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COURT OF APPEALS

STATE OF NEW YORK

MARK S. WALLACH,

Appellant,

-against-

No. 130

TOWN OF DRYDEN, and
TOWN OF DRYDEN TOWN BOARD

Respondent.

COOPERSTOWN HOLSTEIN CORPORATION,

Appellant,

-against-

No. 131

TOWN OF MIDDLEFIELD,

Respondent.

20 Eagle Street
Albany, New York 12207
June 3, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Appearances:

THOMAS S. WEST, ESQ.
THE WEST FIRM, PLLC
Attorneys for Appellant Wallach
677 Broadway, 8th Floor
Albany, NY 12207

DEBORAH GOLDBERG, ESQ.
EARTHJUSTICE
Attorneys for Respondent Dryden
48 Wall Street, 19th Floor
New York, NY 10005

SCOTT R. KURKOSKI, ESQ.
LEVENE GOULDIN & THOMPSON, LLP
Attorneys for Appellant Cooperstown Holstein
450 Plaza Drive
Binghamton, NY 13902

JOHN J. HENRY, ESQ.
WHITEMAN OSTERMAN & HANNA, LLP
Attorneys for Respondent Middlefield
One Commerce Plaza
Albany, NY 12260

1 CHIEF JUDGE LIPPMAN: Number 130 and 131.
2 Counselor, would you like any rebuttal
3 time?

4 MR. WEST: Yes, Your Honor, we'd like three
5 minutes of rebuttal time?

6 CHIEF JUDGE LIPPMAN: Three minutes, sure,
7 go ahead.

8 MR. WEST: And in accordance with the
9 suggestion of your chief clerk, we've attempted to
10 divide up the argument. I'm going to cover the
11 express preemption issues, as well as the many
12 reasons why we don't think this court should follow
13 the Mined Land Reclamation Law. And Mr. Kurkoski is
14 going to cover the implied preemption issues.

15 CHIEF JUDGE LIPPMAN: Okay.

16 MR. WEST: So, Your Honor, may it please
17 the court, we think that this is really a very
18 simple, straightforward case, that the courts below
19 have really misinterpreted what is a very clear
20 preemption clause and a very clear statute.

21 CHIEF JUDGE LIPPMAN: What does that clear
22 preemption clause say?

23 MR. WEST: What it says, specifically, Your
24 Honor, is that the provisions of this article "shall
25 supersede all local laws and ordinances, relating to

1 the regulation of the oil and gas and solution mining
2 industries, but shall not supersede local government
3 jurisdiction over local roads or the rights of local
4 governments under the real property tax law".

5 CHIEF JUDGE LIPPMAN: So what happened
6 here? What was the town trying to do that - - - that
7 - - -

8 MR. WEST: What happened here - - -

9 CHIEF JUDGE LIPPMAN: - - - that has to be
10 superseded?

11 MR. WEST: Yeah, what happened here, Your
12 Honor, this is a very unique case. In both of these
13 towns, they enacted complete bans on oil and gas
14 activity.

15 CHIEF JUDGE LIPPMAN: But why isn't it
16 their right to do that?

17 MR. WEST: Well, because, Your Honor, we -
18 - - we have a situation where we have expressed
19 preemption by the provision that - - -

20 CHIEF JUDGE LIPPMAN: As to - - - as to
21 zoning type regulations - - -

22 MR. WEST: Absolutely.

23 CHIEF JUDGE LIPPMAN: You have expressed
24 preemption?

25 MR. WEST: Yeah, we have - - -

1 JUDGE GRAFFEO: So - - - so how was it
2 expressed? Is it - - - are you saying the word
3 "regulation" encompasses zoning?

4 MR. WEST: It does, Your Honor. And - - -
5 and first of all, you have to look at the - - - the
6 entire statutory scheme and the entire statute - - -
7 the entire preemption.

8 JUDGE GRAFFEO: We have - - - we have to
9 look at plain language - - -

10 MR. WEST: Exactly, and it says - - -

11 JUDGE GRAFFEO: - - - initially, correct?

12 MR. WEST: It says all local laws and
13 ordinances relating to the regulation. And - - - and
14 what - - - what the lower courts have done and what
15 our adversaries have done is they focused only on
16 that snippet relating to regulation. And then
17 they've tried to analogize this to the mining cases
18 with the Frew Run case in it and its progeny.

19 JUDGE GRAFFEO: For - - - for - - -

20 JUDGE READ: So you say this is - - - this
21 is - - -

22 JUDGE GRAFFEO: For express preemption, the
23 legislature has known how to do it - - -

24 MR. WEST: Correct.

25 JUDGE GRAFFEO: - - - in hazardous waste

1 siting, in community residences for mental health
2 folks. They've specifically indicated zoning. We've
3 known - - -

4 MR. WEST: Your Honor, you are - - - you
5 are correct.

6 JUDGE GRAFFEO: It's kind of curious that
7 if zoning was encompassed here - - -

8 MR. WEST: You are correct that - - -

9 JUDGE GRAFFEO: - - - that there wasn't a
10 particular reference to it.

11 MR. WEST: You are correct that there are
12 times when the legislature has expressly referenced
13 zoning, as it did in the Mined Law (sic) Reclamation
14 Law, where it - - - it carved out zoning as an
15 exception to the preemption - - -

16 CHIEF JUDGE LIPPMAN: Why couldn't they
17 have done it here?

18 MR. WEST: They could have, Your Honor,
19 but, you know, this is not a test as to whether or
20 not they should have used a particular phrase. If
21 you remember - - -

22 CHIEF JUDGE LIPPMAN: No, but you're
23 talking about express preemption?

24 MR. WEST: We're - - - we're talking about
25 something that occurred in 1981, before the Frew Run

1 decision. Almost every one of the zoning ordinances
2 that Judge Graffeo referenced and was referenced in
3 the briefs for our opposition came up after Frew Run
4 came down, and the legislature got it, okay. If you
5 want to preempt a zoning, you say zoning.

6 But at the time in 1981, when this law was
7 enacted, it - - -

8 CHIEF JUDGE LIPPMAN: Why isn't Frew - - -
9 why isn't Frew Run very directly relevant to this
10 case?

11 MR. WEST: Well, Your - - - Your Honor,
12 first of all, there - - - there are fundamental
13 differences between the Oil and Gas Solution Mining
14 Law and - - - and the Mined Land Reclamation Law - -
15 -

16 CHIEF JUDGE LIPPMAN: You don't think that
17 the essential theory of the decision is the same?

18 MR. WEST: It's - - - it's absolutely not,
19 because if you - - -

20 CHIEF JUDGE LIPPMAN: Why - - - why not?
21 Tell us.

22 MR. WEST: If you look at the supersession
23 clause at issue there, and again, I - - - I have to
24 quote it, it talks about superseding all local laws
25 relating to the extractive mining industry. It's

1 notable, they don't mention regulation there. They
2 just say relating to the extractive mining industry.

3 But then they go on to open up the barn
4 door for zoning, and they say, but "nothing in this
5 article shall be construed to prevent any local
6 government from enacting local zoning ordinances or
7 other local laws which impose stricter mined land
8 reclamation standards or requirements."

9 JUDGE PIGOTT: And it's your argument that
10 if they wanted to do that in this - - - in this
11 industry, they would have done the same thing. They
12 would have put that wording in, saying nothing will -
13 - - and absent that language, then zoning is
14 superseded as well.

15 MR. WEST: You - - - that's - - - that's
16 correct, Judge Pigott. You have to look at the - - -
17 you go back to the statute. It says "all local laws
18 and ordinances". It talks about jurisdiction being
19 limited to two discrete matters, okay, which, one is
20 road control and, two is real property taxation.

21 JUDGE ABDUS-SALAAM: Counsel, you don't
22 think that you have to look at the term "regulating"
23 at all?

24 MR. WEST: I - - - I think if you look at
25 the term regulating, and if you go to the Town Law,

1 Section 261, which is the enabling law for local
2 zoning, that says that the towns are authorized to
3 regulate the location of buildings and land uses,
4 okay. And since the preemption clause here talks
5 about relating to the regulation of the oil and gas
6 industry, I think the analysis stops there.

7 JUDGE SMITH: Well, but - - - but for Frew
8 Run, wouldn't you have a very simple argument,
9 saying, if you're pro - - - if you're prohibiting
10 something, you're regulating it?

11 MR. WEST: That's exactly right, Your
12 Honor, and - - -

13 JUDGE SMITH: I mean, but - - - but isn't
14 Frew - - - in Frew Run and maybe even more, Gernatt
15 Asphalt, don't they - - - don't they give you a
16 problem? I mean - - -

17 MR. WEST: Well, let's talk about both of
18 those cases, because if you - - - if you go back and
19 read Frew Run carefully, the court explained its
20 reasoning. It said that there are two legislative
21 aims in this statute.

22 So in other words, it was a hybrid
23 preemption clause. On one hand, they tooketh away
24 and said you can't do anything relating to the mining
25 industry, and on the other hand, they gaveth. They

1 said, but you can do whatever you want through zoning
2 relative to reclamation.

3 They went on to analyze how the mining law
4 has two essential components, regulating the
5 operational aspects of the industry and regulating
6 reclamation. Reclamation governs the ultimate land
7 use. Open sand and gravel mines have sometimes
8 occupied hundreds of acres - - -

9 JUDGE SMITH: Tell us - - - tell us why oil
10 and gas is different.

11 MR. WEST: Well, oil and gas is
12 fundamentally different, because you start with the
13 purposes to prevent waste, to promote the ultimate
14 recovery of the resource, and to pre - - - protect
15 the correlative rights - - -

16 JUDGE SMITH: Are you - - - are you saying,
17 really, that with oil and gas, to regulate it, you've
18 got to reg - - - the - - - you got to regulate
19 location?

20 MR. WEST: Absolutely, Your Honor. And - -
21 - and if you understand the way the oil and gas
22 statute is created, integral to the statute is the
23 concept of spacing, all right. And what happens with
24 well spacing is if you have a pool of oil and gas, no
25 matter whether it's ten acres or thousands of acres,

1 you have to lay out spacing units so that you don't
2 strain the resource and create waste.

3 And in practice, the way this happens is
4 they set these rectangular - - -

5 CHIEF JUDGE LIPPMAN: What can the
6 municipality do in relation to fracking or, you know
7 - - - or in this particular kind of - - - nothing?
8 They have no say in what happens? Their elected
9 officials have no say in what happens in that
10 municipality, because it's all superseded. There's
11 nothing they can do, anything to do with oil and gas?

