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Northeast Natural Energy, LLC v. City of Morgantown

57 N.Y.L. SCH. L. REV. 971 (2012–2013)

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NORTHEAST NATURAL ENERGY, LLC v. CITY OF MORGANTOWN

State governments have long had the power to take a leading role in protecting their own environmental interests.¹ West Virginia is no exception.² However, a local government's role in protecting the environment and, by extension, the health of its citizens cannot be overlooked.³ This double layer of regulation—one by the state and one by the local government—often gives rise to concerns about whether a local law conflicts with, and is therefore preempted by, state law.⁴ Regulation of the rapidly growing natural gas drilling industry has recently been the subject of such preemption questions as municipal government bodies have passed ordinances that limit or ban drilling within their borders.⁵

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1. *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (“[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”).
 2. *See W. VA. CODE* § 22-1-1(a)(2) (2001) (“The state has the primary responsibility for protecting the environment . . .”).
 3. *Id.* (“[O]ther governmental entities, public and private organizations and our citizens have the primary responsibility of supporting the state in its role as protector of the environment.”).
 4. *See, e.g., Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. Otsego Cnty. 2012) (holding that state law did not preempt the Town of Middlefield’s ban on natural gas drilling); *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (Sup. Ct. Tompkins Cnty. 2012) (upholding the Town of Dryden’s ban on natural gas drilling despite the oil company’s contention that it was solely within the state’s power to regulate); *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, slip op. 6285 (Cir. Ct. Monongalia Cnty. Aug. 12, 2011) (overturning the City of Morgantown’s ordinance banning hydraulic fracturing because it conflicted with state law regulating oil and gas). Recently the Town of Longmont, Colorado banned fracking in its city limits.

The ban has propelled Longmont to the fiercely contested forefront of the nation’s antifracking movement, inspiring other cities to push for similar prohibitions. But it has also set the city on a collision course with oil companies and the State of Colorado. . . . Gov. John W. Hickenlooper, a Democrat, has warned Longmont residents that the ban is likely to mean a lawsuit from the state, which insists that only it has the authority to regulate drilling. Already this summer, Colorado sued Longmont over earlier city rules that limit drilling near schools and homes.

Jack Healy, *With Ban on Drilling Practice, Town Lands in Thick of Dispute*, N.Y. TIMES, Nov. 26, 2012, at A14.

5. *See, e.g., DRYDEN, N.Y., ZONING ORDINANCE* art. V, § 502 (2011) (eliminating the exploration for natural gas in Dryden, New York); *RALEIGH, N.C., ORDINANCE* No. 86-2012 (2012) (prohibiting fracking in Raleigh, North Carolina); *PITTSBURGH, PA., CODE* ch. 618 (2010) (prohibiting extraction of natural gas in Pittsburgh, Pennsylvania, except from those wells already operating at the time of the ordinance’s adoption); *BARTONVILLE, TEX., ORDINANCE* No. 515-11 (2011) (establishing a moratorium on issuing permits for gas exploration and production); Bd. of Cnty. Comm’rs of Boulder Cnty. Res. 2012–16 (Colo. 2012) (enacting a temporary moratorium on the county’s processing of applications for oil and gas development in Boulder County, Colorado); Council of the City of Cincinnati Res. 29-2012 (Ohio 2012) (placing a moratorium on horizontal hydraulic fracturing in Cincinnati, Ohio); Lewisburg City Council Res. 360 (W. Va. 2011) (prohibiting locating, drilling, equipping, or producing oil or gas in Lewisburg, West Virginia, stating a concern, among other things, that state regulations do not currently provide enough protection for public water systems); Colo. Ballot Question 300 (Nov. 6, 2012) (banning the process of fracking as well as the storage and disposal of waste created by fracking within Longmont, Colorado). In addition to independent local bans on natural gas drilling, several states have banned fracking generally. For example, in addition to individual bans on natural gas drilling in specific areas of New York (e.g., *BETHEL, N.Y., CODE* § 345-37 (2012)), New York State currently has in place a moratorium until the government can further understand the impacts of natural gas drilling and develop regulations. *See B. No. S06261, 2012 Leg.* (N.Y. 2012) (proposing an extension on the moratorium until

The natural gas industry is booming in the United States.⁶ The combination of the rising demand in the United States for new sources of gas with recently developed technology making natural gas drilling more economically feasible has sent private drilling companies buzzing (or drilling) with excitement.⁷ Citizens located in states like West Virginia, where oil and gas developments are increasingly common, are on high alert of the potential impact that drilling may have on the environment and their health.⁸ Citizen concern places a lot of pressure on local governments—especially in those areas heavily affected by the rise in natural gas drilling—to regulate or ban the practice.⁹ But states, too, have the responsibility to regulate drilling.¹⁰ This conflict between state and local regulation often comes to a head in litigation over local bans.¹¹

June 1, 2013)). Moreover, the governor of Vermont signed into law House Bill 464 on May 16, 2012, making Vermont the first state to pass a law that bans hydraulic fracturing entirely. For a complete list of towns that have written resolutions against hydraulic fracturing, see *Local Actions Against Fracking*, FOOD & WATER WATCH, <http://www.foodandwaterwatch.org/water/fracking/fracking-action-center/local-action-documents/> (last visited Mar. 21, 2013).

