# **1 The Law of Pooling and Unitization, 3rd Edition § 4.05**

***The Law of Pooling and Unitization, 3rd Edition* > *CHAPTER 4 The State Conservation Agencies***

**§ 4.05 The Relationship Between State Conservation Agencies and Other State or Local Entities**

1. **Multiple State Agency Coordination**

State agencies are agencies of limited powers. As such, there may be a delegation of power to agencies other than the state conservation agency for matters that relate to ***oil*** and gas development. For example, in many states the problem of disposal of hazardous and other wastes from drilling operations is not controlled by the state conservation agency, but by a state environmental protection agency. Because each state differs as to the allocation of delegated powers, one must carefully inspect the statutes that define the powers that have been given to the respective state agencies.

In *Oklahoma Water Resources Board v. Texas County Irrigation & Water Resources Association,*[[1]](#footnote-2)48 an enhanced recovery operation that had been authorized by the Corporation Commission ran into problems because of its need for groundwater. Mobil, the unit operator, applied for a board permit to use fresh water withdrawn from the Ogallala Aquifer to inject into the reservoir. The commission did not have the authority to grant Mobil the means by which it was to achieve the beneficial purposes of the compulsory unitization. Mobil had to meet the statutory requirements relating to groundwater use in order to accomplish its objectives. In this case the board did issue the permit after determining that the water would not be wasted, under the statutes relating to groundwater permits. The board held, although it was not required to do so, that the use of water for enhanced recovery operations was not waste per se. Note that the board could have found the use of groundwater prohibited by statute, or by its promulgated rules implementing the general statutory mandate, which would have thwarted the commission’s order to unitize and engage in an enhanced recovery operation. Where two agencies have permit-issuing authority over a single project, there should be coordination so that neither of them vetoes a project that has already been determined to be in the public interest. This is not to say that the Corporation Commission can act to authorize illegal uses of groundwater when the legislature has delegated those decisions to the Water Resources Board. The two state agencies must follow their respective statutory mandates to conserve ***oil*** and gas and to conserve water, but should do so in a manner that serves both purposes.

In resolving conflicts between co-equal state agencies, the courts often must interpret independent grants of authority that do not have express language favoring one agency’s power over another. In the *Texas County* decision, the court did not have to deal with a conflict between the exercise of two state agencies’ delegated power. That issue, however, did arise in *State ex rel. Pollution Control Coordinating Board v. Corporation Commission.*[[2]](#footnote-3)49 The issue related to the promulgation of rules and regulations to prevent the pollution of surface and groundwater. The board asserted that it had oversight jurisdiction under its statutory mandate to prevent the pollution of the state’s ground- and surface-water supplies. The court disagreed and interpreted the two statutory grants of power to show an intent to retain the Corporation Commission’s traditional exclusive regulatory authority over all aspects of ***oil*** and gas operations, including the pollution of water supplies. The later-enacted statutes giving the board its authority were deemed not to have repealed by implication the prior grant of authority to the commission. There is, however, a canon of statutory construction that presumes that the later-enacted legislation should prevail over earlier inconsistent legislation because the legislature is presumed to not want to create latent conflicts between two state agencies. Nonetheless, the court found the intent lacking to strip away the traditionally exclusive powers of the Corporation Commission without express language so indicating.

Another potential area for intergovernmental conflict at the state level is whether state-owned mineral interests are subject to the conservation regulations otherwise applicable to ***oil*** and gas development. That issue was faced by the Oklahoma Supreme Court in *State ex rel. Commissioners of the Land Office v. Corporation Commission,*[[3]](#footnote-4)50 which found that mineral interests owned by the state for the benefit of the common schools were nonetheless subject to the control of the Corporation Commission. The state’s lessee had filed a petition to space lands surrounding a producing well that they had drilled pursuant to a Land Office lease. The Land Office contended that the spacing regulations of the Corporation Commission were not applicable to state-owned ***oil*** and gas interests. The Supreme Court disagreed after looking at the statutory language giving the Corporation Commission the power to space.[[4]](#footnote-5)51 While the statutory language does not mention state-owned interests it does authorize the spacing of any lands that cover any common source of supply.

A further problem area where there can be overlapping or competing state agency involvement occurs where the development of ***oil*** and gas and “hardrock” minerals may create developmental conflicts.[[5]](#footnote-6)52 In Ohio, for example, after an individual has filed an application for a permit to drill an ***oil*** and gas well, the conservation agency must determine whether or not the well is located in a coal-bearing township.[[6]](#footnote-7)53 If it is so located, the permit must be transferred to another agency for disposition.[[7]](#footnote-8)54 The Division of Mines and Reclamation is required to notify existing mineral owners or lessees of the proposed drilling permit application. The owners or lessees are given an opportunity to comment on the application. If they protest, and the reasons cited by the owners or lessees are deemed to be “well founded,” the permit application must be denied.[[8]](#footnote-9)55

In *Redman v. Ohio, Department of Industrial Relations*, the constitutionality of the statute was challenged by an ***oil*** and gas well permit applicant whose application was denied after a coal lessee commented negatively on the project.[[9]](#footnote-10)56 The major issue was whether the delegation of power to the agency to determine whether there was an “affected mine” whose owner should receive notice and an opportunity to comment and to then determine whether the reasons given by that owner for rejecting the application were “well founded” was an unconstitutional delegation of legislative authority. The court found that the basic policy choice had been made by the legislature to encourage the production of coal. Having made that basic policy decision, how best to implement it could be left to an administrative agency, even if the terms used to limit that agency’s discretion were somewhat broad.[[10]](#footnote-11)57 The court also concluded that, as applied, the agency’s decision to not grant the ***oil*** and gas well permit applications was neither arbitrary nor unreasonable as the grounds laid out by the coal owners were in fact “well-founded.”

In *Murray Energy Corp. v. Division of Mineral Resources Management*,[[11]](#footnote-12)58 the court examined in great detail the Ohio statutory and administrative process for dealing with applications for permit to drill an ***oil*** and gas well in areas where there are, or may be, coal mining operations. As noted in *Redman* where a permit to drill is sought in a “coal bearing township” than the Division must notify the owner or lessee of any “affected mine” about the application.[[12]](#footnote-13)59 In this case, the Division notified Murray of the application so it must have determined that it was the owner or lessee of an “affected mine” even though there is no formal finding to that effect. In reviewing the Division’s implicit determination the court finds that there is substantial evidence in the record even in the absence of a finding that there is an active mine in the immediate vicinity of the proposed well. The chief of the Division then approves the permit to drill with a number of conditions imposed upon the applicant. Not satisfied with the conditions, Murray seeks administrative review of the permit decision with the Reclamation Commission as is authorized by statute.[[13]](#footnote-14)60 The Reclamation Commission reverses the chief’s decision. All three parties to the process, the ***oil*** and gas operator, the coal operator and the Division seek judicial review of the Reclamation Commission’s order.

Preliminarily, the court finds that Murray’s appeal to the Reclamation Commission was timely filed because Murray had sought an informal review by the chief after the initial order was published. That informal review process tolled the running of the 15-day limitations period for such appeals.[[14]](#footnote-15)61 As to the Division’s appeal of the Commission’s finding that the imposed conditions were *ultra vires*, the court agreed with the Commission that there is no statutory basis for the chief’s decision.[[15]](#footnote-16)62

In Texas, before an applicant can get a Class I disposal well permit for industrial wastes, the applicant must have the Railroad Commission send to the Texas Commission on Environmental Quality, a letter that the proposed well or wells “will not endanger or injure any known ***oil*** or gas reservoirs.”[[16]](#footnote-17)62.1 Only after receiving this so-called “no-harm” letter, will the TCEQ begin its review in earnest. In *Dyer v. Texas Commission on Environmental Quality*,[[17]](#footnote-18)62.2 the Railroad Commission had rescinded its “no-harm” letter after the review process had been initiated but TCEQ nonetheless granted the Class I disposal well permit. The Texas Supreme Court upheld the TCEQ decision because at the time that it was made the RRC rescission decision was not final as its effective date was delayed by 90 days in order to entertain motions for rehearing.[[18]](#footnote-19)62.3

In West Virginia jurisdiction to regulate ***oil*** and gas drilling operations depends on whether the operations involve a “shallow well” or a “deep well.”[[19]](#footnote-20)63 The Shallow Gas Review Board oversees shallow wells while the ***Oil*** and Gas Conservation Commission oversees deep wells.[[20]](#footnote-21)64 The statute provides a definition based on whether the well reaches the Onondaga Formation. In *State of West Virginia ex rel. Blue Eagle Land, LLC v. West Virginia* ***Oil*** *and Gas Conservation Commission*,[[21]](#footnote-22)65 plaintiffs sought a discretionary and extraordinary writ of prohibition directly with the Supreme Court of Appeals challenging the Commission’s promulgation of rule relating to Marcellus Shale wells arguing that it was ultra vires because those wells were shallow wells for which the Commission had been given no power to regulate. The court did not resolve the *ultra vires* issues because it found that the writ of prohibition should not be granted since the plaintiffs could make the ultra vires argument in a direct appeal of the Commission’s rules.

Where there are split surface/mineral estates and the surface is used as a state park, the likelihood of having competing state agencies acting discordantly is increased. In *Belden & Blake Corp. v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources*,[[22]](#footnote-23)66 an operator received a well drilling permit from the Department of Environmental Protection pursuant to the ***Oil*** and Gas Act.[[23]](#footnote-24)67 After DCNR was notified of the proposed drilling activities within a state park, it demanded that the operator execute a “coordination agreement” with it that would among other things impose an additional bonding requirement and a stumpage fee for lost trees.[[24]](#footnote-25)68 The operator then sought injunctive relief against DCNR’s further interference with its drilling plans. While the court admits that DCNR has a constitutionally-imposed fiduciary duty regarding public land under its control, that fiduciary duty does not translate into regulatory power over the owner of the ***oil*** and gas estate.[[25]](#footnote-26)69 Relying on a case involving competing mineral owners,[[26]](#footnote-27)70 the court treats the issue as a private law issue between a surface and mineral owner. Instead of focusing on the competing powers given to DEP to issue well permits and require bonds and given to DCNR to protect the public lands, the court merely places the onus on the surface owner to show that the actual use of the surface is negligent, excessive, or unreasonable. DCNR cannot impose requirements on the use of the surface by the ***oil*** and gas operator as a pre-condition to the use of the surface. The court further notes that merely because the surface owner is a governmental entity, the implied easement of surface use is not eliminated. The court further suggests that any attempt to lessen the scope of the implied easement would constitute a regulatory taking.[[27]](#footnote-28)71

1. **Zoning—County and Municipal**

The exercise of the police power by both state and sub-state units of government may give rise to competing, duplicative, and conflicting regulatory mechanisms. While states are the basic repository of the police power, all states give some of their sub-state units, such as municipalities and counties, the power to regulate land use through the exercise of the zoning power. A mineral owner desiring to drill an ***oil*** or gas well within the boundaries of a sub-state unit so empowered may have to receive permission from that body, notwithstanding that owner’s receipt of state conservation agency approval. Sub-state permitting authorities may view an application for a permit to drill differently than a state conservation agency. Local citizens may not want ***oil*** and gas wells drilled nearby, especially where the surface owners are not going to share in the benefits of production. Local ordinances may require the well operator to seek a building permit, a special use permit, a grading permit or perhaps even a variance, before the well can be drilled.[[28]](#footnote-29)72 Public hearings will probably be required and opposition to the permit application can be organized. In some situations, the decision to grant or deny the permit may be subject to a referendum requirement. Unlike many state ***oil*** and gas conservation agencies that act reasonably promptly upon the submission of an application to drill, it will probably be the case that local permits or approvals will take several months at a minimum. Care must be taken to see that the sub-state unit’s requirements are met in order to avoid lengthy delays in the permitting process.[[29]](#footnote-30)73 The number of sub-state units attempting to regulate and/or prohibit ***oil*** and gas operations has increased substantially with the development of ***oil*** and gas from shale-based formations.[[30]](#footnote-31)74

Various questions arise in these intergovernmental permitting scenarios. An initial basic question is whether the state has empowered the sub-state unit to engage in zoning or land use regulation. All states have adopted some form of a zoning enabling act, but in many states, those acts do not apply to county government. In addition, many states have constitutional or statutory home rule provisions which cede substantial police powers to the sub-state units. A second question relates to whether the state ***oil*** and gas conservation statute preempts local powers after the drilling permit has been granted.[[31]](#footnote-32)75 A third question that may arise relates to whether the sub-state unit has exercised its land use powers pursuant to whatever procedural and substantive requirements are contained in the enabling statute or local ordinance.

In this section we will focus on the interplay between the state conservation agency and a sub-state unit’s exercise of the police power. There are few generalizations in this area that can be made. Individual constitutional and statutory language may be critical. But in most situations, the state, if it expresses its intent to do so, can preempt sub-state units from exercising their land use powers on persons who receive state conservation agency permits.[[32]](#footnote-33)76 In most states, however, the state ***oil*** and gas statutes are silent on the issue of how sub-state and state regulatory efforts are to co-exist.[[33]](#footnote-34)77 Where the statutes are silent, the courts must step in to deal with the overlapping grants of authority, which potentially may lead to conflicts and duplicative permit requirements for the ***oil*** and gas operator.

1. **Limits on Land Use Controls**

The starting point for any discussion on the constitutional limits on land use control is the landmark United States Supreme Court decision, *Village of Euclid v. Ambler Realty Co.*[[34]](#footnote-35)78 *Euclid* upheld the constitutionality of a municipal zoning ordinance against a challenge that it violated the substantive due process and takings clauses of the federal Constitution. This was a per se challenge, and the court found that zoning was a valid exercise of the police power. It reserved the right to find individual applications of the zoning power unconstitutional, but the mere enactment of a zoning law that restricted the use of land would not be invalid. *Euclid* also limited the role of the court in reviewing the validity of zoning ordinances. It suggested that a zoning ordinance, like all legislation, was entitled to a presumption of validity. The burden of proving that the ordinance was invalid was on the party challenging the validity of the ordinance. In addition, if reasonable minds could differ as to the rationality of the ordinance, it should be upheld. Many states follow the general guidelines of *Euclid* insofar as it relates to the judicial review of decisions adopting zoning ordinances and individual decisions made pursuant to that zoning ordinance. This would suggest that attacking zoning ordinances would be difficult. Following the *Euclid* rationale, there have been numerous cases that have allowed a local government to regulate drilling activities even though the effect of the regulation has been to deny a landowner or lessee the right to drill.[[35]](#footnote-36)79 In addition to local regulation of drilling operations, it is clear that zoning ordinances can affect downstream operations such as refineries, compressors and liquid natural gas facilities.[[36]](#footnote-37)80

Several examples of the operation of municipal zoning ordinances will illustrate how the general rules of *Euclid* are applied to ***oil*** and gas operations. In *Frost v. Ponca City,*[[37]](#footnote-38)81 the court recognized that either the state or local government has the power to regulate or even abrogate the rule of capture. In *Frost,* the city prohibited landowners from drilling and producing hydrocarbons, which apparently had escaped from a local refinery, and authorized the city to remove those same hydrocarbons in order to protect the public safety. The court treated the regulation as one that merely restricted the landowner’s right to capture the hydrocarbons and not one that destroyed that right.

Many local ordinances will require the operator to seek a variance from a board of adjustment before they can drill. In most cases a variance can only be granted if the applicant can prove unnecessary hardship or that the operation of the zoning ordinance would be unconstitutional as applied. In *Eason* ***Oil*** *Co. v. Uhls,*[[38]](#footnote-39)82 the court upheld the board’s refusal to grant a variance where there was evidence showing that the drilling operations would threaten the municipal water supply. The court clothed the board’s decision with a presumption of validity. It found that the applicant had not shown that there was unnecessary hardship proven and that the granting of the variance would not be in the public interest because of the threat to the water supply. Thus, it upheld the denial of the variance even though it would prevent the lessee and the lessor from exploiting their mineral and royalty interests.[[39]](#footnote-40)83

In *Pelican Production Corp. v. Mize,*[[40]](#footnote-41)84 the Oklahoma Supreme Court overturned a Board of Adjustment decision denying the plaintiffs their needed variance in order to drill a gas well in an area zoned for single-family residential use. The court determined that the clear weight of the evidence demonstrated that the granting of the variance would not be detrimental to the property in question or to the public interest. Whether the court was following the *Euclid* deferential approach is questionable, although the court did state that the board’s decision was not made with due regard to the rights of the mineral estate owners.

Other cases have not been so harsh on operators and have found that the ordinance as applied is invalid. In *Clouser v. City of Norman,*[[41]](#footnote-42)85 several tracts of land were annexed to the city and placed in a zoning district that prohibited the drilling of ***oil*** wells. Clouser, who leased the acreage, owned 10 acres within the annexed area. The Clouser family was the only family living on the tract. The lessee drilled a 4000-foot well, and the city sought to enjoin the lessee from engaging in further activities. The court acknowledged the general validity of the zoning ordinance, but stated that as individually applied to this largely rural tract, with no other families other than the Clousers, the ordinance was not reasonably related to the public health, safety, or general welfare. This is a somewhat narrow view of what zoning is supposed to accomplish. It is not the present uses of the land that are of primary importance. The zoning ordinance is supposed to deal with future uses as well. Between the comprehensive plan and the zoning ordinance, the municipality is supposed to be able to control, or at least affect, the growth patterns of the city. By allowing the well to be drilled, the court is restricting the municipality from allowing certain types of development surrounding the well. Nonetheless, the court felt that given the rural nature of the land in question, it was unreasonable to deny the operator the right to drill a well. The court’s view may have been influenced by the limited impact of the drilling and the potential for only short-term effects.

The revitalization of the Fifth Amendment’s prohibition against the taking of property without the payment of just compensation throws some doubt into many of the early cases which suggested that a total prohibition against drilling would be valid.[[42]](#footnote-43)86 One of the first cases upholding a compulsory pooling ordinance, in dicta, noted that a total prohibition of drilling within a municipality may be valid if reasonably related to the public health, safety or general welfare.[[43]](#footnote-44)87

A total prohibition against drilling because it would cause waste under the Michigan statute was found to be a regulatory taking in *Miller Brothers v. Department of Natural Resources.*[[44]](#footnote-45)88 Applying state law principles, rather than Fifth Amendment precedent, the Michigan Court of Appeals found that a Departmental decision prohibiting the drilling of any wells within the Nordhouse Dunes Area, encompassing some 4000 acres, was a taking of the mineral owners’ property interests for which just compensation was due. This case suggests that denying a mineral owner for an indefinite period of time the power to extract his minerals will require compensation for the temporary taking of that interest.

*Miller Bros*. was distinguished in *Schmude* ***Oil****, Inc. v. Department of Environmental Quality*.[[45]](#footnote-46)89 An ***oil*** and gas lessee owning ***oil*** and gas leases on private lands located within the Pegeon River Country State Forest claimed that by applying statutory limits on ***oil*** and gas drilling to private lands within the Forest its leasehold estate was being taken without just compensation.[[46]](#footnote-47)90 Michigan generally follows the federal approach to regulatory takings claims. The ***oil*** and gas operator asserted that the *Lucas* total taking test should be applied. Under Michigan terminology the *Lucas* test is classified as a “categorical” taking for which just compensation is due. But in order for there to be a categorical taking “there must be a denial of all economically beneficial or productive use of the land.”[[47]](#footnote-48)91 Here is where the court distinguished *Miller Bros*. which had applied the categorical takings analysis to the prohibition of all drilling within a designated area. In this case, the denial of Schmude ***Oil***’s permit applications in the no-drilling zone did not prohibit it from drilling in the limited development region, nor did it prevent it from drilling horizontal wells from surface sites outside of the no-drilling zone.[[48]](#footnote-49)92

The court then moves on to the ad hoc balancing test of *Penn Central*. Michigan has its own take on the *Penn Central* test looking to determine if the regulation is:

(1) comprehensive and universal so that the private property owner is relatively equally benefited and burdened by the challenged regulation as other similarly situated property owners, and (2) if the owner purchased with knowledge of the regulatory scheme so that it is fair to conclude that the cost to the owner factored in the effect of the regulations on the return on investment, and (3) if, despite the regulation, the owner can make valuable use of his or her land, then compensation is not required …:[[49]](#footnote-50)93

The regulation regarding drilling activities within the Forest applies even-handedly to all those who own the mineral interests. Thus, the burden of the regulatory scheme does not single out Schmude ***Oil*** for special treatment. The second factor, however, favors Schmude ***Oil*** because the regulations will have a negative impact on the value of its ***oil*** and gas leases. As to the third factor, reasonable investment-backed expectations, the court notes that the restrictions on drilling within the Forest were enacted well before Schmude ***Oil*** purchased its ***oil*** and gas leases. Therefore the Penn Central factors favor the finding of no regulatory taking.

In many land use ordinances, ***oil*** and gas drilling permits require the issuance of a discretionary permit. These discretionary permits often give the sub-state unit the power to condition issuance of a permit upon agreement to individually negotiated requirements designed to promote the general welfare. These discretionary permits can be called a conditional use permit, a special use permit or a special exception permit. In *Mid Gulf, Inc. v. Bishop,*[[50]](#footnote-51)94 the plaintiff as a surface owner and subdivider and as an ***oil*** and gas lessee became embroiled with the City of Lansing over plaintiff’s plan to subdivide and drill an ***oil*** and gas well. Mid Gulf sought a discretionary permit to drill a well. At that time there was no drilling ordinance adopted by the City. Two other drilling permits were issued on an ad hoc basis by the City to other ***oil*** and gas lessees. Two days after receiving Mid Gulf’s request the City Council enacted an ordinance imposing a 90-day moratorium on the issuance of discretionary permits for ***oil*** and gas wells. After holding a series of public hearings, the city enacted a drilling ordinance which strictly proscribed the conditions that would have to be met before such a permit would issue.[[51]](#footnote-52)95 After initially denying Mid Gulf’s application, the city voted to conditionally approve it after Mid Gulf had filed a state court action. Mid Gulf rejected the conditional approval asserting that drilling under those conditions would be economically unfeasible. Shortly thereafter Mid Gulf lost its lease.

Mid Gulf’s basic claim was that the conditional approval amounted to a regulatory taking of its leasehold estate. The status of Kansas inverse condemnation law was somewhat confused, but the court eventually applied federal inverse condemnation law, concluding that Kansas law was similar. This case, arising before *Lucas,* did not involve allegations of a total deprivation of use, although it is probable that such an argument could have been raised. Thus, the court applied the traditional two-pronged approach to regulatory takings cases; whether the regulation substantially advances legitimate state interests and whether it denies an owner all economically viable uses of the land.[[52]](#footnote-53)96

The court had no trouble finding that regulation of ***oil*** and gas drilling activities has substantially advanced a legitimate state interest. The real issue is whether the regulation has gone too far in restricting the uses to which the property interest may be placed. The facts in this case raise an interesting problem because Mid Gulf owned both the surface and the mineral interest through its lease. The court aggregated Mid Gulf’s interests in determining whether there was a deprivation of all or most of the beneficial uses of the interest. Clearly there was a restriction that severely impacted the ***oil*** and gas leasehold estate. If that was considered by itself, as in *Miller Brothers,* it is possible that a regulatory taking would have been found.[[53]](#footnote-54)97

In regulatory takings cases there is a requirement similar to the exhaustion of administrative remedies doctrine, that the inverse condemnation claim is not ripe for review until such time as a final decision has been reached on the merits.[[54]](#footnote-55)98 Thus, a party asserting a regulatory taking must show that the sub-state unit has had a chance to approve, conditionally approve or deny the permit application. In this case Mid Gulf cut short its administrative and judicial review of the permit denial to challenge the reasonableness of the ordinance as it dealt with the mandatory conditions imposed on Mid Gulf. The court concluded:

In order for a plaintiff to recover on an inverse condemnation claim under Kansas law, it is necessary for a plaintiff to show that the governing body’s action was final and unable to be altered. The plaintiff here abandoned its challenge to the reasonableness of the City’s regulation under [state law] … Pursuing this procedure would have given a court an opportunity to review specific provisions of the C.U.P.[conditional use permit] for reasonableness and, if “too oppressive,” to either invalidate those provisions or remand them to be changed, thus curing the harm to the plaintiff and preventing a taking from occurring.[[55]](#footnote-56)99

In *Whitman v. Board of Supervisors of Ventura County*,[[56]](#footnote-57)100 a neighbor challenged the issuance of a discretionary permit for an exploratory ***oil*** and gas well because of the alleged inadequacy of the environmental impact report that was required for such a permit. While courts engaging in judicial review of cases arising under the California Environmental Quality Act are supposed to engage in a deferential substantial evidence review, this court gives a “hard look” to the EIR. The court finds that the EIR was clearly inadequate at looking at cumulative impacts of the permit by failing to consider the demand for future permits should the well be a producer.

In addition to classic regulatory takings limitations, a number of states, including Michigan and Pennsylvania, have developed a doctrine that subjects zoning ordinances that totally prohibit an otherwise lawful use, including the extractive industries, to a higher level of judicial scrutiny than otherwise applies to zoning regulations. *Silva v. Ada,*[[57]](#footnote-58)101 is an example of the heightened scrutiny given a zoning ordinance that totally prohibited strip mining within the municipality. The court quoted from an earlier decision dealing with ***oil*** drilling and concluded that the courts: “… have particularly stressed the importance of not destroying or withholding the right to secure ***oil***, gravel, or mineral from one’s property, through zoning ordinances, unless some very serious consequences will follow therefrom.”[[58]](#footnote-59)102

In *Kyser v. Kasson Township*,[[59]](#footnote-60)103 the Michigan Supreme Court overruled the “no serious consequences” rule in *Silva* as it limits the ability to exclude extractive industries from a community and also concluded that *Silva*’s exclusionary zoning rules had been legislatively preempted by the enactment of an exclusionary zoning statute.[[60]](#footnote-61)104

Because ***oil*** and gas operations are not occurring in areas for which there has been little, if any, such development in the past, zoning ordinance definitional issues may arise. In *In re Township of Bradford*,[[61]](#footnote-62)105 the zoning issue was a straightforward ordinance interpretation issue regarding allowed used within a specific use district. An ***oil*** and gas lessee sought to construct a compressor station in order to move its product to market. The Township’s zoning ordinance specifically allowed ***oil*** and gas production activities within the relevant zoning district, but the Township zoning enforcement official interpreted the ordinance so that compressors were not considered part of the production process.[[62]](#footnote-63)106 The Township Zoning Hearing Board reached two conclusions: (1) the compressor station was a building because it was covered by a tarpaulin, and (2) the compressor was a processing, not a production, facility. Without giving any deference to the Board’s interpretation of its own ordinance, and not relying on either generic or legal dictionaries, the court determines that since the gas cannot be sold without a compressor, it is an integral part of the production process.[[63]](#footnote-64)107 Furthermore, there is a statutory canon of construction for zoning ordinances that favors the free use of land.[[64]](#footnote-65)108 Thus, the Board’s interpretation of its ordinance so as to treat compressors as not part of the production process is overturned.[[65]](#footnote-66)109

A similar zoning issue as analyzed in *Bradford Township* was also analyzed in *Markwest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board*.[[66]](#footnote-67)109.1 Markwest Liberty applied for a discretionary permit to locate several compressors needed for its midstream operations in an area zoned for light industrial use. The ZHB rejected the application finding that the proposed use would not be of the same general character as the uses allowed as of right in such a zoning district.[[67]](#footnote-68)109.2 While professing to take a “soft glance” approach to reviewing the ZHB decision, the court clearly takes a “hard look” at the ZHB’s myriad conclusions that supported its decision to deny the discretionary permit.[[68]](#footnote-69)109.3 After remand, the ZHB imposed 26 conditions before it would grant the discretionary permit and Markwest Liberty again appealed.[[69]](#footnote-70)109.4 Pennsylvania law treats a special exception permit as an allowed use subject to the objective criteria contained in the relevant zoning ordinance. In this case, the court essentially reviewed all of the conditions to see if they were reasonable and consistent with the state zoning enabling act and the municipal zoning ordinance. Finding a number of the conditions were not supported by substantial evidence in the record while others went outside of the scope of the ordinance by regulating business operations rather than land use, the Commonwealth Court affirmed a number of the conditions while reversing a majority of the conditions.[[70]](#footnote-71)109.5

Many zoning ordinances provide that if a proposed use is not included within the list of uses allowed then the use is prohibited. In dealing with ***oil*** and gas activities that are new to a particular area then it may be likely that ***oil*** and gas activities are not a listed use. In those circumstances if the ordinance contains such a provision, any proposed ***oil*** and gas activities will not be allowed.[[71]](#footnote-72)110

In certain circumstances zoning ordinances that neither allow nor prohibit a particular use, may allow such uses under a discretionary permit system. In *Gorsline v. Board of Supervisors of Fairfield Township*,[[72]](#footnote-73)110.1 the Township only had three zoning districts none of which either authorized or prohibited ***oil*** and gas drilling operations. In seeking the required discretionary permit, an ***oil*** and gas operator made a presentation about the well drilling or construction phase and the post-drilling phase. The Board granted the permit but the trial court, based on the evidence relating to the drilling phase activities, reversed. Because discretionary uses are concerned with the continuing use of land and not the construction phase for the proposed use, the Commonwealth Court reversed the trial court’s decision and reinstated the Board’s issuance of the discretionary permit that contained numerous conditions that would have to be complied with in both the drilling and post-drilling phases.

Upon appeal to the Pennsylvania Supreme Court, the Commonwealth Court decision was reversed and the trial court decision, which reversed the Township Board of Supervisors’ decision to grant the discretionary permit, was reinstated.[[73]](#footnote-74)110.2 ***Oil*** and gas drilling operations are neither specifically allowed nor specifically prohibited in the relevant zoning district where the drill site was planned to be located. As such it fell within the parameters of the Township zoning ordinance that specifically provides that such uses may be allowed with the issuance of a discretionary permit as long as it is “similar to or compatible with” other permitted uses.[[74]](#footnote-75)110.3 While the substantial evidence test is generally deferential in nature, the majority opinion appeared to take a “hard look” at the evidence before the Board and then made a de novo decision as to what the majority believed “similar to or compatible with” meant in the context of the Township zoning ordinance.[[75]](#footnote-76)110.4

Where sub-state units have not had recent experience in dealing with various ***oil*** and gas operations, the lack of an ordinance dealing with such operations may create some new issues. For example, if a sub-state unit has no ordinance dealing with the regulation of seismic or geophysical operations may it adopt by the passage of a resolution, and not an ordinance, a policy not to allow the use of sub-state unit roads for such operations. At least one federal district court in Pennsylvania has enjoined the implementation of such a resolution.[[76]](#footnote-77)111

Another problem relating to zoning ordinances is whether a permit decision can be put to a popular vote or a referendum before it would become effective. This popular consent requirement may be city-wide or can be limited to neighbors or adjacent landowners. In *Peter Henderson* ***Oil*** *Co. v. City of Port Arthur,*[[77]](#footnote-78)112 the city enacted a zoning ordinance requiring lessees to apply for a special use permit before they could drill a well. The special use permit would only be granted if the adjacent landowners consented to the drilling of the well. The plaintiff was denied a permit because he was unable to secure the required consent. The trial court upheld the neighborhood consent requirement, but the Fifth Circuit dismissed the cause of action based on statute of limitations grounds without discussing the consent problem.

The issue of the validity of consent requirements in zoning ordinances was raised but not resolved in *Shelby Operating Co. v. City of Waskom.*[[78]](#footnote-79)113 The city adopted an ordinance prohibiting the location of wells within 500 feet of any building without the building owner’s consent. An ***oil*** and gas lessee, whose lease specifically allowed wells to be drilled as close as 200 feet to a structure, challenged the validity of the ordinance after the required permit was denied. The court did not resolve the constitutional issue raised by the consent requirement because the issue was not properly preserved for appeal and the city amended its ordinance removing the consent requirement.[[79]](#footnote-80)114

The United States Supreme Court has issued somewhat inconsistent opinions on the validity of consent requirements for zoning or land use permits. It is clear, however, that a general rezoning referendum requirement is valid, so if an operator in a city has to get a zoning change and the city has a referendum requirement for zoning changes, the operator will have to secure approval of a majority of the voters to effectuate that zoning change.[[80]](#footnote-81)115

If an ordinance otherwise allows the use to exist, but gives the neighbors a veto power over that use, the holding in *Seattle Title Trust Co. v. Roberge*[[81]](#footnote-82)116 would find that consent requirement invalid. The ostensible rationale of *Roberge* is that an otherwise lawful use could not be rendered unlawful by the vote of one’s neighbors. Yet, there are cases that support a consent requirement being imposed on certain nuisance-type uses such as billboards, before they are entitled to be built.[[82]](#footnote-83)117

Where an ordinance provides dual procedures to be followed, the shorter of the two being triggered by receiving consent of the surface owner to the ***oil*** and gas drilling operations, a California court rejected the operators’ claim that the county had improperly delegated legislative authority to severed surface owners.[[83]](#footnote-84)117.1 In reconciling the seemingly inconsistent Supreme Court opinions, the court emphasized that the surface owner was not the final or definitive decision-maker in the permit review process. While the surface owner could make it more difficult or expensive to get a permit by withholding consent, it was the county that was the ultimate decision-maker as to whether a permit was to be approved or denied.[[84]](#footnote-85)117.2

Another way municipalities regulate well drilling is through the imposition of regulatory fees. In several cases the courts have invalidated excess regulatory fees or the imposition of mandatory dedications of overriding royalty interests where the clear purpose of the ordinance was to raise money for something other than the reimbursement of the costs of operating the regulatory program.[[85]](#footnote-86)118

The general rule regarding regulatory fees is that they are valid only to the extent that relates to the costs of operating the regulatory program. When the regulatory fees overreach, they in essence become a tax, which in most cases is beyond the power of the local government to impose. A good example of how a fee may be treated as a tax when it seeks to do more than cover the costs of the regulatory program is in *Billy* ***Oil*** *Co., Inc. v. Board of County Commissioners.*[[86]](#footnote-87)119 The county imposed a $200.00 fee for special use permits to drill wells. The county admitted that the fee was intended to go beyond the scope of reimbursing the county for the costs of operating the program. It was also designed to deal with other problems caused by well drilling, including street widening and paving and cleanup funds for spills. The court, therefore, had no problem invalidating the fee aspect of the ordinance as an ultra vires attempt to impose taxes for general revenue purposes.[[87]](#footnote-88)120

The scope and extent of sub-state regulation is expanding as ***oil*** and gas development increasingly occurs within populated areas. In *Kohout v. City of Fort Worth*,[[88]](#footnote-89)121 the court explores at length the Fort Worth ***oil*** and gas drilling ordinance that provides for three levels of permits depending upon where the proposed well site will be located. For high impact permits located within 600 feet of a designated protected use, the operator needs permission of the City Council or a waiver by the owners of the protected uses.[[89]](#footnote-90)122 The other two categories of permits, urban and rural, are treated more like traditional land use permits, which may be administratively issued. In this case plaintiff was challenging the issuance of a permit where it was disputed as to whether an urban or high impact permit was required. The operator eventually got the Tarrant County Regional Water District to execute a waiver since the well site was within 600 feet of a bike trail owned by the District.[[90]](#footnote-91)123 The court dismissed the plaintiff’s suit based on lack of standing since she had not alleged a particularized injury.[[91]](#footnote-92)124

Where it is the governmental body that is executing a lease that is then affected by the exercise of the police power, another constitutional constraint may lead to potential municipal liability. The U.S. Constitution and most state constitutions contain a provision prohibiting the government from engaging in actions that impair the obligation of contract.[[92]](#footnote-93)125 Where the government issues a lease and then engages in legislative actions that totally or substantially impair the value of the contract, the Contract Clause will be deemed to have been violated. That may lead to either monetary damages similar to that used for inverse condemnation claims, or injunctive relief.[[93]](#footnote-94)126

It is not uncommon for sub-state units to have restrictions on the sale or disposition of parkland. In *Don’t Drill the Hills, Inc. v. City of Rochester Hills*,[[94]](#footnote-95)126.1 neither the execution of a lease with a no surface occupancy provision absent approval of the City Council, nor the modification of an existing easement to allow access for purposes of replacing a pipeline, constituted either a sale of the parkland, nor a use of the parkland for non-park purposes.

1. **Conflicts Between State and Local Regulatory Programs**

Intergovernmental conflicts between the exercise of power by state conservation agencies and sub-state units exercising either home rule or delegated powers can arise in several different contexts. Where home rule status has been granted a sub-state unit by either the state constitution or a state statute, that unit possesses all of the police power of the state, except that which may conflict with a state or federal constitutional provision. As is often stated, home rule units do not look to the state for a grant of power, but only for a limitation on that power.[[95]](#footnote-96)127

In those states that have active state environmental protection acts (SEPA’s), the interplay between mineral development, state law and local land use regulation is best settled by express statements of legislative intent and prioritization. In California, for example, counties are required to prepare environmental impact reports (EIRs) before they can make land use decisions. In *Oro Fino Gold Mining Corp. v. County of El Dorado,*[[96]](#footnote-97)128 the petitioner sought a special use permit to drill some test holes prior to proposing a surface mining project. The county refused to issue the permit until such time as an EIR was prepared. The court upheld the county’s determination noting the substantial impacts of the drilling activities. It was clear that Oro Fino had to get local permission in order to mine, which required it to seek a discretionary special use permit from the county.

As noted earlier, however, not all home rule powers are equal. In California,[[97]](#footnote-98)129 and Colorado,[[98]](#footnote-99)130 among others, the constitutional grant of power over matters of local concern cannot be interfered with by the state legislature. In states with non-preemptible home rule units, the issue initially becomes whether the subject-matter of the regulation is one of local concern. If it is, the state has no power to regulate. Typically, matters relating to organization and structure are considered local matters, while regulatory powers are considered matters of statewide or state/local concern. If a matter is considered statewide in nature, the non-preemptible home rule power becomes very much like preemptible home rule power.

Sub-state units that have preemptible home rule power and sub-state units that have enabling authority to exercise the police power come under similar constraints when it comes to intergovernmental conflicts with the state legislature or state administrative bodies. Many state constitutions provide that home rule units can exercise all of the state’s police power except where they are in conflict with state law.[[99]](#footnote-100)131 Likewise, many state legislatures have granted through statutes very broad police powers to sub-state units.[[100]](#footnote-101)132 Even where states retain plenary power, as in Wyoming,[[101]](#footnote-102)133 sub-state units are granted the power to zone.

Illinois has a unique statutory provision dealing with sub-state regulation that gives sub-state governmental units a veto power over the drilling or deepening of wells located within their boundaries.[[102]](#footnote-103)134 It does not authorize the sub-state unit to zone for ***oil*** and gas operations but no permit will be issued unless “consent is secured” by the operator and filed with the permit to drill or deepen application.[[103]](#footnote-104)135 With this kind of veto power a sub-state unit can effectively prohibit the drilling of wells without adopting an ordinance that would reach the same result. Sub-state units, however, may still want to adopt ***oil*** and gas regulatory ordinances in order to impose performance standards on ***oil*** and gas operations where consent to drill or deepen has been given.

In all of the above situations overlapping state and local regulatory powers can occur. Where the legislature expressly preempts sub-state powers, it is clear that the state agency will prevail. The best way to resolve intergovernmental conflict situations is for the legislature to speak clearly on the issue of preemption. For example, in *Billy* ***Oil*** *Co., Inc. v. Board of County Commissioners,*[[104]](#footnote-105)136 an attempt to impose a tax in the form of an excessive regulatory fee was found in conflict with state taxation statutes.[[105]](#footnote-106)137 The Kansas statute in question clearly preempted county regulation of ***oil*** and gas drilling to the extent that the state Corporation Commission was regulating that activity. While there is room for interpretation in the statute regarding the extent to which the Corporation Commission regulates all aspects of ***oil*** and gas drilling and production activities, the statute leaves no room for doubt that when there is a conflict, the state agency’s power prevails.[[106]](#footnote-107)138

In the vast majority of cases where there is no express state preemption and an intergovernmental conflict in the exercise of the police power occurs, there are a number of tests that the court may apply to determine whether the sub-state unit’s powers have been preempted. There are two judicially created implied preemption doctrines. One is implied preemption by occupation of the field. In this type of implied preemption, the issue is whether the state has enacted a comprehensive regulatory scheme so as to preempt sub-state unit regulation in the same field. One difficulty with this doctrine is how do you define the “field” that has been occupied. As a general matter, courts have been very reluctant to find that ***oil*** and gas regulation by the state has occupied the field even though most of the producing states have comprehensive statutory and regulatory programs.[[107]](#footnote-108)139 A second doctrine is implied preemption by conflict. In all jurisdictions, be they non-preemptible or preemptible home rule jurisdictions, sub-state unit police power regulation may not be inconsistent with, or in conflict with, state statutory and regulatory provisions. An initial, and very difficult, question that normally must be asked is whether or not there is a conflict between the state and sub-state exercise of the police power. Having duplicative regulatory schemes does not necessarily create a conflict or an inconsistency with state law. How a court defines a conflict may be critical in determining whether the powers may co-exist.[[108]](#footnote-109)140 If there is no conflict there will be no implied preemption. In many early cases, for example, the court determined that sub-state regulation of ***oil*** and gas operations was intended to achieve public safety objectives, while state regulation had other objectives so that there was no conflict between the dual exercise of power.[[109]](#footnote-110)141 Many of the state cases that are discussed *infra*, attempt to apply an “operational conflicts” analysis without really defining what is an “operational conflict.” This type of analysis not only requires an ad hoc review of the language of the ordinance and the language of the statute but a practical review of how the two regulatory programs operate in the real world. The result of an operational conflict analyst is hard to predict and would necessarily change if either the ordinance, statute, or regulation changes.

Issues relating to preemption and conflict analysis are fairly state-specific. The following sections explore on a state-by-state basis the major cases that have dealt with these issues as they relate to ***oil*** and gas operations.

