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DRILLING

HYDRAULIC FRACTURING

While much of the public's focus to date has been on the federal government's role in promoting and regulating natural gas extraction, the environmental, social and political impacts of hydraulic fracturing occur most acutely in local communities, where there is a growing movement to prevent or delay the encroachment of related operations. Relying on their home rule powers, municipalities in New York and Pennsylvania have pursued a number of strategies, ranging from outright bans to moratoria on hydraulic fracturing. Municipal activism also has achieved traction in the courts. As local bans are upheld, those who support restrictive local ordinances are poised to present a formidable force in determining what the hydraulic fracturing map will look like in the coming years.

Home Rule: The Grass-Roots Story That Will Shape the Hydraulic Fracturing Map

By Jeffrey A. Smith, Danielle Sugarman and Preetha Chakrabarti

I. Introduction

The rapid growth of hydraulic fracturing (referred to throughout this article as either ''hydrofracking'' or ''fracking'') over the past decade has created legal tensions between state and local governments and between proponents of natural gas development and some community residents. While the hydrofracking boom has brought the prospect of energy independence and plentiful alternatives to carbon-intensive coal, it also has required analysis of health and environmental effects, including methane leakage, earthquakes, aquifer contamination and the stresses of process water storage—each of which could have cumulative statewide or national consequences. These large-scale impacts have seized the headlines and dominated the debate over whether and how to exploit shale hydrocarbon resources. To date, however, the federal government has assumed only a limited regulatory role.

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Many states have charted their own path forward and most of the day-to-day consequences of hydrofracking are actually intensely local.[1]

The strong local sentiments on hydrofracking are unsurprising. The most immediate impacts of the natural gas extraction process include construction, road congestion and accidents, dust, noise pollution, wear on roads and other infrastructure and community disruption.[2] In addition, issues of seemingly national concern, such as aquifer contamination and increased seismic activity, also are dependent in large measure on regional geology and affect community character. They too are charged with local politics. More surprising is the traction and leverage that motivated municipalities and anyone asserting the interests of individual landowners have achieved to resist the consequences of broader regulatory schemes.

Notably, municipalities, facing the prospect of a local ''gas rush,''[3] have not been content to leave the decision of whether, and how, fracking is pursued to state governments. Instead, many municipalities have turned to local legislatures to foreclose or forestall the expansion of hydrofracking. These efforts have taken varying forms. Relying primarily on their home rule and zoning powers, many municipalities have pursued permanent bans or temporary moratoria on fracking.[4] Others have used zoning provisions to impose more limited restrictions,[5] and conservation easements to put small parcels of land off-limits to developers.[6] Several recent cases in the Northeast suggest that familiar principles of municipal self-determination have been resurrected and reinvigorated in the hydrofracking arena, arguably making them a more dynamic, and potentially formative, force than the growing number of state regulatory regimes or the threat of overarching federal regulation.

II. Background

The Supremacy Clause of the U.S. Constitution forms the basis of the federal government's right to preempt state and local law. Similarly, states have the power to modify or reverse any local decision, absent state constitutional or legislative provisions to the contrary.[7] Because of this sequence of authority, a number of communities in the Northeast are relying on home rule provisions in state constitutions to limit the development or expansion of hydrofracking operations, or to regulate its location. In fact, local efforts to weigh in on fracking have proliferated to such an extent that several states, including Pennsylvania and Virginia, have attempted to pass laws that preempt these local initiatives.

Not surprisingly, as municipalities have expanded their regulatory reach to address hydrofracking, they have met with opposition to their authority to do so. In many instances, challenges to municipal action have been brought by natural gas exploration and production (E&P) companies.[8] An outright ban on fracking, or a zoning ordinance that excludes hydrofracking from an area where a company owns leases, may render those leases worthless and is therefore a prime target for opposition.[9] Even zoning measures that regulate conduct but fall short of outright bans have engendered opposition, as developers fear that inconsistent regulations will limit their ability to do business within a state by raising their costs of deploying equipment and making it prohibitively complicated to manage their sites efficiently.[10]

Landowners who want to lease their land to gas companies or to receive royalties under existing leases also have reasons to contest any local action that limits hydrofracking.[11] Challenges to such action will turn upon whether the municipality has the authority to adopt the ordinance at issue, or whether that authority has been, or can be, curtailed by the state or the federal government.[12]

Recent decisions by New York and Pennsylvania courts, including *In re: Norse Energy Corp. USA*[13] and *Robinson Township v. Commonwealth of Penn.*,[14] have affirmed local authority to limit hydrofracking under home rule provisions. If the rationale for such decisions are reiterated or affirmed at the highest levels of appellate review, municipalities will exercise significant, and perhaps ultimately controlling, power in shaping the face of hydrofracking.

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[1] The phases of natural gas extraction include site development and drilling preparation, drilling activities, fracturing and completion, well operation and production, and management of fracking fluids, flowback, produced water and storage. *See* Resources for the Future, Center for Energy, Economics and Policy, *Risk Matrix for Shale Gas Development*, *available at* http://www.rff.org/centers/energy_economics_and_policy/Pages/Shale-Matrices.aspx.

[2] *Id.*

[3] *See, e.g.*, Marianne Lavelle, National Geographic, *Special Report: The Great Shale Gas Rush* (Oct. 17, 2010), *available at* http://news.nationalgeographic.com/news//2010/10/101022-energy-marcellus-shale-gas-environment/.

[4] *See, e.g.*, David Giller, *Implied Preemption and Its Effect on Local Hydrofracking Bans in New York*, 21 J.L. & Pol'y 631, 647 (2013) (''Municipalities who oppose hydrofracking have used a variety of legal tactics to ban hydrofracking either in part or entirely. So far, over fifty upstate municipalities have used their zoning power to ban hydrofracking and over one hundred have enacted their own moratoria.'').

[5] Such as setback restrictions and process water storage locations.

[6] *See, e.g.*, Dan Packel, Law 360, *Conservation Easement Bars Pa. Shale Fracking, Judge Says* (Aug. 28, 2013), *available at* http://www.law360.com/environmental/articles/468405?nl_pk=7f9fa8b7-80a1-4c0c-9c52-d56f193e4434&utm_source=newsletter&utm_medium=email&utm_campaign=environmental.

[7] Shaun A. Goho, *Municipalities and Hydraulic Fracturing: Trends in State Preemption*, 64 Planning & Envtl. Law No. 7 (July 2012), at 3.

[8] *In re: Norse Energy Corp. USA*, No. 515227 (N.Y. App. Div. May 2, 2013); *Range Resources v. Salem Township*, 964 A.2d 869 (Pa. 2009).

[9] Goho, *supra* note 7, at 3-4.

[10] *Id. See, e.g.*, Mary Esch, PressConnects, *Driller to NY: Stop the Local Fracking Bans Or We'll Sue* (Aug. 1, 2012), *available at* http://www.pressconnects.com/viewart/20120731/NEWS10/307310030/Driller-NY-Stop-local-fracking-bans-well-sue (''local laws create a patchwork of regulation that thwarts *development*'').

