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THE GROUND GAME: HOW LAND-USE ORDINANCES HAVE BECOME THE NEW BATTLEGROUND FOR NATURAL GAS EXTRACTION IN THE MARCELLUS SHALE

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I. Introduction

Between December 2007 and January 2008,a discovery was made in Pennsylvania that will change the region for years to come: the true extent of the natural gas in the Marcellus Shale Formation.[2]In December 2007, Range Resources, a large oil and gas producer, released its quarterly operating report detailing the impressive production numbers of their first well in the Marcellus Shale.[3] This was followed by the announcement of a report on January 17, 2008 by University of Pennsylvania geoscience professor Terry Engelderand CUNY, Fredonia Geology professor Gary

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[2] "The Marcellus Shale is a black shale formation extending deep underground from Ohio and West Virginia northeast into Pennsylvania and southern New York. Although the Marcellus Shale is exposed at the ground surface in some locations in the northern Finger Lakes area, it is as deep as 7,000 feet or more below the ground surface along the Pennsylvania border in the Delaware River valley. Drilling activity is expected to focus on areas where the Marcellus shale is deeper than 2,000 feet." *SeeMarcellus Shale,* N.Y. STATE DEPT. OF ENVIRO. CONSERVATION, http://www.dec.ny.gov/energy/46288.html
[3] Elwin Green, *Natural Gas Locked in the Marcellus Shale has Companies Rushing to Cash in on Possibilities*, PITTSBURGH POST-GAZETTE, Dec 6, 2009, *available at* http://www.post-gazette.com/stories/business/news/natural-gas-locked-in-the-marcellus-shale-has-companies-rushing-to-cash-in-on-possibilities-370058/.

Lash that threw into question all previous estimates of gas volumes in the Marcellus Shale formation.[4]

It had previously been known that there was natural gas in the Marcellus Shale, but in 2002 the US Geological Survey had estimated that the supply was only 1.9 million cubic feet.[5]The study by Engelder and Lash estimated that the Marcellus in fact contained at least 168 trillion cubic feet of natural gas and possiblyup to 516 trillion cubic feet of natural gas.[6]By comparison, in 2007, the entirety of the US consumed 23.05 trillion cubic feet of natural gas.[7] This new knowledge of the vast potential for gas production in the region, along with confirmed results of the Range Resources well, triggered an unprecedented rush of resources into the area.Although drilling in this region began just five years ago, and has been delayed in New York, it has already become the leading gas producing field in the US, producing 7.4 billion cubic feet of gas each day.[8] Production in this area continues to grow with no sign of slowing, as demonstrated by the over 1200 new well permits granted in the first five months of this year alone.[9]

This sudden "gold rush,"of the large gas companies into the Marcellus region, brought along with it many competing interests. Industry lobbyists, environmental groups, local business interests, state and federal legislatures, and citizen groups have all played a role in shaping the dynamics of this highly contentious issue, which often can ignite strong opinions on either side.[10] The purpose of this note is not to advocate for or against gas drilling in the Marcellus Shale, but rather to address the

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[4]*Id.*

[5] Russell Gold, *Gas Producers Rush to Pennsylvania—Promising Results for Wells There Spur Investment*, WALL ST. J., April 2, 2008, *available at* http://online.wsj.com/article/SB120709326316581793.html.

[6]*Unconventional natural gas reservoir could boost U.S. supply*, PENN STATE NEWS (Jan. 17, 2008),*available at* http://news.psu.edu/story/191364/2008/01/17/unconventional-natural-gas-reservoir-could-boost-us-supply.

[7] Gold, *supra* note 5.

[8]Kevin Begos, *Marcellus Shale becoming top US natural gas field,* AP NEWS (Aug. 5, 2013), *available at* http://finance.yahoo.com/news/marcellus-shale-becoming-top-us-162527250.html

[9]*Id.*

[10] During the comment period on the revised NY state SGEIS they received over 60,000 comments during the four month comment period *SeeSGEIS on the Oil, Gas and Solution Mining Regulatory Program,Marcellus Shale*, N.Y. STATE DEPT. OF ENVIRO. CONSERVATION, *available at* http://www.dec.ny.gov/energy/47554.html.

legal issues raised by the most recent battleground in this struggle: the use of municipal land use regulations to restrict mining companies access to land in two Marcellus states, New York and Pennsylvania.

The use of zoning ordinances to exclude natural gas extraction presents many questions from a social perspective. It raises questions about basic property rights, the relationships between citizens and various levels of government, and how the benefits and burdens of the extraction affect the community, just to name a few. Again, the purpose of this note is not to weigh these social values and costs, but rather to look at how these laws fit within the traditionalcontext of land use regulations and what differentiates them from a traditional land use case.This note will look at the differences in state regulations, how the municipalities have chosen to regulate industry use, and how courts in both New York and Pennsylvania have resolved these disputes. Finally, it will discussimplications for the future applications of land use controls as a means to exclude gas drilling both in the Marcellus and other gas-producing regions.

II. The History

For the years preceding the discovery of mass quantities of gas in the Marcellus, all gas exploration in the region by large companies was seen as economically unviable and was left to "mom and pop" oil companies while the larger companies focused on the Gulf Region.[11] Following a series of hurricanesthat disrupted the Gulf supply, starting in 2005 with Hurricane Katrina, the price of natural gas rose sharply from $2 per million BTUsin 2002 to $16 per million BTUs in 2005 (a million BTUs is roughly equivalent to a thousand cubic feet of gas).[12]The increase in price due to these hurricanes led Range to begin looking for alternate supply options.[13] They began the exploration of the Marcellus by drilling the first modernwell in the region, and in 2005 they were the

[11] Gold, *supra* note 5.
[12] *Id.*
[13] Green, *supra* note 3.

first company to use a relatively new technique in the shale called horizontal hydraulic fracturing.[14]The findings of these early wells later served to confirm the predictions of Engelder and Lash: The Marcellus Shale was rich in natural gas, and with hydrofracking Range had discovered the secret to accessing this resource.

