Supreme Court

State of New York
Appellate Division – Third Department

COOPERSTOWN HOLSTEIN CORPORATION

Plaintiff-Appellant,

-against-

TOWN OF MIDDLEFIELD,

Defendant-Respondent.

Appellate Division Case No. 515498

Ostego County Index No.: 2011-0930

REPLY BRIEF OF PLAINTIFF-APPELLANT COOPERSTOWN HOLSTEIN CORPORATION

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STATEMENT OF THE CASE

Plaintiff-Appellant, Cooperstown Holstein Corporation ("Plaintiff" or "CHC")[1] respectfully submits this reply brief (1) in further support of its appeal of the February 24, 2012 Decision and Order of Acting Supreme Court Justice Donald F. Cerio, Jr. and the June 19, 2012 Decision and Order on the Motion to Renew; and (2) in reply and opposition to the submissions of the Town and various amici.[2] The sole issue here is whether the OGSML and Energy Law § 3-101(5) preempt the Town's zoning ordinance that prohibits all oil and gas drilling, development, and production activities anywhere in the Town. CHC maintains that this question must be answered in the affirmative and the Decision below reversed.

First, the Town's and Amici Professors' generalized articulations about local governments' zoning powers and the benefits of zoning are irrelevant. No one disputes that towns may generally zone as to land use – be it pursuant to the N.Y. Constitution, the Statute of Local Governments, the MHRL, or the Town Law. However, as the Town and amici admit, local zoning enactments may not be inconsistent with general laws of the State, and the State does have the power to supersede local zoning. Thus, the alleged benefits of local zoning with respect to oil and gas drilling are beside the point. The only question here is whether the Legislature superseded local zoning in the OGSML and Energy Law.

Second, contrary to the urging of the Town and amici, there is no presumption against preemption. A locality's lawmaking power is limited to that delegated by the sovereign State, and, indisputably, the State may supersede local zoning ordinances. The question of whether the

[1] Abbreviations herein are as defined in the Brief of CHC, dated Oct. 15, 2012 ("CHC Brief").

[2] Herein, CHC refutes the arguments articulated in the Brief of Defendant-Respondent Town of Middlefield, dated Dec. 21, 2012 (the "Town Brief"). CHC also addresses various contentions raised by amici curiae: (1) Professors Vicki Been, Richard Brifault, Nestor Davidson, Clayton Gillette, Roderick Hills, John Norton, Ashira Ostrow, Patricia Salkin, Christopher Serkin, and Stewart Sterk (the "Amici Professors"), in their Dec. 10, 2012 brief (the "Professors' Brief"); (2) A&E Management & Contracting and other New York business entities (the "NY Business Amici"), in their Dec. 10, 2012 brief (the "NY Businesses' Brief"); and (3) Catskill Mountainkeeper and other environmental groups (the "Environmental Amici"), in their Dec. 7, 2012 brief (the "Environmentalists' Brief").

State did so in the OGSML and Energy Law is resolved by a plain reading of these statutes, as well as their policies and legislative histories. Thus, the plea for a presumption against preemption must be rejected.

Next, the Town cannot ignore the plain text of the express preemption language of ECL § 23-0303(2) by self-servingly injecting into the supersession provision an "operations" qualifier that does not appear in the statute itself, ignoring the remainder of the statute, and ignoring all of the policies of the OGSML and the "promote development" objective of the Energy Law. Nothing supports the Town's strained interpretation: not accepted canons of statutory construction, not New York precedent, not oil and gas case law, and not even dictionary definitions of the word "regulation." Notably, the courts of this State have found that the term "regulation" includes location (i.e., "where" the regulated activity is conducted), thus preempting contrary local zoning where, as here, the State statute addresses location-related subject matter and vests those decisions in the State. Therefore, because location-related decision-making vests with the State under the OGSML, the MLRL and precedent decided thereunder are wholly inapplicable.

Finally, in arguing against a finding of implied preemption, the Town is both short-sighted and wrong. Recent Court of Appeals precedent demonstrates that express preemption language does not foreclose an implied preemption analysis. In any event, the Energy Law does not contain an express preemption clause. Thus, as the Town's silence suggests, there is not even a potential impediment to the implied preemption analysis.

As for the policy underpinnings of the OGSML, the Town urges this Court to adopt the myopic view that protection of landowners' rights and the general public is advanced by its drilling ban. Beyond contravening the "maximize recovery" and "prevent waste" goals of the

OGSML and the "promote development" goal of the Energy Law, the Town's view also ignores critical facts. First, as reflected in legislative history, the public interest sought to be served by the OGSML is advanced by the development of indigenous oil and gas resources. Second, the OGSML and implementing regulations were specifically designed to, and do, protect public health, safety and welfare, making local regulation of that same subject matter entirely unnecessary. Finally, municipality-wide drilling bans like the Town Prohibition obliterate landowners' correlative rights.