1. **California**

California is a non-preemptible home rule state.[[110]](#footnote-111)142 There is a state conservation agency with somewhat limited powers when compared to the major producing states.[[111]](#footnote-112)143 As to the powers granted to the state conservation agency relating to well spacing and community leases there is an express statutory provision that denies that state legislation preempt sub-state unit regulation relating to various aspects of ***oil*** production activities.[[112]](#footnote-113)144 There are no other express statutory provisions relating to the other powers exercised by the state conservation agency relating to ***oil*** and gas production activities. It also has a history of sub-state regulation of ***oil*** and gas drilling activities that overlap with the state agency’s power.[[113]](#footnote-114)145 In the many cases dealing with local zoning regulations, the issue of preemption has never arisen, the courts and/or parties presuming that local governments have the concurrent power to regulate ***oil*** and gas drilling and production activities.[[114]](#footnote-115)146 These decisions have focused on the substantive due process and takings issues.[[115]](#footnote-116)147 It is most likely that both state and sub-state regulation of ***oil*** and gas drilling activities will continue. With recent interest in the development of the geographically large Monterey Shale formation, an increasing number of sub-state units in California have either prohibited ***oil*** and gas operations or prohibited specific types of ***oil*** and gas operations including hydraulic fracturing and/or acidizing within their communites.[[116]](#footnote-117)148

A recent decision, however, has found that certain county ordinances adopted through the initiative process were preempted by state statutes. In *Chevron U.S.A., Inc. v. County of Monterey*,[[117]](#footnote-118)148.1 the voters of Monterey County enacted through the initiative process changes to the County zoning ordinance that prohibited wastewater disposal and impoundment uses and the drilling of new ***oil*** and gas wells.[[118]](#footnote-119)148.2 While noting the many earlier decisions which either directly held that there was no preemption or presumed that local regulation was valid,[[119]](#footnote-120)148.3 the court carefully examined the grant of authority to the state ***oil*** and gas conservation agency to regulate the drilling of ***oil*** and gas wells and the disposal or impoundment of wastewater before concluding that there was a conflict between the relevant state statutes and the prohibitions contained in the County ordinance. As for the express statutory provision that recognizes substate unit authority to regulate the court interpreted that provision as only applying to unit operations and not ***oil*** and gas operations in general.[[120]](#footnote-121)148.4

1. **Colorado**

Colorado is another non-preemptible home rule state.[[121]](#footnote-122)149 But, unlike California, there has been active litigation in the state on the preemption issue, both as it applies to home rule units and to non-home rule units.[[122]](#footnote-123)150 With a recent amendment to the ***Oil*** and Gas Conservation Act, the Legislature seemingly delegated to the courts the preemption issue when it said: “Nothing in this section shall establish, alter, impair, or negate the authority of local and county governments to regulate land use related to ***oil*** and gas operations.”[[123]](#footnote-124)151 Colorado is also a state where the preemption analysis has evolved over time. In the first of the litany of cases challenging sub-state regulation of ***oil*** and gas operations, the Colorado Court of Appeals in *Oborne v. County Commissioners of Douglas County*,[[124]](#footnote-125)152 seemed to find that the Colorado ***oil*** and gas conservation act occupied the field of ***oil*** and gas regulation. In *Oborne*, the County was a non-home-rule unit that enacted an ordinance pursuant to a zoning enabling act.[[125]](#footnote-126)153 The enabling act did not specifically deal with ***oil*** and gas operations. The county ordinance required all ***oil*** and gas operators to apply for a discretionary special use permit before they could drill in the zoning districts where drilling was allowed. The county issued the permit to allow drilling but imposed a number of conditions upon the applicant.[[126]](#footnote-127)154

The Court of Appeals used several different rationales in finding that the county regulations were preempted. The court used a canon of construction often seen in state/sub-state preemption cases, namely that where the state has delegated a general authority to a sub-state unit and has also delegated a specific authority to a state agency, the specific legislative act will prevail over the general legislative act.[[127]](#footnote-128)155 The state conservation act, at that time did not have a clear, express statement of preemption.[[128]](#footnote-129)156 There is some language in the opinion regarding the fact that both the Colorado ***Oil*** and Gas Conservation Commission and the county regulations were in conflict because they covered the same areas, but the clearest statement regarding preemption is as follows:

Here, the comprehensiveness of the provisions of the Act, and the Commission’s regulations issued pursuant thereto, and the purposes sought to be accomplished by them, as well as the absence from the Act’s terms of any reference to local zoning or other regulations, convince us that it was the intent of the General Assembly to vest in the Commission the sole authority to regulate those subjects addressed by the Act and to bar any local regulation addressing those subjects.[[129]](#footnote-130)157

If the occupation of the field theory had been accepted, then both home rule and non-home rule sub-state units would not have been allowed to regulate any aspect of ***oil*** and gas drilling operations. Home rule units would be barred because the field would be defined as a matter of statewide concern and thus outside the “local regulation” that is non-preemptible. But the Colorado Supreme Court refused to embrace the occupation of the field preemption doctrine and instead relied on an implied preemption by conflict approach.

Three years after refusing to hear the appeal in *Oborne*, the Colorado Supreme Court dealt with another general law sub-state unit’s attempt to regulate ***oil*** and gas operations in *Board of County Commissioners, La Plata County v. Bowen/Edwards Associates*.[[130]](#footnote-131)158 The County adopted a zoning ordinance that restricted the location of ***oil*** and gas drilling operations. The ordinance was authorized by the same state zoning enabling act for counties that was at issue in *Oborne*.[[131]](#footnote-132)159 In addition, Colorado has delegated to the ***Oil*** and Gas Conservation Commission the usual regulatory powers over ***oil*** and gas drilling, production and exploration activities. The court analyzed the three traditional ways in which a general law government’s expressly delegated powers may be preempted by state statute. The first way is through an express legislative statement that was not present in the Colorado ***oil*** and gas conservation statute. The second is the occupation of the field theory that seemingly was at the heart of the *Oborne* case discussed earlier.[[132]](#footnote-133)160 Occupation of the field analysis relies in part on defining the regulatory field as one involving state, state/local or local interests. The third deals with the reality of two complementary statutory schemes that can coexist as long as there are no operational conflicts. The *Bowen/Edwards* court found no express preemption and no occupation of the field through the enactment of the Colorado ***Oil*** and Gas Conservation Act. The court does not distinguish *Oborne*, but it is clear that it rejected the language cited above that relied on a finding that the state occupied the field of regulating ***oil*** and gas operations. Implied preemption by occupation of the field cannot be inferred merely by the enactment of a state statute addressing matters of state concern. Even if there is a need for uniformity in regulation, that by itself will not justify a finding of field preemption. Courts will not lightly infer a preemption of express statutory authority for sub-state units.[[133]](#footnote-134)161

On the operational conflicts issue, the court had to remand for further fact finding to determine if there were such conflicts. The court noted that the county regulation was not a total prohibition on locating ***oil*** and gas wells, but merely a requirement that the producer get a county permit and comply with certain performance standards before drilling a well. The fact that the county was regulating in areas covered by state regulations would not necessarily lead to a finding of conflict preemption.[[134]](#footnote-135)162 Likewise, the requirement of getting a county permit was not dispositive of the issue of whether or not a conflict existed. But the court did not define exactly when there would be operational conflicts between the state and sub-state regulatory programs.

The *Bowen/Edwards* approach to preemption was carefully followed in *Town of Frederick v. North American Resources Co*.[[135]](#footnote-136)163 Frederick, a non-home-rule unit, enacted a comprehensive drilling ordinance that required all parties to get a special use (discretionary) permit prior to drilling within the town. In addition, there was a $1,000 application fee and certain performance standards relating to well location, setbacks, noise mitigation, visual impact and aesthetic impacts. The ordinance also imposed penalties for failure to comply. NARCO drilled a well in the town without submitting a special use permit application, based upon its receipt of a Colorado ***Oil*** and Gas Conservation Commission (COGCC) permit.

The tripartite approach to preemption analysis used in *Bowen/Edwards* governed. While there had been changes in state statutes and regulations dealing with the powers of the COGCC and non-home-rule units, the court found that they did not affect the findings of *Bowen/Edwards* insofar as they related to no express preemption and no occupation of the field. The strengthening and expansion of some of COGCC’s powers did not reflect an intent to occupy the field but did expand the potential for sub-state regulation to conflict with COGCC powers. In addition, there was clear statutory language showing that the legislature intended that local regulation of ***oil*** and gas operations continue.

The court, however, did, find that in applying the “operational conflicts” test, several of the town’s regulations were preempted. The court quoted from *Bowen/Edwards* to determine the scope and extent of these operational conflicts. It said:

[T]he efficient and equitable development and production of ***oil*** and gas resources within the state *requires uniform regulation of the technical aspects of drilling*, pumping, plugging, waste prevention, safety precautions, and environmental restoration. ***Oil*** and gas production is closely tied to well location with the result that the *need for uniform regulation extends also to the location and spacing of wells.*[[136]](#footnote-137)164

The existence of a discretionary permit system *per se* did not violate the “operational conflicts” test of *Bowen/Edwards*, especially where the town provided that the permit could not be denied when it met the performance standards imposed by the ordinance. Thus, it was clear that NARCO would have to file a permit application and pay the accompanying fee in order to drill a well within the town. The court also upheld the town’s regulations insofar as they required building permits for above-ground structures, access roads, response costs and similar items. Those matters were found not to conflict with any extant COGCC regulations. On the other hand, after doing a regulation-by-regulation analysis of several other town requirements, the court invalidated the town’s setback requirements, noise abatement rules and visual impact rules as directly conflicting with specific COGCC rules. In addition, the court invalidated the town’s efforts to incorporate existing COGCC rules and allow for independent town enforcement. The court held that while Colorado statutes allow any person to sue to enforce COGCC rules, that person must comply with various procedural safeguards, none of which were present in the town’s enforcement mechanism. Thus, the attempt to have town penalties for violating COGCC rules was also found preempted by state law.

The “operational conflicts” test is necessarily an *ad hoc* approach to determining whether there is state preemption. The COGCC sought to provide some certainty to the test by promulgating a rule that provided: “The permit-to-drill shall be binding with respect to any conflicting local governmental permit or land use approval process.” In *Board of County Commissioners of La Plata County v. Colorado* ***Oil*** *& Gas Conservation Commission*,[[137]](#footnote-138)165 several counties challenged the validity of the rule. As a preliminary matter, the COGCC argued that the plaintiff counties lacked standing to challenge the rule amendment. Colorado applied a two-part test to determine standing. First, the plaintiff must first have suffered an injury in fact; second, the injury must be to a legally protected interest as contemplated by statutory or constitutional provisions. The court found that counties had asserted an injury in fact because the COGCC rule would strip them of their powers to regulate ***oil*** and gas drilling activities. No specific injury in fact needed to be shown because the counties were asserting a facial attack on the validity of the rule. The legally protected interest was the counties’ power to enact and enforce their land use planning powers within their borders. Furthermore, a specific statutory grant to counties authorized them to seek judicial review of any agency action directed toward either a county or its employees.[[138]](#footnote-139)166 The counties had standing to seek a declaratory judgment regarding the effectiveness of the COGCC rule.

On the merits the court had to determine whether the amended rule was consistent with the operational conflicts test. While normally the interpretation of a rule by the agency charged with its enforcement is entitled to substantial deference,[[139]](#footnote-140)167 this rule essentially involved an attempt to codify the *Bowen/Edwards* test, a uniquely judicial function for which no deference should be given. The rule provided that the COGCC permit shall preempt “any conflicting” local land use regulation. *Bowen/Edwards* only allowed preemption where there was an operational conflict determined by the application of the *ad hoc* balancing test. Thus, on its face, the rule went too far in defining what local land use regulations may be preempted and it exceeded the COGCC’s authority to promulgate rules.

The preemption of a home rule unit’s zoning ordinance was analyzed in *Voss v. Lundvall Brothers, Inc*.[[140]](#footnote-141)168 The city ordinance totally prohibited the drilling of ***oil*** and gas wells within city limits unlike the earlier ordinances which regulated ***oil*** and gas operations. The city argued the ordinance was a matter affecting local or municipal affairs and was therefore insulated from state statutory preemption under Colorado’s non-preemptible home rule provision. The state countered by arguing that ***oil*** and gas drilling and production practices were matters of statewide concern. The Colorado Supreme Court found that the ***oil*** and gas conservation was a matter of both state and local concern. As a hybrid state/local matter, ***oil*** and gas conservation regulation may be exercised by both the state and the home rule sub-state unit. The issue then returned to the same arena as for the general law sub-state unit: was the ordinance preempted under any of the three traditional preemption doctrines? Because the ordinance involved a total prohibition, the court found that there was an implied preemption by conflict. The court found a significant state interest in the efficient development and production of ***oil*** and gas resources in a manner that prevents waste and protects correlative rights. A total prohibition against drilling directly conflicted with those goals by removing large areas of potential ***oil*** and gas production from state control. That would frustrate the important state interests as reflected in the Colorado ***Oil*** and Gas Conservation Act. Therefore the ordinance was preempted due to the operational conflict with the Act.[[141]](#footnote-142)169

The difficulty in applying the *Bowen/Edwards* operational conflicts test is reflected in *Board of County Commissioners of Gunnison County v. BDS International, LLC.*[[142]](#footnote-143)170 The county enacted an ordinance that regulated ***oil*** and gas development by imposing various performance standards, bonding requirements and a permit fee. An operator, joined by the Colorado ***Oil*** & Gas Conservation Commission challenged the ordinance on preemption grounds. The trial court found that much of the ordinance was preempted under the operational conflicts test as a matter of law. These regulations included permit submittal requirements relating to wildlife and wildlife habitat analysis, vegetation, water quality, and drainage and erosion control plans. Further county regulations imposing standards including waterbody setbacks, geological hazards, wildlife hazards, financial guarantees, and protection for cultural and historic resources were also invalidated. The operator had not applied for a permit so the attack seemed to be facial in character. Because it was a facial and not an as-applied challenge, the court attempted to harmonize the state and county regulatory programs so as not to find preemption.[[143]](#footnote-144)171

The operational conflicts test necessarily requires the court to take an *ad hoc* and “hard look” approach in reviewing the ordinance and the state statute and regulations. In most situations, summary judgment would be inappropriate in resolving an operational conflicts claim. Notwithstanding the general rule regarding the need for an *ad hoc* balancing approach, the court did find that the county regulations imposing financial requirements and providing access to records to county employees were preempted because they were directly inconsistent with COGCC regulations covering the same areas.[[144]](#footnote-145)172 As to the other permit and performance standards, the Court of Appeals remanded the case for a trial on the merits.[[145]](#footnote-146)173 Preemption in general, and operational conflicts and occupation of the field theories in particular, necessarily require courts to engage in balancing tests. Judicial balancing of public policy interests, which are at the heart of many preemption claims, not only leads to inconsistent approaches but also to the judicial branch stepping into the shoes of the legislative branch.[[146]](#footnote-147)174 This intrusiveness is not necessarily to be blamed on an “activist” state court but on the legislature’s inability to clearly demarcate regulatory powers between the state and its sub-state units.

In *City of Longmont v. Colorado* ***Oil*** *and Gas Association*,[[147]](#footnote-148)174.1 the Colorado Supreme Court resolved some of the inconsistencies impacting Colorado preemption law that had arisen in its earlier opinions. The citizens of Longmont enacted an initiative ordinance that prohibited the use of hydraulic fracturing within City limits and likewise prohibited the storage in open pits or the disposal of solid or liquid wastes created during the hydraulic fracturing process within City limits. The court reiterates its tri-partite approach to preemption analysis, namely that a sub-state ordinance may be the subject of express preemption, implied preemption. and operational conflicts preemption. Colorado uses the term implied preemption to designate what is generally called implied preemption by occupation of the field while operations conflicts preemption arises from *Bowen/Edwards* and is not treated as implied preemption. Because Colorado has non-preemptible home rule as to matters of local concern, an additional analytical process is applied to preemption claims. A court must determine whether a sub-state ordinance is a matter of statewide, mixed state/local or local concern. The court felt that in *Voss* there was language that conflated the state or local concern matter with the three preemption tests. The court also felt that, as the authors contended, the operational conflicts test would necessarily be an ad hoc, fact-based determination that would add substantial uncertainty to the preemption issue.

The Colorado Supreme Court first separated out the non-preemptible/preemptible home rule analysis from the preemption analysis by applying a multi-factor test to determine whether the Longmont ordinance is a matter of state, state/local or local concern. Those factors are: “(1) the need for statewide uniformity of regulation, (2) the extraterritorial impact of the local regulation, (3) whether the state or local governments have traditionally regulated the matter, and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation.”[[148]](#footnote-149)174.2 It relies on *Voss* to conclude that a total prohibition against ***oil*** and gas drilling operations is a matter of state/local concern, due in part to the fact that ***oil*** and gas reservoirs do not coincide with sub-state unit boundaries and that there is a need for statewide uniformity of regulation. Likewise, the court concludes that a local prohibition would have extra-territorial effects since it would increase the cost of producing ***oil*** and gas, leave ***oil*** and gas in the ground and lead to a patchwork of regulation and prohibition. Even though land use and zoning controls have historically been implemented by sub-state units, the court concluded that the Longmont ordinance involves matters of state/local concern.

Once a matter is treated as involving state/local concern, a home rule sub-state unit is treated the same as a general law sub-state unit, meaning that its ordinances may be preempted. Express preemption and implied preemption by occupation of the field primarily involve issues of legislative intent.[[149]](#footnote-150)174.3 In order to show express preemption, the statutory language must show a clear and unequivocal intent to preempt.[[150]](#footnote-151)174.4 Likewise, implied preemption by occupation of the field must be shown by clear legislative intent and should not be lightly inferred. The court noted that it had used different tests to determine whether or not there was an operational conflict between a sub-state unit ordinance and a state statute. One such test is whether the ordinance materially impedes or destroys a state interest. A second is whether the ordinance authorizes what the statute forbids or forbids what the statute authorizes. Neither test was intended to be exclusive. Instead the court posited the following multi-factor test to determine whether or not there is an operational conflict:

[W]e will analyze an operational conflict by considering whether the effectuation of a local interest would materially impede or destroy a state interest, recognizing that a local ordinance that authorizes what state law forbids or that forbids what state law authorizes will necessarily satisfy this standard.[[151]](#footnote-152)174.5

The court, however, said that applying these factors does not involve an ad hoc factual inquiry but instead will be accomplished by the court which will engage in “a facial evaluation of the respective statutory and regulatory schemes … .”[[152]](#footnote-153)174.6 While this clarification eliminates some of the uncertainty in making a preemption decision, it still leaves to the court substantial discretion to determine whether or not there is an occupational conflict.

As applied to the Longmont prohibitory ordinance, the court has no difficulty finding that there is neither express preemption nor implied preemption by occupation of the field.[[153]](#footnote-154)174.7 The court stepped back from its *Bowen/Edwards* decision that suggested that the regulation of “technical” matters by the sub-state unit would necessarily involve an operation conflict. Nonetheless, it finds that the prohibitory ordinance is preempted because of the statute’s extensive delegation of powers to the Colorado ***Oil*** and Gas Conservation Commission to regulate ***oil*** and gas operations to achieve a number of public policy objectives including the prevention of waste, protection of public health and the environment and the production of ***oil*** and gas.[[154]](#footnote-155)174.8 It is almost self-evident that a prohibitory ordinance will operationally conflict with a statutory scheme that allows ***oil*** and gas operations subject to compliance with state-imposed performance standards.[[155]](#footnote-156)174.9

In *City of Ft. Collins v. Colorado* ***Oil*** *& Gas Association*,[[156]](#footnote-157)174.10 decided the same day as *Longmont,* the court was faced with the same preemption arguments except that the prohibitory ordinance in Ft. Collins was labelled a five-year moratorium on ***oil*** and gas drilling operations that involve hydraulic fracturing operations. Ft. Collins argued that because it did not totally prohibit all ***oil*** and gas drilling operations and that because it was a “temporary” prohibition, there were no operational conflicts.[[157]](#footnote-158)174.11 As in *Longmont*, the moratorium ordinance was adopted by an initiative election. The court applied the general principles as it had announced in *Longmont* and did not accept the two distinctions raised by Ft. Collins. While conventional drilling was still allowed, the state still authorized the use of hydraulic fracturing which could not occur within City limits. Additionally, the court found that a five-year moratorium was too long a period of time so as to give the City some breathing room while it considered what type of regulatory ordinance, if any, it should adopt.

There are provisions of the Colorado ***oil*** and gas conservation statute that provide for express preemption. In *Town of Milliken v. Kerr-McGee* ***Oil*** *& Gas Onshore, L.P.*,[[158]](#footnote-159)175 the court was faced with a challenge to a series of Town ordinances that sought to impose various types of security and inspection fees on ***oil*** and gas operations. The relevant Colorado statute prohibits local governments from “charg[ing] a tax or fee to conduct inspections or monitoring of ***oil*** and gas operations with regard to matters that are subject to rule, regulation, order, or permit condition administered by the [Colorado ***Oil*** and Gas Conservation Commission … ].”[[159]](#footnote-160)176 The statute also provides for certain exceptions to the express preemption rule relating to fees for inspecting and monitoring road damage and compliance with local fire codes, land use permit conditions, and local building codes.[[160]](#footnote-161)177 The Town’s ordinances did not refer to those exempted fees and therefore the court had little trouble concluding that the ordinances were expressly preempted.

A year prior to the *Bowen/Edwards* opinion, the Colorado Supreme Court was called upon to resolve a preemption claim relating to hard rock mining operations on state lands. In *Colorado State Board of Land Commissioners v. Colorado Mined Reclamation Board*,[[161]](#footnote-162)178 a lessee of state-owned minerals sued the Board of Land Commissioners after they refused to issue a permit to expand its existing mining operations because the Boulder County zoning ordinance only allowed “limited impact” mining. The Colorado Constitution vests power over state-owned lands with the Board.[[162]](#footnote-163)179 The relevant state statute mandated that a permit must be denied by the Board if it would be in violation of any sub-state unit zoning regulation.[[163]](#footnote-164)180 Given the express power granted to sub-state units to object to mining permits, the Colorado Supreme Court found that there could be no express preemption, notwithstanding the constitutional grant of authority to the Board. While the legislature could either eliminate the required approval of sub-state units, which it did, or preempt any sub-state regulation of operations on state-owned lands, it had not done so. In order for there to be express preemption there must be a clear expression of preemptive intent.

Partly in response to the decisions finding preemption of sub-state regulation of ***oil*** and gas operations, sub-state units began to enter into memorandums of understanding (MOU) or ***oil*** and gas operator agreements whereby the sub-state units would by contract seek to achieve many of their objectives that could not be legislatively enforced.[[164]](#footnote-165)180.1 These MOUs can cover a wide range of topics including, limits on well pads, limits on the number of wells, plugging and abandonment of legacy wells, use of best management practices, exemption from some of the requirements typically imposed upon discretionary land use permits and administrative approvals based on the submitted plans.[[165]](#footnote-166)180.2

After a number of legislative changes designed to give sub-state units a greater role in the regulatory process, the Colorado legislature in 2019 enacted sweeping changes to its ***Oil*** and Gas Conservation Act, including provisions relating to the preemption issue.[[166]](#footnote-167)180.3 The 2019 amendments make it clear that sub-state units may impose regulations on ***oil*** and gas operations that are more stringent than the state regulations.[[167]](#footnote-168)180.4 The statute also gives sub-state units the power to require ***oil*** and gas operators to file siting and location permit applications independent of any state permit requirement.[[168]](#footnote-169)180.5

1. **Idaho**

In 2011, the Idaho Legislature amended its ***oil*** and gas conservation statute in order to partially occupy the field of regulation vis-à-vis sub-state units.[[169]](#footnote-170)181 The statutory amendment does not totally preempt local governmental powers relating to planning and zoning but appears to adopt the Colorado approach that local governments cannot regulate where to do so would involve an “operational conflict” with state regulation.[[170]](#footnote-171)182 The statute uses the following language in its attempt to balance state and sub-state unit power over ***oil*** and gas operations:

(4) To implement the purpose of the ***oil*** and gas conservation act, and to advance the public interest in the orderly development of the state’s ***oil*** and gas resources, while at the same time recognizing the responsibility of local governments to protect the public health, safety and welfare, it is herein provided that:

(a) The commission will notice the respective city or county with jurisdiction upon receipt of an application and will remit, electronically, a copy of all application materials.

(b) No ordinance, resolution, requirement or standard of a city, county or political subdivision, except a state agency with authority, shall actually or operationally prohibit the extraction of ***oil*** and gas; provided however, that extraction may be subject to reasonable local ordinance provisions, not repugnant to law, which protect public health, public safety, public order or which prevent harm to public infrastructure or degradation of the value, use and enjoyment of private property. Any ordinance regulating extraction enacted pursuant to chapter 65, title 67, Idaho Code, shall provide for administrative permitting under conditions established by ordinance, not to exceed twenty-one (21) days, unless extended by agreement of the parties or upon good cause shown.

(c) No ordinance, resolution, requirement or standard of a city, county or political subdivision, except a state agency with authority, shall actually or operationally prohibit construction or operation of facilities and infrastructure needed for the post-extraction processing and transport of gas and ***oil***. However, such facilities and infrastructure shall be subject to local ordinances, regulations and permitting requirements, not repugnant to law, as provided in chapter 65, title 67, Idaho Code.

In 2016, the statute (Idaho Code § 47-314) was amended to read as follows:

(9) It is the intent of the legislature to occupy the field of the regulation of ***oil*** and gas exploration and production with the limited exception of the exercise of planning and zoning authority granted cities and counties pursuant to chapter 65, title 67, Idaho Code.

(10) To implement the purpose of the ***oil*** and gas conservation act, and to advance the public interest in the orderly development of the state’s ***oil*** and gas resources, while at the same time recognizing the responsibility of local governments to protect the public health, safety and welfare, it is herein provided that:

(a) The commission will notify the respective city or county with jurisdiction upon receipt of an application and will remit, electronically, a copy of all application materials.

(b) No ordinance, resolution, requirement or standard of a city, county or political subdivision, except a state agency with authority, shall actually or operationally prohibit the extraction of ***oil*** and gas; provided however, that extraction may be subject to reasonable local ordinance provisions, not repugnant to law, which protect public health, public safety, public order or which prevent harm to public infrastructure or degradation of the value, use and enjoyment of private property. Any ordinance regulating extraction enacted pursuant to chapter 65, title 67, Idaho Code, shall provide for administrative permitting under conditions established by ordinance, not to exceed twenty-one (21) days, unless extended by agreement of the parties or upon good cause shown.

(c) No ordinance, resolution, requirement or standard of a city, county or political subdivision, except a state agency with authority, shall actually or operationally prohibit construction or operation of facilities and infrastructure needed for the post-extraction processing and transport of gas and ***oil***. However, such facilities and infrastructure shall be subject to local ordinances, regulations and permitting requirements, not repugnant to law, as provided in chapter 65, title 67, Idaho Code.

1. **Illinois**

Illinois, by statute, gives to sub-state units the power to veto applications for permits to drill within their jurisdictional boundaries by denying consent to the operator since “no permit shall be issued unless consent is secured and filed with the application.”[[171]](#footnote-172)183 Furthermore, as to non-home rule units, there is an enabling statute that gives such unit the power to: “grant permits to mine ***oil*** or gas, under such restrictions as will protect public and private property and insure proper remuneration for such grants.”[[172]](#footnote-173)184

In *Tri-Power Resources, Inc. v. City of Carlyle*,[[173]](#footnote-174)185 the court was faced with an interesting set of facts regarding a non-home rule unit’s power to regulate or prohibit ***oil*** and gas operations. Tri-Power received a state permit to drill in June 2005 at a time when the location of the proposed well was in the unincorporated area of Clinton County. In September 2005, however, the drillsite tract is annexed into the City. At the time of annexation, the City’s zoning ordinance is silent as to ***oil*** and gas drilling operations but like many other zoning ordinances it contains a provision that if a use is not listed in the ordinance it is a prohibited use and ***oil*** and gas drilling operations was not so listed. Properly, the court must determine if the City has the power to regulate or prohibit ***oil*** and gas operations since it is a non-home rule unit. Illinois generally follows Dillon’s Rule in interpreting enabling acts which is a rule of narrow or strict construction. Nonetheless, the court finds that the combination of the provisions in the ***Oil*** and Gas Act,[[174]](#footnote-175)186 and the enabling act,[[175]](#footnote-176)187 clearly give non-home units the power to allow or disallow ***oil*** and gas drilling operations within their jurisdictional limits.[[176]](#footnote-177)188 The court correctly noted that the *ultra vires* issue is a question of statutory interpretation and that both statutes when read together empower sub-state units to consent or to withhold consent. Neither statute can be read as requiring sub-state units to consent to drilling operations. That consent or withholding of consent may be by virtue of an individual decision or by application of a sub-state unit’s zoning ordinance that either prohibits ***oil*** and gas drilling operations or regulates them in a way so that the operator has not complied with the regulation.[[177]](#footnote-178)189 Given the express language of the ***Oil*** and Gas Act, the decision allowing total prohibitions of ***oil*** and gas drilling operations by sub-state units is understandable. If the Illinois Legislature desires a different result it will need to amend the ***Oil*** and Gas Act limiting sub-state unit’s power to totally prohibit such uses.

A similar consent requirement was added by the Illinois legislature in 2015 to deal with hydraulic fracturing and horizontal drilling operations. As with the prior statutory provision, before an operator may seek to engage in either or both of those activities within the boundaries of a city, village or incorporated town, the operator must show in its application an “official consent” by the local governmental body.[[178]](#footnote-179)189.1

1. **Kansas**

Kansas has a long history of sub-state unit regulation of ***oil*** and gas drilling and production activities.[[179]](#footnote-180)190 The first major municipal regulatory effort to deal with ***oil*** and gas activities in the United States occurred in Winfield, Kansas in 1927.[[180]](#footnote-181)191 It involved spacing and pooling regulation and served as a precursor to state regulatory efforts in those fields. Kansas is one of the few states that provides for express preemption of sub-state unit power where it duplicates the regulatory powers of the Kansas Corporation Commission or the Kansas Department of Health and Environment.[[181]](#footnote-182)192 The statutory provision was applied in *Billy* ***Oil*** *Co., Inc. v. Board of County Commissioners*, discussed earlier in this section.[[182]](#footnote-183)193 This provision expressly preempts Kansas counties, which otherwise operate under a legislative form of home rule, from requiring operators to apply for licenses or permits in order to drill and ***oil*** and gas well. Thus, the state has spoken clearly in depriving counties of almost any power to regulate ***oil*** and gas operations. No such limitation appears for cities, however, leaving them open to regulate subject to the usual three-pronged preemption analysis of express preemption, implied preemption by occupation of the field, and implied preemption by conflict.

1. **Kentucky**

In *Blancett v. Montgomery*,[[183]](#footnote-184)194 an ***oil*** and gas lessee challenged a municipal ordinance that restricted drilling within residential districts. The lessee argued that its inability to drill was causing ***oil*** and gas to drain to an adjacent well that was located outside of the city. The city was a general-law city that had been expressly granted the power to zone by a state enabling act. The court found that the Kentucky ***Oil*** and Gas Conservation Act[[184]](#footnote-185)195 did not preempt municipal zoning power. General policy statements in the ***Oil*** and Gas Conservation Act were insufficient grounds to show either express preemption or implied preemption by occupation of the field. The issuance of a state well drilling permit did not preempt the city from exercising its state-granted powers to zone. The court found that a city has the power to zone to protect the public health, safety, morals or general welfare and cannot have that power preempted in the absence of clear legislative intent to preempt.

1. **Louisiana**

Of all of the states, Louisiana is the one with the clearest and most wide-ranging preemption of sub-state unit regulation of ***oil*** and gas operations. Its statute provides:

The issuance of a permit by the commissioner of conservation shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. No other agency or political subdivision of the state shall have the authority and they are hereby expressly forbidden to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.[[185]](#footnote-186)196

The Louisiana Supreme Court uses the following approach in preemption cases:

Local power is not preempted unless it was the clear and manifest purpose of the legislature to do so, or the exercise of dual authority is repugnant to a legislative objective; if there is no express provision mandating pre-emption, the courts will determine the legislative intent by examining the pervasiveness of the state regulatory scheme, the need for state uniformity, and the danger of conflict between the enforcement of local laws and the administration of the state program.[[186]](#footnote-187)197

In *Energy Management Corp. v. City of Shreveport*,[[187]](#footnote-188)198 the Fifth Circuit applied the above three-part preemption analysis in the context of a municipal regulation prohibiting drilling within 1,000 feet of a municipal-owned lake that served as a drinking water source. The state had conveyed the lake to the municipality but reserved the minerals. The city clearly had the authority to regulate activities on or near the lake for purposes of protecting its drinking water supply.[[188]](#footnote-189)199 The state’s lessee challenged the city’s power to prohibit its exploration for, and production of, state minerals located beneath the lake. This case should have been easily resolved under the express preemption doctrine since the statutory language is very clear that a municipality may not interfere with an ***oil*** and gas operator who has received state permission to drill. Notwithstanding the clarity of the legislative language, the Fifth Circuit added the following language, which would be appropriate if the court was applying the occupation-of-the-field theory:

The statute [La. Rev. Stat. § 30:28(f).] itself reflects a desire for state uniformity and addresses the danger of conflict between the state program and enforcement of local laws. Under La. R.S. 30:28(F) the Louisiana Office of Conservation (“LOC”) has the exclusive authority to regulate drilling and mining in Louisiana. Louisiana state law requires possession of a permit from the LOC to drill in the state. *See* La. R.S. 30:28(A). The statute sets out a comprehensive regulatory regime by which the LOC will determine whether to grant a permit to drill. *See* La. R.S. 30:28(D). It further provides that “[t]he issuance of the permit by the commissioner of conservation shall be sufficient authorization to the holder of the permit upon the property covered by the permit and to drill in search of minerals thereon.” La. R.S. 30:28(F). Even more importantly it provides that “[n]o other agency or *political subdivision* of the state shall have the authority, and they are hereby *expressly forbidden*, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.” La. R.S. 30:28(F) (emphasis added). These statutory provisions make it clear that the process of regulating when and where an ***oil*** and gas well may be drilled within the state is entirely vested in the LOC and interference by other political bodies is prohibited. Moreover, the statute gives the Commissioner authority to issue regulations and orders to “ensure ground water aquifer safety,” which is the same concern motivating the adoption of Ordinance 221.[[189]](#footnote-190)200

The need for uniform state regulation and the mention of conflict are not relevant considerations where the legislature has clearly spoken. The legislature may exercise its plenary power to preempt for any reasons and need not rely on the need for uniformity or the potential for conflict. Having received the state permit to drill, the city was powerless to act to deny the permittee the right to drill a well.[[190]](#footnote-191)201

Upon remand, the district court invalidated the ordinance only insofar as it restricted drilling within 100 feet of the lake and refused to award any damages even though the state lessee apparently lost its lease.[[191]](#footnote-192)202 The Fifth Circuit, however, set the record straight and found that the entire city ordinance was preempted by state statute.[[192]](#footnote-193)203 The Fifth Circuit, however, did not overrule the order insofar as it denied any damage claims or attorneys’ fees to the lessee.

In *St. Tammany Parish Government v. Welsh*,[[193]](#footnote-194)203.1 the Parish filed a declaratory judgment action seeking to have its zoning ordinance declared valid as applied to a drilling permit issued by the Commissioner of Conservation. The Parish tried to avoid the express preemption provision of La. Rev. Stat. 30:28 by relying on the environmental rights provision of the Louisiana Constitution.[[194]](#footnote-195)203.2 Not just relying on the express preemption statute, the court also concluded that the Parish zoning ordinance was preempted because the Legislature had occupied the field of regulating ***oil*** and gas drilling operations. The constitutional provision delegating the zoning power to parishes and other local governments did not take precedence over the constitutional and statutory provisions relating to the regulation of ***oil*** and gas operations.[[195]](#footnote-196)203.3

The Legislature has delegated exclusive authority to the Commissioner “to regulate the disposal of any waste product into the subsurface by means of a disposal well, which includes siting disposal facilities. We further recognize that siting E&P transfer stations … is within that exclusive jurisdiction.”[[196]](#footnote-197)203.4

1. **Michigan**

Michigan used to have an express preemption provision for general-law townships that prohibited them from regulating or controlling the drilling, completion, or operation of ***oil*** or gas wells.[[197]](#footnote-198)204 In 2006, that provision was repealed and re-enacted to cover both townships and counties.[[198]](#footnote-199)205 As with Louisiana, the preemption language is quite broad and general. The statute provides:

A county or township shall not regulate or control the drilling, completion, or operation of ***oil*** or gas wells or other wells drilled for ***oil*** or gas exploration purposes and shall not have jurisdiction with reference to the issuance of permits for the location, drilling, completion, operation or abandonment of such wells.[[199]](#footnote-200)206

Notwithstanding the express preemption of the earlier statutory provision, a Michigan court utilized an occupation-of-the-field theory to deny a township the power to regulate the conversion of an ***oil*** and gas well to a brine injection well.[[200]](#footnote-201)207 In fact, as analyzed by the court, the issue really wasn’t a preemption issue but an *ultra vires* issue because the statute excepted from the grant of zoning enabling authority the authority to regulate ***oil*** and gas wells.[[201]](#footnote-202)208 Under the new statute, no county or township in Michigan has any power to regulate ***oil*** and gas operations even though they have the authority to engage in zoning and other land use controls by virtue of various state enabling acts. A trial court opinion found that a city’s attempt to apply its zoning ordinance to a proposed ***oil*** and gas well drilling operation was preempted under both conflicts and occupation of the field analysis.[[202]](#footnote-203)208.1

1. **Mississippi**

Mississippi has a long history of regulating ***oil*** and gas operations through the activities of the Mississippi ***Oil*** and Gas Board. Up until 2013 there were no cases where a sub-state unit regulatory program was challenged on preemption grounds. In *Delphi* ***Oil****, Inc. v. Forrest County Board of Supervisors,*[[203]](#footnote-204)209 the Mississippi Supreme Court faced the preemption issue for the first time and came out in favor of allowing complementary state and sub-state unit regulation. In response to a fatal accident involving an ***oil*** and gas storage tank, the County enacts an ordinance requiring fencing, locked gates and signage at ***oil*** and gas facilities. In the statutory grant of authority to the ***Oil*** and Gas Board, the Legislature stated that the Board “shall have exclusive jurisdiction and authority, and it shall be it duty, to make, … such reasonable rules … to regulate the use, management, manufacture, production, ownership, … and noncommercial disposal of ***oil*** field exploration and production waste … .”[[204]](#footnote-205)210

There is no ultra vires claim since Mississippi has granted home rule authority to counties subject only to such authority not being exercised in a way inconsistent with the Constitution or state laws.[[205]](#footnote-206)211 In determining when a sub-state unit’s ordinance is “inconsistent” with a state statute, the court embarks on an ad hoc “operational conflicts” test after closely examining the language of both the statute and the ordinance. The fact that there may be complementary state and sub-state regulation of the same subject matter does not cause the ordinance to be preempted. In this case, the ***Oil*** and Gas Board, like the County Board, looked at the issue of premises safety after the fatal accident and came up with a rule that was not as stringent as the County’s.[[206]](#footnote-207)212 The court also rejects the claim that there is an operational conflict between the fencing requirements and the ***Oil*** and Gas Board’s duty to inspect ***oil*** and gas facilities. While those requirements may be inconvenient they do not rise to the level of an operational conflict.

1. **Montana**

In 2021, the Montana Legislature amended the zoning and planning enabling act for sub-state units to make it clear that such regulations are expressly preempted by the powers delegated to the Board of ***Oil*** and Gas Conservation. The statute provides in part:

(2)(a) A provision of this part may not be construed to alter Montana law regarding the primacy of the mineral estate, to limit access to the mineral estate, or to limit development of the mineral estate.

(b) A regulation, resolution, or rule adopted pursuant to the provisions of this part may not prevent the complete use, development, or recovery of any mineral that is under the jurisdiction of the board of ***oil*** and gas conservation pursuant to Title 82, chapter 11, part 1.[[207]](#footnote-208)212.1

1. **New Mexico**

In 1986 the attorney general published an opinion concluding that county regulations dealing with ***oil*** and gas operations were preempted.[[208]](#footnote-209)213 The ***Oil*** and Gas Conservation Act did not in 1986, nor does it at the present time, have any express preemption provision.[[209]](#footnote-210)214 The county has both specific enabling authority to engage in zoning and land use controls[[210]](#footnote-211)215 and general authority to exercise all powers held by municipalities except for those inconsistent with statutory or constitutional limitations placed on counties.[[211]](#footnote-212)216 The opinion is short on analysis and seems to combine both an implied preemption-by occupation-of-the-field theory along with an implied preemption-by-conflict theory. The opinion relies on out-of-state decisions, ignoring a long history of New Mexico court decisions that deal with the preemption issue.

In several cases involving similar statutory schemes to the ***Oil*** and Gas Conservation Act the courts applied the traditional three-part preemption test of express preemption, implied preemption by occupation of the field, and implied preemption by conflict.[[212]](#footnote-213)217 In these cases the courts rejected the preemption claims of the plaintiffs and required the legislature to state with clarity its intent to preempt sub-state unit powers that had been granted to them. The fact that there are concurrent regulatory regimes does not necessarily require a finding of preemption.[[213]](#footnote-214)218 Thus, the current status of preemption jurisprudence in New Mexico is uncertain, although the recent trend clearly is to favor concurrent rather than exclusive jurisdiction.

In *SWEPI, LP v. Mora County*,[[214]](#footnote-215)218.1 the federal district court invalidated on a number of grounds the County ordinance which totally prohibited ***oil*** and gas exploration, drilling and production operations anywhere within the county.[[215]](#footnote-216)218.2 Because the ordinance applied to activities on state land, the court invalidated those provisions on *ultra vires* grounds since there exists no state statute authorizing a County to regulate on state-owned lands.[[216]](#footnote-217)218.3

On the preemption issue, the court follows the tri-partite approach looking at express preemption and implied preemption by occupation of the field or implied preemption by conflict. The court finds no express preemption or implied preemption by occupation of the field.[[217]](#footnote-218)218.4 There is no field occupation because the purposes of the state conservation statute are focused on the prevention of waste and the drilling and maintenance of ***oil*** and gas wells while local governments are much more interested in surface impacts. As for conflict preemption, the court looks at various tests or approaches that have been adopted to define when a conflict arises including the generally unuseful test of whether the ordinance permits an act the state statute prohibits or vice versa.[[218]](#footnote-219)218.5 The court’s analysis is heavily influenced by the ordinance’s total prohibition of ***oil*** and gas operations that are specifically authorized and regulated by the state statute.[[219]](#footnote-220)218.6 If there is to be conflict preemption it has to be in this type of situation where the state’s express policy of allowing certain activities is being thwarted entirely by the sub-state regulation.[[220]](#footnote-221)218.7 The preemption holding only applies to those sections of the ordinance that prohibit ***oil*** and gas activities from occurring within the County.

1. **New York**

New York also has an express preemption provision. The statute says:

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.[[221]](#footnote-222)219

Notwithstanding this express preemption statute, a town sought to impose a bond and permit fee requirement on an ***oil*** and gas lessee. In *Envirogas, Inc. v. Kiantone*,[[222]](#footnote-223)220 the town tried to fit under the exception from preemption by asserting that the bonding requirement was tied to its local road system and that it needed funds to deal with potential damage. The court noted the expansive and all-encompassing language of the statute and the narrow exceptions and concluded: “But where a state law expressly states that its purpose is to supersede all local ordinances then the local government is precluded from legislating on the same subject matter unless it has received ‘clear and explicit’ authority to the contrary.”[[223]](#footnote-224)221 This reading of section 23-0303(2), however, has been reversed in a series of cases dealing with prohibitory ordinances enacted following interest in the development of the Marcellus Shale formation.

In *Cooperstown Holstein Corp. v. Town of Middlefield*,[[224]](#footnote-225)222 the Town had adopted as part of its zoning ordinance a total prohibition of “all ***oil***, gas or solution mining and drilling.” The plaintiff who had leased its mineral estate several years prior to the ordinance amendment challenged the validity of the ordinance on preemption grounds relying on the express language of § 23.0303(2).[[225]](#footnote-226)223 Rather than rely on the express language which seemingly preempts all local regulation except those relating to roads and the real property tax, the court explores the legislative history and the purposes of the statute. Of particular importance to the court was the state’s focus on conservation regulation and the prevention of waste, matters the court believes are not the focus of local zoning ordinances. Relying on the same non-***oil*** and gas cases as *Kiantone*, the court takes a very narrow approach to interpreting express preemption statutes.[[226]](#footnote-227)224 A sub-state unit is not preempted from enacting land use regulations, including those which totally prohibit ***oil*** and gas drilling within the unit.

