 23-0303(2), the court must first start with the plain language employed by the Legislature. See Balbuena v IDR Realty LLC, 6 NY3d 338, 356 (2006); Matter of Theroux v Reilly, 1 NY3d 232, 239 (2003) ("When interpreting a statute, we turn first to the text as the best evidence of the Legislature's intent.");

Riley v County of Broome, 95 NY2d 455, 463 (2000) ("Of course, the words of the statute are the best evidence of the Legislature's intent."); see also e.g. Matter of Frew Run Gravel Prods. v Town of Carroll, 71 NY2d 126, 131 (1987) (noting that where the court faced an express supersession clause, the matter turned on the proper statutory construction of the provision). Where, as here, the language chosen is unambiguous, the plain meaning of the words used must control. See Jones v Bill, 10 NY3d 550, 554 (2008) ("As a general proposition, we need not look further than the unambiguous language of the statute to discern its meaning."); Riley, 95 NY2d at 463 ("As a general rule, unambiguous language of a statute is alone determinative."); Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 (1998) ("As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof."). Thus, the determination of this appeal will turn on this Court's interpretation of the phrase "relating to the regulation of the oil, gas and solution mining industries." ECL 23-0303(2).

As Supreme Court noted, the term "regulation" is defined as "an authoritative rule dealing with details or procedure." Merriam-Webster's Collegiate Dictionary, at 1049 (11th ed 2004). Thus, under the plain language of section 23-0303(2), a local law is not expressly preempted unless it relates to the details or procedure of the oil, gas, and solution mining industries. This is consistent with New York law generally, which draws a distinction between local laws that regulate the operation of a business or enterprise and those that govern land use. See Matter of St. Onge v Donovan, 71 NY2d 507, 516 (1988) ("Nor may a zoning board impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located."); Louhal Props. v Strada, 191 Misc 2d 746, 751 (Sup Ct, Nassau County 2002) ("Applicable case law draws a dichotomy between those

regulations that directly relate to the physical use of land and those that regulate the manner of operation of a business or other enterprise."), affd 307 AD2d 1029 (2d Dept 2003). A generally applicable local zoning ordinance, such as that challenged in this action, does not relate to the details or procedure of the oil, gas, and solution mining industries in any way. Instead, such an ordinance solely defines and governs the land uses that are permissible within the municipality.

Prior to the decisions at Supreme Court below, only one court throughout the State had interpreted the supersession clause contained in ECL 23-0303(2). In Matter of Envirogas, Inc. v Town of Kiantone (112 Misc 2d 432 [Sup Ct, Erie County 1982], affd 89 AD2d 1056 [4th Dept 1982], lv denied 58 NY2d 602 [1982]), the petitioner, a corporation in the oil and gas industry, challenged a zoning ordinance of the Town of Kiantone, which imposed a $25 permit fee and a requirement to post a $2,500 compliance bond prior to construction of any oil or gas well within the Town. See id. at 432. Supreme Court struck down the law, specifically noting that the 1981 amendment to ECL Article 23 made it clear that the supersession provision "pre-empts not only inconsistent local legislation, but also any municipal law which purports *to regulate gas and oil well drilling operations*, unless the law relates to local roads or real property taxes which are specifically excluded by the amendment." Id. at 434 (emphasis added). Clearly, the Court recognized that the Town's zoning ordinance was not a generally applicable land use restriction, but instead impermissibly interfered with the *operations*—the details and procedure—of the oil and gas industry and, thus, contravened the intent of ECL 23-0303(2). See id. ("The Town of Kiantone, however, singled out oil and gas drillers for special treatment. The $2,500 compliance bond and $25 permit fee are requirements unique to oil and gas well drilling operations and do not apply to any other business or land use. This is precisely what the State amendment to ECL article 23 was designed to prevent.").

Unlike Kiantone's zoning ordinance in Envirogas, Dryden's zoning ordinance does not regulate the operations of the oil, gas, and solution mining industries. It does not impose duplicative fees, area and bulk restrictions, or other conditions applicable only to Plaintiff and other members of the oil, gas, and solution mining industry. Instead, the challenged ordinance, adopted under Dryden's municipal home rule authority, is a generally applicable zoning regulation merely defining the land uses that are permissible and prohibited in the Town.[5] As such, the Court's reasoning in Envirogas supports Supreme Court's conclusion that Dryden's generally applicable zoning ordinance does not affect the operations of the oil, gas, and solution mining industries and, thus, is not preempted under ECL 23-0303(2).

The legislative history underlying ECL 23-0303(2), which need not be consulted since the statute is clear, also does not alter this analysis. Indeed, other than a passing reference to the supersession language in a memorandum from the Division of Budget, the bill jacket to the 1981 amendments that added that language is silent on the preemption issue. See Bill Jacket, L 1981, ch 846 ("The existing and amended oil and gas law would supersede all local laws or ordinances regulating the oil, gas, and solution mining industries. Local property tax laws, however, would remain unaffected."). Nor does the general legislative history underlying the Oil, Gas, and Solution Mining Law ("OGSML") support Plaintiff's interpretation of the supersession provision. Instead, the 1963 and 1978 amendments to the OGSML simply indicate the Legislature's intent to reserve to the Department of Environmental Conservation ("DEC") the authority to regulate the technical aspects of oil, gas, and solution mining and drilling, while centralizing promotion of the oil and gas industry in the Energy Department, all without any mention of an intent to preempt local zoning authority.

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[5] Supreme Court below invalidated that portion of Dryden's Zoning Law that purported to invalidate permits granted by other governmental entities.

Additionally, DEC's purported past interpretation of ECL 23-0303(2) has no relevance to this matter whatsoever. Because the interpretation of the supersession provision does not require reliance upon DEC's "knowledge and understanding of underlying operational practices or . . . an evaluation of factual data and inferences to be drawn therefrom," but instead is a question of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent," DEC's interpretation of section 23-0303(2) is not entitled to deference. Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459 (1980); see also Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills, 4 NY3d 51, 59 (2004) ("this Court is faced with the interpretation of statutes and pure questions of law and no deference is accorded the agency's determination").

Most importantly, when the Legislature has intended to supersede the local zoning authority, it has done so expressly. For example, in ECL 27-1107, the Legislature expressly declared that local municipalities were prohibited from requiring "any approval, consent, permit, certificate or other condition *including conformity with local zoning or land use laws and ordinances*, regarding the operation of a [hazardous waste treatment, storage, and disposal] facility." Id. (emphasis added). The Legislature has also expressly preempted local zoning regulation in the context of the siting of major electric generating facilities. See Public Service Law § 172(1) ("no state agency, municipality or any agency thereof may . . . require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility"). Clearly, had the Legislature intended to wholly preempt local regulation of permissible land uses under ECL 23-0303(2), it could have easily done so. See e.g. Rhodes, 84 AD3d at 14; Matter of Estate of Terjesen v Kiewit & Sons Co., 197 AD2d 163, 165 (3d Dept 1994) ("It has long been held that the Legislature is presumed to know what statutes are in effect when it enacts new laws. Had the Legislature intended to add conservators

to Workers' Compensation Law § 115 at the time it enacted Mental Hygiene Law article 77, it could have done so."). Its failure to expressly preempt local zoning regulation here mandates the conclusion that the Legislature did not intend ECL 23-0303(2) to preempt generally applicable zoning ordinances determining which types of land uses are permitted and prohibited within a municipality.

2. New York Courts' Interpretation of the Analogous Supersession Clause of the Mined Land Reclamation Law Establishes that the Legislature Did Not Intend to Preempt Generally Applicable Zoning Ordinances.

Although the interpretation of ECL 23-0303(2) appears to be a matter of first impression, the phrase "relating to the regulation" has been repeatedly construed by New York courts in the context of the supersession provision in the Mined Land Reclamation Law ("MLRL"). See ECL 23-2703(2). In the Court of Appeals' landmark decision in Matter of Frew Run Gravel Prods. v Town of Carroll (71 NY2d 126 [1987]), the Court was asked to consider whether the MLRL supersession provision—ECL 23-2703(2)—was "intended to preempt the provisions of a town zoning law establishing a zoning district where a sand and gravel operation is not a permitted use." Id. at 129. At that time, the MLRL supersession provision provided:

> For the purposes stated herein, this title shall supersede all other state and local laws *relating to the extractive mining industry*; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.

ECL 23-2703(2) (as added by L 1974, ch 1043, § 1) (emphasis added). Notably, this language is nearly identical to that contained in ECL 23-0303(2).

Construing this express supersession clause according to the plain meaning of the phrase "relating to the extractive mining industry," the Court of Appeals concluded that the Town of Carroll Zoning Ordinance—a law of general applicability—was not expressly preempted

because the "zoning ordinance relate[d] not to the extractive mining industry but to an entirely different subject matter and purpose: i.e., regulating the location, construction and use of buildings, structures, and the use of land in the Town." Frew Run Gravel Prods., 71 NY2d at 131 (internal quotation marks omitted). The Court held:

> 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. In this general regulation of land use, the zoning ordinance inevitably exerts an incidental control over any of the particular uses or businesses which, like sand and gravel operations, may be allowed in some districts but not in others. But, this incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the 'extractive mining industry' which the Legislature could have envisioned as being within the prohibition of the statute ECL 23-2703(2).

Id. at 131-132. Thus, the Court concluded that, in limiting the MLRL supersession to those local laws "relating to the extractive mining industry," the Legislature intended to preempt only "[l]ocal regulations dealing with the *actual operation and process of mining*." Id. at 133 (emphasis added).

By interpreting the scope of ECL 23-2703(2) preemption to include only local laws that regulate the actual operation and process of mining, the Court avoided the concomitant impairment of local authority over land use matters that would have inevitably resulted had it accepted the petitioner's argument that section 23-2703(2) was intended to "preempt a town zoning ordinance prohibiting a mining operation in a given zone." Id. Indeed, the Court noted,

> to read into ECL 23-2703(2) an intent to preempt a town zoning ordinance prohibiting a mining operation in a given zone, as petitioner would have us, would drastically curtail the town's power to adopt zoning regulations granted in subdivision (6) of section 10 of the Statute of Local Governments and in Town Law § 261. Such an interpretation would 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. In the absence of any indication that the statute had such purpose, a construction of ECL 23-2703(2) which would give it that effect should be avoided.

Id. at 133-134.

Following the Court of Appeals's decision in Frew Run Gravel Prods., the Legislature amended ECL 23-2703(2) to expressly codify the Court's holding. See L 1991, ch 166, § 228. As amended, the MLRL supersession provision now reads, in pertinent part:

> 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:
>
> a. enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate mining and/or reclamation activities regulated by state statute, regulation, or permit; or
>
> b. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts.

ECL 23-2703(2). Had the Legislature disagreed with the Court's interpretation of the phrase "relating to the extractive mining industry" in Frew Run Gravel Prods., this amendment gave it ample opportunity to so state and add a provision expressly preempting all generally applicable local zoning ordinances. That the Legislature declined to do so is significant. See e.g. Falk v Inzinna, 299 AD2d 120, 122-125 (2d Dept 2002) (noting that "if the Legislature intended to limit or qualify disclosure under CPLR 3101[i], as did the Court of Appeals in DiMichel [v South Buffalo Ry. Co. (80 NY2d 184 [1992])], it would have added language to that effect").

In light of the amendment to section 23-2703(2), the Town of Sardinia, a rural community located in western New York, amended its zoning ordinance to eliminate mining as a permitted use within all zoning districts in the Town. See Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668, 674-676 (1996). Petitioner, the owner and operator of three mines within the Town, challenged the amendments on various grounds, including that the Town's authority to eliminate mining as a permitted use in *all* zoning districts was superseded by ECL 23-2703(2). Specifically, the petitioner argued that the Court of Appeals's holding in Frew

Run Gravel Prods. only left "municipalities with the limited authority to determine in *which* zoning districts mining may be conducted but not the authority to prohibit mining in *all* zoning districts." Id. at 681.

The Court of Appeals, however, rejected the petitioner's attempt to so limit the municipality's home rule authority. See id. Instead, the Court reaffirmed its holding in Frew Run Gravel Prods. that the MLRL supersession clause was intended to preempt only those local laws that regulated the operations of mining. See id. at 682. Indeed, the Court noted,

> In Frew Run, we distinguished between zoning ordinances and local ordinances that directly regulate mining activities. 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 681-682. Recognizing the primacy of local control over local land use matters, the Court further noted that "[a] municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole." Id. at 684. Thus, the Court concluded, because the amendment to the MLRL supersession clause only "withdr[ew] from municipalities the authority to enact local laws imposing land reclamation standards that were stricter than the State-wide standards," and went no further, it could not be inferred that "the Legislature intended the MLRL to . . . limit municipalities' broad authority to govern land use." Id. at 682; see also Preble Aggregate v Town of Preble, 263 AD2d 849, 850 (3d Dept 1999) ("A municipality retains general authority to regulate land use and to regulate or prohibit the use of land within its boundaries for mining operations, although it may not directly regulate the specifics of the mining activities or

reclamation process. Control over permissible uses in a particular zoning area is merely incidental to a municipality's right to regulate land use within its boundaries."), lv denied 94 NY2d 760 (2000).

Relying on these holdings, New York courts have repeatedly upheld municipalities' authority to enact generally applicable zoning ordinances that affect the extractive mining industry or ban mining, but do not regulate the operations thereof. See e.g. Village of Savona v Knight Settlement Sand & Gravel, 88 NY2d 897, 899 (1996) ("the Mined Land Reclamation Law does not preempt a municipality's authority, by means of its zoning powers, to regulate or prohibit the use of land within its municipal boundaries for mining operations"); Patterson Materials Corp. v Town of Pawling, 264 AD2d 510, 512 (2d Dept 1999) (holding that "local laws of general applicability that, at best, would have an incidental burden upon mining" were not preempted); Preble Aggregate, 263 AD2d at 850 (upholding a local law that "prohibited mining below the watertable but otherwise permitted it upon issuance of a special use permit" against a preemption challenge); O'Brien v Town of Fenton, 236 AD2d 693, 695 (3d Dept 1997) (holding that a local law that prohibited mining outside of a designated mining district and revoked the mining classification for abandoned mines was not preempted under ECL 23-2703[2]), lv denied 90 NY2d 807 (1997) .

The Court of Appeals' reasoning in Frew Run Gravel Prods. and Gernatt Asphalt Prods. has also been applied in the context of preemption under the Alcoholic Beverage Control ("ABC") Law, leading to the same result. For example, in DJL Rest. Corp. v City of New York (96 NY2d 91 [2001]), New York City amended its zoning resolution to regulate the location of "adult establishments," which included many establishments that were licensed to dispense alcoholic beverages. See id. at 93. Although noting that "the State's ABC Law impliedly

preempts its field . . . by comprehensively regulating virtually all aspects of the sale and distribution of liquor" (id. at 95-96), the Court nonetheless concluded that the City's amendment was not preempted because it "applie[d] not to the regulation of alcohol, but to the *locales* of adult establishments irrespective of whether they dispense alcoholic beverages." Id. at 97. This type of incidental effect on the preempted field, the Court noted, was not the kind of regulation prohibited by the ABC Law. See id.

The preemption principles articulated in Frew Run Gravel Prods. were similarly extended to article 19 of the Mental Hygiene Law in Incorporated Vil. of Nyack v Daytop Vil. (78 NY2d 500 [1991]). Specifically, in article 19 of the Mental Hygiene Law, the Legislature adopted sweeping regulations designed to "address the myriad problems that have flowed from the scourge of substance abuse in this State." Id. at 506. Although acknowledging that the Legislature adopted a comprehensive regulation scheme addressing substance abuse issues, the Court of Appeals, in Daytop Vil., was unconvinced that "the State's commitment to fighting substance abuse preempts all local laws that may have an impact, however tangential, upon the siting of substance abuse facilities." Id. Instead, the Court concluded, in light of the Village's "legitimate, legally grounded interest in regulating development within its borders," the generally applicable zoning ordinance requiring the owner of a substance abuse facility to apply for a variance and certificate of occupancy was "not preempted by State regulation of the licensing of substance abuse facilities." Id. at 508.

Under the analysis set forth in Frew Run Gravel Prods. and Gernatt Asphalt Prods., it is clear that there is no preemption here. As the Court of Appeals expressly held, the phrase "relating to" as used in the MLRL supersession clause, and the nearly identical language employed in ECL 23-0303(2), means only that local governments are preempted from regulating

the actual operations, processes, and details of the mineral mining and oil, gas, and solution mining industries, not from adopting generally applicable zoning ordinances that determine what land uses shall be permissible within the municipality. This is precisely what Supreme Court held below and this Court should construe the phrase "relating to regulation" in ECL 23-0303(2) in the same manner as the Court of Appeals interpreted the Mined Land Reclamation Law supersession clause in Frew Run Gravel Prods. and Gernatt Asphalt Prods.

3. The Supersession Clause Contained in Pennsylvania's Oil and Gas Act Has Been Similarly Construed Not to Preempt Generally Applicable Zoning Ordinances.

In construing ECL 23-0303(2), this Court should also consider the interpretation of Pennsylvania's statute regulating oil and gas development (PA Stat Ann, tit 58, § 3302), which contains a very similar supersession clause as exists in ECL 23-0303(2). As in ECL 23-0303(2), section 3302 of the Pennsylvania statute expressly supersedes "all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development)," with the exception of ordinances adopted pursuant to two Pennsylvania state statutes, neither of which concerns a local municipality's zoning authority. PA Stat Ann, tit 58, § 3302. Pennsylvania's interpretation of section 3302 and its predecessor (section 602 of the Pennsylvania Oil and Gas Act), also dealing with the oil and gas industry, is particularly instructive here.[6]

As the Court of Appeals did with respect to the issue of preemption under the MLRL supersession clause, the Pennsylvania Supreme Court has, in two decisions issued in conjunction, addressed the scope of preemption under section 602—the predecessor to section 3302. First, in Huntley & Huntley, Inc. v Borough Council of Borough of Oakmont (600 Pa 207,

[6] Importantly, the Pennsylvania Legislature, in adopting the new preemption provision, expressly provided that "[a]ny difference in language between 58 Pa.C.S. § 3302 and section 602 of the Oil and Gas Act is intended only to conform to the style of the Pennsylvania Consolidated Statutes and *is not intended to change or affect the legislative intent, judicial construction or administration and implementation of section 602 of the Oil and Gas Act.*" Oil and Gas—Marcellus Shale, 2012 Pa. Legis. Serv. Act 2012-13, H.B. 1950, § 4 (Purdon's) (emphasis added).

964 A2d 855 [2009]), the plaintiff challenged the denial of a conditional use permit to drill and operate a natural gas well within the Borough on the grounds, among others, that the Borough's zoning ordinance restricting the location of natural gas wells was preempted by section 602. See id. at 212, 964 A2d at 858. Although noting that "[s]ection 602 of the Oil and Gas Act contain[ed] express preemption language . . . [t]hat . . . totally preempts local regulation of oil and gas development," with certain non-relevant exceptions, the Supreme Court concluded that "the express preemption command [was] not absolute." Id. at 221, 964 A2d at 863. Instead, the Court held, the scope of section 602's preemption extended only to regulation of the "technical aspects of well functioning and matters ancillary thereto (such as registration, bonding, and well site restoration), [but not] the well's location." Id. at 223, 964 A2d at 864. Indeed, the Court noted, "[a]lthough one could reasonably argue that a well's placement at a certain location is one of its features in a general sense, it is not a feature of the well's operation because it is not a characteristic of the manner or process by which the well is created, functions, is maintained, ceases to function, or is ultimately destroyed or capped." Id. at 222-223, 964 A2d at 864.

The Court further drew a salient distinction between the purposes served by the Oil and Gas Act and those served by local zoning ordinances:

> By way of comparison, the purposes of zoning controls are both broader and narrower in scope. They are narrower because they ordinarily do not relate to matters of statewide concern, but pertain only to the specific attributes and developmental objectives of the locality in question. However, they are broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development.

Id. at 224, 964 A2d at 865. Emphasizing these disparate purposes, the Court ultimately concluded that the Borough's generally applicable zoning ordinance determining the permissible location of natural gas wells within the municipality was not preempted by section 602. See id.

at 225-226, 964 A2d at 866 ("[A]bsent further legislative guidance, we conclude that the Ordinance serves different purposes from those enumerated in the Oil and Gas Act, and hence, that its overall restriction on oil and gas wells in R–1 districts is not preempted by that enactment."); see also Board of County Commrs. of La Plata County v Bowen/Edwards Assoc., 830 P2d 1045, 1057-1059 (Colo 1992) (holding that a county's zoning authority was not expressly or impliedly preempted by Colorado's Oil and Gas Conservation Act).

In contrast, in Range Resources-Appalachia, LLC v Salem Township (600 Pa 231, 964 A2d 869 [2009]), the Court was asked to determine whether a Salem Township zoning ordinance "directed at regulating surface and land development associated with oil and gas drilling operations" was preempted under section 602. Id. at 232, 964 A2d at 870. Specifically, the challenged ordinance required oil and gas drillers to obtain a municipal permit for all drilling-related activities; regulated the location, design, and construction of access roads, gas transmission lines, water treatment facilities, and well head; established a procedure for residents to file complaints regarding surface and ground water contamination; allowed the Township to declare drilling a public nuisance and to revoke or suspend a permit; and established requirements for site access and restoration. See id. at 234, 964 A2d at 871. Noting its holding in Huntley that section 602's preemptive scope did not "prohibit municipalities from enacting traditional zoning regulations that identify which uses are permitted in different areas of the locality, even if such regulations preclude oil and gas drilling in certain zones" (id. at 236, 964 A2d at 872), the Court concluded that the Township's zoning ordinance far exceeded the permissible bounds of zoning regulation by adopting "regulations pertaining to features of well operations that substantively overlap with similar regulations set forth in the Act" and, thus, was preempted under section 602. Id. at 240-244, 964 A2d at 875-877. Clearly, the Salem Township

ordinance by regulating the technical aspects of oil and gas drilling and imposing additional restrictions above and beyond those contained in the Pennsylvania Oil and Gas Act went too far.

Both the Pennsylvania and New York courts, when construing nearly identical preemption language, have concluded that the scope of preemption of local laws plainly does not encompass a municipality's authority to adopt generally applicable zoning ordinances that govern the permissible and prohibited uses of land within its borders. Thus, as the Pennsylvania Supreme Court held in Huntley, the nearly identical preemption language contained in both section 3302 of the Pennsylvania oil and gas statute and ECL 23-0303(2) do not prohibit municipalities from enacting generally applicable zoning ordinances that identify which uses are permitted and prohibited in different areas of the locality, even if such regulations preclude oil and gas drilling.

Furthermore, the Pennsylvania Legislature's recent attempt to implement a uniform statewide zoning scheme for oil and gas development that applies to all municipalities in Pennsylvania, as Plaintiff appears to seek in this action, has been invalidated as inconsistent with the municipalities' home rule authority and a violation of substantive due process. See Robinson Township v Commonwealth of Pennsylvania, PA Commw Ct, No. 284 M.D. 2012, July 26, 2012 (striking down PA Stat Ann, tit 58, § 3304).[7] As the Court aptly held,

> 58 Pa. C.S. § 3304 requires that local zoning ordinance be amended which, as *Huntley & Huntley, Inc.* states, involves a different exercise of police power. The public interest in zoning is in the development and use of land in a manner consistent with local demographic and environmental concerns. 58 Pa. C.S. § 3304 requires zoning amendments that must be normally justified on the basis that they are in accord with the comprehensive plan, not to promote oil and gas operations that are incompatible with the uses by people who have made

[7] Robinson Township is an unreported decision of the Pennsylvania Commonwealth Court that is not available on Westlaw. Therefore, the Amici respectfully request that this Court take judicial notice of the Robinson Township decision, which is attached as Addendum A to this brief.

> investment decisions regarding businesses and homes on the assurance that the zoning district would be developed in accordance with comprehensive plan and would only allow compatible uses. If the Commonwealth-proffered reasons are sufficient, then the Legislature could make similar findings requiring coal portals, tipples, washing plants, limestone and coal strip mines, steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones for a variety of police power reasons advancing those interests in their development. It would allow the proverbial 'pig in the parlor instead of the barnyard.'
>
> In this case, by requiring municipalities to violate their comprehensive plans for growth and development, 58 Pa. C.S. § 3304 violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications – irrational because it requires municipalities to allow all zones, drilling operations and impoundments, gas compressor stations, storage and use of explosives in all zoning districts, and applies industrial criteria to restrictions on height of structures, screening and fencing, lighting and noise. Succinctly, 58 Pa. C.S. § 3304 is a requirement that zoning ordinances be amended in violation of the basic precept that [l]and-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded. If a municipality cannot constitutionally include allowing oil and gas operations, it is no more constitutional just because the Commonwealth requires that it be done.

Id. at 32-34 (footnotes, internal quotation marks, and citations omitted).[8] In light of this well-reasoned analysis, this Court should not interpret ECL 23-0303(2) as Plaintiff suggests, which would give DEC authority to make all local zoning and land use decisions with respect to the oil and gas industry, because doing so could render it unconstitutional. See LaValle v Hayden, 98 NY2d 155, 161 (2002) ("courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional").

C. The Legislature Has Not Impliedly Preempted Generally Applicable Zoning Ordinances.

Alternatively, Plaintiff argues that, even if this Court concludes that the Legislature has not expressly preempted a municipality's home rule authority to adopt generally applicable zoning regulations, the Legislature has impliedly evidenced its intent to preempt local regulation of the oil and gas industry, including local zoning, in favor of promoting the development of the

[8] This decision has been appealed to the Supreme Court of Pennsylvania, and that appeal remains pending.

resource to maximize recovery and protect the correlative rights of the mineral owners across the State. However, because the Legislature expressly stated its intent to preempt only "regulation of the oil, gas and solution mining industries," the doctrine of implied preemption cannot be considered. See Matter of People v Applied Card Sys., Inc., 11 NY3d 105, 113 (2008), cert denied 129 S Ct 999 (2009). In any event, even considering the doctrine of implied preemption, this Court should affirm the implied holding of Supreme Court below that the Legislature did not intend to preempt local zoning authority in favor of land use regulation permitting oil and gas wells to be sited at any location within a municipality without any local input.

Where the Legislature has not expressly stated its intent to preempt local regulation, "that intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including the need for statewide uniformity in a particular area. A comprehensive and detailed statutory scheme may be evidence of the Legislature's intent to preempt." Matter of Cohen v Board of Appeals of Vil. of Saddle Rock, 100 NY2d 395, 400 (1989). In examining whether the Legislature has impliedly preempted local regulation, the courts must examine whether "the State has acted upon a subject and whether, in taking action, it has demonstrated a desire that its regulations should preempt the possibility of discordant local regulations." Id.; see also Daytop Vil., 78 NY2d at 508. "A desire to pre-empt may be implied from a declaration of State policy by the Legislature or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area." Consolidated Edison Co. of N.Y. v Town of Red Hook, 60 NY2d 99, 105 (1983) (citation omitted); see also People v De Jesus, 54 NY2d 465, 469 (1981) (comprehensive and detailed regulatory scheme imposed under Alcohol Beverage Control Law impliedly evidenced the Legislature's intent to preempt the entire field); Robin v Incorporated Vil. of Hempstead, 30

NY2d 347, 350 (1972) (declaration of State policy to preempt "the subject of abortion legislation and occupy the entire field so as to prohibit additional regulation by local authorities in the same area").

Here, ECL 23-0301 provides the Legislature's statement of policy underlying the statewide regulation of the oil, gas, and solution mining industries. Specifically, section 23-0301 declares that it is

> 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*, and to provide in similar fashion for the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells.

(Emphasis added). Contrary to Plaintiff's suggestion, however, this policy does not in any way indicate that the Legislature intended solely to promote the viability of oil and gas drilling in New York. To the contrary, the Legislature's declaration of policy specifically recognizes the interplay that must occur between the rights of owners of oil and gas properties, such as Plaintiff, and the rights of all landowners and the general public. In order to fully protect the rights of both, as ECL 23-0301 states, the Legislature cannot have intended to wholly supersede the municipal home rule authority of local governments to determine whether and in which districts oil and gas drilling operations will be permitted. To hold otherwise would obviate the clear balancing of rights sought to be protected by the Legislature, and would grant Plaintiff, and potentially DEC, total control over uniquely local land use matters. In fact, the statutory scheme governing mining is not markedly different, yet the Court of Appeals in Frew Run and Gernatt Asphalt Prods. did not find implied preemption.

Although the Legislature has indeed enacted detailed statutory provisions governing the operations of the oil and gas industries, generally applicable zoning ordinances, such as Dryden's zoning law challenged herein, are not inconsistent with the statutory scheme since they do not impact the day-to-day operations of the industry. See e.g. Jancyn Mfg. Corp., 71 NY2d at 97 (state law regulating use of sewage system additives did not preempt local legislation prohibiting use of any sewage system additives without county health department approval); Matter of JIJ Realty Corp. v Costello, 239 AD2d 580, 582 (2d Dept 1997) (holding that a zoning provision prohibiting the use of a warehouse for storage of lubricating oil and grease was not inconsistent with the purpose underlying the Petroleum Bulk Storage Code and, thus was not impliedly preempted by state law), lv denied 90 NY2d 811 (1997).

Plaintiff extensively relies on the ECL provisions regulating delineation of pools and well spacing units, among other things, as evidence that the actual location of oil and natural gas wells is a matter within the exclusive province of the State. Contrary to Plaintiff's argument, however, these regulations merely establish a limit on the number of wells that may be constructed statewide and provide minimum area and setback requirements to ensure adequate protection of the State's natural resources. See ECL 23-0501, 23-0503. Notably, the State-imposed limitations on well siting expressly govern the operations of the oil, gas, and solution mining industries, as contemplated by the Legislature in enacting ECL 23-0303(2), but do not contain any provisions that can be read to indicate that the Legislature intended to wholly preempt a municipality's exercise of its constitutionally guaranteed zoning authority. Indeed, as this Court has recognized, "[a] necessary consequence of limiting the number of wells is that some people will be prevented from drilling to recover the oil or gas beneath their property." Matter of

Western Land Servs., Inc. v Department of Envtl. Conservation of State of N.Y., 26 AD3d 15, 17 (3d Dept 2005), lv denied 6 NY3d 713 (2006).