[11] Goho, *supra* note 7, at 4. *See also* Jarit C. Polley, *Uncertainty for the Energy Industry: A Fractured Look at Home Rule*, 34 Energy L.J. 261, 290 (2013) (''If local bans are upheld, mineral rights holders and oil and gas developers will likely be unable to make use of mineral leases, creating negative ramifications not only for them, but also for local communities.'' One response might be a constitutional takings claim.).

[12] Goho, *supra* note 7, at 4.

[13] No. 515227 (N.Y. App. Div. May 2, 2013).

[14] 52 A.3d 463 (Pa. Commw. Ct., July 26, 2012).

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III. Hydraulic Fracturing: Layers of Control

The U.S. currently has seven major shale plays,[15] and the Energy Information Administration (EIA) recently estimated that total technically recoverable shale oil and shale gas resources to be roughly 2,203 trillion cubic feet of natural gas[16]—enough to provide energy for approximately 92 years.[17] In some areas, developers have created overnight boom towns and brought the consequence of establishing, maintaining and servicing drilling operations into close contact with local communities. Nowhere is this more evident than in the populous Northeast, where the Marcellus, the largest of the U.S. shale plays running through West Virginia, Ohio, Pennsylvania and New York's southern tier, has been a prime target for development.

Federal Regulatory Efforts

The federal government could regulate hydrofracking at the national level under the commerce clause of the U.S. Constitution. Congressional carveouts from existing national regulatory schemes[18] and federal reluctance to impinge on areas of traditional state control have effectively curtailed both the scope and the likelihood of a comprehensive federal regulatory framework to date, however.[19] While federal authority over portions of shale gas development is significant, particularly regarding the protection of air, surface water quality and endangered species, and while the federal government plays a direct role in issuing regulations in its capacity as a landowner—many states with shale gas deposits include large areas of federally wned land—the federal schemes that have been put in place still leave room for state and municipal regulation.[20] The examples of federal regulation that touch on hydrofracking highlight the focus on national impacts, such as methane leakage and pollution from process water, but also reveal the large gaps that remain to be filled by state and local governments.

State Regulation

Mining, oil and gas drilling and other extractive industries that do not operate on federal lands[21] or in connection with offshore production historically have been regulated by state governments.[22] This pattern has remained consistent throughout the shale gas boom—state governments remain the primary source of most oil and gas regulation, including for shale gas.[23] States traditionally have regulated the location and spacing of well sites; the methods of drilling, casing (lining), fracking and plugging wells; the disposal of most oil and gas wastes; and site restoration.[24] State common and public law govern the interpretation of lease provisions and disputes between surface and mineral owners and mineral lessees about payments and surface damage.[25] Due in part to the novel challenges posed by the combination of hydraulic fracturing and horizontal drilling, much of which takes place in regions unaccustomed to the demands and nuances of the widespread presence of extractive industries, the level—as well as the detail, sophistication and stringency—of state regulation var-

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[15] These include the Barnett Shale Play (Ft. Worth Basin, Texas), the Eagle Ford Shale Play (Western Gulf Basin, South Texas), the Fayetteville Shale Play (Arkoma Basin, Arkansas), the Haynesville-Bossier Shale Play (Texas-Louisiana Salt Basin), the Marcellus Shale Play (Appalachian Basin) the Woodford Shale Play (Arkoma Basin, Oklahoma) and the Bakken Shale Play (Williston Basin in Montana and North Dakota).

[16] *See* U.S. Energy Information Administration, *Shale Oil and Shale Gas Resources are Globally Abundant* (June 10, 2013), *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=11611.

[17] *See* U.S. Energy Information Administration, *How Much Natural Gas Does the United States Have and How Long Will It Last* (Aug. 29, 2012), *available at* http://www.eia.gov/tools/faqs/faq. cfm?id=58&t=8.

[18] For example, since 2005, hydrofracking has been almost entirely exempted from the Safe Drinking Water Act, except where diesel fuels are used. Robert H. Freilich & Neil M. Popowitz, *Oil and Gas Fracking: State and Federal Regulation Does Not Preempt Needed Local Government Regulation Examining the Santa Fe County Oil and Gas Plan and Ordinance As A Model*, 44 URB. LAW. 533, 540 (2012).

[19] *See* Sorell E. Negro, *Fracking Wars: Federal, State and Local Conflicts Over the Regulation of Natural Gas Activities*, 2 ZONING AND PLANNING LAW RPT 2 (Feb. 2012) (citing Emily C. Powers, *Fracking and Federalism: Support for an Adaptive Approach that Avoids the Tragedy of the Regulatory Commons*, 19 J.L. POL'Y 913, 913-14 & n.4 (2010)); *cf.* (175 DEN A-1, 9/10/13.

[20] *See* Richardson et al., Resources for the Future, *The State of U.S. Shale Gas Regulation* (June 2013) at 6, *available at* http://www.rff.org/RFF/Documents/RFF-Rpt-StateofStateRegs_Report.pdf. The Clean Water Act effluent guidelines program sets national standards for industrial wastewater discharges, but no comprehensive set of national standards exists for the disposal of wastewater discharged specifically from natural gas extraction activities. *See generally* U.S. Environmental Protection Agency, Natural Gas Extraction – Hydraulic Fracturing, *available at* http://www2.epa.gov/hydraulicfracturing. The EPA also is examining the air quality of hydrofracking, but regulations have yet to be issued. The federal regulations that affect hydrofracking activities most explicitly are EPA's New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants issued in April 2012. These standards involve ''green completion technology to capture methane emissions''. *See* Eric Groten et al., Vinson & Elkins LLP, EPA Finalizes New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants for the Upstream and Midstream Oil and Gas Industries, Including Hydraulic Fracturing Operations (April 12, 2012), *available at* http://www.velaw.com/uploadedFiles/VEsite/Resources/WP_2012_04_ 19_EPA_FinalizesNewSourcePerformanceStandards.pdf .

[21] Interestingly, on July 31, 2013, the House Natural Resources Committee approved a bill that would prohibit the Interior Department from imposing federal hydraulic fracturing regulations on any land in a state that already is regulating hydraulic fracturing through rules, guidance or permits. The Protecting States' Rights to Promote American Energy Security Act (H.R. 2728) would amend the Mineral Leasing Act of 1920 by adding a provision that would block the federal government from overriding state laws on fracking. The bill states: ''Interior shall recognize and defer to State regulations, permitting, and guidance, for all activities related to hydraulic fracturing, or any component of that process, relating to oil, gas, or geothermal production activities on Federal land regardless of whether those rules are duplicative, more or less restrictive, shall have different requirements, or do not meet the Federal guidelines.'' *See* 148 DEN A-13, 8/1/13. The legislation, is expected to be brought to the House floor in early Fall 2013. *See* 175 DEN A-1, 9/10/13.

[22] *See* Richardson, et al., *supra* note 20, at 6.

[23] *Id.*

[24] *Id.*

[25] *Id.*

ies widely across the U.S.[26] Over the last 10 years, however, states in which there are substantial shale gas plays, including New York and Pennsylvania, have greatly increased the pace and scope of their regulation.

