

LOCAL REGULATION OF HYDRAULIC FRACTURING

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I. INTRODUCTION

More than 400 local governments in the United States have enacted restrictions or bans on hydraulic fracturing.¹ Over 200 of these ordinances are in the state of New York.² Several challenges to these ordinances have been litigated or are presently in litigation.

The Court of Appeals of New York upheld a local ban on hydraulic fracturing in late 2013.³ In the most recent decision exploring local authority to regulate hydraulic fracturing, a trial court in Colorado struck down a local ban,

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¹ See *Local Actions Against Fracking*, FOOD & WATER WATCH, <http://www.foodandwaterwatch.org/water/fracking/fracking-action-center/local-action-documents/> (last visited Oct. 12, 2014).

² *Id.*

³ *In re Wallach v. Town of Dryden*, 16 N.E.3d 1188 (N.Y. 2014).

finding that the ban was preempted.⁴ Similarly, a trial court in West Virginia struck down a ban on hydraulic fracturing in 2011.⁵ On the other hand, the Supreme Court of Pennsylvania recently struck down legislation that, *inter alia*, purported to mandate that local governments in Pennsylvania allow hydraulic fracturing in every zoning classification.⁶ The statute also required statewide uniformity with respect to zoning restrictions for hydraulic fracturing.⁷

One issue in these disputes revolves around the extent of local authority to regulate or ban hydraulic fracturing under the land use planning and zoning power. This Article discusses existing case law and lays out the likely parameters of this authority, while acknowledging that the authority may differ from state to state. In addition, this Article lays out a process by which local governments can adopt enforceable regulations mitigating the community impacts of hydraulic fracturing. Taking a cue from the Court of Appeals of New York, this Article does not rehash the debate on the economic and environmental issues surrounding hydraulic fracturing, instead focusing on local authority to regulate the practice.

These appeals are not about whether hydrofracking is beneficial or detrimental to the economy, environment or energy needs of New York, and we pass no judgment on its merits. These are major policy questions for the coordinate branches of government to resolve. The discrete issue before us, and the only one we resolve today, is whether the state legislature eliminated the home rule capacity of municipalities to pass zoning laws that exclude oil, gas and hydrofracking activities in order to preserve the existing character of their communities.⁸

Even those sympathetic to local government control over hydraulic fracturing concede that the state also should have significant regulatory control.⁹ Although several commentators recognize that local governments hold a role in

⁴ Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, 2014 WL 3690665 (Colo. Dist. Ct. July 24, 2014).

⁵ Ne. Natural Energy, LLC v. City of Morgantown, No. 11-C-411 (W. Va. Cir. Ct. Aug. 12, 2011).

⁶ Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013).

⁷ *Id.* at 915.

⁸ *In re Wallach*, 16 N.E.3d at 1202–03.

⁹ See, e.g., Robert H. Freilich & Neil M. Popowitz, *Oil and Gas Fracking: State and Federal Regulation Does Not Preempt Needed Local Government Regulation*, 44 URB. LAW. 533 (2012); John R. Nolon & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 CASE W. RES. L. REV. 995 (2013); John R. Nolon & Victoria Polidoro, *Hydrofracking: Disturbances Both Geological and Political: Who Decides?*, 44 URB. LAW. 507 (2012).

regulating hydraulic fracturing, and the commentators even list some areas of control, the details of local control of hydraulic fracturing remain murky.¹⁰

This Article fills a void in the legal and planning literature by laying out explicit parameters for local regulation of hydraulic fracturing that likely survives attacks that allege preemption. In part, this task is accomplished by analogizing guidelines set out by courts when interpreting challenges to local government actions under Section 704 of the Federal Telecommunications Act.¹¹ Although the focus of Section 704 is to allocate authority between the federal government, on one hand, and the state and local governments, the statute lays clear boundaries and the courts have developed a helpful typology of what actions conform to traditional notions of land use planning and zoning and, thus, remain within the authority of local governments. This typology can be applied to regulation of hydraulic fracturing to delineate the boundaries between state and local authority. In addition, Section 704 of the Federal Telecommunications Act can provide a model for state legislatures in setting out the parameters of state versus local control of hydraulic fracturing activities.

Section II discusses local government regulation of hydraulic fracturing in general, beginning with a discussion of Dillon's Rule and Home Rule, concepts that often play a major role in cases that review local control of hydraulic fracturing. A summary of the local effects of hydraulic fracturing, as opposed to regional, state-wide, or national effects, follows. The Article then focuses on the concept of zoning and what zoning generally entails. The focus then turns to the question of whether a ban or total exclusion of a land use in a community, falls within the rubric of "zoning."

Section III describes a provision of Section 704 of the Federal Telecommunications Act of 1996 that attempts to allocate authority between the federal government, on one hand, and local and state governments on the other. Use of these provisions as a model for allocating authority between state and local governments with respect to hydraulic fracturing is examined. Next, cases from Colorado, New York, Pennsylvania, and West Virginia show the debate on the allocation of authority between state and local governments as addressed by those courts. Finally, the Article concludes that local governments can maintain a significant role in mitigating and compensating for the impacts of hydraulic fracturing, while the state holds a major role in regulating the practice of hydraulic fracturing. Enforceable local regulation of hydraulic fracturing likely falls short of explicit or de facto bans, and doubtless fails to satisfy many opponents of the practice. However, local regulation of the impacts of hydraulic fracturing may allow communities to enjoy the benefits of hydraulic fracturing while limiting the monetary and non-monetary costs.

¹⁰ Nolon & Polidoro, *supra* note 9, at 507.

¹¹ 47 U.S.C. § 332(c)(7) (2013).

II. LOCAL GOVERNMENT REGULATION OF HYDRAULIC FRACTURING

A. *Dillon's Rule and Home Rule*

The tension between local government authority and state government authority appears in many court decisions and policies. The Tenth Amendment of the United States Constitution allocates authority between the state governments and the federal government, providing that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.”¹² Local governments are not mentioned in the United States Constitution and therefore must derive their authority from the state.

When courts confront questions of whether local governments possess authority to enact particular legislation or engage in particular acts, the answer is not always clear. Courts must resort to a rule of statutory construction. With respect to local government authority, two possible rules emerged in the mid-19th century: Dillon’s Rule and Home Rule. Dillon’s Rule, named for its author Judge John Dillon of Iowa, states that:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.¹³

Home Rule proves more difficult to define. The Chicago Home Rule Commission once commented that “[t]here is perhaps no term in the literature of political science or law which is more susceptible to misconception and variety of meaning than ‘home rule.’”¹⁴ Many different types of Home Rule exist, but one definition describes the concept as “the ability of a local government to act and make policy in all areas that have not been designated to be of statewide interest through general law, state constitutional provisions, or initiatives and referenda.”¹⁵ However, the term seems to have taken on a

¹² U.S. CONST. amend. X.

¹³ 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911); *see also* Clark v. City of Des Moines, 19 Iowa 199 (Iowa 1865).

¹⁴ CHICAGO HOME RULE COMM’N, MODERNIZING A CITY GOVERNMENT 193 (1954).

¹⁵ DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 2 (2001).

“talismanic aura over the years and often, inaccurately, connotes almost total freedom of local governments from state control.”¹⁶

The United States Supreme Court, citing Dillon’s Rule, has described the relationship between the states and their local governments as follows:

[Local governments] are the creatures, mere political subdivisions of the State, for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. . . . They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the legislature; the authority of the Legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed.¹⁷

Judge Dillon went even further, finding that

Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.¹⁸

In addition, Dillon’s Rule holds sway in most states, with 39 states using Dillon’s Rule in interpreting grants of local government authority, at least for some types of local governments.¹⁹ Even in those states employing “Home Rule,” which generally presumes that the local government has authority unless specifically denied by the state, states exert control over local government authority. Courts typically overturn municipal ordinances if: (1) the ordinance relates to a “statewide” matter, as opposed to a matter of local concern; (2) the ordinance conflicts with a state statute; (3) state legislation expressly preempts the local ordinance; or, (4) state legislation impliedly preempts the local

¹⁶ JESSE J. RICHARDSON ET AL., *IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON’S RULE ON GROWTH MANAGEMENT* 7 (2003), available at <http://www.brookings.edu/es/urban/publications/dillonsrule.pdf>.

¹⁷ *Atkin v. Kansas*, 191 U.S. 207, 220–21 (1903) (citations omitted).

¹⁸ *City of Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455, 475 (1868) (emphasis omitted).

