

2013

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### Recommended Citation

David Giller, *Implied Preemption and its Effect on Local Hydrofracking Bans in New York*, 21 J. L. & Pol'y (2013).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol21/iss2/15>

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# IMPLIED PREEMPTION AND ITS EFFECT ON LOCAL HYDROFRACKING BANS IN NEW YORK

*David Giller\**

## INTRODUCTION

Depending on whom you ask, hydrofracking is either the future of American energy or an ecological disaster waiting to happen. Hydrofracking, otherwise known as “Fracking,”<sup>1</sup> is a drilling process where underground rock formations are broken apart to extract natural gas.<sup>2</sup> A number of environmental groups have questioned the safety of hydrofracking, alleging that it can damage the environment and that the resulting runoff wastewater can harm drinking water.<sup>3</sup> Currently, there is a moratorium on hydrofracking in New York State<sup>4</sup> until the Department of

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\* J.D. Candidate, Brooklyn Law School, 2014; B.A., State University of New York at Geneseo, 2006. I would like to thank my friends and family for their unwavering support and encouragement, especially my parents and my sister for their insight and guidance. I also want to thank the entire staff of the *Journal of Law and Policy* for their diligence and help throughout the editing process as well as Professor Christopher Serkin for his invaluable assistance.

<sup>1</sup> See, e.g., Erica Levine Powers, *Home Rule Meets State Regulation: Reflection on High-Volume Hydraulic Fracturing for Natural Gas*, A.B.A. ST. & LOC. L. NEWS, Winter 2012, at 1, 1 (2012).

<sup>2</sup> See *Marcellus Shale*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/46288.html> (last visited Mar. 19, 2013) (providing overview of hydrofracking in New York State).

<sup>3</sup> See, e.g., Ian Urbina, *Regulation Lax as Gas Wells’ Tainted Water Hits Rivers*, N.Y. TIMES (Feb. 2, 2011), <http://www.nytimes.com/2011/02/27/us/27gas.html>.

<sup>4</sup> See N.Y. Exec. Order No. 41: Requiring Further Environmental Review (Dec. 13, 2010), available at <http://www.governor.ny.gov/archive/>

Environmental Conservation (“DEC”) completes an environmental impact review and creates new regulations.<sup>5</sup> While the DEC continues its review, a number of local municipalities in New York have enacted their own legal barriers to hydrofracking.<sup>6</sup> These include both zoning bans on hydrofracking<sup>7</sup> and moratoria against hydrofracking.<sup>8</sup> While both zoning bans<sup>9</sup> and moratoria<sup>10</sup> have been challenged in court, this Note only addresses a town’s use of zoning power to ban hydrofracking.

The New York State legislature<sup>11</sup> has delegated to local municipalities the ability to “adopt, amend and repeal zoning regulations.”<sup>12</sup> Local municipalities can use such zoning regulations to advance the public welfare, a power that has been “broadly construed.”<sup>13</sup> However, when a municipality acts

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paterson/executiveorders/EO41.html.

<sup>5</sup> See Mary Esch, *New York Fracking Decision: Cuomo Under Pressure to Rule on Hydraulic Fracturing*, HUFFINGTON POST (Sept. 6, 2012), [http://www.huffingtonpost.com/2012/09/06/new-york-fracking-decision\\_n\\_1862112.html](http://www.huffingtonpost.com/2012/09/06/new-york-fracking-decision_n_1862112.html).

<sup>6</sup> *Id.*

<sup>7</sup> Mary Esch, *Driller to NY: Stop the Local Fracking Bans or We’ll Sue*, PRESS CONNECTS (Aug. 1, 2012), <http://www.pressconnects.com/viewart/20120731/NEWS10/307310030/Driller-NY-Stop-local-fracking-bans-we-ll-sue>.

<sup>8</sup> See Steve Reilly, *Judge Overturns Binghamton Gas Drilling Moratorium*, PRESS CONNECTS (Oct. 3, 2012), <http://www.pressconnects.com/article/20121002/NEWS11/310020090/Judge-overturns-Binghamton-gas-drilling-moratorium> (reporting that Binghamton’s moratorium was struck down for not meeting the necessary legal requirements).

<sup>9</sup> See *id.*; see also Dan Wiessner, *New York Judge Upholds Fracking Ban in Towns*, REUTERS (Feb. 21, 2012), <http://www.reuters.com/article/2012/02/22/us-newyork-fracking-idUSTRE81L05820120222>.

<sup>10</sup> Reilly, *supra* note 8.

<sup>11</sup> The term legislature when used in the remainder of the Note will refer to the New York State legislature. A reference to a local government will be expressly indicated.

<sup>12</sup> N.Y. STAT. LOCAL GOV’TS § 10(6) (McKinney 1994).

<sup>13</sup> Andrew Meyer, “*Get the Frack Out of Town: Preemption Challenges to Local Fracking Bans in New York*,” 37 COLUM. J. ENVTL. L. FIELD REPORTS (Feb. 20, 2012), <http://www.columbiaenvironmentallaw.org/articles/get-the-frack-out-of-town-preemption-challenges-to-local-fracking->

outside of these delegated powers or “intrud[es] into an area of state authority,” such action will be considered preempted by state law either expressly or impliedly.<sup>14</sup> Express preemption exists when the state, through specific language in legislation, reserves power for itself, superseding local municipal control.<sup>15</sup> Implied preemption, on the other hand, occurs where legislation does not explicitly give the state control over a local issue but insinuates that such control was intended by legislature.<sup>16</sup> To find implied preemption, courts often examine “the nature of the subject matter regulated, the purpose and scope of the state legislative scheme, and the need for statewide uniformity.”<sup>17</sup> This usually involves examining the legislature’s intent at the time the law was created.<sup>18</sup> However, such inquiries are problematic because courts are often reluctant to judge legislative intent.<sup>19</sup>

New York case law is unclear regarding the criteria necessary for a finding of implied preemption. While the New York Court of Appeals has indicated that implied preemption can be inferred from state legislative policy or a comprehensive

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bans-in-new-york.

<sup>14</sup> Shaun Goho, *Municipalities and Hydraulic Fracturing: Trends in State Preemption*, PLAN. & ENVTL. L., July 2012, at 3, 5 (2012); see also Michael E. Kenneally & Todd M. Mathes, *Natural Gas Production and Municipal Home Rule in New York*, N.Y. ZONING L. & PRAC. REP., Jan./Feb. 2010, at 1, 3 (2010).

<sup>15</sup> See Goho, *supra* note 14, at 5; see also N.Y. COMM’N ON LOCAL GOV’T EFFICIENCY & COMPETITIVENESS, STRENGTHENING HOME RULE (2008), [http://www.nyslocalgov.org/pdf/Strengthening\\_Home\\_Rule.pdf](http://www.nyslocalgov.org/pdf/Strengthening_Home_Rule.pdf).

<sup>16</sup> See Kenneally & Mathes, *supra* note 14; see also Paul Weiland, *Preemption of Local Efforts to Protect the Environment*, 18 VA. ENVTL. L.J. 467, 470 (1999).

<sup>17</sup> Kenneally & Mathes, *supra* note 14 (citing Albany Area Builders Ass’n v. Town of Guilderland, 546 N.E.2d 920 (N.Y. 1989)).

<sup>18</sup> See, e.g., Goho, *supra* note 14, at 5; Kenneally & Mathes, *supra* note 14, at 3; Weiland, *supra* note 16, at 470.

<sup>19</sup> See Kenneally & Mathes, *supra* note 14, at 5 (“[S]uch curtailment should only occur under a circumstance in which the legislature’s preemptive intent is absolutely clear.”); see also Gernatt Asphalt Prods. v. Town of Sardinia, 664 N.E.2d 1226, 1234–35 (N.Y. 1996).

and detailed regulatory scheme,<sup>20</sup> subsequent Court of Appeals decisions have retreated from such reasoning.<sup>21</sup> This appears to be particularly true when courts examine a town's use of zoning power.<sup>22</sup> For example, in two recent trial court decisions, the trial courts upheld the town's use of zoning power to ban hydrofracking.<sup>23</sup> As part of those decisions, the courts found that the towns were not impliedly preempted<sup>24</sup> under the Oil, Gas and Solution Mining Law ("OGSML").<sup>25</sup> These two decisions are the most recent illustrations of the current difficulty in showing implied preemption without an actual statement of intent by the legislature, especially with regard to zoning.

This Note will examine the intersection of implied preemption in New York with local zoning laws and the hesitancy of New York courts to find such implied preemption. Despite the existence of implied preemption as a doctrine in New York jurisprudence, courts are unlikely to find it in fact.

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<sup>20</sup> See *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 456 N.E.2d 487, 490 (N.Y. 1983) (holding that the local zoning laws could not prohibit a power plant because the legislature had pre-empted local regulation through its "comprehensive and detailed" regulatory scheme, Article VIII of the Public Service Law (now Article X of the Public Service Law)).

<sup>21</sup> See *Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 518 N.E.2d 903 (N.Y. 1987) (holding that the county could enact a law prohibiting sale of cesspool additives without approval by Suffolk County Commissioner since the legislature did not show a desire to preclude local regulation and the local legislation had the same motive as state legislation, safe drinking water); see also *Vatore v. Comm'r of Consumer Affairs*, 634 N.E.2d 958 (N.Y. 1994) (holding that a state statute regulating cigarette vending machines did not implicitly preempt New York City from creating more restrictive regulations).

<sup>22</sup> See *Inc. Vill. of Nyack v. Daytop Vill.*, 583 N.E.2d 928 (N.Y. 1991) (holding that New York State Mental Hygiene Law did not implicitly preempt local zoning laws even though the state law included a detailed regulatory scheme).

<sup>23</sup> These cases are *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. 2012); *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (Sup. Ct. 2012). Both cases are being appealed to the Appellate Division and will be described in more detail later in the Note.

<sup>24</sup> *Cooperstown*, 943 N.Y.S.2d at 730; *Anschutz*, 940 N.Y.S.2d at 474.

<sup>25</sup> Oil, Gas and Solution Mining Law, N.Y. ENVTL. CONSERV. § 23-0303(2) (McKinney 2007).

Furthermore, because the incredibly high burden for finding implied preemption cannot be met in the current cases involving hydrofracking, the New York Court of Appeals<sup>26</sup> should uphold the hydrofracking bans as a proper use of zoning power. Additionally, the Court of Appeals should recognize the reality of implied preemption and its intersection with local zoning power. Namely, with regard to zoning, implied preemption should only be found when there is an explicit indication of legislative intent. A narrow approach to implied preemption with regard to zoning power is a better policy for New York because it eliminates the ambiguity of attempting to discern intent and forces the state legislature to consider the appropriate role of local zoning power.

Part I of this Note describes the process of hydrofracking and the current controversy surrounding its use in both New York and other states. Part II examines the history of zoning and preemption in New York State with an analysis of previous New York cases involving mining and hydrofracking. Part III focuses on the narrow interpretation of what constitutes implied preemption by the New York Court of Appeals and how such an interpretation requires the Court of Appeals to uphold local hydrofracking bans. Ultimately, a narrow view of implied preemption with regard to zoning is the best policy to control hydrofracking in New York State and to promote deliberation and accountability in the state legislature.

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<sup>26</sup> At the time of publication, the Appellate Division has unanimously upheld the hydrofracking bans. *Norse Energy Corp. USA v. Town of Dryden*, No. 515227 (N.Y. App. Div. May 2, 2013). However, hydrofracking ban opponents have indicated that they intend to seek leave to appeal to the Court of Appeals. Adam Briggie, *Cities in New York Just Got a Big Stick in the Fracking Fight*, SLATE (May 3, 2013), [http://www.slate.com/blogs/future\\_tense/2013/05/03/norse\\_energy\\_corp\\_v\\_to\\_wn\\_of\\_dryden\\_court\\_upholds\\_new\\_york\\_town\\_s\\_fracking.html](http://www.slate.com/blogs/future_tense/2013/05/03/norse_energy_corp_v_to_wn_of_dryden_court_upholds_new_york_town_s_fracking.html).

## I. HYDROFRACKING: ECONOMIC BOON OR TICKING TIME BOMB?

*A. Hydrofracking Background*

Although hydrofracking has been used by the natural gas industry for the past fifty years, it has only recently become popular.<sup>27</sup> Its increased use is attributable to the growing desirability of natural gas for environmental and economic reasons, the discovery of large gas reserves within the United States, a desire to create homegrown energy opportunities, and new advancements in the process of hydrofracking.<sup>28</sup> While scientists have known for years that certain shale formations possessed high quantities of natural gas, it is recent technological advancements that have opened up these shale formations to drilling.<sup>29</sup> One such shale formation is the Marcellus Shale, which runs underground from Ohio through northeast Virginia into Pennsylvania and southern New York.<sup>30</sup> Although it is unclear how much natural gas is recoverable from the New York portion, some estimate as much as 489 trillion cubic feet (“TCF”) of natural gas exist throughout the entire shale.<sup>31</sup> To put this into perspective, the United States’ current annual rate of gas consumption is only 25.5 TCF.<sup>32</sup> Gas from shale production alone could provide for practically all domestic natural gas demand with surplus gas that could be exported.<sup>33</sup>

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<sup>27</sup> Goho, *supra* note 14, at 3.

<sup>28</sup> *Id.*

<sup>29</sup> Marianne Lavelle, *Forcing Gas Out of Rock with Water*, NAT’L GEOGRAPHIC NEWS (Oct. 17, 2010), <http://news.nationalgeographic.com/news/2010/10/101022-energy-marcellus-shale-gas-science-technology-water/>.