The Path to Municipal Regulation

Notwithstanding increased awareness, knowledge and willingness to act, the rapid expansion of shale gas development, which coincides with a time of increasingly constrained budgets, has challenged many state regulators to keep pace.[27] In addition, state regulation leaves gaps in areas that are not the traditional domain of state government, including how the use of land for hydrofracking operations affects local facilities and services (such as roads, schools, police, fire, emergency rescue, parks, trails and drainage). Similarly, state regulations do not address issues such as increased noise, blasting or fugitive dust; whether natural gas drilling is compatible with the surrounding lands uses; and the effect of the drilling activity on surrounding property values.[28] These issues traditionally have been addressed by municipalities, where the level of knowledge and focus is appropriate to deal with them, and where the importance of the answers is often at the bedrock of local politics.

While some communities have welcomed the revenue hydrofracking has generated, in others it has engendered opposition on a variety of grounds. In the Bakken Shale formation, prairie farm towns have ''been swallowed in a highway sprawl of workers' camps, truck yards, pipe yards, fuel stations, machine shops, dust, and gravel,''[29] causing some to take measures to defend a vanishing way of life. In the Northeast, where the rapid expansion of natural gas drilling is introducing industrial activity into rural, agricultural or suburban communities, fears of a change in community character accompany the fear of environmental harms, such as methane contamination of local well sites, and the consequences of high volume process water storage. When these concerns have added to the perception that state and federal regimes are inadequate, communities have taken action to protect their neighborhoods from the encroachment of hydrofracking operations.[30]

IV. Municipal Home Rule and Preemption

A municipality is a political subdivision of the state, and therefore, is legally capable of doing only that which the parent body (state) has affirmatively authorized it to do.[31] When there is a conflict over municipal action, the first question must be whether the municipality had the authority to act. If it did, the next inquiry is whether that power has been limited—''preempted'' or ''superseded''—either by the terms of the grant of power, or by the authority of other governmental entities.[32]

In most states, local governments are either ''home rule'' or general law entities. Home rule may be created by the state constitution or by state legislation.[33] It typically empowers local governments to act without state authorization in matters of dual state and local concern, as long as there is no conflict with general legislation or the state has not completely occupied the field. This protects local government decisions from preemption

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[26] *Id.* The rapid expansion in the scope, intensity and geographic range of shale gas development in recent years dictates that state experience with development activity varies greatly. Some states have many years of experience with conventional oil and gas development; others do not. Affected states are participating in information-sharing forums and dialogues, however, to establish a high common denominator of knowledge and practices that will form the basis of future regulation.

[27] *Id.* Many states regulate shale gas development primarily or exclusively with regulations written before unconventional drilling became common.

[28] Freilich & Popowitz, *supra* note 18, at 543.

[29] Richard Manning, *Bakken Business*, *The Price of North Dakota's Fracking Boom*, HARPERS (March 2013), *available at* http://harpers.org/archive/2013/03/bakken-business/.

[30] Goho, *supra* note 7, at 2-3.

[31] John Martinez, *The Place of Local Government in the Scheme of American Law*, 1 Local Government Law § 2:3 (Updated May 2013). *See also Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 220, 964 A.2d 855, 862-63 (2009). ''Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . . The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation.'' 2 Local Government Law § 13:1 (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907)).

[32] 2 Local Government Law § 13:1 (''By comparison, state governments – particularly state legislatures – have inherent sovereign power to act under the 'plenary power principal' ''). Polley, *supra* note 11, at 267-69. (In *City of Clinton v. Cedar Rapids & M.R.R. Co*., 24 Iowa 455 (1868), *overruled by Berent v. City of Iowa City*, 738 N.W.2d 193 (Iowa 2007), Judge John Dillon created what became known as ''Dillon's Rule'' by recognizing state control over municipal government, except as limited by the state or federal constitution. According to Dillon's Rule, a municipality may only act in accordance with the powers granted to it by the state. The U.S. Supreme Court adopted Dillon's Rule in *Hunter v. City of Pittsburgh*).

[33] *See generally* 3 Sutherland Statutory Construction § 64:2 (7th ed. Nov. 2012). *See also* Polley, *supra* note 11, at 268. (''Dillon's Rule ultimately created undue state interference and left local governments without power in municipal affairs. As a result, many municipalities sought to reclaim their autonomy from the states. Municipalities did so by lobbying for the enactment of home rule provisions, which would allow them greater self-governance''). Richard Briffault, *Our Localism: Part I-the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8-9 (1990) (State home rule provisions generally follow two models. ''The original form of home rule amendment treated the home rule municipality as an *imperium in imperio*, a state within a state, possessed of the full police power with respect to municipal affairs and also enjoying a correlative degree of immunity from state legislative interference. When courts encountered difficulties distinguishing 'municipal affairs' from matters of state concern, a second model was developed that sought simply to broaden local lawmaking authority without attempting to erect a wall against state laws on local matters.'' This form of home rule grants affected local governments all the powers the legislature could grant, subject to the legislature's authority to restrict or deny localities a particular power or function. ''In a sense, it reverses Dillon's Rule—all powers are granted until retracted. Most of the states that have adopted home rule since World War II use some version of this more modest 'legislative' model.'').

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by state action in matters of purely local concern.[34] Today, the number of states with home rule provisions has been determined to be as high as 48,[35] and the majority of states in which there has been significant hydrofracking activity have home rule provisions embedded within their constitutions.[36]

Preemption can take several forms. *Express preemption* arises where a state law explicitly prevents local ordinances from regulating or legislating in certain arenas.[37] *Implied preemption* occurs where the legislature has evidenced an intent to supersede a local municipality in a particular area and can take two forms: *conflict preemption*—when the local law is ''found to conflict with or frustrate the purpose'' of the state law; and *field preemption*—when the state has addressed a particular issue in such broad terms that it is said to ''occupy the field,'' leaving no room for local discretion.[38] When a court is called upon to resolve a dispute, it must establish the state legislature's objective. If it determines that the state legislature intended to supersede municipal authority to regulate in a particular area, then it will find that local governments are constrained from issuing their own regulations.[39]

V. Legal Battlegrounds: New York and Pennsylvania

Issues surrounding home rule and preemption form the basis of the challenges that are taking place at the local level between natural gas developers and municipalities in the Northeast. New York state has a temporary moratorium in place while state environmental departments and Gov. Andrew M. Cuomo (D) weigh the costs and benefits of shale gas extraction.[40] This has not deterred local governments from crafting regulations and issuing bans and moratoria to protect local communities in the event fracking is permitted to proceed. Likewise, natural gas developers, staking their claim in advance of what could be a partial or complete lifting of the moratorium, have challenged local efforts

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[34] Home rule entities look to the constitution and general state statutes for restrictions on the local government's ability to exercise its police power. General law entities, on the other hand, must look to either the constitution or state statutes for a grant of authority giving them the power to regulate. There must be an enabling act passed by the state legislature that affords the local government authority to adopt ordinances covering a specific area or field. *See* Freilich & Popowitz, *supra* note 18, at 545-46.

[35] Polley, *supra* note 11, at 268.