¹⁹ RICHARDSON, *supra* note 16.

ordinance.²⁰ Courts often encounter great difficulty in determining what matters are “statewide” as opposed to those limited to “local concern.”²¹ “There is no clear or workable test separating local from state concerns. Courts have acknowledged that there is considerable overlap in these two categories.”²² Consequently, even with Home Rule jurisdictions, one must first examine whether the local government holds authority to regulate hydraulic fracturing, then preemption may be examined.²³

B. State vs. Local Effects of Fracking

Determining whether local regulation of hydraulic fracturing targets matters of statewide or local concern involves similar difficulties. Traditional areas of state regulation of oil and gas production include “on-site drilling, [oversight of the] chemicals used . . . and [the] production process.”²⁴ State regulation also focuses on “prevention of waste, protection of correlative rights, . . . conservation of oil and gas natural resources, . . . safety, [and] on-site contamination.”²⁵

On the other hand, some effects of hydraulic fracturing cause impacts mainly in a small area around the activity and can be classified as “local.” These local impacts include “noise, light and other visual impacts,”²⁶ road damage, blasting, dust and traffic.²⁷ In addition, compatibility of the activity to nearby property uses, impact of the activity on property values in the area, “adequate off-site infrastructure, services [such as police and fire protection], affordable housing, and . . . the [general] health and safety of the community” also traditionally form the focus of local regulation.²⁸ Odors may also be an

²⁰ See, e.g., *Goodell v. Humboldt Cnty.*, 575 N.W.2d 486 (Iowa 1998); *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980); Charles W. Abdalla & John C. Becker, *Jurisdictional Boundaries: Who Should Make the Rules of the Regulatory Game?*, 3 DRAKE J. AGRIC. L. 7 (1998).

²¹ *State ex rel. Haynes v. Bonem*, 845 P.2d 150, 155 (N.M. 1992); 2 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 4:28 (3d ed. 2006).

²² 1 SANDRA M. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW § 21.05 (2d ed. 2014) (citing *Adler v. Deegan*, 167 N.E. 705 (N.Y. 1929)).

²³ Freilich & Popowitz, *supra* note 9, at 545.

²⁴ *Id.* at 535.

²⁵ *Id.* at 543, 547.

²⁶ Alex Ritchie, *On Local Fracking Bans: Policy and Preemption in New Mexico* 40 (Nov. 25, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359773.

²⁷ *San Pedro Mining Corp. v. Bd. of Cnty. Comm’rs*, 909 P.2d 754, 759 (N.M. Ct. App. 1995); 3 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 18:59 (5th ed. 2014).

²⁸ Freilich & Popowitz, *supra* note 9, at 535; see also *San Pedro Mining Corp.*, 909 P.2d at 759; Ritchie, *supra* note 26, at 8, 40, 80.

issue.²⁹ Finally, issues such as potential groundwater contamination, methane emissions, habitat fragmentation, and “degradation of environmentally sensitive areas” may produce mainly local impacts.³⁰

Some of these “local” impacts could spread and become “statewide.” In addition, states may wish to regulate these impacts to provide uniformity and certainty.³¹ Alternatively, states could promulgate a model ordinance to address these effects to promote this uniformity and certainty.³² To the extent that local governments regulate these impacts, setbacks, common in zoning ordinances, may address many of the issues.³³ Other useful tools that are usually available to local governments include impact fees³⁴ and “adequate public facilities ordinances.”³⁵ Impact fees are a charge imposed on development that seeks to offset the cost of capital facilities required as a result of land development.³⁶ The charges must relate to infrastructure resulting from the development, not maintenance fees or the like.³⁷ An adequate public facilities ordinance, implemented in a zoning or subdivision ordinance, conditions development on a requirement that existing infrastructure can service the planning development’s impact.³⁸ Local governments implement most of these tools through a zoning ordinance.

C. Zoning

Many local governments assert the authority to regulate hydraulic fracturing through zoning ordinances. However, some of these regulations appear to exceed the scope of what is normally thought of as zoning. “Zoning is the regulation by the [local government] of the use of land within the community, and of the buildings and structures which may be located thereon, in accordance with a general plan and for the purposes set forth in the enabling statute.”³⁹

The Standard State Zoning Enabling Act was developed by the United

²⁹ 3 SALKIN, *supra* note 27, § 18:59.

³⁰ Freilich & Popowitz, *supra* note 9, at 537–38.

³¹ Ritchie, *supra* note 26, at 40.

³² *Id.* at 89.

³³ *Id.*

³⁴ *Id.* at 41; Freilich & Popowitz, *supra* note 9, at 534.

³⁵ Freilich & Popowitz, *supra* note 9, at 534.

³⁶ 2 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF’S THE LAW OF PLANNING AND ZONING § 15:41 (4th ed. 2005).

³⁷ *Id.*

³⁸ Michele L. LeFaivre, Annotation, *Validity, Construction, and Application of Adequate Public Facilities Statutes or Ordinances*, 123 A.L.R.5th 349, § 2 (2004).

³⁹ 1 RATHKOPF & RATHKOPF, *supra* note 36, § 1.3.

States Department of Commerce in 1926 to provide guidance to state legislatures in enabling local governments to enact zoning ordinances. The Standard Act is still in use in many states, although it has been supplemented with other enabling authority.⁴⁰ “[T]he kinds of regulations authorized by the Act still constitute the basic approach to controlling land use.”⁴¹ Section 1 of the Standard Zoning Act provides that

[f]or the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.⁴²

The Standard Act also sets out the purposes of zoning regulations, stating that the regulations seek

to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid the undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout [the locality].⁴³

Cases in contexts other than oil and gas provide guidance on what measures fall within the rubric of zoning and “local concern.” *Enterprise Partners v. County of Perkins*,⁴⁴ considered ordinances that regulated livestock confinement facilities to minimize odors and flies by requiring that parts of the facility be covered.⁴⁵ In addition, the ordinance required that “no livestock

⁴⁰ JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 4:1 (3d ed. 2013).

⁴¹ *Id.*

⁴² STANDARD STATE ZONING ENABLING ACT § 1 (Dep’t of Commerce 1926) (footnotes omitted), available at <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>.

⁴³ *Id.* § 3 (footnotes omitted).

⁴⁴ 619 N.W.2d 464 (Neb. 2000).

⁴⁵ *Id.* at 466.

waste . . . be carried or washed onto or into county roads, ditches or properties . . . during . . . a 25-year storm.”⁴⁶ The court defined “zoning” as “the process that a community employs to legally control the use which [sic] may be made of property and the physical configuration of development upon the tracts of land located within its jurisdiction.”⁴⁷ Applying this definition to the ordinances at hand, the court found that the ordinances constituted “zoning regulation[s].”⁴⁸

Similar to the ordinance at issue in *Enterprise Partners*, a zoning ordinance may regulate oil and gas production, unless preempted or not enabled.⁴⁹ “As with all zoning ordinances . . . [the] regulations must be reasonable.”⁵⁰ Setbacks, traffic controls, erosion and sediment controls, and bonding requirements generally fall within the scope of “zoning.”⁵¹ Where the activity proposed will be far from residential uses, however, restrictions on oil and gas activities may be found to be “arbitrary and capricious.”⁵²

Another question that arises with respect to zoning ordinances’ treatment of oil and gas production concerns whether a total ban equates to a “zoning ordinance.” This distinction also factors into a determination of whether the ordinance conflicts with state law. If the state law authorizes the activity, a ban prohibits a legal activity from occurring within the boundaries of the locality.

As opposed to a ban, “[m]ost zoning ordinances . . . seek[] to separate, rather than exclude, incompatible uses.”⁵³ Exclusion of lawful uses raises both a policy question and a legal question as to the validity of the ordinance.⁵⁴ Courts reach different results when examining whether a zoning ordinance may exclude certain uses. Such reviews are considered on a on a case-by-case basis.⁵⁵

The Supreme Courts of Illinois and Pennsylvania have struck down such ordinances, regarding outdoor theatres and quarrying respectively.⁵⁶ Most courts appear to place the burden on the local government to show that such a

⁴⁶ *Id.*

⁴⁷ *Id.* (quoting *Ford v. Bd. of Cty. Comm’rs of Converse Cnty.*, 924 P.2d 91, 94 (Wyo. 1996)).

⁴⁸ *Id.* at 469–70.

⁴⁹ 3 SALKIN, *supra* note 27, § 18.59.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ 1 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 9:16 (5th ed. 2014).

⁵⁴ *Id.*

⁵⁵ DANIEL R. MANDELKER, *LAND USE LAW* § 5.37 (5th ed. 2003) (citations omitted).