Nor would a local government determination that oil and gas extraction and development is not a permissible use of land within the municipality prevent landowners from realizing the financial gains that may potentially result from recovery of their subsurface minerals, as Plaintiff asserts. In order to address the perceived inequity of some landowners being prohibited from drilling on their properties, New York has "adopted the doctrine of 'correlative rights,' whereby each landowner is entitled to be compensated for the production of the oil or gas located in the pool beneath his or her property regardless of the location of the well that effects its removal." Id. As such, regardless of whether a landowner is prohibited from conducting oil and gas drilling within a specific municipality, the landowner will still be entitled to compensation for his or her fair share of the oil or gas produced from beneath his property, whether by voluntary agreement, an order of DEC, or otherwise.

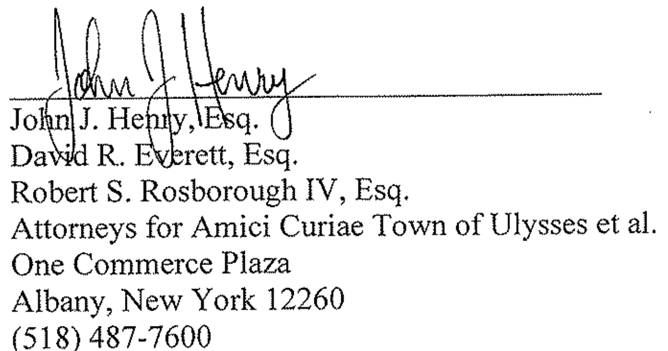
CONCLUSION

For the foregoing reasons, the Amici respectfully request that this Court affirm the Supreme Court judgment declaring that ECL 23-0303(2) does not preempt generally applicable zoning ordinances, including the Town of Dryden's Zoning Law.

Dated: December 10, 2012
Albany, New York

WHITEMAN OSTERMAN & HANNA LLP

By:



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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robinson Township, Washington County, Pennsylvania, Brian Coppola, Individually and in His Official Capacity as Supervisor of Robinson Township, Township of Nockamixon, Bucks County, Pennsylvania, Township of South Fayette, Allegheny County, Pennsylvania, Peters Township, Washington County, Pennsylvania, David M. Ball, Individually and in His Official Capacity as Councilman of Peters Township, Township of Cecil, Washington County, Pennsylvania, Mount Pleasant Township, Washington County, Pennsylvania, Borough of Yardley, Bucks County, Pennsylvania, Delaware Riverkeeper Network, Maya Van Rossum, The Delaware Riverkeeper, Mehernosh Khan, M.D.,	:	No. 284 M.D. 2012 Argued: June 6, 2012
Petitioners,	:	
v.	:	
Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, in His Official Capacity as Chairman of the Public Utility Commission, Office of the Attorney General of Pennsylvania, Linda L. Kelly, in Her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection and Michael L. Krancer, in His Official Capacity as Secretary of the Department of Environmental Protection,	:	
Respondents	:	

AMENDING ORDER

AND NOW, this 31st day of July, 2012, the dissenting opinion filed with this Court dated July 26, 2012, is amended to reflect the following changes to footnote 1 as follows:

> In *Huntley*, the Supreme Court addressed a challenge to a local zoning ordinance that restricted oil and gas extraction in a residential zoning district. The issue before the Court was whether the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§ 601.101-.605 (repealed 2012) (Former Act), preempted the local ordinance. The Supreme Court held that although the Former Act clearly preempted the field of local regulation in terms of how oil and gas resources are developed in the Commonwealth, it left room for local municipalities, through the MPC, to regulate where those resources are developed: "*[A]bsent further legislative guidance*, we conclude that the [local o]rdinance serves different purposes from those enumerated in the [Former] Act, and, hence, that its overall restriction on oil and gas wells in R-1 districts is not preempted by that enactment." *Huntley*, 600 Pa. at 225-26, 964 A.2d at 866 (emphasis added). With Act 13, which repealed the Former Act, the General Assembly has provided the courts with clear legislative guidance on the question of whether Act 13 is intended to preempt the field of how *and where* oil and gas natural resources are developed in the Commonwealth.

A corrected copy of the opinion and order is attached.

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P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robinson Township, Washington County, Pennsylvania, Brian Coppola, Individually and in his Official Capacity as Supervisor of Robinson Township, Township of Nockamixon, Bucks County, Pennsylvania, Township of South Fayette, Allegheny County, Pennsylvania, Peters Township, Washington County, Pennsylvania, David M. Ball, Individually and in his Official Capacity as Councilman of Peters Township, Township of Cecil, Washington County, Pennsylvania, Mount Pleasant Township, Washington County, Pennsylvania, Borough of Yardley, Bucks County, Pennsylvania, Delaware Riverkeeper Network, Maya Van Rossum, the Delaware Riverkeeper, Mehernosh Khan, M.D., Petitioners	
v.	No. 284 M.D. 2012
Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission, Office of the Attorney General of Pennsylvania, Linda L. Kelly, in her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection and Michael L. Krancer, in his Official Capacity as Secretary of the Department of Environmental Protection, Respondents	Argued: June 6, 2012

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION BY
PRESIDENT JUDGE PELLEGRINI[1] FILED: July 26, 2012

Before this Court are preliminary objections filed by the Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission (Commission), *et al.*,[2] (collectively, the Commonwealth) in response to a petition for review filed by Robinson Township, *et al.*,[3] (collectively, Petitioners)

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[1] While the majority of the *en banc* panel voted to grant Petitioners' Motion for Summary Relief regarding Counts I-III, because of a recusal, the vote of the remaining commissioned judges on those Counts resulted in a tie, requiring that this opinion be filed pursuant to Section 256(b) of the Internal Operating Procedures of the Commonwealth Court. 210Pa. Code §67.29(b).

[2] The other Respondents are: Robert F. Powelson, in his official capacity as Chairman of the Public Utility Commission; Office of the Attorney General of the Commonwealth of Pennsylvania; Linda L. Kelly, in her official capacity as Attorney General of the Commonwealth of Pennsylvania; Pennsylvania Department of Environmental Protection (DEP); and Michael L. Krancer, in his official capacity as Secretary of the Department of Environmental Protection.

[3] The other Petitioners are: Washington County, Pennsylvania; Brian Coppola (Coppola), individually and in his Official Capacity as Supervisor of Robinson Township; Township of Nockamixon, Bucks County, Pennsylvania; Township of South Fayette, Allegheny County, Pennsylvania; Peters Township, Washington County, Pennsylvania; David M. Ball (Ball), individually and in his Official Capacity as Councilman of Peters Township; Township of Cecil, Washington County, Pennsylvania; Mount Pleasant Township, Washington County, Pennsylvania; Borough of Yardley, Bucks County, Pennsylvania; Delaware Riverkeeper Network; Maya Van Rossum (Van Rossum), the Delaware Riverkeeper; and Mehernosh Khan, M.D. (Dr. Khan).

challenging the constitutionality of Act 13.[4] Also before the Court is Petitioner's motion for summary relief seeking judgment in their favor.[5] The Commission and the DEP have filed a cross-motion for summary relief.

On March 29, 2012, Petitioners filed a petition for review in the nature of a complaint for declaratory judgment and injunctive relief in this Court's original jurisdiction challenging the constitutionality of Act 13 pertaining to Oil and Gas – Marcellus Shale.[6] Act 13 repealed Pennsylvania's Oil and Gas Act[7] and replaced it with a codified statutory framework regulating oil and gas operations in the Commonwealth. Among other provisions involving the levying and distribution of impact fees and the regulation of the operation of gas wells, Act 13 preempts local regulation,[8] including environmental laws and zoning code provisions except in

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[4] 58 Pa. C.S. §§2301-3504.

[5] Petitioners originally filed a motion for summary judgment, which this Court by order dated May 10, 2012, deemed a motion for summary relief pursuant to Pa. R.A.P. 1532(b).

[6] The petition is lengthy consisting of 108 pages and 14 counts: 12 counts requesting declaratory relief, one count requesting a preliminary injunction and another requesting a permanent injunction.

[7] Act of December 19, 1984, P.L. 1140, *as amended,* formerly 58 P.S. §§601.101-601.605.

[8] 58 Pa. C.S. §3303 provides:

> Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.

limited instances regarding setbacks in certain areas involving oil and gas operations. "Oil and gas operations" are defined as:

> (1) well location assessment, including seismic operations, well site preparation, construction, drilling, hydraulic fracturing and site restoration associated with an oil or gas well of any depth;
>
> (2) water and other fluid storage or impoundment areas used exclusively for oil and gas operations;
>
> (3) construction, installation, use, maintenance and repair of:
>
> (i) oil and gas pipelines;
>
> (ii) natural gas compressor stations; and
>
> (iii) natural gas processing plants or facilities performing equivalent functions; and
>
> (4) construction, installation, use, maintenance and repair of all equipment directly associated with activities specified in paragraphs (1), (2) and (3), to the extent that:
>
> (i) the equipment is necessarily located at or immediately adjacent to a well site, impoundment area, oil and gas pipeline, natural gas compressor station or natural gas processing plant; and
>
> (ii) the activities are authorized and permitted under the authority of a Federal or Commonwealth agency.

58 Pa. C.S. §3301. Act 13 also gives the power of eminent domain to a corporation that is empowered to transport, sell or store natural gas, *see* 58 Pa. C.S. §3241, and requires uniformity of local ordinances, 58 Pa. C.S. §3304.

Petitioners allege that they have close to 150 unconventional[9] Marcellus Shale wells drilled within their borders, and Act 13 prevents them from fulfilling their constitutional and statutory obligations to protect the health, safety and welfare of their citizens, as well as public natural resources from the industrial activity of oil and gas drilling. Petitioners allege that Act 13 requires them to modify many of their zoning laws.[10]

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[9] An "unconventional well" is defined as "A bore hole drilled or being drilled for the purpose of or to be used for the production of natural gas from an unconventional formation." 58 Pa. C.S. §3203.

[10] The Commonwealth agrees that such modification will be necessary in order to promote statewide uniformity of ordinances. Its brief in support of the preliminary objections states that Act 13:

> [I]s the General Assembly's considered response to the challenges of environmental protection and economic development that come with the commercial development of unconventional formations, geological formations that cannot be produced at economic flow rates or in economic volumes except by enhanced drilling and completion technologies. One of the most commonly known unconventional formations is the Marcellus Shale, a hydrocarbon-rich black shale formation that underlies approximately two-thirds of Pennsylvania and is believed to hold trillions of cubic feet of natural gas and is typically encountered at depths of 5,000 to 9,000 feet.
>
> Act 13 broadly rewrote Pennsylvania's Oil and Gas Act in an effort to, *inter alia,* modernize and bolster environmental protections in light of the increased drilling likely to occur throughout the Commonwealth as Marcellus Shale natural gas resources are tapped.... Act 13 also institutes an impact fee, which redistributes industry revenue to communities directly affected by Marcellus Shale operations (as well as to other Commonwealth entities involved in shale development). Finally, and perhaps most relevant to these Preliminary Objections, Act 13 fosters both environmental predictability and investment in the nascent shale industry by

(Footnote continued on next page...)

In response to the passage of the Act, Petitioners filed a 12-count petition for review alleging that Act 13 violates:

- Article 1 §1 of the Pennsylvania Constitution and §1 of the 14th Amendment to the U.S. Constitution as an improper exercise of the Commonwealth's police power that is not designed to protect the health, safety, morals and public welfare of the citizens of Pennsylvania; **(Count I)**

- Article 1 §1 of the Pennsylvania Constitution because it allows for incompatible uses in like zoning districts in derogation of municipalities' comprehensive zoning plans and constitutes an unconstitutional use of zoning districts; **(Count II)**

- Article 1 §1 of the Pennsylvania Constitution because it is impossible for municipalities to create new or to follow existing comprehensive plans, zoning ordinances or zoning districts that protect the health, safety, morals and welfare of citizens and to provide for orderly development of the community in violation of the MPC[[11]] resulting in an improper use of its police power; **(Count III)**

- Article 3 §32 of the Pennsylvania Constitution because Act 13 is a "special law" that treats local

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(continued...)

> increasing statewide uniformity in local municipal ordinances that impact oil and natural gas operations.

(Commonwealth's memorandum of law in support of preliminary objections at 3-4) (footnotes omitted).

[11] The MPC refers to the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended,* 53 P.S. §§10101 – 11202.

governments differently and was enacted for the sole and unique benefit of the oil and gas industry; **(Count IV)**

- Article 1 §§1 and 10 of the Pennsylvania Constitution because it is an unconstitutional taking for private purposes and an improper exercise of the Commonwealth's eminent domain power; **(Count V)**

- Article 1 §27 of the Pennsylvania Constitution because it denies municipalities the ability to carry out their constitutional obligation to protect public natural resources; **(Count VI)**

- the doctrine of Separation of Powers because it entrusts an Executive agency, the Commission, with the power to render opinions regarding the constitutionality of Legislative enactments, infringing on a judicial function; **(Count VII)**

- Act 13 unconstitutionally delegates power to the Pennsylvania Department of Environmental Protection (DEP) without any definitive standards or authorizing language; **(Count VIII)**

- Act 13 is unconstitutionally vague because its setback provisions and requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited; **(Count IX)**

- Act 13 is unconstitutionally vague because its timing and permitting requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited; **(Count X)**

- Act 13 is an unconstitutional "special law" in violation of Article 3, §32 of the Pennsylvania Constitution because it restricts health professionals' ability to disclose critical diagnostic information when dealing solely with information deemed proprietary by the natural gas industry while other industries under the federal Occupational and Safety Act have to list the toxicity of each chemical constituent that makes up the

product and their adverse health effects; **(Count XI)** (Dr. Khan is the only petitioner bringing this claim.)

- Article 3, §3 of the Pennsylvania Constitution prohibition against a "bill" having more than a single subject because restricting health professionals' ability to disclose critical diagnostic information is a different subject than the regulation of oil and gas operations; **(Count XII)** (Dr. Khan is the only petitioner bringing this claim.)[12]

Petitioners' motion for summary relief echoes the allegations in the petition for review.[13]

In response to the petition for review, the Commonwealth has filed preliminary objections alleging that: (1) Petitioners lack standing to file their action;

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[12] Petitioners seek preliminary and permanent injunctive relief in **Counts XIII and XIV** respectively.

[13] "The standard for summary relief is found at Pa. R.A.P. 1532(b) which is similar to the relief envisioned by the rules of civil procedure governing summary judgment. "After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law:

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury."

Brittan v. Beard, 601 Pa. 405, 417 n.7, 974 A.2d 479, 484 n.7 (2009).

(2) Petitioners' claims are barred because they involve non-justiciable political questions; and (3) Counts I through XII fail to state claims upon which relief may be granted. Regarding Counts XIII and XIV, the Commonwealth alleges that Petitioners have not set forth a separate cause of action for granting relief and also fail to state claims upon which summary relief may be granted. It requests that we dismiss the petition for review and, necessarily, its motion for summary relief as well. The Commonwealth has also filed a cross-application for summary relief.

I.

STANDING

The Commonwealth contends that the seven municipalities (municipalities), the two councilmembers, the physician and the environmental association do not have standing to challenge the constitutionality of Act 13.

In simple terms, "standing to sue" is a legal concept assuring that the interest of the party who is suing is really and concretely at stake to a degree where he or she can properly bring an action before the court. *Baker v. Carr*, 369 U.S. 186 (1962) (stating that the "gist" of standing is whether the party suing alleged such a personal stake in the outcome of the controversy); 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE, §14.10, at 387 (2d ed. 1997). Pennsylvania has its own standing jurisprudence, although the doctrine of standing in this Commonwealth is recognized primarily as a doctrine of judicial restraint and not one having any basis in the Pennsylvania Constitution. *Housing Auth. of the Cty. of Chester v. Pa. State Civil Serv. Comm'n*, 556 Pa. 621, 730 A.2d 935 (1999).

Fundamentally, the standing requirement in Pennsylvania "is to protect against improper plaintiffs." *Application of Biester*, 487 Pa. 438, 442, 409 A.2d 848, 851 (1979). Unlike the federal courts, where a lack of standing is directly correlated to the ability of the court to maintain jurisdiction over the action, the test for standing in Pennsylvania is a flexible rule of law, perhaps because the lack of standing in Pennsylvania does not necessarily deprive the court of jurisdiction. *Compare Jones Mem'l Baptist Church v. Brackeen*, 416 Pa. 599, 207 A.2d 861 (1965), *with Raines v. Byrd*, 521 U.S. 811 (1997). As a result, Pennsylvania courts are much more expansive in finding standing than their federal counterparts.

In *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 192, 346 A.2d 269, 281 (1975), where there was a challenge to the legality and the constitutionality of a parking tax, our Supreme Court extensively reviewed the law of standing and stated the general rule: A party has standing to sue if he or she has a "substantial, direct, and immediate interest" in the subject matter of the litigation. The elements of the substantial-direct-immediate test have been defined as follows:

> A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.

S. Whitehall Twp. Police Serv. v. S. Whitehall Twp., 521 Pa. 82, 86-87, 555 A.2d 793, 795 (1989) (internal citations omitted).

Although the substantial-direct-immediate test is the general rule for determining the standing of a party before the court, there have been a number of cases that have granted standing to parties who otherwise failed to meet this test, including *William Penn*. In *William Penn*, our Supreme Court addressed, among other issues, the standing of parking lot owners to challenge a parking tax imposed on patrons of their garages and lots. Even though the parking lot owners were not required to pay the challenged tax, our Supreme Court held that:

> [T]he causal connection between the tax and the injury to the parking operators is sufficiently close to afford them standing under a statute, such as section 6, which is essentially neutral on the question. While the tax falls initially upon the patrons of the parking operators, it is levied upon the very transaction between them. Thus the effect of the tax upon their business is removed from the cause by only a single short step.
>
> We find very persuasive authority for this conclusion in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 271, 69 L.Ed. 1070 (1925), and *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). In *Pierce*, the operators of private schools were held to have standing to challenge a law which required parents to send their children to public schools. In *Truax*, an alien was held to have standing to challenge a law which forbade certain employers to employ aliens as more than 20% of their work force. In each case the regulation was directed to the conduct of persons other than the plaintiff. However, the fact that the regulation tended to prohibit or burden transactions between the plaintiff and those subject to the regulation sufficed to afford the plaintiff standing. While the burdens imposed in those cases may have been more onerous than

> that involved in this case (amounting to a total prohibition is *Pierce*), that does not render the causal connection any less immediate.

William Penn, 464 Pa. at 208-09, 346 A.2d at 289. In *Philadelphia Facilities Management Corporation v. Biester*, 431 A.2d 1123, 1131-1132 (Pa. Cmwlth. 1981), we explained that the United States Supreme Court set the criteria by which a party can challenge the legality and constitutionality of a statute on the putative rights of other persons or entities when "(1) the relationship of the litigant to the third party is such that the enjoyment of the right by the third party is inextricably bound with the activity the litigant seeks to pursue; *and* (2) there is some obstacle to the third party's assertion of his own right." *See also Consumer Party of Pa. v. Commonwealth*, 510 Pa. 158, 507 A.2d 323 (1986) (citing *Application of Biester*) (granting standing to a taxpayer challenging the constitutionality of a legislative pay raise).

This exception has been utilized by our courts to grant standing to taxpayers challenging a variety of governmental actions. For example, the courts have granted standing to taxpayers challenging judicial elections on the grounds that those elections were scheduled in a year contrary to that prescribed by the Pennsylvania Constitution, *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988); to the state bar association, Pennsylvania attorneys, taxpayers and electors challenging the placement of a proposed state constitutional amendment on the ballot, *Bergdoll v. Kane*, 557 Pa. 72, 731 A.2d 1261 (1999); and to a state senator challenging the governor's failure to submit nominations to the state senate within the constitutional period, *Zemprelli v. Thornburg*, 407 A.2d 102 (Pa. Cmwlth. 1979). The theory underlying these cases is that public policy considerations favor a relaxed

application of the substantial-direct-immediate test, particularly the "direct" element that requires the party bringing the action to have an interest that surpasses that of the common people. *Consumer Party*.

Finally, certain public officials have standing to represent the interest of the public both under their authority as representatives of the public interest and under the doctrine of *parens patriae*. The doctrine of "*parens patriae*" refers to the "ancient powers of guardianship over persons under disability and of protectorship of the public interest which were originally held by the Crown of England as 'father of the country,' and which as part of the common law devolved upon the states and federal government." *In re Milton Hershey School Trust*, 807 A.2d 324, 326 n. 1 (Pa. Cmwlth. 2002) (quoting *In re Pruner's Estate*, 390 Pa. 529, 532, 136 A.2d 107, 109 (1957)) (citations omitted). Under *parens patriae* standing, the attorney general is asserting and protecting the interest of another, not that of the Commonwealth. For example, public officials have an interest as *parens patriae* in the life of an unemancipated minor. *Commonwealth v. Nixon*, 563 Pa. 425, 761 A.2d 1151 (2000). *See also DeFazio v. Civil Service Commission of Allegheny County*, 562 Pa. 431, 756 A.2d 1103 (2000) (the sheriff of a second-class county was found to have standing to enjoin the enforcement of legislation that regulated activities both in and out of the workplace because the sheriff had to terminate employees who violated the legislation unless the civil service commission agreed to a suspension of the employees).

A.

Standing of Municipalities

Regarding the seven municipalities who have brought this action, the Commonwealth argues that the petition for review is premised on the notion that

Act 13 is unconstitutional because it impacts the rights of citizens; however, the municipalities have no standing to assert the claims of their citizens against the Commonwealth because Act 13 does not harm the municipalities themselves and the petition for review only addresses speculative harms that may occur to the citizens. "The various Municipal Petitioners simply do not suffer any harm to their 'local government functions' if zoning is required and development allowed that allegedly harms the property and environmental rights of citizens of this Commonwealth. To the extent that such harms are 'permitted' by Act 13, which they are not, the appropriate citizens may have standing to bring such claims.... However, the Municipal Petitioners simply have no basis – no *standing* – to act as proxy parties for the appropriate litigants." (Commonwealth's Memorandum of Law in Support of Preliminary Objections at 9.) (Emphasis in original.)

The Petitioners, however, respond that Act 13 imposes substantial, direct and immediate obligations on them that will result in specific harms to their interests as governing entities, including adverse impacts that serve to affect their abilities to carry out their governmental functions, duties and responsibilities under Pennsylvania law. They explain that Act 13 imposes substantial, direct, immediate and affirmative obligations on them that affect their local government functions, including the requirement of modifying their zoning laws in ways that will make the ordinances unconstitutional.[14] Specifically, to implement the mandates of Act 13,

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[14] For example, Petitioners allege that they would have to: (a) modify their zoning laws in a manner that fails to give consideration to the character of the municipality, the needs of its citizens and the suitabilities and special nature of particular parts of the municipality, Section 603 of the MPC, 53 P.S. §10603(a); (b) modify their zoning laws in a manner that would violate and contradict the goals and objectives of Petitioners' comprehensive plans, Section 605 of the MPC, 53 P.S. §10605; and (c) modify zoning laws and create zoning districts that violate Petitioners'
(Footnote continued on next page...)

the municipalities would be required to completely rewrite their zoning codes and pass new land-use ordinances that create special carve-outs for the oil and gas industry that are inconsistent with long-established municipal comprehensive plans. Noteworthy, Act 13 provides Petitioners with 120 days to expend significant time, monies and resources to develop entirely new comprehensive plans and ordinances; consult with respective planning commissions and county planning commissions; submit formal copies of proposed ordinances to municipal and county planning commissions; submit the proposed ordinance to the Public Utility Commission for review; advertise public notice of public hearings; conduct public hearings; submit revised formal copies of proposed ordinances and publicly advertise for the passage and approve final ordinances and comprehensive plans.

To maintain standing to a constitutional challenge, the municipality must establish that its interest in the outcome of the challenge to a state law is: (1) substantial when aspects of the state law have particular application to local government functions (as opposed to general application to all citizens); (2) direct when the state law causes the alleged constitutional harm; and (3) sufficiently immediate when the municipality asserts factually supported interests that are not speculative or remote. *City of Philadelphia v. Commonwealth of Pennsylvania,* 575 Pa. 542, 561-63, 838 A.2d 566, 578-79 (2003) (holding that the City of Philadelphia had standing to challenge the constitutionality of a state law because "the City's present assertion that it is an aggrieved party is premised upon the effects of [the

(continued...)

constitutional duties to only enact zoning ordinances that protect the health, safety, morals and welfare of the community, Section 604 of the MPC, 53 P.S. §10604.

Act] upon its interests and functions as a governing entity, and not merely upon harm to its citizens.") *See also Franklin Twp. v. Dep't of Envlt. Res.*, 500 Pa. 1, 452 A.2d 718 (1982) (township had standing because of its direct and substantial interest where the possibility of harm was immediate to the quality of life of its citizens); *William Penn*, 464 Pa. at 280, 346 A.2d at 280 (quoting *Man O'War Racing Ass'n, Inc. v. State Horse Racing Comm'n*, 433 Pa. 432, 441, 250 A.2d 172, 176-77 (1968)) ("'The party must have a direct interest in the subject-matter of the particular litigation, otherwise he can have no standing to appeal. And not only must the party desiring to appeal have a direct interest in the particular question litigated, but his interest must be immediate and pecuniary, and not a remote consequence of the judgment. The interest must also be substantial.'") A substantial interest is one in which there is some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.

In this case, the municipalities have standing to bring this action because Act 13 imposes substantial, direct and immediate obligations on them that affect their government functions. Specifically, 58 Pa. C.S. §3304 requires *uniformity of local ordinances* to allow for the reasonable development of oil and gas resources. That will require each municipality to take specific action and ensure its ordinance complies with Act 13 so that an owner or operator of an oil or gas operation can utilize the area permitted in the zoning district. If the municipalities do not take action to enact what they contend are unconstitutional amendments to their zoning ordinances, they will not be entitled to any impact fees to which they may otherwise be entitled and could be subject to actions brought by the gas operators. Because Act 13 requires that the municipalities enact zoning ordinances

to comply with the provisions of Act 13, the municipalities have standing because Act 13 has a substantial, direct and immediate impact on the municipalities' obligations. Moreover, even if the interest of the litigant was not direct or immediate, the municipalities' claims that they are required to pass unconstitutional zoning amendments are inextricably bound with those of the property owners' rights whose property would be adversely affected by allowing oil and gas operations in all zoning districts as a permitted use when even the Commonwealth admits that property owners affected by such a permitted use would have standing to bring a challenge to the constitutionality of the Act 13.

B.

Standing of Council Members and Landowners

The Commonwealth also contends that Coppola and Ball, who have sued as councilmembers of their respective municipalities and as a "citizen of the Commonwealth," have failed to allege any kind of significant interest and have not pled any interest, claim or harm of any kind in their individual capacities. Coppola and Ball allege that they are local elected officials acting in their official capacities representing their respective municipalities who could be subject to personal liability and who would be required to vote on the passage of zoning amendments to comply with Act 13. They are also residents of the townships in which they serve as local elected officials. As individual landowners and residents, they live in a district that has been zoned residential in which oil and gas operations are now permitted under Act 13. They will not be able to rely on the fact that their next-door neighbor will not use his or her property for an industrial activity that will serve to immediately devalue their properties. Coppola has provided an affidavit stating the same and that his respective township has lost areas for future development by way

of drilling in residential areas. Ball has provided an affidavit stating that Act 13 entirely denies him of the protections he relied upon regarding the value of his home and he is unable to guarantee to any prospective buyer that industrial applications will not exist in the residential area in the future. As local elected officials acting in their official capacities for their individual municipalities and being required to vote for zoning amendments they believe are unconstitutional, Coppola and Ball have standing to bring this action.

C.

Standing of Associations

As to the Delaware Riverkeeper Network, even in the absence of injury to itself, an association may have standing solely as the representative of its members and may initiate a cause of action if its members are suffering immediate or threatened injury as a result of the contested action. *Mech. Contractors Ass'n of E. Pa., Inc. v. Dep't of Educ.*, 860 A.2d 1145 (Pa. Cmwlth. 2004); *Nat'l Solid Wastes Mgmt. Ass.'n v. Casey*, 580 A.2d 893 (Pa. Cmwlth. 1990). However, having not shown that at least one member has suffered or is threatened with suffering a "direct, immediate, and substantial" injury to an interest as a result of the challenged action," which is necessary for an association to have standing, *Energy Conservation Council of Pa. v. Public Util. Comm'n,* 995 A.2d 465, 476 (Pa. Cmwlth. 2010), the Delaware Riverkeeper Network lacks standing. *See also Sierra Club v. Hartman,* 529 Pa. 454, 605 A.2d 309 (1992) (holding that Sierra Club and various other environmental organizations that brought suit challenging the failure by the Legislature to adopt a proposed air pollution regulation lacked standing because their interest in upholding a constitutional right to clean air were no greater than the common interest of all citizens).

D.

Standing of Riverkeeper

This failure extends to Van Rossum, the Delaware Riverkeeper[15] who similarly fails to plead any direct and immediate interest, claim or harm. While she contends that she has performed numerous activities in relation to gas drilling issues in the Delaware River Basin, including data gathering, she also contends that her personal use and enjoyment of the Delaware River Basin will be negatively affected if gas drilling is authorized to proceed in these areas without the protections afforded by locally-enacted zoning ordinances. Her concern that truck traffic and air pollution will interfere with her enjoyment of the river or her work as ombudsman, however, does not rise to the level of a substantial, immediate and direct interest sufficient to confer standing.

E.

Standing of Medical Doctor

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[15] The petition for review states that Van Rossum is a full-time, privately funded ombudsman responsible for the protection of the waterways in the Delaware River Watershed. She advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its tributaries and habitats. (Petition for Review (PFR) at ¶ 33.) Petitioners further explain that Delaware Riverkeeper Network (DRN) is "a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries and habitats." (PFR at ¶32.) "To achieve these goals, DRN organizes and implements streambank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River Basin watershed. DRN is a membership organization headquartered in Bristol, Pennsylvania, with more than 8,000 members with interests in the health and welfare of the Delaware River and its watershed. DRN brings this action on its own behalf and on behalf of its members, board and staff." (PFR at ¶ 32.)

Finally, we turn to whether Dr. Khan has standing to challenge the constitutionality of Act 13 as being a "special law" in violation of Article 3, §32 of the Pennsylvania Constitution because it treats the oil and gas industry differently than other industries regarding the disclosure of critical diagnostic information and as having more than a single subject in violation Article 3, §3 of the Pennsylvania Constitution because it deals with both the health care of patients and a different subject, the regulation of oil and gas operations.