[36] *See e.g.* Colo. Const. art. XX, § 6. ''Home rule for cities and towns. The people of each city or town of this state, having a population of two thousand inhabitants . . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town . . . . Such charter and the ordinances made pursuant thereto in such matters *shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith* (*emphasis added*).'';

La. Const. art. VI, § 5, ''Subject to and not inconsistent with this constitution, any local governmental subdivision may draft, adopt, or amend a home rule charter in accordance with this Section. The governing authority of a local governmental subdivision may appoint a commission to prepare and propose a charter or an alternate charter, or it may call an election to elect such a commission.'';

Mont. Const. art. XI, § 6, ''A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter.'';

N.D. Const. art. VII, § 6, ''The legislative assembly shall provide by law for the establishment and exercise of home rule in counties and cities. No home rule charter shall become operative in any county or city until submitted to the electors thereof and approved by a majority of those voting thereon. In granting home rule powers to cities, the legislative assembly shall not be restricted by city debt limitations contained in this constitution.'';

N.Y. Const. art. IX, § 2, ''In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government. . .[list omitted].'';

Okla. Const. art. XVIII, § 2, ''Every municipal corporation now existing within this State shall continue with all of its present rights and powers until otherwise provided by law, and shall always have the additional rights and powers conferred by the Constitution.'';

Pa. Const. art. IX, § 2, ''Municipalities shall have the right and power to frame and adopt home rule charters . . . . A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.'';

Tex. Const. art. XI, § 11, ''Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters . . . . The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.'';

W.V. Const. Art. VI, Section 6-39a, HOME RULE FOR MUNICIPALITIES, ''Under [the] general laws, the electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs: Provided, that any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this constitution or the general laws of the state then in effect, or thereafter from time to time enacted.''

[37] David Giller, *Implied Preemption and Its Effect on Local Hydrofracking Bans in New York*, 21 J.L. & POL'Y 631, 657 (2013) (''Express preemption is found in the statutory text itself and clearly illustrates that the state and not a local town is responsible for handling a specific issue'').

[38] *Id.* (''A local law is not preempted simply because it prohibits an activity that is allowed under state law. If this were the case, the power of local governments would be 'illusory.' Furthermore, implied preemption does not require an express statement by the legislature. Instead the court tries to discern legislative intent. Courts judge legislative intent by investigating the state's public policy, the language of the statute, and whether state law has created a 'comprehensive and detailed regulatory scheme.' '').

[39] Goho, *supra* note 7, at 4.

[40] Almost all stakeholders agree that effective regulation is essential to sustainable development of shale gas resources and the preservation of companies' social license to operate. *See* Richardson et al., *supra* note 20, at 4.

to keep hydrofracking out. In the meantime, the Commonwealth of Pennsylvania, which has a long history of oil and gas activity and currently hosts some of the most extensive natural gas extraction activities in America, has acted in its official capacity to challenge local efforts to limit fracking, asserting the supremacy of its own regulatory actions. Each approach has been advanced through litigation.

While few cases have resulted in published judicial opinions, the cases that uphold municipal authority and those that have come out in favor of state dominance both envision a clear role for local activism. Barring divergent outcomes on appellate review, to date, the victories of municipal authority over challenges *both* from the state—and its claims of preemptive regulation—*and* from developers and landowners—and their claims of harsh restrictions, suggest that whatever the map of state or federal regulation comes to look like, it will be liberally dotted with pockets of local prohibition.

A. Municipal Dominance

1. Norse Energy Corp. v. Town of Dryden

In *Norse Energy Corp. USA v. Town of Dryden*,[41] amidst growing local concern over hydrofracking, the Town of Dryden amended its local zoning ordinance to ban all activities related to the exploration for, and the production or storage of, natural gas and petroleum within the town's borders. Subsequently, Anschutz Exploration Corporation,[42] a driller and developer of oil and natural gas wells, commenced an action to invalidate the zoning amendment on the grounds that it was preempted by the Oil, Gas and Solution Mining Law (OGSML).[43]

The New York Supreme Court, Appellate Division (Third Department) in *Norse* noted specifically that the New York Constitution grants ''every local government [the] power to adopt and amend local laws not inconsistent with the provisions of [the] constitution or any general law relating to its property, affairs or government.''[44] The court emphasized that ''[o]ne of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances,''[45] but that the doctrine of preemption ''represents a fundamental limitation on home rule powers.'' Where the Legislature expressly states its intent to preempt, the effect of such clause requires construction of the statutory provision.[46] The OGSML provides:

> [t]he provisions of Environmental Conservation Law (ECL) article 23 shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the Real Property Tax Law.[47]

In assessing whether the OGSML preempted local action in this case, the *Norse* court afforded the statute its plain meaning. The term *regulation* was defined as ''an authoritative rule dealing with details or procedure.''[48] The court found that, using this definition, the zoning ordinance at issue did not seek to regulate the details or procedure of the oil, gas and solution mining industries, but rather simply established permissible and prohibited uses of land within the Town for the purpose of regulating land generally.[49]

The court reasoned that while the town's exercise of its right to regulate land use through zoning will inevitably have an incidental effect upon the oil, gas and solution mining industries, zoning ordinances are not the type of regulatory provision that the Legislature intended to be preempted by the OGSML. The court reasoned that by construing ECL Article 23 as preempting only local legislation regulating the actual operation, process and details of the oil, gas and solution mining industries, ''the statutes may be harmonized, thus avoiding any abridgment of [a] town's powers to regulate land use through zoning powers expressly delegated in the Statute of Local Governments . . . and [the] Town Law.''[50]

Next, the court analyzed the OGSML under the doctrine of conflict preemption, which would prohibit a local government from exercising ''its police power by adopting a local law inconsistent with constitutional or general law.''[51] Citing to specific provisions of the OGSML that address the spacing of wells, the plaintiff argued that the OGSML directs ''where'' drilling is to occur to ensure that wells are drilled and spaced in a manner that maximizes resource recovery and minimizes waste. The developer argued that this directive cannot be met if municipalities are permitted to enact zoning ordinances banning drilling.

The court rejected this assertion by refusing to acknowledge or endorse the conflict that plaintiff posed. Instead, the court found that the applicable provisions of the OGSML[52] relate to the details and procedures of well-spacing by drilling operators and do not address traditional land use considerations, such as proximity to nonindustrial districts, compatibility with neighboring land uses and noise and air pollution. The court found that the well-spacing provisions of the OGSML concern technical, operational aspects of drilling that are separate and distinct from a municipality's zoning authority. Rather than being in conflict, the zoning law will dictate the districts in which drilling may occur, while the OGSML instructs operators as to the proper

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[41] 964 N.Y.S.2d 714 (Sup. Ct., 3d. Dep't, App. Div. 2013), *leave to appeal granted*, No. 2013-604, slip op. 83668 (N.Y. Aug. 29, 2013).

[42] During the appeal, Anschutz Exploration Corporation assigned its interest in certain oil and gas leases to Norse Energy Corporation.

[43] *Norse*, 964 N.Y.S.2d at 718-19.

