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ZONING OUT FRACKING: ZONING AUTHORITY UNDER NEW YORK STATE'S OIL, GAS AND SOLUTION MINING LAW

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INTRODUCTION

Over the past several years, an increasing amount of public concern has focused on the ills of a method of natural gas drilling called

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hydraulic fracturing, or "fracking."[1] Fracking has been linked to contamination of drinking water, earthquakes, rapid deterioration of public roads, and air pollution.[2] The safety of drinking water has been a particularly prevalent topic. Although only two Environmental Protection Agency (EPA) studies have linked fracking to the contamination of water wells,[3] there have been several incidents in which safety precautions have failed to prevent the escape of natural gas into the water aquifer,[4] and several studies have shown a correlation between drilling activity and high methane levels in nearby water wells.[5]

On the other hand, states are always in need of jobs, and natural gas jobs are particularly attractive in a worsening economy.[6] Studies have shown that natural gas has not only been a boon to employment in the core drilling industry, but also to employment in ancillary

1. *See, e.g.*, Darryl Fears, *Sitting Atop Huge Gas Reserve, Md. Debates Fracking*, WASH. POST, Mar. 27, 2011, at A5; Ian Urbina, *A Tainted Water Well, and Concern There May Be More*, N.Y. TIMES, Aug. 4, 2011, at A13. These ills are showcased in the movie *Gasland*, where a farmer in Dimock, PA with a fracking well on his land is able to light his water on fire due to the high percentage of methane that has seeped into his water well. GASLAND (HBO Documentary Films 2010).

2. SEC'Y OF ENERGY ADVISORY BD., U.S. DEP'T OF ENERGY, SHALE GAS PRODUCTION SUBCOMMITTEE 90-DAY REPORT—AUG. 18, 2011, at 3, 41 n.25 (2011); *see also* AUSTIN HOLLAND, OKLA. GEOLOGICAL SURVEY, EXAMINATION OF POSSIBLY INDUCED SEISMICITY FROM HYDRAULIC FRACTURING IN THE EOLA FIELD, GARVIN COUNTY, OKLAHOMA 1 (2011), *available at* http://thinkprogress.org/wp-content/uploads/2011/11/Fracking-quake.pdf.

3. Dominic C. DiGiulio et al., U.S. ENVTL. PROT. AGENCY, INVESTIGATION OF GROUND WATER CONTAMINATION NEAR PAVILLION, WYOMING, at xi (2011), *available at* http://www.epa.gov/region8/superfund/wy/pavillion/EPA_ReportOn Pavillion_Dec-8-2011.pdf; 1 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROT. AGENCY, REPORT TO CONGRESS: MANAGEMENT OF WASTES FROM THE EXPLORATION, DEVELOPMENT, AND PRODUCTION OF CRUDE OIL, NATURAL GAS, AND GEOTHERMAL ENERGY (1987). Negotiated settlements regarding potential drinking water contamination usually contain a confidentiality clause barring landowners from publicly producing evidence of contamination, thus significantly limiting the data available. Urbina, *supra* note 1, at A13.

4. *See, e.g.*, Jad Mouawad & Clifford Krauss, *Dark Side of a Natural Gas Boom*, N.Y. TIMES, Dec. 8, 2009, at B1. In some cases, fracking fluid has advanced through fissures created by the fracking process into old water wells, and subsequently into underground water resources, thus polluting local drinking water. *Id.*

5. Stephen G. Osborne et al., *Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing*, 108 PROC. NAT'L ACAD. SCI. OCTOBER 2011 EDITION 8172, 8172–73 (2011).

6. CTR. FOR WORKFORCE INFO. & ANALYSIS, PA. DEP'T OF LABOR & INDUS., MARCELLUS SHALE FAST FACTS 15 (2011).

industries.[7] At a time when the financial crisis has run a number of states' budgets to a financial precipice,[8] the natural gas industry provides a stable source of tax revenue.[9] Moreover, a large state supply of natural gas would decrease dependence on other energy sources, namely coal and nuclear power, which operate within unstable regulatory environments.[10]

Currently, New York faces both a host of financial issues and its own energy crunch. The upcoming closing of the Indian Point nuclear power plant, which supplies up to 25% of New York City and Westchester County's energy capacity, and the simultaneous impact of proposed state and environmental regulations may cause a 50% reduction in New York State's generating capacity by 2016.[11] As a result, state officials are pushing the State to look for more stable sources of energy.[12]

Due to stricter federal regulation of dirty fossil fuels, such as coal and oil,[13] and advancements in drilling technology, natural gas, which

7. From 2008 Q1 to 2011 Q1, the Pennsylvania employment rate has increased by 114% in core natural gas industries, adding 10,900 jobs, and has decreased by less than 1% in ancillary industries, losing 1,000 jobs. *Id.* at 4. Over the same period, Pennsylvania's unemployment rate has increased by 3%, losing 160,000 jobs. *Id.*

8. *See, e.g.*, Mary Williams Walsh, *The Little State With a Big Mess*, N.Y. TIMES, Oct. 23, 2011, at B1.

9. TIMOTHY J. CONSIDINE ET AL., THE ECONOMIC IMPACTS OF THE PENNSYLVANIA MARCELLUS SHALE NATURAL GAS PLAY: AN UPDATE 12 (2010), *available at* http://www.energyindepth.org/wp-content/uploads/2009/03/PSU-Marcellus-Updated-Economic-Impact.pdf. Researchers at PSU estimated that the natural gas industry generated more than 29,000 jobs and $240 million in Pennsylvania state and local taxes in 2008. *Id.* at 19. Additionally, landowner royalties on a typical horizontal well (priced at $6 per 1,000 cubic feet of gas with a 12.5% royalty payment) will accrue to $750,000 to $1 million over a five-year period. N.Y. STATE COMM'N ON STATE ASSET MAXIMIZATION, FINAL REPORT 62 (2009).

10. Joseph De Avila, *Property: Area Power Needs Debated*, WALL ST. J., Oct. 20, 2011, at A22.

11. N.Y. INDEP. SYS. OPERATOR, POWER TRENDS 2011: ENERGIZING NEW YORK'S LEGACY OF LEADERSHIP 39–41 (2011).

12. *Id.* at 44. The upcoming regulations require the improving of power plants to achieve: "reasonably available control technology for oxides of nitrogen," "best available retrofit technology," "maximum achievable control technology," and "best technology available for cooling water intake structures." *Id.* at 40. On the other hand, some researchers have also found the energy threat to New York may be overstated based on assumptions that New York must maintain its current capacity surplus. *See* TIM WOOLF ET AL., SYNAPSE ENERGY ECONOMICS, INC., INDIAN POINT ENERGY CENTER NUCLEAR RETIREMENT ANALYSIS 32 (2011).

13. *See, e.g.*, Editorial, *The EPA's War on Jobs*, WALL ST. J., June 13, 2011, at A14; Shawn McCarthy, *Pricey U.S. Carbon Rules Pose Hurdles for Oil Sands*, GLOBE & MAIL (Toronto), Jan. 7, 2010, at B1.

is the cleanest burning fossil fuel, has become a much more attractive resource.[14] The skyrocketing demand for locally extracted and developed natural gas that can be supplied with minimal transportation costs is clearly an incentive behind New York's Department of Environmental Conservation's (DEC's) push to permit instate well drilling and development.

On a national scale, consumption is rapidly increasing.[15] The current oversupply of natural gas on the market has pushed natural gas prices down.[16] In anticipation of the expected shift by U.S. utilities from coal to natural gas,[17] however, producers are still desperately seeking to open up more untapped domestic natural gas resources.[18] An increasing percentage of domestic natural gas resources are coming from shale gas.[19]

New York sits atop one of the largest shale formations in the country, the Marcellus Shale. Shale gas found in a shale formation is thermogenic gas.[20] Thermogenic gas, the type of natural gas found in the Marcellus Shale, is formed over millions of years by the application of heat and pressure to buried organic matter.[21] Wells drilled into the gas reservoir allow the highly compressed gas to

14. OFFICE OF FOSSIL ENERGY & NAT'L ENERGY TECH. LAB., U.S. DEP'T OF ENERGY, MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER 3–4 (2009), *available at* http://www.netl.doe.gov/technologies/oil-gas/publications/epreports/shale_gas_primer_2009.pdf.

15. Natural gas consumption in the United States rose from 21.7 trillion cubic feet in 2006 to 24.1 trillion cubic feet in 2010. U.S. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, *Natural Gas Consumption in the United States, 2006-2011*, NAT. GAS MONTHLY, Apr. 2011, at 5 tbl.2, *available at* http://www.eia.gov/naturalgas/monthly/archive/2011/2011_04/pdf/ngm_all.pdf.

16. U.S. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, SHORT TERM ENERGY OUTLOOK, Sept. 2012, at 6, *available at* http://www.eia.gov/forecasts/steo/archives/sep12.pdf.

17. Rebecca Smith, *Coal-Fired Plants Mothballed by Gas Glut*, WALL ST. J., Sept. 12, 2012, at B1.

18. *See, e.g.*, *Natural Gas Weekly Update for Week Ending September 12, 2012*, U.S. ENERGY INFO. ADMIN. (Sept. 13, 2012), http://www.eia.gov/naturalgas/weekly/archive/2012/09_13/index.cfm.

19. MASS. INST. OF TECH. ENERGY INITIATIVE, THE FUTURE OF NATURAL GAS: AN INTERDISCIPLINARY MIT STUDY 27–29 (2012), *available at* http://mitei.mit.edu/system/files/NaturalGas_Report.pdf [hereinafter MIT ENERGY INITIATIVE] (noting that from 2000 to 2009, the contribution of shale gas to US annual gross gas production increased from 1% to 14%).

20. *Id.* at 17.

21. *Id.* Similar to conventional natural gas, thermogenic natural gas is primarily methane, and may contain small amounts of ethane, propane, butane, carbon dioxide, nitrogen, or hydrogen sulphide. *Id.*

expand through the wells.[22] Due to the very low permeability of these wells, it is generally not cost-effective to drill a vertical well into the formations.[23] Using an advanced technology like fracking makes the development of unconventional resources cost-effective.[24]

Recently, the U.S. Geological Survey increased its assessment of the Marcellus Shale from 2 trillion cubic feet to approximately 84 trillion cubic feet of undiscovered, technically recoverable natural gas.[25] The wellhead value of 50 trillion cubic feet of natural gas may be $1 trillion; thus, making the natural gas in the Marcellus Shale worth close to $1 trillion.[26]

Responding to public concerns, many towns and cities across the country have taken the initiative to prohibit local gas drilling. In New York, several towns[27] have amended or passed zoning ordinances that would ban fracking, "high impact heavy industry,"[28] or gas drilling entirely. Gas drilling companies advocated strongly against these zoning ordinances, and are now filing suit to invalidate them.[29] The DEC has not taken a position against municipalities in court.[30] The Court of Appeals has yet to rule on a municipality's authority to ban

22. *Id.*

23. *Id.* at 18.

24. *Id.* at 36–37.

25. *USGS Releases New Assessment of Gas Resources in the Marcellus Shale, Appalachian Basin*, U.S. GEOLOGICAL SURVEY, (Aug. 23, 2011, 11:30 AM), http://www.usgs.gov/newsroom/article.asp?ID=2893.

26. *See* INDEP. OIL & GAS ASS'N OF N.Y., HOMEGROWN ENERGY: THE FACTS ABOUT NATURAL GAS EXPLORATION OF THE MARCELLUS SHALE 3 (2009).

27. Many towns and cities in New York State are considering adopting zoning ordinances that effectively ban fracking within any part of the town or city, and several have already done so. *Municipal Anti-Fracking Movements in New York State*, CMTY. ENVTL. LEGAL DEF. FUND, http://celdf.org/img/original/NY%20map%20key%20for%20non%20rights%20based%20efforts%20101511.gif (last visited Mar. 31, 2013). Buffalo, Wales, Camillus, Geneva, Cherry Valley, Middlefield, Oneonta, Otsego, Plainfield, Springfield, Danby, Dryden, Ithaca, and Syracuse have all already passed zoning ordinances effectively banning fracking. *Id.*

28. Glynis Hart, *Dryden Accepts Measure to Ban Fracking*, ITHACA TIMES, June 22, 2011, http://www.ithaca.com/news/east/article_0d24a71c-9cf5-11e0-b712-001cc4c002e0.html.

29. *See* Andrew Barber, *Fracking Shame*, N.Y. POST, Feb. 27, 2011, http://www.nypost.com/p/news/business/fracking_shame_9uD035Hsq3dz4tLgiFdPWP.

30. *See generally* N.Y. State Dep't of Envtl. Conservation et al., Revised Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (Dec. 2011), *available at* http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf [hereinafter REVISED DRAFT SGEIS].

fracking locally. Two lower courts have only recently taken up litigation directly addressing the issue.[31]

This Note argues that New York State law does not preclude local zoning ordinances from prohibiting local fracking. Part I of this Note lays out the origin of local zoning authority in the state constitution and subsequent statutes. Part I also outlines the preemption analysis that a court dealing with a challenge to a local anti-fracking ordinance will likely apply. Part II examines the conflict among case precedent that would uphold local zoning ordinances based on express statutory language or based on constitutional authority, and case precedent that would find express preemption. Part III concludes that a constitution-based approach to local authority that adheres to the plain meaning of the constitution most adequately protects local interests of those affected, and best preserves predictability in judicial statutory construction.

