To be Argued by:
John J. Henry, Esq.
(Time Requested: 30 Minutes)

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Appellate Division—Third Department Docket No. 515498

Court of Appeals

of the

State of New York

COOPERSTOWN HOLSTEIN CORPORATION,

Plaintiff-Appellant,

-against-

TOWN OF MIDDLEFIELD,

Defendant-Respondent.

BRIEF FOR RESPONDENT

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1. Did the Appellate Division, Third Department properly conclude that the Town of Middlefield's zoning law, enacted pursuant to its constitutionally guaranteed and legislatively delegated municipal home rule authority, identifying certain heavy industrial uses, such as oil, gas, or solution mining and drilling, as prohibited uses within the Town is not expressly preempted by Environmental Conservation Law § 23-0303(2)?

The Appellate Division properly held that Middlefield's zoning law is not expressly preempted by Environmental Conservation Law § 23-0303(2).

2. Did the Appellate Division, Third Department properly conclude that the Town of Middlefield's zoning law, enacted pursuant to its constitutionally guaranteed and legislatively delegated municipal home rule authority, identifying certain heavy industrial uses, such as oil, gas, or solution mining and drilling, as prohibited uses within the Town is not implicitly preempted by Environmental Conservation Law § 23-0303(2) and the regulations of the New York State Department of Environmental Conservation ("DEC") relating to oil, gas, and solution mining?

The Appellate Division properly held that Middlefield's zoning law is not implicitly preempted by Environmental Conservation Law § 23-0303(2) and the regulations of the DEC relating to oil, gas, and solution mining.

PRELIMINARY STATEMENT

Defendant-Respondent Town of Middlefield (the "Town" or "Middlefield") respectfully submits this brief in opposition to the appeal of Plaintiff Cooperstown Holstein Corporation ("Plaintiff") from a Memorandum and Order of the Appellate Division, Third Department, dated and entered May 2, 2013 (R., Vol. 2, at 1029-1031),[1] affirming the judgment of Supreme Court, Otsego County (Cerio, A.J.), dated August 1, 2012 and entered August 8, 2012, dismissing Plaintiff's complaint and declaring that "the Town of Middlefield's zoning law (Local Law No. 1 of 2011) pertaining to Gas, Oil, or Solution Drilling or Mining and the ban on Gas, Oil, or Solution Drilling or Mining within the Town of Middlefield is valid and is not preempted by New York State Environmental Conservation Law § 23-0303" (R., Vol. 1, at 24-25).

In this declaratory judgment action, Plaintiff seeks to void Middlefield's zoning law, adopted pursuant to its constitutionally guaranteed and legislatively delegated zoning powers, determining that heavy industrial uses, including oil, gas or solution mining, are not permitted uses of land within Middlefield. In an attempt to overcome the strong presumption of validity accorded to Middlefield's local land use regulation, Plaintiff argues that all of Middlefield's land use powers are superseded by Environmental Conservation Law ("ECL") § 23-0303(2), which

[1] Citations to the Record on Appeal herein will appear as "(R., Vol. __, at __)".

preempts only a municipality's attempt to regulate the technical operations of oil and gas extraction. Plaintiff's argument is unsupported by the express statutory language and is contrary to New York law, which recognizes Middlefield's longstanding power to enact generally applicable zoning regulations determining permitted and prohibited land uses within its own borders.

Middlefield respectfully submits that there is no basis to find express or implied preemption of its land use powers here. Under Plaintiff's view, the oil and gas industry can dictate the location of any drilling and other related heavy industrial uses within a municipality without regard to local zoning laws or ordinances. An oil and gas concern could, for example, locate a drilling operation next to a school or church, or in a residential district, so long as the State has given approval to do so, regardless of the terms of Middlefield's zoning law. Such a result disregards the State's longstanding municipal land use home rule principles and is unsupported by ECL 23-0303(2), which preempts only local regulation of the oil and gas industry, not local land use laws that govern whether and where such operations may take place within Middlefield's borders.

The analysis to be applied is no different than that employed by this Court in *Matter of Frew Run Gravel Prods. v Town of Carroll* (71 NY2d 126 [1987]) in which this Court addressed the virtually identical language of the Mined Land Reclamation Law ("MLRL") (ECL art 23, tit 27). In *Frew Run*, this Court

construed the language of the MLRL, which provided that all "local laws relating to the extractive mining industry" were preempted, as preempting only "[l]ocal regulations dealing with the actual operation and process of mining," leaving intact a municipality's power to determine "whether a mining operation—like other uses covered by a zoning ordinance—should be permitted or prohibited in a particular zoning district" (*id.* at 133).[2] The language at issue here—providing that "local laws or ordinances relating to the regulation of the oil, gas and solution mining industries" are preempted (ECL 23-0303[2])—is not materially different and must be construed in the same way. Notably, this Court has repeatedly followed the analysis of *Frew Run* in a variety of contexts.

As demonstrated fully below, the Appellate Division properly rejected Plaintiff's claims and, thus, the Appellate Division order should be affirmed.

COUNTERSTATEMENT OF FACTS

Located in the heart of the Leatherstocking Region of New York, Middlefield is a rural community at the edge of the east side of Otsego Lake, whose main industries are agriculture and tourism (R., Vol. 1, at 225). For years, Middlefield has used its municipal home rule authority to preserve its quiet and rural heritage and to promote land use within its borders that is consistent with that way of life.

[2] As discussed below, the Legislature subsequently codified the results in *Frew Run* in a 1991 amendment to the MLRL.

In that vein, in 2011, following a lengthy and detailed review of Middlefield's Master Plan and zoning ordinance, which included several well-attended public meetings and public hearings and review of hundreds of pages of land use studies, the Town Board unanimously resolved to amend the Master Plan and to adopt a zoning law which classifies a range of heavy industrial uses, including oil, gas, and solution mining and drilling, as prohibited uses in the Town (the "Zoning Law") (R., Vol. 1, at 135, *et seq.*).[3] From its review, the Town Board determined that heavy industry is inconsistent with the Town's rural history and community character because Middlefield, which includes a portion of the Village of Cooperstown, is known for and characterized by its "clean air, clean water, farms, forests, hills, trout streams, scenic viewsheds, historic sites, a quaint village and hamlets, rural lifestyle, recreational activities, sense of history, and history of landscape conservation. These features give Middlefield its sense of place and community character" (R., Vol. 1, at 290; *see also* R., Vol. 1, at 208-209).

Middlefield's local economy is based largely upon tourism and farming, the success of which depends upon maintaining its community character and ensuring

[3] Notably, oil and gas mining and drilling was not an allowable use of land in the Town prior to the enactment of the Town's Zoning Law. Prior to the Zoning Law, the Town's "existing Zoning Ordinance, as underpinned by [its] 1989 Master Plan and [its] 2002 GEIS, already prohibit[ed] natural gas exploration by exclusion"—that is, because the prior zoning ordinance did not list oil and natural gas mining and drilling as permissible uses of land, such land uses were already prohibited (R., Vol. 2, at 606). Thus, the Town's Zoning Law challenged in this action did not alter the Town's zoning, but merely codified the prohibition of heavy industrial uses, including oil, gas, and solution mining and drilling, expressly.

the vitality and health of the natural and community resources mentioned above (R., Vol. 1, at 210-211, 216-217, 225). Tourism is the "fourth largest employment sector in the County, generating 1 in 10 jobs and bringing $20 million in tax revenues annually, and creates more jobs than heavy industries like gas drilling" (R., Vol. 1, at 276). The adverse impacts to the tourism industry and Middlefield's community character from noise and truck traffic and to aesthetic, visual, cultural, historic and natural resources—all critical components of the successful tourist trade—were carefully considered and were a primary basis for the Town Board's decision to amend the Zoning Law (R., Vol. 1, at 202-217, 267-277).

The Town Board was particularly concerned with the impacts that heavy industrial uses would have on its water supply, which could adversely impact not only the health, safety, and welfare of Middlefield's residents (R., Vol. 1, at 203-206), but also the Town's tourism and agricultural sectors (R., Vol. 1, at 210-211, 216-217, 250-256, 267-269). "Agriculture is one of the largest sectors of the Town's economy," and as the number of certified organic farms and related agribusinesses has increased in New York, the importance of unquestionably clean air and water cannot be underestimated (R., Vol. 1, at 205, 268-269, 335, 537-538). Middlefield's tourism industry also relies heavily on the Town's water resources to support recreational fishing and other activities on Otsego Lake (R., Vol. 1, at 255-256). The Town Board likewise concluded that the introduction of industrial land

uses may adversely affect the ability of the County's largest employer, Bassett Healthcare Network, to attract medical professionals to the area, many of whom live and work in Middlefield (R., Vol. 1, at 364-365, 373-374, 381, 511).

With the health, safety, and welfare of its residents and its rural community character in mind, on June 14, 2011, Middlefield repealed its existing Zoning Law and replaced it with a new law, effective June 28, 2011. The Town also added a Profile and Inventory of the Town's resources, which had been generated as part of a regional Generic Environmental Impact Statement ("GEIS") that examined regional growth issues, to its Master Plan (R., Vol. 1, at 135-197). As amended, the Zoning Law prohibits certain heavy industrial uses within the Town, including oil, gas, and solution mining and drilling (R., Vol. 1, at 114). Exemptions from the definition of heavy industry include, among other things, milk processing plants, dairy farms, wineries and breweries, agriculture, and gravel and sand mining (R., Vol. 1, at 100). At the time that Middlefield adopted these amendments, no heavy industrial uses were present or permitted in the Town (R., Vol. 1, at 225; *see also* R., Vol. 2, at 606).

Shortly after Middlefield enacted the Zoning Law, Plaintiff commenced this action, arguing that the Zoning Law was preempted by ECL 23-0303(2) and the Department of Environmental Conservation's ("DEC") regulations relating to the oil, gas, and solution mining industries (R., Vol. 1, at 26-36). Following joinder of

issue, Plaintiff moved for summary judgment seeking a declaration that Middlefield's Zoning Law pertaining to oil, gas, and solution mining and drilling was preempted by ECL 23-0303(2) and void (R., Vol. 1, at 43-44), and Middlefield cross-moved for summary judgment dismissing Plaintiff's complaint (R., Vol. 1, at 88-89).

A. The Supreme Court Judgment

In a well-reasoned decision and order examining the extensive legislative history underlying the ECL 23-0303(2) supersession provision, Supreme Court, Otsego County (Cerio, A.J.) denied Plaintiff's motion and granted Middlefield's cross motion (R., Vol. 1, at 5-15). Specifically, the Court waded through 20 years of legislative history, including the 1963, 1978, and 1981 amendments relating to oil, gas, and solution mining, and concluded that,

> There is no language contained within the legislative history which serves to support plaintiff's claim that the supersession clause enacted was intended to impact, let alone diminish or eliminate, a local municipality's right to enact legislation pertaining to land use.
>
> Therefore, this court finds no support within the legislative history leading up to and including the 1981 amendment of the ECL as it relates to the supersession clause which would support plaintiff's position in this action. Neither the plain reading of the statutory language nor the history of ECL § [23-0303(2)] would lead this court to conclude that the phrase "this article shall supersede all local laws or ordinances **relating to the regulation** of the oil, gas and solution mining industries" was intended by the Legislature to abrogate the constitutional and statutory authority vested in local municipalities to enact legislation affecting land use. (New York State Constitution, Article IX, §2(c)(ii)(10); Municipal Home Rule Law §§10(1)(ii)(a), 11 and 12; Statute of Local Governments §§10(6) and (7), and; Town

> Law §261). Rather, the "natural and most obvious sense" of the word 'regulation' in this statute, taken in conjunction with the legislative history of this body of law as well as its definition as "an authoritative rule dealing with details or procedure" (Merriam-Webster Dictionary), convincingly demonstrates that the legislature's intention was to insure state-wide standards to be enacted by the Department of Environmental Conservation as it related to the manner and method to be employed with respect to oil, gas and solution drilling or mining, and to insure proper state-wide oversight of uniformity with a view towards maximizing utilization of this particular resource while minimizing waste. Clearly, the state's interests may be harmonized with the home rule of local municipalities in their determination of where oil, gas and solution drilling or mining may occur. The state maintains control over the "how" of such procedures while the municipalities maintain control over the "where" of such exploration

(R., Vol. 1, at 12).

Supreme Court also held that this Court's decisions in *Frew Run* (71 NY2d 126 [1987]) and *Matter of Gernatt Asphalt Prods. v Town of Sardinia* (87 NY2d 668 [1996])—addressing the scope of preemption under a "strikingly similar" supersession provision in the Mined Land Reclamation Law ("MLRL")—supported the conclusion that Middlefield's generally applicable exercise of its zoning authority was not preempted by ECL 23-0303(2) (R., Vol. 1, at 12-13). Thus, as this Court held in *Frew Run* and *Gernatt Asphalt Prods.* with respect to the MLRL, Supreme Court below determined that section 23-0303(2) "does not apply to local regulations addressing land use which may, at most, 'incidentally' impact upon the 'activities' of the industry of oil, gas and solution drilling or mining" (R., Vol. 1, at 13). Indeed, Supreme Court concluded,

> [Middlefield's] Zoning Law is an exercise of the municipality's constitutional and statutory authority to enact land use regulations even if such may have an incidental impact upon the oil, gas and solution drilling or mining industry. The Zoning Law does not conflict with the state's interest in establishing uniform policies and procedures for the manner and method of the industry or does it impede implementation of the state's declared policy with respect to these resources

(R., Vol. 1, at 13).