[44] *Id. See also* N.Y. Const., art. IX, § 2[c]; *Anonymous v. City of Rochester,* 13 N.Y.3d 35, 51, 886 N.Y.S.2d 648, 915 N.E.2d 593 [2009].

[45] *See* Municipal Home Rule Law § 10[1][ii][a][11]; Statute of Local Government § 10[6], [7].

[46] The primary consideration in matters of statutory interpretation ''is to 'ascertain and give effect to the intention of the Legislature.' '' *See also Matter of Frew Run Gravel Prods. v. Town of Carroll,* 71 N.Y.2d 126, 131, 524 N.Y.S.2d 25, 518 N.E.2d 920 [1987].

[47] *Norse*, 964 N.Y.S.2d at 719; *see also* (ECL 23–0303[2]).

[48] *Norse*, 964 N.Y.S.2d at 719.

[49] *Id. See also Frew Run,* 71 N.Y.2d at 131, (stating that ''[t]he purpose of a municipal zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally'').

[50] *Norse*, 964 N.Y.S.2d at 721 (quoting *Frew Run*, 71 N.Y.2d at 134).

[51] *Norse*, 964 N.Y.S.2d at 723-24.

[52] *See, e.g.*, ECL 23–0101[20][c]; 23–0503[2].

  DEN ISSN 1060-2976

spacing of the units within those areas to prevent waste.[53]

The court was not convinced that municipal zoning ordinances that effect a ban on drilling conflict with the policies of the OGSML, at least on the theory posited by the plaintiff developer. The court found that there was nothing in the statute or its legislative history suggesting that it is the policy of the state to ''maximize recovery'' of oil and gas resources at the expense of municipal land use decision making. While the statute seeks to avoid waste—that is, ''the inefficient, excessive or improper use of, or the unnecessary dissipation of reservoir energy''[54]—the court made clear that this does not equate to an intention to require oil and gas drilling operations to occur in each and every location where such resource is present, regardless of the land uses existing in that locale.[55] In fact, the court emphasized that the OGSML explicitly seeks to protect the rights of ''all persons including landowners and the general public,'' and not just the owners of oil and gas properties, such as the natural gas developers (former Conservation Law § 70; L. 1963, ch. 959).[56] The court found that the town of Dryden's decision to amend its zoning ordinance to prohibit hydrofracking activity was permissible.

2. Cooperstown Holstein Corp. v. Town of Middlefield

In a similar case,[57] an oil and gas lessor in New York filed suit against the town of Middlefield, seeking a declaration that a zoning ordinance banning oil and gas drilling within the geographical borders of township was preempted by the New York state ECL.

In 2011, the town of Middlefield, Otsego County, New York, enacted a zoning law which declared that ''[h]eavy industry and all oil, gas or solution mining and drilling'' to be prohibited uses'' thus effectively banning oil and gas drilling within the township.[58] The plaintiff, Cooperstown Holstein Corp., previously had executed two oil and gas leases in the town and argued that ECL 23–0303(2) specifically preempts any regulations from local authorities with respect to gas, oil and solution drilling or mining, and therefore the town's zoning law was preempted by exclusive state jurisdiction.[59]

The New York state ECL states ''this article *shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries;* but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property law''.[60] The trial court (New York Supreme Court, Ostego County) found no suggestions in the legislative history,[61] nor did a plain reading of the statutory language or the history of ECL 23-0303 (2) indicate that this provision was intended by the legislature ''to abrogate the constitutional and statutory authority vested in local municipalities to enact legislation affecting land use.''[62] Rather, these factors ''convincingly demonstrate[]'' that the Legislature's intended to insure that statewide standards were enacted by the Department of Environmental Conservation governing the manner and method of oil, gas and solution drilling or mining, and to insure proper statewide oversight of uniformity to maximize utilization while minimizing waste.[63]

The court found that these state interests could be harmonized with the home rule of local municipalities in their determination of where oil, gas and solution drilling or mining may occur. The court differentiated between the role of the state in maintaining control over the ''how'' of such procedures and the role of municipalities in controlling the ''where'' of such exploration.

Furthermore, the *Cooperstown* court looked to other New York decisions, such as the court of appeals case, *Matter of Frew Run Gravel Prods. v. Town of Carroll*,[64] to support its finding that municipalities are not preempted by ECL 23-0303(2) from enacting local zoning ordinances which prohibit oil, gas and solution drilling or mining.[65] There, the court found that preemption does not apply to local regulations addressing land use which may, at most, ''incidentally'' have an impact on the ''activities'' of the industry of oil, gas and solution drilling or mining.[66]

On Aug. 29, 2013, the Court of Appeals of New York, the state's highest court, agreed to hear appeals in *Norse* and *Cooperstown Holstein* to determine whether state law in fact preempts local governments from banning fracking.[67] While the court of appeals was not required to take these cases, the contentiousness of the issue made them likely targets for appellate interven-

[53] *Norse*, 964 N.Y.S.2d at 732-24.

[54] *Id.* at 23-0101[20][b].

[55] *Norse*, 964 N.Y.S.2d at 732-24.

[56] *Id.*

[57] 35 Misc. 3d 767 (2013), *aff'd Cooperstown Holstein Corp. v. Town of Middlefield* (Sup. Ct., 3d Dep't, App. Div. 2013), *leave to appeal granted,* No. 2013-603, slip op. 83651 (N.Y. Aug. 29, 2013).

[58] *Id.* at 768-69.

[59] *Id.* at 769-70.

[60] ECL 23–0303(2) (emphasis added).

[61] The court's review of the legislation found that the various provisions of article 3-A of the former Conservation Law dealt with the Conservation Department's efforts on matters such as the spacing of units, the integration of oil and gas pools and fields, oil and gas leases and the plugging of old wells, which are all regulatory in nature. *Cooperstown*, 35 Misc. 3d at 772.

[62] NY Const, art IX, § 2 [c] [ii] [10]; Municipal Home Rule Law § 10 [1] [ii] [a]; § 11; Statute of Local Governments § 10 [6], [7]; Town Law § 261.

[63] *Cooperstown*, 35 Misc. 3d at 777.

[64] 71 N.Y.2d 126 (1987).

[65] In *Frew Run*, 71 N.Y.2d at 132, the court of appeals, while addressing the breadth of the supersession clause of the Mined Land Reclamation Law (MLRL) (ECL 23-2703 (2)), found that the zoning regulations of the town of Carroll did not frustrate the state's purposes in enacting the statute, namely ''to foster a healthy, growing mining industry'' and to ''aid in assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition'' (internal quotations omitted). The Court of Appeals found that the supersession clause contained in the statute (''which is strikingly similar to that contained in ECL 23-0303 [2]'') preempted the local municipality from establishing regulations pertaining to the methods of mining, since such regulations were exclusively the province of the state, while at the same time it permitted the municipality, by exercise of its constitutional and statutory authority, to ''regulate land use generally.''

[66] *Id.*; *see also Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 Nulled 668, 681-82 (1996) (distinguishing between local regulation which is preempted solely and exclusively as to the method and manner of oil, gas and solution mining or drilling, but not preempted with regard to local land use control).