6. Half of all natural gas consumed today is produced from wells drilled within just the last three and a half years. See DAYNA LINLEY, *FRACKING UNDER PRESSURE: THE ENVIRONMENTAL AND SOCIAL IMPACTS AND RISKS OF SHALE GAS DEVELOPMENT* 3 (2011) (“[R]eserves of conventional sources of oil and gas are dwindling and producers are increasingly focusing on unconventional sources, the development of which usually generates higher environmental and social risks. Shale gas is one such unconventional source.”); see also U.S. ENERGY INFO. ADMIN., *ANNUAL ENERGY OUTLOOK 2011: WITH PROJECTIONS TO 2035*, at 37 (2011) (“Shale gas production in the United States grew at an average annual rate of 17 percent between 2000 and 2006 The combination of horizontal drilling and hydraulic fracturing technologies has made it possible to produce shale gas economically, leading to an average annual growth rate of 48 percent over the 2006-2010 period.”).
7. See U.S. DEP’T OF ENERGY, *MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER* 9 (2009) (explaining that “[t]hree factors have come together in recent years to make shale gas production economically viable: 1) advances in horizontal drilling, 2) advances in hydraulic fracturing, and . . . 3) rapid increases in natural gas prices in the last several years as a result of significant supply and demand pressures”).
8. See generally Stephen G. Osborn et al., *Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing*, 108 *PROC. NAT’L. ACAD. SCI.* 8172, 8172 (2011) (documenting “systematic evidence for methane contamination of drinking water associated with shale-gas extraction”); Ian Urbina, *A Tainted Water Well, and Concern There May Be More*, *N.Y. TIMES*, Aug. 4, 2011, at A13 (detailing a 1987 report that showed water well contamination from the fluids used in hydraulic fracturing at a drill site 600 feet from the water source).
9. See PENN. STATE UNIV., *MARCELLUS SHALE: WHAT LOCAL GOVERNMENTS NEED TO KNOW* 3 (2009) (“[T]he scale of drilling activity may increase the local population, pressuring local housing markets, schools, and local government services. There will be environmental impacts, particularly on water use and quality, forest defragmentation, and wildlife. Local leaders and communities need to be aware of how natural gas drilling may affect them and their residents, how these disturbances may occur, and how to manage them.”). For examples of just a few of the many localities that have banned natural gas drilling, see *supra*, note 5.
10. See W. VA. CODE, § 22-1-1(a)(2) (2001).
11. See *supra* note 4 for examples of instances in which the state and local government are in conflict over the regulation of gas drilling. See also *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, slip op. 6285 (Cir. Ct. Monongalia Cnty. Aug. 12, 2011).

NORTHEAST NATURAL ENERGY, LLC v. CITY OF MORGANTOWN

In *Northeast Natural Energy, LLC v. City of Morgantown*, the Monongalia County Circuit Court issued an order to overturn a 2011 ordinance promulgated by the city council of Morgantown, West Virginia banning natural gas drilling and, specifically, the process of hydraulic fracturing, or “fracking”—a now frequently used method of natural gas drilling.¹² The circuit court held that West Virginia’s state regulatory scheme provided for the exclusive regulation of oil and gas with no exceptions and that the city of Morgantown was therefore preempted from adopting its ban.¹³ The court relied on narrow interpretations of the West Virginia Code and the state constitution in making this determination.¹⁴

This case comment contends that there is no conflict between West Virginia’s state regulatory scheme for oil and gas drilling and the Morgantown ordinance; rather, the state regulations and the municipal ordinance may peacefully co-exist. The circuit court’s decision to nullify the city council’s ordinance is therefore legally unsound for two reasons. First, the circuit court construed too narrowly the broad allocation of power between the state constitution and the municipal code that allows local governments to protect their environment and citizens. While the state has the primary authority to protect the environment, it does not have the sole authority to do so; municipalities are explicitly granted the authority to support the state in this regulatory activity.¹⁵ Second, the circuit court was incorrect to find that the Morgantown ordinance conflicted with, and was therefore preempted by, the state regulations. While the state provides a significant statutory scheme for the regulation of oil and gas, the Morgantown ordinance should stand because it does not conflict with the state’s regulations. By erroneously finding that the two conflicted, the circuit court stripped Morgantown of its ability to protect the environment and its citizens from potentially harmful drilling.¹⁶

At its meeting on June 7, 2011, the Morgantown City Council passed an ordinance in response to growing concerns over the impact of natural gas drilling

12. *Ne. Natural Energy*, slip op. 6285.

13. *See id.* at *9.