I. FRACKING AND ITS CURRENT LEGAL LANDSCAPE

A. What Is Fracking, and Who Regulates the Process?

Fracking is a process of stimulating a natural gas well to maximize the amount of recoverable natural gas from the well.[32] To frack shale rock, drillers first drill a vertical well that reaches beyond the underground water resources[33] to the shale formation.[34] A pipe extends through the well,[35] and is encased in cement pursuant to agency regulations.[36] Once the pipe reaches the shale formation, a lateral wellbore will drill 2,000 to 6,000 feet into the shale formation.[37] To facilitate the escape of the highly compressed natural gas into the wellhead, the well operator emits fracking fluid through the piping

31. *See* Complaint at 1–7, Cooperstown Holstein Corp. v. Town of Middlefield, 943 N.Y.S.2d 722 (N.Y. Sup. Ct. 2012) (No. 2011-0930); Complaint at 1–12, Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458 (N.Y. Sup. Ct. 2012) (No. 2011-0902).

32. *Hydraulic Fracturing Background Information*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm (last visited Mar. 31, 2013).

33. The Marcellus Shale extends from an area 4,000 feet below ground-level to 8,500 feet below ground level; treatable underground water resources are at approximately 850 feet below ground-level. MIT ENERGY INITIATIVE, *supra* note 19, at 40.

34. *See id.* at 38.

35. *Id.*

36. *Id.*

37. *See id.* at 40.

and into the formation causing the fracturing of shale rock.[38] Fracking fluid is principally water, but also contains sand to crack the shale rock, and a number of unknown chemicals.[39] The potential for these unknown chemicals to reach water wells through fissures formed during the fracking process,[40] and the issue of what to do with the millions of gallons of water mixed with possibly toxic chemicals that will return through the wellhead, are significant environmental concerns.[41]

Fracking exists within a complex web of overlapping regulatory bodies.[42] Due to its heavy use and discharge of water, it falls under the jurisdiction of federal, state, and interstate governing bodies.[43] Due to the high volume of gas extracted in the process, it falls under state regulation, and due to the fact that drilling involves development of local property, it may fall under local government authority as well.[44]

B. Federal Law & Interstate Law

The federal government, through the EPA, sets standards for what can be injected underground, and how to dispose of the wastewater

38. *See id.* at 40.

39. *See id.*

40. *See* Mouawad & Krauss, *supra* note 4.

41. *See Documents: Natural Gas's Toxic Waste*, N.Y. TIMES, Feb. 26, 2011, http://www.nytimes.com/interactive/2011/02/07/us/natural-gas-documents-1.html#document/p1 (noting studies are inconclusive as to the capability of water treatment plants and waterways to remove pollutants of concern such as radionuclides). The Niagara Falls government claims its water treatment plant can adequately treat the fracking wastewater. Carolyn Thompson, *Niagara Falls Envisions Profit in 'Fracking' Waste*, WALL ST. J., Oct. 21, 2011, http://online.wsj.com/article/APe76d13d8158a4d25978ec3a8e246ef2a.html. Once through the plant, the wastewater would be released into the Niagara River or reused in fracking. *Id.* The EPA has announced plans to issue standards regulating the cleanliness of the water discharged. *Id.*

42. *See, e.g.*, 42 U.S.C. § 300h (2006); 42 U.S.C. § 1962b (2006) (establishing the Delaware River Basin Commission to regulate the water withdrawals needed for gas drilling from the basin); 43 C.F.R. § 3162 (2012) (regulating drilling operations on federal and Indian lands).

43. 42 U.S.C. § 300h(a)(1); 18 C.F.R. § 806.5 (2012); N.Y. ENVTL. CONSERV. LAW § 23-0303 (McKinney 2012); N.Y. ENVTL. CONSERV. LAW § 15-3301 (McKinney 2012) (requiring persons conducting any operations with the capacity to withdraw more than 100,000 gallons of groundwater or surface water per day to file with the Department of Environmental Conservation).

44. N.Y. CONST. art. IX § 2(b); N.Y. MUN. HOME RULE LAW § 10 (McKinney 2012); N.Y. ENVTL. CONSERV. LAW § 23-0303 (McKinney 2012).

that returns to the surface.[45] Under the Safe Drinking Water Act (SDWA), states are authorized to administer underground injection programs requiring prospective drillers to seek permits disclosing the chemicals they plan to inject underground.[46] A 2005 amendment to the SDWA prohibits the EPA administrator from prescribing requirements that interfere with any underground injection for the recovery of natural gas unless essential to ensuring the safety of underground sources of drinking water.[47] The term "underground injection" excludes the "injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to . . . gas . . . production activities."[48] Therefore, unless gas drillers that plan to use fracking technology inject diesel fuel underground, they are not required to seek a permit, or to disclose any of the chemicals in their fracking fluid under federal law.[49] Even a restriction on diesel fuel has proven overly burdensome for gas drillers who have yet to file for a diesel fuel permit under SDWA, though multiple tests of fracking wastewater have found diesel fuel is being used in fracking fluid.[50]

Acting in tandem with SDWA, the Clean Water Act endows the EPA with authority to set standards for the discharge of effluent that comes back up through the well.[51] Under the National Pollutant Discharge Elimination System (NPDES), the EPA prohibits the direct discharge of fracking wastewater into waters of the United

45. 42 U.S.C. § 300h(a)(1) (2006).

46. *Id.* § 300h.

47. *Id.* § 300h(b)(2)(B).

48. *Id.* § 300h(d)(1)(B)(ii). This exemption was passed following a 2004 EPA report concluding that "the injection of hydraulic fracturing fluids into [coal bed methane] wells poses little or no threat to [underground sources of drinking water]." OFFICE OF GROUND WATER & DRINKING WATER, U.S. ENVTL. PROT. AGENCY, EVALUATION OF IMPACTS TO UNDERGROUND SOURCES OF DRINKING WATER BY HYDRAULIC FRACTURING OF COALBED METHANE RESERVOIRS, at ES-9 (2004). Diesel fuel in fracking fluid was found to present "the greatest threat" to underground sources of drinking water. *Id.* at 4–11.

49. A driller using diesel fuel in fracking fluid must seek EPA authorization. 40 C.F.R. §§ 144–48 (2012). However, a Congressional investigation found oil and gas service companies had injected over thirty-two million gallons of diesel fuel or fracking fluid containing diesel fuel into wells in nineteen states from 2005 to 2009 without permits. *See* Letter from Rep. Henry A. Waxman et al. to Lisa Jackson, Administrator, U.S. Envtl. Prot. Agency (Jan. 31, 2011), *available at* http://democrats.energycommerce.house.gov/index.php?q=news/waxman-markey-and-degette-investigation-finds-continued-use-of-diesel-in-hydraulic-fracturing-f#_ftn6.

50. *See* Letter from Rep. Henry A. Waxman et al., *supra* note 49.

51. 33 U.S.C. § 1311(a) (2006).

States[52] and sets minimum standards for the quality of pre-treatment wastewater.[53] The DEC administers NPDES on a statewide level.[54] Fracking wastewater still ends up in New York's rivers and lakes.[55] The majority of water treatment centers, though happy to take the wastewater and the payments that come along with it, are not properly equipped to fully treat wastewater that has been contaminated with a host of unknown chemicals.[56]

Fracking requires tons of water and naturally results in tons of wastewater rising back to the surface.[57] A large portion of that water will likely come from the Delaware River Basin, which extends into southeastern New York, and the Susquehanna River Basin, which extends into south central New York. The Delaware River Basin Commission (DRBC) and the Susquehanna River Basin Commission (SRBC) regulate the rate and volume of water withdrawals from their respective basins.[58] Their regulatory authority overlaps with federal,

52. 40 C.F.R. §§ 435.12–30 (requiring the use of the best available technology to limit effluent discharge).

53. Envtl. Prot. Agency, Notice of Final 2010 Effluent Guidelines Program, 76 Fed. Reg. 66,286 (Oct. 26, 2011). Although the EPA presently allows state agencies to set pretreatment fracking wastewater standards, the EPA has published a notice of intent to set national standards in this area. *Id.* Under present regulations, prior to accepting wastewater, the publicly owned treatment works (POTW) must notify the Department of Environmental Conservation (DEC) and both the POTW and the DEC will determine the capability of the POTW to handle such wastewater. 40 C.F.R. 122.42(b) (2012). National EPA standards could provide a more comprehensive review of the capability of POTWs to treat fracking wastewater in particular.

54. Letter from Russell E. Train, Administrator, U.S. Envtl. Prot. Agency, to Hugh Carey, Governor of N.Y. (Oct. 28, 1975), *available at* http://www.northwestenvironmentaladvocates.org/nweafiles/NPDES_Letters/NY%20NPDES%20Approval%20Letter.pdf (authorizing Governor Carey to administer the NPDES permit program).

55. David B. Caruso, *Pa. Allows Dumping of Tainted Waters from Gas Boom*, WASH. TIMES, Jan. 3, 2011, http://www.washingtontimes.com/news/2011/jan/3/pa-allows-dumping-of-tainted-waters-from-gas-boom/?page=all. *But see* Jerry Zremski, *Fracking Boom Could Go Bust*, BUFFALO NEWS, Nov. 13, 2011, at C1.

56. *See, e.g.*, Mark Scheer, *Flood of Comments Expected at Water Board Meeting*, NIAGARA GAZETTE, Nov. 23, 2011, http://niagara-gazette.com/local/x1295782769/Flood-of-comments-expected-at-Water-Board-meeting; Charlie Specht, *'Fracking' Residue Poses Concerns in Falls*, BUFFALO NEWS, Sept. 23, 2011, at D1.

57. OFFICE OF RESEACH & DEV., ENVTL. PROT. AGENCY, HYDRAULIC FRACTURING RESEARCH STUDY 1–2 (2010), *available at* http://www.epa.gov/safewater/uic/pdfs/hfresearchstudyfs.pdf.

58. *See Environmental Review Process for Natural Gas Exploration in the Marcellus Shale*, N.Y. STATE DEP'T ENVTL. CONSERVATION, http://www.dec.ny.gov/energy/46288.html?showprintstyles (last visited Mar. 31, 2013).

state, and local authority.[59] Having rejected a vote on new regulations governing gas development, the DRBC has imposed a de facto moratorium on new drilling in the basin for an indefinite period of time.[60] The SRBC prohibits water withdrawal to the extent it interferes with the regular withdrawal of another user of the River and requires review and approval of all gas development projects[61] that may affect interstate water quality or significantly impact the comprehensive plan.[62]

C. New York State Law

1. Fracking on Hold

Although the DEC disputes the authority of these interstate bodies to impose a moratorium on drilling in New York, the issue is moot while a de facto moratorium imposed by the DEC continues. The DEC's Commissioner, Joe Martens, announced he may delay new high-volume fracking permits until 2013 while the DEC reviews the overwhelming number of public comments filed in response to the Revised Draft Supplemental Generic Environmental Impact Statement (SGEIS).[63] Prior to the current de facto moratorium,

59. *See generally* DEL. RIVER BASIN COMM'N, DELAWARE RIVER BASIN COMPACT (1961), *available at* http://www.state.nj.us/drbc/regs/compa.pdf; DELAWARE RIVER BASIN COMM'N, ADMINISTRATIVE AGREEMENT BETWEEN DELAWARE RIVER BASIN COMMISSION AND WATER RESOURCES COMMISSION OF STATE OF NEW YORK (1965), *available at* http://www.state.nj.us/drbc/library/coduments/AA/NY-highres.pdf; SUSQUEHANNA RIVER BASIN COMM'N, SUSQUEHANNA RIVER BASIN COMPACT (1972), *available at* http://www.srbc.net/about/srbc_compact.pdf.

60. James Gerken, *Delaware River Basin Fracking Decision Delayed*, HUFFINGTON POST (Nov. 23, 2011, 3:14 PM), http://www.huffingtonpost.com/2011/11/23/delaware-river-basin-fracking-decision_n_1108141.html; *Natural Gas Drilling Index Page*, DEL. RIVER BASIN COMMISSION, http://www.state.nj.us/drbc/programs/natural/ (last visited Mar. 31, 2013) (noting no new updates on the status of regulations).

61. 18 C.F.R. § 806.4(a)(8) (2012).

62. *Id.* § 806.5(a). The standards for water withdrawals are found at 18 C.F.R. § 806.23.

63. DEC Commissioner Joe Martens, citing the significant number of comments received by the agency during the notice and comment period on proposed permit rules for gas drilling and the inability of other state agencies to finalize their hydraulic fracturing reports on time, says "he can't predict" whether hydraulic fracturing permits will be issued in 2012. Karen DeWitt, *Fracking Report Will Be Delayed, Says New York's Environmental Commissioner*, WSKGNEWS (Oct. 25, 2011), http://wskgnewsarchive.org/2011/10/25/fracking-report-will-be-delayed-says-new-yorks-environmental-commissioner/.

Former Governor Patterson mandated an official moratorium on all new high-volume drilling permits while the DEC drafted a SGEIS.[64] Governor Patterson's moratorium ended in June 2011, yet no new permits have been issued.[65] Under the DEC's Revised Draft SGEIS, New York would have among the strictest rules governing fracking in the nation.[66]

New York and other states distinguish between high-volume and low-volume fracking.[67] New York's upcoming regulations will cover only high-volume fracking operations,[68] and this Note only addresses the dispute over regulation of high-volume fracking. High-volume fracking typically requires multiple stages of drilling and more than 300,000 gallons of fracking fluids.[69] According to 2009 Division of Mineral Resources statistics, there are 6,628 active natural gas wells, including low-volume fracked wells, in New York State.[70]

2. Environmental Conservation Law

The Environmental Conservation Law (ECL) established the DEC to carry out New York's environmental policy by improving natural resource protection and coordinating among the federal, regional, and local governments, and private organizations.[71] DEC is charged with adopting regulations and policies that encourage industrial, commercial, residential, and community development; maximize environmental benefits; and minimize the effects of less desirable environmental conditions.[72] New York's legislature added to this general mandate to regulate land use with the passage of the Oil, Gas and Solution Mining Law.