A similar result was reached in *Anschutz Exploration Corp. v. Town of Dryden*.[[227]](#footnote-228)225 In August 2011, the Town amends its zoning ordinance and essentially prohibits all ***oil*** and gas exploration, production, and storage activities, including hydraulic fracturing within the Town limits.[[228]](#footnote-229)226 Anschutz had, prior to the date of the amendment, leased approximately 22,000 acres for ***oil*** and gas development. In addition to the express preemption claim under § 23-0303, Anschutz argued that the Town ordinance was impliedly preempted because it directly conflicted with the state conservation statute. Relying on *Frew Run* as did *Kiantone* and *Middlefield*, the court finds no clear legislative intent to preempt local control over land use and zoning. The court relies on the hard rock mining experience where similar language was found not to preempt local prohibitions on hard rock mining operations under either the express preemption rationale or the implied preemption by conflict rationale.[[229]](#footnote-230)227 All that § 23-0303(2) preempts is regulation of operations, although one can argue that the prohibition of the use of land for support activities clearly implicates operations. The court buttresses its limited view of express preemption by listing a number of other statutory preemption provisions that indisputably preempt local zoning or land use regulation.[[230]](#footnote-231)228 The court believes that the “operational conflicts” language used in Colorado and Pennsylvania further support the view that the express preemption only applies where there are such conflicts, although as the court points out, Colorado does not have any express preemption language in its ***oil*** and gas conservation statute.[[231]](#footnote-232)229

On appeal, the Appellate Division on similar reasoning upheld the validity of the Dryden ordinance.[[232]](#footnote-233)230 The Appellate Division’s reasoning was similar to, but not identical with, the Supreme Court’s opinion. The Appellate Division noted that land use powers constitute one of the “most significant functions” of local governments.[[233]](#footnote-234)231 Because the ***oil*** and gas conservation statute (N.Y. ECL § 23-0303) contains an express preemption clause, the court’s role is one of statutory interpretation. As did the Supreme Court, the Appellate Division relies on *Frew Run*,[[234]](#footnote-235)232 to conclude that express preemption only relates to the regulation of the ***oil*** and gas business and not to surface use prohibitions and limitations. The Appellate Division, however, supported its interpretation limiting preemption to regulatory matters with an extensive review of the legislative history of N.Y. ECL § 23-0303. That legislative history evinced an intent to deal with matters of “waste” focusing on sub-surface activities. The court also emphasized that the maximization of production along with the promotion of the ***oil*** and gas industry were removed from the powers granted the Department of Environmental Conservation and moved to the Energy Office.[[235]](#footnote-236)233 In order to find express preemption over a traditional sub-state function, a court must find a “clear expression of legislative intent.” which is absent from N.Y. ECL § 23-0303.[[236]](#footnote-237)234 Finally, the court noted that where the Legislature intends to expressly preempt sub-state unit’s exercise of land use powers, it has done so through clear and express language.[[237]](#footnote-238)235

The court also concluded that the Dryden prohibitory ordinance was not preempted under either the implied preemption by occupation of the field or implied preemption by conflict doctrines. It should be clear that where there is a limited, express preemption provision the Legislature has not intended to occupy the field. The court’s rationale of why there is not implied preemption by conflict uses a type of “bootstrap” approach similar to the court’s express preemption analysis. There is no conflict between a zoning ordinance regulating surface uses and locations and the state statute that regulates well spacing even though a prohibitory ordinance such as Dryden’s will prevent an ***oil*** and gas operator from drilling a well even though they have complied with the state spacing regulations and received a permit to drill. Essentially, the court treated well spacing and waste prevention as being in one box and surface uses and locations as being in another box. The two boxes “harmoniously coexist: the zoning law will dictate in which, if any districts drilling may occur, while the OGSML instructs operators as to the proper spacing of the units within those districts in order to prevent waste.”[[238]](#footnote-239)236 This compartmentalized approach obviously treats ***oil*** and gas production operations as any other surface use while ignoring the reality that unlike other surface uses you can only have ***oil*** and gas production operations where there are ***oil*** and gas deposits, or within a reasonable proximity thereof given directional and horizontal drilling techniques. A town-wide prohibition encompassing thousands of acres essentially precludes the development of ***oil*** and gas resources even though the state statute would authorize such activities. The court finds no conflict between the Town’s prohibitory zoning ordinance and the state ***oil*** and gas conservation statute since there is nothing in the statute that makes it the policy of the state to “maximize recovery” of ***oil*** and gas resources. The statute does not encompass a state policy of drilling and producing at any cost or with disregard to sub-state zoning and land use regulation. The court’s analysis would be more appropriate if the ordinance did not prohibit all ***oil*** and gas operations but merely restricted them to designated districts. Nonetheless, the court’s decision is consistent with the *Frew Run* and *Gernatt Asphalt* opinions that likewise prevent the extraction of minerals from where they are located.

In a single consolidated opinion covering both cases, the New York Court of Appeals in a 5-2 opinion affirmed the decisions of the Appellate Division and found that local ordinances that prohibit ***oil*** and gas operations are not preempted.[[239]](#footnote-240)237 The Court of Appeals decision mirrors the Appellate Division’s approach to the express preemption issue. The court notes that the sub-state units being sued clearly have the power to enact land use regulation which the court determines to be “one of the core powers of local governance.”[[240]](#footnote-241)238 New York has a clearly articulated judicial policy that disfavors a finding of preemption when it comes to those core powers of local governance. Thus, only a “clear expression of legislative intent to preempt local control over land use” will support a finding of preemption.[[241]](#footnote-242)239

While the plaintiffs tried to make a distinction between regulatory and prohibitory ordinances,[[242]](#footnote-243)240 the Court of Appeals relied heavily on its earlier analysis of similar preemption language in the Mined Land Reclamation Law that it had pronounced in *Frew Run.*[[243]](#footnote-244)241 Where you have an express preemption provision the court must first look at the plain language of the provision, the statutory scheme as a whole and any relevant legislative history.[[244]](#footnote-245)242 The preemption language relates to the “regulation of the ***oil***, gas and solution mining industries …” and is followed by two exceptions to the rule of preemption.[[245]](#footnote-246)243 Even though the § 23-0303(2)’s language is different from the Mined Land Reclamation Law preemption language, the court declines the plaintiff’s invitation to treat § 23-0303(2) as more broadly preemptive. The court’s emphasis is predicated on its view that both ordinances are “zoning” or “land use” ordinances of general applicability and thus do not impact the state’s regulatory scheme as it relates to the operation of ***oil*** and gas drilling and production activities.[[246]](#footnote-247)244 The court also treats the two statutory exceptions from preemption as dealing with the “operations” of the ***oil*** and gas industry and not with “zoning and land use” matters.[[247]](#footnote-248)245 Then the court notes, as it did in *Frew Run*, that where the Legislature intends to preempt land use or zoning powers it does so with much clearer language than is found in § 23-0303(2).[[248]](#footnote-249)246

Finding that the express language of § 23-0303(2) does not preempt local governmental exercise of its zoning authority, the court then embarks on the last two legs of its preemption analysis which is probably unnecessary but nonetheless indicative of the court’s approach to preemption issues. Looking at the statutory goals of the ***oil*** and gas conservation act,[[249]](#footnote-250)247 the court not surprisingly finds that the act’s focus is on the “safety, technical and operational aspects of ***oil*** and gas activities … .”[[250]](#footnote-251)248 Thus, the local zoning laws do not impinge on the state’s interest in preventing waste or the proper spacing of wells. The court’s view of the legislative history also supports its categorization of state versus local interests so as to find no incompatibility between prohibitory ordinances and § 23-0303(2).

Finally, the court rejects the plaintiffs’ claim that there is a distinction between regulatory ordinances and prohibitory ordinances whereby prohibitory ordinances clearly is a direct regulation of the ***oil*** and gas industry. Here, the court relies on *Gernatt Asphalt*, another Mined Land Reclamation law case that dealt with an ordinance that prohibited mining through the sub-state unit.[[251]](#footnote-252)249 In *Gernatt Asphalt*, the court rejected the plaintiffs’ claim that the preemption provision as interpreted in *Frew Run*, allows mining operations in some, but not all, of the zoning districts, but that a total prohibition is inconsistent with the preemption provision. The court re-affirms its view that the preemption provision (§ 23-0303(2)) does not require a sub-state unit to allow ***oil*** and gas operations anywhere within its jurisdiction. A total prohibition against all kinds of ***oil*** and gas operations is a reasonable exercise of the zoning power.[[252]](#footnote-253)250

1. **North Carolina**

In 2014, the North Carolina Legislature adopted an express, partial preemption statute insofar as it deals with matters relating to ***oil*** and gas exploration, development and production activities.[[253]](#footnote-254)250.1 The statute gives to the Mining and Energy Commission the general power to develop a full regulatory program relating to ***oil*** and gas activities. Any sub-state unit ordinances or other enactments that “prohibit[s] or has the effect of prohibiting ***oil*** and gas exploration, development, and production activities” are preempted to the extent that the Mining and Energy Commission has adopted regulations.[[254]](#footnote-255)250.2 There is also a list of specific types of regulation that are expressly preempted including regulation prohibiting the siting of wells, prohibiting the use of horizontal drilling or hydraulic fracturing operations and imposing regulations upon ***oil*** and gas operations that are not part of the Commission’s regulatory program.[[255]](#footnote-256)250.3

The statute gives to the Commission the principal task of determining whether or not a sub-state unit’s ordinance is preempted.[[256]](#footnote-257)250.4 A local zoning or land use ordinance is presumed to be valid to the extent that it imposes upon ***oil*** and gas operations performance standards that are generally applicable to other forms of development, including setback, buffer and stormwater standards.[[257]](#footnote-258)250.5 In order to make a finding a preemption the Commission must make four mandatory findings including: 1. the ordinance prohibits or has the effect of prohibiting ***oil*** and gas operations, 2. that all legally required federal and/or state permits have been issued, 3. that local citizens and elected officials have had an adequate opportunity to participate, and 4. that the proposed ***oil*** and gas operation will not pose an unreasonable health or environmental risk.[[258]](#footnote-259)250.6 There is a right to seek judicial review of the Commission’s decision.

The North Carolina statute has a unique feature of giving to a state administrative agency primary jurisdiction to make the initial preemption decision. Unlike direct judicial appeals of sub-state unit ordinances on preemption grounds, the judicial review in this case will not make a de novo determination of whether or not there is a conflict between the state and sub-state unit’s regulatory programs. Instead, review will be of the Commission’s decision and its findings as required by the statute. The standard will be prohibiting or having the effect of prohibiting ***oil*** and gas operations rather than a standard based on conflicts or inconsistencies.

In 2015, the North Carolina legislature amended its preemption statute by deleting several provisions and by expanding the express preemption provisions to cover all sub-state unit regulatory provisions, rather than just sub-state unit prohibitory provisions.[[259]](#footnote-260)250.7 The Commission’s role, however, in resolving disputes as to whether or not a sub-state unit’s regulatory provision conflicts with or is inconsistent with the statewide program was not changed.

1. **North Dakota**

While North Dakota, in general, has not adopted home rule as the prevailing source of power for its sub-state units, it does give counties extensive powers to zone and otherwise engage in land use regulation.[[260]](#footnote-261)251 There are no reported judicial opinions regarding conflicts between the Industrial Commission’s authority and county zoning authority. In 1990, an opinion by the attorney general concluded that although it was a close question, the state had occupied the field of regulating ***oil*** and gas operations, preempting county regulation.[[261]](#footnote-262)252 Yet shortly thereafter, that same attorney general hedged his bets when he responded to an inquiry by a county official regarding such regulation. The letter stated in part:

Attorney General Opinion 90-23 stated that a county could not regulate the production of ***oil*** and issue drilling permits as this function was specifically delegated to the Industrial Commission. However, if the county does not attempt to intrude into the Industrial Commission’s jurisdiction over the business of ***oil*** production, instead making decisions regarding use permits based upon land use considerations, the laws will be compatible.[[262]](#footnote-263)253

This clarification makes it difficult to determine the scope and extent of county power to regulate in ways that do not deal with the issuance of permits or regulation of production. Bonding requirements, environmental requirements, road requirements, noise regulation and landscaping requirements all might fit under the rubric of land use regulation, not ***oil*** and gas regulation.

In *Environmental Driven Solutions, LLC v. Dunn County*,[[263]](#footnote-264)253.1 the North Dakota Supreme Court laid out its general approach to dealing with problems of preemption. The question was straightforward in that EDS had received a permit from the North Dakota Industrial Commission (NDIC) to construct a waste ***oil*** treating plant at a specified location. That location, however, was subject to the Dunn County zoning ordinance which did not allow for such uses. The court recognized that North Dakota preemption law mirrors federal preemption in that it recognizes three types of preemption, express preemption, implied preemption by occupation of the field and implied preemption by conflict.[[264]](#footnote-265)253.2 Express preemption occurs when there is an “explicit state law or rule” that prescribes local authority.[[265]](#footnote-266)253.3 Field preemption occurs where the activity is “already subject to substantial state control through broad, encompassing statutes or rules.”[[266]](#footnote-267)253.4 Conflict preemption occurs where a sub-state regulation “contravenes” state law.[[267]](#footnote-268)253.5

While noting that courts occasionally confuse or conflate field and conflict preemption, the court does not resolve that confusion but adds to it by initially finding that regulation of ***oil*** field operations, including the disposal of ***oil*** field wastes, is an area that has been occupied by the state through its delegation of power to the North Dakota Industrial Commission. But the permit issued by the Commission to EDS had a specific provision that required EDS to “comply with all applicable local … laws and regulations.”[[268]](#footnote-269)253.6 That suggests that the Commission either believes that it does not have plenary power or that it has chosen, as a policy matter, to share that power with sub-state units. The court resolves that conundrum by resorting to conflict preemption language without defining what constitutes a conflict.[[269]](#footnote-270)253.7

Given the use of field preemption, it would appear that sub-state units in North Dakota cannot regulate any aspect of any ***oil*** and gas-related operation for which a Commission permit has been issued. In this case, the Commission clearly had the authority to regulate and permit oilfield disposal facilities, rendering them off-limits to sub-state zoning regulation.

1. **Ohio**

In 2004, Ohio repealed its express preemption statutory provision.[[270]](#footnote-271)254 What replaced the express provision were changes to the statutory provisions granting the division of mineral resources management “sole and exclusive authority to regulate the permitting, location, and spacing of ***oil*** and gas wells …”[[271]](#footnote-272)255 This language, as well as additional language relating to the fact that regulation of ***oil*** and gas wells is a matter of statewide concern, mirrors the language used by the Ohio Supreme Court to determine when sub-state units are preempted from regulating matters that are otherwise regulated by the state.[[272]](#footnote-273)256 Thus, since 2004, the prior regime of ad hoc preemption decisions that reflect the problem using a Colorado-type operational conflict doctrine has been eliminated.

The following cases reflect the pre-2004 preemption regime and are presented because the issues raised by these cases may apply in other jurisdictions that follow a similar ad hoc preemption approach.

In *Excalibur Production, Inc. v. Board of Trustees of Springfield Township*,[[273]](#footnote-274)257 the Court of Appeals did not find a township’s zoning ordinance as applied to ***oil*** and gas operations preempted. Under the then-existing preemption statute, local regulation of “health and safety standards for the drilling and exploration for ***oil*** and gas” was excepted from the preemption rule.[[274]](#footnote-275)258 The court determined that because of the exception the state must have intended to allow complementary state and local regulation. As long as the local regulation did not impinge on the state’s exclusive power to regulate minimum acreage requirements for drilling units, minimum distances between wells, and plugging requirements, it would be allowed. In this case the zoning ordinance permitted ***oil*** or gas wells only in a commercial/industrial zoning district. Notwithstanding the statutory prohibition against local permitting requirements, the court concluded that the statutory enabling act giving townships the power to zone in general, and the power to zone for ***oil*** and gas operations specifically, could not be preempted.

A similar result was reached in the unreported case of *Dome Energicorp v. Zoning Board of Appeals, Olmsted Township*.[[275]](#footnote-276)259 As in *Excalibur*, the township had enacted a zoning ordinance restricting ***oil*** or gas wells to either an industrial or commercial zoning district. Dome sought a variance to drill a well in a residential zone. The Board of Appeals denied the variance and Dome appealed.[[276]](#footnote-277)260

The court’s analysis falls somewhat short of what is needed to answer the preemption question. It avoids the preemption analysis by classifying the zoning ordinance as one dealing with the location of wells as opposed to the regulation of production. It is clear, however, that ***oil*** or gas wells, within certain limits, must be placed over or near the common source of supply. The court did not discuss whether the ordinance was a health or safety measure and therefore exempted from the express preemption statutory provision. Well location is an important part of the state’s ***oil*** and gas conservation regulatory regime. Nonetheless, the court ignored those issues and upheld the validity of the application of the ordinance to Dome’s proposed well as well as the denial of the variance.

In *Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc*.,[[277]](#footnote-278)261 the state supreme court attempted to draw the line between allowed local regulation for health and safety and disallowed regulation of well spacing and location. The township zoning ordinance prohibited drilling in most residential zones and required a minimum setback from streets and highways and a 300-foot setback from inhabited structures. The court applied a balancing test by looking at the individual application of the ordinance to the proposed drilling operations. The court noted that much of the township was rural in character, yet the largely uninhabited areas currently being used in agricultural pursuits were zoned for residential development. This had the effect of precluding almost all ***oil*** and gas drilling operations within the township. The court found no “per se” preemption, notwithstanding the express statutory language seemingly preempting locational regulation. But it nonetheless concluded that where drilling is precluded in areas “traditionally appropriate for such activity,” the ordinance is preempted. By effectively vetoing the state’s choice for drill sites, the township had gone too far and was thus preempted from acting. This analysis seemingly falls under the implied-preemption-by-conflict doctrine, but given the express preemption language in the statute, it is hard to reconcile the decision with the conflict doctrine.

The court also found that the township setback requirements were not preempted even though the state had adopted its own setback requirements that were less stringent. The court labeled the township’s standards as involving health and safety concerns, thus not coming under the express preemption language. Here it would have been appropriate to apply an implied preemption by conflicts analysis but the court did not do so. On the issue of minimum setbacks from rights-of-way, the court had little difficulty invalidating that part of the ordinance since the state statute specifically prohibited such local regulation.

The *Newbury Township* opinion could create a substantial amount of uncertainty as to what types of local regulation will be allowed. While eschewing a heightened review role for the court of local zoning regulations, the decision clearly requires courts to take a hard look at local zoning ordinances to determine whether they are “health and safety” measures. In addition, courts will have to carefully review the actual application of the ordinance to see that drilling is only prohibited in areas where such activities are not traditionally located.

Because preemption is ultimately a legislative issue, the legislature is free to “reverse” a judicial result that either finds or does not find that local regulation has been preempted. Partially in response to *Newbury Township*, the legislature amended the statutory preemption provision to make sure that setback requirements from buildings that the supreme court found not to be preempted would be a matter preempted by the state.[[278]](#footnote-279)262 In *St. Croix, Ltd. v. Bath Township*,[[279]](#footnote-280)263 the township enacted an ordinance prohibiting ***oil*** and gas wells within 300 feet of any habitable structure. St. Croix had received a state well permit and was seeking to enjoin the application of the ordinance to its proposed operations on the grounds that the ordinance was preempted. The state conservation agency had adopted setback requirements for ***oil*** and gas wells that were less restrictive than the township ordinance. While noting that there was some ambiguity in the statutes, the court nonetheless concluded that the changes to the preemption provisions covered the circumstances involved in this case and preempted the township from enacting an ordinance that was more restrictive than the state regulations.

In *State ex rel. Morrison v. Beck Energy Corp.*,[[280]](#footnote-281)264 the court was again asked to look at the express preemption language of Ohio Rev. Code § 1509.02. Beck Energy received a well drilling permit from the Ohio Department of Natural Resources, Division of Mineral Resources Management that imposed some 29 conditions on the operator.[[281]](#footnote-282)265 As distilled by the court, the City’s position was that no activities could take place until the operator: “(1) obtain a drilling permit, a ‘conditional’ zoning certificate and a zoning certificate; (2) appear before the city’s planning commission in a public hearing and obtain its approval; (3) pay the necessary fees and post the requisite performance bond; and (4) obtain a rights-of-way construction permit and pay the required fees.”[[282]](#footnote-283)266

Because Ohio has a form of non-preemptible home rule, if the subject matter of the municipal home rule unit’s ordinance relates to the exercise of the powers of local self-government, the State is powerless to deprive the home rule unit of such powers.[[283]](#footnote-284)267 With non-preemptible home rule ordinances, the issue should focus on whether or not the subject matter of the regulation relates to matters of local or statewide concern. In fact, there is language in 1509.02 that is designed to resolve that issue because the Legislature determined that regulation of ***oil*** and gas activities “is a matter of general statewide interest that requires uniform statewide regulation.”[[284]](#footnote-285)268 But Ohio blends into that issue the traditional tri-partite preemption analysis.[[285]](#footnote-286)269 Thus, the court embarked on a three-step analysis: 1. Determine whether the ordinance is an exercise of local self-government, 2. If the ordinance is an exercise of the police power, then is it a general law, and 3. Examine whether the local ordinance conflicts with state law.[[286]](#footnote-287)270

The Village enacted some 11 ordinances that were implicated in Beck Energy’s drilling activities. Beck did not challenge the ordinances that deal with rights of way issues since under 1509.02, unless the sub-state unit discriminates against or unfairly impedes ***oil*** and gas activities, it can fully regulate in that area. As to all of the other regulatory requirements, the trial court concluded that Beck Energy must comply with all of them before it can engage in drilling operations. While 1509.02 has an express statement of the Legislature’s intent to preempt in dealing with a matter of statewide concern, that statement is not binding on the court which must make an independent judgment on that issue.[[287]](#footnote-288)271 Most of the ordinances involve traditional zoning which is an exercise of the police power and not a matter dealing with local self-government. As such those regulations are subject to being preempted. Similarly it is also clear the ***oil*** and gas conservation statute is a general law.

The court then goes on to the implied preemption by conflict analysis which seemingly ignores the express preemption language used by the Legislature when it amended the statute in 2004. The court deprives the Legislature of its power to expressly preempt home rule unit’s powers outside of the realm of matters effecting local self-governance. In theory, the Legislature should have the power to expressly preempt sub-state, home rule units without the necessity of showing a conflict. The court nonetheless appears to ignore the plain legislative intent to preempt local regulation of ***oil*** and gas operations even where there is no conflict.

The court of appeals’ conflict analysis is consistent with the other states have “operational conflicts” tests. Unfortunately, the general conflicts test used in Ohio includes the test of whether the ordinance prohibits that which the statute permits or vice versa.[[288]](#footnote-289)272 That is a singularly unhelpful test because in these cases the ***oil*** and gas operator will undoubtedly have a state-authorized permit to drill which the sub-state unit is attempting to prohibit or condition. The court must look at the individual ordinances and apply them to the relevant state statutes and regulations. Given the express language of 1509.02 relating to the state’s exclusive authority to regulate “permitting, location and spacing” of ***oil*** and gas wells, it borders on the absurd for the Town to argue, as it did, that its zoning and drilling specific ordinances did not conflict. The court of appeals rightly concludes that Beck Energy’s drilling operations at the location authorized by the State cannot be “hindered” by sub-state unit regulation. Furthermore, the public hearing requirement for discretionary permits as is required for ***oil*** and gas operations, is likewise in conflict with 1509.02 to the extent to which the requirement is made a condition precedent for the issuance of a permit. Having a public hearing requirement that is not tied to the issuance of a permit is allowed.[[289]](#footnote-290)273 Instead of focusing on a conflict analysis, the court should have determined whether the ordinances impact those areas where 1509.02 says that the state’s interest will preempt sub-state unit regulation. While the result would have been the same, the ad hoc nature of the implied preemption by conflict analysis would have been avoided.

On appeal, the Ohio Supreme Court affirmed in a split, 3-1-3 decision.[[290]](#footnote-291)273.1 The plurality opinion follows the three-part approach undertaken by the Court of Appeals. It agrees that the various ordinances are clearly an exercise of the police power and not the exercise of “local self-government” which cannot be preempted by state legislative action. It then applies a four-part test to determine if 1509.02 is a general law. The four conditions that must be shown in order to have a general law are: 1.Is it part of a statewide and comprehensive legislative enactment? 2. Does it apply to all parts of the state in a uniform matter? 3. Does it set forth police or similar regulations? and, 4. Does it prescribe a rule of conduct upon citizens generally? The City only attacks the second condition because it asserts that ***oil*** and gas deposits are located only in the eastern portion of Ohio. The statute on its face applies uniformly throughout Ohio. The physical reality that ***oil*** and gas is located in only some parts of the state does not detract from the uniform nature of the regulatory program.[[291]](#footnote-292)273.2

The plurality opinion mirrors the Court of Appeals approach in determining whether or not there is a conflict between the City’s ordinances and the state ***oil*** and gas conservation statute. “A conflict exists if the ‘ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.’ ”[[292]](#footnote-293)273.3 The plurality applies a broad conflicts approach where there are both state and local licensing requirements. In such cases where the local requirements restrict an activity which a state license permits, the local licensing ordinance is in conflict and thus is preempted.[[293]](#footnote-294)273.4 Under this approach once an ***oil*** and gas operator has received a well spacing permit from the Ohio Department of Natural Resources, no local ordinance restricting the location of the well can exist. The plurality opinion also finds that 1509.02 constitutes an express preemption statute insofar as it relates to the regulation of the location, drilling and operation of ***oil*** and gas wells. The plurality is essentially concluding that there is an express occupation of the field so that there is no room for any local regulation relating to the field of location, drilling and operation of ***oil*** and gas wells. The plurality opinion could have solely relied on this express preemption argument without dealing with conflict preemption but it couches the express preemption argument as a part of the conflict preemption theory.

Both the concurring and dissenting opinions take issue with this very broad preemption/conflicts analysis. Neither the concurring nor dissenting opinions agree with the plurality’s express preemption conclusion. The concurring opinion concludes that the City’s permitting process is in conflict because it restricts ***oil*** and gas drilling operations to an industrial district upon receipt of a discretionary permit but that not every local zoning ordinance would necessarily be in conflict with 1509.02.[[294]](#footnote-295)273.5 The concurring judge would also not find that 1509.02 constitutes an express preemption by occupation of the field. He does so by noting that the terms “location” and “spacing” have meanings specific to ***oil*** and gas conservation regulation that relate to underground conditions and the prevention of underground waste. Zoning regulation, on the other hand, deals with surface activities and the prevention of negative externalities. Because the state is regulating one aspect of drilling operations and the municipalities are regulating other aspects of drilling operations, the concurring opinion would find that concurrent, but not conflicting, regulation is allowed.[[295]](#footnote-296)273.6

Justice Lanzinger, in his dissenting opinion, also rejects the plurality’s express preemption by occupation of the field conclusion. The dissenting opinion also focuses on the two different objectives served by state ***oil*** and gas conservation regulation and local zoning regulation. There is no conflict because the local zoning ordinances are designed to deal with the protection of local zoning interests including the preservation of property values and the prevention of negative externalities. In the dissenting justice’s view, the City ordinances do not supplant the state regulatory program but are merely supplemental to it. Relying on the same cases as the concurring justice, Justice Lanzinger believes that through the application of the implied preemption by conflict test, there is no conflict.[[296]](#footnote-297)273.7

There are only three justices that agree that 1509.02 constitutes an express preemption of the field of ***oil*** and gas regulation. The other four justices seemingly agree that the ad hoc balancing approach to conflict preemption should be applied to determine whether or not a particular zoning ordinance or ordinances actually conflict with 1509.02. The three justices who comprise the dissent in this case would find that imposing a discretionary permit requirement and limiting ***oil*** and gas operations to designated zoning districts does not conflict with the state’s issuance of a well drilling permit at a specific location. As noted earlier in the discussion of the Court of Appeals decision, this ad hoc approach has the downside of leading to substantial uncertainty and the need to not only look at individual ordinances to determine if there is a conflict but to individual decisions and/or orders as to specific well drilling permit applications.

1. **Oklahoma**

Oklahoma has a statutory provision originally enacted in 1935 that if applied literally would preclude a finding that sub-state units may not regulate ***oil*** and gas operations.[[297]](#footnote-298)274 The following two Oklahoma Supreme Court decisions antedate the enactment of the statute and apply the traditional preemption analysis. In *Gant v. Oklahoma City*,[[298]](#footnote-299)275 ***oil*** and gas operators sought an injunction to prevent the city from enforcing its ordinance requiring a $200,000 bond for each well drilled within city limits. The city also sought injunctive relief to prevent the operators from drilling wells until such time as the bonding requirements were satisfied. The operators argued that the Corporation Commission regulated ***oil*** and gas drilling operations, including the setting of minimum bonding requirements. Those state statutes and Commission regulations preempted the city’s ordinance according to the operators. The court reviewed several early preemption cases and concluded:

[The cases do] that there is anything in them that would warrant us in holding that the general police power of Oklahoma City to provide for the safety and health of its inhabitants is in any way taken away by virtue of the jurisdiction conferred upon the Corporation Commission to superintend the drilling for ***oil*** and gas[.][[299]](#footnote-300)276

Without express language, the court was not going to presume implied preemption of the local police power. The court was concerned with the safety threat to the citizens of Oklahoma City created by the presence of substantial numbers of ***oil*** wells, located in close proximity to residences. The following excerpt from the court’s opinion reflects its hesitancy to find an implied preemption of local police powers:

We must remember that Oklahoma is full of winds, and that the winds are variable. We also know that in this case there is evidence that the wells not far distant would produce as high as 86,000 barrels of ***oil*** a day. We also know that the gas pressure is enormous, and that the site of the well in this case is so near to the populous part of the city, that with a high wind and a break in the machinery, the well is liable to get out of control and scatter ***oil*** and gas over a large part of the city. As a property protection, the city was endowed with the power of regulation. But there is something far greater than property involved in this case; it is the safety of human life and health. On the other hand, there is at stake the chance of some men, joining with certain lot holders, who are trying to make a lot of money. We have on one side the people that want money, and on the other side the people that want life, and its enjoyment in the home already provided.[[300]](#footnote-301)277

*Gant* follows the traditional view that implied preemption is not to be easily found. Instead, concurrent regulation, especially in the absence of operational conflicts, is to be tolerated. Notwithstanding the seemingly strong sentiment in favor of concurrent, and not exclusive, regulatory jurisdiction, the Oklahoma Supreme Court three years after *Gant* decided that a local regulation was preempted. In *Indian Territory Illuminating* ***Oil*** *Co. v. Larkins*,[[301]](#footnote-302)278 the court faced a challenge to a municipal decision not to grant a variance to the minimum well-spacing requirements of the city zoning ordinance. Instead of labeling the well-spacing requirement as a health and safety issue, which it easily could have given the *Gant* opinion stressing the problems of dense development in residential districts, the court instead labeled this type of regulation a prevention of waste regulation. The court distinguished *Gant* by stating:

We want to emphasize the fact … that the Legislature, in delegating to certain cities the power to restrict the drilling of wells within the boundaries thereof, was dealing with the police power insofar only as the health, morals, safety, and general welfare of the public might be injuriously affected by such drilling. The Legislature did not confer authority upon cities to prevent the commission of waste of natural resources or to prevent the inequitable taking of ***oil*** from a common source of supply. Such authority was delegated by other statutory provisions to another tribunal.[[302]](#footnote-303)279

The Legislature in 1935 essentially overruled the *Larkins* finding that the state had impliedly preempted ***oil*** and gas regulation though its occupation of the field.[[303]](#footnote-304)280 Decisions rendered both before and after the 1935 legislation clearly recognize that the state has not occupied the field of ***oil*** and gas regulation.[[304]](#footnote-305)281

By expressly recognizing the right of cities and towns to regulate ***oil*** and gas exploration and production activities by statute, the Oklahoma Legislature has eliminated the lack of predictability that would have followed the somewhat inconsistent approaches taken by *Gant* and *Larkins* regarding the Corporation Commission’s “exclusive” jurisdiction and the problem of defining conflicts between Commission and sub-state unit regulation.

While the statutory provision insulating “cities and towns” from having their police powers preempted by the state ***oil*** and gas conservation statutory and regulatory provision, there is no specific mention that counties enjoy that same protection. Counties have the power to engage in zoning and planning but their powers are not as broad as those that have been delegated to municipalities. A federal district court when faced with a claim by an ***oil*** and gas operator that the County did not have the authority to deny it a permit in order to operate a disposal well for which the Corporation Commission had issued a permit utilized the *Burford* abstention doctrine in refusing to resolve the state law issues.[[305]](#footnote-306)282

In 2015, the Oklahoma Legislature repealed the existing statute recognizing the right of cities and towns to regulate ***oil*** and gas operations within their jurisdiction and replaced it with a statute that provides for express, but limited, preemption of city and town powers.[[306]](#footnote-307)282.1 The new statute provides:

A municipality, county, or other political subdivision may enact reasonable ordinances, rules and regulations concerning road use, traffic, noise, and odors incidental to ***oil*** and gas operations within its boundaries, provided such ordinances, rules and regulations are not inconsistent with any regulation established by Title 52 of the Oklahoma Statutes or the Corporation Commission. A municipality, county or other political subdivision may also establish reasonable setbacks and fencing requirements for ***oil*** and gas well site locations as are reasonably necessary to protect the health, safety and welfare of its citizens but may not effectively prohibit or ban any ***oil*** and gas operations, including ***oil*** and gas exploration, drilling, fracture stimulation, completion, production, maintenance, plugging and abandonment, produced water disposal, secondary recovery operations, flow and gathering lines or pipeline infrastructure. All other regulations of ***oil*** and gas operations shall be subject to the exclusive jurisdiction of the Corporation Commission. Provided, notwithstanding any provision of law to the contrary, a municipality, county or other political subdivision may enact reasonable ordinances, rules and regulations concerning development of areas within its boundaries which have been or may be delineated as a one-hundred-year floodplain but only to the minimum extent necessary to maintain National Flood Insurance Program eligibility.

Under this new statute, cities and towns can only regulate certain aspects of ***oil*** and gas operations and may do so only if their regulations are not inconsistent with state laws and/or regulations. The principal purpose of the statute is to expressly preempt prohibitory ordinances which would not allow various ***oil*** and gas practices to occur within the boundaries of the city or town. The statute clearly changes the prior dual regulatory regime with one that limits sub-state regulation to the areas specified in the statute. Thus, unless the city or town ordinance is dealing with roads, traffic, noise, odors, fencing or setback requirements, the ordinance will be *ultra vires*.[[307]](#footnote-308)282.2 Zoning restrictions relating to the location of wells or other facilities other than through setback requirements appear to be within the exclusive jurisdiction of the Commission. It would appear that use restrictions that typically are included in zoning ordinances would no longer be enforceable except to the extent that they involved setback or fencing requirements. The statute on its face does not deal with sub-state unit requirements that ***oil*** and gas operations receive discretionary permits or variances in order to be issued a permit, but on its face the statute appears to prevent sub-state units from interfering with a Corporation Commission-issued permit to drill.[[308]](#footnote-309)282.3 The statute also mirrors the Pennsylvania statute in that local zoning and other regulations taken pursuant to the National Flood Insurance Program are specifically authorized.

In *Magnum Energy, Inc. v. Board of Adjustment for the City of Norman*,[[309]](#footnote-310)282.4 the Oklahoma Supreme Court interpreted Okla. Stat. tit. 52, § 137.1 to preclude sub-state regulation of ***oil*** and gas operations except for those specifically-enumerated powers. A Norman ordinance imposed a blanket umbrella bond requirement for ***oil*** and gas operators. After being turned down for a variance by the Board of Adjustment from the bond requirement, Magnum sued asserting that the bonding requirement was preempted. While a bonding requirement imposed by a sub-state unit was upheld in *Gant*, the Oklahoma Supreme Court properly interpreted Section 137.1 as creating a paradigm shift in the way that preemption operates. Since Section 137.1 involves limited express preemption, the supreme court properly focused on the statutory language which clearly evinced an intent to deprive sub-state units of their general police powers to regulate ***oil*** and gas operations which had existed under Section 137 and replace it with a limited set of powers as expressed in Section 137.1.[[310]](#footnote-311)282.5 Since bonding requirements are not mentioned within Section 137.1, the City’s attempt to impose such requirements were preempted by the Corporation Commission’s existing bonding regulations.

1. **Pennsylvania**

Prior to 2009, Pennsylvania appeared to be following the Oklahoma approach to preemption. The Oklahoma approach which emphasizes that sub-state regulation will only be preempted where it intrudes into matters relating to the statewide regulation of ***oil*** and gas operations in order to prevent waste and to conserve natural resources would apparently allow for a substantial amount of sub-state regulation. The pre-2009 cases reflect that approach. In 2009, the Pennsylvania Supreme Court muddied the waters, however, as it attempted to interpret and apply the Pennsylvania ***Oil*** and Gas Act’s express preemption provision, which provides in part:

Except with respect to ordinances adopted pursuant … [to the Pennsylvania Municipalities Planning Code and Flood Management Act] all local ordinances and enactments purporting to regulate ***oil*** and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirement or limitations on the same features of ***oil*** and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of ***oil*** and gas wells as herein defined.[[311]](#footnote-312)283

While the first sentence creates a large exemption from preemption since local zoning ordinances would not be preempted, the second sentence, which was added in 1992, greatly narrows the exemption and requires the court to examine which regulations deal with the same features and/or conditions as do the state ***oil*** and gas conservation statute.[[312]](#footnote-313)284 Prior to the addition, the Pennsylvania courts noted the very broad exemption from preemption for local zoning ordinances adopted pursuant to the MPC. That was the conclusion of the court in *Nalbone v. Borough of Youngsville*,[[313]](#footnote-314)285 which found that a local zoning ordinance could be applied to ***oil*** and gas operations. The zoning ordinance was adopted pursuant to the MPC, a zoning enabling act necessitated by the fact that for non-home rule governments Pennsylvania is a “creature” state, meaning that local governments are totally dependent upon the State Legislature to delegate to them the authority to engage in police power regulation.[[314]](#footnote-315)286 So long as the zoning ordinance was adopted using the powers granted by the MPC, under the pre-1992 version of Section 602 of the ***Oil*** and Gas Act there would be no express preemption.[[315]](#footnote-316)287

With the 1992 language, however, courts have had to examine ordinances on a case-by-case basis to determine whether or not the express preemption language has been triggered. The first case arising under the 1992 amendment was *Commonwealth v. Whiteford*.[[316]](#footnote-317)288 The owner of the mineral estate challenged the municipality’s authority to issue a cease and desist order preventing him from engaging in further drilling activities and fining him for violating various provisions of the local zoning ordinance. The court found that the purposes served by the ***Oil*** and Gas Act did not fall within the purposes served by the zoning ordinance. The municipality argued that the owner’s actions affected nearby roadways and that his failure to apply for a surface grading permit violated the ordinance. The court agreed with the municipality that both roadway and surface disturbing activities were matters not covered by the ***Oil*** and Gas Act and were thus not preempted.

The Pennsylvania Supreme Court then decided two cases relating to preemption that set forth the general parameters of the express preemption provision of Section 602. In *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*,[[317]](#footnote-318)289 the Borough initially told an ***oil*** and gas operator that it had to apply for a discretionary permit to drill a well in a residential zoning district because well drilling involved the extraction of “minerals” for which such a permit was allowed. After local opposition to the drilling project arose, the Borough Council changed its mind and determined that natural gas is not a “mineral” within the terms of the ordinance and thus the operator’s proposed activities did not qualify for a discretionary permit for mineral extraction activities. The Council also determined that since approximately 75% of the well’s expected production would be sold off-site, the remaining 25% going to the two landowners under their respective leasehold free gas clauses, the proposed use was a commercial use and therefore not allowed in a residential zoning district. After the Council decision was upheld at the trial court, the Commonwealth Court initially disagreed with the Council’s interpretation of its own zoning ordinance by concluding that ***oil*** or gas well drilling is a mineral extraction activity for which a discretionary permit is allowed. The Commonwealth Court also found that under Section 602 the locational requirements of the zoning ordinance were preempted because the ***Oil*** and Gas Act and agency regulations do have restrictions on the location of wells. Since the operator had received a state permit to drill at that location, the express preemption language would apply since both the features and purposes of the state statute and local ordinance were the same. As for the other regulatory requirements contained in the zoning ordinance the Commonwealth Court remanded the case back to the trial court for the kind of ad hoc determination that must be made to determine whether there are overlapping features or conditions.

Upon appeal to the Pennsylvania Supreme Court, the Commonwealth Court’s holding regarding the interpretation of the terms “mineral extraction” and “minerals” was correct. Looking to how the MPC defined the term “minerals” as well as to the court’s use of the term, the court finds that natural gas is a mineral.[[318]](#footnote-319)290 Thus, unless preempted, the ***oil*** and gas well operator would have to apply for, and receive, a discretionary land use permit before it could undertake its drilling operations.[[319]](#footnote-320)291

Pennsylvania follows the traditional tri-partite approach to state preemption issues. There may be express preemption, as is the case with Section 602, implied preemption by occupation of the field or implied preemption by conflict.[[320]](#footnote-321)292 Because of the somewhat inartful drafting of the 1992 amendments to Section 602, it is up to the court to determine what is expressly preempted. It finds that “features of ***oil*** and gas well operations regulated by this Act” means the technical aspects of well functioning and matters ancillary thereto, specifically including such matters as registration, bonding and well site restoration.[[321]](#footnote-322)293 The court concludes that the locational restrictions contained within a zoning ordinance do not relate to the “technical” matters that are preempted. The only state regulation dealing with the location of the well relates to proximity to certain features such as water bodies and residences.[[322]](#footnote-323)294

Section 602 besides preempting local governments from regulating the “features of ***oil*** and gas well operations” also expressly preempts zoning regulations that accomplish the same purpose or purposes as set forth in the Act. The purposes are broadly stated in the ***Oil*** and Gas Act and included both optimal development of ***oil*** and gas as well as safety and environmental objectives.[[323]](#footnote-324)295 The court finds that the purposes of zoning are not the same as the purposes of the ***Oil*** and Gas Act. It relies on *Bowen/Edwards*,[[324]](#footnote-325)296 for the basic proposition that since zoning is such a core local function for which the Legislature has created a detailed enabling act that a “total” preemption of such a core function would have to be much clearer before a court would find local governments powerless to act.[[325]](#footnote-326)297 On this basis the court concludes that the Borough’s zoning ordinance which requires the operator to seek a discretionary permit is not preempted.[[326]](#footnote-327)298 The Supreme Court otherwise affirms the Commonwealth Court’s holding which supports the type of ad hoc analysis that the trial court will have to do to determine whether any of the performance standards of the zoning ordinance applicable to the discretionary permitting process fall within the preempted zone of “features” or the preempted zone of “purposes.”

Some of the unanswered questions as to the extent of the express preemption language of Section 602 were answered in *Range Resources—Appalachia, LLC v. Salem Township*.[[327]](#footnote-328)299 The Township initially enacted a general ordinance attempting to regulate ***oil*** and gas drilling operations. After being challenged under the express preemption provisions of Section 602, the Township repeals the ordinance and then goes through the required steps to adopt a zoning ordinance under the MPC. It appends to the zoning ordinance a verbatim copy of the now-repealed ***oil*** and gas regulatory ordinance. The trial court and the Commonwealth Court both find that the ordinance has been expressly preempted.[[328]](#footnote-329)300 The trial court apparently engaged in the kind of ad hoc, regulation-by-regulation, operational conflicts analysis required by Section 602. The Commonwealth Court opinion merely relied on the trial court’s analysis.