<sup>30</sup> *Marcellus Shale*, *supra* note 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Natural Gas Consumption by End Use*, U.S. ENERGY INFO. ADMIN., [http://tonto.eia.doe.gov/dnav/ng/ng\\_cons\\_sum\\_dcu\\_nus\\_a.htm](http://tonto.eia.doe.gov/dnav/ng/ng_cons_sum_dcu_nus_a.htm) (last visited Mar. 19, 2013).

<sup>33</sup> *What is Shale Gas and Why Is It Important?*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/energy\\_in\\_brief/article/about\\_shale\\_gas.cfm](http://www.eia.gov/energy_in_brief/article/about_shale_gas.cfm) (last updated Dec. 5, 2012).

For years, scientists knew of the Marcellus Shale's potential but were unable to harness the natural gas that lay underneath.<sup>34</sup> However, that changed with new technological improvements in the process of hydrofracking.<sup>35</sup> In early 2003, a geologist working for a gas company in Pennsylvania learned of a new "fracking" process pioneered by oilmen in Texas.<sup>36</sup> It relied more on water, and, while originally developed to save money, it had the added benefit of being able to fracture shale more effectively.<sup>37</sup> Larger companies saw the advantage of this new hydrofracking technique and began to combine it with another method known as horizontal drilling.<sup>38</sup> In horizontal drilling, a well is drilled from the surface to just above the gas reservoir where it is "curve[d] to intersect the reservoir . . . with a near-horizontal inclination" maximizing the amount of natural gas available.<sup>39</sup> These advancements gave companies the ability to drill and extract natural gas from areas such as the Marcellus Shale, once considered unreachable.<sup>40</sup>

The process of hydrofracking consists of "pumping an engineered fluid system and a propping agent (proppant) such as sand"<sup>41</sup> along with other chemicals into a well to break up underground rock formations to allow for the easier extraction of natural gas.<sup>42</sup> The fluid involved in hydrofracking often contains compounds such as biocide<sup>43</sup> to prevent bacteria growth

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<sup>34</sup> Lavelle, *supra* note 29.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See id.*

<sup>39</sup> Lynn Helms, *Horizontal Drilling*, 35 DMR NEWSL., no. 1, at 1, 1 (Jan. 2008), available at <https://www.dmr.nd.gov/ndgs/newsletter/NL0308/pdfs/Horizontal.pdf>.

<sup>40</sup> *See Marcellus Shale*, *supra* note 2.

<sup>41</sup> N.Y. STATE DEP'T OF ENVTL. CONSERV., REVISED DRAFT SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS, AND SOLUTION MINING REGULATORY PROGRAM 1-1 (2011) [hereinafter RDSGIS], available at <http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf>.

<sup>42</sup> *See Marcellus Shale*, *supra* note 2.

<sup>43</sup> RDSGIS, *supra* note 41, at 5-50 tbl.5.6 (explaining that biocide is an additive that "[i]nhibits growth of organisms that could produce gases (particularly hydrogen sulfide) that could contaminate methane gas [and]



and other agents to ensure the proppant remains in the fracture of the shale instead of corroding the pipes carrying the water into the fracture.<sup>44</sup> Hydrofracking is also accompanied by a drilling rig<sup>45</sup> and requires the instillation of storage and processing centers nearby.<sup>46</sup> Once the hydrofracking process is completed, the remaining fluid, known as “flowback,” returns to the surface.<sup>47</sup> If the “flowback” is not reused, then it is considered “industrial wastewater” and must be disposed of in a concentrated and safe manner.<sup>48</sup>

Supporters and opponents of hydrofracking dispute whether the benefits outweigh the risks. One benefit of hydrofracking, its supporters argue, is increased revenue and jobs. Proponents point to Pennsylvania, where more than 5,000 hydrofracking wells have been created since 2005.<sup>49</sup> According to the Pennsylvania State Department of Labor and Industry, in 2010 almost 19,000 people were employed in the hydrofracking industry with another 140,000 working in related or supporting jobs.<sup>50</sup> Additionally, the Marcellus Shale Coalition estimates that hydrofracking generated \$11.2 billion in economic activity and \$1.1 billion in state and local tax revenue for Pennsylvania in 2010 alone.<sup>51</sup> An industry study indicated that this could be just the beginning and that gas companies could generate as much as

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prevents the growth of bacteria which can reduce the ability of the fluid to carry proppant into the fracture”).

<sup>44</sup> See *Marcellus Shale*, *supra* note 2.

<sup>45</sup> RDSGIS, *supra* note 41, at 5-135-36 tbl.5.29 (explaining that the drilling rig consists of a drill pad, drill rig, drilling fluid and materials, road construction equipment and drilling equipment such as the casing and drill pipe).

<sup>46</sup> *Id.* at 5-80-82.

<sup>47</sup> *Id.* at 5-99-117.

<sup>48</sup> *Id.* at 5-130.

<sup>49</sup> Goho, *supra* note 14, at 5.

<sup>50</sup> Laura Legere, *Industry Study: Marcellus Economic Impact Dramatic*, CITIZENVOICE.COM (July 11, 2011), <http://citizensvoice.com/news/drilling/industry-study-marcellus-economic-impact-dramatic-1.1178179>.

<sup>51</sup> TIMOTHY J. CONSIDINE ET AL., *THE PENNSYLVANIA MARCELLUS NATURAL GAS INDUSTRY: STATUS, ECONOMIC IMPACTS AND FUTURE POTENTIAL* iv (2011), available at <http://marcelluscoalition.org/wp-content/uploads/2011/07/Final-2011-PA-Marcellus-Economic-Impacts.pdf>.

\$2.6 billion in additional state and local tax revenue in 2011 and 2012.<sup>52</sup> However, it is unclear how many of the new jobs being created are going to Pennsylvania residents.<sup>53</sup> In 2008, the Pennsylvania College of Technology indicated that between seventy to eighty percent of the actual drill workers were not from Pennsylvania.<sup>54</sup> Such reports have led to doubts about whether hydrofracking is actually an effective source of revenue or jobs.<sup>55</sup>

The economic benefit for New York in particular remains unclear. Some economists estimate that hydrofracking would bring over 17,000 new construction jobs and almost 30,000 indirect jobs to New York.<sup>56</sup> Furthermore, it is predicted that hydrofracking would cause New York's personal income tax revenue to increase anywhere from \$31 million to \$125 million a year.<sup>57</sup> Landowners willing to lease or sell their land would also benefit economically. In Pennsylvania, gas companies are paying over \$1,000 per acre, plus royalties, to landowners to drill on their land.<sup>58</sup> Both the jobs and the drilling leases would benefit some of the poorest areas of New York State where jobs have been hard to find.<sup>59</sup>

Opponents of hydrofracking challenge the reliability of reports promoting the economic benefits, the prospect of viable

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<sup>52</sup> *Id.*

<sup>53</sup> See TOM WILBER, *UNDER THE SURFACE: FRACKING FORTUNES AND THE FATE OF THE MARCELLUS SHALE* 102 (2012) (noting the trend in out-of-state workers employed at Pennsylvania drilling rigs).

<sup>54</sup> *Id.*

<sup>55</sup> See Jannette M. Barth, *Hydrofracking Offers Short-Term Boom, Long-Term Bust*, ENR NEW YORK (Mar. 7, 2011), [http://newyork.construction.com/opinions/viewpoint/2011/0307\\_HydrofrackingOffers.asp](http://newyork.construction.com/opinions/viewpoint/2011/0307_HydrofrackingOffers.asp) (discussing studies that have found that any positive economic impact from hydrofracking only occurs in the short-term).

<sup>56</sup> Joan Gralla, *Economists Clash on Jobs Fracking Brings to NY*, REUTERS (Apr. 30, 2012), <http://www.reuters.com/article/2012/04/30/us-natgas-fracking-newyork-idUSBRE83T0EH20120430>.

<sup>57</sup> *Id.*

<sup>58</sup> Steven Kastenbaum, *Fracking in New York: Risk vs. Reward*, CNN (May 2, 2012, 2:39 PM), <http://www.cnn.com/2012/03/09/us/new-york-fracking/index.html>.

<sup>59</sup> *See id.*

long term growth from hydrofracking, and the danger posed to tourism and agriculture. Some academics and economists have disputed recent reports about the economic benefits of hydrofracking.<sup>60</sup> Specifically, the accuracy of a recent Pennsylvania State University study in favor of hydrofracking has been called into question by reports that its funding came from oil and gas companies.<sup>61</sup> Other experts and scholars dispute the number of jobs that would actually be created due to the “capital intensive” nature of hydrofracking.<sup>62</sup> There are also concerns over whether any job creation would be sustainable over the long term.<sup>63</sup> In addition, many landowners are nervous about hydrofracking’s effect on New York’s large agricultural<sup>64</sup> and wine businesses.<sup>65</sup> Damage to farmland could lead to an increase in milk prices.<sup>66</sup> Furthermore, increased ozone emissions from hydrofracking could negatively affect soy and grape production.<sup>67</sup> Vineyard owners, some of whom are on the northern fringe of the Marcellus Shale, are concerned about

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<sup>60</sup> Jim Efstahiou Jr., *Penn State Faculty Snub of Fracking Study Ends Research*, BLOOMBERG (Oct. 3, 2012), <http://www.bloomberg.com/news/print/2012-10-03/penn-state-faculty-snub-of-fracking-study-ends-research.html> (reporting that a recent hydrofracking study at Pennsylvania State University study was canceled after criticism from faculty members that the report was biased in favor of the hydrofracking industry).

<sup>61</sup> *Id.*

<sup>62</sup> Carolyn Krupski, *Experts Debate Effects of Fracking on New York State Economy, Environment*, CORNELL DAILY SUN (Nov. 16, 2012), <http://cornellsun.com/node/54307> (noting that since hydrofracking is capital-intensive, jobs are often only associated with the construction of the wells, and once the wells are complete there is often less need for labor).

<sup>63</sup> *See id.*

<sup>64</sup> *See id.* (describing the danger posed to New York’s agricultural commodities from hydrofracking based on the effect of hydrofracking in Pennsylvania and possible increased ozone emissions).

<sup>65</sup> *See* Michael Hill, *Wine and Fracking Don’t Mix, Say Vineyard Owners*, ASSOCIATED PRESS (Oct. 23, 2012), <http://bigstory.ap.org/article/wine-and-fracking-dont-mix-say-vineyard-owners> (noting the fears of upstate N.Y. vineyard owners that hydrofracking will negatively impact their businesses).

<sup>66</sup> *See* Krupski, *supra* note 62 (noting the negative impact of hydrofracking on agriculture and milk prices in Pennsylvania).

<sup>67</sup> *Id.*

possible damage to their vineyard and the perception of damage by customers.<sup>68</sup> Additionally, any damage to New York's landscape from hydrofracking could negatively affect tourism, which in 2010 was a \$6.5 billion engine for New York State.<sup>69</sup>

There is also considerable fear that hydrofracking will cause serious environmental damage. This fear is shared by a diverse group of residents and environmentalists from all over New York State.<sup>70</sup> Opponents of hydrofracking point to the environmental issues currently facing Pennsylvania.<sup>71</sup> For example, there are reports in Pennsylvania that natural gas drillers are disposing of wastewater in rivers that supply drinking water.<sup>72</sup> Environmentalists are afraid that the chemicals used in creating the hydrofracking fluid and which are present in the wastewater could be dangerous if added to drinking water.<sup>73</sup> There is apprehension about the specific nature of the chemicals used in hydrofracking, since they are currently not disclosed to the public.<sup>74</sup>

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<sup>68</sup> See Hill, *supra* note 65 (discussing the possible damage to vineyards from hydrofracking and the “public relations nightmare” of having hydrofracking near vineyards).

<sup>69</sup> Gralla, *supra* note 56 (noting that hydrofracking could lead to “unsightly rigs and possibly scarred landscapes”).

<sup>70</sup> See *Members, NEW YORKERS AGAINST FRACKING*, <http://nyagainstfracking.org/members/> (last visited Feb. 5 2013) (listing members of Advisory Committee); *Groups Rally to Prevent Fracking in NY*, CRAIN'S N.Y. BUS. (Jan. 11, 2013, 11:50 AM), <http://www.crainsnewyork.com/article/20130111/ECONOMY/130119976> (describing efforts of antifracking groups from “New York City to Buffalo”).

<sup>71</sup> See generally David B. Caruso, ‘Fracking’ Wastewater Still a Problem in Pennsylvania, NBC NEWS (Mar. 1, 2011, 6:35 PM), [http://www.msnbc.msn.com/id/41858136/ns/us\\_news-environment/t/fracking-wastewater-still-problem-pennsylvania/](http://www.msnbc.msn.com/id/41858136/ns/us_news-environment/t/fracking-wastewater-still-problem-pennsylvania/) (detailing the harm caused in Pennsylvania by hydrofracking wastewater); Urbina, *supra* note 3 (noting the environmental concerns surrounding Pennsylvania hydrofracking).

<sup>72</sup> Caruso, *supra* note 71.

<sup>73</sup> See Caruso, *supra* note 71; see also Urbina, *supra* note 3.

<sup>74</sup> See Kate Galbraith, *Seeking Disclosure on Fracking*, N.Y. TIMES (May 30, 2012), <http://www.nytimes.com/2012/05/31/business/energy-environment/seeking-disclosure-on-fracking.html> (pointing out that while individual states have different disclosure requirements they generally contain a “trade secrets” provision that prevents public disclosure of certain

Although natural gas executives often claim that hydrofracking is not responsible for contaminated underground drinking water,<sup>75</sup> recent reports have linked tainted water wells in Pennsylvania to hydrofracking from the Marcellus Shale.<sup>76</sup> These reports indicate that some of the tainted water contained high amounts of methane, double the Pennsylvania state safety level.<sup>77</sup> Methane is dangerous because while it does not affect the smell or taste of the water, it can render the water explosive.<sup>78</sup> Methane can also migrate from a faulty well to an enclosed area where it is difficult to notice.<sup>79</sup> Pennsylvania residents nearby hydrofracking operations have reported exploding wells and homes being destroyed from methane buildup.<sup>80</sup> Additionally, residents who live nearby such operations contend that their well water has become undrinkable.<sup>81</sup> Contaminated well water could result from hydrofracking itself,<sup>82</sup> “shoddy drilling practices, accidents and poor oversight,”<sup>83</sup> or natural migration.<sup>84</sup> Environmentalists in New York State echo the concerns of Pennsylvania residents.<sup>85</sup> New York environmentalists worry that

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chemicals that fracking companies consider proprietary material).

