To be argued by: Thomas S. West
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Supreme Court

State of New York
Appellate Division – Third Department

NORSE ENERGY CORP. USA,

Petitioner-Plaintiff-Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD

Respondents-Defendants-Respondents.

- and –

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

Proposed Intervenor-Cross-Appellant.

Tompkins County Index No.: 2011-0902

BRIEF OF PETITIONER-PLAINTIFF-APPELLANT NORSE ENERGY CORP. USA

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QUESTIONS PRESENTED

Q1. Is a municipal zoning ordinance that bans all natural gas development expressly preempted by State law which (1) directs that it "shall supersede all local laws and ordinances relating to the regulation of the oil, gas and solution mining industries," (2) expressly limits the "jurisdiction" of municipalities to local roads and taxation, and (3) directs that well location and spacing be established by the New York Department of Environmental Conservation according to specific statutory and regulatory requirements?

A1. The court below answered in the negative. *See* Record on Appeal ("R.") 24-36.

Q2. Is a municipal zoning ordinance that bans all natural gas development in conflict with, and thus preempted by, State law which implements a comprehensive statewide program that regulates both the "how" and "where" of drilling to promote the development of all indigenous natural gas resources, maximize ultimate recovery, prevent waste, and protect the correlative rights of mineral owners, where, by virtue of the municipal-wide ban, there can be no drilling and no resource recovery, which results in the ultimate in waste and the total emasculation of Plaintiff-Appellant's correlative rights?

A2. The court below answered in the negative. *See* R. 31-32 & n.13.

NATURE OF THE CASE

This case does not challenge a municipality's rights *vis-a-vis* traditional zoning. This case also does not challenge the ability of a municipality to act within the bounds of its delegated powers under the New York Constitution and State law. Rather, this case seeks to protect property rights of mineral owners and their lessees by challenging one town's attempt to use its local zoning power to supplant a comprehensive, uniform statutory scheme created and enforced

by the State of New York for purposes of regulating oil and gas development in a manner that prevents waste, maximizes resource recovery, and protects the correlative rights of landowners and their lessees.

More specifically, this case seeks a declaration that the express language and underlying policies of the New York State Oil Gas and Solution Mining Law ("OGSML"), as well as Energy Law § 3-101(5), prohibit the Town of Dryden (the "Town") and the Dryden Town Board (collectively, the "Defendants-Respondents") from enforcing a zoning ordinance that, *inter alia,* prohibits all oil and gas exploration, drilling, development, extraction, and related activities anywhere in the Town (the "Town Prohibition"). Because the Town Prohibition bans activities for which control, oversight and regulation are expressly, exclusively and exhaustively delegated to State authorities, the Town Prohibition is preempted by State law.

Accordingly, with the aim of protecting its mineral rights, Petitioner-Plaintiff-Appellant, Norse Energy Corporation USA ("Norse") (the "Plaintiff-Appellant"),[1] respectfully submits this brief in support of its appeal of the February 21, 2012 Decision and Order of Supreme Court Justice Phillip R. Rumsey (the "Decision") which upheld the Town Prohibition. R. 14-39. In the Decision, the court rejected Plaintiff-Appellant's argument that the Town Prohibition was expressly preempted under the supersedure language in ECL § 23-0303(2) and the express directives in the OGSML that regulate not only the "how" but also the "where" of oil and gas drilling in New York. *See* R. 24-36. The court also rejected Plaintiff-Appellant's argument that the Town Prohibition is invalid under conflict preemption principles because it impermissibly conflicts with both the policies and substantive provisions of the OGSML. R. 31-32 & n.13. For

[1] On July 31, 2012, Anschutz Exploration Corporation ("Anschutz") assigned its interest in certain oil and gas leases located in the Town to Norse (the "Assignment"). The Assignment explicitly included the right to participate in this litigation in Anschutz's stead, subject to court approval, which was granted by Order of the Court dated October 5, 2012.

the reasons detailed below, Plaintiff-Appellant respectfully submits that the court erred on both counts.

As a preliminary matter, it is axiomatic that municipalities, as creatures of the State, have no inherent lawmaking powers, but only those that have been delegated by the sovereign. Thus, regardless of municipal home rule powers, a municipality may not enact a local law, regulation, or ordinance that contradicts or conflicts with general laws of the State, or stands as an obstacle to accomplishing State objectives. Contrary to the lower court's holding, that is precisely what the Defendants-Respondents did in enacting the Town Prohibition. By banning any and all natural gas development anywhere in the Town, the Town Prohibition directly contravenes the express supersedure language and detailed spacing and well location directives of the OGSML, as well as all of the statute's underlying policies (*i.e.*, preventing waste, maximizing ultimate recovery, and protecting correlative rights).

Indeed, the supersedure language enacted by the Legislature in 1981 could not be more precise – that the OGSML "supersede[s] *all local laws and ordinances* relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government *jurisdiction* over local roads or the rights of local governments under the real property tax law." ECL § 23-0303(2) (emphasis added). Thus, with the narrow exception limiting "jurisdiction" of municipalities to local roads and taxes, *all* other local laws "and ordinances" relating to the oil and gas industry are expressly preempted by State law.

The lower court, however, found to the contrary, based on a narrow and unsustainable reading of the word "regulation" in ECL § 23-0303(2). The trial court ruled that "regulation" refers only to *how* oil and gas activity is conducted – not *where* or *if* it is conducted at all. Distilled to its essence, the lower court concluded that municipalities may regulate the "where"

of oil and gas drilling, even if it means nowhere, as it does with the complete zoning ban on oil and gas development imposed by the Town Prohibition.

The court reached this result because it felt "constrained to follow [ ] precedent" decided under a wholly separate statute, the Mined Land Reclamation Law ("MLRL"). In so doing, the lower court turned a blind eye to the myriad of crucial differences between the MLRL and the OGSML: namely, that these two statutes differ starkly and materially as to their supersedure language, subject matter and scope of "regulation," legislative history, and statutory objectives and policies – all of which demonstrate that the MLRL affirms local zoning control, whereas the OGSML precludes it. In short, given the many marked differences between these two statutory schemes, there is nothing in the MLRL that is instructive, let alone constraining, on the question of preemption under the OGSML.

At the outset, the supersedure provisions of the OGSML and the MLRL are most certainly *not* "nearly identical." *See* R. 26, Decision at 13. The lower court reached this conclusion by improperly focusing on what it termed "the primary language" of both provisions; thus, the court rendered its interpretation based on a snippet of language wholly divorced from, not only the remainder of the respective supersedure provisions, but also from the remainder of the statutes. This was plain error.

Under a whole language reading, as courts are required to do, the MLRL's supersedure provision is express that it does *not* supersede local "zoning ordinances," whereas the OGSML states the contrary – i.e., that it does "supersede all local [ ] ordinances." The OGSML's supersedure provision further limits local "jurisdiction" (i.e., "the power or right to exercise authority") solely to local roads and taxes, and not to where (or if) oil or gas activity can occur. There is no comparable jurisdiction-limiting language in the MLRL's supersedure provision.

Accordingly, far from being "nearly identical," the supersedure provisions of the OGSML and MLRL could not be more materially different, i.e., with the MLRL confirming local zoning authority and the OGSML disavowing it.

Further, the MLRL and the OGSML "regulate" very differently, and these differences are crucial, indeed dispositive, in this analysis. The MLRL does *not* regulate where mining can occur; in fact, in numerous provisions, the MLRL also expressly affirms local zoning control, i.e., the right "to determine permissible uses in zoning districts." *See, e.g.,* ECL § 23-2703(2)(b). In stark contrast, the OGSML "regulates" the "where" of oil and gas drilling in very specific, detailed, comprehensive terms, thus superseding local regulation of that same subject matter. The cornerstone of the "where" in the OGSML is the policy declaration to prevent waste and the definition of "waste" itself, which contemplates the "where" of drilling in no uncertain terms: i.e., "[w]aste means … [t]he *locating, spacing*, drilling, equipping, operating or producing of any oil or gas well or wells in a manner which causes or tends to cause reduction in the quantity of oil and/or gas ultimately recoverable from a pool under prudent and proper operations . . . ." ECL § 23-0101(20)(c) (emphasis added).

Implementing this broad directive, the OGSML also contains comprehensive requirements for oil and gas unit size, well spacing, and well location, i.e., more "where" requirements. These directives are based on sound geologic and environmental considerations, not the Euclidian planning principles on which local zoning ordinances are typically based. The OGSML commits implementation of these directives (and associated agency regulations) exclusively to the Department of Environmental Conservation (the "Department") so as to prevent waste, maximize ultimate recovery, and protect owners' correlative rights. The bottom line is that the OGSML plainly regulates the "where" of drilling, leaving no room for *any*

location-related local regulation, let alone broad-based municipal-wide bans such as the Town Prohibition at issue here.

