To Be Argued By: Thomas S. West
Time Requested: 20 Minutes

New York State
Court of Appeals

NORSE ENERGY CORP. USA,

Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents.

APL-2013-00245

BRIEF OF APPELLANT NORSE ENERGY CORP. USA

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DISCLOSURE STATEMENT (22 N.Y.C.R.R. § 500.1[f])

Appellant, Norse Energy Corp. USA ("Norse")[1] is a New York corporation that is a wholly-owned subsidiary of Norse Energy Holdings, Inc., a Delaware corporation that is a wholly-owned subsidiary of Norse Energy Corp. ASA, a publicly-traded Norwegian company. Vandermark Exploration, Inc. is a New York corporation that is a wholly-owned subsidiary of Norse Energy Corp. USA. Strategic Energy Corp. and MariCo Oil and Gas Corp. are inactive companies that are affiliated with Norse.

[1] Since December 6, 2012, Norse has operated as the debtor in possession in connection with bankruptcy reorganization proceedings pending in the Bankruptcy Court for the Western District of New York (Bk. No. 12-1385). On May 2, 2013, The West Firm, PLLC was authorized by order of the Bankruptcy Court to represent Norse in connection with these proceedings. On October 10, 2013, Norse voluntarily converted its reorganization proceeding to a liquidation proceeding, which was approved by the Bankruptcy Court.

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QUESTIONS PRESENTED

Question 1:

Is a municipal zoning ordinance that bans all oil and gas development ("Town Prohibition") expressly preempted by the Oil, Gas and Solution Mining Law ("OGSML"), which directs that it (1) "shall supersede all local laws and ordinances relating to the regulation of the oil, gas and solution mining industries;" (2) expressly limits the "jurisdiction" of municipalities to local roads and real property taxation; and (3) regulates well location by directing the New York State Department of Environmental Conservation ("NYSDEC" or "Department") to establish well spacing and wellbore location according to specific statutory requirements designed to meet the statute's policies of preventing waste, providing for greater ultimate resource recovery, and protecting the correlative rights of "all owners"?

The Opinion and Order of the Appellate Division, Third Department, decided and entered on May 2, 2013 ("Appellate Decision"), holds that the OGSML does not expressly preempt the Town Prohibition. (*See* Record on Appeal ["R."] at 20.

Question 2:

Is this Court's precedent regarding express preemption under the Mined Land Reclamation Law ("MLRL") relevant to or determinative of the

express preemption analysis under a wholly different statute – i.e., here, the OGSML – whose express supersession language, legislative history, policies, and means and subject matter of regulation differ markedly from that of the MLRL?

The Appellate Court found that its holding of no express preemption under the OGSML was supported by this Court's preemption precedent decided under the MLRL (R. at 16-18.), as have all lower courts that have passed upon this issue

Question 3:

Is a municipal zoning ordinance that bans all oil and gas development (i.e., the Town Prohibition) in conflict with, and thus impliedly preempted by, the OGSML, which implements a comprehensive statewide program that regulates both the "how" and "where" of drilling to provide for the development of oil and gas properties in such a manner as to prevent waste, provide for greater ultimate recovery of oil and gas, and protect the correlative rights of "all owners," where, by virtue of the municipal-wide ban, there can be no drilling and no resource recovery, which results in the ultimate in waste (zero production) and the total emasculation of mineral owners' correlative rights by destroying their right to recover oil or gas from under their properties?

The Appellate Decision holds that the OGSML does not impliedly preempt the Town Prohibition under conflict preemption principles. (R. at 19-20.)

JURISDICTION OF THE COURT/PRESERVATION OF ISSUES

This Court has jurisdiction over this matter because the proceeding/action originated in the Supreme Court (*see* R. at 64-66, 35-62), and the Appellate Decision that is the subject of this appeal is an order of the Appellate Division, Third Department, which finally determined the action/proceeding by affirming dismissal of the Complaint. (*See* R. at 20.) By Order, dated August 29, 2013, this Court granted Norse's motion for leave to appeal. (R. at 3-4.)

Further, the express and implied conflict preemption issues presented herein were raised, fully briefed, and decided by the Supreme Court and the Appellate Division, Third Department. (*See* R. at 523, ¶¶ 6-7); (R. at 72-73, ¶¶ 19-26) (express preemption cause of action); (R. at 73-74, ¶¶ 27-35) (conflict preemption cause of action); (*see also* R. at 12-20, 35-62.) Accordingly, all of the issues presented herein are preserved.

PRELIMINARY STATEMENT

This case does not challenge a municipality's rights relative to traditional zoning. This case also does not challenge the ability of a

municipality to act within the bounds of its delegated authority under the New York Constitution and State law. Rather, this case seeks to protect the property rights of mineral owners and their lessees by challenging one town's attempt to use its local zoning power to supplant a comprehensive, uniform statutory scheme created and enforced by the State of New York which regulates oil and gas development in a manner that prevents waste, provides for greater ultimate resource recovery, and protects the rights of all persons, including the correlative rights of all mineral owners.

Specifically, this case seeks a declaration that the express language and underlying policies of the OGSML and the Energy Law prohibit the Town of Dryden ("Town") and the Dryden Town Board (collectively, "Town Board" or "Respondents") from adopting a zoning ordinance that prohibits all oil and gas exploration, drilling, development, extraction, and related activities anywhere in the Town. Because the Town Prohibition bans activities for which control, oversight and regulation are expressly, exclusively and exhaustively delegated to State authorities, the Town Prohibition is preempted by State law.

Accordingly, with the aim of protecting its mineral rights, Norse[2] respectfully submits this brief in support of its appeal of the Appellate Decision which upheld the Town Prohibition. (*See generally* R. at 20.) In the Appellate Decision, the Third Department rejected Norse's argument that the Town Prohibition is expressly preempted under the supersedure language in Environmental Conservation Law ("ECL") § 23-0303(2) and the explicit directives in the OGSML that regulate not only the "how" but also the "where" of oil and gas drilling in New York. (*See* R. at 18-19.) The Appellate Court also rejected Norse's argument that the Town Prohibition is invalid under conflict preemption principles because it impermissibly conflicts with the policies and substantive provisions of the OGSML and the Energy Law. (R. at 14.) For the reasons detailed below, Norse respectfully submits that the Appellate Court erred on both counts and that the Appellate Decision must, therefore, be reversed.

THE RELEVANT LAW: THE OGSML

New York's OGSML (codified in ECL article 23) is the result of New York's membership in the Interstate Oil and Gas Compact Commission

[2] On July 31, 2012, Anschutz Exploration Corporation ("Anschutz") assigned its interest in certain oil and gas leases located in the Town to Norse (the "Assignment"). The Assignment explicitly included the right to participate in this litigation in Anschutz's stead, subject to court approval, which approval was granted by Order of the Appellate Division, Third Department, dated October 5, 2012. *Anschutz Exploration Corp. v. Town of Dryden*, 2012 Slip. Op. 515227 (3d Dep't 2012).

("Commission"), a multi-state governmental agency of a group of oil and gas producing states, whose purpose "is to conserve oil and gas by the prevention of physical waste from any cause." (R. at 524-25, ¶¶ 8-13); ECL art. 23, tit. 21. The Commission arose in a climate where lack of regulation was resulting in overproduction and the waste of oil and gas resources in producing states. (R. at 524, ¶ 8.) The participating states endorsed, and Congress ratified, the Interstate Compact to resolve these issues. *Id.*; H.R.J. Res. 407, 74th Cong. (1935).

The Interstate Compact requires each member state to enact laws that prevent, *inter alia*, "[t]he drilling, equipping, locating, spacing or operating of a well or wells so as to bring about physical waste of oil or gas or loss in the ultimate recovery thereof." (R. at 524, ¶ 11); ECL § 23-2101, art. III(e). New York became a member state of the Commission, enacted the Interstate Compact in 1941, and remains a member state today. (R. at 525, ¶ 13.) New York thus adopted the OGSML which, from its initial enactment in 1963 through the present day, incorporates the requirements of the Interstate Compact. (*See* R. at 525-28, ¶¶ 13-22.)

First and foremost, in accord with the Interstate Compact, the OGSML is designed to uniformly regulate all aspects of the oil and gas industries' activities statewide, including as to exploration, development,

production and utilization. (*See* R. at 100, ¶ 11); (R. at 524-26, 543-87, ¶¶ 8-17 & Exhs. A-D.) To that end, the OGSML contains terms of art informing statutory objectives that are wholly unique to the oil and gas industry, thus distinguishing this statutory scheme from any other, including the MLRL.

These terms are reflected in numerous provisions of the OGSML, including its declaration of policy, which states that:

> It is . . . in the public interest to regulate the development, production, and utilization . . . 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 . . . .

ECL § 23-0301; *see also Western Land Servs. v. Dep't of Envtl. Conservation*, 26 A.D.3d 15, 17 (3d Dep't 2005) (recognizing critical legislative purposes of OGSML, including providing for greater resource recovery, preventing waste, and protecting correlative rights).

In accord with the Interstate Compact, the OGSML defines the term of art "waste," *inter alia*, as "locating, spacing [or] drilling" of a well "in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable . . ., or which causes or tends to cause unnecessary or excessive surface loss or destruction of oil and gas." ECL § 23-0101(20)(c).

Thus, the OGSML's policy objectives of preventing waste and providing for greater ultimate resource recovery are inextricably linked to well location and spacing, i.e., the "where" of oil and gas drilling and development.