Finally, Supreme Court rejected Plaintiff's assertion that the ECL gave DEC exclusive control over all aspects of the oil, gas, and solution mining industries, including over land use matters. Noting that the ECL "clearly demonstrates the state's interest in regulating the 'activities,' i.e., the manner and method, of the industry," the Court held that none of the ECL provisions concerning these activities expressly or implicitly referred to local "land use legislation [as] being preempted" (R., Vol. 1, at 13-14). Therefore, Supreme Court held,

> the OGSML supersession clause preempts local regulation solely and exclusively as to the method and manner of oil, gas and solution mining or drilling, but does not preempt local land use control. Such distinct interests are easily harmonize[d] as the local land use controls do not frustrate the state's interest in regulating the method and manner of such industry activities and therefore do not interfere with the state's declared policy as set forth at ECL §23-0301

(R., Vol. 1, at 14).

Plaintiff then moved to renew its motion for summary judgment, on the ground that it had uncovered additional legislative history underlying section 23-0303(2) that would have altered the Court's prior determination had it been

available prior to the decision (R., Vol. 2, at 940-943). Supreme Court denied Plaintiff's motion, holding, first, that Plaintiff had not proffered a reasonable justification for failing to provide the Court with this information with its initial motion papers and, second, that the purportedly new legislative history did not change the Court's prior determination (R., Vol. 1, at 18-21). Specifically, Supreme Court concluded that a Memorandum in Support of a different law that ultimately was not enacted with the 1981 amendments, on which Plaintiff relied in support of its motion to renew (R., Vol. 2, at 992-995),

> clearly references the 1963 predecessor provisions, which, themselves, specifically addressed the "how" of oil, gas and solution mining or drilling, rather than "where" such activity may occur. The memorandum, by its very terms, pertains to the matter of program funding and serves to confirm the state's interest in bringing to bear the "technical expertise" necessarily required by state oversight, rather than disparate local control, to effectuate effective state-wide uniformity with respect to the manner and method by which such drilling would occur. Supersession, as referenced within the memorandum, did not serve nor was intended to preempt local land use regulation with respect to this industry. To conclude from a reading of this passage that the legislative intent was to disenfranchise local authorities from implementing local land use regulation would seem a leap of constructive interpretation which this court cannot embrace

(R., Vol. 1, at 20).

In accordance with its prior decisions and orders, on August 1, 2012, Supreme Court issued a judgment dismissing Plaintiff's complaint and declaring that "the Town of Middlefield's zoning law (Local Law No. 1 of 2011) pertaining

to Gas, Oil, or Solution Drilling or Mining and the ban on Gas, Oil, or Solution Drilling or Mining within the Town of Middlefield is valid and is not preempted by New York State Environmental Conservation Law § 23-0303" (R., Vol. 1, at 25). Plaintiff appealed the August 1, 2012 judgment of Supreme Court (R., Vol. 1, at 2).

B. The Appellate Division Order

The Appellate Division, Third Department (Peters, P.J., Stein, Spain, and Garry, JJ.) affirmed the Supreme Court judgment "[f]or the reasons set forth in Matter of Norse Energy Corp. USA v Town of Dryden" (R., Vol. 2, at 1029-1031). In *Norse Energy Corp. USA*, noting that the New York Constitution grants local municipalities a wide range of authority to determine what is in the best interests of their residents' health, safety, and welfare, the Appellate Division emphasized that one of the most fundamental exercises of local municipalities' constitutional home rule authority is to foster productive land use by enacting zoning laws (R., Vol. 2, at 1037). Although the Appellate Division recognized that a municipality's exercise of its rights cannot conflict with state law, it nonetheless rejected Plaintiff's position that ECL 23-0303(2) preempts generally applicable zoning laws that define heavy industrial uses, such as oil, gas, and solution mining and drilling, as prohibited land uses within a municipality's borders.

Specifically, addressing Plaintiff's contention that generally applicable zoning laws are expressly preempted, the Appellate Division held that "nothing in the language, statutory scheme or legislative history of the statute indicat[es] an intention to usurp the authority traditionally delegated to municipalities to establish permissible and prohibited uses of land within their jurisdictions" (R., Vol. 2, at 1042). Consistent with ECL 23-0303(2)'s plain meaning, the Court concluded that the Oil, Gas, and Solution Mining Law ("OGSML") supersession provision, which expressly preempts only those local laws "relating to the regulation of the oil, gas and solution mining industries," only precludes local laws that concern the technical operations of the oil, gas, and solution mining industries, not zoning laws that apply to all properties in the municipality regardless of the type of business conducted (R., Vol. 2, at 1039). Indeed, the Appellate Division held:

> Regulation is commonly defined as "an authoritative rule dealing with details or procedure." The zoning ordinance at issue, however, does not seek to regulate the details or procedure of the oil, gas and solution mining industries. Rather, it simply establishes permissible and prohibited uses of land within the Town for the purpose of regulating land generally. While the Town's exercise of its right to regulate land use through zoning will inevitably have an incidental effect upon the oil, gas and solution mining industries, we conclude that zoning ordinances are not the type of regulatory provision that the Legislature intended to be preempted

(R., Vol. 2, at 1038-1039 [citations omitted]).

Like Supreme Court, the Appellate Division also conducted an extensive review of the legislative history underlying the enactment of ECL 23-0303(2), and

the OGSML generally, and found its determination of the scope of preemption well supported (R., Vol. 2, at 1039-1042). The Court noted that when the state's statutory scheme governing oil and gas production was first added to the former Conservation Law in 1963, it "focus[ed] on matters that [we]re regulatory in nature, such as well spacing, delineation of pools and procedures for obtaining permits. The[statute did] not address any traditional land use issues that would otherwise be the subject of a local municipality's zoning authority" (R., Vol. 2, at 1040). With the 1978 amendments, which modified the policy of the OGSML from "foster[ing], encourag[ing] and promot[ing]" the production of oil and gas to *regulating* such production, the Court held that "the Legislature clearly acknowledged that promotion and regulation were considered separate and distinct activities, as they transferred the promotion of energy to the Energy Office while continuing regulation of the oil, gas and solution mining industries within the Department of Environmental Conservation" (*id.* [emphasis in original]).

Most significantly, the Appellate Division held, when the Legislature adopted section 23-0303(2) in the 1981 amendments to the OGSML, its clear intent was "'to promot[e] the development of oil and gas resources in New York and regulat[e] the activity of the industry,'" by providing for "'new fees to fund additional regulatory personnel for the industry and . . . a fund to pay for past and future problems which resulted [from] the industry's activities [and] establish[ing]

a uniform method of real property taxation for oil and natural gas lands'" (R., Vol. 2, at 1041 [emphasis and alteration in original]). Moreover, the Court noted, an overriding purpose of the 1981 amendments was to "provide DEC with funding for its 'updated regulatory program' as well as 'additional enforcement powers necessary to enable it to provide for the efficient, equitable and environmentally safe development of the State's oil and gas resources'" in order to remedy the agency's previous inability to keep up with the growth of the oil and gas industry in the state (*id.*).

In essence, the Appellate Division concluded, each of the amendments to the OGSML leading up to, and including, the enactment of ECL 23-0303(2) were designed "to insure uniform statewide standards and procedures with respect to the *technical operational activities of the oil, gas and mining industries* in an effort to increase efficiency while minimizing waste, and that the supersession provision was enacted to eliminate inconsistent local regulation that impeded that goal" (R., Vol. 2, at 1041-1042 [emphasis added]). The Court held, however, that nothing in the legislative history evidenced an intent to preempt local municipalities' home rule powers to establish permissible and prohibited land uses generally (R., Vol. 2, at 1042). Thus, "[i]n the absence of a clear expression of legislative intent to preempt local control over land use, [the Court] decline[d] to give the statute such a construction," but instead harmonized ECL 23-0303(2) with Middlefield's home

rule authority to regulate land uses through zoning by properly limiting the scope of preemption to "only local legislation *regulating the actual operation, process and details of the oil, gas and solution mining industries*" (*id.* [emphasis added]).

The Appellate Division found further support for its construction of ECL 23-0303(2) in this Court's reasoning in *Frew Run* and *Gernatt Asphalt Prods.* with respect to the nearly-identical MLRL supersession provision (R., Vol. 2, at 1042-1043). As this Court held in *Frew Run* and *Gernatt Asphalt Prods.*, local zoning authority was not preempted under the MLRL because it did not "relate" to the extractive mining industry but to "'an entirely different subject matter and purpose: i.e., regulating the location, construction and use of buildings, structures, and the use of land in the Town'" (R., Vol. 2, at 1043, quoting *Frew Run*, 71 NY2d at 131)—so too held the Third Department:

> Here, too, the amendment to the Town's zoning ordinance—enacted pursuant to its constitutional and statutory authority to impose land use regulations—while incidentally impacting the oil, gas, and solution mining industries, does not conflict with the state's interest in establishing uniform procedures for the operational activities of these industries

(R., Vol. 2, at 1043-1044). Thus, the Court properly held that ECL 23-0303(2) did not expressly preempt Middlefield's Zoning Law (R., Vol. 2, at 1044).

Finally, the Appellate Division held that Middlefield's Zoning Law was not implicitly preempted because "the zoning amendment neither conflicts with the language nor the policy of the OGSML" (R., Vol. 2, at 1045). The Court held that

the well spacing provisions of the OGSML on which Plaintiff relied to suggest an irreconcilable conflict

> relate to the details and procedures of well spacing by drilling operators and do not address traditional land use considerations, such as proximity to nonindustrial districts, compatibility with neighboring land uses, and noise and air pollution. As we noted, the well-spacing provisions of the OGSML concern technical, operational aspects of drilling and are separate and distinct from a municipality's zoning authority, such that the two do not conflict, but rather, may harmoniously coexist; the zoning law will dictate in which, if any, districts drilling may occur, while the OGSML instructs operators as to the proper spacing of the units within those districts in order to prevent waste

(*id.* [citations omitted]).

The Appellate Division also rejected Plaintiff's argument that Middlefield's Zoning Law conflicted with the policies underlying the OGSML, holding instead that "[t]here is nothing in the statute or its legislative history suggesting, as petitioner does, that it is the policy of this state to 'maximize recovery' of oil and gas resources at the expense of municipal land use decision making" (*id.*). As the Court held, the OGSML's statement of policy to avoid waste "does not equate to an intention to require oil and gas drilling operations to occur in each and every location where such resource is present, regardless of the land uses existing in that locale" (R., Vol. 2, at 1046). Instead, the Court acknowledged, the policies require a balancing of the rights of all property owners, including the general public, which

is best promoted by allowing municipalities to decide what is in the best interests of their residents (*see id.*).

Plaintiff sought leave to appeal from the Appellate Division order of affirmance, and this Court granted leave (R., Vol. 2, at 1026-1027).

ARGUMENT

POINT I

MIDDLEFIELD PROPERLY EXERCISED ITS CONSTITUTIONAL HOME RULE AUTHORITY TO DETERMINE THAT HEAVY INDUSTRIAL USES, INCLUDING OIL, GAS, AND SOLUTION MINING, ARE PROHIBITED WITHIN ITS BORDERS

Plaintiff seeks to upset the longstanding constitutional and statutory authority of municipalities to determine which types of land uses shall be permissible within their borders. Simply put, by arguing that Middlefield's local zoning authority is preempted by section 23-0303(2) of the Environmental Conservation Law, Plaintiff essentially seeks a unique exemption from the Town's generally applicable zoning law based solely on its apparent intent to use its property for oil, gas, and solution mining. Plainly, such an exemption is not permissible under New York law (*see Matter of St. Onge v Donovan*, 71 NY2d 507, 515 [1988] [noting "the fundamental rule that zoning deals basically with land use and not with the person who owns or occupies (the property)"]; *Dexter v Town Bd. of Town of Gates*, 36 NY2d 102, 105 [1975] ["it is a fundamental principle of zoning that a zoning board is charged with the regulation of land use and not with

the person who owns or occupies it"]; *Village of Valatie v Smith*, 190 AD2d 17, 19 [3d Dept 1993], *affd* 83 NY2d 396 [1994]). Indeed, the Legislature has set forth a comprehensive statutory scheme under which local governments are vested with the authority to regulate land use matters, which cannot be preempted absent a clear expression of an intention to do so (*see e.g. Gernatt Asphalt Prods.*, 87 NY2d at 682 [emphasizing that "in the absence of a *clear expression* of legislative intent to preempt local control over land use, (ECL 23-2703[2]) could not be read as preempting local zoning authority" (emphasis added)]).

A. Middlefield's Zoning Law is Entitled to a Strong Presumption of Validity

Because Middlefield's Zoning Law identifying certain heavy industrial uses, including oil, gas, and solution mining and drilling, as prohibited uses is a legislative act, it is "entitled to the strongest possible presumption of validity and must stand if there was any factual basis therefor" (*Church v Town of Islip*, 8 NY2d 254, 258 [1960]; *see also Goodrich v Town of Southhampton*, 39 NY2d 1008, 1009 [1976]). As this Court has repeatedly held, "legislative enactments [are] supported by a presumption of validity so strong as to demand of those who attack them *a demonstration of invalidity beyond a reasonable doubt*, and the courts strike them down only as a last unavoidable result" (*Matter of Van Berkel v Power*, 16 NY2d 37, 40 [1965] [emphasis added]; *see also Stringfellow's of N.Y. v*

City of New York, 91 NY2d 382, 395-396 [1998]; *Asian Ams. for Equality v Koch*, 72 NY2d 121, 131 [1988] ["Because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt."]; *Matter of McGrath v Town Bd. of Town of N. Greenbush*, 254 AD2d 614, 618-619 [3d Dept 1998], *lv denied* 93 NY2d 803 [1999]; *Kravetz v Plenge*, 84 AD2d 422, 428 [4th Dept 1982] ["zoning ordinances, like all legislative enactments, are invested with an exceedingly strong presumption of constitutionality; the challenger to the ordinance shoulders the very heavy burden of demonstrating unconstitutionality beyond a reasonable doubt, and only as a last resort should courts strike down legislation on this ground"]).