Perplexingly, the lower court acknowledged this crucial distinction – that "the OGSML – unlike the MLRL – contains provisions which directly affect where operations may be conducted" (i.e., the "where" of drilling) – but then ignored its significance. Notwithstanding the court's plain admission that "regulation" under the OGSML includes "where" drilling may occur, the court nonetheless blindly applied MLRL precedent in holding that "regulation" pertains only to the "how," but not the "where," of drilling. R. 31-34, Decision at 18-21. In essence, the lower court's rationale devolves to the maxim that the term "regulation" in a supersedure clause can never encompass land use/zoning, regardless of what the rest of the statute says. And, under a multitude of statutory construction principles, this is plain error. In short, because the OGSML indisputably "regulates" the "where" of drilling, under the express supersedure language in ECL § 23-0303(2), that subject matter is off-limits to municipalities. Thus, the Town Prohibition is preempted, and MLRL precedent is simply irrelevant.

Finally, even if not expressly preempted, the Town Prohibition is invalid under conflict preemption principles because it directly conflicts with the language and policies of the OGSML. For example, the comprehensive permitting and spacing provisions of the OGSML would surely allow some number of wells to be drilled on Plaintiff-Appellant's land or elsewhere within the Town, with wellbore location and spacing unit boundaries determined in accord with the express directives of the OGSML and its implementing regulations. By banning the drilling of any wells within the Town, the Town Prohibition plainly conflicts with these explicit spacing and wellbore location provisions.

Additionally, the policies of the OGSML (i.e., preventing waste, maximizing recovery, and protecting correlative rights) and the associated "promote development" policy of the Energy Law are thwarted by municipal-wide prohibitions that preclude any and all oil and gas development. Certainly, the Town Prohibition emasculates Plaintiff-Appellant's correlative rights. Plaintiff-Appellant, as an oil and gas lessee, has only a temporal right to pursue oil and gas development on the leased properties. Here, Plaintiff-Appellant wishes to develop the resources underlying its leasehold properties in the Town, as to which its predecessor-in-interest had invested more than $5.1 million prior to enactment of the Town Prohibition. By precluding development, the Town Prohibition obliterates Plaintiff-Appellant's mineral rights (i.e., its entire property interest), thereby destroying Plaintiff-Appellant's correlative rights, as well as the correlative rights of Plaintiff-Appellant's lessors (i.e., the ability of mineral rights owners to pool their property rights for development and obtain a share of production). Thus, there could not be a starker example of parochial regulation that will discourage or preclude development, not promote it. Indeed, if municipal drilling bans like the Town Prohibition are upheld, no prudent operator will ever hereafter invest in developing New York's oil and gas resources, given that multi-million dollar investments can be wiped out in an instant by the fickle whim of a municipal board. Since municipalities are often governed by five-member boards, this result could hinge upon a 3-2 board vote emasculating millions of dollars of investment in an area and obliterating the correlative rights of landowners and their lessees. Moreover, since the Town Prohibition bars resource recovery on a Town-wide basis, resource recovery is *minimized*, not maximized, and waste is promoted, not prevented. Indeed, if all local governments in New York State follow the Town's approach, there will be *no* resource recovery Statewide. And this "no recovery"/discourage development result cannot be squared with the language, objectives or

history of the OGSML or the Energy Law. Thus, the Town Prohibition is invalid on conflict preemption grounds as well.

Therefore, the Decision should be reversed and summary judgment granted in Plaintiff-Appellant's favor.

FACTUAL BACKGROUND

Nature of The Dispute

Beginning in or around December 2006, Plaintiff-Appellant, through its predecessors Anschutz and Ansbro Petroleum Company, began acquiring oil and gas leases in the Town of Dryden, Tompkins County, New York. R. 58, Affidavit of Pamela S. Kalstrom, sworn to September 15, 2011 ("Kalstrom Aff."), ¶¶ 6, 7. The purpose of the oil and gas leases was to explore and develop natural gas resources underlying the property. R. 58, *id.* ¶ 5. Plaintiff-Appellant's predecessors-in-interest obtained gas leases covering approximately 22,000 acres in the Town before the enactment of the Town Prohibition and had also invested approximately $5.1 million in the exploration and development of these oil and gas leases. R. 59, *id.* ¶ 11.

On August 2, 2011, Defendants-Respondents enacted the zoning amendment at issue here which expressly prohibits oil and gas extraction, exploration, development and related activities (i.e., the Town Prohibition). R. 49-51, Verified Petition and Complaint (the "Complaint") ¶¶ 12-17. Specifically, Section 2104 of Article XXI of the Town Prohibition prohibits all oil and gas exploration, extraction, processing and storage and support activities, thus effectively banning all oil and natural gas drilling within the geographical borders of the Town and thereby depriving Plaintiff-Appellant of its oil and gas estate. R. 50-51, *id.* ¶ 17.

The Instant Action

On September 16, 2011, Plaintiff-Appellant's predecessor-in-interest (Anschutz) brought an action in the Supreme Court, Tompkins County, challenging the validity of the Town

Prohibition. R. 43-45. On October 21, 2011, Defendants-Respondents answered and moved for summary judgment, seeking a declaration that the Town Prohibition is valid and judgment dismissing the Complaint. R. 89-97, 451. The Court rendered its Decision on February 21, 2011, (1) rejecting the preemption claims and granting Defendants-Respondents' motion for summary judgment dismissing the Complaint, (3) granting *amicus curiae* applications of Assemblywoman Barbara Lifton and George A. Matthewson to the extent they related to matters in this proceeding/action; and (3) denying the motion to intervene by Dryden Resources Awareness Coalition ("DRAC"), but granting DRAC *amicus curiae* status. R.14-41.

The Decision Below

In its Decision, the lower court rejected the express preemption claim and implicitly rejected the conflict preemption claim. R. 25-38, Decision at 12-25. In holding the Town Prohibition not expressly preempted under ECL § 23-0303(2), the lower court opined that it was constrained by *Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987). R. 25, *id.* at 12. The court described the supersedure language of the MLRL at issue in *Frew Run* to be "similar" or "nearly identical" to that in the OGSML. R. 26, *id.* at 13. The court asserted that Plaintiff-Appellant's arguments distinguishing the supersedure language of the two statutes "exalted form over substance." R. 27, *id.* at 14. The court found no meaningful difference between the "local law" language of the MLRL supersedure clause versus the "local law and ordinance" language in ECL § 23-0303(2). R. 27, *id.* The court also dismissed the significance of the OGSML's jurisdictional exceptions (i.e. local roads and taxes) by effectively ignoring the exception for local taxing authority and portraying the regulation of local roads (i.e. truck traffic) as part of the operations of a well. R. 28-29, *id.* at 15-16.

The court then examined the legislative policies of the OGSML and the MLRL, finding that it was "[un]able to discern any meaningful difference in the purposes of the two laws," as

both were meant to provide Statewide regulation of operations in order to promote the development, production and utilization of natural resources and eliminate inconsistent local regulation. R. 29, *id.* at 16. The court further stated that "[n]owhere in the legislative history [of the OGSML] provided to the court [wa]s there any suggestion that the Legislature intended . . . to encourage the maximum recovery of oil and gas regardless of other considerations, or to preempt local zoning authority." R. 30, *id.* at 17. Relying on *Frew Run,* the court found that the OGSML had to be interpreted in a way that would avoid abridging the Town's powers to regulate land use, and that would be achieved by limiting application of the statutory policies of the OGSML only to locations where oil and gas activity could be conducted in accord with local zoning. R. 31, *id.* at 18. Notably, however, the court failed to explain how it would be possible to achieve any of the OGSML's statutory purposes – prevent waste, provide for ultimate recovery, and protect correlative rights – if localities are permitted to ban all development on a municipal-wide (or potentially Statewide) basis. *See generally,* R. at 29-31, *id.* at 16-18.

Nor did the court explain how the specific location-related requirements of the OGSML – which expressly pertain to the "where" of drilling – could be satisfied in the face of broad-based municipal bans, like the Town Prohibition. Significantly, the court admitted that the OGSML speaks to the "where" of drilling, stating that "the OGSML – unlike the MLRL – contains provisions which directly affect where operations may be conducted . . . ." R. 31, *id.* at 18. However, the court dismissed the relevance of this fact and this distinction between the two statutes, stating that these "where" requirements in the OGSML only address "technical operational concerns." R. 31, *id.* In short, because "[n]one of the[se] provisions of the OGSML address[ed] traditional land use concerns, such as traffic, noise or industry suitability for a particular community," the court found that these provisions did not preempt land use/zoning

regulation. R. 31-32, *id.* at 18-19. On this basis, the court then found that "zoning regulations [did] not directly conflict with the provisions of the OGSML that relate to well location" and rejected the conflict preemption claim. R. 32, *id.* at 19 & n.13.

Then, the court relied on *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668 (1996), to find that the supersession analysis must produce the same result whether there is an outright ban on all development or simply a limited restraint on location. R. 33-34, *id.* at 20-21. In so holding, the court made no mention of the facts that (1) *Frew Run* did not involve a municipal-wide ban, and (2) by the time *Gernatt Asphault* was decided, the MLRL had been amended to include express language affirming full local zoning authority. Additionally, without explanation, the court further opined that it would be illogical to find that a limited restraint on location would be allowable, but that a ban would not. R. 34, *id.* at 21 n.15. However, the court ignored or took short notice of jurisprudence from sister jurisdictions holding exactly to the contrary under oil and gas statutes/policy objectives virtually identical to the OGSML. *See* R. 36, *id.* at 23. Then the court found persuasive precedent from Pennsylvania, notwithstanding that it involves a supersedure provision that is expressly confined to "operations" – i.e., the "how" but not the "where" of oil and gas activity. R. 35, *id.* at 22 (citing *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont,* 964 A.2d 855 [Pa. 2009]). In the end, the court found that *Gernatt Asphalt* controlled the result here. R. 36, *id.* at 23.