58 Pa. C.S. §3222.1(b)(10) and (b)(11), titled "Hydraulic fracturing chemical disclosure requirements," regarding hydraulic fracturing of unconventional wells performed on or after the date of the Act, provides that the following are required disclosures:

> (10) A vendor, service company or operator shall identify the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information to any health professional who requests the information in writing if the health professional executes a confidentiality agreement and provides a written statement of need for the information indicating all of the following:
>
> (i) The information is needed for the purpose of diagnosis or treatment of an individual.
>
> (ii) The individual being diagnosed or treated may have been exposed to a hazardous chemical.
>
> (iii) Knowledge of information will assist in the diagnosis or treatment of an individual.
>
> (11) If a health professional determines that a medical emergency exists and the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information are necessary for emergency treatment, the vendor, service provider or operator shall

> immediately disclose the information to the health professional upon a verbal acknowledgment by the health professional that the information may not be used for purposes other than the health needs asserted and that the health professional shall maintain the information as confidential. The vendor, service provider or operator may request, and the health professional shall provide upon request, a written statement of need and a confidentiality agreement from the health professional as soon as circumstances permit, in conformance with regulations promulgated under this chapter.

Under these two sections of Act 13, upon request from a health professional, information regarding any chemicals related to hydraulic fracturing of unconventional wells shall be provided by the vendor.

Dr. Kahn's only predicate for his interest in Act 13 is that "he treats patients in an area that *may likely* come into contact with oil and gas operations." (*See* PFR at ¶ 35.) Petitioners contend that this gives him a direct, substantial and immediate interest in this controversy because it affects his ability to effectively treat his patients. They explain that Dr. Khan is a medical doctor and resident of the Commonwealth and operates a family practice in Monroeville, Allegheny County, where he treats patients in an area that may likely come into contact with oil and gas operations. Because the claim that 58 Pa. C.S. §3222.1(b)(10) and (b)(11) restricts health professionals' ability to disclose critical diagnostic information when dealing with information deemed proprietary by the natural gas industry, it requires him to disregard general ethical duties and affirmative regulatory and statutory obligations and to hide information they have gained solely because it was produced by an industry favored by the General Assembly. (Petitioner's brief in opposition to Commonwealth's preliminary objections at 57.)

While keeping confidential what chemicals are being placed in the waters of the Commonwealth may have an effect, both psychologically and physically, on persons who live near or adjacent to oil and gas operations to where these chemicals may migrate both psychologically and physically, his standing to maintain the constitutional claims is based on his claim that the confidentiality restrictions may well affect his ability to practice medicine and to diagnose patients. However, until he has requested the information which he believes is needed to provide medical care to his patients and that information is not supplied or supplied with such restrictions that he is unable to provide proper medical care, the possibility that he may not have the information needed to provide care is not sufficient to give him standing. *See National Rifle Association v. City of Philadelphia,* 977 A.2d 78 (Pa. Cmwlth. 2009) (plaintiffs did not have standing to bring a claim that their rights under Article I, § 21 of the Pennsylvania Constitution that the "right of the citizens to bear arms in defence of themselves and the State shall not be questioned" were infringed by an ordinance requiring that stolen guns had to be reported to the police until the plaintiffs' guns were stolen or lost). *See also National Rifle Association v. City of Pittsburgh,* 999 A.2d 1256, (Pa. Cmwlth. 2010); *Commonwealth v. Ciccola*, 894 A.2d 744 (Pa. Super. 2006*), appeal denied,* 591 Pa. 660, 916 A.2d 630 (2007); and *Commonwealth v. Semuta*, 902 A.2d 1254 (Pa. Super. 2006), *appeal denied,* 594 Pa. 679, 932 A.2d 1288 (2007).(no standing to object to the constitutionality of a statute unless the party is affected by the particular feature alleged to be in conflict with the constitution). Of course, once the composition of the chemicals placed in the Commonwealth's water is disclosed to him, if Dr. Kahn believes that the chemicals in the water cause a generalized health hazard that would affect the health, safety and welfare of the community, he would

have standing to challenge the confidentiality provisions, even if he has signed the confidentiality agreement.

Accordingly, because he does not have standing, Counts XI and XII of the Petition for Review are dismissed.

II.
JUSTICIABILITY

The Commonwealth also preliminarily objects to the petition for review on the basis that Petitioners' claims are barred because they involve non-justiciable political questions. "The power to determine how to exercise the Commonwealth's police powers, including how to best manage Pennsylvania's natural resources and how to best protect its citizens, is vested in the Legislature." (Commonwealth's preliminary objections at 3.) It argues that Art. 1, §27 of the Pennsylvania Constitution[16] provides that the Commonwealth is the trustee of Pennsylvania's natural resources and it shall conserve and maintain them for the benefit of all the people. That provision provides the Legislature with the authority to determine the best way to manage the development of Pennsylvania's oil and gas resources while

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[16] Art. 1, §27 of the Pennsylvania Constitution provides:

> **Natural resources and the public estate.**
>
> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

protecting the environment. If Petitioners are unhappy with the changes the Legislature has made in enacting Act 13, they should proceed through the political process and not ask this Court to nullify policy determinations that were made pursuant to the Constitution and for which there are no manageable standards for the judiciary to assess the merit of the determinations made by the Legislature.

The political question doctrine is derived from the separation of powers principle. *Pa. Sch. Bds. Ass'n, Inc. v. Commonwealth Ass'n of Sch. Adm'rs,* 569 Pa. 436, 451, 805 A.2d 476, 484-485 (2002). A basic precept of our form of government is that the Executive, the Legislature and the Judiciary are independent, co-equal branches of government. *Id.* at 451, 805 A.2d at 485. Although the ordinary exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers, there are certain powers constitutionally conferred upon the legislative branch that are not subject to judicial review. *Id.* A challenge to the Legislature's exercise of a power that the Constitution commits exclusively to the Legislature presents a non-justiciable political question. *Id.*

Under the Commonwealth's reasoning, any action that the General Assembly would take under the police power would not be subject to a constitutional challenge. For example, if the General Assembly decided under the police power that to prevent crime, no one was allowed to own any kind of gun, the courts would be precluded to hear a challenge that the Act is unconstitutional under Art. 1, §21 of the Pennsylvania Constitution, which provides, "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." Nothing in this case involves making a determination that would

intrude upon a legislative determination or, for that matter, require the General Assembly to enact any legislation to implement any potential adverse order; what we are asked to do is to determine whether a portion of Act 13 is constitutional or not, a judicial function. Because we are not required to make any specific legislative policy determinations in order to come to a resolution of the matters before us, the issue of whether Act 13 violates the Pennsylvania Constitution is a justiciable question for this Court to resolve.[17]

[17] The Commonwealth also raises the issue of ripeness arguing that this Court should refrain from making a determination because the answer would be based on Petitioners' assertions of speculative, hypothetical events that may or may not occur in the future. *See Pa. Power & Light Co v. Pa. Pub. Util. Comm'n,* 401 A.2d 1255, 1257 (Pa. Cmwlth. 1979). However, our Supreme Court has held that "the equitable jurisdiction of this Court allows parties to raise pre-enforcement challenges to the substantive validity of laws when they would otherwise be forced to submit to the regulations and incur cost and burden that the regulations would impose or be forced to defend themselves against sanctions for non-compliance with the law. In this case, the municipalities have alleged that they will be required to modify their zoning codes, and if they fail to do so, they will be subject to penalties and/or prosecution under 58 Pa. C.S. §3255. Therefore, the constitutionality issue is ripe for review, and declaratory judgment is the proper procedure to determine whether a statute violates the constitutional rights of those it affects." *Allegheny Ludlum Steel Corp. v. Pa. Pub. Util. Comm'n,* 447 A.2d 675, 679 (Pa. Cmwlth. 1982).

III.

FAILURE TO STATE A CLAIM

Counts I-III
Art. 1, §1 of the
Pennsylvania Constitution
and violation of the Equal Protection Clause
of the United States Constitution

The Commonwealth contends that Act 13's requirement that municipal zoning ordinances be amended to include oil and gas operations in all zoning districts does not violate the principles of due process under Art. 1, §1 of the Pennsylvania Constitution[18] and the Fourteenth Amendment of the United States Constitution[19] because they have a rational basis and constitute a proper exercise of the Commonwealth's police powers.

The Commonwealth states that Act 13 does not preempt local municipalities' powers to enact zoning ordinances if they are in accord with 58 Pa. C.S. §§3302 and 3304. Unlike 58 Pa. C.S. §3303, which preempts all municipalities from enacting environmental laws, 58 Pa. C.S. §3302 does keep the local municipalities' power of local zoning but only if provisions do not conflict with

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[18] Article 1, §1 of the Pennsylvania Constitution provides: "All men are born equally free an independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty of acquiring, possessing and protecting property and reputation, and of pursing their own happiness."

[19] Section 1 of the 14th Amendment to the United States Constitution provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Chapter 32 of Act 13, which relates to oil and gas well operations and environmental concerns. 58 Pa. C.S. §3304. 58 Pa. C.S. §3304 mandates that all municipalities must enact zoning ordinances in accordance with its provisions. This mandate, it argues "must be evaluated in light of the fundamental structural principles establishing the relationship between the Commonwealth and its municipalities. It cannot be disputed . . . that the Commonwealth has established municipalities and that their power derives solely from its creator-state. 'Municipalities are creatures of the state and have no inherent powers of their own. Rather, they "possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect."'" *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 600 Pa. 207, 220, 964 A.2d 855, 862 (2009).... To state the obvious, the MPC is a statute just like any other and as such, its zoning provisions are subject to amendment, alteration, or repeal by subsequent statutory enactment, unless such legislative act violates the Commonwealth or United States Constitutions." (Commonwealth's memorandum of law in support of preliminary objections at 24.)

While recognizing that their power to regulate zoning is only by delegation of the General Assembly, the municipalities contend that Act 13 is unconstitutional because it forces municipalities to enact zoning ordinances in conformance with 58 Pa. C.S. §3304 allowing, among other things, mining and gas operations in all zoning districts which are incompatible with the municipalities' comprehensive plans that denominates different zoning districts, making zoning irrational. Simply put, they contend that they could not constitutionally enact a zoning ordinance if they wanted to, and it does not make an ordinance any less infirm because the General Assembly required it to be passed.

A.

Zoning is an extension of the concept of a public nuisance which protects property owners from activities that interfere with the use and enjoyment of their property. In *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732-33 (1995), the United States Supreme Court described the purpose of zoning as follows:

> Land-use restrictions designate "districts in which only compatible uses are allowed and incompatible uses are excluded." D. Mandelker, Land Use Law § 4.16, pp. 113–114 (3d ed.1993) (hereinafter Mandelker). These restrictions typically categorize uses as single-family residential, multiple-family residential, commercial, or industrial. *See, e.g.,* 1 E. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 8.01, pp. 8–2 to 8–3 (4th ed. 1995); Mandelker § 1.03, p. 4; 1 E. Yokley, Zoning Law and Practice § 7–2, p. 252 (4th ed. 1978).
>
> Land use restrictions aim to prevent problems caused by the "pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926). In particular, reserving land for single-family residences preserves the character of neighborhoods, securing "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974); *see also Moore v. East Cleveland,* 431 U.S. 494, 521, 97 S.Ct. 1932, 1947, 52 L.Ed.2d 531 (1977) (Burger, C.J., dissenting) (purpose of East Cleveland's single-family zoning ordinance "is the traditional one of preserving certain areas as family residential communities").[20]

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[20] Ignoring that *Edmonds* was cited to explain the purpose of zoning and not the constitutional standard under the Pennsylvania Constitution, the dissent dramatically states that if

(Footnote continued on next page...)

See also Cleaver v. Bd. of Adjustment, 414 Pa. 367, 378, 200 A.2d 408, 415 (1964).

So there is not a "pig in the parlor instead of the barnyard," zoning classifications contained in the zoning ordinance are based on a process of planning with public input and hearings that implement a rational plan of development. The MPC requires that every municipality adopt a comprehensive plan which, among other things, includes a land use plan on how various areas of the community are to be used. Section 301 of the MPC, 53 P.S. §10301. The municipality's zoning

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(continued...)

no incompatible uses were permitted as part of the comprehensive plan, based on the above discussion, that would mean the end of variances and the grant of non-conforming uses. What that position ignores is that non-conforming uses were in existence before zoning and that variances are designed to ameliorate the application of the zoning ordinance to a particular parcel of property. Neither destroys the comprehensive scheme of zoning. *In Appeal of Michener*, 382 Pa. 401, 407, 115 A.2d 367, 371 (1955), our Supreme Court, quoting *Clark v. Board of Zoning Appeals*, 301 N.Y. 86, 90, 91, 92 N.E.2d 903, 904, 905 (1950), explained that in the context of why and when a variance should be granted and the importance of maintaining the general scheme of zoning stating:

> '[B]efore the board may vote a variance, there must be shown, among other things, 'that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself'. The board, being an administrative and not a legislative body, may not review or amend the legislatively enacted rules as to uses, or amend the ordinance under the guise of a variance, * * * or determine that the ordinance itself is arbitrary or unreasonable * * *. If there be a hardship, which * * * is common to the whole neighborhood, the remedy is to seek a change in the zoning ordinance itself. * * * Nothing less than a showing or hardship special and peculiar to the applicant's property will empower the board to allow a variance. * * * The substance of all these holdings is that no administrative body may destroy the general scheme of a zoning law by granting special exemption from hardships common to all.

ordinance implements the comprehensive plan. Section 303 of the MPC, 53 P.S. §10303.

A typical zoning ordinance divides the municipality into districts in each of which uniform regulations are provided for the uses of buildings and land, the height of buildings, and the area or bulk of buildings and open spaces. *See* Section 605 of the MPC, 53 P.S. §10605. Permitted or prohibited uses of property and buildings are set forth for each zoning district, e.g., residential, commercial, and industrial. Use districts are often further sub-classified, for instance, into residential districts and then restricted to single-family houses and those in which multiple-family or apartment structures are permitted; commercial districts into central and local, or those in which light manufacturing is permitted or excluded; for heavy but non-nuisance types of industry; and nuisance or unrestricted districts. Height regulations fix the height to which buildings or portions thereof may be carried. Bulk regulations fix the amount or percentage of the lot which may be occupied by a building or its various parts, and the extent and location of open spaces, such as building set-backs, side yards and rear yards. Zoning ordinances segregate industrial districts from residential districts, and there is segregation of the noises and odors necessarily incident to the operation of industry from those sections in which the homes are located. Out of this process, a zoning ordinance implements a comprehensive zoning scheme; each piece of property pays, in the form of reasonable regulation of its use, for the protection that the plan gives to all property lying within the boundaries of the plan.

B.

To determine whether a zoning ordinance is unconstitutional under Article 1, §1 of the Pennsylvania Constitution and Fourteenth Amendment to the United States Constitution, a substantive due process inquiry must take place. When making that inquiry, we take into consideration the rights of all property owners subject to the zoning and the public interests sought to be protected. Quoting from *Hopewell Township Board of Supervisors v. Golla*, 499 Pa. 246, 255, 452 A.2d 1337, 1341-42 (1982), our Supreme Court in *In re Realen Valley Forge Greenes Assocs.,* 576 Pa. 718, 729, 838 A.2d 718, 728 (2003), stated that:

> [t]he substantive due process inquiry, involving a balancing of landowners' rights against the public interest sought to be protected by an exercise of the police power, must accord substantial deference to the preservation of rights of property owners, within constraints of the ancient maxim of our common law, *sic utere tuo ut alienum non laedas*. 9 Coke 59--So use your own property as not to injure your neighbors. A property owner is obliged to utilize his property in a manner that will not harm others in the use of their property, and zoning ordinances may validly protect the interests of neighboring property owners from harm.

The Court went on to state that under that standard for zoning to be constitutional, it "must be directed toward the community as a whole, concerned with the public interest generally, and justified by a *balancing* of community costs and benefits. These considerations have been summarized as requiring that *zoning be in conformance with a comprehensive plan* for growth and development of the community." *Id.* (Emphasis added).

The Commonwealth argues that Act 13 mandates that zoning regulations be rationally related to its objective: (1) optimal development of oil and

gas resources in the Commonwealth consistent with the protection of the health, safety, environment and property of Pennsylvania citizens; (2) protecting the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil; (3) protecting the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs; and (4) protecting the natural resources, environmental rights and values secured by the Constitution of Pennsylvania. 58 Pa. C.S. §3202.

However, the interests that justify the exercise the police power in the development of oil and gas operations and zoning are not the same. In *Huntley & Huntley, Inc.*, 600 Pa. at 222-24, 964 A.2d at 864-66, our Supreme Court explained that while governmental interests involved in oil and gas development and in land-use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct. The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state. Zoning, on the other hand, is to foster the orderly development and use of land in a manner consistent with local demographic and environmental concerns. It then stated, as compared to the state interest in oil and gas exploration:

> [T]he purposes of zoning controls are both broader and narrower in scope. They are narrower because they ordinarily do not relate to matters of statewide concern, but pertain only to the specific attributes and developmental objectives of the locality in question. However, they are broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development. *See* 53 P.S. § 10606; *see also id.*, § 10603(b) (reflecting that, under the MPC, zoning ordinances are permitted to restrict or regulate such things

> as the structures built upon land and watercourses and the density of the population in different areas). *See generally* Tammy Hinshaw & Jaqualin Peterson, 7 SUMM. PA. JUR.2D PROPERTY § 24:12 ("A zoning ordinance reflects a legislative judgment as to how land within a municipality should be utilized and where the lines of demarcation between the several use zones should be drawn."). More to the point, the intent underlying the Borough's ordinance in the present case includes serving police power objectives relating to the safety and welfare of its citizens, encouraging the most appropriate use of land throughout the borough, conserving the value of property, minimizing overcrowding and traffic congestion, and providing adequate open spaces. *See* Ordinance § 205-2(A).

Id. at 224, 964 A.2d at 865.

In this case the reasons set forth in 58 Pa. C.S. §3202 are sufficient to have the state exercise its police powers to promote the exploitation of oil and gas resources. This is the overarching purpose of Act 13 which becomes even more evident by 58 Pa. C.S. §3231 which authorizes the taking of property for oil and gas operations.

58 Pa. C.S. §3304 requires that local zoning ordinance be amended which, as *Huntley & Huntley, Inc.* states, involves a different exercise of police power. The public interest in zoning is in the development and use of land in a manner consistent with local demographic and environmental concerns. 58 Pa. C.S.§3304 requires zoning amendments that must be normally justified on the basis that they are in accord with the comprehensive plan, not to promote oil and gas operations that are incompatible with the uses by people who have made investment decisions regarding businesses and homes on the assurance that the zoning district

would be developed in accordance with comprehensive plan and would only allow compatible uses. If the Commonwealth-proffered reasons are sufficient, then the Legislature could make similar findings requiring coal portals, tipples, washing plants, limestone and coal strip mines, steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones for a variety of police power reasons advancing those interests in their development. It would allow the proverbial "pig in the parlor instead of the barnyard."[21]

In this case, by requiring municipalities to violate their comprehensive plans for growth and development, 58 Pa. C.S §3304 violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications – irrational because it requires municipalities to allow all zones, drilling operations and impoundments, gas compressor stations, storage and use of explosives in all zoning districts, and applies industrial criteria to restrictions on height of structures, screening and fencing, lighting and noise.[22] Succinctly, 58 Pa. C.S. §3304 is a

[21] While I would not call oil or gas "slop," the dissent posits that this particular pig – oil and gas operations – can only operate where the "slop" is found, inferring that that allows compressor stations, impoundment dams and blasting and the storage of explosives be exempt from normal planning. However, the "slop" here is not the oil and gas but the effects of oil and gas operations on other landowners' quiet use and enjoyment of their property. The slop here – noise, light, trucks, traffic – literally affects the use of the landowner's parlor. The dissent also seems to limit the Legislature's police power to "break" local zoning to extraction industries. There may be other reasons – such as economic development that the General Assembly may want to break local zoning, such as the building of the gas extraction plant that could be used to justify almost any use in any zone under the exercise of police power. Whether you classify oil and gas operations as a "pig in the parlor" or a "rose bush in a wheat field," it nonetheless constitutes an unconstitutional "spot use."

[22] The dissent states that the Section 3304 does not eviscerate local zoning because it does not give *carte blanche* to the oil and gas industry and does not require a municipality to convert a
(Footnote continued on next page...)

requirement that zoning ordinances be amended in violation of the basic precept that "Land-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded." *City of Edmonds*, 514 U.S. at 732 (internal quotation omitted). If a municipality cannot constitutionally include allowing oil and gas operations, it is no more constitutional just because the Commonwealth requires that it be done.[23]

(continued...)

residential district into an industrial district. The dissent then goes on to state that "in crafting Section 3304 of Act 13, the General Assembly allowed, but restricted, oil and gas operations based on, and not in lieu of each local municipality existing comprehensive plan." 58 Pa. C.S. §3304, it posits, shows consideration by requiring additional setbacks for the more intensive of its uses.

It is true that 58 Pa. C.S. §3304 does not convert residential districts into industrial zones; it just requires that industrial uses be permitted in residential districts and that the zoning restrictions applicable to industrial uses be applied. It is also true that 58 Pa. C.S. §3304 does not replace the comprehensive plan; it just supplants the comprehensive plan by allowing oil and gas operations in districts under the comprehensive plan where such a use is not allowed. Again, it is true that Act 13 does provide additional consideration by requiring additional setbacks to lessen the negative effects of oil and gas operations, such as machinery noise and flood lights, on adjoining homeowners. However, the dissent fails to mention that those additional setbacks are based on industry standards regarding industrial operations, and that the added "consideration" that the operations, and the resultant light, noise, and traffic, has to be permitted 24 hours a day. None of these "considerations" would be necessary if the industrial uses included in the definition of oil and gas operations were not allowed because they are incompatible with the other uses in that district.

[23] While there is no disagreement with the dissent's statement that a local ordinance may not frustrate the purposes and objectives of the legislature, the claim here is that the Pennsylvania Constitution stands in the way. While recognizing that "the desire to organize a municipality into zones made of compatible uses is a goal, or objective, of comprehensive planning," and that the inclusion of incompatible uses might be bad planning, the dissent concludes that it does not render the ordinance unconstitutionally infirm. If that were true, then the creation of a spot zone would similarly not be unconstitutional under Article 1, §I of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. Spot zoning is "[a] singling out of one lot or a small area for different treatment from that accorded to similar surrounding land

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Because the changes required by 58 Pa. C.S. §3304 do not serve the police power purpose of the local zoning ordinances, relating to consistent and compatible uses in the enumerated districts of a comprehensive zoning plan, any action by the local municipality required by the provisions of Act 13 would violate substantive due process as not in furtherance of its zoning police power. Consequently, the Commonwealth's preliminary objections to Counts I, II and III are overruled.

C.

Because 58 Pa. C.S. §3304 requires all oil and gas operations in all zoning districts, including residential districts, as a matter of law, we hold that 58 Pa. C.S. §3304 violates substantive due process because it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications. Accordingly we grant Petitioners' Motion for Summary Relief, declare 58 Pa C.S. §3304 unconstitutional and null and void, and permanently enjoin the Commonwealth from enforcing it. Other than 58 Pa. C.S. §§3301

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indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment." *Appeal of Mulac*, 418 Pa. 207, 210, 210 A.2d 275, 277 (1965). While in spot zoning the land is classified in a way that is incompatible with the classification of the surrounding land, the same unconstitutional infirmity exists here. What we have under Act 13 is a "spot use" where oil and gas uses are singled out for different treatment that is incompatible with other surrounding permitted uses. What the dissent ignores is that the sanctioning of "bad planning" renders the affected local zoning ordinances unconstitutionally irrational.

through 3303, which remain in full force and effect, the remaining provisions of Chapter 33 that enforce 58 Pa. C.S. §3304 are similarly enjoined.

Count IV - Art. IV, §32
of the Pennsylvania Constitution
"Special Law"

Petitioners argue that Article 3, §32[24] has been violated because Act 13 treats the oil and gas industry differently from other energy extraction and

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[24] Article 3, §32 of the Pennsylvania Constitution provides:

> **Certain local and special laws.**
>
> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:
>
> 1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:
>
> 2. Vacating roads, town plats, streets or alleys:
>
> 3. Locating or changing county seats, erecting new counties or changing county lines:
>
> 4. Erecting new townships or boroughs, changing township lines, borough limits or school districts:
>
> 5. Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury:
>
> 6. Exempting property from taxation:
>
> 7. Regulating labor, trade, mining or manufacturing:

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production industries by allowing the oil and gas industry to be the only industry permitted to entirely bypass the statutory baselines underlying the constitutionality of zoning and by giving them special treatment in the way they are included in all zones. To support their argument, Petitioners point to 58 Pa. C.S. §3304 for example, which provides a time limitation on local municipalities when reviewing zoning applications. They contend, however, that all others who want to develop land in a district are required to follow the time constraints set forth in the MPC. They further argue that Act 13 creates an unconstitutional distinction between densely and sparsely populated communities because densely populated communities and their residents are afforded greater protection under Act 13 due to setback requirements.[25]

In its preliminary objections, the Commonwealth contends that Act 13 is not a "special law" in violation of Article 3, §32 of the Pennsylvania Constitution

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(continued...)

> 8. Creating corporations, or amending, renewing or extending the charters thereof.
>
> Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

[25] Petitioners also argue that there is disparity because under 58 Pa. C.S. §3218.1, public drinking water facilities are treated differently than private water wells or other drinking sources. That section provides that "[a]fter receiving notification of a spill, the department shall, after investigating the incident, notify any public drinking water facility that could be affected by the event that the event occurred." Under this section, Petitioners allege that there is an unconstitutional distinction between public drinking water supplies and private wells in violation of equal protection principles.

because it is uniform in its regulation of the oil and gas industry and does not benefit or apply solely to a single group or entity or municipality. It alleges that Act 13 has not singled out one particular member of the oil and gas industry for special treatment, and Petitioners cannot show that Act 13 selects one municipality among similarly-situated political units for special treatment. The Commonwealth points out that "special laws" are only those laws which grant special privileges to an individual person, company or municipality, *see Wings Field Preserv. Assocs. v. Dep't of Transp.*, 776 A.2d 311 (Pa. Cmwlth. 2001), and the Legislature has made a valid classification in providing for the regulation of the oil and gas industry.

Any distinction between groups must seek to promote a legitimate state interest or public value and bear a reasonable relationship to the object of the classification. *Pa. Tpk. Comm'n v. Commonwealth,* 587 Pa. 437, 363-365, 899 A.2d 1085, 1094-1095 (2004). Regarding the mineral extraction industry, Pennsylvania courts have legitimate classifications that include classification of coal mines according to the nature of the different kinds of coal, and legislate for each class separately. *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 A. 237 (1895); *Read v. Clearfield Co.*, 12 Pa. Super. 419 (1900); classification of open pit mining as distinguished from other mining, *Dufour v. Maize*, 358 Pa. 309, 56 A.2d 675 (1948).

In this case, while Act 13 does treat the oil and gas industry differently from other extraction industries, it is constitutional because the distinction is based on real differences that justify varied classifications for zoning purposes. While Section 3304 does violate Article 1, §1, it does not violate Article 3, §32. Accordingly, the Commonwealth's preliminary objection to Count IV is sustained.

Count V - Article 1, §§1 and 10
of the Pennsylvania Constitution
and the Fifth Amendment to the United States Constitution
Eminent Domain

In this Count, Petitioners argue that Section 3241(a) of Act 13 is unconstitutional under the United States and Pennsylvania Constitutions because it allows on behalf of a private person the taking of property for storage reservoirs and protective areas around those reservoirs.[26] 58 Pa. C.S. §3241(a) provides, in relevant part:

> **(a) General rule.** Except as provided in this subsection, *a corporation* empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth *may appropriate an interest in real property* located in a storage reservoir or reservoir protective area for injection, storage and removal from storage of natural gas or manufactured gas in a stratum which is or previously has been commercially productive of natural gas.

58 Pa. C.S. §3241(a) (emphasis added).

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[26] The Fifth Amendment to the Constitution of the United States provides, in relevant part, "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Article 1, §1 of the Pennsylvania Constitution reads, "All men ... have certain inherent and indefeasible rights, among which are those ... of acquiring, possessing and protecting property...."

Article 1, §10 of the Pennsylvania Constitution provides, in relevant part, "[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

"Constitutions of the United States and Pennsylvania mandate that private property can only be taken to serve a public purpose. [Our Supreme Court] has maintained that, to satisfy this obligation, the public must be the primary and paramount beneficiary of the taking." *Opening Private Road for Benefit of O'Reilly*, 607 Pa. 280, 299, 5 A.3d 246, 258 (2010). Petitioners contend that no public purpose, only private gain, is served by allowing oil and gas operators to take private property for the oil and gas industry.

In its preliminary objections, among other things, the Commonwealth contends that Petitioners fail to state a claim upon which relief may be granted under Count V because they have failed to allege and there are no facts offered to demonstrate that any of their property has been or is in imminent danger of being taken, with or without just compensation. Even if they had an interest that was going to be taken, we could not hear this challenge in our original jurisdiction because the exclusive method to challenge the condemnor power to take property is the filing of preliminary objections to a declaration of taking. *See* 26 Pa. C.S. §306. Accordingly, the Commonwealth's preliminary objection to Count V is sustained and Count V is dismissed.

Count VI - Art. 1, §27 of
The Pennsylvania Constitution
Public Natural Resources

Article 1, §27 of the Pennsylvania Constitution provides:

Natural resources and the public estate

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. *As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.* (Emphasis added.)

Petitioners contend that Chapter 33 of Act 13 violates Article 1, §27 of the Pennsylvania Constitution because it takes away their ability to strike a balance between oil and gas development and "the preservation of natural, scenic, historic and esthetic values of the environment by requiring a municipality to allow industrial uses in non industrial areas with little ability to protect surrounding resources and community." In its preliminary objections, the Commonwealth argues that Count VI should be dismissed as well because Article 1, §27 explicitly imposes a duty on the Commonwealth, not on municipalities, to act as "trustee" to conserve and maintain the Commonwealth's natural resources, and, therefore, Petitioners fail to state a claim upon which relief may be granted. Even if they have an obligation, the Commonwealth contends that they do not have the power to take into consideration environmental concerns in making zoning determinations because the Commonwealth preempts the local regulation of oil and gas operations regulated by the environmental acts pursuant to 58 Pa. C.S. §3303.