⁵⁶ *People ex rel. Trust Co. of Chi. v. Vill. of Skokie*, 97 N.E.2d 310 (Ill. 1951); *Exton Quarries, Inc. v. Zoning Bd. of Adjustment of W. Whitehead Twp.*, 228 A.2d 169 (Pa. 1967).

ban promotes the general welfare.⁵⁷ The burden is on the complaining party to show that the ordinance, although purporting to allow the use, as a practical matter prohibits the use.⁵⁸

On the other hand, the New Jersey Supreme Court has allowed the total exclusion of heavy industrial uses.⁵⁹ *In re Gernatt Asphalt Products v. Town of Sardinia*⁶⁰ also allowed a ban of mining activity. The New Jersey and New York courts, however, appear to be the exception as opposed to the rule.

Perhaps the leading case on local bans of industrial activity is *Exton Quarries, Inc. v. Zoning Board of Adjustment of West Whiteland Township*. The Pennsylvania zoning enabling authority was modeled on the Standard State Enabling Act.⁶¹ Noting the footnotes to the Standard Act, the court concluded that the powers granted in the act are “broad and flexible.”⁶² “[A]lthough ‘(z)oning [sic] is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future.’”⁶³

The constitutionality of zoning ordinances which totally prohibit legitimate businesses such as quarrying from an entire community should be regarded with particular circumspection; for unlike the constitutionality of most restrictions on property rights imposed by other ordinances, the constitutionality of total prohibitions of legitimate businesses cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community. We believe this is true despite the possible existence outside the municipality of sites on which the prohibited activity may be conducted, since it is more probable than not that, as the operator of the prohibited business is forced to move further from the property he owns, his economic disadvantage will increase to the point

⁵⁷ See, e.g., *Koston v. Town of Newburgh*, 256 N.Y.S.2d 837 (N.Y. Sup. Ct. 1965); *Long Island Lighting Co. v. Vill. of Old Brookville*, 72 N.Y.S.2d 718 (N.Y. Sup. Ct. 1947), *aff'd*, 273 A.D. 856 (N.Y. App. Div. 1948); *Nikola v. Twp. of Grand Blanc*, 209 N.W.2d 803 (Mich. Ct. App. 1973), *aff'd*, 232 N.W.2d 604 (Mich. 1975); *Exton*, 228 A.2d at 169; *Appeal of Olson*, 338 A.2d 748 (Pa. Commw. Ct. 1975); *Amerada Hess Corp. v. Zoning Bd. of Adjustment*, 313 A.2d 787 (Pa. Commw. Ct. 1973).

⁵⁸ *Benham v. Bd. of Supervisors of Middletown Twp.*, 349 A.2d 484 (Pa. Commw. Ct. 1975). Along those lines, the Federal Telecommunications Act of 1996 bars local or state regulation that “prohibit[s] or [has] the effect of prohibiting personal wireless services.” 47 U.S.C. § 332(c)(7)(B)(i)(II) (2013).

⁵⁹ *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*, 64 A.2d 347 (N.J. 1949).

⁶⁰ 664 N.E.2d 1226 (N.Y. 1996); see *infra* Section IV.C.

⁶¹ *Exton*, 228 A.2d at 177.

⁶² *Id.*

⁶³ *Id.* at 178 (quoting *Nat'l Land & Inv. Co. v. Bd. of Adjustment of Easttown Twp.*, 215 A.2d 597, 610 (Pa. 1965)).

of deprivation. Moreover, if one municipality may, with only moderate justification, totally prohibit an undesired use of land, it is not unlikely that surrounding municipalities will do the same—thus increasing the distance to an alternative site and the concomitant economic disadvantage. Thus the possible availability of alternative sites somewhere outside the municipality on which the totally banned business may be conducted does not make permissible the deprivation within the township of property rights imposed by a municipality-wide ban of a particular kind of business. For these reasons, we believe that a zoning ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, morals and general welfare than an ordinance which merely confines that business to a certain area in the municipality.⁶⁴

The court found that the rationale for the prohibition of mining was not supported by evidence.⁶⁵ For example, “[t]he township’s assertion that quarrying will disturb the underground water supply in West Whiteland, though found as a fact by the Board, is not supported by competent evidence.”⁶⁶ In addition, some of the dangers complained of could be reduced through zoning regulations short of prohibition, like a fencing requirement.⁶⁷ The dissenting opinion labeled the majority as substituting its opinion for that of the zoning board. “In effect, this decision has made our Court a zoning board—and a poor one at that.”⁶⁸

D. Example of De Facto Ban

In addition to the disconnect between zoning and a total exclusion of a particular use, a ban seems inconsistent with state regulation. Many state regulations on oil and gas state as purposes the intent to prevent waste and protect correlative rights. A ban on oil and gas uses within a jurisdiction wastes oil and gas.⁶⁹ A ban also eliminates the correlative rights of the owners within the targeted area, denying the owner a share in the pool.⁷⁰ While federal and

⁶⁴ *Id.* at 179.

⁶⁵ See discussion *infra* Part III. A section of the Telecommunications Act requires that local government zoning decisions on the siting of cellular towers be supported by “substantial evidence.” 47 U.S.C. § 332(c)(7)(B)(iii) (2012).

⁶⁶ *Exton*, 228 A.2d at 180.

⁶⁷ *Id.*

⁶⁸ *Id.* at 187 (Cohen, J., dissenting).

⁶⁹ Ritchie, *supra* note 26, at 81.

⁷⁰ *Id.* at 82.

state law may negatively impact correlative rights, where the federal and/or state government determines that the production is allowed within the regulations, local law that denies correlative rights should be preempted.⁷¹ Finally, with respect to hydraulic fracturing, if the oil and gas cannot be otherwise produced, the ban causes waste.⁷² Arguing that state law regulates “how,” but allows bans fails to consider “the relationship between waste and correlative rights.”⁷³

Similarly, where an ordinance theoretically allows a lawful activity, but as practical matter creates so many barriers and discretionary reviews that the activity is essentially banned, the ordinance should be preempted.⁷⁴ The Santa Fe County, New Mexico, ordinance provides an example of a de facto ban.⁷⁵ The 110-page ordinance allows no oil or gas facility “of right” (without discretionary approvals by the county).⁷⁶ The county requires the following of anyone desiring to initiate an oil or gas facility: “an Oil and Gas Overlay Zoning District Classification; Special Use and Development Permit; Grading and Building Permits; and a Certificate of Completion.”⁷⁷

Three distinct processes are required for these approvals.⁷⁸ First, the overlay classification process involves discretionary administrative and quasi-judicial approval.⁷⁹ Second, the special use process is quasi-judicial discretionary.⁸⁰ Finally, the grading and building permits and certificate of completion are obtained through ministerial approvals.⁸¹ Eight different “detailed studies, plans, reports and assessments” are required, including an Environmental Impact Report.⁸² “If the applicant actually survives the overlay application stage, he must then enter into one or more development agreements with the County.”⁸³ This complex gauntlet obviously intends to thwart any attempts to actually engage in hydraulic fracturing in Santa Fe County.

A federal statute, section 704 of the Federal Telecommunications Act, anticipates some of the issues that arise when zoning ordinances impact

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 81–82.

⁷⁴ *Id.* at 86.

⁷⁵ See SANTA FE COUNTY, N.M., ORDINANCE 2008-19 (Dec. 10, 2008).

⁷⁶ *Id.* § 5.

⁷⁷ *Id.*

⁷⁸ *Id.* §§ 5, 8.

⁷⁹ *Id.* § 5.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Ritchie, *supra* note 26, at 18.

activities regulated by a higher level of government. That law attempts to prevent those issues by, *inter alia*, clearly preempting local action based on certain effects, requiring substantial evidence to act on applications for cellular tower siting, and prohibiting bans or effective bans of cellular towers. The next section describes these provisions and analogizes the measures to possible state statutes applying to hydraulic fracturing.

III. THE FEDERAL TELECOMMUNICATIONS ACT AS A MODEL

Federal limitations on the placement of personal wireless service facilities like cellular towers prove instructive with respect to regulation of oil and gas extraction, even though these rules lay out ground rules between the federal government on one hand, and state and local governments on the other. Federal law lays out relatively clear guidelines for the division of authority and courts' decisions have further clarified the guidelines. The applicable provisions of the Federal Telecommunications Act of 1996 may be analogized to hydraulic fracturing given the fact that both cellular towers (the main target of the federal act) and hydraulic fracturing are typically opposed by nearby residents, opposing parties often cite inaccurate information in support of their positions,⁸⁴ and zoning provides the most prominent method of control of both activities.