The Township sought review by the Pennsylvania Supreme Court, arguing that there are portions of its ordinance dealing with access roads, gas transmission lines, road maintenance agreements and water cleaning facilities used in connection with coalbed methane operations that fall outside of the “features” of ***oil*** and gas operations and are thus not preempted. As a companion case to *Huntley & Huntley*, the court relies on that case’s definition of what constitutes “features of ***oil*** and gas well operations.” Thus to the extent to which the Township is regulating the “technical” aspects of such operations, Section 602 expressly preempts such regulation. The Township posits a list of 10 local regulations it claims should not be preempted. The list includes location and grading of access roads, location and grading of gas transmission lines, storm water management plans, minimum depth for burying transmission lines, road maintenance agreements and mandatory testing of potable water supplies.[[329]](#footnote-330)301 While noting that Huntley & Huntley clearly allows for local regulation through zoning, the court finds that the Salem Township ordinance is a type of cradle-to-grave regulation of well operations for which there is substantial overlap with the state statutory and regulatory requirements. The court questions the discretionary permit system because even if the ***oil*** and gas operator complies with the listed performance standards, the ordinance does not require the Township to issue the permit. It makes clear what is implied in *Huntley & Huntley*, namely that the zoning ordinance may not prohibit drilling operations that the state has permitted through the use of the old preemption adage that a local government cannot permit what the state prohibits and cannot prohibit what the state allows.[[330]](#footnote-331)302 But to a certain extent that is what local zoning accomplishes, the exclusion of certain types of uses from certain use districts. Because the Salem Township ordinance goes well beyond the zoning ordinance reviewed in *Huntley and Huntley*, the court does not get into a regulation-by-regulation analysis, instead choosing to find that the entire ordinance is expressly preempted.[[331]](#footnote-332)303

Shortly after *Huntley and Huntley* and *Salem Township* were decided, the federal court invalidated a series of Blaine Township ordinances in *Range Resources-Appalachia, LLC v. Blaine Township*.[[332]](#footnote-333)304 One ordinance attempted to nullify U.S. Supreme Court decisions treating corporations as persons for purposes of constitutional protection. The court had no difficulty finding that a Township did not have the power to interpret or apply the U.S. Constitution in a manner different from that of the Supreme Court.[[333]](#footnote-334)305 A second ordinance required an extensive corporate disclosure form be filed with the Township should the corporation be doing business within the Township. The ordinance also prohibited corporations from doing business within the Township if they have been issued three notices of violation by any state agency, including the Department of Environmental Protection, within the past 20 years.[[334]](#footnote-335)306 The court applied the *Huntley and Huntley* and *Salem Township* preemption analysis to find that the disclosure ordinance was preempted by the ***Oil*** and Gas Act.[[335]](#footnote-336)307 It finds the disclosure ordinance impliedly preempted by conflict because the Township ordinance forbids an ***oil*** and gas operator from drilling within the Township upon the receipt of three notices of violation even though that same operator would be eligible for a drilling permit from DEP.[[336]](#footnote-337)308 Finally, the court invalidates the Township resolution imposing a fee for the location of any temporary structure, storage, or office trailer used at all work sites.[[337]](#footnote-338)309 Because the resolution does not define what temporary means, what is a structure, and what is a storage trailer, the court finds the resolution to be void for vagueness.[[338]](#footnote-339)310

In *Penneco* ***Oil*** *Co. v. County of Fayette*,[[339]](#footnote-340)311 several operators challenged various aspects of the County’s zoning ordinance as it applied to ***oil*** and gas operations. The County zoning ordinance allowed hard rock mining uses in certain districts, as of right, while ***oil*** and gas operations required a discretionary permit in those zoning districts where such uses were allowed. Secondly, the ordinance gives the Zoning Hearing Board the discretionary power to attach additional conditions to the permit in order to “protect the public’s health, safety and welfare.” Thirdly, the ordinance requires an ***oil*** and gas operator to obtain a zoning certificate, and fourthly, the ZHB may attach conditions to the permit that interfere with the operational functioning of the ***oil*** and gas well.[[340]](#footnote-341)312

In addition to the general requirements for a discretionary permit that attach to any use, the ordinance has specific requirements including a setback requirement from property lines and residences, and landscaping and fencing requirements. Applying *Huntley and Huntley* and *Salem Township*, the court finds that the County zoning ordinance in no way deals with the technical aspects of ***oil*** and gas operations or functions including such ancillary items as bonding and site restoration.[[341]](#footnote-342)313 The court finds the discretionary permit requirement valid because unlike in *Salem Township*, the discretion afforded the Zoning Hearing Board to either reject or condition the permit is not unbridled.[[342]](#footnote-343)314 The court also finds that the zoning certificate requirement and its accompanying fee are not duplicate permits to drill but merely and effort by the County to ensure compliance with the zoning ordinance. Since the ordinance does not interfere with the state regulation it is not preempted.

The approach taken by the Pennsylvania Supreme Court in both *Huntley & Huntley* and the *Salem Township* cases was followed in *Hoffman Mining Co., Inc. v. Zoning Hearing Board of Adams Township.*[[343]](#footnote-344)315 In *Hoffman Mining*, the issue was whether a zoning ordinance requiring a 1,000-foot setback for a surface mining operation, along with the requirement that such operations get a discretionary permit was preempted by the Surface Mining Conservation and Reclamation Act.[[344]](#footnote-345)316 SMCRA contains a similar provision to the ***Oil*** and Gas Act’s express preemption provision noting that except as to ordinances adopted pursuant to the Commonwealth’s zoning enabling act, all local ordinances attempting to regulate surface mining operations are preempted.[[345]](#footnote-346)317 Since express preemption does not apply in this case due to the statutory exception for zoning ordinances, the court analyzes the preemption issue through the lens of implied preemption by occupation of the field and implied preemption by conflict, just as in *Huntley & Huntley* and *Salem Township*.[[346]](#footnote-347)318 The court relies on *Salem Township* for the proposition that the Legislature clearly did not intend to preempt sub-state zoning regulation, including use restrictions, when it used the exception language found in both the ***Oil*** and Gas Act and SMCRA.[[347]](#footnote-348)319 As with the ***Oil*** and Gas Act, SMCRA does not contain locational restrictions, another factor showing no intent to either expressly preempt zoning regulation or occupy the field of locational restrictions on surface mining operations. This conclusion is more tenuous than in the ***oil*** and gas cases since SMCRA does contain an express setback requirement of only 100 feet, as opposed to the zoning ordinance’s 1,000-foot setback. Nonetheless a majority of the court finds that the plaintiff has not met its burden of showing that the Legislature intended to occupy the field or that there is a conflict between the two setback requirements.

In 2012, the Pennsylvania Legislature passed Act 13, which made significant changes to the Pennsylvania ***oil*** and gas conservation statutes.[[348]](#footnote-349)320 Act 13 greatly expands the preemptive impact of state regulation. The following section mirrors the language of *Huntley and Huntley* and *Salem Township*:

Section 3302. ***Oil*** and gas operations regulated pursuant to Chapter 32.

Except with respect to local ordinances adopted pursuant to the MPC and the act of October 4, 1978 (P.L.851, No.166), known as the Flood Plain Management Act, all local ordinances purporting to regulate ***oil*** and gas operations regulated by Chapter 32 (relating to development) are hereby superseded. No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of ***oil*** and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32. The Commonwealth, by this section, preempts and supersedes the regulation of ***oil*** and gas operations as provided in this chapter.[[349]](#footnote-350)321

But the ensuing sections provide for much greater state preemption. Section 3303 states that “environmental acts are of Statewide concern” so that local ordinances may not regulate in the environmental arena.[[350]](#footnote-351)322 But it is Section 3304 that greatly restricts the power of sub-state units to regulate ***oil*** and gas operations by generally requiring all local ordinances to “allow for the reasonable development of ***oil*** and gas resources” and by specifically setting forth a laundry list of things local governments must do and cannot do in relation to regulating ***oil*** and gas development.[[351]](#footnote-352)323 For example, local governments must allow ***oil*** and gas operations in all zoning districts, must not delay the processing of permits beyond a statutorily mandated time frame, must not treat ***oil*** and gas operations differently than other industrial operations, and has limited ability to treat ***oil*** and gas operations as discretionary, rather than permitted uses.[[352]](#footnote-353)324 Issues relating to the reasonableness of the zoning ordinances are to be resolved by the Public Utility Commission.[[353]](#footnote-354)325

Almost immediately upon enactment, Act 13 was challenged by a number of plaintiffs in a direct appeal to the Pennsylvania Commonwealth Court.[[354]](#footnote-355)326 The alleged grounds for the constitutional challenge include the violation of Article 1, § 1, relating to inherent rights of mankind, Article 3, § 32 relating to prohibitions on special and local laws, Article 1, § 10 relating in part to eminent domain powers, Article 1, § 27 relating to natural resources, and Article 3, § 3 relating to the form of bills.[[355]](#footnote-356)327 One of the provisions of Act 13 requires local governments to amend their zoning ordinances to comply with its requirements within 120 days of the passage of the Act.[[356]](#footnote-357)328 Because zoning ordinance amendments have to go through a lengthy process pursuant to the Municipalities Planning Code, the court has issued a preliminary injunction preventing the enforcement of the 120-day deadline.[[357]](#footnote-358)329

In *Robinson Township v. Commonwealth of Pennsylvania*,[[358]](#footnote-359)330 a divided court found that three provisions of Act 13 were unconstitutional.[[359]](#footnote-360)331 Preliminarily, the court concluded that the municipalities, the two council members, and the environmental organization have standing to sue while the physician does not since the physician’s alleged injuries are too speculative.[[360]](#footnote-361)332 The court also dismissed the Commonwealth’s claim that the suit should be dismissed under the political question doctrine because the Legislature has made a basic policy decision that cannot be overturned by the courts.[[361]](#footnote-362)333 Based in part on the Pennsylvania constitutional provision giving the people the “right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment,” the court concluded that the political question doctrine is not applicable.[[362]](#footnote-363)334

Applying a traditional substantive due process analysis to the provisions of Act 13 that preempt in some situations a portion of the sub-state unit’s power to zone, the court concluded that the provisions of Act 13 that require ***oil*** and gas operations to be allowed in all zoning districts, including residential districts, violates substantive due process principles. By mandating the inclusion of incompatible uses within zoning districts, Act 13 does not protect the interests of neighboring property owners and mandates “irrational classifications.”[[363]](#footnote-364)335 The rationale of the majority opinion is based on its outdated notion that zoning’s principal purpose is to keep the “pig” out of the “parlor” by separating out incompatible uses. As noted in the dissenting opinion, unlike other industrial uses which create negative externalities and thus can be relegated to certain limited areas within a community, ***oil*** and gas production operations must take place where the ***oil*** and gas is physically located.[[364]](#footnote-365)336 The dissent argued that Act 13 represents a balance between various local and Commonwealth interests that should not be overturned by the court.[[365]](#footnote-366)337 Most of the other constitutional challenges to Act 13 were rejected.[[366]](#footnote-367)338

In a divided opinion, the Pennsylvania Supreme Court affirmed the Commonwealth Court’s decision invalidating several specific sections of Act 13.[[367]](#footnote-368)339 The touchstone of the plurality opinion is its broad reading of the Environmental Rights Amendment (ERA) to the Pennsylvania Constitution.[[368]](#footnote-369)340 Prior lower court decisions had treated the ERA as mostly hortatory in nature while the plurality opinion states that the ERA creates individual environmental rights that “binds all government, state or local or concurrently.”[[369]](#footnote-370)341 The plurality opinion interprets the ERA as accomplishing two primary goals: “(1) the provision identifies protected rights, to prevent the state from acting in certain ways, and (2) the provision establishes a nascent framework for the Commonwealth to participate affirmatively in the development and enforcement of these rights.”[[370]](#footnote-371)342 These goals are accomplished in two ways, giving individual citizens the right to clean air and water on a par with rights normally associated with civil liberties and then by imposing a public trust duty/responsibility on behalf of the Commonwealth to protect the public natural resources which are defined to include more than just Commonwealth-owned resources.[[371]](#footnote-372)343 When viewed through this prism, the issue becomes more than a simple question of can the Commonwealth limit the zoning power it has delegated to sub-state units.

Even the plaintiffs acknowledge that: “the General Assembly has the authority to preempt local laws, amend the ***Oil*** and Gas Act, or simply remove municipalities’ zoning power entirely.”[[372]](#footnote-373)344 But just as the General Assembly may not enact legislation that violates constitutional restrictions relating to civil liberties, it may not enact legislation that violates the duties created by the ERA. While couching its language in the terms of the trust duty under the ERA, the rationale used is consistent with the substantive due process analysis of the Commonwealth Court and the concurring opinion of Justice Baer. Through the use of anecdotal evidence as supplied through affidavits along with its view that zoning’s principal purpose is the segregation of single-family residential uses from other uses, the plurality opinion is essentially questioning the rationality of the choices made by the General Assembly in attempting to balance the competing interests that are in play. It is also clear that the plurality opinion does not like the balance reached by the General Assembly insofar as it is treated as a cave-in to industry interests at the expense of the citizens’ right to a clean environment.[[373]](#footnote-374)345

The Supreme Court’s mandate finds that four provisions of Act 13, sections 3215(b)(4), 3215(d), 3303, and 3304 violate the ERA. It also finds that the other parts of section 3215(b) cannot be severed from 3215(b)(4) and thus they are unconstitutional. The court then remands to the Commonwealth Court the difficult issue of determining which, if any, of the remaining provisions of Act 13 are severable from the unconstitutional provisions. In the interim it is most likely that the courts will be reviewing sub-state preemption cases under the operational conflicts test used prior to *Robinson Township*, although the impact of the court’s expansive interpretation of the ERA may influence that preemption decision.

Upon remand, the Pennsylvania Commonwealth Court had to determine which provisions, if any, under Act 13, other than the four sections invalidated by the Supreme Court, can be saved. In *Robinson Township v. Commonwealth*,[[374]](#footnote-375)345.1 the court specifically dealt with the issue of whether portions of section 3302 dealing with preemption may be severed and enforced because it is severable from the sections determined to be unconstitutional.[[375]](#footnote-376)345.2 The relevant sections that the court reviewed included Sections 3302 and 3305–3309. The latter sections delegate to the Public Utility Commission and the courts the power to make decisions relating to whether or not a sub-state ordinance is preempted. In looking at Section 3302, which is a mirror image of the former express preemption provision except for the last sentence, the court determined that only the last sentence which stated: “The Commonwealth, by this section, preempts and supersedes the regulation of ***oil*** and gas operations as provided in this chapter.”[[376]](#footnote-377)345.3 Since Sections 3303 and 3304 were the express preemption provisions and were found to be unconstitutional, the Commonwealth Court determined that the sentence referring to “this chapter” could not be severed. But as to the prior sentences which contain express, but limited, preemption, they could be severed and would be enforced. A majority of the Commonwealth Court, however, determined that the procedures created by Act 13 in Sections 3305–3309 could not be severed and were thus not enforceable.[[377]](#footnote-378)345.4

In *Robinson Township v. Commonwealth*,[[378]](#footnote-379)345.5 the Pennsylvania Supreme Court affirmed in part and reversed in part the Commonwealth Court opinion. The Supreme Court affirms the invalidation of Sections 3305–3309 of Act 13, because they cannot be severed from Sections 3302–3303 which were found to be unconstitutional in the 2014 *Robinson* decision.[[379]](#footnote-380)345.6

Essentially, the court revived the ad hoc operational conflicts test of *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*,[[380]](#footnote-381)345.7 for sub-state unit ordinances that are enacted pursuant to either the Municipalities Planning Code or the Flood Management Act.

In *Delaware Riverkeeper Network v. Sunoco Pipeline LP*,[[381]](#footnote-382)345.8 the court reviewed the general principles underlying Pennsylvania preemption law in the context of a pipeline’s attempt to find that several different sub-state unit zoning ordinances were preempted by the state statutes relating to the regulation of ***oil*** or petroleum product pipelines. Unlike with the ***Oil*** and Gas Conservation Act, there is no express exemption from preemption made for zoning regulation in the Public Utility Code.[[382]](#footnote-383)345.9 Thus, the court looked at the three ways that a state statute may preempt sub-state regulation, to wit, express preemption, implied preemption by occupation of the field, and implied preemption by conflict.[[383]](#footnote-384)345.10 Neither the Public Utility Code nor the Municipalities Planning Code contain express preemption provisions. As to field preemption, the court attempted to ascertain the intent of the General Assembly to see whether or not the state has “retained all regulatory and legislative power for itself.”[[384]](#footnote-385)345.11 Case precedent shows that when it comes to the regulation of public utilities, the state has evidenced a clear intent to commit the regulation to the state.[[385]](#footnote-386)345.12 As for conflict preemption, the court did not develop a new test for determining when a conflict exists other than to say that it occurs when the sub-state regulation is “contradictory to, or inconsistent with” a state statute.[[386]](#footnote-387)345.13 Looking at it both from a theoretical or policy perspective and a practical perspective, the court concluded that allowing sub-state units to dictate where a state-certificated pipeline may locate constituted a “headlong conflict” with the state statutory scheme. Thus, the Commonwealth Court affirmed the trial court’s finding that the sub-state unit zoning ordinances were preempted and could not be applied against a petroleum pipeline.

1. **Texas**

While the Railroad Commission of Texas has been delegated substantial authority to regulate the ***oil*** and gas industry, local regulation of ***oil*** and gas drilling and production activities has been widespread since the 1930s.[[387]](#footnote-388)346 Early municipal regulation was more than zoning or land use in nature, and often involved compulsory pooling by requiring the creation of drilling blocks within the municipality where only a single well could be drilled.[[388]](#footnote-389)347 Texas also gives home rule status to most larger cities and in recent years has given broad police power powers to general-law cities. Counties, on the other hand, possess minimal police power regulation and no power to zone with few exceptions. In the only frontal attack on a sub-state unit’s zoning and conservation ordinance based on preemption, the court easily dismissed the operator’s arguments and observed:

However, it is held that the Legislature—in so delegating that authority [***oil*** and gas conservation] to the Railroad Commission—did not thereby intend to nor accomplish the repeal of the fundamental law theretofore, as well as subsequently, existing, that municipalities in Texas have, under the police power, authority to regulate the drilling for and production of ***oil*** and gas within their corporate limits, when acting for the protection of their citizens and the property within their limits, looking to the preservation of good government, peace, and order therein.[[389]](#footnote-390)348

Concurrent regulation of ***oil*** and gas operations is accepted as the guiding principle in the absence of any express legislative statement preempting local regulation of such operations.

In *City of Mont Belvieu v. Enterprise Products Operating, L.P*.,[[390]](#footnote-391)349 the court reinforced the basic principle that even though there is extensive state regulation over various aspects of the ***oil*** and gas industry, there is no preemption of municipal regulation. Enterprise received a permit from the Railroad Commission in order to drill a well to operate and maintain an underground hydrocarbon storage facility in a salt dome. It already had a permit to operate the storage facility. After participating in the Railroad Commission hearings on the permit, the city did not appeal the permit decision. It did, however, file suit against Enterprise for failing to apply for a city permit to drill the injection well.[[391]](#footnote-392)350 The way the preemption issue was raised was atypical; Enterprise argued that the court lacked subject matter jurisdiction over the question of the validity of the Commission permit. In resolving the preemption issue, the court looked at the relevant statutory grants of power to the Commission to regulate storage facilities,[[392]](#footnote-393)351 and found that the legislature did not intend to give the commission exclusive jurisdiction over hydrocarbon storage facilities. It did remand the case to determine if there was implied preemption by conflict as to any of the specific city regulatory requirements.[[393]](#footnote-394)352

In 2015, the Texas Legislature enacted an express, but partial, preemption provision ostensibly in response to the voters of the City of Denton enacting an initiative ordinance prohibiting hydraulic fracturing operations from occurring within the City.[[394]](#footnote-395)352.1 The ordinance starts out with an express preemption of all local governmental power to ban, limit, or otherwise regulate ***oil*** and gas operations.[[395]](#footnote-396)352.2 Having taken that power away, the Legislature then gives part of the regulatory power back to local governments using the following language:

… a municipality may enact, amend, or enforce an ordinance or other measure that:

(1) regulates only above ground activity related to an ***oil*** and gas operation … including a regulation governing fire and emergency response, traffic, lights, or noise, or imposing notice or reasonable setback requirements;

(2) is commercially reasonable;

(3) does not effectively prohibit an ***oil*** and gas operation conducted by a reasonably prudent operation; and

(4) is not otherwise preempted by state or federal law.[[396]](#footnote-397)352.3

The statute also defines what is commercially reasonable and provides a presumption of commercial reasonability for ordinances that have been in existence for more than five years under which ***oil*** and gas operations have continued.[[397]](#footnote-398)352.4

The express preemption provision takes the courts out of the implied preemption business insofar as prohibitory ordinances are involved.[[398]](#footnote-399)352.5 But the courts have not been deprived of their power to find individual ordinances preempted should they fail to meet the four statutory requirements. But instead of focusing on the issue of whether or not there is a conflict between the state statutory and regulatory program and the sub-state unit’s ordinance, the principal issue will be whether or not the ordinance is “commercially reasonable” as defined in the statute.[[399]](#footnote-400)352.6 So instead of an operational conflicts analysis the courts will have to determine whether or not a reasonably prudent operator will be allowed to “fully, effectively and economically exploit, develop, produce, process and transport ***oil*** and gas … .” Even with the presumption that applies to ordinances in effect more than five years, the new test will seemingly require an ad hoc approach that weighs the economic impact of the regulation on the operator’s plans to develop.

One of the ways that Texas courts attempt to resolve conflicting grants of power to sub-state units is by determining whether one of the units has the power of eminent domain. In *Texas Midstream Gas Services, LLC v. City of Grand Prairie*,[[400]](#footnote-401)353 a pipeline operator asserted that the municipal zoning ordinance was not applicable to its project to construct and operate a natural gas compressor station because the operator was a “gas corporation” under Texas laws and thus vested with the power of eminent domain.[[401]](#footnote-402)354 The court recognizes some inconsistent prior Texas cases some of which say that an entity, either public or private, that has the power of eminent domain is subject to municipal zoning regulation while others say such an entity is exempt.[[402]](#footnote-403)355 While noting that entities with eminent domain power prevail over municipalities who exercise their zoning power, the court finds that because natural gas compressor stations are not being “zoned out” but are merely being subject to the discretionary permit process there is exemption from the application of the zoning ordinance.

The relationship between municipalities exercising their regulatory or police power authority and public or private entities exercising eminent domain authority is not all that clear. Texas Midstream is arguing that because it has the power of eminent domain, the City may not impose setback requirements on it because the Legislature has seen fit to give it the right to condemn land for utility purposes. The Fifth Circuit concludes that both the City’s police power and the utility’s eminent domain power are co-equal or correlative powers with one not necessarily trumping the other. As the court notes, the setback requirement may impose additional expenses in the form of condemnation costs on the utility, but if the requirement is reasonable it may be imposed.[[403]](#footnote-404)356

1. **Virginia**

Virginia has an express statutory partial preemption provision, first enacted in 2013 and then amended several times, that is similar to the one that existed in Pennsylvania prior to 2012. The statute provides:

No locality or other political subdivision shall impose any condition, or require any other license, permit, fee, or bond that varies from or is in addition to the requirements of this chapter to perform any gas, ***oil***, or geophysical operation. However, no provision of this chapter shall be construed to limit or supersede the jurisdiction and requirements of any other state agency, local land use-ordinances, regulation of general purpose, or §§ 58.1-3712, 58.1-3713, 58.1-3713.3, 58.1-3713.4, 58.1-3741, 58.1-3742, or 58.1-3743.[[404]](#footnote-405)357

The statutory cross-references are to provisions given cities and counties the power to levy a severance tax. To date, there are no reported decisions applying or interpreting the preemption statute.

In 2012, prior to the enactment of the express preemption statute, the Attorney-General issued an opinion on the specific issue of whether or not a sub-state unit could prohibit ***oil*** and gas operations within its jurisdiction pursuant to its land use authority.[[405]](#footnote-406)358 The opinion deals with a specific fact situation and is more like a judicial opinion than an opinion of an Attorney-General. The factual predicate for the Opinion is a county’s decision to deny an ***oil*** and gas operator a permit to drill after the operator received a permit from the Virginia Gas & ***Oil*** Board. The County’s initial position was that such operations were not an allowed use anywhere and that a moratorium on all ***oil*** and gas operations would take place until the United States Environmental Protection Agency completed its report on public safety issues relating to hydraulic fracturing.

Virginia counties are not home rule units but they do possess expressly granted authority to engage in land use regulation.[[406]](#footnote-407)359 Virginia also follows the traditional three-part approach to preemption, namely, express preemption, implied preemption by occupation of the field and implied preemption by conflict. Since the Virginia ***Oil*** and Gas Conservation Act contains an express, but partial, preemption provision quoted above, the discussion about field preemption is gratuitous since the Legislature has determined that the Act does not occupy the field. The issue therefore relates to whether or not a prohibition would be in conflict with the Act and other statutory provisions.[[407]](#footnote-408)360 The Opinion, however, still uses the Act’s comprehensive nature as one of the factors to include in the ad hoc determination of whether a prohibitory ordinance would be in conflict with, or inconsistent with, the Act. The Opinion also utilizes the old conflict adage that a sub-state unit may not prohibit that which the state allows. The Opinion concludes that the County zoning ordinance if read to encompass a total prohibition against all ***oil*** and gas operational facilities would be inconsistent with the Act and other state statutes and thus be preempted. Without those legislative modifications, the court would have had a more difficult time showing that the “general permits” were not rules since they apply to everyone discharging produced water generated by coalbed methane production into the named watersheds.

In 2015, a different Virginia Attorney-General authored a new opinion which disagrees with the basic conclusion of the 2013 opinion.[[408]](#footnote-409)360.1 The 2015 Opinion initially finds that sub-state entities have clearly been given the power to regulate and the power to prohibit land uses under Virginia’s enabling act.[[409]](#footnote-410)360.2 Given that power, only if an ordinance is in conflict with, or inconsistent with, state law will it be preempted. In this situation, the statute specifically authorizes local land use regulation of ***oil*** and gas operations that are otherwise regulated by the Gas & ***Oil*** Board.[[410]](#footnote-411)360.3 The partial, express preemption statute was enacted a year after the Virginia Supreme Court had decided that a sub-state unit could exercise its zoning and land use powers to prohibit a landfill that had received a state permit.[[411]](#footnote-412)360.4 In light of that decision, the Legislature’s decision to exempt the exercise of zoning and land use powers from the express preemption language evinces a clear intent to reject the 2013 opinion’s reliance on the principle that a sub-state ordinance is in conflict with a state statute if it prohibits that which the state allows. The 2015 Opinion, however, does not state that all local zoning and/or land use regulations will be valid. As amended, the statute provides: “However, no provision of this chapter shall be construed to limit or supersede the jurisdiction or requirements of any other state agency, local land-use ordinance, regulation of general purpose. …”[[412]](#footnote-413)360.5 It would appear that sub-state unit zoning ordinances would not fall under the express preemption statutory provision but may run afoul of potential preemption claims relating to direct conflicts between the state ***oil*** and gas conservation statute and regulations and local land use ordinances.

1. **West Virginia**

West Virginia’s extensive ***oil*** and gas conservation statutes do not contain an express preemption clause. With increased drilling activities in the state, the City of Morgantown enacted an ordinance which prohibited the drilling of a well using horizontal drilling with fracturing methods.[[413]](#footnote-414)361 A lessee who had received a drilling permit to locate a well within the City limits challenged the ordinance on preemption grounds. The trial court uses the implied preemption by occupation of the field doctrine to invalidate the ordinance. The court noted the extensive state regulation through the West Virginia Department of Environmental Protection of all aspects of ***oil*** and gas drilling and production operations.[[414]](#footnote-415)362 The state regulatory scheme does not provide any exception or latitude for the City to regulate, much less prohibit, ***oil*** and gas development and production activities. The court further notes, as an aside, that where there are inconsistencies between state and sub-state regulation, sub-state regulation fails, which seemingly raises the implied preemption by conflict doctrine.[[415]](#footnote-416)363

In *EQT Production Co. v. Wender*,[[416]](#footnote-417)363.1 the court expressly recognized that sub-state units in West Virginia are subject to express preemption, implied preemption by conflict and implied preemption by occupation of the field. Finding that regulation of both surface and subsurface disposal of oilfield wastes and frac water was regulated by the state ***oil*** and gas conservation agency, the court rejected a county’s claim that implied preemption by occupation of the field did not exist. It also suggested that conflict preemption is a broad concept so that more than direct conflicts between state and sub-state regulation will be covered.

On appeal to the Fourth Circuit, the finding that the sub-state regulation of the disposal of oilfield wastes was preempted was affirmed.[[417]](#footnote-418)363.2 Without resolving the issue of whether West Virginia applies the occupation of the field doctrine, the court found that there was a clear conflict between the ordinance’s prohibition against the storage of wastewater at wellsites and various provisions of the ***oil*** and gas conservation statute that give the Department of Environmental Protection the power to regulate ***oil*** and gas production activities.[[418]](#footnote-419)363.3

1. **Wyoming**

Wyoming has an express preemption provision relating to the regulation of ***oil*** and gas operations by counties. In the zoning enabling act for counties, the statute states:

[N]o zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any lands subject thereto.[[419]](#footnote-420)364

This particular preemption provision was applied in *River Springs Limited Liability Co. v. Board of County Commissioners*.[[420]](#footnote-421)365 This case involved a county zoning ordinance regulating sand and gravel operations. The Wyoming Supreme Court indicated that it would not apply traditional preemption analysis to a situation where both state and sub-state governmental entities were seeking to regulate the same type of mineral extraction operation. The State Department of Environmental Quality was delegated the authority to regulate mining activities, including sand and gravel operations.[[421]](#footnote-422)366 The county was given broad zoning powers, subject to the limitation of those powers quoted above.[[422]](#footnote-423)367 The court did not apply an express preemption test because it found that sand and gravel operations did not fall within the statutory phrase “extraction or production of the mineral resources[.]” The court therefore attempted to analyze the competing statutory grants of authority under a conflict-type analysis. As to one of the mining operators suing the county, the court concluded that the state statutes preempted sub-state regulation because they were “sufficiently broad … to control the regulation of the removal of the identified minerals from the earth for reuse or further processing.”[[423]](#footnote-424)368 But as to a second mining operator, the state statute created an exemption from its regulatory power for small surface mining operations consuming 10 acres or less.[[424]](#footnote-425)369 Since that operator was seeking an exemption from state regulation, the court concluded that the county was free to regulate, or even prohibit, the excavation activity, ignoring the traditional view that a conflict exists where the sub-state unit prohibits what the state unit permits. The court also did not analyze the issue of whether the state had occupied the entire field of mineral extraction regulation, which would have precluded any sub-state regulation of that activity. Because the county was granted the power to zone, the court would not restrict that power where the state had exempted a particular activity from state regulation.

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1. 48Oklahoma Water Resources Bd. v. Texas County Irrigation & Water Resources Ass’n, 1984 OK 96, 711 P.2d 38, 88 O.&G.R. 331. [↑](#footnote-ref-2)
2. 49State *ex rel.* Pollution Control Coordinating Bd. v. Corporation Comm’n, 1983 OK 3, 660 P.2d 1042, 76 O.&G.R. 107. [↑](#footnote-ref-3)
3. 50State *ex rel.* Commissioners of the Land Office v. Corporation Comm’n, 1987 OK 126, 747 P.2d 306, 97 O.&G.R. 373. [↑](#footnote-ref-4)
4. 51The statute, Okla. Stat. Ann. § tit. 52, 87.1(a) does not provide for any express exemption for lands that can be spaced, other than that they cover a common source of supply. The Land Office argued that the statutes dealing with the development of state-owned minerals, Okla. Stat. Ann. tit. 64, §§ 285–286, are exclusive and admit to no further limitation. The court disagreed, reading the statutory provisions as providing certain exclusive powers to the Land Office, such as the power to lease and the power to voluntarily communitize state-owned minerals, but not providing an exemption from the provisions relating to spacing. 747 P.2d at 308. [↑](#footnote-ref-5)
5. 52*See generally* Bruce M. Kramer, *Conflicts Between the Exploitation of Lignite and* ***Oil*** *and Gas: The Case for Reciprocal Accommodation,* 21 Hous. L. Rev. 49, 91–98 (1984); Steven Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners,* 33 Vand. L. Rev. 871 (1980). [↑](#footnote-ref-6)
6. 53Ohio Rev. Code § 1509.08. The application is made to the Ohio Department of Natural Resources, Division of ***Oil*** and Gas. [↑](#footnote-ref-7)
7. 54Through October 29, 1995 that agency was the Department of Industrial Relations, Division of Mines. That agency’s functions were taken over by the Department of Natural Resources, Division of Mines and Reclamation. *See generally* Redman v. Ohio Dep’t of Indus. Relations, 75 Ohio St. 3d 399, 1996 Ohio 196, 662 N.E.2d 352, 354 (n.1) (Ohio 1996). [↑](#footnote-ref-8)
8. 55Ohio Rev. Code § 1509.08. Redman v. Ohio Dep’t of Indus. Relations, 75 Ohio St. 3d 399, 1996 Ohio 196, 662 N.E.2d 352, 354 (Ohio 1996). [↑](#footnote-ref-9)
9. 56Redman v. Ohio Dep’t of Indus. Relations, 75 Ohio St. 3d 399, 1996 Ohio 196, 662 N.E.2d 352, 354 (Ohio 1996). This case is also discussed in §§ 24.02[1] and 24.05[1][c] *below*. [↑](#footnote-ref-10)
10. 57The non-delegation doctrine issue is discussed in more detail in § 24.02[1] *below.* [↑](#footnote-ref-11)
11. 58Murray Energy Corp. v. Div. of Mineral Res. Mgmt., 2013-Ohio-4162, 998 N.E.2d 872 (Ohio App.). [↑](#footnote-ref-12)
12. 59*Id.* at 876–77 relying on Ohio Rev. Code §§ 1509.05, 1509.08. [↑](#footnote-ref-13)
13. 60*Id.* at 879–80 relying on Ohio Rev. Code §§ 1509.08, 1509.13. [↑](#footnote-ref-14)
14. 61*Id.* [↑](#footnote-ref-15)
15. 62*Id*. at 880. The source of authority for the chief to impose conditions on permit applications is Ohio Rev. Code. § 1509.06. The court seemingly looks beyond the language of the permit itself to determine that the Chief imposed the conditions as a means of satisfying the coal operator’s concerns regarding the proposed well. [↑](#footnote-ref-16)
16. 62.1Tex. Water Code § 27.015(a). [↑](#footnote-ref-17)
17. 62.2Dyer v. Texas Comm’n on Envtl. Quality, 646 S.W.3d 498 (Tex. 2022). [↑](#footnote-ref-18)
18. 62.3Similarly, it was not arbitrary or capricious for TCEQ to grant the permit without re-opening the administrative record to consider the RRC rescission order which was not final at the time of TCEQ’s decision. 646 S.W.3d at 502–03. [↑](#footnote-ref-19)
19. 63W. Va. Code § 22C-9-2. [↑](#footnote-ref-20)
20. 64W. Va. Code § 22C-8-1 *et seq.* (shallow wells); § 22C-9-1 *et seq.* (deep wells). [↑](#footnote-ref-21)
21. 65State *ex rel.* Blue Eagle Land, LLC v. W. Va. ***Oil*** & Gas Conservation Comm’n, 222 W. Va. 342, 664 S.E.2d 683 (2008). [↑](#footnote-ref-22)
22. 66Belden & Blake Corp. v. Commonwealth of Pennsylvania, Dep’t of Conservation and Natural Resources, 600 Pa. 559, 969 A.2d 528, 170 O.&G.R. 704 (2009). *See* Minard Run ***Oil*** Co. v. United States Forest Service, 2009 U.S. Dist. LEXIS 116520 (W.D. Pa. 2009), *aff’d*, 670 F.3d 236, 177 O.&G.R. 1 (3d Cir. 2011), where both the district court and the Third Circuit rely on *Belden & Blake* for the proposition that the surface estate owner may not unilaterally impose additional conditions on the mineral owner in the context of a case where the Forest Service was imposing EIS requirements on parties who owned the mineral estate underneath the Allegheny National Forest. The ruling by the Third Circuit led to the issuance of a permanent injunction by the District Court limiting the Forest Service’s control over ***oil*** and gas operations on the ANF to the procedures that had been approved in the 1980 decision. Minard Run ***Oil*** Co. v. United States Forest Serv., 2012 U.S. Dist. LEXIS 39978 (W.D. Pa. Mar. 23, 2012), 894 F. Supp. 2d 642 (W.D. Pa. 2012). The Third Circuit affirmed the issuance of the permanent injunction, finding that the challenges made by the environmental intervenors were barred by the “law of the case” doctrine. Minard Run ***Oil*** Co. v. United States Forest Serv., 549 Fed. Appx. 93, 180 O.&G.R. 351 (3d Cir. 2013). In the unreported opinion, 2012 U.S. Dist. LEXIS 39978, op cit., the district court concluded that the Forest Service should not be held in contempt for allegedly delaying the issuance of a permit for ***oil*** and gas exploration and development purposes. *See also* Pennsylvania ***Oil*** & Gas Ass’n v. United States Forest Service, 2014 U.S. Dist. LEXIS 21601 (W.D. Pa. Feb. 21, 2014) (dismisses litigation against USFS relating to invalid forest plan); Seneca Res. Corp. v. United States Forest Serv., 2013 U.S. Dist. LEXIS 37297 (W.D. Pa. Mar. 19, 2013) (follows *Minard Run* and issues a permanent injunction requiring the Forest Service to follow the approval procedures as set forth in the 1980 decision); Duncan Energy v. U.S. Forest Service, 50 F.3d 584 (8th Cir. 1995); United States v. Minard Run ***Oil*** Co., 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. 1980).

    The rule laid out in *Minard Run* is generally not accepted in other decisions, under different enabling acts than the Weeks Act, where federal land managers are capable of regulating the surface use for unpatented mining claims and other mineral extraction activities. *See e.g.* United States v. Doremus, 888 F.2d 630, 632 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991); United States v. Goldfield Deep Mines Co., 644 F.2d 1307 (9th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); United States v. Richardson, 599 F.2d 290 (9th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); United States v. Pepper, 697 F. Supp. 2d 1171 (E.D. Cal. 2009). [↑](#footnote-ref-23)
23. 6758 P.S. § 601.101 *et seq*. The well drilling permit requirement is set forth in § 601.201 and a bonding requirement is set forth in § 601.215. [↑](#footnote-ref-24)
24. 68969 A.2d at 529. [↑](#footnote-ref-25)
25. 69Pa. Const. art I, § 27. [↑](#footnote-ref-26)
26. 70Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 25 A. 597 (Pa. 1893). [↑](#footnote-ref-27)
27. 71969 A.2d at 533. The court states: “However, a property owner’s interests and rights cannot be lessened, nor their reasonable exercise impaired without just compensation, simply because a governmental agency with a statutory mandate comes to own the surface.” *Id.* This ignores the nature of the “accommodation” doctrine which the court seems to embrace as defining the scope of the implied easement of surface use. The use of the surface is a relevant consideration in determining what the mineral owner can do, and where a public park is involved, one would think that the mineral owner’s choices will be restricted in order to protect the surface owner’s park use. We agree that the government cannot eliminate the mineral owner’s easement of surface use, but it may require directional drilling, or other restrictions on surface use consistent with the public interest in protecting the park. *See, e.g.*, Tarrant County Water Improvement District No. 1 v. Haupt, Inc., 854 S.W.2d 909, 119 O.&G.R. 850 (Tex. 1993); Hobson Petroleum Corp. v. State, 2001 Mich. App. LEXIS 2708 (Dec. 21, 2001); Miller Brothers v. Department of Resources, 203 Mich. App. 674, 513 N.W.2d 217, 128 O.&G.R. 518, *appeal denied*, 447 Mich. 1038, 527 N.W.2d 513 (1994). The approach taken in *Haupt*, whereby a regulatory takings claim cannot be determined until one knows whether or not the minerals may be produced through slant or horizontal drilling techniques was followed in Schmude ***Oil***, Inc. v. Dep’t of Envtl. Quality, 306 Mich. App. 35, 856 N.W.2d 84 (2014). [↑](#footnote-ref-28)
28. 72*See generally* Heidi Gorovitz Robertson, *Home Rule Symposium: Cities and Citizens Seethe: A Case Study of Local Efforts to Influence Natural Gas Pipeline Routing Decisions*, 122 W. Va. L. Rev. 881 (2020); Kevin Perron, *“Zoning Out” Climate Change: Local Land Use Power, Fossil Fuel Infrastructure, and the Fight Against Climate Change*, 45 Colum. J. Envtl. L. 573 (2020); Heidi Gorovitz Robertson, *When States’ Legislation and Constitutions Collide with Angry Locals: Shale* ***Oil*** *and Gas Development and Its Many Masters*, 41 Wm. & Mary Envtl. L. & Pol’y Rev. 55 (2016); Bruce M. Kramer, *The State of State and Local Governmental Relations as It Impacts the Regulation of* ***Oil*** *and Gas Operations: Has the Shale Revolution Really Changed the Rules of the Game*, 29 Fla. State Univ. J. of Land Use & Envt’l L. 69 (2014); Bruce M. Kramer, *Local Land Use Regulation of* ***Oil*** *and Gas Development: Pumpjacks and Preemption*, 2009 La. Min. L. Inst. 1; Bruce M. Kramer, *Drilling in the Cities and Towns: Rights and Obligations of Lessees, Royalty Owners, and Surface Owners in an* *Urban Environment* (Part I), 23 Pet. Accounting & Fin. Management J. 58 (2004); Alex Ritchie, *Creatures of Circumstance: Conflicts Over Local Government Regulation of* ***Oil*** *and Gas*, 60 Rocky Mtn. Min. L. Fdn. Ann. Inst. ch. 11 (2014); Jan Laitos & Elizabeth Getches, *Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development*, 24 Va. Envtl. L.J. 1 (2004); Jeffrey R. Fiske & Anne E. Lane, *Urbanization of the* ***Oil*** *Patch: What Happens When They Pave Paradise and Put Up a Parking Lot*, 45 Rocky Mt. Min. L. Inst. 15-1 (2003); Michael J. Wozniak, *Home Court Advantage? Local Governmental Jurisdiction Over* ***Oil*** *and Gas Operations*, 48 Rocky Mtn. Min. L. Inst. 12-1 (2002); Bruce M. Kramer, *The Pit and the Pendulum: Local Governmental Regulation of* ***Oil*** *and Gas Activities Returns from the Grave,* 50 Inst. of ***Oil*** & Gas L.& Tax’n 5-1 *et seq.* (1999); Bruce M. Kramer, *Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches,* a paper presented at the Mineral Development and Land Use Special Institute sponsored by the Rocky Mountain Mineral Law Foundation in May 1995. The Special Institute papers focus on the issues discussed in this section. A revised version of Professor Kramer’s article can be found in Bruce M. Kramer, *Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches,* 14 U.C.L.A. J. of Envtl L. & Pol’y 41 (1996).

    There are special issues relating to mineral extraction cases involving non-conforming uses. *See* Zimmerly v. Columbia River Gorge Comm’n, 527 P.3d 84 (Wash. App. 2023); Robert T. Winzinger, Inc. v. Pinelands Commission, 2006 N.J. Super. Unpub. LEXIS 1678 (N.J. Super. June 5, 2006); Matter of Syracuse Aggregate Corp. v. Weise, 51 N.Y.2d 278, 284–285, 434 N.Y.S.2d 150, 414 N.E.2d 651 (1980); Matter of Cobbleskill Stone Products, Inc. v. City of Schoharie, 169 A.D.3d 1182, 94 N.Y.S.3d 658 (2019); Matter of Cobleskill Stone Products, Inc. v. Town of Schoharie, 95 A.D.3d 1636, 945 N.Y.S.2d 793 (2012); City of Mosier v. Hood River Sand & Gravel and Readymix, Inc., 206 Or. App. 292, 136 P.3d 1160 (2006).

    Typically zoning regulation must be adopted through the ordinance process. Thus, sub-state units may not adopt land use regulations through the enactment of a resolution. The requirement that regulation occurs through the adoption of an ordinance can impact which court can exercise the power of judicial review. In Seitel Data, Ltd. v. Ctr. Twp. & Ctr. Twp. Bd. of Supervisors, 92 A.3d 851, 180 O.G.R. 637 (Pa. Commw. Ct. 2014), *motion for rehearing en banc denied*, 2014 Pa. Commw. LEXIS 213 (Apr. 8, 2014), the Pennsylvania Commonwealth Court found that it lacked jurisdiction over claims made by a geophysical operator that it was wrongfully denied the right to engage in such operations since none of the sub-state units had adopted an ordinance.

    In Youth for Environmental Justice v. City of Los Angeles, 2019 Cal. App. Unpub. LEXIS 1110 (Cal. App. Feb. 15, 2019), an ***oil*** and gas trade group was attacking a settlement agreement between the City and some non-governmental organizations that changed the way the City enforced its zoning ordinance. The court concluded that the settlement agreement did not impinge upon any vested rights of existing well permit owners because the permits were expressly made subject to discretionary review in the future.

    Where sub-state units require the receipt of a discretionary permit for ***oil*** and gas operations, it would frequently be the case that the terms of the discretionary permit would be negotiated between the sub-state unit and the permit applicant. In Colorado, a more formal process has arisen to deal with this circumstance, namely the negotiation and execution of memorandum of understandings (MOUs). Ghislaine G. Torres Bruner, *The Evolution and Development of* ***Oil*** *and Gas Operator Agreements*,” The Law of Fracking: Federal, State and Local Regulation of Modern ***Oil*** & Gas Development, Paper 6b (Rocky Mtn. Min. L. Fdn. 2019). These MOUs typically require the operator to engage in best management practices (BMPs) in its drilling and production operations. *Id.* Depending on the language used in the MOUs, problems may arise if a court determines that the MOUs constitute invalid contract zoning versus valid conditional zoning. See Bruce M. Kramer, *Contract Zoning: New Myths and Old Realities*, American Planning Association, Planning Advisory Service Publication Service (Summer 1982).