<sup>75</sup> Ian Urbina, *A Tainted Water Well, and Concern There May Be More*, N.Y. TIMES (Aug. 3, 2011), <http://www.nytimes.com/2011/08/04/us/04natgas.html>.

<sup>76</sup> Mark Drakem & Jim Efstahiou Jr., *Cabot's Methodology Links Tainted Water Wells to Gas Fracking*, BLOOMBERG (Oct. 2, 2012 12:01 AM), <http://www.bloomberg.com/news/2012-10-02/cabot-s-methodology-links-tainted-water-wells-to-gas-fracking.html>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; see also Mark Drajem, *High Methane in Pennsylvania Water Deemed Safe by EPA*, BLOOMBERG (Mar. 30, 2012), <http://www.bloomberg.com/news/2012-03-29/high-methane-in-pennsylvania-water-deemed-safe-by-epa.html> (noting that high amounts of Methane in water can become explosive, even when the water itself is not unsafe to drink according to the EPA).

<sup>79</sup> WILBER, *supra* note 53, at 89–92.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 133–38.

<sup>82</sup> See Drakem & Efstahiou Jr., *supra* note 76.

<sup>83</sup> Kastenbaum, *supra* note 58.

<sup>84</sup> See *id.*

<sup>85</sup> *Id.*

hydrofracking could not only affect local landowners' drinking water but also New York City drinking water.<sup>86</sup> Hydrofracking could negatively affect the watersheds in the Catskills, an area that provides much of New York City's drinking water.<sup>87</sup>

The environmental dangers from hydrofracking combined with the economic potential have galvanized both supporters and detractors in New York State.<sup>88</sup> What was once an unremarked and unknown drilling technique has become a statewide issue.<sup>89</sup> A recent protest against hydrofracking had 3,000 individuals in attendance<sup>90</sup> and over 200,000 comments have been submitted to the DEC both in support and against hydrofracking.<sup>91</sup>

### *B. Fracking in New York State*

In December of 2010, Governor David Paterson introduced a moratorium on hydrofracking in New York State.<sup>92</sup> The moratorium will continue until the DEC completes an environmental review, including a public comment period,<sup>93</sup> and

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<sup>86</sup> *Id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See* Thomas Kaplan, *Millions Spent in Albany Fight to Drill for Gas*, N.Y. TIMES (Nov. 25, 2011), <http://www.nytimes.com/2011/11/26/nyregion/hydrofracking-debate-spurs-huge-spending-by-industry.html>; *see also* Alan Chartock, *Anti-Frackers Get Gov. Andrew Cuomo's Attention*, DAILY FREEMAN (Sept. 30, 2012), <http://www.dailyfreeman.com/articles/2012/09/30/opinion/doc506061d0150a2528440730.txt>.

<sup>89</sup> *See* Goho, *supra* note 14, at 3 ("Fracking is not a new process; it has been in use for more than 50 years. But the scale and scope have expanded significantly in the last decade."); *see also* *Celebrities Lead Crowd of 3,000 in Albany Protesting Hydraulic Fracking*, CBS NEW YORK (Jan. 23, 2013), <http://newyork.cbslocal.com/2013/01/23/celebrities-lead-crowd-of-3000-in-albany-protesting-hydraulic-fracturing/>.

<sup>90</sup> *Celebrities Lead Crowd of 3,000 in Albany Protesting Hydraulic Fracking*, *supra* note 89.

<sup>91</sup> *Groups Rally to Prevent Fracking in NY*, *supra* note 70; *New Yorkers Deliver Unprecedented 200k+ Comments on Cuomo's Fracking Rules*, ECOWATCH (Jan. 11, 2013), <http://ecowatch.com/2013/comments-ny-fracking-rules/>.

<sup>92</sup> *See* N.Y. Exec. Order No. 41, *supra* note 4.

<sup>93</sup> *Groups Rally to Prevent Fracking in NY*, *supra* note 70.

crafts regulations regarding hydrofracking.<sup>94</sup> The DEC introduced a preliminary impact statement in 2011, but it is unclear when a final plan will be complete.<sup>95</sup> During the first comment period, the DEC received over 65,000 comments on the proposed regulations,<sup>96</sup> a previously record-setting number.<sup>97</sup> The DEC then had until December of 2012 to incorporate those comments and complete its proposed hydrofracking regulations.<sup>98</sup> However, before the proposed regulations were due, the DEC directed the state Health Department to begin a health assessment of hydrofracking, delaying the final decision.<sup>99</sup> The DEC then filed for a ninety day extension by submitting a revised set of DEC regulations and opening up the process for another thirty days of comment ending January 11, 2013.<sup>100</sup> This recent comment period elicited an “unprecedented” number of comments, over 200,000.<sup>101</sup> The DEC missed their recent March deadline for promulgating hydrofracking regulations, and now any new regulations will be subject to another forty-five-day comment period and additional public hearings.<sup>102</sup>

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<sup>94</sup> See Esch, *supra* note 5.

<sup>95</sup> Rick Karlin, *Is Trial Balloon Full of Shale Gas?*, ALBANY TIMES UNION (June 13, 2012), <http://www.timesunion.com/local/article/Is-trial-balloon-full-of-shale-gas-3632650.php>.

<sup>96</sup> Kastenbaum, *supra* note 58.

<sup>97</sup> *New Yorkers Deliver Unprecedented 200k+ Comments on Cuomo's Fracking Rules*, *supra* note 91.

<sup>98</sup> Jon Campbell, *New Hydrofracking Comment Period Begins Dec. 12*, ITHACA J. (Nov. 29, 2012, 9:56 PM), <http://www.theithacajournal.com/article/20121129/NEWS11/311290097/New-hydrofracking-comment-period-begins-Dec-12>.

<sup>99</sup> Jacob Gersman, *Pressure Rises for Decision on Drilling*, WALL ST. J. (Sept. 28, 2012), <http://online.wsj.com/article/SB10000872396390443389604578024851639481218.html>.

<sup>100</sup> Campbell, *supra* note 98.

<sup>101</sup> *Groups Rally to Prevent Fracking in NY*, *supra* note 70; *New Yorkers Deliver Unprecedented 200k+ Comments on Cuomo's Fracking Rules*, *supra* note 91.

<sup>102</sup> *Fracking Deadline Passes; Health Impact Study Sought*, STEUBENCOURIER.COM (Mar. 5, 2013, 10:00 AM), <http://www.steubencourier.com/news/x846064007/Fracking-deadline-passes-health-impact-study-sought>.

While the final plan is still being developed by the DEC, an unofficial report from the DEC's office indicated that hydrofracking would be limited to Chemung, Chenango, Steuben, Tioga and Broome counties.<sup>103</sup> Additionally, development would be limited to willing communities with an initial cap of fifty wells statewide.<sup>104</sup> The Governor neither confirmed nor denied the report.<sup>105</sup> However, the Governor did say that he believed that home rule should be taken into consideration.<sup>106</sup> Such reports have been described as a "trial balloon" to possibly appease both hydrofracking proponents and critics.<sup>107</sup>

Hydrofracking has both powerful supporters and opponents. Supporters of hydrofracking include some of the largest gas and energy companies. For instance, Exxon Mobile plans to invest \$185 billion over five years to develop new sources of oil and gas.<sup>108</sup> Pro-fracking advocates also employ an army of lobbyists and industry spokespeople with the goal of bringing hydrofracking to New York.<sup>109</sup> Those opposed to hydrofracking consist of grass roots activists, conservation groups and notable celebrities.<sup>110</sup> While hydrofracking opponents aim to protect the

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<sup>103</sup> Danny Hakim, *Cuomo Proposal Would Restrict Gas Drilling to a Struggling Area*, N.Y. TIMES (June 13, 2012), <http://www.nytimes.com/2012/06/14/nyregion/hydrofracking-under-cuomo-plan-would-be-restricted-to-a-few-counties.html>

<sup>104</sup> *Id.*

<sup>105</sup> Karlin, *supra* note 95.

<sup>106</sup> Jorteh Senah & Karen DeWitt, *Cuomo Offers Some Support for Limited Fracking*, WNYC (July 10, 2012), <http://www.wnyc.org/articles/wnyc-news/2012/jul/10/calls-independent-review-fracking-state-set-unveil-plan-summer/>.

<sup>107</sup> Karlin, *supra* note 95; *see also* Senah & DeWitt, *supra* note 106.

<sup>108</sup> Brian O'Keefe, *Exxon's Big Bet on Shale Gas*, CNNMONEY (Apr. 16, 2012, 5:00 AM), <http://tech.fortune.cnn.com/2012/04/16/exxon-shale-gas-fracking/>.

<sup>109</sup> *See* Kaplan, *supra* note 88 (noting that in 2011 companies that drill for natural gas spent more than \$3.2 million lobbying the state).

<sup>110</sup> *See* Peter Applebome, *Drilling Critics Face a Divide Over the Goal of Their Fight*, N.Y. TIMES (Jan. 9, 2012), <http://www.nytimes.com/2012/01/10/nyregion/gas-drilling-critics-in-new-york-face-a-divide-over-their-goal.html>; Chartock, *supra* note 88.



environment, there is disagreement over the best way to do that, such as a statewide ban or stringent hydrofracking regulations.<sup>111</sup>

Hydrofracking has also become an important political issue. Elected officials from both parties and different levels of government have taken a position on hydrofracking.<sup>112</sup> In recent New York State elections, both local and federal candidates have focused on the role of hydrofracking.<sup>113</sup> These have been hard fought campaigns with resources and volunteers on both sides.<sup>114</sup> Although in the last few years antifracking activists have become more pronounced in New York State,<sup>115</sup> recent election results included notable victories for pro-fracking candidates.<sup>116</sup> One such victory was Debbie Preston's successful campaign for Broome County executive against an outspoken antifracking activist.<sup>117</sup>

In the meantime, towns have been taking their own steps, with some passing resolutions in favor of hydrofracking<sup>118</sup> and others amending their laws to ban hydrofracking within their borders.<sup>119</sup> Currently, over fifty towns have passed resolutions in favor of hydrofracking.<sup>120</sup> Those towns in favor are mostly

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<sup>111</sup> See Applebome, *supra* note 110.

<sup>112</sup> See Steve Reilly, *Hydrofracking: It Has Polarized Voters and May Decide the Election*, PRESSCONNECTS.COM (Sept. 29, 2012, 9:06 PM), <http://www.pressconnects.com/article/20120929/NEWS11/309290033/Hydrofracking-has-polarized-voters-may-decide-election>.

<sup>113</sup> See *id.*

<sup>114</sup> *Id.*

<sup>115</sup> Ellen Cantarow, *The Secret War of Anti-Fracking Activists*, MOTHERJONES (Nov. 19, 2012), <http://www.motherjones.com/environment/2012/11/fracking-new-york-cuomo>.

<sup>116</sup> Mary Esch, *NY Anti-Fracking Candidates Fared Poorly at Polls*, BUS. WK. (Nov. 8, 2012), <http://www.businessweek.com/ap/2012-11-08/ny-anti-fracking-candidates-fared-poorly-at-polls>.

<sup>117</sup> *Id.*

<sup>118</sup> See Memorandum from the Joint Landowners Coal. of N.Y., Inc. to N.Y. Local Officials (June 28, 2012) *available at* <http://www.jlcny.org/site/attachments/article/1348/JLC%20-20Resolution%20Cover%20Memo.pdf>.

<sup>119</sup> See David Slottje & Helen Holden Slottje, *A Legal Plan to Control Drilling*, SIERRA ATLANTIC (Sierra Club Atl. Chapter, Albany, N.Y.), Spring 2011, *available at* [http://newyork.sierraclub.org/SA/Vol41/Legal\\_plan.htm](http://newyork.sierraclub.org/SA/Vol41/Legal_plan.htm).

<sup>120</sup> *Map of Town Resolutions in Support of Hydrofracking*, JOINT

located in the southern tier near the Pennsylvania border, the richest area of the Marcellus Shale.<sup>121</sup> Due to the state moratorium, there is currently no hydrofracking in New York;<sup>122</sup> therefore the pro-fracking resolutions have no legal authority. However, they are a symbolic indication of support for hydrofracking.<sup>123</sup> Sometimes the resolutions specify their support for the DEC to have the final say on hydrofracking, rather than local municipalities.<sup>124</sup> These resolutions are intended to combat local hydrofracking bans and illustrate that there is substantial support for bringing hydrofracking to New York.<sup>125</sup>

Municipalities who oppose hydrofracking have used a variety of legal tactics to ban hydrofracking either in part or entirely.<sup>126</sup> So far, over fifty upstate municipalities have used their zoning power to ban hydrofracking and over one hundred have enacted their own moratoria.<sup>127</sup> Most of the municipalities that have passed bans are in central and western New York.<sup>128</sup> These areas tend to possess less natural gas than those areas closer to Pennsylvania, leading some hydrofracking supporters to question their motives.<sup>129</sup> However, some of the hydrofracking bans are in areas along the natural gas rich area of the Marcellus Shale.<sup>130</sup>

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LANDOWNERS COAL. OF N.Y., INC., <http://www.jlcnny.org/site/attachments/article/1349/JLCNY%20NYS%20Map%208.7.12.pdf> (last visited Dec. 5, 2012).