The third policy objective – protecting the "correlative rights of all owners" – is also a phrase of art and is a statutory policy wholly unique to the oil and gas industry. The OGSML defines "owner" to be "the person who has a right to drill into and produce from a pool." ECL § 23-0101(11). The protection of an owner's "correlative rights" means that the owner is entitled to a reasonable opportunity to recover or receive the oil or gas (or the equivalent thereof) attributable to its property, regardless of where the well is drilled. *See Sylvania Corp. v. Kilbourne*, 28 N.Y.2d 427, 430 n.3 & 433 (1971) (discussing correlative rights under Conservation Law precursor to ECL article 23; stating that the doctrine of correlative rights provides for equitable apportionment among landholders of the migratory gas and oil underlying their land); N.Y. Comp. Codes R. & Regs. tit. 6 ("6 N.Y.C.R.R.") § 550.3(ao) (defining protection of correlative rights to mean "that the action or regulation by the department should afford a reasonable opportunity to each person entitled thereto to recover or receive the oil or gas beneath his tracts or the equivalent thereof without being required to

drill unnecessary wells or to incur other unnecessary expenses to recover or receive such oil or gas or its equivalent").[3]

This policy and the OGSML's location-based provisions that are designed to accomplish it (i.e., as to unit size, spacing, orientation, and wellbore location) reflect the unique geophysical nature of oil and gas, as distinguished from solid minerals governed by the MLRL. That is, oil and gas are substances that exist in underground pools, and their movement in the subsurface is determined by geophysical properties. Thus, a well drilled on one property may result in draining the resource underlying other properties, thereby depriving those property owners of the ability to recover the resource or receive compensation for it. Indeed, under the pre-statutory "rule of capture," this was precisely what happened. *See Wagner v. Mallory*, 169 N.Y. 501, 505 (1902) (stating that under the rule of capture, title to subsurface oil and gas vests in the party who first brings it to the surface and reduces it to possession). The OGSML, however, modified the rule of capture through its spacing and location-related provisions that prevent wasteful practices; thereby, "all [mineral] owners" in a common source of

[3] *See also* 8 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law* 214 (LexisNexis Matthew Bender 2012) ("*Williams & Meyers*") (stating "[t]here appear to be two aspects to the doctrine of correlative rights: (1) as a corollary to the rule of capture, each person has a right to produce [ ] from his land and capture such oil or gas as may be produced from his well, and (2) a right of the landowner to be protected against damage to a common source of supply and a right to a fair and equitable share of the source of supply").

supply are assured an opportunity to either recover the resource or be compensated in kind, thus protecting their "correlative rights." *See* ECL § 23-0301; *see also Sylvania Corp.*, 28 N.Y.2d at 433 (upholding constitutionality of statutes designed to prevent waste; stating that, in so doing, the correlative rights of owners in a common source of supply are protected). Notably, there is no comparable concept, policy, or related terminology in any other New York law, including the MLRL.

The OGSML also seeks to protect the rights of all landowners and the general public. *See* ECL § 23-0301. This general welfare policy is achieved, however, through the comprehensive scheme contained in the OGSML, which the NYSDEC administers statewide through uniform rules and regulations promulgated under the OGSML, in accord with the detailed environmental impact review required under ECL article 8, the New York State Environmental Quality Review Act ("SEQRA"). *See, e.g.*, 6 N.Y.C.R.R. pts. 550-559. To date, this process has, among other things, involved preparation of a Generic Environmental Impact Statement relative to oil and gas development ("1992 GEIS"), as well as the ongoing development of the exhaustingly comprehensive Supplemental Generic Environmental Impact Statement ("SGEIS") relative to high-volume hydraulic fracturing – a process which has been ongoing for more than five

years. N.Y. Dep't of Envtl. Conservation, Generic Envtl. Impact Statement (1992), *available at* http://www.dec.ny.gov/energy/45912.html; N.Y. Dep't of Envtl. Conservation, Draft Supplemental Generic Envtl. Impact Statement (rev. 2011), *available at* http://www.dec.ny.gov/energy/75370.html. In furtherance of the policy to "protect all persons," the SGEIS incorporates even more stringent regulatory controls and prohibitions relative to the "where" of oil and gas drilling, including a host of location-related prohibitions, setbacks, and environmental restrictions. (R. at 529-32, ¶¶ 30, 33, 34, 36, 37.)

Thus, the general welfare is protected pursuant to these comprehensive, uniform statewide controls, which are to be implemented consistently with the OGSML's other explicit policies derived from the Interstate Compact – i.e., protecting the correlative rights of "all owners," preventing waste, and providing for greater ultimate resource recovery. *See Envirogas, Inc. v. Town of Kiantone*, 112 Misc. 2d 433, 433-35 (Sup. Ct. Erie Cnty. 1982) (stating the OGSML and its implementing regulations "are designed to protect the public, prevent waste and ensure a greater ultimate recovery of oil and gas;" noting legitimacy of the town's concerns, but finding those concerns accommodated by the OGSML's substantive provisions; finding local governments "precluded from legislating on the

same subject matter" as the OGSML), *aff'd*, 89 A.D.2d 1056 (4th Dep't 1982), *lv. denied*, 58 N.Y.2d 602 (1982).

Indeed, legislative history – which tracks the statute's evolution from 1963 through 1981 (when the supersedure language was added) – confirms that the OGSML vests exclusive control over oil and gas activities in the State, including the responsibility for proper well spacing and location based on sound geologic principles (i.e., the "where" of drilling); therefore, pursuant to the supersession language, that same subject matter is off-limits to municipalities. (*See generally* R. at 527-29, 589, 593, 596, 600-610, 616-617, 619-20.)

More specifically, as enacted in 1963, the OGSML's precursor (former Conservation Law, L. 1963, c. 959) sought to: (1) "foster, encourage and promote" natural gas development, production and utilization in a manner that would prevent waste; (2) authorize and provide for the operation and development of oil and gas properties in such a manner that greater ultimate recovery may be had; and (3) fully protect the correlative rights of all owners and the rights of all persons, including landowners and the general public. (R. at 526-27, 555, 589, 592, 594, 597, 600, ¶¶ 17-21 & Exhs. D & E.); *see also* ECL § 23-0301 (Historical and Statutory Notes detailing derivation from L. 1963, c. 959). These policies were to be

achieved by vesting administration of the statute in the State, including the responsibility for establishing well spacing and wellbore location based on sound geologic principles. (R. at 528-29, 589, 593, 596, 600-10, 616-17, 619-20, ¶¶ 22-25 & Exhs. E-H); *see also* ECL § 23-0501(2) (Historical and Statutory Notes detailing derivation from L. 1963, c. 959).

In the years following the OGSML's enactment, New York experienced the energy crisis of the 1970s, which the Legislature found "inimical to the health, safety and welfare of the people" of New York State. *See* Energy Law § 1-101 (Historical and Statutory Notes). In response, the Legislature took a number of steps. In 1976, the Legislature enacted the State Energy Law and created the State Energy Office. L. 1976, c. 819, § 2. The Energy Law was created, *inter alia*, "to obtain and maintain an adequate, continuous supply of safe, dependable and economical energy for the people of [New York State]." Energy Law § 3-101(1). In addition, the Energy Law directed that "[e]very agency of the state shall conduct its affairs so as to conform to the state energy policy expressed in this chapter." Energy Law § 3-103.

Also in response to the energy crisis of the 1970s and in furtherance of the functions of the State Energy Office, in 1978, the Legislature amended Energy Law § 3-101(5), declaring it to be the energy policy of the

State "to foster, encourage and promote the prudent development and wise use of all indigenous state energy resources including, but not limited to, on-shore oil and natural gas, off-shore oil and natural gas, [and] natural gas from Devonian shale formations . . . ." L. 1978, c. 396. Concomitantly, the Legislature amended the OGSML's declaration of policy (codified in ECL § 23-0301) by replacing the words "foster, encourage and promote" oil and gas development, production and utilization with the word "regulate." L. 1978, c. 396; *see also* ECL § 23-0301.

Nothing else in the OGSML was changed. The OGSML's articulated policies – to prevent waste, provide for greater ultimate recovery, and protect the correlative right of all owners and the rights of the general public – remained exactly the same. And, the substantive provisions designed to achieve those objectives also remained unchanged. Likewise, the directive in Energy Law § 3-103 – that every state agency conduct its affairs to conform to the policies in Energy Law § 3-101, now including promoting the prudent development of indigenous state energy resources – also remained the same.

Accordingly, the 1978 amendments merely strengthened the Legislature's commitment to the effective development of New York's indigenous resources, with the NYSDEC being required to conduct its

activities under the OGSML to effectuate that goal (*see* Energy Law § 3-103), while still providing for greater ultimate recovery, preventing waste and protecting the correlative rights of "all owners" and the rights of the general public (per ECL § 23-0301) via the OGSML's substantive location-based directives. *See Cooperstown Holstein Corp. v. Town of Middlefield* Record on Appeal ["CHC R."] at 725-26, ¶¶ 27-32.[4]

Despite the Legislature's clear and repeated commitment to efficiently developing New York's indigenous energy resources, for more than twenty years, piecemeal local regulation often frustrated that purpose. Accordingly, in 1981, the Legislature amended the ECL by enacting an express supersedure provision, ECL § 23-0303(2), directing that the OGSML supersedes "all local laws and ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or . . . under the real property tax law." *See* L.1981, c. 846 § 4; (R. at 529-30, 622-23, 625-26, ¶¶ 27-32 & Exhs. I & J);

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

(R. at 100-102, ¶¶ 11-15); *see also* ECL § 23-0303 (Historical and Statutory Notes discussing 1981 amendments).