    Sub-state units often seek to regulate the hours of operation for ***oil*** and gas drilling sites as well as for truck and other traffic accessing and leaving the site. In Town of Flower Mound v. EagleRidge Operating, LLC, 2019 Tex. App. LEXIS 7561 (Tex. App.—Ft. Worth Aug. 22, 2019), a challenge to the enforcement of such restrictions was filed in state district court. The Court of Appeals, however, found that the district court lacked subject matter jurisdiction over the case because the ordinance was penal in nature and could only be attacked in a criminal proceeding unless the party could show an irreparable injury to a vested property right. [↑](#footnote-ref-29)
29. 73Perry Pearce, *The Spectrum of Choices: Formulation and Implementation of Regulatory Land Use Decisions Affecting Mineral Development,* a paper presented at the Mineral Development and Land Use Special Institute sponsored by the Rocky Mountain Mineral Law Foundation in May 1995. For an earlier helpful work, see White, *Constitutional Derivation and Statutory Exercise of Land Use Control Powers,* 21 Rocky Mtn. Min. L. Inst. 657 (1975).

    For an example of the discretionary permit review process often imposed on ***oil*** and gas operators see Nat’l Fuel Gas Supply Corp. v. Town of Wales, 904 F. Supp. 2d 324 (W.D.N.Y. 2012), 2013 U.S. Dist. LEXIS 151916 (W.D.N.Y. Oct. 21, 2013).

    In City of Dallas v. Trinity East Energy, LLC, 2022 Tex. App. LEXIS 5392 (Tex. App.—Dallas Aug 1, 2022, pet for rev. filed), the court described the discretionary permit system for well drilling permits in upholding a jury finding that denial of several discretionary permits constituted an inverse condemnation of the permit applicant’s ***oil*** and gas leases. [↑](#footnote-ref-30)
30. 74In 2013, a website reported that there were over 400 ordinances directed at ***oil*** and gas operations. Alex Ritchie, *Creatures of Circumstance: Conflicts Over Local Government Regulation of* ***Oil*** *and Gas*, 60 Rocky Mtn. Min. L. Fdn. Ann. Inst. ch. 11 (2014), at 11-5 (n.21), citing to Food & Water Watch, Local Actions Against Fracking, https://foodandwaterwatch.org. [↑](#footnote-ref-31)
31. 75Patricia Tisdale & Erin Smith, *Municipal and County Regulation of Natural Resources Development: How Far Can Local Regulation Go?*, a paper presented at the Mineral Development and Land Use Special Institute sponsored by the Rocky Mountain Mineral Law Foundation in May 1995. [↑](#footnote-ref-32)
32. 76For example, Wyoming in its county zoning enabling act states: “no zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the minerals resources in or under any lands subject hereto.” Wyo. Stat. § 18-5-201. Most states, however, do not have such express language in either their zoning enabling statute or the state ***oil*** and gas conservation statute.

    Several states, including Colorado and California, have what is called non-preemptible constitutional home rule provisions. As such, if an activity is treated as being a matter of local concern, the state cannot interfere with the home rule unit’s exercise of power. While zoning and land use controls are historically viewed as being of local concern, there is certainly no case law supporting the view that home rule units in those states can exclusively regulate ***oil*** and gas development. It is typical that only matters relating to the structure and organization of a home rule unit are immune from state regulation. [↑](#footnote-ref-33)
33. 77Perry Pearce, *The Spectrum of Choices: Formulation and Implementation of Regulatory Land Use Decisions Affecting Mineral Development,* in Mineral Development and Land Use, n.30.1 *above.* discusses the statutory and regulatory framework for this intergovernmental issue as it relates to Utah, Texas, Oklahoma, North Dakota and New Mexico. There may be conflicting statutory provisions relating to the relationship between state and sub-state units. For example, in Oklahoma one statutory provision, Okla. Stat. Ann. tit. 52, § 2 gives to the Corporation Commission “exclusive jurisdiction” over ***oil*** and gas exploration and development activities while Okla. Stat. Ann. tit 52, § 137 provides that nothing in the statute is to limit or restrict the powers of sub-state units to regulate ***oil*** and gas operations. [↑](#footnote-ref-34)
34. 78Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio Law Abs. 816 (1926). [↑](#footnote-ref-35)
35. 79*See, e.g.,* Marrs v. City of Oxford, 24 F.2d 541 (D. Kan. 1928), *aff’d,* 32 F.2d 134 (8th Cir. 1929), *cert. denied,* 280 U.S. 573, 50 S. Ct. 29, 74 L. Ed. 625 (1929); Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir. 1931); Blancett v. Montgomery, 398 S.W.2d 877 (Ky. 1966); Friel v. County of Los Angeles, 172 Cal. App. 2d 142, 342 P.2d 374, 11 O.&G.R. 155 (1959). The cases are collected at 10 A.L.R.3d 1226. *See also* Gill, *Intergovernmental Restraints on* ***Oil*** *and Gas Developments,* 16 Land & Water L. Rev. 457 (1981).

    With the development of ***oil*** and gas bearing shales throughout the United States there has been a revival of local zoning regulation of ***oil*** and gas operations. Oftentimes, sub-state units enact moratoria ordinances until a zoning ordinance amendment may be enacted. In Jeffrey v. Ryan, 37 Misc. 3d 1204(A), 2012 N.Y. Misc. LEXIS 4684, the plaintiffs argued that a moratorium ordinance relating to ***oil*** and gas operations was *ultra vires* because the procedural requirements for the adoption and/or amendment of a zoning ordinance were not followed. The court classified the moratorium as a general police power ordinance which did not require the City to follow the statutory requirements for zoning ordinances.

    In City of Fort Collins v. Colorado ***Oil*** & Gas Association, 369 P.3d 586, 2016 CO 28, the court found that a five-year moratorium ordinance on the issuance of permits for ***oil*** and gas drilling and hydraulic fracturing operations was to be treated similarly to a permanent ordinance because of the length of the moratorium. [↑](#footnote-ref-36)
36. 80*See, e.g.*, Tex. Midstream Gas Servs. LLC v. City of Grand Prairie, 608 F.3d 200, 176 O.&G.R. 791 (5th Cir. 2010) (municipal regulation of compressor stations not preempted by Pipeline Safety Act); Algonquin LNG v. Loqa, 79 F. Supp. 2d 49, 147 O.&G.R. 128 (D.R.I. 2000) (municipal zoning ordinance as applied to LNG facility preempted by federal law); AES Sparrows Point Lng, LLC v. Smith, 470 F. Supp. 2d 586, 165 O.&G.R. 287 (D. Md. 2007) (county zoning regulation that prohibits LNG facility and places strict limitations on such uses preempted by the Natural Gas Act under all three prongs of preemption test: express preemption, implied preemption by occupation of the field, and conflict preemption).

    Litigation regarding the preemptive effect of the Natural Gas Act on the AES Sparrows Point LNG project has continued. In AES Sparrows Point LNG, LLC v. Smith, 527 F.3d 120, 170 O.&G.R. 15 (4th Cir. 2008), *rev’g*, 539 F. Supp. 2d 788, 170 O.&G.R. 1 (D. Md. 2007), *cert. denied*, 555 U.S. 888, 129 S. Ct. 310, 172 L. Ed. 2d 153 (2008), the Fourth Circuit concluded that a revised County zoning ordinance that attempted to piggy-back into the State’s coastal management plan was also preempted because the plan requires both state and federal approval before it becomes an official part of the cooperative federalism structure of the CZMA. The revised ordinance had the same effect of the earlier ordinance, namely that of prohibiting AES Sparrows from locating its LNG facility on a tract of its own choosing. However, in AES Sparrows Point LNG, LLC v. Wilson, 589 F.3d 721, 170 O.&G.R. 23 (4th Cir. 2009), the court upheld Maryland’s decision to deny AEF a water quality certificate because of the potential impact of the required dredging on dissolved oxygen levels. Under the Natural Gas Act, while FERC has exclusive jurisdiction to issue a permit, states retain the power to review such projects under three statutes: the CZMA, the Clean Air Act, and the Clean Water Act. 15 U.S.C. § 717b(d). *See* City of Quincy v. Massachusetts Department of Environmental Protection, 21 F.4th 8 (1st Cir. 2021) (DEP decision to issue air permit upheld on remand after *Weymouth*); Town of Weymouth v. Massachusetts Department of Environmental Protection, 961 F.3d 34 (1st Cir.), *modified on reh’g,* 973 F.3d 143 (1st Cir. 2020) (NGA gives state permit authority for actions taken pursuant to CZMA, Clean Air Act, and Clean Water Act; state permit decision on air quality permit remanded); Constitution Pipeline Co. v. New York State Department of Environmental Conservation, 868 F.3d 87 (2d Cir. 2017).

    In two related cases involving a compressor station that had been approved by the FERC when it issued a certificate of public convenience and necessity, the courts found that a sub-state unit’s zoning ordinance was preempted to the extent that it would prohibit the siting of the compressor station where the FERC had so approved, Dominion Transmission, Inc. v. Town of Myersville Town Council, 982 F. Supp. 2d 570 (D. Md. 2013) and that a Maryland agency’s failure to act on an air quality permit for that same compressor station was unwarranted. Dominion Transmission, Inc. v. Summers, 723 F.3d 238 (D.C. Cir. 2013). In subsequent litigation, Myersville Citizens for a Rural Community, Inc. v. FERC, 783 F.3d 1301 (D.C. Cir. 2015), the court upheld the FERC’s issuance of a certificate of public convenience and necessity where the state authorities had approved Clean Air Act and Clean Water act permits for the compressors.

    *See also* Algonquin Gas Transmission, LLC v. Weymouth Conservation Comm’n, 2017 U.S. Dist. LEXIS 213024 (D. Mass. Dec. 29, 2017), *aff’d*, 2019 U.S. App. LEXIS 8097 (1st Cir. Mar. 18, 2019) (town ordinance not adopted pursuant to powers reserved to the states under the CZMA, CAA, and CWA was preempted by the Natural Gas Act). In Algonquin Gas Transmission, LLC v. Town of Weymouth, 365 F. Supp. 3d 147 (D. Mass. 2019), the court further held that compliance with the Town’s wetlands ordinance could not be used as a means to attack Massachusetts’ decision to find that the approved project met all of the requirements of Massachusetts’ coastal zone regulatory program. *Weymouth* was followed in Atlantic Coast Pipeline, LLC v. Nelson County Board of Supervisors, 2020 U.S. Dist. LEXIS 40653 (W.D. Va. Mar. 9, 2020), to invalidate the county’s attempt to apply its flood plain zoning regulations to a FERC-certificated pipeline. [↑](#footnote-ref-37)
37. 81Frost v. Ponca City, 1975 OK 141, 541 P.2d 1321, 53 O.&G.R. 370.

    *See also* Cerrillos Gravel Products, Inc. v. Board of County Commissioners of Santa Fe County, 2005 NMSC 23, 117 P.3d 932*, aff’g* 136 N.M. 247, 96 P.3d 1167, 2004 NMCA 96, 160 O.&G.R. 1101 (county zoning enabling act authorizes county to administratively enforce conditional use permit requirements by suspending the permit rather than having to go to the court system to seek a judicial enforcement order). [↑](#footnote-ref-38)
38. 82Eason ***Oil*** Co. v. Uhls, 1974 OK 1, 518 P.2d 50, 47 O.&G.R. 161. [↑](#footnote-ref-39)
39. 83For other cases upholding the general validity of the Oklahoma City zoning ordinance as it applies to ***oil*** and gas drilling activities, *see* Gruger v. Phillips Petroleum Co., 1943 OK 48, 192 Okla. 259, 135 P.2d 485; Beveridge v. Harper & Turner ***Oil*** Trust, 1934 OK 398, 168 Okla. 609, 35 P.2d 435; Van Meter v. Westgate ***Oil*** Co., 168 Okla. 200, 32 P.2d 719; Anderson-Kerr v. Van Meter, 162 Okla. 176, 19 P.2d 1068; *In re* Dawson, 1928 OK 754, 136 Okla. 113, 277 P. 226.

    In Van Meter v. Westgate ***Oil***, *op. cit.*, the court imposed four conditions on an operator before a variance would be properly issued by the local governmental board:

    First, that the granting of such permit would not be contrary to public interest; second, that the literal enforcement of the provisions of the ordinances will result in unnecessary hardship; third, that by granting the permit contrary to the provisions of the ordinance, that “the spirit of the ordinance shall be observed”; fourth, that by granting of such permit “substantial justice be done.” 32 P.2d 719, 721. [↑](#footnote-ref-40)
40. 84Pelican Prod. Corp. v. Mize, 1977 OK 235, 573 P.2d 703, 60 O.&G.R. 70. [↑](#footnote-ref-41)
41. 85Clouser v. City of Norman, 1964 OK 109, 393 P.2d 827, 20 O.&G.R. 826. [↑](#footnote-ref-42)
42. 86The regulatory takings doctrine has blossomed since the Supreme Court of the United States recognized that a monetary recovery could be had for police power exercises that “went too far” and constituted a taking of property in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). Determining when a regulation becomes a taking has not yet yielded a definitive test, although the Supreme Court has defined some situations where regulatory actions are “per se” takings. *See, e.g.,* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (deprivation of all beneficial use); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) (physical invasion). The regulatory takings issue is discussed in more depth at § 24.01[2] *infra*.

    Regulatory takings doctrine is discussed at length at § 24.01[2] *infra*. A related question is whether a zoning ordinance may be retroactively applied. Some states, such as Maine, require the sub-state unit to specifically make a zoning ordinance retroactive if it seeks to have it apply to existing uses or existing permit applications. Where the sub-state unit does not, the ordinance may not be applied. Lane Construction Corp. v. Town of Washington, 2007 ME 31, 916 A.2d 973 (mining ordinance restricting amount of ore that could be removed could not be applied to operator who had filed its permit application prior to enactment of ordinance). [↑](#footnote-ref-43)
43. 87Many of the statutes and ordinances limiting ***oil*** and gas development do not involve total prohibitions although in Marrs v. City of Oxford, 32 F.2d 134 (8th Cir. 1929), *cert. denied,* 280 U.S. 573, 50 S. Ct. 29, 74 L. Ed. 625 (1929) and Winkler v. Anderson, 104 Kan. 1, 177 P. 521 (1919), the courts state that such a prohibition would be valid. In *Marrs,* the Eighth Circuit stated: “Indeed, it would be hard to say that an ordinance prohibiting the drilling and operation of any well within the business or residential districts of a city would be an unreasonable and invalid exercise of the police power.” 32 F.2d at 140.

    In a consolidated case, Matter of Wallach v. Town of Dryden, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.3d 1188 (2014), the New York Court of Appeals upheld the validity of two ordinances that totally prohibited a wide range of ***oil*** and gas-related activities. The case is discussed in more detail at § 4.05[2][x] *infra*.

    The Attorney-General of Kansas has issued an opinion concluding that two municipal ordinances prohibiting the drilling of ***oil*** wells within 1000 feet of residential structures and totally prohibiting ***oil*** storage facilities were valid. Op. Kan. Att’y. Gen. No. 88-132 (Sept. 9, 1988). *See generally* David Pierce, *Local Government Regulation of the Development Process,* Kansas ***Oil*** and Gas Handbook § 15.05 (1988).

    *See also* Millcreek Township v. N.E.A. Cross Co., 152 Pa. Commw. 576, 620 A.2d 558, 125 O.&G.R. 409 (1993), *appeal denied*, 537 Pa. 655, 644 A.2d 739 (1994). This case held that a leasehold interest is a property interest that may not be condemned for a public use by a zoning ordinance without just compensation. But compensation was to be limited to “bonus value” damages, *i.e.*, the difference between the fair rental value of the leased premises and the rent actually reserved in the lease. [↑](#footnote-ref-44)
44. 88Miller Bros. v. Department of Natural Resources, 203 Mich. App. 674, 513 N.W.2d 217, 128 O.&G.R. 518, *review denied,* 447 Mich. 1038, 527 N.W.2d 513 (1994). *Miller* is also discussed at § 3.02[4][a] *above*.

    Regulatory takings claims, like any other claim, must be filed within the period allowed by the appropriate statute of limitations or prescriptive period. In the first iteration of Trail Enterprises, Inc. v. City of Houston, 957 S.W.2d 625, 138 O.&G.R. 454 (Tex. App.—Houston [14th Dist.] 1997), the court found that the regulatory takings claim could not be brought because the ordinance which prohibited drilling within a defined watershed of Lake Houston, a municipal drinking water source, had been enacted more than 10 years prior to the filing of the action. Later iterations of *Trail Enterprises* are discussed *infra* and at § 24.01[2] *infra*. *See also* Helton v. City of Burkburnett, 619 S.W.2d 23, 71 O.&G.R. 602 (Tex. Civ. App.—Ft. Worth 1981, writ ref’d n.r.e.), *appeal dism’d*, 456 U.S. 940 (1982). *See* § 24.01[2] *infra*.

    In Harris v. State *ex rel.* Kempthorne, 210 P.3d 86 (Idaho 2009), the court found that the statute of limitations barred an inverse condemnation claim by the owner of the sand and gravel because the State’s substantial interference with the owner’s property interest was apparent at the time that the State executed a lease of the sand and gravel to the owner. It wasn’t until several years after the lease was executed that the Idaho Supreme Court held that deeds from the State reserving minerals did not reserve sand and gravel.

    A similar result was reached under Louisiana’s prescription rules in Energy Management Corp. v. City of Shreveport, 397 F.3d 297, 305, 161 O.&G.R. 963 (5th Cir. 2005). After remand, the Fifth Circuit noted that because the state law regulatory takings claim had been prescribed under Louisiana law, the federal claims under § 1983 might also be precluded, under the general theory that since § 1983 has no statute of limitations the relevant statute of limitations is the most analogous state statute of limitations or prescriptive period. Energy Management Corp. v. City of Shreveport, 467 F.3d 471, 169 O.&G.R. 716 (5th Cir.), on remand, 2006 U.S. Dist. LEXIS 80925 (W.D. La.). *See also* Drury v. U.S. Army Corps of Engineers, 359 F.3d 366 (5th Cir. 2004).

    For another case dismissing a claim analogous to an inverse condemnation claim for failure to file within the period allowed by the statute of limitations, see Ram Energy, Inc. v. United States, 94 Fed. Cl. 406, 171 O.&G.R. 67 (2010) (six-year statute of limitations began to run at the time the Interior Department rescinded its suspension of operations, which ultimately led to the termination of the federal ***oil*** and gas lease).

    In Maguire ***Oil*** Co. v. City of Houston, 69 S.W.3d 350, 154 O.&G.R. 428 (Tex. App.—Texarkana 2002, rev. denied), the court found that the operator had stated an inverse condemnation claim after the city revoked a drilling permit issued for a location within 1000 feet of Lake Houston. The case differed from *Trail Enterprises, op. cit.*, in that the court found the ordinance inapplicable by interpreting its prohibition to apply only to lands outside the municipal boundaries. Thus, the permit that was revoked was valid because the prohibition against drilling did not apply since the well location was inside of the city limits.

    On remand, the trial court dismissed the inverse condemnation action based on *Hamilton Bank* ripeness grounds, namely that Maguire ***Oil*** should have sought an appeal of the permit revocation decision from the City Council. While *Hamilton Bank* was overruled as to its requirement that an action be filed in stated court in Knick v. Township of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019), the Supreme Court did not overrule the final decision requirement for inverse condemnation claims. In Maguire ***Oil*** Co. v. City of Houston, 243 S.W.3d 714, 169 O.&G.R. 48 (Tex. App.—Houston [14th Dist.] 2007, rev. denied), the court determined that under the relevant ordinances, there was no duty to appeal the permit denial decision to the City Council and therefore a final decision had been made, which satisfied the ripeness standard. The court also suggested, in dicta, that the futility exception to the final judgment rule would apply since the ordinances, as interpreted by the city, prohibited drilling where Maguire ***Oil*** proposed to drill.

    On remand again, the trial court awarded Maguire ***Oil*** $2 million in inverse condemnation damages based on the jury’s findings that when the City initially issued its stop work order, the ordinance on its face did not apply the Maguire ***Oil***’s drillsite tract since it was not within the City’s extra-territorial jurisdiction. It was only subsequent to the original stop-work order that the City amended its ordinance to include the area where Maguire ***Oil*** was drilling. The court of appeals affirmed the jury verdict. City of Houston v. Maguire ***Oil*** Co., 342 S.W.3d 726 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

    In Trail Enterprises, Inc. v. City of Houston, 2002 Tex. App. LEXIS 1872 (Tex. App.—Houston [14th Dist.] Mar. 14, 2002) (not designated for publication), an ***oil*** and gas lessee challenged a Houston ordinance that expanded the coverage of the drilling prohibition from unannexed lands within the city’s extra-territorial jurisdiction to lands within the city. Trail owned some leases within Houston. Unlike the first *Trail* litigation that involved an ordinance enacted more than 10 years prior to the inverse condemnation claim, this litigation was initiated shortly after the new drilling prohibition ordinance was enacted. The court found that plaintiff was collaterally estopped from the first litigation from questioning whether the drilling prohibition advanced a legitimate state interest. But the court also found that the plaintiff was not collaterally estopped from bringing an inverse condemnation claim due to the fact that a new lease was affected by the expanded coverage of the new ordinance. The court further found that there were triable issues of fact as to whether there was either a *Lucas* or *Penn Central* takings claim. The Texas Supreme Court in Mayhew v. Town of Sunnyvale, 41 Tex. Sup. Ct. J. 517, 964 S.W.2d 922 (Tex. 1998) identified three bases for a valid regulatory takings claim. One is *Lucas*, one is *Penn Central*, and the other is substantive due process, namely, whether the action substantially advances a legitimate state interest. Whether or not the substantive due process taking claim survives Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) is not clear.

    After remand and a trial court finding of a regulatory taking, the Court of Appeals in Trail Enters. v. City of Houston, 255 S.W.3d 105, 175 O.&G.R. 265 (Tex. App.—Waco 2008) reversed and rendered a judgment for the mineral owner for apparently the full value of the minerals and in an opinion after granting a motion for rehearing reversed itself and did not grant the mineral estate title to the City. The opinion on rehearing premised the award on the fact that the mineral estate was damaged, not taken, by the enactment of the ordinance that prohibited drilling.

    The Court of Appeals decision was reversed as to the rendition of the judgment and remanded to the trial court for further proceedings on the issue of whether there was a *Penn Central* taking. City of Houston v. Trail Enters., 300 S.W.3d 736, 175 O.&G.R. 271 (2009). The Supreme Court did affirm the Court of Appeals decision that the regulatory takings claim was ripe for review. On remand to the trial court, a jury once again found that the City’s actions constituted an inverse condemnation and awarded damages. In City of Houston v. Trail Enters., 377 S.W.3d 873, 175 O.&G.R. 274 (Tex. App.—Houston [14th Dist.] 2012), the Court of Appeals reversed and found that as a matter of law there was no inverse condemnation applying the *Penn Central* test.

    In City of Houston v. Commons at Lake Houston, Ltd., 587 S.W.3d 494 (Tex. App.—Houston [14th Dist.] 2019), the court found an inverse condemnation claim not ripe for review because no final decision had yet been rendered regarding the potential uses that would be allowed on the tract in question. In City of Dallas v. Trinity East Energy, LLC, 2017 Tex. App. LEXIS 1070 (Tex. App.—Dallas Feb. 7, 2017), the City executed a number of ***oil*** and gas leases to Trinity East and then several years later sought approval for its drilling operations. Because the drill sites were in a designated flood plain, a permit was required from the Planning Commission which was denied. This litigation concerns whether the City is immune from various tort claims brought by Trinity East under the Texas Tort Claims Act. The court determines that when it executed the ***oil*** and gas leases the City was acting in its proprietary capacity and thus could be sued. On the inverse condemnation claim, the court found the action was ripe for review based on the denial of the proposed drill sites even though there might have been other sites that could have been used. Subsequently, a jury verdict finding inverse condemnation damages in the amount of over $33,000,000 for the denial of several well permit applications was upheld in City of Dallas v. Trinity East Energy, LLC, 2022 Tex. App. LEXIS 5392 (Tex. App.—Dallas Aug. 1, 2022, pet. for rev. filed).

    After being sued by an operator asserting a regulatory taking after the denial of a municipal well drilling permit, the City Council executed a settlement agreement allowing the operator to drill on a 40-acre tract. The surface owners then filed an action against the City, the City Council and individual City Council members for entering the settlement agreement. In Walton v. City of Midland, 287 S.W.3d 97, 173 O.&G.R. 523 (Tex. App.—Eastland 2009, pet. denied) the court dismissed the claims against the individual City Council members and the City Manager because an action challenging the settlement agreement had to be brought using the *quo warranto* form of action necessitating the joinder of the State. Since the State had not been joined the plaintiffs lacked standing to sue the City. In subsequent litigation, Walton v. City of Midland, 409 S.W.3d 926 (Tex. App.—Eastland 2013, rev. denied), the surface owner changed his inverse condemnation claim against the City by focusing on the permit to drill requirement that the operator drill a water well in order to irrigate trees that it was also required to place on the well pad as a condition imposed by the settlement agreement. After noting that Texas follows the federal rule categorizing inverse condemnation claims into physical invasions, per se total takings and *Penn Central* takings, the court concludes that no taking occurred under the *Penn Central* test. The court also finds that a permit to drill cannot constitute a regulatory taking since it does not give the permit holder a property right to drill but merely removes from the permit holder the governmentally-imposed requirement that it receive a permit.

    In Chevron U.S.A., Inc. v. County of Monterey, 70 Cal. App. 5th 153, 285 Cal. Rptr. 3d 247 (2021), *rev. granted*, 2022 Cal. LEXIS 450 (Jan. 26, 2022), the ***oil*** and gas operator’s regulatory takings claim against an initiative ordinance prohibiting both the use of land for wastewater injection or impoundment purposes or for the drilling of ***oil*** and gas wells was dismissed because the court found that the two provisions were preempted by the state ***oil*** and gas conservation act.

    In Hermosa Beach Stop ***Oil*** Coalition v. City of Hermosa Beach, 86 Cal. App. 4th 534, 103 Cal. Rptr. 2d 447, 151 O.&G.R. 161*, review denied,* 2001 Cal. LEXIS 3153 (Cal. May 2, 2001), the court found that an initiative ordinance prohibiting ***oil*** and gas drilling within the city did not unconstitutionally impair the contract of a lessee who had secured a lease from the city some six years prior to the passage of the initiative ordinance. *See* § 24.01[2] *below* for a more complete discussion of this case.

    For other cases dealing with a regulatory takings claim based on the application of a zoning ordinance, see Saddle Mountain Minerals, L.L.C. v. Joshi, 152 Wash.2d 242, 95 P.3d 1236, 162 O.&G.R. 980 (Wash. 2004) (dicta); Board of Supervisors of Shenango Township v. McClimans, 142 Pa. Commw. 470, 597 A.2d 738 (1991); Beverly ***Oil*** Co. v. City of Los Angeles, 242 P.2d 682 (Cal. App. 1952), *vacated on other grounds*, 40 Cal. 2d 552, 254 P.2d 865, 2 O.&G.R. 477 (1953).

    After *Joshi* was remanded for trial, the trial court dismissed the trespass claims and the Court of Appeals again remanded finding that there were triable issues of fact as to whether the surface owners had trespassed on Saddle Mountain’s mineral estate regardless of the impact of the County zoning ordinance that seemingly prohibited mining on Saddle Mountain’s parcel. Saddle Mountain Minerals, LLC v. Santiago Homes, Inc., 189 P.3d 821 (Wash. App. 2008). [↑](#footnote-ref-45)
45. 89Schmude ***Oil***, Inc. v. Dep’t of Envtl. Quality, 306 Mich. App. 35, 856 N.W.2d 84 (2014). [↑](#footnote-ref-46)
46. 90The court also dealt with the issue of whether the statutory provisions, Mich. Comp. L. § 324.61901 *et seq*. applied to privately owned lands within the boundaries of the Forest, which it did, and then whether a consent order relating to ***oil*** and gas development was incorporated into the same statutory program, which it also did. As a result of the court’s interpretation, Schmude was restricted to drilling in certain designated areas and even in those areas was subject to setback requirements from water bodies. There were other areas where no drilling was allowed where Schmude had sought permits to drill which were denied. [↑](#footnote-ref-47)
47. 912014 Mich. App. LEXIS 1273 at \*19, citing K & K Constr. v. Department of Natural Resources, 456 Mich. 570, 586, 575 N.W.2d 531 (1998). For an earlier case dealing with similar facts see *Hobson Petroleum* Corp. v. State, 2001 Mich. App. LEXIS 2708 (Dec. 21, 2001). In *Hobson Petroleum*, the ***oil*** and gas lessee argued that the Pigeon River Country State Forest drilling restrictions constituted a regulatory taking. The court concluded that summary judgment in favor of the State was not warranted since there were contested questions of fact regarding the application of the *Penn Centra*l test. In Western Michigan Environmental Action Council v. Natural Resources Commission, 405 Mich. 741, 275 N.W.2d 538 (1979), the court upheld a challenge under the Michigan Environmental Protection Act to the well drilling regulations adopted for the Pigeon River Country State Forest. [↑](#footnote-ref-48)
48. 92*Id.* at \*19. The court dismissed the operator’s assertion that it would be more expensive to drill horizontal wells but merely stating that the exercise of the police power cannot be thwarted merely upon a showing that it will cost the property owner more to exploits its property interest so long as the property interest retains some value. [↑](#footnote-ref-49)
49. 93*Id*. at \*21, quoting from K&K Constr., Inc. v. Dep’t of Envtl. Quality, 267 Mich. App. 523, 705 N.W.2d 365 (2005). [↑](#footnote-ref-50)
50. 94There are two opinions, one reported, the other unreported. Mid Gulf, Inc. v. Bishop, 792 F. Supp. 1205, 120 O.&G.R. 480 (D. Kan. 1992), *later proceeding*, 1992 U.S. Dist. LEXIS 14127 (D. Kan. Aug. 11, 1992).

    In E&B Natural Resources Management Corp. v. County of Alameda, 2019 U.S. Dist. LEXIS 63625 (N.D. Cal. Apr. 12, 2019), the court dismissed an ***oil*** and gas operator’s claim under 42 U.S.C. § 1983, that the denial of two conditional use permits violated various provisions of the United States Constitution. The court did allow the operator to file an amended complaint that would have to describe in more detail the alleged constitutional violations.

    In JTC ***Oil*** Co. v. City of Grandview, 604 S.W.3d 806 (Mo. Ct. App. 2020), the court reversed the dismissal of inverse condemnation claims because factual issues existed as to whether or not the ***oil*** and gas lease was still in force at the time that the City denied the operator’s request for the needed discretionary permit.

    In Robert T. Winzinger, Inc. v. Pinelands Commission, 2006 N.J. Super. Unpub. LEXIS 1678 (App. Div. June 5, 2006), the court invalidated a permit denial decision for a non-conforming use because the Commission applied zoning principles or precepts that were not found in the zoning ordinance or in Commission communications with the permit applicant. *See also* Edling v. Isanti County, 2006 Minn. App. Unpub. LEXIS 654 (Minn. App. 2006) (revocation of discretionary permit for mining operations upheld).

    In Kretschmann Farm, LLC v. Township of New Sewickley, 131 A.3d 1044 (Pa. Commw. Ct. 2016), the court upheld the issuance of a discretionary permit for compressors that were to be located in an agricultural zoning district. Neighbors challenging the permit did not sustain their burden of proof to show that the permit decision was arbitrary, capricious or an abuse of discretion. [↑](#footnote-ref-51)
51. 95These mandatory conditions included: 1. Obtaining a $100,000 surety bond; 2. Obtaining a $2,000,000 general liability insurance policy; 3. Prohibiting maintenance of any tank or tank battery within city limits; 4. Limiting noise to certain defined levels; and 5. Limiting activities on the drillsite between 8:00PM and 8:00AM. 1992 U.S. Dist. LEXIS 14127, at \*7–8. [↑](#footnote-ref-52)
52. 96Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). The dicta in *Agins* that one can show a regulatory taking by showing that the police power action does not substantially advance a legitimate state interest was overruled in Lingle v. Chevron, U.S.A., Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). *See also* Keystone Bituminous Coal Ass’n v. De Benedictis, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472, 93 O.&G.R. 300 (1987). Many of the early cases clearly found that municipal regulation of ***oil*** and gas drilling activities served an important public purpose. *See, e.g.,* Marblehead Land Co. v. City of Los Angeles, 36 F.2d 242 (S.D. Cal. 1929), *aff’d,* 47 F.2d 528 (9th Cir.), *cert. denied,* 284 U.S. 634, 52 S. Ct. 18, 76 L. Ed. 540 (1931); Adkins v. West Frankfort, 51 F. Supp. 532 (N.D. Ill. 1943); Friel v. County of Los Angeles, 172 Cal. App. 2d 142, 342 P.2d 374, 11 O.&G.R. 155 (1959); Blancett v. Montgomery, 398 S.W.2d 877 (Ky. Ct. App. 1966); Cline v. Kirkbride, 22 Ohio C.C. 527, 12 Ohio C.D. 517 (1901), *aff’d,* 64 Ohio St. 556, 61 N.E. 1144 (1901). [↑](#footnote-ref-53)
53. 97In looking at regulatory takings claims, a key issue, as yet undefined judicially, is what interest do you look at to determine the loss of beneficial use. Do you aggregate all of the interests owned by the plaintiff, or do you merely look at the interests subject to the challenged regulation? Justice Scalia in footnote 7 in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) alluded to this problem without deciding what was the appropriate approach. Two decisions of the United States Court of Appeals for the Federal Circuit, including one involving mineral extraction, have applied a disaggregate approach, making it easier to find that a regulatory taking has occurred. Loveladies Harbor v. U.S., 28 F.3d 1171 (Fed. Cir. 1994); Florida Rock Indus., Inc. v. United States 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied,* 513 U.S. 1109, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995).

    In Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners, 38 P.3d 59, 153 O.&G.R. 222 (Colo. 2001)*, rev’g* 8 P.3d 522, 148 O.&G.R. 291 (Colo. Ct. App. 2000), the Colorado Supreme Court confronted the issue of defining the property interest that is the subject of a *Lucas* or *Penn Central* inverse condemnation claim. The court remanded for a trial on the merits to determine if a county zoning ordinance prohibiting extraction of minerals constituted a regulatory taking. The court laid out several core principles for the trial, including the finding that a taking could occur under *Penn Central* principles even if the property retained some economically viable use. But the court’s major ruling was that the appropriate focus for the takings analysis was the owner’s entire bundle of property rights, not merely the mineral rights, and that the economic impact of the zoning ordinance should be gauged not just on the portion of the acreage impacted by the ordinance but on the entire holdings of the plaintiff. [↑](#footnote-ref-54)
54. 98MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986); Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). *Hamilton Bank* was overruled in part in Knick v. Township of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019), which eliminated the ripeness requirement that an inverse condemnation claim be filed in state court. The requirement that there be a final order or decision was not affected.

    The futility exception to the ripeness/exhaustion rule for inverse condemnation claims was applied in Trail Enterprises, Inc. v. City of Houston, 255 S.W.3d 105 (Tex. App.—Waco 2008), *rev’d on other grounds*, City of Houston v. Trail Enterprises, Inc., 53 Tex. Sup. Ct. J. 95, 2009 Tex. LEXIS 872 (Tex. 2009).

    *See also* City of Dallas v. Trinity East Energy, LLC, 2017 Tex. App. LEXIS 1070 (Tex. App.—Dallas Feb. 7, 2017) (denial of three proposed drill sites sufficient to meet *Hamilton Bank* ripeness test); Maguire ***Oil*** Co. v. City of Houston, 243 S.W.3d 714, 169 O.&G.R. 48 (Tex. App.—Houston [14th Dist.] 2007, writ denied). *Hamilton Bank* was overruled in part in Knick v. Township of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019), but only as it relates to the filing of the inverse condemnation claim in state court and not as to there being a final order or decision. *See* Stewart E. Sterk & Michael C. Pollack, *A Knock on* Knick’s *Revival of Federal Takings Litigation*, 72 Fla. L. Rev. 419 (2020). [↑](#footnote-ref-55)
55. 99Mid Gulf, Inc. v. Bishop, 1992 U.S. Dist. LEXIS 14127, at \*24 (D. Kan. Aug. 11, 1992). [↑](#footnote-ref-56)
56. 100Whitman v. Board of Supervisors of Ventura County, 88 Cal. App. 3d 397, 151 Cal. Rptr. 866 (1979). *See also* Youth for Environmental Justice v. City of Los Angeles, 2019 Cal. App. Unpub. LEXIS 1110 (Cal. App. Feb. 15, 2019) (well permit owners under existing ordinance did not give them a vested right to prevent conditions being placed on the permit since the permits were discretionary in nature and reserved such rights to the City under the terms of the zoning ordinance).

    The use of discretionary permit regulatory regimes is reflected in Minnesota Sands, Inc. v. County of Winona, 940 N.W.2d 183 (Minn. 2020), where the county started out with a discretionary permit requirement of mining activities and then amended it to prohibit certain types of mining operations while allowing others where they would need to seek a discretionary permit.

    In Lakeland Area Prop. Owners Ass’n v. Oneida Cty., 2021 Wisc. App. LEXIS 67 (Feb. 23, 2021), the court approved the county’s rezoning of land into a district in which gravel mining was allowed with the issuance of a discretionary permit. The court applied traditional tools in finding that the rezoning was consistent with the relevant comprehensive plan.

    In JTC ***Oil*** Co. v. City of Grandview, 604 S.W.3d 806 (Mo. Ct. App. 2020), the court upheld the City’s decision to deny the operator the necessary discretionary permit to drill several wells for which state permits to drill had been issued. [↑](#footnote-ref-57)
57. 101Silva v. Ada, 416 Mich. 153, 330 N.W.2d 663 (1982). *See also* Certain-Teed Prods. Corp. v. Paris Township, 351 Mich. 434, 88 N.W.2d 705 (1958). [↑](#footnote-ref-58)
58. 102330 N.W.2d at 666, quoting from North Muskegon v. Miller, 249 Mich. 52, 57, 227 N.W. 743 (1929). The court in *North Muskegon* found that a city could validly deny a drilling permit because of the potential threat to the city’s water supply. *See also* Pennsylvania General Energy Co., LLC v. Grant Township, 139 F. Supp. 3d 706 (W.D. Pa. 2015); Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967); Township of Paradise v. Mt. Airy Lodge, Inc., 68 Pa. Commw. 548, 449 A.2d 849 (1982). In *In re* Appeal of Penneco Environmental Solutions, LLC, 205 A.3d 401 (Pa. Commw. Ct. 2019), the court found that Penneco’s claim that a zoning ordinance was invalid for not allowing an injection well anywhere within the Borough was ripe for review by the Zoning Hearing Board. For cases applying the more traditional deferential approach in which mining activities are totally prohibited, see Pompa Constr. Corp. v. City of Saratoga Springs, 706 F.2d 418 (2d Cir. 1983); Valley View Village, Inc. v. Proffett, 221 F.2d 412, 57 Ohio Op. 274 (6th Cir. 1955); Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342*, appeal dismissed,* 371 U.S. 37, 83 S. Ct. 145, 9 L. Ed. 2d 112 (1962). [↑](#footnote-ref-59)
59. 103Kyser v. Kasson Township, 486 Mich. 514, 786 N.W.2d 543 (2010). [↑](#footnote-ref-60)
60. 104786 N.W.2d at 552–54. *See* Mich. Comp. L. 125.3207. [↑](#footnote-ref-61)
61. 105*In re* Township of Bradford, 43 A.3d 544 (Pa. Commw. Ct. 2012).

    In EDF Renewable Energy v. Foster Township, 150 A.3d 538 (Pa. Commw. Ct. 2016), the township zoning ordinance provided that a use that was neither permitted nor prohibited could be allowed if it received a discretionary permit. The court affirmed the Zoning Hearing Board’s denial of a discretionary permit for a wind farm.

    In Western Petroleum, LLC v. Williams County Board of Commissioners, 2016 ND 249, 888 N.W.3d 388, the zoning ordinance prohibited temporary housing, including that used for oilfield employees, without a discretionary permit. The issue was whether or not the ordinance’s $1000/day penalty for violation could be multiplied by the number of temporary housing units rather than for the unit as a whole which admittedly was operating without a permit. The court found the County’s interpretation allowing it to have multiple daily violations unreasonable given that one permit could authorize as many units as the applicant applied for. [↑](#footnote-ref-62)
62. 106*In re* Township of Bradford, 43 A.3d 544, 547 (Pa. Commw. Ct. 2012). The Township official treated the compressor as part of the processing of natural gas which was only allowed in a single zoning district which did not encompass the well site. [↑](#footnote-ref-63)
63. 107*Id.* at 550–51. The court noted that unless the Btu content of the natural gas stream can be lessened, the only use of the natural gas coming out of the wellhead would be for “flaring and roasting marshmallows.” [↑](#footnote-ref-64)
64. 108*Id.* at 549 citing 52 P.S. § 10603.1. [↑](#footnote-ref-65)
65. 109The court does not answer the question whether, if the zoning ordinance is amended to specifically define compressor facilities as post-production or refining facilities, that would be an effective prohibition of producing operations within the Township and thus invalid under Pennsylvania law. *Id.* at 561–62. *See* Exton Quarries, Inc. v. Zoning Board of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967), discussed in note 41.8 *supra*, for a case finding that an ordinance that totally prohibited a legal use, such as mining, was presumptively invalid. The court also distinguished Kilmer v. Elexco Land Services, Inc., 605 Pa. 413, 990 A.2d 1147 (2010), which found for royalty calculation purposes that compression is a post-production expense that may be used in the netback methodology. [↑](#footnote-ref-66)
66. 109.1Markwest Liberty Midstream & Res., LLC v. Cecil Twp. Zoning Hearing Bd. Range Res.—Appalachia, LLC, 102 A.3d 549 (Pa. Commw. Ct. 2014). In a similar case, Appeal of New Century Pipeline, 43 A.3d 544 (Pa. Commw. Ct. 2012), the court reached the same result, namely a reversal of a ZHB decision not to issue a discretionary permit, although *New Century Pipeline* involved different interpretational issues. *See also* Gorsline v. Board of Supervisors of Fairfield Township, 123 A.3d 1142 (Pa. Commw. Ct. 2015), *rev’d*, 186 A.3d 375 (Pa. 2018) discussed below at text accompanying note 110.1 *infra*. In *Gorsline*, the Pennsylvania Supreme Court concluded that ***oil*** and gas well drilling operations were not sufficiently similar to public service facilities so as to allow them as to operate with a discretionary permit.

    In Pennsylvania, a discretionary permit requirement (special exception) is evidence that the proposed use is compatible with all of the uses allowed in that zoning district and thus a party challenging the issuance of such a permit bears a heavy burden of proof to overturn such a decision. Protect PT v. Penn Township Zoning Hearing Board, 199 A.3d 511 (Pa. Commw. Ct. 2018) (unpublished) (upholds issuance of four discretionary permits to drill wells on four separate pads; if decision is fairly debatable it will be upheld). Subsequent objections to the issuance of various special exception permits under the Penn Township zoning ordinance were similarly upheld. Protect PT v. Penn Township Zoning Hearing Board, 220 A.3d 1174 (Pa. Commw. Ct. 2019); Protect PT v. Penn Twp. Zoning Hearing Bd., 238 A.3d 530 (Pa. Commw. Ct. 2020) (unpublished opinion), *app. dism’d*, 252 A.3d 600 (Pa. 2021); Protect PT v. Penn Twp. Zoning Hearing Bd., 238 A.3d 530 (Pa. Commw. Ct. 2020) (unpublished opinion), *app. dism’d*, 252 A.3d 600 (Pa. 2021). *In accord*: Murrysville Watch Committee v. Municipality of Murrysville Zoning Hearing Board, 2022 Pa. Commw. Unpub. LEXIS 32 (Jan. 24, 2022).