[67] *Norse Energy Corp. v. Town of Dryden*, *leave to appeal granted*, No. 2013-604, slip op. 83668 (N.Y. Aug. 29, 2013); *Cooperstown Holstein Corp v. Town of Middlefield*, *leave to appeal granted*, No. 2013-603, slip op. 83651 (N.Y. Aug. 29, 2013).

tion,[68] and the outcome will hold great weight in determining the success of future municipal home rule initiatives.

3. Robinson Township. v. Commonwealth of Pennsylvania

Meanwhile in Pennsylvania, in an effort to streamline natural gas production, in February 2012 the Legislature passed Act 13, which repealed Pennsylvania's Oil and Gas Act and replaced it with a codified statutory framework regulating oil and gas operations in the commonwealth. Among other provisions involving the levying and distribution of impact fees and the regulation of the operation of gas wells, Act 13 preempted local regulation of the process, superseding local environmental laws and zoning code provisions except in limited instances, such as setbacks in areas involving oil and gas operations.[69] Act 13 also gave the power of eminent domain to companies that transport, sell or store natural gas,[70] and required uniformity of local ordinances.[71] This sweeping initiative was designed to optimize the development of the oil and gas resources of Pennsylvania, and was intended to supersede all local ordinances that attempt to regulate matters addressed by the Act.[72]

In response, in *Robinson Township v. Commonwealth of Pennsylvania*,[73] municipalities and individuals[74] brought a petition challenging the constitutionality of Act 13 as it related to oil and gas regulation on the Marcellus Shale. The petitioners alleged that almost 150 unconventional Marcellus Shale wells had been drilled within the borders of the township, and that Act 13 prevented petitioners from fulfilling their constitutional and statutory obligations to protect the health, safety and welfare of their citizens, as well as public natural resources from the industrial activity of oil and gas drilling.[75] The municipalities argued that Act 13 was unconstitutional because compliance would force them to enact zoning ordinances that would allow mining and gas operations in all zoning districts—an action that would be incompatible with the municipalities' comprehensive plans and would make zoning irrational.[76]

The commonwealth argued that Act 13 furthered the goal of achieving energy independence and did not preempt local municipalities' powers to enact zoning ordinances, so long as those ordinances did not conflict with oil and gas well operations and environmental concerns.[77]

In determining whether a zoning ordinance is unconstitutional under the Pennsylvania Constitution and Fourteenth Amendment to the U.S. Constitution, the court conducted a substantive due process inquiry,[78] balancing landowners' rights against the public interest protected by an exercise of the police power. This process gives substantial deference to the preservation of rights of property owners, in accordance with common law precepts requiring landowners to ''use your own property so as not to injure your neighbors.''[79]

To avoid what it called '' 'pig in the parlor instead of the barnyard,' '' the court reasoned that zoning classifications are designed to implement a rational plan for development that is informed by public input and guided by a planning process.[80] Zoning ordinances ''segregate industrial districts from residential districts, and there is segregation of the noises and odors neces-

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[68] *See* 169 DEN A-3, 8/30/13.

[69] It is revealing that on Aug. 29, 2013, Pennsylvania State Representative Karen Boback announced that she intends to introduce legislation in the Pennsylvania House of Representatives entitled ''Act 13 - Local Zoning Provisions Restoration'' aimed at removing the key provisions in Act 13 that prohibit local regulation of fracking. In introducing the proposed bill, she stated: ''[a]s we are all aware, the local zoning provisions in Act 13 have become a source of controversy snarled in our judicial system since their passage . . . I believe that it is important to have statewide regulations in relation to this industry; however, it is also important that our communities have the ability to make important land use decisions regarding activities within their borders. Accordingly, by eliminating this section, we will restore the ability of our local governments to manage their municipalities as had existed prior Act 13.'' *See* Penn. Gen. Assembly, House Co-Sponsorship Memoranda *available at* http://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm? chamber=H&SPick =20130&cosponId =13235.

[70] 58 Pa.C.S. § 3241. Under § 401 of the Oil and Gas Act, certain oil and gas companies have a limited right of eminent domain to acquire real property interests for gas storage purposes. The right of eminent domain cannot be exercised unless the recoverable reserves within the proposed reservoir have been depleted by 80 percent and the company has acquired the storage rights ''underlying at least 75% of the area of the proposed storage reservoir.'' In addition, companies cannot use eminent domain to acquire interests in land in which another gas company has a storage interest.

[71] 58 Pa.C.S. § 3304.

[72] A brief filed by appellees in *Great Lakes Energy Partners, Penneco Oil Company, CB Energy, Inc., and Independent Oil & Gas Association of Pennsylvania v. Salem Township*, No. 1866-CD-2006 (Pa. Commw., Jan. 19, 2007) argued that ''[t]he Oil and Gas Act strongly favors uniform and central governance of oil and gas well issues. The Act expresses this policy through not only its preemption provision, but through its creation of the Oil and Gas Technical Advisory Board, comprised of geologists, engineers, and/or drilling experts.'' *See* 58 P.S. § 601.216. DEP must ''consult with the board in the formulation, drafting and presentation stages of all regulations of a technical nature promulgated under this act.'' 58 P.S. § 601.216(d). The creation of this board and the role assigned to it ''demonstrate an intent to have a centralized expert body craft rules to apply to oil and gas well operation.'' Through such provisions, appellees argued the Oil and Gas Act clearly demonstrates ''that it . . . does not . . . intend[] to regulate the area of oil and gas development through 'a patchwork of municipal regulations' . . . . To permit each municipality to enact its own laws and regulations would create a lattice of additional rules,'' and would be ''in direct opposition to the legislative mandate.''

[73] 52 A.3d 463 (Pa. Commw. Ct. 2012).

[74] In addition to the township itself, the plaintiffs in *Robinson Township* included: Brian Coppola, individually and in his official capacity as Supervisor of Robinson Township; the township of Nockamixon, Bucks County; the township of South Fayette, Allegheny County; Peters Township, Washington County; David M. Ball, individually and in his official capacity as councilman of Peters Township; Township of Cecil, Washington County; Mount Pleasant Township, Washington County; Borough of Yardley, Bucks County; Delaware Riverkeeper Network; Maya Van Rossum; the Delaware Riverkeeper; and Mehernosh Khan, M.D.

[75] *Robinson Township*, 52 A.3d at 469.

[76] *Id.*

[77] *Id.* at 480-81.

[78] *Id.* at 482-83.

[79] *Id.*

[80] *Id. See also City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732–33 (1995) (Supreme Court described the purpose of zoning as designating ''districts in which only compatible uses are allowed and incompatible uses are excluded'').

  DEN ISSN 1060-2976

sarily incident to the operation of industry from those sections in which the homes are located.''[81]

The court distinguished between the interests that justify the exercise of police power in the development of oil and gas operations and those that drive zoning. The state's interest in oil and gas development is primarily the efficient production and use of the natural resources in the state, while zoning is designed to foster the orderly development and use of land in a manner consistent with local demographic and environmental concerns.

