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

New York State
Court of Appeals

IN THE MATTER OF MARK S. WALLACH, AS CHAPTER 7 TRUSTEE FOR NORSE ENERGY CORP. USA,

Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents.

APL-2013-00245

REPLY BRIEF OF APPELLANT MARK S. WALLACH, AS CHAPTER 7 TRUSTEE FOR NORSE ENERGY CORP. USA

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PRELIMINARY STATEMENT

Mark S. Wallach, as the Chapter 7 Trustee of Norse Corp. USA ("Norse") respectfully submits this Reply Brief in further support of its appeal of the Appellate Decision[1] and in reply to the Town's arguments urging affirmance of the Appellate Decision. The Town's 50 pages of argument devolve to a single notion: that *Frew Run* and its progeny, decided under a wholly unrelated law, the MLRL, control the analysis here and mandate the conclusion that the OGSML does not supersede the Town Prohibition. The lower courts misguidedly adopted this approach and, thereby, turned a blind eye to (1) longstanding principles of statutory construction; (2) the stark distinctions between these two statutes in every relevant respect; and (3) the entirety of the OGSML, its Interstate Compact Commission origins, its unique policies, and its many locational-based directives that stand in direct conflict with local zoning, particularly zoning bans.

When faced with the question of State preemption of local zoning – i.e., "where" an activity can take place – the courts of this State consistently have looked to the statute at issue, *not* unrelated statutory schemes. This has

[1] In this Reply Brief, Norse adopts the same abbreviations used in its main brief, dated October 28, 2013.

happened in a variety of contexts, including, among others, those involving the location of major steam generating facilities, conducting abortions, urban development projects, check-cashing establishments, adult shelters, aerial pesticide application, and hazardous waste facilities and disposal sites. In not one of these instances did the courts look to unrelated statutes to resolve the question of preemption under the statute at issue. This begs the question why the MLRL is even an issue in this analysis.

The answer to that question is simple: the lower courts' approach and the Town's position are in error because MLRL precedent is *not* even relevant, let alone controlling, here. To interpret the scope of supersession under the OGSML, *that* statute must be viewed in its entirety, together with its legislative history, underlying policies, and circumstances of enactment. That there are arguably three discrete seeming similarities between the two statutes – i.e., (1) use of the word "regulation" in the OGSML's supersession clause and the discussion of "regulation" in *Frew Run*; (2) the goal of resource development shared by the two statutes; and (3) a legislative articulation about uniformity or standardization of regulation – does not limit the analysis or resolve the OGSML preemption question. Rather, the OGSML preemption issue must be viewed in the context of the OGSML as a whole, not in the shadow of the MLRL.

That holistic reading – i.e., of the OGSML's supersession language, subject matter and mode of regulation, legislative history, underlying policies, and circumstances of enactment – demonstrates that any seeming similarities between the OGSML and MLRL are superficial at best. In fact, the many stark distinctions between the two statutes underscore that MLRL precedent is irrelevant to the OGSML preemption analysis:

- The OGSML's supersedure language states that the OGSML supersedes "all local laws or ordinances;" any such "ordinance" language is absent in the MLRL's supersedure language.
- The OGSML's supersedure language limits local "jurisdiction" solely to local roads and real property taxes; there is no "jurisdiction"-limiting language in the MLRL's supersedure language, and other provisions of the MLRL expressly speak to local "jurisdiction" over the mine site.
- The exceptions to supersession in the OGSML are rendered superfluous if the term "regulation" is restricted solely to oil and gas operations; the reclamation exception in the MLRL's supersession language retains full meaning when supersession is limited to the technical aspects of mining.

- The OGSML vests exclusive administration of oil and gas development in the NYSDEC and regulates well location, orientation, spacing and unit participation in explicit, detailed and comprehensive terms; there are no corresponding provisions in the MLRL that actually address permissible locations for mines or the spacing between mines and mine shafts.
- The OGSML did not and does not require any notice to localities prior to the NYSDEC's issuing the State drilling permit; the MLRL did and still does contain notice requirements at the permitting phase, prior to issuance of a State mining permit.
- The OGSML contains no provisions speaking to local approvals prior to obtaining a State drilling permit; the MLRL did and still does contain such requirements.
- The OGSML's supersedure language was enacted in 1981, in response to the energy crisis and after years of parochial legislation that thwarted effective oil and gas development; the expressly asserted legislative intent of the supersession provision was to remedy this problem by vesting control solely in the State to ensure the efficient development of indigenous oil and gas resources, that for years had eluded the State due to local

regulation; the MLRL's supersedure provision was part of the initial enactment, invited zoning regarding reclamation, recognized retained local jurisdiction over the mine site, and, over the course of time, the Legislature reaffirmed localities' full control over mine location and land use.

- Two of the OGSML's policies – protection of the correlative rights of "all" owners and the prevention of waste – have their origins in the Interstate Compact and directly conflict with local zoning bans; these policies are unique to oil and gas development due to the physical nature of these substances and have no applicability to the solid minerals governed by the MLRL.
- The Energy Law declares it to be state policy to promote development of indigenous oil and gas resources, specifically including Devonian shales, and directs all state agencies to conduct their activities to effectuate this policy; this declaration is not applicable to the solid minerals governed by the MLRL.

The bottom line is that, from the outset, the question of preemption under the OGSML should have been evaluated by the lower courts based on the OGSML, not the MLRL. The lower courts were led astray by the Town's contrary argument and, thereby, erred. When the OGSML is

examined, as it must be, in its own light, the conclusion is inescapable that its supersession language means precisely what it says – that "all" local ordinances that regulate what the OGSML regulates are superseded. Because the OGSML comprehensively regulates in excruciating detail every significant aspect of well location, localities may not regulate that same subject matter; thus the Town Prohibition is expressly preempted.

Furthermore, there could not be a starker example of a direct head-on conflict between local and State regulation than that presented by a town-wide prohibition on any and all oil and gas activities (i.e., meaning no drilling, zero production, the ultimate in waste, and the obliteration of owners' correlative rights), and the OGSML's express directives dictating where drilling should occur with the aim of providing for greater ultimate resource recovery, preventing waste, and protecting the correlative rights of all owners. Accordingly, the Town Prohibition is conflict preempted as well, and the Appellate Decision must be reversed.

ARGUMENT

POINT I
THE STATE UNQUESTIONABLY MAY PREEMPT LOCAL ZONING

Notwithstanding the Town's articulations regarding the alleged exalted status of its "extensive home rule powers" implying that those

powers cannot be preempted (*see* Town Brief, at 8 n.4), the State indisputably has the power to preempt local zoning. Norse Brief, Point I. That is, local authority to enact and enforce land use restrictions is limited by legislative grant, with the preemption doctrine representing an "overriding limitation" on local lawmaking power "with respect to matters of State concern." *Cohen v. Bd. of Appeals of the Vil. of Saddle Rock,* 100 N.Y.2d 395, 400 (2003) (quoting *Albany Area Bldrs. Ass'n v. Town of Guilderland,* 74 N.Y.2d 372, 377 [1989]); *see also* Norse Brief, Point I.

Where the Legislature expressly states the intent to supersede local regulation, any local regulation of that subject matter is invalid, regardless of home rule powers. *Wambat Realty Corp. v. State,* 41 N.Y.2d 490, 496 (1977). In fact, time and time again, the Legislature has exercised its preemption power and superseded local zoning that restricted the location of (or "zoned out") facilities or activities that served substantial Statewide interests. *See, e.g.,* Public Service Law § 172(1); Mental Hygiene Law § 41.34; Banking Law § 369; Social Services Law §§ 2(23), 460-463(b); ECL article 33; ECL article 27, title 11. Moreover, the courts of this State have not hesitated to enforce the Legislature's will and hold such local land use ordinances preempted. *See, e.g., Consol. Edison Co. of N.Y. v. Town of Red Hook,* 60 N.Y.2d 99, 108 (1983) (location of major steam electric generating

facilities); *Robin v. Incorporated Vil. of Hempstead*, 30 N.Y.2d 347, 352 (1972) (location of conducting abortions); *Floyd v. New York State Urban Dev. Corp.*, 33 N.Y.2d 1, 7 (1973) (location of urban development projects); *Sunrise Check Cashing & Payroll Servs., Inc. v. Town of Hempstead*, 91 A.D.3d 126, 139-40 (2d Dep't 2011) (location of check-cashing establishments), *aff'd on other grounds*, 20 N.Y.3d 481 (2013); *DeStefano v. Emergency Hous. Grp., Inc.*, 281 A.D.2d 449, 451 (2d Dep't 2001) (location of adult shelters), *lv. denied*, 96 N.Y.2d 715 (2001); *Ames v. Smoot*, 98 A.D.2d 216, 222 (2d Dep't 1983) (location for aerial application of pesticides); *Town of Moreau v. New York State Dep't of Envtl. Conservation*, 178 Misc. 2d 56, 60 (Sup. Ct. Albany Cnty. 1998) (location for hazardous waste disposal).

Thus, the only pertinent question here is whether the Legislature preempted local land use restrictions in the OGSML. To the extent that the lower courts found to the contrary, they erred by placing primary reliance on MLRL precedent and ignoring the wholly distinct language, policies and history of the OGSML. Norse Brief, at 3-66; *see also* Points II & III, *infra.* The question of preemption under the OGSML must be resolved, not by reference to the MLRL, but, instead, by a plain language reading of the entirety of the OGSML, its policies, purpose, scope, and legislative history.

See Consol. Edison Co. of N.Y., 60 N.Y.2d at 106-07; *People v. De Jesus,* 54 N.Y.2d 465, 468 (1981); Norse Brief, Points II & III.