Moreover, in reviewing zoning legislation, a court may not substitute its decision for that of the legislative body (*see Rodgers v Village of Tarrytown*, 302 NY 115, 121 [1951]). In *Rodgers*, for example, this Court explained that,

> [The] decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon him who asserts it. In that connection, we recently said [in] Shepard v. Village of Skaneateles, 300 N.Y. 115, 118, 89 N.E.2d 619, 620: "Upon parties who attack an ordinance . . . rests the burden of showing that the regulation assailed is not justified under the police power . . . by any reasonable interpretation of the facts. 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control'"

(id.; *see also Stringfellow's*, 91 NY2d at 396 ["even if the validity of a (zoning) provision is 'fairly debatable,' the municipality's judgment as to its necessity must control," quoting *Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 186 (1973)]).

As demonstrated clearly below, because no evidence exists that the Legislature intended ECL 23-0303(2) to preempt, either expressly or impliedly, Middlefield's constitutionally guaranteed and legislatively delegated zoning authority to determine permissible and prohibited uses of land within its borders, Plaintiff has not, and indeed cannot, overcome the presumption of validity accorded to Middlefield's Zoning Law.

B. The Constitutional and Statutory Authority of Municipalities to Enact Zoning Laws

The New York State Constitution provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law" (NY Const, art IX, § 2[c][ii]; *see Greater N.Y. Taxi Assn. v State of New York*, 21 NY3d 289, 300-301 [2013] ["The Municipal Home Rule Clause grants local governments considerable independence relative to local concerns. Just as there are affairs that are exclusively those of the State, [t]here are some affairs intimately connected with

the exercise by the city of its corporate functions, which are city affairs only" (internal quotation marks omitted)]). Implementing this express grant of authority to local governments, the Legislature enacted the Municipal Home Rule Law, which provides that a municipality may enact local laws for the "protection and enhancement of its physical and visual environment" and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein" (Municipal Home Rule Law § 10[1][ii][a][11], [12]).

Most importantly, the Legislature delegated to Middlefield, and every other local government, the authority to adopt, amend, and repeal generally applicable zoning ordinances and to "perform comprehensive or other planning work relating to its jurisdiction" (*see* Statute of Local Governments § 10[6], [7]).[4] Moreover, the Town Law grants Middlefield the express authority to regulate land use within its borders by defining zoning districts and determining what uses will be permitted or prohibited therein (*see* Town Law § 261 ["For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby

[4] Because the authority to enact zoning regulations was expressly delegated to local governments under the Constitution and Statute of Local Governments, any law that would diminish or impair that authority, including ECL 23-0303(2), may be subject to the re-enactment requirement of Article IX, § 2(b)(1) of the Constitution (*see* Statute of Local Governments § 2). Notably, although ECL 23-0303(2) was added in 1981, it was not subsequently re-enacted. Because the Legislature is presumed to have known of these procedural requirements at the time it enacted ECL 23-0303(2), it cannot have intended that section supersede a local government's constitutionally and statutorily guaranteed authority to enact generally applicable zoning regulations (*see* Governor's Mem approving L 1964, ch 205, 1964 McKinney's Session Laws of NY at 1953 ["the Statute provides a unique mechanism whereby the Legislature may give more permanency to important home rule powers without the necessity of amending the Constitution"]).

empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."]). As the Legislature emphasized when enacting the Statute of Local Governments, these "are basic powers which should be possessed by local governments . . . [and] which the Legislature would want local governments to have and exercise in order . . . to perform their functions responsibly and consistently with the principles of home rule" (Mem of Off for Local Govt, 1964 McKinney's Session Laws of NY at 1850; *see also* Governor's Mem approving L 1964, ch 205, 1964 McKinney's Session Laws of NY at 1953).

As this Court has repeatedly emphasized, "[o]ne of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances" (*DJL Rest. Corp. v City of New York*, 96 NY2d 91, 96 [2001]; *see also Udell v Haas*, 21 NY2d 463, 469 [1968] ["Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems."]). In that same vein, Middlefield has spent significant amounts of time,

effort, and resources on developing its comprehensive plan, outlining the zoning and planning goals for the future of the Town according to the identifiable features of the lands and natural resources specific thereto (R., Vol. 1, at 135-197, 221-298; *see* Town Law § 272-a[1][b] ["Among the most important powers and duties granted by the legislature to a town government is the authority and responsibility to undertake town comprehensive planning and to regulate land use for the purpose of protecting the public health, safety and general welfare of its citizens."]; *Udell*, 21 NY2d at 469 ["(T)he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll."]). Taken together, these powers rightfully leave local land use matters in the hands of the Town Supervisor and members of the Town Board—those individuals who know Middlefield best and can best determine what uses will serve the public health, safety, and general welfare of its citizens (*see Kamhi v Town of Yorktown*, 74 NY2d 423, 431 [1989] ["a town's planning needs with respect to its neighborhood parks and playgrounds are 'distinctively' matters of local concern"]; *Adler v Deegan*, 251 NY 467, 485 [1929] [Cardozo, J., concurring] ["A zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting, as it does, the density of population, the growth of city life, and the course of city values."]; *see also Zahara v Town of*

Southold, 48 F3d 674, 680 [2d Cir 1995] ["decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government"]).

Because the "inclusion of [a] permitted use in [a zoning] ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood" (*Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243 [1972]), New York courts have consistently held that a municipality's home rule authority includes the power to zone out certain uses of land in order to serve the public health, safety, or general welfare of the community (*see e.g. Gernatt Asphalt Prods.*, 87 NY2d at 683-684 [upholding the Town's determination that mining was not a permitted use of land within its borders]; *Matter of Iza Land Mgt. v Town of Clifton Park Zoning Bd. of Appeals*, 262 AD2d 760, 761-762 [3d Dept 1999] [upholding the exclusion of heavy industrial uses from the Town because of "the potential adverse and/or harmful impact" of such uses to the Town's residents]; *Thomson Indus. v Incorporated Vil. of Port Wash. N.*, 55 Misc 2d 625, 632 [Sup Ct, Nassau County 1967] ["The defendant village may certainly exclude from its industrial district any uses which constitute a danger or nuisance to other properties within the district or within the village."], *mod on other grounds* 32 AD2d 1072 [2d Dept 1969], *affd* 27 NY2d 537 [1970]; *see also e.g. Village of*

Euclid v Ambler Realty Co., 272 US 365, 388-389 [1926] [upholding an exercise of local zoning authority to preclude all industrial uses]).

Here, Middlefield, which currently hosts no heavy industrial uses within its borders, determined that heavy industrial uses, including the exploration for and extraction of natural gas, as proposed by Plaintiff, poses a significant threat to its residents' health, safety, and welfare, would impair Middlefield's rural and agricultural community character, and, thus, should not be a permitted use within the Town (R., Vol. 1, at 202-217). This conclusion is amply supported by the Town Board's comprehensive review of the potential impacts of heavy industrial uses on Middlefield and, as established, is well within Middlefield's home rule authority (R., Vol. 1, at 250-256, 267-277, 335, 364-365, 373-374, 381, 511, 537-538; *see generally* Michelle L. Kennedy, *The Exercise of Local Control Over Gas Extraction*, 22 Fordham Envtl L Rev 375 [2011]).

Given this well-established and longstanding policy in favor of municipal home rule over land use decisions, any legislative attempt at preemption must explicitly usurp local land use powers since the Legislature is presumed to know the status of New York law (*see e.g. Easley v New York State Thruway Auth.*, 1 NY2d 374, 379 [1956] ["Legislatures are presumed to know what statutes are on the books and what is intended by constitutional amendments approved by the Legislature itself."]; *Rhodes v Herz*, 84 AD3d 1, 14 [1st Dept 2011] [holding that,

insofar as the Legislature is presumed to know the status of the law when it acts, its failure to include a private right of action in an amendment to article 11 of the General Business Law was purposeful]; *Matter of Estate of Terjesen v Kiewit & Sons Co.*, 197 AD2d 163, 165 [3d Dept 1994] ["It has long been held that the Legislature is presumed to know what statutes are in effect when it enacts new laws. Had the Legislature intended to add conservators to Workers' Compensation Law § 115 at the time it enacted Mental Hygiene Law article 77, it could have done so."]). ECL 23-0303(2) contains no explicit preemption of local land use authority. Thus, where, as here, the OGSML can be harmonized with Middlefield's home rule authority, this Court should reject Plaintiff's attempt to upset Middlefield's longstanding constitutional and statutory authority to determine which types of land uses shall be permissible and prohibited within its borders (*see Frew Run*, 71 NY2d at 134 [refusing to construe the MLRL to preempt a municipality's zoning authority where the statutes could be harmonized]).

POINT II

ECL 23-0303(2) DOES NOT EXPRESSLY PREEMPT MIDDLEFIELD'S ZONING LAW

Plaintiff appears to concede that Middlefield's Zoning Law is within its authority generally, but argues that ECL 23-0303(2) expressly preempts Middlefield's constitutionally guaranteed zoning authority with respect to the oil,

gas, and solution mining industries because the language of the supersession provision limits local "jurisdiction" to local roads and property taxes only (Pl's Brf, at 26-27). Plaintiff's construction of section 23-0303(2), however, misreads the plain language of the supersession provision, lacks any support in the legislative history underlying the OGSML, and has been rejected by this Court with respect to the nearly identical supersession provision contained in the MLRL. Therefore, as Supreme Court and the Appellate Division properly held, ECL 23-0303(2) does not expressly preempt Middlefield's Zoning Law.

Although a local government's municipal home rule powers are construed very broadly, any local law adopted pursuant thereto must be consistent with the Constitution and the general laws of this State (*see* NY Const, art IX, § 2[c]; *see also Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 96 [1987] ["although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State"]; *New York State Club Assn. v City of New York*, 69 NY2d 211, 217 [1987], *affd* 487 US 1 [1988]). Where the Legislature has expressly preempted an area of regulation, a local law governing the same subject matter must yield "because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does

not proscribe or (2) imposes additional restrictions on rights granted by State law" (*Jancyn Mfg. Corp.*, 71 NY2d at 97 [citations omitted]; *see also Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d 500, 505 [1991]). Notably, however, the fact that state and local laws touch on the same subject matter does not automatically lead to the conclusion that the State intended to preempt the entire field of regulation (*see Jancyn Mfg. Corp.*, 71 NY2d at 99 ["that the State and local laws touch upon the same area is insufficient to support a determination that the State has preempted the entire field of regulation in a given area"]).

Plaintiff asserts that the Legislature has expressly stated its intent to preempt local governments' zoning authority with respect to property owned or leased by oil, gas, and solution mining entities in ECL 23-0303(2). Specifically, section 23-0303(2) provides that "[t]he provisions of this article shall supersede all local laws or ordinances *relating to the regulation of the oil, gas and solution mining industries*; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law" (ECL 23-0303[2] [emphasis added]). Although this provision evidences the Legislature's intent to preempt municipal "regulation of the oil, gas and solution mining industries," the enactment of Middlefield's generally applicable Zoning Law, pursuant to its constitutionally guaranteed home rule authority, does not constitute "regulation" of the oil, gas, and solution mining industries.

A. The Plain Language of ECL 23-0303(2) Establishes that the Legislature Did Not Intend to Preempt Middlefield's Generally Applicable Zoning Law

When determining the scope of preemption intended under ECL 23-0303(2), this Court must first start with the plain language employed by the Legislature (*see Balbuena v IDR Realty LLC*, 6 NY3d 338, 356 [2006]; *Matter of Theroux v Reilly*, 1 NY3d 232, 239 [2003] ["When interpreting a statute, we turn first to the text as the best evidence of the Legislature's intent."]; *Riley v County of Broome*, 95 NY2d 455, 463 [2000] ["Of course, the words of the statute are the best evidence of the Legislature's intent."]; *see also e.g. Frew Run*, 71 NY2d at 131 [noting that where this Court faced an express supersession clause, the matter turned on the proper statutory construction of the provision]). Where, as here, the language chosen is unambiguous, the plain meaning of the words used must control (*see Jones v Bill*, 10 NY3d 550, 554 [2008] ["As a general proposition, we need not look further than the unambiguous language of the statute to discern its meaning."]; *Riley*, 95 NY2d at 463 ["As a general rule, unambiguous language of a statute is alone determinative."]; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] ["As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof."]). The Appellate Division's determination of this matter below thus properly turned on its

interpretation of the phrase "relating to the regulation of the oil, gas and solution mining industries" (ECL 23-0303[2]).

Notably, as Supreme Court and the Appellate Division have both held, the plain meaning of the term "regulation" is "an authoritative rule dealing with details or procedure" (Merriam-Webster's Collegiate Dictionary, at 1049 [11th ed 2004]; *see id.* [defining "regulate" as "to govern or direct according to rule"]; *Rosner v Metro. Prop. and Liab. Ins. Co.*, 96 NY2d 475, 479-480 [2001] ["In the absence of any controlling statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as 'useful guideposts' in determining the meaning of a word or phrase."]; *see also e.g. Graev v Graev*, 11 NY3d 262, 272 [2008] [referencing Black's Law Dictionary, Oxford English Dictionary, The New Oxford American Dictionary, Webster's Third New International Dictionary, Random House Webster's Unabridged Dictionary, and Merriam Webster's Collegiate Dictionary to determine the plain meaning of the term "cohabitation"]). Under the plain language of section 23-0303(2), therefore, Middlefield's Zoning Law is not expressly preempted unless it relates to the details or procedure of the oil, gas and solution mining industries. This is consistent with New York law generally, which draws a distinction between local laws that regulate the operation of a business or enterprise and those that govern land use (*see St. Onge*, 71 NY2d at 516 ["Nor may

a zoning board impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located."]; *Frew Run*, 71 NY2d at 133; *Louhal Props. v Strada*, 191 Misc 2d 746, 751 [Sup Ct, Nassau County 2002] ["Applicable case law draws a dichotomy between those regulations that directly relate to the physical use of land and those that regulate the manner of operation of a business or other enterprise."], *affd* 307 AD2d 1029 [2d Dept 2003]).