The court concluded that by requiring municipalities to violate their comprehensive plans for growth and development, Act 13[82] violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications—''because it requires municipalities to allow all zones, drilling operations and impoundments, gas compressor stations, storage and use of explosives in all zoning districts, and applies industrial criteria to restrictions on height of structures, screening and fencing, lighting and noise.''[83]

The substantive reach and consequences of the *Robinson* holding are being delayed by an unused procedural development. Shortly after the decision was reached, the commonwealth appealed to the Pennsylvania Supreme Court.[84] On Aug. 6, 2013, before the court has issued its final ruling, the Pennsylvania Public Utility Commission (PUC) and Department of Environmental Protection (DEP) petitioned the court to rehear the appeal in front of a full slate of justices.[85] The municipalities have argued that allowing the case to be reheard after the appointment of a new seventh justice could force the court to rehear dozens of other appeals, would result in disparate treatment and would be a waste of judicial resources.[86]

The large number of municipalities that challenged the act in *Robinson* is evidence of the importance to local governments of retaining a say in how the hydrofracking map is ultimately filled in. Conversely, the commonwealth's vigorous appeal of the decision highlights the state's perception that municipal regulation poses a formidable threat to the orderly expansion of the natural gas industry. Just as with *Norse* and *Cooperstown Holstein* in New York, individuals on both sides of the hydrofracking expansion debate are awaiting a decision that will reverberate across the state.

B. The Other Side of the Coin

A number of decisions have upheld states' right to preempt local regulation of fracking, in a manner that is similarly instructive in mapping out the parameters and potential outcomes of municipal activism.

1. Jeffrey v. Ryan

In *Jeffrey v. Ryan*,[87] the New York Supreme Court, Broome County, addressed the issue of whether the city

[81] *Robinson Township,* 52 A.3d at 482-83.

[82] 58 Pa. C.S § 3304.

[83] *Robinson Township,* 52 A.3d at 485. The court concluded that if the promotion of oil and gas development could trump the comprehensive plan, upon which people have relied to make investment decisions regarding businesses and homes, then the legislature could make similar findings requiring coal portals, tipples, washing plants, limestone and coal strip mines, steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones.

[84] On July 25, 2013, the Pennsylvania Supreme Court quashed a notice of appeal filed by the Pennsylvania Public Utilities Commission (PUC) from a 2012 order that stayed its review of local ordinances under Act 13 of 2012. *Robinson Tp. v. Com.*, No. 100 MAP 2012 (Pa. Commw. Ct. July 25, 2013). Following the Commonwealth Court striking down portions of Act 13 in 2012, the PUC continued to review local ordinances under Act 13's surviving provisions. If the PUC found an ordinance to be in conflict with Act 13's drilling regulations, the municipality would not receive any portion of the impact fees paid out to areas affected by drilling under the Act. *See Penn State Marcellus Shale Law Blog*, *PA Supreme Court Quashes PUC Appeal of Order Staying Ordinance Review* (Aug. 1, 2013) *available at* http://www.pennstatelawmarcellusblog.com/2013/08/pa-supreme-court-quashes-puc-appeal-of.html. Robinson Township filed suit as part of the ongoing litigation surrounding the constitutionality of Act 13, and in October 2012, the Pennsylvania Commonwealth Court ordered the PUC to ''cease and desist'' from implementing certain parts of Act 13, specifically the provisions under which the agency would have a role in reviewing and approving municipal zoning ordinances. *See also* Amanda Gillooly, CANON MCMILLAN PATCH, *State Supreme Court Quashes Act 13 Appeal by PUC* (July 26, 2013), *available at* http://canon-mcmillan.patch.com/groups/politics-and-elections/p/state-supreme-court-quashes-act-13-appeal-by-puc.

[85] In addition to filing a Motion to Resubmit the Case, discussed below, appellant PUC filed an application, also on Aug. 6, 2013, asking the court to reconsider its order of July 25, 2013, which quashed the notice of appeal in the same matter. Pennsylvania Public Utility Commission's Application for Reconsideration Before Entire Court, *Robinson Twp. v. Com.*, 52 A.3d 463 (Pa. Commw. Ct. 2012) (No. 100 MAP 2012), submitted Aug. 6, 2013.

Due to the suspension former Justice Joan Orie Melvin, only six justices participated when the Supreme Court heard arguments in the appeal in October 2012. *See In re Melvin*, 57 A.3d 226 (Pa. Ct. Jud. Discipline 2012). Justice Correale F. Stevens was chosen to replace Justice Melvin, who ultimately resigned from the Supreme Court in May 2013 following a criminal conviction. Appellants' Application to Resubmit the Case, *Robinson Twp. v. Com.*, 52 A.3d 463 (Pa. Commw. Ct. 2012) (No. 63 MAP 2012), submitted Aug. 6, 2013. The PUC and DEP's Application to Resubmit Case requests that the case be resubmitted, at minimum, on briefs to the full court, and if the court deems it appropriate, that additional oral argument be held. *Id.* at 5. The PUC argued that the application is appropriate because the issues pending in the appeal ''concern various serious matters of broad Commonwealth importance'' the resolution of which ''will impact not only core intergovernment relationships, but will also affect communities across the Commonwealth in various economic, social, and environmental ways.'' *Id* at 4. Additionally, the PUC argued that rehearing was appropriate because Section 3304 of Act 13 was declared unconstitutional ''in a deeply divided opinion . . . in effect, a *tie vote* on constitutionality resulted in a decision for *un*constitutionality . . . . '' *Id* at 3. While Justice Stevens brings the Supreme Court up to seven members, ''the Supreme Court issued a statement that Justice Stevens would not participate in deciding any case on which he had not heard oral argument.'' *See* Lawrence H. Baumiller, SHALE ENERGY LAW BLOG, *Pennsylvania Public Utility Commission Applies To Resubmit Act 13 Case to Supreme Court* (Aug. 8, 2013), *available at* http://www.shaleenergylawblog.com/oil-gas/pennsylvania-public-utility-commission-applies-to-resubmit-act-13-case-to-supreme-court/.

[86] *Id.*

[87] 37 Misc. 3d 1204(A), 961 N.Y.S.2d 358 (Pa. Sup. Ct. 2012).

of Binghamton could lawfully issue a moratorium on fracking, as opposed to the bans examined in *Dryden* and *Middlefield*. In *Ryan,* The city of Binghamton enacted Local Law 11–006 banning hydraulic fracturing activity for two years. The local law was challenged on three grounds, and ultimately struck down on one—that is was an improperly enacted moratorium on drilling. The court held that a municipality is allowed to enact a temporary ''stop-gap'' measure to ban a particular land use while a municipality is reviewing a comprehensive zoning law. For a moratorium to be upheld, however, the municipality must show that its actions were in response to a dire necessity; reasonably calculated to alleviate or prevent a crisis condition; and that it is presently taking steps to rectify the problem.