In fact, the Town's argument that landowners' correlative rights are preserved under the Town's total ban on drilling (i.e., both on the surface and in the subsurface throughout the entire Town) does not make sense if those mineral rights cannot be accessed. Oil and gas resources underlying the Town cannot be accessed or extracted at all; thus, there can be no compensation to mineral rights owners within the Town, thereby destroying their property interest. Moreover, due to State spacing requirements and geophysical properties of the resource, mineral rights owners beyond the Town's boundaries also stand to be deprived of their mineral estate. Thus, the Town Prohibition destroys landowners' correlative rights territorially and extraterritorially. This directly contravenes the policies of the OGSML and Energy Law, rendering the Town Prohibition conflict preempted.

ARGUMENT

POINT I

THE STATE HAS THE POWER TO PREEMPT LOCAL ZONING

The Town's and Amici Professors' lengthy discourse regarding the constitutional and statutory authority of municipalities to enact zoning laws, the governmental function served by regulating land use, and the general effect or benefits of zoning is simply irrelevant. *See, e.g.*,

Town Brief, Point I.B; Professors' Brief, Point I.C-E. As all parties must (and do) admit, "Towns . . . have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant . . . ." *Kamhi v. Planning Bd. of Town of Yorktown*, 59 N.Y.2d 385, 389 (1983). Thus, localities' power to legislate remains "subject to the Legislature's overriding interest in matters of statewide concern." *Cohen v. Bd. of Appeals of the Vill. of Saddle Rock*, 100 N.Y.2d 395, 399 (2003). Accordingly, "'[t]he preemption doctrine represents . . . [an] *overriding limitation* [on local lawmaking power] . . . embody[ing] 'the untrammeled primacy of the Legislature to act . . . with respect to matters of State concern.'" *Id.* at 400 (quoting *Albany Area Buildrs Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 [1989]). Thus, it is beyond dispute that the State may preempt local zoning. *See, e.g., Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 498 (1977); *see also* CHC Brief, Point I; Town Brief, at 15-16 (acknowledging same and stating that "[w]here the Legislature has expressly preempted an area of regulation, a local law governing that same subject matter must yield"); Professors' Brief, at 12 (noting longstanding precedent that the State may preempt local laws).

State preemption of local zoning is neither unusual nor improper. As the Town acknowledges (*see* Town Brief, at 20), this State repeatedly has superseded local zoning that restricts the location of (or totally "zones out") facilities or activities that serve a substantial Statewide interest. *See, e.g.*, Public Serv. Law § 172(1); Mental Hyg. Law § 41.34; Banking Law § 369; Soc. Serv. Law § 2(23); ECL Art. 33. Moreover, the courts of this State have not hesitated to enforce the Legislature's will and hold local ordinances preempted. *See, e.g., Consolidated Edison Co. of N.Y. v. Town of Red Hook*, 60 N.Y.2d 99, 108 (1983) (location of major steam electric generating facilities); *Robin v. Incorporated Vill. of Hempstead*, 30 N.Y.2d 347, 352 (1972) (location of conducting abortions); *Floyd v. New York State Urban Dev. Corp.*,

33 N.Y.2d 1, 7 (1973) (location of urban development projects); *Sunrise Check Cashing & Payroll Servs., Inc. v. Town of Hempstead,* 91 A.D.3d 126, 139-40 (2d Dep't 2011) (location of check-cashing establishments); *DeStefano v. Emergency Hous. Grp., Inc.,* 281 A.D.2d 449, 451 (2d Dep't 2001) (location of adult shelters); *Ames v. Smoot,* 98 A.D.2d 216, 222 (2d Dep't 1983) (aerial application of pesticides); *People v. Blair,* 23 Misc. 3d 902, 912 (City Ct., City of Albany, 2009) (placement of sex offenders); *Town of Moreau v. New York State Dep't of Envt'l Conservation,* 178 Misc. 2d 56, 60 (Sup. Ct., Albany Cnty., 1998) (location for hazardous waste disposal). And, preempting local zoning control is precisely what the State did when it enacted ECL § 23-0303(2).[3]

POINT II

THERE IS NO "ANTI-PREEMPTION" PRESUMPTION

Contrary to the Town's and the Amici Professors' claims, there is no presumption of validity or presumption against preemption, and, respectfully, this Court is not at liberty to create one here. The Town claims a "presumption of validity" and relies on ten cases involving constitutional claims, spot zoning, and contract zoning. *See* Town Brief, at 9-10. Tellingly, none of these cases involved State preemption of local enactments. *See id.*

