ENVIRONMENTAL LAW — HYDROFRACKING — NEW YORK COURT OF APPEALS HOLDS THAT STATE OIL AND GAS LAW DOES NOT PREEMPT TOWN ZONING ORDINANCES BANNING HYDROFRACKING. — *Wallach v. Town of Dryden*, 16 N.E.3d 1188 (N.Y. 2014).

In the past few years, developments in the technology used to extract oil and gas from shale rock formations — particularly improvements in hydraulic fracturing,[1] commonly known as "fracking" or "hydrofracking" — have made it economically feasible to reach previously inaccessible mineral deposits. As a result, the energy industry has increased gas production in the Marcellus shale formation, which extends through parts of Ohio, West Virginia, Pennsylvania, and southern and central New York.[2] Fracking raises a variety of health, safety, and environmental concerns, and many New York municipalities have enacted local zoning provisions effectively prohibiting fracking activities.[3] Last June, in *Wallach v. Town of Dryden*,[4] the New York Court of Appeals, the state's highest court, ruled that the state's Oil, Gas and Solution Mining Law[5] (OGSML) does not preempt local zoning ordinances that effectively ban oil and gas extraction.[6] In upholding the local bans as a matter of statutory interpretation, the Court of Appeals relied on a traditional vision of zoning and may have underestimated the way some modern local zoning practices not on display in *Wallach* may intersect with state policy. Although Department of Environmental Conservation (DEC) Commissioner Joe Martens announced in December that he would issue a legally binding findings statement prohibiting high-volume hydraulic fracturing in New York State,[7] the Court of Appeals' opinion remains good law relevant to other New York preemption cases. The opinion's failure to acknowledge when state law might preempt legitimate zoning methods could chill valuable experimentation in local land use regulation.

In the town of Dryden, the town board amended its zoning ordinance in August 2011 to ban all activities related to oil and gas explo-

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[1] Hydraulic fracturing is a process by which fluid is pumped underground at high pressure to extract oil or natural gas. Ellen Burford, Recent Development, *The Need for Federal Regulation of Hydraulic Fracturing*, 44 URB. LAW. 577, 578 (2012).

[2] Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458, 464 (Sup. Ct. 2012).

[3] *See* Shaun A. Goho, *Municipalities and Hydraulic Fracturing: Trends in State Preemption*, PLAN. & ENVTL. L., July 2012, at 3, 3, 6.

[4] 16 N.E.3d 1188 (N.Y. 2014).

[5] N.Y. ENVTL. CONSERV. LAW §§ 23-0101 to 23-2723 (McKinney 2007 & Supp. 2014).

[6] *Wallach*, 16 N.E.3d at 1191–92.

[7] *See* Press Release, N.Y. State Dep't of Envtl. Conservation, New York State Department of Health Completes Review of High-Volume Hydraulic Fracturing (Dec. 17, 2014), http://www.dec.ny.gov/press/100055.html [http://perma.cc/QPU4-NP4S].

ration, extraction, and storage, effectively banning fracking.[8] A month later, Norse Energy Corp. USA (Norse),[9] which owned gas leases covering 22,200 acres in Dryden, or approximately one-third of the town, challenged the zoning amendment on the ground that it was expressly preempted by the OGSML.[10] The OGSML contains a supersession clause, section 23-0303(2), added in 1981, that preempts "all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries" excluding "local government jurisdiction over local roads or the rights of local governments under the real property tax law."[11]

The Tompkins County Supreme Court, the trial-level court, granted the town's motion for summary judgment.[12] The court stated that it was constrained by precedent[13]: in *Frew Run Gravel Products, Inc. v. Town of Carroll*,[14] the Court of Appeals had rejected a challenge to local zoning ordinances based on a similar supersession clause in the state's Mined Land Reclamation Law[15] (MLRL).[16] The Third Department of the Appellate Division affirmed the grant of summary judgment for Dryden, examining the legislative history of the OGSML, in particular the 1981 amendments, and construing the law "as preempting only local legislation regulating the actual operation, process and details of"[17] the oil and gas industry and "thus avoiding any abridgment of [a] town's powers to regulate land use."[18]

Combining the action with a similar case from the town of Middlefield,[19] the New York Court of Appeals affirmed the judgments of

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[8] Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458, 461 (Sup. Ct. 2012); *see* DRYDEN, N.Y., ZONING LAW § 502 (2012).