<sup>121</sup> *Id.*; see also Matt Richmond, *Resolutions Supporting DEC's Fracking Decision Spread*, INNOVATION TRAIL (July 13, 2012), <http://innovationtrail.org/post/resolutions-supporting-decs-fracking-decision-spread>.

<sup>122</sup> See N.Y. Exec. Order No. 41, *supra* note 4.

<sup>123</sup> See Joint Landowners Coal. of N.Y., Inc., *supra* note 118.

<sup>124</sup> See Richmond, *supra* note 121.

<sup>125</sup> See *id.*

<sup>126</sup> Goho, *supra* note 14, at 4.

<sup>127</sup> *Current High Volume Horizontal Hydraulic Fracturing Drilling Bans and Moratoria in NY State*, FRAC TRACKER (Mar. 16, 2013), <http://www.fractracker.org/maps/ny-moratoria/>.

<sup>128</sup> See Joseph de Avila, *Fracking' Goes Local*, WALL ST. J. (Aug. 29, 2012, 12:01 PM), <http://online.wsj.com/article/SB10000872396390444327204577617793552508470.html>; see also Joint Landowners Coal. of N.Y., Inc., *supra* note 118.

<sup>129</sup> See Richmond, *supra* note 121; see also de Avila, *supra* note 128.

<sup>130</sup> *Current High Volume Horizontal Hydraulic Fracturing Drilling Bans*

Two local hydrofracking bans have been challenged in court.<sup>131</sup> Both were upheld at the trial court level and both were heard on appeal before the Appellate Division, Third Department on March 21, 2013.<sup>132</sup> The Appellate Division unanimously upheld the hydrofracking bans as a proper use of town zoning power, although hydrofracking proponents have indicated that they plan to appeal.<sup>133</sup>

With the moratorium against hydrofracking still in place and an ever-changing deadline for the DEC,<sup>134</sup> passions run high for both supporters and opponents of hydrofracking. Their battle has taken place in the street,<sup>135</sup> over the airwaves<sup>136</sup> and at the ballot box.<sup>137</sup> Now with the advent of hydrofracking bans all over New York State, it appears that the courts are the next major battle ground.

### *C. Fracking Legal Regulatory Structure in Other States*

While hydrofracking is still in its infancy in New York, it has been employed for some time in a number of surrounding states with legal battles already underway.<sup>138</sup> Pennsylvania was

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*and Moratoria in NY State, supra* note 127.

<sup>131</sup> Dan Wiessner, *New York Fracking Ban in Towns Upheld by Second Judge*, HUFFINGTON POST (Feb. 24 2012, 7:55 PM), [http://www.huffingtonpost.com/2012/02/25/new-york-fracking-ban\\_n\\_1300600.html](http://www.huffingtonpost.com/2012/02/25/new-york-fracking-ban_n_1300600.html).

<sup>132</sup> Jon Campbell, *Appeals Heard on Dryden, Middlefield Fracking Bans*, ITHACAJOURNAL.COM (Mar. 21, 2013, 7:24 PM), <http://www.theithacajournal.com/article/20130321/NEWS01/303210042/Appeals-heard-Dryden-Middlefield-fracking-bans>.

<sup>133</sup> Jon Campbell, *Appeals Court: N.Y. Towns Can Ban Hydrofracking*, LOHUD.COM (May 22, 2013), <http://www.lohud.com/article/20130502/NEWS/305020063/Appeals-court-N-Y-towns-can-ban-hydrofracking>.

<sup>134</sup> See Esch, *supra* note 5.

<sup>135</sup> *Celebrities Lead Crowd of 3,000 in Albany Protesting Hydraulic Fracking*, *supra* note 89.

<sup>136</sup> See Kaplan, *supra* note 88.

<sup>137</sup> Reilly, *supra* note 112.

<sup>138</sup> See generally Francis Grandijan, *State Regulations, Litigation, and Hydraulic Fracturing*, 7 ENVTL. & ENERGY L. & POL'Y J. 47 (2012) (detailing the regulatory structure and history of hydraulic fracturing); see also Goho, *supra* note 14, at 6.

one of the first states to be part of the gas rush with companies leasing land from landowners for hydrofracking as early as 2007.<sup>139</sup> From 2008 to 2010 the number of permit applications increased from 478 to 3,314.<sup>140</sup> The permit application is supposed to involve a detailed evaluation of water intake and the process for discharging wastewater for that specific drilling site.<sup>141</sup> However, due to the overwhelming number of permits, Pennsylvania Department of Environmental Protection (“DEP”) officials have not been able to properly screen them.<sup>142</sup> This has led to an approval rate of over 99.5%.<sup>143</sup> While Pennsylvania does have general legislation to protect water supplies,<sup>144</sup> many citizens are concerned that there is no appropriate oversight of the hydrofracking industry.<sup>145</sup> Reports of exploding wells, contaminated groundwater, and destruction of nearby property have only increased those fears.<sup>146</sup>

Concerns with the state regulatory process have led a number of Pennsylvania towns to enact their own laws controlling where hydrofracking may take place.<sup>147</sup> In 2009, the Pennsylvania Supreme Court ruled that local municipalities have the ability to “control the location of wells consistent with established zoning principles.”<sup>148</sup> Such authority was pursuant to the Pennsylvania Oil and Gas Act which expressly preempted any laws regarding the specific operation of hydrofracking.<sup>149</sup> The Pennsylvania Oil and Gas Act did, however, allow

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<sup>139</sup> See WILBER, *supra* note 53, at 17.

<sup>140</sup> *Id.* at 80.

<sup>141</sup> Grandijan, *supra* note 138, at 74.

<sup>142</sup> See WILBER, *supra* note 53, at 81.

<sup>143</sup> *Id.*

<sup>144</sup> 58 PA. CONS. STAT. § 3218 (2012) (mandating protection of well water and holding companies liable for replacing any water that they damage).

<sup>145</sup> See WILBER, *supra* note 53, at 80–82.

<sup>146</sup> See *id.* at 89–142.

<sup>147</sup> See Goho, *supra* note 14, at 6.

<sup>148</sup> Range Res.-Appalachia LLC v. Salem Twp., 964 A.2d 869, 876 (Pa. 2009).

<sup>149</sup> 58 PA. CONS. STAT. § 3302 (2012).

municipalities to ban drilling in residential areas.<sup>150</sup> Some municipalities in Pennsylvania though have gone further and banned hydrofracking entirely.<sup>151</sup> While Pennsylvania courts have ruled that towns can control the location of hydrofracking drilling sites, the legality of zoning bans under the Pennsylvania Oil and Gas Act are uncertain.<sup>152</sup>

In response to the court's support of local zoning power to control the location of hydrofracking sites, the Pennsylvania legislature enacted Act 13, amending the Oil and Gas Act, to allow hydrofracking in all zoning districts, even residential ones.<sup>153</sup> Act 13 also invalidated all existing ordinances involving hydrofracking.<sup>154</sup> However, a Pennsylvania Appellate Court recently struck down Act 13.<sup>155</sup> The court ruled that its provisions were unconstitutional in that they took too much power from local government to regulate their own communities.<sup>156</sup> That ruling is being appealed to the Pennsylvania Supreme Court.<sup>157</sup> In addition, the Public Utility Commission determined that Pittsburgh's ban on hydrofracking was not allowed under state law.<sup>158</sup> However, this is only a

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<sup>150</sup> *Id.*

<sup>151</sup> See, e.g., *Pittsburgh Bans Hydrofracking*, BAY RIDGE JOURNAL (Dec. 1, 2010), <http://www.bayridgejournal.blogspot.com/2010/12/pittsburgh-bans-hydrofracking.html>; *Hydrofracking Bans and Moratoria*, SIERRA CLUB ACTIVIST NETWORK (May 26, 2011), <http://bit.ly/14fIwV9> (listing bans and moratoria in Pennsylvania).

<sup>152</sup> See Goho, *supra* note 14, at 6.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Editorial, *Towns Win a Round in Court Against Unfettered Fracking*, PHILLY.COM (Aug. 1, 2012), [http://articles.philly.com/2012-08-01/news/32962407\\_1\\_buildings-and-water-wells-impact-fees-environmental-hazards](http://articles.philly.com/2012-08-01/news/32962407_1_buildings-and-water-wells-impact-fees-environmental-hazards).

<sup>156</sup> Marc Levy, *Pennsylvania Act 13 Provisions Struck Down by Appellate Court*, HUFFINGTON POST (July 26, 2012, 2:19 PM), [http://www.huffingtonpost.com/2012/07/26/pennsylvania-act-13-natural-gas\\_n\\_1706822.html](http://www.huffingtonpost.com/2012/07/26/pennsylvania-act-13-natural-gas_n_1706822.html).

<sup>157</sup> Scott Detrow, *Corbett Administration Files Act 13 Appeal With State Supreme Court*, STATEIMPACT (July 27, 2012, 4:53 PM), <http://stateimpact.npr.org/pennsylvania/2012/07/27/corbett-administration-files-act-13-appeal-with-state-supreme-court/>.

<sup>158</sup> Laura Olson & Joe Smydo, *PUC Says Pittsburgh's Ban on Natural*

recommendation and relies on Act 13.<sup>159</sup> It is unclear whether Pittsburgh will revise its hydrofracking ban.<sup>160</sup> As challenges to Act 13 continue to move through Pennsylvania courts, it remains unsettled whether towns in Pennsylvania will ultimately be able to control the location of hydrofracking through their zoning power.

West Virginia was also confronted with the issue of preemption with regard to hydrofracking when a number of its local municipalities passed zoning laws banning hydrofracking.<sup>161</sup> However, West Virginia's Monongalia County Circuit Court struck down a ban passed by Morgantown<sup>162</sup> that prohibited "[d]rilling a well for the purpose of extracting or storing oil or gas using horizontal drilling with fracturing or fracking methods."<sup>163</sup> The court ruled that the West Virginia Oil and Gas Act<sup>164</sup> fully "occupied the field," rendering the local ban invalid.<sup>165</sup> The court further found that the Oil and Gas Act indicated an intention for regulatory authority to be at the state

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*Gas Extraction Conflicts with State Law*, PITTSBURGH POST-GAZETTE (Sept. 11, 2012), <http://www.post-gazette.com/stories/local/neighborhoods-city/puc-says-pittsburghs-ban-on-natural-gas-extraction-conflicts-with-state-law-652858/>.

<sup>159</sup> *Id.*

<sup>160</sup> Levy, *supra* note 156; see also Abby W. Schachter, *Pittsburgh Rethinks Fracking Ban*, N.Y. POST (Sept. 20, 2012), [http://www.nypost.com/p/blogs/capitol/pittsburgh\\_rethinks\\_fracking\\_ban\\_QoyPPTO8iYQNEs5BTQpt eO](http://www.nypost.com/p/blogs/capitol/pittsburgh_rethinks_fracking_ban_QoyPPTO8iYQNEs5BTQpt eO) (reporting that a Pittsburgh councilman has "proposed legislation to eliminate the current ban and replace it instead with strict zoning regulations for gas extraction").

<sup>161</sup> Goho, *supra* note 14, at 6.

<sup>162</sup> Adam Orford, *Local Bans on Hydraulic Fracturing Upheld in New York State, Struck Down in West Virginia*, MARTEN L. NEWS (Apr. 10, 2012), <http://www.martenlaw.com/newsletter/20120410-local-hydraulic-fracturing-bans>.

<sup>163</sup> Goho, *supra* note 14, at 6. (quoting An Ordinance Repealing Article 721 of the City of Morgantown's Business and Taxation Code (Morgantown, W. Va. 2011), available at [http://documents.foodandwaterwatch.org/doc/Frack\\_Actions\\_MorgantownWV-ban.pdf](http://documents.foodandwaterwatch.org/doc/Frack_Actions_MorgantownWV-ban.pdf)).

<sup>164</sup> West Virginia Oil and Gas Act, W. VA. CODE § 22-6-1 to -41 (West 2011).

<sup>165</sup> Orford, *supra* note 162.

level.<sup>166</sup> The court discerned such an intention by looking to the language and rules promulgated by the West Virginia DEP which gave the state ultimate responsibility for protecting the environment and indicated a “comprehensive framework.”<sup>167</sup> Additionally, the court held that West Virginia’s municipality’s powers are “narrowly proscribed” and that if there is a question as to whether a municipality has certain legislative power, the court should find that the municipality does not possess such power.<sup>168</sup> Morgantown did not appeal and other municipalities have since repealed their hydrofracking bans.<sup>169</sup> Recently, Morgantown considered limited zoning laws, controlling the location of hydrofracking rather than an outright ban, although it is unclear if even such a limited ban would be allowed.<sup>170</sup> Until appellate courts in West Virginia address the level of power local municipalities possess through their zoning power, it seems unlikely that any type of hydrofracking ban will be allowed.

The states surrounding New York, where hydrofracking already exists, have all taken different approaches to local zoning power and hydrofracking bans. Generally the courts and legislature have been more restrictive of local power with greater control given to the state.<sup>171</sup> However, the law in both West Virginia and Pennsylvania is still unsettled, with the validity of Act 13 pending before the Pennsylvania Supreme Court<sup>172</sup> and the West Virginia bans only being struck down at the trial level.<sup>173</sup>

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Goho, *supra* note 14, at 6–7.

<sup>170</sup> *See* Goho, *supra* note 14, at 6–7; Orford, *supra* note 162.

<sup>171</sup> Goho, *supra* note 14, at 5–7.

<sup>172</sup> Detrow, *supra* note 157.

<sup>173</sup> Orford, *supra* note 162.