12 MR. WEST: We would not go that far, Your
13 Honor.

14 CHIEF JUDGE LIPPMAN: So what can they do?

15 MR. WEST: Well, first of all - - -

16 CHIEF JUDGE LIPPMAN: What's the answer to
17 my quest - - -

18 MR. WEST: - - - they can regulate local
19 roads. And that's a big issue with high volume - - -

20 CHIEF JUDGE LIPPMAN: They can regulate
21 local roads, how so, relating to - - -

22 MR. WEST: Well, they - - - they can
23 regulate - - - they can post limits on weight, as
24 long as those apply eve - - - evenhandedly to all the
25 industries. They can - - - most - - - in most cases,

1 the - - -

2 CHIEF JUDGE LIPPMAN: The weight that can
3 be on the road?

4 MR. WEST: Yeah, and the bridges. And they
5 can post roads to be off-limits. They can help them
6 dictate routes. They can talk about timing of when
7 deliveries should be made to these sites.

8 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
9 in essence, those are really on the fringes, in terms
10 of this whole issue. Basically, you're saying that
11 they don't have really any say when it comes to oil
12 and gas, other than these tangential - - - yeah, the
13 - - - on the roads, the - - -

14 JUDGE READ: Well, I guess you're saying
15 zoning. They can't zone it out - - -

16 MR. WEST: They can't zone; that's correct,
17 Judge Read. And - - - and they - - - they have - - -
18 they were specifically granted limited jurisdiction -
19 - -

20 CHIEF JUDGE LIPPMAN: Isn't zoning
21 fundamental to the power of - - - of local
22 municipalities?

23 MR. WEST: Your Honor, I think - - -

24 CHIEF JUDGE LIPPMAN: Can that just be
25 taken away so easily, and - - - and without expressly

1 saying that you're taking it away?

2 MR. WEST: We believe it can. We think the
3 Wambat Realty case, and the Albany Area Builders
4 Association case, say as long as it's a statute of
5 statewide importance, the state has the right to
6 preempt municipalities from a given subject matter.

7 JUDGE GRAFFEO: In - - - in light of Frew
8 Run, how do we know that this is - - - I guess you
9 would say, that this is - - - this preempts where to
10 drill, as opposed to how to drill?

11 MR. WEST: It - - - the way you do that - -
12 -

13 JUDGE GRAFFEO: What - - - is there
14 anything in the legislative history that tells us
15 that this is not just a how-to-drill statute?

16 MR. WEST: You go back and you look at - -
17 - you look at the Oil and Gas Compact which talks
18 about requiring spacing units. You look at the oil
19 and gas law, which talks about spacing. You - - -

20 JUDGE SMITH: You - - - so you're saying
21 there's location right in the statute.

22 MR. WEST: It's right in the statute, and
23 it's been there since 1963, and it was in the
24 original Oil and Gas Compact Commission from 1935,
25 that - - - that we adopted in 1941. That's in the

1 statute; it's at ECL Article 23, Title 21, and it
2 expressly says, you have to space this to prevent
3 waste - - -

4 JUDGE SMITH: Would - - - would this be a
5 different case if - - - if there had been a
6 longstanding zoning regulation that said this area is
7 residential only, no industrial use? Would that - -
8 - would that be preempted?

9 MR. WEST: We - - - we don't think it is,
10 Your Honor. We think the DEC has the authority to
11 regulate, not only spacing - - -

12 JUDGE SMITH: You don't think it - - - you
13 don't think it's different or you don't think it's
14 preempted?

15 MR. WEST: I don't think - - - I - - - no,
16 I think it is preempted, even if it's been long - - -

17 JUDGE SMITH: It would be - - - yeah.

18 MR. WEST: - - - even if it's been
19 longstanding. The DEC in addition to the - - -

20 JUDGE GRAFFEO: So even existing zoning
21 laws are - - -

22 MR. WEST: Absolute - - - absolutely, Your
23 Honor.

24 JUDGE GRAFFEO: - - - are preempted?

25 MR. WEST: Yeah, because most of these

1 towns - - -

2 JUDGE GRAFFEO: Not something that - - -
3 that a town, because they think there's going to be
4 some contract signed, decide to pass a zoning - - - a
5 new zoning restriction?

6 MR. WEST: And let me just - - - let me
7 just explain why, Judge Graffeo. Once you go through
8 the - - - the requirements for setting up spacing
9 units in a wellbore and you get DEC to say that looks
10 good from a geologic standpoint, you still have to
11 deal with all of the environmental restrictions and
12 safeguards that the DEC imposes through the State
13 Environmental Quality Review Act and that they're - -
14 - they're agonizing over under the Supplemental
15 Generic Environmental Impact Statement, which looks
16 at setbacks from houses, schools, hospitals, it looks
17 at watersheds, it looks at wetlands, to make sure
18 that you've picked a good location.

19 Now, it may be in a - - -

20 JUDGE GRAFFEO: It's pretty - - - it's
21 pretty drastic, though, to change longtime
22 residential zoning restrictions.

23 MR. WEST: It - - -

24 JUDGE GRAFFEO: I mean, one would think
25 that the legislature would be a little more explicit

1 if that's what they intended to do.

2 MR. WEST: Well, I think all means all,
3 Judge Graffeo, all local laws and local ordinances.
4 And I don't think they have to - - - they - - - they
5 don't have to say it. They didn't put in the
6 exception. If they wanted to exempt zoning, they
7 should have put it in - - -

8 JUDGE RIVERA: Well - - - well - - - I'm
9 sorry. If - - - if we disagree with you, that
10 regulation means something different from what you're
11 suggesting it means in this particular case, I take
12 it, though, your argument, right now, based on your
13 responses to Judge Graffeo's, is if we hold against
14 you, the state certainly could then pass a very
15 express statute that makes very clear that they're
16 preempting.

17 MR. WEST: Absolutely, and what will happen
18 in the New York Legislative process, regarding
19 hydraulic fracturing I think is beyond any of us to
20 predict.

21 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
22 that's up to them, isn't it?

23 MR. WEST: But - - - but what's the issue -
24 - -

25 CHIEF JUDGE LIPPMAN: Counsel, that's up to

1 them, isn't it?

2 MR. WEST: It is up to them, Your Honor,
3 but what's up to you, as the court that agreed to
4 hear this case, is - - - is very clear issue of
5 express preemption - - -

6 CHIEF JUDGE LIPPMAN: You think they've
7 done it already.

8 MR. WEST: We think they've done it
9 already.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.

11 MR. WEST: They did in '63 - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. WEST: - - - and they - - - and they -
14 - -

15 CHIEF JUDGE LIPPMAN: You'll have your
16 rebuttal. Let's hear from - - - from your colleague.

17 MR. KURKOSKI: Good afternoon. May it
18 please the court, my name is Scott Kurkoski. I
19 represent the appellant in this matter, the
20 Middlefield matter, Jennifer Huntington. Jennifer
21 Huntington is a dairy farmer in the Town of
22 Middlefield. She leased her property for purposes of
23 developing her - - -

24 CHIEF JUDGE LIPPMAN: So where's the
25 implied preemption?

1 MR. KURKOSKI: Your Honor, I wanted to just
2 make clear - - -

3 CHIEF JUDGE LIPPMAN: Where is it? Where
4 does it come from?

5 MR. KURKOSKI: I wanted to make clear that
6 we've been talking a lot about hydraulic fracturing.
7 Jennifer Huntington was not going to hydraulically
8 fracture her property. Her company was here to con -
9 - - to explore and develop her minerals by
10 conventional means. The same means that we've been
11 drilling wells with - - -

12 CHIEF JUDGE LIPPMAN: Where is - - - where
13 - - -

14 MR. KURKOSKI: - - - in New York State for
15 over a hundred years.

16 CHIEF JUDGE LIPPMAN: Where - - - where is
17 there implied preemption?

18 MR. KURKOSKI: The implied preemption
19 comes, Your Honor, from - - - from different sources.
20 It comes from a conflict; it comes from the fact that
21 there's field preemption. And it comes from the fact
22 that - - -

23 CHIEF JUDGE LIPPMAN: Counsel, I'm sorry.
24 Do you want any rebuttal time?

25 MR. KURKOSKI: A minute and a half, Your

1 Honor.

2 CHIEF JUDGE LIPPMAN: A minute and a half,
3 go ahead. I'm sorry; go ahead.

4 MR. KURKOSKI: So, it - - - it comes from
5 those areas because there are direct conflicts with
6 respect to what's happened locally and what the state
7 interests are. And the state interests are
8 paramount.

9 You asked earlier what - - - what's the
10 important difference between this case and - - - and
11 Frew Run? This is an energy case. This is dramatic.

12 CHIEF JUDGE LIPPMAN: What does mean - - -
13 but what - - - what are the municipalities'
14 interests? What interests do they have in this
15 issue?

16 MR. KURKOSKI: Well, what makes this an
17 implied case, Your Honor, is that the DEC, through
18 the Environmental Conservation Law and other - - -
19 the conflicts, comprehensive statutory scheme has
20 supplanted the rights of the - - -

21 CHIEF JUDGE LIPPMAN: Preempted the field?

22 MR. KURKOSKI: They completed preempted the
23 field, Your Honor. And if you take a look at that,
24 they - - -

25 CHIEF JUDGE LIPPMAN: Even as to something

1 as basic as zoning - - -

2 MR. KURKOSKI: Even something - - -

3 CHIEF JUDGE LIPPMAN: - - - to a
4 municipality?

5 MR. KURKOSKI: But when you look at the
6 statutory scheme, we have a specific tax provision
7 that provides taxes to a municipality. We have a
8 specific com - - - compulsory integration provision
9 that happens without regard to zoning.

10 CHIEF JUDGE LIPPMAN: And you agree with
11 your - - - your adversary, even with preexisting
12 zoning?

13 MR. KURKOSKI: Well, with com - - - with
14 compulsory integration, you know, we have to figure
15 out what the pool is, what the unit is. And the
16 reason is - - -

17 JUDGE SMITH: Well, lack of compulsory - -
18 - explain what compulsory integration is. That's - -
19 - you mean, you - - - you can tell - - - you can tell
20 people where they can drill and where they can't?

21 MR. KURKOSKI: Well, the concept in New
22 York is - - -

23 JUDGE SMITH: The state can?

24 MR. KURKOSKI: - - - that we need to be
25 able to fully develop the resource, right, and

1 pursuant to the policy of - - - of Article 23, we
2 need to have an ultimate recovery of - - - of oil and
3 gas; we need to protect the correlative rights of the
4 landowners. In this case, my client's correlative
5 right is her ability - - -

6 JUDGE SMITH: Let me - - - let me ask you a
7 simpler question. If I - - - if I - - - if I am a -
8 - - if I'm in the oil business and I want to drill a
9 well, and you - - - I have compulsory integration,
10 that means the state is telling me where I can drill
11 and where I can't?

