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LEGAL TOOLS FOR LOCAL CONTROL OF OIL AND GAS DEVELOPMENT:
SUCSESSES, CHALLENGES, AND OPPORTUNITIES – FOCUSING ON SELECT
EASTERN AND WESTERN U.S. STATES WITH CURRENT AND POTENTIAL OIL/GAS
DEVELOPMENT

By

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Professional Paper

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ABSTRACT

Ostermayer, Gabrielle, M.S., December 2015

Environmental Studies

Legal Tools for Local Control of Oil and Gas Development: Successes, Challenges, and Opportunities – Focusing on Select Eastern and Western U.S. States with Current and Potential Oil/Gas Development

Chairperson: Dr. Vicki Watson

In response to the rise in unconventional oil and gas drilling and hydraulic fracturing, coupled with concerns over local environmental, social, and health impacts, and weak state regulatory oversight, many communities have chosen to assert zoning or regulatory control over oil and gas development. However, the legal framework that enables and constrains local government powers varies by state, based on diverse statutory and constitutional language as well as the preemption of local control by state agency regulations governing industry development. Through a series of case studies, this article identifies successful, legally defensible strategies for local control of oil and gas development as well as the legal constraints placed on local initiatives in select eastern and western states that have experienced oil or natural gas shale development and hydraulic fracturing within the last decade.

For each state examined (New York, Pennsylvania, Colorado, New Mexico, and Montana), this article describes the state oil and gas legislation that constrains local government action, relevant constitutional provisions that enable local government action, relevant zoning laws that support local government action, and how local government authority is delegated and interpreted. Overall, this article concludes that zoning authority, although still subject to conflict preemption, is a more effective and widely used source of authority than home rule charters. The success of zoning ordinances that assert control over mineral development can vary based on the content and intent of the ordinance, the comprehensiveness of the state's regulatory scheme, and the scope of local authority that can be asserted. The most significant factor, however, is the extent to which local zoning authority is liberally construed and the stated purpose of a state's oil and gas legislation. These two factors influence whether or not a conflict preemption will arise that invalidates a local ordinance.

Of the five states examined, New York is the only state in which local governments have broadly construed land use planning authority that allows them to completely prohibit any form of mineral development. Pennsylvania municipalities can also control where drilling may occur, but cannot completely prohibit mineral development, regardless of home rule authority and despite citizens' constitutional right to a clean environment. In Montana, which has a similar constitutional right to a clean environment, only county governments are explicitly restricted from prohibiting mineral development, while municipal and citizen-initiated zoning districts have the potential to limit or prohibit mineral development. In New Mexico, since state regulations do not occupy the entire field of regulation or address local impacts, county and city governments have the authority to fill that gap with local ordinances, as long as the ordinances do not conflict with state law. In most states, such as New Mexico, Colorado, and Pennsylvania, local ordinances are in conflict with state law if they prohibit an activity that state law permits, regardless of home rule status.

In addition to discussing how home rule authority does not immunize local government action from state preemption, this article also proposes the importance of a state constitutional guarantee to a clean environment in protecting local government land use planning authority from state encroachment.

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This professional paper would not have reached its final stage of completion and refinement without the moral and academic support of numerous people. In terms of academic support, I owe a great deal of gratitude to my Committee (Law Professor Michelle Bryan and Geography Professor David Shively) and my Committee Chair and Advisor (Environmental Studies Professor Vicki Watson) for accommodating and adjusting to my ever-evolving timetable for completion. Their positive feedback, support, and research suggestions throughout the proposal, drafting, and revision phases of this paper were both academically helpful and encouraging. I would also like to thank the Rocky Mountain Land Use Institute at the University of Denver for providing live stream access to their "Local Responses to Fracking" Workshop on March 11, 2015. Being able to remotely attend that day-long workshop was an important step in my understanding of Colorado's complicated and somewhat uncertain legal framework surrounding local control over oil and gas development.

I also owe a big round of hugs to all of my Missoula (and Pacific Northwest) tango friends who cheered me on toward completion, danced with me, and unknowingly reinvigorated my spirit on a weekly and/or monthly basis. I owe the biggest hug of all to my amazing friend Morgan Vinyard, for supporting me through the ups and downs of my final semesters in graduate school.

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I. INTRODUCTION

A. Problem statement

The rise in hydraulic fracturing and horizontal drilling for unconventional oil and gas deposits since 2000 has generated a myriad of health, social, and environmental concerns and impacts in the U.S. that have been felt primarily at the local level. Documented environmental impacts of recent oil and gas shale development range from groundwater and surface water contamination to increased ozone levels and seismic activity.¹ In Pavillion, Wyoming, the EPA correlated natural gas drilling and hydraulic fracturing with groundwater contamination of dissolved methane and petroleum based compounds such as benzene, toluene, ethylbenzene, and xylenes, most likely due to inadequate well casing.² Well “blowouts”³ can contaminate nearby surface waters; methane can migrate into groundwater aquifers; and spills of hydraulic fracturing constituents can contaminate surface water and groundwater. Water depletion is also a concern in the arid West, due to the high volumes of water necessary for hydraulic fracturing.

In addition to environmental impacts, an oil and gas boom can also negatively impact local health and safety and erode community character. Oil and gas development brings increased demand for infrastructure and social services. A population influx can overwhelm public utilities and local services such as public water supply infrastructure, road maintenance, schools, housing, and law enforcement.^{4,5} A social and economic study conducted by Penn

¹ Hailey Branson-Potts, *Oklahoma Coming To Terms With Unprecedented Surge In Earthquakes*, L.A. TIMES (Jun. 17, 2014), <http://www.latimes.com/nation/la-na-oklahoma-earthquakes-20140618-story.html#page=1>

² U.S. EPA. 2011. Investigations of Groundwater Contamination near Pavillion, WY. Draft. EPA 600/R-00/000.

³ Uncontrolled releases of natural gas or oil due to loss of pressure control at wells during hydraulic fracturing and/or production phases

⁴ Jacobson, M. and T.W. Kelsey. 2011. “Impacts of Marcellus Shale Development on Municipal Governments in Susquehanna and Washington Counties, 2010.” Pennsylvania State Cooperative Extension, The Pennsylvania State University, University Park..

⁵ Raimi, D. and R.G. Newell. 2014. “Shale Public Finance: Local Government Revenues and Costs Associated with Oil and Gas Development.” Duke University Energy Initiative, Duke University, Durham, N.C.

State University researchers found an increasing trend in arrests for theft and driving-under-the-influence in counties with Marcellus shale natural gas development.⁶

Hydraulic fracturing has also increased the economic viability and oil/gas production potential of shale formations in ecologically sensitive areas as well as urban areas across the United States. Figure 1 shows the widespread extent of current and prospective oil and gas shale formations across the lower 48 states. In Colorado, for instance, oil and gas deposits in the Niobrara shale have brought energy development closer to urban and residential areas, bringing the environmental and social concerns of an oil and gas boom more prominently into the public eye. In central Montana, exploration of the Heath shale has raised concerns about the sensitivity of aquifer recharge zones that are crucial to local water supplies.⁷

The current state of hydraulic fracturing and industry regulation is another matter of concern. Hydraulic fracturing is currently exempt from numerous applicable federal regulations: the Safe Drinking Water Act (SDWA), Clean Water Act (CWA), Clean Air Act (CAA), Comprehensive Environmental Response Compensation Act (CERCLA), Resource Conservation and Recovery Act (RCRA), and Toxic Substance Control Act (TSCA).⁸ State responsibility for regulating hydraulic fracturing, oil/gas development, and wastewater disposal often fails to address the risks associated with this form of energy development, due to inadequate staff and monitoring resources, and weak regulations that are not comprehensive or precautionary.⁹

⁶ Kowalski, Lindsay and Gary Zajac. 2012. *A Preliminary Examination of Marcellus Shale Drilling Activity and Crime Trends in Pennsylvania*. University Park, PA: Justice Center for Research. Available:

<http://justicecenter.psu.edu/research/documents/MarcellusFinalReport.pdf>

⁷ Denison, C. 2013. Resident Concerned about Oil and Gas Leases. *Lewistown News – Argus*. Available:

<https://www.northernplains.org/resident-concerned-about-oil-and-gas-leases-lewistown-news-argus-july-8-2013/>.

⁸ Brady, William, J. and James P. Crannel. 2012. Hydraulic Fracturing Regulation in the United States: The Laissez-Faire Approach of the Federal Government and Varying State Regulations. *Vermont Journal Of Environmental Law*. Vol 14 Issue 1.

⁹ See Nathan Richardson, Medeline Gottlieb, Alan Krupnick, & Hannah Wiseman, *The State of Shale Gas Regulation*, Resources for the Future (2013), available at <http://www.rff.org/shalemaps>.

A boom in oil and gas activity thus generates social, environmental, and health concerns, in addition to concerns of weak regulatory oversight. Given these concerns and exemption from federal environmental regulation, many communities facing the prospect of a local oil/gas boom have chosen to be more proactive and search for methods to assert more control over oil and gas development. These efforts at local control have taken the form of zoning ordinances, community bill of rights, regulations such as conditional use permits that limit or place conditions on oil/gas activity, and local moratoria on hydraulic fracturing, by drawing on local government police powers to protect community health, safety, and welfare. Currently, there are hundreds of local bans, moratoria, and/or conditional use permit regulations that have been adopted nationally.¹⁰ Prime examples of both successful and failed local efforts that have gained national attention can be found in Pennsylvania (municipal level), New York (municipal level), and Colorado (municipal and county level). Additional local initiatives in recent years can also be found in New Mexico at the county level.

However, in the face of these local efforts, the issue of state preemption arises for oil and gas regulation and permitting. If state law preempts local ordinances, the local ordinances will be deemed invalid in court. This issue of preemption and local governing authority varies with each state's constitutional and statutory language. Limitations of local zoning authority can also vary by state, based on diverse statutory and constitutional language. Constitutional provisions for environmental protection that can be used to prevent industrial development also vary by state. In addition, how local government authority is delegated and interpreted also varies by state. In states that follow Dillon's Rule of delegating local (i.e., municipal and/or county) authority, a local government can only exercise the power that is expressly granted to it via the

¹⁰ Local Actions Against Fracking, [foodandwaterwatch.org](http://www.foodandwaterwatch.org), <http://www.foodandwaterwatch.org/water/fracking/fracking-action-center/local-action-documents/>

state constitution or the legislature. In states that follow the Home Rule model of delegating local governing authority, a local government has broad, inherent powers that have to be expressly limited by state statute or constitutional amendments. States may also use a combination of both models, applying Home Rule to certain local governments but Dillon's Rule to all others. Above all of the statutory and constitutional framework that enables local government action, there is also state oil and gas legislation, which plays a significant role in the success of local initiatives or the inevitability of state preemption. Due to all of these legal variations across states, a detailed, state-by-state look at local governance victories is necessary to determine where and how successful local control of oil and gas development can be exercised and what legal constraints these local initiatives face.

B. Objectives

This article, through a series of case studies, identifies successful, legally defensible strategies for local control of oil and gas development as well as the legal constraints placed on local initiatives, with focus on two eastern states (Pennsylvania and New York) and three western states (Colorado, New Mexico, and Montana) that have experienced an influx of oil and/or natural gas shale development and hydraulic fracturing within the last decade.

Pennsylvania, New York, and Colorado have been selected for analysis due to the established presence of a "local control movement" in response to the influx of natural gas drilling in these states' shale basins. New Mexico and Montana have been selected due to their less established presence of a "local control movement" and the presence of oil/gas shale plays that are still in the early stages of exploration and/or development. Exploration is currently underway in the San

Juan and Permian Basins in New Mexico¹¹ and the Heath/Otter formation¹², Madison formation, and western Beartooth Front of the Bakken shale in Montana. Exploration is also still underway in the Niobrara shale basin in Colorado.

In order to identify successful, legally defensible strategies in each state, this article will characterize the legal principles that govern local authority and state preemption. The underlying objectives of this paper are as follows:

1. Clarify the existing statutory and constitutional underpinnings that govern local authority and state preemption in PA, NY, CO, NM, and MT.
2. Clarify the existing statutory, constitutional, and/or judicial basis of failed and/or successful local control initiatives in these states.
3. In states facing legal uncertainty (such as CO, NM and MT, due to unsettled or lack of judicial decisions), identify the potential challenges and opportunities that may exist for future local control initiatives, based on statutory, constitutional, and/or judicial language that governs local (municipal and county) zoning and planning authority and state preemption.

Part II of this article describes the general legal framework that determines the balance of power between state and local governments. This balance of power, which affects the success of local control initiatives, is determined by constitutional provisions, zoning statutes, state oil and gas legislation, and the model the state follows for delegating and interpreting local government authority, all of which influence whether or not state preemption will occur. Part III of this article presents the five case studies, which examine the legal framework of each individual state and the resulting success and/or challenges local governments face when

¹¹ Soape, Roger. 2014. What's Next for America's Biggest Oil & Gas Producing States: New Mexico. *Oil & Gas Monitor*. <http://www.oilgasmonitor.com/whats-next-americas-biggest-oil-gas-producing-states-new-mexico/7545/>

¹² Flowers, Darryl. 2014. Is the Heath Heating up...Again? *Fairfield Sun Times*. http://www.fairfieldsuntimes.com/business/article_24b88ca2-ea83-11e3-a177-001a4bcf887a.html

asserting control over oil and gas development. Each case study includes overviews of state oil and gas legislation, the delegation of local government authority, relevant constitutional provisions that ensure a right to a clean environment, and state zoning laws, followed by in-depth discussion and analysis of successful and/or failed local control initiatives. Part IV of this article discusses the broader conclusions that span state lines. This last section examines how home rule authority gives local governments false hope when acting to control, limit, or prohibit oil and gas development, since home rule authority does not immunize local governments from state preemption. This section also echoes the reoccurring theme that the stated purpose of a state's oil and gas legislation is one of the most significant factors in determining whether or not a local ban on oil and gas development will be invalidated due to state preemption.

Throughout this analysis, emphasis has been placed on land use law and land use planning practices, such as zoning and other forms of land use and municipal ordinances, as the means of controlling or prohibiting industry development. Throughout this article, the concept of local control initiatives will be used to refer to initiatives, such as drilling/fracking moratoria, zoning revisions, conditional use permits, citizen-initiated community bill of rights referenda, and other similar land use planning and regulatory initiatives at the local (county or municipal) level.

Many communities (primarily at the municipal level but also at the county level) in states with existing and proposed oil/gas development have asserted control over the presence and manner of such development, with varying levels of success. Pennsylvania, New York, and Colorado are three such states with local-control initiatives that have been active for several years, while New Mexico and Montana are states with newly budding local control efforts underway. The overall purpose of this research is to identify the possibilities and range of

options that local governments (municipalities and counties) can and cannot take with regard to controlling, limiting, or prohibiting oil and gas development, the legal challenges these local initiatives face, and opportunities for future success.

C. Research Questions

In order to identify and characterize successful local control initiatives, each case study will answer the following research questions with regard to local initiatives and their associated court cases in each of the five states (PA, NY, CO, NM, and MT):

1. What methods/actions were legally defensible within each state? Why were those initiatives legally successful? Are there certain types of initiatives within each state that have proven or appear to be the most successful at prohibiting or limiting oil and gas development?
2. What methods/actions failed in state courts? Why were those initiatives struck down by the state courts?
3. What lessons, if any, can be transferred to other states, based on similar statutory or constitutional language?
4. In states without settled court cases (such as Colorado and Montana), what legal concerns, if any, may arise from current county or municipal actions?

D. Methods

I focused my research efforts by identifying applicable state statutes and relevant articles of each state's constitution. These were identified by reviewing seminal court cases (with issued decisions) in each state as well as law review literature focused on land use planning law.

Overall, this research was conducted through the use of primary sources (case law, state statutes, state constitutions, state oil and gas legislation), and secondary sources (law review literature).

II. LEGAL FRAMEWORK DETERMINING BALANCE OF STATE AND LOCAL POWER

When deciphering the scope of authority local governments have in the face of oil and gas development, it is necessary to understand the legal boundaries placed on local government action as well as the constitutional and statutory provisions that enable local government action. Overall, local governments are enabled to act through zoning laws, constitutional provisions that define the scope of local government authority, and constitutional provisions that guarantee a right to a clean environment. Constraints on local government authority, in the realm of mineral development, come from state legislation that governs and regulates the industry. Local government authority is also constrained and enabled by the general model of how local government authority is delegated and interpreted, through the state's application of Dillon's Rule or Home Rule. All of these factors, combined, influence whether or not state preemption will occur to invalidate a local ordinance. The following section explains how preemption can occur and how local governments derive their power.

A. HOW STATE OIL AND GAS LAWS CAN PREEMPT LOCAL ORDINANCES

Local government actions will be deemed invalid if they are preempted by state law. State preemption of local ordinances can take three forms: express, implied, and conflict (or operational). Express preemption occurs when a state law explicitly prohibits local legislation on certain subjects or activities. New York and Pennsylvania's oil and gas legislation, for instance, explicitly states that it preempts any local ordinances that regulate oil and gas operations.^{13, 14}

¹³ N.Y. Envtl. Conserv. Law § 23-0303(2). Municipalities still retain zoning authority. See New York case study for further discussion.

Implied preemption occurs when state law creates a comprehensive regulatory scheme or the legislative intent of state law indicates a dominant state interest, which leads to the conclusion that the state legislature has “occupied the field” of regulation. This form of preemption rarely occurs in the field of mineral development, since state regulations rarely are comprehensive enough to address local impacts, leaving room for concurrent jurisdiction with local governments.¹⁵

The final form of preemption, conflict preemption (sometimes referred to as operational preemption) is the form of preemption that occurs most frequently with local ordinances that attempt to assert control over oil and gas development. Conflict preemption occurs when a local government act or a provision of local legislation conflicts with the purposes or application of a state law. A conflict preemption of a local law could lead to only certain provisions of the law being invalidated, while non-conflicting provisions of the local law remain in effect. For instance, if the stated purpose of a state’s oil and gas legislation includes the promotion of oil and gas development or the minimization of oil and gas waste, a local ordinance that directly or indirectly bans oil and gas development would be seen as impeding the state’s execution of its own law and would thus be invalidated due to conflict preemption.¹⁶ For this reason, the purpose of a state’s oil and gas legislation is generally more important than how local government authority is construed, since the purpose of a state’s oil and gas legislation determines the potential for conflict preemption by state law over local ordinances.

¹⁴ 58 PA. STAT. ANN. § 601.602. Municipalities still retain zoning authority. See Pennsylvania case study for further discussion.

¹⁵ See New Mexico case study as an example where concurrent jurisdiction of state and local oil and gas regulation is possible.

¹⁶ Discussion of this issue arises in the Pennsylvania, Colorado, New Mexico, and Montana case studies.

B. MODELS OF DELEGATING LOCAL AUTHORITY – DILLON’S RULE AND HOME RULE

The U.S. Constitution is silent on the matter of local government authority, leaving discretion in the hands of the states. Local government powers are thus derived from state constitutions and state statutes, which grant various ranges of authority, and are subject to judicial interpretation. Although no two states have exactly the same regulatory model, states are generally broken into two categories of statutory construction: Dillon’s Rule states and Home Rule states.¹⁷

Dillon’s Rule is a rule of statutory construction, meaning it is a rule followed by courts when interpreting vague language in state statutes to determine the scope of local governments’ regulatory power. The term “Dillon’s Rule” comes from an 1865 state court decision by Judge John F. Dillon of Iowa, which states that local governments only have powers that are expressly granted to them by state law, making local governments subordinate to the state legislature. These local government powers are also strictly construed against local government authority and in favor of state authority.¹⁸ The constitutionality of Dillon’s Rule has also been upheld by the U.S. Supreme Court,¹⁹ making it the default for delegating state vs. local authority unless otherwise stated in state constitutions or state statutes. According to a 2012 review by the Council of State Governments, 40 states follow Dillon’s Rule as the rule of statutory construction to some degree, but do not necessarily apply Dillon’s Rule to all municipal and county governments.²⁰ For instance, according to Krane et al., only 9 states strictly apply

¹⁷ Montana is a notable exception to this categorization, since local governments are classified as having “self-governing” or “general” powers. See the Montana Case Study for more details.

¹⁸ See Discussion of *Clark v. City of Des Moines* (1865) in Richardson, J.J. Jr. 2010. Dillon’s Rule is From Mars, Home Rule is From Venus: Local Government Autonomy and the Rules of Statutory Construction. *Publius*. Vol. 41 Issue 4

¹⁹ See Discussion of *Atkins v. Kansas* (1903); *City of Trenton v. New Jersey* (1923) in Richardson, J.J. Jr. 2010. Dillon’s Rule is From Mars, Home Rule is From Venus: Local Government Autonomy and the Rules of Statutory Construction. *Publius*. Vol. 41 Issue 4.