And, where, as here, "a [s]tate law expressly states that its purpose is to supersede *all* local ordinances," then "the *local government is precluded from legislating on the same subject matter unless it has received '**clear and explicit**' authority to the contrary.*" *Envirogas, Inc. v. Town of Kiantone*, 112 Misc. 2d 432, 433 (Sup. Ct. Erie Cnty. 1982) (emphasis added) (quoting *Robin,* 30 N.Y.2d at 350-51), *aff'd,* 89 A.D.2d 1056 (4th Dep't 1982), *lv. denied,* 58 N.Y.2d 602 (1982). There is no such "clear and explicit authority" here affirming local zoning authority; rather, the OGSML belies it, thus, preempting the Town Prohibition. Norse Brief, Points II-IV; *see also* Points II & III, *infra.*

POINT II
CONTRARY TO THE TOWN'S ARGUMENT, MLRL PRECEDENT IS NOT RELEVANT TO, LET ALONE CONTROLLING OF, THE OGSML PREEMPTION ANALYSIS

Although the Town's Brief goes on for 50 pages in support of the Town Prohibition, the essence of its analysis devolves to a single notion – namely, that *Frew Run* and its progeny (decided under the MLRL) mandate the conclusion that "regulation of an industry" is limited to operational aspects of the industry and can never encompass where the activity takes place. *See* Town Brief, Point I. In other words, the Town's argument is

that, regardless of whatever else a statute may say, regardless of legislative history, and regardless of statutory objectives, the phrase "regulation of an industry" is always separate and distinct from land use determinations – that is, regulation of an industry is mutually exclusive of regulation of land use. *See id.*

By putting all of its eggs in the *Frew Run* basket, however, the Town has turned a blind eye to the very different language, history, and policies of the OGSML, as compared with the MLRL. Reduced to its essence, the Town's argument is that unless the magic word "zoning" or "land use" appears in a supersession clause, there can be no State preemption of local zoning restrictions or prohibitions. This is not the law in New York State, however. And, were this bright-line rule to be adopted, as did the lower courts here, it would fundamentally alter the analytical rubric of longstanding preemption jurisprudence in New York State, with the judiciary effectively re-writing many statutes and ignoring legislative intent. Accordingly, the Town's analysis does not withstand scrutiny, and the Appellate Decision must be reversed. *Contrast* Town Brief, Point I, *with* Norse Brief, Points II & III.

A. The Town's General Attack On Norse's Express Preemption Analysis Is Unavailing

At the outset, the misguided nature of the Town's attack on Norse's discussion of *Frew Run* and its progeny bears discussion. *See* Town Brief, at 11 n.5. First, because the lower courts relied on *Frew Run*, Norse certainly must address it and, likewise, may also cite to general principles – namely, that preemption must be determined from a holistic reading of the statute at issue, together with its underlying policies and relevant history. Even the Town acknowledges this point. *See* Town Brief, at 16 (citing *Frew Run* for same).

Moreover, contrary to the Town's assertion, this case is not simply about a "new set of facts" from which this Court can draw implications from *Frew Run.* *See* Town Brief, at 11 n.5. Rather, the OGSML is a wholly distinct statute, which differs from the MLRL in all material respects – supersession language, substantive regulatory provisions, subject matter of regulation, policies, circumstances of enactment, and legislative history.

Also, contrary to the Town's mischaracterization, the OGSML is about oil and gas well drilling and development, *not* solid minerals mining. *See* Town Brief, at 16 (stating "nothing in the OGSML imposes an obligation on local governments to permit the *mining* of oil and gas within municipal borders" [emphasis added]). Oil and gas extraction is

fundamentally different from mining, which is why solid minerals versus oil and gas are regulated under separate acts having different histories, purposes, objectives and substantive requirements. This begs the question why the MLRL is even an issue in this analysis.

Moreover, the OGSML regulates in detailed, comprehensive fashion where spacing units and wells must be located in order to fulfill unique statutory objectives. The OGSML also requires that extensive environmental protections requirements (which protect the public welfare) must be satisfied before a well can be drilled in New York State. The MLRL has no comparable provisions, thus further highlighting that MLRL precedent has no bearing on the OGSML preemption analysis.

Finally, Norse's discussion of other preemption cases in its preemption analysis is also eminently proper. Norse relies on these cases not to apply their ultimate result to the OGSML preemption analysis, but, rather, for general analytical preemption principles – most pointedly, to demonstrate that, time and time again, the courts of this State have looked to the statute *at issue* (not wholly unrelated statutory schemes) in determining the question of preemption. In other words, the analyses set forth in the numerous cases in which preemption has been found to bar restrictive zoning demonstrate that (1) each statute must be evaluated on its own merits,

and, thus, (2) *Frew Run* cannot be broadly applied in a vacuum resulting in a bright-line rule that "regulation of an industry" can never encompass location (i.e., land use).

Viewing the OGSML in its own light (as it must be), the conclusion that it expressly preempts the Town Prohibition is compelled. Norse Brief, Points II & III; *see also* Points II.B-II.E, *infra*.

B. The OGSML Contains A Clear Expression Of Legislative Intent To Preempt All Ordinances, Thus Including Zoning Ordinances; The MLRL Provides For Local Zoning Control

A full analysis of the OGSML's supersedure language (ECL § 23-0303[2]), and a discussion of the marked contrast between that language and the MLRL's supersedure language, are detailed in Norse's Brief. Norse Brief, Points II.A & III.A. Rather than address the merits of Norse's arguments, the Town, instead, premises its contrary claims on a selective reading, mischaracterizations, and analogies that do not hold muster. *See* Town Brief, at 16-19, 28-32. Notably, these very same misguided arguments are what led the Supreme Court and the Appellate Division astray in the Decisions below. *See* Norse Brief, at 20-29.

First, contrary to the Town's claim, the OGSML is "not silent on zoning in both the general rule and the exceptions clause [of ECL 23-0303(2)]." *See* Town Brief, at 18 n.8. Rather, the prefacing language of

ECL § 23-0303(2) *does* include zoning ordinances because it states without qualification that the statute supersedes "all local laws or ordinances," and a zoning ordinance is the most common type of local ordinance. Of course, there is no comparable "ordinance" language in the MLRL's supersedure provision. The Town improperly ignores this language distinction, which error was repeated by the Appellate Division. *See* R. at 12-13.

The Town's analysis of the exceptions to supersession in the OGSML versus the MLRL fares no better. At the outset, the Town ignores the existence and significance of the "jurisdiction" language in ECL § 23-0303(2) – that local government "jurisdiction" (i.e., the power or right to exercise authority) is limited solely to two discrete areas, local roads and real property taxes. *See* Norse Brief, at 33. There is no corresponding "jurisdiction" language in the MLRL's exceptions to supersession; and this distinction of legal significance was also improperly ignored by the Appellate Division. *See Ames,* 98 A.D.2d at 219 (holding that ECL article 33 preempted local regulation that prohibited aerial pesticide application; finding significant statutory language stating that "jurisdiction in all matters pertaining to the distribution, sale, use and transportation of pesticides" was vested in the NYSDEC); *see also* R. at 12-13.

To the extent that the Town attempts to draw analogies between the specific exceptions to supersession in the OGSML versus the MLRL, it is misguided. *See* Town Brief, at 18 (stating "[a]ccording to Appellant, the OGSML's listing of specific exceptions related to industrial activities implies that all other regulations are prohibited, including regulations relating to the different subject of land use…. The *Frew Run* Court could not have reached its holding had it adopted Appellant's reasoning"). Fatally, the Town's argument is circular because it *assumes* that "regulation of an industry" is necessarily limited to operational activities and can never encompass land use – i.e., where the industrial activity takes place. The Appellate Division made the very same assumption in reaching its no preemption conclusion – in its case, based on a restrictive dictionary definition. *See* R. at 12-13.[2]

Of course, beyond that fact that both caselaw and statutory language belie this assumption in the context of other statutory schemes (*see, e.g.*, Norse Brief, at 36, 40-42), whether regulation under the OGSML includes location (thus preempting the Town's exclusionary zoning) is for this Court

[2] Also noteworthy is the attempt by the Town in this case and the Town of Middlefield in the companion case to classify oil and gas exploration and development activities as industrial activities. They are not. Oil and gas development is a temporal activity that lasts a matter of months and results in surface facilities that are mostly underground with very little traffic or other surface activity or structures. In contrast, industrial activities result in large buildings and structures that often operate 24 hours per day, 7 days per week, resulting in noise, ongoing traffic, and other surface impacts.

to decide by evaluating the OGSML as a whole and cannot be presumed based solely upon MLRL precedent. *See* Town Law § 261 (defining "regulation" to include "local . . . ordinance[s] [that] regulate and restrict . . . the location and use of . . . land for trade [and] industries"); *Sunrise Check Cashing & Payroll Servs., Inc.*, 91 A.D.3d at 139-40 (holding that Banking Law superseded local zoning where statute vested in the State decision-making authority regarding appropriate locations for check-cashing establishments); *Ames,* 98 A.D.2d at 219-22 (finding that ECL article 23 vested in the NYSDEC exclusive authority to regulate distribution, sale, use and transportation of pesticides; holding that this included location of aerial pesticide application, thus preempting village law that prohibited aerial spraying).

The Town is also wrong in asserting that the *Frew Run* holding is inconsistent with Norse's analysis. As fully detailed in Norse's Brief, the local roads and ad valorem taxing exceptions to supersession in ECL § 23-0303(2) are rendered superfluous by the Town's and the Appellate Division's interpretation. Norse Brief, at 36-37. That is, if supersession under the OGSML were limited to the "details or procedure" of oil and gas drilling, the Legislature would not have needed to include the local roads and real property tax exceptions because neither local roads nor taxes has

anything to do with the operational aspects (i.e., details or procedure) of well drilling. *Id.* Notably, even the Town acknowledges that courts "may not adopt an interpretation of [a] statute that renders its language mere surplusage." Town Brief, at 29 n.13. In marked contrast, the reclamation exception to supersession in the MLRL – i.e., one of the open invitations to zoning in the MLRL – has meaning under the *Frew Run* holding because reclamation is a key component of the operational aspects of mining that are regulated under the MLRL. *See, e.g.,* ECL § 23-2713 & former ECL § 23-2717 (now ECL § 23-2715). Thus, the Court's interpretation in *Frew Run* does not render any portion of the MLRL's supersession language meaningless. Accordingly, there is no inconsistency between Norse's analysis and *Frew Run*.

Moreover, to the extent that the *Frew Run* Court found local zoning not preempted under the first clause of the MLRL's supersession language, that holding is fully consistent with the fact that the MLRL does not substantively regulate mine location. In contrast, the OGSML regulates well location in detailed, specific and comprehensive terms (with an aim toward achieving policy objectives that are unique to oil and gas drilling). Therefore, this subject matter – the "where" of drilling – is off-limits to municipalities. Norse Brief, Points II.B & III.B; *see also* Point II.C, *infra*.