Finally, the court properly found that the portion of the Town Prohibition invalidating other local, state or federal permits (Section 2104[5]) is preempted. R. 37, *id.* at 24. Thus, the court severed that provision, granted the Defendants-Respondents' motion for summary judgment, and declared that the Town Prohibition, as modified by striking Section 2104(5), is not preempted by the OGSML. R. 37-38, *id.* at 24-25.

Plaintiff-Appellant's predecessor-in-interest (Anschutz), timely appealed from the Decision. R. 3. Plaintiff-Appellant was then substituted as a party in the place and stead of Anschutz by Order of this Court. R. 1, ¶ 2.

ARGUMENT

POINT I

MUNICIPAL HOME RULE POWERS DO NOT TRUMP STATE PREEMPTION

Defendants-Respondents cannot invoke their municipal home rule powers to justify a local zoning ordinance that shuts down oil and gas development contrary to the language and policies of this State's general laws – namely, the OGSML and the Energy Law. Moreover, the lower court is not at liberty to interpret a general State law so as not to "abridge[ ] [ ] a town's powers to regulate land use through zoning powers" (*see* R. 31, Decision at 18) where that State law or its underlying policy objectives direct otherwise. In short, because the Town Prohibition directly contravenes the express supersedure language in the OGSML and directly conflicts with the language, policies and goals of the OGSML and the Energy Law, it is preempted.

It is well-settled that "Towns . . . have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant and in the absence of legislative delegation of power their actions are *ultra vires* and void." *Kamhi v. Planning Bd. of Town of Yorktown,* 59 N.Y.2d 385, 389 (1983) (citation omitted). While the State Constitution's "home rule" provisions (art. IX, § 2) and the Municipal Home Rule Law ("MHRL") confer police powers upon local governments relating to the welfare of their citizens, those powers are expressly limited. *New York State Club Ass'n v. City of N.Y.,* 69 N.Y.2d 211, 217 (1987); N.Y. Const. art. IX, § 2[c][iii]; MHRL § 10(1)(i) & (ii); *see generally Wambat Realty Corp. v. New York,* 41 N.Y.2d 490 (1977). A municipality may exercise its legislative

power "only when and to the degree it has been delegated such lawmaking authority." *People v. De Jesus,* 54 N.Y.2d 465, 468 (1981). "[I]n the spirit of this broad principle, article IX (§ 2, subd [c], par [ii]) of the New York State Constitution specifies that any local law be 'not inconsistent with * * * any general law' . . . ." *DeJesus,* 54 N.Y.2d at 468 (citation omitted). Likewise, the MHRL restricts the powers of local governments to adopting laws "not inconsistent with the provisions of the constitution or not inconsistent with any general law." MHRL § 10(1)(i) & (ii). Also, where, as here, "'State interests are involved 'to a substantial degree, in depth or extent,' the State may freely legislate without home rule approval, notwithstanding the legislation's impact on local concerns.'" *Citizens for Hudson Valley v. New York State Bd. on Elec. Generation Siting and Env't,* 281 A.D.2d 89, 95 (3d Dep't 2001) (citing *City of N.Y. v. New York,* 94 N.Y.2d 577, 590 [2000] [quoting *Wambat Realty Corp.,* 41 N.Y.2d at 494]). And, these same limitations on local lawmaking authority exist relative to delegations of authority under other statutes, such as the Town Law and the Statute of Local Governments. *See Wambat Realty Corp.,* 41 N.Y.2d at 491-92, 497-49.

Accordingly, based on these fundamental principles:

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

Albany Area Bldrs. Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 377 (1989) (quoting *Wambat Realty Corp. v. State of N.Y.,* 41 N.Y.2d 490, 497 [1977]). And, where the Legislature has expressly stated the intent to supersede local regulation, any local regulation of that subject

matter is invalid, regardless of home rule powers. *See Wambat Realty Corp.,* 41 N.Y.2d at 492-98.

Of course, the preemption doctrine is not limited to express preemption, but also includes implied preemption (i.e., conflict and field preemption). *See Albany Area Builders Ass'n,* 74 N.Y.2d at 377. Under the doctrine of conflict preemption, local laws that conflict with State law (i.e., making compliance with both impossible) or that stand as an obstacle to accomplishing the full objectives of the State law are invalid. *See generally id.* Further, because local laws cannot be "inconsistent" with State law, the conflict need not be express or direct in order for the local enactment to be invalid; there need be only an inconsistency. *New York State Club Ass'n.,* 69 N.Y.2d at 217 (citing *Consolidated Edison Co. v. Town of Red Hook,* 60 N.Y.2d 99, 105 [1983]); *see also De Jesus,* 54 N.Y.2d at 468. Inconsistency exists where the local enactment "'prohibit[s] what would have been permissible under State law or impose[s] "prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws.'" *New York State Club Ass'n,* 69 N.Y.2d at 217 (citation omitted); *see also Jancyn Mfg. Corp. v. County of Suffolk,* 71 N.Y.2d 91, 97 (1987).

Accordingly, contrary to the lower court's view, municipal home rule and police powers are not sacrosanct and certainly do not trump State preemption principles. *See* R. 31, Decision at 18. Indeed, two courts in sister jurisdictions have invalidated local bans on drilling despite the assertion of home rule powers in those jurisdictions. R. 904-05, *Northeast Natural Energy, LLC. v. City of Morgantown, W.V.,* Civ. Action No. 11-C-411, Slip Op. 8-9 (Cir. Ct., Monongalia Cnty., W.V., Aug. 12, 2011) (holding local drilling ban invalid because it encroached on state's powers to regulate oil and gas development); *Voss v. Lundvall Bros. Inc.*, 830 P.2d 1061, 1068 (Colo. 1992) (finding that the "state's interest in efficient oil and gas development and

production . . . [was] sufficiently dominant to over-ride a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits" because the ban "substantially impede[d] the interest of the state in fostering the efficient development and production of oil and gas resources in a manner that prevent[ed] waste and further[ed] the correlative rights of owners . . . .").[2]

In sum, New York's well-established preemption doctrines apply with full vigor here, and the issue before this Court is whether the Town Prohibition is preempted, either expressly by the supersedure language of ECL § 23-0303(2), or impliedly due to conflicts and inconsistencies with the language and policies of the OGSML and the Energy Law. Plaintiff-Appellant respectfully submits that these questions must be answered in the affirmative, and, therefore, the Decision must be reversed.

POINT II

PRECEDENT DECIDED UNDER THE MLRL IS IRRELEVANT HERE, AND THE LOWER COURT ERRED IN FINDING IT CONTROLLING

The lower court erred when it relied on MLRL precedent to reach its no preemption holding. Contrary to the lower court's view (R. 25, Decision, at 12), preemption precedent decided under the MLRL is not even relevant, let alone controlling, here. The relevant law here is the OGSML, not the MLRL. And the question of whether the OGSML preempts the Town Prohibition must be decided based on the specific statutory language at issue, read in the context of the supersedure provision as a whole and the remainder of the statute, and informed by the

[2] The lower court failed to even acknowledge *Northeast Natural Energy, LLC* and rejected the ruling in *Voss* because it felt that *Gernatt Asphalt* compelled a finding that the Town Prohibition is not preempted. *See* R. 34, 36, Decision at 21 n.15, 23. As explained fully below, however, *Gernatt Asphalt* is irrelevant to the instant analysis, whereas the reasoning in *Voss* directly contradicts the lower court's rationale and result. *See* Points IIB & IIIB, *infra.*

OGSML's evolution, underlying policies, and legislative history. *See New York State Psychiatric Ass'n v. New York State Dep't of Health,* 19 N.Y.3d 17, 23-24 (2012) (stating "[i]t is well settled that '[a] statute or legislative act is to be construed as a whole and all parts of an act are to be read and construed together.' Furthermore, '[e]ach section of the legislative act must be considered and applied in connection with every other section of the act, so that all will have their due and conjoint effect.'" [citation omitted]); *Nostrom v. A.W. Chesterton Co.,* 15 N.Y.3d 502, 507 (2010) (stating that inquiry into the spirit and purpose of the legislation "'requires examination of the statutory context of the provision as well as its legislative history'" [citation omitted]).

In all of these respects, the MLRL is materially and markedly different from the OGSML, with the MLRL expressly confirming local zoning authority, and the OGSML disavowing it. Thus, *Frew Run* and *Gernatt Asphalt* are wholly inapt and do not detract from the conclusion that the OGSML expressly preempts the Town Prohibition.