²⁰ Council of State Governments. 2012. State Permitting Authority vs. Local Zoning – A Growing Trend for Hydraulic Fracturing Development? *Capital Research: Energy & Environment*. Available:

Dillon's Rule to all local governments, while 32 states apply Dillon's Rule to certain local governments and Home Rule to others.²¹

In response to the rise of Dillon's Rule for interpreting state statutes, a number of states adopted constitutional language that establishes what is termed a Home Rule model of interpreting local government authority. Home Rule states are states in which the scope of local government power is broadly assumed unless explicitly denied by state law; local government power is also liberally construed in favor of local government authority. According to the 2012 review by the Council of State Governments, only 10 states follow the Home Rule of statutory construction. The 10 states identified by the Council of State Governments as following the Home Rule model are Alaska, Florida, Iowa, Massachusetts, Montana, New Jersey, New Mexico, Oregon, South Carolina, and Utah. However, Montana is often erroneously identified as a Home Rule state; state law differentiates between "self-governing" powers and "general" powers of local governments, making it one of 32 states that use a combination of both Home Rule and a modified Dillon's Rule in defining the scope of local government authority.²²

C. CLARIFYING CONFUSION REGARDING THE TERM "HOME RULE"

In recent years, the concept of Home Rule has been used to mean two very different concepts: a legal doctrine (described above) and a political motto. Activists and organizers within the environmental and "local control" movement have used the term "home rule" to refer to the ability of a local government to control the trajectory and type of development within its borders. These individuals and organizations use the term "home rule" to allude to a form of

<http://knowledgecenter.csg.org/kc/content/state-permitting-authority-vs-local-zoning-growing-trend-hydraulic-fracturing-development>

²¹ Krane, Dale, et al. 2001. *Home Rule in America: A Fifty State Handbook*.

²² See Appendix A for map of Home Rule vs. Dillon's Rule in the U.S. Note that Montana's local governments with "general" powers, although they rely on explicitly delegated authority, have local government powers that are liberally construed.

local self-determination and to rally citizens around the idea of greater local land use control and a stronger voice in community decision-making.

However, in the legal context, “Home Rule” more accurately denotes *to what extent* local governments can assert their authority. In states that strictly follow the model of Home Rule – as defined by constitutional language and state statute – local governments can assert regulatory authority that has not been explicitly denied to them or limited by other state laws or regulations. In other words, local governments granted authority through the Home Rule model have broad powers that have to be explicitly limited or narrowed by state statutes or constitutional amendments. The power local governments can assert can then be referred to as “home rule” provisions. Home Rule can thus refer to the interpretation of a local government’s authority and the subsequent exercise of that local authority.

In contrast to Home Rule states, states that follow Dillon’s Rule of delegating local authority only allow local governments to exercise the power that is explicitly granted to them via the state constitution or state statutes. The amount of regulatory authority given to local governments in Dillon’s Rule states can thus vary greatly, as can the amount of authority given to local governments with a home rule charter. States that follow Dillon’s Rule may grant extensive authority to local governments and often have additional constitutional amendments that provide for some degree of local authority, often referred to as “home rule” provisions, which vary by state. Such states are often classified as following a hybrid form that includes aspects of Home Rule and Dillon’s Rule. As seen in the map in Appendix A, the combination of Home Rule and Dillon’s Rule is the dominant trend across most states. These states that use a “combination” apply Dillon’s Rule unless a local government has adopted a home rule charter.

Many grey areas also exist, since few states strictly follow the Dillon’s Rule or Home Rule construction of local government authority. For instance, many states, such as Pennsylvania and New York, fall under Dillon’s Rule for delegating authority to local governments but have enacted statutes that explicitly give municipal governments a broad range of powers, mainly concerning land use decisions, which exist irrespective of home rule status. On the contrary, a Home Rule state can place extensive restrictions on local government power through explicit constitutional or statutory language. For example, there are Home Rule states, such as Ohio, that have explicitly denied local governments the power to “place land use limitations on drilling for oil and gas” under the state’s oil and gas law.²³

D. CLARIFYING THE IMPORTANCE OF ZONING LAWS

Aside from these models of delegating local government authority (discussed above), local governments also derive explicit land use planning authority from zoning enabling statutes. The power to enact zoning and engage in land use planning is distinct from the powers that local governments derive from a “home rule” designation. This is because zoning enabling statutes apply to the broadest range of municipal (and in some states, county) governments and exist irrespective of home rule status. In the context of this discussion, therefore, zoning authority, although still subject to state preemption, is the more prominent source of authority that local governments draw on when acting to limit, prohibit, or impose conditions on oil and gas development.

²³ Lange, E. 2013. Local Control of Emerging Energy Sources: A Due Process Challenge to Disparate Treatment by States. *Case Western Law Review*. Vol. 64. Issue 2.

E. IMPORTANCE OF CONSTITUTIONAL PROVISIONS IN ENABLING AND PROTECTING LOCAL GOVERNMENT AUTHORITY

The ability of a local government to adopt a home rule charter often derives from a “home rule” provision in a state’s constitution.²⁴ More importantly, the ability of a local government to assert its land use planning authority as a means of protecting and maintaining a clean and healthy environment also derives from a state’s constitution, if such a provision exists.²⁵ When a state’s constitution includes an article or amendment that guarantees the right to a clean environment and that right is defined as an inherent right, the prominent legal argument that arises is one that protects local land use planning authority from legislative interference. The constitutional right to a clean environment acts as a limit on government authority, and if the duty to enforce that right is conferred beyond the state legislature, the state legislature cannot revoke local government authority to address local environmental issues.²⁶ A constitutional right to a clean environment, as it has been demonstrated in Pennsylvania courts, can thus protect local governments from constraints that state legislatures may place on their land use planning authority.

²⁴ States (discussed in this article) with such a constitutional provision include Pennsylvania, Colorado, and New Mexico.

²⁵ Bryan, M. 2011. A "Constant and Difficult Task": Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment. *Ecology Law Quarterly*. Vol 38. The four states with a constitutional provision creating the right to a clean environment are: Pennsylvania, Illinois, Hawaii, and Montana.

²⁶ See discussion of *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 978 (Pa. 2013) (plurality opinion) in Pennsylvania case study.

III. CASE STUDIES:

GUIDES TO ASSERTING LOCAL CONTROL OVER OIL/GAS DEVELOPMENT IN SELECT STATES

A. *NEW YORK - A GUIDE TO LOCAL GOVERNANCE IN THE FACE OF UNCONVENTIONAL OIL & GAS DEVELOPMENT*

The southern portion of New York (NY) lies within the Marcellus Shale basin, which has been a significant source of natural gas since 2008. This shale is a low permeability shale that also underlies Pennsylvania, West Virginia, and eastern Ohio, and requires the use of horizontal drilling and hydraulic fracturing for well completion and production.

In mid-December 2014, New York Governor Andrew Cuomo announced a state-wide ban on hydraulic fracturing, in light of the recently finalized study by the NY Department of Health (DOH) that found potentially significant public health impacts from fracking and inconclusive scientific evidence to support the safety of the industrial practice.^{27,28} In late June 2015, the NY Department of Environmental Conservation (DEC) formalized this state-wide ban on hydraulic fracturing when it issued its Findings Statement.²⁹ This action made permanent the state-wide fracking moratorium that had been temporarily in place since December 2010, when the NYDEC began drafting hydraulic fracturing regulations and initiated an environmental

²⁷ Kaplan, T. 2014. Citing Health Risks, Cuomo Bans Fracking in New York State. *New York Times*. Available: http://www.nytimes.com/2014/12/18/nyregion/cuomo-to-ban-fracking-in-new-york-state-citing-health-risks.html?_r=0

²⁸ New York State Department of Health. 2014. A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development. Available: https://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf

²⁹ New York State Department of Environmental Conservation. 2015. New York State Officially Prohibits High-Volume Hydraulic Fracturing. Press Release. Available: <http://www.dec.ny.gov/press/102337.html>.

impact assessment on the industrial practice.³⁰ Since 2011, however, municipalities throughout southern New York, within the Marcellus Shale Basin, have passed local fracking bans that have withstood legal scrutiny and shed light on the legal framework that governs municipal powers in the state.

1. State Regulation of Oil and Gas Development

In New York, oil and gas operations are regulated by the Oil, Gas and Solution Mining Law (OGSML), contained within Article 23 of the New York's Environmental Conservation Law (ECL § 23), and overseen by the Department of Environmental Conservation (NYDEC). The OGSML includes regulations for permitting, well spacing, drilling practices, compulsory integration of oil and natural gas pools, reclamation fees, and oil and gas production on state-owned lands, with a primary emphasis on conventional oil and gas development.³¹ At the time of New York's initial hydraulic fracturing moratorium in 2010, the OGSML did not address the process of hydraulic fracturing.

In 1978, the New York legislature amended the purpose of the OGSML to its current language. Prior to 1978, the stated purpose of the OGSML was

to foster, encourage and promote the development, production and utilization of natural resources of oil and gas . . . in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had...³²

The 1978 amendments to the OGSML replaced the phrase "to foster, encourage and promote the development, production and utilization of natural resources of oil and gas . . . in such a manner

³⁰ Hoyer, S. 2010. New York Governor Pauses "fracking." *CNN*. Available: <http://www.cnn.com/2010/US/12/13/new.york.fracking.moratorium/>

³¹ N.Y. Environmental Conservation Law § 23 (Mineral Resources) Available: <http://codes.lp.findlaw.com/nycode/ENV/23>

³² former NY Conservation Law § 1

as will prevent waste" with "to regulate the development, production and utilization of natural resources of oil and gas . . . in such a manner as will prevent waste."³³ This amendment to the OGSML's legislative purpose played an important role in the recent legal arguments regarding local bans on oil and gas development, since it eliminates a legislative intent to maximize recovery and foster development of oil and gas.

Of additional importance in this analysis is Title 3 Section 3 of the OGSML. This section of the statute states that the oil and gas extraction regulatory program:

supersede[s] 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.³⁴
(Emphasis added.)

A municipality's ability to exercise authority over natural gas development has primarily hinged on how the language from this section of the statute has been interpreted in state court – what constitutes “regulation” of oil and gas.

2. Overview of Local Authority

New York is generally classified as a Dillon's Rule state, in which local powers and regulatory authority need to be explicitly given to local governments through constitutional or state law provisions. However, New York's model of defining and delegating local government authority actually resides in a unique grey area between the Dillon's Rule and Home Rule model. Although New York does not provide local governments the option to adopt home rule charters, the state grants explicit broad authority over local affairs through New York's Constitution,

³³ *re: Norse Energy Corp. USA*, No. 515227 (N.Y. App. Div. May 2, 2013), at 9.

³⁴ N.Y. Envtl. Conserv. Law § 23-0303(2)

Municipal Home Rule Law, and Statute of Local Governments.³⁵ Article IX of the New York State Constitution gives broad authority to local governments to enact local laws “for the protection, order, conduct, safety, health and well-being of persons or property therein.”³⁶ Furthermore, Article IX, section 3(c) provides that “rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.”³⁷ This requirement of liberal interpretation, which is also derived from New York’s Municipal Home Rule Law, applies to local governments’ power to enact zoning laws.³⁸

New York’s Statute of Local Governments also explicitly gives municipalities³⁹ the authority to regulate land use and establish zoning within their jurisdiction.⁴⁰ Therefore, if any law hindered a local government’s power to establish zoning regulations, it would conflict with Article IX of the state constitution as well as state statutes. The New York Court of Appeals has also made it clear that even if a state law and local law touch upon the same area, that conclusion is not sufficient for the state to claim preemption of the entire field of regulation.⁴¹ New York municipalities, therefore, have inherent broad powers created through explicit grants of authority in the state constitution and state statutes. The language in Article IX of New York’s

³⁵ NY State Department of State. 2015. Adopting Local Laws in New York State. Available: https://www.dos.ny.gov/lg/publications/Adopting_Local_Laws_in_New_York_State.pdf.

³⁶ NY Constitution Article IX, §2(c)(i), 2(c)(ii)(10).

³⁷ NY. Constitution Article IX, §3(c).

³⁸ Nolon, J.R., and Gavin, S.E. 2013. Hydrofracking : State Preemption, Local Power, and Cooperative Governance. *Case Western Reserve Law Review*. Vol 63 Issue 4.

³⁹ Within New York, the term “local government” or “municipality” will be the general term that encompasses cities, towns, and villages, which are also given the explicit power to adopt zoning, unlike counties, which are not given the authority to adopt zoning in New York. Towns often encompass rural, unincorporated lands, such as hamlets, within their jurisdiction.

⁴⁰ Statute of Local Govt. § 10(6).

⁴¹ *Jancyn Mfg. Corp. v. Suffolk County*, 71 N.Y.2d 91 (1987).

Constitution has even led some legal scholars to classify New York as a constitutional home rule state and New York municipalities as having “home rule powers.”⁴²

3. Legal Success of Local Fracking Bans – Dryden & Middlefield⁴³

Town of Dryden

In August 2011, the Town of Dryden amended its zoning ordinance to prohibit natural gas drilling, including exploration for and extraction of natural gas and/or petroleum. The ordinance also invalidated any permit issued at the state or federal level which would violate the local ordinance.⁴⁴ Anschutz Exploration Corporation, a Colorado-based natural gas drilling company with numerous natural gas leases within the town, challenged Dryden’s ordinance in court, with the argument that the language in ECL § 23-0303(2) (Title 3 Section 3 of the OGSML, quoted above) expressly preempted local zoning powers. Anschutz Exploration Corporation further claimed that the legislature only allowed local preemption with regard to local roads and laws dealing with property taxes, under the OGSML. In September 2011, the case was filed in Tompkins County and on February 21, 2012, the New York Supreme Court in Tompkins County upheld Dryden’s ban on natural gas development.^{45,46}

The court’s ruling was straightforward and based on a precedent set by the NY Court of Appeals in a 1987 case involving a mining ban within certain districts of the Town of Carroll. In

⁴² Polley, J.C. 2013. Uncertainty for the Energy Industry: A Fractured Look at Home Rule. *Energy Law Journal*. Vol. 34 Issue 1.

⁴³ The Towns of Dryden and Middlefield include rural, unincorporated lands within their jurisdiction.

⁴⁴ Notice, Town of Dryden Notice of Adoption of Amendments to Zoning Ordinance, at 1, 2 (Aug. 3, 2011). Available at <http://drydensec.org/node/27>

⁴⁵ Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458 (Sup. Ct. 2012).

⁴⁶ It is important to note the unique structure of the New York State Court system. County-level supreme courts are a division of state court that hear matters of major significance. Appeals from these courts proceed to the Appellate Division of the Supreme Court, followed by the NY Court of Appeals, which is the highest court in the state. See Johnstone, Q. 1999. New York State Courts: Their Structure, Administration and Reform Possibilities. Faculty Scholarship Series. Paper 1906.

Frew Run Gravel Prods. v. Town of Carroll, the court clarified language in the Mined Land Reclamation Law (MLRL), which is also situated within New York’s ECL § 23 and was directly comparable to the language currently at issue in the OGSML. The court pointed out that the MLRL superseded all “local laws relating to the extractive industry.”⁴⁷ The NY Court of Appeals found that the mining ban regulated the use of the land, which incidentally impacted the mining industry, but did not directly regulate it. In *Frew Run*, local laws relating to the use of land were found to be distinct from laws “relating to the extractive industry” and were therefore not superseded by the state statute.⁴⁸

In the Dryden case, the court relied on the *Frew Run* decision and declared the ECL § 23-0303(2) (OGSML) and ECL § 23-2703(2) (MLRL) to be nearly identical in that both statutes preempt local regulations “relating to” a particular industry. In upholding Dryden’s ban on natural gas development, the court ruled that local governments are not expressly preempted by ECL § 23-0303(2) from enacting land use ordinances that ban the presence of an industry because such ordinances do not relate “to the regulation of the oil, gas and solution mining industry.” Rather, such an ordinance relates to the local government’s authority to enact zoning and land use laws, which may incidentally affect the industry but do not regulate it. The court also found no implied preemption, because it found no clear legislative intent that the OGSML would preempt local zoning. Instead the legislature’s intent was to impose uniform statewide oversight and promote efficient utilization of the resource.⁴⁹ Justice Phillip Rumsey summarized the ruling as such:

Local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place, while DEC (the state

⁴⁷ ECL § 23-2703(2)

⁴⁸ *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126 (1987), at 131.

⁴⁹ *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458, 474 (Sup. Ct. 2012).

regulatory agency) regulates all technical operational matters on a consistent statewide basis in locations where operations are permitted by law.⁵⁰

The ability to enact a permanent ban on a particular type of natural resource extraction was also upheld, based on New York Court of Appeals precedent. In *Matter of Gernatt Asphalt Products, Inc. v. Town of Sardinia*, the court ruled that a municipality is not required to permit natural resource extraction “if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.”⁵¹ In addition, since the legislative intent of the OGSML no longer “promoted” oil and gas development but merely regulated it, a local ban on oil and gas development was deemed to not conflict with state law.

The only provision of the local ordinance that was found invalid and subsequently removed was the clause that invalidated state and federal permits, since that form of authority was expressly preempted by the OGSML. The OGSML, however, did not expressly preempt local zoning and the town’s zoning ordinance did not regulate natural gas production or operations; it regulated land use. Therefore, all other provisions of the zoning ordinance were upheld.⁵²

Norse Energy, which acquired Anschutz Corporation’s leases, pursued an appeal through the Appellate Court and the New York Court of Appeals, the highest court in the state, unsuccessfully arguing that the only local laws that preempt state regulations are those involving local roads and property taxes. In May 2013, the Appellate Court upheld the ruling of the lower court when it held that the Town of Dryden’s zoning ordinance could not be preempted by the

⁵⁰ *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458, 474 (Sup. Ct. 2012), at 20.

⁵¹ *Matter of Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 683 (1996) at 684.

⁵² Nolon, J.R., and Gavin, S.E. 2013. Hydrofracking : State Preemption, Local Power, and Cooperative Governance. *Case Western Reserve Law Review*. Vol 63 Issue 4.

OGSML.⁵³ The authority to enact land use regulations that prohibit oil and gas extraction was further upheld by the New York Court of Appeals in its June 2014 decision.⁵⁴

Town of Middlefield

In June 2011, the Town of Middlefield, New York amended its comprehensive plan and zoning law to prohibit heavy industry within its jurisdiction, after studying the potential impact of heavy industry on its rural and agricultural environment and water supply. Within the amended comprehensive plan and zoning law, heavy industry was broadly defined to include the “drilling of oil and gas wells”, “chemical manufacturing,” as well as “petroleum and coal processing.”⁵⁵ This zoning law was challenged by Cooperstown Holstein Corporation, a local dairy operation that had leased about 400 acres of its land for natural gas development. In September 2011, at the same time the Dryden case was filed in Tompkins County, the Middlefield case was filed within Otsego County.

On February 24, 2012, three days after the Dryden decision, the Supreme Court in Otsego County reach the same conclusion as the Tompkins County Supreme Court and upheld Middlefield’s zoning law. The court specifically found that

Neither the plain reading of the statutory language nor the history of [the OGSML] would lead this court to conclude that the phrase “this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries” was intended by the Legislature to abrogate the constitutional and statutory authority vested in local municipalities to enact legislation affecting land use.⁵⁶

⁵³ Norse Energy Corp. v. Town of Dryden, 515227 (N.Y. App. Div., May 2013)

⁵⁴ Wallach v. Town of Dryden. 16 N.E.3d 1188 (N.Y. 2014)

⁵⁵ Middlefield, N.Y., The Town of Middlefield Zoning Law, Local Law No.1, art. II, § B(8) (2011), available at http://www.middlefieldny.com/uploads/1/2/6/8/12682437/zoning_law_061411_2011_final.pdf.

⁵⁶ Cooperstown Holstein Corp. v. Town of Middlefield, 943 N.Y.S.2d 722, 730 (Sup. Ct. 2011) at 728 (quoting N.Y. Env’tl. Conserv. Law § 23-0303(2)).

As in the Dryden case, the court upheld the broad constitutional and statutory authority to control land use and enact zoning regulations, which were found to be distinct from the regulation of oil and gas operations.

4. Summary of Legal and Political Success in New York

Since the Dryden and Middlefield cases, 63 municipalities in New York have followed suit and passed local bans on natural gas development.⁵⁷ These local bans, as upheld by the New York Court of Appeals, are within the broad powers granted under Article IX of the state constitution and the Municipal Home Rule Law. If local ordinances are viewed as “relating to the regulation of” the oil and gas industry, they are preempted by the language of the OGSML. However, if local ordinances, such as zoning ordinances, are merely identifying appropriate locations – if any – where oil and gas development can occur, they are not preempted by state law due to the broadly construed authority of local governments to enact zoning. Even if a local ordinance completely bans oil and gas development, such an ordinance will not be in conflict with the OGSML, since its intent to “promote” oil and gas development was eliminated in 1978.

⁵⁷ See FracTracker. 2013. Current High Volume Horizontal Hydraulic Fracturing Drilling Bans and Moratoria in NY State. Available: <http://www.fractracker.org/maps/ny-moratoria/>.

Table 1: Overview of Local Control Initiatives in New York

City, State	Year of Ordinance	Key Provisions of Ordinance	Authority for Ordinance	Court Case(s)	Upheld or Invalidated in Court?
Dryden, NY	2011	Prohibited natural gas exploration and extraction	Article IX of the NY State Constitution; Municipal Home Rule Law	<i>Anschutz Exploration Corp. v. Town of Dryden (2012)</i> Appeals: <i>Norse Energy v. Town of Dryden (2013)</i> ; <i>Wallach v. Town of Dryden (214)</i>	Upheld
Middlefield, NY	2011	Prohibited heavy industry, including oil and gas	Article IX of the NY State Constitution; Municipal Home Rule Law	<i>Cooperstown Holstein Corp. v. Town of Middlefield (2012)</i>	Upheld

B. PENNSYLVANIA - A GUIDE TO LOCAL GOVERNANCE IN THE FACE OF UNCONVENTIONAL OIL & GAS DEVELOPMENT

Pennsylvania, which also lies within the Marcellus shale basin, has had significant natural gas development since 2008. Unlike New York, which placed a temporary moratorium on hydraulic fracturing until state regulations were developed and an environmental impact assessment conducted, Pennsylvania already had regulations in place that were applicable for both oil and gas development and hydraulic fracturing, due to the historic presence of the oil industry and traditional oil derricks in the western portion of the state. As natural gas development and hydraulic fracturing spread throughout northern, central, and southwestern Pennsylvania, however, many cities, boroughs, and townships became more and more concerned about groundwater and surfacewater contamination, lax government oversight, impacts to local infrastructure (roads), as well as social impacts to communities from a natural gas development

boom. The two main approaches local governments have taken at asserting control over this development, zoning ordinances and a Community Bill of Rights, shed light on the legal framework that authorizes and constrains municipal powers in the state.