The 1981 amendments further clarified that (1) the Legislature's original intent (dating back to at least 1963) was *not* to allow local control over oil and gas activities; (2) the supersedure language was enacted to remedy the problems resulting from decades of local regulation; and (3) exclusive jurisdiction over the entire oil and gas industry and all of its activities would vest in the NYSDEC through the OGSML's comprehensive scheme providing for efficient, safe resource development, with local authority limited solely to local roads and taxation. (CHC R. at 949, 950-51, 995, ¶¶ 34, 39-41 & Exh. G) (detailing legislative history to A.6928); (R. at 101-102, ¶¶ 14-19); (*see also* R. at 529-32, ¶¶ 26-37.)

Importantly, in return for expressly preempting all local control over oil and gas activity (with the only exceptions being relative to local roads and real property taxes), the Legislature created two new rights for local authorities to compensate for any costs or damages that might result from oil and gas development. The 1981 amendments (1) added subdivision 3 to ECL § 23-0303, establishing a liability fund to compensate for any damage potentially resulting to municipal land or property; and (2) amended article 5, title 5, of the Real Property Tax Law, authorizing municipalities to levy

taxes on natural gas based upon production. (R. at 530-32, 622, 628, ¶¶ 33-37 & Exhs. I & K); (*see also* R. at 100-102, ¶¶ 12-19); *see also* ECL § 23-0303 (Historical and Statutory Notes discussing 1981 amendments).

That the Legislature intended the 1981 amendments to definitively eliminate all local control over oil and gas activities is clear from the legislative history. The Memorandum in Support of one of the bills integrated into the 1981 amendments (A.6928) speaks directly to the scope and intent of the supersedure provision:

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

(CHC R. at 949, 995, ¶ 34 & Exh. G) (emphasis added).

Thus, the Legislature's intent is clear: create a "comprehensive scheme" for oil and gas regulation "reserved to the State" and prevent "[l]ocal government's diverse attempts to regulate the oil [and] gas . . .

activities" that for years had "serve[d] to hamper those who [sought] to develop these resources and threaten the efficient development of these resources[.]" Also clear is the Legislature's intent that local government concerns be accommodated through statewide regulation implemented by the NYSDEC; and, indeed, the NYSDEC uniformly interpreted the 1981 amendments as preempting localities' authority over oil and gas activities, including location. (*See* R. at 105, ¶¶ 27-29 & Exh. A.) In other words, with the sole exception of local roads and taxes, ECL § 23-0303(2) left no room for local control over any oil and gas activities, including where those activities could occur, thus preempting the most severe type of local regulation at issue here - a broad-based ban on all oil and gas activities. *See* (CHC R. at 949, 950-51, ¶¶ 34, 39-42.)

THE INSTANT DISPUTE: FACTUAL BACKGROUND & PROCEDURAL HISTORY

Nature Of The Dispute

Beginning in or around December 2006, Norse, through its predecessors, began acquiring oil and gas leases in the Town of Dryden, Tompkins County, New York. (R. at 79, ¶¶ 6, 7.) The purpose of the oil and gas leases was to explore and develop natural gas resources underlying the property. (R. at 79, ¶ 5.) Norse's predecessors-in-interest obtained gas leases covering approximately 22,000 acres in the Town before the

enactment of the Town Prohibition, ultimately investing approximately $5.1 million in the exploration and development relative to these leases. (R. at 80, ¶ 11)

On August 2, 2011, the Town Board enacted the zoning amendment at issue here which expressly prohibits all oil and gas exploration, extraction, processing and storage and support activities, thus effectively banning all oil and natural gas drilling within the geographical borders of the Town and thereby depriving Norse and all other mineral rights owners in the Town of their respective oil and gas estates. (R. at 70-72, ¶¶ 12-17.)

The Instant Action

On September 16, 2011, Norse's predecessor-in-interest (Anschutz) brought an action in the Supreme Court, Tompkins County (Rumsey, J.), challenging the validity of the Town Prohibition. (R. at 64-66.) On October 21, 2011, the Town Board answered and moved for summary judgment, seeking a declaration that the Town Prohibition is valid and a judgment dismissing the Complaint. (R. at 110-118, 472.) Anschutz opposed the motion and cross-moved for summary judgment in its favor that the Town Prohibition was expressly and impliedly preempted by the OGSML (codified in ECL article 23). (R. at 523, ¶¶ 6-7); (R. 72-73, ¶¶ 19-26.)

(express preemption cause of action); (R. at 73-74, ¶¶ 27-35) (conflict preemption cause of action); (*see also* R. at 42-57).

The Supreme Court Decision

On February 21, 2012, the Supreme Court rendered its Decision and Order ("Decision"), granting the Town Board's motion for summary judgment, concluding that, with the exception of a provision invalidating permits issued by other local or state agencies, the Town Prohibition was not preempted by the OGSML. (R. at 35-62.)

The Supreme Court rejected the express preemption claim and implicitly rejected the conflict preemption claim. (R. at 46-59.) In holding the Town Prohibition not expressly preempted under ECL § 23-0303(2), the Supreme Court opined that it was "constrained" by *Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987) ("*Frew Run*"). (R. at 46.) The court described the supersedure language of the MLRL at issue in *Frew Run* to be "similar" or "nearly identical" to that in the OGSML, finding no meaningful difference between the "local law" language of the MLRL supersedure clause versus the "local law and ordinance" language in ECL § 23-0303(2). (R. at 47-48.) The court also dismissed the significance of the OGSML's explicit jurisdictional exceptions (i.e. local roads and taxes) by (1) effectively ignoring the exception for local taxing authority, and (2)

portraying the regulation of local roads (i.e. truck traffic) as part of the operations of a well. (R. at 49-50.)

Examining the legislative policies of the OGSML and the MLRL, the court also found no "meaningful difference in the purposes of the two laws." (R. at 50.) Relying on *Frew Run*, the court found that the OGSML had to be interpreted in a way that would avoid abridging the Town's powers to regulate land use, and that would be achieved by limiting application of the statutory policies of the OGSML only to locations where oil and gas activity could be conducted in accord with local zoning. (R. at 52.)

Finally, the court relied on *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668 (1996) ("*Gernatt*"), to find that the supersession analysis must produce the same result whether there is an outright ban on all development or simply a limited restraint on location. (R. at 54-55.) In so holding, the court failed to consider that (1) *Frew Run* did not involve a municipal-wide ban, and (2) by the time *Gernatt Asphault* was decided, the MLRL had been amended to include express language affirming full local zoning authority. Additionally, the court opined that it would be illogical to find that a limited restraint on location would be allowable, but that a ban would not. (R. at 55.) In so finding, the court ignored or took short notice of jurisprudence from sister jurisdictions holding exactly to the contrary

under oil and gas statutes virtually identical to the OGSML. (*See* R. at 57.) In the end, the court found that *Gernatt* controlled the preemption analysis here and held that the Town Prohibition, as modified by striking Section 2104(5), is not preempted by the OGSML. (R. at 57-59.)

Norse's predecessor-in-interest (Anschutz) timely appealed from the Decision. (R. at 24.) Later, Norse was substituted as a party in the place and stead of Anschutz by Order of the Appellate Division, Third Department. (R. at 1.) In addition, several interested groups were granted permission to file *amicus curiae* briefs on the appeal. (*See* R. at 9.)

The Appellate Decision

On May 2, 2013, the Appellate Division, Third Department, rendered the Appellate Decision, affirming the Decision. (R. at 6-21.) Specifically, the Third Department held that (1) the express supersession clause of the OGSML, ECL § 23-0303(2), does not expressly preempt the Town Prohibition; and (2) the OGSML does not impliedly preempt the Town Prohibition under principles of conflict preemption. (R. at 20.)

On the issue of express preemption, the Third Department improperly focused on one clause in the express preemption language and then employed a constrained so-called "plain language" analysis of the term "regulation." (R. at 12.) Adopting an inappropriately narrow definition from

the Merriam-Webster On-Line Dictionary, the Third Department concluded that the phrase "regulation of the . . . industries" in the OGSML pertained only to the "details or procedure" of the oil and gas industries and did not address land use decisions. (R. at 12-13) (citing Merriam-Webster On-line Dictionary, http://www.meriam-webster.com/dictionary/regulation).

The Appellate Court also found support for its conclusion in precedent decided under the MLRL, but failed to address, *inter alia*, the language distinctions between the supersedure provisions of the OGSML and the MLRL. Specifically, the Third Department failed to discuss the "local laws *and ordinances*" language of the OGSML (which "ordinance" language is lacking in the MLRL) and the express limited exceptions in the OGSML that carve out local "jurisdiction" only as to roads and real property taxation. *See* (R. at 12.) The Appellate Court also did not explain why these exceptions would have been necessary if the term "regulation" refers only to the details or procedures of oil and gas drilling, given that neither local roads nor taxes has anything to do with the details or procedures of oil and gas drilling. Lastly, the Appellate Court did not address how the express policy objectives of the OGSML – preventing waste, providing for greater ultimate resource recovery, and protecting correlative rights – inform the analysis concerning the scope of the supersedure provision. Although Norse fully

briefed these matters, the Appellate Court did not address them in its analysis.