Natural gas within these shale formations tends to form along vertical fractures within the stone, so drilling a traditional vertical well limits access to these fractures. Horizontal fracturing solves this problem by drilling down to the shale, then turning horizontally and drilling across these fractures, allowing a single well much greater access to the gas within the formation.[15] The mining company then injects a fluid consisting of water, sand, and chemicals[16] into the well to break these fissures allowing the extraction of the gas.[17]Each well uses four to eight million gallons of this material, often referred to as "fracking fluid."[18]These horizontal wells are much more financially costly than traditional vertical wells – where a vertical well costs about $800,000to drill, a horizontal well costs about $3,000,000 to drill.[19]Besides the greater economic cost, this process, even if done well, creates a greater environmental impact than a traditional vertical well.

Potential environmental impacts from horizontalhydrofrackinginclude effects on water resources, air pollution including the release of greenhouse gases,[20] seismic stability issues, as well as

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[14]*Id.*

[15] *Id.*

[16] These may include a friction reducer, a biocide to prevent the growth of bacteria that would damage the well piping or clog the fractures, a gel to carry the proppant into the fractures, and various other agents to make sure the proppant stays in the fractures and to prevent corrosion of the pipes in the well.
N.Y. STATE DEPT. OF ENVIRO. CONSERVATION, *supra* note 2.

[17] "States' rules generally contain a 'trade secrets' provision that allows companies to withhold public disclosures of certain chemicals so they can avoid giving away proprietary recipes for the fracking fluids."; Kate Galbraith, *Seeking Disclosure on Fracking*, N.Y. TIMES, May 30, 2012 *available at* http://www.nytimes.com/2012/05/31/business/energy-environment/seeking-disclosure-on-fracking.html?_r=0.

[18] Don Hopey, *EPA Counsel Outlines Efforts to Protect Air and Water*, PITTSBURGH POST GAZETTE Nov. 17, 2011, *available at http://www.post-gazette.com/stories/news/environment/epa-counsel-outlines-efforts-to-protect-air-and-water-324288/*.

[19]*Supra* note 6.

[20] Natural Gas production has now become the second largest source of greenhouse gas emissions in the U.S., *See* Mark Drajem, *Oil, Gas Production Among Top Greenhouse-Gas Sources*,BLOOMBERG NEWS, Feb. 8, 2013,

noise pollution and even traffic concerns.[21] Of these potential impacts, the most troubling may be fracking's potential impact on water resources, which comes in six forms: 1) water withdrawals to provide the high volumes of water needed for fracking which can affect surface or groundwater, including wetlands through water depletion; 2) polluted storm water runoff from the drilling site; 3) surface chemical or petroleum spills; 4) pit or surface impoundment failures or leaks that come from the storage of clean and used fracking fluid; 5) groundwater contamination associated with improper well drilling and construction; and 6) improper waste disposal of the fracking fluid and other waste pumped out of the well.[22]Some of these effects are co-located with the wellhead, but other effects can extend well beyond its location.

The environmental regulation of the hydrofracking industry has been one that has in large part been left for the states rather than the federal government. In 2005, Congress exempted fracking fluid (except those using diesel fuel in their mixture)from EPA regulation under the Clean Water Act.[23]In addition, Congress has generally exempted the Oil and Gas industry from regulation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act, the Safe Drinking Water Act (SDWA), the Clean Water Act, the Clean Air Act, the National Environmental Policy Act (NEPA), and the Toxic Release Inventory under the Emergency Planning and Community Right-to-Know Act (EPCRA.)[24]

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http://www.businessweek.com/news/2013-02-05/greenhouse-gas-emissions-fall-in-u-dot-s-dot-power-plants-on-coal-cuts.

[21]N.Y. STATE DEPT. OF ENVIRO.CONSERVATION,REVISED SEGIS N.Y. ON THE OIL, GAS AND SOLUTION MINING INDUSTRY (September 2011), *available at* http://www.dec.ny.gov/energy/75370.html.

[22] *Id.*

[23]Hopey, *supra* note 18.

[24] For the text of the various exceptions *see* Fracking Exceptions, THE SIERRA CLUB ACTIVIST NETWORK, *available at* http://connect.sierraclub.org/app/render/go.aspx?g=4258d489-0312-45f1-91e1-131e008a61a3&xsl=tp_SocialObjects_ObjectType_SIERRA_CLUB_ONLINE_COMMUNITIES_PROJECT_PUBLIC.xslt&id=4258D489-0312-45F1-91E1-131E008A61A3&cons_id=&ts=1361119097&signature=b3c2d66754dba37d311196d89e6e5a35 (last visited Feb. 24, 2013).

In 2009, Congress, "in response to public concerns and anticipated growth in the oil and gas industries" commissioned the EPA to conduct a study on the effects of fracking on drinking water resources.[25]In December 2012 they issued their first progress report, and expect to have a final draft report for peer review and comment in 2014.[26]The EPA has issued some regulations regarding emissions released by fracking,[27] but environmental regulation of the other aspects such as well drilling and maintenance rules, setback and spacing, water disposal, wastewater disposal, plugging and termination, and transportation regulations, amongst others, have been under control of the states and are typically governed by state environmental and mining laws.