12 MR. KURKOSKI: That's how comprehensive
13 this - - -

14 JUDGE SMITH: Is that a yes?

15 MR. KURKOSKI: - - - statutory scheme is.
16 Yes, without regard to zoning. And that is because
17 oil and gas pools - - -

18 JUDGE SMITH: Well, I guess - - - well, I
19 guess, your - - - your - - -

20 MR. KURKOSKI: - - - do not follow
21 municipal boundaries.

22 JUDGE SMITH: - - - your point is, if the
23 state's going to tell you that, then it's going to be
24 - - - it might be a problem if every locality can
25 say, no drilling here.

1 MR. KURKOSKI: Of course. Because if it
2 turns out that I want to drill in a town that's
3 immediately adjacent to Middlefield, but I now have
4 this potential issue, then what's going to happen to
5 my compulsory integration law?

6 CHIEF JUDGE LIPPMAN: You're saying it's
7 unworkable if every - - - if every town can - - -
8 every municipality can - - - can ban it or can
9 whatever - - - it becomes an unworkable kind of
10 patchwork thing?

11 MR. KURKOSKI: It becomes a conflict and
12 therein lies the implied preemption, Your Honor - - -

13 JUDGE GRAFFEO: Do we know that there's - -
14 -

15 MR. KURKOSKI: - - - because of that
16 conflict that happens.

17 JUDGE GRAFFEO: Do we know that there's no
18 municipalities that want this that have a supply?

19 MR. KURKOSKI: Well - - - well, what we
20 know is that there right now are seventy
21 municipalities in the state of New York who have
22 banned oil and gas drilling. So not only has the
23 Town of Middlefield taken the correlative rights of
24 my client, my client's right in the formation
25 underlying her property. There is that right that is

1 in Article 23-0301, that she the right to - - -

2 JUDGE RIVERA: Perhaps there's a suggestion
3 that - - -

4 MR. KURKOSKI: But not - - -

5 JUDGE RIVERA: Perhaps as a suggestion that
6 the population of New York is not so enamored of
7 hydrofracking?

8 MR. KURKOSKI: It's - - - if you take a
9 poll, it's interesting, but are we going to let 932
10 towns decide the energy policy of New York State?

11 CHIEF JUDGE LIPPMAN: What about the
12 legislature deciding the energy policy of New York
13 State, if they're not clear on what they're doing
14 now?

15 MR. KURKOSKI: They certainly could have,
16 right. They could have come in and said, look, we're
17 going to come - - -

18 CHIEF JUDGE LIPPMAN: No, no, why not let
19 them come in now?

20 MR. KURKOSKI: - - - let them do it, but
21 they haven't.

22 CHIEF JUDGE LIPPMAN: Why isn't that a good
23 thing to let the elected representatives of the
24 people determine that, again, unless it's already
25 been determined?

1 MR. KURKOSKI: The legislature, after you
2 determine this case, can fully look at it, amend - -
3 - like they did make that adjustment in the Frew Run
4 and Gernatt case to the mining law - - -

5 CHIEF JUDGE LIPPMAN: Yeah, but - - - but I
6 think you'd agree with your colleague it's not so
7 easy to get action in one direction or another,
8 that's why we have this case, right?

9 MR. KURKOSKI: We have this case because we
10 have - - -

11 CHIEF JUDGE LIPPMAN: If the legislature
12 was going to, tomorrow, express their will in a
13 definitive way, we probably wouldn't need a - - - you
14 know, focus in on the - - - on what the scheme is
15 exactly now, right?

16 MR. KURKOSKI: I don't know if we have this
17 case without Frew Run, you know. No court in the
18 country has looked at their mining law to inter - - -
19 to determine their energy law. That's what has
20 somewhat complicated this case. And that's what - -
21 -

22 CHIEF JUDGE LIPPMAN: But mining is so
23 different from oil and gas that - - -

24 MR. KURKOSKI: Your Honor, there's never
25 been a sand and gravel crisis in this country. But

1 we have lived through an energy crisis. And - - -

2 JUDGE GRAFFEO: Do you think - - -

3 MR. KURKOSKI: - - - it is important.

4 JUDGE GRAFFEO: Do you think, even without
5 Frew Run, these other seventy communities would not
6 have adopted those zoning restrictions?

7 MR. KURKOSKI: No, but - - - those seventy
8 communities came in; they thought they understood it.
9 They are - - - they thought that they might actually
10 have the expertise that our DEC has - - - doesn't
11 make sense. But for some reason or another, they've
12 decided, this makes us nervous; we're going to ban
13 it. Now - - -

14 JUDGE GRAFFEO: So we're - - - we're not
15 actually deciding this case for the just these two
16 municipalities. There's going to be implications for
17 the other seventy?

18 MR. KURKOSKI: That's the problem, right.
19 Because not only has this town taken away the - - -
20 the correlative rights - - -

21 JUDGE GRAFFEO: Is that - - - is that yes?
22 Is that yes?

23 MR. KURKOSKI: Yes. Because they've taken
24 away the correlative rights of my client, Jennifer
25 Huntington. They've also taken away the correlative

1 rights of thousands of landowners throughout the
2 state.

3 JUDGE RIVERA: But - - - but the law does -
4 - - does say that the rights of the rest of community
5 has to be taken into consideration, does it not?

6 MR. KURKOSKI: It does, but you know what?
7 The Appellate Division - - -

8 JUDGE RIVERA: So why does your client's
9 rights trump all other rights of everyone else - - -

10 MR. KURKOSKI: They - - -

11 JUDGE RIVERA: - - - in that community?

12 MR. KURKOSKI: Your Honor, they don't.
13 They are taken collectively and they are viewed by
14 the DEC. And this is where the Appellate Division
15 did not get it right in its decision. They focused
16 on one part of the policy statement that said that -
17 - - that we have to focus on the - - - the general
18 public.

19 But that policy statement also said that it
20 has to - - - we have to be concerned about the
21 correlative rights. And they completely ignored the
22 correlative rights. Take a look at the Supreme
23 Court's decision in Voss, and that explains it
24 perfectly. In fact, in Voss, they really relied upon
25 the fact that the correlative rights issue, all - - -

1 paired with the fact that the state has this
2 superseding interest in energy, that really is what
3 made that determination in Voss banned - - -

4 JUDGE RIVERA: Yeah, let me ask you, what -
5 - - what - - -

6 MR. KURKOSKI: - - - that Voss - - -

7 JUDGE RIVERA: Yes, thank you. What, if
8 any, significance does the moratorium have if there -
9 - - if there's such a concern about the energy
10 crisis?

11 MR. KURKOSKI: Well, it - - - it goes
12 towards, right, this overriding procedural policy
13 that we're going through in the state, right, the
14 suggestion that the towns don't have any say in this.
15 Well, what's going on is now we have a state that's
16 been at this for six years on a SGEIS, prepared a
17 GEIS in 1992, and with respect to health impacts,
18 there will not be an SGEIS until our Department of
19 Health decides on it.

20 That's what's going on at the state level.
21 That's where we have this comprehensive plan that is
22 looking at these local interests, and these
23 communities are saying, well, we don't have a say.
24 But the state is saying, in order for us to do this -
25 - -

1 CHIEF JUDGE LIPPMAN: That's where this is
2 decided - - - that's where this is going to be
3 decided? Not in the local municipalities.

4 MR. KURKOSKI: It has to be, Your Honor.
5 It has to be because the experts - - -

6 CHIEF JUDGE LIPPMAN: For some kind of
7 coherent approach?

8 MR. KURKOSKI: We will not have a uniform
9 state approach to energy if we allow 932 towns in the
10 state of New York to decide.

11 JUDGE READ: So you're saying that's how -
12 - - that's how it's different from Frew or why it's
13 not controlled by Frew, because Frew just involved an
14 entirely different field, which is mining?

15 MR. KURKOSKI: Well, first - - - mining is
16 one, right. The interest - - - the state interest is
17 not the same. We - - - right. The state will
18 survive whether or not - - -

19 JUDGE READ: I'm - - - I'm having a hard
20 time - - -

21 MR. KURKOSKI: - - - we have sand and
22 gravel.

23 JUDGE READ: I'm having a hard time getting
24 around Frew, so I'm asking you why - - - why - - -
25 how would I distinguish it? Why is it - - - why

1 isn't this just controlled by Frew?

2 MR. KURKOSKI: Take a look at the
3 jurisdictional issues, as well. The jurisdiction
4 statement in the - - - the oil and gas law says that
5 we're the - - - the towns are preempted from having
6 any jurisdiction over everything, except roads and
7 taxes.

8 JUDGE READ: So you're relying on - - - the
9 differences - - - you say the differences in the
10 language are material between the superseding clauses
11 in the two - - -

12 MR. KURKOSKI: Of course, it goes a lot
13 farther - - -

14 JUDGE READ: - - - statutes.

15 MR. KURKOSKI: - - - than Frew Run does in
16 the mining statute that we have - - - we are
17 preempting you so that you have no power to regulate,
18 and have no jurisdiction over anything except, we're
19 going to delineate two exceptions, and that's it.
20 All, but two. And otherwise, we have jurisdiction
21 over everything.

22 JUDGE RIVERA: Is - - - is - - -

23 JUDGE PIGOTT: Do you know what we did - -
24 - what - - - what was done in the cell phone tower
25 issue?

1 MR. KURKOSKI: I - - - I know that the
2 towns really have no say with respect to cell towers,
3 because it's an important national interest that we
4 move forward with that.

5 JUDGE PIGOTT: But wasn't it spelled out
6 rather specifically in the - - - in the legislation
7 that they could not oppose a cell tower in a given
8 area - - -

9 MR. KURKOSKI: Sure.

10 JUDGE PIGOTT: - - - for that reason,
11 because - - -

12 MR. KURKOSKI: It happens there; it happens
13 with pipelines. It happened in FERC. Right, if FERC
14 wants to put in a pipeline, then the communities
15 cannot do that.

16 CHIEF JUDGE LIPPMAN: Why wasn't it more
17 clear - - - why wasn't it clearer here?

18 MR. KURKOSKI: It sure would have been a
19 lot easier, Your Honor. But I can tell you, and we
20 had introduced this in some of our motions - - -

21 CHIEF JUDGE LIPPMAN: And why shouldn't it
22 be a lot clearer if it's a matter of, as you say, you
23 know, great policy concern to our state and to our
24 country?

25 MR. KURKOSKI: When we look at the plain

1 language of the law, how is "all" and - - - plus
2 jurisdiction over everything, except two things, how
3 is that not clear? It is clear. I wish they would
4 have gone further and said, "and zoning", but you
5 know what?

6 CHIEF JUDGE LIPPMAN: But you say, don't -
7 - -

8 MR. KURKOSKI: The fact that they didn't,
9 and the fact that they did do it in the mining law,
10 that means something too.