64. *See* N.Y. STATE DEP'T OF ENVTL. CONSERVATION, *supra* note 58.

65. *Id.*

66. *Compare* REVISED DRAFT SGEIS, *supra* note 30, at 3-14 to 3-15 (barring fracking within 2,000 feet of drinking water supplies, 500 feet of private wells, and 4,000 feet of the New York City and Syracuse watersheds), *with* 25 Pa. Code § 78.60(b)(7) (2013) (barring fracking within 100 feet of streams and wetlands and 200 feet of structures unless the applicant receives a waiver).

67. *See, e.g.*, STATE OF MICH. DEP'T OF ENVTL. QUALITY, HIGH VOLUME HYDRAULIC WELL COMPLETIONS (2011), *available at* http://www.michigan.gov/documents/deq/SI_1-2011_353936_7.pdf.

68. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 7.41 (2013).

69. REVISED DRAFT SGEIS, *supra* note 30, at 3–6.

70. *New York Natural Gas & Oil Production*, N.Y. ST. DEP'T ENVTL. CONSERVATION, http://www.dec.ny.gov/energy/1601.html (last visited Mar. 31, 2013) (follow "2009 zip file" hyperlink).

71. N.Y. ENVTL. CONSERV. LAW § 1-0101 (McKinney 2012).

72. *Id.* § 03-0301(1)(g).

3. Oil, Gas and Solution Mining Law

In 1971, the New York Legislature passed the Oil, Gas and Solution Mining Law (OGS), amending the ECL, which entrusted the DEC with the authority to regulate the state's oil, gas, and mining industry.[73] The explicit policy goals of the OGS are to foster the development of New York's natural resources, prevent waste, and protect the rights of private landowners and the public.[74] The OGS grants the DEC and its Commissioner powers to require—and set standards for—the drilling, operating casing, plugging, and re-plugging of wells,[75] as well as the power to specify the required distance between wells and underground water sources.[76] Further, the DEC has exclusive authority to issue a permit to drill.[77]

The express regulatory scheme defines only a limited local role. ECL section 23-0303(2) was amended in 1981 to read, "[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."[78] The prior version did not include the phrase "shall supersede all local laws or ordinances."[79] At its discretion, the DEC may seek the cooperation of local authorities to enforce regulations proposed and adopted by the DEC.[80] Otherwise, the recipients of DEC-issued drilling permits must notify the local government prior to the commencement of drilling operations, and nothing more.[81] Even in the case of municipal property damage, the local government is directed to go through the DEC to request reimbursement.[82]

At first glance, the provision appears to grant complete authority to the DEC to override all local laws that interfere with gas

73. *Id.* § 23-0301.

74. *Id.*

75. *Id.* § 23-0305(8)(d).

76. *Id.* § 23-0503 ("The [DEC] shall issue a permit to drill, deepen, plug back or convert a well, if the proposed spacing unit submitted to the department pursuant to paragraph a of subdivision 2 of section 23-0501 of this title conforms to statewide spacing.").

77. *Id.* § 23-0305.

78. *Id.* § 23-0303(2).

79. *In re* Envirogas, Inc. v. Town of Kiantone. 447 N.Y.S.2d 221, 222 (N.Y. Sup. Ct. 1982), *aff'd*, 454 N.Y.S.2d 694 (N.Y. App. Div. 1982).

80. ENVTL. CONSERV. § 23-0305(11).

81. *Id.* § 23-0305(13).

82. *Id.* § 23-0303(3)(a).

regulation. However, in prior decisions involving statutory construction of similar language, the Court of Appeals has read the language, "shall supersede all local laws or ordinances relating to the regulation," narrowly.[83] Essentially, state law would supersede a limited spectrum of local laws.

Up until 2012, there was only one reported decision addressing ECL section 23-0303(2). In *Envirogas, Inc v. Town of Kiantone*, the Chatauqua County Supreme Court invalidated a town zoning ordinance that mandated the payment of a $2,500 compliance bond and a $25 permit fee prior to construction of a gas or oil well.[84] Under the *Envirogas* court's construction of the statute, a local law or ordinance that reasonably relates to the regulation of the gas industry will be struck down.[85] Imposing local compliance bonds and permit fees on gas drillers reasonably relates to the gas industry; therefore, the court struck down the local ordinances.[86]

The two 2012 courts that interpreted section 23-0303 found preemption analysis key to upholding zoning ordinances banning fracking within a town's jurisdiction.[87] In *Anschutz Exploration Corp. v. Town of Dryden*, the court analyzed section 23-0303(2)'s second clause exempting "local government jurisdiction over local roads or the rights of local governments under the real property tax" from state jurisdiction.[88] The plaintiff in *Dryden* argued that OGS carves out two physical areas—roads and real property taxes—within which a local government has not been preempted.[89] Therefore, according to the plaintiff, state law preempts regulation of any other physical area or site.[90] In rejecting this interpretation, the court found regulation of local roads relates to physical area and to gas drilling operations: "[r]egulation of local roads . . . would plainly relate to operation of gas wells by directly affecting access to well sites or other

83. *See, e.g.*, *In re* Gernatt Asphalt Prods. v. Town of Sardinia, 664 N.E.2d 1226 (N.Y. 1996); *In re* Frew Run Gravel Prods. v. Town of Carroll, 518 N.E.2d 920 (N.Y. 1987).

84. *See Envirogas, Inc.*, 447 N.Y.S.2d at 221–22.

85. *See id.* at 223.

86. *See id.*

87. *See* Cooperstown Holstein Corp. v. Town of Middlefield, 943 N.Y.S.2d 722, 724 (N.Y. Sup. Ct. 2012); Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458, 460 (N.Y. Sup. Ct. 2012).

88. *Dryden*, 940 N.Y.S.2d at 468 (quoting N.Y. ENVTL. CONSERV. LAW § 23-0303 (McKinney 2012)).

89. *Id.*

90. *Id.*

areas of operation and by imposing additional burdens or costs."[91] State law does not preempt local road regulation, which includes matter related to local road regulation. The physical location of natural gas wells to be used for fracking is a matter related to local road regulation. Thus, the Town of Dryden can freely regulate the physical location of a gas drilling well and can also regulate gas-drilling operations to the extent that they relate to local roads or real property taxes.[92] Any analysis of preemption necessarily starts with a discussion of the origin of local regulatory authority.[93]

4. Preemption

Article IX of the New York State Constitution confers broad police power on local governments to regulate matters involving the public welfare.[94] The constitution directs the Legislature to "enact, and . . . from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to . . . powers vested in them by [the constitution]."[95] The constitution further stipulates that once the "statute of local governments" is enacted, the State will have limited ability to override its reach:

> A power granted in [the statute of local governments] may be repealed, diminished, impaired or suspended 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.[96]

This procedural rule, a significant restriction on state action, is known as the "double enactment procedure"[97] or "re-enactment,"[98] and plays a pivotal role in the future application of this constitutional provision.

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91. *Id.*

92. *See id.*; *see also Cooperstown Holstein*, 943 N.Y.S.2d at 730 (noting OGS's legislative history "clearly demonstrates the state's interest in regulating the 'activities,' i.e., the manner and method, of the industry").

93. *See, e.g.*, Jancyn Mfg. Corp. v. County of Suffolk, 518 N.E.2d 903, 907 (N.Y. 1987); N.Y. State Club Ass'n, Inc. v. City of New York, 505 N.E.2d 915, 918 (N.Y. 1987), *aff'd*, 487 U.S. 1 (1988); People v. De Jesus, 430 N.E.2d 1260, 1262 (N.Y. 1981).

94. N.Y. CONST. art. IX, § 2(b)(1); *see also N.Y. State Club Ass'n, Inc.*, 505 N.E.2d at 917; *De Jesus*, 430 N.E.2d at 1261.

95. N.Y. CONST. art. IX, § 2(b)(1).

96. N.Y. CONST. art. IX, § 2(b)(1); *see* N.Y. STAT. LOCAL GOV'TS § 2 (McKinney 2012) ("statute of local governments").

97. *See, e.g.*, Wambat Realty Corp. v. State, 362 N.E.2d 581, 583 (N.Y. 1977). The procedure is known as "double enactment" because the legislation must be adopted twice in successive legislative sessions.

Additionally, the constitution granted that in the absence of state action in a field, the local government may have authority to act first:

> [E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government.[99]

A later statute, however, repealed this power to the extent it goes beyond local authority over matters relating to "property, affairs or government of local government."[100] Where "property, affairs or government of local government" are involved, courts find the Legislature has either not acted with regard to the subject matter, or explicitly carved out an area in which the local government may act.[101] Reading local authority in these situations broadly, courts rarely preclude local regulation if the subject matter of the regulation relates to the public welfare.

The "statute of local governments," enacted pursuant to constitutional mandate, outlines the general scope of the legislative and administrative powers endowed in local government.[102] These powers include: "The power to adopt, amend and repeal ordinances, resolutions and rules and regulations in the exercise of [the local government's] functions, powers and duties."[103] State legislation and case precedent more succinctly illustrate the extent of local authority.

New York's Town Law provides some guidance as to the zoning authority of local governments.[104] The statute empowers the town board to regulate and restrict "the location and use of buildings,

98. County of Nassau v. Nassau Cnty. Interim Fin. Auth., 920 N.Y.S.2d 873, 883 (N.Y. Sup. Ct. 2011); *see also* Michael E. Kenneally & Todd M. Mathes, *Natural Gas Production & Municipal Home Rule in New York*, 10 N.Y. ZONING L. & PRAC. REP. (West) at 1 (Jan./Feb. 2010).

99. N.Y. CONST. art. IX, § 2(c).

100. LOCAL GOV'TS § 11(4); *see also Nassau Cnty. Interim Fin. Auth.*, 920 N.Y.S.2d at 883.

101. *See infra* note 271 and accompanying text.

102. LOCAL GOV'TS § 10. The "statute of local governments" also restates the re-enactment procedure for State regulation affecting local governance of "property, affairs or government." *Id.* § 12(1).

103. *Id.* § 10(1). With regard to cities, towns, and villages, where such local entity maintains jurisdiction over the surrounding area, the entity may adopt, repeal, and amend zoning ordinances regarding the surrounding area. *Id.*§ 10(6).

104. N.Y. TOWN LAW § 261 (McKinney 2012).

structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city."[105] This authority over land use has been construed as the local government zoning authority. Accordingly, the town board may divide the area within its jurisdiction into districts of different permitted uses.[106] Town regulations for each district are created in light of a town's objective, and not the purpose of each district.[107]

Once a town adopts a comprehensive plan, all town land use regulations must be consistent with that plan.[108] Unless the plan is found to be ad hoc or subservient to special interests, it will be presumed valid.[109] The plan may contain "material that identif[ies] the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the town located outside the limits of any incorporated village or city."[110]

The power to create zones of different permissible land uses has been gradually developed by precedent. Case law defines the implementation of a zoning ordinance as "essentially a legislative act."[111] The purpose of zoning is "to regulate land use generally."[112] Implicit in the authority to regulate land use is the right to limit the uses to which property may be put.[113] A zoning ordinance prohibiting a certain activity does not make the activity itself illegal; it makes it illegal for the individual to use the land in the manner proscribed by

105. *Id.* § 261.

106. *Id.* § 262.

107. *Id.* § 263; *see also* Connell v. Town of Granby, 209 N.Y.S.2d 379, 381 (N.Y. App. Div. 1961).

108. TOWN § 272-a(11); *see also* Infinity Consulting Grp., Inc. v. Town of Huntington, 854 N.Y.S.2d 524, 526 (N.Y. App. Div. 2008). Since *Ramapo*, the Court of Appeals has conducted stricter review of town plans where the court finds local control has had "crippling efforts toward regional and State-wide problem solving." John R. Nolon, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497, 498 (1993) (citing *In re* Golden v. Planning Bd. of Town of Ramapo, 285 N.E.2d 291 (N.Y. 1972)).

109. TOWN § 263; *see also* Randolph v. Brookhaven, 337 N.E.2d 763, 765 (N.Y. 1975); Udell v. Hass, 235 N.E.2d 897, 897 (N.Y. 1968) ("[Defendant must make an adequate] showing that the change does not conflict with the community's basic scheme for land use.").

110. TOWN § 272-a(11).

111. Berenson v. Town of New Castle, 341 N.E.2d 236, 243 (N.Y. 1975).

112. Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920, 922 (N.Y. 1987).

113. Young v. City of Binghamton, 447 N.Y.S.2d 1017, 1024 (N.Y. Sup. Ct. 1982).

the ordinance.[114] This distinction illustrates the difference between state power to outlaw an activity, and local power to limit land uses. Therefore, a zoning ordinance prohibiting gas drilling would not make gas drilling illegal per se, but it would make gas drilling illegal within a certain area.