The Third Department's analysis of legislative history also left many questions unanswered. (R. at 13.) First, the Appellate Court examined the 1978 amendments, which modified the OGSML's declaration of policy by replacing the "*foster, encourage and promote* development" language with "*regulate* the development" language. Observing that the NYSDEC is charged with "regulating" oil and gas drilling, while the Energy Office is charged with "promoting" oil and gas development, the Appellate Court concluded that the phrase "regulation of the . . . industries" in ECL § 23-0303(2) cannot include where the activity may take place. (R. at 14.) Beyond the fact that this conclusion is unsupported by legislative history, the court's analysis fails to address the dispositive issue in this case: what does "regulation of the . . . industries" mean in the context of the OGSML? And, if the OGSML "regulates" where drilling may occur (as it does), then the "where" of drilling is off-limits to municipalities under the express language of ECL § 23-0303(2).

The legislative history of the 1981 amendments, which enacted the supersession language, also does not support the Appellate Court's findings. (R. at 15-16.) Misreading or ignoring legislative articulations by the

sponsor, and failing to appreciate the significance of the taxation and damage fund trade-offs granted to municipalities, the Third Department concluded that the NYSDEC is charged only with regulating the "technical, operational" aspects of oil and gas activities, but not where drilling may occur (i.e. local zoning determinations). (*See* R. at 15-16.) Thus, the Appellate Court opined it "[was] evident that the Legislature's intention [in enacting the 1981 amendments] was to insure uniform statewide standards and procedures" in any area – if any – where municipalities allow drilling to occur. (R. at 15.) This finding, however, ignores the Legislature's explicit declaration that the intent of the 1981 amendments was to "promote development of domestic energy reserves" by removing local controls which, for decades, had hampered efficient, effective development. *See* (CHC R. at 949, 995, ¶ 34 & Exh. G.) The Appellate Court failed to address this point.

The Appellate Court also failed to address how its finding could be squared with the OGSML's explicit location-related requirements. Due to the geophysical characteristics of oil and gas lying in underground pools, well location is directly tied to potential production. Therefore, municipal-wide bans on drilling make it impossible to satisfy the OGSML's location-related directives pertaining to unit size, shape, orientation, and wellbore

location – which are designed to achieve the statute's objectives of preventing waste, protecting the correlative rights of all owners, and providing for greater ultimate resource recovery. *See* ECL §§ 23-0501, 23-0503.

Further, the Appellate Court erred in relying on MLRL precedent, notwithstanding the stark differences between the two statutes as to supersession text, policy objectives, subject matter and means of regulation. Although the Appellate Court observed that the policies of the OGSML include protecting the correlative rights of "all owners," providing for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery may be had, and preventing waste (which is expressly defined in terms of locating and spacing wells so as not to cause reduction in the amount of the resource ultimately recoverable), the Appellate Court nonetheless found that because these matters did "not address any traditional land use issues that would otherwise be the subject of a local municipality's zoning authority," local zoning was not preempted. *See* R. at 14.)

Troublingly, however, the Appellate Court did not identify any precedent establishing a bright-line rule that the only way State law can preempt local zoning is if the State statute addresses so-called traditional

land use issues. Nor did the Appellate Court explain how it would be possible to achieve any of the OGSML's objectives if localities could ban all development on a municipal-wide (and potentially statewide) basis, thereby preventing any resource recovery, creating the ultimate in waste, and wholly obliterating mineral owners' rights. (*See generally* R. at 13-16.)

Significantly, the MLRL does not share the same policy objectives as the OGSML. Nonetheless, the Appellate Court cited MLRL precedent in finding that municipal drilling bans – which preclude development, result in total waste of the resource, and destroy mineral owners' correlative rights – only "incidentally impact" the oil and gas industry and do not frustrate the OGSML's goals or the State's interest in efficient, effective resource recovery. (R. at 17-18.) Thus, the Third Department held that "ECL § 23-0303(2) does not serve to preempt" the Town Prohibition. (R. at 18.)

As for implied preemption, the Appellate Court correctly determined that the OGSML's express supersession clause did not foreclose an implied preemption analysis. (R. at 18.) In conducting the substantive conflict preemption analysis and finding no conflict preemption, however, the Appellate Court employed flawed reasoning comparable to that in its express preemption analysis. (R. at 19.)

Specifically, while the Appellate Court acknowledged the statutory provisions relating to unit size, spacing and well location, it classified these matters as "regulatory" – which it defined as relating only "to the details and procedures" of the well. (R. at 19.) Rather than undertake the relevant inquiry – i.e., whether local drilling bans prevent or impede compliance with these requirements – the Appellate Court concluded that because these matters did "not address any traditional land use issues that would otherwise be the subject of a local municipality's zoning authority," there was no conflict. (R. at 19.) Indeed, the Appellate Court concluded that local bans and the OGSML "may harmoniously coexist; the zoning law will dictate in which, if any, district drilling may occur, while the OGSML [will] instruct[ ] operators as to the proper spacing . . . to prevent waste." (R. at 19.) Thus, the Appellate Court found no conflict even if "where" drilling is allowed in a municipality (or, by extension, throughout the entire State) is nowhere.

Finally, the Appellate Court also found that the Town Prohibition does not conflict with the OGSML's policies. (R. at 19.) The Court opined that (1) nothing in the statute or its legislative history suggested an intention to maximize recovery at the expense of local land use decision-making, and (2) because the statute sought to protect the rights of all persons, including the general public, drilling bans did not conflict with the statute. (R. at 19.)

The Appellate Court did not explain, however, how broad-based municipal-wide drilling bans – which wholly obliterate landowners' mineral estates – could be squared with the explicit statutory directive that "the correlative rights of *all [mineral] owners*" be protected, as opposed to being taken. Nor did the Appellate Court address the reality that the comprehensive statewide scheme enacted in the OGSML (including the still-evolving SGEIS process under SEQRA) is the means through which "all persons . . . and the general public" are protected relative to environmental impacts, thereby rendering municipal drilling bans unnecessary and, indeed, in conflict with the OGSML.

In short, the Appellate Decision allows every municipality in the State of New York to ban any and all oil and gas development. The inevitable result is zero resource recovery, the ultimate in waste, and the obliteration of mineral owners' correlative rights. This result starkly conflicts with the language and policies of the OGSML and the Energy Law and, therefore, cannot stand.

ARGUMENT

POINT I
THE STATE HAS THE POWER TO PREEMPT LOCAL ZONING

As the Appellate Court correctly acknowledged, "[t]he preemption doctrine represents a fundamental limitation on home rule powers." (R. at 12.) "While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies 'the untrammeled primacy of the Legislature to act * * * with respect to matters of State concern.'" *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989) (quoting *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 497 [1977]). Where the Legislature has expressly stated the intent to supersede local regulation, any local regulation of that subject matter is invalid, regardless of home rule powers. *See Wambat Realty Corp.*, 41 N.Y.2d at 492-98.

Further, as the Appellate Court also observed, the preemption doctrine is not limited to express preemption, but also includes implied preemption (i.e., conflict and field preemption). (R. at 1); *see Albany Area Builders Ass'n*, 74 N.Y.2d at 377. Under the doctrine of conflict preemption, local laws that conflict with State law (i.e., making compliance with both

impossible) or that stand as an obstacle to accomplishing the full objectives of the State law are invalid. *See generally id.*

Norse respectfully maintains that the OGSML preempts the Town Prohibition, both expressly under ECL § 23-0303(2) and under conflict preemption principles. Therefore, the Appellate Decision must be reversed.

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

Whether the OGSML expressly preempts the Town Prohibition must be decided based on the specific supersedure language at issue, read in the context of the OGSML as a whole and informed by its evolution, unique policies, and legislative history – and not arbitrarily-selected dictionary definitions. *See New York State Psychiatric Ass'n v. Dep't of Health*, 19 N.Y.3d 17, 23-24 (2012); *Nostrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 507 (2010). Contrary to the Appellate Court's approach and result, a holistic analysis of the OGSML reveals that the Town Prohibition is expressly preempted by ECL § 23-0303(2).

A. ECL § 23-0303(2) Supersedes All Local Zoning Ordinances And Limits Local Jurisdiction Solely To Roads And Taxes

ECL § 23-0303(2), states:

> The provisions of this article shall supersede *all local laws or ordinances* relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government *jurisdiction* over local roads or the rights of local governments under the real property tax law.

(Emphasis added).

This language is unambiguous and its application is straightforward: (1) all local laws or ordinances that purport to regulate the oil and gas industry are preempted; and (2) local government authority is limited solely to regulation of local roads and the levying of property taxes. Thus, zoning ordinances that regulate where drilling may occur – which is a subject matter having nothing to do with roads or taxes – are preempted.

A plain language analysis of ECL § 23-0303(2) proves this point. First, the supersedure language applies unqualifiedly not only to "all local laws," but also to "all . . . local [ ] ordinances." A zoning ordinance is the archetype of a "local ordinance" – indeed, it is the most common form of a local ordinance. And, notably, this provision contains no exception for zoning ordinances. Thus, by plain language application, zoning ordinances fall within the preemptive scope of the OGSML. *See People v. Paulin*, 17 N.Y.3d 238, 245 (2011) (refusing to write into a statute an exception that

was not there); *Chemical Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 394 (1995) (stating "'[n]ew language cannot be imported into a statute to give it a meaning not otherwise found therein'" [citation omitted]).