A generally applicable local zoning ordinance, such as that challenged in this action, does not relate to the details or procedure of the oil, gas and solution mining industries in any way. Instead, Middlefield's Zoning Law solely defines and governs the land uses that are permissible and prohibited within its borders (R., Vol. 1, at 114). As this Court held in *Frew Run*, Middlefield's "zoning ordinance relates not to the [oil, gas, and solution mining] industr[ies] but to an entirely different subject matter and purpose . . . The purpose of a municipal zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally" (*Frew Run*, 71 NY2d at 131). Thus, the Appellate Division properly held that Middlefield's Zoning Law is not expressly preempted under the plain language of ECL 23-0303(2).

Plaintiff's reliance on the *in pari materia* canon of statutory construction, raised for the first time on this appeal in an attempt to avoid the plain language of ECL 23-0303(2), is misplaced. First, resort to the *in pari materia* rule is inappropriate because the language of ECL 23-0303(2) and the intent of the Legislature is clear: Middlefield's generally applicable Zoning Law is not preempted (*see e.g. People v Fitch*, 148 NY 71, 77 [1895] [declining to apply the *in pari materia* rule of construction because "the act of 1893 is too plain in language and intent to admit of doubt"]; *Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal*, 96 AD3d 524, 530 [1st Dept 2012] [holding that the *in pari materia* "rule of construction does not apply here because the legislative intent is clear"]). Second, *in pari materia* may not be applied to construe the OGSML and Town Law together as Plaintiff suggests because the OGSML and local municipalities' authority to enact zoning ordinances defining permissible and prohibited uses of land under the Town Law do not relate to the same subject matter (*see e.g. Matter of Siemens Corp. v Tax Appeals Trib.*, 89 NY2d 1020, 1022 [1997] [rejecting the Appellate Division's application of *in pari materia* to construe two sections of the Tax Law together], *revg* 217 AD2d 247, 251 [3d Dept 1996]; *Matter of Grade Crossing Comrs.*, 20 App Div 271, 274 [4th Dept 1897] [declining to construe two statutes together because "the two acts are not so related as to make them in pari materia"]). Instead, as the Appellate

Division acknowledged, the subject matter of the OGSML is the regulation of the technical operations of oil and gas production in New York (R., Vol. 2, at 1039-1042), whereas local zoning authority concerns the regulation of land use generally without regard to the property owner or lessee.

Moreover, it is well established that the term "regulation" contained in Town Law § 261 relates only to land uses, i.e., "the location and use of buildings, structures and land for trade, industry, residence or other purposes," not to controlling industry, as Plaintiff contends (Town Law § 261; *see also O'Mara v Town of Wappinger*, 9 NY3d 303, 310-311 [2007] ["towns are separately bestowed with the authority to regulate land use within their borders (*see* Town Law § 261). This grant of authority is broad"]; Black's Law Dictionary [9th ed 2009], land-use regulation ["An ordinance or other legislative enactment *governing the development or use of real estate*" (emphasis added)]). As the language of section 261 indicates, it bestows authority upon towns, such as Middlefield, to regulate all possible uses of land, including residential, commercial, industrial, and others. It does not permit Middlefield, however, to regulate the technical operations of the oil, gas, and solution mining industries. Thus, even construing the OGSML and Town Law together, as Plaintiff suggests, it is clear that Middlefield's Zoning Law regulating land uses generally does not constitute regulation of the oil, gas, and solution mining industries, which is necessary to establish preemption under

section 23-0303(2) (*see e.g. Frew Run*, 71 NY2d at 131 ["In this general regulation of land use, the zoning ordinance inevitably exerts an incidental control over any of the particular uses or businesses which, like sand and gravel operations, may be allowed in some districts but not in others. But, this incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the 'extractive mining industry' which the Legislature could have envisioned as being within the prohibition of the statute ECL 23–2703(2)."]).

Critically, when the Legislature has intended to supersede the local zoning authority, it has done so expressly. For example, in ECL 27-1107, the Legislature expressly declared that local municipalities were prohibited from requiring "any approval, consent, permit, certificate or other condition *including conformity with local zoning or land use laws and ordinances*, regarding the operation of a [hazardous waste treatment, storage, and disposal] facility" (ECL 27-1107 [emphasis added]). The Legislature has also expressly preempted local zoning regulation in the context of the siting of major electric generating facilities (*see* Public Service Law § 172[1] ["no state agency, municipality or any agency thereof may . . . require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility"]; *see also* Mental Hygiene Law § 41.34 [siting of community residential facilities]) and casino

gaming (*see* Racing, Pari-Mutuel Wagering and Breeding Law § 1366 ["gaming authorized at a location pursuant to this article shall be deemed an approved activity for such location under the relevant city, county, town, or village land use or zoning ordinances, rules, or regulations"]).

Clearly, had the Legislature intended to wholly preempt local regulation of permissible land uses under ECL 23-0303(2), it could have easily done so (*see e.g. Rhodes*, 84 AD3d at 14; *Terjesen*, 197 AD2d at 165). Its failure to expressly preempt local zoning regulation here requires the conclusion that the Legislature did not intend ECL 23-0303(2) to preempt Middlefield's generally applicable Zoning Law determining that certain heavy industrial uses, including oil, gas, and solution mining and drilling, are prohibited within its borders. Contrary to Plaintiff's suggestion, no basis exists to overlook the fact that the Legislature has expressly preempted local zoning authority when it intended to do so. Indeed, when the OGSML is read *in pari materia* with the MLRL, which is contained in the same article of the ECL and relates to the same subject matter—state regulation of the mining industries—the intent of the Legislature is clear: the State has reserved to the DEC the authority to regulate the technical operations of the oil, gas, and solution mining industries, while leaving to Middlefield the home rule authority to regulate land use generally through its constitutionally guaranteed zoning powers. Thus, this Court should hold that the Appellate Division properly

construed the express language of ECL 23-0303(2) as preempting only local regulation of the technical operations of the oil, gas, and solution mining industries and properly determined that Middlefield's Zoning Law is not expressly preempted.

B. Unlike the Exercise of Local Zoning Authority, Regulation of Local Roads and Imposition of Ad Valorem Taxes Were Exempted from Preemption under ECL 23-0303(2) Because They Would Otherwise Constitute Impermissible Local Regulation of the Oil, Gas, and Solution Mining Industries

Plaintiff further attempts to avoid the Appellate Division's proper interpretation of ECL 23-0303(2)'s plain language by arguing that the OGSML supersession provision's two exceptions to preemption confine local legislative authority with respect to oil and gas concerns solely to jurisdiction over local roads and taxation (Pl's Brf, at 32-33). As this Court held with respect to the MLRL, however, the listing of exceptions to preemption does not preclude a finding that a generally applicable zoning law does not fall within the preemption provision in the first instance (*see e.g. Frew Run*, 71 NY2d at 132-133 [noting that ECL 23-2703(2)'s exception for local ordinances imposing stricter reclamation standards than state law did not evidence an intent to preempt local municipalities from enacting generally applicable local zoning controls]).

Similarly here, in ECL 23-0303(2), the Legislature exempted from preemption: (1) "local government jurisdiction over local roads" and (2) "the rights

of local governments under the real property tax law" (ECL 23-0303[2]). These exemptions are only relevant, however, if the challenged local law constitutes "*regulation of the oil, gas and solution mining industries*" in the first instance and, thus, would otherwise be preempted. Because Middlefield's Zoning Law does not regulate the details and procedure of oil and gas operations, the stated exemptions from preemption cannot limit Middlefield's constitutionally guaranteed zoning authority, as Plaintiff contends.

In contrast, given the frequent heavy truck traffic associated with oil and gas production, including for water and wastewater hauling (R., Vol. 1, at 244), local laws limiting truck trips and the weight and length of vehicles, among other things, traveling over local roads directly impact the details and procedure of oil and gas operations, and thus would otherwise be preempted had the Legislature declined to exempt them expressly (*see e.g. Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau*, 18 Misc 3d 1130[A], *7 [Sup Ct, Rensselaer County 2008] [invalidating as superseded by ECL 23-2703(2) those portions of a local law requiring an applicant for a special use permit for extractive mining to submit for local approval, among other things, "an operations plan that includes the numbers and respective noise levels of trucks and machinery that will be used"]). Plaintiff's attempt to construe regulation of the oil, gas, and solution mining industries as limited solely to the operation of the drilling site and well pad is vastly

underinclusive, and ignores the significant impacts that oil and gas operations have on the host communities and local roads in particular (R., Vol. 1, at 277-279).

Similarly, when the Legislature adopted the OGSML supersession provision, it also authorized local municipalities to impose an ad valorem tax upon businesses in the oil, gas, and solution mining industries once production based upon an exercise of oil and gas rights has begun (*see* L 1981, ch 846, § 19 [enacting RPTL § 594]; *see also* Governor's Mem approving L 1981, ch 846, 1981 McKinney's Session Laws of NY at 2629 ["The bill amends the Real Property Tax Law to clarify the taxable status of oil and gas development rights"]; Sponsor's Mem, Bill Jacket, L 1981, ch 846 ["Local governments are authorized to levy a real property tax on oil and natural gas based on production."] [available at R., Vol. 2, at 840]; *see generally Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 30 [2008] ["A severance tax is based on the volume of a natural resource exploited pursuant to a governmental concession."]). Specifically, the 1981 amendments provided: "Upon the exercise of oil and gas rights resulting in oil and gas production, such rights shall be separately assessed in the manner provided in this title . . . [O]il and gas rights shall be assessed in the name of the possessor of such rights" (*id.*). Thus, unlike traditional real property taxation, which is assessed against the parcel without regard to its owner (*see* RPTL 304 ["All assessments shall be against the real property itself"]; *see also e.g. Matter of Knickerbocker Vil. v Boyland*, 16

AD2d 223, 228 [1st Dept 1962] ["It is to be noted the pertinent statutes have to do with the assessment of land and improvements without reference to the identity, nature or extent of the ownership thereof. What is to be assessed is the whole of the property and the full value thereof regardless of restrictions personal to the owner."], *affd* 12 NY2d 1044 [1963]), the local taxation permitted under the 1981 amendments to the OGSML is assessed against an oil and gas concern precisely because of its production of oil and gas (*see generally Commonwealth Edison Co. v Montana*, 453 US 609, 624 [1981] ["there can be no question that Montana may constitutionally raise general revenue by imposing a severance tax on coal mined in the State. The entire value of the coal, before transportation, originates in the State, and mining of the coal depletes the resource base and wealth of the State, thereby diminishing a future source of taxes and economic activity. In many respects, a severance tax is like a real property tax, which has never been doubted as a legitimate means of raising revenue by the situs State (quite apart from the right of that or any other State to tax income derived from use of the property)" (footnote and citation omitted)]).

Moreover, under the 1981 amendments, the local taxation of a business in the oil and gas industries permitted under the RPTL is based upon the volume of production in a given year, which amounts to a local fee based solely upon operations (R., Vol. 2, at 840; *see* RPTL 594[2] [authorizing imposition of an ad

valorem tax upon an oil and gas producer based upon the "amount of production from that [oil and gas] economic unit in the production year"]). Thus, as the Legislature recognized in crafting the exceptions to preemption found in ECL 23-0303(2), the local taxation authorized under the RPTL—imposed upon the business entity that possesses and exercises oil and gas rights based solely on the volume of oil and gas production—also constitutes regulation of the oil, gas, and solution mining industries requiring an exemption from the supersession provision.

Unlike regulation of local roads and imposition of ad valorem taxes based on actual oil and gas production, however, this Court has consistently held that generally applicable zoning laws regulating only permissible uses of land without regard to the land owner or lessee do not relate to the regulation of industry, and thus are not preempted (*see e.g. Frew Run*, 71 NY2d at 131). Therefore, the Appellate Division properly held that Middlefield's home rule authority is not merely constrained to the regulation of local roads and the exercise of its rights under the RPTL, as Plaintiff contends.

C. Prior Case Law Interpreting ECL 23-0303(2) Supports the Appellate Division's Order.

Prior to the decisions below, and the decisions in the related action in Tompkins County (*see Matter of Anschutz Exploration Corp. v Town of Dryden*, 35 Misc 3d 450 [Sup Ct, Tompkins County 2012], *affd sub nom. Matter of Norse Energy Corp. USA v Town of Dryden*, 108 AD3d 25 [3d Dept 2013], *lv granted* 21

NY3d 863 [2013], *appeal PU* [Appeal No. APL-2013-00245]),[5] only one court throughout the State had interpreted the supersession clause contained in ECL 23-0303(2). In *Matter of Envirogas, Inc. v Town of Kiantone* (112 Misc 2d 432 [Sup Ct, Erie County 1982], *affd* 89 AD2d 1056 [4th Dept 1982], *lv denied* 58 NY2d 602 [1982]), the petitioner, a corporation in the oil and gas industry, challenged a zoning ordinance of the Town of Kiantone, which imposed a $25 permit fee and a requirement to post a $2,500 compliance bond prior to construction of any oil or gas well within the Town (*see id.* at 432). Supreme Court struck down the law, specifically noting that the 1981 amendment to ECL Article 23 made it clear that the supersession provision "pre-empts not only inconsistent local legislation, but also any municipal law which purports *to regulate gas and oil well drilling operations*, unless the law relates to local roads or real property taxes which are specifically excluded by the amendment" (*id.* at 434 [emphasis added]). Clearly, the *Envirogas* Court recognized that the Town of Kiantone's zoning ordinance was not a generally applicable land use restriction, but instead impermissibly interfered with the *operations*—the details and procedure—of the oil and gas industry and, thus, contravened the intent of ECL 23-0303(2) (*see id.* ["The Town of Kiantone,

[5] Following the decision of Supreme Court below, and the decision of Supreme Court, Tompkins County in *Anschutz Exploration Corp.*, New York courts have consistently held that local zoning ordinances are not preempted by ECL 23-0303(2) (*see e.g. Matter of Lenape Resources, Inc. v Town of Avon*, Sup Ct, Livingston County, Mar. 15, 2013, Wiggins, A.J., index No. 1060-2012; *Jeffrey v Ryan*, 37 Misc 3d 1204[A], 2012 NY Slip Op 51881[U], *5 [Sup Ct, Broome County 2012]).

however, singled out oil and gas drillers for special treatment. The $2,500 compliance bond and $25 permit fee are requirements unique to oil and gas well drilling operations and do not apply to any other business or land use. This is precisely what the State amendment to ECL article 23 was designed to prevent."]).