1. State Regulation of Oil and Gas Development

The Pennsylvania Oil and Gas Act (passed in 1984 and last amended in 2012) regulates the exploration, development and production of oil and gas for both private and public mineral rights in the state and is carried out by the Pennsylvania Department of Environmental Protection (PADEP). The Act contains specific standards such as well location restrictions, site restoration requirements, casing requirements for groundwater protection, and bonding requirements, with the goal of protecting environmental and property rights. The Oil and Gas Act has four specific purposes:

- (1) Permit the optimal development of the oil and gas resources of Pennsylvania consistent with the protection of the health, safety, environment and property of the citizens of the Commonwealth.
- (2) Protect the safety of personnel and facilities employed in the exploration, development, storage and production of natural gas or oil or the mining of coal.
- (3) Protect the safety and property rights of persons residing in areas where such exploration, development, storage or production occurs.
- (4) Protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution.⁵⁸

In general, the PA Oil and Gas Act contains rules governing the operations of a well, from exploration through abandonment, including the use, management, and disposal of hydraulic

⁵⁸ 58 PA. STAT. ANN. § 601.102

fracturing fluids, as well as a well-operators' responsibilities in the event of water contamination.⁵⁹

The Act also has explicit supremacy over any other local or state laws that would regulate the same subject matter. As stated in Section 602, the Oil and Gas Act specifically supersedes “all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act,” with an exception for the Municipal Planning Code and Flood Plain Management Act.⁶⁰ A 1992 amendment to the Oil and Gas Act further clarified the language of Section 602 by adding that local ordinances cannot “contain provisions which impose conditions, requirements 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.”⁶¹ This 1992 amendment limits the scope of municipal authority under the Pennsylvania Municipal Planning Code (MPC) and has been used by the courts as clarification of the Act's preemption power, the legislature's intent, and the boundaries of local government authority regarding control of oil and gas development.⁶² Even with the 1992 amendment, however, municipalities' zoning and planning power under the MPC still expressly preempts the Oil and Gas Act, which gives municipalities a unique privilege to enact zoning ordinances that impact local oil and gas development.

⁵⁹ 58 PA. STAT. ANN. 601.101-601.607; See Discussion of PA Oil & Gas Act in Wagstaff, W.D. 2013. Fractured Pennsylvania: An Analysis of Hydraulic Fracturing, Municipal Ordinances, and the Pennsylvania Oil and Gas Act. *N.Y.U. Environmental Law Journal*. Vol. 20.

⁶⁰ 58 PA. STAT. ANN. § 601.602

⁶¹ 58 PA. STAT. ANN. § 601.602

⁶² Wagstaff, W.D. 2013. Fractured Pennsylvania: An Analysis of Hydraulic Fracturing, Municipal Ordinances, and the Pennsylvania Oil and Gas Act. *N.Y.U. Environmental Law Journal*. Vol. 20.

2. Constitutional Right to a Clean Environment

Pennsylvania is one of four states with an environmental rights provision in its constitution.⁶³ In 1971, Pennsylvania ratified an environmental rights amendment into the state Constitution through public referendum, guaranteeing “a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment” to all people. This section of the Pennsylvania Constitution also assigns the Commonwealth of Pennsylvania with the duty to conserve and maintain these public natural resources “for the benefit of all people,” “including generations to come.”⁶⁴ This environmental rights amendment is contained in Article 1 of the constitution, analogous to the U.S. Bill of Rights, making the right to a clean environment an inherent right that operates as a limit on government power.⁶⁵

3. Overview of Local Authority

Pennsylvania is generally classified as a Dillon’s Rule state, in which local powers and regulatory authority need to be explicitly given to local governments through constitutional or state law provisions. However, like many states that follow Dillon’s Rule of statutory construction, the Pennsylvania Constitution allows local governments to adopt “home rule charters” with more broadly defined powers of self-government that must explicitly be denied.

Under Article IX of the PA Constitution:

Municipalities shall have the right and power to frame and adopt home rule charters....A municipality which has a home rule charter may exercise any power or perform any

⁶³ Bryan, M. 2011. A "Constant and Difficult Task": Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment. *Ecology Law Quarterly*. Vol 38. The four states with a constitutional provision creating the right to a clean environment are: Pennsylvania, Illinois, Hawaii, and Montana.

⁶⁴ PA. CONST. Art. I, § 27.

⁶⁵ Dernbach, J. C., May, J. and Kristl, K. 2014. Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications. *Rutgers U. L. Rev.* Vol. 67, 2015; Widener Law School Legal Studies Research Paper No. 14-10. Available at SSRN: <http://ssrn.com/abstract=2412657> or <http://dx.doi.org/10.2139/ssrn.2412657>.

function not denied by the Constitution, by its home rule charter or by the General Assembly at any time.⁶⁶

Municipalities have the power to draft and amend their own charters and can exercise any power or function not explicitly denied by the state constitution, the legislature, or their own home rule charters. The interpretation of municipal powers with home rule charters is thus more within the model of Home Rule of statutory construction than Dillon's Rule. Municipalities without home rule charters can exercise authority only where specifically granted by state law. All municipalities, however, derive their basic land use planning and zoning authority through the Pennsylvania Municipal Planning Code (MPC); thus, all municipalities have land use planning and zoning authority, regardless of the adoption of a home rule charter.⁶⁷

In Pennsylvania, all land is located within a municipal boundary. Whether it be a city, borough, or township, all land is incorporated and served by a municipal government. Counties also have the authority to adopt home rule charters; but the majority of comprehensive planning occurs at the township, borough, or city level and only five counties currently have home rule charters.⁶⁸ As of January 2006, 71 jurisdictions had home rule charters, including six counties, 19 cities, 19 boroughs and 27 townships.⁶⁹

Pennsylvania's Municipal Planning Code (MPC) gives municipal planning authority to local governments, including cities, towns, townships, boroughs, and counties.⁷⁰ Of particular importance is the MPC section 10603, which authorizes local government's broad ability to establish zoning ordinances. Section 10603 states that ordinances should "give consideration to (1) the character of the municipality, (2) the needs of the citizens and (3) the suitabilities and

⁶⁶ Pa. Const. art. IX, § 2

⁶⁷ Krane, Dale, et al. 2001. *Home Rule in America: A Fifty-State Handbook*.

⁶⁸ Krane, Dale, et al. 2001. *Home Rule in America: A Fifty-State Handbook*.

⁶⁹ PennReporter. 2010. Reporter's Guide to Pennsylvania Local Government. Available: <https://pennreporter.wordpress.com/home-rule/>

⁷⁰ 53 PA. STAT. ANN. § 10107

special nature of particular parts of the municipality.”⁷¹ Although municipal zoning authority is curtailed by the Pennsylvania Oil and Gas Act, due to the 1992 amendment discussed earlier,⁷² zoning authority under the MPC still expressly preempts the Oil and Gas Act,⁷³ which gives municipalities a unique privilege to enact zoning ordinances that impact local oil and gas development, as long as they avoid regulating industrial operations. This municipal authority to control where oil and gas development occurs, however, is still subject to a requirement under the Municipal Planning Code that zoning ordinances “provide for the reasonable development of minerals.”⁷⁴

In February 2012, the state legislature also passed a law called the Marcellus Drilling Law, also known as Act 13, which both expanded and contracted local government authority when dealing with natural gas development. Prior to Act 13, Pennsylvania was the only state with mineral development that did not have a severance tax in place on resource extraction. Act 13 allowed local governments to levy impact fees on natural gas production. However, it also prohibited local ordinances from being stricter than state environmental protection standards, and required local governments to allow oil and gas development across all zones within their jurisdiction.⁷⁵ In response to this legislation, seven municipalities objected to the zoning requirements which limited local land use control and filed suit against the state in Commonwealth Court in March 2012.⁷⁶ The outcome of this case clarifies the scope and constitutionally protected source of municipal planning and zoning authority. Prior to this case,

⁷¹ 53 PA. STAT. ANN.. § 10603(a).

⁷² 58 PA. STAT. ANN § 601.602

⁷³ As discussed earlier, Section 602 of the PA Oil and Gas Act supersedes “all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act,” with an exception for the Municipal Planning Code and Flood Plain Management Act. 58 PA. STAT. ANN § 601.602

⁷⁴ M.P.C. §603(i).

⁷⁵ C.S. §§ 2301-2318 (Pa Act 13)

⁷⁶ Robinson Twp. v. Commonwealth, 52 A.3d 463, 494 (Pa. Commw. Ct. 2012)

there were also two notable District Court cases that clarified the scope of municipal zoning and regulatory authority regarding oil and gas development.

4. Limited Legal Success of Local Zoning Initiatives: Use of Zoning Ordinances to Limit Where Oil and Gas Development Can Occur But Not for Regulating Operations

Borough of Oakmont, 2009

Prior to the 2012 legislature's passage of Act 13, which eliminated the ability to exclude oil and gas development from any municipal zone, the Borough of Oakmont, Pennsylvania enacted a zoning ordinance that limited gas well sites to certain zoning districts and required conditional use permits. Huntley & Huntley, Inc., a gas well operator that was denied a conditional use permit for its well site, filed suit against the borough in 2007. The Pennsylvania Commonwealth Court found that the zoning ordinance was preempted by the Pennsylvania Oil and Gas Act because the Act already contained restrictions on well locations through the use of setback requirements.⁷⁷ However, the Pennsylvania Supreme Court reversed that ruling and created the distinction between a land use planning decision and the state's regulation of gas well operations.⁷⁸

The lease in question was located in a single-family, residential zoning district, where mineral extraction was allowed as a conditional use and required a conditional use permit. The Pennsylvania Supreme Court, in upholding the local ordinance, ruled that zoning regulated a different aspect of oil and gas development than that which was regulated by the Oil and Gas Act. The zoning ordinance regulated locations where drilling could occur rather than technical aspects of drilling, which are regulated by the Oil and Gas Act. The Supreme Court found that

⁷⁷ Huntley & Huntley, Inc. v. Borough Council of Oakmont, 929 A.2d 1252, 1253 (Pa. Commw. Ct. 2007).

⁷⁸ Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855, 862 (Pa. 2009)

§602 of the Oil and Gas Act only preempts ordinances that “impose conditions, requirements, or limitations on the same features of oil and gas operations” or that “accomplish the same purposes” as the Oil and Gas Act.⁷⁹ Section 602 of the Act preserves local zoning power; it allows local governments to determine *where* drilling activity may occur but not *how*.

The court also made a distinction between the state government and local government interests. Although governments at both the state and local level have an interest in protecting public health and safety, the local government’s main interests in oil and gas development focus on orderly development, preserving the character of residential neighborhoods, encouraging compatible uses, and protecting public safety and welfare, while the state’s main interest in oil and gas development is focused on efficient production and utilization of a resource.⁸⁰ The Pennsylvania Supreme Court acknowledged that the impact of the state and local laws could slightly overlap but the objectives of the state and local laws do not conflict; the PA Oil and Gas Act does not preempt zoning-based ordinances. Municipalities, under the zoning authority granted by the Municipal Planning Code, have the authority to determine where certain land uses are appropriate within municipal boundaries.

In addition to this central ruling, the state Supreme Court also referenced an important rule that would prohibit a total ban on oil and gas development: “Local legislation cannot permit what a state statute or regulation forbids or prohibit what state enactments allow.”⁸¹ Any local legislation that does so, such as a fracking ban, would be deemed invalid due to conflict preemption by state law.

⁷⁹ Huntley, Inc. v. Borough of Oakmont, 964 A.2d 855 (Pa. 2009) at 863-864 (quoting 58 Pa. Cons. Stat. Ann. § 601.602).

⁸⁰ Huntley, Inc. v. Borough of Oakmont, 964 A.2d 855 (Pa. 2009) (quoting Bd. of Cnty. Comm’rs v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1057 (Colo. 1992)).

⁸¹ Liverpool Township v. Stephens, 900 A.2d 1030, 1037 (Pa.Cmwltth.2006).

Salem Township, 2009

In another 2009 Pennsylvania Supreme Court case, a similar distinction was made between a permissible local ordinance that does not regulate natural gas development and an impermissible ordinance that does regulate aspects of natural gas operations. In *Range Resources Appalachia, LLC v. Salem Township*, the court was asked to determine if § 602 of the Oil and Gas Act preempted Salem Township’s zoning ordinance. The township’s zoning ordinance “require[d] a municipal permit for all drilling-related activities; regulate[d] the location, design, and construction of access roads, gas transmission lines, water treatment facilities and well heads; [...] and establishe[d] requirements for site access and restoration.”⁸² The court struck down the ordinance based on a two-part test used to determine express preemption of the PA Oil and Gas Act.

The two-part preemption test is based on the 1992 amendment to Section 602 of the Oil and Gas Act, which added that local ordinances cannot “contain provisions which impose conditions, requirements 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.”⁸³ In this case, the court found that Salem Township’s ordinance failed both parts of the test, since it regulated aspects of oil and gas development that are addressed by the Oil and Gas Act and because the ordinance duplicated the purposes of the Oil and Gas Act. The ordinance was, therefore, expressly preempted by Section 602 of the PA Oil and Gas Act. The court also found that even if express preemption did not apply, many provisions of the local ordinance would still be invalidated due to conflict preemption, because the local regulatory provisions were stricter than

⁸² *Range Resources-Appalachia, LLC v. Salem Twp.*, 964 A.2d 869 (Pa. 2009).

⁸³ 58 PA. STAT. ANN. § 601.602

state regulations. The court thus affirmed the *Huntley* decision that local governments can regulate “where” oil and gas activity occurs, but cannot assert regulatory control over “how.”

5. Unconstitutionality of Zoning Requirement in Pennsylvania’s Marcellus Drilling Law (Act 13)

With the passage of Act 13 in 2012, the Pennsylvania legislature stripped local governments of their power to decide where natural gas development could and could not occur within municipal jurisdictions. This issue, among other controversial provisions of the statute, prompted a monumental court case in the Pennsylvania Commonwealth Court, with several significant decisions also affirmed by the Pennsylvania Supreme Court. The constitutionality of Pennsylvania’s Marcellus Drilling Law, or Act 13 was challenged by Robinson Township and six other townships, two individuals, the Delaware Riverkeeper network, and a physician. The plurality decision by the Pennsylvania Supreme Court not only affirmed local government planning authority; it also strengthened the power of the Environmental Rights provision in the state’s constitution.⁸⁴

Two of the three provisions struck down by the PA Supreme Court had been passed by the legislature specifically to create express preemption of state regulations over local zoning laws. Section 3303 of the Act declared that state environmental laws “occupy the entire field” of oil and gas regulation, “to the exclusion of all local ordinances.”⁸⁵ Section 3304 required “all local ordinances regulating oil and gas operations” to “allow for the reasonable development of oil and gas resources,” in order to create uniform rules across the state.⁸⁶ The Supreme Court found these two sections unconstitutional because they violate the fundamental rights of local

⁸⁴ Robinson Twp. v. Commonwealth, 83 A.3d 901, 978 (Pa. 2013) (plurality opinion).

⁸⁵ 58 PA. CONS. STAT. ANN. §§ 3303.

⁸⁶ 58 PA. CONS. STAT. ANN. §§ 3304.

governments and their citizens (a substantive due process violation), and they violate the Environmental Rights Amendment in the state constitution.

Since the Environmental Rights Amendment is contained in Article 1 of the state constitution, it is analogous to the U.S. Bill of Rights, making the right to a clean environment an inherent right that operates as a limit on government power.⁸⁷ The Pennsylvania Supreme Court, in its plurality decision in the Act 13 case, held that the duty to act in accordance with that right extends to the state as well as local governments. Section 3303 of Act 13, which preempted all local regulation of oil and gas development, violated the environmental rights amendment in Article 1, Section 27 because the state legislature did not have the power to strip local governments of their authority and public trust duties to protect and maintain a clean environment.⁸⁸

Section 3304 specifically required municipalities to violate their own comprehensive plans, which are required as a guideline for all zoning regulations. If a municipality's comprehensive plan sought to shield residential areas from gas development, it would no longer be able to do so. According to the lower court, municipalities would be forced to enact zoning that would be incompatible with their comprehensive plans and would no longer have control over the placement of incompatible uses.⁸⁹ The plurality decision of Pennsylvania Supreme Court in 2013 went even further when it applied the environmental rights provision of the state

⁸⁷ Dernbach, J. C., May, J. and Kristl, K. 2014. Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications . Rutgers U. L. Rev. Vol. 67, 2015; Widener Law School Legal Studies Research Paper No. 14-10. Available at SSRN: <http://ssrn.com/abstract=2412657> or <http://dx.doi.org/10.2139/ssrn.2412657>

⁸⁸ Robinson Twp. v. Commonwealth, 83 A.3d 901, (Pa. 2013) (plurality opinion).

⁸⁹ Robinson Twp. v. Commonwealth, 52 A.3d 463, 494 (Pa. Commw. Ct. 2012), *aff'd in part, rev'd in part*, 83 A.3d 901 (Pa. 2013).

constitution in affirming the unconstitutionality of Section 3303 and 3304, which stripped local governments of their authority and duty to protect and maintain a clean environment.⁹⁰

This Supreme Court case was the first in the state to use Article 1, Section 27 (the environmental rights amendment) of the state constitution to justify ruling a state statute unconstitutional.⁹¹ This decision represents not only a victory in the court's clarification of Article 1, Section 27, it also represents a victory for municipalities because it ensures that the state legislature cannot interfere with local zoning authority involving the environment. Local zoning authority is no longer solely derived from the Pennsylvania Municipal Planning Code; it is now a duty that local governments must carry out in order to protect and preserve a clean environment. This duty as trustee of the environment is a duty that had never been fully recognized by Pennsylvania municipalities before this court decision.⁹² With this newly realized authority and duty to protect the environment for its citizens, local governments recently began making more use of Community Bill of Rights ordinances that ban and oil and gas development and related activity.

6. Legal Uncertainty of Community Bill of Rights Ordinance to Ban Fracking

Grant Township – Community Bill of Rights Ordinance to Ban Injection Wells

In June 2013, Grant Township adopted a Community Bill of Rights Ordinance with assistance from the Community Environmental Legal Defense Fund (CELDF). The CELDF, a Pennsylvania-based, non-profit, public interest law firm, assists communities in drafting these

⁹⁰ Robinson Twp. v. Commonwealth, 83 A.3d 901, (Pa. 2013) (plurality opinion)

⁹¹ Dernbach, J. C., May, J. and Kristl, K. 2014. Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications . Rutgers U. L. Rev. Vol. 67, 2015; Widener Law School Legal Studies Research Paper No. 14-10.

⁹² Id.

ordinances to prohibit unwanted development, such as that of the oil and gas industry.⁹³ Grant Township's Ordinance declared citizens' right to self-government, prohibited any corporation or government from "engaging in the depositing of waste from oil and gas extraction" and invalidated any permit or license issued by any state or federal agency that violated the prohibition. The ordinance claimed supremacy over state laws and any rules adopted by state agencies; and violators of the ordinance would be unable to claim the legal rights, privileges, and protections as 'persons.' It was soon challenged by Pennsylvania General Energy Corp (PGE), which had operated a gas well in Grant Township beginning in 1997, as it initiated the process in May 2013 for obtaining the necessary EPA and PADEP permits to convert the well to an underground injection well for the injection and disposal of brine and flowback/produced fluids. PGE received the necessary federal permit in March 2014 and was awaiting approval for the PADEP permit. PGE filed suit against Grant Township in U.S. District Court in the Western District of Pennsylvania because the Community Bill of Rights Ordinance precluded it from operating its federally permitted injection well.

In October 2015, the U.S. District Court found Grant Township's Community Bill of Rights Ordinance to be invalid due to violation and preemption of state laws.⁹⁴ In reaching a decision, the court looked first at state laws, before determining if constitutionality needed to be addressed. The court found that the major provisions of the ordinance violated Pennsylvania's Second Class Township Code and Limited Liability Companies Law, making a decision on unconstitutionality irrelevant. The ordinance's provision that stripped corporations of their rights as persons was deemed invalid due to preemption by Pennsylvania's Limited Liability

⁹³ CELDF's legal assistance and grassroots organizing work to support local self-government began in Pennsylvania in 1999, but, since 2013, their efforts have spread to other states such as New Mexico, New Hampshire, and Oregon. See <http://celdf.org/about/>.

⁹⁴ Pennsylvania General Energy Co., L.L.C. v. Grant Township, No. 14-cv-209 (W.D. Pa., 2015).