In *Community College of Delaware County v. Fox,* 342 A.2d 468 (Pa. Cmwlth. 1975), the sewage permit issued by the Department of Environmental Resources, predecessor of DEP, allowed a sewer authority to run a 24-inch diameter sewer along a stream. Suit was brought against the sewer authority claiming a violation of Article 1, §27 because the issuance of the sewer permit harmed the

natural resources of the Commonwealth. The sewer authority argued that the action was not maintainable because only the Commonwealth was named as a trustee of the Commonwealth natural resources in that provision. In rejecting that argument, we stated:

> The language of Section 27, of course, does not specify what governmental agency or agencies may be responsible for the preservation of the natural scenic, historic and esthetic values enumerated therein, but it seems clear that many state and local governmental agencies doubtless share this responsibility. The legitimate public interest in keeping certain lands as open space obviously requires that a proper determination of the use to which land shall be adapted must be made, but again this is clearly not a statutory function of the DER. On the contrary, we believe that such a determination clearly is within the **statutory authority** not of the DER but of the various boroughs, townships, counties, and cities of the Commonwealth pursuant to a long series of legislative enactments. **Among these enactments is the Municipalities Planning Code which specifically empowers the governing bodies of these governmental subdivisions to develop plans for land use and to zone or to regulate such uses.** Another such enactment is the Eminent Domain Code under which property may be taken and its owners may be compensated when it is condemned for a proper public purpose. These municipal agencies have the responsibility to apply the Section 27 mandate as they fulfill their respective roles in the planning and regulation of land use, and they, of course, are not only agents of the Commonwealth, too, but trustees of the public natural resources as well, just as certainly as is the DER.

342 A.2d at 481-82 (emphasis added).

College of Delaware held that *local* agencies were subject to suit under

Article 1, §27 because of statutory obligations that they were required to consider or enforce. With regard to Petitioners' claim that Act 13 violates Article 1, §27 because they cannot strike a balance between environmental concerns and the effects of oil and gas operations in developing their zoning ordinances, an obligation is placed on them by the MPC. It requires that all municipalities, when developing the comprehensive plan upon which all zoning ordinances are based, must "plan for the protection of natural and historic resources" but that obligation is limited "to the extent not preempted by Federal or State law." Section 301(a)(6) of the MPC, 53 P.S. §10301(a)(6).

Act 13 is such a state law. It preempts a municipalities' obligation to plan for environmental concerns for oil and gas operations. One of the purposes given by the General Assembly in enacting Chapter 32 of Act 13, dealing with oil and gas operations, was to "[p]rotect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania. 58 Pa. C.S. §3202. In Section 3303, the General Assembly specifically stated that all local obligation or power to deal with the environment was preempted because Chapter 32 occupied "the entire field to the exclusion of all local ordinances." 58 Pa. C.S. §3303. By doing so, municipalities were no longer obligated, indeed were precluded, from taking into consideration environmental concerns in the administration of their zoning ordinances. Because they were relieved of their responsibilities to strike a balance between oil and gas development and environmental concerns under the MPC, Petitioners have not made out a cause of action under Article 1, §27. Accordingly, the Commonwealth's preliminary objection to Count VI is sustained and that count is dismissed.

Counts VII - Violation of Separation of Powers - Commission

Under the Separation of Powers doctrine, "Neither the legislative branch nor the executive branch of government acting through an administrative agency may constitutionally infringe on this judicial prerogative." *Pennsylvania Human Relations Comm'n v. First Judicial Dist. of Pa.,* 556 Pa. 258, 262, 727 A.2d 1110, 1112 (1999). In its preliminary objections, the Commonwealth denies that 58 Pa. C.S. §3305(a) violates the doctrine of Separation of Powers because it only confers authority on the Public Utility Commission to issue non-binding advisory opinions regarding the compliance of a local zoning ordinances with the requirements of Act 13. The Commonwealth also denies that Section 3305(b) violates the doctrine of Separation of Powers by allowing the Commission to make a determination regarding the constitutionality of a local zoning ordinance.

Petitioners disagree, arguing that 58 Pa. C.S. §3305(a) violates the doctrine because it permits an executive agency, i.e., the Commission, to perform both legislative and judicial function. The Commission is to play an integral role in the exclusively legislative function of drafting legislation. The Commission is also to render unappealable, advisory opinions. Petitioners argue that Section 3305(b) violates the doctrine because the constitutionality of a municipal zoning ordinance as related only to oil and gas development is no longer determined in accordance with a local municipality's zoning ordinance but is determined solely by the Commission.

58 Pa. C.S. §3305(a) provides:

(a) **Advisory opinions to municipalities.—**

(1) A municipality may, prior to the enactment of a local ordinance, in writing, request the commission to review a proposed local ordinance to issue an opinion on whether it violates the MPC, this chapter or Chapter 32 (relating to development).

(2) Within 120 days of receiving a request under paragraph (1), the commission shall, in writing, advise the municipality whether or not the local ordinance violates the MPC, this chapter or Chapter 32.

(3) An opinion under this subsection shall be advisory in nature and not subject to appeal.

58 Pa. C.S. §3305(b) provides the following regarding "Orders":

(1) An owner or operator of an oil or gas operation, or a person residing within the geographic boundaries of a local government, who is aggrieved by the enactment or enforcement of a local ordinance may request the commission to review the local ordinance of that local government to determine whether it violates the MPC, this chapter or Chapter 32.

(2) Participation in the review by the commission shall be limited to parties specified in paragraph (1) and the municipality which enacted the local ordinance.

(3) Within 120 days of receiving a request under this subsection, the commission shall issue an order to determine whether the local ordinance violates the MPC, this chapter or Chapter 32.

(4) An order under this subsection shall be subject to de novo review by Commonwealth Court. A petition for review must be filed within 30 days of the date of service of the commission's order. The order of the

commission shall be made part of the record before the court.

58 Pa. C.S. §3305(a) does not give the Commission any authority over this Court to render opinions regarding the constitutionality of legislative enactments. 58 Pa. C.S. §3305(a) merely allows the Commission to give a non-binding advisory opinion, and although that opinion is not appealable by the municipality, no advisory opinion is. Moreover, 58 Pa. C.S. §3305(b) specifically gives this Court *de novo* review of a Commission final *order* so there is no violation of the Separation of Power doctrine. Accordingly, the Commonwealth's preliminary objection is sustained as to Count VII.

Count VIII - Violation of Non-Delegation Doctrine – DEP

Petitioners contend Act 13 violates Article 2, §1 because it provides insufficient guidance to waive setback requirements established by the General Assembly for oil and gas wells from the waters of the Commonwealth. Specifically, they contend that 58 Pa. C.S. §3215(b)(4) violates the basic principles that the legislation must contain adequate standards that will guide and restrain the exercise of the delegated administrative functions because the statutory language fails to contain adequate standards or constrains DEP's discretion when it administers mandatory waivers from water body and wetland setbacks. Section 3215(b), regarding "Well location restrictions," provides:

(b) **Limitation.—**

(1) No well site may be prepared or well drilled within 100 feet or, in the case of an unconventional well, 300 feet from the vertical well bore or 100 feet from the edge of the well site, whichever is greater, measured horizontally from any solid blue lined stream, spring or body of water as identified on the most current 7 ½ minute topographic quadrangle map of the United States Geological Survey.

(2) The edge of the disturbed area associated with any unconventional well site must maintain a 100-foot setback from the edge of any solid blue lined stream, spring or body of water as identified on the most current 7 ½ minute topographic quadrangle map of the United States Geological Survey.

(3) No unconventional well may be drilled within 300 feet of any wetlands greater than one acre in size, and the edge of the disturbed area of any well site must maintain a 100-foot setback from the boundary of the wetlands.

(4) *The department shall waive the distance restrictions upon submission of a plan identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth.* The waiver, if granted, shall include additional terms and conditions required by the department necessary to protect the waters of this Commonwealth. Notwithstanding section 3211(e), if a waiver request has been submitted, the department may extend its permit review period for up to 15 days upon notification to the applicant of the reasons for the extension.

58 Pa. C.S. §3215(b) (emphasis added).

Article 2, §1 of the Pennsylvania Constitution provides that the legislative power of the Commonwealth is vested in a General Assembly consisting

of a Senate and a House of Representatives. Although this article prohibits delegation of the legislative function, the Legislature may confer authority and discretion upon another body in connection with the execution of a law but that "legislation *must contain adequate standards which will guide and restrain* the exercise of the delegated administrative functions." *Eagle Envlt. II, L.P. v. Commonwealth,* 584 Pa. 494, 515, 884 A.2d 867, 880 (2005) (emphasis added) quoting *Gilligan v. Pa. Horse Racing Comm'n,* 492 Pa. 92, 94, 422 A.2d 487, 489 (1980). *See also Commonwealth of Pa. v. Parker White Metal Co.*, 512 Pa. 74, 515 A.2d 1358 (1986). Further, although the Legislature may delegate the power to determine some fact or state of things upon that the law makes or intends to make its own action depend, it cannot empower an administrative agency to create the conditions which constitute the fact. *In Re Marshall*, 363 Pa. 326, 69 A.2d 619 (1949); *Reeves v. Pa. Game Comm'n,* 584 A.2d 1062 (Pa. Cmwlth. 1990). Basic policy choices must be made by the General Assembly. *Blackwell v. State Ethics Comm'n*, 523 Pa. 347, 567 A.2d 630 (1989).

In its preliminary objections, the Commonwealth denies that 58 Pa. C.S. §3215(b)(4) grants DEP the power to grant waivers without establishing standards for making determinations in violation of the non-delegation doctrine under Article 2, §1.[27] Those standards, it contends, are contained in 58 Pa. C.S. §3202, which provides that the General Assembly intended to "Permit optimal development of oil and gas resources of this Commonwealth consistent with

[27] Article 2, §1 of the Pennsylvania Constitution provides that "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

protection of health, safety, environment and property of Pennsylvania citizens." 58 Pa. C.S. §3202.

In *Pennsylvanians Against Gambling Expansion Fund v. Commonwealth*, 583 Pa. 275, 877 A.2d 383 (2005) (*PAGE*), our Supreme Court considered a similar defense to a constitutional challenge under Article 2, §1 to 4 Pa. C.S. §1506. At the time PAGE was decided, Section 1506 provided that the siting of a gaming facility:

> shall not be prohibited or otherwise regulated by any ordinance, home rule charter provision, resolution, rule or regulation of any political subdivision or any local or State instrumentality or authority that relates to zoning or land use to the extent that the licensed facility has been approved by the board.

The Gaming Board stated that the policies and objectives listed by the Legislature in 4 Pa. C.S. §1102[28] as well as standards provided in other sections in

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[28] 4 Pa. C.S. §1102 provides that:

> The General Assembly recognizes the following public policy purposes and declares that the following objectives of the Commonwealth are to be served by this part:
>
> (1) The primary objective of this part to which all other objectives and purposes are secondary is to protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful.
>
> (2) The authorization of limited gaming by the installation and operation of slot machines as authorized in this part is intended to enhance live horse racing, breeding programs, entertainment and employment in this Commonwealth.

(Footnote continued on next page...)

(continued...)

(3) The authorization of limited gaming is intended to provide a significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives.

(4) The authorization of limited gaming is intended to positively assist the Commonwealth's horse racing industry, support programs intended to foster and promote horse breeding and improve the living and working conditions of personnel who work and reside in and around the stable and backside areas of racetracks.

(5) The authorization of limited gaming is intended to provide broad economic opportunities to the citizens of this Commonwealth and shall be implemented in such a manner as to prevent possible monopolization by establishing reasonable restrictions on the control of multiple licensed gaming facilities in this Commonwealth.

(6) The authorization of limited gaming is intended to enhance the further development of the tourism market throughout this Commonwealth, including, but not limited to, year-round recreational and tourism locations in this Commonwealth.

(7) Participation in limited gaming authorized under this part by any licensee or permittee shall be deemed a privilege, conditioned upon the proper and continued qualification of the licensee or permittee and upon the discharge of the affirmative responsibility of each licensee to provide the regulatory and investigatory authorities of the Commonwealth with assistance and information necessary to assure that the policies declared by this part are achieved.

(8) Strictly monitored and enforced control over all limited gaming authorized by this part shall be provided through regulation, licensing and appropriate enforcement actions of specified locations, persons, associations, practices, activities, licensees and permittees.

(Footnote continued on next page...)

the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. §§1101-1904, were sufficient standards for the Board to exercise its discretion with regard to zoning. Our Supreme Court rejected the Board's argument while acknowledging the "eligibility requirements and additional criteria guide the Board's discretion in determining whether to approve a licensee, we find that they do not provide adequate standards upon which the Board may rely in considering the local zoning and land use provisions for the site of the facility itself." 583 Pa. at 335, 877 A.2d at 419. It then declared 4 Pa. C.S. §1506 to be unconstitutional and severed it from the Gaming Act.

The subsections of Section 3215(b) provide specific setbacks between the wellbore or the disturbed area of a well site and the water source. In authorizing a waiver, Section 3215(b)(4) gives no guidance to DEP that guide and constrain its discretion to decide to waive the distance requirements from water body and wetland setbacks. Moreover, it does not provide how DEP is to evaluate an

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(continued...)

> (9) Strict financial monitoring and controls shall be established and enforced by all licensees or permittees.
>
> (10) The public interest of the citizens of this Commonwealth and the social effect of gaming shall be taken into consideration in any decision or order made pursuant to this part.
>
> (11) It is necessary to maintain the integrity of the regulatory control and legislative oversight over the operation of slot machines in this Commonwealth; to prevent the actual or appearance of corruption that may result from large campaign contributions; ensure the bipartisan administration of this part; and avoid actions that may erode public confidence in the system of representative government.

operator's "plan identifying additional measures, facilities or practices to be employed...necessary to protect the waters of this Commonwealth." 58 Pa. C.S. §3215(b)(4).

Just as in *PAGE*, some general goals contained in other provisions are insufficient to give guidance to permit DEP to waive specific setbacks. Given the lack of guiding principles as to how DEP is to judge operator submissions, Section 3215(b)(4) delegates the authority to DEP to disregard the other subsections and allow setbacks as close to the water source it deems feasible. Because the General Assembly gives no guidance when the other subsections may be waived, Section 3215(b)(4) is unconstitutional because it gives DEP the power to make legislative policy judgments otherwise reserved for the General Assembly. Of course, our holding does not preclude the General Assembly's ability to cure the defects by subsequent amendment that provides sufficient standards. Accordingly, because Act 13 provides insufficient guidance to DEP as to when to grant a waiver from the setback requirements established by the Legislature, Section 3215(b)(4) is unconstitutional under Article 2, §1. The Commonwealth's preliminary objection is overruled and summary relief is entered in favor of the Petitioners on this count.

Counts IX & X -
Unconstitutionally Vague

The Commonwealth denies that the setback, timing and permitting provisions and requirements for municipalities under Act 13 are unconstitutionally vague because they fail to provide sufficient information to inform Petitioners as to what is permitted or prohibited under the Act. Petitioners allege that the Act is vague relying on Section 3304, "Uniformity of local ordinances." They argue, for example, that under Section 3304(b), the Act mandates distance requirements for municipalities requiring that any local zoning ordinance governing oil and gas operations strictly comply with the same, but fails to provide any meaningful information or guidance with regard to when to grant a waiver or variance of the distance requirements pursuant to Sections 3215(a) and (b).

Both Sections 3304 and 3215 provide specific information regarding the local ordinance requirements. Section 3215 specifically provides well location restrictions and the distance within which they may be drilled from existing water wells, surface water intakes, reservoirs or other water supply extraction points. While Section 3304(b)(4) does not provide for adequate standards, Section 3304 is not unconstitutionally vague, and the Commonwealth's preliminary objections to Counts IX and X are sustained.

Accordingly, the Commonwealth's preliminary objections to Counts IV, V, VI, VII, IX, X, XI and XII are sustained. The preliminary objections to Counts I, II, III and VIII are overruled. Petitioners' request for summary relief as to Counts I, II, III and VIII is granted and these provisions are declared null and void.

The Commonwealth's cross-motion for summary relief is denied.

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DAN PELLEGRINI, President Judge

Judge Leavitt did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robinson Township, Washington :
County, Pennsylvania, Brian Coppola, :
Individually and in his Official :
Capacity as Supervisor of Robinson :
Township, Township of Nockamixon, :
Bucks County, Pennsylvania, :
Township of South Fayette, :
Allegheny County, Pennsylvania, :
Peters Township, Washington :
County, Pennsylvania, David M. Ball, :
Individually and in his Official :
Capacity as Councilman of Peters :
Township, Township of Cecil, :
Washington County, Pennsylvania, :
Mount Pleasant Township, :
Washington County, Pennsylvania, :
Borough of Yardley, Bucks County, :
Pennsylvania, Delaware Riverkeeper :
Network, Maya Van Rossum, :
the Delaware Riverkeeper, :
Mehernosh Khan, M.D., :
Petitioners :
:
v. : No. 284 M.D. 2012
:
Commonwealth of Pennsylvania, :
Pennsylvania Public Utility :
Commission, Robert F. Powelson, :
in his Official Capacity as Chairman :
of the Public Utility Commission, :
Office of the Attorney General of :
Pennsylvania, Linda L. Kelly, in :
her Official Capacity as Attorney :
General of the Commonwealth of :
Pennsylvania, Pennsylvania :
Department of Environmental :
Protection and Michael L. Krancer, :
in his Official Capacity as Secretary :
of the Department of Environmental :
Protection, :
Respondents :

ORDER

AND NOW, this 26th day of July, 2012, the preliminary objections filed by the Commonwealth to Counts IV, V, VI, VII, IX, X, XI and XII are sustained and those Counts are dismissed. The preliminary objections to Counts I, II, III and VIII are overruled.

Petitioners' motion for summary relief as to Counts I, II, and III is granted. 58 P.S. §3304 is declared unconstitutional, null and void. The Commonwealth is permanently enjoined from enforcing its provisions. Other than 58 Pa. C.S. §3301 through §3303 which remain in full force and effect, the remaining provisions of Chapter 33 that enforce 58 Pa. C.S. §3304 are similarly enjoined.

Petitioners' motion for summary relief as to Count VIII is granted and Section 3215(b)(4) is declared null and void.

The cross-motions for summary relief filed by the Pennsylvania Public Utility Commission and Robert F. Powelson in his Official Capacity as Chairman of the Public Utility Commission and by the Department of Environmental Protection and Michael L. Krancer in his Official Capacity as Secretary of the Department of Environmental Protection are denied.

DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robinson Township, Washington County, Pennsylvania, Brian Coppola, Individually and in His Official Capacity as Supervisor of Robinson Township, Township of Nockamixon, Bucks County, Pennsylvania, Township of South Fayette, Allegheny County, Pennsylvania, Peters Township, Washington County, Pennsylvania, David M. Ball, Individually and in His Official Capacity as Councilman of Peters Township, Township of Cecil, Washington County, Pennsylvania, Mount Pleasant Township, Washington County, Pennsylvania, Borough of Yardley, Bucks County, Pennsylvania, Delaware Riverkeeper Network, Maya Van Rossum, The Delaware Riverkeeper, Mehernosh Khan, M.D.,

Petitioners,

v.

Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, in His Official Capacity as Chairman of the Public Utility Commission, Office of the Attorney General of Pennsylvania, Linda L. Kelly, in Her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection and Michael L. Krancer, in His Official Capacity as Secretary of the Department of Environmental Protection,

Respondents

No. 284 M.D. 2012
Argued: June 6, 2012

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

DISSENTING OPINION BY
JUDGE BROBSON FILED: July 26, 2012

I agree with the majority's analysis of the standing and justiciability questions. I also agree with the majority's decision to sustain the Preliminary Objections of the Commonwealth Respondents directed to Counts IV-VII and IX-XII and dismiss those Counts of the Petition for Review. I further agree with the majority's decision to grant Petitioners' Motion for Summary Relief directed to Count VIII. I thus join in those portions of the majority opinion. I write separately, however, because I disagree with the majority's analysis and disposition of Counts I-III of the Petition for Review. I thus respectfully dissent.

The majority holds that Section 3304 of Act 13, 58 Pa. C.S. § 3304, is an affront to substantive due process because it would allow "oil and gas operations," what the majority refers to as the "pig," in zoning districts that, based on a local municipality's comprehensive plan, allow for incompatible uses—*i.e.*, residential and agricultural, to name a few. The majority refers to these incompatible zoning districts as "the parlor." Instead, the majority appears to argue that this particular pig belongs in an unidentified but different zoning district, which the majority identifies only as "the barnyard." The majority reasons that if the General Assembly can require that municipalities allow this particular pig to be in every zoning

district, it could also "require steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones." (Maj. slip op. at 29-30.)

The problem with the majority's analysis is that this particular pig (unlike steel mills, chicken farms, rendering plants, and fireworks plants) can only operate in the parts of this Commonwealth where its slop can be found. The natural resources of this Commonwealth exist where they are, without regard to any municipality's comprehensive plan. Oil and gas deposits can exist in a residential district just as easily as they might exist in an industrial district. What a local municipality allows, through its comprehensive plan, to be built above ground does not negate the existence and value of what lies beneath.

The General Assembly recognized this when it crafted Act 13 and, in particular, Section 3304. It decided that it was in the best interest of all Pennsylvanians to ensure the optimal and uniform development of oil and gas resources in the Commonwealth, *wherever those resources are found.* To that end, Act 13 allows for that development under certain conditions, recognizing the need to balance that development with the health, safety, environment, and property of the citizens who would be affected by the development.

Section 3304, however, does not, as the majority suggests, eviscerate local land use planning. It does not give carte blanche to the oil and gas industry to ignore local zoning ordinances and engage in oil and gas operations anywhere it wishes. Section 3304 does not require a municipality to convert a residential district into an industrial district. Indeed, in crafting Section 3304 of Act 13, the General Assembly allowed, but restricted, oil

and gas operations *based on, and not in lieu of, each local municipality's existing comprehensive plan.*

"Oil and gas operations" is broadly defined to include different classes of activities, or "uses", related to oil and gas operations—*e.g.*, assessment/extraction, fluid impoundment, compressor stations, and processing plants. Section 3301 of Act 13, 58 Pa. C.S. § 3301. The definition reflects multiple different "uses" related to the oil and gas industry. Recognizing that some of these uses would be more intrusive than others, if not downright unsuitable for certain zoning districts, Section 3304(b) *limits* where and under what circumstance certain oil and gas operations may be allowed within a particular zoning district of a municipality.

Section 3304(b)(5), for example, provides that a local zoning ordinance must allow oil and gas operations as permitted uses in all zoning districts, but excludes from this command activities at impoundment areas, compressor stations, and processing plants. In terms of wells, Section 3304(b)(5.1) empowers local municipalities to prohibit wells within a residential district if the well cannot be located in such a way as to comply with a 500 foot setback. With respect to compressor stations, Section 3304(b)(7) provides that a municipality must allow them as a permitted use in agricultural and industrial zoning districts only. In all other zoning districts, however, they would be allowed only as conditional uses, so long as certain setback and noise level requirements can be satisfied. Act 13 does not require a municipality to allow a processing plant in a residential district. To the contrary, Section 3304(b)(8) would restrict processing plants to

industrial zoning districts as a permitted use and agricultural districts as a conditional use, subject to setback and noise level requirements.

The majority cites *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995). In *City of Edmunds*, a city filed a declaratory judgment action, seeking a ruling that its single-family zoning provision did not violate the Fair Housing Act. From *City of Edmonds*, the majority excises the following sentence: "Land-use restrictions designate 'districts in which only compatible uses are allowed and incompatible uses are excluded." *City of Edmunds*, 514 U.S. at 732 (quoting D. Mandelker, Land Use Law § 4.16, at 113-14 (3d ed. 1993)). The words "due process" appear nowhere in the Supreme Court's opinion in *City of Edmunds.* Yet, the majority, based on this quote, reaches a legal conclusion that any zoning ordinance that allows a particular use in a district that is incompatible with the other uses in that same district is unconstitutional. I find no support for this broad legal proposition in *City of Edmonds*. Indeed, if accepted, such a rule of law would call into question, if not sound the death knell for, zoning practices that heretofore have recognized the validity of incompatible uses—*e.g.*, the allowance of a pre-existing nonconforming use and authority of municipalities to grant a use variance.

The desire to organize a municipality into zones made up of compatible uses is a goal, or objective, of comprehensive planning. *See Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 224, 964 A.2d 855, 865 (2009).[1] But it is not an inflexible

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[1] In *Huntley*, the Supreme Court addressed a challenge to a local zoning ordinance that restricted oil and gas extraction in a residential zoning district. The issue before the Court was whether the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as*
(Footnote continued on next page...)

constitutional edict. Although the inclusion of one incompatible use within a zoning district of otherwise compatible uses might be bad planning, it does not itself render the ordinance, or law, constitutionally infirm. "[A] local ordinance may not stand as an obstacle to the execution of the full purposes and objectives of the Legislature." *Id.* at 220, 964 A.2d at 863. This is exactly what the majority has done in this case by deferring to the locally-enacted comprehensive plans and zoning ordinances over the will of the General Assembly as expressed in Section 3304 of Act 13.[2]

Section 3304 of Act 13 is, in essence, a zoning ordinance. Substantive due process cases addressed to local zoning ordinances tend to

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(continued...)

amended, 58 P.S. §§ 601.101-.605 (repealed 2012) (Former Act), preempted the local ordinance. The Supreme Court held that although the Former Act clearly preempted the field of local regulation in terms of how oil and gas resources are developed in the Commonwealth, it left room for local municipalities, through the MPC, to regulate where those resources are developed: "*[A]bsent further legislative guidance*, we conclude that the [local o]rdinance serves different purposes from those enumerated in the [Former] Act, and, hence, that its overall restriction on oil and gas wells in R-1 districts is not preempted by that enactment." *Huntley*, 600 Pa. at 225-26, 964 A.2d at 866 (emphasis added). With Act 13, which repealed the Former Act, the General Assembly has provided the courts with clear legislative guidance on the question of whether Act 13 is intended to preempt the field of how *and where* oil and gas natural resources are developed in the Commonwealth.

[2] The majority cites to our Supreme Court's decision in *In re Realen Valley Forge Greenes Associates*, 576 Pa. 718, 838 A.2d 718 (2003), in support of its claim that zoning must be in conformity with a local municipalities' comprehensive plan. A closer reading of the Supreme Court's decision in *In re Realen*, however, shows that the Court in that case was dealing with a "spot zoning" challenge, where the municipality attempted to act in contravention of its own comprehensive plan. As stated above, however, the General Assembly cannot be held hostage by each local municipality's comprehensive plan when exercising its police power. Accordingly, the restriction imposed on municipalities in *In re Realen* to comply with their comprehensive plans does not extend to the General Assembly when exercising its police power.

involve challenges to ordinances as *too* restrictive of the citizenry's right to use their property. Here, the challenge is that the law is too lax, in that it allows a use that Petitioners claim is appropriately restricted, if not prohibited, by local zoning ordinances. The inquiry, however, is the same, that being whether the challenged law reflects the proper exercise of the police power. If so, we must uphold it. Our Supreme Court has summarized the appropriate standard for evaluating such challenges as follows:

> When presented with a challenge to a zoning ordinance, the reviewing court presumes the ordinance is valid. The burden of proving otherwise is on the challenging party.
>
> A zoning ordinance is a valid exercise of the police power when it promotes public health, safety or welfare and its regulations are substantially related to the purpose the ordinance purports to serve. In applying that formulation, Pennsylvania courts use a substantive due process analysis which requires a reviewing court to balance the public interest served by the zoning ordinance against the confiscatory or exclusionary impact of regulation on individual rights. The party challenging the constitutionality of certain zoning provisions must establish that they are arbitrary, unreasonable and unrelated to the public health, safety, morals and general welfare. Where their validity is debatable, the legislature's judgment must control.

Boundary Drive Assocs. v. Shrewsberry Twp. Bd. of Supervisors, 507 Pa. 481, 489-90, 491 A.2d 86, 90 (1985) (citations omitted). In addition, "[t]he party challenging a legislative enactment bears a heavy burden to prove that it is unconstitutional. A statute will only be declared unconstitutional if it clearly, palpably and plainly violates the constitution. Any doubts are to be resolved in favor of a finding of constitutionality." *Payne v.*

Commonwealth, Dep't of Corr., 582 Pa. 375, 383, 871 A.2d 795, 800 (2005) (citations omitted).

The stated legislative purposes of Act 13 include:

> (1) [permitting] optimal development of oil and gas resources of this Commonwealth consistent with the health, safety, environment and property of Pennsylvania citizens[;]
>
> (2) [protecting] the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil[;]
>
> (3) [protecting] the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs[;] and
>
> (4) [protecting] the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.

58 Pa. C.S. § 3202. The stated purpose of Section 3304 of Act 13 is to "allow for the *reasonable* development of oil and gas resources" in the Commonwealth, consistent with the purposes of Chapter 32 of Act 13. *Id.* § 3304(a) (emphasis added).

In light of the standards set forth above, which must guide our review, Section 3304 of Act 13 is a valid exercise of the police power. The law promotes the health, safety, and welfare of all Pennsylvanians by establishing zoning guidance to local municipalities that ensures the uniform and optimal development of oil and gas resources in this Commonwealth. Its provisions strike a balance both by providing for the harvesting of those natural resources, wherever they are found, and by restricting oil and gas operations based on (a) type, (b) location, and (c) noise level. The General

Assembly's decision, as reflected in this provision, does not appear arbitrary, unreasonable, or wholly unrelated to the stated purpose of the law.

"The line which in this field separates the legitimate from the illegitimate assumption of [police] power is not capable of precise delineation. It varies with circumstances and conditions." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). There is no doubt that Petitioners have legitimate concerns and questions about the wisdom of Act 13. But it is not our role to pass upon the wisdom of a particular legislative enactment. Under these circumstances and conditions, Petitioners have failed to make out a constitutional challenge to Section 3304 of Act 13. For that reason, I would sustain the Commonwealth Respondents' preliminary objections directed to Counts I through III of the Petition for Review and deny Petitioners' Motion for Summary Relief directed to those Counts.

P. KEVIN BROBSON, Judge

Judges Simpson and Covey join in this dissenting opinion.

Supreme Court

State of New York
Appellate Division – Third Department

NORSE ENERGY CORP. USA,

Petitioner-Plaintiff-Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD

Respondents-Defendants-Respondents,

-and-

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

Proposed Intervenor-Cross-Appellant.