State and local authority to regulate land use generally overlap in many areas, and their overlapping does not necessarily mean one is prohibited, or preempted, from regulating in that area.[115] If state and local legislation are "inconsistent," then one will be invalidated.[116] If the latter is to be invalidated, then state law has preempted local regulation. Inconsistent regulation likely inhibits the effectiveness of state regulation, and thwarts state policy concerns.[117] Inconsistency, and thus preemption, occurs in one of two ways: (1) the local law directly conflicts with the state law;[118] or (2) the State Legislature has evidenced its intent to regulate exclusively the subject matter, or field.[119]

A direct conflict arises where local government is prohibited from taking a certain action; specifically, if the local law permits action specifically prohibited by state law or local law removes rights specifically granted to persons by state law.[120] Naturally, direct

114. *See* Town of Fenton v. Tedino, 356 N.Y.S.2d 397, 397 (N.Y. Sup. Ct. 1974).

115. *See, e.g.*, Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia, 417 N.E.2d 78, 80 (N.Y. 1980) (explaining that the court never construed the principle of pre-emption so broadly that the mere fact that the State deals with a subject it automatically pre-empts it); Sonmax, Inc. v. City of New York, 372 N.E.2d 9, 12 (N.Y. 1977) ("[L]ack of uniformity is [not] the same as inconsistency or contradiction."); People v. Lewis, 64 N.E.2d 702, 704 (N.Y. 1945) ("Laws dealing with the same subject matter are not necessarily incompatible because not identical.").

116. *See, e.g.*, Inc. Vill. of Nyack v. Daytop Vill., Inc., 583 N.E.2d 928, 930 (N.Y. 1991); Jancyn Mfg. Corp. v. County of Suffolk, 518 N.E.2d 903, 905 (N.Y. 1987); Ames v. Smoot, 471 N.Y.S.2d 128, 130–31 (N.Y. App. Div. 1983).

117. *See Jancyn*, 518 N.E.2d at 905–06.

118. Only recently has direct conflict been considered a form of preemption. *See, e.g.*, Dougal v. County of Suffolk, 477 N.Y.S.2d 381, 382 (N.Y. App. Div. 1984); Council for Owner Occupied Hous., Inc. v. Koch, 462 N.Y.S.2d 762, 764 (N.Y. Sup. Ct. 1983), *aff'd*, 463 N.E.2d 620 (N.Y. 1984).

119. *See, e.g.*, DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 190 (N.Y. 2001); *Jancyn*, 518 N.E.2d at 905; Sunrise Check Cashing & Payroll Servs., Inc. v. Town of Hempstead, 933 N.Y.S.2d 388 (N.Y. App. Div. 2011).

120. *See Jancyn*, 518 N.E.2d at 905. Prior to *Jancyn*, courts found inconsistency where the local law permitted action barred under state law and where the local law barred action under State law. *See, e.g.*, N.Y. State Club Ass'n, Inc. v. City of New York, 505 N.E.2d 915, 917 (N.Y. 1987); People v. Cook, 312 N.E.2d 452, 457 (N.Y. 1974); Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 234 N.Y.S.2d 862, 864 (N.Y. App. Div. 1962), *aff'd*, 189 N.E.2d 623 (N.Y. 1963). If the prior rule had

conflicts are less common when local legislation prohibits actions that are permissible under state law.[121]

The state law governing solid waste management and resource recovery facilities is an example of concurrent state and local regulation.[122] The Solid Waste Management and Resource Recovery Facilities Law reads, "[a]ny local laws, ordinances or regulations of any governing body of a county, city, town or village which are not inconsistent with this title or with any rule or regulation which shall be promulgated pursuant to this title shall not be superseded by it."[123] By its plain language, the statute welcomes local variations of the state law, as long as the local variation is consistent with state regulation.[124] In *Monroe-Livingston Sanitary Landfill v. Town of Caledonia*, the court upheld an ordinance that set a stricter standard than that stated in the state statute.[125] The local ordinance imposed a condition on the collection of refuse under the state statute: refuse generated outside of the Town of Caledonia will only be accepted at facilities licensed by the Caledonia if the Town Board authorizes it and such receipt is consistent with the regional comprehensive solid waste management plan.[126]

In *People v. New York Trap Rock Corp.*, a case dealing with criminal nuisance, the court did not find explicit statutory language outlining the local regulatory role.[127] Instead, the court looked beyond the state statute at issue to find legislative intent that the municipality could regulate.[128] Per State Penal Law, a person is guilty of criminal nuisance if, "he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a

been applied literally there could never be a local variation of state law that would withstand judicial review.

121. *See, e.g.*, Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1235 (N.Y. 1996) (upholding a local zoning ordinance that further narrowed the area within which mining is a permissible land use).

122. *See* Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia, 417 N.E.2d 78, 80 (N.Y. 1980).

123. N.Y. ENVTL. CONSERV. LAW § 27-0711 (McKinney 2012).

124. *Monroe-Livingston*, 417 N.E.2d at 80.

125. *See id.*

126. *See id.* at 80. If a person has received a state-issued permit to conduct an activity that the local government concurrently regulates, the person must still abide by local law. *See id.*

127. 442 N.E.2d 1222, 1225 (N.Y. 1982) ("There is nothing in section 240.45 of the Penal Law, the criminal nuisance statute, to indicate an intention by the Legislature, directly or indirectly, to restrict the town's power to enact a noise ordinance.").

128. *See id.* at 1225.

considerable number of persons."[129] For issues of state-local power, the Municipal Home Rule Law demands a broad reading of local authority to regulate the field of public welfare.[130] The challenged zoning ordinance expanded the application of criminal nuisance to include "unnecessary noise" that "annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a person."[131] The court found local regulation of criminal nuisance permissible absent statutory language to the contrary.[132] Here, the state law was silent regarding local authority, and the court found the local government may regulate where the subject matter is reasonably related to local public welfare.[133]

In *Walker v. Town of Hempstead*, the town ordinance at issue required prior notification to the town government before any defect in a public space could be used as reason to file an action against the local government.[134] However, the state statute read, "[n]o other or further notice . . . shall be required as a condition to the commencement of an action" against the local government.[135] Impliedly, there are permissible local variations in the field of civil litigation against the local government, but additional conditions on filing procedures is not one of them. The end result is quite similar to the cases above wherein local variations of state regulation are "inconsistent" with state regulation and thereby ultra vires if local regulations are weaker.

A state statute that expressly prohibits[136] or preempts[137] local law precludes exercise of the supersession authority by indicating a desire

129. N.Y. PENAL LAW § 240.45 (McKinney 2012).

130. N.Y. MUN. HOME RULE LAW § 10(1) (McKinney 2012).

131. *N.Y. Trap Rock Corp.*, 442 N.E.2d at 1224 (citing Town of Poughkeepsie Unnecessary Noise Control Ordinance § 3.01).

132. *Id.* ("[L]ocal governments have been given broad authority to adopt ordinances governing the safety, health and well-being of those within their jurisdictions."). If, on the other hand, statutory silence were interpreted to prohibit local regulation of the subject matter, it "would vitiate the concept of home rule." Council for Owner Occupied Hous., Inc. v. Koch, 462 N.Y.S.2d 762, 764 (N.Y. Sup. Ct. 1983), *aff'd*, 463 N.E.2d 620 (N.Y. 1984).

133. *See N.Y. Trap Rock Corp.*, 442 N.E.2d 1222, 1225 (N.Y. 1982).

134. 643 N.E.2d 77, 79 (N.Y. 1994).

135. *Id.*

136. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 2012); *see Walker*, 643 N.E.2d at 79.

137. Kamhi v. Town of Yorktown, 547 N.E.2d 346, 349 (N.Y. 1989); Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920, 922 (N.Y. 1989).

to prohibit "the possibility of varying local legislation."[138] The overriding authority of the State to preempt local legislation embodies "the untrammeled primacy of the Legislature to act, as it always had, with respect to matters of state concern."[139] Due to the broad scope of the State's police power,[140] the absence of statutory purpose to preclude local variation of state legislation implies that the State intended that the local government have authority to regulate.[141] However, the absence of preemption alone is not enough for a local government to take action;[142] as stated above, the local government must derive its authority expressly from a state statute or the constitution.[143]

Intent to preempt may be signaled by several indicators. The four most prominent indicators are: (1) express language providing for exclusivity; (2) the nature of the subject matter being regulated; (3) the scope of the state legislative scheme; and (4) the need for statewide uniformity.[144] The presence of any one of these indicators is sufficient to find legislative intent to preempt the subject matter.[145]

138. Monroe-Livingston Sanitary Landfill v. Town of Caledonia, 417 N.E.2d 78, 80 (N.Y. 1980); *see also* Council for Owner Occupied Hous., Inc. v. Koch, 462 N.Y.S.2d 762, 764, (N.Y. Sup. Ct. 1983), *aff'd*, 463 N.E.2d 620 (N.Y. 1984) ("[O]nly when the state has evidenced a desire to occupy the entire field to the exclusion of local law [is] a municipality powerless to act.").

139. Wambat Realty Corp. v. State, 362 N.E.2d 581, 586 (N.Y. 1977).

140. *Cf.* Adler v. Deegan, 167 N.E. 705, 708–09 (N.Y. 1929) (finding substantial "state concern" in New York City housing).

141. *See, e.g.*, People v. De Jesus, 430 N.E.2d 1260, 1261 (N.Y. 1981); People v. Cook, 312 N.E.2d 452, 455–56 (N.Y. 1974).

142. *See* Ames v. Smoot, 471 N.Y.S.2d 128, 130 (N.Y. Sup. Ct. 1983) ("A municipal corporation is a political subdivision of the State and its lawmaking authority can be exercised only to the extent that it has been delegated by the State.").

143. Generally, courts have cited the Municipal Home Rule Law for the source of local authority to adopt laws relating to local "property, affairs or government." *See, e.g.*, Walker v. Town of Hempstead, 643 N.E.2d 77, 78 (N.Y. 1994); Kamhi v. Town of Yorktown, 547 N.E.2d 346, 348–49 (N.Y. 1989). Therefore, the legal issue of whether the state law has infringed on constitutionally protected local governance rights is rarely raised.

144. *Ames*, 471 N.Y.S.2d at 130–31; *see also* DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 192 (N.Y. 2001) (finding no preemption because the declaration of policy does not evidence legislative intent to remove local legislation of the matter and the regulatory scheme is not detailed and comprehensive); Inc. Vill. of Nyack v. Daytop Vill., Inc., 583 N.E.2d 928, 930–31 (N.Y. 1991) (same).

145. *See, e.g.*, Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920, 922 (N.Y. 1989) ("comprehensive and detailed regulatory scheme" in the field of highway funding); *Ames*, 471 N.Y.S.2d at 130–31 (finding express language providing for exclusivity and a detailed and comprehensive regulatory scheme).

In *Albany Area Builders Association v. Town of Guilderland*, the Town of Guilderland imposed a transportation "impact fee" on all "applicants for building permits who seek to make a change in land use that will make additional traffic."[146] The fee fund was intended to pay for the expansion of the local roadway system and local transportation facilities.[147] However, the State had already adopted an "elaborate budget system" delineating "how towns are to budget for improvements and repairs to highways," putting a cap on town highway taxes, and dictating the procedures towns must adhere to in developing their roadway budget.[148] Based on its finding of a comprehensive and detailed regulatory scheme, the court held that the State evinced its purpose to preempt the entire field of roadway funding, thereby precluding local legislation on the subject.[149]

On the other hand, local legislation is not preempted where it will only have an incidental effect on a comprehensive and detailed regulatory scheme.[150] *DJL Restaurant Corporation v. City of New York* is illustrative of this concept. In *DJL*, New York City amended its zoning ordinance to limit "adult establishments" to manufacturing and high-density commercial zoning districts.[151] Not only did the ordinance limit the siting of establishments providing only adult entertainment, but also those businesses serving as both "adult establishments" and bars.[152] The State preempts the field of alcohol distribution under the Alcohol Beverage Control Law (ABC),[153] and the Law contains several provisions regarding nudity in bars and the

146. *Albany Area Builders Ass'n*, 546 N.E.2d at 921.

147. *Id.* at 921.

148. *Id.* at 922–23 (citing N.Y. TOWN LAW §§ 102, 104, 107 (McKinney 1989); N.Y. HIGHWAY LAW §§ 141, 271 (McKinney 1989)).

149. *Id.* at 923. In *Consolidated Edison Co. of N.Y., Inc. v. Town of Red Hook*, the Court of Appeals held that a local zoning ordinance was preempted partially based on the state law's establishment of a Siting Board that "is required to determine whether any municipal laws or regulations governing the construction or operation of a proposed generating facility are unreasonably restrictive, and has the power to waive compliance with such municipal regulations." 456 N.E.2d 487, 490 (N.Y. 1983).

150. *See, e.g.*, DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 191 (N.Y. 2001); Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1234–35 (N.Y. 1996) (citing Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920, 922 (N.Y. 1987)).

151. *DJL Rest.*, 749 N.E.2d at 188–89 (citing N.Y.C. Amended Zoning Resolutions §§ 32-01(b), 42-01(b)).

152. *Id.* at 189.