Unlike the zoning ordinance in *Envirogas*, Middlefield's Zoning Law does not regulate the operations of the oil, gas, and solution mining industries. It does not impose duplicative fees, area and bulk restrictions, or other conditions applicable only to Plaintiff or members of the oil, gas, and solution mining industries. Instead, the challenged ordinance, adopted under Middlefield's home rule authority, is a generally applicable zoning regulation merely defining certain heavy industrial uses, including oil, gas, and solution mining and drilling, as inconsistent with the Town's rural and agricultural community character and, thus, prohibited within the Town's borders.

Because the express language of ECL 23-0303(2) unambiguously identifies the Legislature's intent to preempt only discordant regulation of the operations of the oil and gas industry, this Court need look no farther (*see Jones*, 10 NY3d at 554). Indeed, the Legislature's declaration of policy confirms the intent to address only "the *operation* and development of oil and gas properties," which as shown above, does not indicate an intent to preempt municipal land use powers, only regulations affecting drilling operations (ECL 23-0301 [emphasis added]).

Plaintiff's argument that this policy language evidences the Legislature's intent to give preeminence to oil and gas rights also ignores this plain language and the balance that must be struck with the rights of the public generally. That is, the statement of intent establishes that the purpose of the OGSML is to insure that "the rights of all persons including landowners and the *general public* may be fully protected" (*id.* [emphasis added]). Thus, the purpose of the OGSML and the interest of the DEC in acting under the statute is in regulating operations—not to protect only the landowners that may have entered into leases for drilling operations (*see Matter of Spence v Cahill*, 300 AD2d 992, 993 [4th Dept 2002] [holding that the interest of the DEC under the OGSML is "regulatory only"]). The preservation of local land use authority is entirely consistent with the statute's intent to "fully" protect the rights of all persons, including the general public.

D. The Legislative History Underlying ECL 23-0303(2) Does Not Establish that the Legislature Intended to Preempt Middlefield's Zoning Law

The legislative history underlying ECL 23-0303(2), which need not be consulted since the statute is clear, also does not alter this analysis. As the Appellate Division's extensive review of the legislative history reveals (R., Vol. 2, at 1039-1042; *see also* R., Vol. 1, at 8-12),[6] no evidence exists that the Legislature

[6] The courts below properly refused to consider the post-enactment affidavit of Gregory H. Sovas, a former DEC employee now acting as a hired consultant for the industry who claims to have been the "primary author of the Amendments to the . . . Oil, Gas and Solution Mining Law in 1981," which Plaintiff had submitted in an attempt to establish the Legislature's intent in

intended to preempt Middlefield's constitutionally guaranteed home rule authority to determine the types and extent of permissible and prohibited uses of land within its borders. Indeed, other than a passing reference to the supersession language in a memorandum from the Division of Budget, the bill jacket is silent on the preemption issue (*see* Div of Budget, Ten Day Bill, Budget Report on Bill S. 6445-B, Bill Jacket, L 1981, ch 846 ["The existing and amended oil and gas law would supersede all local laws or ordinances regulating the oil, gas, and solution mining industries. Local property tax laws, however, would remain unaffected."]).

Nor does the legislative history underlying the OGSML generally support Plaintiff's interpretation of the supersession provision. Instead, as the Appellate Division noted, when the OGSML was added to the former Conservation Law in 1963, "the enactment focus[ed] on matters that [we]re regulatory in nature, such as

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enacting ECL 23-0303(2) (R., Vol. 1, at 12 n 1). New York courts have repeatedly rejected submissions attempting to express the legislative intent behind an enactment, such as Mr. Sovas's affidavit, because they are not part of the recognized legislative history and this Court should similarly refuse to consider it on this appeal (*see e.g. Matter of Lorie C.*, 49 NY2d 161, 169 [1980] [holding that "a letter, written more than a year after passage of the 1972 amendment and constituting, therefore, no part of the legislative process, is not entitled to consideration as legislative history"]; *Matter of Morabito v Hagerman Fire Dist.*, 128 Misc 2d 340, 341 [Sup Ct, Suffolk County 1985] [rejecting an affidavit from "the former Chief Counsel to the Committee on Local Government of the New York State Assembly . . . for the purpose of expressing the intent of the statute's draftsmen since such an affidavit, dated after the effective date of the statute, is not entitled to consideration as legislative history"]; *Meredith v Monahan*, 60 Misc 2d 1081, 1082 [Sup Ct, Rensselaer County 1969] [rejecting submission of an affidavit from "one of the members of the Common Council, . . . which allege(d) certain facts pertaining to the Council's legislative enactments and some surrounding circumstances" on the ground that "the question before the court is one of law and not of fact and the court cannot question the intent or wisdom of the legislative procedure"]). Mr. Sovas was not a member of the Legislature and cannot speak to the intent of that body.

well spacing, delineation of pools and procedures for obtaining permits. They d[id] not address any traditional land use issues that would otherwise be the subject of a local municipality's zoning authority" (R., Vol. 2, at 1040; *see* L 1963, ch 959, § 1 [adding provisions to the former Conservation Law making it unlawful to "commence operations for the drilling of a well for oil or gas . . . without first obtaining a permit from the (conservation) department" and empowering the conservation department to, among other things, "*(r)egulate the drilling of wells and all other operations for the production of gas or oil*," establish well spacing units, and delineate the boundaries of pools (emphasis added)] [available at R., Vol. 2, at 745-780]). In fact, the former Conservation Department expressly acknowledged that its duty under the newly-enacted OGSML was to "*administ[er] . . . oil and gas operations* in the state" (Conservation Dept Mem in Support, Bill Jacket, L 1963, ch 959 [emphasis added] [available at R., Vol. 2, at 791]).

The 1978 amendments to the OGSML further indicate the Legislature's intent to reserve to the DEC the authority to regulate the technical aspects of oil, gas, and solution mining and drilling, while centralizing promotion of the oil and gas industry in the Energy Department (R., Vol. 2, at 1040; *see* L 1978, ch 396, §§ 1, 2 [changing the statement of intent of the OGSML from fostering, encouraging, and promoting the development and production of oil and gas to regulating such development and production, while transferring the duty to

promote oil and gas development to the State Energy Office]; Letter from St Dept of Commerce, June 5, 1978, Bill Jacket, L 1978, ch 396 ["The separation of regulatory authority for (the development of all indigenous state energy resources) (assigned to the Department of Environmental Conservation) from the development responsibilities (State Energy Office) is appropriate and recognizes the vast difference between the two responsibilities"] [available at R., Vol. 2, at 836]). Again, the 1978 amendments make no mention of a legislative intent to preempt local zoning authority.

When the Legislature enacted the OGSML supersession provision at issue here, the purpose of the 1981 amendments was clearly stated: the growth of the oil and gas industry in New York had outpaced the state's ability to effectively regulate the industry, and this legislation was needed to provide additional funding for the state's regulatory program and to expand the DEC's enforcement powers under the statute (*see* Sponsor's Mem, Bill Jacket, L 1981, ch 846 ["The recent growth of drilling in the State has exceeded the capacity of DEC to effectively regulate and service the (oil and gas) industry. The industry will benefit from the expeditious handling of permits and improved regulation and it is therefore equitable that the industry provide increased support for the services it requires."]). The Governor's approval memorandum confirms this intent:

> In view of the revitalization of oil and gas development in New York State, the Department of Environmental Conservation is unable, with

> existing funding and powers, to fulfill its regulatory responsibilities under the Environmental Conservation Law. This bill amends the existing law to increase funding, provide an updated regulatory program, and grant the Department of Environmental Conservation additional enforcement powers necessary to enable it to provide for the efficient, equitable and environmentally safe development of the State's oil and gas resources

(Governor's Mem approving L 1981, ch 846, 1981 McKinney's Session Laws of NY at 2629). Because the purposes underlying the 1981 amendments to the OGSML related almost exclusively to the state's ability to effectively regulate the operations of the oil, gas, and solution mining industries, the Appellate Division properly concluded that the legislative history underlying the OGSML generally provides no support for Plaintiff's argument.

Moreover, the Memorandum in Support on which Plaintiff relied in seeking renewal of its motion for summary judgment below—which notably relates to a different bill that was never enacted into law—confirms the Legislature's intent to preempt only local regulation of the technical aspects of oil, gas, and solution mining and drilling:

> The comprehensive scheme envisioned by [the OGSML] 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, with Statewide repercussions. With adequate staffing and funding, the State's . . . regulatory program will be able to address the concerns of local governments and assure the efficient and safe development of these energy resources

(R., Vol. 2, at 995 [emphasis added]). Thus, this statement recognizes, as the bill's sponsor and Governor had, that the DEC's technical expertise with respect to the operations of the oil, gas, and solution mining industries was likely superior to any expertise found on the local level, which necessitated reserving exclusive regulatory authority over the industries' activities to the DEC, as ECL 23-0303(2) contemplates. The statement does not, however, reference local municipalities' zoning authority in any way, much less indicate that the Legislature intended to preempt local home rule authority to enact zoning laws relating only to the permitted and prohibited uses of land generally, as Plaintiff suggests.

Contrary to Plaintiff's argument, the establishment of the state oil and gas fund in the 1981 amendments was not intended as a "trade-off" for municipalities, such as Middlefield, in exchange for relinquishing local zoning authority over land use, but instead was intended to defray the rising costs of the State's regulatory program, which the Legislature determined "should be borne in greater part by the [oil and gas] industries and operators directly affected" (L 1981, ch 846, § 1 ["this legislation establishes an oil and gas fund to help meet unexpected contingencies and imposes new fees on oil, gas and solution mining activities to supplement the continuing general state revenues' funding of the state's (regulatory) program"]; Executive Chamber Mem, Bill Jacket, L 1981, ch 846 [noting that one of the bill's main purposes was "to finance a substantial portion of DEC's regulatory program

in this area"]). Indeed, the 1981 amendments merely provided municipalities with the right to request reimbursement from the state oil and gas fund if oil and gas extraction was a permitted use of land and resulted in damages to municipal land or property (*see* L 1981, ch 846, § 4 [enacting ECL 23-0303(3)]). Notwithstanding Plaintiff's unsupported characterization, nothing in this conditional grant of rights suggests that the Legislature intended to force municipalities such as Middlefield to allow oil and gas drilling and extraction within their borders merely because they were permitted the option to seek reimbursement from the state if they decided to allow such heavy industrial activities and suffered damages as a result.

As the Appellate Division recognized, the "legislative history of the OGSML and, in particular, the 1981 amendments" makes clear that

> the Legislature's intention was to ensure uniform statewide standards and procedures with respect to the technical operational activities of the oil, gas and mining industries in an effort to increase efficiency while minimizing waste, and that the supersession provision was enacted to eliminate inconsistent local regulation that impeded that goal. We find nothing in the language, statutory scheme or legislative history of the statute indicating an intention to usurp the authority traditionally delegated to municipalities to establish permissible and prohibited uses of land within their jurisdictions

(R., Vol. 2, at 1041-1042). Therefore, the Appellate Division properly held that Middlefield's Zoning Law is not preempted by ECL 23-0303(2).

E. New York Courts' Interpretation of the Analogous Supersession Clause of the Mined Land Reclamation Law Establishes that the Legislature Did Not Intend to Preempt Generally Applicable Zoning Ordinances

Although the interpretation of ECL 23-0303(2) required herein may be a matter of first impression, the phrase "relating to the regulation" has been repeatedly construed by New York courts, including this Court, in the context of the supersession provision in the MLRL (*see* ECL 23-2703[2]; *People v Rogers*, 183 App Div 604, 607 [1st Dept 1918] ["where a statute is not clear, resort may be had to the history of the statute, as well as to the decisions of the court interpreting analogous statutes, in order to ascertain, if possible, its actual intendment"]). In this Court's landmark decision in *Frew Run*, the Court was asked to consider whether the MLRL supersession provision—ECL 23-2703(2)—was "intended to preempt the provisions of a town zoning law establishing a zoning district where a sand and gravel operation is not a permitted use" (71 NY2d at 129). At that time, the MLRL supersession provision provided that:

> For the purposes stated herein, this title shall supersede all other state and local laws *relating to the extractive mining industry*; provided, however, that nothing in this title shall be construed to prevent any local government from 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] [as added by L 1974, ch 1043, § 1] [emphasis added]). Notably, this language is nearly identical to that contained in ECL 23-0303(2).[7]

Construing this express supersession clause according to the plain meaning of the phrase "relating to the extractive mining industry," this Court concluded that the Town of Carroll Zoning Ordinance—a law of general applicability—was not expressly preempted, notwithstanding that the petitioner had already obtained a DEC mining permit, because the "zoning ordinance relate[d] not to the extractive mining industry but to an entirely different subject matter and purpose: i.e., regulating the location, construction and use of buildings, structures, and the use of land in the Town" (*Frew Run*, 71 NY2d at 131 [internal quotation marks omitted]). This Court held that:

> The purpose of a municipal zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally. In this general regulation of land use, the zoning ordinance inevitably exerts an

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[7] Plaintiff's attempt to distinguish the MLRL supersession provision on the ground that it applied only to "local laws" (ECL 23-2703[2] [as added by L 1974, ch 1043, § 1]), whereas the OGSML applies to "local laws or ordinances" is without merit (ECL 23-0303[2]). The sole difference between a local law and a local ordinance is the procedure by which it is enacted (*see* Municipal Home Rule Law § 20; Town Law § 264; *Yoga Socy. of N.Y. v Incorporated Town of Monroe*, 56 AD2d 842, 843 [2d Dept 1977], *appeal dismissed* 42 NY2d 910 [1977]). Moreover, were Plaintiff correct that the scope of the MLRL's supersession provision was significantly more limited than the OGSML's provision because it preempts only local laws, but not local ordinances, this Court's entire discussion of the scope of preemption in *Frew Run* would have been unnecessary, as the Court would have presumably held that the MLRL supersession provision on its face preempts only local laws and that the challenged zoning enactment was a local ordinance, without reaching the intent underlying the enactment (*see Matter of Civil Serv. Empls. Assn. v Bartlett*, 41 NY2d 998, 999 [1977] [declining to reach issue unnecessary to its determination]). Such a limited construction of the MLRL supersession provision is unsupported by this Court's decision in *Frew Run* and New York authority generally.