Accordingly, nothing in Norse's analysis impugns the reasoning or result in *Frew Run.*

Finally, the Town's numerous mischaracterizations of both the facts and the law do not help its cause. At the outset, the Town's characterization of ad valorem taxing authority and regulation of local road usage (e.g., size and weight of vehicles) as operational/technical aspects of well drilling does not withstand scrutiny. *See* Town Brief, at 30 (characterizing same as "industrial activities," "industry operations," or "oil and gas operations"). As even the Appellate Division implicitly recognized by its silence, real property taxing authority (which applies to every industry or piece of realty) has nothing to do with the actual details, procedure, operations or manner in which the specific activities of a given industry are conducted.

Likewise, local jurisdiction over Town roads is a wholly separate subject matter from, and has nothing to do with, any operational aspect of oil and gas well drilling. Under the Town's contrary argument, local roads must also be an operational feature of the justice system, the medical profession, insurance institutions, banking institutions, and every other regulated profession because roadways are necessary to conduct the profession's business.

Further, to the extent the Town references the "disruptive construction of new access roads and pipelines" relative to well construction, those matters do not concern "local [Town] roads" and, therefore, are irrelevant to the Town's jurisdiction over "local roads" under the OGSML. *See* Town Brief, at 31. To the extent that the Town then attempts to equate real property taxes and local road usage (which do fall within the Town's jurisdiction under the OGSML) with fees and bonding requirements associated with local permitting/approval requirements (which are plainly preempted under the OGSML), that is a red herring, as, again, the former has nothing to do with the latter. *See* Town Brief, at 31; *Envirogas*, 112 Misc.2d at 434-35 (invalidating as preempted local fee requirements that town attempted to impose under local roads exception in ECL § 23-0303[2])**.**

In the end, the exceptions for local road usage and taxing authority on gas production make no sense if supersession under the OGSML is limited to the operational aspects of well drilling, as the Town maintains and the Appellate Division held. The Town's attempt to obfuscate this reality is unconvincing, and the Appellate Division's refusal to address, let alone resolve, this matter is improper. Consequently, the Town's argument fails, MLRL precedent does not control the result here, and the Appellate Decision must be reversed.

Finally, contrary to the Town's claim, the OGSML's express supersession language is not rendered unclear or equivocal simply because, as time progressed, the Legislature adopted more explicit language in other statutes. *See* Town Brief, at 36-37. For example, the Town cites ECL § 27-1107 as "a good example of a law expressly preempting local zoning" – and, apparently, the Town believes it is a good example because it uses the magic words "including conformity with local zoning or land use laws and ordinances. . . . " What the Town neglects to mention, however, is that this language was added to this provision in 1987 (L. 1987, c. 618, § 10). *See* ECL § 27-1107 (Historical & Statutory Notes). This amendment to this unrelated statute, enacted six years after the 1981 amendments to the OGSML, is hardly probative of the Legislature's intent in 1981 when it added the OGSML's supersedure language. *See* Statutes § 93 ("a statute speaks not from . . . when the courts are called upon to interpret it, but as of the time it took effect"); Statutes § 124 ("[i]n ascertaining the purpose and applicability of a statute, it is proper to consider the legislative history of the act, the circumstances surrounding its passage, and *the history of the times*" [emphasis added]). Moreover, the Legislature added this language to ECL § 27-1107 more than seven months after the Appellate Division decided *Frew Run* on December 19, 1986 (i.e., holding that the MLRL did not preempt

local zoning). That the Legislature saw fit subsequently to enact this additional language in ECL § 27-1107 to further clarify its intent in the wake of *Frew Run* does not, and cannot, speak to its intent in enacting the OGSML's supersession language many years earlier in 1981. *See* Statutes §§ 93, 124; *see also Spencer v. Bd. of Educ. of Schenectady,* 39 A.D.2d 399, 401-02 (3d Dep't 1972), *aff'd*, 31 N.Y.2d 810 (1972); *People v. Reilly,* 20 Misc.2d 139, 141 (Spec. Sess. 1959).

Further, the Town has identified no precedent suggesting, let alone, dictating, that "magic words" are a necessary prerequisite to finding local zoning preempted by State law. Indeed, such a concept flies in the face of well-settled principles of implied preemption. *See Ames,* 98 A.D.2d at 218-19 (stating "[t]he intent to preempt may be deduced not only from express language providing for exclusivity, but also from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme . . . including the need for statewide uniformity in a given area" [citation omitted]); *see also DeStefano v. Emergency Hous. Grp.,* 281 A.D.2d at 451, 453 (involving implied preemption of local regulation [special permit requirement] under Social Services Law §§ 460-463[b] relative to location of adult home; dissent noting "[t]here is certainly no explicit statement of intent by the Legislature to preempt local zoning

laws"); *Town of Moreau*, 178 Misc.2d at 58-60 (finding local code prohibition against dumping hazardous waste in any area other than town landfill to be impliedly preempted by State hazardous waste law, ECL article 27 governing hazardous waste disposal and cleanup; stating that because the local code "infringe[d] upon the Legislature's broad delegation of authority to the Commissioner to oversee remediation of hazardous waste sites, . . . it must be deemed to be preempted by ECL article 27").

Accordingly, on all counts, the Town's analysis of ECL § 23-0303(2) fails.

C. The OGSML Regulates Well Location In Comprehensive, Detailed Terms, And There Are No Comparable Provisions In The MLRL

Norse's Brief sets forth the many provisions of the OGSML which, in detailed fashion, comprehensively regulate the location and spacing of oil and gas wells to prevent waste, ensure greater ultimate resource recovery, and protect the correlative rights of all mineral owners. Norse Brief, Points II.B & III.B. A further demonstration of the OGSML's comprehensive regulation of the "where" of drilling is found in ECL § 23-0501(2), which provides that an applicant must control no less than sixty percent of the acreage within the proposed unit and control the rights to the target formation in order to proceed with the permitting process. This

demonstrates that the OGSML contemplates the specific conditions under which mineral owners can decide to exercise their mineral rights, in furtherance of the overarching objectives of the OGSML to prevent waste and protect the correlative rights of all owners in the proposed unit. *See generally*, ECL article 23, titles 5, 7, and 9.

Consequently, resolution of the issue here is simple: because the OGSML "regulates" well location in detailed, explicit, comprehensive terms and directs that the NYSDEC "shall" issue the drilling permit if these statutory requirements are satisfied, under ECL § 23-0303(2), localities may not regulate this same subject matter. *Id*.[3] In other words, contrary to the Town's argument, because the OGSML regulates well location, the OGSML *cannot* be harmonized with state statutes (like the MLRL) that "confer local

[3] Facially unavailing is the Town's attempt to equate the "shall issue the permit" provisions of the MLRL and the OGSML. *See* Town Brief, at 35 n.19 (stating that because, when *Frew Run* was decided, the MLRL provided that the permit shall be issued following approval of the application, "Appellant thus cannot distinguish [the] OGSML from the MLRL by pointing to the provision of the OGSML stating that DEC 'shall' issue a permit to drill if certain requirements are met"). When *Frew Run* was decided (as is the case now), the MLRL did not regulate where mining could occur. In addition, as part of the application process under the MLRL when *Frew Run* was decided, ECL § 23-2711(3) and (10) were in force and effect, respectively (1) requiring notice at the application phase to "officials of local governments having jurisdiction over the proposed site…" and directing that "[n]othing in this article shall be construed as exempting any person from any provisions of any other law or regulation not otherwise superseded by this title." R. at 534, ¶ 47; R. at 641 & 643 (Exh. M). In other words, mining applicants were then (as they are now) subject to local zoning/land use control. There is no (and never was any) comparable provision in the OGSML, meaning that the "shall issue the permit" directive of the OGSML is based on statutory criteria alone, devoid of any local control. Accordingly, the "shall" directives in the OGSML and MLRL are fundamentally different, and the Town's contrary argument fails.

zoning power." *See* Town Brief, at 19. Well drilling is not mining; they are distinctly different activities governed by two separate, distinctly different acts. Proving this point by contrast, the MLRL does not contain any even remotely comparable provisions regarding mine location and the spacing of mine shafts. Norse Brief, Point III.B. This highlights the impropriety of the Appellate Division's reliance on MLRL precedent and blind application of it to interpret the phrase "regulation of the industry" as used in the OGSML.

None of the Town's contrary arguments detracts from this conclusion. Attempting to downplay the OGSML's detailed, comprehensive regulation of well location, the Town asserts that the MLRL addresses mine location. For this proposition, the Town cites a single provision – ECL § 23-2711, which requires that a mined land use plan be submitted with the permit application. ECL § 23-2711(2); *see also* ECL § 23-2713.

This provision, however, is striking – not for its similarity to any of the OGSML's location-based requirements – but, instead, for its stark differences. ECL § 23-2711 is a generalized narrative that lacks any explicit directives regarding location, spacing, acreage requirements, orientation or setbacks. Rather, it is meant to provide for a general plan for the ultimate reclamation of the large surface area disturbed as mining operations proceed over a period of many years. *See id.* Pointedly, this provision and the

remainder of the MLRL lack any explicit directives regarding mine placement, the spacing between mine shafts, the lay-out of the mine site relative to underground resources or adjacent mine sites, setbacks, or any other physical feature of the mine site. And, the MLRL does not speak to the correlative rights of mineral owners, which is the basis for the OGSML's statutory requirement that the operator control at least 60% of the mineral rights in the spacing unit before a well permit can be issued. ECL § 23-0501(2). Thus, this marked difference between the scheme of regulation under the MLRL and the OGSML proves Norse's point.