Index No. 515227

BRIEF OF *AMICI CURIAE* CATSKILL MOUNTAINKEEPER; DELAWARE RIVERKEEPER NETWORK; GAS DRILLING AWARENESS FOR CORTLAND COUNTY; THE NATURAL RESOURCES DEFENSE COUNCIL, INC.; OTSEGO 2000, INC.; THE PRESERVATION LEAGUE OF NEW YORK STATE; RIVERKEEPER, INC.; THEODORE GORDON FLYFISHERS, INC.; AND VESTAL RESIDENTS FOR SAFE ENERGY IN SUPPORT OF RESPONDENTS-DEFENDANTS-RESPONDENTS

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici Curiae (*Amici*) are a diverse group of national, statewide, regional, and local not-for-profit and environmental organizations, all of which have a strong connection to New York's local communities and an interest in their health, history, and ecological well being. *Amici*'s long collective history of involvement in a wide range of community and environmental issues across the state of New York is detailed in Exhibit A to Katherine Sinding's Affirmation in Support of Motion of Proposed *Amici Curiae* to File a Brief *Amici Curiae*. *Amici* incorporate, by reference, those statements of interest.

INTRODUCTION

At issue in this appeal is whether New York's municipalities will be stripped of their traditional zoning powers to protect essential community character from the harms of noxious industrial uses.

Shale gas development using the technique known as high volume hydraulic fracturing ("hydrofracking") is one of the highest profile and most controversial issues in New York State, and indeed, the nation. Whatever one may think about the desirability of increased gas development in New York, one fact is beyond dispute: hydrofracking is an innately industrial activity that will fundamentally transform the character of any community in which it is permitted. Consistent with long-standing principles of law concerning local home rule and zoning authority in New York, the State's municipalities must be empowered to decide for themselves whether to accept this inherently industrial activity within their borders.

Community character is of primary importance to all municipalities. It can create the conditions for municipal health, happiness, and success or, conversely, promote

disinvestment and the deterioration of personally and economically valuable local resources. Land use decisions shape community character, and nowhere do they have a greater impact than when they involve the placement of offensive industrial activities, such as anticipated hydrofracking in New York. Hydrofracking is an intense industrial activity characterized by ugly drilling rigs, intrusive truck traffic, air and water pollution, and excess noise and light, with the potential for drinking water contamination, loss of historical resources, and other long term community damage.

New York's system for delegating land use authority has long been informed by the principle that residents familiar with and invested in their communities are best situated to decide whether particular industrial uses are compatible with local character and development goals. Appellant's reading of § 23-0303 of the New York Oil Gas and Solution Mining Law ("OGSML") to allow indiscriminate placement of major industrial operations is not only contrary to New York's tradition of land use regulation, but would invite the widespread disruption and pollution of the many places where New Yorkers live, work, and recreate. The development of the State's energy resources may proceed without eviscerating municipalities' powers and responsibilities to define their community character. *Amici* urge this Court to affirm the decision of the Supreme Court of Tompkins County at issue in this appeal.

ARGUMENT

I. Community Character is Essential to the Health, Identity, and Economic Viability of New York's Communities

All New Yorkers are influenced by the character of the communities in which they live. Often described as a place's "personality," a community's character has consequences

for the aggregate health, happiness, identity, and economic well-being of community residents.

Community character is composed of physical inputs (e.g., land use patterns, natural resources, landscape and architectural features, and special historic or natural areas) and human inputs (e.g., demographics, employment mix, local history, and cultural traditions). *See generally* Am. Planning Ass'n, *Community Character: How Arts and Cultural Strategies Create, Reinforce, and Enhance Sense of Place* (2011).[1] The interplay of these elements, as well as the sense of place or "feel" they engender in residents or visitors, creates the community's character.

Community character is complex and particularized. For this reason, a community's character is best understood by those who regularly experience it (or those who carefully study it, such as professional planners), and poorly understood by those with no experience of it.

While the character of a community is impossible to quantify by itself, it has powerful and measurable effects on community identity, health, and economic viability. The sense of one's community and "home" is "bound-up" with personal identity, as well as personal welfare. Donna Jalbert Patalano, Note, *Police Power and the Public Trust: Prescriptive Zoning through the Conflation of Two Ancient Doctrines*, 28 B.C. Envtl. Aff. L. Rev. 683, 694 (2001) (quoting Mary Jane Radin, *Residential Rent Control*, 15 Phil. & Pub. Aff. 350, 362, 365 (1986)). *See also* Theodore Millon & Melvin J. Lerner, 5 *Handbook of Psychology: Personality and Social Psychology* 421 (2003) [hereinafter "Psychology Handbook"] ("[Local environment] is used to confer meaning, to promote identity, and to

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[1] *Available at*: http://www.planning.org/research/arts/briefingpapers/character.htm.

locate the person socially, culturally, and economically"). The degree to which residents are satisfied with a neighborhood—especially with regard to characteristics like green space, aesthetics, and degree of noise—has a studied effect on personal satisfaction and psychological well-being. Psychology Handbook at 425.

Correspondingly, where neighborhood character is unsatisfactory or oppressive, it can impair psychological and physical health. *See id.* at 426; Carolyn E. Cutrona et al., *Neighborhood Characteristics and Depression, in* Current Directions in Psychological Science 188 (2006).[2] Negative community character elements, such as excess traffic or the presence of hazardous waste sites, have been linked with stress and depression. *See* Cutrona et al.; Tse-Chuan Yang & Stephen A. Matthews, *The Role of Social and Built Environments in Predicting Self-Rated Stress: A Multilevel Analysis in Philadelphia, in* 16 Health & Place 803 (2010).[3]

Community character also has significant economic consequences. Negative inputs can depress home values, thus diminishing what is often a resident's single largest investment. *See, e.g.*, Molly Espey & Hilary Lopez, *The Impact of Airport Noise and Proximity on Residential Property Values, in* 31 Growth and Change 408 (2000). These types of changes also erode intangible personal wealth, such as the value residents place on the quiet enjoyment of their surroundings. *See* Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. Land Use & Envtl. L. 45, 64-78 (1994) [hereinafter "Karkkainen"] (discussing the "consumer surplus" not capitalized in home values).[4] On the community level, local

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[2] *Available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2186297/.

[3] *Available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3200568/.

[4] This loss of value has personal as well as economic dimensions. As Karkkainen describes, the arrival of an incompatible use may signify that "the neighborhood is taking the first step toward becoming something

character drives economic vitality. Character of place is key to attracting investment and commerce. As discussed below, this is particularly true for communities dependent on industries based in aesthetics or outside perception, such as tourism or organic agriculture and food production.

II. Hydraulic Fracturing Is a Heavy Industrial Process with the Potential to Seriously Impair the Community Character and Development Goals of New York's Local Communities

Shale gas extraction employing hydrofracking is, by its nature, an intense industrial activity that can transform communities overnight. The hallmarks of hydrofracking are visible landscape impairment and fragmentation from drilling facilities, emissions of air pollutants, intense water usage, toxic wastewater production, persistent heavy truck traffic, and noise. Hydrofracking shale deposits, like those underlying New York, involves a process by which millions of gallons of fresh water are mixed with chemical additives and pumped at high pressure deep underground, where they disturb deposits of methane gas, corrosive salts, and naturally occurring radioactive materials. U.S. Dep't of Energy, *Modern Shale Gas Development in the United States: A Primer* ES-3 to ES-5 (2009);[5] N.Y. State Dep't of Envtl. Conservation (DEC), *Revised Draft Supplemental Generic Environmental Impact Statement* ES-6 to ES-8 (2011) [hereinafter "DSGEIS"];[6] *The Pennsylvania Guide to Hydraulic*

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other than the neighborhood where I chose to live. Although difficult to place in quantitative terms, the loss is great." *Id.* at 73.

[5] *Available at* http://www.netl.doe.gov/technologies/oil-gas/publications/epreports/shale_gas_primer_2009.pdf.

[6] The DSGEIS is the New York Department of Environmental Conservation's review of the potential environmental impacts of its proposed program for permitting hydrofracking activities in New York pursuant to the State Environmental Quality Review Act. The approximately 1,500 page report includes a detailed explanation of the process as well as many of its environmental effects. *Available at* http://www.dec.ny.gov/energy/75370.html.

Fracturing, or "Fracking", StateImpact (2012).[7] Millions of gallons of toxic wastewater returning to the surface must be stored or transported, and the methane itself must be captured, compressed, and piped across the countryside. Rebecca Hammer & Jeanne VanBriesen, Ph.D., NRDC, *In Fracking's Wake* 10-11 (2012);[8] DSGEIS at 5-99 to 5-118 (discussing fluid return); 5-14, 5-142 to 5-143 (describing utility corridors and gas gathering and compression).

Widespread hydrofracking of the expansive Marcellus and Utica Shales presents an unprecedented prospect of industrializing New York communities that wish to preserve their unindustrialized nature, threatening short- and long-term damage to their community character and local natural and historic resources.[9]

A. Hydrofracking is a Heavy Industrial Activity

The effects of hydrofracking are those associated with a noxious industrial activity. Its emissions of volatile organic compounds, ozone pre-cursors, and other air pollutants have the potential to threaten public health. *See* DSGEIS at 6-102 to 6-107, 6-169 to 6-171; Lisa M. McKenzie et al., Colo. Sch. of Pub. Health, *Human Health Risk Assessment of Air Emissions from Development of Unconventional Natural Gas Resources* (2012) [hereinafter "CO Air Study"] (discussing increased cancer as well as chronic and acute non-cancer risks

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[7] *Available at* http://stateimpact.npr.org/pennsylvania/tag/fracking/.

[8] *Available at* http://www.nrdc.org/energy/files/Fracking-Wastewater-FullReport.pdf.

[9] Contrary to the assertion implied by of the Brief of the American Petroleum Institute ("API"), et al. in Support of Plaintiff Appellant, high volume hydrofracking of shale formations has not been conducted "successfully and safely in New York for decades." API Brief at 3. Indeed because of the potential for new and unstudied significant environmental harms associated with hydrofracking the Marcellus Shale, permits for high volume hydrofracking will not be issued until the State completes its environmental review of the process. *See generally* DSGEIS.

for residents living near hydrofracking operations).[10] U.S. Dep't of Health and Human Services, *Health Consultation, Garfield County: Public Health Implications of Ambient Air Exposures to Volitile Organic Compounds as Measured in Rural, Urban, and Oil & Gas Development Areas* 1, 13 (2008).[11] *See also* Wendy Koch, *Wyoming's smog exceeds Los Angeles' due to gas drilling*, USA Today's Green House Blog (Mar. 09, 2011, 11:52 AM).[12] High-volume fresh water withdrawals jeopardize the health of local waterbodies by diminishing stream flows and concentrating preexisting pollution. *See* U.S. Envtl. Protection Agency, *Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources* 27 (2011);[13] DSGEIS at 6-2 to 6-6. Drilling rigs and other hydrofracking facilities scar the landscape. *Id.* at 6-263 to 6-288 (visual impacts). And the thousand-plus heavy truck trips—necessary to carry the water, chemicals, heavy machinery, and waste to and from each well drilled at a well pad—crowd and damage local roads and can lead to an increase in traffic accidents and related injuries and deaths. *Id.* at 6-301 to 6-303, 6-307 to 6-315.

Phases in the hydrofracking process include site preparation, drilling, fracturing shale formations (i.e. the high-pressure pumping of the hydrofracking fluid), wastewater management, and gas recovery—all of which are loud, bright, and ugly. Initial creation of

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[10] *Available at* http://cogcc.state.co.us/library/setbackstakeholdergroup/Presentations/Health%20Risk%20Assessment%20of%20Air%20Emissions%20From%20Unconventional%20Natural%20Gas%20-%20HMcKenzie2012.pdf.

[11] *Available at* http://www.atsdr.cdc.gov/hac/pha/Garfield_County_HC_3-13-08/Garfield_County_HC_3-13-08.pdf.

[12] *Available at* http://content.usatoday.com/communities/greenhouse/post/2011/03/wyomings-smog-exceeds-los-angeles-due-to-gas-drilling/1#.UFEBVo2PWJE.

[13] *Available at* http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/upload/hf_study_plan_110211_final_508.pdf.

the well requires "four to five weeks of drilling at 24 hours per day to complete," during which, operational noise is commonly audible for thousands of feet. DSGEIS at 6-274, 6-289, 6-293 to 6-296. Towering drill rigs—about 150 feet high—must be illuminated at night, and during well completion, elevated flare stacks burn excess gas above the tree line. *Id.* at 6-274 (noting the "high visibility" of such activities). Actual hydrofracking of the well requires two to five days of up to "20 diesel-pumper trucks operating simultaneously," generating noise levels of up to 84 decibels—the equivalent of a busy Manhattan street. *Compare id.* at 6-296 *with* N.Y.C. Dep't of Envtl. Protection, *A Guide to New York City's Noise Code* 2 (2011).[14] And each well pad is capable of holding up to twelve individual wells, with each well capable of being hydrofracked multiple times. Jim Ladlee & Jeffrey Jacquet, *The Implications of Muli-Well Pads in the Marcellus Shale, in* 43 Cornell University & Penn State Research and Policy Brief Series (2011);[15] DSGEIS at 5-22 to 5-23 (projecting six to eight wells per pad for drilling of Marcellus wells in New York), 5-98 to 5-99 (refracturing). As such, the productive life of a single well pad may bring, cumulatively, over a year's worth of around-the-clock community disturbance.

Accidents associated with these activities are commonplace. While the most nationally visible of these are the failures of improperly cemented well casings, which can lead to contamination of community drinking water, well site accidents are a frequent occurrence. *See, e.g.*, Pa. Land Trust Ass'n, *Marcellus Shale Drillers in Pennsylvania Amass*

[14] *Available at* http://www.nyc.gov/html/dep/pdf/noise_code_guide.pdf.

[15] *Available at* http://devsoc.cals.cornell.edu/cals/devsoc/outreach/cardi/publications/loader.cfm?csModule=security/getfile&PageID=1016988. The average numbers of wells per pad for Marcellus drilling in Pennsylvania has been increasing since the start of shale drilling. In 2010, the average number of wells per pad was 2.15, and "analysis suggests that in most cases operators are not drilling single wells instead of multi-well pads, as only about 6% of pads with 1, 2, or 3 wells were drilled within 1500 of feet of another well pad. The lack of nearby wells may indicate the early stages of a longer term infill strategy." *Id.*

1614 Violations Since 2008 (2010);[16] Riverkeeper, *Fractured Communities: Case Studies of the Environmental Impacts of Industrial Gas Drilling* (2010) [hereinafter "Fractured Communities"].[17] Such routine incidents include well explosions (termed "blowouts"); soil and groundwater contamination from mismanagement of chemical fracking fluids and wastewater; and explosive levels of gas migrating into private homes. *See* Pa. Dep't of Envtl. Protection, Bureau of Oil and Gas Management, *Stray Natural Gas Migration Associated with Oil and Gas Wells* (2009);[18] Fractured Communities at 6-12, 18-19, 22-24.

Where hydrofracking is allowed indiscriminately, its effects are felt by the entire community. Because shale deposits are vast, and leaseholds are owned by multiple operators, hydrofracking operations are often community-wide and uncoordinated. When multiple wells in a town are engaged in the labor-intensive drilling and actual hydrofracking phases of production, community character injuries—such as diminished air quality, landscape impairment, truck traffic, and the potential for aquifer contamination—are compounded. Additionally, distribution of well pads throughout a community (approximately four acres each) contributes to increased soil erosion and the destruction of forestland and wildlife habitat—effects amplified by the construction of necessary support infrastructure, such as access roads, pipelines, and compressor stations. *See* U.S. Geological Survey, *Landscape Consequences of Natural Gas Extraction in Bradford and Washington Counties, Pennsylvania, 2004–2010* 10 (2012) [hereinafter "USGS Landscape Report"] (average well pad and associated infrastructure in Pennsylvania requires "nearly

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[16] *Available at* http://conserveland.org/violationsrpt.

[17] *Available at* http://www.riverkeeper.org/wp-content/uploads/2010/09/Fractured-Communities-FINAL-September-2010.pdf.

[18] *Available at* http://www.dep.state.pa.us/dep/subject/advcoun/oil_gas/2009/Stray%20Gas%20Migration%20Cases.pdf.

3.6 hectares (9 acres) per well pad with an additional 8.5 hectares (21 acres) of indirect edge effects" (internal citations omitted));[19] DSGEIS at 5-6 (land disturbance), 6-14 to 6-15 (erosion), 6-68 to 6-69, 6-72 to 6-76 (habitat fragmentation).

B. The Harms that Hydrofracking Poses to the Character of New York's Diverse Communities

The effects and costs of hydrofracking must be evaluated locally, because they vary with the character and development goals of each community.[20] At the most general level, one variable driving community character costs from hydrofracking will be local differences in land use patterns and population density. The closer industrial pollution is to residences and workplaces, the greater the injury. *See, e.g.*, CO Air Study (air impacts higher as proximity to wells increases). As such, densely populated municipalities that are primarily residential or commercial in character may simply be incompatible with any hydrofracking activities whatsoever.

Community costs can also be overwhelming for towns whose local economy depends on their appealing or bucolic character. Revenue streams from tourism and outdoor recreation—absolutely vital to the economic livelihood of many of communities home to the state's historic landmarks and rich wildlands—may be uniquely threatened by hydrofracking activities. Ecology and Environment, Inc., *Economic Assessment Report for the Supplemental Generic Environmental Impact Statement on New York State's Oil, Gas, and Solution Mining Regulatory Program* 4-58 to 4-59 (noting potential harm to tourism and

[19] *Available at* http://pubs.usgs.gov/of/2012/1154/of2012-1154.pdf.

[20] Indeed, the state, in its generic environmental review of proposed hydrofracking, recognizes that community character impacts from hydrofracking cannot be accounted for at a state level. DSGEIS at 2-173, 6-317 (stating "[a] sense of place and community character cannot be described for New York State as a whole" and that while ("[community character] impacts are expected to be significant, the determination of whether these impacts are positive or negative cannot be made").

agriculture industries), 3-23 (noting travel and tourism is the second largest employer in the Southern Tier and Mohawk Valley Regions, and the largest employer in the Mid-Hudson Region) (2011).[21] New York's world-class trout streams and wildlife refuges will be less appealing to weekend birders and flyfishers when located next to noisy drill rigs, and a day trip out to historic Cooperstown may simply not be worth enduring the increased truck traffic and smog.

Hydrofracking may also threaten communities that depend on agriculture. Studies have linked pollution from hydrofracking with health impacts to livestock and degradation of soil. Michelle Bamberger & Robert E. Oswald, *Impacts of Gas Drilling on Human And Animal Health*, *in* 22 New Solutions 51, 72 (2012);[22] Rebecca Lesser, *New Test Assesses Impact of Gas Drilling, Pipeline Construction on Soil Health*, Chronicle Online, Cornell University (Mar. 31, 2010) (fallow agricultural lands "were found to have marked negative effects from pipeline construction").[23] The specter of hydrofracking can also endanger the market for local exports of goods that rely on the actual or perceived purity of local natural resources, such as specialty food production and organic farming—one of the fastest growing segments of U.S. agriculture. Organic Trade Ass'n, *2011 Organic Industry Survey* 5 (2011).[24] In New York State alone, there are over 170,000 acres of pasture and cropland dedicated to organics, and more than 800 organic farms, the fourth highest in the nation. *See* U.S. Dep't of Agriculture, Economic Research Service, Data Sets, Table 4: Certified

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[21] *Available at* http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisecon0811.pdf.

[22] *Available at* http://ecowatch.org/wp-content/uploads/2012/01/Bamberger_Oswald_NS22_in_press.pdf.

[23] *Available at* http://www.news.cornell.edu/stories/March10/soiltestdrilling.html.

[24] Overview *available at* http://www.ota.com/pics/documents/2011OrganicIndustrySurvey.pdf.

organic pasture and cropland (2010);[25] *see also* N.Y. State Comptroller, *The Role of Agriculture in the New York State Economy* 1 (Feb. 2010). Consumer contamination fears have already driven one major purchaser, the Park Slope Food Cooperative, which buys upward of $3 million worth of organic farm products each year, to stop buying products from areas with hydrofracking. Mary Esch, *Fracking Poses Mixed Bag for Farmers in New York*, Pittsburgh Post-Gazette (May 21, 2012, 1:50 PM).[26] For communities heavily invested in organic farming, an acceleration of this trend would be disastrous.

Overall, some of the greatest damage may come from a community's loss of rural identity and desirability as a place to live. *See* Karkkainen at 73 (quoted at fn. 4). Hydrofracking wells, along with new infrastructure necessary to support those wells (e.g., drilling rigs, impoundment pits, pipelines, compressor stations, waste treatment facilities, and natural gas processing plants) can alter the landscape of a formerly rural or forested area. *See* USGS Landscape Report at 3 ("With the accompanying areas of disturbance, well pads, new roads, and pipelines from [Marcellus Shale and coal bed methane wells], the effect on the landscape is often dramatic"). Many New York families have invested their lives, as well as their finances, into living in a rural community, and simply do not want to live next door to heavy industrial activities.

Loss of rural aesthetic can also result in tangible economic injury. Industrialization of communities related to hydrofracking, especially communities largely dependent on well water, can lower local property values. Lucija Muehlenbachs et al., *The Drill and the Bill: Shale Gas Development and Property Values*, *in* Canadian Journal of Economics 1, 22 (2012)

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[25] *Available at* http://www.ers.usda.gov/Data/Organic/ (last visited June 7, 2012).

[26] *Available at* http://pipeline.post-gazette.com/news/archives/24545-fracking-poses-mixed-bag-for-farmers-in-new-york.

(finding values of homes reliant on well water negatively affected by proximity to hydrofracking wells). Even those who refuse to lease their lands may be forced to accept a horizontal well bore under their property under New York's compulsory integration laws. *See* N.Y. Envtl. Conserv. Law § 23-0901. Such an encumbrance may decrease salability of the property by impairing the ability to obtain a mortgage. Elisabeth N. Radow, *Homeowners and Gas Drilling Leases: Boon or Bust?*, 83-DEC N.Y. St. B. J. 10, 12, 18-21 (2011).

In situations where hydrofracking does decrease the value of neighboring properties, royalty revenues received by leasing landowners will not compensate for the measurable and non-monetizable losses suffered by the rest of community. *Cf.* Timothy W. Kelsey et al., *Marcellus Shale: Land Ownership, Local Voice, and the Distribution of Lease and Royalty Dollars*, Penn State Center for Economic and Community Development (2012) (finding that the top 10% of local landowners and non-resident landowners make the vast majority of Marcellus leasing decisions in Pennsylvania, and that, most often, recieve the greatest share of royalties from hydrofracking).[27] For many communities, the multi-generational wealth potential of existing economies or property is more valuable than the temporary gains accruing to a few selected residents.

III. Municipal Zoning and Comprehensive Planning Protect Community Character and Local Natural and Historic Resources from Damaging or Inappropriate Uses, Such as Hydrofracking, and Promote Productive Development

Municipal zoning is New York's principal method for identifying and safeguarding community character against incompatible and potentially destructive development, such

[27] *Available at* http://aese.psu.edu/research/centers/cecd/publications/marcellus/marcellus-shale-land-ownership-local-voice-and-the-distribution-of-lease-and-royalty-dollars/view.

as hydrofracking. Since its origins in New York, zoning has played a central role in the protection and promotion of the health and vibrancy of the state's diverse communities.

A. The Foundations of Zoning Are Rooted in Communities' Rights to Protect Themselves Against New Industrial Uses

Zoning initially arose to protect communities against the new harms posed by the rapid industrialization and urbanization of the late nineteenth and early twentieth centuries. Harmful spillover effects from new uses such as skyscrapers and manufacturing facilities, especially in residential neighborhoods, demanded solutions beyond traditional, after-the-fact tort and nuisance remedies. *See generally* Edward Bassett, *Zoning* 316 (1922) [hereinafter "Zoning"].[28] Factories and livery stables intruded into residential neighborhoods and "bright business streets," sickening residents and driving away customers. Zoning at 316. The recognized need for land use controls to manage development according to the "character of the district and its suitability for particular uses" paved the way for the nation's first highly-publicized, comprehensive zoning ordinance in New York City. U.S. Dept. of Commerce, *A Standard State Zoning Enabling Act* § 3 (1926);[29] N.Y.C Bd. of Estimate and Apportionment, *New York City Building Zone Resolution* (1916).[30]

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[28] Edward Bassett was Chairman of New York City's first zoning commission.

[29]The quoted language comes from § 3 of the Standard State Zoning Enabling Act, a model act published by the U.S. Department of Commerce that codified many early zoning principles.

[30] *Available at* http://www.nyc.gov/html/dcp/pdf/history_project/1916_zoning_resolution.pdf. The 1916 ordinance famously divided the entire city into three use districts—"residence," "business," and "unrestricted"—to separate neighborhoods of a sensitive character from uses with the greatest potential for harm. This scheme allowed some conceptual flexibility. Residence districts enumerated "farming" as a permissible use, but excluded business and industry. *Id.* at § 3. Likewise, "business districts" completely excluded only the most noxious industrial uses, such as "gas . . . manufacture or storage" and "petroleum refining." *Id.* at § 4(a).

The United States Supreme Court recognized the critical function of this and other early ordinances in *Village of Euclid, Ohio v. Ambler Realty Co.*, where it upheld use of state-delegated police power to enact zoning laws designed to benefit the "public health, safety, morals, [and] general welfare"—an inquiry heavily dependent on community character. 272 U.S. 365, 395 (1926). Analogizing to the context-based nature of nuisance law, the Court held that, to benefit the public welfare, municipalities may exclude a land use from certain areas "not by [] abstract consideration . . . but by considering it in connection with the circumstances and the locality." *Id.* at 388 (famously stating that an excludable "nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."). Under this rubric, the more noxious the use, the greater the discretion a municipality may exercise in excluding it from an area with sensitive community character. Accordingly, the "serious question" in *Euclid* was whether municipalities could exclude less noxious uses, such as apartment buildings and businesses, from lower density residential areas; the court found "no difficulty" in sustaining zoning regulations designed to "divert an industrial flow from the course which it would follow." *Id.* at 390. Although zoning law has evolved significantly in the nearly 100 years since the first ordinance, and the nearly 90 years since *Euclid*, the separation of industrial uses from sensitive community areas remains a central and uncontroversial principal of zoning.

B. New York's Statutory System For Delegating Land Use Authority Is Designed to Enable Municipalities to Effectively Protect the Character of Their Communities and Resources and Promote Important Development Goals

Today, municipal authority over land use is both a constitutionally codified power and New York's central tool for protecting community character and promoting the productive development of the state. N.Y. Const. art. IX, § 2(c)(10). *See* N.Y. Gen. City Law

§ 28-a(2)(a); N.Y. Town Law § 272-a(1)(a); N.Y. Village Law § 7-722(1)(a) (recognizing material effect of local land use decisions on "the immediate and long-range protection, enhancement, growth and development of the state and its communities."). Accordingly, New York encourages municipalities to make the "most appropriate use of land," by carefully delegating land use authority in a manner that accounts for and protects community character. N.Y. Town Law § 263; N.Y. Village Law § 7-704.

First and foremost, New York law requires municipalities to consider community character in all land use decisions by mandating that all zoning occur in "accordance with a comprehensive plan." N.Y. Town Law § 263; N.Y. Village Law § 7-704; *see also* N.Y. Gen. City Law § 20(25)[31] (zoning regulations must reasonably consider "the character of [each] district, [and] its peculiar suitability for particular uses."). Plans themselves can be either formal or informal. Formal plans are often complex documents, sometimes prepared by professional consultants, which meticulously detail the "great diversity" of existing community resources and outline land use goals. *See* N.Y. Gen. City Law § 28-a(2)(d), (4); N.Y. Town Law § 272-a(1)(d), (3); N.Y. Village Law § 7-722(1)(d), (3) (formal plans should consider, *inter alia*, regional needs; existing intensity and location of land uses; historic, cultural, and environmental resources; location of health and educational facilities; and sensitive environmental areas). *See, e.g.*, George R. Frantz and Associates, *Town of Dryden Comprehensive Plan* (2005). A composite of local studies and reports, public hearings, the zoning map, and the zoning ordinance itself can constitute an informal plan, provided "careful and deliberate" consideration has been given to the composition and development needs of the community. *Udell v. Haas*, 21 N.Y.2d 463, 470-72 (1968); *see also Thomas v.*

[31] The General City Law states that such laws be made "in accord with a well considered plan."

Town of Bedford, 11 N.Y.2d 428, 434-35 (1962). *See, e.g.*, Town of Middlefield, *Master Plan for the Township of Middlefield* (1989) (updated Jun. 14, 2011);[32] Town of Middlefield, Zoning Law (2011).

Requiring municipal officials to zone in accordance with a holistic, well-considered plan discourages, from the outset, haphazard zoning decisions with injurious long-term consequences. Likewise, municipalities are constrained in their ability to make ad-hoc zoning changes that could damage community character. N.Y. Gen City Law § 81-b(3)(b)(iii); N.Y. Town Law § 267-b(2), (3); N.Y. Village Law § 7-712-b(2), (3) (use variances must not "alter the essential character of the neighborhood," and the zoning hearing board must "preserve and protect the character of the neighborhood" in granting both area and use variances).

State law governing local land use also augments traditional zoning authority to foster compatible development. Non-traditional tools—such as density incentives, the allowance of marketable air rights, or the ability to cluster development—promote development consistent with community character and reflect a strong desire to protect important community resources, particularly historic, agricultural, and natural resources. *See* N.Y. Gen. City Law § 20-f(2), N.Y. Town Law § 261-a(2), and N.Y. Village Law § 7-701(2) (purpose of transferrable development rights to "protect the natural, scenic or agricultural qualities of open lands, to enhance sites and areas of special character or special historical, cultural, aesthetic or economic interest"); N.Y. Town Law § 261-b(2) and N.Y. Village Law § 7-703(2) (purpose of incentive zoning "to advance the town's specific physical, cultural and social policies in accordance with the town's comprehensive plan"); N.Y. Town Law

[32] *Available at Cooperstown Holstein Corp. v. Town of Middlefield* (No. 515498) Record on Appeal at 140-197.

§ 278(2)(b) and N.Y. Village Law § 7-738(2)(b) (purpose of cluster development "to preserve the natural and scenic qualities of open lands").

New York additionally grants land use powers outside the realm of zoning to identify and protect locally important resources, as well as to target conditions particularly damaging to community character. *See* N.Y. Gen. Mun. Law §§ 119-aa to 119-dd (which "clarif[ies] and amplif[ies] existing [municipal] authority" for the protection of the "historical, architectural, archeological, and cultural environment," allowing municipalities to regulate places or objects of "historical, cultural or aesthetic interest or value" and establish a historical preservation board); *id.* §§ 239-x to 239-y (allowing for the creation of a local conservation advisory council "to advise in the development, management and protection of [local] natural resources"); *id.* §§ 501-525 (authorizing ability to encourage and engage in renewal projects and to exercise municipal authority "essential" to combat the "serious . . . menace" of "blight").