> incidental control over any of the particular uses or businesses which, like sand and gravel operations, may be allowed in some districts but not in others. But, this incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the 'extractive mining industry' which the Legislature could have envisioned as being within the prohibition of the statute ECL 23-2703(2)

(*id.* at 131-132). Thus, in limiting the MLRL supersession to those local laws "relating to the extractive mining industry," the Legislature intended to preempt only "[l]ocal regulations dealing with the *actual operation and process of mining*" (*id.* at 133 [emphasis added]). As this Court recognized, the exception to MLRL preemption did not "invite" local zoning control, as Plaintiff suggests (Pl's Brf, at 45-48), but simply permitted municipalities to impose stricter reclamation standards on mining operations (*see Frew Run*, 71 NY2d at 133).

By interpreting the scope of ECL 23-2703(2) preemption to include only local laws that regulate the actual operation and process of mining, this Court avoided the concomitant impairment of local authority over land use matters that would have inevitably resulted had it accepted the petitioner's argument that section 23-2703(2) was intended to "preempt a town zoning ordinance prohibiting a mining operation in a given zone" (*id.*). Indeed, this Court noted,

> to read into ECL 23-2703(2) an intent to preempt a town zoning ordinance prohibiting a mining operation in a given zone, as petitioner would have us, would drastically curtail the town's power to adopt zoning regulations granted in subdivision (6) of section 10 of the Statute of Local Governments and in Town Law § 261. Such an interpretation would preclude the town board from deciding whether a

> mining operation—like other uses covered by a zoning ordinance—should be permitted or prohibited in a particular zoning district. In the absence of any indication that the statute had such purpose, a construction of ECL 23-2703(2) which would give it that effect should be avoided

(*id.* at 133-134; *see also Matter of Hunt Bros. v Glennon*, 81 NY2d 906, 909 [1993] ["In (*Frew Run*), we held that this supersession clause does not preclude local zoning ordinances that are addressed to subject matters other than extractive mining and that affect the extractive mining industry only in incidental ways. Such local laws do not frustrate the statutory purpose of encouraging mining through standardization of regulations pertaining to mining operations. Thus, *only those laws that deal with the actual operation and process of mining are superseded.*" (citations and internal quotation marks omitted; emphasis added)]).

Following this Court's decision in *Frew Run*, the Legislature amended ECL 23-2703(2) to expressly codify the Court's holding (*see* L 1991, ch 166, § 228). As amended, the MLRL supersession provision now reads, in pertinent part:

> For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from:
>
> a. enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate mining and/or reclamation activities regulated by state statute, regulation, or permit; or
>
> b. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts

(ECL 23-2703[2]). Had the Legislature disagreed with this Court's interpretation of the phrase "relating to the extractive mining industry" in *Frew Run*, this amendment gave it ample opportunity to so state and add a provision expressly preempting all generally applicable local zoning ordinances. That the Legislature declined to do so is significant (*see e.g. Falk v Inzinna*, 299 AD2d 120, 122-125 [2d Dept 2002] [noting that "if the Legislature intended to limit or qualify disclosure under CPLR 3101(i), as did the Court of Appeals in DiMichel (v South Buffalo Ry. Co. [80 NY2d 184 (1992)]), it would have added language to that effect"]).

In light of the amendment to section 23-2703(2), the Town of Sardinia, a rural community located in western New York, amended its zoning ordinance to eliminate mining as a permitted use within all zoning districts in the Town (*see Gernatt Asphalt Prods.*, 87 NY2d at 674-676). Petitioner, the owner and operator of three mines within the Town, challenged the amendments on various grounds, including that the Town's authority to eliminate mining as a permitted use in *all* zoning districts was superseded by ECL 23-2703(2). Specifically, the petitioner argued that this Court's holding in *Frew Run* only left "municipalities with the limited authority to determine in *which* zoning districts mining may be conducted but not the authority to prohibit mining in *all* zoning districts" (*id.* at 681).

This Court, however, rejected the petitioner's attempt to so limit the municipality's home rule authority (*see id.*). Instead, the Court reaffirmed its holding in *Frew Run* that the MLRL supersession clause was intended to preempt only those local laws that regulated the operations of mining (*see id.* at 682). Indeed, the Court noted,

> In *Frew Run*, we distinguished between zoning ordinances and local ordinances that directly regulate mining activities. Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the *type* of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities

(*id.* at 681-682). Recognizing the primacy of local control over local land use matters, this Court further held that "[a] municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole" (*id.* at 684). Because the amendment to the MLRL supersession clause only "withdr[ew] from municipalities the authority to enact local laws imposing land reclamation standards that were stricter than the State-wide standards," and went no further, it could not be inferred that "the Legislature intended the MLRL to . . . limit municipalities' broad authority to govern land use" (*id.* at 682; *see also Preble Aggregate v Town of Preble*, 263 AD2d 849, 850 [3d Dept 1999] ["A

municipality retains general authority to regulate land use and to regulate or prohibit the use of land within its boundaries for mining operations, although it may not directly regulate the specifics of the mining activities or reclamation process. Control over permissible uses in a particular zoning area is merely incidental to a municipality's right to regulate land use within its boundaries."], *lv denied* 94 NY2d 760 [2000]).

Contrary to Plaintiff's argument, this Court's holdings in *Frew Run* and *Gernatt Asphalt Prods.* are particularly instructive here because the MLRL does, in fact, regulate the "where" of mineral mining. Specifically, the MLRL provides that all mineral mining *must* be "conducted in accordance with an approved mined land-use plan," which specifies

> the boundaries of the land controlled by the applicant, the outline of potential affected acreage and the general sequence of areas to be mined through successive permit terms. The graphic description shall include *the location of the mine* and shall identify the land affected by mining after April first, nineteen hundred seventy-five, including but not limited to *areas of excavation; areas of overburden, tailings, and spoil; areas of topsoil and mineral stock piles; processing plant areas; haulageways; shipping and storage areas; drainage features and water impoundments*

(ECL 23-2713[1][a] [emphasis added]). Although the MLRL requires the DEC to approve the mined land-use plan prior to issuance of a mining permit, which necessarily gives DEC control over the "where" of mining (*see* 6 NYCRR

§ 422.1), this Court nonetheless held that local municipalities were not preempted from enacting generally applicable zoning laws.

Moreover, the OGSML and MLRL supersession provisions are not only nearly identical, but the MLRL provision is arguably broader in scope than the provision at issue here. Where the MLRL preempts any local law "relating to the extractive mining industry" (ECL 23-2703[2]), the OGSML preempts only those local laws "relating to the regulation of the oil, gas and solution mining industries" (ECL 23-0303[2]). By including the term "regulation" in the OGSML, which is not present in the MLRL supersession provision, the Legislature appears to have further circumscribed the scope of preemption in this case beyond the language analyzed by this Court in *Frew Run*. Thus, contrary to Plaintiff's argument, no basis exists to distinguish *Frew Run* and *Gernatt Asphalt Prods.* here.

Relying on this Court's holdings, New York courts, including this Court, have repeatedly upheld municipalities' authority to enact generally applicable zoning ordinances that incidentally affect the extractive mining industry, but do not regulate the operations thereof (*see e.g. Village of Savona v Knight Settlement Sand & Gravel*, 88 NY2d 897, 899 [1996] ["the Mined Land Reclamation Law does not preempt a municipality's authority, by means of its zoning powers, to regulate or prohibit the use of land within its municipal boundaries for mining operations"]; *Patterson Materials Corp. v Town of Pawling*, 264 AD2d 510, 512

[2d Dept 1999] [holding that "local laws of general applicability that, at best, would have an incidental burden upon mining" were not preempted]; *Preble Aggregate*, 263 AD2d at 850 [upholding a local law that "prohibited mining below the watertable but otherwise permitted it upon issuance of a special use permit" against a preemption challenge]; *O'Brien v Town of Fenton*, 236 AD2d 693, 695 [3d Dept 1997] [holding that a local law that prohibited mining outside of a designated mining district and revoked the mining classification for abandoned mines was not preempted under ECL 23-2703(2)], *lv denied* 90 NY2d 807 [1997]).

This Court's reasoning in *Frew Run* and *Gernatt Asphalt Prods.* has also been applied in the context of preemption under the Alcoholic Beverage Control ("ABC") Law, leading to the same result. For example, in *DJL Rest. Corp. v City of New York* (96 NY2d 91 [2001]), New York City amended its zoning resolution to regulate the location of "adult establishments," which included many establishments that were licensed to dispense alcoholic beverages (*see id.* at 93). Although noting that "the State's ABC Law impliedly preempts its field . . . by comprehensively regulating virtually all aspects of the sale and distribution of liquor" (*id.* at 95-96), this Court nonetheless concluded that the City's zoning amendment was not preempted because it "applie[d] not to the regulation of alcohol, but to the *locales* of adult establishments irrespective of whether they dispense alcoholic beverages" (*id.* at 97). This type of incidental effect on the

preempted field, this Court noted, was not the kind of regulation prohibited by the ABC Law (*see id.* ["To be sure, by regulating land use a zoning ordinance '*inevitably exerts an incidental control* over any of the particular uses or businesses which . . . may be allowed in some districts but not in others.' Nevertheless, as we have observed, separate levels of regulatory oversight can coexist. State statutes do not necessarily preempt local laws having only 'tangential' impact on the State's interests. Local laws of general application—which are aimed at legitimate concerns of a local government—will not be preempted if their enforcement only incidentally infringes on a preempted field" (some internal quotation marks omitted), quoting *Frew Run*, 71 NY2d at 131]).

The preemption principles articulated in *Frew Run* were similarly extended to article 19 of the Mental Hygiene Law in *Incorporated Vil. of Nyack v Daytop Vil.* (78 NY2d 500 [1991]). Specifically, in article 19 of the Mental Hygiene Law, the Legislature adopted sweeping regulations designed to "address the myriad problems that have flowed from the scourge of substance abuse in this State" (*id.* at 506). Although acknowledging that the Legislature adopted a comprehensive regulatory scheme addressing substance abuse issues, this Court, in *Daytop Vil.*, was unconvinced that "the State's commitment to fighting substance abuse preempts all local laws that may have an impact, however tangential, upon the siting of substance abuse facilities" (*id.*). In light of the Village's "legitimate,

legally grounded interest in regulating development within its borders," the generally applicable zoning ordinance requiring the owner of a substance abuse facility to apply for a variance and certificate of occupancy was "not preempted by State regulation of the licensing of substance abuse facilities" (*id.* at 508).

Under the analysis set forth in *Frew Run* and *Gernatt Asphalt Prods.*, and their progeny, it is clear that there is no preemption here. As this Court expressly held, the phrase "relating to" as used in the MLRL supersession clause, and the nearly identical language employed in ECL 23-0303(2), means only that Middlefield is preempted from regulating the actual operations, processes, and details of the mineral mining and oil, gas, and solution mining industries, not from adopting a generally applicable zoning law that determines what land uses shall be permissible and prohibited within its borders. This is precisely what Supreme Court and the Appellate Division held below, and this Court should similarly construe the phrase "relating to regulation" in ECL 23-0303(2) as it did the MLRL supersession clause in *Frew Run* and *Gernatt Asphalt Prods.*

POINT III

ECL 23-0303(2) DOES NOT IMPLICITLY PREEMPT MIDDLEFIELD'S ZONING LAW

A. In Light of the OGSML's Express Preemption Provision, This Court Need Not Consider Implied Preemption

Alternatively, Plaintiff argues that, even if this Court concludes that the Legislature has not expressly preempted Middlefield's home rule authority to adopt generally applicable zoning regulations, the Legislature has implicitly evidenced its intent to preempt local regulation of the oil and gas industry, including local zoning, in favor of promoting the development of the resource to maximize recovery and protect the correlative rights of the mineral owners across the State. However, because the Legislature expressly stated its intent to preempt only "regulation of the oil, gas and solution mining industries," the doctrine of implied preemption need not be considered (*see Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 113 [2008] ["When dealing with an express preemption provision, as we do here, it is unnecessary to consider the applicability of the doctrines of implied or conflict preemption."], *cert denied* 555 US 1136 [2009]; *Harrell v Champlain Enters.*, 200 AD2d 290, 293 [3d Dept 1994] ["under the doctrine of expressio unius est exclusio alterius, implied preemption is not applicable because of the existence of an express preemption provision"]). Indeed, this Court recognized as much in *Frew Run*, holding:

> The Legislature has simplified our determination of whether the Mined Land Reclamation Law preempts the provisions of the town zoning ordinance in question. *Unlike preemption cases which require the court to search for indications of an implied legislative intent to preempt in the Legislature's declaration of a State policy or in the comprehensive and detailed nature of the regulatory scheme established by the statute, we deal here with an express supersession clause* (ECL 23–2703[2]). The appeal turns on the proper construction of this statutory provision

(71 NY2d at 130-131 [emphasis added and some citations omitted]).