## II. ZONING AND PREEMPTION IN NEW YORK STATE

A. *History of Local Government and Zoning*

New York State consists of a myriad of different levels of local government, some existing for hundreds of years and tracing their existence to the establishment of the New York State Constitution in 1777.<sup>174</sup> The different levels of local government include county, city, town, and village governments.<sup>175</sup> The New York Constitution only confers legislative power to the New York State legislature as opposed to individual municipalities.<sup>176</sup> This gives the state the authority to “enact laws which regulate, prohibit, or require certain conduct, provided that such laws have some reasonable relation to the public health, safety, morals or welfare.”<sup>177</sup> Such broad power gives state legislatures the initial authority to impose land use restrictions.<sup>178</sup> While there are some statewide land use ordinances, such as fire laws, land use regulation is often left to local municipalities.<sup>179</sup> The rationale, as expressed by the Court of Appeals, is that towns are in the best position to evaluate community needs and use their zoning power accordingly.<sup>180</sup>

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<sup>174</sup> See N.Y. DEP’T OF STATE, LOCAL GOVERNMENT HANDBOOK 59 (2011) [hereinafter LOCAL GOVERNMENT HANDBOOK], available at [http://www.dos.ny.gov/lg/publications/Local\\_Government\\_Handbook.pdf](http://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf).

<sup>175</sup> *Id.* at 29.

<sup>176</sup> N.Y. CONST. art. III, § 1 (“The legislative power of this state shall be vested in the senate and assembly.”).

<sup>177</sup> PATRICIA SALKIN, NEW YORK ZONING LAW AND PRACTICE § 2:01 (4th ed. 2012).

<sup>178</sup> *Id.* (noting that a state legislature’s power to regulate land use is derived from the state’s general police power).

<sup>179</sup> *Id.*

<sup>180</sup> See *id.* § 2:01 n.3 (“A zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting as it does the density of population, the growth of city life, and the court of city values.” (quoting *Adler v. Deegan*, 167 N.E. 705, 711 (N.Y. 1929) (Cardozo, C.J., concurring))); see also LOCAL GOVERNMENT HANDBOOK, *supra* note 174, at 147–56.



In New York, local governments<sup>181</sup> do not have any inherent law making authority; instead, such authority comes from state legislation and Article IX of the New York State Constitution.<sup>182</sup> Article IX, often referred to as the “Home Rule” article,<sup>183</sup> delegates both broad and limited powers to local government.<sup>184</sup> This includes the power to create laws that relate to the municipality’s “property, affairs or government.”<sup>185</sup> However, the ability of local governments to exercise zoning authority is not explicit in the New York Constitution.<sup>186</sup> Instead courts have held that such zoning power comes from enabling statutes such as the Statute of Local Governments and the Municipal Home Rule Law.<sup>187</sup> The Statute of Local Governments includes the power for cities, villages, and towns to “adopt, amend and repeal zoning regulations”<sup>188</sup> but allows for restriction by the state legislature.<sup>189</sup> Counties are excluded and do not have the power to enact zoning regulations.<sup>190</sup> The Municipal Home Rule Law, enacted by the Legislature, allows local governments to “have the power to adopt and amend local laws where and to the extent that its legislative body has the power to act by ordinance, resolution, rule or regulation.”<sup>191</sup> This allows for local governments to enact ordinances or zoning laws within the

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<sup>181</sup> Local government is defined as “a county, city, town or village.” N.Y. CONST. art. IX, § 3(d)(2).

<sup>182</sup> N.Y. CONST. art. IX (defining the powers and rights of local governments).

<sup>183</sup> LOCAL GOVERNMENT HANDBOOK, *supra* note 174, at 30.

<sup>184</sup> *See id.* at 30–34.

<sup>185</sup> N.Y. CONST. art IX, § 2(c).

<sup>186</sup> *See* SALKIN, *supra* note 177, § 2:03.

<sup>187</sup> *See id.* §§ 2:03–04 (stating that although delegated to local government these powers are “quasi-constitutional” and can only be changed through legislation action at regular session in two calendar years).

<sup>188</sup> N.Y. STAT. LOCAL GOV'TS § 10(6) (McKinney 1994).

<sup>189</sup> *Id.* § 10 (“Grant[s of power] . . . to local governments . . . shall at all times be subject to such purposes, standards and procedures as the legislature may have heretofore prescribed or may hereafter prescribe.”).

<sup>190</sup> *See* SALKIN, *supra* note 177, § 2:09.

<sup>191</sup> *Id.* § 2:05 (citing N.Y. MUN. HOME RULE LAW § 10 (McKinney 1994)).

purview of their legislative power.<sup>192</sup> Though cities, towns, and villages all have similar zoning authority,<sup>193</sup> this Note will focus on the zoning power of towns.

### *B. Zoning and Preemption*

Local governments can use their police power to create laws for the “protection, order, conduct, safety, health and well-being of persons or property.”<sup>194</sup> Such police power also includes advancing the general welfare.<sup>195</sup> Under both the Statute of Local Governments and the Municipal Home Rule Law, local governments can zone under their police power.<sup>196</sup> Local government’s police power covers a broad array of activities from aesthetic concerns to preserving the character of the community.<sup>197</sup> While the zoning power of local governments is quite broad, courts have limited their authority in some areas.<sup>198</sup> For instance, the Court of Appeals in New York has generally held that local governments cannot use their zoning power to create regulations that have the effect of excluding minorities or the poor.<sup>199</sup> Another common area of contention is whether

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<sup>192</sup> Zoning ordinances and zoning laws are interchangeable and this Note will refer to both as zoning laws. There are some procedural differences between enacting a zoning ordinance or zoning law but they are not relevant for a discussion of preemption. *See* SALKIN, *supra* note 177, §§ 3:01–03, 3:13–40; *see also* *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458, 467–68 (Sup. Ct. 2012) (citing *Gernatt Asphalt Prods. v. Town of Sardinia*, 664 N.E.2d 1226, 1234–35 (N.Y. 1996) (referring to zoning ordinances as land use laws)).

<sup>193</sup> *See* SALKIN, *supra* note 177, §§ 2:06–08 (stating that villages and towns have similar zoning authority since all of their authority comes through the Municipal Home Rule Law).

<sup>194</sup> N.Y. CONST. art IX, § 2(c)(10); *see also* MUN. HOME RULE § 10.

<sup>195</sup> SALKIN, *supra* note 177, § 6:01.

<sup>196</sup> *See* N.Y. STAT. LOCAL GOV’TS § 10(6) (McKinney 1994); MUN. HOME RULE § 10.

<sup>197</sup> *See* SALKIN, *supra* note 177, §§ 6:01–25.

<sup>198</sup> *See id.* §§ 6:02–03.

<sup>199</sup> *See id.* § 20:11 (citing *Asian Am. for Equal. v. Koch*, 527 N.E.2d 265 (N.Y. 1988)) (“The enabling acts of cities, towns and villages in New York do not authorize zoning to exclude from the enacting municipality

zoning rules can be used to ban or regulate specific uses of the land.<sup>200</sup> These disputes often involve an analysis of the extent of a town's police power and what constitutes the general welfare of a town.<sup>201</sup>

The legislature retains the ability to impose restrictions on local zoning power.<sup>202</sup> One such restriction is that zoning regulations must be part of a comprehensive plan.<sup>203</sup> Another is that they cannot be part of "spot zoning," singling out a small piece of land for a different use for the exclusive "benefit of the owner of such property and to the detriment of other owners."<sup>204</sup> This is to ensure that zoning is used to build a better community and is a "means rather than [an] end."<sup>205</sup>

State law may preempt local zoning power either expressly or impliedly.<sup>206</sup> With "express preemption," the state explicitly prevents local municipalities from addressing an issue.<sup>207</sup> Express preemption is found in the statutory text itself and clearly illustrates that the state and not a local town is responsible for handling a specific issue.<sup>208</sup> When there is "implied preemption," the legislature has evidenced an intent to supersede a local municipality in a particular area.<sup>209</sup> Implied preemption generally

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persons of low or moderate income, and if the party attacking the ordinance establishes that it has either of an exclusory purpose or effect, the ordinance will be annulled.").

<sup>200</sup> See *id.* §§ 11:01–38.

<sup>201</sup> See *id.* § 6:01.

<sup>202</sup> See *id.* § 4:02; see also Goho, *supra* note 14, at 5.

<sup>203</sup> See SALKIN, *supra* note 177, § 4:03.

<sup>204</sup> *Id.* § 4:10 (quoting *Rodgers v. Vill. of Tarrytown*, 96 N.E.2d 731, 734 (N.Y. 1951)).

<sup>205</sup> See *id.* § 4:03 (citing *Asian Am. for Equal. v. Koch*, 527 N.E.2d 265 (N.Y. 1988)).

<sup>206</sup> See *id.* § 4:22; see also Weiland, *supra* note 16, at 470; Kenneally & Mathes, *supra* note 14.

<sup>207</sup> See, e.g., N.Y. COMM'N ON LOCAL GOV'T EFFICIENCY & COMPETITIVENESS, *supra* note 15; Goho, *supra* note 14, at 5; Weiland, *supra* note 16, at 470.

<sup>208</sup> See Weiland, *supra* note 16, at 470; Goho, *supra* note 14, at 5; see also N.Y. COMM'N ON LOCAL GOV'T EFFICIENCY & COMPETITIVENESS, *supra* note 15.

<sup>209</sup> Weiland, *supra* note 16, at 470–71.

appears in two forms. One form is “conflict preemption,” where the local law is “found to conflict with or frustrate the purpose” of the state law.<sup>210</sup> The other is “field preemption,” which occurs if state law concerning a particular issue is so broad that it “occupies the field,” leaving no ability for local discretion<sup>211</sup> or creates a “comprehensive and detailed regulatory scheme in a particular area.”<sup>212</sup>

Conflicts often arise in determining whether there is implied preemption. Unlike express preemption, which is often easily resolved based on the plain meaning of the statute,<sup>213</sup> implied preemption is more difficult to discern.<sup>214</sup> The courts often examine “the nature of the subject matter regulated, the purpose and scope of the state legislative scheme, and the need for statewide uniformity.”<sup>215</sup> Additionally, a local law is not preempted simply because it prohibits an activity that is allowed under state law.<sup>216</sup> If this were the case, the power of local governments would be “illusory.”<sup>217</sup> Furthermore, implied preemption does not require an express statement by the legislature.<sup>218</sup> Instead the court tries to discern legislative

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 456 N.E.2d 487, 490 (N.Y. 1983).

<sup>213</sup> *See, e.g., Inc. Vill. of Lloyd Harbor v. Town of Huntington*, 149 N.E.2d 851, 854 (N.Y. 1958) (holding that a local village cannot zone out a park that a state law specifically authorizes).

<sup>214</sup> *See Kenneally & Mathes, supra* note 14, at 3.

<sup>215</sup> *Id.*

<sup>216</sup> *See, e.g., N.Y. State Club Ass’n v. City of New York*, 505 N.E.2d 915, 919–20 (N.Y. 1987) (holding that the city was not preempted, either expressly or implicitly, by the New York State Human Rights Law when it prohibited discrimination in clubs even though the city was banning an activity allowed under state law).

<sup>217</sup> *Id.* at 920.

<sup>218</sup> *See Consol. Edison Co.*, 456 N.E.2d at 489 (holding that Red Hook’s Local Law 2, which required a license for power plants that the town could deny due to zoning rules, was invalid because it was preempted by Article VIII). The Legislature made it clear that the purpose of Article VIII was to expedite the process and create a “unified procedure.” *Id.* Additionally, article VIII had a detailed regulatory scheme, which the court said was

intent.<sup>219</sup> Courts judge legislative intent by investigating the state's public policy, the language of the statute, and whether state law has created a "comprehensive and detailed regulatory scheme."<sup>220</sup> Issues commonly arise as to what type of statement by the legislature or what level of detail in a regulatory scheme is needed to show intent.<sup>221</sup> Resolving those issues often requires a fact intensive search into the statute itself or the legislative purpose and history.<sup>222</sup>

*C. Mining in New York—The Precursor to the Hydrofracking Debate*

The Court of Appeals has never addressed the issue of whether a town can use its zoning power to ban hydrofracking. However, the Court of Appeals has addressed the extent to which towns can use their zoning power to control and ban mining.<sup>223</sup> The issue in mining, similar to that of hydrofracking, is whether local zoning power is preempted by a state statute regulating that industry. In mining, the focus was on the Mined Land Reclamation Act ("MLRA"),<sup>224</sup> which bears many similarities to the OGSML.<sup>225</sup> The Court of Appeals addressed this issue in *Frew Run Gravel Products, Inc. v. Town of Carroll*<sup>226</sup> and *Gernatt Asphalt Products, Inc. v. Town of*

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evidence of the legislature's intent to preempt. *Id.*

<sup>219</sup> See, e.g., *id.*

<sup>220</sup> See *id.*; see also *Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 518 N.E.2d 903, 904–05 (N.Y. 1987) (upholding local law because there was no indication that state law preempted the local regulatory scheme).

<sup>221</sup> See *Jancyn Mfg. Corp.*, 518 N.E.2d at 907; see also *N.Y. State Club Ass'n*, 505 N.E.2d at 917.

<sup>222</sup> See *Consol. Edison Co.*, 456 N.E.2d at 490 (looking at the statute to discern intent); see also *Jancyn*, 518 N.E.2d at 906 (looking at the purpose of the statute, here to protect the environment).

<sup>223</sup> See, e.g., *Frew Run Gravel Prods., Inc. v. Town of Carroll*, 518 N.E.2d 920 (N.Y. 1987); see also *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 664 N.E.2d 1226 (N.Y. 1996).

<sup>224</sup> Mined Land Reclamation Act, N.Y. ENVTL. CONSERV. § 27-0030 (McKinney 2007).