11 JUDGE RIVERA: It's - - - but it's which
12 category of all, right? Which of those laws, right?
13 They're making an argument that laws that deal with
14 regulation may or may not be encompassed, that - - -
15 that there's something already that somehow separates
16 the "all" from every law and a subcategory of laws.
17 That's their argument. Why doesn't that make sense,
18 based on Frew Run, based on these other cases?

19 MR. KURKOSKI: The regulation issue, Your
20 Honor, take a look at the - - - what Black's Law
21 dictionary says, because regulation is really viewing
22 not just the procedures as the lower court did, it -
23 - - it really is far broader than that and it should
24 be looked at in those terms.

25 JUDGE ABDUS-SALAAM: Counsel, did I hear

1 you correctly? Did you say that the regulation in
2 the supersession provision of the regulation in - - -
3 in Frew Run was narrower in scope than this one?

4 MR. KURKOSKI: Well - - -

5 JUDGE ABDUS-SALAAM: Or is it broader?

6 MR. KURKOSKI: I don't - - - I don't have
7 an issue with the way that Frew Run was interpreted,
8 because I don't think that the state interest is the
9 same with respect to sand and gravel. The state
10 interest in energy is gigantic.

11 Just to give you an example, right, the - -
12 - the city of Dunkirk has a power plant, a coal-fired
13 power plant. And just this past December, the
14 Governor went to Dunkirk and said, we are going to
15 convert this power plant from coal to natural gas.
16 It will help our environment; it will help our
17 economy. We will move forward in an important state
18 interest.

19 And in March of this year, the city of
20 Dunkirk passed a ban on all hydraulic fracturing
21 activities and oil and gas activities. Now, to the
22 extent that that ban will impact the Governor's
23 decision to move forward with this power plant, that
24 is a conflict that cannot exist. We cannot have the
25 towns coming in and taking over - - -

1 CHIEF JUDGE LIPPMAN: Okay, coun - - -

2 MR. KURKOSKI: - - - on this issue.

3 CHIEF JUDGE LIPPMAN: Thanks, counselor.

4 MR. KURKOSKI: Thank you.

5 CHIEF JUDGE LIPPMAN: Counsel?

6 MS. GOLDBERG: May it - - - may it please
7 the court, my name is Deborah Goldberg of
8 Earthjustice, representing respondents Town of Dryden
9 and its town board.

10 CHIEF JUDGE LIPPMAN: Counsel, what - - -
11 what is unclear about the preemption here? Why - - -
12 why - - - why is this not express preemption?

13 MS. GOLDBERG: Your Honor, the legislature
14 knows how to do express preemption when it wants to
15 do so. It mentions zoning and land - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but look at the
17 - - - look at the plain language. What's - - -

18 MS. GOLDBERG: Abs - - -

19 CHIEF JUDGE LIPPMAN: - - - what's - - -
20 what is it that gives you pause in the language
21 that's there, that - - - to think that every county
22 or every town can go and, you know, make its own ban
23 or whatever it is?

24 MS. GOLDBERG: What the language says is
25 that it supersedes laws that relate to the regulation

1 of the oil, gas and solution mining industries. So
2 if it were something that addressed the oil, gas and
3 solution mining industries, per se as such, it might
4 very well be preempted. But what we have in - - -

5 JUDGE SMITH: Well, how - - -

6 CHIEF JUDGE LIPPMAN: What could be more
7 express than a ban on doing it?

8 MS. GOLDBERG: Your Honor - - -

9 CHIEF JUDGE LIPPMAN: How can it not affect
10 oil and gas?

11 MS. GOLDBERG: - - - this court has
12 recognized, not only in the Frew Run line of cases,
13 that there's a distinction between regulation of a
14 business and regulation of land use. What we have
15 here is regulation of - - - of an industry.

16 JUDGE SMITH: Does that - - - does that - -
17 - does that distinction really work in this industry
18 when you're - - - when you're talking about
19 regulating oil and gas drilling? Don't you have to -
20 - - isn't that - - - isn't that in itself regulation
21 of land use?

22 MS. GOLDBERG: Your Honor, there are land -
23 - - there are locational requirements in the Mined
24 Land Reclamation Law. There are locational
25 requirements in the Alcohol and Beverage Control Law.

1 Nevertheless - - -

2 JUDGE SMITH: Isn't - - - isn't location -
3 - -

4 MS. GOLDBERG: - - - this court found - - -

5 JUDGE SMITH: Isn't location really more
6 basic, though, to mi - - - to oil and gas regulation?

7 MS. GOLDBERG: No, Your Honor. The - - -
8 the units that are - - - that define where the
9 drilling is done are defined entirely by the
10 industry. The industry goes in, proposes it to DEC.
11 DEC then accepts or de - - - or declines it based on
12 interest.

13 So that they can choose their units so that
14 they don't overlap with towns that ban it. They can
15 set those limits and - - - they don't have to paint
16 themselves into a corner.

17 JUDGE PIGOTT: But isn't the mine - - -

18 JUDGE GRAFFEO: It certainly would have
19 been easy for the legislature to put zoning in along
20 with roads?

21 MS. GOLDBERG: Absolutely, Your Honor.

22 JUDGE GRAFFEO: I mean, it seems - - -

23 MS. GOLDBERG: It - - -

24 JUDGE GRAFFEO: - - - that would have been
25 pretty basic - - -

1 MS. GOLDBERG: Un - - -

2 JUDGE GRAFFEO: - - - and they were
3 certainly aware of zoning. Every single municipality
4 has a zoning code.

5 MS. GOLDBERG: Absolutely, Your Honor.
6 Under - - - under their theory, absolutely every
7 local law - - -

8 JUDGE GRAFFEO: Well, why - - - why is it
9 missing in the exceptions?

10 MS. GOLDBERG: Because what was presented
11 to them at the time, as you can see from the
12 legislative history, was a concern about the ability
13 to regulate the vehicles and the roads in the town,
14 and on the fees and other taxes that were - - - that
15 the towns were imposing, because they were being
16 forced to enforce this law in the absence of funding.

17 JUDGE GRAFFEO: Right. So if the
18 legislature was aware of those problems, why weren't
19 they aware of the lo - - -

20 MS. GOLDBERG: They weren't raised - - -

21 JUDGE GRAFFEO: - - - the other local
22 considerations?

23 MS. GOLDBERG: They weren't raised at the
24 time. At the time, Okalahoma allowed bans - - -

25 JUDGE PIGOTT: But then - - - but then - -

1 - but then how do you square - - -

2 MS. GOLDBERG: - - - Texas allowed bans - -

3 -

4 JUDGE PIGOTT: Excuse me, Ms. Goldberg.

5 MS. GOLDBERG: I'm sorry.

6 JUDGE PIGOTT: I apologize for interrupting
7 you, but how do you square the fact that the
8 Environmental Conservation Law with respect to mining
9 says "nothing in this title should be construed to
10 prevent any local government from enacting local
11 zoning ordinances or other local laws which impose
12 stricter mined land reclamation standards or
13 requirements than those found herein" - - -

14 MS. GOLDBERG: So in the - - -

15 JUDGE PIGOTT: - - - with - - - with the
16 oil and gas one which does not make that specific
17 exception?

18 MS. GOLDBERG: Your Honor, the Mined Land
19 Reclamation Law allowed zoning only with respect to
20 higher standards of reclamation. And what this court
21 determined - - -

22 JUDGE PIGOTT: No, no, what I'm saying is -
23 - - what I'm saying is that this law says zoning's
24 excluded. Mining - - -

25 MS. GOLDBERG: No, Your Honor. The Mined

1 Land Reclamation Law says zoning - - -

2 JUDGE PIGOTT: Can I read it again?

3 MS. GOLDBERG: - - - with respect to
4 reclamation - - -

5 JUDGE PIGOTT: Do you want me to read it
6 again?

7 MS. GOLDBERG: - - - is the - - - I - - -
8 if you read the provision, it says, it does not
9 exclude zoning for higher standards for reclamation.
10 It does not say, it does not exclude zo - - - it
11 excludes zoning completely. It has one very narrow
12 type of zoning that's permitted - - -

13 JUDGE PIGOTT: Right, okay.

14 MS. GOLDBERG: - - - and this court
15 nevertheless allowed them to zone it out completely.

16 JUDGE PIGOTT: Right. But it - - - but
17 they - - - they said that in the mining law. They
18 don't say that in the - - - in the oil and gas law.
19 And I'm wondering if you have a reason why they were
20 - - - they were conscious of zoning in mining, but
21 were not conscious of zoning in oil?

22 MS. GOLDBERG: Zoning was not at issue in
23 the Oil, Gas and Solution Mining Law, because in
24 Texas, Okalahoma, many other states, there were
25 already bans - - -

1 JUDGE PIGOTT: No, now - - - now you're
2 reading the - - -

3 MS. GOLDBERG: - - - that they were aware
4 of.

5 JUDGE PIGOTT: I suggest to you that you
6 may be reading the minds of the legislators, and they
7 may be saying, you know, we're not going to think
8 about zoning because Oklahoma did something. I'm
9 suggesting that maybe the legislature knew what it
10 was doing, because they wrote it in one law and
11 didn't write it in another. Now why would your
12 argument that they were thinking about Oklahoma - - -

13 MS. GOLDBERG: Your Honor, I - - -

14 JUDGE PIGOTT: - - - I'm almost done - - -
15 be stronger than my argument that they wrote two
16 laws; in one of them they - - - they considered
17 zoning, in the other they didn't.

18 MS. GOLDBERG: If you follow your argument
19 to its logical conclusion, then every single law of
20 general applicability that's not mentioned in the
21 exclusions is preempted. That means that the truck
22 driver can drive his truck into town with his radio
23 blaring down the - - - wrong way down the one-way
24 street - - -

25 JUDGE PIGOTT: No, no, no, I - - -

1 MS. GOLDBERG: - - - throw its - - -

2 JUDGE PIGOTT: - - - you can say anything
3 to - - - to absurdity, and I understand your point,
4 but I bet you have local constabulary and I think you
5 have people who will enforce vehicle and traffic laws
6 and things like that.

7 MS. GOLDBERG: Yes, Your Honor.

8 JUDGE PIGOTT: You can make - - - you can
9 make bad arguments about all of that. Mr. Kurkoski
10 makes the point that you've got landowners, who want
11 oil and gas, and they're saying there's nothing in
12 this law that says I can't - - - that I can't do
13 that. And the town now says I can't, but there's
14 nothing in the laws. I can't - - - I can't - - - you
15 know, I can do my mining, because they specifically
16 said, you know, that there could be zoning there, and
17 the town hasn't zoned, but there's nothing over here.