A. The Relevant Law: The OGSML

New York's OGSML (codified at ECL Article 23, Titles 1 to 21) was originally enacted in 1963 based on an interstate model designed to achieve uniform Statewide regulation of all aspects of the oil and gas industry, including exploration, development, production and utilization. *See* R. 79, Affidavit of Gregory H. Sovas, dated September 12, 2011 ("Sovas Aff."), ¶ 11; R. 503-05, 522-566, Affirmation of Yvonne E. Hennessey, dated October 28, 2011 ("Hennessey Aff.") ¶¶ 8-17 & Exhs A-D. Through such uniformity, the OGSML aims to prevent waste, maximize ultimate recovery, and protect the correlative rights of all landowners. *See* ECL § 23-0301 (articulating legislative purpose and policy objectives). "Waste" is expressly defined to include the "locating, spacing [or] drilling" of a well "in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable . . ., or which causes

or tends to cause unnecessary surface loss or destruction of oil and gas." ECL § 23-0101(20)(c). Thus, the concepts of preventing waste and maximizing recovery are explicitly linked by the OGSML's express terms to well location and spacing, i.e., the "where" of oil and gas exploration, drilling, and development. Legislative history reveals that the means for achieving these objectives was by vesting exclusive administration of the law with the State, including responsibility for proper well spacing and location based on sound geologic principles. R. 506-08, Hennessey Aff. ¶¶ 21-25.

The supersedure language at issue here (ECL § 23-0303[2]) was enacted by amendment to the OGSML in 1981. *See* L. 1981, c. 846, § 4; R. 508, 509, Hennessey Aff. ¶¶ 26, 31, 32. This amendment came to fruition after almost two decades of regulatory problems caused predominantly by disparate local regulation that thwarted efficient, economical development of oil and gas resources – i.e., precisely what the OGSML and the original interstate model on which it was based sought to avoid. *See* R. 79-81, Sovas Aff. ¶¶ 12-15. The 1981 amendment clarified that (1) the Legislature's original intent (dating back to at least 1963) was that there *not* be local control over oil and gas activities; (2) the supersedure provision was being enacted to remedy the problems that had been caused by local regulation; and (3) exclusive jurisdiction over the entire oil and gas industry would vest in the Department through a comprehensive scheme of regulation providing for efficient, safe resource development, with local authority limited solely to local roads and taxation. *Cooperstown Holstein Corp. v. Town of Middlefield* Record on Appeal ("CHC R.") 949, 950-51, 995, Affirmation of Yvonne E. Hennessey in Support of Motion to Renew, dated March 29, 2012 ("Hennessey Renewal Aff."), ¶¶ 34, 39-41 & Exh. G

(detailing legislative history to A.6928);[3] R. 80-81, Sovas Aff. ¶¶ 14-19; *see also* R. 508-11, Hennessey Aff. ¶¶ 26-37.

To that end, the 1981 amendments added subdivisions 2 and 3 to ECL § 23-0303. R. 509-10, 602-03, 608, Hennessey Aff. ¶¶ 31-35 & Exhs. I & K. Subdivision 2 is the supersedure provision, which explicitly states that the statute supersedes "all local laws and ordinances relating to the regulation of the oil, gas and solution mining industries." ECL § 23-0303(2). To compensate localities for any unique costs or damages that they could potentially experience as a result of oil and gas drilling activities under the State's comprehensive scheme of regulation, subdivision 3 provided benefits for municipalities: namely, (1) the establishment of an oil and gas fund to reimburse municipalities for damages caused by activities regulated under the OGSML (ECL § 23-0303[3]); and (2) the creation of an ad valorem tax under Article 5, title 5, of the Real Property Tax Law ("RPTL"). *See* R. 509-10, 511, Hennessey Aff. ¶ 33-35, 37; ECL § 23-0303(3). There was no question among the drafters that the supersedure clause evidenced the plain intent of the Legislature that localities had no authority to regulate any aspect of oil and gas development, including the right to zone oil and gas wells. R. 81, Sovas Aff. ¶¶ 17-19.

B. The Supersedure Language Of The OGSML And The MLRL Differ Markedly, Rendering *Frew Run* And *Gernatt Asphalt* Inapt

The supersedure language of the OGSML in ECL § 23-0303(2) states:

> 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

[3] This Court may take judicial notice of statutes and their legislative history, regardless of whether they are part of the record or were relied upon below. *See New York v. Green,* 96 N.Y.2d 403, 408 n.2 (2001) (stating that although the State did not rely below on environmental lien provisions, the court may take judicial notice of these provisions and their legislative history); *Affronti v. Crosson,* 95 N.Y.2d 713, 720 (2001) (stating that courts make take judicial notice of public records where data reflects legislative facts, as opposed to evidentiary facts, and their absence from the record does not prevent their consideration for the first time on appeal); *Seidel v. Bd. of Assessors,* 88 A.D.3d 369, 378 (2d Dep't 2011) (stating that the court may take judicial notice of the bill jacket, even though it is not part of the record).

> ***jurisdiction*** over local roads or the rights of local governments under the real property tax law. Emphasis added.

This language is unambiguous, and the result is straightforward: with the sole exception of local roads and taxation, all local laws or ordinances that would purport to relate to the regulation of the oil and gas industry are preempted, and this includes zoning ordinances that specify where drilling can occur or that prohibit drilling altogether.

The specific terminology in ECL § 23-0303(2) proves this point. First, the supersedure language applies not only to "local laws," but also to "local [ ] ordinances." A zoning ordinance is the archetype of a "local ordinance" – indeed, it is the most common form of a local ordinance. Notably, the supersedure language applies unqualifiedly to "ordinances," with no exception for zoning ordinances, and, with all due respect, the lower court was not at liberty to ignore the "ordinance" language that the Legislature did enact, or insert an exception for "zoning ordinances" that the Legislature did not enact. *See* R. 26-28, Decision at 13-15. Thus, by plain language application, zoning ordinances fall within the preemptive scope of the OGSML. *See People v. Paulin,* 17 N.Y.3d 238, 245 (2011) (refusing to write into a statute an exception that was not there); *Chemical Specialties Mfrs. Ass'n v. Jorling,* 85 N.Y.2d 382, 394 (1995) (stating "'[n]ew language cannot be imported into a statute to give it a meaning not otherwise found therein'" [citation omitted]).

The supersedure language also speaks specifically about the "jurisdiction" retained by local governments under the OGSML. "Jurisdiction" is a term of art. It means "areas of authority," "the authority of a sovereign power to govern or legislate," "the power or right to exercise authority," "the extent or range of [ ] authority," or "the subject matter to which authority applies," *See* Black's Law Dictionary (6th ed. West 1990); The Merriam-Webster Dictionary; The Random House College Dictionary (rev. ed. 1973). Simply put, the New York

State Legislature made clear that, with respect to oil and gas regulation, a locality's "power or right to exercise authority" is specifically and solely limited to two discrete areas – local roads and property taxes – *not* drilling location, well spacing, or other forms of land use restrictions.

Based upon the express terms of the supersedure clause at bar, it is clear that the Legislature knew how to articulate *exceptions* to the preemption rule it was crafting. That the Legislature did not exclude local zoning ordinances in ECL § 23-0303(2) is, thus, revealing by itself. *See* McKinney's Cons Laws of N.Y., Book 1, Statutes § 240; ("where a law expressly describes a particular act . . . an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded."); *see also Weingarten v. Board of Trs. of the N.Y.C. Teachers' Retirement Sys.*, 98 N.Y.2d 575, 576 (2002) ("where the Legislature lists exceptions in a statute, items not specifically referenced are deemed to have been intentionally excluded"). However, the additional fact that the Legislature specifically *included* "local ordinances" in its articulation of what *is* preempted by the State's oil and gas laws only underscores the preemption point. Basically, the Legislature made that point twice: local ordinances, including local zoning ordinances, are preempted, and there are only two narrow exceptions that confine the "jurisdiction" of municipalities (*i.e.*, local roads and taxes).

Indeed, the statutory carve-out for municipal jurisdiction over local roads and real property taxes makes no sense if the supersession language is, as the lower court held, limited to the "how" of drilling (i.e., drilling operations and the like), but not the "where." If the phrase "regulation of the [ ] industry[y]" were limited solely to "operations," it would have been wholly unnecessary for the Legislature to have carved out exceptions relative to local roads and property taxation. And this is so, notwithstanding the lower court's unsupportable attempt to portray road usage (i.e., local truck traffic) as an "operation" of gas wells. *See* R. 28-29, Decision at 15-16.

In fact, neither road usage nor property taxes has anything to do with drilling operations, i.e., the method and manner of conducting oil and gas drilling. Merely because an operator might use local roads in the course of conducting drilling operations (e.g., to get to and from the drill site) does not transform local road usage into a drilling operation; otherwise, local roads would be part of judicial administration because judges and jurors use roads to get to the courthouse. Thus, the lower court's contrary rationale (*see* R. 28-29, Decision, at 15-16) must be rejected.

Likewise, ad valorem taxes, which are imposed by the State on all industries to varying levels, have nothing to do with the specific industry's "operations," i.e., the technical aspects of conducting the industry's physical activities. Interestingly, the lower court did not address this point. *See* R. 28, Decision at 15 n.10 (stating only that taxation on gas production is governed by the RPTL article 5, title 5, enacted concurrently with ECL § 23-0303[2]). Thus, the Legislature would not have needed to carve out these two exceptions (which do *not* involve operations) if, "regulation of the [ ] industry" were confined to only operations. In short, the Decision renders these exceptions mere surplusage and, thus, cannot be sustained. *See Criscione v. City of N.Y.*, 97 N.Y.2d 152, 157 (2001) (stating that meaning and effect should be given to every word of a statute); *Leader v. Maroney, Ponzini & Spencer,* 97 N.Y.2d 95, 104 (2001) (stating that words in a statute are not to be rendered superfluous).