[9] Technically, it was Anschutz Exploration Corporation, Norse's predecessor in interest, that was involved at the time Dryden's ordinance passed. *See* Norse Energy Corp. USA v. Town of Dryden, 964 N.Y.S.2d 714, 716 (App. Div. 2013).

[10] *Id.*

[11] N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2007).

[12] *Anschutz*, 940 N.Y.S.2d at 474.

[13] *See id.*

[14] 518 N.E.2d 920 (N.Y. 1987).

[15] ENVTL. CONSERV. §§ 23-2701 to 23-2727.

[16] *See Frew Run*, 518 N.E.2d at 923–24. The court did sever and invalidate a provision of the Dryden zoning amendment that purportedly invalidated any "permit issued by any local, state or federal agency," finding it expressly preempted by the OGSML. *Anschutz*, 940 N.Y.S.2d at 473 (quoting DRYDEN, N.Y., ZONING LAW § 2104(5) (2011)); *see id.* at 473–74.

[17] Norse Energy Corp. USA v. Town of Dryden, 964 N.Y.S.2d 714, 721 (App. Div. 2013).

[18] *Id.* (alteration in original) (quoting *Frew Run*, 518 N.E.2d at 924).

[19] In *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. 2012), Cooperstown Holstein Corporation (CHC), which held two natural gas leases in the town of Middlefield, brought an action challenging Middlefield's zoning law. *See Wallach*, 16 N.E.3d at 1193. Similar to Dryden, Middlefield's ordinance excluded "[h]eavy industry and all oil, gas or solution mining and drilling." MIDDLEFIELD, N.Y., ZONING LAW art. V, § A (2011). The Otsego County Supreme Court also concluded that section 23-0303(2) does not preempt local land use controls. *Cooperstown Holstein*, 943 N.Y.S.2d at 730. On the same day as its decision in *Norse Energy*

the Appellate Division.[20] Writing for the court, Judge Graffeo[21] characterized a municipality's power to enact zoning laws for the "health, safety, morals, or the general welfare of the community"[22] as "one of the core powers of local governance" contemplated by the New York Constitution's "home rule" provision.[23] In light of this power, Judge Graffeo explained, the court would interpret a state statute as preempting a locally enacted zoning law only "where there is a 'clear expression of legislative intent.'"[24] In determining whether the statute demonstrates such intent, the court was guided by its decision in *Frew Run*, which considered three factors: the plain language of the supersession clause, the statutory scheme as a whole, and the legislative history.[25]

First analyzing the plain language, the court stated that given the striking similarities between the OGSML's supersession clause and the MLRL's supersession clause,[26] found in *Frew Run* not to preempt local zoning ordinances, no "broader meaning" could be ascribed to the OGSML.[27] In *Frew Run*, the court recounted, "local laws that purported to regulate the 'how' of mining activities and operations were preempted whereas those limiting 'where' mining could take place were not."[28] In light of the similarities between the statutes,[29] the court read section 23-0303(2) "as preempting only local laws that pur-

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Corp. USA v. Town of Dryden, 964 N.Y.S.2d 714, the Third Department of the Appellate Division affirmed "[f]or the reasons set forth in" the *Norse Energy* opinion. Cooperstown Holstein Corp. v. Town of Middlefield, 964 N.Y.S.2d 431, 432 (App. Div. 2013).

20 *Wallach*, 16 N.E.3d at 1202–03.

21 Chief Judge Lippman and Judges Read, Rivera, and Abdus-Salaam joined Judge Graffeo's opinion.

22 *Wallach*, 16 N.E.3d at 1194 (quoting N.Y. TOWN LAW § 261 (McKinney 2013) (internal quotation mark omitted)).