In short, the comprehensiveness and explicit detail in the OGSML regarding location-based criteria (which apply on a Statewide basis), and the lack thereof in the MLRL, mandate the conclusion that the OGSML preempts local location-related restrictions (i.e., zoning bans), whereas the MLRL does not. *See Ames*, 98 A.D.2d at 220 (stating "evidence of intent to pre-empt . . . is provided by the complete and detailed nature of the State scheme. Comprehensiveness and detail are important in determining the existence of an intent to pre-empt"); *Envirogas, Inc.*, 112 Misc. 2d at 433-34 (finding preemption of town regulation because it regulated matters falling within the same subject matter as that regulated by the OGSML); *see also Albany Area Bldrs. Ass'n.*, 74 N.Y.2d at 377 (stating "intent [to preempt]

may be implied from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area . . . A comprehensive, detailed statutory scheme . . . may evidence an intent to preempt" [citation omitted]).

Moreover, it cannot escape notice that the sole provision cited by the Town for the proposition that the MLRL addresses mine location unequivocally reaffirms local zoning control: ECL § 23-2711(2)(c) (MLRL permit application must contain a statement that mining is not prohibited at the proposed location); ECL § 23-2711(3) (MLRL permit applicant must send notice of application to political subdivision in which the proposed mine is to be located); ECL § 23-2711(3)(a)(v) (NYSDEC must determine if mining is prohibited at the proposed location); ECL § 23-2711(7) (stating that this title does not exempt any person from any other law or regulation not otherwise superseded by this title [formerly ECL § 23-2711[10]).[4] *See*

[4] The Town faults Norse for reciting provisions of the current MLRL that were enacted post-*Frew Run*. *See* Town Brief, at 29 n.15. Norse's Brief and the record citations therein fully detail the evolution of the MLRL; this discussion includes the provisions in effect when *Frew Run* was decided, such as former ECL §§ 23-2711(3) & (10) (L. 1974, c. 1043), which contemplate and reaffirm local zoning control. Norse Brief, at 48-49; R. at 534, ¶¶ 46-49; R. at 635, 637, 641, 643. Moreover, because the Town and the lower courts extensively relied on *Gernatt Asphalt* (*see* Town Brief, at 15-16, 24, 26-27, 30, 46; R. 13, 16, 18, 47-49, 53, 55, 57, 59), it is entirely appropriate for Norse to also detail provisions of the MLRL in effect when *Gernatt Asphalt* was decided. Moreover, the Town portrays *Gernatt Asphalt* as being the "third time" this Court distinguished between zoning ordinances (i.e., land use) and regulation of industry. *See* Town Brief, at 15; *see id*, at 26. However, the Town fails to acknowledge that *Gernatt Asphalt* was decided under wholly different statutory language – i.e., by the time *Gernatt Asphalt* was decided,

also R. at 534, ¶ 47, R. at 641, 643 (Exh. M) (MLRL language in effect when *Frew Run* was decided, former ECL §§ 23-2711[3] & [10] [L. 1974, c. 1043]). There are no analogous provisions in the OGSML that reaffirm local zoning authority. This difference in the design of the two statutes underscores yet again the error of the Appellate Division's and the Town's dependence upon MLRL precedent in the OGSML preemption analysis.

The Town's additional arguments relative to a plain language interpretation of the OGSML fare no better. Specifically, that Town asserts that "[u]nder Appellant's argument, mining operators would be allowed to strew trash all over their property or ignore stormwater pollution resulting from land clearance. . ." Town Brief, at 18 n.7. The Town also maintains that *Envirogas* – the only case to discuss the import of the 1981 amendments to the OGSML which added the supersession language – supports its position that the OGSML does not preempt local zoning. The Town is wrong on both counts.

The Town's claim about strewing trash constitutes a total lack of understanding of the extent to which the NYSDEC regulates activities at drill sites under the statutes, rules, regulations and permit conditions

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the Legislature had amended the MLRL to expressly reaffirm full local zoning control. L. 1991, c. 166 (adding ECL §§ 23-2711[2][c], [3], [7]); *see also Gernatt Asphalt*, 87 N.Y.2d 668 (1996). Accordingly, to the extent that any party distorts history, that fault lies with the Town, not Norse.

administered by the NYSDEC under the OGSML. *See, e.g.,* ECL §§ 23-0305(8)(d), (12)(a); 6 N.Y.C.R.R. §§ 553.2, 554.1, 556.5; *see also* n.11, *infra*. And stormwater discharges have been and will continue to be extensively regulated under the standards being developed under the SGEIS process. *See* SGEIS §§ 7.1.2, 7.1.2.1, 7.1.2.3; *see also* n.11, *infra*. Accordingly, the Town's attempt to refute a preemption finding by painting a picture of local gloom and doom fails, as the NYSDEC has never allowed these conditions to exist in the past decades of successful oil and gas operations in New York State and will not allow them to exist in the future under the rigorous standards being adopted under the SGEIS.

The Town's argument respecting *Envirogas* is equally unavailing. In *Envirogas*, the court held that ECL § 23-0303(2) preempted a local ordinance that regulated drilling operations by imposing a permit fee and performance bond requirement. 112 Misc. 2d at 434-35. Thus, the court was faced with local regulation solely of oil and gas "operations" and, therefore, did not address whether supersession under the OGSML also included drilling location. Accordingly, *Envirogas* does not support the

Town's position that "regulation of the . . . industr[y]" under the OGSML is limited to "operations" (i.e., the details or procedure of drilling).[5]

Envirogas, however, does support Norse's analysis in a number of respects. *Envirogas* confirms that the OGSML and its implementing regulations "are designed to protect the public, prevent waste and ensure a greater ultimate recovery of oil and gas." *Id.* at 433. The *Envirogas* court also found that where, as here, "State law expressly states that its purpose is to supersede all local ordinances then the local government is precluded from legislating on the same subject matter unless it has received 'clear and explicit' authority to the contrary." *Id.* (citation omitted). Finally, the *Envirogas* court rejected an attempt by the town to broaden the local roads exception beyond its intended scope and impose fees based thereon. *Id.* at 434. In this regard, the court noted that, while the town's concerns were legitimate, those concerns were accommodated by the substantive provisions

[5] The only way for the Town to claim that *Envirogas* supports its position is by *assuming* that "regulation" can never encompass land use (zoning determinations). *See* Town Brief, at 24-25 (stating that *Envirogas* recognized that local legislation in the area of oil and gas regulation is preempted by state law on the same subject matter, but that the court was not asked to adjudicate a state preemption claims against a local law "on a different subject matter"). Of course, the meaning of "regulation" under the OGSML is the issue before this Court, and the Town cannot presume that "regulation" of an industry is always a "different subject matter" from local zoning in maintaining that *Envirogas* supports it position. The Town's patently circular argument, therefore, must be rejected. Likewise, since the OGSML does regulate the location of spacing units, well pads and the environmental safeguards associated with oil and gas wells and associated facilities, the OGSML does regulate the "same subject matter" of local zoning. And, this is why *Envirogas* leads to the conclusion that local zoning is preempted.

of the OGSML – namely, by allowing municipalities to request compensation for damages, granting the NYSDEC the authority to impose financial security requirements, and requiring well permit holders to notify local governments and affected landowners of intent to drill prior to drilling. *Id.* at 434-35. Thus, in multiple respects, *Envirogas* supports Norse's argument.

Finally, there is no merit to the Town's argument (erroneously adopted by the lower courts) that the absence of "community need" or other traditional land use-related criteria in the OGSML bars a finding of preemption. *Contrast* Norse Brief, at 26-28, 40-41, *with* Town Brief, at 37-39 & n.20. Although community need was a criterion under the statutory program in *Sunrise Check Cashing*,[6] contrary to the Town's articulation, *Sunrise Check Cashing* does not stand for the general proposition that, in every statutory scheme, community need is a prerequisite for finding local zoning to be preempted.

[6] The Town notes that this Court affirmed *Sunrise Check Cashing* on other grounds, and then goes on to question whether the Second Department's preemption ruling remains good law. *See* Town Brief, at 38 n.20. This is another attempt by the Town at obfuscation. This Court will not decide questions unnecessarily and issue what are in effect advisory opinions. Hence, this Court did not reach the preemption issue in *Sunrise Check Cashing* because it found that the local regulation there was not a valid exercise of the zoning powers since the local regulation addressed the identity of the user rather than land use. *See generally,* 20 N.Y.3d 481. Nothing in this Court's decision, however, affects the validity of the Second Department's holding. *See id.*

For example, in *Ames*, where no community need requirement was present, the court found a local prohibition on aerial spraying of pesticides to be preempted by ECL article 33 because the NYSDEC was vested with the exclusive authority to regulate all matters regarding the distribution, sale, use and transportation of pesticides. 98 A.D.2d at 219-22 (also noting state policy that the use of pesticides was necessary for the "welfare, health, economic well-being and productive and industrial capabilities of the people of this state" and citing ECL § 33-0301). Notwithstanding the absence of any community need or land use-related criteria in ECL article 33, the court nonetheless found that regulation regarding the mode and location of pesticide application was vested in the NYSDEC and, therefore, the local prohibition was preempted.

Analogously, here, ECL § 23-0303(1) directs that "[e]xcept to the extent that the administration of this article [i.e., the OGSML] is specifically entrusted to other agencies or officers of the state by its provisions, such administration shall be by the department" and must be administered in a manner that fully protects the general public. *See* ECL § 23-0301. By its plain language, this provision does not admit to any control by local governments, and, of course, the OGSML contains no provisions entrusting to local governments any control over oil and gas activities. In subdivision

2, the statute expressly reaffirms that it supersedes all local government regulation (laws and ordinances), allowing local "jurisdiction" only as to local roads and real property taxes. *See* ECL § 23-0303(2). And, the substantive permitting provisions of the OGSML set forth comprehensive, detailed, location-based requirements to be applied on a Statewide basis, all of which the statute entrusts to the NYSDEC to administer and enforce in the public interest. *See* ECL §§ 23-0301, 23-0501, 23-0503. Accordingly, the statute regulates the same subject matter as local zoning and a finding of preemption is fully warranted, notwithstanding the lack of traditional land use criteria in the OGSML's permitting provisions.