<sup>225</sup> See SALKIN, *supra* note 177, § 11:23.50.

<sup>226</sup> *Frew Run*, 518 N.E.2d at 921.

*Sardinia*.<sup>227</sup> These cases dealt specifically with whether a town could use its zoning power to limit where mining could occur and if a town could ban mining entirely.<sup>228</sup>

In *Frew Run*, the Court of Appeals held that a town was permitted to use its zoning power to regulate the location of a mine. In that case, the town of Carroll passed a zoning ordinance that regulated the placement of mines within the town, although the ordinance did not ban them entirely.<sup>229</sup> A mining company sued the town claiming that the town's zoning powers were preempted by a state statute, the MLRL.<sup>230</sup> The court reviewed the text of the statute and found that the town's zoning regulations were not superseded by the MLRL because the zoning regulations did not "relat[e] to the extractive mining industry."<sup>231</sup> Local laws would be superseded only if they detailed the specific operations and practice of how the mining could occur.<sup>232</sup> Towns had the power to regulate the land itself and thereby could control the locations of the mines.<sup>233</sup> Additionally, the court held that there was no evidence of intention by the legislature to preempt local zoning power.<sup>234</sup> The legislature's intent, concern for the environment, was consistent with the aim of the zoning ordinances.<sup>235</sup>

In *Gernatt*, the Court of Appeals affirmed a town's use of its zoning power to ban mining entirely. In this case, the town of Sardinia passed a zoning law which banned the construction of any new mines in town.<sup>236</sup> The law did not affect previously constructed mines.<sup>237</sup> The town claimed this was an extension of

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<sup>227</sup> *Gernatt*, 664 N.E.2d at 1234.

<sup>228</sup> See *Frew Run*, 518 N.E.2d at 921; see also *Gernatt*, 664 N.E.2d at 1230.

<sup>229</sup> See *Frew Run*, 518 N.E.2d at 921.

<sup>230</sup> *Id.* at 921–22.

<sup>231</sup> *Id.* at 922.

<sup>232</sup> *Id.* at 923.

<sup>233</sup> *Id.* at 923–24.

<sup>234</sup> *Id.* at 923.

<sup>235</sup> *Id.*

<sup>236</sup> See *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 664 N.E.2d 1226, 1230–31 (N.Y. 1996).

<sup>237</sup> *Id.* at 1231

the zoning power that the Court of Appeals approved in *Frew Run*, where the mines were allowed but only in certain areas.<sup>238</sup> In *Gernatt*, the court held that the town's use of its zoning power to ban all mining within the town did not violate the MLRL.<sup>239</sup> The court noted that without a "clear expression of legislative intent to preempt local control over land use" the local zoning laws were not preempted.<sup>240</sup> The court also found that towns are not "obligated to permit the exploitation of any and all natural resources within th[at] town."<sup>241</sup>

These two cases established an important baseline for how towns may use their zoning power. However, both cases dealt only with mining and the zoning power of towns in relation to the MLRL.<sup>242</sup> Therefore, a number of oil and gas companies claim the decisions in *Frew Run* and *Gernatt* are not applicable to hydrofracking.<sup>243</sup>

#### *D. The Legal Journey of Hydrofracking in New York*

Supporters and opponents of hydrofracking hold divergent opinions as to whether zoning bans on hydrofracking are preempted by state law. Gas companies argue that hydrofracking, as a type of gas drilling, can only be controlled by state law, specifically the OGSML.<sup>244</sup> They further argue that

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<sup>238</sup> See *Frew Run*, 518 N.E.2d at 923–24.

<sup>239</sup> See *Gernatt*, 664 N.E.2d at 1235–37.

<sup>240</sup> *Id.* at 1234.

<sup>241</sup> *Id.* at 1235 ("A municipality is not obligated to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interest of the community as a whole.").

<sup>242</sup> See *Frew Run*, 518 N.E.2d at 921; see also *Gernatt*, 664 N.E.2d at 1230.

<sup>243</sup> See Charles Gottlieb, *Regulating Natural Gas Development Through Local Planning and Land Use Controls*, N.Y. ZONING L. & PRAC. REP., May/June 2012, at 1, 3; Campbell, *supra* note 132 ("West, the Norse attorney, warned the appellate justices against falling into the 'trap' of judging based on past decisions on sand and gravel, which are regulated under a separate portion of state law.")

<sup>244</sup> Oil, Gas and Solution Mining Law, N.Y. ENVTL. CONSERV. § 23-0303(2) (McKinney 2007) ("The provisions of this article shall supersede all

the OGSML preempts local zoning laws through both express language in the statute and implicitly through state occupation of gas mining regulation and legislative intent.<sup>245</sup> Opponents of hydrofracking disagree and claim that the zoning bans are a proper exercise of the zoning power of towns.<sup>246</sup> Furthermore, antifracking advocates argue that they are following precedent set by the New York Court of Appeals<sup>247</sup> regarding the ability of towns to use their zoning power to ban mining activity within their town.<sup>248</sup> Hydrofracking opponents focus on previous Court of Appeals rulings, where the court did not find express or implied preemption in the MLRL, and cite the similar language between the OGSML and the MLRL.<sup>249</sup>

Gas companies have challenged the hydrofracking bans in two cases—*Anschutz Exploration Corp. v. Town of Dryden*<sup>250</sup> and *Cooperstown Holstein Corp. v. Town of Middlefield*.<sup>251</sup> In both cases the hydrofracking bans were upheld by the trial courts and

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local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.”).

<sup>245</sup> See Gottleib, *supra* note 243, at 3.

<sup>246</sup> *Id.* at 2; see also Slottje & Slottje, *supra* note 119.

<sup>247</sup> The Court of Appeals upheld selective zoning regarding mining in *Frew Run Gravel Prods., Inc. v. Town of Carroll*, 518 N.E.2d 920 (N.Y. 1987), and a town’s use of zoning power to exclude mines in *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 664 N.E.2d 1226 (N.Y. 1996).

<sup>248</sup> See Gottleib, *supra* note 243, at 2.

<sup>249</sup> *Id.*; see also Mined Land Reclamation Law, N.Y. ENVTL. CONSERV. § 23-2703(2) (McKinney 2007) (“[F]or the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry.”) (emphasis added); ENVTL. CONSERV. § 23-0303(2) (“The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.”) (emphasis added).

<sup>250</sup> *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (Sup. Ct. 2012), *aff’d sub nom.* Norse Energy Corp. USA v. Town of Dryden, No. 515227 (App. Div. May 2, 2013).

<sup>251</sup> *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. 2012), *aff’d*, No. 515498 (App. Div. May 2, 2013).



by the Appellate Division.<sup>252</sup> However, the issue is far from settled, as hydrofracking ban opponents are currently seeking leave to appeal to the Court of Appeals.<sup>253</sup> These cases concern the extent of a town's zoning power and whether hydrofracking bans are a proper use of that power.

In *Anschutz Exploration*, the trial court found that the New York legislature did not intend to preempt local control over land use and zoning when it passed the OGSML.<sup>254</sup> Due to the similar language between the OGSML and the MLRL, the trial court based its decision largely on the precedent set by the Court of Appeals in *Frew Run*.<sup>255</sup> The court found that the OGSML's language, superseding those laws *regulating* oil and gas drilling, indicated only laws that dealt with the actual operation of drilling. The OGSML did not prevent local governments from determining where within their borders the drilling should take place.<sup>256</sup> It was within the town's land use power to ban the location of hydrofracking drilling sites if the town thought that it would negatively affect the community.<sup>257</sup> Such a ban did not rise to the level of regulation.<sup>258</sup> In effect, only the state can regulate the "how" of mining but local municipalities can regulate the "where."<sup>259</sup>

Additionally, the court in *Anschutz* found that there was no "clear expression of legislative intent" in the OGSML to preempt zoning laws, language that had been included in other state statutes.<sup>260</sup> While another trial court had interpreted the

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<sup>252</sup> Campbell, *supra* note 133.

<sup>253</sup> *Id.*

<sup>254</sup> *Anschutz Exploration*, 940 N.Y.S.2d at 471.

<sup>255</sup> *Id.* at 471–73.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *See id.* at 470–73.

<sup>259</sup> SALKIN, *supra* note 177, § 11:23.50.

<sup>260</sup> *Anschutz Exploration*, 940 N.Y.S.2d at 470. New York has clearly expressed its intent to preempt local zoning ordinances in other state statutes. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 27-1107 (McKinney 2007) (“[N]o municipality may, except as expressly authorized by this article or the board, require any approval, consent, permit, certificate or other condition including conformity with local zoning or land use laws and ordinances” (emphasis

OGSML to preempt local fees being charged, that court had not examined the bill's language with regard to zoning.<sup>261</sup> Furthermore, the bill's language and legislative history show no indication that the legislature believed that maximizing the drilling for natural gas at the cost of local sovereignty was in the best interests of New York State.<sup>262</sup> Additionally, the OGSML only touched on technical concerns,<sup>263</sup> and it did not address common zoning problems such as traffic, noise, and protecting the character of a community.<sup>264</sup> Lastly, the court found that, as in *Gernatt*, the town did not engage in exclusionary zoning, as there is no obligation to permit the exploitation of a town's natural resources.<sup>265</sup> *Anschutz* was a clear victory for hydrofracking opponents, finding that towns could use their zoning power to ban hydrofracking.<sup>266</sup> Shortly after *Anchutz*, other trial courts would weigh in on the legality of hydrofracking bans.<sup>267</sup>

In *Cooperstown Holstein*, a different trial court upheld the local municipality's power to use their zoning power to ban hydrofracking.<sup>268</sup> The court found that the purpose and intent of

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added)); N.Y. MENTAL HYG. LAW § 41.34(e) (McKinney 2011) ("A community residence established pursuant to this section and family care homes shall be deemed a family unit, *for the purposes of locals laws and ordinances.*" (emphasis added)).

<sup>261</sup> *Envirogas, Inc. v. Town of Kiantone*, 447 N.Y.S.2d 221 (Sup. Ct. 1982), *aff'd*, 454 N.Y.S.2d 694 (App. Div.).

<sup>262</sup> *See Anschutz Exploration*, 940 N.Y.S.2d at 469–70.

<sup>263</sup> The technical concerns in the OGSML include "where operations may be conducted, such as those governing delineation of pools, well spacing, and integration of unit" and the distance between wells to "comport with geological features of the underlying pool[s]." *Id.* at 470.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*; *see also Gernatt Asphalt Prods., Inc., v. Town of Sardinia*, 664 N.E.2d 1226, 1236 (N.Y. 1996).

<sup>266</sup> *See Anschutz Exploration*, 940 N.Y.S.2d at 471–72.

<sup>267</sup> *See Lena Groeger, Decision on Dryden Fracking Ban Could Set a National Precedent*, SYRACUSE.COM (Feb. 23, 2012, 12:50 PM), [http://www.syracuse.com/news/index.ssf/2012/02/decision\\_on\\_drydens\\_fracking\\_b.html](http://www.syracuse.com/news/index.ssf/2012/02/decision_on_drydens_fracking_b.html).

<sup>268</sup> Jinjoo Lee, *Another Court Upholds Fracking Ban*, CORNELL DAILY SUN (Feb. 27, 2012), <http://cornellsun.com/node/50051>.

the OGSML was to regulate the industry and not to preempt local land use authority.<sup>269</sup> The court relied heavily on *Frew Run* and *Gernatt* but utilized a more in-depth historical analysis than in *Anschutz*, to ascertain legislative intent.<sup>270</sup> The court, looking at previous state statutes and legislative memoranda,<sup>271</sup> found that the legislative intent was to minimize waste.<sup>272</sup> Additionally, amendments in 1978 replaced the phrase “foster, encourage and promote” regarding the state role in gas production with the word “regulate.”<sup>273</sup> The court found that this did not show clear legislative intent for state law to supersede local zoning control.<sup>274</sup>

*Anschutz* and *Cooperstown Holstein* were recently upheld by the Appellate Division, but attorneys for the hydrofracking industry have indicated that they intend to appeal.<sup>275</sup> While the Court of Appeals only grants leave to a fraction of the cases that request it,<sup>276</sup> there is a strong chance that the court will grant such leave here since it is a matter of first impression that has repercussions across the state. If the decisions are upheld by the Court of Appeals, towns will be able to ban hydrofracking through their zoning powers limiting where hydrofracking will occur in New York State. Moreover, these cases also provide the Court of Appeals an opportunity to clarify their own opaque jurisprudence on implied preemption and its appropriate application with regard to zoning.

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<sup>269</sup> *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722, 730 (Sup. Ct. 2012).

<sup>270</sup> See SALKIN, *supra* note 177, § 11:23.50.

<sup>271</sup> *Cooperstown Holstein*, 943 N.Y.S.2d at 723–29 (examining Article 3-A of the Conservation Law, amendments in 1978, amendments in 1981, and the Legislative Memorandum).

<sup>272</sup> *Id.* at 728–29.

<sup>273</sup> *Id.* at 726.

<sup>274</sup> See *id.* at 729.

<sup>275</sup> Campbell, *supra* note 133.