23 *Id.* The New York constitutional home rule provision grants municipalities authority to "adopt and amend local laws not inconsistent with" state law. N.Y. CONST. art. IX, § 2(c)(ii); *see also* N.Y. MUN. HOME RULE LAW § 10 (McKinney Supp. 2014) (implementing the constitutional principle).

24 *Wallach*, 16 N.E.3d at 1195 (quoting Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1234 (N.Y. 1996)).

25 *Id.*

26 The MLRL provision supersedes "local laws relating to the extractive mining industry." N.Y. ENVTL. CONSERV. LAW § 23-2703(2) (McKinney 2007); *see also Wallach*, 16 N.E.3d at 1195–96.

27 *Wallach*, 16 N.E.3d at 1197.

28 *Id.* at 1196.

29 The court also cited statutes that explicitly mention zoning laws when the legislature meant to preempt them. *See id.* at 1198; *see also, e.g.*, ENVTL. CONSERV. § 27-1107 (prohibiting a municipality from requiring a permit for the siting of a hazardous waste facility). Moreover, such statutes typically include specific safeguards designed to account for local circumstances and accommodate public input. For example, when a community residential facility for the disabled is proposed, the Mental Hygiene Law requires that a municipality be given notice and have forty days to object. N.Y. MENTAL HYG. LAW § 41.34(c) (McKinney 2011); *Wallach*, 16 N.E.3d at 1198.

port to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses."[30]

The court next looked to the statutory scheme. The stated purposes of the OGSML are to "prevent waste," to authorize the "development of oil and gas properties" in order to ensure "a greater ultimate recovery of oil and gas," to protect the rights of all property owners and the general public, and to regulate underground gas storage.[31] To further these goals, the statute creates a detailed regime of operations standards and empowers the DEC to further regulate by, for example, issuing permits, executing leases, and requiring well plugging.[32] Thus, the court found it "readily apparent" that the OGSML as a whole is concerned with "the safety, technical and operational aspects of oil and gas activities across the State."[33]

The court then considered the last *Frew Run* factor: legislative history. According to the court, the OGSML was enacted to conserve oil and gas resources.[34] The state legislature passed the 1981 amendments, including the supersession clause, to increase the DEC's funding and enforcement capacity after finding that "recent growth in drilling had exceeded the Department's capabilities."[35] The court found no historical materials that shed additional light on the supersession clause.[36] Ultimately, the court found nothing in the OGSML's text, structure, or legislative history to demonstrate a clear intent to preempt zoning ordinances such as those at issue in the case.

The court concluded by responding to Norse's argument that, regardless of the validity of other types of zoning provisions, local zoning laws that create an "outright ban" should be considered regulation of the oil and gas industry preempted by section 23-0303(2).[37] The court found this interpretation foreclosed by its decision in *Gernatt Asphalt Products, Inc. v. Town of Sardinia*.[38] Whereas *Frew Run* upheld a local law that authorized sand and gravel operations in certain districts

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[30] *Wallach*, 16 N.E.3d at 1197. Norse and CHC argued that the second half of the OGSML's supersession clause, preserving "local jurisdiction over roads and taxes[,] makes sense only if the preemptive span" of the text extends beyond operations; otherwise, the carve-out for roads and taxes would be superfluous. *Id.* The court rejected this argument, determining that roads and taxes "can fairly be characterized as touching on the operations of the oil and gas industries." *Id.*

[31] ENVTL. CONSERV. § 23-0301.

[32] *Wallach*, 16 N.E.3d at 1199.

[33] *Id.* The court rejected Norse and CHC's argument that the local zoning ordinances contravened the statutory purpose of preventing waste, construing "waste" as a "term of art" referring to "inefficient or improper" drilling, *id.*, unrelated to any goal of achieving "greater ultimate recovery," *id.* (quoting ENVTL. CONSERV. § 23-0301) (internal quotation mark omitted).

[34] *Id.* at 1200.

[35] *Id.* at 1201.

[36] *Id.*

[37] *Id.* at 1202.