18 MS. GOLDBERG: The Mined Land Reclamation
19 Law does not say that zoning is excluded. The Mined
20 Land Reclamation Law says higher standards are
21 permitted under local law. What this court found was
22 that there's a fundamental distinction looking at the
23 initial enacting clause between regulating an
24 industry and regulating land use. And even though
25 the land mentioned zoning with respect to higher

1 standards, it did not preempt zoning altogether.

2 CHIEF JUDGE LIPPMAN: Counsel, what - - -
3 but even if we - - - let's say we accept your
4 argument on express, why isn't - - - does it make any
5 sense on implied preemption that every different town
6 can - - - can ban it, do - - - do what they want? Is
7 that going - - - is that going to work in terms of a
8 statewide policy that - - - that exists for this
9 industry?

10 MS. GOLDBERG: There's two things to say.
11 First of all - - -

12 CHIEF JUDGE LIPPMAN: Doesn't that implied
13 - - - isn't that a harder argument for you to meet
14 than the express?

15 MS. GOLDBERG: No, Your Honor. We - - -
16 you need - - -

17 CHIEF JUDGE LIPPMAN: Why not?

18 MS. GOLDBERG: Because first of all, you
19 don't need to reach the implied preemption argument
20 at all, because you have an expressed preemption
21 clause here. And if you determine that there's no
22 clear expression of intent to preempt in the express
23 preemption clause, you can't turn around and say, but
24 we're going to impute it to them anyways, under
25 implied preemption.

1 JUDGE SMITH: Well, I - - - I - - - I think
2 that the Chief may be getting at a more basic point.
3 It does say quite a few places in - - - in these
4 statutes, we want to foster and grow and may - - -
5 have a vibrant energy industry in this state. The
6 question is how are you supposed to do that if any
7 town can prohibit it that wants to?

8 MS. GOLDBERG: Precisely the way that Texas
9 does it, and Oklahoma does it, and California does it
10 and Illinois does it, where all of the localities
11 have exactly the right that we're talking about here,
12 and the industry is thriving. This industry figures
13 out what the lay of the land is, and it manages to
14 accommodate itself and do very well - - -

15 JUDGE GRAFFEO: That sounds - - -

16 MS. GOLDBERG: - - - in all of those
17 states.

18 JUDGE GRAFFEO: - - - that sounds like we
19 should be stepping into the void that the legislature
20 hasn't addressed - - -

21 MS. GOLDBERG: No, Your Honor, the
22 legislature - - -

23 JUDGE GRAFFEO: - - - because apparently
24 there's an impasse with them trying to pass statewide
25 clarification here as to whether it's preempted or

1 not preempted. So we have to deal with the language
2 of the statute.

3 MS. GOLDBERG: Absolutely, Your Honor. The
4 language of the statute is - - - is very clear. It
5 stands in huge contrast to what you see in the
6 hazardous waste law or in the gaming law, where
7 there's explicit mention of zoning. It is silent.
8 And under the principles of law in this state, when a
9 law is silent as to land use or zoning, you cannot
10 impute to the legislature the intention to preempt.

11 CHIEF JUDGE LIPPMAN: What do you think the
12 legislature is trying to achieve with - - - with this
13 statute about - - -

14 MS. GOLDBERG: What the legislature - - -
15 what the - - -

16 CHIEF JUDGE LIPPMAN: - - - gas and oil?
17 What's - - - what's the purpose behind it?

18 MS. GOLDBERG: The purpose of it is to
19 ensure that as to the technical operations and
20 activities and processes of this industry, you don't
21 have the localities stepping in and setting up
22 inconsistent regulatory provisions. And the towns in
23 this case understand that that is the prerogative of
24 the state. They are not trying to regulate the
25 technicality - - -

1 CHIEF JUDGE LIPPMAN: So you don't think
2 the individual municipalities - - - let's say there
3 are loads of them - - - who want to put in bans,
4 would be inconsistent with the policy of the state?

5 MS. GOLDBERG: Absolutely not, Your Honor.

6 JUDGE GRAFFEO: What about the issue - - -

7 MS. GOLDBERG: Promoting the industry is
8 not pro - - -

9 JUDGE GRAFFEO: What about the issue of
10 waste? In reading the statute, I thought to a large
11 extent what the legislature was trying to do was to
12 prevent wasteful use of our natural resources - - -

13 MS. GOLDBERG: Yes, Your Honor.

14 JUDGE GRAFFEO: - - - and - - - and over -
15 - -

16 MS. GOLDBERG: If you - - - if you - - -

17 JUDGE GRAFFEO: - - - I guess,
18 overextraction.

19 MS. GOLDBERG: Right. The Oil, Gas and
20 Solution Mining Law does not direct DEC to promote.
21 The promotion of this industry is in the energy law.
22 If you look at the six policies of the energy law,
23 five of them talk about conservation, husbanding
24 resources, that's what these towns are doing.

25 Waste has not kicked in. It's physical

1 waste. It does not kick in until there's actual
2 development. If you look closely at the amicus
3 brief, for example, submitted by the Community
4 Environmental Defense Council, it goes at great
5 length into the history - - -

6 JUDGE SMITH: But - - -

7 MS. GOLDBERG: - - - of that terminology.

8 JUDGE SMITH: But isn't - - - isn't - - -
9 isn't - - -

10 MS. GOLDBERG: It doesn't apply here.

11 JUDGE SMITH: Isn't the - - - isn't the
12 spacing the wells a very basic part of - - - of
13 avoiding waste?

14 MS. GOLDBERG: Yes, Your Honor, in
15 conventional drilling, that is the case. In the type
16 of drilling that we're facing today, the spacing is
17 not a matter of producing waste as it has - - - it
18 addresses it - - -

19 JUDGE SMITH: Well, I mean, assuming - - -
20 assuming you're right, presumably the legislature
21 that passed this law was thinking about conventional
22 drilling.

23 MS. GOLDBERG: It was thinking about
24 conventional drilling, Your Honor. But on the - - -
25 as explained before and as the courts below have

1 found, these spacing units are created by the
2 industry. They can follow the municipal lines,
3 should they decide to do so.

4 And secondly, what they do not explain to
5 you, is that even if the spacing unit overlaps
6 between one jurisdiction that does permit it and
7 another jurisdiction does not, the - - - it is
8 plausible with lateral drilling these days for the
9 companies to develop the resources even underneath
10 the town's - - -

11 CHIEF JUDGE LIPPMAN: Counsel, is anybody -
12 - - I'm sorry.

13 JUDGE PIGOTT: Are you saying you can
14 regulate that?

15 MS. GOLDBERG: Pardon?

16 JUDGE PIGOTT: Are you saying you can
17 regulate that?

18 MS. GOLDBERG: The towns are regulating the
19 surface uses. This is a land use law. They are not
20 attempting to regulate the subsurface drilling in - -
21 -

22 CHIEF JUDGE LIPPMAN: Counsel, was anybody
23 thinking about hydrofracking when this was put into
24 place? And is that part of the problem here?

25 MS. GOLDBERG: Your Honor, we sort of can't

1 have it both ways. We can't talk about what the
2 SGEIS is going to do for - - - for the - - -

3 CHIEF JUDGE LIPPMAN: What's the answer - -
4 - was anybody thinking about hydro - - -

5 MS. GOLDBERG: No, Your Honor. In 19 - - -
6 in 1981, hydrofracking was not something that was - -
7 -

8 CHIEF JUDGE LIPPMAN: But that's - - - so
9 now how does that play into our looking at express or
10 implied preemption if - - - if nobody even
11 contemplated at that time?

12 MS. GOLDBERG: We do not rely on the idea
13 that there is interest in hydraulic fracturing and
14 horizontal drilling today in making our case. What
15 we rely on is the principle that there has to be a
16 clear expression of intent here.

17 And when a law is silent, then by - - -
18 then this court must find that there is - - - there
19 is an ambiguity at best as to the intent of the
20 legislature, and when there is an ambiguity as to the
21 intent of the legislature, to find that there's no
22 intention to preempt.

23 CHIEF JUDGE LIPPMAN: And does it matter
24 whether they said - - - what if everybody decided
25 they're going to ban hydro - - - if each of the towns

1 and villages, would that create any problem?

2 MS. GOLDBERG: You know, that is plainly
3 not the situation right now - - -

4 CHIEF JUDGE LIPPMAN: But let's say it - -
5 - let's say hypothetically it was. What's the
6 consequence of that?

7 MS. GOLDBERG: Then the legislature needs
8 to revisit its law, and determine whether or not it's
9 important to promote this industry - - -

10 JUDGE SMITH: Why - - - why should we not
11 think - - -

12 MS. GOLDBERG: - - - at the expense of
13 everything else.

14 JUDGE SMITH: Why should we not think that
15 they were worried about that sort of thing when they
16 visited it the first time? That is, they - - - they
17 passed a law that said thou shalt not regulate. To -
18 - - to the simple mind, doesn't that mean, thou shalt
19 not prohibit?

20 MS. GOLDBERG: Your Honor, the - - - what
21 the localities were doing at that time, was
22 attempting to regulate the industry. They were
23 hiring their own petroleum engineers. They were
24 stepping into the breach, because DEC did not have
25 the funding to do the actual regulation and to

1 protect them from that. They - - -

2 JUDGE PIGOTT: This is in 1981 you're
3 talking about?

4 MS. GOLDBERG: Pardon?

5 JUDGE PIGOTT: You're talking about 1981?

6 MS. GOLDBERG: Yes, Your Honor. They - - -
7 at that time in New York, they were not zoning out.
8 They were in Tulsa, Oklahoma, but they weren't in
9 New York, so that wasn't the issue that was presented
10 to - - -

11 CHIEF JUDGE LIPPMAN: Counsel, is - - -

12 MS. GOLDBERG: - - - to the legislature.

13 CHIEF JUDGE LIPPMAN: - - - there
14 something - - - and this is not a rhetorical
15 question. Is there something so fundamental about
16 zoning that this statute couldn't mean to
17 take away the municipality's right to zone without
18 express - - - expressly saying that they're going to
19 do so? Is it - - - what's - - - what's unique about
20 zoning?

21 MS. GOLDBERG: Your Honor, the legislature
22 can take away the right to zone, unquestionably. And
23 it has done so in some cases as we have seen.

24 CHIEF JUDGE LIPPMAN: Yes.

25 MS. GOLDBERG: But when it does so, it puts

1 in place substitute protections for the - - - for the
2 interests that are typically protected by zoning. It
3 doesn't leave the municipalities entirely at the
4 mercy of the industry. It makes sure that there is a
5 participatory process. It looks at the concentration
6 near the - - - of the industry. It looks at
7 neighboring uses. None of that is present here.