Companies Law. The ordinance's prohibition of underground waste injection specifically violated Pennsylvania's Second Class Township Code, which is a state code that applies to townships without zoning. Because Grant Township did not have zoning, it could not claim to be acting under authority granted by the Municipal Planning Code; and, because it did not have a municipal charter, its authority was restricted to the express powers given to it by the Second Class Township Code. The Second Class Township Code does not authorize the regulation of underground injection wells; that provision of the ordinance was thus deemed invalid and unenforceable.⁹⁵

Another notable reason used to invalidate the ordinance is of special significance to all Pennsylvania municipalities, even those that attempt to ban natural gas development and related activity through the use of zoning ordinances. The court declared that Grant Township's ordinance was also invalid on the grounds that it was exclusionary⁹⁶ and cited a provision of the Municipal Planning Code. Even though Grant Township's ordinance was not a zoning ordinance and was not adopted under the authority of the MPC, the court cited the requirement that "zoning ordinances shall provide for the reasonable development of minerals in each municipality."⁹⁷ Zoning ordinances cannot completely exclude the broad category of mineral development within a municipality.

Even if Grant Township did have zoning, the requirement for allowing the "reasonable development of minerals" would still apply. In addition, even if Grant Township had a home rule charter, the established precedent brought up in the *Oakmont* case that "local legislation

⁹⁵ Pennsylvania General Energy Co., L.L.C. v. Grant Township, No. 14-cv-209 (W.D. Pa., 2015).

⁹⁶ Exclusionary zoning prohibits a broad category of development, such as low income housing or, in this case, a broad category of industrial development.

⁹⁷ 53 P.S. § 10603(i)

cannot permit what a state statute or regulation forbids or prohibit what state enactments allow”⁹⁸ would still prevent the township from prohibiting injection wells. A local ordinance that bans mineral development and related activities, such as hydraulic fracturing and waste disposal – whether it be through a community bill of rights or a zoning ordinance – will not be able to escape preemption by state law.

Pittsburgh’s Community Bill of Rights Ordinance & Others Remain Unchallenged

The common language in Community Bill of Rights Ordinances, as promoted by the CELDF, strips corporations of personhood and claims supremacy over state and federal regulations, which makes these ordinances bound to fail in court. Despite this, many of these ordinances with language similar to Grant Township’s Ordinance have not been challenged in court. Over a dozen of these Ordinances have been enacted in municipalities across Pennsylvania.⁹⁹ The home rule city of Pittsburgh, which adopted the first Community Bill of Rights Ordinance that banned oil and gas activity in November 2010,¹⁰⁰ is among the Pennsylvania municipalities that have not been challenged in court. The fact that many of these Community Bill of Rights have not been challenged, however, does not necessarily prove the constitutionality or validity of the ordinances. These communities most likely do not lie within prime regions for natural gas exploration or development.

⁹⁸ Liverpool Township v. Stephens, 900 A.2d 1030, 1037 (Pa.Cmwlt.2006).

⁹⁹ Baldwin Hills Oil Watch. 2015. Municipality Fracking Bans. Available: <http://baldwinhillsoilwatch.org/action-center/municipality-fracking-bans/>

¹⁰⁰ See PITTSBURGH ORDINANCES No. 37-2010 (eff. Dec. 1, 2010). See Home Rule Charter of the City of Pittsburgh, Pennsylvania. Available: <http://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/563d19b2e4b03259f234a630/144684485014/Marcellus+Shale+Ord+Pittsburgh.pdf>

7. Summary and Analysis of Legal Success & Failure in Pennsylvania

The Pennsylvania Supreme Court followed a similar line of reasoning that the courts of New York did when it upheld municipal zoning authority. In Pennsylvania, however, this decision was based not on a lack of express preemption by state oil and gas regulations but on the express preemption of the Municipal Planning Code over the Pennsylvania Oil and Gas Act. Like municipalities in New York, local governments in Pennsylvania can control where drilling may occur, often done through conditional use permits, but are expressly preempted from regulating technical aspects of drilling operations. Unlike New York, however, Pennsylvania municipalities are required to allow for the “reasonable development of minerals” within their jurisdiction.¹⁰¹ Although no court case has explicitly addressed the power of a home rule municipality in Pennsylvania, the zoning requirement to allow for the “reasonable development of minerals” would still apply to such a municipality. Pennsylvania municipalities, regardless of home rule status cannot prohibit what state law allows. Zoning cannot completely prohibit mineral development, even when drawing on local governments’ power and duty to uphold citizens’ constitutional right to a clean environment.

This newly clarified constitutional right to a clean environment may have future implications for the constitutionality of state laws and local ordinances. Article I, Section 27 of the Pennsylvania Constitution (the Environmental Rights Amendment) was used to declare the several key revisions of PA’s Oil and Gas Act unconstitutional, which affirmed municipal zoning authority, but it remains to be seen if the provision in the Municipal Planning Code that requires the “reasonable development of minerals” will reach a similar fate, given municipalities’ duty to preserve and protect the environment.¹⁰² Until Pennsylvanians’ right to a clean environment is

¹⁰¹ 53 PA. CONS. STAT. § 10603(i)

¹⁰² See 53 PA. CONS. STAT. §§ 10603-10604

given supremacy over the “optimal development of the oil and gas resources of Pennsylvania,”¹⁰³ it is unlikely that municipalities will gain the right to completely ban oil and gas development in their jurisdictions, even with home rule charters.

Table 2: Overview of Local Control Initiatives in Pennsylvania

City, State	Year of Ordinance	Key Provisions of Ordinance	Authority Used for Ordinance	Court Case(s)	Upheld or Invalidated in Court?	If Invalidated, Why?
Borough of Oakmont, PA	2005	Limited natural gas wells to certain districts and required conditional use permits	PA Municipal Planning Code (MPC)	<i>Huntley & Huntley, Inc. v. Borough Council of Oakmont (2009)</i>	Upheld	
Salem Township, PA	2005	Required permits for drilling activities; regulated technical aspects of drilling pad development and drilling operations	PA Municipal Planning Code (MPC)	<i>Range Resources Appalachia, LLC v. Salem Township (2009)</i>	Invalidated	Expressly preempted by § 602 of the PA Oil and Gas Act
Pittsburgh, PA	2010	Community Bill of Rights Ordinance banned oil and gas activity within city limits; stripped corporations of personhood; invalidated conflicting state and federal permits	City Home Rule Charter	Not challenged		
Grant Township, PA	2014	Community Bill of Rights Ordinance prohibited injection wells for oil/gas waste disposal; stripped corporation of personhood; invalidated conflicting state and federal permits	PA Constitution; Declaration of Independence	<i>Pennsylvania General Energy Co., LLC. v. Grant Township (2015)</i>	Invalidated	Overstepped authority provided in Second Class Township Code; violated PA Limited Liability Company Law

¹⁰³ 58 PA. STAT. ANN. § 601.102

C. COLORADO - A GUIDE TO LOCAL GOVERNANCE IN THE FACE OF UNCONVENTIONAL OIL & GAS DEVELOPMENT

Oil and gas development in Colorado has accelerated since 2007, as energy prices rose and the use of horizontal drilling and hydraulic fracturing proliferated. The Niobrara shale formation in northeastern Colorado – particularly the Denver-Julesburg basin and the Wattenburg field – contain the majority of this recent oil and gas boom. Other basins such as the San Juan in southwestern Colorado and the Raton in the south-central part of the state contain coalbed methane (CBM); and the Piceance basin in western Colorado contains large amounts of natural gas that have been extracted with conventional drilling.¹⁰⁴

As horizontal drilling and hydraulic fracturing became more economical in the late 2000s, oil and gas drilling in the Niobrara shale has come into closer proximity with population centers, causing the development, and fracking in particular, to become a subject of intense debate.¹⁰⁵ As both county and city residents have become more concerned about the human and environmental health impacts of fracking, local governments at the county and city level have taken steps to regulate, and in some cases prohibit, this activity, often in the face of legal uncertainty. Case law dating from 1992 informs the debate on local government authority; but recent initiatives muddy the waters on the state’s legal framework and certain decisions regarding bans and moratoria have yet to be resolved in the Colorado Supreme Court.

1. State Regulation of Oil and Gas Development

Colorado regulates the development of oil and gas under the Oil and Gas Conservation Act (OGCA),¹⁰⁶ which authorizes the Colorado Oil and Gas Conservation Commission

¹⁰⁴ Weiner, C. 2014. Oil and Gas Development in Colorado. Colorado State University Extension.

¹⁰⁵ *Id.*

¹⁰⁶ Colo. Rev. Stat. § 34-60-100, et seq.

(COGCC) to implement rules and regulate oil and gas development at the state level.¹⁰⁷ The Oil and Gas Conservation Act (OGCA), enacted in 1951 and updated most recently in 2013, has multiple stated purposes: fostering responsible and efficient development and production of oil and gas; protecting public health, safety, and welfare, including protection of the environment and wildlife resources; minimizing waste in oil and gas production; and protecting the rights of owners and producers in oil and gas pools.¹⁰⁸ The purpose of the OGCA is best summarized in section 102(1)(b) of the statute, which states:

It is the intent and purpose of this article to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, and welfare, including the protection of the environment and wildlife resources...¹⁰⁹

The COGCC is specifically charged with promoting the exploration, development, and conservation of Colorado's oil and gas resources. In pursuing these goals, the Colorado Oil and Gas Conservation Commission (COGCC) regulates oil and gas operations, including drilling, producing, and plugging of wells. The Commission's rules and regulations also include exploration and production waste management; aesthetic, noise, and air quality mitigation; protection of water resources through setbacks and monitoring; liability insurance requirements; surface location assessments; setbacks from buildings and roads; protection of wildlife resources; and procedures for addressing violations.¹¹⁰ The COGCC has also developed rules that specifically focus on hydraulic fracturing, chemical disclosure,¹¹¹ and public notice requirements.¹¹²

¹⁰⁷ 2 CCR 404-1.

¹⁰⁸ COLO REV. STAT. ANN. §34-60-102(1)(a).

¹⁰⁹ COLO REV. STAT. ANN. §34-60-102(1)(b)

¹¹⁰ Discussed in Colorado Oil and Gas Conservation Commission v. City of Longmont (Colo. Dist. Ct., filed July 30, 2012)

¹¹¹ 2 Colo. Code Regs. §404-1(205A).

¹¹² 2 Colo. Code Regs. §404-1(316C).

2. Overview of Local Authority – Municipal and County Level

Colorado applies a mixture of Home Rule and Dillon’s Rule in determining the scope of local government authority, depending on the presence of a local government charter. The four main types of local governments in Colorado include home rule municipalities, statutory municipalities, home rule counties, and statutory counties. There are approximately 97 home rule municipalities, which include the consolidated city-counties of Denver and Broomfield, 171 statutory municipalities, 60 statutory counties, and 2 home rule counties (Weld and Pitkin Counties).¹¹³

Home rule municipalities enjoy broad local powers drawn from the state constitution and state statutes, while statutory municipalities also retain a broad range of land use authority. Article XX, section 6 of the Colorado Constitution authorizes municipalities to enact charters and grant themselves home rule powers, which includes eminent domain, taxation, and election holding. Section 6 also grants home rule municipalities “all other powers necessary [...] for the government and administration of its *local and municipal matters*” (emphasis added) and that local ordinances passed pursuant to home rule charters and dealing with local and municipal matters supersede state law.¹¹⁴ A significant 1992 court case involving local zoning control of oil and gas development also recognized that “the exercise of zoning authority for the purpose of controlling land use within a home-rule city’s municipal borders is a matter of local concern.”¹¹⁵ Home rule counties, meanwhile, are authorized by a state statute and not the Colorado

¹¹³ Minor, J. 2012. Local Government Fracking Regulations: A Colorado Case Study. *Stanford Environmental Law Journal*. Vol 33.

¹¹⁴ COLO. CONST. art. XX, § 6.

¹¹⁵ Voss v. Lundvall Bros., 830 P.2d 1061, 1064 (Colo. 1992)

Constitution and have a much less broad grant of governing authority, but still retain police powers and zoning authority.¹¹⁶

Dillon’s Rule applies to local governments that have not adopted a home rule charter; these local governments are statutory municipalities or statutory counties. Statutory municipalities, while limited to the powers explicitly delegated to them by the state legislature, do have powers explicitly granted to them by Titles 29 and 31 of Colorado’s Revised Statutes. These powers include general police powers, zoning, and water pollution control. The Local Government Land Use Control Enabling Act of 1974 (Title 29) specifically grants all local governments, which includes home rule and statutory cities, towns, and counties, the “authority to plan for and regulate the use of land.”¹¹⁷ Statutory counties, thus, have explicit land use powers. Title 30 of Colorado’s Revised Statutes, also known as the County Planning Act, also grants statutory counties police powers, oil and gas leasing authority, and zoning authority.¹¹⁸

All four of the main types of local governments in Colorado thus have well-recognized land use planning authority.¹¹⁹ Local governments with home rule charters have an added layer of protection for their “self-government” powers. With matters of purely local concern, a home rule municipality’s regulations will preempt the state Legislature’s actions. On matters of mixed state and local concern and where there is conflict between state and local laws, however, the Legislature’s actions will preempt the local home rule government actions.¹²⁰

¹¹⁶ COLO REV. STAT. ANN. § 30-11-501 (West 2013).

¹¹⁷ COLO REV. STAT. ANN §29-20-104(1).

¹¹⁸ COLO REV. STAT. ANN. § 30-15-401 , § 30-11-302, § 30-28-111 .

¹¹⁹ Deihl, C., et al. 2014. Tug of War over Colorado’s Energy Future: State Preemption of Local Fracking Bans. *Environmental Law Reporter*, Vol. 44.

¹²⁰ Deihl, C., et al. 2014. Tug of War over Colorado’s Energy Future: State Preemption of Local Fracking Bans. *Environmental Law Reporter*, Vol. 44. See also COLO REV. STAT. ANN. § 30-15-411: No county shall adopt an ordinance that is in conflict with any state statute.

3. Overview of Colorado’s Numerous Local Control Initiatives – Recent Bans & Moratoria

As concerns about the health impacts and environmental hazards associated with hydraulic fracturing have spread, cities and counties in the Front Range of northern and central Colorado have attempted to control and/or prohibit the spread of oil and gas development through the use of land use regulations, hydraulic fracturing bans, or hydraulic fracturing moratoria. The city of Longmont started the trend of banning the industry in 2012, with the passage of a ballot initiative that banned hydraulic fracturing as well as the storage and disposal of hydraulic fracturing waste within city limits.¹²¹ Prior to this voter-approved ban, in July 2012, Longmont city council had updated its oil and gas regulations with increased setback requirements, increased water quality testing and wildlife protection requirements, and a drilling ban in existing and planned residential neighborhoods.¹²²

In November 2013, four other home rule municipalities – Boulder, Broomfield, Fort Collins, and Lafayette – followed Longmont’s fracking ban with similar ballot initiatives. Fort Collins voters approved an amendment to city ordinances that placed a moratorium on hydraulic fracturing within city limits for five years, to allow time to study the impacts of the process on property values and human health.¹²³ A voter-approved “Community Bill of Rights and Obligations” for Lafayette’s Home Rule Charter, based on the community rights model of the CELDF, banned all oil and gas extraction and related activities, including the transport of fracking wastewater for all but currently active wells within the city.¹²⁴ In the city of Boulder, voters approved an extension of an existing moratorium on oil and gas exploration for another

¹²¹ Healy, J. 2012. With Ban on Drilling Practice, Town Lands in Thick of Dispute, *N.Y. Times*.
<http://www.nytimes.com/2012/11/26/us/withban-on-fracking-colorado-town-lands-in-thick-of-dispute.html>

¹²² Colorado Oil and Gas Conservation Commission v. City of Longmont (Colo. Dist. Ct., filed July 30, 2012); Ordinance O-2012-25

¹²³ City of Fort Collins Ordinance No. 032, 2013.

¹²⁴ Colorado Oil and Gas Association v. City of Lafayette, Colorado, Case No. 2013CV031746, In the District Court, Boulder County, Colorado (Dec. 3, 2013).

five years. Voters in the incorporated city-county of Broomfield, which operates as a home rule municipality, approved a five-year moratorium on hydraulic fracturing and the disposal and storage of fracking wastes.¹²⁵ In response to these local initiatives, the Colorado Oil and Gas Association (COGA) – a nonprofit trade association with industry members – filed suit against three of these municipalities in 2013 and claimed that state law preempted local regulations in the case of Longmont’s fracking ban, Lafayette’s permanent ban on oil and gas development, and Fort Collins’s five-year moratorium. COGA also filed suit against Broomfield’s moratorium in November 2014.¹²⁶ Only the moratorium in the city of Boulder remains unchallenged in court, most likely because it is not a prime area for oil and gas development.

Meanwhile, in July 2012, the home rule municipality of Commerce City passed city-wide regulations that created a new wildlife mitigation plan, prohibited oil and gas drilling near the local national wildlife refuge and state park, and required individual agreements with operators that can include noise-mitigation, water quality control measures, and restricted hours of operations.¹²⁷ These regulations have yet to be challenged in court.

In addition, in February 2012 in Boulder County (a statutory county), the Board of County Commissioners approved a temporary moratorium on processing oil and gas permits while updates were made to the County’s Comprehensive Plan and Land Use Code.¹²⁸ Some of these policy changes went into effect in late 2012, but as of early 2015 the county moratorium

¹²⁵ See Colorado County and Municipal Law. Intermountain Oil and Gas BMP Project. http://www.oilandgasbmps.org/laws/colorado_localgovt_law.php. Last Accessed Oct. 30, 2015.

¹²⁶ Quinn, M. 2015. Judge denies Broomfield motion to dismiss COGA fracking complaint. *Broomfield Enterprise*. Available: http://www.broomfieldenterprise.com/broomfield-news/ci_27914868/judge-denies-broomfield-motion-dismiss-coga-fracking-complaint

¹²⁷ Robles, Y. 2012. *Commerce City Approves Fracking Rules*, DENVER POST. Available: http://www.denverpost.com/ci_20994400/commerce-city-approves-fracking-rules

¹²⁸ See Colorado County and Municipal Law. Intermountain Oil and Gas BMP Project. http://www.oilandgasbmps.org/laws/colorado_localgovt_law.php. Last Accessed Oct. 30, 2015.

had been extended to allow time for additional policy revisions.¹²⁹ Boulder County's temporary moratorium has also not been challenged in court, but due to COGA's legal challenge against Fort Collins's five-year moratorium, it remains unclear whether or not a temporary moratorium would withstand legal scrutiny.

4. Legal Framework Thwarts Success of Bans & Moratoria in Home Rule Municipalities

The recent cases involving the home rule municipalities of Longmont, Fort Collins, Broomfield and Lafayette all raise the same question: can municipalities ban oil and gas development or hydraulic fracturing within their jurisdictions or are the local ordinances preempted by state regulations? A close look at the decisions in these cases reveals that bans on oil and gas activity do not withstand the state's complex preemption analysis. The extent to which local governments can enact land use regulations that control the location of oil and gas development, enact stricter setbacks or control local land use aspects of development, however, remains somewhat uncertain. The legal grounds for a temporary moratorium on oil and gas development are also currently tenuous.

Longmont, Lafayette, Broomfield, and Fort Collins – Home Rule Municipalities

In all four cases, the Colorado Oil and Gas Association (COGA) claimed an express or operational preemption of the local bans and moratoria by the Colorado Oil and Gas Conservation Act (OGCA). Three of the four cases have been resolved in Colorado District Courts. Longmont's fracking ban, Lafayette's permanent ban on oil and gas development via a community rights ordinance, and Fort Collins's moratoria on fracking were all struck down in District Court, based on the Colorado Supreme Court's preemption test and established Colorado

¹²⁹ Sanchez, Kim. Regulatory Approaches in Boulder County, Colorado. Workshop Presentation. Local Responses to Fracking Workshop. March 11, 2015. *Rocky Mountain Land Use Institute*. Denver, CO.

Supreme Court rulings concerning local oil and gas development regulations and bans. The two main cases the district courts relied on were *City Commissioners of La Plata County v.*

Bowen/Edwards Assoc. Inc., 830 P.2d 1045 (Colo.1992) and *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992).

In *Bowen/Edwards*, La Plata County, a statutory county, enacted a land use ordinance that required oil and gas operations to obtain a special use permit. Even as a statutory county, La Plata County drew on the land use planning powers provided in the Local Government Land Use Control Enabling Act (Title 29) and the County Planning Act (Title 30). The Colorado Supreme Court upheld the county's land use ordinance because of the land use planning authority granted through Titles 29 and 30 and because the court found no express, implied, or operational preemption of the county's land use ordinance. Of particular importance is the fact that La Plata County's ordinance was not deemed to be an operational conflict with the state regulations because it did not impose technical conditions on drilling operations that conflict with existing state regulations. In reaching their decision, the Supreme Court did find that the efficient production of oil and gas resources requires uniform statewide regulations and is a matter of state interest that could operationally preempt a conflicting local ordinance. However, operational conflicts between local ordinances and state regulations would need to be decided on an ad-hoc – or case by case – basis.¹³⁰ Most importantly, the Court declared that the

state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.¹³¹

¹³⁰ *Bowen/Edwards Assoc. Inc.*, 830 P.2d 1045 (Colo.1992); *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992)

¹³¹ *Bowen/Edwards Assoc. Inc.*, 830 P.2d 1045 (Colo.1992), at 1058.

Bowen/Edwards affirmed local governments' authority to enact land use regulations that target oil and gas development but did not clearly define what land use regulations would lead to an operational preemption by state law. Those decisions would need to be made on a case-by-case basis by the court.