    In Flat Rock Wind, LLC v. Rush County Board of Zoning Appeals, 2017 Ind. App. LEXIS 60 (Ind. Ct. App. Feb. 14, 2017), the court found that the BZA had the power to impose setback requirements for a windfarm that were in excess of those mandated by the zoning ordinance as part of its issuance of a discretionary permit. [↑](#footnote-ref-67)
67. 109.2Under the Township’s Uniform Development Ordinance, a special exception or discretionary permit is specifically authorized where the proposed use would have an equal or lesser impact than the listed as of right uses and is of the same general character as the listed uses. 102 A.3d at 553. [↑](#footnote-ref-68)
68. 109.3The court is not to substitute its judgment for that of the fact finder and the Board’s interpretation of the ordinance is entitled to deference in the absence of fraud, bad faith, abuse of discretion, or arbitrary actions. 102 A.3d at 554–55. [↑](#footnote-ref-69)
69. 109.4MarkWest Liberty Midstream & Res., LLC v. Cecil Twp. Zoning Hearing Bd., 184 A.3d 1048 (Pa. Commw. Ct. 2018). In Protect PT v. Penn Township Zoning Hearing Board, 199 A.3d 511 (Pa. Commw. Ct. 2018) (unpublished), the court applied the same type of “soft glance” review of a Board’s decision to issue 4 discretionary permits to drill wells on 4 separate pads. The court applied the “fairly debatable” standard of review in upholding the Board’s decision. [↑](#footnote-ref-70)
70. 109.5The court applied the traditional *ultra vires* analysis that limits the actions of zoning hearing boards to authority expressly granted them by the zoning ordinance. To the extent that a number of the conditions imposed by the ZHB were not authorized by the zoning ordinance, they were ultra vires. [↑](#footnote-ref-71)
71. 110*See e.g.*, Matter of Wallach v. Town of Dryden, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.3d 1188 (2014) where the court describes the position of the Town that ***oil*** and gas operations were not allowed since the zoning ordinance precluded any use not specifically allowed;

    Tri-Power Res., Inc. v. City of Carlyle, 2012 IL App (5th) 110075, 359 Ill. Dec. 781, 967 N.E.2d 811, where the court noted that upon annexation the newly-annexed land is immediately put into a single-family residential district which does not allow for ***oil*** and gas operations. [↑](#footnote-ref-72)
72. 110.1Gorsline v. Board of Supervisors of Fairfield Township, 123 A.3d 1142 (Pa. Commw. Ct. 2015), *rev’d*, 186 A.3d 375 (Pa. 2018).

    A similar “savings” provision for unidentified uses was applied in JoJo ***Oil*** Co. v. Dingman Township Zoning Hearing Board, 77 A.3d 679 (Pa. Commw. 2013). Such unidentified uses are entitled to a presumption of validity upon a showing that they are similar to or compatible with other uses. *Id.* *See* Bray v. Zoning Board of Adjustment of Philadelphia, 48 Pa. Commw. 523, 410 A.2d 909 (1980). [↑](#footnote-ref-73)
73. 110.2Gorsline v. Board of Supervisors of Fairfield Township, 186 A.3d 375 (Pa. 2018). The decision was 4-3 with Justice Dougherty filing a dissenting opinion. [↑](#footnote-ref-74)
74. 110.3186 A.3d at 379. There is an interesting debate between the majority opinion and the dissenting opinion as to whether the majority opinion totally precludes drilling operations without a zoning ordinance amendment or merely requires the applicant to present more evidence of the similarity and or compatibility of the proposed drilling operation to otherwise allowed uses. Compare the majority’s statement seemingly requiring an ordinance amendment along with a footnote stating that the dissent’s characterization of the majority opinion is wrong, 186 A.3d at 389 n.14 with 186 A.3d at 396 n.7 (Daugherty, J., dissenting).

    In Protect PT v. Penn Township Zoning Hearing Board, 220 A.3d 1174 (Pa. Commw. Ct. 2019), the court looked to the majority opinion in *Gorsline* to uphold a township zoning ordinance that specifically allowed ***oil*** and gas operations to be undertaken in a rural resource zone and in a mineral extraction overlay district to be constitutional. *See also* Murrysville Watch Committee v. Municipality of Murrysville Zoning Hearing Board, 2022 Pa. Commw. Unpub. LEXIS 32 (Jan. 24, 2022). [↑](#footnote-ref-75)
75. 110.4The dissent notes that no new evidence was adduced beyond the Township Zoning Hearing Board and that all courts were supposed to review the record evidence to determine whether or not substantial evidence existed to support the Board’s decision. 186 A.3d at 394–395 (Daughery, J., dissenting). [↑](#footnote-ref-76)
76. 111ION Geophysical Corp. v. Hempfield Twp., 2014 U.S. Dist. LEXIS 49549 (W.D. Pa. Apr. 10, 2014). The court emphasizes the lack of an ordinance and the lack of cooperation between the Township officials and the geophysical operator. The court, however, seemingly ignores the general rule that is usually incorporated into zoning ordinances that if a zoning ordinance is silent as to a specific use, that use is prohibited. *See also* Seitel Data, Ltd. v. Ctr. Twp. & Ctr. Twp. Bd. of Supervisors, 92 A.3d 851, 180 O.&G.R. 637 (Pa. Commw. 2014), *motion for rehearing en banc denied*, 2014 Pa. Commw. LEXIS 213 (Apr. 8, 2014). [↑](#footnote-ref-77)
77. 112Peter Henderson ***Oil*** Co. v. City of Port Arthur, 806 F.2d 1273, 94 O.&G.R. 402 (5th Cir. 1987). [↑](#footnote-ref-78)
78. 113Shelby Operating Co. v. City of Waskom, 964 S.W.2d 75 (Tex. App.—Texarkana 1997, writ denied), *on later appeal,* 1999 Tex. App. LEXIS 4250 (Tex. App.—Texarkana, not for publication). [↑](#footnote-ref-79)
79. 114The trial judge initially wrote a letter to the parties stating that the consent requirement was invalid ostensibly on the basis that it was an improper delegation of the police power to an individual. However, the trial judge later granted a motion for a new trial after the city revised its ordinance to remove the consent requirement and dismissed the operator’s claims as moot. 964 S.W.2d at 78–79. [↑](#footnote-ref-80)
80. 115City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976). [↑](#footnote-ref-81)
81. 116Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928). [↑](#footnote-ref-82)
82. 117Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1917), upheld a consent requirement relating to signs that required the sign owner to get approval of his sign from 50 percent of the neighbors. *See also* Eubank v. City of Richmond, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912), where the court struck down a consent provision relating to setback lines, *and* Gorieb v. Fox, 274 U.S. 603, 47 S. Ct. 675, 71 L. Ed. 1228 (1927), where the court upheld a setback line provision that averaged the existing setbacks on the street to determine the amount of setback required for the new home. The states have also reached somewhat inconsistent results. *See generally* Valkanet v. Chicago, 13 Ill. 2d 268, 148 N.E.2d 767 (1958); State *ex rel.* Omaha Gas Co. v. Withnell, 78 Neb. 33, 110 N.W. 680 (1907); O’Brien v. City of St. Paul, 285 Minn. 378, 173 N.W.2d 462 (1969).

    The *Roberge* and *Eubank* decisions have been recast as the private nondelegation doctrine where the Due Process clause places limits on legislative delegation of power to private entities. Cox v. State, 2016 U.S. Dist. LEXIS 115184 (N.D. Ohio Aug. 29, 2016). *Cox* involved a challenge to the Ohio statutory scheme giving certain types of common carriers the power of eminent domain. *See also* Kiser v. Kamdar, 831 F.3d 784 (6th Cir. 2016); Center for Powell Crossing, LLC v. City of Powell, Ohio, 173 F. Supp. 3d 639 (S.D. Ohio 2016).

    In Boerschig v. Trans-Pecos Pipeline, LLC, 872 F.3d 701 (5th Cir. 2017), the court rejected the application of *Roberge* and *Eubank* to the situation where a group of layperson commissioners were authorized by statute to review an eminent domain action brought by a private entity.

    It is hard to reconcile these Supreme Court opinions and predict with any certainty what type of local or popular consent provisions are valid. *See* Davidson, *Localist Administrative Law*, 126 Yale L.J. 564, 609 (2017); Kenneth Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. Pa. L. Rev. 939, 960 (2013). [↑](#footnote-ref-83)
83. 117.1Vaquero Energy, Inc. v. County of ***Kern***, 42 Cal. App. 5th 312, 255 Cal. Rptr. 3d 221 (2019). In King & Gardiner Farms, LLC v. County of ***Kern***, 2020 Cal. App. LEXIS 161 (Cal. App. Feb. 25, 2020), the court invalidated portions of the ***Kern*** County ordinance because of the County’s failure to comply with the requirements of the California Environmental Quality Act. [↑](#footnote-ref-84)
84. 117.2Vaquero Energy, Inc. v. County of ***Kern***, 42 Cal. App. 5th 312, 329–31, 255 Cal. Rptr. 3d 221 (2019). The court notes that while the operators couched their constitutional challenge as involving due process concerns, the challenge was better characterized as an unlawful delegation challenge because it involves the private exercise of the police power. *See* Eugene Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges,* 37 Harv. J.L. & Pub. Pol’y 931 (2014). [↑](#footnote-ref-85)
85. 118*See, e.g.,* Great Plains Resources v. City of Benton, 127 Ill. App. 3d 971, 82 Ill. Dec. 807, 469 N.E.2d 341, 83 O.&G.R. 495 (1984); City of Hartshorne v. Marathon ***Oil*** Co., 1979 OK 48, 593 P.2d 97, 63 O.&G.R. 147 (Okla. 1978); Keaton v. Oklahoma City, 1940 OK 215, 187 Okla. 593, 102 P.2d 938, *cert. denied,* 311 U.S. 616, 61 S. Ct. 75, 85 L. Ed. 391 (1940); Gruger v. Phillips Petroleum Co., 1943 OK 48, 192 Okla. 259, 135 P.2d 485 (1943). [↑](#footnote-ref-86)
86. 119Billy ***Oil*** Co., Inc. v. Board of County Comm’rs, 240 Kan. 702, 732 P.2d 737, 91 O.&G.R. 470 (1987). [↑](#footnote-ref-87)
87. 120Kansas during the pendency of the litigation had enacted a statute that mooted the plaintiff’s request for future injunctive relief. By statute, Kansas withdrew from counties the power to regulate the “production or drilling of any ***oil*** or gas well in any manner which would result in the duplication of regulation by the state corporation commission … .” Kan. Stat. Ann. § 19-101a(22). This is the best way to resolve intergovernmental conflict situations. The legislature should determine whether they want preemptive state or coextensive state/local regulation. That avoids having the judicial branch have to resolve the issue by searching for implied intent to preempt or not to preempt. [↑](#footnote-ref-88)
88. 121Kohout v. City of Fort Worth, 292 S.W.3d 703, 170 O.&G.R. 620 (Tex. App.—Fort Worth 2009). For another ordinance that sets up a multi-tiered regulatory program dependent upon receiving consent from landowners, see Vaquero Energy, Inc. v. County of ***Kern***, 42 Cal. App. 5th 312, 255 Cal. Rptr. 3d 221 (2019). [↑](#footnote-ref-89)
89. 122*Kohout*, 292 S.W.3d at 705. [↑](#footnote-ref-90)
90. 123*Kohout*, 292 S.W.3d at 706. At first the City treated the permit application under the urban well requirements since the bike trail was not a City park and thus it was not within 600 feet of a protected use. Due to the controversy caused by the permit application, the permit was switched to a high impact permit, necessitating the need for the waiver by the District. [↑](#footnote-ref-91)
91. 124Plaintiff asserted that she had been denied her right to petition the government for redress of grievances and that she had been treated in a discriminatory manner in violation of her equal protection rights. [↑](#footnote-ref-92)
92. 125*See e.g.* U.S. Const. art. 1, § 10, cl. 1; Ohio Const. Art. 2, § 28. These issues are discussed in greater length at § 24.01[2] *infra*. [↑](#footnote-ref-93)
93. 126For cases involving Contract Clause claims or breach of contract claims against the government, see Mobil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604, 150 O.&G.R. 98 (2000); Century Exploration New Orleans, LLC v. United States, 745 F.3d 1168 (Fed. Cir. 2014), *aff’g* 110 Fed. Cl. 148 (2013); Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC, 683 F.3d 1330 (Fed. Cir. 2012); Hermosa Beach Stop ***Oil*** Coalition v. City of Hermosa Beach, 86 Cal. App. 4th 534, 103 Cal. Rptr. 2d 447, 151 O.&G.R. 161 (2001); Bass Energy Inc. v. City of Highland Heights, 193 Ohio App. 3d 725, 2010-Ohio-2102, 954 N.E.2d 130 (8th Dist.).

    Another issue that may arise in the zoning context is whether the sub-state unit may be sued for breach of contract or tort claims based on the enforcement of the zoning ordinance. In Wasson Interests, Ltd. v. City of Jacksonville, 2016 Tex. App. LEXIS 13124 (Tex. App.—Tyler Dec. 9, 2016), *on remand from* 59 Tex. Sup. Ct. J. 524, 489 S.W.3d 427 (Tex. 2016), the court concluded that under the Texas Tort Claims Act, the City was immune from suit because the enforcement of the zoning ordinance which led to the termination of a long-term lease was a governmental and not a proprietary function. *But cf.* City of Dallas v. Trinity East Energy, LLC, 2017 Tex. App. LEXIS 1070 (Tex. App.—Dallas Feb. 7, 2017) (act of executing an ***oil*** and gas lease is a proprietary function for which sovereign immunity has been waived). [↑](#footnote-ref-94)
94. 126.1Don’t Drill the Hills, Inc. v. City of Rochester Hills, 2016 Mich. App. LEXIS 615 (March 24, 2016). [↑](#footnote-ref-95)
95. 127*See, e.g.,* State *ex rel.* Haynes v. Bonem, 114 N.M. 627, 845 P.2d 150 (1992); City of Richardson v. Responsible Dog Owners of Texas, 33 Tex. Sup. Ct. J. 634, 794 S.W.2d 17 (Tex. 1990); City of Santa Fe v. Young, 949 S.W.2d 559, 138 O.&G.R. 165 (Tex. App.—Houston [14th Dist.] 1997, no writ).

    On the differences between “statutory cities and counties” and “home rule” units and on local government jurisdictional conflicts generally, see Michael J. Wozniak, *Home Court Advantage? Local Governmental Jurisdiction Over* ***Oil*** *and Gas Operations*, 48 Rocky Mt. Min. L. Inst. §§ 12.06–12.08 (2002).

    In the absence of home rule status, sub-state units must look to a legislative enabling act to give them the power to regulate. In Pennsylvania General Energy Co., LLC v. Grant Township, 2015 U.S. Dist. LEXIS 139921 (W.D. Pa. Oct. 14, 2015), *reconsideration denied*, 2016 U.S. Dist. LEXIS 14211 (W.D. Pa. Feb. 5, 2016), the court relied on the *ultra vires* doctrine to strike down a Township ordinance that attempted to prohibit all ***oil*** and gas drilling operations and waste disposal operations.

    The expansion of state ***oil*** and gas conservation statutes to specifically include environmental factors also impacts the preemption issue. *See* Tara K. Righetti, *The Incidental Environmental Agency*, 20 Utah L. Rev. 685 (2020); Tara K. Righetti, Hannah J. Wiseman & James W. Coleman, *The New* ***Oil*** *and Gas Governance,* 130 Yale L.J.F. 51 (2020). [↑](#footnote-ref-96)
96. 128Oro Fino Gold Mining Corp. v. County of El Dorado, 225 Cal. App. 3d 872, 274 Cal. Rptr. 720, 113 O.&G.R. 167 (1990).

    The New York Environmental Quality Review Act (SEQRA) has served as the basis for the multi-year moratorium on the use of high-volume, high-pressure hydraulic fracturing operations while the state revises its generic environmental impact report regarding such operations. *See* Alex Ritchie, *Creatures of Circumstance: Conflicts Over Local Government Regulation of* ***Oil*** *and Gas*, 61 Rocky Mtn. Min. L. Inst. 11-1, 11-14 to 15 (2014). [↑](#footnote-ref-97)
97. 129Cal. Const. art. XI, § 5. [↑](#footnote-ref-98)
98. 130Colo. Const. art. V, § 5.

    While Colorado sub-state home rule units have extensive powers, unless expressly granted they do not possess the authority to seek judicial review of state administrative agency rulemaking decisions. Martin v. District Court, 191 Colo. 107, 109 550 P.2d 864, 866 (1976); Weld County v. Ryan, 2022 COA 26. In *Weld County*, the county sought to challenge an Air Quality Control Commission’s promulgated rule which would have an impact on ***oil*** and gas operations within the county. [↑](#footnote-ref-99)
99. 131*See, e.g.,* Idaho Const. art. XII, § 2; N.M. Const. art. X, § 6; Tex. Const. art. 11, § 5; Utah Const. art. XI, § 5. [↑](#footnote-ref-100)
100. 132*See, e.g.,* N.D. Cent. Code § 40-05-01. [↑](#footnote-ref-101)
101. 133River Springs Ltd. Liability Co. v. Board of County Comm’rs, 899 P.2d 1329, 134 O.&G.R. 650 (Wyo. 1995); KN Energy, Inc. v. City of Casper, 755 P.2d 207 (Wyo. 1988). [↑](#footnote-ref-102)
102. 134225 ILCS 725/13, reproduced *infra* at § 30.13A. In Tri-Power Res., Inc. v. City of Carlyle, 2012 IL App (5th) 110075, 359 Ill. Dec. 781, 967 N.E.2d 811, the court used this provision to uphold the City’s rejection of an application for a permit to drill. *See* § 4.05[2][x] *infra*.

     In Georgia, a section of the ***Oil*** and Gas Conservation Act specifically states: “This part shall not be construed as limiting the authority of local governments to adopt local zoning or land use ordinances limiting the location or timing of activities defined here for the purposes of protecting natural resources or human health and welfare.” O.G.C.A. § 12-4-52.1. [↑](#footnote-ref-103)
103. 135225 ILCS 725/13, reproduced *infra* at § 30.13A. [↑](#footnote-ref-104)
104. 136Billy ***Oil*** Co., Inc. v. Board of County Comm’rs, 240 Kan. 702, 732 P.2d 737, 91 O.&G.R. 470 (1987). For a Louisiana case concerned with the same type of interplay between the powers of the state conservation agency and the zoning powers of a local governmental entity, see Total Minatome Corp. v. Parish of Caddo, 618 So. 2d 1088, 126 O.&G.R. 258 (La. App. 1993). The case as reported only resolves the question of where the issues should be litigated and not how the powers are to be distributed between the two levels of government. *See also* Town of Serena v. Kelly, 311 Ill. App. 3d 344, 243 Ill. Dec. 944, 724 N.E.2d 543, 145 O.&G.R. 257, *appeal denied*, 189 Ill. 2d 681, 246 Ill. Dec. 923, 731 N.E.2d 771, 731 N.E.2d 772 (2000) (express preemption of township regulation of gravel operations because legislature amended statute exempting only counties from the express preemption even though the statutory amendment referred to “local law”).

     In Maryland, preemption of sub-state units by state statutes is determined on an ad hoc basis by looking at the scope and extent of the state regulatory scheme and contrasting it with the nature of the sub-state regulation. Thus, public utility regulation does not preempt a county from requiring a regulated public utility to comply with the county’s zoning ordinance. Washington Gas Light Co. v. Prince George’s County Council, 2012 U.S. Dist. LEXIS 31798 (D. Md. Mar. 9, 2012), *aff’d,* 711 F.3d 412 (4th Cir. 2013).

     Notwithstanding the judicial reluctance to find an implied preemption by occupation of the field, the court in Bd. of Cty. Comm’rs v. Solar, 239 Md. App. 380, 196 A.3d 933 (2018), *cert. granted*, 2019 Md LEXIS 49 (Md. Feb. 4, 2019), determined that the state statutes delegating power to the Public Service Commission to issue certificates of public convenience and necessity to solar power generating facilities impliedly preempted the County zoning ordinance requiring such facilities to go through the discretionary permit process in order to construct the generating facility.

     In South Carolina, the mining statute first gave exclusive authority to the State to regulate mining but then said: “No provision of this chapter, supersedes, affects, or prevents the enforcement of a zoning regulation or ordinance within the jurisdiction … , except when a provision of the regulation or ordinance is in direct conflict with this chapter.” S.C. Code Ann. § 48-20-250. In Red Bluff Trade Center, LLC v. Horry County, 454 F. Supp. 3d 570 (D.S.C. 2020), the court analyzed two ordinances, one a zoning ordinance and the other a mine permit ordinance, and concluded that the mine permit ordinance was preempted. Also preempted was a provision in the zoning ordinance requiring compliance with the mine permit ordinance before a discretionary permit would issue. [↑](#footnote-ref-105)
105. 137During the pendency of the litigation, Kansas enacted a statute which mooted the plaintiff’s request for future injunctive relief. Kansas withdrew from counties the power to regulate the “production or drilling of any ***oil*** and gas well in any manner which would result in the duplication of regulation by the state corporation commission …” Kan. Stat. Ann. § 19-101a(22). A similar statute exists in Wyoming. Wyo. Stat. Ann. § 18-5-201. This is the best way to resolve intergovernmental conflict situations. The legislature should determine whether they want preemptive state or coextensive state and local regulation of ***oil*** and gas activities. Express statements to preempt or not to preempt avoids the problem of having the judicial system attempt to divine implied legislative intent which may lead to inconsistent results. [↑](#footnote-ref-106)
106. 138A similar result was reached in Dart Energy Corp. v. Iosco Township, 206 Mich. App. 311, 520 N.W.2d 652 (1994), where the court found express statutory language prohibiting a county from regulating an ***oil*** and gas well that is converted to a brine injection well. Mich. Comp. L. § 125.271.

     An example of express preemption is Mich. Comp. L. § 125.3205(2), which prohibits counties and townships from regulating “the drilling, completion or operation of ***oil*** and gas wells or other wells drilled for ***oil*** or gas exploration purposes. Even though the statute does not mention cities or villages, a trial court found that the Michigan ***Oil*** and Gas Conservation Act preempted municipal zoning regulations from applying to ***oil*** and gas operations. The case is discussed in William A. Horn & Joshua D. Beard, *2017 Survey of* ***Oil*** *and Gas Law—Michigan*, 3 Texas A&M J. of Prop. L. 37, 42–44. *See* § 4.05[2][b][viii] *infra*.

     In Idaho, a 2016 statutory amendment states that the State has occupied the field of ***oil*** and gas regulation but then continues on to suggest that concurrent state and sub-state regulation is allowed. Idaho Code § 47-314(9–11). [↑](#footnote-ref-107)
107. 139A North Dakota Attorney General’s opinion concluded that a county could not issue an ***oil*** drilling permit notwithstanding a broad grant of power to the county to regulate land use. N.D. Att’y Gen. Op. 90-23. This appears to be about the only “decision” finding that a state has occupied the field of ***oil*** and gas regulation.

     In California, the general approach of applying both an implied preemption by conflict and implied preemption by occupation of the field was affirmed in Chevron U.S.A., Inc. v. County of Monterey, 70 Cal. App. 5th 153, 285 Cal. Rptr. 3d 247 (2021), *rev. granted,* 2022 Cal. LEXIS 450 (Jan. 26, 2022), where the court also noted that it should only sparingly use the implied preemption by occupation of the field doctrine.

     Even in Oklahoma and Texas where there has been comprehensive state regulation of ***oil*** and gas operations for 75 years, courts have not found that the state intended to occupy the field. Gant v. Oklahoma City, 1931 OK 241, 150 Okla. 86, 6 P.2d 1065, *appeal dismissed*, 284 U.S. 594, 52 S. Ct. 203, 76 L. Ed. 512 (1932), *subsequent appeal*, 1932 OK 469, 160 Okla. 62, 15 P.2d 833, *aff’d*, 289 U.S. 98, 53 S. Ct. 530, 77 L. Ed. 1058 (1933); Klepak v. Humble ***Oil*** & Refining Co., 177 S.W.2d 215 (Tex. Civ. App.—Galveston 1944, writ ref’d w.o.m.).

     In Wash. Gas Light Co. v. Prince George’s County Council, 784 F. Supp. 2d 565, 172 O.&G.R. 699 (D. Md. 2011), the court noted that even though the Pipeline Safety Act only expressly preempted matters relating to safety, the court would not grant the County’s motion for summary judgment since there were issues relating to whether there was implied preemption by occupation of the field or implied preemption by conflict. The court further noted that due to the similarity between federal and state preemption doctrines, there was no need to apply *Burford* abstention.

     In a subsequent opinion, 2012 U.S. Dist. LEXIS 31798 (D. Md. Mar. 9, 2012), the court applied the typical tri-partite analysis for finding sub-state preemption by federal law. Finding only express preemption of safety matters by the Pipeline Safety Act and neither implied preemption by occupation of the field nor implied preemption by conflict, the court upheld the application of the County zoning ordinance to the location of the proposed LNG facility. The court further noted that while zoning regulation entails, in some aspects, public safety concerns, such concerns were not the “primary motivator” for the County zoning ordinance that limited the uses on the landowner’s tract. Similarly, while location of certain facilities has a public safety component both in terms of a zoning ordinance and in terms of FERC-certification, there is no sense that Congress intended to preempt zoning ordinances which restrict the location of such facilities. This decision was affirmed in Wash. Gas Light Co. v. Prince George’s County Council, 711 F.3d 412 (4th Cir. 2013) with the court noting that neither the Pipeline Safety Act nor the Natural Gas Act were implicated in the case since the petitioner was a local distribution company and thus not involved in interstate natural gas operations.

     In a series of cases the Maryland courts have found that Surface Mining Act, Md. Code Ann., Envir. §§ 15-801 to 15-834, does not preempt sub-state units from regulating such operations under their zoning and planning powers. County Council of Prince George’s County v. Chaney Enterprises, LP, 165 A.3d 379 (Md. Ct. App. 2017); Chaney Enterprises Limited Partnership v. City Council of Prince George’s County, 2016 Md. App. LEXIS 402 (Md. Ct. Spec. App. Sept. 7, 2016). Maryland follows the general approach to preemption analysis through the tri-partite analysis of express preemption, preemption by conflict, and “implied preemption” which is preemption by occupation of the field. *Chaney Enterprises*, 165 A.2d at 395, citing Md. Reclamation Assocs. v. Harford County, 414 Md. 1, 994 A.2d 842 (2010). *See also* Wheelabrator Baltimore, L.P. v. Mayor & City Council of Baltimore, 2020 U.S. Dist. LEXIS 53020 (D. Md. Mar. 27, 2020) (sub-state unit regulation of solid waste facility preempted by state law).

     But in Board of County Commissioners v. Perennial Solar, LLC, 464 Md. 610, 212 A.3d 868 (2019), the court applied the implied preemption by occupation of the field doctrine to Md. Code Ann., Pub. Util. § 7-207, which authorizes the Public Service Commission to issue certificates of public convenience and necessity for solar energy generating stations. [↑](#footnote-ref-108)
108. 140O. Reynolds, Handbook of Local Government Law 114-132 (2nd ed. 2001). It is often stated that a conflict exists “where a local ordinance prohibits an act that a state statute permits, or permits an act that a state statute prohibits.” *Id.* at 128. That aphorism, however, does not apply to many situations and does not deal with overlapping regulations which may be different in some aspects and similar in others.

     The difficulty of determining whether a true or “inimical” conflict exists was explored in Chevron U.S.A., Inc. v. County of Monterey, 70 Cal. App. 5th 153, 285 Cal. Rptr. 3d 247 (2021), *rev. granted,* 2022 Cal. LEXIS 450 (Jan. 26, 2022). The alleged conflict was between two county zoning provisions, one of which prohibited the use of land for wastewater injection or impoundment purposes and the other prohibited the use of land for ***oil*** and gas drilling operations, and various provisions of the state ***oil*** and gas conservation act that delegated authority to the state agency to regulate such activities. While noting that the mere existence of dual regulatory systems will not necessarily rise to the level of a conflict, the court emphasized the state statute’s granting of authority to regulate and encourage both the injection and drilling operations that the county ordinance would prohibit. *Id.*, 70 Cal. App. 5th at 170, citing T-Mobile West LLC v. City & County of San Francisco, 6 Cal. 5th 1107, 245 Cal. Rptr. 3d 412, 438 P.3d 239 (2019) and City of Dublin v. County of Alameda, 14 Cal. App. 4th 264, 17 Cal. Rptr. 2d 845 (1993).

     In some states where there are multiple statutory grants of authority, the courts apply the “harmonizing” canon which creates a presumption against preemption. Cerillos Gravel Products, Inc. v. Board of County Comm’rs, 136 N.M. 247, 2004 NMCA 96, 96 P.3d 1167, 160 O.&G.R. 1101 (counties have option to bring criminal or quasi-criminal (permit suspension) actions for alleged violation of zoning ordinance as it impacted a sand and gravel mining operation).

     Alaska clearly recognizes express preemption and implied preemption by conflict. Jacko v. State, 353 P.3d 337 (Alaska 2015); Jefferson v. State, 527 P.2d 37 (Alaska 1974).

     *See* Synagro-WWT, Inc. v. Rush Township, 204 F. Supp. 2d 827, 159 O.&G.R. 935 (M.D. Pa. 2002) (township ordinance regulating disposal of sewage sludge may be preempted by state statute). On subsequent hearing, the court found that portions of the township ordinance were preempted by the state’s Solid Waste Management Act but not by the state’s Nutrient Management Act. Synagro-WWT, Inc. v. Rush Township, 299 F. Supp. 2d 410, 159 O.&G.R. 972 (M.D. Pa. 2003). [↑](#footnote-ref-109)
109. 141The cases are collected in “***Oil*** and Gas—Municipal Regulations,” 10 A.L.R.3d 1226. [↑](#footnote-ref-110)
110. 142Cal. Const. art. IX, § 5(a). [↑](#footnote-ref-111)
111. 143*See* Cal. Pub. Res. Code § 3300 *et seq.* [↑](#footnote-ref-112)
112. 144Cal. Pub. Res. Code § 3690. In Chevron U.S.A., Inc. v. County of Monterey, 70 Cal. App. 5th 153, 285 Cal. Rptr. 3d 247 (2021), *rev. granted*, 2022 Cal. LEXIS 450 (Jan. 26, 2022), the court interpreted § 3690 as only applying to unit operations and not to other types of conservation regulation. Oklahoma had a similar provision, 52 Okla. Stat. § 137, that was repealed and replaced by an express preemption provision that allows some sub-state regulation. 52 Okla. Stat. § 137.1 is discussed at § 4.05[2][b][xvi] *infra*. [↑](#footnote-ref-113)
113. 145*See e.g.*, Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir.), *cert. denied*, 284 U.S. 634 (1931); No ***Oil***, Inc. v. City of Los Angeles, 196 Cal. App. 3d 223, 242 Cal. Rptr. 37, 97 O.&G.R. 504 (1987); Friel v. County of Los Angeles, 172 Cal. App. 2d 142, 342 P.2d 374, 11 O.&G.R. 155 (1959); Bernstein v. Smutz, 83 Cal. App. 2d 108, 188 P.2d 48 (1947). [↑](#footnote-ref-114)
114. 146See cases cited in note 64 *supra*. [↑](#footnote-ref-115)
115. 147As with zoning in general, the courts have upheld the validity of ***oil*** and gas drilling regulations, Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir. 1931), *cert. denied*, 284 U.S. 634, 52 S. Ct. 18, 76 L. Ed. 540 (1931). *See also* Friel v. County of Los Angeles, note 64 *supra*. The several instances where California courts have struck down municipal ordinances deal with procedural and substantive due process and takings claims. *See e.g.*, Pacific Palisades Association v. Huntington Beach, 196 Cal. 211, 237 P. 538 (1925); Braly v. Board of Fire Commissioners, 157 Cal. App. 2d 608, 321 P.2d 504 (1958); Trans-Oceanic ***Oil*** Corp. v. Santa Barbara, 85 Cal. App. 2d 776, 194 P.2d 148 (1948).

     Sub-state units may be required to comply with the requirements of the California Environmental Quality Act before they adopt zoning regulations, including those specifically designed to deal with ***oil*** and gas regulations. Failure to do so will cause the ordinance to be invalidated. King & Gardiner Farms, LLC v. County of ***Kern***, 2020 Cal. App. LEXIS 161 (Cal. App. Feb. 25, 2020). For another case dealing with the same ***Kern*** County ordinance, see Vaquero Energy, Inc. v. County of ***Kern***, 42 Cal. App. 5th 312, 255 Cal. Rptr. 3d 221 (2019). [↑](#footnote-ref-116)
116. 148See www.foodandwaterwatch.org for an up to date list. As of June 30, 2014, there were some 13 sub-state units that had adopted some form of anti-fracing or anti-acidizing ordinance. [↑](#footnote-ref-117)
117. 148.1Chevron U.S.A., Inc. v. County of Monterey, 70 Cal. App. 5th 153, 285 Cal. Rptr.3d 247 (Cal. App. 2021), *rev. granted*, 2022 Cal. LEXIS 450 (Jan. 26, 2022). [↑](#footnote-ref-118)
118. 148.270 Cal. App. 5th at 159–60. The ordinance also prohibited the use of hydraulic fracturing but the challenge to that provision was struck as none of the ***oil*** and gas operators could show that they were presently using, or planning to use, hydraulic fracturing on their property interests. [↑](#footnote-ref-119)
119. 148.3*See, e.g.*, Hermosa Beach Stop ***Oil*** Coalition v. City of Hermosa Beach, 86 Cal. App. 4th 534, 103 Cal. Rptr. 2d 447 (2001); Higgins v. City of Santa Monica, 62 Cal. 2d 24, 41 Cal. Rptr. 9, 396 P.2d 41 (1964); Beverly ***Oil*** Co. v. City of Los Angeles, 40 Cal. 2d 552, 254 P.2d 865 (1953); Pacific Palisades Ass'n v. Huntington Beach, 196 Cal. 211, 237 P. 538 (1953).

     The general framework for determining whether there is a conflict between state and sub-state regulation follows the general approach of express preemption, conflict preemption and occupation of the field preemption. Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 16 Cal. Rptr. 2d 215, 844 P.2d 534 (1993); Big Creek Lumber Co. v. County of Santa Cruz, 38 Cal. 4th 1139, 45 Cal. Rptr. 3d 21, 136 P.3d 821 (2006). [↑](#footnote-ref-120)
120. 148.4Cal. Pub. Res. Code § 3690 provides in part that it only applies to chapter 3.5 of the state conservation act and not to other chapters. Chapter 3.5 deals solely with unit operations. [↑](#footnote-ref-121)
121. 149Colo. Const. art. IX, § 9. [↑](#footnote-ref-122)
122. 150*See* Mark Mathews, *Efforts to Ban Hydraulic Fracturing by Local Governments in Colorado,* 67 Inst. on ***Oil*** & Gas L. 77 (2016); Angela Neese, *The Battle Between the Colorado* ***Oil*** *and Gas Conservation Commission and Local Governments: A Call for a New and Comprehensive Approach*, 76 U. Colo. L. Rev. 561 (2005). [↑](#footnote-ref-123)
123. 151Colo. Rev. Stat. § 34-60-128. This section in general deals with habitat stewardship and surface use in order to minimize the impact of ***oil*** and gas development on wildlife resources. [↑](#footnote-ref-124)
124. 152Oborne v. Board of County Comm’rs, 764 P.2d 367, 102 O.&G.R. 1 (Colo. App. 1988), *cert. denied*, 778 P.2d 1370 (Colo. 1989). [↑](#footnote-ref-125)
125. 153Colo. Rev. Stat. § 29-20-101 *et seq.* [↑](#footnote-ref-126)
126. 154The conditions included requirements for a dirt berm for sediment ponds, a bond to cover the cost of reclamation and potential claims for damages in the event of an accident, a system for groundwater pollution prevention and monitoring and cement casing. 764 P.2d at 399. [↑](#footnote-ref-127)
127. 155764 P.2d at 401. [↑](#footnote-ref-128)
128. 156Colo. Rev. Stat. § 34-60-101 *et seq.* [↑](#footnote-ref-129)
129. 157764 P.2d at 401–02. [↑](#footnote-ref-130)
130. 158Board of County Commissioners, La Plata County v. Bowen/Edwards Associates, 830 P.2d 1045, 118 O.&G.R. 417 (Colo. 1992). For a more thorough history of the tension between state and local regulation of ***oil*** and gas operations in Colorado, see Katherine Toan, *Not Under My Backyard: The Battle Between Colorado and Local Governments Over Hydraulic Fracturing*, 26 Colo. Nat. Res., Energy & Envtl L. Rev. 1 (2015); Angela Neese, *The Battle Between the Colorado* ***Oil*** *Commission and Local Governments: A Call for a New and Comprehensive Approach*, 76 U. Colo. L. Rev. 561 (2005). [↑](#footnote-ref-131)
131. 159Colo. Rev. Stat. § 29-20-101 *et seq.* [↑](#footnote-ref-132)
132. 160Oborne v. Board of County Comm’rs, 764 P.2d 367, 102 O.&G.R. 1 (Colo. App. 1988), *cert. denied*, 778 P.2d 1370 (Colo. 1989). [↑](#footnote-ref-133)
133. 161830 P.2d at 1059. [↑](#footnote-ref-134)
134. 162The court halfheartedly distinguishes Oborne, which found an implied preemption by conflict: “[W]e read the Oborne decision as turning on a narrow operational conflict between the conditions imposed by the county on the technical aspects of ***oil*** and gas operations within the county and the regulatory authority vested in the ***Oil*** and Gas Conservation Commission over the very same technical matters.” 830 P.2d at 1060 (n.7). [↑](#footnote-ref-135)
135. 163Town of Frederick v. North American Resources Co., 60 P.3d 758, 157 O.&G.R. 716 (Colo. App. 2002), *cert. denied*, 2003 Colo. LEXIS 7 (Colo. Jan 6, 2003). [↑](#footnote-ref-136)
136. 16460 P.3d at 763, *quoting* *Bowen/Edwards*, 830 P.2d at 1058. [↑](#footnote-ref-137)
137. 16581 P.3d 1119, 158 O.&G.R. 216 (Colo. App. 2003, *cert. denied*). [↑](#footnote-ref-138)
138. 166Colo. Rev. Stat. § 24-2-106(4, 5). [↑](#footnote-ref-139)
139. 167*See* Halverstadt v. Department of Corrections, 911 P.2d 654 (Colo. App. 1995). [↑](#footnote-ref-140)
140. 168Voss v. Lundvall Brothers, Inc., 830 P.2d 1061, 120 O.&G.R. 245 (Colo. 1992). [↑](#footnote-ref-141)
141. 169The approach taken in *Voss* to prohibitory ordinances was not followed in New York in a case involving an express preemption statutory provision. *See* § 4.05[2][b][xi] *infra*. [↑](#footnote-ref-142)
142. 170Board of County Commissioners of Gunnison County v. BDS International, LLC, 159 P.3d 773 (Colo. App. 2006), *cert. denied*, (June 11, 2007). [↑](#footnote-ref-143)
143. 171A similar approach was taken in Colorado Mining Association v. Board of County Commissioners of Summit County, 170 P.3d 749 (Colo. App. 2007), *cert. granted*, 2007 Colo. LEXIS 1068 (Colo. Nov. 13, 2007), which dealt with claims that the Colorado Mined Land Reclamation Act preempted sub-state regulation. *See also* California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987), discussed *infra* at §§ 16.05[1], 24.04[1]. [↑](#footnote-ref-144)
144. 172In Delphi ***Oil***, Inc. v. Forrest County Bd. of Supervisors, 114 So. 3d 719 (Miss. 2013), the Mississippi Supreme Court did not find an operational conflict where the county had imposed a mandatory fencing requirement that the state ***Oil*** & Gas Board had rejected when the Board promulgated similar rules dealing with premises access and safety. Delphi ***Oil*** is discussed at § 4.05[2][b][ix] *infra*. [↑](#footnote-ref-145)
145. 173To show the uncertainty of this *ad hoc* approach, the court remanded for a trial on the merits the issue of whether certain local fire protection regulations were preempted, even though it had found similar regulations preempted in Oborne v. Board of County Commissioners, 764 P.2d 397, 102 O.&G.R. 1 (Colo. App. 1988), *cert. denied*, 778 P.2d 1370 (1989). [↑](#footnote-ref-146)
146. 174*See generally* Osborne Reynolds, Local Government Law §§ 38–44. [↑](#footnote-ref-147)
147. 174.1City of Longmont v. Colorado ***Oil*** & Gas Association, 369 P.3d 573, 2016 CO 29. On the same day that the *Longmont* case was decided, the Colorado Supreme Court also decided City of Fort Collins v. Colorado ***Oil*** & Gas Association, 369 P.3d 586, 2016 CO 28.

     One of the ways that Colorado sub-state units have avoided the preemption issue is through the requirement that ***oil*** and gas operators execute memorandum of understandings (MOUs) with the sub-state unit as a condition to the receipt of a discretionary permit needed to engage in ***oil*** and gas operations. *See* Ghislaine G. Torres Bruner, *The Evolution and Development of* ***Oil*** *and Gas Operator Agreements*,” The Law of Fracking: Federal, State and Local Regulation of Modern ***Oil*** & Gas Development, Paper 6b (Rocky Mtn. Min. L.Fdn. 2019). [↑](#footnote-ref-148)
148. 174.22016 CO 29 at para. 20, 369 P.3d at 579. [↑](#footnote-ref-149)
149. 174.3*Id.* at para. 33–35, 369 P.3d at 582–83. [↑](#footnote-ref-150)
150. 174.4*Id.* at para. 34, 369 P.3d at 582, citing to *Bowen/Edwards*, 830 P.2d at 1057. [↑](#footnote-ref-151)
151. 174.5*Id*. [↑](#footnote-ref-152)
152. 174.6*Id.* at para. 42, 369 P.3d at 583. [↑](#footnote-ref-153)
153. 174.7*Id*. at para. 44–46, 369 P.3d at 583–84, relying in part on *Bowen/Edwards*, 830 P.2d at 1058; *Voss*, 830 P.2d at 1066 and *Town of Frederick*, 60 P.3d at 763. [↑](#footnote-ref-154)
154. 174.8*Id.* at para. 49–51, 369 P.3d at 584, citing Colo. Rev. Stat. § 34-60-102(1)(b). [↑](#footnote-ref-155)
155. 174.9*Id.* at para. 53–55, 369 P.3d at 585–86. The court rejected an intervenor’s argument that relied on the Pennsylvania decision in Robinson Twp. v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 181 O.&G.R. 102 (2013) discussed *infra* at § 4.05[2][b][xvi], because the Colorado Constitution does not have an environmental rights provision as does the Pennsylvania Constitution. [↑](#footnote-ref-156)
156. 174.10City of Ft. Collins v. Colorado ***Oil*** & Gas Association, 369 P.3d 586, 2016 CO 28. [↑](#footnote-ref-157)
157. 174.11For regulatory takings purposes there is a difference between a moratorium and a permanent ordinance. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002), discussed at § 24.01[2] *infra*. [↑](#footnote-ref-158)
158. 175Town of Milliken v. Kerr-Mcgee ***Oil*** & Gas Onshore LP, 410 P.3d 471, 2013 COA 72, *cert. denied*, 2014 Colo. LEXIS 274 (Apr. 14, 2014). [↑](#footnote-ref-159)
159. 176Colo. Rev. Stat. § 34-60-106(15). Because the court resolved the issue on express preemption grounds it did not answer the question of whether the non-home Town had the authority to enact the challenged ordinances. [↑](#footnote-ref-160)
160. 177*Id.* [↑](#footnote-ref-161)
161. 178Colorado State Board of Land Commissioners v. Colorado Mined Reclamation Board, 809 P.2d 974, 115 O.&G.R. 26 (Colo. 1991), *reh’g denied*, 1991 Colo. LEXIS 276 (May 6, 1991), *aff’g sub nom*., Conda, Inc. v. Colorado State Board of Land Commissioners, 782 P.2d 851 (Colo. App. 1989). [↑](#footnote-ref-162)
162. 179Colo. Const. art. IX, § 9. [↑](#footnote-ref-163)
163. 180Colo. Rev. Stat. § 34-32-115(4)(e). This provision was later repealed, eliminating the veto power that sub-state units had over mining operations on state lands. Laws 1988, S.B. 162, § 16. Earlier cases had given the legislature the power to impose reasonable conditions on the State Board’s authority to control the public lands. C & M Sand & Gravel v. Board of County Commissioners, 673 P.2d 1013 (Colo. App. 1983); *In re* Leasing of State Lands, 18 Colo. 359, 32 P. 986 (1893). [↑](#footnote-ref-164)
164. 180.1Ghislaine G. Torres Bruner, *The Evolution and Development of* ***Oil*** *and Gas Operator Agreements, The Law of Fracking: Federal, State, and Local Regulation of Modern* ***Oil*** *and Gas Development* 6b-1 (Rocky Mtn. Min’l L. Fdn 2019). The author identifies over 45 MOUs as being in place in Colorado. [↑](#footnote-ref-165)
165. 180.2Ghislaine G. Torres Bruner, *The Evolution and Development of* ***Oil*** *and Gas Operator Agreements, The Law of Fracking: Federal, State, and Local Regulation of Modern* ***Oil*** *and Gas Development* 6b-13 to 6b-19 (Rocky Mtn. Min’l L. Fdn 2019). Attorneys need to be aware that there may be constitutional issues relating to whether a sub-state unit may “contract” away its police power. Historically, the distinction was made between valid “conditional” zoning and invalid “contract” zoning, but over time that discrepancy has become muddled. [↑](#footnote-ref-166)
166. 180.3SB 181, 2019 Colo. Legis. Serv., ch. 120. The changes were made effective April 16, 2019.