In any event, although consideration of "community need" or other traditional land use concerns is not a prerequisite for a preemption finding, even if it were, that condition would be met here. The legislative history and statutory language of the OGSML and Energy Law reflect that there is a Statewide public need for the development of indigenous energy resources that applies to all communities. *See* ECL § 23-0301; Energy Law §§ 3-101(5), 3-103. Further, by vesting authority in the NYSDEC to administer the OGSML on a Statewide basis (*see* ECL § 23-0303[1]), the Legislature also entrusted to the NYSDEC the obligation that it administer the OGSML in a manner such that "the rights of all persons including landowners and the

general public may be fully protected." ECL § 23-0301. These objectives are accomplished through the statutory directives to prevent pollution and the extensive environmental protection requirements imposed through regulations, the 1992 GEIS, and as proposed in the SGEIS. *See* n.11, *infra*. This further evidences the Legislature's intent to preempt local land use restrictions. *See, e.g., Robin,* 30 N.Y.2d at 350 (finding local restrictions on location of abortions to be preempted; noting significance of Public Health Law declaration of policy "to provide for the protection and promotion of the health of the inhabitants of the state"); *see also Envirogas*, 112 Misc.2d at 434-35 (finding municipal concerns accommodated by substantive provisions of the OGSML).

Finally, it bears mention that community character concerns have been, and continue to be, fully evaluated under prior and current review of oil and gas drilling pursuant to SEQRA. In the past, oil and gas drilling was subject to SEQRA review, culminating in the 1992 GEIS. And, for more than five and one-half years, oil and gas drilling utilizing high-volume hydraulic fracturing ("HVHF") has been subject to an unparalleled level of supplemental environmental review, including heightened public participation and full consideration of environmental and community character concerns. *See generally*, SGEIS §§ 2.4.15, 5.1, 6.9, 6.10, 6.12,

7.1.11, 7.9, 7.10, 7.12; Norse Brief, at 10-11; n.11, *infra*. The Statewide requirements and restrictions being proposed through the SGEIS process – which further regulate drilling location – underscore that a preemption finding is mandated here.

In the end, where, as here, the State statute (1) expressly entrusts administration of its provisions to the NYSDEC with an aim toward protecting the interests of the general public; (2) states that it supersedes "all" local laws or ordinances relating to regulation of the oil and gas industry; (3) in a myriad of substantive provisions, comprehensively and in detail regulates the proper location for oil and gas activities to occur; (4) accommodates local concerns via Statewide regulation which enables the Department "to provide for the efficient, equitable *and environmentally safe development* of the State's oil and gas resources" (R. at 528-30, 625-26; ¶ 30 & Exh. J [emphasis added]) and provides a compensation fund allowing municipalities to recoup damages from oil and gas activities (ECL § 23-0303[3]); and (4) is motivated by policies that are plainly defeated by contrary local zoning (*see* Norse Brief, at 56-58 & Point III.C, *infra*), "traditional respect for the primacy of the state interest requires that the will of the Legislature prevails over the desires of [the] individual locality." *Cohen*, 100 N.Y.2d at 403; *Town of Islip v. Cuomo*, 64 N.Y.2d 50, 56-57

(1984) (stating that "legislation on matters of State concern 'even though . . . having a direct effect on the most basic of local interests does not violate the constitutional home rule provisions'" [citation omitted]).[7] In short, the Legislature's will is clear: contrary local zoning regulations, such as the drilling ban at issue here, are preempted.

D. The Legislative History and Circumstances Of The OGSML's Enactment Are Relevant, Properly Before This Court, And Further Distinguish The MLRL

The Norse Brief fully details the history of the OGSML and the circumstances of enactment of ECL § 23-0303(2), all of which confirm both (1) the Legislature's intent to preempt local zoning when it enacted the supersession provision in 1981, and (2) the distinctions between the intent of the supersedure language of the OGSML versus that of the MLRL. Norse Brief, Points II.C & III.C.

The Town cannot escape the significance of the OGSML's legislative history and the circumstances of ECL § 23-0303(2)'s enactment by employing smokescreen tactics. Attempting to divert this Court from the merits of the issue before it, the Town first alleges unavailing procedural challenges to preclude this Court's consideration of relevant history. *See*

[7] *See also Woodbury Hgts. Estates Water Co. v. Vil. of Woodbury*, 111 A.D.3d 699 (2d Dep't 2013) (finding village law prohibiting removal of groundwater for use outside of village field preempted by ECL § 15-0501; noting State's transcendental interest).

Town Brief, at 22 & n.10, 44 (asserting that the Hennessey Affidavit has no bearing on legislative intent and that the Sovas Affidavit is legally inadmissible; characterizing A.6928 as a "different bill" from the ultimate enactment of ECL § 23-0303[2]). None of these procedural challenges withstands scrutiny.

The Hennessey Affidavit is part of the record and is an eminently proper vehicle for presenting to this Court documentary evidence of the legislative history and circumstances of enactment of the OGSML and, by contrast, the MLRL. *Zuckerman v. New York*, 49 N.Y.2d 557, 563 (1980) (stating "[t]he affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form,' e.g., documents, transcripts"). In any event, this Court may take judicial notice of any statute, its legislative history, and any legislative facts reflected in public records, regardless of whether they are part of the record here or were relied upon below. *See* Norse Brief, at 15 n.4 (citing *State v. Green*, 96 N.Y.2d 403, 408 n.2 [2001]; *Affronti v. Crosson*, 95 N.Y.2d 713, 720 [2001] [where public records reflect legislative facts, as opposed to evidentiary facts, their absence from the record does not prevent consideration for the first time on appeal]). Accordingly, the Hennessey

Affidavit and the documentary evidence appended to it are squarely before this Court, and the Town's contrary argument must be rejected.

Likewise, the Town's miscasting of the Sovas Affidavit also cannot succeed in precluding this Court's consideration of it. Contrary to the Town's articulation, the Sovas Affidavit was never offered to alter, supplant or expand upon legislative history. Rather, the Sovas Affidavit was offered to (1) provide important context regarding the circumstances surrounding enactment of ECL § 23-0303(2) in 1981, and (2) inform the Court as to the manner in which the NYSDEC, the agency charged with administering the OGSML (including the supersedure language), consistently implemented that provision for thirty years. Norse Brief, at 54. Notably, the Town does not dispute that, after the supersession language was added in 1981, the NYSDEC did, in fact, implement the OGSML as preempting local zoning.

Moreover, contrary to the Town's argument and the Supreme Court's finding, the Sovas Affidavit is proper, directly relevant, and, indeed, highly probative on the question of the proper construction to be accorded ECL § 23-0303(2). *See Shoreham-Wading River Cent. Sch. Dist. v. Town of Brookhaven*, 107 A.D.2d 219, 224 (2d Dep't 1985) (stating "[w]hen a legislative enactment is susceptible to more than one reasonable interpretation, the practical meaning attached to it by the parties whom it

affects, when acquiesced in over an extended period of time is highly persuasive . . . . Unless manifestly wrong, the meaning which public officials attach to an act which they are responsible for administering is to be accorded great weight in construing the law" [citations omitted]); *accord City of N.Y. v. State*, 282 A.D.2d 134, 144 (1st Dep't 2001), *aff'd*, 98 N.Y.2d 740 (2002); *see also S*tatutes § 128 ("[w]here the language of a statute is ambiguous or uncertain, the construction placed upon it by contemporaries, as in the case of a practical construction which has received general acquiescence for a long period of time, will be given considerable weight in its interpretation").

Further, given Mr. Sovas' tenure as Division Director for the Division of Mineral Resources and Chief of the Bureau of Mineral Resources at the NYSDEC for two and one-half decades during the relevant timeframes, and the fact that he was the primary author of the 1981 amendments, he is eminently competent to speak to these matters. Accordingly, to the extent that the Supreme Court found to the contrary and the Town continues to maintain that position (*see* R. at 51 n.12; Town Brief, at 22 n.10), they are in error.[8]

[8] Also without merit is the Town's contention that Norse failed to appeal from the Supreme Court's "evidentiary ruling" regarding the admissibility of the Sovas Affidavit. *See* Town Brief, at 22 n.10. The Supreme Court ruled that it would not consider the

Also contrary to the Town's assertions, the circumstances of enactment of the OGSML's supersession language are certainly relevant here and, further, do distinguish the MLRL. *See* Town Brief, at 32-34 (asserting there is no relevance to the fact that ECL § 23-0303[2] was enacted as an amendment to the OGSML rather than as part of the original enactment; also stating that it makes no difference that the 1981 amendments to the OGSML followed the energy crisis of the 1970s). First, this Court has repeatedly reaffirmed the general principle that "[t]he context underlying the enactment . . .[,] the history of the times, the circumstances surrounding the statute's passage, and . . . attempted amendments" are all relevant in construing statutes and discerning legislative intent. *E.g., Albany Law Sch. v. New York State Off. of Mental Retardation & Dev. Disabilities*, 19 N.Y.3d 106, 122 (2012) (internal quotation marks and citation omitted); *accord Consedine v. Portville Cent. Sch. Dist.*, 12 N.Y.3d 286, 290 (2009); *Riley v. County of Broome*, 95 N.Y.2d 455, 464 (2000) (citing McKinney's Cons Laws of N.Y., Book 1, Statutes § 124, at 253).

Sovas Affidavit, stating the Sovas Affidavit could not be considered because it was not a proper method of ascertaining legislative intent, and it was not relevant because interpretation of the OGSML "involves [an issue] of pure statutory interpretation that does not require reliance upon DEC's knowledge or understanding of underlying operational practices." R. at 51 n. 12. Norse's notice of appeal to the Appellate Division from the final Supreme Court Decision brings up for review "any ruling … which was a refusal or failure to act as requested by the appellant." CPLR § 5501(a)(3). Consequently, the propriety of the Supreme Court's ruling respecting the Sovas Affidavit is also properly before this Court.

Thus, as detailed in Norse's Brief, the fact that ECL § 23-0303(2) was enacted after decades of local regulation that had thwarted effective oil and gas development (and was intended to pave the way toward securing a reliable supply of indigenous oil and gas resources in response to the energy crisis per the policies and directives of both the OGSML and the Energy Law) *is* pertinent to what the Legislature intended by enacting the supersession language in the OGSML. Norse Brief, Point II.C; *see also Albany Law Sch.,* 19 N.Y.3d at 122; Statutes § 124. And, the facts that any such comparable circumstances are lacking in the history of the MLRL, and that energy shortage issues which adversely impact the public interest were never implicated under the MLRL's regulatory scheme, certainly do distinguish the two statutory schemes – most pointedly, what the Legislature intended in enacting ECL § 23-0303(2) as a remedy to a dire Statewide need for indigenous oil and gas resources. Norse Brief, Point III.C.