In *Voss*, the Colorado Supreme Court struck down a land use ordinance that banned oil and gas drilling within the city of Greeley, a home rule city.¹³² The Court invalidated the ban after applying a four-part preemption test. To determine whether the matter was of purely local, state, or mixed local and state concern and determine if state regulations preempted the home rule municipality's ordinance, the court considered four factors:

(1) whether there is a need for statewide uniformity of regulation;(2) whether the municipal regulation has an extraterritorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation.¹³³

On the first three factors, the court concluded that oil and gas regulation is an area of traditional statewide concern that requires uniform statewide regulations and does have an extraterritorial impact, since oil and gas formations do not conform to municipal boundaries. On the fourth factor, the court concluded that Greeley's ban on oil and gas development is operationally preempted because it "substantially impedes" state regulations by completely prohibiting oil and gas development.¹³⁴ The COGCC is charged with "fostering the efficient development and production of oil and gas resources in a manner that prevents waste" and a local ban on oil and gas development impedes that state interest. The court added, however, that Greeley is not "prohibited from exercising any land-use authority over those areas of the city in which oil and

¹³² *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992)

¹³³ *Id.* at 1067

¹³⁴ *Id.* at 1067-68.

gas activities are occurring or are contemplated.”¹³⁵ The Colorado Supreme Court, while it struck down a complete ban on oil and gas development, affirmed the authority of home rule cities to adopt land use regulations that deal with oil and gas development and operations, as long as the local regulations can be harmonized with the state Oil and Gas Conservation Act. An operational conflict arises, however, if an oil or gas well operator cannot simultaneously comply with both laws. More specifically, the test to determine whether a conflict exists is “whether the home-rule city’s ordinance authorizes what state statute forbids or forbids what state statute authorizes.”¹³⁶

Based on the 1992 Supreme Court precedents established in *City Commissioners of La Plata County v. Bowen/Edwards Assoc. Inc.* and *Voss v. Lundvall Bros., Inc.*, Longmont’s fracking ban, Lafayette’s permanent ban on oil and gas development via a community rights ordinance, and Fort Collins’s moratoria on fracking were each invalidated as operationally preempted by the OGCA.¹³⁷ Bans and moratoria on hydraulic fracturing were considered de-facto bans on oil and gas development, which impedes state interests in promoting efficient development and production of the state’s oil and gas resources. In the *COGA v. Fort Collins* case, the court declared that the city’s five-year fracking ban conflicts with state regulation because it “forbids what state statute authorizes.”¹³⁸ In the *COGA v. Lafayette* case in particular, the district court also stated that

¹³⁵ *Id.* at 1068.

¹³⁶ *Colo. Mining Assoc. v. Bd. of County Comm’rs*, 199 P.3d 718, 731, 39 ELR 20017 (Colo. 2009). at 492.

¹³⁷ *Colorado Oil and Gas Association v. City of Fort Collins, Colorado*, Case No. 2013CV031385, In the District Court, Larimer County, Colorado (Colo. Dist. Ct. Aug. 7, 2014).

Colorado Oil and Gas Association v. City of Lafayette, Colorado, Case No. 2013CV031746, In the District Court, Boulder County, (Colo. Dist. Ct. Aug. 27, 2014).

Colorado Oil and Gas Association v. City of Longmont, Colorado, Case No. 2012CV960, In the District Court of Weld County, Colorado (Dec. 17, 2012) (transferred to Boulder County on May 11, 2013).

¹³⁸ *Colorado Oil and Gas Association v. City of Fort Collins, Colorado*, Case No. 2013CV031385, In the District Court, Larimer County, Colorado (Colo. Dist. Ct. Aug. 7, 2014), at 9.

The Court does not disagree that protection of public health, safety, and welfare and protection of the environment are legitimate matters of local concern. However, the Court does not find they are matters of *exclusively* local concern.”¹³⁹

...Lafayette is essentially asking this Court to establish a public policy that favors protection from health, safety, and environmental risks over the development of mineral resources. Whether public policy *should* be changed is a question for the legislature or a different court.¹⁴⁰

This brings to light an important point in Colorado case law: while home rule and statutory local governments have undisputed authority to regulate land use, that authority to regulate land use is not supported by a constitutional provision that asserts citizens’ right to a clean environment, as is the case in the Pennsylvania and Montana Constitutions, or a statutory command that local governments must preserve and protect the environment, as is the case in the Pennsylvania Municipal Planning Code. This lack of an environmental protection provision in the state constitution and state enabling statutes allows mineral development to trump environmental protection and also allows the state legislature to absorb more authority over environmental protection regulations through statutory amendments to the Colorado Oil and Gas Conservation Act.

5. Limited Success of Local Governments in Controlling Aspects of Oil and Gas Development

– Local Ordinances that Remain Unchallenged

Although Longmont, Fort Collins, and Lafayette’s bans and moratoria were struck down in District Court, Fort Collins and Longmont have appealed those decisions to the Colorado Supreme Court, which is expected to issue a decision in 2016. There have also been local initiatives in Colorado that have been successful to some degree. *Voss* established the ruling that

¹³⁹ *Colorado Oil and Gas Association v. City of Lafayette* (2014), at 10.

¹⁴⁰ *Id.* At 11

“in matters of mixed local and state concern, a home-rule municipal ordinance may coexist with a state statute as long as there is no conflict between the ordinance and the statute...”¹⁴¹ There are several examples of local ordinances that appear to coexist with state regulations and have not been challenged in court. These successful ordinances include the City of Greeley’s oil and gas regulations, Commerce City’s oil and gas regulations, and several city and county moratoria – such as Colorado Springs, Boulder County, and El Paso County – that remain unchallenged while oil and gas regulations are under development. La Plata County’s regulations that require oil and gas operations to acquire a special use permit have also been upheld by the CO Supreme Court as a land use regulation that did not conflict with state regulations.

After the 1992 *Voss* Supreme Court case that struck down Greeley’s oil and gas ban, the city of Greeley passed a less restrictive ordinance that has not prevented oil and gas development or been challenged in court. The ordinance, passed in 2013, requires special use permits for oil and gas operations, creates setbacks based on population density, requires mitigation for noise and visual impacts, includes wildlife mitigation planning and cumulative impact analysis.¹⁴² These land use regulations have not prevented oil and gas development from occurring and thus have not been challenged in court.

A 2006 Colorado Appellate Court case shed some light on areas of potential county regulation where such local regulations would not be automatically preempted but could operationally conflict with state regulations. These areas where a statutory county may have room to regulate include water quality, soil erosion and reclamation, wildlife and vegetation protection, livestock protection, geological hazard avoidance, protection of cultural and historic resources, preservation of recreational opportunities, and local permit duration periods, all of

¹⁴¹ *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992), at 1066.

¹⁴² Minor, J. 2012. Local Government Fracking Regulations: A Colorado Case Study. *Stanford Environmental Law Journal*. Vol 33.

which overlap with COGCC regulations.¹⁴³ However, as the recent preemption cases have made clear, what can be defined as a state interest depends on the language of the OGCA and any amendments that get made to it. Legislative amendments made in 2007 significantly expanded the COGCC's regulatory authority over water quality and wildlife protection; this broadened the state's interest in public health and the environment and could increase the likelihood of an operational conflict with a local ordinance that has a similar purpose.¹⁴⁴ In response to local control initiatives in recent years, it is becoming more obvious that the Colorado state government is aiming to expand state control of oil and gas development by making state regulations more comprehensive, which operationally undermines local governments' land use planning authority.

6. Summary of Recent Failures and Legal Uncertainty in Colorado

Statutory and home rule municipalities and counties in Colorado have the authority to enact land use regulations that impact oil and gas development. The two 1992 Colorado Supreme Court cases affirmed local governments' authority to enact land use regulations that address local impacts of oil and gas development, as long as the local ordinances do not operationally conflict with state regulations. The Colorado Supreme Court, however, has not clearly defined what land use regulations would lead to an operational preemption by state law.

Local governments in Colorado are precluded from banning an activity that state law permits and regulates. Local governments hoping to protect their citizens from potential impacts of oil and gas development and hydraulic fracturing can do so only by enacting land use regulations that do not operationally conflict with state regulations and are not so strict so as to

¹⁴³ Board of County Commissioners of Gunnison County v. BDS International, LLC, 159 P.3d 773 (Colo. App. 2006)

¹⁴⁴ Deihl, C., et al. 2014. Tug of War over Colorado's Energy Future: State Preemption of Local Fracking Bans. Environmental Law Reporter, Vol. 44.

completely prevent oil and gas development. Much like Pennsylvania municipalities cannot prohibit an activity that the state permits and must permit all industrial uses somewhere within their jurisdiction; counties and municipalities in Colorado must also play by the state rules, which promote oil and gas development. Unlike Pennsylvania, however, local governments in Colorado do not have strong constitutional language that prevents any state legislation from interfering with or limiting local governments' land use planning authority. As the Colorado legislature amends the Colorado Oil and Gas Act (COGA) to expand state authority over environmental matters, local governments will most likely see their own authority over those local matters erode even more.

Local governments in Colorado – particularly home rule municipalities – are still awaiting a clear definition of what type of local legislation would be operationally preempted by state law. For instance, the extent to which local governments can enact stricter regulations, such as stricter setback requirements, remains somewhat uncertain. This definition will hopefully be given greater clarity by the Colorado Supreme Court in its upcoming cases, which will also address the ability of a home rule city to pass a moratorium on oil and gas development.

Table 3: Overview of Local Control Initiatives in Colorado

City/ County, State	Year of Ordinance	Key Provisions of Ordinance	Authority for Ordinance	Court Case(s)	Upheld or Invalidated in Court?	If Invalidated, Why?
Greeley, CO (home rule city)	1985	Banned oil/gas development	CO Constitution, art. XX, § 6 (Home-Rule Amendment of CO Constitution) Title 29 of CO Revised Statutes	<i>Voss v. Lundvall Brothers (1992)</i>	Invalidated	Conflict/Operational Preemption: The ban operationally impeded COGCC from promoting efficient oil/gas production
La Plata County, CO (statutory county)	1988	Required oil/gas operations to obtain special use permit, with mitigation requirements	Title 29 of CO Revised Statutes (Local Government Land Use Control Enabling Act of 1974); Title 30 of CO Revised Statutes (County Planning Code)	<i>La Plata County v. Bowen/Edwards Assoc, Inc. (1992)</i>	Upheld	
Boulder County, CO (statutory county)	2012	Temporary moratorium on oil/gas permits while updating county’s Comprehensive Plan & Land Use Code; moratorium extended again in 2015	Titles 29 and 30 of CO Revised Statutes	Not challenged		
Commerce City, CO (home rule city)	2012	Prohibited oil/gas development near defined sensitive wildlife areas; required individual operator agreements with strict standards	CO Constitution, art. XX, § 6 Title 29 of CO Revised Statutes	Not challenged		
Longmont, CO (home rule city)	2012	Banned drilling in existing and planned residential areas; increased setback requirements; water quality and wildlife protection requirements (superseded by fracking ban, below)	CO Constitution, art. XX, § 6 Title 29 of CO Revised Statutes	Case dropped by plaintiff (COGCC)		

City/ County, State	Year of Ordinance	Key Provisions of Ordinance	Authority for Ordinance	Court Case(s)	Upheld or Invalidated in Court?	If Invalidated, Why?
Longmont, CO (home rule city)	2012	Ballot initiative banned hydraulic fracturing and storage of fracking waste	CO Constitution, art. XX, § 6 Title 29 of CO Revised Statutes	<i>COGA v. City of Longmont (2014)</i> ; appealed to Colorado Supreme Court (2016)	Invalidated	Ban is operationally preempted by state law
Greeley, CO (home rule city)	2013	Requires special use permits for oil/gas operations, with setback and various environmental mitigation requirements	CO Constitution, art. XX, § 6 Title 29 of CO Revised Statutes	Not challenged		
Fort Collins, CO (home rule city)	2013	5-year moratorium on hydraulic fracturing, to allow time to study impacts	CO Constitution, art. XX, § 6 Title 29 of CO Revised Statutes	<i>COGA v. City of Fort Collins (2014)</i> ; appealed to Colorado Supreme Court (2016)	Invalidated	Moratorium is operationally preempted by state law
Lafayette, CO (home rule city)	2013	Community Bill of Rights banned oil/gas development	CO Constitution, art. XX, § 6 Title 29 of CO Revised Statutes	<i>COGA v. City of Lafayette (2015)</i>	Invalidated	Ban is operationally preempted by state law
Boulder, CO (home rule city)	2013	5-year extension on existing moratorium on oil/gas exploration and drilling	CO Constitution, art. XX, § 6 Title 29 of CO Revised Statutes	Not challenged		
Broomfield, CO (city-county with home rule authority)	2013	5-year moratorium on hydraulic fracturing and disposal/storage of fracking waste	CO Constitution, art. XX, § 6 Title 29 of CO Revised Statutes	<i>COGA v. Broomfield (2014)</i>	Case pending	

D. NEW MEXICO - A GUIDE TO LOCAL GOVERNANCE IN THE FACE OF UNCONVENTIONAL OIL & GAS DEVELOPMENT

The two main shale basins in New Mexico are the San Juan in the northwestern corner of the state, and the Permian Basin in the southwestern corner. More recently, intense exploration has also begun in the Raton of northeastern New Mexico and the Gallup-Mancos oil shale formation within the San Juan Basin.¹⁴⁵ Although the local control movement is a more recent phenomenon in New Mexico, it is gaining more attention within the state, as communities become more concerned about drought and water usage for hydraulic fracturing. Communities in New Mexico, primarily at the county level, have taken one of two approaches in attempting to control oil and gas development and hydraulic fracturing. The use of Community Rights Ordinances, as promoted by the Community Environmental Legal Defense Fund (CELDF), and the use of land use regulations have yielded very different legal results, which clarifies local government (municipal and county-level) authority over the industrial development.

1. State Regulation of Oil and Gas Development

Oil and gas development in New Mexico is governed by the New Mexico Oil and Gas Act (NMOGA; N.M. Stat. § 70-2-1 through 70-2-38), which gives the New Mexico Oil Conservation Division (OCD) the authority to regulate oil and gas development, issue permits, and insure industry compliance throughout the state. Provisions of related statutes, such as the Surface Owners Protection Act (N.M. Stat § 70-12-1–10), the Air Quality Control Act (N.M. Stat. § 74-2-1–22) and the Water Quality Act (N.M. Stat. § 74-6-1–16) also apply to oil and gas development. The Surface Owners Protection Act specifically requires oil and gas operators to compensate landowners for property damage caused by oil and gas operations.

¹⁴⁵ Broadhead, R. 2014. Overview of Selected Shale Plays in New Mexico. Search and Discovery Article #10627. Available: http://www.searchanddiscovery.com/pdfz/documents/2014/10627broadhead/ndx_broadhead.pdf.html

The New Mexico Oil and Gas Act (NMOGA) contains rules for pit construction, the plugging and abandonment of wells, well casing, waste disposal, and bond requirements.¹⁴⁶ The Oil Conservation Division (OCD) also has developed rules regarding the disclosure of hydraulic fracturing fluids' ingredients and concentrations.

The New Mexico Oil and Gas Act (NMOGA) grants the Oil Conservation Division (OCD) general authority over:

all matters relating to the conservation of oil and gas, the prevention of waste of oil and gas and of potash as a result of oil and gas operations, the protection of correlative rights and the disposition of wastes resulting from oil and gas operations.¹⁴⁷

One of the state purposes of the NMOGA, therefore, is to prevent “waste of oil and gas,” with “waste” defined as both surface waste (due to leakage, fire, or seepage losses) and subsurface waste (due to well spacing or inefficient production).¹⁴⁸

Currently, no court in New Mexico has addressed whether or not the NMOGA occupies the entire field of oil and gas regulation and would preempt local land use regulations. However, a 1995 New Mexico Supreme Court case involving Santa Fe County and New Mexico's Mining Act indicates that implied preemption by the NMOGA should not be a concern.¹⁴⁹ In 1995, San Pedro Mining Corporation challenged Santa Fe County's Land Development Code because of its permit requirements for mining operations, with the argument that the state's Mining Act preempted local land use regulations. The New Mexico Supreme Court ruled that there was no express preemption in the statute. Other statutes, such as the New Mexico Pesticide Control Act, do contain an express preemption clause, which allows it to invalidate any other ordinance or

¹⁴⁶ Univ. of Colorado Law School. 2015. New Mexico County and Municipal Law. *Intermountain Oil and Gas BMP Project*. See http://www.oilandgasbmps.org/laws/new_mexico_localgovt_law.php for more details.

¹⁴⁷ NMAC 19.15.2.3

¹⁴⁸ NMSA § 70-2-3

¹⁴⁹ San Pedro Min. Corp. v. Board of County Com'rs of Santa Fe County, 1995-NMCA-002, 121 N.M. 194, 909 P.2d 754.

statute; the Mining Act does not contain such a clause. The court ruled that the Mining Act also does not occupy the field because it does not comprehensively govern all aspects of mining, thus leaving room for concurrent jurisdiction with local government regulations that address more local concerns such as traffic, noise levels, compatibility with surrounding land uses, and effect on surrounding property values.¹⁵⁰

The NMOGA, like the Mining Act, does not contain an express preemption clause and does not regulate all aspects of oil and gas development, such as local land use concerns. This enables concurrent jurisdiction with local government regulations. Provisions of a local ordinance, however, can still be invalidated due to conflict preemption. An ordinance conflicts with state law if “the ordinance permits an act the general law prohibits, or vice versa.”¹⁵¹

2. Overview of Local Authority – Municipal and County Level

New Mexico is generally classified as a Home Rule state, with broad powers conferred to local governments through a Constitutional provision and the power to adopt charters conferred to local governments through state law. The New Mexico Constitution declares, “A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter.”¹⁵² A home rule amendment in 1970 broadened the interpretation of these powers further: Article 10, section 6, subsection E of the state constitution states: “The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities.”

¹⁵⁰ San Pedro Min. Corp. v. Board of County Com'rs of Santa Fe County, 1995-NMCA-002, 121 N.M. 194, 909 P.2d 754.

¹⁵¹ See State ex rel. Coffin v. McCall, 58 N.M. 534, 273 P.2d 642, (1954). Quoted in Armstrong, J. 2013. What the Frack Can We Do? Suggestions for Local Regulation of Hydraulic Fracturing in New Mexico. *Natural Resources Journal*. Vol 53, at 377.

¹⁵² New Mexico Constitution (1991), Article 10, section 6, subsection D.

In addition to their ability to acquire home rule authority, New Mexico municipalities and counties also have broad authority to enact laws to protect public health and welfare. Under N.M. Stat. § 3-17-1, municipalities can pass ordinances "not inconsistent with the laws of New Mexico" to provide for safety, health, and prosperity of residents or provide order for the municipality. N.M. Stat. § 4-37-1 grants similar powers to counties. In addition, under N.M. Stat. § 3-18-17, any municipality or county with a floodplain must have an ordinance that establishes building and permit requirements for construction – including that of oil and gas facilities. New Mexico municipalities also have extraterritorial powers, meaning they have planning and zoning authority that extends for five miles beyond the municipality's limits into the surrounding county.¹⁵³

3. Successes and Failures of Local Regulatory Ordinances and Community Bill of Rights

Santa Fe County and Successful Land Use Ordinances

In 2008, Santa Fe County became the first county in New Mexico to use its constitutional home rule powers to protect itself from hydraulic fracturing.¹⁵⁴ Since the NMOGA does not comprehensively regulate all aspects of oil and gas development and leaves room for concurrent jurisdiction, local governments can fill in those regulatory gaps and supplement state law. Santa Fe County specifically drew on its police, zoning, and planning authority to protect public health, safety, and general welfare through the adoption of a local regulatory ordinance that is “not inconsistent with the laws of New Mexico.” The purpose of the ordinance is to “ensure that oil and gas activity is compatible with the on and off-site environment and adjacent properties and

¹⁵³ N.M. Stat. § 3-21-3

¹⁵⁴ Armstrong, J. 2013. What the Frack Can We Do? Suggestions for Local Regulation of Hydraulic Fracturing in New Mexico. *Natural Resources Journal*. Vol 53.

neighborhoods,”¹⁵⁵ which clearly emphasizes the land use planning purposes of regulatory requirements. Some of the ordinance’s complex compliance requirements include insurance to cover the cleanup costs from spills and an intensive local permitting process that supplements the current state permit requirements.¹⁵⁶ Section 11.25 of the ordinance specifically addresses fracking, which can only occur between 8:00am and 5:00pm and cannot create noise greater than eighty decibels when measured 300 feet from the site. In addition, the use of synthetic fracking fluids is prohibited; fracking operations can only use freshwater.¹⁵⁷ The ordinance also includes a variance process for applicants that are denied a permit, in order to prevent a regulatory takings claim.¹⁵⁸

The energy company that currently leases most of the available lease tracts in Santa Fe County, Tecton Energy, has stated that it has no grounds for a takings claim, even though it does not plan on pursuing development, mainly for financial reasons.¹⁵⁹ The ordinance does not prohibit an activity; it merely regulates local and environmental impacts of oil and gas development and hydraulic fracturing in a way that supplements current state regulations and also discourages development.

The success of Santa Fe County’s strict environmental regulations is due in part to special provisions in the OCD Rules that apply to Santa Fe County and New Mexico’s Galisteo Basin, which also includes portions of San Miguel and Sandoval Counties. This region has been deemed a unique ecological, archeological, and cultural region of the state and was granted

¹⁵⁵ Id. § 9.1

¹⁵⁶ SANTA FE COUNTY, N.M., ORDINANCE No. 2008-19, § 5, 6, 8, 9, 11 (2008) *available at* http://www.santafecountynm.gov/documents/ordinances/SFCOrdinance2008_19.pdf.