Courts have generally upheld "reasonable" local zoning regulation of cellular towers and personal wireless facilities.⁸⁵ Typical ordinances regulate location, placement, installation, fencing, screening, height, and co-location requirements.⁸⁶

The Federal Telecommunications Act of 1996 first declares that its provisions do not limit state or local authority except as provided in the statute.⁸⁷ State or local regulations based on the environmental effects of radio frequency emissions are prohibited.⁸⁸ Federal agencies regulate this aspect of cell phone towers. Local governments may not ban cell phone towers or enact regulations that have the effect of a ban.⁸⁹ Any decision on the placement of a

⁸⁴ See, e.g., Stephen J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 CATH. U. L. REV. 445, 457 (2005); Joshua P. Fershee, *Facts, Fiction, and Perception in Hydraulic Fracturing: Illuminating Act 13 and Robinson Township v. Commonwealth of Pennsylvania*, 116 W. VA. L. REV. 819, 823-24 (2014).

⁸⁵ 4 RATHKOPF & RATHKOPF, *supra* note 36, § 79:18.

⁸⁶ *Id.*

⁸⁷ 47 U.S.C. § 332(c)(7)(A) (2013).

⁸⁸ *Id.* § 332(c)(7)(B)(iv).

⁸⁹ *Id.* § 332(c)(7)(B)(i)(II).

cell phone tower must be in writing and based on substantial evidence.⁹⁰ Such decision must also be made within a reasonable time.⁹¹

For example, with respect to the substantial evidence requirement, where a cell tower was denied based on generalized complaints by citizens that amounted to Not In My Backyard (“NIMBY”) concerns, including complaints that the tower would be “ugly” or that a resident would not want the tower in his backyard, the finding was not supported by substantial evidence.⁹² On the other hand, where residents and planning department staff voiced concerns that the cell tower would be twice as high as the surrounding trees and the height and proximity to residences would diminish the residential character of the neighborhood, the court found substantial evidence to deny the tower.⁹³ The efforts of the provider to mitigate the effects by disguising the tower as a bell tower did not change this conclusion.⁹⁴

Cases interpreting the limitations contained in section 704 of the Federal Telecommunications Act emphasize the importance of the comprehensive plan in setting out land use objectives to support regulatory provisions.⁹⁵ Zoning ordinances may address aesthetic issues, preferences for locating equipment on existing structures, preferences for concealment of equipment, and preferred zoning classifications for the location of towers.⁹⁶ For example, the Fourth Circuit Court of Appeals placed great weight on the Regional Approach to Telecommunications Towers, a document developed by five different local governments to create a uniform approach to telecommunication tower siting in the region.⁹⁷ The Regional Approach was incorporated into the defendant county’s comprehensive plan and indicated preferences for colocation, placement on certain types of land and, in certain zoning districts, types of towers (monopole versus lattice).⁹⁸

A similar approach by local governments that desire to apply zoning regulations to hydraulic fracturing activities would increase the chances that the zoning regulations would be upheld by clarifying the role of the regulations in the local government’s land use plan. In addition, an enabling statute that set

⁹⁰ *Id.* § 332(c)(7)(B)(iii).

⁹¹ *Id.* § 332(c)(7)(B)(ii).

⁹² *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 800 (6th Cir. 2012).

⁹³ *T-Mobile Ne. LLC v. Town of Islip*, 893 F. Supp. 2d 338, 360–61 (E.D.N.Y. 2012).

⁹⁴ *Id.*

⁹⁵ *USCOC of Va. RSA #3, Inc. v. Montgomery Cnty. Bd. of Supervisors*, 343 F.3d 262 (4th Cir. 2003); *see also* Claire B. Levy, *Zoning for Cellular Towers Under Current Regulatory Conditions*, 27 *COLO. LAW.* 75, 75 (1998).

⁹⁶ Levy, *supra* note 95, at 75.

⁹⁷ *USCOC*, 343 F.3d at 265–66.

⁹⁸ *Id.*

out clear objects for local government regulation and declared certain areas of regulation as not allowable, like the applicable provisions of the Federal Telecommunications Act of 1996, would give guidance to local governments in crafting regulations.

IV. RECENT CASE LAW

A. Introduction

This section discusses four recent state court decisions, three that considered local regulation of hydraulic fracturing operations, and one that reviews a challenge to a state statute that limits local regulation of hydraulic fracturing through zoning. Courts in Colorado and West Virginia struck down local ordinances that banned hydraulic fracturing. On the other hand, the New York court upheld a local ban, and the Pennsylvania court, showing great deference to local authority to engage in land use planning and zoning, struck down a state statute limiting that local authority. Home Rule authority and state preemption form part of the consideration in each case, but each court's reasoning and approach differ greatly. Examination of these cases may enable generalities to be drawn and lessons to be learned about local regulation of hydraulic fracturing in the United States.

These cases play out the tension between local and state governments over which should primarily regulate hydraulic fracturing. These battles have been fought before, for example, with respect to the siting⁹⁹ and land application of biosolids.¹⁰⁰ Most litigation involving state versus local control involves the doctrine of preemption. The United States Supreme Court has developed a typology of preemption that recognizes three types: express, field, and conflict.¹⁰¹ Most state courts also recognize preemption of local ordinances by implication.¹⁰² This Article, however, will not focus on preemption issues, but instead examines the appropriate roles of state and local governments.

B. Colorado Oil and Gas Association v. City of Longmont

Several plaintiffs filed suit against the City of Longmont, alleging that a ban on hydraulic fracturing adopted by the city was preempted by the

⁹⁹ See, e.g., WASH. REV. CODE §§ 80.50.010–.904; *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 197 P.3d 1153 (Wash. 2008) (en banc).

¹⁰⁰ See, e.g., *Franklin Cnty. v. Fieldale Farms Corp.*, 507 S.E.2d 460 (Ga. 1998).

¹⁰¹ See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

¹⁰² Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 266 (2000).

Colorado Oil and Gas Conservation Act.¹⁰³ The plaintiffs included the Colorado Oil and Gas Association (“COGA”), an association of oil and gas operators and the Colorado Oil and Gas Conservation Commission (“COGCC” or the “Commission”), a statewide agency created by the Colorado Oil and Gas Conservation Act (“the Act”) to regulate oil and gas activity in the state.¹⁰⁴ Finally, TOP Operating Company (“TOP”), an oil and gas operating company with principal holdings in or adjoining the City of Longmont, was also a plaintiff.¹⁰⁵ The opinion details the case law on preemption with respect to oil and gas in the state.¹⁰⁶

The Act creates the COGCC¹⁰⁷ and provides for the appointment of a director for the Commission.¹⁰⁸ The statutory provisions give the Commission, *inter alia*, the authority to “make and enforce rules, regulations, and orders pursuant to” the Act.¹⁰⁹ The Act seeks “balanced development” of oil and gas “consistent with protection of public health, safety, and welfare,” including protection of the environment.¹¹⁰ The legislature also declares that the Act aims to prevent waste¹¹¹ and protect correlative rights.¹¹²

A 1990 Court of Appeals decision found that the Act completely preempted local land use regulation of oil and gas activity.¹¹³ The Colorado Supreme Court reversed.¹¹⁴ Instead of preempting all aspects of a county’s land use authority with respect to oil and gas, some local regulatory authority remains in the state. The state exclusively regulates the technical aspects of oil and gas development, preventing waste and protecting correlative rights.¹¹⁵ However,

[t]he state’s interest in oil and gas activities is not so patently dominant over a county’s interest in land-use control, nor are

¹⁰³ COLO. REV. STAT. § 34-60-101 (2014).

¹⁰⁴ Colo. Oil & Gas Ass’n v. City of Longmont, No. 13CV63, 2014 WL 3690665 (Colo. Dist. Ct. July 24, 2014) (The Sierra Club; Earthworks; Our Health, Our Future, Our Longmont; and Food and Water Watch were Defendants-Intervenors.).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ COLO. REV. STAT. § 34-60-104(1) (2014).

¹⁰⁸ *Id.* § 104.5(1).

¹⁰⁹ *Id.* § 105(1).

¹¹⁰ *Id.* § 102(1)(a)(I).

¹¹¹ *Id.* § 102(1)(a)(II).

¹¹² *Id.* § 102(1)(a)(III).

¹¹³ Bowen/Edwards Assocs., Inc. v. Bd. of Cnty. Comm’rs, 812 P.2d 656 (Colo. App. 1990).

¹¹⁴ Bd. of Cnty. Comm’rs v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1048 (Colo. 1992) (en banc).