The Town cannot defeat these stark distinctions between the histories of the MLRL and OGSML – and yet again, attempt to equate the two statutes – by simply reciting the "standardization function" in the MLRL's original legislative history, out-of-context of everything else. *See* Town Brief, at 32-33 (citing MLRL legislative history of intent to adopt uniform regulations to replace patchwork system of local ordinances; stating that

Norse cannot distinguish *Frew Run* precedent because "[j]ust as the MLRL could serve its standardizing function without abridging local land use powers, so can the OGSML"). The so-called standardization/uniformity function is but one aspect of both statutes and this, viewed in isolation, cannot answer the interpretative question.

In fact, this is where any superficial similarity between the two statutes ends. The MLRL and OGSML regulate different subject matter, and they do so with different supersession language and different substantive provisions – with an aim toward achieving very different policy objectives. Norse Brief, Points II.A, II.B, III.A, III.B, III.D. In contrast to the MLRL (which from the outset contained supersession language), the Legislature amended the OGSML in 1981 by adding the supersession language to correct problems resulting from years of local restrictions, including local zoning controls. The 1981 amendments reaffirmed that full jurisdiction over all oil and gas activities must be vested solely in the State to prevent local governments' diverse attempts to regulate oil and gas activities which had for years hampered efficient development. CHC R. at 949, 995, ¶ 34 & Exh. G. Accordingly, when viewed in context, the so-called shared "standardization" function does not override the overwhelming distinctions between the two statutes.

Also unavailing is the Town's attempt to deflect this Court's attention from the substance and import of relevant legislative history – namely, of A.6928, which the Town characterizes as a "different bill" from that enacted in 1981. *See* Town Brief, at 22. As fully detailed in the Middlefield Record on Appeal, however, as is typical practice in the Legislature (and as was the case here with the 1981 amendments to the OGSML), multi-pronged legislation often is proposed as separate bills. Ultimately, the three bills initially proposed to implement the 1981 amendments were consolidated into one bill which was ultimately passed. A.6928 was the initial bill proposing the supersedure language that ultimately was adopted in the omnibus legislation in 1981. *See* CHC R. at 949-51, 995, ¶¶ 34, 39-42 & Exh. G. The significant point here is that the substance of A.6928 is exactly what was enacted in 1981 as the supersedure provision (albeit by different bill number). Because the substance of the two bills is identical, the legislative history of A.6928 is part of the legislative history of ECL § 23-0303(2) and directly pertinent to interpreting it, and the Town's contrary argument fails.

Seemingly recognizing that it cannot preclude this Court from considering the legislative history associated with A.6928, the Town then impermissibly attempts to re-write it. Town Brief, at 22-23 (discussing, but

distorting, legislative history of A. 6928; stating is "was responding principally to deficiencies in DEC funding"). The Town cites to certain segments of the Sponsor's Memorandum, out-of-context, injecting its own conclusions and, then, troublingly omits language that is critical to the interpretive question. *See id.* Although fully set forth in Norse's Brief (Point II.C), the Town's distortion of this language merits reiterating it here:

> 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 governments' 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).

Accordingly, contrary to the Town's argument, the supersession language was not merely about "deficiencies in DEC funding." *See* Town Brief, at 22. Rather, per the articulation above, the intent of ECL § 23-0303(2) was to (1) reserve solely to the State authority to implement New York's comprehensive oil and gas scheme under the terms of the OGSML; (2) remove local control over oil and gas activities that for years had

hampered efficient development; and (3) provide for efficient, safe development which accommodated local government concerns through implementation of the OGSML on a Statewide basis. Thus, legislative history fully supports a preemption finding, and the Town's contrary argument fails. Moreover, the fact that this legislative history fully comports with the factual context in which the legislation was adopted, both prior to and subsequent to the adoption, as detailed by former NYSDEC Division Director Sovas provides further support for the holistic reading of the supersession clause advanced by Norse and ignored by the courts below.

E. Policies Of The OGSML Are Unique To Oil And Gas Drilling And Further Distinguish The MLRL

In its discussion of policy objectives, the Town again puts all of its eggs in the *Frew Run* basket and, by selective reading, unavailingly attempts to equate the MLRL and the OGSML. *See* Town Brief, at 25-27. The Town's argument is as follows: the MLRL recognized the policy of fostering the development of a stable mining industry as well as encouraging other productive uses normally addressed by localities; the OGSML seeks to "regulate" (but not foster) the industry and identifies no role for the State in encouraging productive land uses. Therefore, the Town concludes, it is

easier to reconcile the purposes of the OGSML with local land use than it is under the MLRL. Town Brief, at 25-27.

The Town's first error is its out-of context reading of the "foster development" and "encourage other productive uses" policy, devoid of the remainder of each of the statutes and their respective histories. The MLRL's recognition of productive land uses other than mining, when read (as it must be) *in conjunction* with the remainder of that statute's substantive provisions – which do not regulate mine location and reaffirm localities' jurisdiction over the mine site and the authority to impose land use controls – accounts for the result in *Frew Run* and its progeny. By contrast, the OGSML does regulate drilling location and precludes local jurisdiction over same, rendering the rationale and result in the *Frew Run* line of cases wholly inapplicable here.

Indeed, the Town's exclusive focus on the "foster development" policy of the MLRL and the so-called "regulate" policy of the OGSML further highlights the error of its reasoning and conclusion. The Town's analysis impermissibly places exclusive reliance on one policy wholly out-of-context – not only out-of-context of the remainder of the statute (and its history), but also to the exclusion of the remainder of the OGSML's declared policy objectives. *See* Town Brief, at 26 n.12. Tellingly, the Town relegates

to a footnote what it terms "the OGSML's *subsidiary* objectives (preventing waste, providing for a greater ultimate recovery, and protecting the correlative rights of owners and the rights of landowners and the general public)." *See id.* (emphasis added).

The Town provides no support whatsoever for its characterization of these remaining objectives as being "subsidiary." Certainly, the Town's mischaracterization is ends-oriented – i.e., this is the only way for the Town to attempt to analogize the policies of the OGSML with those of the MLRL. The Town's mischaracterization of these policies as "subsidiary" is also dead wrong, particularly given that they have their basis in the Interstate Compact, which is the foundation from which the OGSML arose. Accordingly, these policies are the driving force of the OGSML, making them the preeminent policy considerations in the preemption analysis. *See* Norse Brief, at 5-18, & Points II.B & III.D; *see also Voss v. Lundvall Bros., Inc.,* 830 P.2d 1061, 1067-68 (Colo. 1992).

Regarding the substance of these policies, two points also are irrefutable. First, these policies are unique to the OGSML, and nowhere to be seen in the MLRL, thus distinguishing the two statutes. Second, due to the unique nature of oil and gas, the policies of preventing waste, providing for greater ultimate resource recovery, and protecting correlative rights are

thwarted or defeated by local drilling bans. Norse Brief, Points II.B & III.D; *see also* Point III.C, *infra.*

Accordingly, the OGSML's language, policy objectives, history and circumstances of enactment demonstrate that ECL § 23-0303(2) expressly preempts the Town Prohibition, and the Appellate Decision, therefore, must be reversed.

POINT III
CONTRARY TO THE TOWN'S ARGUMENT, THE TOWN PROHIBITION IS CONFLICT PREEMPTED BY THE OGSML

A. The OGSML's Express Supersedure Clause Does Not Foreclose An Implied Preemption Analysis

The Appellate Decision properly found that the OGSML's express supersession clause does not foreclose an implied preemption analysis. Norse Brief, Point IV, at 58. Accordingly, the Town's contrary argument must be rejected and the Appellate Decision affirmed on this issue.[9]

B. The Express Directives Of The OGSML Conflict With Drilling Bans

As did the Appellate Division, the Town acknowledges that the OGSML regulates well location (*see* R. 19-20; Town Brief, at 34), but then, based solely on *Frew Run*, concludes that this is a different subject matter

[9] Moreover, because the Town did not cross-appeal from the Appellate Decision, it waived this issue.

from "land use." In this regard they err. The holding of no preemption in the MLRL cases presents no conflict with State law because the MLRL does not regulate mine location, meaning localities may. Here, however, even the Town and the lower courts acknowledge that the OGSML regulates well location. *See* Town Brief, at 14; R. 19-20. This fact has legal significance – namely, this means that "regulation of the industry" as used in ECL §23-0303(2) includes well location; and, that, in turn, means that this subject matter is off-limits to local governments. *See Envirogas, Inc.*, 112 Misc.2d at 433 (stating that where, as here, "State law expressly states that its purpose is to supersede all local ordinances then the local government is precluded from legislating on that same subject matter unless it has received 'clear and explicit' authority to the contrary").

The Town maintains, however, that there is no conflict because (1) "[t]he operator, not the State, proposes a spacing unit in its application for a drilling permit," (2) "[e]ach application is considered independently – not on a statewide basis," and (3) "[o]perators can plan the size and shape of spacing units to conform to local zoning laws and then conduct their activities in compliance with state rules establishing technical requirements." Town Brief, at 47.

Although the operator proposes the spacing unit, the parameters of that unit are determined by statutory and regulatory criteria that *are* applied by the NYSDEC on a Statewide basis. The Town's argument fails to recognize that oil and gas resources are located where they are (regardless of municipal boundaries), and explicit directives in the OGSML and its implementing regulations mandate the proper size and orientation of the spacing unit, wellbore location, setbacks, and alignment and spacing relative to other units – all of which is designed to ensure that the Statewide policies of preventing waste, protecting correlative rights and providing for greater ultimate resource recovery are realized.[10]

This cannot be accomplished where, as here, a locality "zones out" well drilling on thousands of acres – i.e., *all* of the acreage within its borders (surface and subsurface). In short, there is a plain conflict between the substantive spacing and well location provisions of the OGSML and the Town Prohibition if, under the OGSML, a permit "shall" be granted where the application conforms to comprehensive, explicitly detailed Statewide

[10] For example, ECL § 23-0503(2) directs that "[t]he department shall issue a permit to drill . . . if the proposed spacing 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." Drilling bans, like the Town Prohibition, preclude the ability to comply with these requirements. *See, e.g.*, 6 N.Y.C.R.R. § 553.4 (Wyckoff field spacing order and map showing layout and orientation of typical spacing units).

regulation, but the Town Prohibition precludes well drilling at that location (and everywhere else within Town boundaries). Norse Brief, Point III.B, at 52-53, & Point IV, at 59.