A common feature ofstate laws regarding gas miningis a restriction on the ability of municipalities to regulate the extraction of gasin any way at a local level.[28] Numerous municipalities in the Marcellus states, unable to regulate gas mining in their borders based on these state laws which preempt any municipal regulations of fracking, have begun to turn instead to zoning laws as an alternative togive the municipalities the ability to allow, limit, or even outright ban hydrofracking.[29] This approach is not without its critics, who argue that state regulation is necessary to ensure consistent management of the industry throughout each state, encouraging predictable rules for the gas industry and a shared burden for all the municipalities.[30]

III. New York

In New York, municipalities derive their authority to limited self-government through the

[25]*See* STUDY OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES PROGRESS REPORT, US EPA (Dec. 2012) *available at* http://www.epa.gov/hfstudy/pdfs/hf-report20121214.pdf.
[26]*See Id.*
[27] Nicolas Kusnetz, *EPA Proposes New Rules on Emissions Released by Fracking*, PROPUBLICA.ORG (July 7, 2011), http://www.propublica.org/article/epa-proposes-new-rules-on-emissions-released-by-fracking; *see also*PENN STATE NEWS, *supra* note 6.
[28]*See e.g.*Division of Oil and Gas Resources Management; Oil and Gas Well Fund, Ohio Rev. Code § 1509.02 (2012); NY Oil, Gas, and Solution Mining, N.Y. Envir. Conser.Law §23 (1981).
[29]Joseph De Avia, *'Fracking' Goes Local*, WALL ST. J., (Aug 29, 2012), *available at* http://online.wsj.com/article/SB10000872396390444327204577617793552508470.html.
[30] Scott Detrow, *A Debate Over Who Regulates Gas 'Fracking' In Pa.*, NPR, Nov. 30, 2011, *available at* http://www.npr.org/2011/11/30/142948831/a-debate-over-who-regulates-gas-fracking-in-penn.

"home rule" provision of the state constitution.[31] This article states that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property"[32] including the right to regulate use of its highways and roads.[33] These provisions, codified by the New York Municipal Home Rule Law,[34] grant the municipalities of the state the right to self govern in matters of strictly local concern. This includes regulations for the "protection, order, conduct, safety, health and well-being of persons or property" within the municipality.[35]

Home rule powers include the areas of land use and development, which the courts have described as "[o]ne of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances."[36] Absent a conflicting "preempting" state law (along with a demonstrated substantial degree of state concern in the matter) deference will be given to the municipality's power under the home rule powers.[37] Even if there is preemption, either express or implied, the job of the courts then become to "ascertain and give effect to the intention of the legislature" to determine the extent to which this preemption applies.[38]

As the gas boom hit the Marcellus states,New York, in 2008, chose to take a cautious approach. Governor David Patterson created what was effectively a moratorium on horizontal hydrofracking by ordering that the state Department of Environmental Conservation (DEC) revise its 1992 gas mining GEIS (Generic Environmental Impact Statement) [39] prior to any new

[31]N.Y. CONST. art.IX, §2.
[32]N.Y. CONST. art. IX, §2 (c)(1).
[33]N.Y. CONST. art. IX, §2 (b)(6).
[34]N.Y. MUN. HOME RULE LAW (Consol. 1964).
[35]N.Y. MUN. HOME RULE LAW §10 (a)(12), (Consol. 1964).
[36]*DLJ Rest. Corp. v. City of New York*, 96 N.Y. 2d 206, 209 (N.Y. 1983)
[37]*See generally*, James D. Cole, *Constitutional Home Rule in NY: The Ghosts of Home Rule"*, 59 ST. JOHN'S L.REV.713, (1985).
[38]*Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 25, 31 (N.Y. App. Div. 2013)
[39] Generic EISs may be broader, and more general than site or project specific EISs and should discuss the logic and rationale for the choices advanced. They may also include an assessment of specific impacts if such details are available. They may be based on conceptual information in some cases. They may identify the important elements of the natural resource base as well as the existing and projected cultural features, patterns and character. They may discuss in general terms the constraints

hydrofracturing to ensure that the GEISwould address "potential impacts to groundwater, surface water, wetlands, air quality, aesthetics, noise, traffic and community character, as well as cumulative impacts" from hydraulic fracturing and horizontal drilling.[40]In the years that have followed, drilling companies have been entering into lease agreements with landowners throughout the state in anticipation of the supplemental GEIS (SGEIS).[41] The first draft of the SGEIS was released in July 2011,and following a period of public commentary which lasted through January 2012, is at present is being prepared in its final draft.[42] This will likely be delayed into late 2013 as the DEC waits on results from its health impact study.[43]

In the years since the drafting of the SGEIS was initiated, some municipalities have responded to residents' concerns by seeking to prevent hydrofracking in their municipalities.[44] The state had in place an Oil, Gas, and Solution Mining Law (OGSML), which governsand explicitly supersedes"all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries" with only a few exceptions.[45] Instead of regulating the practices of gas mining in their municipalities, the towns chose to turn to zoning ordinances, as enabled by the Home Rule Law to restrict drilling in their towns. In a pair of cases, *Anschutz Exploration Corp. v. Town of Middlefield* and

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> and consequences of any narrowing of future options. They may present and analyze in general terms a few hypothetical scenarios that could and are likely to occur. A generic EIS may be used to assess the environmental impacts of: (1) a number of separate actions in a given geographic area which, if considered singly, may have minor impacts, but if considered together may have significant impacts; or (2) a sequence of actions, contemplated by a single agency or individual; or (3) separate actions having generic or common impacts; or (4) an entire program or plan having wide application or restricting the range of future alternative policies or projects, including new or significant changes to existing land use plans, development plans, zoning regulations or agency comprehensive resource management plans. Once a GEIS is done by the state, all subsequent conforming uses do not need to perform site-specific analysis as typically required under the State Environmental Quality Review Act (SEQRA).

N.Y. Dep't of Envtl.Conservation Regulations, Chapter VI S.E.Q.R. §617.10 (2001).
[40] Peter J. Kiernan, *An Analysis of Hydrofracking Gubernatorial Decision Making*, 5 Alb. Gov't L. Rev. 769, 775 (2012).
[41]*Id.*
[42]*Id.* at 781.
[43]*Cuomo: Fracking Decision Likely Delayed Into 2013,*ALBANY TIMES UNION, NOV. 20, 2012, *available at* http://www.timesunion.com/news/article/Cuomo-Fracking-decision-likely-delayed-into-2013-4055432.php.
[44]*See, e.g.*, Anschutz Exploration Corp. v. Town of Dryden 35 misc. 3d 450, 458 (N.Y. Sup.Ct. 2012).
[45]New York Oil, Gas, and Solution Mining (OGSML) N.Y. Envir.Conserv. Law §23 (1981); exceptions include local governmental jurisdiction over local roads or the right of local governments under the real property tax law.