<sup>276</sup> *Id.*

## III. IMPLIED PREEMPTION AND HYDROFRACKING

## A. Zoning and Implied Preemption

A number of New York Court of Appeals cases have addressed when zoning laws are implicitly preempted by state laws.<sup>277</sup> The issue of preemption most commonly arises in regard to exclusionary zoning<sup>278</sup> or prevention of specific uses of land.<sup>279</sup> Both are a form of “NIMBYism.” NIMBY, which stands for “not in my backyard,” refers to objections by the community about the placement of certain activities or structures in their particular neighborhood.<sup>280</sup> Such NIMBY problems often arise from projects that generate extensive benefits but impose a facility or project that negatively affects the local residents.<sup>281</sup> Examples include when communities use their zoning power to restrict housing for the low income or mentally disabled<sup>282</sup> and the placement of waste disposal facilities.<sup>283</sup> Issues arise when

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<sup>277</sup> See, e.g., *Inc. Vill. of Nyack v. Daytop Vill., Inc.*, 583 N.E.2d 928 (N.Y. 1991); *Kamhi v. Town of Yorktown*, 547 N.E.2d 346 (N.Y. 1989); *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 456 N.E.2d 487 (N.Y. 1983).

<sup>278</sup> Exclusionary zoning is often employed to describe land use laws which exclude certain people or projects from a certain community. The focus is often on individuals rather than uses. For more information see SALKIN, *supra* note 177, §§ 20:01–02.

<sup>279</sup> Often the problem arises when the specific uses of land have a relation to the public welfare. For more information see *id.* §§ 11:01–06.

<sup>280</sup> *Nimby Definition*, OXFORD DICTIONARIES, [http://oxforddictionaries.com/definition/american\\_english/Nimby](http://oxforddictionaries.com/definition/american_english/Nimby) (last visited Dec. 15, 2012) (“[A] person who objects to the siting of something perceived as unpleasant or potentially dangerous in their own neighborhood, such as a landfill or hazardous waste facility, especially while raising no such objections to similar developments elsewhere.”).

<sup>281</sup> See Barak D. Richman, *Mandating Negotiations to Solve the NIMBY Problem*, 20 UCLA J. ENVTL. L. & POL’Y 223, 223 (2001–02) (“NIMBY conflicts arise from projects that typically generate widespread dispersed benefits while imposing concentrated costs, such as homeless shelters, prisons, airports, sports stadiums, and waste disposal sites.”).

<sup>282</sup> SALKIN, *supra* note 177, §§ 20:01–02.

<sup>283</sup> Richman, *supra* note 281, at 223.

the placement of the project, while perhaps undesirable for the neighborhood, is essential for the community as a whole.<sup>284</sup>

One means to address NIMBYism is through legislation controlling placement. Since local municipalities derive their authority from the state legislature,<sup>285</sup> municipalities cannot pass zoning plans that are preempted by state law.<sup>286</sup> The local law is expressly preempted if the state law reserves control over the zoning procedure for a specific industry for itself.<sup>287</sup> However, even if the state law does not specifically reserve control over zoning, the local law could still be impliedly preempted.<sup>288</sup> In both forms of implied preemption (conflict and field), the key is to analyze the intent of the legislature.<sup>289</sup> The language in some Court of Appeals decisions seems to indicate a broad reading for what constitutes implied preemption with regard to zoning but actual decisions have created an almost impossibly narrow application.

#### *B. (Trying) To Find Implied Preemption*

The Court of Appeals has found that the intent to preempt does not have to be expressly stated and it is “enough that the Legislature has impliedly evinced its desire to do so.”<sup>290</sup> It is also not enough “that the state and local laws touch upon the same area.”<sup>291</sup> Instead, the court can look to declared state policy to infer whether the legislature intended to preempt local laws.<sup>292</sup>

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<sup>284</sup> *Id.* at 223–24.

<sup>285</sup> *E.g.*, N.Y. CONST. art. IX, § 2.

<sup>286</sup> *See* SALKIN, *supra* note 177, § 4:22.

<sup>287</sup> *See* Weiland, *supra* note 16, at 472; Goho, *supra* note 14, at 5.

<sup>288</sup> N.Y. COMM’N ON LOCAL GOV’T EFFICIENCY & COMPETITIVENESS, *supra* note 15.

<sup>289</sup> *See id.*

<sup>290</sup> *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 456 N.E.2d 487, 487 (N.Y. 1983) (citations omitted).

<sup>291</sup> *Inc. Vill. of Nyack v. Daytop Vill., Inc.*, 583 N.E.2d 928, 930 (N.Y. 1991) (quoting *Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 518 N.E.2d 903, 907 (N.Y. 1987)).

<sup>292</sup> *Consol. Edison Co.*, 456 N.E.2d at 490 (citing *Robin v. Inc. Vill. of Hempstead*, 285 N.E.2d 285 (N.Y. 1972)).

However, in actuality, the Court of Appeals has applied a very narrow test and has been loath to find implied preemption by the state with regard to zoning without an express statement of intent.<sup>293</sup> The apparent necessity of such a clear and unequivocal statement of intent by the state raises the question of whether in the absence of such a statement any zoning act could be considered impliedly preempted.

For example, in *Incorporated Village of Nyack v. Daytop Village Inc.*,<sup>294</sup> the Court of Appeals held that “separate levels of regulatory oversight can coexist”<sup>295</sup> without preemption and that the detailed regulatory structure alone did not “evidence[] a desire” to preempt local zoning power.<sup>296</sup> The court held that the Mental Hygiene Law,<sup>297</sup> a very detailed regulatory scheme, did not preempt local zoning law since there was no clear indication of legislative intent to preempt.<sup>298</sup> Although not specifically stated, the court’s failure to find implied preemption in this case establishes an incredibly high burden for what constitutes implied preemption. *DJL Restaurant Corp. v. City of New York*

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<sup>293</sup> See *Daytop Vill.*, 583 N.E.2d at 928–32; see also *Jancyn*, 518 N.E.2d at 906; *Frew Run Gravel Prods., Inc. v. Town of Carroll*, 518 N.E.2d 920 (N.Y. 1987).

<sup>294</sup> *Daytop Vill., Inc.*, 583 N.E.2d at 929 (holding that local zoning regulations for substance abuse treatments were not preempted by state law, even though article 19 of the Mental Hygiene Law created a detailed regulatory structure because there is no evidence of legislative intent to preempt local zoning laws).

<sup>295</sup> *Id.* at 931.

<sup>296</sup> *Id.* (quoting *People v. Cook*, 312 N.E.2d 452, 457 (N.Y. 1974)).

<sup>297</sup> “DSAS [Division of Substance Abuse Services] is charged with the responsibility for establishing procedures and setting standards for the approval of substance abuse programs.” *Daytop Vill.*, 583 N.E.2d at 930 (citing N.Y. MENTAL HYG. LAW § 23.01 (McKinney 1991) (repealed 1999)). DSAS also is to “cooperate with and assist local agencies and community service boards in the development and periodic review of local comprehensive plans and programs for substance abuse services and approve such plans and programs . . . .” *Id.* (citing MENTAL HYG. § 19.07(b)(4) (McKinney 2011)). DSAS also must “inspect and approve or disapprove the facilities of and the services provided by substance abuse programs . . . .” *Id.* (citing MENTAL HYG. § 19.07(b)(5)).

<sup>298</sup> *Id.* at 931.

also demonstrates this high burden.<sup>299</sup> In that case, the Court of Appeals held that even though adult establishments were regulated by state law, local zoning rules were not impliedly preempted because state law did not address the “secondary effects” of these establishments.<sup>300</sup> Zoning laws are purposefully designed for local communities to address such concerns and protect their quality of life.<sup>301</sup> Additionally, the court held that there was no statement of legislative intent in the Alcoholic Beverage Control Law indicating that the state intended to preempt local zoning laws.<sup>302</sup>

*Frew Run* and *Gernatt* are additional examples of the reluctance of New York courts to find preemption without a specific statement of legislative intent.<sup>303</sup> In both cases, the court read the MLRL as not limiting zoning in large part because there was no explicit language of legislative intent and the local town ordinances were “consistent with the statute’s overall aim of protecting the environment.”<sup>304</sup>

The Court of Appeals has also applied this narrow view of implied preemption to questions of local power outside of zoning. In the case of *Jancyn Mfg. Corp. v. County of Suffolk*,<sup>305</sup> the Court of Appeals refused to find that a state law that prohibited the sale and use of certain sewage system cleaning additives was implicitly preempted by local laws, which set

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<sup>299</sup> *DJL Rest. Corp. v. City of New York*, 749 N.E.2d 186, 188, 191–92 (N.Y. 2001) (holding that local zoning rules regulating adult industry locations were not preempted even though the venues served alcohol, which is regulated by the Alcoholic Beverage Control Law).

<sup>300</sup> *Id.* at 191–92 (defining “secondary effects” as “increased crime rates, reduced property values, neighborhood deterioration and inappropriate exposure of children to sexually oriented environments”).

<sup>301</sup> *See id.* at 188–89.

<sup>302</sup> *See id.* at 191.

<sup>303</sup> *See* discussion *supra* Part II.C.

<sup>304</sup> *Frew Run Gravel Prods., Inc. v. Town of Carroll*, 518 N.E.2d 920, 923 (N.Y. 1987); *see also Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 664 N.E.2d 1226, 1235–36 (N.Y. 1996).

<sup>305</sup> *Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 518 N.E.2d 903 (N.Y. 1987) (finding no preemption where plaintiff’s sewage additives, were approved for sale by state law but were not allowed to be sold according to a more stringent local standard).

stricter standards for the sale of sewage cleaning additives.<sup>306</sup> The court looked to the legislature's intent and to the statutory scheme.<sup>307</sup> Although the statutory regulatory scheme was very detailed,<sup>308</sup> the court held that it was not thorough or extensive enough to have superseded all possible future local regulation.<sup>309</sup> A key reason that the court did not find implied preemption involved the absence of an express statement from the state of its intent to preempt.<sup>310</sup> The court also held that implied preemption could not be found merely because both pieces of legislation had the same goal.<sup>311</sup> In other cases, the Court of Appeals has also held that local laws that expand a definition in state law are not preempted as long as the legislature has not "evidenced a desire" to preempt.<sup>312</sup>

When the Court of Appeals has held local zoning laws are impliedly preempted, there is often specific language in the bill itself indicating a desire for preemption.<sup>313</sup> For example, in *Consolidated Edison Co. of New York v. Town of Red Hook*,<sup>314</sup>

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<sup>306</sup> *See id.* at 906.

<sup>307</sup> *Id.* at 905–07.

<sup>308</sup> The State law prohibited the sale and use of certain sewage system cleaning additives in Long Island. It also empowered the State Commissioner of Environmental Conservation to create regulations forcing manufacturers to disclose their chemical components and restrict sale of products with restricted chemical material after investigation and hearing. *See id.* at 903–04.

<sup>309</sup> *Id.* at 907.

<sup>310</sup> *Id.* ("Although an express statement of preemption is not required it is significant that no such statement appears in the statute . . .").

<sup>311</sup> *Id.* (finding that both the local law and state law shared the same goal, protection of the Long Island water supply).

<sup>312</sup> *N.Y. State Club Ass'n v. City of New York*, 505 N.E.2d 915, 920 (N.Y. 1987) (holding that New York City's narrower definition of what constituted a private club was not preempted by state antidiscrimination laws).

<sup>313</sup> However courts have been more likely to find implied preemption of local laws not connected to zoning. *See Albany Area Builders Ass'n v. Town of Guilderland*, 546 N.E.2d 920 (N.Y. 1989) (holding that a local law setting up a Transportation Impact Fee was impliedly preempted by the state regulatory structure regulating highway funds).

<sup>314</sup> *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 456 N.E.2d 487 (N.Y. 1983).



the court held that Red Hook's Local Law 2, which allowed the town to refuse Consolidated Edison Company a permit under its zoning law, was preempted by Article VIII of the Public Service Law.<sup>315</sup> The court cited the legislature's purpose, clearly expressed in Article VIII, and the detailed regulatory structure.<sup>316</sup> Article VIII plainly indicated that the legislature intended "to provide for the expeditious resolution of all matters concerning the location of major steam electric generating facilities."<sup>317</sup> This was reaffirmed when the Legislature reenacted Article VIII in 1978, asserting "its purpose was to have the Siting Board balance all interests, including local interests, on a State-wide basis."<sup>318</sup> Although there is language indicating the role of the regulatory structure in the decision, it is clear that the holding was based primarily on the very express legislative intent indicated in Article VIII.

Together, these cases illustrate that when the Court of Appeals examines whether state law impliedly preempts local law, especially with respect to zoning, it rarely finds such preemption without an explicit statement from the state legislature. Although previous Court of Appeals decisions include language that an explicit expression of legislative intent is not required,<sup>319</sup> the reality appears to be otherwise. If the previously mentioned cases are any indication, it does not appear that any comprehensive regulatory scheme, absent a declared intention to preempt local power, will be sufficient for the Court of Appeals to find implied preemption.<sup>320</sup>

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<sup>315</sup> See *id.* at 489-90.

<sup>316</sup> *Id.* at 490-91.

<sup>317</sup> *Id.* at 490 (quoting L. 1972, ch. 385, § 1).

<sup>318</sup> *Id.* (quoting L. 1978, ch. 708, § 1).

<sup>319</sup> See, e.g., *Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 518 N.E.2d 903, 906 (N.Y. 1987).

<sup>320</sup> See, e.g., *Consol. Edison Co.*, 456 N.E.2d at 490 (holding that Article XIII contained an express statement about the legislature's intent to preempt local zoning rules).

*C. Hydrofracking Bans Are Not Implicitly Preempted*

If the Court of Appeals follows the exacting standard it has thus far used for determining implied preemption, it is likely to uphold the town's hydrofracking bans.<sup>321</sup> There are two aspects of implied preemption that need to be analyzed: conflict preemption and field preemption.<sup>322</sup> Either is sufficient for a law to be preempted and both are controlled by the intent of the legislature.<sup>323</sup> Since there is no explicit statement in the OGSML indicating unequivocal intent by the legislature to preempt local land use control over gas drilling, the Court of Appeals will likely find that local hydrofracking bans are not preempted.