     Pursuant to these amendments, sub-state units are actively engaging in the regulation of ***oil*** and gas operations. For example, a number of such units have enacted setback requirements. *See, e.g.*, Adams County Development Standards and Regulations § 4-11-02-03-03-03(4) (2000 foot setback); Broomfield Municipal Code § 17-54-070(C) (2000 foot setback); Larimer County Land Use Code § 11.3.2 (sliding scale setback requirement between 1000 and 2000 feet). [↑](#footnote-ref-167)
167. 180.4SB 181, 2019 Colo. Legis. Serv., ch. 120, at § 4, amending Colo. Rev. Stat. § 29-20-104. [↑](#footnote-ref-168)
168. 180.5SB 181, 2019 Colo. Legis. Serv., ch. 120, at § 4, amending Colo. Rev. Stat. § 29-20-104. [↑](#footnote-ref-169)
169. 181Idaho Code § 47-317. [↑](#footnote-ref-170)
170. 182Idaho Code § 47-317(4)(a–c). [↑](#footnote-ref-171)
171. 183225 ILCS 725/13 reproduced at § 30.13A *infra*. *See* Robin Stoller, *Illinois* ***Oil*** *and Gas Update*, 19 Tex. Wesleyan L. Rev. 319 (2013). [↑](#footnote-ref-172)
172. 18465 ILCS 5/11-56-1. Notwithstanding this statutory enabling act, the court in People *ex rel.* Simpkins v. Kincaid, 26 Ill. App. 2d 68, 167 N.E.2d 698 (1960) granted an ***oil*** and gas operator a writ of mandamus ordering the non-home rule unit to grant an operator a permit since the ordinance did not vest with governmental officials discretion not to issue the permit. [↑](#footnote-ref-173)
173. 185Tri-Power Res., Inc. v. City of Carlyle, 2012 IL App (5th) 110075, 359 Ill. Dec. 781, 967 N.E.2d 811. [↑](#footnote-ref-174)
174. 186*See* note 91.3 *supra*. [↑](#footnote-ref-175)
175. 187*See* note 91.4 *supra*. [↑](#footnote-ref-176)
176. 188359 Ill. Dec. at 784. The court distinguished *Simpkins*, note 91.4 *supra* based on the operator’s apparent compliance with the ordinance’s requirements in that case with the permit being denied by village officials due to extra-ordinance considerations. The *Simpkins* court noted, however, that the non-home rule unit could enact a more stringent ordinance that might have authorized a permit denial. [↑](#footnote-ref-177)
177. 189359 Ill. Dec. at 784–85. The court does not deal with the operator’s regulatory takings claim since the Court of Appeals review of the trial court certified question was limited to the single issue of whether a sub-state unit could prohibit ***oil*** and gas operations. [↑](#footnote-ref-178)
178. 189.1225 ILCS 732/1-35(c). [↑](#footnote-ref-179)
179. 190One Kansas statute, enacted in 1907, authorized counties to appoint an “inspector of natural gas, gas wells and gas pipe lines.” American Bar Association, *Legal History of Conservation of* ***Oil*** *and Gas* 41 (1938). [↑](#footnote-ref-180)
180. 191ABA History, note 190 *supra* at 55–56. *See also* Marrs v. Oxford, 24 F.2d 541 (D. Kan. 1928), *aff’d*, 32 F.2d 134 (8th Cir. 1929), *cert. denied*, 280 U.S. 573 (1929). [↑](#footnote-ref-181)
181. 192Kan. Stat. Ann. § 19-101a(19) provides that “Counties may not regulate the production or drilling of any ***oil*** and gas well in any manner which would result in the duplication of regulation by the state corporation commission and the Kansas department of health and environment pursuant to chapter 55 and chapter 65 of the Kansas Statutes Annotated, and amendments thereto, and any rules and regulations adopted thereto. Counties may not require any license or permit for the drilling or production of ***oil*** and gas wells. Counties may not impose any fee or charge for the drilling or production of any ***oil*** and gas well.” [↑](#footnote-ref-182)
182. 193Billy ***Oil*** Co., Inc. v. Board of County Commissioners, 240 Kan. 702, 732 P.2d 737, 91 O.&G.R. 470 (1987) discussed at text accompanying notes 56–57 *supra*. [↑](#footnote-ref-183)
183. 194Blancett v. Montgomery, 398 S.W.2d 877 (Ky. App. 1966). [↑](#footnote-ref-184)
184. 195Ky. Rev. Stat. § 353.300 *et seq.*, reproduced at Section 30.17A *infra.* [↑](#footnote-ref-185)
185. 196La. Rev. Stat. Ann. § 30:28(F). An earlier version of this statute was the subject of an attorney general’s opinion concluding that sub-state units were preempted from regulating ***oil*** and gas operators. Attorney General Opinion No. 82-1021 (Oct. 22, 1982).

     *See generally* Gerald F, Slattery, Jr., *State and Local Regulation of Drilling in Louisiana*, 7 L.S.U. J. of Energy L. & Resources 315 (2019); Madeline R. Flores, *Fighting Fracking: Unexplored Territory in State and Parish Policy*, 91 Tul. L. Rev. 801 (2017). [↑](#footnote-ref-186)
186. 197Palermo Land Co. v. Planning Commission of Calcasieu Parish, 561 So. 2d 482, 497 (La. 1990). *Palermo Land* was relied on to invalidate a Parish zoning ordinance that attempted to regulate ***oil*** and gas operations. St. Tammany Parish Government v. Welsh, 199 So. 3d 3 (La. Ct. App. 2016). In Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury, 371 So. 2d 1127 (La. 1979), the court found that the Parish ordinance prohibiting the location of disposal wells was preempted by the state statutes regulating the disposal of hazardous wastes.

     In Air Products Blue Energy, LLC v. Livingston Parish Gov’t, 2022 U.S. Dist. LEXIS 231839 (M.D. La. Dec. 26, 2022), the court noted the similarity in approach taken in preemption cases for both federal/state and state/local preemption issues. [↑](#footnote-ref-187)
187. 198Energy Management Corp. v. City of Shreveport, 397 F.3d 297, 161 O.&G.R. 963 (5th Cir. 2005).

     In Air Products Blue Energy, LLC v. Livingston Parish Gov’t, 2022 U.S. Dist. LEXIS 231839 (M.D. La. Dec. 26, 2022), the court relied on *Energy Management* to find that the plaintiff had standing to challenge a Parish moratorium ordinance precluding the issuance of permits for certain types of wells that could only be permitted by the State Office of Conservation. *See also* Vanguard Environmental, LLC v. Terrebonne Parish Consolidated Government, 2012-1998 (La. App. 1st Cir. 6/11/13) (unpublished opinion). [↑](#footnote-ref-188)
188. 199Energy Management Corp. v. City of Shreveport, 397 F.3d 297, 302–03, 161 O.&G.R. 963 (5th Cir. 2005). [↑](#footnote-ref-189)
189. 200397 F.3d. at 304. [↑](#footnote-ref-190)
190. 201397 F.3d at 303–04. [↑](#footnote-ref-191)
191. 202*See also* Holland v. Questar Exploration & Prod. Co., 2006 U.S. Dist. LEXIS 9492 (W.D. La. Feb. 23, 2006) (*Energy Management I* preempts the ordinance only insofar as it prohibits drilling within 1,000 feet of the lake). [↑](#footnote-ref-192)
192. 203Energy Management Corp. v. City of Shreveport, 467 F.3d 471, 163 O.&G.R. 716 (5th Cir.), *on remand*, 2006 U.S. Dist. LEXIS 80925 (W.D. La. Nov. 6, 2006). *See* also Greater New Orleans Expressway Commission v. Traver ***Oil*** Co., 494 So. 2d 1204 (La. Ct. App. 1986) (upholds state permit to drill a well within 1338 feet of a causeway owned by the Commission). [↑](#footnote-ref-193)
193. 203.1St. Tammany Parish Government v. Welsh, 199 So. 3d 3 (La. App. 2016, writ denied). There is some criticism of *Welsh* because zoning and land use control power was given to sub-state units by changes to the Louisiana Constitution in 1974. Andres Jacoby, *Local Government Control of* ***Oil*** *& Gas Operations and State Preemption Issues, The Law of Fracking: Federal State and Local Regulation of Modern* ***Oil*** *& Gas Development* 6a (Rocky Mtn. Min. L.Fdn. 2019). *See* Lafourche Parish Council v. Autin, 648 So. 2d 343 (La. 1994). [↑](#footnote-ref-194)
194. 203.2La. Const. Art. IX, § 1. [↑](#footnote-ref-195)
195. 203.3La. Const. Art. VI, § 17. The court also relied on La. Const. Art. VI, § 9(B), which confers upon the state the full police powers that cannot be abridged. [↑](#footnote-ref-196)
196. 203.4Louisiana Environmental Action Network v. Welsh, 224 So. 3d 383, 387 (La. Ct. App. 2017), *reh’g denied*, 2017 La. App. LEXIS 1334 (La. App. July 19, 2017); Vanguard Environmental, LLC v. Terrebonne Parish Consolidated Government, 2013 La. App. LEXIS (June 6, 2013), *writ denied*, 126 So. 3d 490 (La. 2013). [↑](#footnote-ref-197)
197. 204Mich. Comp. L. § 125.171(1), repealed by Pub. Acts 2006, No. 110, Art II, § 205 and replaced by Mich. Comp. L. § 125.3205. [↑](#footnote-ref-198)
198. 205Mich. Comp. L. § 125.3205. [↑](#footnote-ref-199)
199. 206*Id.* [↑](#footnote-ref-200)
200. 207Dart Energy Corp. v. Iosco Township, 206 Mich. App. 311, 520 N.W.2d 652 (1994). In City of Wyoming v. Kragt, 2006 Mich. App. LEXIS 618 (Mar. 9, 2006) (unreported opinion), the court interpreted a provision of the state building code statute (Mich. Comp. L. § 125.1501 *et seq*.) that exempts mines from state and local building code regulation to not apply to the erection of a structure in an abandoned mine that was being used as an electronic data storage facility. [↑](#footnote-ref-201)
201. 208Prior to the statutory amendment expanding the preemption coverage to counties, the court applied the traditional *ultra vires* doctrine to deny a county the power to regulate some aspects of ***oil*** and gas drilling activities. County of Alcona v. Wolverine Environmental Production, Inc., 233 Mich. App. 238, 590 N.W.2d 586 (1998), *app. denied*, 461 Mich. 854, 602 N.W.2d 386 (1999). In *Wolverine*, the County attempted to require an ***oil*** and gas operator who had a drilling permit to apply for a soil erosion permit and be subject to other performance standards. The Court of Appeals determined that even though the county had authority to implement state environmental standards, it did not have authority to require soil erosion permits.

     In Don’t Drill the Hills, Inc. v. City of Rochester Hills, 2016 Mich. App. LEXIS 615 (March 24, 2016), the court found that the City could execute an ***oil*** and gas lease with a no surface occupancy provision and modify an easement to replace an existing pipeline on city park land without violating a city charter provision not allowing the sale of park land or its use for non-park purposes. [↑](#footnote-ref-202)
202. 208.1William A. Horn & Joshua D. Beard, *2017 Survey of* ***Oil*** *and Gas Law—Michigan,* 3 Texas A&M J. of Prop. L. 37, 42–44. As of the date of this writing in June 2017, there was no reporting of a Court of Appeals decision in that case although the Michigan Supreme Court in a summary order said that it would not hear the case on an expedited basis because “we are not persuaded that the questions presented should be reviewed by this Court.” City of Southfield v. Jordan Development Co., 500 Mich. 858, 884 N.W.2d 297 (2016). Michigan appears to follow the traditional tri-partite preemption analysis involving express preemption, implied preemption by conflict and implied preemption by occupation of the field. *See* People v. Llewellyn 257 N.W.2d 902 (Mich. 1977). [↑](#footnote-ref-203)
203. 209Delphi ***Oil***, Inc. v. Forrest County Bd. of Supervisors, 114 So. 3d 719 (Miss. 2013). [↑](#footnote-ref-204)
204. 210Miss. Code Ann. § 53-1-17(7). There is also a more general grant of authority to the ***Oil*** and Gas Board “over all persons and property necessary to administer and enforce effectively the provisions of this chapter and all other laws relating to the conservation of ***oil*** and gas.” *Id.*, 53-1-17(1). [↑](#footnote-ref-205)
205. 211Miss. Code Ann. § 19-3-40(1). [↑](#footnote-ref-206)
206. 212In fact the ***Oil*** and Gas Board specifically opted not to impose a mandatory fencing requirement because it would hinder access to first-responders and other ***oil*** field personnel in the event of an emergency. 114 So. 3d at 724. [↑](#footnote-ref-207)
207. 212.1Mont. Laws 2021, ch. 533, § 2, amending Mont. Code Ann. § 76-2-109. [↑](#footnote-ref-208)
208. 213A.G. Ref. No. 56521/00, 1986 N.M. AG LEXIS 6. [↑](#footnote-ref-209)
209. 214N.M. Stat. Ann. § 70-2-1 *et seq.* [↑](#footnote-ref-210)
210. 215N.M. Stat. Ann. § 3-21-1. [↑](#footnote-ref-211)
211. 216N.M. Stat. Ann. § 4-37-1. [↑](#footnote-ref-212)
212. 217Rancho Lobo, Ltd. v. DeVargas, 303 F.3d 1195 (10th Cir. 2002) (rejecting claim that Forest Conservation Act, N.M. Stat. Ann. § 68-2-1 *et seq*., preempted county authority to adopt its own timber harvesting ordinance); San Pedro Mining Corp. v. Board of County Comm’rs, 121 N.M. 194, 909 P.2d 754, 1996-NMCA-002 (rejecting claim that Mining Act, N.M. Stat. Ann. § 69-36-1 *et seq*., preempted county authority to adopt its own mining regulation ordinance). [↑](#footnote-ref-213)
213. 218San Pedro Mining, 909 P.2d at 760. In 2008, Santa Fe County adopted a comprehensive revision to its planning and zoning ordinance that regulates ***oil*** and gas operations. Santa Fe County, N.M., Ordinance No. 2008-19 (Dec. 9, 2008). The ordinance is analyzed at Alex Ritchie, *Creatures of Circumstance: Conflicts Over Local Government Regulation of* ***Oil*** *and Gas*, 60 Rocky Mtn. Min. L. Inst. 11-1, 11-11 (2014). [↑](#footnote-ref-214)
214. 218.1SWEPI, LP v. Mora County, 81 F. Supp. 3d 1075 (D.N.M. 2015). [↑](#footnote-ref-215)
215. 218.2For a more complete discussion of the ordinance, see Alex Ritchie, *Creatures of Circumstance: Conflicts Over Local Government Regulation of* ***Oil*** *and Gas*, 60 Rocky Mtn. Min. L. Fdn. Ann. Inst. ch. 11 (2014). The Mora County ordinance is similar to the ordinances invalidated in Seneca Resources Corp. v. Highland Township, 2017 U.S. Dist. LEXIS 162629 (W.D. Pa. Sept. 20, 2017); Pennsylvania General Energy Co., LLC v. Grant Township, 139 F. Supp. 3d 706 (W.D. Pa. 2015), *motion for reconsideration denied*, 2016 U.S. Dist. LEXIS 14211 (W.D. Pa. Feb. 5, 2016); Range Res.—Appalachia, LLC v. Blaine Twp, 2009 U.S. Dist. LEXIS 100932 (W.D. Pa. Oct. 29, 2009), 649 F. Supp. 2d 412 (W.D. Pa. 2009) and Penn Ridge Coal, LLC v. Blaine Twp., 2009 U.S. Dist. LEXIS 84428 (W.D. Pa. Sept. 16, 2009).

     *See also* Seneca Res. Corp. v. Highland Twp., 2017 U.S. Dist. LEXIS 152737 (W.D. Pa. Sept. 20, 2017), 2017 U.S. Dist. LEXIS 152738 (W.D. Pa. Sept. 29, 2017) (disallowing intervention by private parties after the township refused to defend the provisions of the community bill of rights included in the township’s charter); Pennsylvania General Energy Co., LLC v. Grant Township, 658 Fed. Appx. 37 (3d Cir. 2016) (affirming district court decision not to allow intervention by a non-governmental organization), *on remand*, 2016 U.S. Dist. LEXIS 135357, 135359 (W.D. Pa. Sept. 30, 2016). [↑](#footnote-ref-216)
216. 218.3*See* Santa Fe v. Armijo, 96 N.M. 663, 1981-NMSC-102, 634 P.2d 635, 70 O.&G.R 579. [↑](#footnote-ref-217)
217. 218.4The court is particularly critical of the 1981 Attorney-General’s opinion discussed at text accompanying note 213 *supra*. The court relies instead on *San Pedro Mining*, note 217 *supra* and *Rancho Lobo*, note 217 *supra* to support its conclusion that the ***Oil*** and Gas Conservation Act does not totally occupy the field of ***oil*** and gas regulation. [↑](#footnote-ref-218)
218. 218.5*See* State *ex rel.* Coffin v. McCall, 58 N.M. 534, 273 P.2d 642 (1954) and Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876, 881 (1974). [↑](#footnote-ref-219)
219. 218.6The court identifies the Appellate Division opinion in New York that upholds a total prohibition ordinance, Matter of Norse Energy Corp. USA v. Town of Dryden, 108 A.D.3d 25, 964 N.Y.S.2d 714 (2013), *aff’d*, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.3d 1188 (2014), but believes the better reasoned cases support the conclusion that there is a conflict in those situations. [↑](#footnote-ref-220)
220. 218.7*See* Stennis v. City of Santa Fe, 143 N.M. 320, 176 P.3d 309, 2008-NMSC-008. [↑](#footnote-ref-221)
221. 219N.Y. Envtl. Conserv. Law § 23-0303(2), reproduced in § 30.32A *supra*.

     *See also* Nicholas S. Cortese, *Drawing Lines in the Shale: Local Zoning Bans, The Takings Clause, and the Clash to Come If New York State Promulgates Hydrofracking Regulations*, 64 Syracuse L. Rev. 489 (2014). [↑](#footnote-ref-222)
222. 220Envirogas, Inc. v. Kiantone, 112 Misc. 2d 432, 447 N.Y.S.2d 221 (Sup.Ct.), *aff’d*, 89 A.D.2d 1056, 454 N.Y.S.2d 694 (1982), *leave to app. denied*, 58 N.Y.2d 602, 458 N.Y.S.2d 1026, 444 N.E.2d 1013 (1983). New York courts have taken a narrow approach to preemption of local governmental powers even where there is an express preemption provision. *See, e.g.*, Matter of Frew Run Gravel Products v. Town of Carroll, 71 N.Y.2d 126, 524 N.Y.S.2d 25, 518 N.E.2d 920 (1987); Preble Aggregates, Inc. v. Town of Preble, 263 A.D.2d 849, 694 N.Y.S.2d 788, 791, 143 O.&G.R. 257 (1999), *leave to app. denied*, 94 N.Y.2d 760, 706 N.Y.S.2d 81, 727 N.E.2d 578 (2000) (Mined Land Reclamation Law, N.Y. Envtl.Conserv. Law § 23-2703, expressly preempting local regulation of the extractive mining industry, does not preempt local zoning and other land use regulations that do not affect mining operations *per se*); *but cf*, Briarcliff Associates, Inc. v. Cortlandt, 144 A.D.2d 457, 534 N.Y.S.2d 215 (1988). [↑](#footnote-ref-223)
223. 221447 N.Y.S.2d at 222. Prior to the enactment of ECL § 23-0302(2), local regulation of ***oil*** and gas operations was allowed. Envirogas, Inc. v. Town of Westfield, 82 A.D.2d 117, 442 N.Y.S.2d 290, 70 O.&G.R. 34 (1981). [↑](#footnote-ref-224)
224. 222Cooperstown Holstein Corp. v. Town of Middlefield, 943 N.Y.S.2d 722 (N.Y. Sup.Ct. 2012). On appeal, the Appellate Division affirmed the trial court’s decision finding no preemption for reasons stated more fully in the appeal of the Dryden ordinance. Cooperstown Holstein Corp. v. Town of Middlefield, 106 A.D.3d 1170, 964 N.Y.S.2d 431 (2013). [↑](#footnote-ref-225)
225. 223N.Y. ECL § 23-0303(2). [↑](#footnote-ref-226)
226. 224Matter of Gernatt Asphalt Products, Inc., 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996); Matter of Frew Run Gravel Products, Inc. v. Town of Carroll, 71 N.Y.2d 126, 524 N.Y.S.2d 25, 518 N.E.2d 920 (1987). *Frew Run* was followed in Matter of Southampton v. New York State Department of Environmental Conservation, 194 A.D.3d 1310 (3d Dept. 2021), where DEC sought to allow a minor expansion of an existing mining operation which was contrary to the local zoning ordinance. The court found no preemption of local regulation and no authority on behalf of DEC to override the local zoning ordinance due to specific statutory language relating to the preemption issue. [↑](#footnote-ref-227)
227. 225Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458 (N.Y. Sup.Ct. 2012). [↑](#footnote-ref-228)
228. 226The Town ordinance prohibited the use of any land within Town for “natural gas and/or petroleum support activities.” Would that prevent an equipment or water hauler from stopping its truck within the Town limits if it was on its way to an ***oil*** and gas operation outside of the Town limits? [↑](#footnote-ref-229)
229. 227Matter of Gernatt Asphalt Products, Inc., 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996). [↑](#footnote-ref-230)
230. 228N.Y. ECL § 27-1107 dealing with hazardous waste facilities prohibits sub-state units from requiring “conformity with local zoning or land use laws” and N.Y. Mental Hygiene Code § 41.34 (3), makes certain types of group homes a family unit for purposes of local regulation. [↑](#footnote-ref-231)
231. 229The court cites to Board of County Commissioners, La Plata County v. Bowen/Edwards Associates, 830 P.2d 1045, 118 O.&G.R. 417 (Colo. 1992), discussed in § 4.05[2][b][ii] *supra,* and Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont, 600 Pa. 207, 964 A.2d 855, 168 O.&G.R. 524 (2009); Range Resources-Appalachia, Inc. v. Salem Township, 600 Pa. 231, 964 A.2d 869, 168 O.&G.R. 507 (2009); Penneco ***Oil*** Co., Inc. v. County of Fayette, 4 A.3d 722 (2010)*, app. denied,* 38 A.3d 827 (Pa. 2012), discussed at § 4.05[2][b][xiii], *infra*. [↑](#footnote-ref-232)
232. 230Matter of Norse Energy Corp. USA v. Town of Dryden, 108 A.D.3d 25, 964 N.Y.S.2d 714 (2013). Pending appeal, Anschutz assigned its interest in the leases within the Town to Norse Energy Corp. *Id.* at 716 n.2. [↑](#footnote-ref-233)
233. 231*Id*. at 718–19. [↑](#footnote-ref-234)
234. 232*Matter of Frew Run Gravel Prods. v. Town of Carroll*, note 119.3 *supra*. [↑](#footnote-ref-235)
235. 233*Norse Energy*, at 721. [↑](#footnote-ref-236)
236. 234*Id*. at 721 citing *Gernatt Asphalt Products*, note 119.3 *supra*; *Frew Run*, note 119.3 *supra*. [↑](#footnote-ref-237)
237. 235*Id*. at 721 citing to N.Y. ECL § 27-1107 dealing with municipal land use regulation of hazardous waste facilities. [↑](#footnote-ref-238)
238. 236*Id*. at 723. [↑](#footnote-ref-239)
239. 237Cooperstown Holstein Corp. v. Town of Middlefield, 106 A.D.3d 1170, 964 N.Y.S.2d 431 (2013)*, leave to app. granted,* 21 N.Y.3d 863, 972 N.Y.S.2d 535, 995 N.E.2d 851 (2013), *aff’d,* 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.3d 1188 (2014); Matter of Norse Energy Corp. USA v. Town of Dryden, 108 A.D.3d 25, 964 N.Y.S.2d 714 (2013), *leave to app. granted*, 21 N.Y.3d 863, 972 N.Y.S.2d 535, 995 N.E.2d 851 (2013), *aff’d sub nom*, Matter of Wallach v. Town of Dryden, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.3d 1188 (2014).

     In Jeffrey v. Ryan, 37 Misc. 3d 1204(A), 2012 N.Y. Misc. LEXIS 4684 (Sup. Ct. 2012), the court relies on both *Middlefield* and *Dryden* to conclude that the City of Binghamton is not preempted from enacting an ordinance placing a two-year moratorium on ***oil*** and gas exploration, extraction, and storage operations. Nonetheless, the court invalidates the ordinance because it fails to comply with the common law requirements for the imposition of land use moratoria that are set forth in Belle Harbor Realty Corp. v. Kerr, 35 N.Y.2d 507, 364 N.Y.S.2d 160, 323 N.E.2d 697 (1974). Those requirements impose upon local governments the duty to show that their actions: “were: 1. in response to a dire necessity; 2. reasonably calculated to alleviate or prevent a crisis condition; and 3. that the municipality is taking steps to rectify the problem.”

     An express preemption provision in the South Carolina mining law was held to preempt a sub-state unit’s “mine permit” ordinance while not preempting a sub-state-unit’s zoning ordinance since zoning regulation was specifically exempted from express preemption. Red Bluff Trade Center, LLC v. Horry County, 454 F. Supp. 3d 570 (D.S.C. 2020), interpreting S.C. Code Ann. § 48-20-250.

     See Nicholas S. Cortese, *Drawing Lines in the Shale: Local Zoning Bans, The Takings Clause, and the Clash to Come if New York State Promulgates Hydrofracking Regulations*, 64 Syracuse L. Rev. 489 (2014). [↑](#footnote-ref-240)
240. 238*Id*. at 742–43, citing DJL Rest. Corp. v. City of New York, 96 N.Y.2d 91, 96 (2001). New York is a preemptible home rule state so that sub-state units can adopt any ordinance that is “not inconsistent with the provisions of this constitution or any general law …” N.Y. Const., art. IX, § 2. There is in addition a state enabling act relating to the exercise of land use powers. N.Y. Town Law § 261. [↑](#footnote-ref-241)
241. 239*Id*. at 743, citing Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 642 N.Y.S.2d 164 (1996). [↑](#footnote-ref-242)
242. 240Judge Piggott’s dissenting opinion picked up on this point and also emphasized that both ordinances were not “zoning” ordinances but ordinances designed to prohibit any type of ***oil*** and gas-related operation within their respective communities. *Id.* at 755 (Piggott, J., dissenting). [↑](#footnote-ref-243)
243. 241*Id*. at 744–46, Frew Run Gravel Products, Inc. v. Carroll, 71 N.Y.2d 126, 524 N.Y.S.2d 25 (1987). [↑](#footnote-ref-244)
244. 242*Id*. at 744. The court correctly notes that there is no room for either of the implied preemption doctrines where you have a preemption clause. Under New York terminology, an express preemption clause is referred to as a “supersession” clause. *Id*. at 744. [↑](#footnote-ref-245)
245. 243N.Y. ECL § 23-0303(2). The statutory provision in its entirety is quoted at the start of this sub-section. [↑](#footnote-ref-246)
246. 24423 N.Y.3d at 746–47. Calling a total prohibition against any ***oil*** and gas drilling activities as involving only an “incidental control” over ***oil*** and gas industries is somewhat disingenuous. The state ***oil*** and gas conservation act is designed to deal with the exploration for, and production of, hydrocarbons. Local ordinances that prohibit such operations seemingly would be inconsistent with a state permitting and regulatory scheme that anticipates that such operations will take place. [↑](#footnote-ref-247)
247. 245*Id*. at 748. The court’s distinction between land use and operational matters creates an illusion of rationality as did Justice O’Connor’s distinction between “land use” and “environmental” matters in California Coastal Com. v. Granite Rock Co., 480 U.S. 572, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987), a federal-state preemption case. *Granite Rock* is discussed more fully at § 24.04[1] *infra*. That distinction was also used in Bohmker v. State of Oregon, 903 F.3d 1029 (9th Cir. 2018), *motion for rehearing en banc denied*, 2018 U.S. App. LEXIS 30182 (9th Cir. Oct. 20, 2018), *pet. for cert. filed*, Jan. 18, 2019), to support a finding that an Oregon statute restricting a particular type of mining operation was not preempted by the Mining Law. In both cases there is no bright line distinction between the two comparable. How does one not directly impact ***oil*** and gas operations by prohibiting them just as one can regulate land use but not environmental matters. [↑](#footnote-ref-248)
248. 246*Id*. at 748, citing N.Y. Mental Hygiene Law § 41.34[f] and N.Y. Racing, Pari-Mutual Wagering and Breeding Law § 1366. [↑](#footnote-ref-249)
249. 247N.Y. ECL § 23-0301. [↑](#footnote-ref-250)
250. 248*Id*. at 749–50. The court’s argument appears to ignore most of the purposes listed in 23-301, including the “development, production and utilization of natural resources”, the protection of correlative rights and the regulation and development of ***oil*** and gas in a way that provides for the ultimate recovery of ***oil*** and gas. N.Y. ECL § 23-0301. How can one maximize the ultimate recovery of ***oil*** and gas if portions of a common source of supply cannot be developed? [↑](#footnote-ref-251)
251. 249*Gernatt Asphalt*, note 239 *supra*. [↑](#footnote-ref-252)
252. 250*Id.* at 754. In the Dryden ordinance the only provision that was invalidated was the provision seeking to invalidate state and federal permits authorizing ***oil*** and gas operations. *Id.* at 754. That reflects the fact that the sub-state units were not engaging in classic zoning or land use regulation but merely seeking to prohibit both pre- and post-production ***oil*** and gas related operations. [↑](#footnote-ref-253)
253. 250.1N.C. Gen. Stat. § 113-415.1, reproduced in § 30.33A *supra*. [↑](#footnote-ref-254)
254. 250.2*Id.* § 113-415.1(a). [↑](#footnote-ref-255)
255. 250.3*Id.* [↑](#footnote-ref-256)
256. 250.4*Id.*, §§ 113-415.1(c), (d). The Commission must provide a notice to the public and hold a hearing once a petition is filed by an operator who is claiming that an ordinance is preventing him from engaging in some type of ***oil*** and gas operation. [↑](#footnote-ref-257)
257. 250.5*Id.*, § 113-415.1(f). The Commission, however, has the power to find that even ***oil*** and gas neutral performance standards may be preempted. [↑](#footnote-ref-258)
258. 250.6*Id.* § 113-415.1 (f)(1–4). [↑](#footnote-ref-259)
259. 250.7N.C. Gen. Stat. § 113-415.1. [↑](#footnote-ref-260)
260. 251N.D. Cent. Code § 11-33-01 *et seq.* [↑](#footnote-ref-261)
261. 252N.D. Att’y Gen. Opinion 90-23 (Oct. 5, 1990). [↑](#footnote-ref-262)
262. 253Letter from Nicholas J. Spaeth, Attorney General, to Steven Wild, Bowman County State’s Attorney, dated December 16, 1991 and reproduced in Perry Pearce, “The Spectrum of Choices: Formulation and Implementation of Regulatory Land Use Decisions Affecting Mineral Development,” in Mineral Development and Land Use Special Institute of the Rocky Mountain Mineral Law Foundation (May 1995). [↑](#footnote-ref-263)
263. 253.1Environmental Driven Solutions, LLC v. Dunn County, 2017 ND 45, 890 N.W.2d 841. The County clearly has the power to enact zoning ordinances so there is no ultra vires issue. N.D. Cent. Code § 11-33-01. See *also* Black Hills Trucking, Inc. v. North Dakota Industrial Comm’n, 2017 ND 284, 904 N.W.2d 326, where the court rejected the claim that the NDIC lacked jurisdiction to regulate alleged illegal dumping of waste water on county roads. [↑](#footnote-ref-264)
264. 253.2*See* State *ex rel.* Stenehjem v. FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828. [↑](#footnote-ref-265)
265. 253.3Environmental Driven Solutions, LLC v. Dunn County, 2017 ND 45, 890 N.W.2d 841, 844. [↑](#footnote-ref-266)
266. 253.4Environmental Driven Solutions, LLC v. Dunn County, 2017 ND 45, 890 N.W.2d 841, 844. The court does not specifically identify the field that has been occupied since the County’s zoning regulation merely deals with the location of the industrial-type facility and not to any performance standards relating to how the plant was to operate. [↑](#footnote-ref-267)
267. 253.5Environmental Driven Solutions, LLC v. Dunn County, 2017 ND 45, 890 N.W.2d 841, 844. [↑](#footnote-ref-268)
268. 253.6Environmental Driven Solutions, LLC v. Dunn County, 2017 ND 45, 890 N.W.2d 841, 846. Such provisions are not unusual but are more commonly included in environmental permits than in ***oil*** conservation agency permits. [↑](#footnote-ref-269)
269. 253.7Environmental Driven Solutions, LLC v. Dunn County, 2017 ND 45, 890 N.W.2d 841, 846. The court does not cite to either of the North Dakota Attorney-General opinions on the subject. [↑](#footnote-ref-270)
270. 254Ohio Rev. Code § 1509.39 repealed by 2004 H 278. [↑](#footnote-ref-271)
271. 255Ohio Rev. Code § 1509.02. *See* Aaron Williams & John Keller, ***Oil*** *and Gas Drilling and Operations in Ohio: The Evolution of the State’s Sole and Exclusive Regulatory Authority*, 67 Inst. on ***Oil*** & Gas L. 105 (2016). [↑](#footnote-ref-272)
272. 256City of Canton v. State, 95 Ohio St. 3d 149, 2002 Ohio 2005, 766 N.E.2d 963 (2002). The other statutory language that clearly evinces a legislative intent to preempt includes giving the division the power to adopt regulations that will “constitute a comprehensive plan.”

     In Natale v. Everflow Eastern, Inc., 195 Ohio App. 3d 270, 2011-Ohio-4304, 959 N.E.2d 602, the court, citing to Ohio Rev. Code § 1509.02 preempting sub-state units from regulating the “locating” and “operating” of ***oil*** or gas wells, found that a City ordinance purporting to impose setback requirements for ***oil*** and gas wells was preempted. [↑](#footnote-ref-273)
273. 257Excalibur Prod., Inc. v. Bd. of Trustees of Springfield Township, 48 Ohio App.3d 179, 549 N.E.2d 224, 109 O.&G.R. 307 (1989), *motion to certify the record denied*, 45 Ohio St.3d 719, 545 N.E.2d 908 (1989). [↑](#footnote-ref-274)
274. 258*Id.* [↑](#footnote-ref-275)
275. 259Dome Energicorp v. Zoning Board of Appeals, Olmsted Township, 1986 Ohio App. LEXIS 7523 (1986). Under Rule 2 of the Ohio Supreme Court there are restrictions and limitations placed on the use of unpublished opinions. [↑](#footnote-ref-276)
276. 260Dome tried to argue that the zoning ordinance was invalid on traditional substantive due process grounds. The court rejected that claim using the traditional presumption of validity for police power enactments and the scope of judicial review, which upholds zoning ordinances even if they are “fairly debatable.” [↑](#footnote-ref-277)
277. 261Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc., 62 Ohio St. 3d 887, 583 N.E.2d 302, 117 O.&G.R. 107 (1992). [↑](#footnote-ref-278)
278. 262Ohio Rev. Code § 1509.23. [↑](#footnote-ref-279)
279. 263St. Croix Ltd. v. Bath Township, 118 Ohio App. 3d 438, 693 N.E.2d 297, 139 O.&G.R. 363 (1997). [↑](#footnote-ref-280)
280. 264State ex rel. Morrison v. Beck Energy Corp., 2013-Ohio-356, 989 N.E.2d 85 (9th Dist.), *appeal granted*, 989 N.E.2d 70 (Ohio 2013). [↑](#footnote-ref-281)
281. 265989 N.E.2d at 88. Most of the conditions related to the fact that the drilling was going to take place in an urbanized area. [↑](#footnote-ref-282)
282. 266*Id.* at 95–96. [↑](#footnote-ref-283)
283. 267Ohio Const. Art. XVIII, § 3. California and Colorado are other states with non-preemptible home rule provisions. Cal. Const. art. XI, § 5(a); Colo. Const. art. XX, § 6. [↑](#footnote-ref-284)
284. 268Ohio Rev. Code § 1509.02. [↑](#footnote-ref-285)
285. 269*See* Ohioans for Concealed Carry, Inc. v. City of Clyde, 120 Ohio St. 3d 96, 2008-Ohio-4605, 896 N.E.2d 967. [↑](#footnote-ref-286)
286. 270989 N.E.2d at 92–95. [↑](#footnote-ref-287)
287. 271989 N.E.2d at 96, citing *City of Clyde*, note 130.6 *supra*. [↑](#footnote-ref-288)
288. 272989 N.E.2d at 93–94, citing *City of Clyde*, note 130.6 *supra* and Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923). [↑](#footnote-ref-289)
289. 273*Id.* at 98–99. [↑](#footnote-ref-290)
290. 273.1State *ex rel*. Morrison v. Beck Energy Corp., 143 Ohio St. 3d 271, 2015-Ohio-485, 37 N.E.3d 128. Justices French, O’Connor and Kennedy agree on the plurality opinion, Justice O’Donnell concurs in the judgment only while Justices Pfeifer, Lanzinger, and O’Neill dissent in two separate opinions. Justice Kennedy also signs on to O’Donnell’s concurring opinion.

     *Morrison* was cited as dispositive in finding that an initiative-enacted municipal ordinance that prohibited all new drilling and hydraulic fracturing operations was preempted by the state ***oil*** and gas conservation act. Mothers Against Drilling in our Neighborhood v. State, 2016-Ohio-817, 60 N.E.3d 727 (Ohio App.).

     In State *ex rel.* Walker v. Husted, 144 Ohio St. 3d 361, 2015-Ohio-3749, 43 N.E.3d 419, the Ohio Supreme Court said that the Secretary of State acted ultra vires when he denied three separate petitions for municipal initiative ordinances that would prohibit ***oil*** and gas drilling activities because the Secretary of State was not given the authority to deny ballot access merely because the proposed ordinances might, or even would be, unconstitutional. [↑](#footnote-ref-291)
291. 273.2*See also* OOhioans for Concealed Carry, Inc. v. City of Clyde, 120 Ohio St. 3d 96, 2008-Ohio-4605, 896 N.E.2d 967. [↑](#footnote-ref-292)
292. 273.32015-Ohio-485 at ¶ 24, relying on *Ohioans for Concealed Carry*, note 273.2 *supra* and Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923). The plurality’s approach in determining when a conflict exists was followed in a state trial court opinion, Bass Energy, Inc. v. City of Broadview Heights, Case No. CV-14-828074 (Cuyahoga County Court of Common Pleas, March 10, 2015). The City through an initiative ordinance prohibited the drilling of new wells. The trial court concluded that the ordinance was preempted. [↑](#footnote-ref-293)
293. 273.4*Id.* at ¶ 26, relying on Ohio Ass’n of Private Detective Agencies, Inc. v. North Olmsted, 65 Ohio St. 3d 242, 602 N.E.2d 1147 (1992); Auxter v. Toledo, 173 Ohio St. 444, 183 N.E.2d 920 (1962). [↑](#footnote-ref-294)
294. 273.5*Id.* at ¶ 36. [↑](#footnote-ref-295)
295. 273.6*Id.* at ¶ 26, relying on Board of County Comm’rs v. Bowen/Edwards Assoc., Inc., 830 P.2d 1045, 118 O.&G.R 417 (Colo. 1992) discussed at § 4.05[2][b][ii] *supra*; Matter of Wallach v. Town of Dryden, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.3d 1188 (2014), discussed at § 4.05[2][b][xi] *supra*, and Huntley & Huntley, Inc. v. Borough Council, 600 Pa. 207, 964 A.2d 855, 168 O.&G.R 524 (2009), discussed at § 4.05[2][b][xv] *infra*. *Bowen/Edwards and Huntley & Huntley* do not deal with express preemption analysis but focus on the implied preemption by conflict analysis. *Town of Dryden* is an express preemption case that interprets an express preemption statute very narrowly as would the concurring justice in this case. [↑](#footnote-ref-296)
296. 273.7*Id.* at ¶ 52–¶ 75. Justice O’Neill dissents on the basis that the ***oil*** and gas industry has esentially captured both the Ohio Legislature and the Ohio Department of Natural Resources so that “local control of drilling-location decisions has been unceremoniously taken away from the citizens of Ohio.” *Id.* at ¶ 76. [↑](#footnote-ref-297)
297. 27452 Okla. Stat. § 137 provides in part: “Nothing in this Act is intended to limit or restrict the rights of cities’ and towns’ governmental corporate powers to prevent ***oil*** or gas drilling therein nor under its police powers to provide its own rules and regulations … .” [↑](#footnote-ref-298)
298. 275Gant v. Oklahoma City, 1931 OK 241, 150 Okla. 86, 6 P.2d 1065, *app. dism’d* 284 U.S. 594 (1932), *on subsequent appeal*, 1932 OK 469, 160 Okla. 2, 15 P.2d 833, *aff’d*, 289 U.S. 98 (1933). [↑](#footnote-ref-299)
299. 2766 P.2d at 1068. The court in C.C. Julian ***Oil*** & Royalties Co. v. City of Oklahoma City, 1934 OK 88, 167 Okla. 384, 29 P.2d 952, 955 said: “The delegation of power to the corporation commission did not operate to deprive the Legislature of power to delegate to cities the power [to regulate ***oil*** and gas operations].” [↑](#footnote-ref-300)
300. 2776 P.2d at 1070. [↑](#footnote-ref-301)
301. 2781934 OK 125, 168 Okla. 69, 31 P.2d 608. [↑](#footnote-ref-302)
302. 27931 P.2d at 611. [↑](#footnote-ref-303)
303. 28052 Okla. Stat. § 137. [↑](#footnote-ref-304)
304. 281*See, e.g.*, Pelican Production Corp. v. Mize, 1977 OK 235, 573 P.2d 703, 60 O.&G.R. 70; Eason ***Oil*** Co. v. Uhls, 1974 OK 1, 518 P.2d 50, 47 O.&G.R. 161; Clouser v. City of Norman, 1964 OK 109, 393 P.2d 827, 20 O.&G.R. 826; Van Meter v. Westgate ***Oil*** Co.,1934 OK 237, 168 Okla. 200, 32 P.2d 719, Anderson-Kerr v. Van Meter, 1933 OK 156, 162 Okla. 176, 19 P.2d 1068, *overruled in part*, Oklahoma City v. Harris, 1941 OK 341, 191 Okla. 125, 126 P.2d 988. [↑](#footnote-ref-305)
305. 282Overflow Energy, L.L.C. v. Bd. of County Comm’rs of the County of Roger Mills, 2014 U.S. Dist. LEXIS 12860 (W.D. Okla. Feb. 3, 2014). The plaintiff made the argument that the Corporation Commission had been delegated “exclusive, plenary jurisdiction” over ***oil*** and gas development issues which seemingly is contrary to the rules set forth in the cases dealing with municipalities that are discussed earlier in this sub-section. The plaintiff did not appeal the denial of the variance as allowed under the Oklahoma statutory zoning system because it argued that its constitutional rights had been violated because the County was acting *ultra vires*.