The Amici Professors go further, urging this Court – without citing to any binding precedent – to create a presumption against State preemption. The Amici Professors cite to only one distinguishable case from Illinois to support their claim that State limitations on local powers should be narrowly construed. *See* Professors' Brief, at 7-8 (citing *Neri Bros. Constr. v. Village of Evergreen Park,* 841 N.E.2d 148 [Ill. App. Ct. 2005]). Unlike the broad supersession

[3] To the extent the Town suggests that ECL § 23-0303(2) is procedurally infirm due to the Legislature's failure to reenact this provision per Art. IX, § 2(b)(1) of the N.Y. Constitution (*see* Town Brief, at 11 n.4), the Court of Appeals has soundly rejected a comparable argument. *See Wambat Realty Corp.,* 41 N.Y.2d at 496-98; *see also Floyd,* 33 N.Y.2d at 4, 6-7.

language of the OGSML, the preemption language in *Neri Bros.* was narrowly drawn to preempt local regulation of underground utilities only as to damage prevention. Thus, the court held that a local law allowing a village to recoup certain remediation expenses was not preempted, because recoupment of expenses did not conflict (or even overlap) with damage prevention. Accordingly, *Neri Bros.* lends no support for a presumption against preemption.[4]

In short, localities' zoning powers are limited to what has been delegated from the sovereign State, and local zoning may not be inconsistent with general laws of the State. *See* Point I, *supra.* Thus, the question of whether the OGSML preempts the Town Prohibition is resolved by a straightforward reading of the OGSML, its policies, and its legislative history. *See Consolidated Edison Co. of N.Y.*, 60 N.Y.2d at 107; *People v. De Jesus*, 54 N.Y.2d 465, 468 (1981); *see also* CHC Brief, Points II.A-D & III.B.

And where, as here, State statutory language and policies express a clear intent to preempt a particular subject matter, the "municipality lacks authority to deal with [that] matter '*unless it is specifically empowered so to do in terms* ***clear and explicit.***'" *See Robin*, 30 N.Y.2d at 350-51 (emphasis added) (citations omitted). Thus, to the extent that there is any presumption here, it favors preemption. *See id.*

POINT III

ECL § 23-0303(2) EXPRESSLY PREEMPTS THE TOWN PROHIBITION

It is well settled that in construing statutes to determine legislative intent, courts must "look to the particular words for their meaning, both as they are used in the [particular] section

[4] The Amici Professors' argument that the canon of "implied repeal" supports a presumption against preemption also has no merit. ECL § 23-0303(2) was enacted in 1981, long before the Town Prohibition was passed in June 2011; and, contrary to the Amici Professors' claim, the Town Prohibition does not date back to the Town's enabling statutes. By the Amici Professors' reasoning, since zoning derives from (and allegedly dates back to) the Town Law and the MHRL, the Legislature could never prospectively enact a statute that supersedes local zoning. This is plainly not the case. *See, e.g., Consolidated Edison Co. of N.Y.*, 60 N.Y.2d 99, 105-06 (on field preemption grounds, holding that town could not deny power company the ability to locate electrical plant within its jurisdiction); *see also Wambat Realty Corp.*, 41 N.Y.2d at 497.

and in their context as part of the entire statute." *Price v. Price*, 69 N.Y.2d 8, 13 (1986). Likewise, courts must look to the statute's legislative purposes and policies, as well as the history leading up to the statute's enactment. *Id.* at 14. Moreover, under the guise of interpretation, courts may not insert into a statute language that the Legislature did not enact, ignore language that the Legislature did enact, or adopt an interpretation that contravenes statutory objectives. *See New York State Psychiatric Ass'n, Inc. v. New York State Dep't of Health*, 19 N.Y.3d 17, 23-24 (2012); *People v. Paulin*, 17 N.Y.3d 238, 245 (2011); *see also* CHC Brief, Point II.B-D. Because the Town's interpretation of ECL § 23-0303(2) (and the Decision below) violate each and every one of these precepts, it must be rejected.

A. The Supersedure Language and Policies of the OGSML Are Not Limited To Regulating "Operations"

The Town's entire argument is fatally flawed because it *assumes* that the term "regulation" can never encompass where the regulated activity takes place. For example, the Town asserts that the OGSML's "express language . . . unambiguously identifies the Legislature's intent to preempt only discordant regulation of the operations of the oil and gas industry." *See* Town Brief, at 17-18, 21. However, the supersession language of ECL § 23-0303(2) applies unqualifiedly to all "local [ ] ordinances" – there is no language or qualifier limiting the phrase "regulation of the . . . industr[y]" solely to operations. *See* CHC Brief, at 17-18.