*Norse Energy Corp. v. Town of Dryden,*the New York Courthasupheld the right of the municipalities to regulate gas-drilling activities in this manner.[46]In both of these cases the court found that zoning restrictions on hydrofracking were not "ordinances relating to the regulation of the oil, gas, and solution mining industries" and thus not preempted by state mining laws.[47]

In February 2012, the New York Supreme Court[48]decided first of these cases, *Anschutz Exploration Corp. v.Town of Dryden.*[49]Following Joinder of issue and a change of plaintiff, the Appellate Division – Third Judicial Department upheld this decision in *Norse Energy Corp. v Town of Dryden.*[50]In 2009, the municipality of Dryden, New York, (which in 2010 had a total population of 14,435)[51]received many requests from townspeople asking for a ban of fracking in the town, and presented the town board with a petition including 1,594 signatures requesting a ban.[52]In response the municipality enacted Amendment XXI to the town's zoning ordinance deeming any use of property in the municipality for natural gas extraction, or other gas related support activities to fall into the category of "prohibited uses."[53] At the time of the municipality zoning amendment's

[46]*See* Anschutz Exploration Corp. v. Town of Dryden 35 misc. 3d 450, 474 (N.Y. Sup. Ct. 2012); Cooperstown Holstein Corp. v. Town of Middlefield, 35 Misc. 3d 767, 780 (N.Y. Sup. Ct. 2012).
[47]*Id.*
[48] Note that in New York, the lowest state court of first impression is termed the "Supreme Court of New York"
[49] 35 Misc. 3d 450
[50]108 A.D.3d 25 (N.Y. App. Div. 3d Dep't, 2013).
[51]U.S. CENSUS BUREAU, American Fact Finder (2010) *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml.
[52]*Supra* note49 at 465.
[53] Prohibited Uses. (1)Prohibition against the Exploration for or Extraction of Natural Gas and/or Petroleum. No land in the Town shall be used: to conduct any exploration for natural gas and/or petroleum; to drill any well for natural gas and/or petroleum; to transfer, store, process or treat natural gas and/or petroleum; or to dispose of natural gas and/or petroleum exploration or production wastes; or to erect any derrick, building or other structure; or to place any machinery or equipment for any such purposes. (2)Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Materials. No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production materials. (3)Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Wastes. No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production wastes. (4)Prohibition against Natural Gas and/or Petroleum Support Activities. No land in the Town shall be used for natural gas and/or petroleum support activities. (5)Invalidity of Permits. No permit issued by any local, state or federal agency, commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town. DRYDEN, N.Y., ZONING ORDINANCE,§2104 (2012). Note that (5) was deemed unconstitutional and severed by the

passage, the gas drilling company had secured leases to 22,000 acres in the town, with a total investment of approximately $5.1 million.[54] Anschutz immediately brought suit arguing that the towns zoning amendment was preempted by the supersedure clause of the OGSML and conflicted with the substantive provisions of the OGSML.[55]

Just days after *Dryden*, a different Supreme Court decided *Anschutz Exploration Corp. v. Town of Middlefield*[56] in February of 2012. This decision was also brought to the Appellate Division – Third Judicial Department, who upheld the lower court decision in this case as well.[57] Unlike the city of Dryden, CooperstownHolstein Corporation had, at the time of the ordinance in 2007, secured just two leases in the municipality, and had not conducted any drilling pending approval of the SGEIS.[58] Despite this limited drilling presence, the town chose to repeal their existing zoning ordinance and adopt a new zoning law which included a provision that defined "heavy industry and all oil, gas, or solution mining," as well as connected support activities, as prohibited uses within the town.[59] As in *Dryden*, Cooperstown Holstein brought suit alleging that this zoning ordinance was

court; 35 Misc 3d 450 at 470.

[54] *Supra* note49 *at* 453.

[55] N.Y. Envir.Conserv.Law §23.

[56] Cooperstown Holstein Corp. v. Town of Middlefield, 35 Misc. 3d 767 (Sup. Ct. 2012).

[57] Anschutz Exploration Corp. v. Town of Middlefield, 106 A.D.3d 1170 (2013)

[58] *Cooperstown*, 35 Misc. 3d at *769.*

[59] MIDDLEFIELD ZONING LAW Article V; further defined in article II B(7-8) as:

> *Gas, Oil, or Solution Drilling or Mining:* The process of exploration and drilling through wells or subsurface excavations for oil or gas, and extraction, production, transportation, purchase, processing, and storage of oil or gas, including, but not limited to the following: I. A new well and the surrounding well site, built and operated to produce oil or gas, including auxiliary equipment required for production (separators, dehydrators, pumping units, tank batteries, tanks, metering stations, and other related equipment; ii. Any equipment involved in the re-working of an existing well; iii. A water or fluid injection station(s) including associated facilities; iv. A storage or construction staging yard associated with an oil or gas facility; v. Gas pipes, water lines, or other gathering systems and components including but not limited to drip station, vent station, chemical injection station, valve boxes. *Heavy Industry:* a use characteristically employing some of, but not limited to the following: smokestacks, tanks, distillation or reaction columns, chemical processing or storage equipment, scrubbing towers, waste-treatment or storage lagoons, reserve pits, derricks or rigs, whether temporary or permanent. Heaving industry has the potential for large-scale environmental pollution when equipment malfunction or human error occurs. Examples of heavy industry include, but are not limited to: chemical manufacturing, drilling of oil and gas wells, oil coal mining, steel manufacturing.