As a whole, New York's system of land use enabling laws delegates to municipalities planning authority that cannot be effectively exercised at the state level. Because municipal officials have both a strong understanding of the local characteristics most important to community vitality and a personal stake in its improvement, they occupy an ideal position to identify both compatible and detrimental development. Even if state actors could be equally effective in such determinations, the administrative burden of individually and comprehensively planning and zoning for each of the state's fifteen hundred municipalities is beyond the ability and resources of any existing state agency. This is no doubt why New York's zoning enabling laws recognize the "authority *and responsibility* to undertake comprehensive planning and to regulate land use" as "[a]mong

the most important powers and duties granted by the legislature to a [local] government." N. Y. Gen. City Law § 28-a(2)(b); N.Y. Town Law § 272-a(1)(b); N.Y. Village Law § 7-722 (emphasis added).

C. New York Courts Have Affirmed the Importance of Municipal Land Use Authority

New York courts recognize the vital function performed by municipalities in the State's system for land use regulation. *See, e.g., DJL Rest. Corp. v. City of N.Y.*, 96 N.Y.2d 91, 96 (2001) ("one of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances."); *Thomas*, 11 N.Y.2d at 433 ("[i]n any area of even moderate density, comprehensive and balanced zoning is essential to the health, safety and welfare of the community."). This is particularly true regarding decisions respecting community character. Municipalities enjoy broad discretion in addressing community character threats, even those that fall well short of that posed by invasion of industrial uses into residential zones. *See People v. Goodman*, 31 N.Y.2d 262, 266-67 (1972) (upholding zoning restrictions on the size and illumination of signs in small town because, given the town's "unique cultural character and natural features," large, illuminated signs could "materially affect the appearance and character of the community."); *Cromwell v. Ferrier*, 19 N.Y.2d 263 (1967) (upholding prohibition of off-premise billboards); *People v. Stover*, 12 N.Y.2d 462 (1963) (upholding prohibition on outdoor display of clotheslines).

This Court has repeatedly deferred to the determination of municipal boards to exclude incompatible development where local zoning laws require harmony of a proposed project with existing community character as a condition for municipal permit approval. *Cipperley v. Town of E. Greenbush*, 262 A.D.2d 764 (3d Dep't 1999) (upholding permit denial

for proposed mine because of concerns about traffic and impairment of property values); *Wal-Mart Stores, Inc. v. Planning Bd. of Town of N. Elba*, 238 A.D.2d 93 (3d Dep't 1998) (upholding permit denial for big-box store based upon negative visual impacts); *Mkt. Square Properties, Ltd. v. Town of Guilderland Zoning Bd. of Appeals*, 109 A.D.2d 164 (3d Dep't 1985), *aff'd*, 66 N.Y.2d 893 (1985) (upholding permit denial for shopping center for increased traffic and resultant hazards to children). Municipal decisions regarding community character are respected even where state agencies reach different conclusions. *See Schadow v. Wilson*, 191 A.D.2d 53, 56-59 (3d Dep't 1993) (upholding a denial of a proposed mine on community character grounds, despite a DEC finding that the project would have no significant noise, dust erosion, traffic, or visual impacts). And where development is also governed by state law mandating consideration of community character, such as the State Environmental Quality Review Act (SEQRA), the municipal role is preserved. *See Wal-Mart*, 238 A.D.2d at 97 (municipality "entitled to consider factors outside the scope of the environmental review mandated by SEQRA [when considering whether to grant conditional use permit], insofar as they bear on matters legitimately within the purview of the [Town Land Use Code].").

This distinction between state regulatory objectives and local community character goals has also been recognized by the Court of Appeals. Accordingly, in cases interpreting municipal preemption clauses of state regulatory statutes, ambiguous preemptive language nearly identical to that of the OGSML has been consistently construed in favor of traditional municipal authority to control the location of land uses potentially damaging to community character. *See DJL*, 96 N.Y. 2d at 96 (distinguishing state statute controlling "all aspects" of alcohol sale and distribution from local zoning regulating location of adult bars—"Alcohol

[] is not land"); *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 682 (1996) (interpreting *Matter of Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126, 131-33 (1987), as finding that, in the absence of a "clear expression of legislative intent," the New York Mined Land Reclamation Law (MLRL) could not be read as preempting local zoning authority); *cf. Hunt Bros., Inc. v. Glennon*, 81 N.Y.2d 906 (1993) (clarifying that MLRL similarly does not preempt authority of state Adirondack Park Agency where it exercises land use powers similar to that of local zoning authority).

IV. The OGSML Does Not Safeguard Municipalities Against the Damage that Hydrofracking May Inflict on Community Character and Locally Important Resources of Many New York Communities

The consequence of Appellant's interpretation of the OGSML as preempting all municipal zoning with respect to oil and gas activities would be to allow indiscriminate and communitywide hydrofracking throughout every shale-bearing New York community, with potentially devastating effects on the character, resources, and economies of many of those communities. Wholesale expansion of an industrial activity without consideration of particular community suitability is contrary to New York's tradition of local land use planning and the historic purposes of zoning.

As the lower courts have recognized, the OGSML addresses only "technical operational concerns.... None of the provisions... address traditional land use concerns, such as traffic, noise or industry suitability for a particular community or neighborhood." *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc. 3d 450, 465 (N.Y. Sup. Ct. 2012). Unlike other state regulatory laws that specifically preempt municipal *zoning*, the OGSML has no mechanism by which to account for or protect community character in siting decisions. *Id.* at 466-67 (discussing mandatory consideration of community character and

ex ante municipal participation in the siting of hazardous waste facilities and community residential facilities under E.C.L. § 27-1101 *et seq.* and Mental Hygiene Law § 41.34, respectively). The only available land use-based restrictions—found in DEC's regulations implementing the OGSML—permit wells as close as 100 feet from any "inhabited structure" (i.e., a home) and 150 feet from a "public building" (e.g., a school or a hospital)."[33] 6 NYCRR § 553.2. As such, in a world where the OGSML replaced traditional zoning controls, every operational aspect of hydrofracking—drill rigs, pipelines, waste pits, condensate tanks, and compressor stations—would effectively be allowed as-of-right in nearly every zone.

It is easy to see where this interpretation of the OGSML would leave municipalities exposed to potentially serious and long-term community damage. Blanket authorization of hydrofracking would allow the conversion of any landscape—including formerly tranquil rural, residential, agricultural, historic, or natural areas—into a *de facto* industrial zone. Residents would be powerless to take even basic protective measures to protect their health and property, such as preventing a compressor station or waste storage unit from being placed next door to a home or the local elementary school.

Blanket authorization of an injurious industrial activity with no specialized attention to its effects on particular community areas or communities at large does not accord with New York's protective tradition of comprehensive land use planning and ignores even the basic public health foundations of land use law—the separation of people

[33] New York's current proposed regulations for hydrofracking provide for larger setbacks from the boundary lines of spacing units (Proposed 6 NYCRR § 553.1) and additional setbacks from dwellings, places of assembly, and certain water resources (Proposed 6 NYCRR § 560.4). Such minimum safety precautions, however, are not equivalent to the practical and particularized land use considerations evaluated common to any zoning process. New York's proposed minimum setback distances, for example, fail to exclude industrial hydrofracking activities from residential neighborhoods, sensitive agricultural or natural areas, or places of historic significance, leaving these areas vulnerable to unavoidable community character impacts associated with hydrofracking.

from pollution. The OGSML does not duplicate the important protective function of the state's scheme for municipal zoning and would not protect the character of New York's communities from the threats of hydrofracking.

V. Throughout the Nation, State Oil and Gas Laws Exist in Harmony with Local Zoning Laws that Govern the Use of Land for Oil and Gas Development

Like New York, a number of other oil and gas producing states regulate the industry's operations while leaving the regulation of land use in the hands of individual localities. This common-sense division of regulatory authority has been the standard in many states where the development of natural gas resources is robust.

In Texas, for example—the nation's top gas producing state—municipalities have long enjoyed home-rule status as in New York and may enact and enforce ordinances designed to protect health, life, and property of their citizens. *See* Tex. Const. art. XI, § 5; *Unger v. State*, 629 S.W.2d 811, 812 (Tex. App. 1982) ("[A]ppellee asserts that [a municipality], under its police power has full authority to both regulate and prohibit the drilling of oil wells within its city limits. We agree."); U.S. Energy Information Admin., *Top 5 producing states' combined marketed natural gas output rose in 2011* (2012). Exercising that power of local self-government, municipalities in Texas have adopted zoning ordinances that extensively control the use of land for oil and gas development. *See, e.g.*, Southlake City Code Ch. 9.5, Art. IV, §§ 9.5-221–9.5-299; Code of the City of Fort Worth, Texas § 15-30–15-51. Similarly, three of the other four largest gas producing states also leave primary authority over land use controls to localities, which have adopted zoning provisions governing the permissible locations of oil and gas activities. *See, e.g.*, La Plata County Code of Ordinances §§ 90-16–90-127 (Colorado); Lafayette Code of Ordinances §§ 26-22.1-1–26-22.1-14 (Colorado); El Reno Code of Ordinances §§ 270- 3–270-12

(Oklahoma); Lawton City Code, 2005, § 18-5-1-502(A)(4) (Oklahoma); Code of the City of Evanston §§ 16-1–16-48 (Wyoming); Newcastle Town Code, 1961, § 17-16 (Wyoming).[34]

Across the border in Pennsylvania, strong local controls over the location of well drilling have not impeded the use of hydrofracking to develop Marcellus Shale resources. Like the New York Court of Appeals in *Frew Run*, *Hunt Bros.*, and *Gernatt*, the highest court in Pennsylvania has held that a similar municipal preemption provision of that state's Oil and Gas Act ("OGA") applies only where a locality attempts to regulate "technical aspects of well functioning and matters ancillary thereto (such as registration, bonding, and well site restoration), rather than the well's location." *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 223 (2009);[35] *see also Penneco Oil Co. v. County of Fayette*, 4 A.3d 722 (Pa. Commw. Ct. 2010) (holding that county zoning ordinance was not preempted by the OGA where ordinance did not attempt to regulate technical aspects of gas development operations). Despite the fact that Pennsylvania municipalities have exercised control over the location of gas wells, however, state production of natural gas is at an all-time high. *See* U.S. Energy Information Admin., *Natural Gas Gross Withdrawals and Production*, Natural Gas (Nov. 30, 2012) (showing gas production numbers tripled from

[34] Municipalities in Kansas and New Mexico have also adopted ordinances regulating the location of gas drilling. *See, e.g.*, Chanute, Kansas Municipal Code §§ 16.44.010–16.44.120; Wichita, Kansas Code of Ordinances §§ 25.04.010–24.04.240; Code of Dona Ana County § 250-72 (New Mexico); Carlsbad City Code § 56-267(16) (New Mexico). And California also provides for the right of localities to exercise control over the location of oil production activities within their borders. *See* Cal. Pub. Res. Code § 3690. *Amici* recognize, however, that not every gas-producing state allows for local control of land use decisions relating to oil and gas development. For example, in Ohio, the State exercises exclusive control over the location of oil and gas wells. *See* Ohio R.C. § 1509.02.

[35] Subsequent to this decision, the Pennsylvania legislature amended the OGA to explicitly preempt municipal zoning authority with respect to the siting of oil and gas drilling activities, effectively mooting this decision. Act 13 of 2012, P.L. 87 (Feb. 14, 2012). These statewide zoning amendments, however, were declared unconstitutional by the Commonwealth Court of Pennsylvania and the matter is currently pending before the Pennsylvania Supreme Court. *Robinson Twp. v. Com. of Pennsylvania.* 52 A.3d 463, 467 (Pa. Commw. Ct. 2012), *cert. granted* Nos. 63 & 64 MAP 2012.

2008 to 2010.);[36] Pa. Dep't of Envtl. Protection, *SPUD Data Report* (search performed on Sept. 7, 2012) (last year, 1,981 hydrofracking wells drilled or "spudded" in Pennsylvania, more than in either of the two previous years).[37]

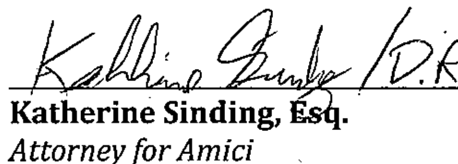
That municipal control over the location of natural gas development activities has long been the status quo in Pennsylvania and other top producing states underscores the fact that a state need not completely sacrifice the health and character of its local communities in order to develop its energy resources. Given the widespread exercise of such zoning power in states throughout the nation where natural gas extraction is booming, Appellant's argument that the Town of Middlefield's Zoning Law will frustrate the efficient recovery of oil and gas in New York is unsupported and unsupportable.

CONCLUSION

Because it is of central importance to the character, health, and welfare of New York's communities that municipalities maintain traditional land use authority over industrial hydrofracking, and for the reasons stated in the brief of Respondents-Defendants-Respondents, *Amici* pray that this Court affirm the decision of the Supreme Court of Tompkins County.

Dated: December 7, 2012
New York, NY

Respectfully Submitted,



Katherine Sinding, Esq.
Attorney for Amici

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[36] *Available at* http://www.eia.gov/dnav/ng/ng_prod_sum_dcu_spa_a.htm.

[37] *Available at* http://www.depreportingservices.state.pa.us/ReportServer/Pages/ReportViewer.aspx?/Oil_Gas/Spud_External_Data.

STATE OF 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.

AFFIRMATION OF SERVICE

Index No.: 515227

I, Katherine Sinding, an attorney duly admitted to practice law before the Courts of the State of New York, affirm under penalty of perjury:

That I am not a party to this action and am over 18 years of age, and am employed by the Natural Resources Defense Council, 40 W. 20th St., 11th Fl., New York, NY 10011.

That on December 7, 2012, the foregoing BRIEF OF *AMICI CURIAE* was served on the following by electronic mail:

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AFFIRMED: December 7, 2012
New York, NY

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STATE OF NEW YORK: SUPREME COURT:
APPELLATE DIVISION: THIRD DEPARTMENT

NORSE ENERGY CORP. USA, *Plaintiff-Appellant,* *-against-* TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD, *Defendant-Respondents.* *-and-* DRYDEN RESOURCES AWARENESS COALITION, by its President, Marie McRae, *Proposed Intervenor-Cross-Appellant*	BRIEF OF ASSEMBLYWOMAN BARBARA LIFTON AS *AMICUS CURIAE* Appellate Division Third Department Index No. 515227

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December 10, 2012

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INTEREST OF AMICUS CURIAE

Assemblywoman Barbara Lifton has represented the 125th New York Assembly District, comprising Tompkins and most of Cortland Counties since 2003. The Assemblywoman submits this amicus brief to provide the Court with information about state law regarding the zoning authority of municipalities with respect to establishment of permissible uses within zoning districts. The Assemblywoman has looked at this issue for several years and sponsors a bill in the NY State Assembly which seeks to clarify current law via NY Court of Appeals case law precedent, and codify the recent Supreme Court rulings on appeal today. She was granted amicus curiae status in the case below, *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (N.Y. Sup. Ct. 2012), and submitted an influential brief which helped the court rule favorably for New Yorkers to retain zoning authority over oil, gas and solution mining.

The Assemblywoman has heard from many local municipal officials, and has seen growing statewide concern, about the need for home rule authority over where and if natural gas drilling may take place in a community. She is concerned about the possibility of state law compelling gas drilling in neighborhoods where such activity is in contravention of zoning regulations or a comprehensive plan. Such preemption of home rule authority is, however, not supported by NY case law. The Assemblywoman's role as a public representative, along with significant public interest in the outcome of this litigation, and the question of upholding long-standing legal principles which allow a community to decide its own course of development and foster its own identity, character, and livelihood as a valid exercise of police power, compels the Assemblywoman to file this brief as special assistance to the court.

INTRODUCTION

Since 2008, the NYS Department of Environmental Conservation (DEC) has been working on an update to the 1992 Generic Environmental Impact Statement governing the state Oil, Gas and Solution Mining Regulatory Program. Until this regulatory review has been completed, no DEC permits will be issued to allow High-Volume Hydraulic Fracturing (HVHF) of low permeability shale formations to move forward in New York. Some would have this court and all residents of New York believe that such delay is unreasonable, yet many unanswered questions about the process and effects of HVHF remain. By the State's own admission, in relation to fracturing fluid:

> Toxicity testing data is quite limited for some chemicals, and less is known about their potential adverse effects…. there is little meaningful information one way or the other about the potential impact on human health of chronic low level exposures to many of these chemicals, as could occur if an aquifer were to be contaminated as the result of a spill or release that is undetected and/or unremediated.[1]

Recognizing the many concerns about human health and the effects of heavy industrialization of a community's landscape, regardless of agricultural, residential or recreational land use values, municipalities across New York, including the Town of Dryden, have enacted land use plans which restrict heavy industry or oil and gas drilling. Health, safety and welfare concerns leading to a restrictive zoning ordinance have long been upheld by New York courts.

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[1] N.Y. DEP'T ENVTL. CONSERV., *Draft Supplemental Generic Environmental Impact Statement (dSGEIS)* at 5-75 (proposed Sept. 2011), *available at* http://www.dec.ny.gov/energy/75370.html

SUMMARY OF ARGUMENT

The authority for municipal governments to enact local laws relating to their property, affairs and government, as well as for the "protection, order, conduct, safety, health and well-being of persons or property therein," stems from Article IX of the NY Constitution.[2] Known as municipal "police power," this ability for local governments to protect local citizens and property is a key component of home rule, and, at the direction of the Constitution, the legislature has codified such authority in the "Statute of Local Governments."[3] The power to adopt, amend and repeal zoning regulations was expressly granted to local governments.[4] Furthermore, Article IX of the Constitution requires that a post-facto limitation of a power authorized under the Statute of Local Governments pass both houses and be signed by the governor in two consecutive calendar years.[5] Accordingly, the Town of Dryden's zoning regulations are duly authorized and ECL §23-0303(2) can have no effect upon limitation of zoning power, as the 1981 amendment of the law was not passed during regular session in two consecutive years.

The NY Court of Appeals has previously ruled on local zoning authority in relation to the state regulatory program for the extractive mining industry, which contained statutory language analogous to ECL §23-0303(2) at issue in this case.[6] In *Frew Run Gravel Products, Inc. v. Town of Carroll*,[7] the Court of Appeals addressed the issue of preemption of local zoning by the Mined Land Reclamation Law (MLRL), which states that it "shall supersede all other state and local

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[2] N.Y. CONST. art. IX, §2(b)(3); §2(c)(ii)(10).
[3] *Id* at §2(b)(1).
[4] *See* NY STAT. LOCAL GOVT. §10(6).
[5] N.Y. CONST. art. IX, §2(b)(1).
[6] *See* NY ENVTL. CONSERV. LAW §23-2703(1) [as originally enacted, L 1974, ch 1043].
[7] 71 N.Y. 2d 126 (N.Y. 1987).
[8] *See* NY ENVTL. CONSERV. LAW §23-2703(1) [as originally enacted, L 1974, ch 1043].
[4] *See* NY STAT. LOCAL GOVT. §10(6).
[5] N.Y. CONST. art. IX, §2(b)(1).
[6] *See* NY ENVTL. CONSERV. LAW §23-2703(1) [as originally enacted, L 1974, ch 1043].
[7] 71 N.Y. 2d 126 (N.Y. 1987).

laws relating to the extractive mining industry."[8] Yet the Court held that local zoning regulations were part of a comprehensive land use plan and did not relate to regulation of the mining process itself, which was the sole purpose of the MLRL.[9] In fact, the Court notes that placing such a restriction on the home rule zoning powers of a municipality would "drastically curtail" the grant of such authority under the Statue of Local Governments, and would overreach in its interpretation of the law with no record of legislative intent to do so.[10] Faced with nearly-identical language in ECL §23-0303(2) regarding oil, gas and solution mining, this compelling precedent establishes that municipalities retain their zoning powers, which regulate land use generally and do not affect state regulatory policy for resource extraction. Both courts below, in the *Anschutz* and *Middlefield* cases, found this MLRL precedent binding in their interpretation of ECL §23-0303(2), and found that the Oil, Gas and Solution Mining Law (OGSML) did not preempt valid exercise of municipal zoning authority.

Importantly, there is no requirement that a locality allow for extraction of some, or all, of its natural resources, as long as such a limitation is a valid exercise of police powers.[11] In revisiting the MLRL, the Court of Appeals held that a town can completely zone out any extractive industry, despite the presence of a coveted resource, if the land use ordinance is a reasonable exercise of its police powers to prevent harm to the property and rights of residents and benefits the interests of the community at large.[12] NY courts have continually upheld an unfettered right for home rule and local control over land use practices, including in the cases of first instance now on appeal. The Town of Dryden must, accordingly, have such a right as a

[8] *See* NY ENVTL. CONSERV. LAW §23-2703(1) [as originally enacted, L 1974, ch 1043].
[9] Frew Run Gravel Prod., Inc. v. Town of Carroll, 71 N.Y. 2d 126, 133 (N.Y. 1987).
[10] *Id* at 134.
[11] Gernatt Asphalt Prod. Inc., v. Town of Sardinia, 87 N.Y. 2d 668, 684 (N.Y. 1991).
[12] *Id.*

reasonable exercise of its police power with respect to oil, gas and solution mining within its jurisdiction.

Finally, there is no right to drill for natural gas in this situation, as a right only vests "when substantial work is performed and obligations are assumed *in reliance on a permit legally issued*."[13] The mineral lease interests acquired by the corporate Appellant in the Town of Dryden were secured before DEC even decided whether HVHF permitting would be authorized in New York. While the regulatory process for HVHF is ongoing, and no permits have been issued, there is no legal or vested right to use HVHF anywhere in New York State.

ARGUMENT

I. ARTICLE IX OF THE NY CONSTITUTION AUTHORIZES MUNICIPAL ZONING AUTHORITY

As directed by the NY Constitution via the revised Article IX passed in 1963, the legislature promulgated the Statute of Local Governments in 1964.[14] Article IX provided for enactment of broad allocations of power to local governments relating to their property, affairs and government.[15] Amongst the express powers identified by the Constitution, is the ability for municipalities to pass local laws for the "protection, order, conduct, safety, health and well-being of persons or property therein."[16] This authority, known as "police power," is a critical element of municipal home rule, and, indeed, is codified by the NY State Legislature. Under the Statute

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[13] Preble Aggregate v. Town of Preble, 263 A.D.2d 849, 851 (N.Y. App. Div. 1999). (emphasis added)
[14] *See* N.Y. CONST. art. IX, §2(b)(1).
[15] *Id* at §2(b)(2).
[16] *Id* at §2(c)(ii)(10).

of Local Governments, the legislature specifically conferred to cities, villages, and towns the power to adopt, amend, and repeal zoning ordinances.[17]

A. US Supreme Court case law upholds the validity of local government power to enact zoning ordinances

At the turn of the twentieth century, land use regulations were a relatively new concept first addressed by the US Supreme Court in *Village of Euclid v. Amber Realty Co.*[18] Following the onset of the industrial revolution, the Court noted that "with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands."[19] Reflecting the need for flexibility over regulation of land use in its review of the constitutionality of restrictive local zoning measures, the Court held that "it is not easy to find a sufficient reason for denying the [zoning] power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated."[20] Accordingly, the Supreme Court upheld the extension of municipal police power to allow for restrictive zoning practices, as a valid method for the prevention of injury to people and property, despite the possibility that such zoning might alter the course of industrial development. Indeed, the court went so far as to say that "[i]n a changing world it is impossible that it should be otherwise."[21] The Town of Dryden's use of restrictive zoning is a similarly valid exercise of local police power.

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[17] *See* STAT. LOCAL GOVT. §10(6).
[18] 272 U.S. 365 (1926).
[19] *Id* at 386.
[20] *Id* at 390.
[21] *Id* at 387.

B. The NY Constitution requires legislation seeking to curtail local government powers to pass in two consecutive calendar years

Article IX of the NY Constitution authorizes the home rule powers of local governments, which the legislature codified in the Statute of Local Governments. Just as Article IX compels the legislature to bestow localities with clearly-enumerated authorities, it also details the constitutional procedure for revoking or limiting a duly-granted power.[22] The requirements for repealing, diminishing, impairing or rescinding a home rule power already granted under the Statute of Local Governments ensures that local police powers, including zoning, are not wantonly altered. A law which seeks to abrogate these powers can do so "only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year."[23] This standard sets a difficult threshold to overcome and ensures that the sanctity of home rule authority is taken seriously. ECL §23-0303(2) was passed once and enacted only once, in 1981. The fact that the law was not subsequently re-enacted indicates that there was no legislative intent for this law to constrain local zoning authority as a part of the state regulatory program over the oil, gas and solution mining industries. Even if there were such an intent, the failure to comply with Article IX's procedural requirements for limiting zoning authority means that ECL §23-0303(2) cannot have any effect over municipal land use planning.

The issue before the court is distinguishable from that in *Wambat Realty Corp. v. State of N.Y.* which held that the double enactment procedure of Article IX "was not, however, designed

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[22] *See* N.Y. CONST. art. IX, §2(b)(1).
[23] *Id.*

as a rigid impenetrable barrier to ordinary legislative enactments in matters of State concern."[24] The Adirondack Park Agency Act in that case had clear legislative intent to affect development and curtail local zoning authority, as the state's interest in conservation and preservation necessarily requires preemption over inconsistent land use priorities. ECL §23-0303(2) lacks such clear intent, and in the absence of express language to this effect, the protections of the double enactment provision of Article IX are triggered "to afford protection from hasty and ill-considered legislative judgments."[25] The Town of Dryden's zoning regulations must be upheld by this Court, accordingly.

II. MUNICIPAL HOME RULE POWERS ARE NOT PREEMPTED BY ECL §23-0303(2)

A. NY case law supports local zoning control over extractive industries with state regulatory programs

In this case of first impression, now on appeal, the Court was asked to determine if the Town of Dryden's zoning ordinance prohibiting oil and gas drilling is superseded by the state oil, gas and solution mining program.[26] In its plain language interpretation of ECL §23-0303(2), the trial court found that "there remains an absence…of a clear expression of legislative intent to preempt local zoning control over land use concerning oil and gas production."[27] The ruling, hinging on judicial analysis of the phrase "relating to the regulation of the oil, gas and solution mining industries," found compelling precedent in the MLRL with nearly-identical language to

[24] Wambat Realty Corp., v. State of NY, 41 N.Y.2d 490, 492 (N.Y. 1977).
[25] *Id*.
[26] *See* Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458 (N.Y. Sup. Ct. 2012).
[27] *Id* at 462.

ECL §23-0303(2). As originally written, the MLRL states that it "shall supersede all other state and local laws relating to the extractive mining industry."[28] In *Frew Run Gravel Prods. v. Town of Carroll*,[29] the Court of Appeals addressed whether a town's zoning ordinance, which excluded gravel mining from certain districts, was preempted by MLRL state regulations relating to the extractive mining industries. To reach a conclusion, the Court looked to whether the town zoning ordinance was the type of regulation intended to be preempted by the MLRL provision. Application of a plain language reading of the statute led the Court to hold that "we cannot interpret the phrase 'local laws relating to the extractive mining industry' as including the … Zoning Ordinance."[30] The Court found that the zoning ordinance did not relate to the regulation of the mining industry, but rather to an entirely different subject matter and purpose for the regulation of land use generally.[31] Acknowledging that land use planning may result in "incidental control over any of the particular uses or businesses" in a municipality, the Court none-the-less held that supersession of zoning authority was not contemplated by the legislature as the type of local law relating to the extractive mining industry regulated under the MLRL.[32] Only local laws that conflict with the actual operations and process of extractive mining would violate the purpose of the MLRL to streamline mining operations through standardized state-wide regulation.[33] Additionally, the Court notes that construing this preemption language so broadly would be a severe curtailment to codified zoning authority granted in the Statute of Local Governments and Town Law §261.[34]

[28] *See* NY ENVTL. CONSERV. LAW §23-2703(1) [as originally enacted, L 1974, ch 1043].
[29] 71 N.Y. 2d 126 (N.Y. 1987).
[30] *Id* at 131.
[31] *Id.*
[32] *Id.*
[33] *Id* at 133.
[34] *Id.*; *See* NY STAT. LOCAL GOVT. §10(6) (enacted 1964); NY TOWN LAW §261.

Similarly, ECL §23-0303(2), at issue before this Court, provides that the OGSML "shall supersede all local laws or ordinances relating to the regulation of the oil, gas, and solution mining industries."[35] Yet proper construction of this statutory provision must include an analysis of whether Dryden's zoning ordinance "relates to the regulation" of the industry or has the alternate intent of general land use control. Following the methodology in *Frew Run*, which received treatment as compelling precedent by the Supreme Courts below, the Appellate Division must similarly uphold the unfettered right for municipalities to use zoning ordinances as a vital element of their police power. Absent clear legislative intent to contrary, zoning authority must remain sacrosanct under ECL §23-0303(2), just as it is under the MLRL.

B. Legislative history of the state oil, gas and solution mining program indicates no intent to preempt municipal zoning authority

In *Cooperstown Holstein Corp. v. Town of Middlefield*, a case concerning preemption of ECL §23-0303(2) decided mere days after *Anschutz*, the trial court performed an extensive review of the legislative history concerning enactment of the state's oil, gas and solution mining programs. A careful look was justified as "both appropriate and necessary in determining what the intent of the legislation was at the time of the enactment."[36] Distilling down its review, the Supreme Court found that the original 1963 oil and gas law's "thrust was to establish a statewide management system for the utilization of these resources so as to encourage oil and gas drilling in the state in a uniform and productive fashion."[37] Subsequently, the 1978 amendments "recognized the need to centralize promotion of the state's energy resources under the authority of a single administrative body… [h]owever, no reference was made in the legislation, itself, nor

[35] NY ENVTL. CONSERV. LAW §23-0303(2) (enacted 1981).
[36] Cooperstown Holstein Corp., v. Town of Middlefield, 35 Misc.3d 767, 771 (N.Y. Sup. Ct. 2012).
[37] *Id* at 773.

any correspondence in support of the legislation, pertaining to the impact or preemption by the state of local municipal land use management."[38] And with the promulgation of the 1981 law, including section 23-0303(2), the Memorandum of Support clarifies that the purpose of the bill is to "promot[e] the development of oil and gas resources in New York and regulat[e] the activity of the industry" including "a fund to pay for past and future problems which resulted by the industry's activities" as "[t]he recent growth of drilling in the State has exceeded the capacity of DEC to effectively regulate and service the industry."[39] As the court concludes based on its substantive review of the legislative history, there is no indication that the 1981 amendments are intended to preempt, diminish or replace the authority of a municipality to enact legislation dictating permissible land uses within its jurisdiction.[40] Convincingly, the court demonstrated that ECL §23-0303(2), through both its legislative history and plain language statutory interpretation, does not abrogate municipal zoning authority.