The Town also argues that legislative policies of the OGSML are limited solely to statewide regulation of "operations," not location. Specifically, the Town asserts that "the Legislature's declaration of policy confirms the intent to address only 'the *operation* and development of oil and gas properties,' which . . . does not indicate intent to preempt municipal land use powers, only regulations affecting drilling operations." Town Brief, at 21 (quoting ECL

§ 23-0301). However, the very language the Town quotes speaks not only to operations, but to "*development*" as well. Because there can be *no* development at all due to the Town Prohibition, the Town Prohibition plainly conflicts with the Legislature's express policy. The Town cannot inject language that the Legislature did not enact and ignore language that the Legislature did enact.

Likewise, the Town's reading of the exemptions in ECL § 23-0303(2) must be rejected. The Town argues that the exemptions in ECL § 23-0303(2) limiting local "jurisdiction" to local roads and real property taxes "are only relevant [ ] if the challenged local law constitutes 'regulation of the . . . industr[y],'" which it claims is limited to "operations." *See* Town Brief, at 18. Nowhere, however, does the Town even attempt to explain why these two exceptions would be necessary if "regulation of the . . . industr[y]" were limited solely to "operations." *See id. Local roads and property taxes have nothing to do with operations (i.e., the details or procedures for conducting oil and gas drilling).* Thus, these exceptions would be wholly unnecessary if "regulation" in the prefacing part of the clause were limited to "operations" as the Town contends. *See* CHC Brief, at 19-20. Thus, the Town's interpretation has no merit. *See* CHC Brief, at 19-20; *see also Floyd*, 33 N.Y.2d at 5-6 (reading "construct[ ], reconstruct[ ], and rehabilitate[ ], alter[ ] or improve[ ]" language in first part of supersedure provision together with second portion of provision; concluding based on that whole language reading that the "construction, reconstruction, etc." language could not be narrowly interpreted, but, rather, contemplated supersession of local zoning and not merely local building codes).[5]

[5] Contrary to the Amici NY Businesses' argument, CHC is not asking this Court to read the local roads and property tax exceptions so as to "annul the enacting clause." *See* NY Businesses' Brief, at 5-6. Again, this *assumes* that the term "regulation of the . . . industr[y]" can never include where the activity takes place. Rather, CHC is asking this Court to adopt the only reading of the supersession provision that does not render the local roads and property tax exceptions meaningless. *See Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104 (2001); *see also Floyd*, 33 N.Y.2d at 5-6 (reading supersession provision as a whole and in context to determine scope of supersession).

Also, contrary to the Town's claim, *Envirogas* does not support its argument. *See* Town Brief, at 19-20. In *Envirogas, Inc. v. Town of Kiantone*, 112 Misc. 2d 432 (Sup. Ct., Erie Cnty.), *aff'd*, 89 A.D.2d 1056 (4th Dep't), *lv. denied*, 58 N.Y.2d 602 (1982), the court held that ECL § 23-0303(2) preempted a local ordinance that regulated drilling operations by imposing a permit fee and performance bond requirement. Thus, the court was faced with local regulation solely of operations and, therefore, did not address whether supersession under the OGSML also included drilling location. Accordingly, *Envirogas* lends no support to the Town's position.

Finally, equally unavailing is the Town's parroting of the lower court's reliance on the dictionary definition of "'regulation'" as being "'an authoritative rule dealing with details or procedure." *See* Town Brief, at 17 (citation omitted). The Town, once again, self-servingly advances a distorted, selective misinterpretation of plain language – because to the extent the Town notes that "'regulate'" is also defined to mean "to govern or direct according to rule'", that definition necessarily encompasses where an activity may take place. *See id.* (citation omitted). Indeed, Black's Law Dictionary defines regulation in a manner that would include location. Specifically, (1) "regulate" is defined as "to fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or law"; (2) "regulation" is defined as "[t]he act of regulating; a rule or order prescribed for management or government; a regulating principle; a precept"; and (3) regulations are defined to be "[s]uch as are issued by various governmental departments *to carry out the intent of the law.*" Black's Law Dictionary 1286 (6th ed. 1990) (emphasis added). To the extent dictionary definitions are relevant at all, they do not support the Town's view that "regulation" can never encompass location. In fact, these definitions underscore that the meaning of "regulation" must be gleaned

from the context of the statute itself. Thus, the Town's so-called "plain language" reading of the OGSML fails.

B. "Regulation" Under The OGSML Includes The "Where" Of Drilling, Thus Preempting Local Regulation Of That Same Subject Matter

To determine the scope of preemption under ECL § 23-0303(2), the phrase "regulation of the . . . industr[y]" must be read in the context of the OGSML as a whole.[6] As explained in CHC's Brief, the OGSML regulates where drilling may occur in detailed fashion, and entrusts those decisions to the Department. CHC Brief, Point II.C. For example, ECL § 23-0303(1) vests administration of the OGSML exclusively in the Department. ECL § 23-0301 mandates that the Department "regulate … in such a manner as will prevent waste," and 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). ECL § 23-0501(1)(b)(1) details both specific acreage and wellbore location requirements relative to unit boundaries, and ECL § 23-0503(2) contains permitting directives that address the size and shape of units and relative distances between them to prevent waste, maximize recovery, and protect mineral owners' correlative rights.