[38] 664 N.E.2d 1226 (N.Y. 1996); *see Wallach*, 16 N.E.3d at 1202.

but not in the district in question,[39] the Court of Appeals in *Gernatt* upheld a town's total ban on mining because the MLRL does not create an obligation to allow mining *somewhere* within each municipality.[40] Applying the same logic, the *Wallach* court upheld the outright bans before it under the OGSML.[41]

Judge Pigott dissented.[42] In his view, by "creating a blanket ban on an entire industry"[43] rather than specifying zones for different uses, the local laws at issue "go above and beyond zoning"[44] and effectively "regulate oil, gas and solution mining industries under the pretext of zoning."[45] He distinguished the prohibition of mining in *Gernatt*, opining that the Middlefield and Dryden zoning ordinances "go into great detail concerning the prohibitions against the storage of gas, petroleum exploration and production materials and equipment."[46]

At the time of the *Wallach* decision, New York had a statewide temporary moratorium on the use of fracking pending further study of its environmental and health risks.[47] Six months after the decision, following a two-year public review, the state's Department of Health (DOH) published a study recommending a prohibition of fracking due to "significant uncertainties" about the health risks associated with high-volume fracking.[48] At a state cabinet meeting on December 17, 2014 DOH Commissioner Howard Zucker described these findings, and DEC Commissioner Martens announced his decision to issue a legally binding findings statement prohibiting fracking in New York State.[49]

The Court of Appeals' discussion of zoning techniques leaves uncertainty about the preemption of other regulations that a locality might employ to restrict, but not altogether ban, fracking uses. Also, by sharply distinguishing the purposes of local zoning from those of state environmental regulation, the court sidestepped the question of which objectives of zoning are legitimate when there is potential for interference with state policy. While the Cuomo Administration's recent decision to ban fracking statewide attenuates the immediate practical impact of the *Wallach* court's opinion, future courts could chill

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[39] Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920, 921 (N.Y. 1987).

[40] *Gernatt*, 664 N.E.2d at 1235.

[41] *Wallach*, 16 N.E.3d at 1202 (citing *Gernatt*, 664 N.E.2d at 1234).

[42] Judge Smith joined Judge Pigott's opinion.

[43] *Wallach*, 16 N.E.3d at 1203 (Pigott, J., dissenting).

[44] *Id.* at 1204.

[45] *Id.* at 1203.

[46] *Id.*

[47] *Id.* at 1192 n.1 (majority opinion).

[48] *See* N.Y. DEP'T OF PUB. HEALTH, A PUBLIC HEALTH REVIEW OF HIGH VOLUME HYDRAULIC FRACTURING FOR SHALE GAS DEVELOPMENT 12 (2014).

[49] Press Release, *supra* note 7.

innovation in local land use regulation by relying on the *Wallach* court's characterization of zoning.

Under traditional Euclidean zoning, towns are carved into geographically mapped zones, and each zone allows a preset list of land uses as of right.[50] However, starting in the 1950s, and partly motivated by growing concerns about land development and environmental impact, American municipalities moved far from early iterations of Euclidean zoning. Zoning ordinances today are increasingly complex, particularized, and discretionary.[51] Among the zoning innovations, special exception or conditional use regulations allow uses by special permit if certain conditions related to the use of the land are met.[52]

The Dryden and Middlefield ordinances took the classic as-of-right form by banning oil and gas production outright, and the *Wallach* and *Frew Run* courts relied on that vision of zoning when interpreting the OGSML and the MLRL. In *Frew Run*, the court explained that municipal zoning ordinances "regulate land use generally" by "dividing a governmental area into districts and establishing uses to be permitted within the districts,"[53] essentially describing Euclidean zoning. In characterizing zoning this way, the *Frew Run* court concluded that zoning's "incidental" effect on all "uses or businesses"[54] does not raise the concerns associated with "patchwork"[55] local regulation of industry.[56] By also distinguishing the "how" of "details, procedures or operations"[57] from the "where" of land use,[58] the *Wallach* court appeared to have as-of-right Euclidean zoning — district-by-district or total bans on certain uses — in mind when answering the preemption question.