Simply put, the best expression of legislative intent is the express language used in the statute. Since the express language of ECL 23-0303(2) does not preempt the Town's zoning authority, the Court need not attempt to glean an implied intent to do so. Plaintiff makes no effort to refute, or even distinguish, this long line of case law, but nonetheless presses its claim of implied preemption. In any event, even if this Court were to consider the doctrine of implied preemption, the Appellate Division order should be affirmed because the Legislature did not intend to preempt local zoning authority in favor of the absence of land use regulation permitting oil and gas derricks to be sited at any location within a municipality without any local input.

B. Middlefield's Zoning Law is Not Preempted Under the Doctrine of Field Preemption

Where the Legislature has not expressly stated its intent to preempt local regulation, "that intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme,

including the need for statewide uniformity in a particular area. A comprehensive and detailed statutory scheme may be evidence of the Legislature's intent to preempt" (*Matter of Cohen v Board of Appeals of Vil. of Saddle Rock*, 100 NY2d 395, 400 [1989]; *see Anonymous v City of Rochester*, 13 NY3d 35, 52 [2009] [Graffeo, J., concurring] ["Field preemption may occur by express legislative direction or may be implied from a declaration of State policy by the Legislature . . . or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area" (internal quotation marks omitted)]). In examining whether the Legislature has impliedly preempted local regulation, the courts must examine whether "the State has acted upon a subject and whether, in taking action, it has demonstrated a desire that its regulations should preempt the possibility of discordant local regulations" (*Cohen*, 100 NY2d at 400; *see also Daytop Vil.*, 78 NY2d at 508). "A desire to pre-empt may be implied from a declaration of State policy by the Legislature or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area" (*Consolidated Edison Co. of N.Y. v Town of Red Hook*, 60 NY2d 99, 105 [1983] [citation omitted]; *see also People v De Jesus*, 54 NY2d 465, 469 [1981] [comprehensive and detailed regulatory scheme imposed under the ABC Law implicitly evidenced the Legislature's intent to preempt the entire field]; *Robin v Incorporated Vil. of Hempstead*, 30 NY2d 347, 350 [1972] [declaration of State

policy to preempt "the subject of abortion legislation and occupy the entire field so as to prohibit additional regulation by local authorities in the same area"]).

Here, ECL 23-0301 provides the Legislature's statement of policy underlying the statewide regulation of the oil, gas, and solution mining industries. Specifically, section 23-0301 declares that it is

> in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners *and the rights of all persons including landowners and the general public may be fully protected*, and to provide in similar fashion for the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells

(emphasis added). Contrary to Plaintiff's suggestion, the Legislature's declaration of policy specifically recognizes the interplay that must occur between the rights of owners of oil and gas properties, such as Plaintiff, and the rights of *all* landowners *and* the general public. In order to fully protect the rights of both, as ECL 23-0301 states, the Legislature cannot have intended to wholly supersede the municipal home rule authority of local governments to determine whether and in which districts oil and gas drilling operations will be permitted. To hold otherwise would obviate the clear balancing of rights sought to be protected by the Legislature, and would grant Plaintiff, and potentially the DEC, total control over uniquely local land use matters. In fact, the statutory scheme governing extractive mining is not

markedly different—the MLRL was enacted "to foster and encourage the development of an economically sound and stable mining industry" (ECL 23-2703[1]) and to eliminate the patchwork scheme of local regulation—yet this Court in *Frew Run* and *Gernatt Asphalt Prods.* did not find express or implied preemption (*see Frew Run*, 71 NY2d at 132-133).

Although the Legislature has indeed enacted detailed statutory provisions governing the technical operations of the oil and gas industries, generally applicable zoning ordinances determining whether, and in which districts, heavy industrial uses such as oil and gas drilling may be permitted, such as Middlefield's Zoning Law, are not inconsistent with the State regulations since they do not impact the day-to-day operations of the industry (*see e.g. Jancyn Mfg. Corp.*, 71 NY2d at 97 [state law regulating use of sewage system additives did not preempt local legislation prohibiting use of any sewage system additives without county health department approval]; *Matter of JIJ Realty Corp. v Costello*, 239 AD2d 580, 582 [2d Dept 1997] [holding that a zoning provision prohibiting the use of a warehouse for storage of lubricating oil and grease was not inconsistent with the purpose underlying the Petroleum Bulk Storage Code and, thus, was not impliedly preempted by state law], *lv denied* 90 NY2d 811 [1997]).

Plaintiff nonetheless extensively relies on the ECL provisions regulating delineation of pools and well spacing units, among other things, as evidence that

the actual location of oil and natural gas wells is a matter within the exclusive province of the State. 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, as well as to encourage an efficient yield of resources where it is permitted (*see* ECL 23-0501, 23-0503). If Middlefield had imposed farther setbacks or maximum acreage limits for a spacing unit located within the Town's borders, such regulation of the operations of the oil, gas, and solution mining industries would be preempted. Middlefield's generally applicable Zoning Law, setting only the permissible and prohibited uses of land in the Town, however, does not impose such duplicative requirements and, thus, does not attempt to occupy the field that is governed by the OGSML.

Notably, as the courts concluded below, the State-imposed limitations on well siting expressly govern the operations of the oil, gas, and solution mining industries, as contemplated by the Legislature in enacting ECL 23-0303(2), but do not contain any provisions that can be read to indicate the Legislature intended to wholly preempt a municipality's exercise of its constitutionally guaranteed zoning authority (*see* R., Vol. 2, at 1045; *see also* R., Vol. 1, at 13-14). Indeed, as the Third Department has recognized, "[a] necessary consequence of limiting the number of wells is that some people will be prevented from drilling to recover the

oil or gas beneath their property" (*Matter of Western Land Servs., Inc. v Department of Envtl. Conservation of State of N.Y.*, 26 AD3d 15, 17 [3d Dept 2005], *lv denied* 6 NY3d 713 [2006]). Thus, although Middlefield's prohibition on heavy industrial uses, such as oil and gas drilling, within its borders may have an incidental impact on the business of Plaintiff's lessee, the ECL restrictions governing well siting plainly do not evidence any legislative intent to preempt Middlefield's zoning authority in its entirety.

Nor does Middlefield's determination that oil and gas extraction and development is not a permissible use of land within its borders prevent Plaintiff and other landowners from realizing the financial gains that may potentially result from recovery of their subsurface minerals, as Plaintiff asserts. In order to address the perceived inequity of some landowners being prohibited from drilling on their properties, New York has "adopted the doctrine of 'correlative rights,' whereby each landowner is entitled to be compensated for the production of the oil or gas located in the pool beneath his or her property regardless of the location of the well that effects its removal" (*id.*). As such, 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 the oil or gas

produced from beneath his property, whether by voluntary agreement, an order of DEC, or otherwise.[8]

Because Middlefield's Zoning Law does not intrude upon the field governed by the OGSML—regulation of the actual operations of the oil, gas, and solution mining industries—but rather relates to a different subject matter entirely—regulation of land uses generally—it is not impliedly preempted under field preemption.

C. Middlefield's Zoning Law is Not Preempted Under the Doctrine of Conflict Preemption

Having failed to establish field preemption, Plaintiff alternatively argues that Middlefield's Zoning Law conflicts with the language and policies of the OGSML and the Energy Law. Conflict preemption only may be found, however, where "a local government adopts a law that directly conflicts with a State statute" (*DJL Rest. Corp.*, 96 NY2d at 95 [holding that a zoning ordinance did not conflict with, and thus was not preempted by, the Alcoholic Beverage Control Law]; *see also Anonymous*, 13 NY3d at 51 [Graffeo, J., concurring] ["under the doctrine of

[8] The exercise of private property rights, such as oil and gas rights, are separate and distinct from the use of land under a zoning ordinance (*see e.g. Matter of Friends of Shawangunks v Knowlton*, 64 NY2d 387, 392 [1985] ["The use that may be made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule, separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of private agreement."]). The mere prohibition of oil and gas mining and drilling on the surface of a property owner's land, pursuant to a generally applicable zoning ordinance, does not in any way preclude the property owner from obtaining compensation for the withdrawal of the natural gas existing beneath his or her property.

conflict preemption, a 'local government . . . may not exercise its police power by adopting a local law inconsistent with constitutional or general law,'" quoting *New York State Club Assn.*, 69 NY2d at 217]; *Consolidated Edison Co. of N.Y.*, 60 NY2d at 107). No such conflict exists here.

As demonstrated above, no conflict exists between the language and policies of the OGSML and Middlefield's Zoning Law establishing the permissible and prohibited uses of land within the Town (*see* Point II[A], [B], [D], *supra*). The OGSML governs the technical operations of the oil, gas, and solution mining industries, whereas Middlefield's Zoning Law regulates land use generally. Indeed, this Court should reject Plaintiff's unsupported assertion that the OGSML somehow requires that Middlefield "allow some wells to be drilled in the Town" (Pl's Brf, at 56). No provision of the OGSML directs that Middlefield permit oil and gas drilling and extraction to occur within its borders, especially where it has determined that such heavy industrial uses are inimical to its residents' health, safety, and welfare, inconsistent with its community character, and were not permitted even prior to the enactment of the Zoning Law challenged in this action (R., Vol. 1, at 203-211, 216-217, 225, 250-256, 267-269, 290, 335, 537-538; R., Vol. 2, at 606). The mere fact that the OGSML provides the DEC with the authority to grant a permit to conduct oil and gas operations does not authorize the DEC, Plaintiff, or its lessee to dictate to Middlefield whether such uses of land

should be permissible, regardless of whether they conflict with Middlefield's comprehensive plan and zoning ordinance (*see e.g. Frew Run*, 71 NY2d at 131-133 [holding that a local zoning ordinance was not preempted notwithstanding that the petitioner had already obtained a DEC mining permit]; *Matter of Valley Realty Dev. Co. v Jorling*, 217 AD2d 349, 353 [4th Dept 1995] [noting that the DEC's technical guidance memorandum concerning issuance of MLRL permits provides that "if DEC is advised that mining is prohibited, '(t)he permit, if one is issued, will not contain any special conditions regarding local prohibition if one exists, beyond the general advisory that *issuance of a DEC permit does not relieve the applicant of the need to obtain any required local permits or approvals, and a notation that the local government has declared that mining is prohibited at this location*'" (emphasis added)]).

Plaintiff's further speculation that Middlefield's Zoning Law "prohibits wells from being constructed in the ideal location for providing greater recovery (and prevention of waste and the protection of correlative rights)" far exceeds the scope of the record on this appeal (Pl's Brf, at 58). Indeed, no evidence exists in the record concerning where the "ideal" location for well siting is or that Middlefield's Zoning Law actually causes a reduction in the quantity of oil and gas ultimately recoverable so as to constitute waste, as Plaintiff suggests. Plaintiff's

pure speculation regarding these matters cannot establish any conflict between Middlefield's Zoning Law and the OGSML.

This Court should also reject Plaintiff's attempt to argue that Middlefield's Zoning Law conflicts with the OGSML because it could hypothetically prevent oil and gas operators from using horizontal drilling to drill beneath lands located in Middlefield, notwithstanding that the well site is located in an adjacent municipality. This issue is not before the Court in this action. Middlefield's Zoning Law, as currently phrased, regulates only surface uses of land in Middlefield (R., Vol. 1, at 103-105, 114-117); it does not purport to regulate subsurface activities that result from land uses in other municipalities. In any event, a de facto moratorium on horizontal drilling is currently in place preventing the issuance of any horizontal drilling permits in New York, as the DEC reviews and updates its Supplemental Generic Environmental Impact Statement with respect to the new drilling technique. Thus, it is the State, not Middlefield's Zoning Law, that has foreclosed the use of horizontal drilling in New York at this time.

Finally, Middlefield's Zoning Law does not irreconcilably conflict with the policies of the OGSML and Energy Law because the statutes may be harmonized to serve the twin policy goals of promoting oil and gas development, while also reserving to Middlefield the crucial home rule authority to choose what uses of

land best serve the health, safety, and welfare of its residents (*see e.g. Frew Run*, 71 NY2d at 134 ["By simply reading ECL 23–2703(2) in accordance with what appears to be its plain meaning—i.e., superseding any local legislation which purports to control or regulate extractive mining operations excepting local legislation prescribing stricter standards for land reclamation—the statutes may be harmonized, thus avoiding any abridgement of the town's powers to regulate land use through zoning powers expressly delegated in the Statute of Local Governments § 10(6) and Town Law § 261"]). As the Appellate Division held, the OGSML and Energy Law policy goal of promoting development and minimizing waste "does not equate to an intention to require oil and gas drilling operations to occur in each and every location where such resource is present, regardless of the land uses existing in that locale" (R., Vol. 2, at 1046).

> Indeed, the policy of the OGSML explicitly seeks to protect the rights of "all persons including landowners and the general public"—not just the owners of oil and gas properties, such as petitioner, *a goal which is realized when individual municipalities can determine whether drilling activities are appropriate for their respective communities*

(*id.* [citations omitted and emphasis added]).

In sum, even if this Court were to consider the doctrine of implied preemption, it is clear that the Legislature, in enacting state regulations governing the operations of the oil, gas, and solution mining industries, did not intend to wholly preempt local governments' municipal home rule authority to adopt

generally applicable zoning ordinances determining the permitted and prohibited uses of land within their borders. Thus, the Appellate Division order should be affirmed.