Furthermore, the implementing regulations of the OGSML also contain location-based spacing, unit size, and setback requirements that complement the statutory directives. *See generally,* 6 NYCRR Part 553. And, the revised draft SGEIS and attendant proposed regulations include even more broad-based, location-based directives and prohibitions. *See, e.g.,* Draft SGEIS, § 3.2.4 (location-based drilling prohibitions). Notably, even the lower court recognized

[6] Even *Frew Run Gravel Prods., Inc. v. Town of Carroll,* on which the Town so heavily relies, instructs that in determining the scope of an express supersedure clause, the court must look to the plain meaning of the supersedure language "as one part of the entire [statute], to the relevant legislative history, and to the underlying purpose of the supersession clause as part of the statutory scheme." 71 N.Y.2d 126, 131 (1987).

that the OGSML regulates drilling location. *See* R. 14, Decision, at 10. Where the court erred was in not recognizing the legal significance of this fact – namely, that because the OGSML regulates drilling location, local governments may not.

Importantly, under statutory schemes where the regulation of location was far less explicit and comprehensive than that under the OGSML, the Appellate Division Second Department did not hesitate to find local regulation of location preempted. In *Sunrise Check Cashing,* the Second Department held that a local zoning ordinance restricting check-cashing establishments to industrial and light manufacturing districts was preempted by the State Banking Law, Article 9-A, specifically Banking Law § 369(1). 91 A.D.3d at 139-40. Legislative findings accompanying Article 9-A noted that the article was "to provide for the regulation of the business of cashing checks," which was to be performed by the superintendent of banks (the "Superintendent"). *Id.* at 135. The court then looked to the substantive provisions of the Banking Law and noted that the criteria for issuance of a license by the Superintendent included considerations as to whether the proposed check-cashing establishment was properly located. *Id.* at 136-38. The court found the local zoning ordinance preempted because "the Legislature ha[d] specifically delegated to the Superintendent the task of determining whether particular locations [were] appropriate for check-cashing establishments." *Id.* at 138.

Accordingly, where, as here, the State statute (1) expressly states that it supersedes local ordinances that regulate the oil and gas industry; (2) in multiple substantive provisions, regulates the proper location for oil and gas activity to occur; (3) accommodates local concerns via both comprehensive Statewide regulation legislatively determined to be protective of the public and a fund to compensate municipalities for damages due to oil and gas activity; and (4) is motivated by policies that are plainly defeated by contrary local zoning, "traditional respect for the primacy

of the state interest requires that the will of the Legislature prevails over the desires of [the] individual locality." *See Cohen,* 100 N.Y.2d at 403; *see also Town of Islip v. Cuomo,* 64 N.Y.2d 50, 56-57 (1984) ("legislation on matters of State concern 'even though . . . having a direct effect on the most basic of local interests does not violate the constitutional home rule provisions'" [citation omitted]).[7] In short, the Legislature's will is clear – contrary local zoning, such as the drilling ban at issue here, is preempted.

C. Statutory Background And Legislative History Support A Finding of Preemption

As discussed in CHC's Brief (Point II.D), when the supersedure provision was added to the OGSML in 1981, the Legislature was attempting to remedy rampant problems that had been caused by decades of parochial regulation. Notably, the Memorandum in Support of A.6928 (a separate bill that was ultimately incorporated into the omnibus 1981 legislation that enacted ECL § 23-0303[2]), expressly noted that (1) the supersedure provision was meant to clarify the intent behind the initial 1963 enactment; (2) the comprehensive scheme and the technical expertise required to administer and enforce the OGSML necessitated that administration and enforcement authority "be reserved to the State;" (3) localities' diverse attempts to regulate oil and gas activities "threaten[ed] the efficient development of these resources, with Statewide repercussions;" and (4) the State program embodied in the OGSML adequately "address[ed] the concerns of local government and assure[d] efficient and safe development . . . ." CHC Brief, at 27 (citing R. 949, 995). This background to the 1981 amendments, coupled with the language actually enacted by the Legislature, paint a clear picture of preemption here.[8]

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[7] *See also Woodbury Heights Estates Water Co. v. Vill. of Woodbury,* 37 Misc. 3d 180, 188-89 (Sup. Ct., Orange Cnty., 2012) (finding village law prohibiting removal of groundwater for use outside of village field preempted by ECL § 15-0501; noting State's transcendental interest).