Second, the supersedure language specifically limits the "jurisdiction" retained by local governments. "Jurisdiction" is a term with strong legal significance. It means "areas of authority," "the authority of a sovereign power to govern or legislate," "the power or right to exercise authority," "the extent or range of [ ] authority," or "the subject matter to which authority applies." *See* Black's Law Dictionary 853 (6th ed. West 1990); Merriam-Webster On-line Dictionary, http://www.meriam-webster.com/dictionary/jurisdiction; The Random House College Dictionary 727 (rev. ed. 1973). Thus, the New York State Legislature made clear that, with respect to oil and gas regulation, a locality's "power or right to exercise authority" is specifically limited to only two discrete areas – local roads and property taxes – and, therefore, *not* drilling location, well spacing, wellbore location, or other forms of land use restrictions or prohibitions.

Third, that the Legislature created certain exceptions to the supersedure language, but did not include any exception for "zoning ordinances" is further revealing. By excepting local roads and taxes, it is clear the Legislature knew how to articulate exceptions to the preemption

rule it was crafting. That the Legislature specifically included "all . . . local ordinances" in the supersession language and did *not* except zoning ordinances means that the exclusion was intended. *See Weingarten v. Bd. of Trs. of N.Y.C. Teachers' Ret. Sys.*, 98 N.Y.2d 575, 576 (2002) ("where the Legislature lists exceptions in a statute, items not specifically referenced are deemed to have been intentionally excluded"); *see also* Stat. § 240 ("where a law expressly describes a particular act . . . an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded"). Thus, zoning ordinances that regulate drilling location – which has nothing to do with roads or taxes – are preempted.

Indeed, the specific limitation of municipal jurisdiction to local roads and real property taxes would be given no effect if the supersession language is, as the lower courts held, limited to the "how" of drilling (i.e., drilling operations, or the details and procedures of drilling), but not the "where." If the phrase "regulation of the [ ] industries" were intended to be so limited, it would have been unnecessary for the Legislature to carve out exceptions relative to local roads and property taxation. As Norse explained to the courts below, neither road usage nor property taxes has anything to do with drilling operations, i.e., the method, manner, procedure or details of

conducting oil and gas drilling.[5] Thus, the Legislature would not have needed to carve out these two exceptions (which do *not* involve operations or the details/procedure of drilling) if, "regulation of the [ ] industries" were so confined.

The Appellate Court made no mention of this analysis in the Appellate Decision, nothwithstanding that Norse fully briefed this matter. Rather than looking at the totality of the supersession language in context – including the carve-out for local "jurisdiction" as to only roads and taxes – the Appellate Court resorted to the Merriam-Webster's On-line Dictionary definition of "regulation" to hold that "regulation" in ECL § 23-0303(2) is limited solely to the details, procedures, or technical operational aspects of drilling (i.e., the "how," but not the "where," of drilling). (R. at 12.)

The Appellate Court's analysis is misguided on a number of grounds. First, in selectively relying on the Merriam-Webster On-line Dictionary definition of the word "regulation," the Appellate Court ignored other arguably more appropriate definitions that defy the court's constrained reading. For example, Black's Law Dictionary defines regulations to be rules "issued by various governmental departments to carry out the intent of

[5] Merely because an operator might use local roads in the course of conducting drilling operations (e.g., to get to and from the drill site) does not transform local road usage into a drilling operation; otherwise, local roads would be part of judicial administration because judges and jurors use roads to get to the courthouse.

the law" and "to guide the activity of those regulated by the agency." Black's Law Dictionary at 1286. In accord with established principles of statutory construction, this underscores that the meaning of "regulation" is inextricably tied to the agency's enabling statute, further demonstrating the error in selectively relying on an on-line dictionary definition of a subset of supersession language divorced from the remainder of the supersession clause and the entire statute.

Furthermore, State statutes that authorize localities' zoning authority explicitly refer to a locality's power "by local law or ordinance to regulate and restrict . . . the location and use of . . . land for trade [and] industry" as constituting "regulation." *E.g.,* Town Law § 261; *see also* Village Law § 7-700; Gen. City Law § 20(24); Stat. of Local Gov'ts § 10(6). Thus, as evidenced by these statutes, the Legislature plainly understands that the term "regulation" encompasses local zoning, thus defying the Appellate Court's contrary interpretation.

The Appellate Court also erred by failing to give any meaning to the statutory language that the Legislature enacted – i.e., the term "jurisdiction" and the two limited discrete exceptions to supersession (local roads and taxes). The Appellate Court seemingly ignored the "jurisdiction" language. And, its interpretation of the term "regulation" impermissibly renders the

local roads and taxation exceptions wholly superfluous – i.e., since if regulation is limited to "how" drilling occurs, there would be no need to except local roads and taxes.

The Appellate Decision – which ignores the language the Legislature did enact and effectively incorporates restrictions that the Legislature did not enact – cannot be sustained and, therefore, must be reversed. *See Criscione v. City of N.Y.*, 97 N.Y.2d 152, 157 (2001) (stating that meaning and effect should be given to every word of a statute); *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104 (2001) (stating that words in a statute are not to be rendered superfluous); *see also Paulin*, 17 N.Y.3d at 245 (refusing to write into a statute an exception that was not there).

B. The Meaning Of "Regulation . . . Of The Industries" Must Be Gleaned From The OGSML As A Whole, In Light Of Its Policies

Although ECL § 23-0303(2) is clear on its face that all local zoning ordinances are superseded, were there any doubt about what "regulation of the [oil and gas] industries" means, that question can be resolved only by examining the entirety of the statutory and regulatory scheme under the OGSML. Here, the dispositive point is this: because ECL § 23-0303(2) directs that the OGSML supersedes all local ordinances relating to the "regulation of the [oil and gas] industries," by plain language application, if

the OGSML "regulates" where drilling may occur – which it does – then that subject matter if off-limits to municipalities.

Examining the OGSML in its entirety, together with its implementing regulations and other pertinent regulatory documents (namely, 6 N.Y.C.R.R. pts. 550-559; the 1992 GEIS; and the proposed revised draft SGEIS), it is apparent that these statutes, rules and regulations comprehensively "regulate" the oil and gas industry statewide, including drilling location. Indeed, these authorities unambiguously speak not only to "how" oil and gas activity takes place, but "where" those activities may take place (*e.g.*, well location, spacing unit boundaries, setbacks, etc.). (*See generally* R. 532-33, ¶¶ 38-43.); *see also* ECL § 23-0101(20)(c).

This point is plain in numerous provisions of the OGSML. ECL § 23-0303(1) entrusts administration of the OGSML to the NYSDEC, and, pursuant to ECL § 23-0301, mandates that the Department "regulate . . . in such a manner as will prevent waste." ECL § 23-0101(20)(c) expressly defines waste to include "[t]he *locating, spacing, [or] drilling* . . . of any oil or gas well [ ] in a manner which causes . . . reduction in the quantity of oil or gas ultimately recoverable from a pool . . . ." (emphasis added). This, of course, is in accord with the requirements of the Interstate Compact, requiring state laws that prevent "locating" and "spacing" of wells to "bring

about physical waste of oil or gas or loss in the ultimate recovery thereof." *See* ECL § 23-2101. In other words, the OGSML and the Interstate Compact which it implements expressly instruct the Department to regulate the "where" of oil and gas activity, including the location of gas wells, to promote the full development of the resource.

Further, ECL § 23-0501(1)(b)(1) details specific acreage and wellbore location requirements relative to unit boundaries for various pools. ECL § 23-0503(2) directs that the Department "shall" issue a drilling permit if the proposed unit "conforms to statewide spacing and is of approximately uniform shape with other spacing units within the same field or pool, and abuts other spacing units in the same pool, unless sufficient distance remains between units for another unit to be developed," again with the aim of preventing waste and providing for greater ultimate recovery from the pool. These directives plainly regulate the size, shape and location of spacing units and the location of the wellbore (both as to surface location and the subterranean path of the wellbore), *i.e.*, the "where" of drilling, and commit these decisions to the Department, leaving no room for local regulation.

Similar confirmation is found in (1) the OGSML's implementing regulations, which regulate spacing unit size and setbacks for drilling, *see*, *e.g.*, 6 N.Y.C.R.R. pt. 553; and (2) the revised draft SGEIS, *see*, *e.g.*, section

3.2.4 (prohibiting drilling activities at explicitly identified locations, including primary aquifers). Again, all of these provisions instruct the Department in very detailed terms to comprehensively regulate the "where" of oil and gas activity.

The Appellate Court failed to appreciate the legal significance of the OGSML's "where-related" provisions in the preemption analysis. Instead, the Appellate Court classified them as "regulatory in nature" and concluded that because these provisions did "not address any traditional land use issues that would otherwise be the subject of a local municipality's zoning authority," there was no preemption of local zoning. (*See* R. at 14.) In this regard, the Appellate Court missed the relevant inquiry: given that these "where" directives are part of "regulation" of the oil and gas industry under the OGSML, that subject matter – the where of drilling – is off-limits to municipalities under the plain language of ECL § 23-0303(2). *See Envirogas*, 112 Misc. 2d at 433 (finding local governments "precluded from legislating on the same subject matter" as the OGSML), *aff'd*, 89 A.D.2d 1056 (4th Dep't 1982), *lv. denied*, 58 N.Y.2d 602 (1982).