8 So in this case, there's no reason to
9 believe that to impute to the legislature the idea
10 that this industry would get the extreme and
11 unprecedented right that no other industry has ever
12 received in the state of New York simply because we
13 want to foster to the development of oil and gas
14 industry.

15 JUDGE RIVERA: Well, let - - -

16 MS. GOLDBERG: We're not promoting it at
17 all costs.

18 JUDGE RIVERA: May I ask you then? Let - -
19 - put aside for one moment, although that, of course,
20 is the issue in the case, the rights of the
21 localities to do this through zoning, if the
22 landowners in a locality just simply did not want to
23 permit this, could the state demand that they allow
24 the industry to come in and hydrofrack?

25 MS. GOLDBERG: No, Your Honor. I mean, if

1 - - - if it were true that, you know, an oil and gas
2 policy means that the industry gets to go wherever it
3 chooses to be, it wouldn't have to lease the land.
4 It certainly has to lease the land. If a landowner
5 does not want to - - - it - - - a well on their
6 property, they don't have to have a well on their
7 property.

8 JUDGE RIVERA: Let me ask you another
9 question. If we hold against you and decide that
10 indeed the bans are - - - are prohibitive, that it's
11 preemption, is there anything that would prevent the
12 state - - - foreclose the state legislature from then
13 deciding that, no, we actually meant for the towns to
14 decide on their own whether or not to permit this
15 industry in their local boards?

16 MS. GOLDBERG: Your Honor, this is a
17 question of statutory interpretation. If the court -
18 - -

19 JUDGE READ: Well, I guess the legislature
20 could do - - - depending on what we do, they could
21 disagree with us, whatever we want to do, right?

22 MS. GOLDBERG: Absolutely, Your Honor.

23 JUDGE READ: I want to follow up just on
24 one - - - one of your responses to Judge Pigott, if I
25 understood it. Are you saying that this is only

1 surface - - - surface regulation?

2 MS. GOLDBERG: Yes, Your Honor.

3 JUDGE READ: So for example, if I - - - my
4 farm is on the border between a town that permits and
5 a town that doesn't, and I lease my land, it can go
6 underground and drill horizontally into the town that
7 doesn't?

8 MS. GOLDBERG: Under the town, yes, Your
9 Honor. Both of the - - - both of the towns have
10 recognized that that is permissible under their
11 zoning laws.

12 CHIEF JUDGE LIPPMAN: Okay.

13 JUDGE SMITH: Well - - - well - - -

14 JUDGE ABDUS-SALAAM: So having - - -

15 CHIEF JUDGE LIPPMAN: I'm sorry, go ahead.

16 JUDGE SMITH: Let me follow up on Judge
17 Read's question, if I could. I mean - - -

18 CHIEF JUDGE LIPPMAN: Judge Smith and then
19 Abdus-Salaam. Go ahead.

20 JUDGE SMITH: You say - - - you're saying
21 they can do it because the towns let them, or they
22 can do it, because they're - - - the towns are
23 preempted from stopping it?

24 MS. GOLDBERG: They can do it because the
25 land use law doesn't address it. The land use law

1 addresses - - -

2 JUDGE SMITH: Okay, but suppose - - -

3 MS. GOLDBERG: - - - typical uses of
4 property on the surface.

5 JUDGE SMITH: - - - so - - - so suppose you
6 pass another one tomorrow that says we got another -
7 - - we got another zoning regulation, no horizontal
8 drilling. Is that valid?

9 MS. GOLDBERG: No horizontal drilling? No,
10 Your Honor, that would be a regulation of the
11 industry. That addresses the technical process - - -

12 JUDGE SMITH: So - - - so this - - - so
13 this - - - so this is land use, but this is
14 regulation of the industry.

15 MS. GOLDBERG: When it - - - when it's
16 prohibited from the surface of the land within the
17 town, that is a land use for regulation, but there -
18 - - if there's - - -

19 JUDGE SMITH: But drilling in from the side
20 isn't use of the land?

21 MS. GOLDBERG: No, Your Honor, it's coming
22 from another town where it's permitted.

23 CHIEF JUDGE LIPPMAN: Okay, Judge Abdus-
24 Salaam, go ahead.

25 JUDGE ABDUS-SALAAM: Yeah, I was just - - -

1 that may segue right into the question about the
2 compulsory integration - - -

3 MS. GOLDBERG: Yes.

4 JUDGE ABDUS-SALAAM: - - - that was
5 discussed by your adversary. Would that cover - - -
6 if another town next to the town that banned it
7 allowed it, would that cover the compulsory
8 integration problem that your adversary mentioned?

9 MS. GOLDBERG: Yes, Your Honor. If - - -
10 if there were landowners in the town without a ban
11 that wanted it and some that didn't want it, it would
12 be possible to compulsorily integrate a unit of
13 people who did not want the surface of their land
14 used.

15 What compulsory integration does is it
16 helps the industry build a unit where it can - - -
17 where it can drill. And if people do - - - you know,
18 and you can force forty percent of the leases into
19 that unit. It's still protects their surface, but it
20 allows the resource underneath their land to be
21 developed.

22 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
23 hear from your colleague.

24 Counselor?

25 MR. HENRY: Good afternoon, John Henry,

1 Whiteman Osterman & Hanna, on behalf of the Town of
2 Middlefield. I would submit that the issue in front
3 of the court today is whether there's a difference
4 between a local law relating to an industry which was
5 the language of the Mined Land Reclamation Law at
6 issue in Frew Run and a local law relating to the
7 regulation of an industry.

8 I would submit that there's no functional
9 difference between those two statutory terms, and if
10 there is, it's a difference that favors the town's
11 position here, because it imposes an additional
12 limitation on the preemption provisions of the
13 statute.

14 So what the appellants argue here, frankly,
15 their best arguments - - - their best statutory
16 construction argument is that the oil and gas law
17 contains two reservations of power: the power to
18 regulate roads and the power to - - - the real
19 property taxation power.

20 And their best argument is, well, those
21 provisions wouldn't make sense if you accept our
22 reading of the statute, because we don't think those
23 things relate to the operations or activities of the
24 mining industry themselves, but they clearly do.

25 JUDGE PIGOTT: No, I think that they're

1 arguing that there are certain that have to be - - -
2 that are just local to you. I mean, your bridges,
3 your roads, who knows what kind of trucks and things
4 they're - - - they're going to be bringing in and
5 doing with this stuff, maybe nothing. But you should
6 have the right in your town to make sure that they're
7 doing it and that they're not doing it, you know, in
8 the middle of the night or whatever.

9 And with respect to the taxes, I took it to
10 mean that when Mrs. Murphy decides she wants an oil
11 well in the middle of her pasture that maybe her
12 taxes are going up.

13 MR. HENRY: No, I - - - and actually the -
14 - - the property tax issue is very interesting. So
15 there is a special provision of the real property tax
16 law, Section 594(2), which allows a municipality to
17 impose a tax on an oil and gas - - - specifically on
18 oil and gas well drilling, and it is based on the
19 production from the well.

20 That would otherwise be in complete
21 contravention of real property taxation principles,
22 which - - - on which - - - under which taxation is
23 based only on the value of the land, not the
24 operations on the land. So it is - - - in that
25 sense, it is clearly - - - that - - - that provision

1 of the tax law is a regulation of the operations of
2 the industry.

3 JUDGE PIGOTT: Is this all - - - is this -
4 - - is this all built on fear? You know, there's - -
5 -

6 MR. HENRY: I - - -

7 JUDGE PIGOTT: Let me - - - let me just get
8 my thought out. The - - - I mean, everybody's plus
9 and minus on fracking. Now people that have got gas
10 underneath their land tend to like the idea of
11 fracking. And that - - - and you know, you always
12 hear about Pennsylvania and things like that.

13 Towns, you know, you're not alone; you
14 know, say, we don't want fracking in our - - - in our
15 backyard. We just don't want it, and so we're going
16 to zone it out. Is - - - is that - - - is that what
17 we're talking about here?

18 MR. HENRY: I would submit absolutely not,
19 and here's what's interesting about that question is,
20 this has consistently been phrased as a ban on
21 fracking, and that is not the case. Without - - -

22 JUDGE GRAFFEO: Well, what - - - what was
23 the local purpose then in your municipality taking -
24 - -

25 MR. HENRY: Okay.

1 JUDGE GRAFFEO: - - - the action that they
2 did?

3 MR. HENRY: It's a zoning purpose. This is
4 a zoning law. So remember that under New York law -
5 - -

6 JUDGE SMITH: But where's - - - where's the
7 zone in your town - - -

8 JUDGE GRAFFEO: But what - - - what does -
9 - - what does that mean?

10 MR. HENRY: Under New York law, if you have
11 - - - if a town has a zoning ordinance, and a use is
12 not listed as a permitted use, it is a prohibited
13 use.

14 JUDGE GRAFFEO: Right.

15 MR. HENRY: So - - -

16 JUDGE GRAFFEO: They want to pro - - - they
17 want to prohibit this activity in the town.

18 MR. HENRY: So, both before and after the
19 enactment of the local law challenged here, oil and
20 gas mining was not a permitted activity in the town.
21 Prac - - - in fact, I submit the town didn't need
22 this local law at all, because the Town of
23 Middlefield has a very basic zoning code.

24 It has a residential-agricultural district.
25 It has a residential-hamlet district. Okay. You can

1 have - - - residential-agricultural is just what it
2 sounds like. You can have a house, a farm.
3 Residential-hamlet, you could have a house, a small
4 store, a professional office space.

5 Basically, in the Town of Middlefield, you
6 can farm, you could have a house, you could have a
7 store. You cannot have any heavy industry of any
8 description, whether it's steel mining, smelting,
9 anything.

10 CHIEF JUDGE LIPPMAN: But the state could
11 say that that's not - - - that you can't do that,
12 that there has - - - you have to allow oil and gas -
13 - -

14 MR. HENRY: The state - - -

15 CHIEF JUDGE LIPPMAN: - - - if they wanted
16 to.

17 MR. HENRY: The state could if it wanted
18 to. And let's take a look at those instances in
19 which the state has. The state has done two things -
20 - - the legislature has done two things when it has
21 preempted local zoning law.

22 JUDGE PIGOTT: Well, if you didn't need
23 this law, why did you pass it?

24 MR. HENRY: To clarify.

25 JUDGE PIGOTT: And when - - - how - - - and

1 you clarified in saying what?

2 MR. HENRY: That heavy industry was not an
3 allowable use. Heavy industry includes oil and gas
4 drilling.

5 But let's look at those instances in which
6 the legislature has expressly prohibited or preempted
7 local zoning law. The legislature has done two
8 things in those instances: it has expressly referred
9 to zoning powers and it has created an alternative
10 siting mechanism.