prevented by the supersedure clause of the OGSML.[60]

In both cases, the courts looked to two factors:1) there was no expressed legislative intent that the OGSML supersede land use restriction; and 2) case law based on similarly worded legislation.[61] On the first of these factors, legislative intent,the court first turned to the text of the bill, including its expressly stated purpose of achieving "greater ultimate recovery of oil and gas and that the correlative rights of all owners and the rights of all persons including landowner and the general public be fully protected."[62]The court took note that there were state laws that did in fact preempt municipal zoning.[63] These include laws siting hazardous waste facilities and community residential facilities but in these cases there was explicit language that stated their intent to preclude local zoning laws from excluding these facilities.[64]

Such a provision was not present in the OGSML. The courts found nothing in the provisions of the OGSML that require "the abridgement of a town's powers to regulate land use through zoning powers expressly delegated in the statute of local governments §10(6) and Town Law §261" and noted that zoning conflicts do not directly conflict with the provisions in the OGSML.[65] This harmony between the state's interests and municipal home rule interests was stated most succinctly in *Middlefield*: "The state maintains control over the "how" of such procedures while the municipalities maintain control over the "where" of such exploration."[66]

The courts also found support for this notion from state case law. In the case *Matter of Frew Run Gravel Products v. Town of Carroll*[67] the NY state Court of Appeals looked at a very similar

[60]35 Misc. 3d 767.
[61]108A.3d 25(1947), 106 A.D.3d 1170.
[62]*Dryden*, 35 Misc. 3d 450 at 470.
[63]*Id.* at 470
[64]*Id.* at 470-1.
[65]*Id.* at 465.
[66]35 Misc. 3d 767 at 777-8.
[67]518 N.E.2d 920.

supersession provision in the state's Mined Lands Reclamation Law.[68]The relevant language in the OGSML reads:

> The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.[69]

While the language in the MLRL reads:

> For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.[70]

In *Frew Run*, the court found a difference between laws that directly regulate the industry practices, and land use regulations that incidentally affect the mining industry.[71]The Court failed to find anything in the language of the law that would prevent municipalities from zoning out the industry, but only from enacting laws that directly regulate the industry.[72] Absent a clear expression of legislative intent to preempt local control over land use restriction, there was no reason to read the law as preempting local zoning authority.[73]

This approach was further confirmed by the Court of Appeals in *In the Matter of Gernatt Asphalt Products, Inc. v. Town of Sardinia*, when the court further defined the differences between manner and method regulations and land use regulations.[74]The Court noted that nothing in the language of the MLRL indicated that the law was broader than necessary to prevent conflicting regulations dealing with the manner of mining operations, but does not preempt local land use

[68]N.Y. Envir.Conserv.Law §23 (1981).
[69]N.Y. Envir.Conserv.Law § 23-0303(1981).
[70]N.Y. Envir.Conserv.Law § 23-2703 [2].
[71]*Dryden*, 35 Misc 3d 450 at 460.
[72]*Id.*
[73]*Id.*
[74]87 N.Y.2d 668.

controls. [75]Notably, they also found that "[a] municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole."[76] Relying on *Frew Run* and *Gernatt Asphalt*,combined withthe lack of expressed legislative intent to prevent zoning regulation, the Third Department upheld the zoning laws in *Dryden and Middlefield* cases.[77]

IV. Pennsylvania

As in New York, municipalities in Pennsylvania derive their home rule power from the state constitution. Article IX of the Pennsylvania Constitution allows that any 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."[78] It is from this that the Municipalities Planning Code (MPC)article VI was created to govern zoning in PA.[79] The MPC creates two types of uses in municipal zoning – permitted uses and conditional uses.[80]Permitted uses are allowed as a right in municipality (for example a commercial structure in a commercial district).[81]Conditional uses are a use outside of the permitted uses.[82] In allowing this conditional use, the governing body may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of their zoning ordinance.[83]

As the gas boom in the Marcellus began, Pennsylvania became ground zero for development. Between 2000 and 2012 billions of dollars in investment poured into Pennsylvania. During this time period, the Department of Environmental Protection permitted 9,848 Marcellus

[75]*Id.*
[76]*Id.* at 684.
[77] 108A.3d 25 (2013), 106 A.D.3d 1170 (2013)
[78]PA CONST. art.IX §2.
[79] PA MUNICIPALITIES PLANNING CODE, Ch. 30 Article VI (1988).
[80]*Id.*
[81]PA MUNICIPALITIES PLANNING CODE, Ch. 30 Article VI §10913.2 (2002).
[82]*Id.*
[83]*Id.*

Shale wells, of which 6,391 are presently either drilled and producing, as well as 2,457 active permits that could eventually be drilled.[84]Projections for 2012 estimate that the wholesale revenues for gas producers in Pennsylvania will be in the range of $6 to $8 billion.[85] As this development occurred, the gas mining laws in Pennsylvania were set up very similarly to those of New York, in that they did not preempt municipal zoning regulations. Municipalitieshad the power to classify drilling as either a permitted or conditional use, which allowed them to review the use and to restrict or denyit as they saw fit.Seeking consistency in state regulations, the gas drilling industry began to lobby for state level legislation that would supersede the right of municipalities to choose how to classify gas-drilling operations, and instead mandate thatitbe deemed a permitted use in all municipalities. From 2007-2012 the gas lobbying expenditures in Pennsylvania were nearly $15.7 million consisting of donations to state candidates and political committees, including $6.8 million of new lobbying in 2011 and 2012 as the push to pass this act increased.[86]

