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How Should Hydraulic Fracturing Be Regulated?

**Columbia Law School
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Regulatory Strategies: Allocating Responsibility Among Different Levels and Branches of Government

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Sources of Local Authority



- State Constitution
 - Home Rule
 - Substantive Due Process
- State Statute
 - Home Rule Implementing Provisions
 - Industry-Specific Grants
- Judicial Decision on Preemption Claims

Local Regulatory Authority



- Wide spectrum includes, but is not limited to:
 - Land use (including bans) and operational regulations (*e.g.*, OK, TX)
 - Land use regulations (including bans) (*e.g.*, CA, NY)
 - Land use (excluding bans) and operational regulations not in conflict with state law (*e.g.*, CO)
 - Regulations in areas not covered by state law (*e.g.*, OH)
 - No local land use or operational regulations (*e.g.*, WV)
- Scope of authority subject to judicial interpretation

Current Litigation



- New York
 - Dryden (ban)
 - Middlefield (ban)
 - Binghamton (moratorium)
 - Avon (moratorium)
- Colorado
 - Supreme Court jurisprudence
 - Longmont (regulations and ban)
- Pennsylvania
 - Supreme Court jurisprudence
 - Superseded by Act 13
- Ohio – City of Munroe Falls

New York Cases



- Claims
 - Express Preemption
 - Implied (Conflict) Preemption
- Holdings – No Preemption
- Reasoning: Application of NY Court of Appeals Precedents under Mined Land Reclamation Law (“MLRL”) to Oil, Gas and Solution Mining Law (“OGSML”)

NY Court of Appeals Precedents



- Preemption of local zoning authority is disfavored “*in the absence of a clear expression of legislative intent to preempt local control over land use.*” *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 682 (1996) (emphasis added).
- The preemption question with respect to oil and gas extraction is one of first impression in New York, but the New York Court of Appeals decided a similar claim with respect to the MLRL.
- The Court of Appeals repeatedly and consistently has held that the MLRL does not preempt local zoning.

Express Preemption



- An express preemption provision precludes local regulation of *the same subject matter* as the state law.
- To decide an express preemption claim, the court need only look “to the plain meaning of the phrase ‘relating to the extractive mining industry’ as one part of the entire Mined Land Reclamation Law, to the relevant legislative history, and to the underlying purposes of the supersession clause as part of the statutory scheme.”
Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126, 131 (1987).

The Plain Language



- MLRL supersession clause:
“[T]his title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.” ECL § 23-2703(2).

- “[W]e cannot interpret the phrase “local laws relating to the extractive mining industry” as including the Town of Carroll Zoning Ordinance. The zoning ordinance relates not to the extractive mining industry but to an entirely different subject matter and purpose The purpose of a municipal zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally.”
Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126, 131 (1987).

History, Policy, and Purposes



- “[O]ne of the statute’s aims is to encourage the mining industry by the adoption of standard and uniform restrictions and regulations At the same time, the statute is intended to achieve a parallel and equally important purpose: . . . ‘provide for the reclamation of lands affected by mining for the purpose of returning such lands to other productive uses.’” *Frew Run*, 71 N.Y.2d at 132
- “From the statutory scheme and the legislative history, it is evident that the sole purpose of the supersession provision . . . is to prevent local governments from enacting laws which would conflict with or frustrate one or both of the statute’s purposes.” *Id.* at 133.
- “There is nothing in the Mined Land Reclamation Law or its history indicating that ECL 23-2703(2) was intended to be . . . broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands.” *Id.*

The Conclusion



“The zoning ordinance relates not to the extractive mining industry but to an entirely different subject matter and purpose The purpose of a municipal zoning ordinance . . . is to regulate land use generally. . . .[T]he zoning ordinance inevitably exerts an incidental control over any of the particular uses or businesses which . . . may be allowed in some districts but not in others. But, this incidental control resulting from . . . zoning is not the type of regulatory enactment relating to the ‘extractive mining industry’ which the Legislature could have envisioned as being within the prohibition of the statute.”

Frew Run, 71 N.Y.2d at 131.

Frew Run's Extension to Bans



- “At bottom, petitioner’s argument is that if the land within the municipality contains extractable minerals, the statute obliges the municipality to permit them to be mined somewhere within the municipality. Nothing in the MLRL imposes that obligation on municipalities”

Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 683 (1996).

- “A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole”

Id. at 684.

Oil, Gas and Solution Mining Law



The plain language:

“The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede jurisdiction over local roads or the rights of local governments under the real property tax law.” ECL § 23-0303(2).

Policy and purposes:

“It is hereby declared to be in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; . . . and that the correlative rights of all owners and the rights of all persons including . . . the general public may be fully protected”
ECL § 23-0301.

The Real Thing



- The Legislature knows how to preempt local land use law when it wants to do so.
- The Legislature has preempted local land use law in statutes siting hazardous waste facilities and major electrical generating facilities (among others). ECL § 27-1107; Pub. Serv. L. § 172.
- When local land use law is preempted, the Legislature provides formal protections for the private property and community character interests normally protected by zoning, by requiring opportunities for local participation in the siting decisions.
- The MLRL had provisions for local involvement, but the Court of Appeals still declined to find preemption. The OGSML has none.

Conclusion



- Federal law should provide a floor for environmental regulation.
- State law may preempt regulation of technical oil and gas operations.
- Where state law permits oil and gas development, local governments should be permitted to exercise traditional zoning powers and to regulate industrial activities to the extent necessary to protect community character and quiet enjoyment of private property.
- Industry flourishes under widely divergent allocations of state and local regulatory authority.