¹¹⁵ *Id.* at 1058.

the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.¹¹⁶

The court remanded the case to the trial court to determine whether an operational conflict existed after the evidence had been fully developed.¹¹⁷ The court gave guidance to the trial court, stating:

We hasten to add that there may be instances where the county's regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations on land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest.¹¹⁸

On the same day that *Board of County Commissioners of La Plata County v. Bowen/Edwards Associates, Inc.* was decided, the Colorado Supreme Court issued an opinion on another ban, this time involving a Home Rule city.¹¹⁹ The Colorado Constitution grants Home Rule cities "the full right of self-government in both local and municipal matters."¹²⁰ Home Rule city ordinances "supersede within the territorial limits . . . any law of the state in conflict therewith."¹²¹ In addition, the Home Rule Amendment expressly states that "the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right."¹²²

The court first laid out the state's preemption doctrine as to "matter[s] of purely local concern."¹²³

It is a well-established principle of Colorado preemption doctrine that in a matter of a purely local concern an ordinance of a home-rule city supersedes a conflicting state statute, while

¹¹⁶ *Id.* (citations omitted).

¹¹⁷ *Id.* at 1060.

¹¹⁸ *Id.*

¹¹⁹ *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1064 (Colo. 1992).

¹²⁰ COLO. CONST. art. XX, § 6.

¹²¹ *Id.*

¹²² *Id.* § 6(h).

¹²³ *Voss*, 830 P.2d at 1066.

in a matter of purely statewide concern a state statute or regulation supersedes a conflicting ordinance of a home-rule city. Our case law, however, has recognized that municipal legislation is not always a matter of exclusive local or statewide concern but, rather, is often a matter of concern to both levels of government[.]¹²⁴

The test in Colorado for determining state preemption involves four factors: “[1] whether there is a need for statewide uniformity of regulation; [2] whether the municipal regulation has an extraterritorial impact; [3] whether the subject matter is one traditionally governed by state or local government; and [4] whether the Colorado Constitution specifically commits the particular matter to state or local regulation.”¹²⁵

The Colorado Supreme Court found that the ordinance was preempted by state law.

Because oil and gas pools do not conform to the boundaries of local government, Greeley’s total ban on drilling within the city limits substantially impedes the interest of the state in fostering the efficient development and production of oil and gas resources in a manner that prevents waste and that furthers the correlative rights of owners and producers in a common pool or source of supply to a just and equitable share of profits. In so holding, we do not mean to imply that Greeley is prohibited from exercising any land-use authority over those areas of the city in which oil and gas activities are occurring or are contemplated.¹²⁶

Notably, the court distinguished a “*total ban*” from mere regulation.¹²⁷

A 2002 Colorado Court of Appeals decision considered a town ordinance that required a special permit for oil and gas drilling.¹²⁸ The permit “requirements included specific provisions for well location and setbacks, noise mitigation, visual impacts and aesthetics regulation, and the like.”¹²⁹ The Court of Appeals granted summary judgment, finding some provisions of the ordinance in operational conflict with state rules, but finding some provisions

¹²⁴ *Id.* (citations omitted).

¹²⁵ *Id.* at 1067 (citation omitted).

¹²⁶ *Id.* at 1068.

¹²⁷ *Id.* at 1069 (emphasis in original).

¹²⁸ *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 760 (Colo. App. 2002).

¹²⁹ *Id.*

valid.¹³⁰ Specifically, regulations on “above-ground structures, access roads, and emergency response costs” were not preempted.¹³¹

The Court of Appeals, citing *Voss*, also distinguished a ban from regulation.

If a home-rule city, instead of imposing a total ban on all drilling within the city, enacts land-use regulations applicable to various aspects of oil and gas development and operations within the city, and if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city’s regulations should be given effect.¹³²

The court also cited *Bowen/Edwards*:

[T]he efficient and equitable development and production of oil and gas resources within the state *requires uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration*. Oil and gas production is closely tied to well location, with the result that the *need for uniform regulation extends also to the location and spacing of wells*.¹³³

Relying on this language, the Court of Appeals distinguished between technical aspects of drilling, solely governed by state law, and nontechnical aspects, which may be subject to local regulation.¹³⁴

Laying out a test of sorts, the court concluded that “although the Town’s process may delay drilling, the ordinance does not allow the Town to prevent it entirely or to impose arbitrary conditions that would materially impede or destroy the state’s interest in oil and gas development.”¹³⁵ Considering these precedents, the trial court found that Longmont’s ban contradicted state regulation by causing waste.¹³⁶ The court noted that Longmont essentially acknowledged that the ordinance at issue infringed upon state regulatory authority, but argued that the state agency was failing to

¹³⁰ *Id.* at 764.

¹³¹ *Id.*

¹³² *Id.* at 762 (quoting *Voss*, 830 P.2d at 1068–69).

¹³³ *Id.* at 763 (en banc) (emphasis in original) (quoting Bd. of Cnty. Comm’rs of La Plata Cnty. v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1058 (Colo. 1992)).

¹³⁴ *Id.*

¹³⁵ *Id.* at 766.

¹³⁶ Colo. Oil & Gas Ass’n. v. City of Longmont, No. 13CV63, 2014 WL 3690665, at *13–14 (Colo. Dist. Ct. July 24, 2014).

adequately regulate hydraulic fracturing in the opinion of the city.¹³⁷ The court granted summary judgment to the plaintiffs and enjoined Longmont from enforcing the ban, but it stayed the order pending appeal by the City of Longmont.¹³⁸

In conclusion, the Colorado District Court, relying on a body of precedent in that state, found that the Longmont ordinance conflicted with the state statutes and regulations.¹³⁹ This conflict is “obvious and patent on its face.”¹⁴⁰ The court found that a ban, as opposed to regulation, fails to prevent waste and protect correlative rights.¹⁴¹ Uniformity in regulation of hydraulic fracturing is desirable, and the impacts of hydraulic fracturing are not purely local.

C. *In re* Wallach v. Town of Dryden¹⁴²

In contrast to Colorado jurisprudence, the Court of Appeals of New York dismissed arguments that a ban frustrates state concerns and that uniformity is desirable. The court held that towns in that state may ban oil and gas production through local zoning because the Oil, Gas and Solution Mining Law (OGSML)¹⁴³ does not preempt Home Rule authority to regulate land use. This case involved a combined appeal of two bans on hydraulic fracturing, one by the Town of Dryden and one by the Town of Middlefield.¹⁴⁴

New York’s Home Rule provisions give every local government broad authority to enact any local laws, requiring only that the laws be consistent with the provisions of the state constitution and state statutes.¹⁴⁵ In addition, the state legislature may restrict local authority.¹⁴⁶ The Consolidated Laws of New York, Chapter 62, Article 16, provides enabling authority to towns for planning and zoning. Specifically, towns are authorized, *inter alia*, to regulate “the location and use of buildings, structures and land for trade, industry, residence or other purposes.”¹⁴⁷

¹³⁷ *Id.* at *11–12.

¹³⁸ *Id.* at *14.

¹³⁹ *Id.* at *13–14.

¹⁴⁰ *Id.* at *14.

¹⁴¹ *Id.* at *13–14.

¹⁴² 16 N.E.3d 1188 (N.Y. 2014).

¹⁴³ N.Y. ENVTL. CONSERV. LAW § 23-1901 (McKinney 2014).

¹⁴⁴ *In re Wallach*, 16 N.E.3d at 1192, 1193 .

¹⁴⁵ N.Y. CONST. art. IX, § 2(c)(ii).

¹⁴⁶ *Id.*

¹⁴⁷ N.Y. TOWN LAW § 261 (McKinney 2014); *see also* N.Y. MUN. HOME RULE LAW § 10.6 (Consol. 2014).