Further, these language features, among others, demonstrate that the supersession language of the MLRL was, and remains, strikingly and materially different from ECL § 23-0303(2) – and most certainly *not* "nearly identical." *See* R. 26, Decision at 13. As enacted in 1974 (L.1974, c. 1043) and in effect when *Frew Run* was decided, the MLRL's supersession language provided:

> For the purposes stated herein, this article shall supersede all other state and ***local laws*** relating to the extractive mining

> industry; provided, however, that ***nothing in this article shall be construed to prevent any local government from enacting local zoning ordinances*** or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.

ECL § 23-2703(2) (L. 1974, c. 1043) (emphasis added). R. 615, 617, Hennessey Aff. Exh. M. Unlike the OGSML, which supersedes "all local laws or ordinances," the MLRL applied only to "local laws." Indeed, unlike the OGSML, the MLRL explicitly *excepted* from supersession "local zoning ordinances" and actually invited local zoning. The Legislature thus clearly knew how to write a supersession clause that excepted "local zoning ordinances" from its scope: it did so in the MLRL, but not in the OGSML. The fact that the Legislature did not include that exception in the OGSML is telling and fatal to the lower court's holding.

Moreover, the MLRL exception was preceded by "nothing in this article shall be construed to prevent any local government from enacting local zoning ordinances," whereas the OGSML exceptions for local roads and property taxes are preceded by the phrase "but shall not supersede local government jurisdiction . . . ." The MLRL language thus did not suggest that it was providing a narrow exception from a broad supersedure provision. In contrast, the OGSML language suggests precisely that: namely, that everything else other than what "shall not be supersede[d]" (local roads and property taxation) is, in fact, superseded.

This reading is further confirmed by the Legislature's use of the word "jurisdiction" in the OGSML – *i.e.*, that local "jurisdiction" ("the power or right to exercise authority") is narrowly limited solely to local roads and taxation (with no exception for local land use or zoning ordinances). There was no comparable limiting "jurisdiction[al]" language in the MLRL, and, in any event, the MLRL expressly confirmed, if not invited, local zoning control. *Compare*

ECL § 23-0302(2) (L.1981, c. 846), *with* ECL § 23-2703(2) (L.1974, c. 1043); *Paulin,* 17 N.Y.3d at 245 (refusing to write exceptions into statutes).

These material and significant differences between the supersession provisions of the MLRL and the OGSML – which the lower court ignored or found irrelevant – render the lower court's reliance on *Frew Run* wholly misplaced. *See* R. 24-28, Decision at 11-15. *Frew Run* was decided based on the aforementioned MLRL supersession provision that explicitly affirmed, if not invited, local zoning control – not the OGSML supersession provision that explicitly disavows any local control except for two discrete areas (local roads and taxes). *See Frew Run Gravel Prods., Inc.,* 71 N.Y.2d at 130-32. These differences in language, as well as the several other MLRL provisions that also reaffirm local zoning authority, make *Frew Run* wholly irrelevant to deciding the OGSML preemption issue in this case. R. 513, 621, 623, Hennessey Aff., ¶ 47 & Exh. M (discussing MLRL provisions ECL § 23-2711[3], requiring notice at the application phase to local governments having jurisdiction over the proposed [mining] site, and ECL § 23-2711[10], recognizing local permitting authority).

Likewise, the lower court also erred in relying on *Gernatt Asphalt. See* R. 33-34, 36 Decision at 20-21, 23. By the time *Gernatt Asphalt* was decided, the MLRL had been amended to include very express language leaving no doubt that municipalities retain full zoning authority under that statute. *See Gernatt Asphalt Prods., Inc.,* 87 N.Y.2d 668. Indeed, the Court in *Gernatt Asphalt* noted that the 1991 amendments to ECL § 23-2703 (the MLRL supersession provision) "expressly excluded [ ] from its preemptive reach" any restriction on municipal authority to regulate permissible land uses within the municipality. 87 N.Y.2d at 683. Such an express exclusion from the scope of the supersession language, of course, does not exist in the

OGSML supersession language of ECL § 23-0303(2). Thus, *Gernatt Asphalt* is also wholly irrelevant to deciding the question of preemption under the OGSML.

Accordingly, the lower court's finding that *Frew Run* and *Gernatt Asphalt* compelled the result here is erroneous.

C. "Regulation" Differs Markedly Under Both Statutes: The OGSML "Regulates" The "Where" Of Oil And Gas Development; The MLRL Does Not "Regulate" The "Where" Of Mining, Thus Rendering MLRL Precedent Inapt

Although the broad supersession language of ECL § 23-0303(2) is clear on its face, if there were any doubt about what "relating to the regulation of the [oil and gas] industries" means, that question can only be resolved by looking at, among other things, the entirety of the statutory and regulatory scheme under the OGSML. *See New York State Psychiatric Ass'n, Inc.*, 19 N.Y.3d at 23-24. This includes the OGSML in its entirety, its implementing regulations, and other pertinent regulatory documents (namely, 6 NYCRR Ch. V, Subpart B; the 1992 Generic Environmental Impact Statement ["1992 GEIS"]; and the proposed revised draft Supplemental Generic Environmental Impact Statement ["SGEIS"]), because it is these statutes, rules and regulations that comprehensively "regulate" the oil and gas industry Statewide. And these authorities unambiguously speak not only to "how" oil and gas activity takes place, but "where" it takes place (*e.g.*, well location, spacing unit boundaries, setbacks, etc.). *See generally,* R. 511-12, Hennessey Aff. ¶¶ 38-43; *see also* ECL § 23-0101(20)(c).

The OGSML makes this point plain again and again in numerous provisions. For example, ECL § 23-0303(1) entrusts administration of the OGSML to the Department, and, pursuant to ECL § 23-0301, mandates that the Department "regulate . . . in such a manner as will prevent waste." ECL § 23-0101(20)(c) expressly defines waste to include "[t]he *locating, spacing, [or] drilling* . . . of any oil or gas well [ ] in a manner which causes . . . reduction in the

quantity of oil or gas ultimately recoverable from a pool . . . ." (emphasis added). In other words, the OGSML expressly instructs the Department to regulate the "where" of oil and gas activity, including the location of gas wells to promote the full development of the resource. Further, ECL § 23-0501(1)(b)(1) details specific acreage and wellbore location requirements relative to unit boundaries for various pools. ECL § 23-0503(2) directs the Department to issue a drilling permit if the proposed unit "conforms to statewide spacing and is of approximately uniform shape with other spacing units within the same field or pool, and abuts other spacing units in the same pool, unless sufficient distance remains between units for another unit to be developed," again with the aim of preventing waste and maximizing recovery from the pool. These directives plainly regulate the size, shape and location of spacing units and the location of the wellbore (both as to surface location and the subterranean path of the wellbore), *i.e.*, the "where" of drilling, and commit these decisions to the Department, leaving no room for local regulation.

Similar confirmation is found in (1) the OGSML's implementing regulations, which regulate spacing unit size and setbacks for drilling, *see, e.g.,* 6 NYCRR Part 553; and (2) the revised draft SGEIS, *see, e.g.,* section 3.2.4 (prohibiting drilling activities at explicitly identified locations, including primary aquifers). Again, all of these provisions instruct the Department in very detailed terms to comprehensively regulate the "where" of oil and gas activity.

In marked contrast, the MLRL does not regulate the "where" of subsurface mining. In other words, in contrast to the drilling location and spacing requirements in the OGSML, there are no comparable requirements in the MLRL specifying mine location or the spacing of mine shafts. *See generally,* ECL Article 23, title 27. In addition, throughout time, the MLRL has repeatedly

and expressly reaffirmed, if not, invited local zoning control. R. 615, 617, 621, 623, Hennessey Aff. ¶¶ 47 & Exh. M; ECL §§ 23-2703(2)(b) & (3), 23-2711(3) & (7).

Here, the lower court correctly found that (1) the OGSML does, indeed, regulate not only the "how," but also the "where," of oil and gas activity, whereas (2) the MLRL did not (and does not) regulate where mining operations can occur. R. 31, Decision at 18. However, then the court fatally erred by failing to recognize the significance of this fact to the preemption analysis: first, because the OGSML regulates "where" drilling may take place, that subject matter is off-limits to municipalities under the express supersedure language in ECL § 23-0303(2); and, second, because the MLRL does not "regulate" location (i.e., the "where" of mining), and also expressly affirms local zoning authority, MLRL precedent is simply irrelevant to the preemption analysis under the OGSML. In other words, because the MLRL does not regulate location, "regulation" in the MLRL's supersedure provision does not refer to "where" the regulated activity takes place (thus reinforcing the statute's recognition of local zoning and land use regulations), whereas, because the OGSML does regulate the "where" of oil and gas development, "regulation" in the OGSML's supersedure provision *does* include the "where" of oil and gas development (thus reinforcing the statute's recognition that it supersedes all "ordinances" and allows for local control only as to local roads and taxes). Thus, MLRL precedent is inapt here.