[8] Additionally, when ECL § 23-0303(2) was added to the statute, in exchange for removing local control over the oil and gas industry, the Legislature gave localities two trade-offs – a liability fund to compensate localities for

The Town's arguments to the contrary are wholly unavailing. *Contrast* Town Brief, at 21-23, *with* CHC Brief, at 24-28. First, contrary to the Town's view, these legislative articulations *do* indicate the Legislature's intent to preempt discordant local land use regulation. Second, while the Town claims that the Legislature intended "to preempt only the technical aspects of . . . drilling" or "activities," the Town fatally fails to recognize that drilling *is* an "activity," and drilling at the proper location *is* a "technical aspect" of oil and gas drilling (as evidenced by the myriad provisions of the OGSML and its implementing regulations that specifically dictate where drilling may occur). Town Brief, at 22; *see* CHC Brief, Point II.C (discussing, *inter alia*, ECL §§ 23-0301, 23-0101[20], 23-0501[1][b][1], 23-0503[2], and 6 NYCRR Part 553).[9] Accordingly, statutory background and legislative history support a preemption finding.

D. The MLRL And Precedent Decided Thereunder Are Irrelevant

For all the reasons set forth in CHC's Brief, the Town's focus on the statutory history of the MLRL and precedent decided thereunder is wholly misguided. *Contrast* Town Brief, Point II.C, *with* CHC Brief, Point II.E. The OGSML is at issue here, not the MLRL. Try as they might, the Town and amici cannot render the two statutes comparable, be it in terms of supersession language, substance, policies, legislative history or circumstances of enactment.

First, merely because "relating to the regulation" of the mining industry was interpreted not to preempt local zoning under the MLRL does not mean that the same result is compelled

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damages resulting from oil and gas activities and taxing authority. *See* ECL § 23-0303(3); s*ee also* R. 728-30, Hennessey Aff.. ¶¶ 41-44.

[9] The Town's objection to this Court's consideration of the Sovas Aff. (*see* R. 45-51), must be rejected. The Sovas Aff. is not offered to supplant or expand upon legislative history; the statute and legislative history are clear on their face. Rather, the Sovas Aff. is offered to provide important context relative to the circumstances surrounding enactment of ECL § 23-0303(2) in 1981 and how the Department has consistently implemented that provision for three decades. Given Mr. Sovas' tenure as Division Director for the Division of Mineral Resources and Chief of the Bureau of Mineral Resources for two and one-half decades during the relevant timeframes, and the fact that he was the primary author of the 1981 amendments, he is eminently competent to speak to the matters set forth in his affidavit.

under the "regulation of the . . . industr[y]" language of the OGSML. Even *Frew Run* instructs that the scope of supersession must be determined by viewing the supersession language within the context of the subject statute, its legislative history and surrounding circumstances. *Frew Run*, 71 N.Y.2d at 131. Of course, as *Sunrise Check Cashing* (91 A.D.3d 126) demonstrates, the phrase "regulation of the . . . industry[y]" does encompass location, thus preempting local zoning ordinances, where the statute's substantive provisions and implementing regulations specifically address where the activity may be conducted and vest those determinations in the State. And, that is precisely what the OGSML does relative to drilling location. *See* Point III.B, *supra;* CHC Brief, Point II.C; *see also Ames*, 98 A.D.2d at 219-22 (invalidating local ordinance that banned aerial pesticide spraying in the village, where ECL Article 33 vested in the Commissioner authority to promulgate regulations prescribing time, *place*, manner and method of application).

Moreover, the Town cannot escape this legislative reality by claiming that the MLRL regulates mining location. *See* Town Brief, at 27-28. The Town's entire argument relies on a single statutory provision, taken wholly out of context, which requires a mining applicant to submit a mined land-use plan which must be approved by the Department prior to issuance of the mining permit. *See id.* (citing ECL § 23-2713[1][a]). This argument is specious for a variety of reasons. First and foremost, the MLRL *specifically provides for local zoning control*, precluding the Department from issuing a permit unless mining is an allowable use in the location proposed by the applicant. *See* ECL § 23-2711(2)(c) & (3). Thus, under the MLRL, the situs municipality, not the Department, controls the permissible locations for mining. Further, as the Town's silence suggests, the MLRL lacks anything remotely comparable to the statutorily-prescribed, location-based directives that pervade the OGSML and its implementing regulations,

or the overarching mandate that the activity be located and conducted so as to prevent waste. *See* CHC Brief, Point II.C; *see also* Point III.B, *supra*.

The Town also cannot succeed in drawing parallels between the two statutes by flatly ignoring key language distinctions between them relative to local jurisdiction. The MLRL expressly states that it does not prevent stricter local zoning ordinances, reaffirms local authority to determine permissible land uses, and further acknowledges local zoning control in a number of substantive provisions. In stark contrast, the OGSML unqualifiedly states that it supersedes all "local laws *and ordinances*" (with the only exceptions being local roads and real property taxes) and has no provisions reaffirming local zoning authority. *Contrast* Town Brief, at 23 n. 6, *with* CHC Brief, at 28-30.