The Town's remaining arguments fare no better. Try as it might, the Town cannot succeed in equating oil and gas drilling with solid minerals mining; nor can the Town insert into the OGSML (judicially or otherwise) the zoning-affirming language of the MLRL. *Contrast* Norse Brief, Point III, *with* Town Brief, at 47-48. In other words, *Gernatt Asphalt* and its predecessor cases are simply not relevant to the analysis here. *See* Norse Brief, Point III.

Also without merit, and, indeed, troubling, is the Town's attack on Mr. Sovas in a last ditch effort to dissuade this Court from considering relevant history pertinent to the OGSML analysis. Town Brief, at 47 n.25. Rather than address the merits of Norse's submissions regarding the manner in which the NYSDEC uniformly implemented the OGSML's supersedure language for thirty years, the Town attacks Mr. Sovas' credibility. *See* Town Brief, at 47 n.25. The Town states that "[b]efore Mr. Sovas became an industry consultant, he worked for DEC, and he strenuously protested against the idea that DEC was a land use agency." *Id.* As the Town is well aware, however, all of the comments it quotes were made by Mr. Sovas in

the context of the MLRL, *not* the OGSML, or, for that matter, the hazardous waste siting and remediation programs (ECL article 27), the pesticide application program (ECL article 33), the potable water program (ECL article 15), or any of the other many programs that the NYSDEC administers under statutes unrelated to the MLRL. *See id.* Comments made in the context of one NYSDEC regulatory program cannot be deemed to apply across-the-board to all other programs that are governed by wholly different statutory language, policies, history, and circumstances of enactment – and that is evidenced by the number of other NYSDEC regulatory programs that *do* preempt local restrictions and land use controls. *See, e.g., Woodbury Hgts. Estates Water Co.,* 111 A.D.3d at 188 (ECL article 15, preempting village regulation prohibiting withdrawal of groundwater for use outside village); *Ames*, 98 A.D.2d at 219-22 (ECL article 33, preempting village prohibition on location of aerial pesticide application); *Town of Moreau*, 178 Misc.2d at 59-60 (ECL article 27, preempting town restriction on the location for deposition of hazardous waste). This again underscores the error in evaluating the scope of supersession under the OGSML by reference to the MLRL. In the end, beyond the fact that the Town's attack on Mr. Sovas is highly inappropriate, it also has no legal merit.

Finally, the Town cannot control the OGSML preemption analysis with its emotional plea that "quiet rural towns enjoying clean air and water" should not be forced "to sacrifice . . . their community character and . . . surrender the quiet enjoyment of their land to a noisy and dirty industry." *See* Town Brief, at 48. Beyond the fact that this type of emotional appeal has no place in a statutory construction analysis, it is also factually infirm for two reasons. Oil and gas drilling is not an "industrial activity" as that term is commonly understood, let alone a noisy, dirty one. Oil and gas drilling is temporally and spacially limited and does not result in the long-term, expansive surface disruption associated with typical industrial operations.

In any event, there will be no sacrifice of community character, quiet enjoyment of land, or enjoyment of clean air and water, given the comprehensive scheme of regulation in the OGSML and its implementing regulations which fully addresses environmental concerns and the extensively-detailed, highly-restrictive regulation of oil and gas drilling proposed in the draft SGEIS.[11] Thus, again, the Town's argument fails.

[11] The OGSML includes a number of provisions intended to protect against environmental damage, pollution, or impact to nearby properties. *See* ECL §§ 23-0305(8)(d) (authorizing DEC to require drilling operations and reclamation in a manner that prevents groundwater or surface water pollution); (8)(h)(requiring reporting for any non-routine incident "that may affect the health, safety, welfare or property of any person,"); (12)(a) (requiring DEC to indemnify municipalities for damages resulting from spills); and (13) (requiring permittee to provide notice to local governments and

C. The Unique Policies Of The OGSML Are Defeated By Drilling Bans

Employing omission, selective reading, inventive reading and distortion, the Town asserts that "all" of the so-called "subsidiary" policies of the OGSML – preventing waste, protecting correlative rights, providing for greater ultimate resource recovery – can be fulfilled even if the Town Prohibition is enforced. *See* Town Brief, at 40-44. Again, the Town is wrong.

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landowners prior to drilling "whose surface rights will be affected by drilling operations").

The revised draft SGEIS contains myriad mitigation measures and requirements for HVHF practices. These include full consideration of potential impacts to municipalities. *See* SGEIS, Executive Summary, Section 7.8, 7.12, 8.1.1.3, 8.1.1.4 (also asserting NYSDEC's belief that local municipalities' laws, including zoning, are superseded by the OGSML).

Further, the revised draft SGEIS contains over 150 pages of proposed mitigation measures relating to all areas of environmental and land use concern, including water resource protection (Section 7.1), floodplains (Section 7.2), freshwater wetlands (Section 7.3), ecosystems and wildlife (Section 7.4), air quality (Section 7.5), greenhouse gas emissions (Section 7.6), NORM impacts (Section 7.7), socioeconomic impacts (Section 7.8), visual impacts, including requiring mitigation for temporary well pad construction, as well as development, production and reclamation of a well site (Section 7.9), noise impacts (Section 7.10), transportation impacts (Section 7.11), community character (7.12), and emergency response plans (7.13).

Last, but not least, the SGEIS contains numerous location-based directives imposing prohibitions and setbacks on drilling, similar to zoning, that will govern the "where" of natural gas drilling and stimulation in a level of detail that exceeds most local zoning ordinances: SGEIS Executive Summary, and Sections 1.8; 3.2.3.3; 3.2.4; 7.1.3.1(b); 7.1.3.5; 7.1.5; 7.1.11.1; 7.2; 7.3; 7.10.2; 7.10.4; 9.2.3.1; 9.2.3.2; 9.2.3.3.

To begin, with the exception of a passing reference to *Frew Run*, the Town is silent on the policy of providing for greater ultimate resource recovery. *See generally,* Town Brief, at 40-44. The reason for the Town's silence is apparent: bans like the Town Prohibition preclude any and all resource recovery. Thus, drilling bans – which result in zero recovery – present a head-on conflict with this policy directive.

As for preventing waste, the Town advances a selective reading which fails to acknowledge the crucial part of the definition that expressly pertains to the "*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. . .*" ECL § 23-0101(20)(c) (emphasis added). Perplexingly, the Town does not even acknowledge this part of subdivision (c) of the definition, instead quoting only the latter segment of subdivision (c) as well as subdivision (b). *See* Town Brief, at 40-41 (defining waste to mean "avoiding 'inefficient, excessive or improper use of, or the unnecessary dissipation of reservoir energy' as well as imprudent or improper operations that cause 'unnecessary or excessive surface loss or destruction' of the resource").

Whether or not the Town acknowledges it, however, the fact remains that the OGSML's definition of waste is explicit, defining waste in terms of

proper well location and spacing (i.e., to provide for greater ultimate recovery and the protection of correlative rights). *See* ECL §§ 23-0101(20)(c); 23-0301; R. at 524-25, ¶¶ 8-13; Norse Brief, at 5-6. Like the Appellate Division, the Town does not address, let alone, resolve this point – and the reason for this omission is the reality that waste cannot be prevented in the face of broad-based drilling bans like the Town Prohibition.

As for correlative rights, the Town again advances an impermissibly selective reading. *See* Town Brief, at 42-43 (citing Oklahoma precedent and suggesting that the concept of correlative rights is limited solely to the rights one owner in a common source of supply has against other owners in that source of supply). The Town's reading, however, misguidedly ignores that one of the two components of "correlative rights" is the mineral owner's right or opportunity to extract the oil or gas beneath his or her land (or be compensated in kind). *See* 8 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law* 214 (Lexis Nexis Matthew Bender 2012) (defining correlative rights, stating "[t]here appear to be two aspects of 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"); *see also* Norse Brief, at 8-10. The Town Prohibition obliterates mineral owners' correlative right by denying them the right or ability to recover the resource. In short, it is nonsensical for the Town to say that mineral owners' correlative rights are protected by forcing the resource to remain in the ground and precluding the owners' ability to extract, thus rendering the underlying resource wholly valueless. And, because the Town Prohibition obliterates mineral owners' rights *in toto*, correlative or otherwise, it directly conflicts with the OGSML's policies. *See* ECL § 23-0301.

Seemingly recognizing the pervasive weaknesses of its interpretative argument, the Town then resorts to maintaining that the policies of waste and correlative rights do not apply to low-permeability formations (like Devonian shales), but are apt only to "conventional" formations. Town Brief, at 41-43. Of course, there is nothing in the OGSML substantiating this view. *See* ECL § 23-0301 (providing no exceptions or limitations in declaration of policy relative to formation type). Indeed, the substantive terms of the OGSML – among them the explicit spacing provisions for shale formations and the remaining directives in the statute that the NYSDEC process permit applications expeditiously (including relative to Devonian shales) with the overarching aim of fulfilling statutory objectives – belies the

Town's position. *See* ECL §§ 23-0501(1), (3), 23-0503, 23-0701, 23-0901. This conclusion is all the more underscored by the espoused policy of Energy Law § 3-101(5) which is "to foster, encourage and promote the prudent development [. . .] of *all* indigenous state energy resources including . . . *natural gas from Devonian shale formations* (emphasis added)." *See* Point III.D, *infra*; Norse Brief, at 13-14. In addition, it cannot escape notice that the Town Prohibition bans *all* drilling, not only unconventional drilling technologies or the drilling of so-called "unconventional" low-permeability formations. Thus, this argument has no merit.