The Dryden ordinance at issue prohibits all oil and gas exploration, extraction and storage activities.¹⁴⁸ In adopting the amendment, the town board asserted that such activity would, *inter alia*, “endanger the health, safety and general welfare of the community through the deposit of toxins into the air, soil, water, environment, and the bodies of residents.”¹⁴⁹ The Dryden ordinance additionally prohibits “[n]atural [g]as and/or [p]etroleum [s]upport [a]ctivities.”¹⁵⁰ Natural gas and/or petroleum support activities include

[t]he construction, use, or maintenance of a storage or staging yard, a water or fluid injection station, a water or fluid gathering station, a natural gas or petroleum storage facility, or a natural gas or petroleum gathering line, venting station, or compressor associated with the exploration or extraction of natural gas or petroleum.¹⁵¹

Further, the provisions purport to invalidate any local, state or federal permits that would allow a prohibited activity.¹⁵² In contrast, the Middlefield ordinance at issue simply states that “[h]eavy industry and all oil, gas or solution mining and drilling are prohibited uses.”¹⁵³

The power to regulate land use is “[a]mong the most important powers and duties granted . . . to a town government” in New York.¹⁵⁴ However, this authority may not be used to enact regulations that conflict with state law.¹⁵⁵ The OGSML, like the Colorado Oil and Gas Conservation Act, seeks to prevent waste and protect correlative rights, among other purposes.¹⁵⁶ Notably, the OGSML strives 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.”¹⁵⁷ The provisions of the Act address drilling, casing, operation and

¹⁴⁸ See DRYDEN, N.Y., ZONING LAW art. V, § 502 (2012), available at http://dryden.ny.us/Planning-Department/ZoningLaw/Zoning_Ordinance_Amendments_adopted_7_19_2012.pdf.

¹⁴⁹ *In re Wallach*, 16 N.E.3d at 1192.

¹⁵⁰ DRYDEN, N.Y., ZONING LAW art. V, § 502(d).

¹⁵¹ *Id.* at art. III.

¹⁵² *Id.* at art. V, § 502(e).

¹⁵³ See MIDDLEFIELD, N.Y., ZONING LAW art. V, § A (2011), available at http://www.middlefieldny.com/uploads/1/2/6/8/12682437/zoning_law_061411_2011_final.pdf.

¹⁵⁴ N.Y. TOWN LAW § 272-a(1)(b) (McKinney 2014); see also *DJL Rest. Corp. v. City of N.Y.*, 749 N.E.2d 186, 191 (N.Y. 2001).

¹⁵⁵ N.Y. MUN. HOME RULE LAW §§ 10.1(i)–(ii) (Consol. 2013); *Albany Area Builders Ass’n v. Town of Guilderland*, 546 N.E.2d 920, 922 (N.Y. 1989).

¹⁵⁶ N.Y. ENVTL. CONSERV. LAW § 23-0301 (McKinney 2014).

¹⁵⁷ *Id.*

other technical aspects of extraction.¹⁵⁸ Among other provisions, the Act addresses well spacing “to promote efficient drilling and prevent waste.”¹⁵⁹

The clause relating to preemption states that the OGSML “supercede[s] 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.”¹⁶⁰

The court relied heavily on the decision in *In re Frew Run Gravel Products, Inc. v. Town of Carroll*.¹⁶¹ That decision distinguished between local regulations addressing “the actual operation and process of mining” and land use regulations.¹⁶² In other words, local governments may regulate “where” the activity takes place, but not “how” the activity is conducted.¹⁶³

Although the “how” versus “where” distinction is valid, *Frew Run* appears to be wrongly decided. The Supreme Court for Livingston County, in a case that involved the same preemption clause as *Wallach*, reluctantly found that the local ordinance was not preempted, opining that *Frew Run* is “flawed,” but feeling bound by the decision.¹⁶⁴ The statutory provision at issue in *Frew Run* excepted local laws imposing stricter reclamation standards from the supercession clause.

“For the purposes stated herein, this title shall supersede all other state or local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.”¹⁶⁵

The fact that land reclamation was expressly subject to tighter zoning controls by municipalities should have led to the conclusion that extractive mining operations were not. But that

¹⁵⁸ *Id.* § 23-0305(8).

¹⁵⁹ *In re Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1199 (N.Y. 2014) (citing N.Y. ENVTL. CONSERV. LAW § 23-0503).

¹⁶⁰ N.Y. ENVTL. CONSERV. LAW § 23-0303(2).

¹⁶¹ *See In re Wallach*, 16 N.E.3d at 1195–202 (relying heavily on *In re Frew Run Gravel Prods., Inc. v. Town of Carroll*, 518 N.E.2d 920 (N.Y. 1987)).

¹⁶² *Frew Run*, 518 N.E.2d at 923.

¹⁶³ *In re Wallach*, 16 N.E.3d at 1196 (citing *Frew Run*, 518 N.E.2d at 922).

¹⁶⁴ *Lenape Res., Inc. v. Town of Avon*, No. 1060-2012, at *4 (N.Y. Sup. Ct. Mar. 15, 2013), available at <http://www.nysba.org/workarea/downloadasset.aspx?id=43604>.

¹⁶⁵ *In re Wallach*, 16 N.E.3d at 1195–96 (emphasis omitted) (quoting N.Y. ENVTL. CONSERV. LAW § 23-0703(2)).

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is not what the Court of Appeals held, and its interpretation of the primary clause of the statute in *Frew Run* is strong persuasive precedent¹⁶⁶

The statute at issue in *Frew Run* was amended in 1991¹⁶⁷ to essentially codify the court's holding in the case as to preemption. The applicable provision now reads:

2. For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from:

a. enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate mining and/or reclamation activities regulated by state statute, regulation, or permit; or

b. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts. Where mining is designated a permissible use in a zoning district and allowed by special use permit, conditions placed on such special use permits shall be limited to the following:

(i) ingress and egress to public thoroughfares controlled by the local government;

(ii) routing of mineral transport vehicles on roads controlled by the local government;

(iii) requirements and conditions as specified in the permit issued by the department under this title concerning setback from property boundaries and public thoroughfare rights-of-way natural or man-made barriers to restrict access, if required, dust control and hours of operation, when such requirements and conditions are established pursuant to [the mining permit provisions of this statute] of this title;

(iv) enforcement of reclamation requirements contained in mined land reclamation permits issued by the state[.]¹⁶⁸

¹⁶⁶ *Lanape*, No. 1060-2012, at *4.

¹⁶⁷ 1991 N.Y. SESS. LAWS Ch. 166 § 228 (McKinney 2014).

¹⁶⁸ N.Y. ENVTL. CONSERVE. LAW § 23-2703(2).

The court in *Wallach* applied the three pronged test from *Frew Run*, examining the plain language of the statute, the statutory scheme, and legislative history. Considering these factors, the court found that the local bans in question are not preempted.¹⁶⁹ In contrast to the court's decision in *Colorado Oil and Gas Association v. City of Longmont*, the *Wallach* opinion rejected the notion that a ban conflicted with the state's goals of preventing waste and promoting greater production.¹⁷⁰ The court similarly dismissed the assertion that the statute's provisions relating to well spacing (a typical zoning provision) indicated any intent to preempt local zoning regulations.¹⁷¹

The holding in *Wallach* arguably stands on an even shakier foundation than *Frew Run*. The provision in *Frew Run* referred to local zoning ordinances, albeit in a limited context. The supercession provision in the OGSML excepts only "local government jurisdiction over local roads or the rights of local governments under the real property tax law."¹⁷²

Another issue in *Wallach* revolved around whether a distinction exists between zoning ordinances that allow an activity in some parts of the community, but not in others, and a total ban.¹⁷³ The majority opinion, citing *Gernatt*, found no distinction. The dissent attempted to distinguish *Gernatt*, which involved an ordinance that eliminated mining as a permitted use throughout the town.

The ordinances here, however, do more than just "regulate land use generally," they purport to regulate the oil, gas and solution mining activities within the respective towns, creating a blanket ban on an entire industry without specifying the zones where such uses are prohibited. In light of the language of the zoning ordinances at issue—which go into great detail concerning the prohibitions against the storage of gas, petroleum exploration and production materials and equipment in the respective towns—it is evident that they go above and beyond zoning and, instead, regulate those industries, which is exclusively within the purview of the Department of Environmental Conservation. In this fashion, prohibition of certain activities is, in effect, regulation.¹⁷⁴

Justice Pigott's distinction remains unclear, however. In *Gernatt*, mining was allowed in all zoning classifications in the town under the 1969

¹⁶⁹ *In re Wallach*, 16 N.E.3d at 1201.

¹⁷⁰ *Id.* at 1199.

¹⁷¹ *Id.*

¹⁷² N.Y. ENVTL. CONSERV. LAW § 23-0303(2).

¹⁷³ *In re Wallach*, 16 N.E.3d at 1202.