There is no conflict preemption between the OGSML and local hydrofracking bans because the bans do not frustrate the purpose of the OGSML. There is no inherent conflict simply because the local zoning laws prohibit what state law allows, otherwise local power would be meaningless.<sup>324</sup> Instead, the court looks to legislative intent in the statute itself.<sup>325</sup> The OGSML indicates that its main purpose is not to ensure that drilling occurs anywhere that it is possible but to prevent waste and protect the rights of the general public.<sup>326</sup> While the OGSML

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<sup>321</sup> This Note does not examine whether or not the Court of Appeals will find express preemption in the OGSML.

<sup>322</sup> See Goho, *supra* note 14, at 5; N.Y. STATE COMM'N ON LOCAL GOV'T EFFICACY & COMPETITIVENESS, *supra* note 15.

<sup>323</sup> See Goho, *supra* note 14; see also N.Y. STATE COMM'N ON LOCAL GOV'T EFFICACY & COMPETITIVENESS, *supra* note 15.

<sup>324</sup> See *Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 518 N.E.2d 903, 907 (N.Y. 1987); see also *N.Y. State Club Ass'n v. City of New York*, 505 N.E.2d 915, 920 (N.Y. 1987).

<sup>325</sup> See, e.g., *Consol. Edison Co.*, 456 N.E.2d 487; *N.Y. State Club Ass'n*, 505 N.E.2d at 915; see *Jancyn*, 518 N.E.2d at 906 ("No preemptive intent is evident from either the Legislature's declaration of State policy . . . or the statutory scheme which has been enacted.").

<sup>326</sup> N.Y. ENVTL. CONSERV. § 23-0301 (McKinney 2007) ("It is hereby declared to be in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had and that correlative right of all

does mention the “greater ultimate recovery of oil and gas,” that is in reference to the operation and development of the sites, not where such sites should occur.<sup>327</sup> The only language which explicitly restricts local power refers to the “regulation” of mining.<sup>328</sup> Such a term though has never been interpreted to restrict all interaction with that activity.<sup>329</sup> The OGSML makes no mention of noise, traffic, and neighborhood character, all of which are responsibilities normally left to local government.<sup>330</sup> As the Court of Appeals held in *DJL Restaurant*, these are the types of concerns that are specifically meant to be addressed by zoning.<sup>331</sup> Local zoning laws that address these issues are not “regulating” hydrofracking but only affecting where hydrofracking can take place.<sup>332</sup> In addition, two levels of regulatory oversight, one stricter than the other, have been allowed<sup>333</sup> even when local law prohibits an activity allowed under state law.<sup>334</sup>

Additionally, there is no field preemption because under the Court of Appeals’ narrow view of implied preemption, the regulatory structure of the OGSML is not sufficiently detailed or comprehensive enough to eliminate local discretion.<sup>335</sup> Even in

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owners and the rights of all persons including landowners and the general public may be fully protected.”).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* § 23-0303(2).

<sup>329</sup> See *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, 923 (N.Y. 1987).

<sup>330</sup> SALKIN, *supra* note 177, § 11:23.50.

<sup>331</sup> *DJL Rest. Corp. v. City of New York*, 749 N.E.2d 186, 188, 191–92 (N.Y. 2001).

<sup>332</sup> See *Frew Run*, 518 N.E.2d at 923–24; *Gernatt*, 664 N.E.2d at 1235–36.

<sup>333</sup> See *Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 518 N.E.2d 903, 907 (N.Y. 1987).

<sup>334</sup> See, e.g., *id.* (holding that a local regulation is not preempted by a state law that also addresses the same issue); *N.Y. State Club Ass’n v. City of New York*, 505 N.E.2d 915 (N.Y. 1987) (holding that local law can have a narrower definition of what constitutes a private club than state antidiscrimination laws).

<sup>335</sup> See *Inc. Vill. of Nyack v. Daytop Vill., Inc.*, 583 N.E.2d 928 (N.Y.

cases where the state legislature had a more comprehensive regulatory scheme, such as for substance abuse housing,<sup>336</sup> discrimination,<sup>337</sup> and mining,<sup>338</sup> local zoning laws were not considered preempted. The OGSML regulatory structure is not as detailed as that of the cases above, focusing only on reserving power for the state to control the *regulation* of the gas mining rather than its placement.<sup>339</sup> There is nothing to indicate that the purpose of the OGSML is to ensure hydrofracking happens anywhere that it can.<sup>340</sup> It is telling that the Court of Appeals held in *Garnett* that there is no explicit requirement that towns permit mining just because they have such resources.<sup>341</sup> Additionally, the current regulatory structure does not create a system where a single town's decision to ban hydrofracking would affect another town's ability to allow hydrofracking. While some commenters claim that natural gas production is only feasible over many municipalities,<sup>342</sup> that claim is unlikely as towns are often separated by many miles and the hydrofracking bans would only affect drilling sites within that specific town. It is also unlikely that the hydrofracking bans would be adopted by all towns due to the victory of

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1991) (holding that local zoning regulations for substance abuse treatments were not preempted by a detailed state regulatory structure because there was no evidence of legislative intent to preempt local zoning laws); *see also Jancyn*, 518 N.E.2d at 907 (upholding a local law banning cleaning additives even though cleaning additives were also regulated through state scheme).

<sup>336</sup> *See Daytop Vill., Inc.*, 583 N.E.2d at 928–29.

<sup>337</sup> *See N.Y. State Club Ass'n*, 505 N.E.2d at 916.

<sup>338</sup> *See Gernatt Asphalt Prods., Inc., v. Town of Sardina*, 664 N.E.2d 1226, 1227 (N.Y. 1996); *Frew Run Gravel Prods., Inc. v. Town of Carroll*, 518 N.E.2d 920, 921 (N.Y. 1987).

<sup>339</sup> N.Y. ENVTL. CONSERV. § 23-0303(2) (McKinney 2007) (“The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.”).

<sup>340</sup> *See Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458, 464–66 (Sup. Ct. 2012).

<sup>341</sup> *Gernatt*, 664 N.E.2d at 1235.

<sup>342</sup> Gregory R. Nearpass & Robert J. Brenner, *High Volume Hydraulic Fracturing and Home Rule: The Struggle for Control*, 76 ALB. L. REV. 167, 188–89 (2013).

hydrofracking proponents in recent elections<sup>343</sup> and the presence of prohydrofracking resolutions in over fifty towns.<sup>344</sup> Even if all towns did enact hydrofracking bans, that would not alter the preemption argument since the language in the OGSML speaks to regulation of drilling where it occurs,<sup>345</sup> not the maximization of gas drilling everywhere. The limited regulatory structure created by the OGSML is not comprehensive enough to imply that the legislature intended to occupy the field and preempt all local zoning laws.

The Court of Appeals is not likely to find that towns' hydrofracking bans are impliedly preempted due to their own narrow interpretation of what constitutes implied preemption. Court of Appeals jurisprudence appears to indicate that only an explicit statement of legislative intent will preempt even the most exacting of state regulations. While the OGSML does specifically discuss control over the regulation of gas drilling, there is no explicit statement indicating that the state intended to reserve power over the placement of gas drilling locations.<sup>346</sup> Without such an explicit statement, the Court of Appeals is unlikely to find local zoning concerns impliedly preempted.

#### CONCLUSION

The Court of Appeals' narrow interpretation of implied preemption is appropriate public policy for New York in general and specifically with regard to hydrofracking. Although hydrofracking has been conducted for many years in other states, there are still a number of questions as to its effect on the local environment, including tainted water and methane explosions.<sup>347</sup> These environmental concerns are important as they could affect the drinking water of local towns and New

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<sup>343</sup> Esch, *supra* note 116.

<sup>344</sup> See *Map of Positive Resolutions for Hydrofracking*, *supra* note 120 (showing specifically that the towns in favor of hydrofracking are also along the Marcellus Shale, the most lucrative area for hydrofracking).

<sup>345</sup> ENVTL. CONSERV. § 23-0303(2).

<sup>346</sup> See SALKIN, *supra* note 177, § 11:23.50.

<sup>347</sup> See WILBER, *supra* note 53, at 89-92; Caruso, *supra* note 71.

York City,<sup>348</sup> as well as impact tourism and local agriculture.<sup>349</sup> Ensuring that local governments are able to ban hydrofracking within their communities will provide another level of protection against any possible dangers from hydrofracking. It will also allow those communities eager for jobs and economic benefits to permit hydrofracking. An open debate about the pros and cons of hydrofracking will increase residents' knowledge and through the local political process, individuals will be able to have their voices heard.

Furthermore, town hydrofracking bans do not present a NIMBY problem. Unlike a waste reactor, which is often necessary for the community and needs to be placed somewhere, hydrofracking does not need to occur. Hydrofracking is not necessary for a community and while it may bring economic benefits, those benefits also come with risks. Individual towns should have the ability to decide for themselves if the costs outweigh the benefits. Additionally, even if towns are able to enact hydrofracking bans, it is unlikely that would end hydrofracking in New York State. Over fifty towns have already enacted resolutions supporting hydrofracking.<sup>350</sup> The ability of local governments to ban hydrofracking also appears to be in line with recent unofficial reports from the DEC indicating that hydrofracking would only occur in those areas that desire it.<sup>351</sup>

Additionally, allowing local governments to ban hydrofracking will not negatively affect other energy producers in New York State. The recent Power NY Act of 2011<sup>352</sup> includes express preemption language that creates a "one stop approval process for new and expanded power plans" including wind farms.<sup>353</sup> Since the Power New York Act expressly gives

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<sup>348</sup> See Kastenbaum, *supra* note 58.

<sup>349</sup> See Gralla, *supra* note 56.

<sup>350</sup> *Map of Positive Resolutions for Hydrofracking*, *supra* note 120.

<sup>351</sup> Karlin, *supra* note 95 (citing recent reports, which the Governor refuses to deny, indicating that his administration is considering a plan where hydrofracking would only be permitted in willing communities).

<sup>352</sup> Power NY Act of 2011, S. 5844, Assemb. 8510, Reg. Sess. (codified in scattered sections of N.Y. PUB. SERV. LAW).

<sup>353</sup> *New York Legislature Enacts Power Plant Siting Law*, Bryan Cave Bulletin (Bryan Cave, LLP, St. Louis, MO), Aug. 9, 2011, at 1, *available at*

control over zoning to the state, there is no need to look for implied preemption. This is different from the OGSML, which only has specific language preempting regulation and does not have any explicit language regarding zoning or the placement of drilling sites.

Permitting New York towns to ban hydrofracking does go further than other states but that is a positive development. While West Virginia courts have struck down hydrofracking bans, their reasoning focused on the “narrow” power held by municipalities and West Virginia DEP’s primary authority to protect the environment.<sup>354</sup> For the New York Court of Appeals to analyze the OGSML in a similar manner would upend years of jurisprudence that allowed local municipalities greater control through zoning. It is also not clear in Pennsylvania what level of control local municipalities will have over hydrofracking.<sup>355</sup> It is possible that the Pennsylvania Supreme Court will take a similar position to that of the New York Court of Appeals and adopt a broad view of zoning power. Regardless, the environmental issues that Pennsylvania has encountered in its quick embrace of hydrofracking<sup>356</sup> are additional evidence that the best path forward is greater local control.

The New York Court of Appeals should also take this opportunity to clarify that implied preemption should only be found with regard to zoning if there is an explicit statement of intent from the legislature. Such a statement would simply codify what is already effectively unstated law. This would have a number of policy benefits for New York State. It would create a clear bright line rule that would give local municipalities a greater sense of what they are able to do and would decrease the number of lawsuits challenging their authority.

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[http://www.bryancave.com/files/Publication/b03ff613-d188-440a-bd0b-01f498b4e1bc/Presentation/PublicationAttachment/f8e28986-f958-4912-91e0-119d5dccd6e0/New%20York%20Power%20Plant%20Siting%20Article%20X%20Client%20Alert\\_v7%20\(AP\).pdf](http://www.bryancave.com/files/Publication/b03ff613-d188-440a-bd0b-01f498b4e1bc/Presentation/PublicationAttachment/f8e28986-f958-4912-91e0-119d5dccd6e0/New%20York%20Power%20Plant%20Siting%20Article%20X%20Client%20Alert_v7%20(AP).pdf)

<sup>354</sup> Orford, *supra* note 162.

<sup>355</sup> Detrow, *supra* 157.

<sup>356</sup> See Caruso, *supra* note 71; see also Drakem & Efstahiou Jr., *supra* note 76.

Greater control for local municipalities is especially important with regard to zoning. A municipality's zoning power is its most effective weapon to protect their community. As Judge Cardozo commented, "a zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting as it does the density of population, the growth of city life, and the court of city values."<sup>357</sup> Due to the unique importance of zoning, it is proper for the Court of Appeals to adopt such a bright line rule that forces the legislature to explicitly state if they intend to remove a municipality's zoning power.

In addition, a requirement of express intent for preemption would help the judiciary and the legislature. The judiciary will no longer have to struggle to discern unclear legislature intent. Instead, courts could look at the legislation itself for an explicit statement to determine if the state reserved zoning power for itself, otherwise local municipalities would retain that authority. Government, both on the state and the local level, would also benefit. State legislatures going forward would have to truly contemplate if the laws they are enacting would be better served through local involvement or through laws controlling zoning power. This would create an environment conducive to better lawmaking. Local governments would also be spared the threat of constant litigation based on the intended thoughts of the legislature.

The legality of hydrofracking bans will likely remain precarious until the Court of Appeals clarifies the limits of implied preemption. In the interim, local municipalities will continue to use their zoning power to decide for themselves whether the risks of hydrofracking outweigh its rewards.

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<sup>357</sup> See SALKIN, *supra* note 177, § 2:01 n.3 (citing *Adler v. Deegan*, 167 N.E. 705 (N.Y. 1929)).