¹⁵⁷ Id., § 11.25.2, .3, .4

¹⁵⁸ Id. § 12

¹⁵⁹ Armstrong, J. 2013. What the Frack Can We Do? Suggestions for Local Regulation of Hydraulic Fracturing in New Mexico. *Natural Resources Journal*. Vol 53.

federal protection in 2004.¹⁶⁰ Special rules for Santa Fe County and the Galisteo Basin require oil and gas operators to comply with any applicable “local statutes, rules, or regulations or ordinances” in addition to state law.¹⁶¹ County governments within this region thus have a unique ability to enact legally defensible oil and gas regulations that can be more stringent than state regulations. For instance, the Santa Fe County ordinance can prohibit the use of synthetic chemicals in hydraulic fracturing fluid, while state law permits the use of chemical constituents. In any other region of the state, a local government regulation would not be able to prohibit an act that state law permits. In other words, most local governments in New Mexico can only enact environmental regulations that supplement but do not conflict with state regulations. Only Santa Fe County and local governments in the Galisteo Basin (including portions of San Miguel and Sandoval Counties) can enact environmental regulations that supplement and are more stringent than state regulations.

Mora County & Unsuccessful Community Bill of Rights Ordinance

A Community Rights Ordinance, often termed a Community Bill of Rights, focus on what communities’ claim to be a natural right to local self-government.¹⁶² The Pennsylvania-based, non-profit, public interest law firm, CELDF, assists communities in drafting these ordinances to prohibit unwanted development, such as that of the oil and gas industry. In May 2013, Mora County, New Mexico became the first county in the U.S. to prohibit oil and gas development and related activities within its jurisdiction using a “Community Water Rights and

¹⁶⁰ Bureau of Land Management. 2012. Galisteo Basin Archaeological Sites Protection Act: General Management Plan. U.S. Department of the Interior. Taos, NM. Available: http://www.blm.gov/style/medialib/blm/nm/field_offices/taos/taos_planning/galisteo_basin.Par.59140.File.dat/GBASPA_Mgmt_Plan_12.2012.pdf.

¹⁶¹ 19.15.39.9 NMAC (as amended through 05/01/2013)

¹⁶² Community Environmental Legal Defense Fund. <http://celdf.org/about/>

Local Self-Government Ordinance” drafted by the CELDF. In November 2013, the Independent Petroleum Association of New Mexico and several landowners filed a lawsuit against the county in U.S. District Court, claiming that the ban was unconstitutional and preempted by state law.¹⁶³ In January 2014, Shell Western E&P Inc. (SWEPI), a subsidiary of Royal Dutch Shell PLC, challenged the ban in a similar lawsuit it filed in federal district court.¹⁶⁴ Both cases were settled in January 2015 after the U.S. District Court struck down Mora County’s Ordinance.

The court invalidated the ordinance on the grounds that it violated the Supremacy Clause of the U.S. Constitution and the New Mexico Oil and Gas Act. The ordinance stripped corporations of their constitutional protections as persons and invalidated state and federal laws that conflicted with the county ordinance. These provisions of the ordinance led to the court decision that the ordinance violated the Supremacy Clause of the Sixth Amendment of the U.S. Constitution, which establishes federal law as the “supreme Law of the Land.” The NMOGA also preempted Mora County’s ban on oil and gas development and fracking, not because of express language in the NMOGA, but because the state’s permitting system allowed for the extraction of oil and gas. Mora County’s ordinance was in conflict with state law because it prohibited an activity that state law permits. The court declared that “a county cannot outright ban an activity that is highly regulated by that state and of which that state impliedly encourages.”¹⁶⁵ The court also found that Mora County lacked the authority to enforce zoning ordinances on state lands, since local zoning ordinances only apply to privately owned land.

¹⁶³ *Vermillion, v. Mora County*, New Mexico, No. 1:13-cv-01095 (D. N.M. filed Nov. 13, 2013)

¹⁶⁴ *SWEPI, LP v. Mora County, New Mexico*, 81 F.Supp.3d 1075, 1171-72 (D.N.M. Jan. 19, 2015)

¹⁶⁵ *Id.* at 101.

4. Summary of Success and Legal Constraints in New Mexico

Municipal and county governments in New Mexico have the authority to enact land use ordinances that regulate local aspects of oil and gas development. No express language in state law preempts these local regulations. In addition, because the NMOGA does not provide a comprehensive regulatory scheme that includes local impacts, local governments can fill in that gap with local regulations. This is in stark contrast to the regulatory framework that exists in Pennsylvania and New York, where local governments can only control *where* oil and gas development occurs and cannot assert any authority over technical aspects of operations or development. In New Mexico, however, unless the local government resides in Santa Fe County or the Galisteo Basin, the local regulations will be subject to a conflict preemption if they are stricter than state regulations or prohibit an activity that state law permits. In addition, since the NMOGA contains the stated purpose of “prevent[ing] the waste of oil and gas,” an outright ban on oil and gas development could be viewed as operationally impeding state law. For these reasons, any ban on oil and gas development, even in a home rule municipality or county or enacted through a Community Bill or Rights Ordinance, would not survive in court. A county or municipality’s best chance of controlling where and how oil and gas development occurs is through local environmental regulations that fill in the regulatory gaps that are not addressed by the NMOGA.

Table 4: Overview of Local Control Initiatives in New Mexico

City/County, State	Year of Ordinance	Key Provisions of Ordinance	Authority for Ordinance	Court Case(s)	Upheld or Invalidated in Court?	If Invalidated, Why?
Santa Fe County, NM	2008	Strict environmental regulations on oil/gas activity and hydraulic fracturing, supplement state regulations	Special Provisions in OCD Rules: 19.15.39.9 NMAC	Not challenged		
Mora County, NM	2013	Community Bill of Rights Ordinance banned oil/gas development and related activities; invalidated conflicting state & federal laws; stripped corporation of personhood	Declaration of Independence; Article 2 of NM Constitution; Mora County Comprehensive Land Use Plan;	<i>Vermillion, v. Mora County, New Mexico</i> (2015); <i>SWEPI, LP v. Mora County, New Mexico</i> (2015)	Invalidated	Violated Supremacy Clause of the U.S. Constitution and the NM Oil and Gas Act

E. MONTANA - A GUIDE TO LOCAL GOVERNANCE IN THE FACE OF UNCONVENTIONAL OIL & GAS DEVELOPMENT

Montana resource extraction dates back to the late 1800s, primarily in the form of coal and metal mining, with short-lived oil booms occurring in eastern Montana in the 1950s and 70s. The most recent boom in oil and gas production peaked in 2006 in the Bakken Formation of eastern Montana and western North Dakota, with the rise of horizontal drilling and hydraulic fracturing. More recently, oil and gas exploration has begun in the Heath/Otter formation, Madison formation, and western Beartooth Front of the Bakken shale in Montana, with local residents a bit more hesitant than in the past to accept the unfettered development of these resources and more concerned about environmental impacts of hydraulic fracturing and the development in general.^{166,167} Groups of local citizens are making their voices and concerns

¹⁶⁶ See public concerns regarding contamination susceptibility of Madison Aquifer in: Montana Dept of Natural Resources and Conservation. 2013. Lower Missouri River Basic Water Resources Issues Scoping Report. Prepared by Milton Mediation and Facilitation for Montana Water Supply Initiative (MWSI). Available:

heard, and, with the help of Montana non-profit organizations, have begun using unique aspects of Montana's zoning enabling statutes with varying degrees of success.

1. State Regulation of Oil and Gas Development

Oil and gas development in Montana is governed by statutory provisions in Title 82, Chapters 10 and 11 (Montana Oil and Gas Conservation Act) of the Montana Code and by the rules administered through the Montana Board of Oil and Gas Conservation (Administrative Rules of Montana, Title 36, Chapter 22).¹⁶⁸ The Montana Board of Oil and Gas Conservation (MBOGC) implements Montana oil and gas regulations, which serves three primary purposes:

(1) to prevent waste of oil & gas resources, (2) to conserve oil & gas by encouraging maximum efficient recovery of the resource, and (3) to protect the correlative rights of the mineral owners, i.e., the right of each owner to recover its fair share of the oil & gas underlying its lands.¹⁶⁹

Provisions of the state statute ensure landowner compensation and operator liability,¹⁷⁰ prohibit pollution of any state waters,¹⁷¹ and prohibit waste of oil and gas.¹⁷² The MBOGC's rules specifically address permit fees, bonding requirements, seismic exploration requirements, well plugging and abandonment, public notice requirements, well spacing, waste disposal, surface restoration, blowout prevention requirements, drilling and production guidelines, the temporary use of earthen ponds for waste water, requirements for injection wells, and reporting

http://dnrc.mt.gov/divisions/water/management/docs/state-water-plan/lower-missouri/scoping_report-lower-missouri.pdf

¹⁶⁷ Northern Plains Resource Council. 2015. Beartooth Front. Available:

<https://www.northernplains.org/issues/beartooth-front/>

¹⁶⁸ ARM 36.22. Oil and Gas Conservation. Available:

<http://www.mtrules.org/gateway/ChapterHome.asp?Chapter=36.22>

¹⁶⁹ Montana Board of Oil and Gas. Overview. Available: <http://bogc.dnrc.mt.gov/boardsummaries.asp>. Last visited Dec. 30, 2015.

¹⁷⁰ Mont. Code Ann. (MCA) § 85-10-505

¹⁷¹ Mont. Code Ann. (MCA) § 82-1-127

¹⁷² MCA § 82-1-121

requirements for production and injection well activity. Of noteworthy significance in these regulations is a lack of setback requirements, such as minimum distances from buildings and water resources.

Other state regulations that apply to oil and gas development include emission control requirements under Montana's Air Quality Act¹⁷³ and stormwater and pollutant discharge permit requirements under Montana's Water Quality Act.¹⁷⁴

2. Constitutional Right to a Clean Environment

Montana's environmental regulations regarding oil and gas development, such as air quality and water quality regulations, have been established to protect the environmental rights afforded to residents of the state by the Montana Constitution. Montana's Constitution, adopted in 1972, contains two separate clauses that create citizens' right to a clean environment. Article II, Section 3 states that all persons have inalienable rights, the first of which is a "right to a clean and healthful environment." Article IX, Section 1 declares "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." This duty is especially conferred on the Montana legislature:

The legislature shall provide for the administration and enforcement of this duty. The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.¹⁷⁵

All citizens have a right to a clean and healthful environment, and the legislature, along with citizens of the state, have a responsibility to ensure that right for present and future generations. This constitutional provision has only been applied in limited instances in Montana

¹⁷³ ARM 17.8.1710, .1711

¹⁷⁴ ARM 17.30

¹⁷⁵ Montana Constitution, Article IX, Section 1

courts, but its application is of particular importance when discussing local government police powers and land use planning authority, especially in relation to oil and gas recovery.

3. Overview of Local Authority – Municipal and County Level

Montana tends to be classified as a Home Rule state; however, the term “home rule” is not used anywhere in the state constitution or in any state statutes.¹⁷⁶ Local governments are classified as having “self-government powers” or “general powers,” with “self-government” powers often compared to the Home Rule model. The 1972 Montana Constitution made it possible for both counties and municipalities to acquire broad self-governing powers via voter approval.¹⁷⁷ A local government that has adopted a self-government charter “may exercise any power not prohibited by this constitution, law, or charter.”¹⁷⁸ The implementing statutes also define self-governing powers as the authority to “provide any services or perform any functions not expressly prohibited by the Montana Constitution, state law or its charter;” and courts are required to liberally construe the self-governing powers of local units.¹⁷⁹ A local government that has not adopted a self-government charter is considered to only have “general powers,” meaning it can perform duties that are expressly or impliedly granted by the state legislature. Unlike the Dillon’s Rule model, however, these “general powers” are liberally construed in favor of local government authority.

In many ways, the language enabling Montana’s self-governing authority mirrors the liberally construed authority granted to home rule municipalities in New York. However, unlike New York, self-governing local governments are explicitly limited from exercising a broad range

¹⁷⁶ Krane, Dale, et al. 2001. *Home Rule in America: A Fifty-State Handbook*.

¹⁷⁷ See also Montana Code Annotated (MCA) §7-1-101 (2013)

¹⁷⁸ Montana Constitution, Article XI, Section 6

¹⁷⁹ Montana Code Annotated (MCA) §7-1-106 (2013)

of authority. Montana Code Annotated, §7-1-111 through 114 specifies what powers are legislatively prohibited, require explicit legislative grants of authority, or require consistency with state regulations. Although the regulation of mineral development is not explicitly included in Title 7's (Local Government) list of prohibited powers, §7-1-113 states that

(1) A local government with self-government powers is prohibited from the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control.

(2) The exercise of a power is inconsistent with state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation.¹⁸⁰

In other words, local governments cannot enact regulations that are inconsistent with state regulations, which include being less stringent than state regulations. City and county governments with self-government powers are, therefore, not prohibited from enacting local regulations that are *more* stringent than state regulations. However, additional restrictions are placed on county governments that enact zoning, regardless of whether they have self-governing or general powers.

Zoning in Montana takes one of three forms: municipal zoning, county-wide zoning, and citizen-initiated county zoning. In general, municipal and county zoning is authorized for “the purpose of promoting the public health, safety, morals, or the general welfare of the community” and “encourag[e] the most appropriate use of land throughout the jurisdictional area.”¹⁸¹ Citizen-initiated zoning, sometimes referred to as Part 1 County zoning, is a form of zoning that is unique to Montana and typically occurs within unincorporated county land. A citizen-initiated zoning district can be created by a “petition of 60% of the affected real property owners in the

¹⁸⁰ MCA § 7-1-114

¹⁸¹ MCA § 76-2-201, -203 (County); §76-2-301, -304 (Municipal)

proposed district” to the board of county commissioners.¹⁸² This type of zoning district is also subject to citizen disapproval: “If real property owners representing 50% of the titled property ownership in the district protest the establishment of the district within 30 days of its creation, the board of county commissioners may not create the district.”¹⁸³

Of the three forms of zoning in Montana, only county-wide zoning, sometimes referred to as Part 2 County zoning, has explicit restrictions placed on it that constrains it from limiting natural resource and mineral development. County governments enacting county-wide zoning cannot adopt a resolution or rule that “prevent[s] the complete use, development, or recovery of any mineral, forest, or agricultural resources by the owner of any mineral, forest, or agricultural resource.”¹⁸⁴ A county government adopting county wide-zoning, therefore, cannot adopt local regulations that are inconsistent with state law and also cannot completely prevent mineral development, with mineral defined as:

gas; oil; coal; other gaseous, liquid, and solid hydrocarbons; oil shale; cement material; sand and gravel; road material; building stone; chemical raw material; gemstone; fissionable and nonfissionable ores; colloidal and other clay; steam and other geothermal resource; or any other substance defined as a mineral by the law of this state.¹⁸⁵

The only form of Part 2 County zoning exempt from this restriction on preventing mineral development is emergency, or interim zoning, which can be initiated by a county and placed over previously un-zoned county land but can only be in place for one year and is only allowed a single one-year extension.¹⁸⁶ Although county governments are prohibited from permanently and completely preventing mineral development through county-wide zoning, in 1985, the Montana Supreme Court decided that Part 2 County zoning laws could regulate a wide range of

¹⁸² MCA § 76-2-101(1)

¹⁸³ MCA § 76-2-101(5)

¹⁸⁴ MCA § 76-2-209

¹⁸⁵ MCA § 70-9-802(9)

¹⁸⁶ MCA § 76-2-206

development, including mineral development, as long as the zoning code “allow[s] the activities necessary to develop the resource to a point at which it can be effectively utilized.”¹⁸⁷ County zoning ordinances, therefore, cannot completely prevent mineral development but they can regulate development to the extent that they are not less stringent than state law and still allow development to occur, in accordance with local zoning regulations; local governments can impose reasonable conditions, such as those required for conditional use permits.

Although Montana’s Land Resources and Use Code (Title 76) prohibits planning boards in general from authorizing an “ordinance, resolution, or rule that would prevent the complete use, development, or recovery of any mineral, forest, or agricultural resources,”¹⁸⁸ that prohibition placed on planning boards does not apply to municipal or citizen-initiated zoning. Although this prohibition is often assumed to extend to all county and municipal zoning, this is not the case, since neither citizen-initiated zoning districts nor municipal governments have or use planning boards.¹⁸⁹ The constraint placed on planning boards also carries very little weight in the scheme of local land use regulation, since planning boards, when they exist at the county level, only serve an advisory role to the board of county commissioners, which acts as the legislative body. Overall, these powers and restrictions placed on the various types of zoning regulations exist irrespective of the local government’s status as having “self-governing” or “general” powers.

¹⁸⁷ *Missoula County v. Am. Asphalt, Inc.*, 701 P.2d 990, 992 (Mont. 1985).

¹⁸⁸ MCA § 76-1-113

¹⁸⁹ When a citizen-initiated zoning district is created, the board of county commissioners creates a planning and zoning commission (MCA § 76-2-101). Within a municipal zoning district, a zoning commission advises the city council on appropriate regulations (MCA § 76-2-307).

4. Zoning laws Permit Emergency Moratoriums and Citizen-Initiated Ordinances at County Level

Gallatin County Emergency Moratorium and Citizen-Initiated (Part 1 County) Zoning

Gallatin County has led the way in establishing successful and legally sound zoning regulations for controlling mineral development, including oil and gas development and coalbed methane development specifically. Within Gallatin County, there are several citizen-initiated zoning districts that have established a Natural Resource Conditional Use Permitting system, with extensive conditional use permit requirements.¹⁹⁰ These include the South Cottonwood Zoning District, the Reese Creek Zoning District, and the Bridger Canyon Zoning District, which has been in place for over 30 years and was designed to discourage a broad range of development.¹⁹¹ The Bridger Canyon Zoning District and more recent Bozeman Pass District are of particular significance, because their oil and gas zoning regulations successfully halted exploration and development of coalbed methane, were temporarily challenged by a gas company, but have remained in place and successful since 2004.

In January 2002, after the Bridger Canyon Planning and Zoning Commission denied a conditional use permit to the Huber Corp. for coalbed methane exploration, the Gallatin County Board of Commissioners took proactive steps to prevent the influx of coalbed methane development that the Huber Corp. had planned for the region. As allowed by Montana's interim zoning provision, Gallatin County Board of Commissioners created an emergency zoning district in the Bozeman Pass – an unzoned region adjacent to the Bridger Canyon Zoning District – and

¹⁹⁰ See Montana County and Municipal Law. Intermountain Oil and Gas BMP Project. Available: http://www.oilandgasbmps.org/laws/montana_localgovt_law.php. Last accessed November 30, 2015.

¹⁹¹ See Gallatin County Zoning District Information. Available: http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zoning/districts/zd?textPage=1 for current zoning regulations of all districts within Gallatin County.

passed a one year moratorium on coalbed methane and gas development,¹⁹² in order to allow time for the county to establish regulations that protected property values, wildlife and the rural character of the region.¹⁹³ During the moratorium, which expired in August 2004, the community worked with the Sonoran Institute¹⁹⁴ to develop strict standards for oil and gas development in the area; and the Huber Corp. ultimately decided to relinquish their leases in 2006, with coalbed methane development never occurring in the District.¹⁹⁵

Bozeman Pass Zoning District's final regulations, which are designed to protect agricultural uses, wildlife habitat, rural character, and property rights, while mitigating the impacts of resource extraction,¹⁹⁶ require a Natural Resource Conditional Use Permit in all zoning districts for several forms of resource extraction:

(1) Coal bed methane exploration and development, (2) Commercial quarries greater than five acres in size, (3) Mining (surface and underground) and (4) Oil and gas exploration and development.¹⁹⁷

In outlining the conditional approval process, the regulations state that the County Commission will grant a conditional use permit only if several strict requirements are met. These requirements include: impact fees for public services and infrastructure maintenance; the guarantee that the "use conforms to the objectives of the Gallatin County Growth Policy and the intent of this Regulation;" and a finding that "the use will not adversely affect nearby properties,

¹⁹² The moratorium was enacted for one year and extended for a second year.

¹⁹³ Ring, R. 2002. Backlash: Local governments tack an in-your-face rush on coalbed methane. *High County News*. Available: <http://www.hcn.org/issues/233/11371>

¹⁹⁴ The Sonoran Institute is a nonprofit that promotes and enables environmentally responsible land use decisions, resilient communities through collaborative community processes. One of their offices is in Bozeman, Montana. For more information, see <http://www.sonoraninstitute.org/>.

¹⁹⁵ Red Lodge Clearinghouse. 2010. Oil and Gas Resource Development. Available: <http://rlch.org/content/oil-and-gas-resource-development>

¹⁹⁶ Revised Bozeman Pass Zoning Regulations. 2005. §2.01.1. Available: <https://www.earthworksaction.org/files/publications/05.Bozemanregulation.pdf>

¹⁹⁷ Id. §2.01.6, 2.02.6, 2.03.6

residents, groundwater, streams, and wetlands.”¹⁹⁸ The conditional use permit application process also requires a detailed Environmental Impact Study conducted by a state licensed third party.¹⁹⁹ Similar conditional use permit regulations are also in place in Bridger Canyon Zoning District and Reece Creek Zoning District in Gallatin County.

Meanwhile, in 2002, after the Bozeman Pass moratorium was first established, Huber Corp. filed suit against Gallatin County in both district court (alleging state preemption of coalbed methane regulations) and federal court (alleging an unconstitutional regulatory taking).²⁰⁰ These cases, however, were settled out of court when Huber Corp decided to retract its interest in the coalbed methane developments it had originally planned. A state precedent has therefore not been established regarding the validity of a strict Natural Resource Conditional Use Permitting system for oil and gas development used through citizen-initiated zoning districts in Gallatin County. The zoning regulations, such as those in Bridger Canyon and Bozeman Pass Zoning Districts, however, have successfully prevented coalbed methane development from occurring. No company has pursued development or challenged the current regulations in court.