Notably, under statutory schemes where the regulation of location is far less explicit than that under the OGSML, other courts have not hesitated to find regulation of location preempted. For example, in *Sunrise Check*

Cashing & Payroll Servs., Inc. v. Town of Hempstead, the Second Department held that a local zoning ordinance restricting check-cashing establishments to industrial and light industrial districts was preempted by the State Banking Law, article 9-A, specifically Banking Law § 369(1). 91 A.D.3d 126, 135-40 (2d Dep't 2011). Legislative findings accompanying article 9-A noted that the article was "to provide for the *regulation* of the business of cashing checks," which was to be performed by the superintendent of banks ("Superintendent"). *Id.* at 135 (emphasis added). The Second Department examined the substantive provisions of the Banking Law which vested in the Superintendent the authority to issue a license based upon whether the proposed check-cashing establishment was properly located – i.e., which provisions bear a striking parallel to the OGSML's provisions vesting authority in the State and, *inter alia*, directing the NYSDEC to issue a well drilling permit where the application conforms with statewide spacing requirements. *See id.* at 136-38. Based upon these considerations, the court found the local zoning ordinance preempted because "the Legislature ha[d] specifically delegated to the Superintendent the task of determining whether particular locations [were] appropriate for check-cashing establishments." *Id.* at 138.

Accordingly, where, as here, the Legislature has asserted that all local ordinances relating to the regulation of the industry are superseded and has affirmatively vested exclusive authority in the State to determine where drilling may occur based on explicit statutory and regulatory criteria, then that subject matter (i.e., the where of drilling) is expressly preempted. *See* ECL § 23-0303(2); *Sunrise Check Cashing*, 91 A.D.3d at 135-40*; see also Ames v. Smoot*, 98 A.D.2d 216, 219-22 (2d Dep't 1983) (invalidating local ordinance that banned aerial pesticide spraying in the village where ECL article 33 vested in the Commissioner authority to promulgate regulations prescribing the time, place, manner and method of application).

The Appellate Court's result also does not account for the OGSML's unique policy objectives, which are directly pertinent to the preemption analysis. Subsurface geology – not municipal boundary lines or zoning – controls being able to properly locate the wellbore and establish spacing units for a given pool. In other words, well location (the "where" of drilling) is inextricably tied to whether and how an operator can effectively recover the resource so as to provide for greater ultimate recovery, prevent waste, and protect correlative rights.

This is precisely why the OGSML *does* regulate location – because the "where" and "how" of oil and gas drilling are not distinct, unrelated

issues but, rather, are interdependent and inextricably linked. Only by regulating well location and spacing (the "where" of drilling) can the State ensure that the unique objectives of the OGSML – *i.e.*, providing for greater ultimate recovery, preventing waste, and protecting correlative rights – will be achieved. Significantly, the policies of preventing waste and protecting correlative rights are wholly unique to the oil and gas industry and have no place in the context of the development of other resources, such as solid minerals. Because the OGSML regulates well location, there is no room for parochial local ordinances, like the Town Prohibition, that prevent *any* resource development and, thereby, promote the very ultimate in waste and result in the destruction of mineral owners' correlative rights – in direct violation of the statute.

Consider the following hypothetical as illustrative of the point. There exists a natural gas field that underlies equally (50/50) two separate, but adjacent, towns. One of these towns has passed a zoning ordinance that bans all oil and gas activity. The property owners under whose land this natural gas field lies all want to see it developed and have entered into lease agreements with an oil and gas operator. The State has granted the required permits. The goal of New York's oil and gas regulatory regime is to see that this natural gas field is developed to its maximum potential, with waste

prevented and correlative rights protected. Yet, despite the landowners' desires and the State's permits, because one town has banned all oil and gas activity, upwards of 50% of this natural gas field cannot be accessed or developed by the operator.

This scenario does not provide for greater ultimate recovery; it diminishes potential recovery. Also, assuming the operator proceeds to develop the accessible acreage, by definition, the operator commits waste by leaving upwards of 50% of the gas in the ground and failing to develop the resource in the most efficient manner possible. In addition, the correlative rights of the owners of the unrecovered 50% are obliterated, as the municipal ban denies them access to the resource and the ability to recover it. Moreover, if there is insufficient acreage to create a new unit in the town that allows drilling because of other abutting units, the town ban actually has extraterritorial impact on the mineral owners in the adjoining town and destroys the correlative rights of the mineral owners in both towns.

Accordingly, quite contrary to the Appellate Court's articulation, this is the antithesis of an "incidental[ ] impact[ ]" on the oil and gas industry. (*See* R. at 17.) The Appellate Court's holding – *i.e.*, that "regulation of the [ ] industries" means *only how* oil and gas operations are conducted (i.e., details, procedure, technical/operational aspects), not *where* they are

conducted – flies in the face of the OGSML's words, policies, and entire evolutionary history. (*See* R. at 12-13); *see also Northeast Natural Energy, LLC v. City of Morgantown, W.V.*, Civ. Action No. 11-C-411, Slip Op. (Cir. Ct., Monongalia Cnty., W.V., Aug. 12, 2011) (holding local ban invalid because it encroached on the state's power to regulate oil and gas development).

C. The OGSML's History Evidences Legislative Intent To Eliminate Local Control

The history of the OGSML's evolution likewise reflects the Legislature's clear intent that ECL § 23-0303(2) was enacted to preempt all local control of oil and gas development. As demonstrated by the legislative history to A.6928 (one of the bills ultimately incorporated into the 1981 amendments), the supersession language was enacted to remedy problems caused by two decades of parochial local regulation. (CHC R. at 949, 995). Thus, the Legislature: (1) expressly eliminated all local control over oil and gas activities (with the only exceptions being relative to local roads and real property taxes), (2) vested full, exclusive authority in the State to effectuate efficient development to provide for greater ultimate recovery, prevent waste, and protect owners' correlative rights, and (3) ensured protection to localities through the OGSML's comprehensive scheme. In exchange, the Legislature provided as trade-offs ad valorem taxing authority and a damage

fund to compensate municipalities for any damages potentially resulting from oil and gas activities. (*See generally* R. at 529-32, 622-26, 628, ¶¶ 26-37 & Exhs. I, J & K); (R. at 100-02, ¶¶ 11-19); (CHC R. 949, 950-51, 995¶¶ 34, 39-42 & Exh. G.).

In reviewing pieces of legislative history but seemingly ignoring other, the Appellate Court found it "evident" that the Legislature's intent was to supersede only "technical operational activities of the oil [and] gas . . . industry" but that nothing indicated a clear intent to usurp municipal authority over land use decisions. (R. at 15-16.) On its face, however, the legislative history, most pointedly, the Memorandum in Support of A. 6928 (which the Appellate Court failed to mention), speaks to the contrary, as does the factual context in which the 1981 amendments arose. (*See generally* R. at 529-32, 622-26, 628, ¶¶ 26-37 & Exhs. I, J & K); (R. at 100-02, ¶¶ 11-19); (CHC R. 949, 950-51, 995¶¶ 34, 39-42 & Exh. G.)

Moreover, contrary to the Appellate Court's finding, nothing in the legislative history or the statutory language speaks to any "operations" restriction on the scope of supersession. And, indeed, the legislative carve-outs for retaining municipal jurisdiction over local roads and taxes would have been unnecessary if the Legislature's intent were to limit the scope of supersession to only the operational aspects of wells. The Appellate Court

did not address these issues in its analysis. Accordingly, the Appellate Court's historical analysis is in error and does not support the court's "no preemption" finding. Thus, the Appellate Decision must be reversed.

POINT III

MLRL PRECEDENT IS IRRELEVANT TO THE OGSML EXPRESS PREEMPTION ANALYSIS

Contrary to the Appellate Court's articulations, MLRL precedent does not support the court's holding of no express preemption under the OGSML. *See* R. at 16.) Given (1) the stark distinctions between the supersession language of the MLRL and OGSML, (2) the different manner and subject matter of regulation of each of these statutes, (3) the unique policies of the OGSML – protecting correlative rights and preventing waste – which have no analog in the MLRL, and (4) the different evolution of and legislative history pertaining to each of these statutes, MLRL precedent is not relevant to the OGSML preemption analysis, let alone controlling or constraining as the lower courts in this State have improperly found.

A. Distinctions In Supersession Language

The Appellate Court erred in finding that the MLRL and OGSML have "similar supersession provision[s]" and, thus, relying on *Frew Run* and *Gernatt*. (*See* R. at 18.) Contrary to the Appellate Court's articulation, the

supersession language of the MLRL was, and remains, materially different from ECL § 23-0303(2). (*See* R. at 18.)

As enacted in 1974 and in effect when *Frew Run* was decided, the MLRL's supersession language provided:

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

ECL § 23-2703(2) (L. 1974, c. 1043) (emphasis added); (R. at 635, 637, Exh. M) Unlike the OGSML, which broadly supersedes "all local laws or ordinances," the MLRL applied only to "local laws" and, most significantly, explicitly *excepted* from supersession "local zoning ordinances," thus, actually inviting local zoning.

Moreover, the MLRL exception was preceded by "nothing in this article shall be construed to prevent any local government from enacting local zoning ordinances," whereas the OGSML exceptions for local roads and property taxes are preceded by the phrase "but shall not supersede local government jurisdiction . . . ." The MLRL language, thus, did not suggest that it was providing a narrow exception from a broad supersedure provision. In contrast, the OGSML language suggests precisely that:

namely, that everything else other than what "shall not be supersede[d]" (local roads and real property taxation) is, in fact, superseded.