Indeed, the lower court rationale and result ignore the significance of both this key distinction between these two statutory schemes and the underlying basis for why these statutes "regulate" so differently. For oil and gas drilling, subsurface geology – not municipal boundary lines or zoning determinations – controls being able to properly locate the wellbore and establish spacing units. In other words, well location (the "where") inextricably affects whether and how

an operator can effectively recover the resource so as to provide for maximizing recovery, preventing waste, and protecting correlative rights.

This is precisely why the OGSML *does* regulate location – because the "where" and "how" of oil and gas drilling are not distinct, unrelated issues. To the contrary, they are interdependent and inextricably linked. It is only by regulating well location and spacing (the "where" of drilling) that the State can ensure that the underlying objectives and policies of the OGSML – *i.e.*, maximizing recovery, preventing waste, and protecting correlative rights – will be achieved. Thus, that is why this comprehensive regulatory scheme makes no allowance for parochial local ordinances, like the one here, which have precisely the opposite effect of preventing efficient resource development.

Consider this hypothetical as illustrative of the point. Imagine a natural gas field that, being the product of geologic forces, neither recognizes nor adheres to political boundaries and underlies equally (50/50) two separate, but adjacent, towns. One of these towns has passed a zoning ordinance that bans all oil and gas activity. The property owners under whose land this natural gas field lies all want to see it developed and have entered into lease agreements with an oil and gas operator. The State has granted the required permits. The goal of New York's oil and gas regulatory regime is to see that this natural gas field is developed to its maximum potential, with waste prevented and correlative rights protected. Yet, despite the landowners' desires and the State's permits, because one town has banned all oil and gas activity, upwards of 50% of this natural gas field cannot be accessed or developed by the operator. Field recovery is not "maximized" and, assuming the operator proceeds to develop the accessible acreage, by definition, the operator commits waste by leaving upwards of 50% of the gas in the ground.

Moreover, the correlative rights of the owners of the unrecovered 50% are obliterated, given that the municipal ban denies them access to the resource and the ability to recover it.

Accordingly, the lower court's holding – *i.e.*, that "regulation of the [ ] industry" means *only* local laws or ordinances that relate to *how* oil and gas operations are conducted, not *where* they are conducted – is starkly at odds with the objectives and express location-related requirements of the OGSML and, therefore, cannot be sustained. In short, where State law directs that oil and gas activity can and should be conducted at specified locations, and a local ordinance says that that activity cannot be conducted at all, that local ordinance "regulates" that oil and gas activity – and, thus, certainly "relates to" the regulation of that oil and gas activity. Put another way: if "where" means "nowhere" (as it does with the Town Prohibition), then "how" means "not at all;" and, this is an untoward result that is belied by the OGSML's express directives. This result also presents the ultimate in waste, precludes recovery as opposed to maximizing it, and is the antithesis of protecting correlative rights because the entire mineral estate (property interest) is destroyed. This result also has far-reaching policy implications, given that no prudent operator will ever invest in developing New York's indigenous oil and gas resources, where its investment could be instantly obliterated by the whim of municipal boards.

Thus, the Decision cannot stand. *See New York State Psychiatric Ass'n,* 19 N.Y.3d at 25-26 (adopting a construction that comported with legislative purpose; stating that even if a literal reading would not produce absurd results, such reading will not be adopted if it produces results "at variance with the policy of the legislation as a whole").

D. The Legislative History And Factual Backgrounds Of Both Statutes Differ Markedly, With The History Of The OGSML's Supersedure Provision Expressly Evidencing Legislative Intent To Eliminate Local Control

The lower court also erred in finding no meaningful distinctions in the purposes, factual evolution, or legislative histories of the two statutes. *See* R. 29-31, Decision at 16-18. Once again, the multiple material distinctions in these regards confirm both the preemption finding under the OGSML and the court's error in applying MLRL precedent here.

The New York Legislature added the supersedure language of ECL § 23-0303(2) to the OGSML in 1981. L.1981, c. 846. If there could be any remaining doubt that the Legislature intended to preclude *all* local regulation relating to oil and gas development (including local zoning respecting drilling location), so as to achieve the statutory goal of efficiently developing New York's mineral resources (by preventing waste and maximizing recovery), such doubt is dispelled by the legislative history and factual backdrop of ECL § 23-0303(2).

As originally enacted in 1963, the OGSML sought to "foster, encourage and promote" natural gas development in a manner that would prevent waste, maximize recovery of the State's oil and gas resources, and protect correlative rights. R. 505-06, 534, 568, 571, 573, 576, 579, Hennessey Aff. ¶¶ 17-21 & Exhs. D & E; *see* ECL § 23-0301 (L. 1963, c. 959). Both the language of the statute and its legislative history reveal that the manner in which this was to be achieved was by vesting administration of the statute in the State, including the responsibility for establishing well spacing and wellbore location based on sound geologic and geophysical principles. R. 507-08, 568, 572, 575, 585-89, 595-96, 598-99, Hennessey Aff. ¶¶ 22-25 & Exhs. E-H.

In 1978, the statute's declaration of policy (codified in ECL § 23-0301) was amended such that the words "foster, encourage and promote" oil and gas development were replaced with

the word "regulate." CHC R. 725, ¶¶ 24, 25; *see also* L. 1978, c. 396. At the same time, the Legislature also amended subdivision 5 of Energy Law § 3-101 to declare it to be the energy policy of the State "to foster, encourage and promote the prudent development and wise use of all indigenous state energy resources including, but not limited to, on-shore oil and natural gas, off-shore oil and natural gas, natural gas from Devonian shale formations . . . ." L.1978, c. 396. Thus, as of 1978, the "promote development" policy language was added to the Energy Law, while regulatory responsibility remained with the Department. Nonetheless, the State's overarching objective – as reflected, now, in both the Energy Law and the ECL – remained the same as it had been since 1963 – to maximize the recovery of indigenous oil and gas resources and prevent waste. CHC R. 725-26, ¶¶ 27-32. And, nothing was changed in the remainder of the statute (*e.g.*, the objectives of preventing "waste," maximizing recovery, or protecting correlative rights) relative to the Department's authority regarding the "where" of drilling through control over the size, shape, and location of spacing units and the proper designation of drilling location. *See* L. 1978, c. 396.

The 1981 amendments to the ECL (L.1981, c. 846), which added the supersession language, came into being with the advent of the energy crisis of the 1970s and after almost two decades of problems resulting from piecemeal local regulation of the oil and gas industry. R. 508-09, 602-03, 605-06, Hennessey Aff. ¶¶ 27-32 & Exhs. I & J; R. 79-91, Sovas Aff. ¶¶ 11-15. Thus, the 1981 amendments sought to "promote the development of domestic energy supplie[s], including NYS's resources of oil and natural gas." R. 508, 602-03, Hennessey Aff. ¶ 28 (quoting Legislative Memorandum in Support [S.6455-B/A.8475-B], Exh. I). To that end, the 1981 amendments updated the regulatory program, granting the Department additional powers "to enable it to provide for the efficient, equitable and environmentally safe development of the

State's oil and gas resources," by, among other things, adding the supersession language of ECL § 23-0303(2). R. 508-09, 605-06, Hennessey Aff. ¶ 30 & Exh. J. The legislation also (1) established a liability fund to compensate municipalities for damages related to oil and gas activities, ECL § 23-0303(3); and (2) amended the RPTL to create an ad valorem tax authorizing municipalities to levy a real property tax on oil and natural gas based upon production. R. 509-10, 602, 608, Hennessey Aff. ¶¶ 33-35 & Exhs. I & K. In other words, the Legislature (1) gave municipalities these two trade-offs because it was "cracking down" on years of local regulation of oil and gas development, which hampered efficient resource development, and (2) preempted all local control of oil and gas activities, including any effort to determine or otherwise regulate "where" those activities could occur (i.e., local zoning ordinances). R. 510-11, *id.* ¶¶ 36-37; *see also* R. 79-81, Sovas Aff. ¶¶ 12-19.

Indeed, legislative history to a separate bill (A.6928) that was ultimately incorporated into the omnibus 1981 legislation makes this plain. Specifically, the Memorandum in Support of A.6928 states:

> The provision for supersedure by the [OGSML] of local laws and ordinances clarifies the legislative intent behind the enactment of the oil and gas law in 1963. The ***comprehensive scheme*** envisioned by this law and the technical expertise required to administer and enforce it, ***necessitates that this authority be reserved to the State. Local government's diverse attempts to regulate the oil, gas, and solution mining activities serve to hamper those who seek to develop these resources and threaten the efficient development of these resources, with Statewide repercussions. With adequate staffing and funding, that State's [OGSML] regulatory program will be able to address the concerns of local government and assure efficient and safe development of these energy resources.***

CHC R. 949, 995, Hennessey Renewal Aff. ¶ 34 & Exh. G (emphasis added).

The Legislature's intent and purpose for its supersedure clause could not be stated more clearly: to create a "comprehensive scheme" for oil and gas regulation that would "be reserved to the State and would avoid the "[l]ocal government's diverse attempts to regulate the oil [and] gas" industries" that for years had "serve[d] to hamper those who seek to develop these resources and threaten the efficient development of these resources[.]" The Legislature also determined that local concerns would be adequately accommodated through State regulation. In other words, the State preempted all local laws and ordinances relating to oil and gas activity (including zoning), with the only exception being local roads and taxes. CHC R. 949, 950-51, *id.*, ¶¶ 34, 39-42. Accordingly, both the factual circumstances and the legislative history of the 1981 amendments establish the Legislature's intent to preempt local zoning authority. Thus, the lower court's conclusion that there is nothing in the legislative history of the OGSML that indicates the intent to preempt local zoning authority is erroneous.