More flexible zoning techniques like special permits, however, might not fall neatly into the "how" versus "where" framework from *Frew Run*. Rather than banning oil and gas production from a given

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[50] *See* 4 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 34:2 (5th ed. 2009). The term "Euclidean" is derived from the name of the first case in which the U.S. Supreme Court upheld zoning laws from challenge under the Due Process and Equal Protection Clauses, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

[51] *See* 1 ARDEN H. RATHKOPF ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:14 (2008). For an overview of innovations in zoning today, see Jerold S. Kayden, *Reconsidering Zoning: Expanding an American Land-Use Frontier*, ZONING PRAC., Jan. 2004, at 2.

[52] *See* 2 SALKIN, *supra* note 50, §§ 14:1, 14:32.

[53] Frew Run Gravel Prods., Inc v. Town of Carroll, 518 N.E.2d 920, 922 (N.Y. 1987).

[54] *Id.*

[55] *Id.* at 923 (quoting N.Y. Dep't of Envtl. Conservation, Memorandum in Support of Assembly Bill 10463 (May 31, 1974)) (internal quotation mark omitted).

[56] *See id.* at 922–23.

[57] *Wallach*, 16 N.E.3d at 1197.

[58] *See id.* at 1196–97. The lower court in *Wallach* distinguished "technical operational concerns" from "traditional land use concerns, such as traffic, noise or industry suitability for a particular community or neighborhood" to harmonize the two regimes and "avoid[] any 'abridgment of a town's powers to regulate land use.'" Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458, 470 (Sup. Ct. 2012) (quoting *Frew Run*, 518 N.E.2d at 924).

zoning district based on concerns about odors, air pollution, visual impacts, or water use, a town may prefer to issue special permits for fracking that would mitigate those risks.[59] For example, a town may wish to condition a special permit for fracking near residential areas on the applicants' agreement to limit fracking to certain hours of operation. Such a special permit would arguably impose more than an "incidental"[60] effect on the "actual operations of oil and gas activities"[61] and thus straddle the line between "where" and "how" regulation.

No New York court has considered whether a special permit for fracking is preempted by section 23-0303(2), but a comparison to case law interpreting the MLRL's preemption clause suggests that at least some special permits might face preemption risk. In one MLRL case — decided at a time when the MLRL preemption clause mirrored section 23-0303(2) — a lower court ruled that a town could not impose hours of operations on a mining site as a condition on a special permit.[62] Subsequently, in 1991, the MLRL preemption clause was amended, both codifying *Frew Run* and enumerating the types of conditions a locality can place on a mining special permit.[63] Although a locality may consider factors other than those statutorily enumerated in the MLRL when choosing to *deny* a special permit for mining, New York cases indicate that these factors must be designed to "regulate land use generally, not to regulate the actual operation of extractive mining."[64] Thus it seems likely that, despite the lack of explicit statutory limitations on special permit conditions for oil and gas operations, the OGSML would be interpreted as preempting some zoning rules, like hours-of-operations conditions, that attempt to impose restrictions on fracking with methods short of an outright ban. For this reason, the *Wallach* court's explanation that the OGSML preempts only regu-

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[59] Non–New York municipalities have adopted permit requirements, impact fees, and limits related to traffic, noise, odors, visual impacts, and water use. *See* Goho, *supra* note 3, at 5 & nn.26–31.

[60] *Wallach*, 16 N.E.3d at 1197 (quoting *Frew Run*, 518 N.E.2d at 922).

[61] *Id.*

[62] Charlton Suburban Servs., Ltd. v. Town of Glenville, 537 N.Y.S.2d 99, 100 (Sup. Ct. 1988) ("While as noted localities are free to prohibit mining activities altogether, they are not free to impose conditions on their operation in the guise of a conditional use permit.").

[63] *See* Act of June 12, 1991, ch. 166, § 228, 1991 N.Y. Laws 2562, 2643–47 (codified at N.Y. ENVTL. CONSERV. LAW §§ 23-2703, 23-2705, 23-2709 (McKinney 2007)); *see also* ENVTL. CONSERV. § 23-2703(2)(b).