This reading is further confirmed by the Legislature's use of the word "jurisdiction" in the OGSML – *i.e.*, that local "jurisdiction" ("the power or right to exercise authority") is narrowly limited solely to local roads and taxation (and therefore does not include authority to control drilling location). There was no comparable limiting "jurisdiction" language in the MLRL. Instead, the MLRL expressly confirmed, if not invited, local zoning control, both in the supersedure provision and other substantive provisions. *Compare* ECL § 23-0303(2) (L.1981, c. 846), *with* ECL § 23-2703(2) (L.1974, c. 1043); *Paulin*, 17 N.Y.3d at 245 (refusing to write exceptions into statutes); (*see also* R. at 534, 641, 643, ¶ 47 & Exh. M) (discussing MLRL provisions ECL § 23-2711[3], requiring notice at the application phase to local governments having jurisdiction over the proposed [mining] site, and ECL § 23-2711[10], recognizing local permitting authority). These significant material differences between the supersession language of the MLRL and the OGSML (and their respective substantive provisions) render the Appellate Court's reliance on *Frew Run* misplaced. (*See* R. at 18.)

Likewise, *Gernatt* also does not support the Appellate Court's holding here. *See id*. By the time *Gernatt* was decided, the MLRL had been

amended to include express language leaving no doubt that municipalities retain full zoning authority under that statute. *See Gernatt*, 87 N.Y.2d 668. Indeed, this Court in *Gernatt* noted that the 1991 amendments to ECL § 23-2703 (the MLRL supersession provision) "expressly excluded [ ] from its preemptive reach" any restriction on municipal authority to regulate permissible land uses within the municipality. 87 N.Y.2d at 683. This express exclusion from the scope of supersession under the MLRL does not exist in the OGSML's supersession language, ECL § 23-0303(2). Thus, *Gernatt* is irrelevant to deciding the question of preemption under the OGSML, and the Appellate Court's supersession analysis and result are, therefore, in error.

B. Distinctions In Subject Matter Of Regulation

In relying on MLRL precedent to inform the OGSML express preemption analysis, the Appellate Court also erred by failing to recognize the legally significant distinctions between the two statutes relative to what each actually regulates – which is critical in determining what is superseded. In short, the OGSML substantively regulates the "where" of drilling and, therefore, localities may not. In contrast, the MLRL does not regulate where mining may occur, meaning that localities may determine mining location. (*See* R. at 105, & Exh. A.)

More specifically, the OGSML and its implementing regulations contain explicit, comprehensive location-based directives as to where drilling may occur. These provisions include requirements as to unit size, configuration, orientation, wellbore location, setbacks and other location-related restrictions regulating the "where" of well drilling based upon subsurface geologic conditions and environmental surface conditions. *See, e.g.*, ECL §§ 23-0501, 23-0503. The MLRL, however, does not regulate the "where" of subsurface mining – that is, in contrast to the drilling location and spacing requirements in the OGSML, there are no comparable requirements in the MLRL specifying mine location or the spacing of mine shafts. *See generally* ECL art. 23, tit. 27.

This stark distinction in the subject matter of regulation is directly pertinent to interpreting the meaning of the phrase "regulation of the . . . industries" and hence the scope of supersession under ECL § 23-0303(2). *See Sunrise Check Cashing*, 91 A.D.3d at 136-38 (finding local zoning preempted based on, *inter alia*, examining substantive provisions of Banking Law which vested in the Superintendent authority to issue a license based on whether proposed check-cashing establishment was properly located); *see also Floyd v. New York State Urban Dev. Corp.*, 33 N.Y.2d 1, 5-7 (1973) (finding local zoning affecting location of urban development projects

preempted; interpreting scope of supersession by reading totality of preemption language in context of the statute and its legislative history). In other words, this distinction – that the OGSML regulates location, but the MLRL does not – renders MLRL precedent inapt to this analysis.

Highlighting this conclusion are other substantive terms of the MLRL which show that, from its enactment to the present time, the MLRL repeatedly and expressly reaffirmed, if not, invited local zoning control. (R. at 534, 635, 637, 641, 643, ¶¶ 47 & Exh. M); ECL §§ 23-2703(2)(b) & (3), 23-2711(3) & (7). This is reflected in express legislative articulations, among others, that (1) municipalities retain the power to enact and enforce local ordinances, including as to permissible uses in zoning districts, and retain "jurisdiction" over the proposed mine site, (2) state mining permits cannot be issued if local ordinances prohibit mining at the proposed site, and (3) notice of an application for a state mining permit must be sent to the locality for a determination of whether mining is allowed at the proposed site. (*See generally* R. at 534, 635, 637, 641, 643, ¶¶ 47 & Exh. M); ECL §§ 23-2703(2)(b) & (3), 23-2711(3) & (7).

The OGSML speaks to the contrary. It (1) directs that the NYSDEC "shall" issue the permit if the proposed application conforms to statewide spacing (ECL § 23-0503[2]); (2) nowhere makes any affirmative statement

respecting retention of local zoning power, instead limiting local "jurisdiction" solely to local roads and taxes (*see generally* ECL §§ 23-0303[2], 23-0501, 23-0503), and (3) contains no requirement that notice of a well drilling application be provided to the locality for a determination of whether the use is permissible (*see generally* ECL art. 23, tit. 3 & 5).

Viewing the term "regulation" in context of the OGSML as a whole, the legally significant distinctions between the OGSML and MLRL could not be more pronounced. The term "regulation" as used in the OGSML encompasses where the activity takes place, leaving no room for local zoning. Thus, the Appellate Court erred in relying on MLRL precedent to interpret the meaning of "regulation" in ECL § 23-0303(2).

C. Distinctions In Statutory Evolution And Legislative History

The historical evolution and legislative history of the OGSML – as distinguished from the MLRL – further underscore the Appellate Court's error is relying on MLRL precedent. *See New York State Psychiatric Ass'n*, 19 N.Y.3d at 24 (stating that "[t]o determine the intent of a statute, 'inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision'" [citation omitted]); *Frew Run*, 71 N.Y.2d at 131, 132 (noting relevance of statutory policies, purposes and history in preemption analysis).

First, both statutes arose from very different factual circumstances. The supersedure language of the OGSML was added, by amendment, (1) in response to almost two decades of parochial local regulation relating to oil and gas development, (2) to combat the energy crisis of the 1970s, and (3) to reassert the State's role as the exclusive regulator of oil and gas activity in the State. (R. at 100-02, 104-05, ¶¶ 11-19, 24-26) There is no comparable "cause and effect" history regarding the supersedure provision of the MLRL, as the MLRL's supersedure provision was included in the initial enactment, and there has never been a sand and gravel crisis in New York State necessitating the elimination of local control over solid minerals mining.

Moreover, the legislative history of the MLRL establishes that stakeholder groups clearly understood that the MLRL retained (if not invited) local control over mining operations, which generated considerable controversy and industry opposition. (R. at 534-35, 649-56, ¶¶ 48-51 & Exhs. N-P.). For example, the Memorandum in Opposition submitted by the New York State Chapter of the Associated General Contractors of America noted that the legislation "would not insure an evenly administered State-wide program, since it would allow local governments to enact yet more stringent standards and requirements." (R. at 534-35, 652, ¶ 49 & Exh. N.) No such discussion or opposition based on local control is present anywhere

in the legislative history of the OGSML, suggesting that lawmakers and oil and gas stakeholders understood the statute's supersedure provision would preempt local laws or ordinances that might seek to control oil and gas development (with the only exception being relative to local roads and taxes). *See generally* Bill Jacket, L. 1981, c. 846; (*see also* R. at 102, ¶¶ 15-19.) Of course, this is precisely what the unambiguous language of the OGSML's supersedure provision does.

D. Distinctions In The Substances Regulated And Statutory Policy Objectives

The physical differences between the substances regulated by the MLRL and the OGSML explain the difference in approaches taken relative to supersession. The MLRL regulates the mining of solid minerals. Solid mineral resources do not move within the subsurface, and often require significant development and disruption, both temporally and in areal extent, to the land surface in order for extraction to occur in a series of phases. Accordingly, the MLRL establishes a partnership with localities relative to mine location and the ultimate reclamation of affected lands.

This is reflected in the MLRL's (1) supersedure provision, which reaffirms local zoning authority, (2) declaration of policy, which articulates multiple purposes aimed at balancing a variety of interests, many of which concern matters traditionally within the control of local governments, and

(3) the multitude of reclamation provisions which pervade the MLRL but do not at all limit municipal power to determine permissible uses in zoning districts. *See Frew Run*, 71 N.Y.2d at 132-33 (noting that the 1974 version of the MLRL provided a statewide standard for regulation of operations, "'while recognizing the legitimate concerns of localities in the aftereffects of mining by permitting stricter local control of reclamation'" [citation omitted]); ECL § 23-2703(2)(a) & (b) (precluding stricter local standards for mining activity and reclamation, but affirmatively recognizing local zoning authority to determine permissible land uses); (*see* R. at 533-34, 536, ¶¶ 44-47, 54.); *see also* ECL §§ 23-2703(2) & (3). 23-2711(3) & (7), 23-2713, 23-2715; former ECL §§ 23-2703(2), 23-2711(3) & (10), 23-2713, 23-2715. Simply put: local zoning control makes sense in the context of a large surface activity like solid minerals mining.