Only one case directly involving ECL §23-0303(2) has come before the New York courts prior to *Anschutz* and *Middlefield*. *Matter of Envirogas, Inc. v. Town of Kiantone* dealt with the issue of supersession of a town ordinance which required an additional $2,500 compliance bond and $25 permit fee payable to the town prior to oil and gas production.[41] The Erie County Supreme Court held that this type of local law, which directly regulates oil and gas operations is expressly preempted by ECL §23-0303(2).[42] As bonding and permit fees are under the scope of the state regulatory program, a town law regulating the same subject matter is superseded. Yet note, importantly, that the holding in *Envirogas* illustrates what type of local oil and gas

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[38] *Id* at 775.
[39] *Id* at 775, 776.
[40] *Id* at 777.
[41] 112 Misc.2d 432, 434 (N.Y. Sup. Ct. 1982).
[42] *Id* at 433.

regulations are in impermissible conflict with state law. An express ordinance with intent to control the industry is struck down, but this situation is distinguishable from zoning ordinances that regulate land use generally, such as in the Town of Dryden. While land use laws can be harmonized with the state oil, gas and solution mining program, local regulation of operational and technical processes are in conflict with the intent of state law. Under this reading, ECL §23-0303(2) cannot be construed to infringe upon the validly-delegated lawmaking authority of local zoning powers.

C. ECL §23-0301 does not indicate that the state oil, gas and solution mining program preempts local zoning authority

Appellants, and Amici in support of Appellants, in their reliance on ECL §23-0301 (Declaration of policy), point to language concerning "development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had" and the concept of correlative rights as an indication that the state regulatory program is intended to allow mineral resource extraction over all other land uses.[43] Yet, a better understanding of the development of the law of oil and gas in New York State indicates that the correlative rights doctrine is not intended to foster primacy for fossil fuel extraction in contravention of traditional land use protections. Case law from the Appellate Division, Third Department, documents the historical governance of the common law principle of "rule of capture" over oil and gas resources.[44] This archaic rule of law, designed to encourage development in the vast, untamed, and seemingly limitless wilderness of the nascent United States allowed for any person who could exploit subsurface minerals into physical possession to rightfully own the materials, regardless of whether the resources came from under their property or the property of another. Accordingly,

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[43] *See* NY ENVTL. CONSERV. LAW §23-0301 (1981).
[44] Western Land Serv. v. NYSDEC 26 A.D.3d 15, 16 (N.Y. App. Div. 2005).

every landowner was forced to drill a well in order to claim the mineral resources beneath their land, leading to excessive wells and considerable waste.[45] To provide for "greater ultimate recovery of oil and gas" and "prevent waste," New York established well spacing units and replaced the "rule of capture" with the concept of "correlative rights."[46] Because landowners might be unable to drill a well directly on their own property due to spacing laws, correlative rights ensure pro rata compensation for any oil and gas removed from their mineral estate, regardless of the location of the well.[47] Oil and gas policy encouraging "greater ultimate recovery" is enhanced by spacing laws and the correlative rights doctrine, yet "greater" recovery does not mandate "maximum" recovery of mineral resources over all other land use management.

Neither the concept of "waste" nor of "correlative rights" imply any sort of hierarchical land use scheme imposed by the state preempting local zoning authority in favor of oil and gas extraction as the highest and best use of land. Simply, these two principles, which are now ingrained into the law dictating technical operation of oil and gas wells, do not expressly or impliedly speak to an intent to abrogate New York's longstanding municipal zoning protections, and to hold otherwise, and allow heavy industry unfettered access to every community across the state, regardless of risks to a local environment or economy, would create a dangerous precedent. Interpreting "waste" and "correlative rights" as part of the OGSML's regulation of the technical operations of mineral extraction is consistent with rulings of the courts below, which found "[n]owhere in the legislative history provided to the court is there any suggestion that the Legislature intended… to encourage the maximum ultimate recovery of oil and gas regardless of

[45] *Id.*
[46] *Id* at 17.
[47] *Id.*

other considerations, or to preempt local zoning authority."[48] Additionally, ECL §23-0301 also declares that oil and gas development be conducted in such a manner that "the rights of all persons including landowners and the general public may be fully protected." Many landowners and their municipal boards may decide that HVHF poses too much of a risk, or is incompatible with their community character, and local zoning control is vital to ensure their rights are, indeed, "fully protected." [49]

III. THERE IS NO LEGAL REQUIREMENT OR VESTED RIGHT FOR NATURAL RESOURCE EXTRACTION

A. Complete zoning exclusion of extractive industry is valid

Following the *Frew Run* decision, the legislature amended the MLRL in 1991 to expressly state that the statute would not prevent enactment or enforcement of local zoning ordinances.[50] In a subsequent challenge to the MLRL, the NY Court of Appeals reaffirmed its previous ruling that zoning which regulates land use generally was not the type of regulation the legislature sought to preempt under the MLRL.[51] Critically, the Court also addressed whether a town could *completely* zone out an industrial use as an exercise of their police powers. Noting that the "primary goal of a zoning ordinance … is to provide for the development of a balanced, cohesive community which will make efficient use of the Town's available land," the Court refused to extend the concept of exclusionary zoning, evidenced when an ordinance improperly

[48] Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458, 464 (N.Y. Sup. Ct. 2012).
[49] Such land use ordinances validly enacted through delegated zoning powers are a critical component of American democracy, allowing for land use decisions to be made at the local level by those who best understand their community, not as a "fickle whim of a municipal board" as has been suggested by Appellants.
[50] *See* N.Y. ENVTL. CONSERV. LAW §23-2703(2) (enacted 1991).
[51] Gernatt Asphalt Prods. Inc., v. Town of Sardinia, 87 N.Y.2d 668, 681-82 (N.Y. 1996).

excludes specific groups of people, to apply to the exclusion of industrial uses.[52] Judge Simons held that "[a] municipality is not obligated 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."[53] Even if a zoning ordinance prevents the operation of new mines there is "no vested right to have the existing zoning ordinance continue unchanged if the Town Board has rationally exercised its police power and determined that a change in the zoning was required for the well-being of the community."[54] Sardinia was concerned with potential negative environmental impacts, as well as the effects upon community character, the local agricultural economy, and issues of future growth in the face of expanded mining operations.[55] Here, the Court of Appeals has upheld municipal police power, as long as the rational basis test is satisfied.

Both the *Anschutz* and *Middlefield* cases noted this compelling precedent, and found no rationale to prevent a municipality from completely excluding an incompatible land use from its comprehensive plan. Accordingly, the Town of Dryden's amended zoning ordinance must be viewed as a valid use of home rule, exercised by the Town Board in light of legitimate concerns about large-

company alleged that they had acquired a vested right to mine, despite a zoning ordinance barring mining.[56] The vested right claim was made based upon the plaintiff's expenditures in excess of $240,000 to obtain the required permits; yet outlay of capital alone is insufficient to secure a vested right.[57] Rather, a property owner only acquires a vested right to complete a project when "substantial work is performed and obligations are assumed in reliance on a permit legally issued."[58] Here, the gravel company made efforts and expenditures with the mere hope of receiving a DEC permit, despite its knowledge of the restrictive zoning ordinance and the possibility that its mine would be fully precluded from operation.[59] The plaintiff failed to show that enforcement of the zoning law would be inequitable, despite its investment, and failed to show that it had acquired a vested right in reliance on a valid state permit.[60] In its holding, the Appellate Division, Third Department, reaffirmed the core principle of general municipal authority to regulate land use within its boundaries, upholding the zoning ordinance as a valid exercise of delegated land use powers, and stating that "[a] municipality retains general authority to regulate land use and to regulate or prohibit the use of land within its boundaries for mining operations, although it may not directly regulate the specifics of mining activities … [c]ontrol over permissible uses in a particular zoning area is merely incidental to a municipality's right to regulate land use within its boundaries."[61]

As recently as May of 2012, the Appellate Division, Third Judicial Department, reviewed the concept of vested rights with respect to natural resource extraction. Here, Cobleskill Stone Products sought to expand its mining operation to adjacent land, despite a recently-enacted

[56] 263 A.D.2d 849, 851 (N.Y. App. Div. 1999).
[57] *Id* at 851.
[58] *Id*, quoting Matter of Lefrak Forest Hills Corp. v. Galvin, 40 A.D.2d 211, 218 (N.Y. 1973).
[59] *Id.*
[60] *Id* at 851 -52.
[61] *Id* at 850.

zoning law that banned mining in the area. While the Court recognized that existing quarrying activity could continue as a non-conforming use under a special use permit, after reflecting upon changing circumstances and concerns that may affect a community, the ruling made clear that no vested right exists to have zoning ordinances remain static, as long as the police power was rationally exercised for the well-being of the municipality.[62] Where actual extraction of resources has yet to begin, there is no vested right. Clearly the same principle must be upheld with respect to oil and gas extraction in the Town of Dryden.

In a similar case, Glacial Aggregates LLC, a sand and gravel mining company, spent approximately $500,000 in applying for a valid DEC mining permit. When a subsequent local zoning ordinance prohibited mining on the parcel that Glacial Aggregates planned to mine, the company alleged a substantive due process violation and sought a non-conforming use designation to begin to operate the mine as a vested right. In its analysis, the Court of Appeals affirmed that a property owner obtains a vested right only "pursuant to a legally issued permit" and through "substantial changes and incurring substantial expenses to further the development."[63] Importantly, the two elements of this test must both be satisfied to validate a vested right for a non-conforming use, with the Court emphasizing that "neither the issuance of a permit nor the landowner's substantial improvements and expenditures, standing alone, will establish the right."[64] The subjective element of expenditures is satisfied only when "[t]he landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless."[65] Applying this test to Norse Energy and the Town of Dryden zoning ordinance, clearly no vested right to drill for

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[62] Cobleskill Stone Prod. v. Town of Schoharie, 2012 WL 1948307 (NYAD 3 Dept. 5/31/2012).
[63] *Id* at 136, quoting Town of Orangetown v. Magee, 88 NY2d 41, 47 (N.Y. 1996).
[64] *Id.*
[65] *Id.*

natural gas exists. No valid permit has been issued, and Norse has made no substantial improvements or expenditures to further development.

Addressing property rights deprivation and expenditures, the Court of Appeals notes that "[e]very zoning regulation, because it affects property already owned by individuals at the time of its enactment, effects some curtailment of 'vested' rights, either by restricting prospective uses or by prohibiting the continuation of existing uses."[66] Yet the court finds that in determining if a property interest faces undue deprivation by any particular zoning ordinance, a zoning restriction "almost always imposes substantial loss and hardship" when it prohibits an existing property use, incurring "a loss much greater that that sustained by reason of a prospective use restriction only."[67] Using this balancing test to scrutinize property rights, the court makes clear that restriction of a potential future use of real property does not incur as severe an economic loss for the owner as limitation of an existing use. Accordingly, the lease expenditures of Norse Energy in reliance on the mere possibility of legalization of HVHF in New York State do not reach the threshold of detrimental hardship necessary to uphold a vested right claim in face of a zoning ordinance that curtails a prospective use.[68]

In New York State, accordingly, there can be no vested right to hydrofrack in lieu of a "permit legally issued." Simply, the process has not been authorized in New York, and despite expenditures on lease agreements and regional operations, these activities are undertaken with

[66] People v. Miller, 304 N.Y. 105, 108 (N.Y. 1952).
[67] *Id.*
[68] The Appellant, a sophisticated oil and gas company which understands the nature of business risks, willingly and knowingly acquired leasehold agreements with landowners in Dryden with the full understanding that the procedure of HVHF had not been legalized in NY. Indeed, the predecessor in interest to Norse Energy, Anschutz Exploration Corp., has largely pulled out of New York, as record low natural gas prices have made drilling non-economic across much of the country. Note that existing conventional wells have been voluntarily shut down, as well, a sure indication that low gas prices are to blame for the industry's lack of interest in drilling in New York.

only an expectation of a future permit. This precatory activity on behalf of the oil and gas industry does not secure a vested right to drill when faced with a prohibitive zoning ordinance.

CONCLUSION

For the reasons stated above, Assemblywoman Barbara Lifton urges that the Town of Dryden's zoning ordinance be upheld as a valid exercise of home rule police power.

Dated: December 10, 2012
Albany, New York

Respectfully submitted,

____

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STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

NORSE ENERGY CORP. USA,
Petitioner-Plaintiff-Appellant,

-against-

Index No.: 515227

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.

BRIEF OF AMICI CURIAE PROFESSORS VICKI BEEN, RICHARD BRIFFAULT, NESTOR DAVIDSON, CLAYTON GILLETTE, RODERICK HILLS, JOHN NOLTON, ASHIRA OSTROW, PATRICIA SALKIN, CHRISTOPHER SERKIN, AND STWEART STERK

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IDENTITY AND INTEREST OF AMICUS CURIAE

The *amici* are professors of local government and land-use law at law schools in New York. Specifically, the *amici* are:

- Vicki Been, New York University Law School
- Richard Briffault, Columbia Law School
- Nestor Davidson, Fordham Law School
- Clayton Gillette, New York University law School
- Roderick M. Hills, Jr. New York University Law School
- John Nolon, Pace University Law School
- Ashira Ostrow, Hofstra Law School
- Patricia Salkin, Touro Law School
- Christopher Serkin, Brooklyn Law School
- Stewart Sterk, Benjamin N. Cardozo Law School

The *amici* have all devoted their scholarly careers to analyzing how authority over land use regulation ought to be divided between state and local governments. Their research interests are reflected by their scholarship analyzing (among other topics) the effects of neighbors' abutting land uses on each other's neighbors' property values,[1] local governments' adjustment of their level of zoning regulation to take into account the benefits and burdens imposed by land uses,[2]

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[1] *See, e.g.,* Stewart E. Sterk, *Neighbors in American Land Law*, 87 Colum. L. Rev. 55 (1987).

[2] *See, e.g.*, Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 Colum. L. Rev. 883 (2007); Stewart E. Sterk, *Municipal Competition as a Constraint on Land Use Exactions*, 45 Vand. L. Rev. 831 (1992); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 Colum. L. Rev. 473 (1991).

effects of high-intensity, industrial uses on the character of a community,[3] and the extent to which local governments can be expected to take into account regional and state-wide interests in proposed land uses when deciding whether to permit or exclude such uses within their territory.[4]

The *amici* do not have a direct personal stake in this litigation. They have instead a scholarly interest, based on decades of teaching and researching local government law and land-use regulation, in limiting the preemption of local government law to circumstances where local law interferes with some substantial state interest. Although each *amicus* has focused on different legal problems in their individual writing, all amici endorse the principle that, when an activity's effects are confined within a local government's boundaries or when local officials have incentives to consider the extra-local benefits of the activity, then the officials presumptively best suited to regulate those effects are those who are elected by residents of the local jurisdiction most affected by that activity. *Amici*'s brief *amicus curiae* advances this scholarly interest in insuring that state preemption of local zoning goes no further than necessary to protect state interests in controlling inter-local effects of zoning, while leaving intact local protections for residents' quiet enjoyment of their property.

INTRODUCTION

This case raises the issue of how courts should construe local governments' zoning power when the state legislature has expressed no unambiguous purpose to repeal such power and when

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[3]*See, e.g.*, Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. Land Use & Envtl. L. 1 (1995); John R. Nolon, *Discovering Local Environmental Law*, 25 Zon. & Plan. L. Rep. 73 (Nov. 2002).

[4] *See, e.g.*, Patricia E. Salkin, 2 Am. Law. Zoning § 10 (5th ed. 2012) (on metropolitan and regional land use planning); Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes,* 48 Harv. J. on Legis. 289, 319-21 (2011); Ashira Pelman Ostrow, *Land Law Federalism*, 61 Emory L.J. 1397, 1410-22 (2012); Nestor M. Davidson, *Cooperative Localism: Federal-Local Cooperation in an Era of State Sovereignty,* 93 Va. L. Rev. 959 (2007); Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law,* 80 Va. L. Rev. 625 (1994); Richard Briffault, *Our Localism: Part I--The Structure of Local Government Law*, 90 Colum. L. Rev. 1 (1990).

local communities have taken different positions about whether to use that power to exclude an activity over which they are deeply divided. *Amici* respectfully urge a simple principle by which to resolve the impasse when state legislative purpose is unclear: Presume that state law does not preempt local zoning laws, unless those laws encroach on some substantial state interest that local residents are likely to ignore. This presumption allows each local government to make up its own mind about controversial development activities until the state legislature squarely addresses whether and how to protect landowners' quiet enjoyment of their property from the collateral effects of a controversial industrial use.

There can be no doubt that New Yorkers have strongly differing views about the extraction of natural gas through hydraulic fracturing. Some communities regard hydraulic fracturing as an economic boon and a source of clean, abundant energy. Based on these beliefs, over forty municipalities over the Marcellus Shale have passed resolutions in support of hydraulic fracturing. Brief *Amici Curiae* of Business Council *et al.* at 25-26. By contrast, other communities believe that hydraulic fracturing poses unknown but potentially grave environmental risks as well as the certainty of noise, traffic, aesthetic blight, and loss of community character. Two such communities, the Towns of Dryden and Middlefield, have enacted zoning amendments to exclude gas and oil drilling based on such traditional zoning considerations.

There can also be no serious pretense that the state legislature, through the Oil, Gas, and Solution Mining Law ("OGSML") has resolved this division of opinion among localities by expressing some unambiguous purpose to repeal local governments' power to exclude gas drilling through zoning law. When the OGSML was enacted in 1981, neither the widespread use of hydraulic fracturing nor its exclusion through local zoning law existed: As a result, neither

the text nor the legislative history of the OGSML specifically reference local zoning power's exclusion of such a use of land.

In these circumstances of statutory ambiguity, both deeply rooted legal tradition and democratic accountability point in the same direction: Allow each local government to make a democratically accountable decision about whether to allow or forbid gas drilling. Such a presumption against preemption is required by Article IX, §3(c) of the New York Constitution, which provides that the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed." The presumption against preemption is also required by the longstanding canon against implied repeal, because preemption of zoning power by the OGSML would repeal *pro tanto* pre-existing state statutory delegations of zoning power contained in enabling laws like New York's Municipal Home Rule Law and Town Law.

This presumption against preemption has special force when one local government's exclusion of an industrial activity does not prevent other communities from permitting the activity and when each local government has incentives to balance the activity's costs and benefits. Under such circumstances, each community can make up its own mind until the state legislature speaks clearly about whether and how to address traditional zoning concerns at the state level. Any implied preemption of the zoning laws at issue here would destroy democratic accountability, by sweeping away zoning laws on which neighbors depend for the quiet enjoyment of their real property in the name of a judicially invented purpose of maximizing resource extraction over all else. That purpose appears nowhere in OGSML: Democratic accountability requires that the enforcement of such an unwritten purpose should not be imposed by judicial fiat but instead await the state legislature's clear endorsement.

ARGUMENT

I. ECL §23-0303(2) SHOULD BE CONSTRUED IN LIGHT OF A PRESUMPTION AGAINST PREEMPTION OF LOCAL LAW BY AMBIGUOUS STATE STATUTES.

The lower court's holding regarding express preemption turns on the meaning of the supersedure clause of New York's Oil, Gas, and Solution Mining Law ("OGSML"), codified at ECL §23-0303(2), which provides that

> 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.

Amici agree with the court below that the plain meaning of this text does not preempt the Towns of Dryden's and Middlefield's zoning prohibitions of gas and oil drilling. If, however, this court finds that this text is ambiguous on the question of preemption, then *amici* respectfully urge this court to resolve the ambiguity by applying a presumption against state preemption of local law described below.

There is a need in New York for such a judicial clarification of the basic framework within which disputes about preemption are analyzed. The problem of preemption frequently recurs before New York's courts. Patricia E. Salkin, 1 N.Y. Zoning Law & Prac. § 4:22 (describing conflicts between state law and local zoning laws). Although each such case turns on the details of the particular disputed state statute and local law, such decisions also implicate larger principles of local democracy immanent in the state constitution and the state's legal traditions. Those principles and traditions can easily be lost in the competing litigants' exhaustive, exhausting, and ultimately fruitless parsing of often ambiguous textual minutiae.

Toward the end of bringing these principles and traditions to bear on the problem of preemption, *amici* respectfully urge a canon of construction, drawn from legal principles and traditions defining local democracy in New York, that disfavors state preemption of local zoning laws. Under this presumption, where state statutes are silent about the statute's effect on zoning laws and provide no substitute protection for property owners' quiet enjoyment of land, then such statutes should be presumed not to preempt local zoning laws, unless local law encroaches on some substantial state interest that local residents are likely to ignore. *Amici* urge that such a presumption against preemption is required not only by Article IX, §3(c) of the New York Constitution and the canon against implied repeal but also implied by the likely intent of the state legislature as well as basic principles of democratic accountability. If the state legislature has expressed no clear view on some local law, then judicial preemption of such a law under the aegis of the ambiguous state statute deprives local voters of the benefits of local democracy without advancing any democratically ratified policy of state lawmakers. By staying the judicial veto of local law until state lawmakers have plainly spoken, the courts best assure that some democratically elected body, state or local, will speak directly to the interests in quiet enjoyment of land protected by zoning.

A. Article IX §3(c) of the New York Constitution requires a presumption against state statutory preemption of local law.

Article IX, §3(c) of the New York Constitution provides that "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed." This constitutional requirement has also been codified by section 51 of the Municipal Home Rule Law, which provides that home rule powers "shall be liberally construed." These requirements of liberal construction apply to towns' powers to enact zoning laws, which are derived not only

from specific delegations of power contained in the Town Law but also the Municipal Home Rule Law. *See, e.g., Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 432-33 547 N.E.2d 346, 351, 548 N.Y.S.2d 144, 149 (1989) (recognizing towns' power to enact zoning rules pursuant to §10 of the Municipal Home Rule Law); *Pete Drown Inc. v. Town Bd. of Town of Ellenburg*, 188 A.D.2d 850, 852, 591 N.Y.S.2d 584, 585-586 (3d Dept. 1992) (same).

Article IX, §3(e) necessarily implies that the state statutes' preemption clauses, where ambiguous, be narrowly construed, because towns' "[r]ights, powers, privileges and immunities" are defined by those state laws that abrogate such powers just as much as by state laws delegating such powers. Put simply, local governments' powers cannot be "liberally construed" unless state statutes' preemption clauses are narrowly construed.

The plain language of Article IX, §3(c), therefore, calls for a presumption against preemption when state statutory text is ambiguous. While there is little relevant New York precedent construing Article IX, §3(c), precedents from other states construing analogous "liberal construction" clauses follow the common-sensical reading of the clause as containing a presumption against preemption. In *Neri Bros. Const. v. Village of Evergreen Park*, 363 Ill. App. 3d 113, 841 N.E.2d 148 (Ill. App. 3d 2005), for instance, the court held that a village's power to impose liability on persons who released hazardous natural gas as a result of damaging a utility line was not preempted by an Illinois statute making the prevention of damage to utility lines a matter of exclusive state-wide concern. The Illinois statute contained a lengthy preemption clause providing that "[t]he regulation of underground utility facilities ... damage prevention ... is an exclusive power and function of the State" and that "[a] home rule unit may not regulate under-ground utility facilities ... damage prevention...." Despite this explicit language, the *Neri Bros.* court held that the village's ordinance imposing the cost of cleaning up

discharge of natural gas on a subcontractor who broke a gas line was not preempted by state law, because the village's law was aimed at a goal different from the purpose of state law -- recouping remediation expenses rather than preventing negligent damage to utility lines. In rejecting preemption of local law, *Neri Bros.* relied on Article VII, § 6(m) of the Illinois Constitution's clause, which provided that the "[p]owers and functions of home rule units shall be construed liberally," a provision that, according to *Neri Bros.*, required that "any limitation on the power of home rule units by the General Assembly must be specific, clear, and unambiguous." *Neri Bros. Const*, 363 Ill. App. 3d 113, 119, 841 N.E.2d 148, 152 (Ill. App. Ct. 2005).

Neri Bros.' approach to the state constitutional admonition that local powers be "liberally construed" is compelled by the plain terms of the constitutional phrase and should, therefore, be adopted by this court. As a matter of plain logic, the court cannot "liberally construe[]" local power without narrowly construing limits on that power. It follows that this court should not find preemption of the Towns' zoning laws unless ECL §23-0303(2)'s application to those laws is, in *Neri Bros.'* phrase, "specific, clear, and unambiguous."

B. The canon against implied repeal requires a presumption against state statutory preemption of local zoning authority.

The presumption against preemption of local zoning authority is not only a constitutional principle but also a specific application of the well-established canon of statutory construction that "[r]epeals 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." N.Y. Stat. Law § 391 (McKinney 2012); 97 N.Y. Jur. 2d Statutes § 78 (2d ed. 2012). State statutes such as the Town Law or Home Rule Law must authorize every valid exercise of valid zoning authority in New York . Patricia E. Salkin, 1 Am. Law. Zoning § 2:8 (5th ed. 2012) (explaining that towns' zoning power in New York is derived from "zoning enabling statutes or from

charters promulgated by special act of the state legislature, or adopted pursuant to the Municipal Home Rule Law, a state legislative act"); Patricia E. Salkin, 1 N.Y. Zoning Law & Prac. §§2.08, 2:12 (2012) (describing zoning authority of towns under Town Law and Municipal Home Rule Law respectively). The judicial inference that a state statute preempts a local zoning law, therefore, also constitutes, by definition, an inference that the same state statute repeals an earlier state statutory delegation of zoning authority. Under the canon against implied repeal, such an implied repeal of a state statutory delegation of zoning power should be disfavored unless plainly required by the text or unwritten purpose of the allegedly preemptive state law. *See* Patricia E. Salkin, 4 Am. Law. Zoning at § 41:13; *Fammler v. Board of Zoning Appeals of Town of Hempstead*, 254 A.D. 777, 4 N.Y.S.2d 760 (2d Dept. 1938) (holding that four-month time limit for filing petition in Article 78 of Civil Procedure Law did not repeal 30-day time limit contained in §267 of Town Law for petitions to boards of zoning appeals and noting that "[w]here statutory construction in seeking the intent of the Legislature will have such far-reaching effect as would be the case here, the repeal of workable statutes by implication is not favored"); *Emerson College v. City of Boston*, 393 Mass. 303, 306, 471 N.E.2d 336, 338 (1984) (holding that Boston's zoning law was not preempted by state law on ground that "local regulations are presumed valid unless a sharp conflict exists between the local and the State regulation").

The canon against implied repeal as applied to zoning authority reflects not only deeply rooted legal tradition but also the likely intent of the state legislature. Zoning authority is one of the most frequently exercised forms of local power, pervasively affecting virtually every resident of New York. Towns have exercised such zoning power for over eight decades, since the New York legislature delegated zoning authority to them in 1926. *See* Act of Apr. 30, 1926, ch. 714, 1926 N.Y. Laws 1280 (amending Town Law to authorize towns to create zoning districts). The

tenacious character of towns' zoning authority is not an accident; it is the result of the popularity of local control with local voters who seek power over matters immediately affecting their vital interests – in particular, power over changes in the character of their neighborhood that could affect the value of owner-occupied homes. *See* William A. Fischel, The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School, Finance and Land Use Policies 80-82 (Harvard University Press 2001)(describing incentives of homeowners to be attentive to local land-use policies to protect value of owner-occupied housing); Richard Briffault, *Smart Growth and American Land Use Law,* 21 St. Louis U. Pub. L. Rev. 253, 267-68 (2002); Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 Harv. J. on Legis. 289, 295 - 98 (2011). It is not plausible that the state legislature would casually and by mere implication cast aside the popular and deeply entrenched principle of local control over land use. Instead, courts should presume that, if the state legislature intended to uproot such a longstanding power of local governments, then the legislature would have said so explicitly. *Town of Brookhaven v. New York State Bd. of Equalization and Assessment*, 88 N.Y.2d 354, 361, 668 N.E.2d 407, 412 (1996) (holding that town's right to receive transition assessments under RPTL § 545 is not preempted by Long Island Power Authority Act and noting that "the Legislature is hardly reticent to repeal statutes when it means to do so"); *Hunter v. Warren County Bd. of Supervisors*, 21 A.D.3d 622, 624, 800 N.Y.S.2d 231, 234 (3d Dept. 2005) (holding that county's authority under state enabling act to impose tax is not repealed by implication by specific grants of power to other counties).

That the zoning power over mineral extraction is, in particular, protected by the canon against implied repeal is implicitly recognized by *Frew Run Gravel Products v. Town of Carroll,* 71 N.Y.2d 126, 518 N.E.2d 920 (1987), the precedent most closely analogous to the dispute in

this case. In *Frew Run*, the Court held that the supersedure clause of the New York Mined Land Reclamation Law, MLRL§23-2703(2), which provided that "this title shall supersede all other state and local laws relating to the extractive mining industry," did not preempt the Town of Carroll's ban on sand and gravel mining in AR2 zoning districts. In reasoning that the Town's zoning classification did not "relat[e] to the extractive mining industry," the *Frew Run* court noted that "read[ing] into ECL 23-2703(2) an intent to preempt a town zoning ordinance prohibiting a mining operation in a given zone...would drastically curtail the town's power to adopt zoning regulations." To avoid such "drastic[] curtail[ment]" of towns' zoning powers, the *Frew Run* court adopted a presumption holding that any interpretation of the Mined Land Reclamation Law "should be avoided" if it would "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." *Frew Run,* 71 N.Y.2d at 133-34. In adopting this presumption that state regulation of mining does not oust local governments from simultaneously regulating land use, *Frew Run* is consistent with similar presumptions against preemption of adopted by other states. *See, e.g.,* Jan G. Laitos & Elizabeth H. Getches, *Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development,* 23 Va. Envtl. L.J. 1, 15 (2004) ("Typically, local governments are not totally preempted by state oil and gas agencies, unless 'the effectuation of a local interest would materially impede or destroy the state interest.'"); Patricia E. Salkin, 3 Am. Law. Zoning § 18:55 (5th. ed. 2012) ("State mining laws generally do not preempt local governments from enacting more stringent requirements on mining....").