Nor can the Town succeed in arguing that the evolution of the MLRL post-*Frew Run* and later culminating in the *Gernatt Asphalt* decision and its progeny somehow informs the preemption analysis under the OGSML. *See, e.g.,* Town Brief, at 25-27 (arguing that the Legislature's codification in 1991 of the *Frew Run* holding interpreting the phrase "relating to the extractive mining industry" is significant to or dispositive of the meaning of the phrase "regulation of the oil, gas and solution mining industries" in the OGSML). The OGSML is a wholly distinct statute, with language, background, history, purpose and design wholly different from the MLRL. CHC Brief, Point II.E.

Finally, the Town cannot equate the policies of the MLRL and OGSML and assert that drilling bans like the Town Prohibition (and others like it that are being enacted throughout New York State) exert only "incidental control" over, or only "tangentially impact," the State's interests. *See* Town Brief, at 29, 34. The State's espoused interests relative to natural gas development include: (1) "promot[ing] the development of domestic energy supplie[s], including

NYS's resources of oil and natural gas" (R. 727, 840, Hennessey Aff. ¶ 35 & Exh. K); (2) providing for "the efficient and safe development of these energy resources" (R. 949, 995, Hennessey Renewal Aff. ¶ 34 & Exh. G); (3) preventing waste, "provid[ing] for . . . greater ultimate recovery of oil and gas," and protecting correlative rights (ECL § 23-0301); and (4) "foster[ing], encourag[ing] and promot[ing] the prudent development of [ ] all indigenous state energy resources including . . . natural gas from Devonian shale formations[.]" R. 725-26, Hennessey Aff., ¶ 27 (stating the central policy of Energy Law § 3-101[5], L. 1978, c. 396). All of this is meant to (and must) be accomplished through a comprehensive State-led statutory and regulatory scheme that specifically dictates where drilling is to occur. This stands in marked contrast to the design and policies of the MLRL which contain no location-based directives and expressly speak to accommodating local interests through local land use controls.

In the end, the dispositive point is simple: if the Town Prohibition is not preempted, then all localities can pass drilling bans. And, if all localities can "zone out" natural gas drilling entirely, how is it possible to satisfy any of the explicit spacing and location-based directives of the OGSML or any of the aforementioned policies of the OGSML and Energy Law? The answer is that it is not possible. Thus, the Town Prohibition is preempted and cannot stand.

POINT IV

THE TOWN PROHIBITION IS CONFLICT PREEMPTED UNDER THE OGSML AND ENERGY LAW

A. An Implied Preemption Analysis Is Not Foreclosed

As explained fully in CHC's Brief (Point III.A), the express supersedure language in ECL § 23-0303(2) does not foreclose an implied preemption analysis under the OGSML. *See Doomes v. Best Transit Corp.*, 17 N.Y.3d 594, 602-03 (2011). Moreover, it certainly does not foreclose an implied preemption analysis under the Energy Law.

B. The Town Prohibition Conflicts With The OGSML And Energy Law

In arguing against implied preemption, the Town does not substantively address the many head-on conflicts between its ban on drilling and the "prevent waste" and other location-based directives in the OGSML. The Town states only that "these regulations merely establish a limit on the number of wells that may be constructed statewide and provide minimum area and setback requirements to ensure adequate protection of the State's natural resources . . . ." Town Brief, at 33-34 (citing ECL §§ 23-0501, 23-0503). However, the reality is that the Town Prohibition presents the very ultimate in waste since all oil and gas resources underlying the Town, as well as some resources beyond the Town's boundaries, will be wholly inaccessible. CHC Brief, at 36-38.

Strikingly, in arguing against implied preemption, the Town makes no mention whatsoever of the "foster, encourage and promote [ ] development" policy of Energy Law § 3-101(5). This is likely so because it is obvious that development of New York State's indigenous natural gas resources is wholly frustrated – indeed, impossible – in the face of wholesale bans like the Town Prohibition. CHC Brief, at 39.

To the extent the Town acknowledges the policies underlying the OGSML, it cherry picks certain ones to the exclusion of others, and then uses those policies to serve its own end. *See* Town Brief, at 32-33, 34-35. The Town focuses on the policy in ECL § 23-0301 "that the correlative rights of all owners and the rights of all persons including landowners and the general public [ ] be fully protected." *Id*. at 32. Then, arguing against preemption, the Town claims that (1) by this articulation the Legislature recognized "the interplay that must occur between the rights of owners of oil and gas properties, such as Plaintiffs, and the rights of all landowners and the general public;" and (2) correlative rights are protected despite drilling bans because

"regardless of whether a landowner is prohibited from conducting oil and gas drilling within a specific municipality, the landowner will still be entitled to compensation for his fair share of oil or gas produced from beneath his property. . . ." *Id*. at 32, 34-35.