153. *Id.* at 190 (citing *In re* Landsdown Entm't Corp. v. N.Y.C. Dep't of Consumer Affairs, 543 N.E.2d 725, 726 (N.Y. 1989)).

siting of such establishments.[154] The court read ABC as narrowly tailored to "promot[ing] temperance in the consumption of alcoholic beverages," which is distinct from the regulation of land.[155] Zoning is meant to regulate land use, not "the consumption of alcoholic beverages."[156] Invariably, regulations of these two distinct fields will impact one another, but such "incidental control" is permissible within preemption[157]: "separate levels of regulatory oversight can coexist."[158]

Even a detailed regulatory scheme may be insufficient to preempt where local regulation is not explicitly addressed.[159] For example, in *Village of Nyack v. Daytop Village*, Daytop Village received state approval to open a substance abuse program in a commercial district where residential uses were specifically prohibited.[160] Based on the comprehensive regulatory scheme embodied in Article 19 of the Mental Hygiene Law, the Appellate Division determined additional restrictions imposed by the local government "would clearly impose additional restrictions on rights granted by State law and thereby 'tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns.'"[161] Yet the Court of Appeals reversed, finding no "inherent inconsistency" between the regulations.[162] For the local government to retain authority over the siting of substance abuse programs is not "inconsistent" with the state agency's authority to manage the program.[163] Notwithstanding the comprehensiveness of the statute, without clear intent to divest local government of its zoning authority, the municipality will continue to exercise supersession authority.[164]

Express language providing for exclusivity, and thus preemption, is found where the statute is interpreted to intend to omit a certain term

154. *Id.* at 190 (citing N.Y. ALCO. BEV. CONT. LAW § 106(6-a) (McKinney 2012)).

155. *Id.*

156. *Id.*

157. *See id.* at 191; *see also* Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920, 920 (N.Y. 1987)).

158. *DJL Rest.*, 749 N.E.2d at 191 (citing Inc. Vill. of Nyack v. Daytop Vill., Inc., 583 N.E.2d 928, 931 (N.Y. 1991)).

159. *See, e.g.*, *Daytop Vill.*, 583 N.E.2d at 929; N.Y. State Club Ass'n v. City of New York, 505 N.E.2d 915, 917–18 (N.Y 1987).

160. *Daytop Vill.*, 583 N.E.2d at 929.

161. *Id.* (quoting *N.Y. State Club Ass'n*, 505 N.E.2d at 917).

162. *Id.* at 929.

163. *Id.* at 930–31.

164. *See id.*

or criterion.[165] Unlike where the statute's silence implies a carve-out for local regulation, the statutes that are read to expressly preclude local amendment tend to contain some type of list of permissible or impermissible activity.[166] The method of statutory construction that reads a statute to include only the listed items and exclude all other items is *expressio unius est exclusio alterius*: where a law expressly describes a particular act to which it shall apply, an irrefutable inference must be drawn that what is omitted was intended to be omitted.[167] This maxim only has force when the items expressed are members of an associated group such that legislative intent to exclude other members of a grouping is clear.[168]

For example, under New York's Retirement and Social Security Law, the salary base upon which future pensions are calculated expressly excludes lump sum payments, termination pay, payment in lieu of retirement, and the portion of compensation over one year that exceeds the previous year's compensation by more than twenty percent.[169] The listing of these four exclusions led the Court of Appeals to find the State Legislature did not intend to exclude any other items from the calculation of salary for future pension purposes.[170]

If there is neither express preemption of local action nor an express carve out for local authority in a field of regulation, courts will move on to implicit preemption.[171] For implicit preemption, courts will examine the declaration of policy accompanying the legislation or a

165. *See, e.g.*, City of New York v. N.Y. Tel. Co., 489 N.Y.S.2d 474, 476 (N.Y. App. Div. 1985); People v. Ceasar, 727 N.Y.S.2d 258, 260 (N.Y. Sup. Ct. 2001).

166. *See, e.g.*, Weingarten v. Bd. of Trs. of N.Y.C. Teachers' Ret. Sys., 780 N.E.2d 174, 179–80 (N.Y. 2002); Walker v. Town of Hempstead, 643 N.E.2d 77, 79 (N.Y. 1994).

167. *See* N.Y. STAT. LAW § 240 (McKinney 2012); *see also* Jewish Home & Infirmary of Rochester, N.Y., Inc. v. Comm'r of N.Y. State Dep't of Health, 640 N.E.2d 125, 129 (N.Y. 1994); *N.Y. Tel. Co.*, 489 N.Y.S.2d at 476; *Ceasar*, 727 N.Y.S.2d at 259. *But see* Erie County v. Whalen, 394 N.Y.S.2d 747, 749 (N.Y. App. Div. 1977), *aff'd*, 377 N.E.2d 984 (N.Y. 1978) ("[A]lthough a useful tool of statutory construction,' [*expressio unius est exclusio alterius*] must not be utilized to defeat the purpose of an enactment or to override the manifest legislative intent." (citing Goldstein v. City of Long Beach, 280 N.Y.S.2d 272, 273 (N.Y. App. Div. 1967))).

168. 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007).

169. *Weingarten*, 780 N.E.2d at 179 (citing N.Y. RETIRE. & SOC. SEC. LAW § 431 (McKinney 2002)).

170. *See id.* at 179.

171. *See* People *ex rel.* Spitzer v. Applied Card Sys., Inc., 894 N.E.2d 1, 5 (N.Y. 2008).

comprehensive detailed regulatory scheme.[172] Similarly, to express preemption, where courts find legislative intent to regulate without concurrent local regulation, the court will strike down an ordinance that infringes on state authority.[173] In *Consolidated Edison Company of New York, Inc. v. Town of Red Hook*, the Court of Appeals found enlightening a declaration accompanying the enactment of the state statute and statements made by both Governor Rockefeller and Governor Carey during their respective terms about the bill.[174] There, each statement raised the issue of a conflicting series of patchwork regulations that caused significant bureaucratic delays in the "field of siting major steam electric generating plants."[175]

The declaration of policy may also be more explicit in claiming the State's authority, and will likely be deemed implicit preemption: "[The State's] department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services . . . ."[176] In *Robin*, a local ordinance prohibited hospitals not accredited by the State Department of Health from conducting abortions.[177] The State Penal Law, which regulated permissible abortions, only required a "duly licensed physician" and that the woman seeking the abortion "act[] under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy."[178] The local town ordinance had added to hospital-related services by adopting an ordinance requiring abortions to occur in hospitals, and thus acted contrary to the implicit intent of the legislature.[179] Additionally, the

172. *See, e.g.*, People v. De Jesus, 430 N.E.2d 1260, 1262 (N.Y. 1981); Robin v. Inc. Vill. of Hempstead, 285 N.E.2d 285, 286 (N.Y. 1972).

173. *See, e.g.*, Jancyn Mfg. Corp. v. Cnty. of Suffolk, 518 N.E.2d 903, 905–06 (N.Y. 1987); N.Y. State Club Ass'n v. City of New York, 505 N.E.2d 915, 917 (N.Y 1987); Consol. Edison Co. of N.Y., Inc. v. Town of Red Hook, 456 N.E.2d 487, 490 (N.Y. 1983).

174. *See Consol. Edison Co.*, 456 N.E.2d at 490.

175. *Id.*

176. *Robin*, 285 N.E.2d at 286 (quoting N.Y. PUB. HEALTH LAW § 2800 (McKinney 1972)) (internal quotation marks omitted).

177. *See id.* at 286.

178. *Id.*

179. *See id.*

ordinance was contrary to legislative intent to regulate abortion-related services on a statewide basis.[180]

Local governments derive authority to enact local laws with respect to local governance issues from the New York Constitution and Municipal Home Rule Law.[181] The vast majority of state laws will likely impact local governance. Where a state and local law concurrently regulate a person, corporation, or activity, and the court is asked to resolve inconsistencies between the relevant laws, the court will conduct preemption analysis.[182] If a state law does not contain express language demonstrating the state regulates exclusively over the subject, then the reviewing court will review the state law for language implying the state law regulates exclusively.[183] If the state law only implicitly regulates the subject, then courts have some discretion to read state law in a manner that allows for some degree of local regulation of the subject.[184]

5. New York State Constitution and Home Rule Law

In theory, the New York Constitution provides the easy solution to the OGS provision. Courts, however, have not applied the plain meaning of the provision. Article IX of the constitution dictates that the State Legislature must follow a unique set of adoption procedures whenever it passes legislation affecting local government affairs.[185] Where the procedure is not followed, the local government retains superseding authority over the field.

First, Article IX directs the Legislature to adopt a "statute of local governments" that will define local government affairs. The statute grants local governments broad authority to enact local laws with respect to local governmental affairs, such as the levy and collection of taxes, public order, welfare, and safety.[186] Included among these powers is the authority to adopt, amend, and repeal zoning ordinances regarding local land usage.[187]

180. *See id. But see generally* People v. N.Y. Trap Rock Corp., 442 N.E.2d 1222, 1224–25 (N.Y. 1982) (finding a state statute's silence does not preclude the adoption of a local ordinance expanding the application of a state law).

181. *See supra* notes 83, 137 and accompanying text.

182. *See supra* note 111 and accompanying text.

183. *See, e.g.*, City of Buffalo v. Lewis, 84 N.E. 809, 811 (N.Y. 1908).

184. *See, e.g.*, Weingarten v. Bd. of Trs. of N.Y.C. Teachers' Ret. Sys., 780 N.E.2d 174, 177–80 (N.Y. 2002).

185. N.Y. CONST. art. IX, § 2(b)(i).

186. *Id.* §§ 2(c)(i), 2(c)(ii)(10).

187. *Id.* § 2(b)(i).

Second, any State legislation that repeals, diminishes, or impairs the powers reserved to the local government under the "statute of local governments" must adhere to a double re-enactment procedure. Once the infringing legislation is approved by the State Legislature and signed by the Governor in a regular session, it must be re-enacted and approved by the Legislature and the Governor the following year.[188] Seemingly, therefore, any law that would impair the power of a local government to adopt zoning ordinances, including ECL section 23-0303(2), would be subject to the re-enactment requirement of Article IX, section 2(b)(i) of the New York Constitution. ECL section 23-0303(2) was enacted in 1971 and amended in 1982, each by a single enactment.[189]

The Home Rule provision was first added to the constitution in 1894.[190] The principle of Home Rule was strengthened in a 1923 amendment.[191] *Adler v. Deegan* is one of the first cases to confront its scope. The court in *Adler* first established the concept of "substantial state concern" as a reason not to follow the double re-enactment procedure required by the constitution for all matters relating to local property, affairs, or government.[192] In that case, New York City sued to enjoin the State from enforcing the Multiple Dwelling Law as it conflicted with local law.[193] Chief Justice Cardozo, in a concurring opinion that has been cited in a majority of the opinions on the distinction between state and municipal authority, distinguished between the City's law and zoning resolutions.[194] Cardozo's test is if "the subject be in a substantial degree a matter of state concern, the Legislature may act, though intermingled with it are concerns of the locality."[195] Cardozo explicitly notes, however, that a municipality will not be preempted from taking any action within the field.[196] In this sense, state action in a field of local concern is substantially different from ordinary preemption.

188. *Id.*
189. Kenneally & Mathes, *supra* note 98, at 2.
190. *See* Adler v. Deegan, 167 N.E. 705, 706–07 (N.Y. 1929).
191. *See id.* at 713.
192. *See id.* at 713–14.
193. *See id.* at 706.
194. *See id.* at 711–12 (Cardozo, C.J., concurring).
195. *Id.* at 713–14.
196. *Id.* at 712; *see also* James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 718 ("[L]ocal regulation could be adopted to add additional protections, as long as the city's involvement is consistent with the powers of the State.").

Preempting the municipality from acting altogether would be a totally different question than whether the State may act.[197] In the instance of urban slums, both the State and the municipality have authority to regulate issues of public welfare, and thus are in the position to enact laws or ordinances.[198] Or, as Cardozo put it, "[t]he concern of the state to protect the health and welfare of its inhabitants may not stand in the way of action by the city consistent with the ends envisaged by the state, but adding greater safeguards with reference to related ends that are municipal or urban."[199] Even where the State has acted, the municipality may step in to regulate as long as the municipality only adds to standards, restrictions, or conditions set forth in the state statute.[200] These added restrictions fit within the municipality's authority to enact ordinances that further the public welfare.

Courts rarely find a statute triggers the constitution's local authority provision. In deciding against applying the complicated procedure required per the constitution, courts have regularly cited Cardozo for the proposition that a strong reading of the provision would overrule years of precedent.[201] Thus, an issue only must be a matter of substantial state concern for the State Legislature to have the authority to regulate in the field.[202] In *Floyd v. New York State Urban Development Corp.*, the statute in question laid out the procedures for local challenge of a state action to build in a zoning district wherein such construction was prohibited.[203] If the municipality challenged the state action, then it was still within the state's discretion whether to build in the zoning district at issue.[204] The court took a further step in the direction of state authority in *Wambat Realty Corp. v. State of New York*.[205]

Prior to the *Wambat* decision, the Home Rule provision of the New York State Constitution was amended in 1963. The 1963 Home

197. *See Adler*, 167 N.E. at 712 (Cardozo, C.J., concurring).

198. N.Y. STAT. LOC. GOVTS. § 11(4) (McKinney 2012).

199. *Adler*, 167 N.E. at 712 (Cardozo, C.J., concurring).

200. *See id.* ("There can be no legitimate concern of the state, or none at least is now suggested, that would throw open Murray Hill to industry and trade, if the city authorities were to hold fast to the belief that it should be preserved for residences only.").

201. *See, e.g.*, Whalen v. Wagner, 152 N.E.2d 54, 56 (N.Y. 1958).

202. *See* Bugeja v. City of New York, 266 N.Y.S.2d 80, 82 (N.Y. App. Div. 1965).

203. *See* 300 N.E.2d 704, 705 (N.Y. 1973).

204. *See id.* at 706.

205. 362 N.E.2d 581, 586–87 (N.Y. 1977).