POINT IV

PLAINTIFF'S RELIANCE ON LAW IN OTHER STATES TO INTERPRET THE SCOPE OF PREEMPTION UNDER ECL 23-0303(2) IS MISPLACED

Finding little support for its interpretation of the OGSML supersession provision under New York law, Plaintiff resorts to reliance on the law of other states in order to attempt to show that the New York Legislature intended ECL 23-0303(2) to preempt generally applicable zoning laws. Relying on decisions from Colorado, Ohio, West Virginia, and the Fifth Circuit Court of Appeals interpreting Louisiana law, Plaintiff argues that the New York Legislature could not have intended to permit Middlefield to control local land uses within its borders, through its constitutionally guaranteed and legislatively delegated home rule powers, allegedly because "[n]o court in the country has authorized a total ban on oil and gas activities through zoning" (Pl's Brf, at 61). Because each of the statutes underlying these decisions is significantly different than the OGSML, however, Plaintiff's reliance on these decisions to inform its interpretation of ECL 23-0303(2) is misplaced.

For example, in Louisiana, the statutory scheme governing oil and gas development provides that the mere issuance of a state permit by the Louisiana

Office of Conservation ("LOC") entitles the permit holder to enter the property covered by the permit and to drill for oil and gas without any other approvals (*see* La Stat Ann § 30:28[F]). In fact, the Louisiana statute expressly forbids local municipalities from "prohibit[ing] or in any way interfer[ing] with the drilling of a well or test well in search of minerals by the holder of such a permit" (*id.*). As the Fifth Circuit held, this statutory scheme "make[s] it clear that the process of regulating when and where an oil and gas well may be drilled within the state is entirely vested in the LOC and interference by other political bodies is prohibited" (*Energy Mgt. Corp. v City of Shreveport*, 397 F3d 297, 304 [5th Cir 2005]).

Similarly, in Colorado, the intent of the Colorado Oil and Gas Conservation Act is "to foster, encourage, and promote the development, production, and utilization of the natural resources of oil and gas in the state of Colorado," to prevent waste, and to protect the correlative rights of landowners and producers in sharing in the ultimate production of oil and gas (*see* Colo Rev Stat Ann § 34-60-102[1][a]). Noticeably absent from this statement of intent is the OGSML's required balancing of the correlative rights of the landowners with the interests of the general public, which as the Appellate Division held is a determination that New York has determined is best left with local municipal officials, such as Middlefield's Town Supervisor and Town Board.

Nor does *State ex rel. Morrison v Beck Energy Corp.* (989 NE2d 85 [Ohio Ct App 2013], *appeal allowed* 135 Ohio St 3d 1469 [2013]) provide support for Plaintiff's position. In that case, the local municipality enacted an ordinance requiring a local drilling permit, an $800 application fee, a $2,000 performance bond, a zoning certificate for the construction of any building, and a "conditional zoning certificate" before permitting drilling to occur within its borders (*see id.* at 89). These requirements were plainly duplicative of, and were in direct conflict with, the state's statutory requirements for drilling and were thus preempted under Ohio law (*see id.* at 97-99 ["we find the city's imposition of an $800 local permit application fee and a $2,000 performance bond to be in conflict with the state law, which already imposes a fee of $2,000 and a performance bond"; "Because drilling necessarily involves the construction of a well, this ordinance, to the extent it requires a zoning certificate and 'conditional zoning certificate' for drilling, conflicts with R.C. 1509.02 and cannot be enforced against a person seeking to drill"]; *see also* Ohio Rev Code Ann § 1509.02 [reserving "exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state" to the Ohio Department of Natural Resources, excepting local regulation of roads, but prohibiting the exercise of such local authority in a manner that "discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated"]).

Moreover, in *Northeast Natural Energy, LLC v City of Morgantown* (Civ Act No. 11-C-411, 2011 WL 3584376 [W Va Cir Ct Aug. 12, 2011]), the plaintiff challenged a local ordinance that prohibited "[d]rilling a well for the purpose of extracting or storing oil or gas *using horizontal drilling with fracturing or fracking methods* within the limits of the City of Morgantown or within one mile of the corporate limits of the City of Morgantown" (*id.* [internal quotation marks omitted and emphasis added] [available at R., Vol. 2, at 899-900]). The West Virginia court held that this statute, which unquestionably regulates the operations of the oil and gas industry by prohibiting the use of the hydraulic fracturing extraction and production technique, was preempted by West Virginia's comprehensive Oil and Gas Act, which reserved to the state "the sole discretion . . . to perform all duties as related to the exploration, development, production, storage and recovery of this State's oil and gas" and required local governments "to supplement and complement the efforts of the State by coordinating their programs with those of the State" (*id.* [available at R., Vol. 2, at 902).

Plainly, these statutory provisions are significantly different than the limited preemption intended under ECL 23-0303(2), as they leave no room for harmonizing local control over land uses for the production of oil and gas. Thus, contrary to Plaintiff's argument, the laws of other states should not considered by this Court in order to discern the New York Legislature's intent.

Even assuming, *arguendo*, that resort to the law of New York's sister states was necessary in order to interpret the clear language of ECL 23-0303(2), the oil and gas laws of Pennsylvania most closely resemble the OGSML, and have been interpreted consistently with this Court's precedent in *Frew Run and Gernatt Asphalt Prods*. Notably, Pennsylvania's statute regulating oil and gas development (Pa Stat Ann, tit 58, § 3302) contains a very similar supersession clause to ECL 23-0303(2). As in ECL 23-0303(2), section 3302 of the Pennsylvania statute expressly supersedes "all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development)," with the exception of ordinances adopted pursuant to two Pennsylvania state statutes, neither of which concerns a local municipality's zoning authority (Pa Stat Ann, tit 58, § 3302). Pennsylvania's interpretation of section 3302 and its predecessor (section 602 of the Pennsylvania Oil and Gas Act), also dealing with the oil and gas industry, is particularly instructive here.[9]

As this Court held with respect to the issue of preemption under the MLRL supersession clause, the Pennsylvania Supreme Court has, in two decisions issued in conjunction, addressed the scope of preemption under section 602—the

[9] Importantly, the Pennsylvania Legislature, in adopting the new preemption provision, expressly provided that "[a]ny difference in language between 58 Pa.C.S. § 3302 and section 602 of the Oil and Gas Act is intended only to conform to the style of the Pennsylvania Consolidated Statutes and *is not intended to change or affect the legislative intent, judicial construction or administration and implementation of section 602 of the Oil and Gas Act*" (Oil and Gas—Marcellus Shale, 2012 Pa. Legis. Serv. Act 2012-13, H.B. 1950, § 4 [Purdon's] [emphasis added]).

predecessor to section 3302. First, in *Huntley & Huntley, Inc. v Borough Council of Borough of Oakmont* (600 Pa 207, 964 A2d 855 [2009]), the plaintiff challenged the denial of a conditional use permit to drill and operate a natural gas well within the Borough on the grounds, among others, that the Borough's zoning ordinance restricting the location of natural gas wells was preempted by section 602 (*see id.* at 212, 964 A2d at 858). Although noting that "[s]ection 602 of the Oil and Gas Act contain[ed] express preemption language . . . [t]hat . . . totally preempts local regulation of oil and gas development," with certain non-relevant exceptions, the Supreme Court concluded that "the express preemption command [was] not absolute" (*id.* at 221, 964 A2d at 863). Instead, the Court held, the scope of section 602's preemption extended only to regulation of the "technical aspects of well functioning and matters ancillary thereto (such as registration, bonding, and well site restoration), [but not] the well's location" (*id.* at 223, 964 A2d at 864). Indeed, the Court noted, "[a]lthough one could reasonably argue that a well's placement at a certain location is one of its features in a general sense, it is not a feature of the well's operation because it is not a characteristic of the manner or process by which the well is created, functions, is maintained, ceases to function, or is ultimately destroyed or capped" (*id.* at 222-223, 964 A2d at 864).

The Court further drew a salient distinction between the purposes served by the Oil and Gas Act and those served by local zoning ordinances:

> By way of comparison, the purposes of zoning controls are both broader and narrower in scope. They are narrower because they ordinarily do not relate to matters of statewide concern, but pertain only to the specific attributes and developmental objectives of the locality in question. However, they are broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development

(*id.* at 224, 964 A2d at 865). Emphasizing these disparate purposes, the Court ultimately concluded that the Borough's generally applicable zoning ordinance determining the permissible location of natural gas wells within the municipality was not preempted by section 602 (*see id.* at 225-226, 964 A2d at 866 ["(A)bsent further legislative guidance, we conclude that the Ordinance serves different purposes from those enumerated in the Oil and Gas Act, and hence, that its overall restriction on oil and gas wells in R–1 districts is not preempted by that enactment."]; *see also Board of County Commrs. of La Plata County v Bowen/Edwards Assoc.*, 830 P2d 1045, 1057-1059 [Colo 1992] [holding that a county's zoning authority was not expressly or impliedly preempted by Colorado's Oil and Gas Conservation Act]).

In contrast, in *Range Resources-Appalachia, LLC v Salem Township* (600 Pa 231, 964 A2d 869 [2009]), the Court was asked to determine whether a Salem Township zoning ordinance "directed at regulating surface and land development associated with oil and gas drilling operations" was preempted under section 602 (*id.* at 232, 964 A2d at 870). Specifically, the challenged ordinance required oil

and gas drillers to obtain a municipal permit for all drilling-related activities; regulated the location, design, and construction of access roads, gas transmission lines, water treatment facilities, and well head; established a procedure for residents to file complaints regarding surface and ground water contamination; allowed the Township to declare drilling a public nuisance and to revoke or suspend a permit; and established requirements for site access and restoration (*see id.* at 234, 964 A2d at 871). Noting its holding in *Huntley* that section 602's preemptive scope did not "prohibit municipalities from enacting traditional zoning regulations that identify which uses are permitted in different areas of the locality, even if such regulations preclude oil and gas drilling in certain zones" (*id.* at 236, 964 A2d at 872), the Court concluded that the Township's zoning ordinance far exceeded the permissible bounds of zoning regulation by adopting "regulations pertaining to features of well operations that substantively overlap with similar regulations set forth in the Act" and, thus, was preempted under section 602 (*id.* at 240-244, 964 A2d at 875-877). Clearly, the Salem Township ordinance, by regulating the technical aspects of oil and gas drilling and imposing additional restrictions above and beyond those contained in the Pennsylvania Oil and Gas Act, went too far.

Both the Pennsylvania and New York courts, when construing nearly identical preemption language, have concluded that the scope of preemption of

local laws plainly does not encompass a municipality's authority to adopt generally applicable zoning ordinances that govern the permissible and prohibited uses of land within its borders. Thus, as the Pennsylvania Supreme Court held in *Huntley*, the nearly identical preemption language contained in both section 3302 of the Pennsylvania oil and gas statute and ECL 23-0303(2) do not prohibit municipalities from enacting generally applicable zoning ordinances that identify which uses are permitted and prohibited in different areas of the locality, even if such regulations preclude oil and gas drilling.

Significantly, the Pennsylvania Legislature's recent attempt to implement a uniform statewide zoning scheme for oil and gas development that applies to all municipalities in Pennsylvania, as Plaintiff appears to seek in this action, has been invalidated as inconsistent with the municipalities' home rule authority and a violation of substantive due process (*see Robinson Twp. v Commonwealth of Pennsylvania*, 52 A3d 463, 471 [Pa Commw Ct 2012] [striking down PA Stat Ann, tit 58, § 3304], *appeal quashed* 73 A3d 520 [Pa 2013]). As the Court aptly held,

> 58 Pa. C.S. § 3304 requires that local zoning ordinance be amended which, as *Huntley & Huntley, Inc.* states, involves a different exercise of police power. The public interest in zoning is in the development and use of land in a manner consistent with local demographic and environmental concerns. 58 Pa. C.S. § 3304 requires zoning amendments that must be normally justified on the basis that they are in accord with the comprehensive plan, not to promote oil and gas operations that are incompatible with the uses by people who have made investment decisions regarding businesses and homes on the assurance that the zoning district would be developed in accordance

> with comprehensive plan and would only allow compatible uses. If the Commonwealth-proffered reasons are sufficient, then the Legislature could make similar findings requiring coal portals, tipples, washing plants, limestone and coal strip mines, steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones for a variety of police power reasons advancing those interests in their development. It would allow the proverbial pig in the parlor instead of the barnyard.
>
> In this case, by requiring municipalities to violate their comprehensive plans for growth and development, 58 Pa. C.S § 3304 violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications – irrational because it requires municipalities to allow all zones, drilling operations and impoundments, gas compressor stations, storage and use of explosives in all zoning districts, and applies industrial criteria to restrictions on height of structures, screening and fencing, lighting and noise. Succinctly, 58 Pa. C.S. § 3304 is a requirement that zoning ordinances be amended in violation of the basic precept that [l]and-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded. If a municipality cannot constitutionally include allowing oil and gas operations, it is no more constitutional just because the Commonwealth requires that it be done

(*id.* at 484-485 [footnotes, internal quotation marks, and citations omitted]). In light of this well-reasoned analysis, this Court should not interpret ECL 23-0303(2) as Plaintiff suggests, which would give the DEC authority to make all local zoning and land use decisions with respect to the oil and gas industry, because doing so could render it unconstitutional (*see LaValle v Hayden*, 98 NY2d 155, 161 [2002] ["courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional"]).

CONCLUSION

For the foregoing reasons, the Town of Middlefield respectfully requests that this Court affirm the order of the Appellate Division, Third Department, award it the costs, disbursements and fees incurred in this proceeding, and award it such other relief as this Court shall deem just, proper or equitable.

Dated: December 11, 2013
Albany, New York

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