Carbon and Stillwater County Citizen-Initiated (Part 1 County) Zoning

The most recent example of citizen-initiated zoning to control oil and gas development has been underway along the Beartooth Front in Carbon and Stillwater Counties. In October 2013, Energy Corporation of America first announced its plans for oil and gas exploration and

¹⁹⁸ Id. §4.05.1

¹⁹⁹ Id. §4.0.3

²⁰⁰ Duffy, R. 2005. Political Mobilization, Venue Change, and the Coal Bed Methane Conflict in Montana and Wyoming. *Natural Resources Journal*: 45.

hydraulic fracturing along the Beartooth Front in Montana,²⁰¹ with an oil and gas well specifically planned in an area north of Belfry. This raised concerns among residents in the region. In October 2014, residents in the Belfry area of Carbon County, with assistance from Montana's Northern Plains Resource Council,²⁰² petitioned the Board of County Commissioners for the creation of the Silvertip Zoning District, a 3,000 acre agricultural region north of Belfry, with 60% of the real property owners in the proposed district represented by the petition.²⁰³ In Stillwater County, the Stillwater Protective Association²⁰⁴ has launched a similar effort to establish a citizen-initiated zone in the Nye-Dean area.

The Belfry petition states that the goals of the citizen-initiated zoning district are consistent with the goals of the Carbon County's 2009 Growth Policy, which seeks to maintain the rural residential and agricultural character of the proposed district. The petitioners specifically want oil and gas activity to be "conducted in a responsible manner" to

(1) preserve public health, (2) protect private property, (3) protect and improve public infrastructure and public services, (4) protect surface and ground water, (5) protect air quality, (6) protect soil quality, and (7) maintain the quality of life by preserving the rural residential and agricultural character of the area.²⁰⁵

²⁰¹ Falstad, J. 2013. Denver energy company opens Billings office, plans to drill near Beartooths. *Billings Gazette*. Available: http://billingsgazette.com/news/local/denver-energy-company-opens-billings-office-plans-to-drill-near/article_d0ba4fc8-fe91-5b91-b21a-06d652c74fe8.html

²⁰² Northern Plains Resource Council is a conservation group that focuses on organizing and supporting Montana citizens' efforts at protecting family agriculture, maintaining a quality environment, and promoting sustainable development. NPRC has numerous affiliate organizations that it supports throughout eastern and central Montana. For more information, see <https://www.northernplains.org/>.

²⁰³ Petition for the Creation of the Citizen-Initiated Zoning District with Planning and Zoning Commission. Oct. 29, 2014. Available: <https://davidjkatz.files.wordpress.com/2014/11/new-silvertip-zone-petition.pdf>

²⁰⁴ Stillwater Protective Association (SPA) is a grassroots conservation group that advocates for a clean environment, family farms and ranches, and responsible development in Stillwater County. SPA is an affiliate of Northern Plains Resource Council. For more information, see <https://www.northernplains.org/our-local-groups/stillwater-protective-association/>.

²⁰⁵ Petition for the Creation of the Citizen-Initiated Zoning District with Planning and Zoning Commission. Oct. 29, 2014. Available: <https://davidjkatz.files.wordpress.com/2014/11/new-silvertip-zone-petition.pdf>

The residents draw their authority to act from Montana's zoning enabling statutes, which are established to promote health, safety, and general welfare,²⁰⁶ and also from Article II, Section 3 and Article IX, Section 1 of the Montana Constitution, which guarantees their right to a clean and healthful environment.

Although the Carbon County Commissioners approved the creation of the Silvertip Zoning District on December 15, 2014, that decision was later reversed on January 15, after a 30-day landowner protest period, during which several affected residents protested its creation.²⁰⁷ Since the Montana Supreme Court recently ruled that the protest provision in the Part 2 County zoning enabling statute was an unconstitutional delegation of legislative power to a non-legislative body,²⁰⁸ residents in the proposed Silvertip Zone filed a legal challenge against Carbon County in District Court. In July 2015, however, the District Court judge dismissed the case without a ruling because the Carbon County Commissioners had failed to follow the correct procedure for establishing a citizen-initiated zoning district.²⁰⁹ The Silvertip Zoning District has not been created but the case has now been appealed to the Montana Supreme Court, which will begin proceedings in early 2016.²¹⁰ If established, the Silvertip Zoning District would require setbacks, water testing, and soil and water quality monitoring, paid for by impact fees levied on oil and gas companies operating within the district.²¹¹

²⁰⁶ MCA § 76-2-104

²⁰⁷ Preserve the Beartooth Front. 2015. <http://preservethebeartoothfront.com/2015/01/15/unbelievable-carbon-county-commissioners-defy-will-of-majority-to-deny-silvertip-zone/>

²⁰⁸ *Williams v. Board of County Commissioners of Missoula County*, 2013 MT 243, 371 Mont.

²⁰⁹ MARTINELL, ET AL. V. BOARD OF COUNTY COMMISSIONERS, ET AL., Mont. DV 15-14. 2015.

²¹⁰ Preserve the Beartooth Front. 2015. Montana Supreme Court agrees to hear Silvertip zoning case. Available: <http://preservethebeartoothfront.com/2015/09/29/montana-supreme-court-agrees-to-hear-silvertip-zoning-case/>

²¹¹ Martinell, B. 2014. Guest opinion: Silvertip zoning district will protect landowners' rights. Available: http://billingsgazette.com/news/opinion/guest/guest-opinion-silvertip-zoning-district-will-protect-landowners-rights/article_b0d870ea-1e82-5f56-9f60-4eb34bf23eff.html

5. Tentative but Promising Success Stories of Citizen-Initiated Zoning to Regulate & Discourage Mineral Development

Citizen-initiated zoning within Montana counties may be the most empowering form of self-governance of all the states looked at, since it can only be initiated and terminated by the affected landowners. This form of zoning also has the power to affect unincorporated regions that are most likely to experience oil and gas development. Unlike Part 2 County zoning, citizen-initiated zoning is not explicitly prevented from prohibiting mineral development. A complete ban on mineral development in a citizen-initiated zoning district, however, has yet to be tested and may raise the potential for conflict preemption by state law, since the regulatory action of the Montana Board of Oil and Gas Conservation (MBOGC) serves the purpose of “encouraging maximum efficient recovery of the resource.”²¹² An outright ban on oil and gas development could, therefore, trigger conflict preemption, since it could be viewed as impeding the state’s execution of its own law. Gallatin County’s conditional use permitting regulations, on the other hand, appears to be the more legally defensible but equally effective option. A complete ban in a citizen-initiated or municipal zoning district may not withstand legal scrutiny, but the strict regulation of mineral development through conditional use permitting systems has, thus far, proven to be a successful option that discourages development.

Although the citizen-initiated zoning districts that apply conditional use permit requirements or environmental monitoring and impact fee requirements on oil and gas development may state their right to a clean and healthful environment as part of the rationale for their zoning regulations, those regulations have yet to be affirmed by Montana courts. Such regulations have yet to be challenged in court and settled in court. In the Silvertip Zoning

²¹² Montana Board of Oil and Gas. Overview. Available: <http://bogc.dnrc.mt.gov/boardsummaries.asp>. Last visited Dec. 30, 2015.

District, the current legal challenge is mainly focusing on Carbon County's petition procedure for allowing and denying the creation of such a district, rather than the substance of the proposed zoning regulations.

The fact that existing conditional use permit regulations throughout zoning districts in Gallatin County have not faced repeated challenges in state court, however, lends support to the argument that these regulations are indeed valid under state law. The conditional use permit requirements, such as those used in Gallatin County and proposed in the Belfry area, most likely would be upheld in court, since they do not ban oil and gas development; they allow it with conditions that are designed to protect the health and welfare of the community and encourage suitable uses of land. Although these conditional use permit requirements could reduce the economic viability of a proposed well, they do not completely preclude development if companies meet the requirements. As is the case in Santa Fe County, New Mexico, which applies the strictest regulations on oil and gas development in the country, zoning and land use regulations – if allowed to be more stringent than state regulations – can significantly discourage oil and gas activity without explicitly banning it. Communities in Gallatin, Carbon, and Stillwater Counties have discovered and applied that semantic nuance to their zoning codes in a way that satisfies both local residents and statutory requirements and does not trigger conflict preemption.

6. Potential Application of Constitutional Right to a Clean Environment

The constitutional right to a clean environment has, so far, only been applied to state government actions and permitting decisions by state agencies. In 1999, the Montana Supreme Court issued a landmark decision when it struck down the Montana Department of

Environmental Quality's (MTDEQ) permit approval of an industrial operation that would discharge millions of gallons of arsenic-tainted water into the Landers Fork and Blackfoot River. In its landmark ruling, the court established Montanans' constitutional right to a clean environment as a fundamental right that is both anticipatory and preventative; it is intended to both redress harm and be preventative and can only be infringed upon if there is a compelling state interest.²¹³ As in Pennsylvania, Montanans' right to a "clean and healthful environment: is identified as an inalienable right, which should operate as a limit on government power.

However, the application of the Montana Constitution's environmental rights provision as justification for local government's police powers has not been established in Montana as it has in Pennsylvania. Local governments have not been implicated in this duty to protect the environment through their comprehensive plans and zoning laws. Local governments in Montana have also not challenged any statutory provisions that limit their zoning authority as Pennsylvania municipalities did in the *Robinson* case. The use of Montana's environmental rights constitutional provision in justifying a local government action is therefore uncertain. Unlike the Pennsylvania Oil and Gas Act, Montana's Oil and Gas Conservation Act does not include protection of the environment as one of its defined purposes. This absent language may present some legal trouble for Montana's oil and gas regulations in the future, in light of the state's constitutional right to a clean environment. In addition, the fact that Montana's Oil and Gas Conservation Act does not contain language that claims oil and gas development to be a "compelling state interest,"²¹⁴ means that oil and gas development cannot infringe upon citizens' constitutional right to a clean environment.

²¹³ Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236.

²¹⁴ The coalbed methane section of Montana's Oil and Gas Conservation Act includes a legislative finding that the permitting of coalbed methane wells is a "compelling state interest." MCA § 82-11-173. This language is not used

7. Summary of Legal Success & Future Opportunities in Montana

Montana zoning ordinances, which are authorized at the city and county level and can be enacted by local governments with self-governing and general powers, can regulate mineral development as long as the regulations are not less stringent than state law and still allow development to occur. Municipal and citizen-initiated zoning districts can also prohibit mineral development where it is incompatible with other uses. Such a zoning ordinance, however, could be subject to conflict preemption, due to the stated purpose of the state's oil and gas regulations. At the county level, the only form of zoning exempt from the restriction on preventing mineral development is emergency, or interim zoning, which can be initiated by a county and placed over previously un-zoned land but cannot be in place for more than two years.

Since most oil and gas development in Montana occurs in unincorporated county land, citizen-initiated zoning is the most effective tool for concerned citizens hoping to ensure responsible development. Currently, however, no state court cases have created an upper threshold on how strict local oil and gas regulations, such as conditional use permit requirements, can be, or if citizen-initiated zoning districts can successfully prohibit mineral development without state preemption. In enacting local regulations, zoning and planning boards can draw on the environmental rights provisions of the Montana Constitution for legal support. However, the reactive and proactive duty to maintain a clean and healthful environment has not explicitly been conferred on local governments in Montana, as it has been in Pennsylvania, where the environmental rights clause of the state constitution has been clearly defined as a limit on state and local government powers.

as a purpose of oil and gas legislation more generally. The legislature only claims coalbed methane development to be a compelling state interest, allowing it to infringe upon citizens' right to a clean environment.

Table 5: Overview of Local Control Initiatives in Montana

City/ County, State	Year of Ordinance	Key Provisions of Ordinance	Authority for Ordinance	Court Case(s)
Gallatin County, MT	2002	Bridger Canyon Zoning District Regulations: Conditional use permit requirements for coalbed methane development	Citizen-Initiated (Part 1 County) Zoning Enabling Statute: MCA § 76-2-101 – 117	Challenged by Huber Corp but settled outside of court
Gallatin County, MT	2005	Bozeman Pass Zoning District Regulations: Natural Resource Conditional Use Permit for mining and oil/gas exploration & development, with strict requirements	MCA § 76-2-101 – 117	Not challenged
Carbon County, MT	n/a	Silvertip Zoning District proposed by petition. Regulations would require setbacks, environmental monitoring, and impact fees on oil/gas operations.	MCA § 76-2-101 – 117	Currently awaiting argument before Montana Supreme Court regarding a procedural issue.

IV. CONCLUSION

A. SUMMARY OF LESSONS LEARNED & IMPLICATIONS FOR LOCAL CONTROL INITIATIVES

Municipal powers are derived from both statutory and constitutional sources, how the language in those sources is construed in state court, and may be subject to preemption by state law. In the pursuit of local government control over oil and gas development, the two main tactics are traditional zoning regulations (which can take the form of environmental regulations) and community rights ordinances. Success of traditional zoning ordinances can vary based on the content and intent of the ordinance, the state’s regulatory scheme, and the scope of local

authority that can be asserted. Community rights ordinances, on the other hand, have consistently failed when challenged in court.

The Community Bill of Rights, as they are currently proposed by the Community Environmental Legal Defense Fund (CELDF), are bound to fail in court. Regardless of the presence or absence of municipal home rule powers in a given state, such ordinances will be found unconstitutional, since they claim to have supremacy over federal and state law; such a claim violates the U.S. Constitution and respective state constitutions. Their unconstitutionality also stems from other commonly used provisions, such as stripping corporations of personhood. In general, a Community Bill of Rights asserts powers that a local government cannot assert. In order for a Community Bill of Rights to withstand legal scrutiny, it cannot overstep the authority granted to that particular type of local government, especially if it is not a municipality with home rule powers or a home rule charter. Local governments with home rule powers, however, are still subject to preemption by state laws. If a Community Bill of Rights Ordinance prohibits an activity that state law permits, such as hydraulic fracturing, injection wells, or oil and gas development in general, it will be deemed invalid due to conflict preemption. Home rule charters, much to the dismay of their proponents, do not immunize local governments from state preemption.

Regardless of whether a state follows Home Rule or Dillon's Rule or whether a local government is operating under home rule charters or not, that state sets the bar that local governments cannot cross. Only in New York, Montana, and the Galisteo basin in New Mexico do local governments have some flexibility. In New York, municipalities can decide mineral extraction is not compatible with surrounding uses and ban it completely. In Santa Fe County and the Galisteo basin of New Mexico, local governments can impose environmental regulations

on operations even to the extent that higher investment costs deter development. In Montana, county governments, although they cannot completely prohibit mineral extraction, can impose regulations that are stricter than state standards. These examples, however, are exceptions to the rule. Regardless of whether Home Rule or Dillon’s Rule or a hybrid is applied, states have generally drawn a line somewhere – whether it be in the regulations of mineral extraction or the enabling statutes of local governments’ land use planning authority. Only in New York’s liberal application of local zoning authority can a local ban on mineral development be enacted.

New York is so far the only state in which local governments – in this case municipalities – have had their local zoning and land use planning authority upheld to the extent that the government body can completely prohibit a certain activity or type of development, such as oil and gas development or an ancillary aspect of oil and gas development such as hydraulic fracturing. The courts of New York have held that state oil and gas regulations (as well as mining regulations) do not expressly or impliedly preempt local land use ordinances as long as those ordinances do not regulate extraction operations. Unlike in Pennsylvania, New York municipalities can decide “where” development occurs, even if the answer to “where” is “nowhere” in their jurisdiction. Unlike Colorado, which also distinguishes between land use ordinances and regulations that govern oil and gas operations, New York’s legal decision supported a more liberal interpretation of land use planning authority and defined local land use laws as explicitly addressing matter of local concern. Even though such land use laws may incidentally affect a matter of state-wide concern – namely oil and gas development – such land use laws were not determined to “operationally impede” the intent and purpose of New York’s oil and gas regulations, since New York’s post-1978 OGSML is no longer intended to promote oil and gas development.

The stated purpose of state legislation – such as a state’s oil and gas regulations – is another important factor in determining a community’s ability to regulate or ban oil and gas development. If a state’s oil and gas regulations charge a regulatory agency with “promoting” the “efficient development” of a mineral resource – as in the case in Colorado – or “permitting” the “optimal development” of oil and gas – as in Pennsylvania – the likelihood of a local oil and gas development ban getting struck down in court, even in a home rule municipality, is guaranteed due to conflict preemption. A local government ordinance cannot prevent the state from promoting or achieving optimal or efficient development of its mineral resources.

The scope and comprehensiveness of state regulations also impacts local governments’ ability to pass valid legislation. In New Mexico, since the NMOGA does not address local impacts, county and city governments have the authority to fill in that gap with local ordinances. In Colorado, since the state OGCA has not historically addressed water quality and wildlife protection, municipalities such as Commerce City and Greeley have enacted successful ordinances that are designed to mitigate these environmental impacts. However, with recent amendments to Colorado’s OGCA, the state’s authority over mitigating oil and gas development’s environmental impacts has expanded, which could further undermine local governments’ authority to address those impacts under their land use planning authority.

In many ways, home rule authority offers a false hope to the municipal and county governments that can acquire such authority. In Pennsylvania and Colorado, for example, the application of Dillon’s Rule and Home Rule bears no difference on the outcome of court decisions focusing on land use planning authority, since zoning authority is explicitly granted to all local governments regardless of the establishment of a home rule charter and courts consistently look to those zoning laws in their decision-making. Even with home rule charters,

local governments are not exempt from preemption by state law. Even if express or implied preemption is not at play, local ordinances that ban oil and gas development under the auspices of home rule authority will lose their validity if a conflict preemption analysis is applied in court. On that note, it has become increasingly obvious that state courts will apply conflict preemption to these cases. The only state that has not applied conflict preemption to local ordinances is New York. New York, however, is a unique state in its interpretation of broad, almost inherent home rule powers of all municipal governments, and its oil and gas regulations which were amended in 1978 to eliminate the “promotion” of oil and gas development.

Many activists at the national and local level across the U.S. have looked to what happened in New York, especially the success at the local level, and viewed that outcome as the final goal for their own communities. The reality, however, is that New York’s constitutional and statutory language as well as judicial precedents and state regulatory intent created a unique outcome that is unlikely to be replicated in most other states. The scope of land use planning powers that New York municipalities have been given definitely cannot be replicated in Pennsylvania, New Mexico, Colorado, or Montana. This is because most states contain statutory sideboards that restrict local governments from completely preventing oil and gas development or require local zoning to allow for the “reasonable development” of oil and gas somewhere in their jurisdiction. In some states, such as New Mexico and Colorado, in which there is not complete express or implied preemption of state regulations or express preemption of local regulations, a conflict preemption analysis arises, which leads courts to the conclusion that a local government body cannot prohibit an activity that the state permits.

Only New York has adopted a truly liberal interpretation of home rule for its municipalities. New York is therefore the idealized example of local self-government, in which

a liberally construed land use authority allows municipalities with comprehensive planning and zoning to preempt state regulations with their zoning ordinances. In New York, the conflict preemption analysis did not arise because of the liberal construction of local government powers and stated purpose of the OGSML. In Colorado, even though it has been determined that state regulation of oil and gas development does not expressly or impliedly preempt local land use planning decisions, home rule powers have not been liberally construed; home rule powers have still been subject to a conflict preemption analysis that favors state authority – state authority that is required to promote oil and gas development. Similarly, in New Mexico, while the NMOGA does not expressly preempt local regulation or occupy the entire field of regulation so as to preclude local regulation of local impacts, such local regulation cannot conflict with state regulations, which prohibit subsurface waste of oil and gas.

It has become obvious, in the comparison of legal success and failure across five states, that one rule of delegating local authority is not inherently better than the other. Home Rule and Dillon’s Rule are not polar opposites of each other. In the case of local control over mineral development, the application of Home Rule and Dillon’s Rule are generally irrelevant, since land use planning authority is primarily derived from state zoning enabling laws. In terms of land use controls and environmental protection, the range of authority given to local governments also depends on the current political climate of each state – the political climate that determines the statutory sideboards placed on the preexisting constitutional and statutory language. Pennsylvania and New York, for example, are two states that follow Dillon’s Rule, yet grant municipalities home rule powers, and have clearly defined local land use planning authority that can be used to control where oil and gas development occurs. In Pennsylvania, however, the historic presence and promotion of mineral extraction across the state has been expressed

through the Pennsylvania Municipal Planning Code to prevent municipalities from completely prohibiting any form of industrial development. Montana counties are similarly precluded from prohibiting or preventing mineral extraction on a county-wide basis. Meanwhile, the Colorado legislature has revised its oil and gas regulations to be more comprehensive and occupy more of the field of statewide regulations in a way that could potentially preempt city and county attempts at regulating local impacts of oil and gas activity.

In looking generally at the five states that have been analyzed, it is clear that Dillon's Rule states are not comparable to each other, Home Rule states are not directly comparable to each other, and each state's expression of authority provided to local governments is unique. States that follow Dillon's Rule may grant extensive local powers to local governments. States that follow Home Rule or a derivation of Home Rule may place extensive limitations on local government powers, rendering their self-government authority over certain matters or types of development nonexistent. However, local governments in states with widespread application of Dillon's Rule – particularly New York – do happen to have the most clearly defined ability to prohibit oil and gas development and fracking through their zoning powers. This is because municipalities have the authority to completely control land use aspects of development, even if they cannot regulate aspects of the industry's activity.