Rule Amendment was "intended to expand and secure the powers enjoyed by local governments."[206] Concurrently, the Municipal Home Rule Law and the Statute of Local Governments were amended to mandate that they be "liberally construed."[207] The amended Home Rule Law, however, maintained the previously narrowly construed language that the Legislature could pass any law that did not affect "property, affairs or government" of a locality.[208] The retention of that phrase led many scholars to predict the amendment would have no effect on the judicial interpretation of home rule.[209]

In *Wambat*, the Adirondack Park Agency Act established a comprehensive zoning plan affecting 119 local governments, thereby encroaching on local zoning power.[210] The court found two subsidiary issues key to the resolution: (1) whether the subject is a matter of state concern; and (2) whether the constitution's re-enactment requirement applies to matters of state concern.[211] In arriving at its conclusion, the court assumed matters of state concern necessarily relate to "other than the property, affairs or government of local government."[212] Under such a reading of Article IX, the Constitution's re-enactment procedure is never triggered when the matter is of State concern. Moreover, the two subsidiary issues would collapse into one issue, because matters of state concern are not matters that would trigger the constitution's re-enactment procedure.

The *Wambat* court narrowly interpreted Article IX not to impact areas of the law covered by existing state regulatory bodies.[213] *Wambat* holds, "The price of strong local government may not be the destruction or even the serious impairment of strong State interests."[214] On the other hand, later cases have found state and local authority often intermingle.[215] *Hotel Dorset Company v. Trust for*

206. *Id.* at 585.

207. N.Y. MUN. HOME RULE LAW § 51 (McKinney 1963).

208. N.Y. CONST. art. IX § 3.

209. *See* J.D. Hyman, *Home Rule in New York 1941–1965: Retrospect & Prospect*, 15 BUFF. L. REV. 335, 338–48 (1965).

210. *See Wambat*, 362 N.E.2d at 584.

211. *Id.* at 582.

212. *Id.*

213. *See id.*

214. *Id.* at 586–87.

215. *See, e.g.*, Hotel Dorset Co. v. Trust for Cultural Res. of City of N.Y., 385 N.E.2d 1284, 1291–92 (N.Y. 1978); Farrington v. Pinckney, 133 N.E.2d 817, 824 (N.Y. 1956). Matters that affect local zoning ordinances are subjected to greater scrutiny due to the strong local interest in maintaining zoning, or siting, as an exercise of

Cultural Resources of City of New York held that a state statute that has the appropriate level of state interest will not be rendered invalid by its operation in a field that is also of local concern as long as the enactment is reasonable and related to the State's purpose.[216] Accordingly, matters of state concern may also be matters of local concern, suggesting that concurrent state and local regulation is a possibility.

In *City of New York et. al. v. Patrolmen's Benevolent Association of City of New York, Inc*, the State did not provide evidence that its legislation would serve its stated ends better than the local law, and the court struck the state law.[217] A 1974 state statute exempted New York City from the mandated use of the State's arbitration board to resolve collective bargaining negotiations with government employees, because the City had already created its own arbitration board.[218] Without following the double re-enactment procedure, the State Legislature eliminated the exemption from the City by passing a statute purporting to give the State's arbitration board the exclusive authority over negotiations between the City and city police.[219] Returning to Cardozo's concurring opinion in *Adler*, the Court of Appeals adopted a two-part test: "the subject [must] be in a substantial degree a matter of State concern," and the "subjects of State concern [must be] directly and substantially involved."[220] Assuming arguendo the State has a substantial interest in the uniformity of impasse procedures available to police department members and in a fairer forum for bargaining, the court found no reasonable relationship between those interests and the means adopted to achieve them.[221] Further, the State provided no evidence that the City-provided forum was unfair relative to the State's arbitration board.[222] Thus, the local law that is more effective at achieving the State's stated interests was upheld.

exclusive local power. Town of Monroe v. Carey, 412 N.Y.S.2d 939, 942–43 (N.Y. Sup. Ct. 1977), *aff'd*, 386 N.E.2d 1335 (N.Y. 1979).

216. *Hotel Dorset*, 385 N.E.2d at 1291–92.

217. *See* City of New York v. Patrolmen's Benevolent Ass'n of City of N.Y., 676 N.E.2d 847, 853 (N.Y. 1996).

218. *See id.* at 848–49.

219. *See id.* at 849.

220. *Id.* at 851–52.

221. *See id.* at 853.

222. *See id.*

6. Mined Land Reclamation Law

Absent significant case precedent interpreting the OGS, courts are likely to rely on the courts' interpretation of an analogous provision in the Mined Land Reclamation Law (MLRL), which gives the DEC authority to adopt regulations and issue permits to develop land that concurrently falls under local jurisdiction. The MLRL's initial supersession clause read,

> [T]his title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from enacting . . . local zoning ordinances or laws which impose stricter mined land reclamation standards or requirements than those found herein.[223]

Prior to MLRL enactment, some municipalities regulated local mining activity.[224] The plain meaning of the clause precludes such local legislation.[225] Further, the Bill Jacket characterizes the MLRL as establishing a statewide uniform law to replace the local patchwork of regulations based on little to no technical expertise.[226] As for local ordinances that clash with the statewide law, the MLRL established a procedure whereby the DEC will review zoning ordinances, and potentially include restrictions within the permit, while reserving the right to cast local ordinances aside.[227]

Two seminal decisions, *Frew Run Gravel Products v. Town of Carroll*[228] and *Gernatt Asphalt Products, Inc. v. Town of Sardinia*,[229] are of particular importance. The Court of Appeals held in both cases that local zoning ordinances did not relate to the extractive mining industry, and therefore were not preempted under New

223. N.Y. ENVTL. CONSERV. LAW § 23-2703(2) (McKinney 1997).

224. Joan Leary Matthews, *Siting Mining Operations in New York–The Mined Land Reclamation Law Supersession Provision*, 4 ALB. L. ENVTL. OUTLOOK 9, 11 (1999).

225. *See, e.g.*, Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1235 (N.Y. 1996); Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920, 922 (N.Y. 1987)).

226. *Frew Run*, 518 N.E.2d at 923 (citing Memorandum in Support of Assembly Bill 10463-A, N.Y. STATE DEP'T OF ENVTL. CONSERVATION Bill Jacket, L. 1974, c. 1043 (May 31, 1964)).

227. ENVTL. CONSERV. § 23-2711(3) ("If the [DEC] finds that the determinations made by the local government . . . are reasonable and necessary, the department shall incorporate these into the permit, if one is issued.").

228. 518 N.E.2d 920 (N.Y. 1987).

229. 664 N.E.2d 1226 (N.Y. 1986)

York's MLRL. The MLRL contains language regarding the State's scope of regulatory authority that is very similar to the language in the OGS.

Frew Run is the leading case on deciphering the extent to which the municipality is precluded from legislating. In the case, the landowner received a DEC-issued permit to mine sand and gravel on his land in a zoning district wherein sand and gravel operations were expressly prohibited by the town's zoning ordinance.[230] Though the DEC had decided against the determinations of the local government, the local government did not cease to enforce the zoning ordinance.[231] Preemption analysis of statutory language involves examining certain provisions for express language outlining local authority and the whole statute for implicit preemption.[232] Where express language is found, judicial review will not include implicit preemption analysis.[233] Due to the above express supersession clause detailing the scope of the State's regulatory authority, the court held the validity of the ordinance to be determined by direct conflict preemption analysis.[234]

Under the MLRL, there is direct conflict between the two regulatory bodies if the local law "relat[es] to the extractive mining industry."[235] Thus, if the local law does not "relat[e] to the extractive mining industry," and is otherwise within local authority to enact, it will be upheld.[236] The zoning ordinance at issue in *Frew Run* "regulat[es] the location, construction and use of buildings, structures, and the use of land in the Town of Carroll, County of Chautauqua, State of New York and for said purposes dividing the Town into districts."[237] The purported reasons behind the adoption of the MLRL and zoning ordinances are different, and the subject matter they intend to regulate are different. The court held that "relating to the extractive mining industry" does not include zoning ordinances,

230. *Frew Run*, 518 N.E.2d at 921.

231. *See id.*

232. *See id.* at 923.

233. *See id.* at 921–23.

234. *See id.* at 922. In *Frew Run* and the literature analyzing the decision, implicit preemption is distinguished from "express supersession," wherein the statute expressly carves out an area within the field of regulation for local regulation. *Id.*; *see, e.g.*, Kenneally & Mathes, *supra* note 98, at 1; Michelle L. Kennedy, *The Exercise of Local Control over Gas Extraction*, 22 FORDHAM ENVTL. L. REV. 375 (2011). Without changing the analysis, later decisions have placed "express supersession" within preemption analysis.

235. *Frew Run*, 518 N.E.2d at 922.

236. *Id.*

237. *See id.*

which regulate land use generally; such local laws only exert incidental control over any particular businesses and thus are not preempted by ECL section 23-2703.[238] Moreover, in later decisions, the court extended exclusive local authority over land use regulation in this arena to conditional zoning as long as the conditions did not "relate to the extractive mining industry."[239]

The court found support for its ruling in the MLRL's legislative history. Judicial review, even regarding a direct state-local conflict, not only entails a glance over the applicable provision, but also an examination of the legislative history and the statute as a whole.[240] The Governor's Bill Jacket and the separate requirements for mining and mined land reclamation reinforce the notion that the Legislature intended to retain local zoning authority in the hands of the municipality.[241] On the other hand, the MLRL established a mechanism for the DEC to reject local zoning authority.[242] Overall, the MLRL sends conflicting messages regarding the local role in the regulation of mining applicants, but the plain meaning of the supersession clause clearly favors maintaining local zoning ordinances that place higher restrictions on mining applicants than the MLRL.[243]

Frew Run established a framework for interpreting supersession clauses and is key to future cases dealing with supersession authority. Where the language regarding the State and local spheres of regulation is express, "absen[t] a clear expression of legislative intent

238. *See id.* In *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, the Court clarified that the local government may prohibit mining activity in every zoning district. 664 N.E.2d 1226 (N.Y. 1996).

239. *See, e.g.*, Seaboard Contracting & Material, Inc. v. Town of Smithtown, 541 N.Y.S.2d 216, 218 (N.Y. App. Div. 1989), *appeal dismissed*, 547 N.E.2d 104, (N.Y. 1989), *mot. for lv. den.*, 553 N.E.2d 1024 (N.Y. 1990) (upholding requirement on "Heavy Industry" in zoning district that they may only,"operat[e] outside a 500–foot radius of a residential district or a school or church or a similar place of public assembly and must establish that the proposed mining operation would not produce a significant adverse effect upon the environment"); Morrell v. C.I.D. Landfill, 510 N.Y.S.2d 395, 396 (N.Y. App. Div. 1986), *appeal den.*, 511 N.E.2d 87 (N.Y. 1986) (upholding town ordinance conditioning approval of "excavation, stockpiling, and sale of mineral matter" in residential and agricultural districts on whether operations will create a nuisance and whether the area will be "safe and useful" upon termination of operations).

240. *See Frew Run*, 518 N.E.2d at 922.

241. *See id.* at 922–23 (citing N.Y. ENVTL. CONSERV. LAW §§ 23-2705(8); MEMORANDUM OF GOVERNOR WILSON FILED WITH ASSEMBLY BILL 10463-A Governor's Bill Jacket, L.1974, ch. 1043 (June 15, 1974)).

242. ENVTL. CONSERV. § 23-2711(3)(b) (McKinney 2012).

243. *See, e.g.*, Ne. Mines, Inc. v. State Dep't of Envtl. Conservation, 494 N.Y.S.2d 914, 916 (N.Y. App. Div. 1985).

to preempt local control over land use, the statute should not be read as preempting local zoning authority."[244] The MLRL very clearly expresses legislative intent to regulate the particulars of mining, but any language from which may be inferred legislative intent to override zoning ordinances is not nearly as express.[245] Thus, the State has not evinced a desire to preempt the entire land use field,[246] and the adoption of local zoning ordinances is not in direct conflict with state legislation.[247]

II. LOCAL OR STATE RULE OVER LOCAL GOVERNANCE

Judicial review of local law entails reviewing state law and the constitution for inconsistency.[248] If no inconsistency is present and the local government properly derives its authority to act pursuant to the constitution or state law, the local law will be upheld.[249] In the case of fracking in New York, OGS is the relevant state law.[250] The fracking process requires the use of surface land and the use of the shale lying below the surface.[251] Thus, OGS implicates and, as demonstrated in Part I, conflicts with local regulation of land uses.

Courts can examine the conflict between state and local law in one of two ways. First, courts can conduct preemption analysis to determine whether OGS places all gas-related regulation, including the location of gas wells, exclusively within the state's regulatory authority.[252] If a court ruling on this issue were to find the OGS places the physical location of gas wells within the exclusive scope of

244. Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1234 (N.Y. 1996).

245. *Id.*

246. *See, e.g.*, Jancyn Mfg. Corp. v. County of Suffolk, 518 N.E.2d 903, 907 (N.Y. 1987); N.Y. State Club Ass'n v. City of New York, 505 N.E.2d 915, 920 (N.Y 1987); People v. N.Y. Trap Rock Corp., 442 N.E.2d 1222, 1239 (N.Y. 1982).

247. *See, e.g.*, People v. De Jesus, 430 N.E.2d 1260, 1261 (N.Y. 1981); Robin v. Inc. Vill. of Hempstead, 285 N.E.2d 285, 287 (N.Y. 1972).

248. *See, e.g.*, Kamhi v. Town of Yorktown, 547 N.E.2d 346, 348 (N.Y. 1989); Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920, 921 (N.Y. 1989); *Jancyn*, 518 N.E.2d at 902.

249. *See generally, e.g.*, *Jancyn*, 518 N.E.2d 903; *N.Y. State Club Ass'n*, 505 N.E.2d 915.