Of course, the history of the OGSML's supersession language and the associated articulation of legislative intent – i.e., that local control be removed to effectuate the statute's overriding purpose of efficient resource development – once again, distinguish the MLRL and underscore the error of the lower court's reliance on it. Plainly, both statutes arose from very different factual circumstances and serve very different purposes, achieved by very different means. *See Frew Run,* 71 N.Y.2d at 131, 132 (noting relevance of statutory policies, purposes and history in preemption analysis); *New York State Psychiatric Ass'n,* 19 N.Y.3d at 24 (stating that "[t]o determine the intent of a statute, 'inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision'" [citation omitted]). The supersedure language of the OGSML was added, by amendment, in response to almost two decades of parochial local regulation relating to oil and gas development, and was

added precisely to reassert the State's role as the exclusive regulator of oil and gas activity in the state. R. 79-81, 83-84, Sovas Aff. ¶¶ 11-19, 24-26. There is nothing comparable in the history of the MLRL, as its supersedure provision was included in the initial enactment.

Moreover, the legislative history of the MLRL establishes that stakeholder groups clearly understood that the MLRL retained (if not invited) local control over mining operations, and this generated considerable controversy and industry opposition. R. 513-14, 632, 634, 636, Hennessey Aff. ¶¶ 48-51 & Exhs. N-P. For example, the Memorandum in Opposition submitted by the New York State Chapter of the Associated General Contractors of America noted that the legislation "would not insure an evenly administered State-wide program, since it would allow local governments to enact yet more stringent standards and requirements." R. 513-14, 632, Hennessey Aff. ¶ 49 & Exh. N. No such discussion or opposition based on "local" control is present anywhere in the legislative history of the OGSML, suggesting that lawmakers and oil and gas stakeholders understood the statute's supersedure provision would preempt local laws or ordinances that might seek to control oil and gas development (with the only exception being local roads and taxes). *See generally,* Bill Jacket, L. 1981, c. 846; *see also* R. 81, Sovas Aff. ¶¶ 15-19. And, of course, this is precisely what the unambiguous language of the OGSML's supersedure provision does.

Finally, although no less importantly, the crucial differences in the nature of the tangible substances regulated by the MLRL and the OGSML explain the different approaches taken in terms of supersession. The MLRL regulates the mining of solid minerals. Solid mineral resources do not move within the subsurface, and often require significant development and disruption, both temporally and in areal extent, to the land surface in order for extraction to occur in a series of phases. Accordingly, the MLRL establishes a partnership with localities relative to

mine location and the ultimate reclamation of affected lands. This is reflected in the MLRL's (1) supersedure provision, which reaffirms local zoning authority, (2) declaration of policy, which articulates multiple purposes aimed at balancing a variety of interests, many of which concern matters traditionally within the control of local governments, and (3) the multitude of reclamation provisions which pervade the MLRL but do not at all limit municipal power to determine permissible uses in zoning districts. *See Frew Run,* 71 N.Y.2d at 132-33 (noting that the 1974 version of the MLRL provided a Statewide standard for regulation of operations, "'while recognizing the legitimate concerns of localities in the aftereffects of mining by permitting stricter local control of reclamation'" [citation omitted]); ECL § 23-2703(2)(a) & (b) (precluding stricter local standards for mining activity and reclamation, but affirmatively recognizing local zoning authority to determine permissible land uses); *see* R. 512-13, 515, Hennessey Aff., ¶¶ 44-47, 54; *see also* ECL §§ 23-2703(2) & (3). 23-2711(3) & (7), 23-2713, 23-2715; former ECL §§ 23-2703(2), 23-2711(3) & (10), 23-2713, 23-2715. Simply put: local zoning control makes sense in the context of solid mineral mining.

In contrast, the OGSML principally regulates the development of liquid or gaseous substances, such as oil and gas. Oil and gas deposits are migratory and do not respect municipal boundaries. The migratory nature of oil and gas thus necessitates that the State determine "where" drilling occurs, because this is the only way that recovery can be maximized, waste prevented, and property owners' correlative rights protected. Local control, particularly municipal-wide bans like the Town Prohibition, make it impossible to achieve these objectives, as reflected in the history leading up to the enactment of ECL § 23-0303(2) in 1981. R. 79-81, 83-84, Sovas Aff. ¶¶ 11-19, 21-26; *see* R. 510-11, Hennessey Aff. ¶ 36. In addition, oil and gas

development tends to be less surface-intensive and of far shorter duration than solid mineral extraction, thus having far fewer implications for traditional land use concerns.

The bottom line is that the objectives of the OGSML (and Energy Law) cannot be achieved – and, in fact, are frustrated – by disparate local regulations like the Town Prohibition. Thus, the lower court erred in concluding that there was no conflict and that the statutory goals of the OGSML could be met by interpreting "regulation of the [ ] industries" in ECL 23-0303(2) to be limited to the "how" but not the "where" of oil and gas drilling. *See* R. 30-31, Decision at 17-18. Local zoning ordinances like the one at issue here do not merely incidentally impact the activities of the oil and gas industry; they completely destroy them by prohibiting the activity altogether and thereby obliterating the underlying mineral interests (which have value only if the resource can be extracted). In short, local zoning ordinances like the Town Prohibition make it impossible for the Department to comply with, and for New York State to achieve, the OGSML's objectives of preventing waste, maximizing recovery, and protecting correlative rights. *See Voss,* 830 P.2d at 1067 (finding that a total ban on drilling precludes the ability to prevent waste or protect correlative rights). Thus, the Decision must be reversed.

POINT III

THE COURT BELOW ERRED IN FAILING TO FIND THE TOWN PROHIBITION CONFLICT PREEMPTED UNDER ECL ARTICLE 23

A. The Express Supersedure Language in ECL § 23-0303(2) Does Not Foreclose An Implied Preemption Challenge

The lower court apparently believed that the express supersession language in ECL § 23-0303(2) foreclosed an implied preemption challenge to the Town Prohibition. *See* R. 25, 32, Decision at 12 & 19 n.13. As a result, the court did not specifically evaluate Plaintiff-Appellant's conflict preemption argument and, instead, evaluated the "conflict" issue as part of

the statutory construction process relative to the question of express preemption. *See* R. 32, *id.* at 19 n.13. The court erred on this ground as well, both as to approach and result.

It is well-established that the preemption doctrine is not limited to express preemption, but also includes implied preemption (*i.e.*, conflict and field preemption). *See Albany Area Builders Ass'n,* 74 N.Y.2d at 377. Contrary to the lower court's approach, the OGSML's express supersedure clause (ECL § 23-0303[2]) does not foreclose a conflict preemption analysis under that statute. *See Geier v. American Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (stating same in context of federal preemption of state law); *accord Doomes v. Best Transit Corp.,* 17 N.Y.3d 594, 602-03 (2011) (recent Court of Appeals' case evaluating implied preemption notwithstanding express supersedure language). Likewise, the supersedure language of ECL § 23-0303(2) certainly does not foreclose an implied preemption challenge under an entirely different statute, namely, Energy Law § 3-101(5). And, this Court may take judicial notice of Energy Law § 3-101(5), both as part of the legislative history of ECL § 23-0303(2) and by virtue of its being a legislative fact. *See Green,* 96 N.Y.2d at 408 n.2; *Affronti,* 95 N.Y.2d at 720. Thus, the lower court erred in failing to expressly address conflict preemption principles, and the question of conflict preemption under both the OGSML and Energy Law is properly before this Court.

B. The Town Prohibition Conflicts with New York State Law And, Therefore, Is Conflict Preempted

As discussed above, the Town Prohibition presents a multitude of irreconcilable "heads-on" conflicts with the OGSML, both as to explicit wellbore location and spacing directives and policy objectives. *See* Point IIC, *supra.* First and foremost, the express provisions of the OGSML plainly would allow some wells to be drilled in the Town, but the Town Prohibition precludes that. More specifically, the substantive provisions of the OGSML are comprehensive

and express as to "where" drilling is to occur. For example, ECL § 23-0503(2) directs the Department to issue a well drilling permit if the proposed drilling unit (1) conforms to statewide spacing requirements, (2) is of approximately uniform shape with other spacing units in the same field, and (3) abuts other spacing units overlaying the same resource pool, unless there is sufficient distance between units for another unit to be developed. This specific provision, which was carefully crafted to apply uniformly Statewide, ensures that wells are drilled and spaced in locations that maximize resource recovery, prevent waste, and protect mineral owners so that they are fully compensated for their pro rata share of well production. It is simply not possible for the Department to comply with this express statutory mandate if individual municipalities, like Defendants-Respondents, can exercise local zoning authority to enact bans on all drilling in entire towns.