11 JUDGE READ: Well, why is - - - why is that
12 any different from saying that the provision shall
13 supersede all, and then two exceptions? Why - - -
14 how doesn't that accomplish the same thing?

15 MR. HENRY: Because you - - - you have to -
16 - - in order for those two exceptions to even come
17 into play, or for the preemption provision to come
18 into play, it has to be a local law relating to the
19 regulation of an industry. This court has
20 consistently held that zoning law is not a law
21 relating to the industry, whether it's mining,
22 whether it's alcohol or beverage control - - -

23 CHIEF JUDGE LIPPMAN: So your - - - your -
24 - - the same question I asked your adversary.
25 There's something different about zoning than

1 anything else that relates to - - -

2 MR. HENRY: It is certainly - - -

3 CHIEF JUDGE LIPPMAN: - - - the fundamental
4 right of the municipality to be heard and to protect
5 its own - - -

6 MR. HENRY: Absolutely, and it is - - -

7 CHIEF JUDGE LIPPMAN: - - - land uses?

8 MR. HENRY: This court has consistently
9 recognized that zoning is one of the, if not, in
10 fact, the most fundamental power of a town - - -

11 JUDGE GRAFFEO: If this case is difficult,
12 though, because it's pretty fundamental for local
13 taxation as well. So the legislature addressed
14 taxation, but they didn't address zoning - - -

15 MR. HENRY: And the reason for addressing
16 taxation - - -

17 JUDGE GRAFFEO: - - - which is rather - - -
18 which is rather strange. They tend to go hand in
19 hand.

20 MR. HENRY: Yes, but because of the unique
21 nature of the taxation that applies only to the oil
22 and gas industry, let's look at the Envirogas case,
23 which is a case where the local ordinance was
24 preempted because it imposed specific fees on the
25 industry, and that's - - - that's the right result.

1 You can't impose a fee on the industry.

2 But the legislature did create a - - - a
3 tax provision, 594(2) of the - - - of the real
4 property tax law, that applies specifically to the
5 oil and gas industry. And that's the reason for
6 inclusion of that reservation in the statute.

7 I agree, on its face, you would think, gee,
8 a regular RPTL Article 7 proceeding or regular real
9 property taxation principles - - -

10 JUDGE GRAFFEO: Does - - - does the plain
11 language analysis allow us to dig as far as we're
12 hearing here about - - -

13 MR. HENRY: I would submit no. I - - - I
14 mean - - -

15 JUDGE GRAFFEO: - - - all these other - - -
16 all these other related statutes and the rest of what
17 we're hearing in argument today?

18 MR. HENRY: I would submit the - - - the
19 statute is plain on its face and doesn't preempt
20 local zoning. And at best, what they've done here is
21 - - -

22 JUDGE GRAFFEO: Can we come to that - - -
23 do we need Frew Run to come to that conclusion?

24 MR. HENRY: Frew Run certainly helps in
25 reaching that conclusion. And - - - but I don't see

1 any jurisprudential reason why the same plain
2 language analysis that was followed in Frew Run,
3 wouldn't be applied here - - -

4 CHIEF JUDGE LIPPMAN: Counsel - - -

5 MR. HENRY: - - - whether that gives us
6 this or not.

7 CHIEF JUDGE LIPPMAN: Counsel, what - - -
8 what happens in practical terms, once the state
9 finishes its study and makes a recommendation?
10 What's going to - - - what - - - what's the
11 consequence of that vis-à-vis what we're talking
12 about today?

13 MR. HENRY: I - - - I submit, none, because
14 don't forget, this is - - -

15 CHIEF JUDGE LIPPMAN: So what are they
16 studying exactly? What are they studying?

17 MR. HENRY: Well, they're - - - they're
18 studying the technical aspects of hydrofracking.

19 CHIEF JUDGE LIPPMAN: And let's say they
20 say hydrofracking is great; we should do it. Or
21 hydrofracking is terrible; we shouldn't. How does it
22 affect you?

23 MR. HENRY: Well, if they say it doesn't, I
24 suppose the issue is moot.

25 CHIEF JUDGE LIPPMAN: Say it says the

1 opposite.

2 MR. HENRY: I would actually - - - I might
3 take that back, because our zoning law applies to oil
4 - - - all oil and gas mining. It's not a permitted
5 use in the town, okay. So the technology of how that
6 happens is really not relevant to our zoning law.

7 JUDGE PIGOTT: So when - - - so when you do
8 that - - - I asked earlier about cell - - - cell
9 towers. If the federal government says you got to
10 put in cell towers, you have to do it, right?

11 MR. HENRY: Well, if it explicitly says
12 that. We're not making an argument that the
13 legislature can't do it - - -

14 JUDGE PIGOTT: Wind power.

15 MR. HENRY: - - - we're arguing that they
16 haven't.

17 JUDGE PIGOTT: With it - - - they say you
18 got to allow the wind power - - - you know, the big -
19 - -

20 MR. HENRY: Well, it's interesting. Wind
21 power is a very interesting issue in talking about
22 state - - - statewide interests. I think - - - I'd
23 submit that the state has an interest in wind - - -
24 wind power. It's a statewide interest. It is left
25 to the localities. Zoning laws apply to all - - - to

1 wind farms.

2 CHIEF JUDGE LIPPMAN: So what's the answer
3 to - - -

4 JUDGE RIVERA: If they change their mind
5 tomorrow - - - your position is, the state could
6 change its mind tomorrow.

7 MR. HENRY: And they can enact a different
8 statute, but we - - -

9 JUDGE RIVERA: But at this point in time,
10 you're arguing they have not specifically preempted.

11 MR. HENRY: Absolutely, they have not. And
12 - - -

13 CHIEF JUDGE LIPPMAN: And if they - - - and
14 if they study says hydrofracking is in, what happens
15 next?

16 MR. HENRY: It doesn't - - - it doesn't
17 affect the analysis, because - - - unless the
18 legislation changes.

19 JUDGE RIVERA: Yeah, you're saying they
20 could decide hydrofracking would be a very good way,
21 a good source of energy for the state of New York,
22 but they could at the same time say, but we'll leave
23 it to the localities to decide whether or not they
24 want it in their backyard.

25 MR. HENRY: And if you look - - -

1 JUDGE RIVERA: Or they could say, it's now
2 state policy, hydrofracking is open everywhere, no
3 one can ban it.

4 MR. HENRY: And if you look at the DEC
5 materials in the record, their proposal is basically
6 to say the applicant has to show consistency with
7 local zoning.

8 JUDGE PIGOTT: When - - - when you say they
9 - - -that they left wind farms to the - - - to the
10 localities, how did they do that?

11 MR. HENRY: They didn't do anything. So
12 whatever town's local zoning law said, if you could
13 have - - - you could only have certain things at a
14 certain height or you could only have certain
15 property uses in a town. Many towns enacted their
16 own wind farm local laws, but the legislature
17 essentially didn't do anything.

18 JUDGE READ: There's no superseding - - -

19 JUDGE SMITH: Can I take you back to the -
20 - -

21 JUDGE READ: There's no superseding
22 provision at all?

23 MR. HENRY: There's no - - - no.

24 JUDGE READ: Nothing?

25 MR. HENRY: No, no, no.

1 JUDGE SMITH: Could - - -

2 MR. HENRY: And - - - and I want to also
3 point out - - -

4 JUDGE SMITH: Can I ask you for a minute
5 about - - -

6 MR. HENRY: Absolutely.

7 JUDGE SMITH: - - - the Envirogas case,
8 which you talked about a minute ago. Are you - - -
9 you're saying that was rightly decided?

10 MR. HENRY: Yes, because I - - - in my
11 view, that was a regulation - - -

12 JUDGE SMITH: Were they - - - I mean, what
13 - - - what - - -

14 MR. HENRY: - - - meaning, that was
15 regulation of the industry.

16 JUDGE SMITH: But what Judge Green says
17 here, is we're talking about subdivision q of Section
18 4 of the zoning - - - the zoning ordinance - - -
19 zoning ordinance of the town. And it says that no
20 oil or gas well shall be constructed in the town
21 without prior payment of a bond and a permit fee.

22 MR. HENRY: Correct.

23 JUDGE SMITH: And you're saying - - - and
24 you agree that's invalid. But if they stopped - - -

25 MR. HENRY: Yes, because that is imposing -

1 - -

2 JUDGE SMITH: Okay, but if they stopped
3 after town, and said no oil or gas well shall be
4 constructed in the town, that's valid?

5 MR. HENRY: Correct, because that is a
6 zoning power. It is not unique to the industry. It
7 is a land use regulation. Let's use the example of
8 Petroleum Bulk Storage. There's a State Petroleum
9 Bulk Storage Code. It says what you can and cannot
10 do in the storage of petroleum.

11 There's - - - there's a couple of good
12 Second Department cases that are right on - - - on
13 point here, in which the - - - one town enacts its
14 own petroleum bulk storage code. The Second
15 Department says, no, you can't do that. Another
16 developer wants to build a warehouse in the town to
17 store petroleum in a bulk - - - in a bulk manner, and
18 says, oh, wait, the Code preempts the zoning code
19 here; I can do this.

20 JUDGE SMITH: So it sounds - - - it sounds
21 to me like you're saying you can do anything you want
22 if you call it zoning.

23 MR. HENRY: You cannot - - - I would agree
24 with you. You cannot tailor a law that specifically
25 relates to the industry. You can have a chance - - -

1 JUDGE SMITH: You don't think - - - you
2 don't think your law relates - - - specifically
3 relates to the industry?

4 MR. HENRY: No, it does - - - absolutely
5 does not, because it does not - - -

6 JUDGE SMITH: They had a whole meeting to
7 say let's keep this industry out of this town.

8 MR. HENRY: Well, I'm - - - the language of
9 the zoning code doesn't allow oil and gas use,
10 whether it's fracking or not, within the town. And
11 that's to be contrasted from all those other
12 instances in which the legislature has expressly
13 preempted zoning power. It has always enacted a
14 siting mechanism.

15 I've used the casino gaming legislation as
16 the most recent example. So under the Racing Law,
17 Section 1366, the statute explicitly says that it - -
18 - once - - - once a casino or a gaming facility is -
19 - - is located by the board, that shall preempt all
20 local laws, including - - -

21 CHIEF JUDGE LIPPMAN: Okay, counsel.

22 MR. HENRY: - - - local zoning acts.

23 CHIEF JUDGE LIPPMAN: Thanks, counsel.

24 Thank you.

25 Counsel, rebuttal.

1 MR. WEST: Just very briefly, Your Honor.
2 I just need to correct a couple of concepts. First
3 of all, there's nothing really different about
4 conventional drilling and high-volume hydraulic
5 fracturing, except the - - - the fact that they
6 learned how to turn the drill bit horizontally and -
7 - -

8 CHIEF JUDGE LIPPMAN: So it didn't matter
9 that the legislature may not have contemplated
10 fracking when they - - - when they passed it?