     In Sierra Club v. Chesapeake Operating, LLC, 248 F. Supp. 3d 1194 (W.D. Okla. 2017), the court dismissed an action against and ***oil*** and gas operator seeking to enjoin various activities that allegedly violated RCRA and SDWA relying on the *Burford* abstention doctrine. [↑](#footnote-ref-306)
306. 282.152 Okla. Stat. § 137.1. [↑](#footnote-ref-307)
307. 282.2In 2015, the Oklahoma Attorney-General issued an opinion, 2015 Okla. AG LEXIS 189 (Nov. 30, 2015), specifically noting the change that was brought about by the adoption of Section 137.1. In addition, the Opinion concluded that ordinances enacted prior to the passage of Section 137.1 would be void and unenforceable to the extent they encroached upon the Corporation Commission’s exclusive jurisdiction, and that Section 137.1 would apply to charter (home rule) and non-charter (general law) municipalities. [↑](#footnote-ref-308)
308. 282.3In Revolution Resources, LLC v. Annecy, LLC, 2020 OK 97, 477 P.3d 1133, the court eschewed answering that question in an action brought by a surface owner seeking to enjoin the drilling of a well that had received a permit to drill from both the Corporation Commission and the City of Oklahoma City. The City had taken the position that Section 137.1 precluded it from requiring a well permit applicant to go through a variance process for wells located in residential areas. The Oklahoma Supreme Court said that a separate lawsuit involving the surface owner, the ***oil*** and gas operation and the City was the proper venue to discuss the impact of Section 137.1 on the City’s variance requirement. [↑](#footnote-ref-309)
309. 282.4Magnum Energy, Inc. v. Board of Adjustment for the City of Norman, 2022 OK 26, 510 P.3d 818. [↑](#footnote-ref-310)
310. 282.5The Oklahoma Supreme Court emphasized the fact that when the Legislature amends a statute, it either effects a change in existing law or clarifies existing law. 2022 OK 26 at ¶ 18. In this case, it is obvious that Section 137.1 changes existing law by drastically limiting the areas where sub-state units may regulate ***oil*** and gas operations. [↑](#footnote-ref-311)
311. 28358 Pa. Stat. Ann. § 601.602. [↑](#footnote-ref-312)
312. 284The 1992 amendment also added the word “supersedes” to the third sentence. [↑](#footnote-ref-313)
313. 285Nalbone v. Borough of Youngsville, 104 Pa. Commw. 623, 522 A.2d 1173 (1987). [↑](#footnote-ref-314)
314. 286*See* City of Philadelphia v. Schweiker, 579 Pa. 591, 858 A.2d 75, 84 (2004); Appeal of Gagliardi, 401 Pa. 141, 163 A.2d 418 (1960). Pennsylvania also appears to follow Dillon’s Rule for non-home rule units that says that enabling statutes are to be narrowly construed and that local governments only have such powers as are expressly granted or necessarily implied. *Id.* There are, however, other cases that support the more modern notion that grants of municipal power are to be “liberally construed in favor of the municipality.” County of Delaware v. Township of Middletown, 511 Pa. 66, 511 A.2d 811 (1986). *See also* Seneca Resources Corp. v. Highland Township, 2017 U.S. Dist. LEXIS 162629 (W.D. Pa. Sept. 29, 2017). [↑](#footnote-ref-315)
315. 287While there might not be express preemption, another pre-1992 case suggested that there might be either implied preemption by occupation of the field or by conflict. Land Acquisitions Services, Inc. v. Clarion County Board of Commissioners, 146 Pa. Commw. 293, 605 A.2d 465 (1991). [↑](#footnote-ref-316)
316. 288Commonwealth v. Whiteford, 884 A.2d 364, 164 O.&G.R. 826 (Pa. Commw. Ct. 2005). [↑](#footnote-ref-317)
317. 289Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont, 600 Pa. 207, 964 A.2d 855, 168 O.&G.R. 524 (2009), *aff’g in part and rev’g in part* 929 A.2d 1252 (Pa. Commw. 2007).

     Language similar to the ***Oil*** and Gas Act that exempts from preemption zoning regulations adopted pursuant to Pennsylvania’s Municipal Planning Act was interpreted to negate preemption of the regulation of a sand and gravel operation in *Pennsy Supply, Inc. v. Zoning Hearing Board of Dorrance Township*, 987 A.2d 1243 (Pa. Commw. Ct. 2009). *Pennsy Supply* also provides a trenchant analysis of the scope of review of ZHB land use decisions as well as the burden of proof on parties who challenge ZHB decisions. [↑](#footnote-ref-318)
318. 290964 A.2d at 867. The cases cited to support the proposition that natural gas is included within the term mineral are United States Steel Co. v. Hoge, 503 Pa. 140, 468 A.2d 1380, 1383 (1983) (ownership of coalbed methane) and Kelly v. Keys, 213 Pa. 295, 62 A. 911, 913 (1906). The court cites but does not distinguish two cases relied upon by the Borough that hold that natural gas is not a mineral. Highland v. Commonwealth, 400 Pa. 261, 161 A.2d 390 (1960); Dunham & Short v. Kirkpatrick, 101 Pa. 36 (1882). [↑](#footnote-ref-319)
319. 291964 A.2d at 866–67. [↑](#footnote-ref-320)
320. 292964 A.2d at 862–63. It is interesting to note that the Pennsylvania Department of Environmental Protection filed a brief in which it did not urge an interpretation of “total” express preemption but merely took the position that the “technical” aspects of ***oil*** and gas drilling and production operations are preempted. *Id.* at 861–62. [↑](#footnote-ref-321)
321. 293964 A.2d at 864. Why bonding is considered a “feature” of ***oil*** and gas well operations is not clear. Bonding can serve multiple purposes including compliance with state statutory and regulatory requirements and compliance with local concerns relating to aesthetics, road use, fencing and the like. [↑](#footnote-ref-322)
322. 294964 A.2d at 863–64. Well spacing requirements are not mentioned by the court and the entire notion that wells need to be located to prevent waste and protect correlative rights seems to have escaped the court’s notice. [↑](#footnote-ref-323)
323. 29558 Pa. Stat. § 601.102. The statute does not mention specifically the prevention of waste, which is most unusual for an ***oil*** and gas conservation statute. [↑](#footnote-ref-324)
324. 296Board of County Commissioners of La Plata County v. Bowen/Edwards Associates, 830 P.2d 1045, 118 O.&G.R. 417 (Colo. 1992) discussed at note 74 *supra*. [↑](#footnote-ref-325)
325. 297964 A.2d at 865, citing *Bowen/Edwards*, 830 P.2d at 1057. [↑](#footnote-ref-326)
326. 298The court notes that merely because there is not “total” express preemption, local governments will not be able to use their zoning ordinances in untoward ways, such as by making permits subject to conditions that involve the “technical” aspects of drilling. 964 A.2d at 866 n.11. The court does not say whether a zoning ordinance may “zone out” ***oil*** and gas drilling operations from large swaths of land. It alludes to the old preemption adage that a local government may not permit what the state allows or may not prohibit what the state permits. *Id.* at 862–63, citing Liverpool Township v. Stephens, 900 A.2d 1030, 1037 (Pa. Commw. 2006), and Duff v. Northampton Township, 110 Pa. Commw. 277, 532 A.2d 500, 504 (1987). [↑](#footnote-ref-327)
327. 299Range Resources—Appalachia, LLC v. Salem Township, 600 Pa. 231, 964 A.2d 869, 168 O.&G.R. 507 (2009), *aff’g* Great Lakes Energy Partnership v. Salem Township, 931 A.2d 101 (Pa. Commw. Ct. 2007). [↑](#footnote-ref-328)
328. 300The ordinance attempted to regulate such things as “casing requirements, protection of water supplies, safety devices and the plugging of wells.” 964 A.2d at 871. [↑](#footnote-ref-329)
329. 301964 A.2d at 873 n.3. [↑](#footnote-ref-330)
330. 302964 A.2d at 876 n.7. [↑](#footnote-ref-331)
331. 303964 A.2d at 877. The court also rejects the Township’s plea to sever the preempted portions of the ordinance from the non-preempted portions. For example, one could posit a basis for imposing a road maintenance agreement requirement for ***oil*** and gas drilling and production operations or a fencing or screening easement requirement that might stand muster under *Huntley and Huntley* but if those requirements were part of a comprehensive local zoning regulation that included preempted regulations, then the entire ordinance would fall. [↑](#footnote-ref-332)
332. 304Range Resources-Appalachia, LLC v. Blaine Township, 2009 U.S. Dist. LEXIS 100932 (W.D. Pa. Oct. 29, 2009), 649 F. Supp. 2d 412 (W.D. Pa. 2009). A similar result was reached relating to the Blaine Township ordinance in an action brought by a coal lessee. Penn Ridge Coal, LLC v. Blaine Twp., 2009 U.S. Dist. LEXIS 84428 (W.D. Pa. Sept. 16, 2009). [↑](#footnote-ref-333)
333. 305649 F. Supp. 2d at 418. [↑](#footnote-ref-334)
334. 306649 F. Supp. 2d at 415. [↑](#footnote-ref-335)
335. 307The court rejected the claim that the Pennsylvania Limited Liability Company Act, 13 Pa.C.S.A. § 8901 *et seq.* preempted the disclosure ordinance. [↑](#footnote-ref-336)
336. 3082009 U.S. Dist. LEXIS 100932 at \*22–\*23. [↑](#footnote-ref-337)
337. 309649 F. Supp. 2d at 416. [↑](#footnote-ref-338)
338. 3102009 U.S. Dist. LEXIS 100932, at \*26–\*28 (W.D. Pa. Oct. 29, 2009). The court noted that Range had been cited for violating the ordinance when it placed water tanks at the drillsite in order to hydraulically fracture the well. If water tanks fit within the definition of a structure or trailer the Township retains unfettered discretion to issue fines without the guilty party knowing how to avoid a violation. [↑](#footnote-ref-339)
339. 311Penneco ***Oil*** Co., Inc. v. County of Fayette, 4 A.3d 722 (Pa. Commw. Ct. 2010). [↑](#footnote-ref-340)
340. 3124 A.3d at 729. [↑](#footnote-ref-341)
341. 3134 A.3d at 730–31. [↑](#footnote-ref-342)
342. 3144 A.3d at 731. [↑](#footnote-ref-343)
343. 315Hoffman Mining Co., Inc. v. Zoning Hearing Board of Adams Township, 32 A.3d 587 (Pa. 2011).

     In Geryville Materials, Inc. v. Planning Commission of Lower Milford Township, 74 A.3d 322 (Pa. Comm2. 2013), the court found that a zoning ordinance was not preempted by the Noncoal Surface Mining Conservation and Reclamation Act, 52 Pa. Stat. Ann. § 3316, because locational restrictions were not operational restrictions and that only the latter were preempted. *See also*: Pennsylvania Coal Company, Inc. v. Township of Conemaugh, 149 Pa. Commw. 22, 612 A.2d 1090 (1992). [↑](#footnote-ref-344)
344. 31652 P.S. §§ 1396.1–1396.19a. [↑](#footnote-ref-345)
345. 31752 P.S. § 1396.17a. [↑](#footnote-ref-346)
346. 318An earlier version of the SMCRA was found not to preempt local zoning ordinances in Miller & Son Paving, Inc. v. Wrightstown Township, 499 Pa. 80, 451 A.2d 1002 (1982). [↑](#footnote-ref-347)
347. 31932 A.3d at 588. [↑](#footnote-ref-348)
348. 320Act 2012–13 (H.B. 1950), P.L. 87, approved Feb. 14, 2012, eff. immediately. [↑](#footnote-ref-349)
349. 32158 P.S. § 3302. [↑](#footnote-ref-350)
350. 32258 P.S. § 3303. [↑](#footnote-ref-351)
351. 32358 P.S. § 3304. [↑](#footnote-ref-352)
352. 32458 P.S. § 3304. [↑](#footnote-ref-353)
353. 32558 P.S. §§ 3302–09. [↑](#footnote-ref-354)
354. 326Robinson Township v. Commonwealth of Pennsylvania, 2012 Pa. Commw. Unpub. LEXIS 387 (April 20, 2012). This decision rejected several motions to intervene on behalf of an ***oil*** and gas trade association and several individual legislators. [↑](#footnote-ref-355)
355. 327Robinson Township v. Commonwealth of Pennsylvania, 2012 Pa. Commw. Unpub. LEXIS 387 (April 20, 2012). [↑](#footnote-ref-356)
356. 32858 P.S. § 3309. [↑](#footnote-ref-357)
357. 329Paragraph 19 of the Preliminary Injunction which covers other subjects including the continued validity of extant ordinances can be found in Barclay Nicholson and Stephen C. Dillard, *Analysis of Litigation Involving Shale & Hydraulic Fracturing in Center for American and International Law*, Third Annual Law of Shale Play Conference, Ch. 15 (2012). [↑](#footnote-ref-358)
358. 330Robinson Twp. v. Commonwealth, 52 A.3d 463, 181 O.&G.R. 66 (Pa. Commw. Ct. 2012). [↑](#footnote-ref-359)
359. 331The plaintiffs included a number of municipalities, two council members, a physician, and an environmental association. *Id.* at 471. There were 12 separate counts each alleging a constitutional violation. *Id*. at 469–70. The three provisions were 58 Pa. Stat. § 3215(b)(4) (waiver of setback requirements from water bodies), 58 Pa. Stat. § 3304 (preempting certain types of sub-state zoning ordinances and prohibiting sub-state units from keeping ***oil*** and gas operations out of all use districts and those portions of 58 Pa. Stat. §§ 3305–3309 designed to enforce or implement § 3304). [↑](#footnote-ref-360)
360. 33252 A.3d at 471–72. Because the physician lacked standing, two of the 12 counts relating to Act 13 being an impermissible “special law” under Pa. Const. art. 3, § 32 and to Act 13 violating the “single subject” provisions of Pa. Const. art. 3, § 33 are dismissed. Issues of standing to sue are discussed at § 4.04[5] *supra*. [↑](#footnote-ref-361)
361. 333The source of the political question doctrine is the separation of powers doctrine. 52 A.3d at 478–79. [↑](#footnote-ref-362)
362. 334Pa. Const. art. 1, § 27. Unless a party can show that the issuance of a well drilling permit is in violation of a statutory or regulatory provision, the Environmental Rights Amendment will not be violated. Brockway Borough Municipal Authority v. Department of Environmental Protection, 131 A.3d 578 (Pa. Commw. 2016). The contours of the public trust doctrine that is an inherent part of Pa. Const. art. I, § 27 have been fleshed out in Pennsylvania Environmental Defense Foundation v. Commonwealth, 108 A.3d 140 (Pa. Commw. Ct. 2015)*, rev’d and remanded,* 161 A.3d 911 (Pa. 2017)*, motion denied,* 2018 Pa. LEXIS 1753 (Pa. Apr. 6, 2018), *on remand*, 214 A.3d 748 (Pa. Commw. Ct. 2019), *rev’d* 255 A.3d 289 (Pa. 2021). The ultimate decision treated the ERA as creating two separate rights in the people, the first relating to the declared environmental rights to clean air, pure water and other environmental values and the second relating to the common ownership by the people of the Commonwealth’s natural resources essentially making the Commonwealth a trustee for the beneficiary/public. [↑](#footnote-ref-363)
363. 33552 A.3d at 485. [↑](#footnote-ref-364)
364. 33652 A.3d at 494–95 (Brobson, J., dissenting). [↑](#footnote-ref-365)
365. 337*Id.* [↑](#footnote-ref-366)
366. 338These constitutional challenges included Pa. Const. art. 3, § 32 (prohibition against local and special laws); Pa. Const. art. 1, §§ 1, 10 (taking of property without just compensation); Pa. Const. art. 1, § 27 (environmental rights); Separation of Powers (Public Utility Commission does not have power to supersede local zoning ordinances although it does have power to give a non-binding advisory opinion regarding whether the local zoning ordinance complies with Act 13). The majority opinion does find that Pa. Const. art. 2, § 1, the separation of powers article, has been violated because Act 13 does not provide any guidance to the Department of Environmental Protection in DEP’s role as the granter of waivers from the setback requirements for well sites. [↑](#footnote-ref-367)
367. 339Robinson Twp. v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 181 O.&G.R. 102 (2013). Chief Justice Castille wrote the plurality opinion joined by Justices Todd and McCaffery invalidating the provisions based on the Environmental Rights Amendment, Justice Baer concurred but would rely on substantive due process principles as had the Commonwealth Court while Justices Saylor and Eakin dissented.

     *See also* Gabriella T. Soreth, *Cracks in the Court’s Analysis? Court Strikes Balancing Act Between Citizens’ Constitutional Rights and Government’s Exploitation of Natural Gas Reserves in Pennsylvania Environmental Defense Foundation v. Commonwealth*, 27 Vill. Envtl. L.J. 329 (2016). [↑](#footnote-ref-368)
368. 340Pa. Const. art. I, § 27. The ERA provides: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.” In Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140 (Pa. Commw. Ct. 2015), the Commonwealth Court narrowly construed the ERA in a challenge by a non-governmental organization to various decisions relating to the leasing of state forest lands for ***oil*** and gas development and to the allocation of state funding to the Department of Conservation and Natural Resources. On appeal to the Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017)*, motion denied,* 2018 Pa. LEXIS 1753 (Pa. Apr. 6, 2018), the court reversed and adopted a very broad reading of the ERA. The court invalidated various statutory provisions relating to the leasing of public ***oil*** and gas resources and the re-allocation of the revenue received from such leasing activities. On remand, the Commonwealth Court determined that bonus and rental payments made in connection with the lease of Commonwealth-owned ***oil*** and gas were not part of the corpus or principal of the trust created under Article 27 so that they could be appropriated by the legislature as they saw fit.

     In Marcellus Shale Coalition v. Department of Envtl. Protection, 193 A.3d 447, 470 (Pa. Commw. Ct. 2018), *appeal quashed*, 198 A.3d 330 (Pa. 2018), *on later appeal*, 216 A.3d 448 (Pa. Commw. Ct. 2019), *appeal dismissed*, 2019 Pa. LEXIS 7108, 7116 (Dec. 24. 2019), *rev’d*, 292 A.3d 921 (Pa. 2023), the Commonwealth Court reinforced a broad reading of the ERA to include not just publicly owned land and minerals but public resources. On appeal to the Supreme Court, while reversing the Commonwealth Court’s conclusion that some of the DEP regulations were ultra vires, the court affirmed a broad reading of the ERA given the ERA’s two primary goals of ensuring citizens’ rights to clean air and water and to preserve the natural, scenic, historic and aesthetic values of the environment. 292 A.3d at 939–40.

     Nonetheless, where a pipeline sought to condemn land owned by a homeowners’ association, the court in *In re* Appeal of Andover Homeowners’ Association, 217 A.3d 906 (Pa. Commw. Ct. 2019), concluded that the association had not shown a nexus between the condemned easement and injury to the public natural resources. *See also* Frederick v. Allegheny Township Zoning Hearing Board, 196 A.3d 677 (Pa. Commw. Ct. 2018) (testimony of alleged harm to public natural resources must be more than mere speculation).

     In Murrysville Watch Committee v. Municipality of Murrysville Zoning Hearing Board, 2022 Pa. Commw. Unpub. LEXIS 32 (Jan. 24, 2022), the court relied on *Frederick* to dismiss constitutional challenges regarding a zoning ordinance that allowed unconventional ***oil*** and gas wells to be drilled in residential zones. [↑](#footnote-ref-369)
369. 341Robinson Twp. v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 952, 181 O.&G.R. 102 (2013). [↑](#footnote-ref-370)
370. 34283 A.3d at 950. [↑](#footnote-ref-371)
371. 34383 A.3d at 955–58. [↑](#footnote-ref-372)
372. 34483 A.3d at 936. [↑](#footnote-ref-373)
373. 34583 A.3d at 975. [↑](#footnote-ref-374)
374. 345.1Robinson Twp. v. Commonwealth, 96 A.3d 1104 (Pa. Commw. Ct. 2014). *See also* Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911 (Pa. 2017), *rev’g* 108 A.3d 140 (Pa. Commw. Ct. 2015), where the Pennsylvania Supreme Court gave a very broad reading to the Environmental Rights Amendment and its restrictions on the exercise of legislative power, including power to lease Commonwealth-owned minerals. On remand, the Commonwealth Court determined that bonus and rental payments were not corpus or principal of the Article 27 trust and thus could be appropriated for other purposes by the legislature. Pennsylvania Environmental Defense Foundation v. Commonwealth, 214 A.3d 748 (Pa. Commw. Ct. 2019). Upon appeal, Pennsylvania Environmental Defense Foundation v. Commonwealth, 255 A.3d 289 (Pa. 2021), the Pennsylvania Supreme Court reversed. It concluded that while the royalties should be treated as part of the corpus of the trust set up by the ERA, the bonus, delay rental and penalty payments were not part of the corpus, but that under general trust principles, such funds had to be returned to the corpus for the benefit of the people who were beneficiaries of the trust created by the ERA.

     In Protect PT v. Penn Township Zoning Hearing Board, 220 A.3d 1174 (Pa. Commw. Ct. 2019), the court said that *Robinson* did not prevent a Township from enacting a zoning ordinance that allowed ***oil*** and gas drilling operations in a number of different zoning districts, including a rural resource district. The court refused to second guess the Township’s balancing of environmental and other factors in creating a mineral extraction overlay district where drilling was allowed with a discretionary permit. *In accord:* Frederick v. Allegheny Township Zoning Hearing Board, 196 A.3d 677 (Pa. Commw. Ct. 2018), *appeal denied,* 208 A.3d 563 (Pa. 2019). *In accord*: Murrysville Watch Committee v. Municipality of Murrysville Zoning Hearing Board, 2022 Pa. Commw. Unpub. LEXIS 32 (Jan. 24, 2022).

     In Pennsylvania General Energy Co., LLC v. Grant Township, 139 F. Supp. 3d 706 (W.D. Pa. 2015), *motion for reconsideration denied*, 2016 U.S. Dist. LEXIS 14211 (W.D. Pa. Feb. 5, 2016), the court read *Robinson Township* to preclude a finding of preemption by virtue of the ***Oil*** & Gas Act as to any ***oil*** and gas regulatory ordinance.

     In Pennsylvania ***Oil*** & Gas Ass’n v. Department of Environmental Protection, 135 A.3d 1118 (Pa. Commw. Ct. 2015), the court found that PIOGA had standing to seek a declaratory judgment that existing DEP procedures for permitting ***oil*** and gas wells were invalid based on *Robinson* even though there was no pending enforcement action. The court also finds the dispute ripe for review notwithstanding PIOGA member’s failure to seek administrative relief from the denial of any specific drilling permit. In Marcellus Shale Coalition v. Department of Environmental Protection, 2016 Pa. Commw. Unpub. LEXIS 830 (Nov. 8, 2016), plaintiffs sought injunctive relief against DEP’s continued regulation of ***oil*** and gas development following *Robinson*. In Marcellus Shale Coalition v. Department of Environmental Protection, 185 A.3d 985 (Pa. 2018), the court affirmed in part and reversed in part the Commonwealth Court’s decision. The Pennsylvania Supreme Court affirmed the grant of injunctive relief against the Department’s proffered rules regarding the protection of public resources. On remand, the Commonwealth Court invalidated several sections of the regulations. Marcellus Shale Coal. v. Dep’t of Envtl. Prot. of Pa., 193 A.3d 447 (Pa. Commw. Ct. 2018), *notice to appeal quashed*, 2018 Pa. LEXIS (Pa. Nov. 28, 2018). In a subsequent decision, the Commonwealth Court approved certain of the proposed regulations, disapproved of others and remanded for development of a factual record for others in Marcellus Shale Coalition v. Dep’t of Envtl. Prot., 216 A.3d 448 (Pa. Commw. Ct. 2019), *appeal dismissed*, 2019 Pa. LEXIS 7108, 7116 (Pa. Dec. 24, 2019). Upon appeal to the Pennsylvania Supreme Court a highly splintered court reversed the Commonwealth Court’s partial invalidation of several DEP regulations, finding that all of the regulations were within the power of DEP to promulgate. Marcellus Shale Coalition v. Department of Envtl. Protection, 292 A.3d 921 (Pa. 2023).

     In *In re* Appeal of Andover Homeowners’ Ass’n, 217 A.3d 906 (Pa. Commw. Ct. 2019), the court refused to apply the ERA to a pipeline condemnation action taken against private property owned by a homeowners’ association. The court said that the association had not shown a nexus between the privately-owned land and the alleged degradation of the public natural resources, such as groundwater, the ambient air and flora and fauna so as to trigger the ERA.

     In Deiter Family, L.P. v. City of Easton Building Code Board of Appeals, 130 A.3d 795 (Pa. Commw. 2015), the court found that a zoning ordinance could not consider the safety of the placement of propane tanks because the Pennsylvania Propane and Liquefied Petroleum Gas Act, 35 Pa. C.S. §§ 1329.1–1329.19. [↑](#footnote-ref-375)
375. 345.2In addition to the preemption provisions, the Commonwealth Court dealt with three other provisions of Act 13. It first held that Section 3218 imposing a requirement that public water suppliers be notified of any spills or pollution was not a local law and did not violate equal protection principles even though private water suppliers and individual water well owners were not required to be notified. Secondly it held that Sections 3222.1(b)(10) and (11) which restrict the release of proprietary information to certain health care professionals were also valid. Thirdly, it held that the provision of Act 13 (Section 3241(a)) giving entities possessing certificates of public convenience and necessity the private right of eminent domain as it applies to underground natural gas storage facilities was constitutional. [↑](#footnote-ref-376)
376. 345.396 A.3d at 1119–20. [↑](#footnote-ref-377)
377. 345.4Justice Brobson in a separate, concurring and dissenting opinion, would have found that the procedures set forth in Sections 3305–3309 could be severed. 96 A.3d at 1122–23. [↑](#footnote-ref-378)
378. 345.5Robinson Township v. Commonwealth, 147 A.3d 536 (Pa. 2016). [↑](#footnote-ref-379)
379. 345.6Robinson Township v. Commonwealth, 147 A.3d 536, 554–558 (Pa. 2016).

     While Act 13 does not have a severability provision, Pennsylvania has enacted a Statutory Construction Act, 1 Pa. Cons. Stat. § 1501 *et seq.* that contains a provision that statutes are to be interpreted as severable if the severed provisions can stand alone. The Supreme Court concluded that §§ 3305–3309 cannot stand alone after the invalidation of §§ 3303–3304. The Supreme Court concluded that the limitations imposed by § 3222.1(b)(10) and (11) on the dissemination of information to medical professionals about the constituent elements of the frac fluid being used was a constitutional violation of Pa. Const. Art. III, § 32 which prohibits the enactment of local and special laws. It also invalidates § 3218.1 which limits the disclosure of spills to public, but not private, water supply organizations, under Pa. Const. Art. III, § 32. Finally, the court invalidated § 3241 which delegated to corporations who transport, sell or store natural gas the private right of eminent domain. The scope of the invalidation of § 3215(c) has been limited in Pennsylvania Independent ***Oil*** & Gas Association v. Commonwealth, 146 A.3d 820 (Pa. Commw. 2016), a case decided several weeks prior to *Robinson*, and Marcellus Shale Coalition v. Department of Environmental Quality, 2016 Pa. Commw. Unpub. LEXIS 830 (Nov. 8, 2016), a case decided some six weeks after *Robinson*. [↑](#footnote-ref-380)
380. 345.7Huntley & Huntley, Inc. v. Borough Council, 600 Pa. 207, 964 A.2d 855, 168 O.&G.R. 524 (2009), discussed in depth at text accompanying notes 289–298 *supra*. In Seneca Resources Corp. v. Highland Township, 2017 U.S. Dist. LEXIS 162629 (W.D. Pa. Sept. 29, 2017), the court relied on *Huntley & Huntley* as well as Range Resources—Appalachia, LLC v. Salem Township, 600 Pa. 231, 964 A.2d 869 (2009), to strike down on preemption grounds a township charter provision that prohibited brine disposal. Since the charter was neither a zoning ordinance nor an ordinance adopted under the Flood Plain Management Act, it could not be in conflict with state statutes. [↑](#footnote-ref-381)
381. 345.8Delaware Riverkeeper Network v. Sunoco Pipeline LP, 179 A.3d 670 (Pa. Commw. Ct. 2018).

     In Lorenzen v. West Cornwall Township Zoning Hearing Board, 222 A.3d 893 (Pa. Commw. Ct. 2019), the court found that the township zoning ordinance did not create an independent exemption for public utilities so that adjacent landowners could challenge the issuance of permits for the construction of a compressor station that was part of a larger pipeline project. Under Pennsylvania law, only those parties who are aggrieved by a zoning hearing board order have standing to appeal. They must show that they have a “substantial, direct, and immediate” interest in the order. [↑](#footnote-ref-382)
382. 345.911 Pa. Cons. Stat. §§ 101–3316. [↑](#footnote-ref-383)
383. 345.10179 A.3d at 689, citing Hoffman Mining Co., Inc. v. Zoning Hearing Board of Adams Township, 612 Pa. 598, 32 A.3d 587 (2011). [↑](#footnote-ref-384)
384. 345.11179 A.3d at 690. [↑](#footnote-ref-385)
385. 345.12179 A.3d at 690–91. The court relied heavily on Duquesne Light Co. v. Upper St. Clair Township, 377 Pa. 323, 105 A.2d 287 (1954) and County of Chester v. Philadelphia Electric Co., 420 Pa. 422, 218 A.2d 331 (1966), to support that conclusion. [↑](#footnote-ref-386)
386. 345.13179 A.3d at 690–91. The court added that the conflict must be irreconcilable. [↑](#footnote-ref-387)
387. 346*See, e.g.*, Tysco ***Oil*** Co. v. Railroad Commission of Texas, 12 F. Supp. 195 (S.D. Tex. 1935) (City of South Houston sued as a defendant after adopting a zoning ordinance restricting the density and location of wells). [↑](#footnote-ref-388)
388. 347*See* William K. Kroger, et al., *Texas House Bill 40 and Texas Cities’ Attempts to Ban Hydraulic Fracturing*, 67 Inst. on ***Oil*** & Gas L. 91 (2016); Jeff Lam, *Bringing a Gun to a Knife Fight: Texas H.B. 40 and Local Regulation of* ***Oil*** *and Gas Operations*, 54 Hous. L. Rev. 545 (2016); Note, *Recent Legislation: Energy Law—State-Local Preeemption*, 129 Harv. L. Rev. 610 (2015); Scott Lansdown, *Municipal Ordinances That Compel or Encourage the Pooling or Unitization of* ***Oil*** *and Gas Interests*, 14 State Bar of Texas, ***Oil***, Gas and Mineral Law Section Report 1 (1989). [↑](#footnote-ref-389)
389. 348Klepak v. Humble ***Oil*** & Refining Co., 177 S.W.2d 215, 218 (Tex. Civ. App.—Galveston 1944, writ ref’d w.o.m.). *See also* Unger v. State, 629 S.W.2d 811 (Tex. App.—Ft. Worth 1982, writ ref’d). Texas, in general, has recognized the three general types of preemption, express preemption, implied preemption by occupation of the field and implied preemption by conflict. BCCA Appeal Group, Inc. v. City of Houston, 496 S.W.3d 1, 2016 Tex. LEXIS 352; Dallas Merchant’s & Concessionaire’s Association v. City of Dallas, 852 S.W.2d 489 (Tex. 1993). While requiring that intent to preempt be shown with unmistakable clarity. Lower Colorado River Authority v. City of San Marcos, 523 S.W.2d 641 (Tex. 1975), the recent decision in *BCCA Appeal*, found that the City of Houston’s ordinance dealing with air pollution was preempted. In City of Laredo v. Laredo Merchs. Ass’n, 550 S.W.3d 586 (Tex. 2018), the Texas Supreme Court invalidated on preemption grounds a municipal ordinance restricting the use of disposable grocery bags under an express preemption theory. [↑](#footnote-ref-390)
390. 349City of Mont Belvieu v. Enterprise Products Operating, L.P., 222 S.W.3d 515, 171 O.&G.R. 455 (Tex. App.—Houston [14th Dist.] 2007, no writ).

     Rather than try the preemption case, the parties in *Mont Belvieu* entered into a settlement agreement requiring Enterprise to purchase residences of those persons who lived in the area over the salt dome prior to the explosion that occurred in the 1980s. The City agreed to issue the drilling permits for the wells that had received Railroad Commission permits. In Cernosek Enterprises, Inc. v. City of Mont Belvieu, 338 S.W.3d 655, 172 O.&G.R. 711 (Tex. App.—Houston [1st Dist.] 2011), the court dismissed a challenge to the settlement agreement brought by a party who was not eligible for the mandatory buyout.

     A settlement agreement between a City and an ***oil*** and gas operator relating to the application of the City’s zoning ordinance to the operator was unsuccessfully challenged by the surface owner in Walton v. City of Midland, 287 S.W.3d 97, 173 O.&G.R. 523 (Tex. App.—Eastland 2009), *on later appeal*, Walton v. City of Midland, 409 S.W.3d 926 (Tex. App.—Eastland 2013, rev. denied). The settlement agreement imposed upon the ***oil*** and gas operator a duty to plant trees around the drillsite and to drill a water well to provide irrigation for the trees. [↑](#footnote-ref-391)
391. 350222 S.W.3d at 517–18. [↑](#footnote-ref-392)
392. 351Tex. Nat. Res. Code Chap. 211.

     In Town of Flower Mound v. EagleRidge Operating, LLC, 2019 Tex. App. LEXIS 7561 (Tex. App.—Ft. Worth Aug. 22, 2019), an operator sought to challenge a municipal ordinance restricting the hours that trucks could access the wellsite. After the trial court granted a temporary injunction, the court of appeals concluded that the trial court lacked subject matter jurisdiction over the case since the ordinance was penal in nature and thus could be challenged only where the plaintiff showed that it owned a vested property right that would be irreparably injured if the ordinance was not enjoined. [↑](#footnote-ref-393)
393. 352*See also* *In re* Entergy Corp., 142 S.W.3d 316 (Tex. 2004), for a further explanation of what the court labels as the dichotomy between forum preemption and conflict preemption. Only forum preemption gives the administrative agency exclusive jurisdiction to resolve an issue which robs the court of subject matter jurisdiction. [↑](#footnote-ref-394)
394. 352.1H.B. No. 40 (2015) to be codified at Tex. Nat. Res. Code § 81.0523. Although the City of Denton’s actions are not expressly mentioned in the preamble to H.B. No. 40, it is widely believed that after 75 years of not having an express preemption provision, the prohibitory, initiative ordinance of Denton triggered legislative action. *See* William K. Kroger, et al., *Texas House Bill 40 and Texas Cities’ Attempts to Ban Hydraulic Fracturing,* 67 Inst. on ***Oil*** & Gas L. 91 (2016). [↑](#footnote-ref-395)
395. 352.2Tex. Nat. Res. Code § 81.0523. The full text of the statute is provided in § 30.43A *supra*.

     In City of Port Arthur v. Thomas, 659 S.W.3d 96 (Tex. App.—Beaumont 2022), plaintiff argued that Tex. Nat. Res. Code § 81.0523 preempted a municipal ordinance that prohibited the driving of certain types of trucks on some city streets that allegedly would prevent the plaintiff from continuing his oilfield waste disposal business. The City argued that it had sovereign immunity from the lawsuit but the Court disagreed saying that the limited preemption provisions of § 81.0523 raised questions of fact as to whether or not the City acted ultra vires in enforcing its ordinance relating to truck traffic engaging in oilfield-related activities. [↑](#footnote-ref-396)
396. 352.3Tex. Nat. Res. Code § 81.0523(c)(1–4). [↑](#footnote-ref-397)
397. 352.4Tex. Nat. Res. Code § 81.0523(a) & (d). [↑](#footnote-ref-398)
398. 352.5Only Colorado and New York have state court decisions dealing with prohibitory ordinances yielding different results. In Voss v. Lundvall Bros., 830 P.2d 1061, 120 O.&G.R 245 (Colo. 1992), the Colorado Supreme Court found that a total prohibition against ***oil*** and gas operations was preempted by the state’s ***oil*** and gas conservation statute. *Voss* is discussed in depth at § 4.05[2][b][ii] *supra*. In Matter of Wallach v. Town of Dryden, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.3d 1188 (2014), *rearg. denied*, 2014 N.Y. LEXIS 2858 (N.Y. Oct. 16, 2014), the court concluded that a prohibitory ordinance was not preempted. *Wallach* is discussed in depth at § 4.05[2][[xi] *infra*. A number of decisions have been rendered by federal courts invalidating prohibitory ordinances that also declare that corporations have no rights within the municipality. *See, e.g.*, Swepi, LP v. Mora County, 81 F. Supp. 3d 1075 (D.N.M. 2015); Range Res.—Appalachia, LLC v. Blaine Twp., 2009 U.S. Dist. LEXIS 100932 (W.D. Pa. Oct. 29, 2009), 649 F. Supp. 2d 412 (W.D. Pa. 2009).

     The Colorado Supreme Court invalidated two separate prohibitory ordinances adopted through the initiative process based on operational conflict preemption. City of Ft. Collins v. Colorado ***Oil*** & Gas Association, 369 P.3d 586, 2016 CO 28 (5-year moratorium on hydraulic fracturing); City of Longmont v. Colorado ***Oil*** & Gas Association, 369 P.3d 573, 2016 CO 29 (permanent ban on hydraulic fracturing or storing or disposing of frac fluids). [↑](#footnote-ref-399)
399. 352.6Tex. Nat. Res. Code § 81.0523(a)(1). [↑](#footnote-ref-400)
400. 353Texas Midstream Gas Services, LLC v. City of Grand Prairie, 2008 U.S. Dist. LEXIS 95991 (N.D. Tex. 2008), *aff’d*, 608 F.3d 200 (5th Cir. 2010).

     Upon the request of Texas Midstream Gas Services, the district court dismissed the action without prejudice over the opposition of the City of Grand Prairie, due in part to the City’s condemnation of a portion of the site where Texas Midstream was planning to locate its compressor. Texas Midstream Gas Services LLC v. City of Grand Prairie, 2010 U.S. Dist. LEXIS 93454 (N.D. Tex. Sept. 8, 2010). [↑](#footnote-ref-401)
401. 354Tex. Utils. Code § 181.1004. [↑](#footnote-ref-402)
402. 355*Compare* Porter v. Southwestern Public Service Co., 489 S.W.2d 361 (Tex. App.—Amarillo 1972, writ ref’d n.r.e.) (SPS subject to municipal zoning) *with* Austin Independent School District v. City of Sunset Valley, 502 S.W.2d 670 (Tex. 1973) (AISD not subject to City’s zoning ordinance in location of auxiliary facilities) and City of Lubbock v. Austin, 628 S.W.2d 49 (Tex. 1982) (City not bound by its own zoning ordinance when it uses its eminent domain power). [↑](#footnote-ref-403)
403. 356608 F.3d at 206–08. [↑](#footnote-ref-404)
404. 357Va. Code § 45.1-361.5. [↑](#footnote-ref-405)
405. 358Opinion of the Attorney-General 12-102 (Jan. 11, 2013). Available on the Attorney-General’s website, www.oag.state.va.us. [↑](#footnote-ref-406)
406. 359Va. Code Ann. § 15.2-2280 *et seq*. Virginia is one of the few states that narrowly construe grants of authority to sub-state units utilizing Dillon’s Rule. Board of Supervisors v. Countryside Inv. Co., 258 Va. 497, 522 S.E.2d 610 (1999). [↑](#footnote-ref-407)
407. 360Virginia has enacted a Commonwealth Energy Policy which includes a policy of expanding the production and distribution of natural gas. Va. Code Ann. §§ 67-100 through 67-1305. [↑](#footnote-ref-408)
408. 360.1Opinion of the Attorney-General (May 5, 2015). [↑](#footnote-ref-409)
409. 360.2Va. Code Ann. §§ 15.2-2280 to 15.2-2316. Section 15.2-2280 contains a non-exclusive list of land uses that may be prohibited including mining operations. *See* Resource Conservation Management, Inc. v. Board of Supervisors, 238 Va. 15, 380 S.E.2d 879 (1989). [↑](#footnote-ref-410)
410. 360.3Va. Code Ann. § 45.1-361.5. [↑](#footnote-ref-411)
411. 360.4Resource Conservation Management, note 360.2 *supra*. [↑](#footnote-ref-412)
412. 360.5Va. Code § 45.2-1605. [↑](#footnote-ref-413)
413. 361Northeast Natural Energy, LLC v. City of Morgantown, Civ.Action No. 11-C-411 (Monongalia County Circuit Court) (slip opinion). The case is discussed at Emery L. Lyon, *Case Comment: Northeast Natural Energy, LLC v. City of Morgantown,* 57 N.Y.L. Sch. L. Rev. 971 (2013). [↑](#footnote-ref-414)
414. 362*See e.g.*, W. Va. Code § 22-1-1, *et seq.* [↑](#footnote-ref-415)
415. 363Slip opinion at pp. 7–8. The City argued that as a home rule entity, it has the full power of local self-government. The court refuted that claim arguing that the City is a mere “creature” of the state. It is generally perceived that where constitutional home rule exists, the “creature” theory of local government has been supplanted. See text accompanying note 49, *supra*. [↑](#footnote-ref-416)
416. 363.1EQT Production Co. v. Wender, 191 F. Supp. 3d 583 (S.D. W. Va. 2016). [↑](#footnote-ref-417)
417. 363.2EQT Production Co. v. Wender, 870 F.3d 322 (4th Cir. 2017). The Fourth Circuit analysis was followed in Red Bluff Trade Center, LLC v. Horry County, 454 F. Supp. 3d 570 (D.S.C. 2020), where the state’s mining law expressly preempted local regulation except for zoning ordinances that were not in direct conflict with the state mining law. The County enacted two ordinances, one clearly a zoning ordinance and the other a mine permit ordinance. The mine permit ordinance was expressly preempted but the zoning ordinance provisions that require mining operations to receive a discretionary permit were not so preempted. [↑](#footnote-ref-418)
418. 363.3*See e.g.,* W. Va. Code §§ 22-6-2; 22-6-30. The court further noted that West Virginia applies the “creature” theory for sub-state units so that any conflict or inconsistency between an ordinance of a sub-state unit and a state statute will be resolved in favor of the state. *See* Butler v. Tucker, 187 W. Va. 145, 416 S.E.2d 262 (1992); Davidson v. Shoney’s Big Boy Restaurant, 181 W. Va. 65, 380 S.E.2d 232 (1989); Brackman’s Inc. v. City of Huntington, 126 W. Va. 21, 27 S.E.2d 71 (1943). [↑](#footnote-ref-419)
419. 364Wyo. Stat. Ann. § 18-5-201. [↑](#footnote-ref-420)
420. 365River Springs Limited Liability Co. v. Bd. of County Commissioners, 899 P.2d 1329, 134 O.&G.R. 650 (Wyo. 1995). [↑](#footnote-ref-421)
421. 366Wyo. Stat. Ann. § 35-11-101 *et seq.* [↑](#footnote-ref-422)
422. 367Wyo. Stat. Ann. § 18-5-201 *et seq.* [↑](#footnote-ref-423)
423. 368899 P.2d at 1336. [↑](#footnote-ref-424)
424. 369Wyo. Stat. Ann. § 35-11-401(3)(vi). [↑](#footnote-ref-425)