[64] Schadow v. Wilson, 599 N.Y.S.2d 335, 336 (App. Div. 1993); *see also* Joan Leary Matthews, *Siting Mining Operations in New York — The Mined Land Reclamation Law Supersession Provision*, ALB. L. ENVTL. OUTLOOK, Spring 1999, at 9. In *Schadow v. Wilson*, 559 N.Y.S.2d 335, the town considered four factors: "harmony" with nearby residential area, *id.* at 337, traffic, real estate values, and public convenience. *Id.* at 337–38. The court found these procedures permissible under MLRL because they were no more intrusive on the mining industry than on any other use. *Id.* at 336.

lation of the details, operations, and procedures of oil and gas operations does not actually immunize all common zoning measures.

Just as the court's tidy division between "where" and "how" regulation relied on an outdated vision of how zoning law operates, its failure to see overlap between the purposes of local zoning and statewide regulation of the oil industry also ignores modern zoning practices. As the court noted, the state legislature authorizes towns to enact zoning provisions to protect "the health, safety, morals, or the general welfare of the community,"[65] language which invokes the police power.[66] While zoning was initially understood to address nuisance issues like detrimental noise and odors, promoting safety, and preserving neighborhood character,[67] the adoption of more complex, flexible techniques coincided with "expanding the concept of 'public welfare.'"[68] New York courts have accepted a wide range of legislative purposes for zoning, including environmental concerns, growth management, preserving property values, economic development, and aesthetics.[69] Thus, the permissible purposes of zoning regulation surely encompass the stated goals of the OGSML, which include the "development of oil and gas properties"[70] and protection of the "rights of all . . . landowners and the general public."[71] But the *Wallach* court appeared to rely on *Frew Run*'s claim that zoning laws relate "to an entirely different subject matter and purpose"[72] than state laws governing natural resources. In this way, both the court's explanation of zoning techniques as "where" rules and the court's description of zoning's purposes fail to account for the increasing potential for modern zoning law's means and ends to overlap with other legislative efforts.

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[65] *Wallach*, 16 N.E.3d at 1194 (quoting N.Y. TOWN LAW § 261 (McKinney 2014)) (internal quotation marks omitted).

[66] *See* Trs. of Union Coll. v. Members of the Schenectady City Council, 690 N.E.2d 862, 864 (N.Y. 1997) (describing the "police power as the predicate for the State's delegation of municipal zoning authority"); 1 SALKIN, *supra* note 50, § 2:12 (explaining that the Standard State Zoning Enabling Act, written in 1926, uses the language "health, safety, morals, and general welfare" to invoke the police power).

[67] *See* Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445, 461 (2000).

[68] 1 PATRICIA E. SALKIN, NEW YORK ZONING LAW AND PRACTICE § 6:01 (4th ed. 2008); *see also* Udell v. Haas, 235 N.E.2d 897, 900 (N.Y. 1968) ("Zoning is not just an expansion of the common law of nuisance. . . . Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.").

[69] TOWN § 261 note; 1 SALKIN, *supra* note 68, § 6:01.

[70] *Wallach*, 16 N.E.3d at 1199 (quoting N.Y. ENVTL. CONSERV. LAW § 23-0301 (McKinney 2007)).

[71] *Id.* (quoting ENVTL. CONSERV. § 23-0301) (internal quotation mark omitted).

[72] *Id.* at 1196 (quoting Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920, 922 (N.Y. 1987)).

Wallach nicely illustrates the potential for conflict between modern zoning measures and statewide policy, as well as the difficulty in determining when such a conflict is present. The majority understood Dryden and Middlefield's total bans as intended to preserve the "small-town character of their communities,"[73] a traditional goal of Euclidean zoning.[74] In dissent, Judge Pigott attributed a different purpose to the local ordinances by describing them as having the "pretext"[75] of zoning but actually regulating oil, gas and solution mining operations.[76] The majority failed to engage with this version of legislative intent and left an important question open: How should a court analyze a zoning regulation that could be justified both by traditional zoning goals and as a direct regulation of business activity? Should a court consider which is the primary purpose or take total or district-wide bans as presumptively valid? The *Wallach* court might have been using the where-versus-how framework as a proxy to distinguish between rules pursuing traditional land use objectives and those attempting to implement economic or environmental policy of statewide concern, but this assumption is faulty given the ubiquity of discretionary zoning measures. The Supreme Court of Colorado, in comparison, has consistently held that a total ban on oil and gas production amounts to a regulation of the industry, which is traditionally a matter of state control, but has left open the door for "land-use regulations applicable to various aspects of oil and gas development and operations" that do not frustrate the goals of state law.[77]