Local bans on all oil and gas development also make it impossible for the Department to comply with the objectives of the OGSML. Local bans, like the Town Prohibition, preclude the Department from issuing drilling permits for locations where drilling *should* occur (i.e., based on the geophysical properties of the underlying resource and environmental conditions relating to the surface location in order to maximize recovery, prevent waste and protect correlative rights). Although the lower court ignores it, the definition of "waste" in the OGSML includes "locating . . . [a] well [ ] in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable . . . ." ECL § 23-0101(20)(c). Yet, that is precisely what the Town Prohibition does – i.e., it prohibits wells from being located in the ideal location to provide for maximum resource recovery (and the prevention of waste and the protection of correlative rights). It defies common sense, and certainly frustrates the goals of the OGSML, for the Department to essentially say "Based on all of the geophysical data, your wells should be drilled

at locations X, Y and Z to maximize recovery and prevent waste," only to have a local zoning board come in and say "You cannot drill at locations X, Y or Z, or anywhere at all, because we have zoned oil and gas activity out of our jurisdiction altogether." Oil and natural gas resources are where they are because of geology, not political boundaries. Effectively recovering those resources – meeting the goals of the OGSML – requires that wells be drilled where the geophysical data says they should go. In the end, sweeping bans such as the Town Prohibition are the very ultimate in waste and cannot be squared with the Department's mandates under the OGSML.

Consider the hypothetical where an operator holds oil and gas leases in adjoining municipalities A and B. Municipality B has a drilling prohibition. Municipality A does not. Based on the geologic orientation of the play, the operator begins laying out units in municipality A in accordance with the spacing directives in ECL § 23-0503(2) that the units be of uniform shape and abut other spacing units overlaying the same resource pool. The operator lays out the units so that they are of the same shape and have no gaps. As the operator approaches the border of municipality A and municipality B, it finds that the acreage that is left in municipality A is not itself large enough to constitute a spacing unit or is of irregular shape because the proper geologic orientation of the wellbore does not parallel municipal boundaries. The drilling ban in municipality B does not allow wellbore placement anywhere on the surface of municipality B; nor does it allow for subsurface penetration of any resource pool underlying the surface of lands located in municipality B. As a result, the "left-over" acreage in municipality A cannot be incorporated into a spacing unit, and a well cannot be drilled on this acreage to effectively capture the underlying resource pool which extends below the subsurface of municipality B (*i.e.*, even if the drill site is located on land in municipality A). In other words, this acreage in

municipality A cannot be developed. Thus, the ban in municipality B obliterates not only the *totality* of the operator's property interest in municipality B, but also destroys correlative rights outside municipality B, such as those of the operator and its lessors relative to the left-over acreage in municipality A. Accordingly, municipal bans, such as the Town Prohibition, directly conflict with the language and policies of the OGSML.

Moreover, municipal bans like the Town Prohibition patently conflict with the Energy Law. Energy Law § 3-101(5) articulates the Statewide goal "to foster, encourage and promote the prudent development [ ] of all indigenous state energy resources including . . . natural gas from Devonian shale formations." If the Decision is allowed to stand, every municipality in New York could ban all oil and gas development – a result that plainly would conflict with *both* the "promotion" directive of the Energy Law and all of the objectives of the OGSML (*i.e.*, maximize recovery, prevent waste, protect property owners' correlative rights). The policy implications of this are severe, as there could not be a starker example of local control that will wholly discourage, in fact, preclude, development. The Town Prohibition, in one fell swoop, wiped out a more than $5.1 million investment. This begs the question: what prudent operator would ever invest in oil and gas development in New York if, after the fact, municipalities could, based upon a 3-2 majority vote, enact broad-based drilling bans that obliterate the operator's entire property interest? The answer is obvious: municipal-wide bans on oil and gas activity cannot be squared with the directive, policies, and goals of this State's OGSML or Energy Law.

The bottom line is this: even if the Town Prohibition is not "regulation" *per se*, so as to come within the supersedure provision of ECL § 23-0303(2), a point that Plaintiff-Appellant vigorously disputes, the Town Prohibition *still* conflicts with the express directives of the OGSML relative to spacing and wellbore location and the fundamental goals of the Energy Law

and the OGSML, both of which are general laws of the State. The Town Prohibition, at *best,* frustrates the Department's ability to comply with the OGSML and Energy Law mandates; and, at *worst,* stands as an insurmountable obstacle to meeting those objectives. In either instance, the Town Prohibition is in conflict with New York's general laws and, therefore, is conflict preempted. *See Lansdown Entm't Corp. v. New York City Dep't of Consumer Affairs,* 74 N.Y.2d 761, 764-65 (1989) (finding direct conflict between local ordinance and State law; stating "assuredly a local law which conflicts with the State law must [ ] be preempted"); *Anonymous v. City of Rochester,* 13 N.Y.3d 35, 51 (2009) (Graffeo, J., concurring) (stating that local curfew ordinance contradicted the Family Court Act and was thus invalid); *Cohen v. Board of Appeals of Village of Saddle Rock,* 100 N.Y.2d 395, 400 (2003) (finding local variance regulation preempted; stating in the critical area of overlap, the Legislature prevails).

Finally, two courts that have considered the propriety of municipal bans on oil and gas activity otherwise permitted by state law have invalidated those bans. *See Voss,* 830 P.2d at 1068; R. 904-05, *Northeast Natural Energy, LLC,* Civ. Action No. 11-C-411, Slip Op. 8-9 (Cir. Ct., Monongalia Cnty., W.V., Aug. 12, 2011). The *Voss* case involved a comprehensive state regulatory regime very similar to the OGSML and a local drilling ban comparable to the Town Prohibition. Colorado's high court concluded that the local ban was fundamentally at odds with Colorado's goals and policy objectives of preventing waste, maximizing recovery, and protecting correlative rights – *i.e.*, the very same goals and policy objectives of the OGSML. Specifically, the Colorado Supreme Court observed:

> Oil and gas are found in subterranean pools, the boundaries of which do not conform to any jurisdictional pattern. As a result, certain drilling methods are necessary for the productive recovery of these resources . . . . [I]t is often necessary to drill wells in a pattern dictated by the pressure characteristics of the pool, and because each well will only drain a portion of the

> pool, an irregular drilling pattern will result in less than optimal recovery and a corresponding waste of oil and gas. Moreover, an irregular drilling pattern can impact on the correlative rights of the owners of oil and gas interests in a common source of supply by exaggerating production in one area and depressing it in another. ***Because oil and gas production is closely tied to well location, [a municipality's] total ban on drilling ... could result in uneven and potentially wasteful production . . . . [The] total ban, in that situation, would conflict with the [state agency's] express authority to divide a pool of oil or gas into drilling units and to limit the production of the pool so as to prevent waste and to protect the correlative rights of owners ... In our view, the state's interest in the efficient and fair development and production of oil and gas resources in the state, including the location and spacing of individual wells, militates against a home-rule city's total ban on drilling within city limits.***

Voss, 830 P.2d at 1067 (emphasis added); *see also id.,* at 1067 n.3 (quoting state law, defining "waste" in a manner identical to that in ECL § 23-0101[20][c]). Given the factual realities of oil and gas development (which are largely the same regardless of where the reserves are located), and the identical goals and policy objectives pursued by the New York and Colorado oil and gas regimes, the Colorado Supreme Court's reasoning in *Voss* – while not binding on this Court – is particularly compelling and appropriate here.

The lower court rejected *Voss* because it felt constrained by *Gernatt Asphalt.* R. 36, Decision at 23. However, that was in error, because, as already explained, by the time *Gernatt Asphalt* was decided, the MLRL had been amended to include language that the statute did not supersede local zoning control. *See Gernatt Asphalt Prods.,* 87 N.Y.2d at 683 (noting that the 1991 amendment to ECL § 23-2703 "expressly excluded [ ] from its preemptive reach" any restriction on municipal authority to regulate permissible land uses). Moreover, *Frew Run* did not address a municipal-wide ban, and, therefore, beyond involving a markedly different statute, it involved a very different question from that here. *See generally, Frew Run,* 71 N.Y.2d 126.

Troublingly as well, the court wholly ignored *Northeast Natural Energy, LLC,* but then relied on precedent from Pennsylvania as being persuasive. *See* R. 35-36, Decision at 22-23 (citing *Huntley & Huntley, Inc.,* 964 A.2d 855). That, too, was error. At the time *Huntley & Huntley, Inc.* was decided, the supersedure provision of the Pennsylvania Oil and Gas Act confined preemption to "operations." *See* 964 A.2d at 858. Accordingly, that language is eminently distinguishable from the language in ECL § 23-0303(2); therefore, *Huntley & Huntley, Inc.* provides no support for the lower court's Decision. In the end, the Decision cannot be sustained.

In sum, the Town Prohibition conflicts with the language and policies of both the OGSML and Energy Law § 3-101(5). Accordingly, the Town Prohibition is conflict preempted and, therefore, invalid, and the Decision must be reversed. *See, e.g., Consolidated Edison Co.,* 60 N.Y.2d at 107-08; 25 N.Y. Jur. 2d, Counties, Towns & Municipal Corporations, § 351.

CONCLUSION

For all of the foregoing reasons, Plaintiff-Appellant respectfully requests that this Honorable Court reverse the Decision and grant summary judgment in Plaintiff-Appellant's favor and order the relief requested in the Complaint.

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