The only advantage of Dillon's Rule for local governments is that there is less room for interpretation of state statutes and constitutional provisions when local government planning authority is governed by Dillon's Rule. At the same time, if Home Rule is liberally applied, local governments are also more likely to retain local land use authority. However, the liberal application of Home Rule in state courts remains to be seen. More often than not, home rule

powers are not liberally construed, since most state courts infer a mixed state-local interest with regard to oil and gas development and require a conflict preemption analysis.

Table 6. In a Nutshell: Successes and Limitations of Local Control Initiatives by State

New York	<ul style="list-style-type: none"> • Municipalities can completely ban mineral development due to broadly interpreted local land use planning authority and state regulations that do not promote oil and gas development.
Pennsylvania	<ul style="list-style-type: none"> • Municipalities can control where mineral development occurs and place some conditions on development through conditional use permits, but cannot regulate technical aspects of operations. • Municipalities cannot ban mineral development, despite a constitutionally guaranteed right to a clean environment, due to state regulatory promotion of oil and gas development.
Colorado	<ul style="list-style-type: none"> • Municipalities and counties can impose conditions on development but the line where conflict preemption arises is blurry. • State regulations have also been absorbing more environmental aspects of development, favoring state interest over local interest in environmental regulations.
New Mexico	<ul style="list-style-type: none"> • Municipalities and counties can regulate local impacts that are not addressed by state law, as long as they do not conflict with state law. • Local regulations within Santa Fe County and the Galisteo Basin can be more stringent than state regulations.
Montana	<ul style="list-style-type: none"> • Only counties are restricted from prohibiting mineral development through county-wide zoning, but can enact conditions that are stricter than state regulations. • Citizen-initiated and municipal zoning districts can prohibit mineral development, but may still face conflict preemption.

B. CRITICAL AREAS OF FUTURE ACTION AND RESEARCH

The application of the environmental rights constitutional amendment to the local control movement has had a significant impact in Pennsylvania and could be an example for other states. In Pennsylvania, the constitutional bill of rights amendment that guarantees citizens' right to a clean environment realigned the balance of power within the state. Because of the amendment's placement in Article I, it has been deemed an inalienable right that constrains government actions and bestows both state government and local governments with the duty to maintain that right. The ability to protect and maintain a clean environment is thus an added layer of responsibility when carrying out land use planning and zoning authority. When the Pennsylvania Supreme Court ruled that a state statute could not remove that duty from local governments, it created a constitutional protection for Pennsylvania's municipal planning powers.

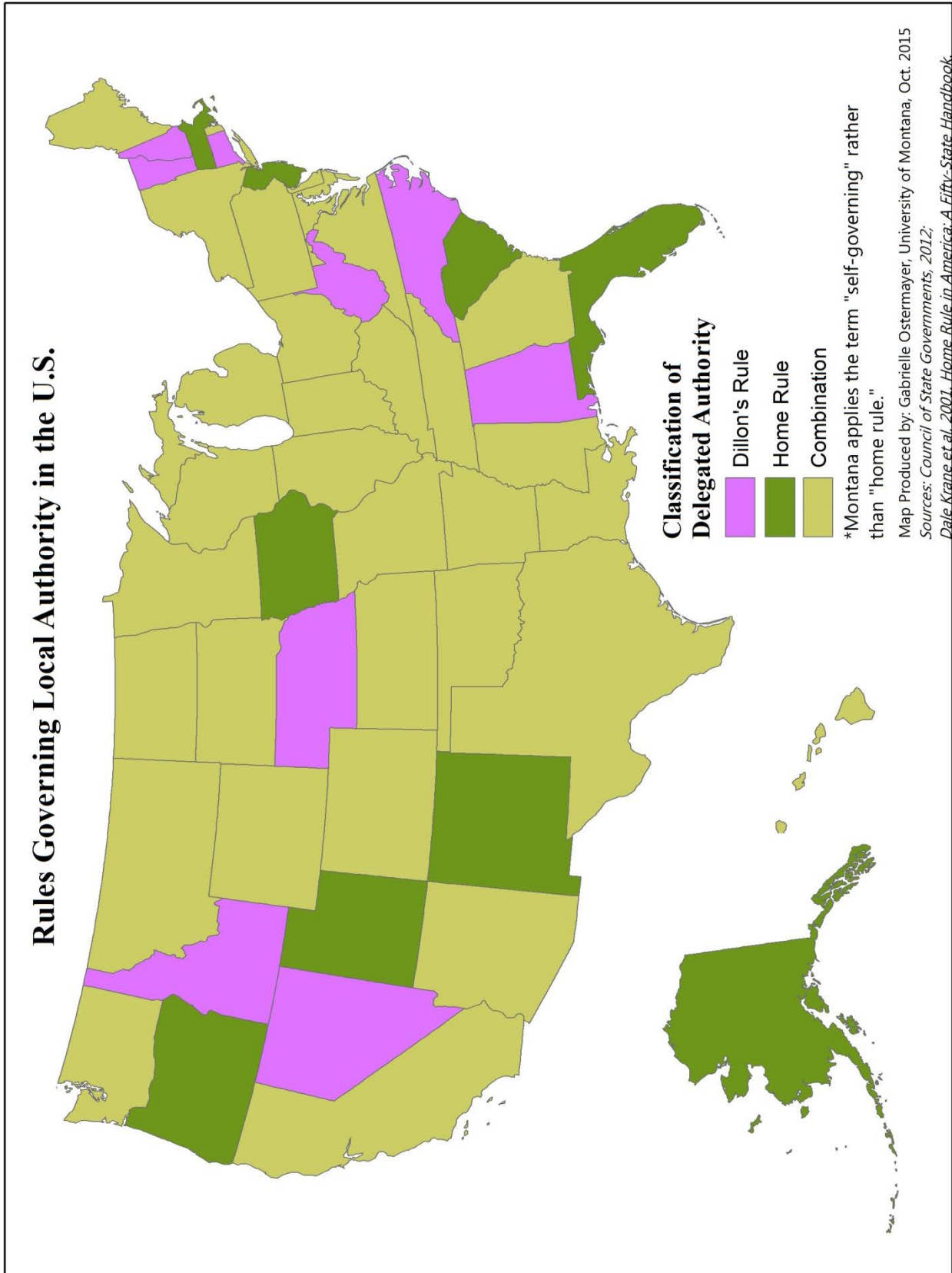
The Montana Constitution creates a similar inalienable right to a "clean and healthful environment," which should also operate as a limit on government power. If similar constitutional amendments passed via referendum in other states, such a constitutional provision could bolster local government authority over land use and environmental concerns. If such a constitutional amendment was also paired with environmental requirements in state zoning enabling statutes, local governments would have more stable grounds to assert their interest in environmental protection, even in the face of a state law that was given the purpose of "promoting" oil and gas development.

While the above combination of constitutional amendment & zoning statutes may be considered ideal by local control advocates, the political climate of many states make it unlikely that this combination could be achieved. In the case of Colorado, for instance, if the Colorado legislature was to somehow – despite the current political climate in the state – pass a

Constitutional amendment granting citizens the right to a clean environment, local governments would have a legal tool to use in court when defending their right to govern land use development. However, the Colorado courts could still find such local zoning laws operationally impede state law and are thus operationally preempted, with the authority to sustain a clean environment being more vested in state agencies and not the local government.

The political climate of each state thus plays a significant role in the formation and revision of state law and the courts' interpretation of those laws. As unconventional oil and gas development and hydraulic fracturing become more prominent and exert even more political pressure at the state level, local government authority may face even more legislative constraints, while the authority to resist those constraints must be derived from state constitutions, since state constitutions create the framework that state legislation must operate within.

APPENDIX A: Map of Dillon's Rule vs. Home Rule States



APPENDIX B: Important Acronyms Organized by State

Colorado

- OGCA - Oil and Gas Conservation Act
- COGA - Colorado Oil and Gas Association
- COGCC - Colorado Oil and Gas Conservation Commission

Montana

- MBOGC - Montana Board of Oil and Gas Conservation
- MTDEQ - Montana Department of Environmental Quality

New Mexico

- NMOGA - New Mexico Oil and Gas Act
- OCD - Oil Conservation Division

New York

- ECL - Environmental Conservation Law
- MLRL - Mined Land Reclamation Law
- NYDEC - New York Department of Conservation
- NYDOH - New York Department of Health
- OGSML - Oil, Gas and Solution Mining Law

Pennsylvania

- MPC - Municipal Planning Code
- PADEP - Pennsylvania Department of Environmental Protection

APPENDIX C: Timelines of Important Court Decisions, State Laws, and Local Ordinances

New York

- 1978 - NY legislature amended the OGSML from “promoting” oil and gas development to “regulating” the development.
- 1987 - *Frew Run Gravel Products v. Town of Carroll*:
NY Court of Appeals ruled that a mining ban regulated the use of land but did not regulate mining and was therefore not preempted by NY’s MLRL.
- 1996 - *Matter of Gernatt Asphalt Products Inc. v. Town of Sardinia*:
NY Court of Appeals ruled that a municipality is not required to permit natural resource extraction if it is incompatible with the interests of the community.
- Dec 2010 - NY Governor David Paterson signed an executive order enacting temporary moratorium on hydraulic fracturing.
- June 2011 - Town of Middlefield amended comprehensive plan and zoning ordinance to ban heavy industry, including oil and gas drilling, chemical manufacturing, and petroleum and coal processing.
- Aug 2011 - Town of Dryden amended zoning ordinance to prohibit natural gas exploration and extraction.
- Feb 2012 - *Anschutz Exploration Corp. v. Town of Dryden*:
Supreme Court of Tompkins County, NY upheld Dryden’s ban on natural gas development, which was not preempted by NY’s OGSML.
- Cooperstown Holstein Corp. v. Town of Middlefield*:
Supreme Court in Otsego County, NY upheld Middlefield’s zoning law, following the same reasoning used in *Dryden*. Local ordinances can control where oil and gas development can occur, based on broad municipal zoning and land use planning authority.
- May 2013 - *Norse Energy v. Town of Dryden*:
NY Appellate Court upheld lower court ruling regarding Dryden’s ban.
- June 2014 - *Wallach v. Town of Dryden*:
NY Court of Appeals upheld Appellate Court decision regarding Dryden’s ban.
- Dec 2014 - NY Governor Andrew Cuomo announced permanent statewide ban on hydraulic fracturing, based on NY Department of Health findings.

June 2015 - NY Department of Conservation (DEC) formalized state-wide ban on hydraulic fracturing.

Pennsylvania

1971 - PA ratified an environmental rights amendment to its constitution through public referendum. (Article I, Section 27)

2006 - *Liverpool Township v. Stephens*

PA Commonwealth Court ruled that local legislation cannot permit what state law forbids or forbid what state law allows.

2007 - Huntley & Huntley, Inc. filed suit against the Borough of Oakmont because of its zoning ordinance that limited natural gas wells to certain zoning districts and required conditional use permits.

2009 - *Huntley & Huntley, Inc. v. Borough Council of Oakmont:*

PA Supreme Court upheld Borough of Oakmont's zoning ordinance as a land use planning decision and zoning power authorized under the Municipal Planning Code and Section 602 of PA's Oil and Gas Act. Local zoning ordinances can control where oil and gas development occurs, but cannot regulate technical aspects of operations.

Range Resources Appalachia LLC v. Salem Township:

PA Supreme Court clarified that local ordinances cannot regulate aspects of oil and gas well operations or be enacted with the purpose of regulating operations.

2010 - Pittsburgh (a city with a home rule charter) passed the first Community Bill of Rights Ordinance that banned oil and gas activity within city limits. It has not been challenged in court.

2012 - PA legislature passed Marcellus Drilling Law, also known as Act 13.

- *Robinson Township. v. Commonwealth:*

PA Commonwealth Court declared section 3304 of the Marcellus Drilling Law unconstitutional because it violated the rights and powers of local governments to decide where oil and gas development can suitably occur.

2013 - *Robinson Township v. Commonwealth:*

PA Supreme Court issued a plurality decision that Sections 3303 and 3304 of the Marcellus Drilling Law, which created express preemption of state regulations over all local zoning laws, was unconstitutional.

- Grant Township, a township without zoning or a home rule charter, adopted Community Bill of Rights Ordinance, which prohibited oil and gas waste disposal, invalidated state and federal permits, and stripped corporations of personhood.

2014 - Pennsylvania General Energy Corp. filed suit against Grant Township.

2015 - *Pennsylvania General Energy Co., LLC. v. Grant Township:*

U.S. District Court invalidated Grant Township's Community Bill of Rights Ordinance, on the grounds that it violated the Second Class Township Code and the Limited Liability Company Law. The court did not address issues of constitutionality.

Colorado

1992 - *La Plata County v. Bowen/Edwards Assoc, Inc.:*

CO Supreme Court upheld a statutory county's land use ordinance that required oil and gas operations to obtain a special use permit. Court found no express or implied preemption of CO's OGCA over local land use ordinances; an operational conflict between state and local laws was not found but such a decision would need to be made on a case-by-case basis by the courts.

Voss v. Lundvall Brothers:

CO Supreme Court struck down land use ordinance that banned oil and gas development in the home rule city of Greeley. Greeley's ban operationally impeded the COGCC from promoting efficient oil and gas development and production. Because oil and gas development is an area of mixed state-local concern, a home rule city's ordinance can be subject to operational preemption.

2006 - *Board of County Commissioners of Gunnison County v. BDS International:*

CO Appellate Court identified areas where a statutory county could regulate oil and gas operations, but may be subject to operational preemption: water quality, soil erosion and reclamation, wildlife protection, livestock protection, geological hazard avoidance, and cultural and historical preservation.

- 2007 - Legislative amendments to Colorado's Oil and Gas Conservation Act (OGCA) expanded COGCC's regulatory authority over water quality and wildlife protection.
- Feb 2012 - Boulder County (a statutory county) Board of County Commissioners passed a temporary moratorium on oil and gas permits while updates were made to the County's Comprehensive Plan and Land Use Code.
- July 2012 - Commerce City (a home rule city) passed oil and gas regulations that created a wildlife mitigation plan, prohibited oil and gas drilling near a national wildlife refuge and state park, and required individual operator agreements that can include noise mitigation, water quality control, and restricted hours of operations. These regulations have not been challenged in court.
- City of Longmont (a home rule city) updated oil and gas regulations with increased setback requirements, water quality testing, and wildlife protection requirements, and a drilling ban in existing and planned residential neighborhoods. These regulations have not been challenged in court and were superseded by a hydraulic fracturing ban.
- Nov 2012 - City of Longmont (a home rule city) passed a ballot initiative that bans hydraulic fracturing and the storage of fracking waste within city limits.
- 2013 - City of Greeley passed ordinance that requires special use permits for oil and gas operations, creates setbacks based on population density, requires mitigation for noise and visual impacts, requires wildlife mitigation planning, and cumulative impact analysis. These regulations have not prevented or slowed local oil and gas development and have not been challenged in court.
- Nov 2013 - Fort Collins (a home rule city) voters approved amendment to city ordinance that created a 5-year moratorium on hydraulic fracturing, in order to study its impacts on property values and human health.
- Lafayette (a home rule city) voters approved "Community Bill of Rights and Obligations" for the city's Home Rule Charter. This ordinance banned oil and gas extraction and related activities within city limits.
 - Voters in the city of Boulder (a home rule city) approved a 5-year extension on existing moratorium on oil and gas exploration and drilling. This moratorium remains unchallenged in court.

- Voters in the incorporated city-county of Broomfield, which operates as a home rule municipality, approved a 5-year moratorium on hydraulic fracturing and the disposal and storage of fracking wastes.

Dec 2013 - Colorado Oil and Gas Association (COGA) filed suit against Longmont, Lafayette, and Fort Collins.

July 2014 - *COGA v. City of Longmont*:

District Court in Weld County struck down Longmont's ban on hydraulic fracturing as operationally preempted by state law. Longmont appealed the decision.

Aug 2014 - *COGA v. City of Fort Collins*:

District Court in Larimer County struck down Fort Collins' 5 year moratorium as operationally preempted by state law. Fort Collins appealed the decision.

Nov 2014 - COGA filed suit against Broomfield. This case remains pending in District Court.

Aug 2015 - *COGA v. City of Lafayette*:

District Court in Boulder County struck down Lafayette's ban on oil and gas drilling and related activities, as operationally preempted by state law.

- Colorado Court of Appeals transferred Fort Collins and Longmont's appeal to Colorado Supreme Court, which will begin hearing oral argument in December 2015.

2015 - Boulder County extended its existing moratorium on oil and gas development in order to revise local regulations.

New Mexico

1970 - A home rule amendment to the New Mexico Constitution created "maximum local self-government" that shall be liberally construed.

1995 – *San Pedro Mining Corp. v. Board of County Commissioners of Santa Fe County*:

NM Supreme Court clarified that the state's Mining Act does not preempt local ordinances because it contains no express preemption language and it does not

comprehensively regulate all aspects of mining operations, such as local traffic and noise concerns. There is room for concurrent local regulations that address local concerns. The same reasoning has been applied to the New Mexico Oil and Gas Act.

- 2008 - Santa Fe County enacted strict environmental regulations on oil and gas activity and hydraulic fracturing. These regulations have discouraged development but have not been challenged by energy companies.
- 2013 - Mora County, NM passed Community Water Rights and Local Self Government Ordinance, which banned oil and gas development and related activities, invalidated state and federal laws and stripped corporations of personhood.
- 2015 – Two U.S. District Court cases filed against Mora County were settled. The Court invalidated Mora County’s ordinance, on the grounds that it violated the Supremacy Clause of the U.S. Constitution and was preempted by the NMOGA. Since the NMOGA regulates oil and gas activity, a county cannot ban that activity.

Montana

- 1972 – Montana adopted its state constitution, which contains environmental rights clauses in Article II (Inalienable Rights), Section 3 and Article IX, Section 1.
- 1999 - *Montana Environmental Information Center v. Dept. of Environmental Quality*: Montana Supreme Court struck down MTDEQ’s permit approval of an industrial operation that would discharge millions of gallons of arsenic-tainted water into the Landers Fork and Blackfoot Rivers. The court ruled that Montanans’ constitutional right to a clean environment is both reactive and preventative and can only be infringed upon if there is a compelling state interest.
- Jan 2002 - Bridger Canyon Planning and Zoning Commission in Gallatin County denied a conditional use permit to Huber Corp. for coalbed methane exploration.
 - Gallatin County created an emergency zoning district in an un-zoned region of Bozeman Pass and passed a one-year moratorium on coalbed methane and gas development. The moratorium was extended for a second year.

- 2002 - Huber Corp filed suit against Gallatin County in District Court (alleging state preemption of coalbed methane regulations) and federal court (alleging an unconstitutional regulatory taking). However, these cases were settled outside of court when Huber retracted its interest in development.
- Aug 2004 - The Bozeman Pass coalbed methane and gas moratorium expired.
- 2005 - Bozeman Pass Zoning Regulations created Natural Resource Conditional Use Permit for mining and oil and gas exploration and development, with strict requirements. The conditional use permit requirements have not been struck down in court and have discouraged exploration within the region.
- 2013 - *Williams v. Board of County Commissioners of Missoula County*: Montana Supreme court ruled that the protest provision in the Part 2 county zoning enabling statute was an unconstitutional delegation of legislative power to a non-legislative body.
- Oct 2014 - Residents in Belfry area of Carbon County petitioned Board of County Commissioners for the creation of the 3,000 acre Silvertip Zoning District, in order to ensure that proposed oil and gas activity is conducted in a responsible manner.
- Jan 2015 - Carbon County Board of County Commissioners denied the creation of the Silvertip Zoning District because several residents had filed protests. The Zoning District proponents soon filed suit against the county in district court.
- July 2015 - District Court dismissed the case involving Silvertip Zoning District without a ruling because the Carbon County Commissioners had failed to follow the correct procedure for establishing a citizen-initiated zoning district. The case has been appealed to the Montana Supreme Court, which will begin proceedings in early 2016.

APPENDIX D: Local Governments in Montana with Self-Government Powers

Consolidated City-County Governments with Self-Government Powers
Anaconda-Deer Lodge
Butte-Silverbow

Montana Counties	Cities with Self-Government Powers
Beaverhead	Dillon Lima
Carbon	Bridge Fromberg Red Lodge
Cascade	Great Falls Neihart
Chouteau	Fort Benton
Fergus*	Lewistown
Flathead	Whitefish
Gallatin	Belgrade Bozeman Manhattan Three Forks West Yellowstone
Glacier	Browning Cut Bank
Hill	Hingham
Lake	Polson
Lewis & Clark	Helena
Lincoln	Libby Troy
Madison	Ennis Virginia City
McCone	Circle
Mineral	Superior
Missoula	Missoula
Park	Clyde Park
Phillips	Saco
Pondera	Conrad
Ravalli	Darby Pinesdale
Roosevelt	Wolf Point

Montana Counties	Cities with Self-Government Powers
Rosebud	Colstrip Forsyth
Teton	Choteau
Toole	Sunburst
Valley	Fort Peck Glasgow
Yellowstone	Billings Broadview Laurel
*Indicates Self-Governing County	

Source:
MSU Extension, Local Government Center,
Montana State University, Bozeman, MT.
Montana Local Government Profiles, Fiscal
Year 2013. Available:
<http://www.msulocalgov.org/images/Montana%20Local%20Government%20Profile%202013.pdf>.