¹⁷⁴ *In re Wallach*, 16 N.E.3d at 1203–04 (Pigott, J., dissenting) (citation omitted).

zoning ordinance, with Town Board approval of the site.¹⁷⁵ Approval was conditioned on consideration of whether the activity would constitute a nuisance and on the operator's restoration plan.¹⁷⁶ Amendments adopted in 1993 resulted in the prohibition of future mining throughout the town, with existing operations continuing as nonconforming uses.¹⁷⁷ The court in *Gernatt* directly addressed the issue of whether the prohibition of mining in all zoning districts was distinguishable from an ordinance that prohibited mining in some zoning districts.¹⁷⁸ The holding finds that municipalities have no obligation to allow mining "somewhere" within the municipality.¹⁷⁹ *Gernatt* also involved a claim of exclusionary zoning. The court summarily concluded that exclusionary zoning did not apply to exclusion of industrial uses.¹⁸⁰

In conclusion, the Court of Appeals of New York rejected any notion that bans are distinguishable from reasonable local regulation. The supercession clause was narrowly construed to apply to very little local regulation. The court stressed the importance of zoning as a local government power.

D. *Robinson Township v. Commonwealth of Pennsylvania*¹⁸¹

The Supreme Court of Pennsylvania used sweeping language in *Robinson* to express many of the same sentiments as the Court of Appeals of New York,¹⁸² but in a case that offered the flipside of a preemption challenge. *Robinson* involved numerous constitutional challenges to Pennsylvania Act 13 of 2012 ("Act 13").¹⁸³ Pertinent to this discussion, Chapter 33 of Act 13¹⁸⁴ set out a uniform system of regulation throughout the state, requiring uniformity among local zoning ordinances in the state with respect to oil and gas development.¹⁸⁵ Most notably, Act 13 required that local governments allow oil and gas development as of right throughout their communities.¹⁸⁶ However, the provisions also imposed setback and other requirements. The court found that Chapter 33 violated Section 27 of the Declaration of Rights of the Pennsylvania Constitution, which provides as follows:

¹⁷⁵ *In re Gernatt Asphalt Prods. v. Town of Sardinia*, 664 N.E.2d 1226, 1230 (N.Y. 1996).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1234–35.

¹⁷⁹ *Id.* at 1235.

¹⁸⁰ *Id.* at 1235–36.

¹⁸¹ 83 A.3d 901 (Pa. 2013).

¹⁸² *See supra* Part IV.C.

¹⁸³ *See Robinson*, 83 A.3d at 913; *see also* 58 PA. CONS. STAT. § 2301 (2014).

¹⁸⁴ 58 PA. CONS. STAT. § 3301.

¹⁸⁵ *Robinson*, 83 A.3d at 915.

¹⁸⁶ *See* 58 PA. CONS. STAT. § 3304(b)(5).

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.¹⁸⁷

The court found that permitting oil and gas development in every zoning district could not, as a matter of law, conserve and protect the environment as required in Section 27 of the Declaration of Rights.¹⁸⁸ In addition, Chapter 33 requires some properties and communities to bear a heavier environmental burden than others.¹⁸⁹ Finally, the court concluded that Chapter 33 violated the Commonwealth's duties under the public trust created under Article I, Section 27 of the Pennsylvania Constitution.¹⁹⁰ Notably, Pennsylvania uses Dillon's Rule.¹⁹¹ Thus, Justice Saylor's dissenting opinion rightfully pointed out that the plurality seems to reverse the roles of the state and local governments, ignoring the fact that local governments derive their powers solely from the state.¹⁹² The Saylor dissent also characterized the plurality as "hypothesizing" about the negative impacts of Act 13 on the environment, while ignoring the detailed requirements of Act 13.¹⁹³ For example, the requirements of Act 13 make locating oil and gas operations in residential neighborhoods virtually impossible.¹⁹⁴

Justice Eakin joined in Justice Saylor's dissent and submitted a separate dissenting opinion. Eakin's dissent reiterated the inconsistency between the plurality's opinion and settled law on the relationship between state and local governments.¹⁹⁵ Justice Eakin stated that "the bottom line is this—the gas in question *will* be extracted."¹⁹⁶

In conclusion, the Supreme Court of Pennsylvania seemingly flipped Dillon's Rule on its head, finding that the state cannot infringe upon a local government's planning and zoning regime by requiring that hydraulic

¹⁸⁷ PA. CONST. art. I, § 27.

¹⁸⁸ *Robinson*, 83 A.3d at 979.

¹⁸⁹ *Id.* at 980 (noting that existing zoning regimes often place a heavier burden on some citizens and communities than others, and discussing these issues under the rubrics of environmental justice, exclusionary zoning, and others).

¹⁹⁰ *Id.* at 981–82.

¹⁹¹ *See supra* Part II.A (discussing Dillon's Rule).

¹⁹² *See Robinson*, 83 A.3d at 1010–12 (Saylor, J., dissenting).

¹⁹³ *Id.* at 1011.

¹⁹⁴ *See id.*

¹⁹⁵ *Id.* at 1014–15 (Eakin, J., dissenting).

¹⁹⁶ *Id.* at 1015.

fracturing be allowed in all zoning classifications. This conclusion stands even though the state legislature must enable local governments to plan and zone, but nevertheless may prohibit local governments from enacting zoning ordinances. Instead of examining whether the local ban was inconsistent with state regulations, the court used a constitutional provision to find that state law unreasonably infringed on local prerogatives.

*E. Northeast Natural Energy, LLC v. City of Morgantown*¹⁹⁷

The circuit court decision in *Morgantown* represents a more traditional approach to the issues than the opinion in *Robinson*. In June 2011, the city of Morgantown, West Virginia, passed an ordinance banning hydraulic fracturing within city limits and within a one-mile radius of the city.¹⁹⁸ Northeast Natural Energy, LLC and Enrout Properties, LLC filed suit, claiming that the ordinance was preempted by West Virginia Code section 22-1-1, and the regulations promulgated thereunder. Although not cited by the court, West Virginia's regulatory regime for oil and gas, like the regulations of Colorado and New York, seek to, *inter alia*, prevent waste and protect correlative rights.¹⁹⁹ The Secretary of the West Virginia Department of Environmental Protection is given "full charge of the oil and gas matters" set out in West Virginia law.²⁰⁰ The West Virginia legislature also declared that the state holds the primary responsibility for protecting the environment.²⁰¹ "[O]ther government entities . . . have the primary responsibility of supporting the state in its role as protector of the environment."²⁰² The state environmental program is intended to be "comprehensive."²⁰³

The city asserted that West Virginia's Home Rule provisions²⁰⁴ granted the city authority to enact the ban, characterizing hydraulic fracturing as a nuisance.²⁰⁵ The West Virginia Constitution authorizes municipalities in the state to pass ordinances related to municipal affairs, so long as those ordinances are consistent with, and do not conflict with, the state constitution and state

¹⁹⁷ No. 11-C-411, 2011 WL 3584376 (Cir. Ct. W. Va. Aug. 12, 2011).

¹⁹⁸ MORGANTOWN, W. VA., ORDINANCE art. 721.01 (June 21, 2011), available at http://documents.foodandwaterwatch.org/doc/Frack_Actions_MorgantownWV-ban.pdf, repealed by MORGANTOWN, W. VA., ORDINANCE art. 12-33 (July 3, 2012).

¹⁹⁹ W. VA. CODE R. § 39-1-1(1.1) (2014).

²⁰⁰ W. VA. CODE § 22-6-2(c) (2014).

²⁰¹ W. VA. CODE § 22-1-1(a)(2).

²⁰² *Id.*

²⁰³ W. VA. CODE § 22-1-1(b)(3).

²⁰⁴ W. VA. CODE § 8-12-2.

²⁰⁵ *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, 2011 WL 3584376, at *2, *8 (Cir. Ct. W. Va. Aug. 12, 2011).

laws.²⁰⁶ This provision is codified in two separate places in the West Virginia Code. The statute laying out Home Rule authority for all cities includes the provision,²⁰⁷ as well as the grant of general powers to all municipalities.²⁰⁸ Most pertinent to the Morgantown ordinance at issue, municipalities may “provide for the elimination of hazards to public health and safety and to abate or cause to be abated anything which in the opinion of a majority of the governing body is a public nuisance.”²⁰⁹

The court granted summary judgment to the plaintiffs, finding that the West Virginia Oil and Gas Act²¹⁰ constituted a “comprehensive regulatory scheme with no exception carved out for a municipal corporation to act in conjunction with the [West Virginia Department of Environmental Protection] pursuant to the Home Rule provision.”²¹¹ Applying Dillon’s Rule,²¹² the court found that the city lacked authority to enact and enforce the ban.²¹³ In addition, state law holds that where the state and local governments enact regulations on a certain matter, the state regulation controls where inconsistencies exist.²¹⁴

The city missed the filing deadline for appealing the case.²¹⁵ However, Morgantown amended its zoning ordinance to specifically regulate hydraulic fracturing (“extractive industry use”) in July 2012.²¹⁶ The requirements add to the general requirements for heavy industry. The ordinance prescribes a minimum lot size of five acres for oil and gas extraction²¹⁷ and a 625 foot setback from any residential zone, and the property boundary of any dwelling unit located in other than a residential zone, church, school, day care facility, or park.²¹⁸ The activity must be setback at least 100 feet from any 100-year floodplain, 1,000 feet from a public water intake, and 1,000 feet from the 100-

²⁰⁶ W. VA. CONST. art. VI, § 39.