250. *See* N.Y. ENVTL. CONSERV. LAW § 23-0305 (McKinney 2012).

251. MIT ENERGY INITIATIVE, *supra* note 19; *see, e.g.*, Cooperstown Holstein Corp. v. Town of Middlefield, 943 N.Y.S.2d 722 (N.Y. Sup. Ct. 2012).

252. *See Cooperstown Holstein*, 943 N.Y.S.2d at 724; Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458, 461 (N.Y. Sup. Ct. 2012); *In re* Envirogas, Inc. v. Town of Kiantone. 447 N.Y.S.2d 221, 222 (N.Y. Sup. Ct. 1982), *aff'd,* 454 N.Y.S.2d 694 (N.Y. App. Div. 1982).

the state's regulatory authority, then the local government that restricts the physical location of gas wells would be exceeding its authority. As a result, the court would strike down the local government's restriction. Second, courts can invoke constitutional authority for local governments to enhance public welfare protections adopted by state law.[253] If the courts were to find that local governments could impose greater restrictions than those imposed under state law when a regulation affects the public welfare, then the reviewing court would uphold the local restriction.

A. Preemption of Fracking Under the Oil, Gas, and Solution Mining Law

A state statute that expressly prohibits[254] or preempts[255] the local law precludes the local government's exercise of supersession authority. The overriding authority of the State to preempt local legislation embodies "the untrammeled primacy of the Legislature to act, as it always had, with respect to matters of State concern."[256] Thus, before arriving at a question as to the scope of the local government's supersession authority, courts will necessarily conduct a preemption analysis.[257] Preemption analysis entails two steps. First, courts will look for direct conflict between the state and local laws, or express preemption.[258] Absent express preemption, courts will look for implied preemption.[259]

If courts find implicit preemption analysis does not apply because the express language of OGS makes this an issue of direct conflict, then the scope of local authority will be determined by the plain meaning of the supersession clause.[260] Case precedent has shown the comprehensiveness of the statute's regulatory scheme, and the

253. *See* Adler v. Deegan, 167 N.E. 705, 713–14 (N.Y. 1929).

254. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 2012); *see* Walker v. Town of Hempstead, 643 N.E.2d 77, 78–79 (N.Y. 1994).

255. Kamhi v. Town of Yorktown, 547 N.E.2d 346, 349 (N.Y. 1989); Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920, 922 (N.Y. 1989).

256. Wambat Realty Corp. v. State, 362 N.E.2d 581, 586 (N.Y. 1977).

257. *See, e.g.*, Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1234 (N.Y. 1996) ("[T]he preemption question was one of statutory construction, not a search for implied preemption, because the Legislature included within the MLRL an express supersession clause.").

258. *See, e.g.*, *id.*, Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920 (N.Y. 1987); *see also* DJL Rest. Corp. v. City of New York, 749 N.E.2d 186 (N.Y. 2001).

259. *See, e.g.*, *Frew Run*, 518 N.E.2d at 922.

260. *See, e.g.*, *Gernatt Asphalt*, 664 N.E.2d at 1234; *Frew Run*, 518 N.E.2d at 922.

legislative history is important,[261] but not dispositive.[262] The clause in OGS that outlines the scope of state jurisdiction reads, "[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."[263] In *Frew Run*, based on the language, "this title shall supersede all other state and local laws relating to the extractive mining industry," the court held that the MLRL does not implicitly preempt local zoning power.[264] Therefore, if courts apply preemption analysis, they will apply direct conflict analysis.

In *Envirogas*, the court found express preemption of all local laws relating to the subject matter of oil, gas, and mining solution activity.[265] The court "acknowledge[d] that the qualifying language—'relating to the regulation'—may be relevant to determining the scope of the supersession."[266] Further, the court emphasized that any interpretation of the scope of state authority must be limited by the constitutional requirement that local powers be liberally construed.[267] Under New York's preemption analysis, the express preemption language in ECL section 23-0303(2) should not be expanded based on a comprehensive and detailed regulatory scheme, because the analysis does not reach implied preemption analysis unless there is no express preemption.[268] Where there is express preemption language, the scope of preemption is to be determined by the language alone.[269] Therefore, "ECL § 23-0303(2) may be viewed as superseding only those local laws 'relating to the regulation' of the oil and gas industry."[270]

The plain meaning of the OGS supersession clause is slightly different from the MLRL, and this difference could be interpreted in two ways. First, the *Frew Run* and *Gernatt Asphalt* decisions held "relating to mining activity" not to include general land use regulation, so long as the regulation set a higher standard than that

261. *See, e.g.*, *Frew Run*, 518 N.E.2d at 922.

262. *See supra* notes 107–23.

263. N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2012).

264. *Id.* § 23-0703(2); *see also Frew Run*, 518 N.E.2d at 921.

265. *See* Matter of Envirogas, Inc. v. Town of Kiantone. 447 N.Y.S.2d 221 (N.Y. Sup. Ct. 1982), *aff'd*, 454 N.Y.S.2d 694 (N.Y. App. Div. 1982).

266. Kenneally & Mathes, *supra* note 98, at 3.

267. *Id.*

268. *Id.* at 4.

269. *Id.* at 3–4.

270. *Id.* at 4.

required by state law.[271] Both cases held legislative intent as evidenced by the MLRL did not include prohibiting general land use regulations, since zoning has only an "incidental effect" on mining regulation.[272] Under direct conflict analysis, courts may interpret OGS to carve out room for local zoning ordinances that satisfy minimum DEC safety standards.

As opposed to MLRL, OGS expressly preserves local authority over local roads and property taxes. A law that expressly describes a particular act to which it shall not apply creates an inference that what is omitted was intended to be omitted.[273] The OGS supersession clause "shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."[274] The clause represents "clear and explicit authority" against any form of preemption or unreasonable limitation on the municipality's authority to adopt laws relating to local roads and property taxes.[275] Local roads and property taxes are among the enumerated powers granted to local governments under the Statute of Local Governments and the Municipal Home Rule Law.[276] Had the Legislature intended to carve out a municipality's ability to use its zoning powers to dictate whether and where drilling may occur, it could have done so, similar to the carve-out for local roads and property taxes. The fact that they did not do so may suggest that courts will interpret the supersession clause to preclude the municipality from now claiming such authority.[277]

271. *See generally, e.g.*, Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226 (N.Y. 1996); Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920 (N.Y. 1987); *see also* DJL Rest. Corp. v. City of New York, 749 N.E.2d 186 (N.Y. 2001).

272. *See, e.g.*, *Gernatt Asphalt*, 664 N.E.2d at 1234; *Frew Run*, 518 N.E.2d at 922.

273. *See supra* notes 153–55.

274. N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2012).

275. *See In re* Envirogas, Inc. v. Town of Kiantone, 447 N.Y.S.2d 221, 222 (N.Y. Sup. Ct. 1982) (citing Robin v. Inc. Vill. of Hempstead, 285 N.E.2d 285, 287–88 (N.Y. 1972)), *aff'd*, 454 N.Y.S.2d 694 (N.Y. App. Div. 1982). An example of a reasonable limitation is requiring that a local law adopted on the premise of regulating local roads be reasonably related to such regulation. *Id.* Imposing local compliance fees on well pads due to the pressure put on local roads by oil and gas industry trucks is unreasonable. *Id.*

276. N.Y. MUN. HOME RULE LAW § 10 (McKinney 2012); N.Y. STAT. LOC. GOV'TS § 10 (McKinney 2012).

277. *See* N.Y. STAT. LAW § 240 (McKinney 2012); Weingarten v. Bd. of Trs. of N.Y.C. Teachers' Ret. Sys., 780 N.E.2d 174, 179 (N.Y. 2002) ("[W]here the Legislature lists exceptions in a statute, items not specifically referenced are deemed

There is evidence in OGS as a whole and the legislative history that the legislative intent was to preempt all local regulation. For direct conflict analysis, the statute's comprehensiveness and history are indicative of the local role, if any, in regulation.[278] OGS requires a certain distance of separation between a well pad and bodies of water.[279] Thereby, OGS, and thus the DEC, regulate permissible and impermissible land uses in the field and oil and gas activity. Similarly, zoning ordinances establish permissible and impermissible land uses.[280] OGS and zoning ordinances regulate permissible land uses.

However, the fact that OGS touches upon permissible land uses is not dispositive as to local zoning authority. *DJL Restaurant* held that the purpose of the Alcohol Beverage Control Law was to "promote temperance in the consumption of alcoholic beverages" and not to regulate land use, notwithstanding limits imposed by the law on the location of bars and adult entertainment liquor establishments.[281] With regard to the removal of local zoning authority, *Daytop Village* held the statute must provide clear intent to divest such authority.[282] Under the rules of statutory construction,[283] there may be intent to relinquish local zoning authority, but the purpose of OGS is not to regulate land use. The policy aims are to develop New York's natural resources, prevent waste, and protect landowners' rights.[284] As MLRL contained similar policy statements seeking to develop natural resources and the courts still upheld local zoning ordinances, courts will also likely distinguish between OGS's purpose and the purpose of general land use regulations.[285]

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to have been intentionally excluded."); Jewish Home & Infirmary of Rochester, N.Y., Inc. v. Comm'r of N.Y. State Dep't of Health, 640 N.E.2d 125, 128 (N.Y. 1994).

278. *See, e.g.*, Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226 (N.Y. 1996); Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920 (N.Y. 1987).

279. N.Y. ENVTL. CONSERV. LAW § 23-0501 (McKinney 2012)

280. *See, e.g.*, *Frew Run*, 518 N.E.2d at 922; Young v. City of Binghamton, 447 N.Y.S.2d 1017, 1024 (N.Y. Sup. Ct. 1982); Town of Fenton v. Tedino, 356 N.Y.S.2d 397, 401 (N.Y. Sup. Ct. 1974).

281. *See* DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 191 (N.Y. 2001).

282. Inc. Vill. of Nyack v. Daytop Vill., Inc., 583 N.E.2d 928, 931 (N.Y. 1991).

283. *See, e.g.*, Weingarten v. Bd. of Trs. of N.Y.C. Teachers' Ret. Sys., 780 N.E.2d 174, 178–79 (N.Y. 2002); Jewish Home & Infirmary of Rochester, N.Y., Inc. v. Comm'r of N.Y. State Dep't of Health, 640 N.E.2d 125, 129 (N.Y. 1994) (*expressio unius est exclusio alterius*).

284. N.Y. ENVTL. CONSERV. LAW § 23-0301 (McKinney 2012).

285. *See, e.g.*, *DJL Rest.*, 749 N.E.2d 191; Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1234–35 (N.Y. 1996); Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920, 922 (N.Y. 1987).

If a reviewing court were to find the interpretation of MLRL analogous to the OGS, then the court would uphold local zoning authority. As a result, any community would have the power to bar fracking within its jurisdiction and thereby limit New York's tax revenue opportunities from profits made on energy exploration and development. Depending on the number of communities that choose to prohibit local fracking, the New York government may lose control over energy policy and lose the ability to adopt a comprehensive plan for statewide energy production and use. Such an interpretation, however, would also create more leverage for local communities that desire access to scientific studies of the impact of fracking on public welfare.

B. Constitutional Analysis

Article IX of the New York State Constitution stipulates that any infringement on the part of the state government on local authority over "property, affairs or government" will not have the force of law unless enacted under the re-enactment procedure.[286] Ambiguity surrounding the phrase "property, affairs or government" of local government, as opposed to the property and affairs of state government, led to the adoption of Chief Justice Cardozo's "substantial state concern" test.[287] Cardozo found state concern particularly prevalent in situations involving public safety and welfare where the local government chose not to regulate.[288] Later court decisions in the context of a more integrated State became less reticent to find matters of "substantial state concern."[289] However, Cardozo also raised several situations wherein it is not likely a court would find "substantial state concern" and thus would hold the matter to be exclusively within the city or town's discretion: namely, where such a change would drastically affect local population or degrade the infrastructure of the locality.[290] Moreover, even where the State has chosen to regulate, "[t]he [zoning] power is left intact,

286. N.Y. CONST. art. IX, § 2(b)(i).

287. *See* Adler v. Deegan, 167 N.E. 705, 713–14 (N.Y. 1929); *see also* City of New York v. Patrolmen's Benevolent Ass'n of City of N.Y., 676 N.E.2d 847, 851–52 (N.Y. 1996); Hyman, *supra* note 209.

288. *See Adler*, 167 N.E. at 712.

289. *See, e.g.*, Wambat Realty Corp. v. State, 362 N.E.2d 581, 582–83 (N.Y. 1977); Floyd v. N.Y. State Urban Dev. Corp., 300 N.E.2d 704, 705–06 (N.Y. 1973).

290. *See Adler*, 167 N.E. at 712.

except for the declaration of a minimum below which restriction may not fall."[291]

Here, OGS has set a standard for all gas development activity within the state. The Legislature has proclaimed that developing New York's natural resources while preserving the environment is a state concern.[292] The distinction between a matter of local concern and one of state concern lies in the scope of its impact. Noting the policy goal of OGS and the technical expertise of the state agency endowed with regulatory authority, removing the regulations put in place to preserve the environment will conflict with a matter of state concern: the preservation of the environment across town, county, and city borders. Environmental standards are particularly necessary where the regulated activity could potentially pollute a region much larger than a city, as in the case of fracking.[293]

Intermingled with matters of state concern are matters of local concern. Though the premise for local concern and local governance is Article IX of the New York Constitution, disputes over state and local regulatory territory are regularly decided by a balancing of statutory interests per the Municipal Home Rule Law and the state statute at issue.[294] By invoking statutory law, courts avoid invalidating a statute that conflicts with a constitutional mandate. As a result, the concept of local concern has developed not only through the constitution, but also through statutes. Notably, the power to adopt local zoning ordinances in step with a local development plan that protects local public welfare is among the matters of local concern.[295] Preservation of the local public welfare, associated with greater regulation, is a matter of local concern and therefore a municipality would be within its constitutional power to enhance state-imposed regulations. Therefore, in the case of OGS, the municipality would maintain the authority to adopt zoning ordinances, as the state did not adhere to the constitution's re-enactment procedure.