Finally, the Town's position is not at all supported by the policy of ECL § 23-0301 which entrusts to the NYSDEC protection of the general public; in fact, this policy weighs in favor of preemption. As reflected in both the comprehensively detailed regulation of all oil and gas activities in the OGSML (and its implementing regulations), as well as the statute's legislative history, protection of the general public is accomplished through Statewide regulation under the OGSML, and not by individual local restrictions such as drilling bans. Norse Brief, at 14-15 & Points II.C & III.D; *Envirogas,* 112 Misc.2d at 433-35 (stating that the OGSML and its implementing regulations "are designed to protect the public. . ."; also finding that municipal concerns, while legitimate, were accommodated by

the OGSML's substantive provisions). Moreover, this Court has found that comprehensively detailed Statewide regulation seeking to protect the general public weighs in favor of finding local regulation to be preempted. *See, e.g.*, *Robin*, 30 N.Y.2d at 350 (finding local regulation of location of abortions to be preempted by State law; stating that the declared policy in the Public Health Law providing for the protection and promotion of the health of the inhabitants of the State evidenced the intent to prohibit additional regulation by local authorities; holding local regulation preempted).

In the end, as cogently explained by the Colorado Supreme Court in interpreting a statutory regime very similar to that in New York, a total ban on drilling cannot be squared with the policies of preventing waste, protecting correlative rights; drilling bans also directly conflict with the policy of providing for greater ultimate resource recovery. Norse Brief, Point IV. A "total ban on drilling . . . could result in uneven and potentially wasteful production . . . [or] conflict with the [state agency's] express authority to divide a pool . . . into drilling units and to limit the production of the pool so as to prevent waste and protect the correlative rights of owners. .

." *Voss*, 830 P.2d at 1067.[12] Accordingly, the Town Prohibition is conflict preempted by the OGSML, and the Appellate Decision must be reversed.

D. The Policies Of The Energy Law Are Apt Here And Are Defeated By Drilling Bans

At the outset, the Town's procedural challenge to Norse's discussion and reliance on the Energy Law in the implied preemption analysis must be rejected. *See* Town Brief, at 44. The import of the Energy Law was pervasively briefed before the Appellate Division. The Town did not object and, therefore, waived that objection. Even had the Town objected, however, its argument would have failed nonetheless on multiple grounds. First, the Energy Law is part of the legislative history of the OGSML and thus is properly considered here. Even were that not the case, this Court may take judicial notice of statutes, their legislative history and any legislative facts, whether or not they are in the record or were relied upon below. *See Green*, 96 N.Y.2d at 408 n.2; *Affronti,* 95 N.Y.2d at 720; *see also* Norse Brief, at 15 n.4. Accordingly, the Energy Law is a proper consideration in the implied preemption analysis.

[12] Moreover, contrary to the Town's claim (*see* Town Brief, at 50 n. 27), neither *Voss* nor *Northeast Natural Energy, LLC v. City of Morgantown, W.V.*, No. 11-C-411 (Cir. Ct. Monongalia Cnty. Aug. 12, 2011) (CHC R. at 897-906) is inconsistent with *Gernatt Asphalt. Gernatt Asphalt* is irrelevant to this analysis, first, because it was decided under the MLRL, not the OGSML, and, second, because it was decided *after* the Legislature had amended the MLRL to include very express language reaffirming full local zoning control. There is, thus, no inconsistency between these two cases and New York law.

As for the substantive policies of the Energy Law, the Town is wrong in claiming that these policies are consistent with municipal bans on oil and gas drilling. *See* Town Brief, at 44-46. Pointing to the conservation-based policies in the Energy Law, the Town asserts that local drilling bans are consistent with these policies because, allegedly, total prohibitions on any and all oil and gas activities "husband[ ] [oil and gas reserves] for future generations, which are always free to lift local bans on oil and gas development." Town Brief, at 45-46.

Contrary to the Town's position, however, the laudable goal of "conservation" and wise use of indigenous resources does not justify a broad-based ban on all development, premised upon a politically-expedient response to community opposition resulting from a not-in-my-backyard mentality. True, it is State energy policy to wisely develop and use New York's resources. It remains New York's espoused policy, however, to promote the development of its indigenous oil and gas resources; and it does not withstand scrutiny to argue, as does the Town, that broad-based municipal bans – bereft of any consideration of energy need, site-specific environmental protection issues, or, in fact, anything to do with science at all – accord with sound public policy. It is also no answer to say that local

municipal governments may decide at some point in the future not to hold the energy resources of this State hostage.

And, the Town's self-serving view further turns the concept of protection of correlative rights on its head by denying mineral owners the right to develop their oil and gas resources when they choose to do so and when Statewide regulation says they may do so, as opposed to when (if ever) a Town Board allows them to do so.

Accordingly, the Town's argument fails. The Town Prohibition is conflict preempted under the Energy Law as well as the OGSML, and the Appellate Decision must be reversed.

POINT IV
CONTRARY TO THE TOWN'S ARGUMENT, THE LAW OF SISTER JURISDICTIONS SUPPORTS A PREEMPTION FINDING HERE

Although the law of sister jurisdictions is not binding on this Court, it is instructive. As already noted, the courts of both Colorado and West Virginia have invalidated municipality-wide bans on natural gas drilling. Norse Brief, at 63; *see also* Point III.C, *supra*. Contrary to the Town's claim (*see* Town Brief, at 50 n.27), these cases are not inconsistent with New York precedent. *Frew Run* was decided under the MLRL, not the OGSML, and did not involve a ban. *Gernatt Asphalt* was also decided under the MLRL,

and by that time, the 1991 amendments to ECL § 23-2703 had been enacted, expressly prohibiting any restriction on municipal zoning authority. Thus, there is no inconsistency.

Moreover, the Town's citation to authority from California, Illinois and Texas in no respect supports the interpretation of the OGSML that it advances here. *See* Town Brief, at 49-50. For example, the Town cites *Unger v. State,* 629 S.W.2d 811 (Tex. App. 1982), for the proposition that local land use controls can harmoniously co-exist with state oil and gas regulation. *See* Town Brief, at 49, 50. However, *Unger* involves only a local permit requirement, and not an outright ban on drilling. *See* 629 S.W.2d at 812. As evidenced by the different results in the companion cases *Bowen/Edwards Assocs., Inc.* and *Voss,* this is a vital distinction in the conflict preemption analysis. *Compare Bd. of County Commissioners, LaPlata County v. Bowen/Edwards Assocs., Inc.,* 830 P.2d 1045 (Colo. 1992), *with Voss,* 830 P.2d 1061.

To the extent some of the cited cases assert that local drilling bans are allowable, the critical distinguishing factor in the preemption analysis is that local zoning control is expressly permitted under the respective State statutes, and, in some instances, the State statute actually disavows that it preempts local zoning. *See, e.g., Tri-Power Res., Inc. v. City of Carlyle,* 359

Ill. Dec. 781, 784, 786 (Ill. App. Ct. 2012) (involving state statute requiring that the applicant secure "the official consent of the municipal authorities" and directing that "no [state] permit shall be issued unless consent is secured" [225 Ill. Comp. Stat. Ann. § 725/13]; distinguishing cases where enabling statute lacked express provision delegating such authority to local governments); Cal. Pub. Res. Code § 3690 ("[t]his chapter [oil and gas act] shall not be deemed a preemption by the state of any existing right of cities and counties to enact and enforce laws . . . regulating the conduct and location of oil production activities including, but not limited to, zoning"). Thus, in California and Illinois, the respective Legislatures made the policy determination to allow local zoning authority to remain in force and effect. There is no comparable language in the OGSML.

Too, it bears mention that even in States that allow local zoning of oil and gas activities, courts have cautioned against depriving the mineral owner of its valuable property interest. *See, e.g.*, *Vinson v. Medley*, 737 P.2d 932, 939 (Okla. 1987) (holding exploration company entitled to zoning variance to allow drilling in corporate limits; reasoning that, otherwise, the company "would suffer a substantial deprivation of its right to enjoy a valuable property interest in extracting the underlying hydrocarbons"). Thus, even where local zoning of oil and gas activities is permitted, the courts of sister

jurisdictions have recognized the important property right at issue and have imposed restraints on the enforcement of zoning bans.

This concern is reflected in New York precedent as well. In examining the permissibility of local zoning, in the absence of an express legislative articulation reserving full zoning authority (such as in the MLRL), this Court has recognized that broad-based bans may indeed contravene State interests. *See, e.g., Incorporated Vil. of Nyack .v Daytop Vil., Inc.*, 78 N.Y.2d 500, 508 (1991) (holding local law regarding placement of substance abuse facilities not preempted; noting that local law included a process for variance and certificate of occupancy; in finding no conflict, expressly noting "[t]here [was] no showing [ ] that the Village . . . tailored its zoning laws to block the placement of substance facilities within its borders"). Accordingly, this Court has recognized a distinction between legitimate zoning controls and sweeping, iron-clad bans that result in impairing important State interests.

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

CONCLUSION

For all the foregoing reasons, Norse respectfully maintains that the Appellate Decision must be reversed and the Town Prohibition held to be

preempted, both expressly and impliedly. The scope of supersession under the OGSML must be determined by viewing *that* statute in its entirety, together with its underlying policies, legislative history and circumstances of enactment. Given the myriad of legally significant distinctions between the OGSML and the MLRL in every material respect, it was pure error for the lower courts to find *Frew Run* and its progeny controlling in this analysis.

When the OGSML is evaluated on its own merits (as it must be), the conclusion is inescapable that the supersession language in ECL § 23-0303(2) means exactly what it says – that "all local laws or ordinances" that regulate what the OGSML regulates are superseded. Because the OGSML comprehensively regulates every significant aspect of well location, localities may not regulate that same subject matter, meaning that the Town Prohibition is expressly preempted.

Furthermore, even absent the OGSML's express supersession language, the Town Prohibition fails nonetheless because it directly conflicts with the explicit location-based requirements of the OGSML, as well as its policy objectives. There could not be a starker example of a direct head-on conflict than that presented by an absolute ban on all oil and gas activities (i.e., no drilling, zero production, the ultimate in waste, and the obliteration of owners' correlative rights town-wide), versus the OGSML's express

directives dictating where drilling should occur so as to achieve greater ultimate resource recovery, prevent waste, and protect the correlative rights of all owners. Accordingly, the Town Prohibition is also conflict preempted, and the Appellate Decision must be reversed on this ground as well.

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Albany, New York

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