²⁰⁷ W. VA. CODE § 8-12-2 (2014).

²⁰⁸ W. VA. CODE § 8-12-5.

²⁰⁹ W. VA. CODE § 8-12-5(23).

²¹⁰ W. VA. CODE §§ 22-6 to -10.

²¹¹ *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, 2011 WL 3584376, at *6 (Cir. Ct. W. Va. Aug. 12, 2011).

²¹² *See supra* Part II.A (discussing Dillon’s Rule).

²¹³ *Ne. Natural Energy*, 2011 WL 3584376, at *7.

²¹⁴ *Id.* at *7–8 (citing *Davidson v. Shoney’s Big Boy Rest.*, 380 S.E.2d 232, 235 (W. Va. 1989)).

²¹⁵ *Local Bans on Hydraulic Fracturing Upheld in New York State, Struck Down in West Virginia*, MARTEN LAW (Apr. 10, 2012) (footnote omitted), available at http://www.martenlaw.com/newsletter/20120410-local-hydraulic-fracturing-bans#_ednref17.

²¹⁶ MORGANTOWN, W. VA. PLANNING & ZONING CODE ch. 1, art. 1355.08(C) (2012), available at <http://www.morgantownwv.gov/wp-content/uploads/Planning-and-Zoning-Code-2012.pdf>.

²¹⁷ *Id.* art. 1355.08(C)(1).

²¹⁸ *Id.* art. 1355.08(C)(2)(a)–(b).

year floodplain of the Monongahela River south or upstream of the Morgantown Lock and Dam.²¹⁹

A variance may be granted reducing the setbacks to no less than 300 feet for any dwelling unit not located in a residential zone, church, school, day care facility, or park.²²⁰ Other provisions address signage,²²¹ fresh water impoundment,²²² secondary containment,²²³ waste disposal,²²⁴ gas emission and burning,²²⁵ security,²²⁶ cleanup and maintenance,²²⁷ and site restoration.²²⁸ This ordinance has not yet been challenged.

The City of Morgantown, rebuffed in its attempt at banning hydraulic fracturing, turned instead to a traditional zoning ordinance. Although the ordinance has not been challenged, existing case law indicates that the ordinance would be upheld. This result likely holds regardless of whether a close examination of the circumstances in the city indicates that the ordinance creates a de facto ban.

V. CONCLUSIONS

Recent case law on local control of hydraulic fracturing provides both models and extremes. Specifically, New York and Pennsylvania provide the extremes. In New York, the court allowed a local government to ban activity that the state allows.²²⁹ The Pennsylvania Supreme Court, however, rejected an attempt by the state legislature to mandate that local governments allow oil and gas production in all zoning classifications.²³⁰ West Virginia²³¹ and Colorado²³² appear to be in the mainstream of jurisprudence, allowing reasonable regulation of oil and gas production, consistent with state regulation. As state courts and state legislators attempt to provide a clearer line between state and local

²¹⁹ *Id.* art. 1355.08(C)(2)(a)–(e).

²²⁰ *Id.* art. 1355.08(C)(3).

²²¹ *Id.* art. 1355.08(C)(4).

²²² *Id.* art. 1355.08(C)(5).

²²³ *Id.* art. 1355.08(C)(6).

²²⁴ *Id.* art. 1355.08(C)(7).

²²⁵ *Id.* art. 1355.08(C)(8).

²²⁶ *Id.* art. 1355.08(C)(9).

²²⁷ *Id.* art. 1355.08(C)(10).

²²⁸ *Id.* art. 1355.08(C)(11).

²²⁹ *See, e.g., In re Wallach v. Town of Dryden*, 16 N.E.3d 1188 (N.Y. 2014).

²³⁰ *See, e.g., Robinson Twp. v. Pennsylvania*, 83 A.3d 901 (Pa. 2013).

²³¹ *See, e.g., Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, 2011 WL 3584376 (Cir. Ct. W. Va. Aug. 12, 2011).

²³² *Colo. Oil & Gas Ass'n v. City of Longmont*, No. 13CV63, 2014 WL 3690665 (Colo. Dist. Ct. July 24, 2014).

authority to regulate oil and gas activities, the history of zoning regulation and other state and federal regulations prove instructive.

Although existing case law provides little guidance, traditional areas of state control and traditional objectives of zoning may provide some hints for local governments that desire to lawfully and reasonably regulate hydraulic fracturing. The following activities clearly lie within the state's authority: on-site drilling, oversight of the chemicals used and the production process, prevention of waste, protection of correlative rights, conservation of oil and gas natural resources, safety, and on-site contamination.²³³ The majority of state regulations address these issues.

Local regulation encompasses noise, light and other visual impacts, road damage, blasting, dust, traffic, compatibility of the activity to nearby property uses, impact of the activity on property values in the area, adequate off-site infrastructure, adequate services (such as police and fire protection), affordable housing, the general health, the safety of the community, odors, potential groundwater contamination, methane emissions, habitat fragmentation, and degradation of environmentally sensitive areas.²³⁴ These local government concerns coincide with traditional zoning regulation.

State statutes should also clearly set out the parameters of preemption. The Federal Telecommunications Act provides a possible model. The Act clearly sets out the intent of the legislature. Courts have had to further define state and local versus federal roles, but the clear guidelines of the statute arguably have produced logical and predictable court rulings. However, state legislatures possess the authority to overturn state court decisions that fail to recognize legislative intent. The New York legislature essentially affirmed the *Frew Run* decision by incorporating the ruling into state statute. However, even that statute placed limits on local government zoning.

Although the New York court's distinction between "where" and "how",²³⁵ provides a good general guideline for determining state versus local authority, a finer distinction must be drawn. Determination of "where" should not include "nowhere," invoking a ban on the activity in the community. Bans defeat the state intentions to prevent waste and protect correlative rights. The prohibition on bans, de facto or otherwise, in the Federal Telecommunications Act ensure that federal objectives are achieved. A similar prohibition with respect to hydraulic fracturing in state statutes would promote state objectives for oil and gas development.

²³³ See Freilich & Popowitz, *supra* note 9, at 533, 535, 543, 547.

²³⁴ *San Pedro Mining Corp. v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 909 P.2d 754, 759 (N.M. Ct. App. 1995); see also 3 SALKIN, *supra* note 27, § 18.59; Freilich & Popowitz, *supra* note 9, at 535; Ritchie, *supra* note 26, at 8, 40, 89.

²³⁵ See *In re Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1196 (N.Y. 2014) (citing *In re Frew Run Gravel Prods., Inc. v. Town of Carroll*, 518 N.E.2d 920, 922 (1987)).

Like objections to cellular towers, some objections to hydraulic fracturing fail to find solid grounding in fact. The Supreme Court in *Robinson*, at least in the view of the dissent, “hypothesized” about negative impacts of hydraulic fracturing, instead of basing its decision on facts. The Federal Telecommunications Act of 1996 requires decisions on the siting of cellular towers be based on “substantial evidence.” A similar requirement for local land use decisions on hydraulic fracturing operations would prevent hypothesizing.

In any case, clearer guideposts for local governments would prevent or reduce litigation and allow state objectives with respect to oil and gas development to be achieved more readily. Pennsylvania Act 13 may have overreached in that regard,²³⁶ but the Court of Appeals of New York appears to have “under-reached” by allowing local governments to thwart state objectives by banning an activity that the state declares as legal and productive. The “balance” that the Supreme Court of Pennsylvania cited so often, but appears to have failed to implement, requires that state and local government regulation complement and supplement each other, not battle each other for control. The Colorado and West Virginia decisions more closely achieve this balance.

[L]ike it or not, the bottom line is this—the gas in question *will* be extracted. It is going to be removed from the earth, and it is going to be transported to refineries. The question for our legislature is not “if” this will happen, but “how.”²³⁷

²³⁶ See generally Fershee, *supra* note 84.

²³⁷ *Robinson Twp. v. Pennsylvania*, 83 A.3d 901, 1015 (Pa. 2013) (Eakin, J., dissenting).