This massive lobbying effort led to the creation of Act 13.[87] Signed into law on February 14, 2012, it amended the existing state gas mining law -Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes.[88] This amendment made significant changes to Pennsylvania zoning laws including: superseding all local zoning ordinances and bans relating to gas development, requiring that gas wells, pipelines, and compressor stations be deemed a permitted use in all municipalities with statutory minimum setbacks from existing structures, mandating that gas processing plants be deemed a permitted use also with statutory minimum setbacks, limiting the ability of municipalities to restrict overweight and other vehicles from their roads, preventing municipalities from limiting

[84]Sean D. Hamil, *Powdermill Compiles List of Pa. Shale Wells*, PITTSBURGH POST GAZETTE, May 25, 2012 *available at* http://www.post-gazette.com/stories/local/marcellusshale/powdermill-compiles-list-of-pa-shale-wells-637445/.
[85] Kevin Begos, *Pa. Supreme Court hears Marcellus Shale Case*,BLOOMBERG BUSINESSWEEK NEWS, Oct 16, 2012 *available at* http://www.businessweek.com/ap/2012-10-16/pa-dot-supreme-court-hears-marcellus-shale-case.
[86]*Gas Industry Spends $23 Million to Influence PA Officials*, CONSERVATION VOTERS OF PENNSYLVANIA, July 12, 2011, *available at* http://www.conservationpa.org/news/gas-industry-spends-23-million-to-influence-pa-officials/.
[87]H.B. 1950 (2011).
[88]58 Pa. C.S §3301-9.

hours of operation of any well or support structures, and gaging physicians treating patients who are exposed to fracking chemicals (that are claimed as a trade secret or confidential proprietary information) from disclosing the information provided to themto assist in treatment.[89] Act 13 also gives the power of eminent domain to corporations that are empowered to transport, sell, or store natural gas in the state.[90]

In exchange for this loss of municipal powers, Act 13 created a 15 year incremental "impact fee" based on the number of wells located there, and was estimated to be the equivalent of a 1-3% tax on natural gas extraction with the intent that this fee should offset the additional cost to the municipalities (road maintenance, cleanup, etc.) in allowing gas drilling there.[91] These fees, administered by the Pennsylvania Public Utilities Commission, raised a total of $204.2 million in 2011-12.[92]Of the $204.2 million, $100.8 million was distributed to municipalities, with an additional $82.4 million being set aside in a "Marcellus Legacy Fund" aimed at mitigating the effects of current of past mining.[93]The remaining funds go to various state agencies which experience higher operating costs in response to gas drilling.[94]

On March 29, 2012, a coalition of municipalities, individuals, and environmental organizations brought suit in the State common wealth court challenging the constitutionality of Act 13 on twelve different counts.[95] On July 26, 2012, the court issued its opinion in *Robinson Township v. Commonwealth of Pennsylvania.*[96]While this decision looked at all twelve counts, this note we will focus only on counts one to three which specifically deal with preemption of zoning ordinances.

Counts one to three of the suit consist of a substantive due process challenge under Article 1

[89]*Id.*
[90]58 Pa. C.S §3241.
[91] Daniel Raichel, *Home Rule Disaster: Pennsylvania Residents May Be Forced to Live Within 300 Feet of a Frack Well Pad,* Feb 9, 2012, *available at* http://switchboard.nrdc.org/blogs/draichel/home_rule_disaster_pennsylvani.html.
[92]PA. PUB. UTIL. COMM'N, ANNUAL REPORT OF FUND REVENUE AND DISBURSEMENTS (2012)
[93]*Id.*
[94]*Id.*
[95]Robinson Twp. v. Commonwealth of PA 52 A.3d 463 (Pa. Commw.Ct. 2012).
[96]*Id.* at 463-98.

§1 of the Pennsylvania Constitution and the 14th Amendment to the U.S. Constitution.[97] These counts allege that Act 13 amounts to an improper exercise of the state's police power that is not designed to protect the health, safety, morals, and public welfare of the citizens of Pennsylvania, that it creates an unconstitutional use of zoning districts by allowing for incompatible uses in a district, and that it makes it impossible for municipalities to create or follow comprehensive plans that protect the health, safety, morals, and public welfare of citizens.[98]In performing itssubstantive due process analysis, the court conducted a balancing test of landowner's rights against the public interest sought to be protected by this exercise of police power.[99]Under this standard for zoning to be constitutional, the court held that it "must be directed toward the community as a whole, concerned with the public interest generally, and justified by a balancing of community costs and benefits. These considerations have been summarized as requiring that zoning be in conformance with a comprehensive plan for growth and development of the community."[100]

The court found that this would effectively prevent cities from allowing the proverbial "pig in the parlor instead of the barnyard"that the US Supreme Court, in the landmark zoning case*Euclid Ohio v. Ambler Realty Co.*, had hoped to prevent.[101]The court in *Robinson Township* found that by mandating that cities allow uses that do not conform with their comprehensive plans violates substantive due process because it does not protect neighbors from harm, protect the neighborhood character, and it creates irrational zoning classifications,[102]which goes against the most fundamental concepts of zoning – that the purpose of land use ordinances are to prevent incompatible uses against a municipality's comprehensive plan. Thus, the court struck down these provisions and

[97]*Id.* at 470
[98]*Id.*
[99]*Id.* at 482-83(citing Hopewell Township Board of Supervisors v. Golla 499 Pa 246 (1982) and *In re*Realen Valley Forge Greens Assn. 576 Pa. 718 (2003))
[100]*Id.* at *483.*
[101] Land use restrictions aim to prevent problems caused by "the pig in the parlor instead of the barnyard" *Id.* (Citing Euclid, Ohio v. Ambler Realty Co. 272 U.S. 365 (1926)).
[102] For example, drilling rigs with 24 hour operations in residential neighborhoods, gas storage in commercial districts, etc.

enjoined any enforcement of them by the state.[103]

At present, this case is currently being appealed to the Pennsylvania Supreme Court.On October 17, 2012 the court heard the oral arguments, but as of the publishing of this note no final decision has been announced.The politics of the Pennsylvania Supreme Court may shape the outcome of this case. In the Commonwealth Court, all four judges thatwere appointed by Democrats voted in the majority, while all three judges appointed by Republicans opposed. On the Supreme Court, this split is three appointed by Republicans and three appointed by Democrats,with the seventh justice having resigned following a conviction on public corruption charges.[104]

This creates the possibility that this decision will be upheld not by a majority of the Supreme Court, but rather based on a tie. The Republican Governor has since appointed a replacement justice to fill the vacancy, however justices do not typically rule in a case if they are not involved in the oral arguments.[105] To that end, the Pennsylvania Department of Environmental Protection and Public Utilities commission have petitioned the court for a rehearing before the now full court.[106] As of publication, no decision has been made in this regard.