Neither contention weighs against a finding of conflict preemption. As to its first claim, the Town asks this Court to adopt the impermissibly myopic view that "protection of the general public" is served by precluding the energy development and independence that the OGSML and Energy Law seek to achieve. Of course, it is not. The Town also ignores that the comprehensive detailed scheme under the OGSML is, itself, fully protective of the environment and public safety, as reflected in legislative history. R. 995, Hennessey Renewal Aff., Exh. G (stating the "State's [OGSML] regulatory program will be able to address the concerns of local government and assure the efficient and safe development of these energy resources").

Last, the Town's claim that correlative rights are protected by the Town Prohibition has no merit. Because oil and gas resources underlying the Town cannot be accessed or extracted at all, there can be no compensation to mineral rights owners within the Town. This means that the property rights of these mineral owners are destroyed. Moreover, due to State spacing requirements and the geophysical properties of the resource, mineral rights owners beyond the Town's boundaries also stand to be deprived of their mineral estate. *See* CHC Brief at 38. Thus, the Town Prohibition *destroys* landowners' correlative rights, both territorially and extraterritorially. This directly contravenes the policies of the OGSML and Energy Law, rendering the Town Prohibition conflict preempted.

Notably, the Colorado Supreme Court reached this conclusion under comparable circumstances and invalidated a municipal drilling ban as being conflict preempted under a state statutory scheme motivated by the very same policies as those underlying the OGSML. *See*

CHC Brief, at 40-41 (discussing *Voss v. Lundvall Bros., Inc*, 830 P.2d 1061, 1067 [Colo. 1992]). In *Voss*, the court astutely noted that a "total ban on drilling . . . could result in uneven and potentially wasteful production . . . [or] conflict with the [state agency's] express authority to divide a pool into drilling units and to limit the production of the pool so as to prevent waste and protect the correlative rights of owners . . . ." *Voss*, 830 P.2d at 1067. Thus, the court found that the home rule city's ban on drilling was preempted. *Id.* That very same rationale applies here.

Accordingly, drilling bans like the Town Prohibition directly conflict with the State's policies to prevent waste, maximize recovery, and protect correlative rights. Thus, the Town Prohibition is conflict preempted and invalid.

C. The Law Of Sister Jurisdictions Supports A Preemption Finding

Although the law of sister jurisdictions is not binding on this Court, it is instructive. The courts of both Colorado and West Virginia have invalidated municipality-wide bans on natural gas drilling. CHC Brief, at 14-15, 40-41. Notably, no party to this litigation has identified a single state that has upheld a locality's total ban on natural gas drilling. Although the Environmental Amici identify a number of restrictive zoning ordinances from municipalities in New Mexico, Kansas, Wyoming, Oklahoma, Texas, and Colorado, local zoning control is expressly permitted under those respective states' statutes, and, in any event, none of the cited ordinances involves a total ban on natural gas drilling. *See* Environmentalists' Brief, at 23-24.

And, it bears mention that in examining the permissibility of local zoning, in the absence of an express legislative articulation reserving full zoning authority as to permissible land use (such as in the MLRL), the New York Court of Appeals has recognized that broad-based bans may indeed contravene State interests. *See, e.g., Incorporated Vill. of Nyack v Daytop Vill. Inc.*, 78 N.Y.2d 500, 508 (1991) (finding local law regarding placement of substance abuse facilities

not preempted by state law, but noting that local law included a process for variance and certificate of occupancy and emphasizing that "[t]here [wa]s no showing [ ] that the Village of Nyack has effectively tailored its zoning laws to block the placement of substance facilities within its borders").

Finally, the Environmental Amici point to Pennsylvania jurisprudence upholding local zoning that did not regulate the so-called "technical aspects of natural gas operations." *See* Environmentalists' Brief, at 24 (discussing, *inter alia*, *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 855 [Pa. 2009]). However, those cases do not involve municipality-wide bans, and the results were dictated by the statutory language which limited the scope of preemption solely to "features of oil and gas well *operations*" regulated by the Pennsylvania Oil and Gas Act. *Huntley & Huntley, Inc*., 964 A.2d at 858. Of course, ECL § 23-0303(2) contains no such "operations" limitation on the scope of preemption.

Accordingly, the law of sister jurisdictions lends no support for the Town's position and actually supports a finding of preemption here.

CONCLUSION

CHC respectfully requests that this Honorable Court reverse the Decision and grant summary judgment in CHC's favor and order the relief requested in CHC's Complaint.

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STATE OF NEW YORK
SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

COOPERSTOWN HOLSTEIN CORPORATION,

Plaintiff-Appellant,

-against-

TOWN OF MIDDLEFIELD,

Defendant- Respondent.

App. Div. Case No.: 515498

Ostego County Index No.: 2011-0930

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