11 MR. WEST: Well, in fact, Your Honor,
12 fracking goes back, you know, many, many years before
13 the 1981 law - - -

14 CHIEF JUDGE LIPPMAN: So you think they
15 contemplated fracking in there?

16 MR. WEST: It was commonplace in New York.
17 In fact, it's - - - it's reflected in the 1992 GEIS.

18 JUDGE RIVERA: But isn't what's going on
19 now an attempt to really understand the consequences
20 of fracking? How can you say it's the same thing?
21 Isn't that exactly the problem right now?

22 MR. WEST: Well, Judge Rivera, with all due
23 respect, what they - - - what they used to do with
24 the vertical well - - -

25 JUDGE RIVERA: Yes.

1 MR. WEST: - - - and then they'd
2 hydraulically fracture it - - -

3 JUDGE RIVERA: Yes.

4 MR. WEST: - - - they found out it's much
5 more effective if you turn the drill bit and you go
6 out a mile and you separate that into separate
7 segments, because you get much more gas. You have a
8 long - - -

9 JUDGE RIVERA: Yes, of course, but isn't
10 the point then - - - isn't part of the debate and the
11 controversy and the difficulty trying to figure out
12 whether or not doing that has particular consequences
13 that - - -

14 MR. WEST: That - - - that is - - -

15 JUDGE RIVERA: - - - that are not the same
16 consequences of just drilling straight down?

17 MR. WEST: That is part of the debate and -
18 - - and the debate has - - -

19 JUDGE RIVERA: So then they're not the
20 same.

21 MR. WEST: It - - - I would say they're
22 fundamentally the same. I would say the impacts are
23 less, because you can drill two square miles - - -

24 JUDGE RIVERA: Okay, but you may not win
25 that argument. So they're not the same, correct?

1 MR. WEST: I'll say they're not the same -
2 - -

3 JUDGE RIVERA: Thank you.

4 MR. WEST: - - - but I don't think it
5 matters for the preemption analysis.

6 JUDGE RIVERA: Okay, fair enough.

7 MR. WEST: I'm just trying to clarify a
8 couple of concepts.

9 As to - - -

10 CHIEF JUDGE LIPPMAN: So what - - - so what
11 - - - what in - - - in relation to what I asked your
12 adversaries, so what happens if the state comes and
13 says now, hydrofracking's great?

14 MR. WEST: If - - - if the state says
15 hydrofracking is great - - -

16 CHIEF JUDGE LIPPMAN: How does that affect
17 what we're dealing with today?

18 MR. WEST: That would open up the state for
19 operators to come back in and seek permits under the
20 regime established by the - - -

21 CHIEF JUDGE LIPPMAN: If we agree with your
22 adversaries, different towns may not have to have it,
23 right?

24 MR. WEST: Well, we disagree. We think - -
25 -

1 CHIEF JUDGE LIPPMAN: No, no, but if - - -
2 if we agreed with your adversary.

3 MR. WEST: Then different towns - - -

4 CHIEF JUDGE LIPPMAN: Then even if the
5 study comes back and says it's great, if they don't -
6 - - if - - - if there's - - - if there's not a law
7 passed that says they can't ban it, then - - - then
8 in all - - - in as many hundreds towns you're talking
9 about, you wouldn't be allowed to have it there?

10 MR. WEST: It's worse than that, Your
11 Honor, because no prudent operator is going to go to
12 a town, even if they allow it, when they're subject
13 to a 3-2 municipal board vote that could change with
14 one - - -

15 JUDGE ABDUS-SALAAM: Is that what happens
16 in Texas and Oklahoma that we've been hearing so much
17 about from your adversary?

18 MR. WEST: You know, Your Honor, I'm not
19 familiar - - - I'm am familiar with their ordinances
20 and I know that they - - - there are some - - - there
21 are some municipalities that do regulate it through
22 zoning, and the industry works very carefully with
23 them to get - - - to get through that process, but
24 that's really not the issue before - - -

25 CHIEF JUDGE LIPPMAN: Are you saying, then,

1 that if we agree with your adversary, at least as of
2 now, it makes the study almost irrelevant and it
3 kills the hydrofracking in the state? Is that - - -

4 MR. WEST: It - - - it has a very - - -

5 CHIEF JUDGE LIPPMAN: Is that your view?

6 MR. WEST: - - - very chilling effect,
7 because it's very hard for operators to justify
8 spending the hundreds of millions of dollars to come
9 in and not have regulatory certainty.

10 JUDGE RIVERA: But - - - but if the study
11 comes back and says, or suggests, that the concerns
12 are not really justified with respect to this
13 particular type of - - - of drilling, certainly towns
14 that have banning, might reconsider the bans - - -

15 MR. WEST: They might - - -

16 JUDGE RIVERA: - - - correct?

17 MR. WEST: They might, but I think that
18 begs the question of the issue before this court,
19 whether or not they have that authority in the first
20 instance.

21 JUDGE GRAFFEO: It's the - - - it's the
22 uncertainty that would chill these operators from
23 coming in?

24 MR. WEST: That's correct, Judge Graffeo,
25 because you - - - you - - - I know, I've seen it in

1 the landfill context - - -

2 JUDGE RIVERA: Yes, yes.

3 MR. WEST: - - - where we had a resolution
4 against, 3-2 in favor, and then it went against, and
5 we litigated over vested rights. It's - - - it's not
6 - - - it's not a good situation for investment.

7 JUDGE RIVERA: Doesn't that mean that you
8 have to go to the state legislature and persuade them
9 to be clear, if they really want preemption to
10 address the uncertainty, if they're concerned about
11 this industry's robustness throughout the state?

12 MR. WEST: That's correct, Your Honor. If
13 we lose in this court, our remedy is with the
14 legislature, and as I said before - - -

15 CHIEF JUDGE LIPPMAN: Okay, thanks,
16 counsel.

17 MR. WEST: - - - I'm not - - - not willing
18 to predict - - -

19 CHIEF JUDGE LIPPMAN: Thank you.

20 MR. WEST: - - - what would happen.

21 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

22 MR. KURKOSKI: First, can I just address
23 the subsurface nature of the oil and gas law in
24 Middlefield. The law in Section 7 specifically talks
25 about subsurface excavations and also includes gas

1 pipes and gathering systems. You cannot gather gas
2 from subsurface without pipelines and gathering
3 systems. You can't float it away in balloons.

4 So this law prohibits that subsurface
5 activity as well, and thereby impacts the correlative
6 rights of neighboring towns that might want to be
7 able to do this, without - - - without regard to
8 municipal boundaries.

9 The concepts that we've been talking about
10 - - - and this is common throughout the country - - -
11 to promote energy, to promote the use of domestic
12 resources. This is now working. For the first time
13 in my lifetime, we are closer to energy independence
14 in this country, than we have ever been. It's
15 because of some of these opportunities.

16 JUDGE PIGOTT: But, you know, what sticks
17 in my mind is when you talk about zoning, people
18 decide how they want to live, and you've got, you
19 know, very densely residential areas that say we
20 don't want anything going on in our residential area,
21 and as Mr. Henry pointed out, they've got some rural
22 ones, too.

23 I would think that if - - - if fracking is
24 great, I mean, I'd want to be in the town next to
25 Dryden, because you got no competition over there,

1 you can drill all you want over here, and with the
2 side drilling, you don't care what that town does,
3 right?

4 MR. KURKOSKI: Your Honor, I think we have
5 to take a look at this case in terms of what we are
6 going to reserve for the state. And it's whether you
7 agree with fracking or not agree with fracking, it's
8 not just fracking. It's many issues that might be
9 before this court. It could be a casino in front of
10 this court, whether they can decide whether they're
11 zone it out, or not zone it out.

12 All of those issues could come into play.
13 The issue that we have is preserving this decision to
14 the state when we have this sort of - - - of
15 comprehensive statutory scheme. Yesterday - - -

16 JUDGE RIVERA: Well, they agree that the
17 state could - - - could preempt. Their position is
18 they haven't. I mean, so if - - - the state
19 legislature could do what you're asking for.

20 MR. KURKOSKI: Of course. But the question
21 before us is what does this statute say, and what
22 will we be able to accomplish.

23 Yesterday, President Obama and the EPA said
24 that we are going to now have a mandate on states to
25 reduce carbon emissions from power plants by thirty

1 percent. I can tell you that if these decisions are
2 not reversed, and we leave this to our 932 towns to
3 make decisions about the energy policy in New York,
4 we won't be able to do it.

5 CHIEF JUDGE LIPPMAN: Counsel, but - - -
6 but you would acknowledge that there are sound public
7 policy arguments both ways. On the other - - - on
8 the one hand, you're saying, yes, we should have a
9 comprehensive strategy to deal with such an important
10 issue to our state, energy, which is obviously
11 important. And on the other hand, municipalities
12 believe, as I think Judge Pigott used the term, that
13 - - - that we are here; we want to determine how
14 we're going to live. We want to have some voice in
15 how we live.

16 So the two competing policy discussions
17 that I agree with you, it comes down to what has the
18 representatives of the people actually done, but I
19 don't think either one or the other policy
20 perspective necessarily prevails automatically.
21 They're both good arguments. So it comes down to
22 then, what did the representatives of the people
23 actually do?

24 MR. KURKOSKI: Your Honor, it - - -

25 CHIEF JUDGE LIPPMAN: Right? I mean, we

1 all agree with that.

2 MR. KURKOSKI: Absolutely.

3 CHIEF JUDGE LIPPMAN: You just disagree on
4 what they did.

5 MR. KURKOSKI: But we do agree - - - we
6 have to agree that there are important state
7 interests that sometimes the "not-in-my-backyard"
8 mentality will always oppose, and that will - - -

9 CHIEF JUDGE LIPPMAN: Yeah, yeah, but all
10 I'm saying is - - - but all I'm saying to you is,
11 there's a flipside of that argument, which is you
12 don't bulldoze over the voice of the people in
13 individual municipalities, who want to be heard about
14 how they live their lives.

15 So I'm not taking either side, but I'm
16 saying to you is, we get it. We get your policy
17 argument, and we get their policy arguments too. The
18 question which we have to determine, what did the
19 representatives of the people, who ultimately have
20 that power, actually do, and we'll try and make that
21 decision.

22 So, thank you, appreciate it.

23 MR. KURKOSKI: Thank you, Your Honor.

24 CHIEF JUDGE LIPPMAN: Thank you all.

25 MR. KURKOSKI: Thank you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Wallach v. Town of Dryden, No. 130, and Cooperstown Holstein Corporation v. Town of Middlefield, No. 131, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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