In contrast, the OGSML principally regulates the development of liquid or gaseous substances, such as oil and gas. Oil and gas are found in subterranean pools, the boundaries of which do not conform to any particular jurisdictional pattern. The ability to efficiently extract oil and gas deposits is dependent on the geophysical properties of the underlying pool (e.g., pressure characteristics, porosity, etc), and drilling pattern, spacing and wellbore location all affect whether optimal recovery can be had or

production exaggerated in one area or diminished in another. In other words, production and the ability to fulfill the policy objectives of the OGSML depend upon proper well and spacing unit location, as well as spacing unit size, layout and orientation. In addition, oil and gas development tends to be far less surface-intensive and of far shorter duration than solid mineral extraction, thus having fewer implications for traditional land use concerns. It is for this reason that the State determines "where" drilling occurs -- i.e., because this is the only way that greater ultimate recovery can be had, waste prevented, and property owners' correlative rights protected, while at the same time ensuring that local concerns are accommodated through the comprehensive statewide controls entrusted to the NYSDEC under the statute. Local control, particularly municipal-wide bans like the Town Prohibition, are, at best, duplicative and thus unnecessary to ensure environmental protection; and, indeed, they are counterproductive, as they make it impossible to achieve the OGSML's objectives, as reflected in the history leading up to the enactment of ECL § 23-0303(2) in 1981. (R. at 100-01, 103-05, ¶¶ 11-19, 21-26); (*see* R. at 531-32, ¶ 36.)

The bottom line is that local zoning ordinances like the Town Prohibition make it impossible for the NYSDEC to comply with, and for

New York State to achieve, the objectives of the OGSML and the Interstate Compact of preventing waste, providing for greater ultimate recovery, and protecting correlative rights. *See Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1067 (Colo. 1992) (finding that a total ban on drilling precludes the ability to prevent waste or protect correlative rights). Thus, the Appellate Decision must be reversed.

POINT IV
THE TOWN PROHIBITION IS CONFLICT PREEMPTED BY THE OGSML AND THE ENERGY LAW

The Appellate Court correctly found that the OGSML's express supersession provision does not foreclose an implied preemption analysis. (*See* R. at 18-19) (and citations therein); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (stating same in context of federal preemption of state law); *accord Doomes v. Best Transit Corp.*, 17 N.Y.3d 594, 602-03 (2011) (evaluating implied preemption, notwithstanding express supersedure language). Likewise, the supersedure language of ECL § 23-0303(2) does not foreclose an implied preemption challenge under an entirely different statute, namely, Energy Law § 3-101(5) and 3-103.[6]

[6] This Court may take judicial notice of the Energy Law, both as part of the legislative history of ECL § 23-0303(2) and by virtue of its being a legislative fact. *See Green*, 96 N.Y.2d at 408 n.2; *Affronti*, 95 N.Y.2d at 720.

The Appellate Court erred, however, in holding that the Town Prohibition "neither conflicts with the language nor the policy of the OGSML" and that municipal-wide drilling bans "may harmoniously coexist" with the OGSML . (*See* R. at 19.) As discussed above, the Town Prohibition presents a multitude of irreconcilable "head-on" conflicts with the OGSML, both as to explicit wellbore location and spacing directives and policy objectives. *See* Point IIB, *supra*.

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

Local bans on all oil and gas development also make it impossible for the NYSDEC to comply with the objectives of the OGSML. Local bans, like the Town Prohibition, preclude the NYSDEC from issuing drilling permits for locations where drilling *should* occur (i.e., based on the geophysical properties of the underlying resource and environmental conditions relating to surface location in order to maximize recovery, prevent waste and protect correlative rights). Importantly, the OGSML directs that drilling is to occur in a manner that prevents waste, defined in the OGSML to include "locating . . . [a] well [ ] in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable . . . ." ECL § 23-0101(20)(c). Yet, ensuring waste is precisely what the Town Prohibition does – i.e., it prohibits wells from being located in the ideal location to provide for greater ultimate resource recovery and, in fact, precludes any recovery whatsoever, resulting in the ultimate in waste and the total destruction of correlative rights. This, of course, is in direct conflict with the OGSML.

Moreover, municipal bans like the Town Prohibition also patently conflict with the Energy Law. Energy Law § 3-101(5) articulates the statewide goal "to foster, encourage and promote the prudent development [ ] of all indigenous state energy resources including . . . natural gas from

Devonian shale formations." Energy Law § 3-103 directs that "every agency of the state must conduct its affairs [ ] to conform to the state energy policy . . . ." If the Appellate Decision is allowed to stand, every municipality in New York could ban all oil and gas development – a result that plainly would conflict with (1) the "promotion" directive of the Energy Law, (2) all of the objectives of the OGSML (*i.e.*, provide for greater ultimate recovery, prevent waste, protect mineral owners' correlative rights), (3) the NYSDEC's implementation of the explicit location-based directives of the OGSML, and (4) the NYSDEC's ability to act in a manner that conforms with the Energy Law's policy to promote the development of indigenous natural gas resources.

The policy implications of the Appellate Decision are severe, as there could not be a starker example of local control that will wholly discourage, in fact, preclude, oil and gas development. The Town Prohibition, in one fell swoop, wiped out a more than $5.1 million investment of one operator. This begs the question: what prudent operator would ever invest in oil and gas development in New York if, after the fact, municipalities could, based upon a 3-2 majority vote, enact broad-based drilling bans that obliterate the operator's entire property interest? The answer is obvious: municipal-wide

bans on oil and gas activity cannot be squared with the directive, policies, or goals of the OGSML or the Energy Law.

In the end, even if the Town Prohibition is not "regulation" *per se*, so as to come within the supersedure provision of ECL § 23-0303(2), a point that Norse vigorously disputes, the Town Prohibition *still* conflicts with the express directives of the OGSML relative to spacing and wellbore location and the fundamental goals of the Energy Law and the OGSML. The Town Prohibition, at *best,* frustrates the NYSDEC's ability to comply with the mandates of the OGSML and Energy Law; and, at *worst,* stands as an insurmountable obstacle to meeting the objectives of both statutes. In either instance, the Town Prohibition is in conflict with New York's general laws and, therefore, is conflict preempted. *See Lansdown Entm't Corp. v. N.Y.C. Dep't of Consumer Affairs*, 74 N.Y.2d 761, 764-65 (1989) (finding direct conflict between local ordinance and State law; stating "assuredly a local law which conflicts with the State law must [ ] be preempted"); *Anonymous v. City of Rochester,* 13 N.Y.3d 35, 51 (2009) (Graffeo, J., concurring) (stating that local curfew ordinance contradicted the Family Court Act and was thus invalid); *Cohen v. Bd. of Appeals of Saddle Rock*, 100 N.Y.2d 395, 400 (2003) (finding local variance regulation preempted; stating in the critical area of overlap, the Legislature prevails).

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

> Oil and gas are found in subterranean pools, the boundaries of which do not conform to any jurisdictional pattern. As a result, certain drilling methods are necessary for the productive recovery of these resources . . . . [I]t is often necessary to drill wells in a pattern dictated by the pressure characteristics of the pool, and because each well will only drain a portion of the pool, an irregular drilling pattern will result in less than optimal recovery and a corresponding waste of oil and gas. Moreover, an irregular drilling pattern can impact on the correlative rights of the owners of oil and gas interests in a common source of supply by exaggerating production in one area and depressing it in another. . . . *Because oil and gas production is closely tied to well location, [a municipality's] total ban on drilling . . . could result in uneven and potentially wasteful production . . . . [The] total ban, in that situation, would conflict with the [state agency's] express authority to divide a pool of oil or gas into drilling units and to limit the production of the pool*

> *so as to prevent waste and to protect the correlative rights of owners . . . In our view, the state's interest in the efficient and fair development and production of oil and gas resources in the state, including the location and spacing of individual wells, militates against a home-rule city's total ban on drilling within city limits.*

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

The Appellate Court did not mention *Voss* or *Northeast Natural Energy, LLC*, notwithstanding that Norse discussed both cases in its briefing. Given the Appellate Court's heavy reliance on MLRL precedent in its express preemption analysis, it appears that this flawed reasoning was implicitly carried over into the implied preemption analysis.

Finally, to the extent the Appellate Court rested its finding of no conflict preemption on the policy to "protect the rights of all persons… including the general public" in ECL § 23-0301, its rationale is also

misguided. The Appellate Court failed to acknowledge the Legislature's express articulations that the comprehensive statewide scheme under the OGSML is intended to, and does, protect the general public through extensive regulatory controls. (*See* R. at 20); (CHC R. at 1046.) Nor did the Appellate Court address the conundrum of how the policy to "protect correlative rights" could be squared with municipal-wide drilling bans, like the Town Prohibition, that indisputably obliterate correlative rights, not only territorially but potentially beyond the municipality's boundaries as well. In short, the Appellate Court's reasoning and result cannot be squared with the directives or policies of the OGSML or Energy Law.

In sum, the Town Prohibition conflicts with the language and policies of both the OGSML and Energy Law §§ 3-101(5) and 3-103. Accordingly, the Town Prohibition is conflict preempted and, therefore, invalid, and the Appellate Decision must be reversed. *See, e.g., Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 107-08 (1983); 25 N.Y. Jur. 2d, *Counties, Towns & Mun. Corps.*, § 351.

CONCLUSION

For all of the foregoing reasons, Norse respectfully requests that this Honorable Court reverse the Appellate Decision and grant summary judgment in Norse's favor.

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