IV. Analysis

Pennsylvania has become the epicenter of the Marcellus shale gas boom, both geographically and in the legal context. The land use and mining law issues that the New York cases are debating are essentially the same issues that were facing Pennsylvania prior to Act 13. In this regard, *RobinsonTownship* serves as an interesting test case for New York and the other Marcellus states and should inform their steps regarding zoning and gas drilling going forward.[107]

While courts in both Pennsylvania and New York found in favor of upholding municipal

[103]*Robinson Twp.*, 52 A.3d 463.
[104] Timothy McNulty, *Orie Melvin resigns: Governor has chance to appoint new justice*,PITTSBURGH POST GAZETTE, March 26, 2013 *http://www.post-gazette.com/stories/local/state/orie-melvin-resigns-governor-has-chance-to-appoint-new-justice-680887/*.
[105] Robert Swift, *Roberts Elevation spurs new Act 13 dispute*, THE SCRANTON TIMES TRIBUNE (Aug. 7, 2013), http://thetimes-tribune.com/news/stevens-elevation-spurs-new-act-13-dispute-1.1540515
[106]*Id.*
[107]52 A.3d 463 (2012).

home rule powers over state gasmining regulations, they did so for very different reasons. In relying on interpretation of the OGSML, the New York municipalities have won a victory in asserting their right to use zoning regulations to decide whether or not to exclude gas drilling in their area. The outcome of these cases is serving as an impetus to many municipalities to pass similar ordinances. In fact, at present,sixty-three municipalities have enacted such a ban, while another one hundred and tenhave passed moratoria.[108]In addition, another eighty-seven are currently debating similar bans or moratoria.[109]However, not all actions aimed at the gas industry since these decisions has been directed at limiting its use. Some municipalities rather than excluding gas operations are instead enacting resolutions explicitly allowing and supporting gas drilling in their towns. Approximately fifty municipalities have taken this preemptive step to encourage gas development.[110]

The fact the municipalities have the ability to allow or prohibit fracking in their territory, and various communities have chosen both alternatives, demonstrates that the decisions in *Middlefield* and *Dryden* do not amount to a ban of fracking, but rather enables and encourages municipalities to decide what is in their best interest and act accordingly.[111]A municipality is able to weighthe benefits that arise from allowing fracking, with things like tax revenues, jobs created, increased income for residents from land leases, etc.As well as potential costs of such heavy industrial use, like pollution, noise, road damage, etc. This allows townstomake an informed decision to see if that use fits in their community. This is the essential purpose for zoning, to prevent "the pig in the parlor instead of the barnyard"[112] and to empower cities as the most appropriate authority to decide and shape the character of their home. This deference to local wishes was embodied in *Euclid* when it said:

[I]t is not the province of the courts to take issue with the council. We have nothing

[108]Current High Volume Horizontal Fracturing Drilling Bans and Moratoria in NY State, *available at* http://www.fractracker.org/maps/ny-moratoria/.
[109]*Id.*
[110]*Id.*
[111]*Anschutz*, 35 misc. 3d at 450; *Cooperstown*, 35 Misc. 3d at 767.
[112]Village of Euclid Ohio v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

> to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot-not the courts.[113]

However, this reliance in New York on statutory protection for these bans and moratoria raises another issue: this decision was not a constitutional upholding creating an affirmative right of municipalities to zone out gas drilling under NY home rule laws, but rather only found that the OGSML did not preempt municipalities from enforcing zoning ordinances against gas drilling. This creates a tenuous situation; municipalities have this right so long as the State Legislature does not amend the OGSML to explicitly include preemption of zoning ordinances.In the first two months of 2013 alone, there were eight separate proposed bills to amend the provisions of the OGSML, both to allow and exclude zoning preemption under this law.[114]At present, none of these have yet been enacted by the legislature, but this creates a measure of uncertainty for all parties involved. As was seen in Pennsylvania, it also opens the floodgate for a massive lobbying effort, similar to the one that led to the creation of Act 13.[115] For this reason, the outcome of the *RobinsonTownship*case in Pennsylvania has become an important touchstone for the strategies that will guide the future of gas drilling in New York.[116]

The State of Pennsylvaniausing Act 13, had already preempted their zoning ordinances from excluding gas drilling, so the municipalities had to turn to other sources to challenge the Act.[117]To do this, they used a substantive due process challenge. In the land use context, substantive due process claims are typically brought by property owners against the municipality arguing that aland use restriction, which prevents their desired use of their land, is arbitrary and capricious. In countering such claims, a municipality must simply show that their ordinance is part of a

[113]*Id.* at 393.
[114]N.Y. A.B. 3806, 236th Leg.Sess. (2013); N.Y. S.B. 2284, 236th Leg.Sess. (2013); N.Y. S.B. 734, 236th Leg.Sess. (2013); N.Y. A.B. 779, 236th Leg.Sess. (2013); N.Y. A.B. 845, 236th Leg.Sess. (2013); N.Y. A.B. 1363, 236th Leg.Sess. (2013); N.Y. A.B. 3806, 236th Leg.Sess. (2013); N.Y. A.B. 779, 236th Leg.Sess. (2013); N.Y. S.B. 734, 236th Leg.Sess. (2013).
[115]*See supra* note 84.
[116]52 A.3d 463 (2012).
[117]H.B. 1950 (2011).

comprehensive plan, and that there is a reasonable governmental interest, aimed at protecting the public as a whole, in preventing this non-conforming use. This is a very deferential standard toward the rights of municipalities to zone as they please.