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291. *Id.* at 711–12.

292. N.Y. ENVTL. CONSERV. LAW § 23-0301 (McKinney 2012).

293. *See supra* notes 3–4 and accompanying text.

294. *See, e.g.*, People v. N.Y. Trap Rock Corp., 442 N.E.2d 1222, 1223 (N.Y. 1982) (requiring a broad reading of the Municipal Home Rule Law); Monroe-Livingston Sanitary Landfill v. Town of Caledonia, 417 N.E.2d 78, 80 (N.Y. 1980).

295. N.Y. CONST. art. IX, § 2(b)(i); N.Y. TOWN LAW § 263 (McKinney 2012); *see also N.Y. Trap Rock Corp.*, 442 N.E.2d at 1223–24; Berenson v. Town of New Castle, 341 N.E.2d 236, 242–43 (N.Y. 1975); Udell v. Hass, 235 N.E.2d 897, 901–02 (N.Y. 1968).

If municipalities are not granted the authority to restrict the physical location of gas wells and courts interpret the OGS to preempt local regulation, then local communities will have limited leverage to negotiate with gas drilling companies. Instead, the DEC will decide the physical location of gas wells. Landowners may choose not to sell, but neighboring landowners could sell their land or mineral rights to their land. As stated above, there is a risk of public drinking water contamination in communities where natural gas wells are fracked.[296]

On the other hand, if municipalities are granted such authority, then municipalities that are even generally in favor of drilling are left either wholeheartedly accepting gas drilling and the state regulations that come with it, or banning local gas drilling. A ruling that gives municipalities the power to voice their concerns only through prohibiting the activity, however, does not create a zero-sum game. Instead, simply giving local government a seat at the table in constructing safe regulations, and raising key local issues may adequately address the interest in giving the municipality a strong voice in whether gas development and its economic benefits develops in New York. Though local authorities are presently hardly equipped to deal with enforcing regulations, the DEC is heavily understaffed to the point that any state regulations could not be effectively enforced.[297] In such an economic crunch, local governments may provide some insight and boots on the ground to help enforce the DEC's regulations.

III. INCREASING PUBLIC WELFARE ONE ZONING ORDINANCE AT A TIME

A. Preemption Analysis Should Not Apply

So far, three court decisions reviewing local ordinances limiting or banning fracking have applied preemption analysis.[298] Besides noting that local governance is expressly preserved in the constitution, none of the decisions have applied the express language in the constitution

296. *See supra* notes 1–2 and accompanying text.

297. *See, e.g.*, Allison Sickle, *New York DEC Staff Shorthanded to Reply to 14,000 Marcellus Shale Comments—Environmental Inspectors Down to 16*, D.C. BUREAU (Apr. 29, 2010), http://www.dcbureau.org/20100429137/natural-resources-news-service/new-york-dec-staff-shorthanded-to-reply-to-13500-marcellus-shale-comments-environmental-inspectors-down-to-16.html.

298. *See supra* notes 84–92 and accompanying text.

for reconciling state laws that infringe on local governance.[299] Although case law has narrowed the meaning of Article IX's re-enactment provision,[300] the courts have not completely discarded Article IX. To apply the law as written, the courts must invoke Article IX where a conflict arises between a local ordinance and a state statute.[301]

Even so, the two most recent cases have made clear that the OGS is significantly analogous to the MLRL such that a reviewing court will most likely uphold a local ordinance banning fracking under preemption analysis.[302] Although this Note argues for a reviewing court to uphold local ordinances that prohibit fracking on constitutional grounds, it is likely that courts will continue along this line of decisions so long as it is unnecessary to invoke the constitution to uphold local authority over local governance.

B. Applying the Constitution

Article IX of the New York State Constitution requires a realm of local authority to exist. The manner in which a local government chooses to use its land is recognized in Article IX and in subsequent cases as integral to local governance. To remain faithful to the constitution and its policy of preserving local governance, courts ruling on the validity of local zoning ordinances banning local fracking should uphold the zoning ordinances.

Article 23 of the ECL authorizes and governs oil and gas development in New York. In doing so, it sets forth the purpose and policy objectives of the State; namely, preventing waste, promoting recovery of the resource, and protecting the correlative rights of the landowner.[303] Consistent with this statutory directive, Article 23 provides a detailed statutory framework with exacting requirements concerning the location and size of drilling units and the location of well pads.[304] These requirements reflect the need to site wells based upon geology and environmental considerations. Once an express intent to carve out an area for local regulatory action is found, however, the court will not find OGS's detailed statutory framework informative.

299. *See supra* notes 84–92 and accompanying text.
300. *See supra* notes 211–15 and accompanying text.
301. *See supra* notes 84–92 and accompanying text.
302. *See supra* notes 90–92 and accompanying text.
303. N.Y. ENVTL. CONSERV. LAW § 23-0301 (McKinney 2012).
304. *See id.* § 23-0501.

The uniform application of statewide regulations ensures that the OGS's resource development and efficient recovery policy objectives will be achieved.[305] A contrary interpretation would inhibit this objective by prohibiting what the State allows and promotes; namely, oil and gas development. As such, any suggestion that municipalities can regulate the location of oil and gas wells or exclude oil and gas extraction, exploration, or development in any portion of a municipality based upon zoning principles frustrates the policy aims of the OGS's statutory scheme.

The policy reasons favoring comprehensive centralized regulation generally have not outweighed the local government's interest in the public welfare. Citing precedent established in cases interpreting the MLRL's supersession clause, the court should find OGS created a similar carve-out for local land use regulations that do not impinge on the State's express authority to regulate gas development activities. The Court in *Gernatt Asphalt* and *Frew Run* held that where the State expressly claims authority to regulate all that "relates" to a subject matter, the State has not preempted local regulation of land use generally.[306] The similarity between the OGS and the MLRL supersession clauses favors upholding local zoning power.

Applying the Municipal Home Rule Law and supersession authority essentially allows the courts to avoid imposing a complicated and unusual procedure on the State Legislature. Like the constitution, the Municipal Home Rule Law provides for local government authority over "local property, affairs, or government." It makes no mention, however, of the re-enactment procedure. Therefore, courts have been less hesitant to invoke supersession authority, since it will not place too high a hurdle on state regulation of local matters of general concern. Furthermore, since the Municipal Home Rule Law is only a statute, and not a constitutional provision, the courts have more discretion to choose how to find a balance between state and local power based on the tools of statutory construction the court decides to apply when reading the statute. The constitution would always trump a state statute where it applies.

By applying Article IX of the constitution, however, the court will establish a clear distinction between local and state power, and

305. *See id.* § 23-0303(2).

306. *See, e.g.*, Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1234 (N.Y. 1996); Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920, 922-23 (N.Y. 1987); *see also* DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 191 (N.Y. 2001).

promote state-local cooperation in formulating regulations that may severely impact the development of a local community. In the case of fracking, multiple incidents have already occurred in New York and neighboring states involving threats to water safety as a result of drilling and disposing of wastewater.[307] In *Adler*, Cardozo finds disturbing a situation where the State government may decide to "throw open Murray Hill to industry and trade" without seeking the approval of the New York City government.[308] Permitting fracking based on State government approval alone would similarly throw open town and city centers to fracking.

Cardozo's exception for local zoning standards that are higher than the standards set forth by the State government entity—in this case the DEC—solves just as many problems as it creates. Having unpredictably wavered between treating Article IX § 2 as a repository for state power and a provision with some, though limited, meaning, establishing Cardozo's exception as a bright line rule clearly has the benefits of predictability and potentially adheres more to the intended meaning of the provision. On the other hand, by only permitting the municipality to increase the standards set by the State entity, the court would not just be interpreting the law, it would be making a policy choice, or alternatively, limiting the policy choices available to the municipality.

With regards to OGS, the Legislature directed the DEC to consider both the importance of energy development for the State and environmental concerns.[309] Presumably, the former consideration tends in favor of fewer restrictions on the land available to use for gas drilling and the latter consideration tends in favor of more restrictions. Clearly, if local government power consists only of the ability to enact restrictions then the municipality would weigh in favor of environmental considerations, but would be precluded from expressing its preference for energy development considerations.

Though this result may appear unfair, it does properly reflect the state-local dynamic. If a municipality were to lower the restrictions imposed on gas development activity, then it may increase the likelihood of drinking water contamination or air pollution, among other concerns. As evidenced by the spread of fracking wastewater in the Niagara River near Buffalo, and the rise in methane levels in

307. *See supra* notes 1, 3–5 and accompanying text.

308. Adler v. Deegan, 167 N.E. 705, 712 (N.Y. 1929).

309. N.Y. ENVTL. CONSERV. LAW § 23-0303 (McKinney 2012).

water-wells near fracking activities, less regulation can harm neighboring localities.[310] Therefore, Cardozo's exception tends toward preventing municipalities from harming neighboring communities, while also preserving some form of local authority over local regulation. In effect, a municipality's choice may only cause slight harm in the form of decreased state tax revenue to neighboring municipalities.

Additionally, courts may find legislative intent in the Municipal Home Rule Law for local governments to have power to increase restrictions. When applying the Municipal Home Rule Law, courts also found that permitting the local government to increase restrictions was inherently inconsistent with state intent, yet still held this to be a permissible manner in which to read the statute and balance state and local power.[311] Therefore, courts, in the same manner as Cardozo in *Adler*, have not taken issue with bias in favor of more restriction. The consequences of not accepting such a bias would be to eliminate the supersession authority of local governments to act in limited arenas. Though courts have been extremely hesitant to find for the local governments to be endowed with constitutional authority, they have actively interpreted the Municipal Home Rule Law to protect some form of local regulation.

Certainly, if the courts rule that the OGS supersession clause upholds local zoning ordinances that do not infringe on the state's regulation of gas development activities or that municipalities retain authority under the New York Constitution to set stricter zoning standards than those set by the state, then the DEC will have to rethink its regulations. Particularly, due to significant environmental concerns voiced during the 2011 notice and comment period for the DEC's final regulations as to gas drilling,[312] and the resultant prohibition of fracking or gas drilling in a number of towns where state regulations would otherwise permit fracking, the DEC, and potentially the legislature, may have to listen to local concerns.

Negotiation may increase the costs of regulating gas development as the DEC must confer with local interests prior to regulation, but these costs will not necessarily outweigh the benefits of energy security and higher employment. Especially in the case of fracking, where neither federal nor state regulators have required the full

310. Hart, *supra* note 28.

311. *See DJL Rest. Corp.*, 749 N.E.2d at 191; Inc. Vill. of Nyack v. Daytop Vill., Inc., 583 N.E.2d 928, 929–30 (N.Y. 1991).

312. *See* DeWitt, *supra* note 63.

disclosure of the materials used in fracking fluid, a slight increase in transaction costs due to negotiation between state and local governments is acceptable.

However, relying solely on the division between regulations related to gas development and those related to land use is a tight rope to walk. To ensure Article IX of the constitution and the division between state and local authority is preserved, courts should not continue to narrow local zoning authority or only maintain it through often unpredictable applications of preemption analysis. Instead, echoing Cardozo's *Adler* concurrence, courts should uphold local zoning authority as among the local powers that may only be impaired by adherence to the constitution's re-enactment procedure. Thereby, each piece of state legislation that infringes on a local government's "property, affairs or government" will only preempt the local ordinance if the state law passed the New York State Legislature twice and was signed by the Governor twice in successive sessions.[313]

The local ordinance would be upheld under Article IX. The New York State Legislature passed the OGS once in 1971.[314] Under Article IX, the OGS would therefore not preempt a local ordinance prohibiting the use of fracking because the OGS was only passed once. Further, invoking Cardozo, "the subject . . . [is] in a substantial degree a matter of State concern,"[315] for which the local ordinance will have established a higher standard of public safety.[316] Therefore, without adhering to the re-enactment procedure outlined in Article IX, the OGS should not preempt a local ordinance prohibiting local fracking.

CONCLUSION

Courts examining this issue should uphold local zoning ordinances banning fracking within their towns' jurisdictions. The three lower court decisions that have reviewed the application of OGS have applied state preemption analysis.[317] In two of these cases, the court upheld the zoning ordinance banning fracking within the respective town's jurisdiction.[318] If a reviewing court were to find that OGS

313. *See supra* notes 95–102 and accompanying text.
314. *See supra* notes 72–75 and accompanying text.
315. *See supra* notes 194–96 and accompanying text.
316. *See supra* notes 198–200 and accompanying text.
317. *See supra* notes 84–92 and accompanying text.
318. *See supra* note 87 and accompanying text.

intended to regulate the entire field of natural gas drilling, the court should still uphold the zoning ordinance under the New York Constitution. New York's Constitution clearly requires re-enactment of any state law contravening local governance, and land use and zoning is a recognized area of local governance.[319] Echoing Justice Cardozo's opinion, local governments did not surrender their authority over local governance in the constitution and they should not be required to surrender this authority where they act on behalf of public safety or public welfare.[320]

319. *See supra* notes 95–102 and accompanying text.

320. *See supra* notes 198–200 and accompanying text.