In finding against the city, the court reasoned that it had not explained how, if the banned hydrofracking activities were such a grave threat, the threat would no longer exist when the law expired.[88] According to the court, the two-year ''sunset'' contradicted Respondents' claims that the law is solely an exercise of their police powers. While recognizing that the issue of gas exploration, extraction and storage is a controversial one, the court stated that, '' . . . a municipality may not invoke its police powers solely as a pretext to assuage strident community opposition.''[89]

Notably, the court also reasoned that the law should *not* have been struck down on the grounds that it was a zoning law or that it was superseded by 23-0303 of the ECL. The court's refusal to require referral of the law to the County Planning Board underscores the municipality's ability to use its police powers to enact laws that protect the health, safety and welfare of its citizens. The court's conclusion that the law had not been preempted by ECL 23-0303(2), because the *Dryden* and *Middlefield* decisions were ''well reasoned'' and ''well founded'', reaffirms the foundations of those cases.

2. Range Res. Appalachia, LLC v. Salem Twp.

In *Range Resources Appalachia, LLC v. Salem Twp.*,[90] Appellant Salem Township enacted a general ordinance directed at regulating surface and land development associated with oil and gas drilling operations which was subsequently challenged by oil and gas producers. Among other things, the oil and gas producers argued that the ordinance's regulations were preempted by Pennsylvania's Oil and Gas Act.[91]

The lower court concluded that each of the oil and gas regulations contained in the local ordinance was preempted by state law. The court found that the ordinance ''places conditions, requirements, or limitations on some of the same features of oil and gas well operations regulated by the Oil and Gas Act,'' and indeed, is even more stringent than the act with regard to the manner in which many activities are regulated.[92] The court suggested that the township was attempting, through the ordinance, to impose requirements on the location of activities that are necessarily incident to the development of wells, and that these types of restrictions fall within the purview of the Oil and Gas Act and the oversight of the Department of Environmental Protection.[93]

On appeal, the Pennsylvania Supreme Court agreed with the lower court's determination that the local ordinance was preempted. The court distinguished a companion case *Huntley v. Huntley*,[94] in which it concluded that the Oil and Gas Act's preemptive scope is not total, because it does not prohibit municipalities from enacting traditional zoning regulations that identify which uses are permitted in different areas of the locality, even if such regulations preclude oil and gas drilling in certain zones.[95] In reaching this determination, the court agreed with the Department that the term, ''features of oil and gas well operations,'' in the Oil and Gas Act refers to the ''technical aspects of well functioning and matters ancillary thereto (such as registration, bonding, and well site restoration), rather than the well's location,''[96] keeping it outside the traditional purposes of zoning.[97]

In *Range Resources*, however, the township's ordinance required a permit for all drilling-related activities; regulated the location, design, and construction of access roads, gas transmission lines, water treatment facilities, and well heads; established a procedure for residents to file complaints regarding surface and ground water; allowed the township to declare drilling a public nuisance and to revoke or suspend a permit; established requirements for site access and restoration; and provided that any violation of the ordinance would be a summary offense that could trigger fines and/or imprisonment.

While accepting the ''how-versus-where'' distinction articulated in *Huntley*,[98] in *Range Resources*, the court found that the Ordinance had more than ''a tangential relationship to oil and gas drilling and extraction,'' and ''reflect[ed] an attempt by the Township to enact a comprehensive regulatory scheme relative to oil and gas development within the municipality.'' The court concluded that the Ordinance regulated ''many of the same

[88] *Id.* (''This activity cannot be so detrimental that it must be banned, but only for two years, particularly when it is clear that the City is not engaging in any investigation, studies or other activities in the interim in order to determine if there is a way to alleviate any harm to the people of the city from this future activity.'').

[89] The court noted that ''[t]here can be no showing of dire need'' or crisis ''since the New York Department of Environmental Conservation has not yet published the new regulations that are required before any natural gas exploration or drilling can occur in this state'' and since there are no regulations, no permits are being granted. *Id.*

[90] 600 Pa. 231, 237, 964 A.2d 869, 872-73 (2009).

[91] *Id.* at 870.

[92] *Id.* at 871.

[93] *Id.* at 871-72. The Commonwealth Court affirmed. *See Great Lakes Energy Partners v. Salem Township*, 931 A.2d 101 (Pa. Commw. 2007) (*en banc*).

[94] The *Range Res.* decision was issued in conjunction with the Pa. Supr. Ct.'s disposition of *Huntley & Huntley*, 600 Pa. 207, which addressed the same issue, within the context of a different set of facts, and comes to a different conclusion.

[95] *See also Penneco Oil Co., Inc. v. Cnty. of Fayette*, 4 A.3d 722, 727-28 (Pa. Commw. Ct. 2010) (concluding that the provisions of the zoning ordinance at issue did not reflect an attempt by Fayette County to enact a comprehensive regulatory scheme relative to the oil and gas development within the county but instead reflected traditional zoning regulations that identify which uses are permitted in different areas of the locality and was therefore not preempted).

[96] *Huntley*, 600 Pa. at 223.

[97] *Id.* at 224.

[98] The township argued that local land-use regulations adopted should only be preempted to the degree they address the technical, operational aspects of oil and gas drilling, but should be permissible if they are consistent with ordinary zoning principles. *Id.* at 237.

  DEN ISSN 1060-2976

aspects of oil and gas extraction activities that are addressed by the Act,'' and that the ''comprehensive and restrictive nature of its regulatory scheme represents an obstacle to the legislative purposes underlying the Act, thus implicating principles of conflict preemption.''[99]

VI. Implications

In New York state to date, 63 municipalities have banned fracking; there are 110 moratoria in place; and 87 local governments have moved to institute such bans or moratoria.[100] In Pennsylvania, the *Robinson Township* decision opens the door to local limitations on hydraulic fracturing operations. The courts have become the battleground between states and developers who would like to see the expansion of natural gas drilling and who fear that bans and disparate rules and regulations will create barriers to the expansion of the industry, and the localities where the impacts of hydraulic fracturing are experienced most acutely.

As President Obama's recent Climate Action Plan evidences,[101] pressure is high to pursue natural gas expansion, both as an alternative to coal as well as an opportunity to achieve energy independence. The national discourse has yet to achieve a balance between further development and the real and perceived risks associated with hydraulic fracturing. But, as the debate continues on the national stage, municipalities are testing the limits of their traditional rights to self-determination on their own terms.

The *Robinson* case suggests that municipal activism, self determination and home rule will present substantial barriers to hydrofracking expansion. While the exercise of home rule does not guarantee municipalities an unfettered say in natural gas development, recent decisions lend credence to the notion that local ordinances that confine regulation to matters of zoning and community character have a strong likelihood of success in the Northeast. Ironically, although many municipalities have pursued local moratoria, such temporal bans seem less likely to survive challenges than efforts to zone hydrofracking activity out. States ultimately may be compelled to pursue strategic approaches to expand natural gas development rather than attempting to assert overarching regulatory dominance over localities.

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[99] *Id.* at 244.

[100] *See* FracTracker, Current High Volume Horizontal Hydraulic Fracturing Drilling Bans and Moratoria in NY State (Aug. 1, 2013), *available at* http://www.fractracker.org/maps/ny-moratoria/.

[101] *See* Press Release, The White House, Fact Sheet: President Obama's Climate Action Plan (Sept. 6, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/25/fact-sheet-president-obama-s-climate-action-plan.

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