Robinson Township turns the logic of a typical land use substantive due process claim on its head.[118]In this case, the municipalities argue that the state was forcing them to accept arbitrary and capricious zoning allowances, forcing them to accept non-conforming uses not aimed at public health or other legitimate governmental interests.[119] This would ineffect force them to allow irrational zoning against their comprehensive plan, by allowing gasdrilling operations in areas such as residential neighborhoods or commercial districts. Such irrational land uses, if allowed by a municipality in their zoning plan, would not be likely to withstand a substantive due process challenge under the 14th Amendment and Article §1 of the Pennsylvania Constitution. The Commonwealth Court found that in passing Act 13, the state imposes just such a plan on all municipalities,forcing them to accept these irrational zoning allowances. These practices, mandated by Act 13, create a chicken and egg dilemma, the municipality is forbidden from using zoning to prevent gas mining to prevent these specific irrational land uses, but if it allows such land uses it opens itself to substantive due process claims, which would likely prevent them from allowing such zoning.

Now in their arguments before the Pennsylvania Supreme Court, the state ignores this dilemma altogether, and makes a fundamentally different argument– that this law should be viewed through the framework of the relationship between the state and the municipalities.[120] They argue that municipalities have no sovereign powers, absent those explicitly granted to them by the state through the enabling statutes and modified by other laws, such as Act 13. While municipalities have

[118]52 A.3d 463.
[119]*Id.*
[120]Brief for the Appellant at 14, Robinson Twp. v. Commonwealth of Pa., 52 A.3d 463 (2012).

the power to enact zoning ordinances, this ability is limited to only pass such ordinances so long as they comply with the limits imposed on them by the state.[121] To allow municipal zoning requirements to preempt a legislatively passed state law goes against the very structure of the state's governmental framework.

The statedoes addresses the substantive due process argument, but not the dilemma, claiming that the Commonwealth Court failed to recognize the deferential standard of such a claim and failed to apply the correct test.[122] They argue that in conducting a balancing test between landowner's rights against the public interest sought to be protected by this exercise of police power the Commonwealth Court erred.[123] They suggest that the court should have mirrored the logic of a traditional land use substantive due process claim, andinstead,asked if Act 13 was rationally related to the state's objectives.[124] If so, under the deferential substantive due process standard, Act 13should be upheld.

Looking at these arguments, both sides have very convincing and contradictory positions under established case law. While the state is correct in asserting that all municipal power is limited to what the state grants to them, it seems hard to imagine that this extends to forcing the municipality to create zoning that conflicts with constitutional provisions. It seems unlikely that a court would uphold a state provision that mandated municipalities to enact discriminatory zoning practices under the equal protection clause, or mandate unconstitutional takings, simply because the state as the sovereign has the ability to place limits on municipal power. So why would a court allow the state to mandate the municipalities to create arbitrary and conflicting zoning in violation of substantive due process, and if it did allow this how would it address the inevitable challenges that arose from residents affected by this forced incompatible zoning?

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[121] *Id.*
[122] *Id.* at 18, 21-23.
[123] *Id.*
[124] *Id.* at 20.

The state would be correct in its assertion that the lower court failed to apply the proper deferential standard if this was a typical land use dispute between a citizen and a municipality, but the languagethat the state argues should be used is from cases where land use regulations are being challenged by property holders against governmental action. However, Act 13 is not a land use regulation per se in this regard, instead it is a law that restricts municipalities from enacting certain land law use regulations. Thus, this is not a typical land use substantive due process challenge – the question should not be if Act 13 is rationally related to a legitimate governmental interest, but rather if the state government has a legitimate interest in mandating that municipalities act in an irrational manner. Under this test, even with a very deferential standard, it seems likely that the state would lose.

Regardless of the outcome in this case, its effects are likely to be felt beyond just the shale gas industry and the states hoping to exploit this resource. Its outcome is likely to influence legislators and lobbyists in states like New York, and to shape future legislation limiting zoning powers regarding gas extraction. Because it deals with such fundamental constitutional questions, this case has a good chance of being appealed to the US Supreme Court regardless the outcome. It has the possibility to address how substantive due process colors not just the relationship between municipalities and their citizens, but also the relationship between states and the municipalities.

V. Conclusion

On the surface, the decision on how and where to permit hydrofracturing for natural gas within each of the Marcellus states seems to rely on localized factors such as the precise wording of state laws and precedential court decisions. However,an analysis of these cases sheds light on the dynamic issues at play in what seems to be a rather straightforward topic.

This issue of permitting gas drilling speaks to questions about the fundamental relationship between states and their municipalities. While the federal constitution is silent on this issue, these

states have chosen, in their state constitutions, to delegate some of their responsibilities to municipalities under the theory that a local body is more ideally situated to address issues that affect that community. However, in these instances this relationship is in conflict. Municipalities are tying to assert their position as the best judge of what is an appropriate use in the community, while states argue that such a scheme produces inconsistent results, which fail to maximize the efficiency of resource extraction.

There are numerous benefits from gas mining operations including job creation, increased tax revenues and lower energy costs. There are alsorisks including pollution to the water, air and soil, noise, increased tax burdens from the truckscreated by natural gas extraction. The role of the states in this process is to balance the interests of the gas-mining corporations and its citizens. How a state chooses to do this directly reflects how it values various factors from municipal home rule, corporate influence, environmental safety, tax dollars, and economic development, just to name a few. This balancing act is occurring in all of the Marcellus states, and the ramifications of these decisions are likely to echo all the way up to the Supreme Court.