C. The presumption against preemption of local law advances local democratic accountability without interfering with the state legislature's power over matters of statewide concern.

It is a truism of local government law in New York and other states that local governments are creatures of state law the powers of which can be destroyed or altered by the state legislature. Patricia E. Salkin, 1 Am. Law. Zoning § 1:1 (5th ed. 2012) ("It is the prevailing view that such a corporation is a creature of the state, possessed of those powers granted to it by constitution or by statute."). Under the New York Court of Appeals' longstanding interpretation of Article IX, §2(b)(2), the state legislature may, if it chooses, preempt a local law dealing with a local government's "property, affairs, and government" just so long as some substantial state interest justifies such preemption. *Adler v. Deegan*, 251 N.Y. 467, 489-90, 167 N.E. 705, 713 (1929) (Cardozo, C.J., concurring). There is, moreover, no doubt that state legislation dealing expressly with zoning of land can address a matter of statewide concern. *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 492, 393 N.Y.S.2d 949, 951, 362 N.E.2d 581, 583 (1977).

The presumption against preemption, however, in no way constrains the state legislature's power to preempt local zoning measures, because the presumption applies only where state statutes are ambiguous enough to require judicial construction. Where a state statute *unambiguously* preempts local law, then the latter must give way to the former. *Town of Islip v. Cuomo,* 64 N.Y.2d 50, 56, 473 N.E.2d 756, 759, 484 N.Y.S.2d 528, 731 (1984) (Article IX, §3(e)'s "liberal construction" provision has no application to state statute unambiguously barring landfill). Where state statutes are less clear about their preemptive purpose, however, Article IX, §3(c) instructs the court to presume that the state legislature intended not to preempt local governments' powers. Far from limiting the state legislature's supremacy over local government, such a rule of construction actually protects the state legislature's likely intent by

insuring that the courts do not transform the state legislature's silence into a judicially crafted veto on local laws. If mere silence in a state statute constituted a veto over local laws, then "the power of local governments to regulate would be illusory," destroying "the essence of home rule." *People v. Cook*, 34 N.Y.2d 100, 109, 356 N.Y.S.2d 259, 266, 312 N.E.2d 452, 457 (1974).

There is no reason to assume that the state legislature would desire such a result. Given that the state legislature enacts statutes against a backdrop of New York's traditions of strong local democracy, the safest assumption to make about vague statutory language is that the state legislature intended to leave local laws in place. By requiring some plain statement of an intention to supersede a particular category of state law, the presumption against preemption safeguards the state legislature's likely unspoken intention that local officials shall continue controlling matters of local concern until the state legislature has had the opportunity to deliberate specifically about the costs and benefits of such local policy-making.

D. The presumption against preemption applies with special force when the state statute alleged to preempt local zoning provides no substitute protections for neighbors' quiet enjoyment of their property.

The presumption against preemption of local law is especially appropriate when a state statute alleged to preempt local zoning law contains no substitute protections for landowners' quiet enjoyment of their property. Preemption of zoning laws by such statutes so burdens local landowners' property rights that it is implausible to attribute to the legislature a preemptive purpose.

By protecting landowners' rights of quiet enjoyment against nearby activities that would otherwise impose noise, traffic, and aesthetic harms, zoning laws serve the same purposes as the common law of nuisance. *See, e.g., Euclid v. Ambler Realty*, 272 U.S. 365, 387-88 (1926)

("[T]he law of nuisances likewise may be consulted not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the [zoning] power."); *see* Vicki Been, *'Exit' as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine,* 91 Colum. L. Rev. 473, 488 (1991) ("When it seeks to regulate such harms [imposed by land users on their neighbors], land use regulation is analogous to nuisance law."). Zoning law, however, provides a more complete and administratively efficient remedy against disruptions of quiet enjoyment than private nuisance claims, because the latter traditionally does not protect landowners from aesthetic harms like loss of a neighborhood's character or loss of light and air. *See, e.g., Blair v. 305-313 East 47th Street Associates*, 123 Misc.2d 612, 613, 474 N.Y.S.2d 353, 355 (N.Y.Sup.1983) (nuisance law provides no easements for light and air); *Dugway, Ltd. v. Fizzinoglia*, 166 A.D.2d 836, 836, 563 N.Y.S.2d 175, 176 (3d Dept. 1990) (allegation that "assorted debris and an uninhabitable trailer" constitutes "eyesore, insufficient basis for claim of private nuisance); 81 N.Y. Jur. 2d Nuisances § 17 ("Things merely disagreeable, however, which simply displease the eye or offend the taste, or shock an oversensitive or fastidious nature, no matter how irritating or unpleasant, are not nuisances."). Indeed, supporters of zoning in the early twentieth century defended the constitutionality of zoning by emphasizing "the utter inadequacy of the law of nuisances to cope with the problems of municipal growth." *See, e.g.*, Alfred Bettman, *Constitutionality of Zoning*, 37 Harv. L. Rev. 834, 836-38, 841 (1924).

Local zoning laws, therefore, have become a substitute for the common-law of nuisance on which landowners rely to safeguard their interest in quiet enjoyment of their land. Courts universally recognize that, just as the arbitrary preemption of nuisance law deprives landowners of property without due process of law, *see, e.g., Bormann v. Board of Supervisors,* 584 N.W.2d

309 (Iowa 1998) (holding that "right-to-farm" law unconstitutionally deprived neighboring landowners of property by preempting nuisance law), so too, the arbitrary elimination of zoning's protections can deprive neighboring landowners of their property interest in quiet enjoyment. *See, e.g., Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 123-24, 96 N.E.2d 731, 734-735 (1951) (describing unconstitutional "spot zoning" as the "singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners"); *Morrison v. Matt-A-Mar, Inc.*, 36 A.D.2d 844, 321 N.Y.S.2d 521 (2d Dep't 1971) (allegation that zoning authorizing marina to detriment of neighboring landowners raises triable issue of fact as to illegal spot zoning).

Given the importance of zoning for the protection of landowners' property rights, courts should not lightly infer that a state statute has swept aside local zoning laws without providing any substitute protection for landowners. Such an inference is improbable for two reasons. First, such an interpretation of state law arbitrarily burdens the property rights of neighboring property owners. Indeed, the states' arbitrarily favoring gas and oil developers' extraction of minerals over neighbors' rights of quiet enjoyment, without any regard for comprehensive planning or the weighing of relative burdens and benefits, could constitute a deprivation of the neighbors' property without due process of law. *See, e.g., Carnat Realty, Inc. v. Town of Islip*, 34 A.D.2d 780, 781, 311 N.Y.S.2d 239, 241 (2d Dep't 1970); *Freeman v. City of Yonkers*, 205 Misc. 947, 956, 129 N.Y.S.2d 703, 710 (Westchester Cnty. Ct. 1954) (illegal spot zoning to grant zoning map amendment for gas station to detriment of neighborhood). At least one court has held that even the selective elimination of zoning through a state-wide law benefiting mineral rights over all other forms of property, constitutes a deprivation of right to quiet enjoyment of property

without due process of law. *See, e.g., Robinson Twp. v. Commonwealth*, 52 A.3d 463, __ (Pa. Commw. 2012) (holding that state statute eliminating local power to impose zoning restrictions on oil and gas drilling unconstitutionally deprives neighboring landowners of property).

Second, quite apart from arbitrarily burdening one class of property rights, such a construction of ambiguous state statutes attributes to the state legislature an improbable purpose of blindly ignoring sound land-use planning principles. Even land uses that the state legislature seeks to encourage can impose local costs on a neighborhood that exceed their value to the state when sited in a particularly sensitive area. William A. Fischel, The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls 63-65 (1985). It defies common sense to attribute to the state legislature the goal of fanatically promoting one particular land use against all rival uses, regardless of the unsuitability of a neighborhood for the favored use, without providing some mechanism whereby the damage that the state-favored use might inflict on particular neighborhoods can be compared to the benefits of the allegedly favored use. As the decision below indicated, the state legislature normally includes procedures for substantial local participation when state statutes expressly repeal zoning. *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc.3d at 466-67, 940 N.Y.S.2d at 471-72 (2012) *Anschutz Exploration Corp. v. Town of Dryden* (describing procedures in Mental Hygiene Law for taking neighbors' views into consideration in siting of community residences). Likewise, federal laws that preempt local zoning for uses like telecommunications towers in which there is a substantial national interest typically include elaborate provision for local participation in the siting decision. *See generally* Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes,* 48 Harv. J. on Legis. 289 (2011). Absent strong evidence to the contrary, it is implausible believe that the state legislature would depart from the customary solicitude for neighbors' interests in siting of locally

undesirable land uses. Therefore, courts ought not to construe a state statute to eliminate zoning restrictions for a particular type of land use unless the state statute provides some procedure whereby the decision to site that land use takes into account the costs that the use will impose on its neighbors.

E. The presumption against preemption applies with special force when local laws do not affect any substantial state interest that local residents are likely to ignore.

Because "zoning often has a substantial impact beyond the boundaries of the municipality," the court in examining an ordinance, should take into consideration not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities." *Berenson v. Town of New Castle,* 38 N.Y.2d 102, 110-111, 378 N.Y.S.2d 672, 681, 341 N.E.2d 236, 242-243 (1975) (defining local governments' obligations to accommodate multi-family housing in their zoning laws). When local governments enact "parochial or exclusionary ordinances" that "impose substantial and tangible social costs on other communities without any sacrifice by the city benefiting from the ordinance," then there is a stronger basis for inferring that the state legislature intended to displace local law with exclusive state-wide legislation. Paul Diller, *Intrastate Preemption,* 87 B.U. L. Rev. 1113, 1160 (2007). By contrast, if local laws balance the costs and benefits of a proposed land use such that "regional needs are presently provided for in an adequate manner," *Berenson,* 38 N.Y.2d at 111, 341 N.E.2d at 242-43, 378 N.Y.S.2d at 681, then there is less reason to construe ambiguities in state law to preempt local laws.

As Professor Diller notes, the strongest case for preemption is presented by local zoning that excludes land uses needed by the region while inflicting no sacrifice on the government enacting the zoning law. *See* Diller, *Intrastate Preemption*, 87 B.U.L. Rev. at 1160-64; *see also* Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 Va.

L. Rev. 625, 628 (1994) (describing local governments' imposing costs on neighboring communities as "expropriation"). Local governments' exclusion of low-income housing constitutes the paradigm of such parochial exclusion: Each local government has incentives to exclude low-income multi-family structures to avoid the fiscal costs of hosting land uses that generate higher expenditures than revenues, but the net effect of such "NIMBYism" can be a regional shortfall in housing. *NAACP v. Twp. of Mount Laurel*, 67 N.J. 151, 162-165, 336 A.2d 713, 719-20 (N.J. 1975) (describing fiscal incentives to exclude affordable housing through zoning); William A. Fischel, The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls 293-315 (1985) (summarizing literature on voters' incentives to exclude low- and moderate income housing because it generates low property tax revenue but high expenditures for schools); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 Stan. L. Rev. 115, 1126 (1996) (describing fiscal incentives to exclude affordable housing); Ashira Pelman Ostrow, *Land Law Federalism*, 61 Emory L.J. 1397, 1411-16 (2012). Recognizing the risk that each local governments' total exclusion of housing types could lead to a regional housing shortage, New York courts have held that "[a] community may not use its police power to maintain the *status quo* by preventing members of lower and middle socioeconomic groups from establishing residency in the municipality." *Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 683, 664 N.E.2d 1226, 1235, 642 N.Y.S.2d 164, 173 (1996); *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville*, 51 N.Y.2d 338, 343, 414 N.E.2d 680, 682 (1980) (zoning ordinance will be invalidated "if it was enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect"). The total exclusion of multi-family housing in the face of a proven regional need for

such housing, therefore, is presumptively prohibited. *See, e.g., Continental Bldg. Co., Inc. v. Town of North Salem*, 211 A.D.2d 88, 92, 625 N.Y.S.2d 700, 703 (3rd Dep't 1995).

New York courts, however, have never held that the total exclusion of a private industrial use such as a mine or drilling operation is presumptively forbidden. To the contrary, the Court of Appeals has expressly distinguished between the total exclusion of housing types and the total exclusion of industrial uses, permitting a small rural community to exclude mining operations from every zoning district. *Matter of Gernatt Asphalt Prods.*, 87 N.Y.2d at 684, 642 N.Y.S.2d at 174, 664 N.E.2d at 1235 ("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.").

This distinction between residential and industrial uses, firmly rooted in legal doctrine, also makes sense as a matter of policy. It is a familiar principle of political economy that local governments can be trusted to make efficient decisions to the extent that they internalize the costs of their decisions. William A. Fischel, The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls 125-49 (1985). Unlike low- and moderate-income housing, industrial uses generally generate economic benefits for the residents of a local government, including fiscal benefits from increased property tax yields, royalties and lease payments for local landowners, indirect economic benefits for local retailers from sales to oil and gas workers, and jobs for local residents.[5] Moreover, the zoning process allows industrial

[5] Concerning the extraction of gas through hydraulic fracturing, for instance, the Department of Environmental Conservation's Supplemental Generic Environmental Impact Statement predicts that "[c]onstruction and operation of the new natural gas wells are expected to increase employment, earnings, and economic output throughout the state." New York State Dep't Envtl. Conservation, Revised Draft Supplemental Generic Environmental Impact Statement, 6-211 (Sept. 2012), *available at* http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisch6a0911.pdf (last viewed December 7, 2012). The new employees and contractors attracted by well construction would also produce indirect benefits for local

enterprises to offer assurances and conditions safeguarding local property values from burdens on quiet enjoyment, thereby muting local opposition to the proposed industrial use. William A. Fischel, The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls 82-96 (1985) (describing bargaining between town and pulp mill over conditions necessary to mitigate nuisance costs of latter); Town Law, §267-b(4) (describing power of zoning board of appeals to impose "reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property"); §274-b (describing special permit process by which towns can mitigate detrimental effect of land uses). As Professor Fischel observes, if the market value of a proposed industrial use equals or exceeds the burden that it imposes on the neighbors' quiet enjoyment of their land, then the industrial use will not be deterred by conditions that that mitigate the nuisance costs that the use imposes on neighboring lots.

These economic incentives insure that local governments will not uniformly and single-mindedly exclude an industrial use for which there is a regional need, because that regional need will be reflected in the amount that the industrial user will bestow on local voters in the form of lease payments, royalties, wages, and property taxes in exchange for the right to drill. By excluding an industrial use, local officials and their constituents forego these considerable economic benefits, surrendering them to competing local governments that are less sensitive to the environmental impacts or more eager for local economic development. *See* Vicki Been, *"Exit" As a Constraint on Land Use Exactions: Rethinking the Unconstitutional. Conditions Doctrine*, 91 Colum. L. Rev. 473, 478–83 (1991) (describing incentives of local governments to

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merchants and retailers, "[a]s the new construction and operations workers spend a portion of their payroll in the local area." *Id.* at 6-214. Likewise, the industrial development required by hydraulic fracturing would increase the property tax receipts of the local governments in which such wells are sited, and such "increase in ad valorem property taxes would have a significant positive impact on the finances of local government entities." *Id.* at 6-262.

reduce burdens on land development in exchange for economic benefits conferred by such development). Indeed, as the Amicus Brief of the Business Council of New York State notes, over forty municipalities in the heart of the Marcellus Shale have adopted resolutions favorable to the development of natural gas through hydraulic fracturing – a larger number of municipalities than the number that have enacted moratoria or prohibitions. Brief *Amici Curiae* of Business Council *et al.* at 25-26 (describing resolutions by "over forty municipalities" in support of hydraulic fracturing as opposed to 30 municipal bans on hydraulic fracturing).

There is, in sum, no reason to infer that local governments will use their zoning authority uniformly to exclude industrial uses and thereby eliminate a use for which there is a regional need. Instead, it is at least as likely that each local government, reflecting the relative preferences of their voters for economic development or environmental quality, will insure that industrial development occurs in the area where it is most needed and least likely to inflict harms in excess of its benefits. Given these incentives to zone industrial uses through "a properly balanced and well-ordered plan for the community" that "adequately consider[s] regional needs and requirements," *Continental Bldg. Co., Inc. v. Town of North Salem*, 211 A.D.2d 88, 92, 625 N.Y.S.2d 700, 703 (3d Dept. 1995), there is no reason to abandon the usual presumption against preemption that protects local zoning laws.

II. READ IN LIGHT OF THE PRESUMPTION AGAINST PREEMPTION, ECL §23-0303(2) DOES NOT PREEMPT THE ZONING PROHIBITIONS ON OIL AND GAS DRILLING ENACTED BY THE TOWNS OF DRYDEN AND MIDDLEFIELD.

Amici agree with the decision below that, read in light of *Frew Run Gravel Products v. Town of Carroll*, 71 N.Y.2d 126, 518 N.E.2d 920 (1987), the text of ECL §23-0303(2) does not preempt the zoning laws of the Towns of Dryden and Middlefield. Assuming, however, that this court does not find the preemptive scope of §23-0303(2) to be unambiguous, *amici* submit that

the supersedure clause does not, at the very least, *unambiguously* bar local zoning directed towards traditional zoning purposes. Given the absence of any plainly preemptive text or purpose, this court can uphold the decision below finding no preemption of the Towns of Dryden's and Middlefield's zoning laws on the basis of the presumption against preemption, because, under the criteria urged above by *amici*, the OGSML presents an easy case for applying the presumption against preemption.

A. The Towns of Dryden's and Middlefield's zoning laws do not unambiguously "relat[e] to the regulation of the oil, gas, and solution mining industries."

ECL §23-0303(2) preempts the Towns of Dryden's and Middlefield's zoning laws only if an exclusion of oil and gas drilling and exploration from every zoning district within the Town "relat[es] to the regulation of the oil, gas, and solution mining industries." *Amici* agree with the reading of the plain text of ECL §23-0303(2) set forth by the decision below and have little to add to that decision's interpretation of the supersedure clause. *Amici* add only that, even if one were to deem the meaning of ECL §23-0303(2) to be less plain, it is indisputable that the phrase "relating to the regulation of the oil, gas, and solution mining industries" is, at the very least, ambiguousas it applies to traditional zoning laws.

In particular, it is at least unclear whether a local law "relate[s] to the regulation of" the covered industries if the law merely affects those industries. As Justice Scalia has noted, trying to extract specific meaning from the bare text of a preemption clause containing the phrase "relates to" is "a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *California Div. of Labor Standards v. Dillingham*, 519 U.S. 316, 336 (1997) (Scalia, J., concurring). A broadly literalistic reading of ECL §23-0303(2) could lead to the absurdity of exempting gas and oil drilling operations from every local law -- general parking regulations, anti-littering rules, bans on late-night noise – that affected those

operations, even if the purpose of such laws had nothing whatsoever to do with the extraction of natural resources as such. By defining the supersedure clause to preempt only local laws directed at the operations and techniques for extracting minerals while excluding local laws having "traditional land use concerns" of controlling noise, traffic, or aesthetic incompatibility, the decision below reasonably construed ECL §23-0303(2). *Anschutz Exploration Corp. v. Town of Dryden,* 35 Misc.3d 450, 465, 940 N.Y.S.2d 458, 470 (2012) ("None of the provisions of the OGSML address traditional land use concerns, such as traffic, noise or industry suitability for a particular community or neighborhood.").

Amici urge that this court can uphold such a reasonable interpretation of the supersedure clause on the basis of the presumption against preemption. As explained below, ECL §23-0303(2) makes no provision whatsoever for weighing the burdens imposed by gas and oil drilling on surface owners' quiet enjoyment of land. By contrast, local governments have ample incentives to consider the fiscal and employment benefits of oil and gas drilling. Given these two considerations, the presumption against preemption of local law should apply, and the decision below, upheld.

B. New York's Oil, Gas, and Solution Mining Law contains no standards or procedures for protecting neighbors' quiet enjoyment of their property from industrial uses.

As the decision below noted, the OGSML contains no substitutes for the protections of quiet enjoyment of property provided by local zoning laws. Instead, as the lower courts have recognized, the OGSML addresses only "technical operational concerns," ignoring "traditional land use concerns, such as traffic, noise or industry suitability for a particular community or neighborhood." *Anschutz Exploration Corp. v. Town of Dryden,* 35 Misc.3d 450, 465, 940 N.Y.S.2d 458, 470 (2012). In place of the usual array of restrictions on the siting of industrial

uses in residential or other areas sensitive to noise, traffic, high population densities, or aesthetic incompatibility, the OGSML merely has a spacing requirement barring wells from being drilled closer than 100 feet to any "inhabited structure" (i.e., a home) or 150 feet from a "public building."[6] 6 NYCRR § 553.2.

These spacing requirements are patently insufficient for the protection of the character of the community from traffic, noise, glare, odor, or aesthetic incompatibility, or other threats to community character against which zoning law traditionally protects. Indeed, the OGSML on its face is not concerned with community character at all: The purpose of the spacing requirements is manifestly the personal safety, not the quiet enjoyment, of pre-existing structures' inhabitants. One hundred and fifty feet may protect inhabitants from cracked foundations and collapsing equipment, but such minimal distance will not create any meaningful buffer against noise, glare, blocked views, aesthetic incompatibility, and other losses to quiet enjoyment severely affecting property values.

As explained above, the presumption against preemption of local zoning laws is specially strong where the allegedly preemptive state law makes no provision for protecting the quiet enjoyment of land. It is simply implausible to infer that the state legislature intentionally conferred on the gas and oil extraction industry a statutory right to site a towering drill and accompanying truck traffic, waste pits, compressor stations, and the like next door to a quaint bed-and-breakfast in a rural hamlet or single-family home in a quiet residential suburb. Given the implausibility of the state legislature's authorizing such a grotesque invasion of quiet enjoyment, the court should presume that any ambiguities in the OGSML should be resolved to

[6] New York's current proposed regulations for hydrofracking provide for larger setbacks from the boundary lines of spacing units (Proposed 6 NYCRR § 553.1), dwellings, places of assembly, and certain water resources (Proposed 6 NYCRR § 560.4).

preserve towns' existing zoning authority when such authority is used to pursue traditional zoning purposes.

C. The Towns of Dryden's and Middlefield's zoning laws do not frustrate any state interest in the extraction of natural gas.

Citing the preamble of the OGSML, appellants urge that the state has an interest in "maximizing" the recovery of gas from natural gas fields and that any zoning law that diminishes such recovery thereby frustrates the OGSML's purpose. Brief of Appellant Cooperstown-Holstein Corporation at 15-16, 22-23 (citing ECL §23-301 and arguing for "maximizing" gas recovery). Any zoning law that prevents drilling for gas or oil in any community, according to appellants, frustrates the purpose of the OGSML and is, therefore, implicitly preempted.

Amici urge that such a sweeping argument for implied preemption merely for the purpose of "maximizing" extraction of a natural resource lacks any support from any authority in New York or elsewhere. Undoubtedly, the state legislature sought to promote the "*greater* ultimate recovery of oil and gas," §23-0301(emphasis added), but "maximize" is a term of appellant's invention, nowhere occurring in the OGSML's text. It hardly follows from this general purpose of promoting natural gas production that the state legislature intended to do so at all costs and in all locations, regardless of any effect on neighbors' quiet enjoyment of their land. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 222 (1983) (holding that California's regulation of nuclear power plants did not frustrate the purpose of the Atomic Energy Act, because "the promotion of nuclear power is not to be accomplished 'at all costs'"). Appellants, therefore, do not show any substantial frustration of the OGSML's purpose merely by showing that local zoning will prevent some natural gas from being extracted that might otherwise be brought to market if the zoning were set aside.

Courts that have found implied preemption of local law based on frustration of the state's purpose in regulating mining have not relied on general assertions about an implausible state purpose to "maximize" energy production at all costs. Instead, such decisions have focused on some *specific* evidence, embodied in state officials' specific administrative findings, that local regulation of mining would have spillover effects on non-residents in neighboring jurisdictions requiring state regulation. Absent specific evidence of such concrete effects on non-residents, implied preemption based on abstract assertions of a state purpose to maximize extraction of mineral wealth have been uniformly rejected.

In *Voss v. Lundvall Bros.,* 830 P.2d 1061 (Colo. 1992), for instance, the Colorado Supreme Court held that Colorado's regulations of oil and gas drilling preempted the City of Greeley's total prohibition of oil and gas drilling within city limits based on the specific opinion of the Colorado Oil and Gas Conservation Commission, urged in an *amicus* brief, that, because "an irregular drilling pattern" could impede extraction of oil or gas from pools underlying Greeley but extending beyond city limits, the City of Greeley's prohibition would impose a burden on non-residents' capacity to extract gas and oil from land outside Greeley's jurisdiction. Given the municipal zoning law's specific extra-territorial effect on non-residents, the Court held the municipal law frustrated the state law's purpose. *Voss*, 830 P.2d at 1067-68 (noting that the Colorado Oil and Gas Commission's amicus brief identified how municipal law would have effects "extend[ing] beyond the city to land where production is not prohibited by a total drilling ban" and finding preemption based on the "extraterritorial effect of the Greeley ordinances" and the state purpose of preserving "Oil and Gas Conservation Commission's express authority" to protect mineral rights "owners and producers in the common source or pool" extending beyond city limits). By contrast, the same court in *Bd. of County Comm'rs v. Bowen/Edwards Assoc.*,

830 P.2d 1045 (Colo. 1992), held that the identical state scheme for regulating oil and gas extraction did not preempt a county law barring oil and gas extraction in unincorporated portions of the county until the County's planning department had granted administrative approval. *Bowen/Edwards* specifically rejected the notion that some paramount interest in energy development automatically overrode the county's interest in land use planning, stating that "[t]he state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes." *Bowen/Edwards*, 830 P.2d at 1058.

Voss's holding of preemption, in short, rested on specific findings that the municipality's zoning imposed an *extra-territorial* effect on *non-residents*. Affording special protection to non-residents makes eminent sense as a matter of the structure of local government law, because there is no reason to believe that local officials will give adequate weight to the interests of a constituency not authorized to vote in local elections. Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law,* 80 Va. L. Rev. 625 (1994). When local governments burden non-residents, therefore, there is greater likelihood that state and regional interests will be shortchanged and less reason for courts to construe state statutes to confer power on local officials. *See, e.g., New York State Public Employees Federation, AFL-CIO by Condell v. City of Albany*, 72 N.Y.2d 96, 101-102, 527 N.E.2d 253, 255-256 (1988) (construing Vehicle & Traffic Law's delegation of power to cities to enact parking restrictions to exclude power to discriminate against non-residents).

Appellants nowhere suggest that the zoning laws of the Towns of Dryden and Middlefield somehow impose an extra-territorial burden on any person lacking representation in

the local political process. Indeed, appellants' "hypothetical" of "a natural gas field that... underlies equally (50/50) two separate, but adjacent, towns" illustrates precisely why preemption is unnecessary to protect the interests of any non-resident lessee. Appellant Cooperstown Holstein Corp. Brief at 23, Appellant Norse Energy Corp. Brief at 27. By contrast with the municipal law at issue in *Voss,* appellant's hypothetical ban in one town leaves the gas underlying the other town unaffected and available for extraction. Each town can, therefore, make its own independent decision about whether the burden imposed by gas extraction on neighbors' quiet enjoyment of their land outweighs the benefits of additional tax revenue, retail sales, jobs, lease revenues, and royalties that extraction will yield for local residents.[7] If the market value of the gas extracted exceeds the costs of mitigating the damage to neighboring property values from the extraction process, then the oil and gas enterprises will presumably be able to pay for conditions mitigating such damage and thereby reducing neighbors' opposition – for instance, exclusion from districts containing sensitive land uses, larger setbacks, berms, noise limits, traffic limits, and other conditions on special permits or variances designed to advance traditional zoning concerns. If the gas drilling enterprise is unable to pay its way by offering such nuisance-mitigating conditions, then this inability is itself an indication that the value of the gas is exceeded by the real costs of extracting it. *See* William A. Fischel, The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls 125-49 (1985).

Appellants offer no reason for why the local political process in each town will not rationally balance these costs and benefits, permitting gas extraction whenever the costs to the community are exceeded by the benefits. Instead, appellants assume that the state has an interest

[7] For evidence that hydraulic fracturing creates jobs, business for local retail, and fiscal benefits, *see* New York State Dep't Envtl. Conservation, Revised Draft Supplemental Generic Environmental Impact Statement, 6-211-6-662 (Sept. 2012), *available at* http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisch6a0911.pdf (last viewed December 7, 2012).

in "maximizing" the extraction of natural gas even when the market value of the gas is exceeded by the loss in property values and tourism that the extraction process would impose. Such a characterization of the OGSML's purpose attributes an extraordinary degree of irrationality to the state legislature without any basis for the inference anywhere in the OGSML's text.

In sum, there is no ground for inferring that local prohibitions of an industrial use in particular towns frustrate the OGSML's stated purpose of promoting "*greater* ultimate recovery of oil and gas" throughout the state. ECL §23-0301(emphasis added). This statutory purpose hardly implies that the state legislature sought the "greatest" possible recovery in every single hamlet and village, regardless of the local burden on quiet residential neighborhoods and tourism. *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 N.Y.2d 668, 684, 642 N.Y.S.2d 164, 174 (1996) ("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."). Absent some specific evidence of extra-territorial effects from the Towns of Dryden's and Middlefield's zoning laws, this court has no basis for inferring that those laws will prevent sufficient natural gas from being developed on land regulated by other local governments. *Cf. Berenson*, 341 N.E.2d at 242-43 (refusing to preempt local zoning excluding multi-family housing if "regional needs are presently provided for in an adequate manner").

CONCLUSION

New York has a strong tradition of local autonomy, legally embodied in enabling acts that confer broad zoning powers on local governments as well as Article IX, §3(c) of the New York Constitution, requiring that these laws be given a "liberal[] constru[ction]." *Amici* urge that

this court recognize and preserve these legal traditions of local democracy by holding that ECL §23-0303(2) be construed according to a presumption against preemption and that, in light of this presumption, the Towns of Dryden's and Middlefield's local zoning laws at issue in this case is not preempted by the OGSML.

Respectfully Submitted,

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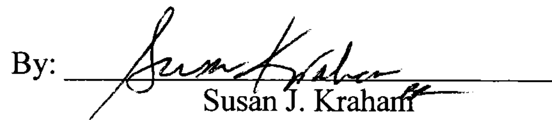
By: 
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