Because the DEC subsequently decided to ban fracking statewide, New York courts will not soon have the opportunity to resolve these open questions in the fracking context. Yet the Court of Appeals' characterization of zoning will guide other New York preemption cases and could influence other state court decisions on local fracking bans. In New York, other state laws, such as environmental laws or laws regulating different industries, can give rise to preemption challenges regarding local land use laws. If the court maintains a narrow understanding of zoning techniques, use of other innovative methods like special permits will be cast into doubt. To avoid a potential legal challenge, a New York municipality may shy away from experimenting with its land use toolbox when state laws also speak to a particular issue.[78]

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[73] *Id.* at 1202.

[74] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

[75] *Wallach*, 16 N.E.3d at 1203 (Pigott, J., dissenting).

[76] *Id.* at 1203–04.

[77] Voss v. Lundvall Bros., Inc., 830 P.2d 1061, 1069 (Colo. 1992) (en banc).

[78] *Cf.* DAVID J. BARRON ET AL., DISPELLING THE MYTH OF HOME RULE 9 (2004) (describing the results of a survey in which local officials in Massachusetts stated that they do not

This chilling effect on local zoning authority undermines New York's commitment to home rule values. Of course, the New York home rule constitutional provision does not legally prevent the state from preempting local laws.[79] Yet by downplaying the overlap in legislative purpose, the Court of Appeals' opinion purports to preserve local zoning authority[80] and fails to address the ways in which its ruling in fact hampers local control. Land use is the prototypical subject of local politics.[81] Thus, the lingering uncertainty regarding modern zoning approaches hinders a municipality's ability to exercise a "core power[] of local governance"[82] by employing the most effective and innovative regulatory tools available. Going forward, a more realistic assessment of the potential for conflict between innovative zoning and state legislation would allow courts to more precisely define a statute's preemptive scope, freeing a municipality to exercise home rule authority within those bounds.

Courts in other states, too, should be mindful of the breadth of land use goals and zoning techniques when considering preemption challenges to local fracking regulation. The legal issue has gained national attention in recent years as more and more localities try to regulate fracking, forcing future litigation on the subject.[83] The outcome of each case will depend on an individual state's oil and gas laws, home rule tradition, and precedent regarding preemption. These cases will give courts the opportunity to reflect on the scope of local authority over land use in light of contemporary practice.

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rely on the home rule authority when they wish to act in part because "the shadow of preemption . . . produces a great deal of uncertainty about a city or town's ability to exercise home rule authority").

[79] *See* N.Y. CONST. art. IX, § 2(c)(i) ("[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . ."); *see also* John R. Nolon, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497, 505–19 (1993).

[80] *See Wallach*, 16 N.E.3d at 1197, 1199.

[81] *See* DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 191 (N.Y. 2001) ("One of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances."); *see also* PAUL E. PETERSON, CITY LIMITS 25 (1981) ("Urban politics is above all the politics of land use . . . .").

[82] *Wallach*, 16 N.E.3d at 1194.

[83] *See* Jack Healy, *Heavyweight Response to Local Fracking Bans*, N.Y. TIMES, Jan. 3, 2015, http://www.nytimes.com/2015/01/04/us/heavyweight-response-to-local-fracking-bans.html [http://perma.cc/2DHQ-RQT6]; *Local Actions Against Fracking*, FOOD & WATER WATCH, http://www.foodandwaterwatch.org/water/fracking/anti-fracking-map/local-action-documents (last visited Feb. 1, 2015) [http://perma.cc/7YXH-N4V2] (cataloging local regulations of fracking).