14. *See id.* at *6 (“The legislation sets forth a comprehensive regulatory scheme with no exception carved out for a municipal corporation to act in conjunction with the [West Virginia Department of Environmental Protection] . . .”).

15. *See* W. VA. CODE § 22-1-1(a)(2) (2001) (“The state has the primary responsibility for protecting the environment.”). *But see Ne. Natural Energy*, slip op. 6285, at *6. (“[O]ther governmental entities, public and private organizations and our citizens have the primary responsibility of supporting the state in its role as protector of the environment.”).

16. *See* W. VA. CODE § 8-12-2 (1969) (“[A]ny city shall have plenary power and authority . . . by ordinance not inconsistent or in conflict with . . . general law or any existing charter, to provide for the government, regulation, and control of the city’s municipal affairs, including, but not limited to the following: . . . (5) The acquisition, care, management and use of the city’s . . . property; . . . (9) The government, protection, order, conduct, safety and health of persons of property therein; (10) The adoption and enforcement of local police, sanitary and other similar regulations; and (11) The imposition and enforcement of penalties for the violation of . . . any of its ordinances.”).

near the city's drinking water supply.¹⁷ The ordinance prohibited fracking within the city limits on grounds that fracking constituted a public nuisance.¹⁸ The ordinance also banned fracking within a one-mile radius beyond the city's corporate limits pursuant to the state code, which gives municipalities the power to do so to the extent necessary to exercise its powers efficiently within the city's limits.¹⁹ The one-mile expansion encompassed a nearby fracking facility operated by Northeast Natural Energy, LLC ("Northeast").²⁰

Fracking is a process used by private gas producers to recover natural gas found in formations of rock called Marcellus Shale.²¹ Marcellus Shale is found largely under Ohio, Pennsylvania, New York, and West Virginia and lies one mile or more below the earth's surface.²² The rock contains pockets of natural gas, which, when released, provide previously untapped energy.²³ Fracking is one of two major recent technological advancements that have catapulted natural gas drilling to the forefront

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17. See generally MORGANTOWN, W. VA. ORDINANCE § 721 (2011) (finding that "fracking has an increased level of potential harm which includes, but may not be limited to, contamination of ground water"), *invalidated by Ne. Natural Energy*, slip op. 6285. For example, a recent study showed that "[i]n active gas-extraction areas (one or more gas wells within 1 km), average and maximum methane concentrations in drinking-water wells increased with proximity to the nearest gas well." Osborn et al., *supra* note 8. Also, fluids pumped into the ground during the fracking process contain an assortment of chemicals, which can permeate soil if not contained properly. See Sean H. Joyner, *Superfund to the Rescue—Seeking Potential CERCLA Response Authority and Cost Recovery Liability for Releases of Hazardous Substances Resulting from Hydraulic Fracturing*, 28 J. CONTEMP. HEALTH L. & POL'Y 111 (2011).
 18. See MORGANTOWN, W. VA. ORDINANCE § 721.03 (2011) ("Drilling a well for the purpose of extracting or storing oil or gas within the limits of the City of Morgantown is prohibited."); see also *id.* § 721.01(a) ("[T]he drilling for oil and gas is an activity which adversely impacts the environment, interferes with the rights of citizens in the enjoyment of their property, and has the potential for adversely affecting the health, well being, and safety of persons living and working in and around areas where drilling operations exist").
 19. See W. VA. CODE § 8-12-19 (1969) ("Wherever the powers and authority granted in this chapter cannot be reasonably and efficiently exercised by confining the exercise thereof within the corporate limits of the municipality, the powers and authority of the municipality shall extend beyond the corporate limits to the extent necessary to the reasonably efficient exercise of such powers and authority within the corporate limits."); see also MORGANTOWN, W. VA. ORDINANCE § 721.01(b) (2011) (finding that the city's powers "cannot reasonably and efficiently be exercised by confining the exercise thereof within the corporate limits of the municipality, and that therefore . . . the provisions of this Article shall extend beyond the corporate limits where stated").
 20. See *Ne. Natural Energy*, slip op. 6285, at *3 (stating that Northeast's two wells at the Morgantown Industrial site were not located "within the corporate limits of the City"). But see *Google Maps Distance Locator*, DAFT LOGIC, <http://www.daftlogic.com/projects-google-maps-distance-calculator.htm> (last visited Mar. 21, 2013) (showing Northeast's drill site at the Morgantown Industrial Park as approximately 0.049 miles from the southwestern border of the city's corporate limits).
 21. See generally U.S. ENVTL. PROT. AGENCY, *Natural Gas Extraction—Hydraulic Fracturing*, <http://www.epa.gov/hydraulicfracture/> (last visited Mar. 21, 2013).
 22. See U.S. ENVTL. PROT. AGENCY, *DIRECTIONAL DRILLING TECHNOLOGY 1* (2010), <http://www.epa.gov/cmop/docs/dir-drilling.pdf> (explaining and diagramming the process of horizontal drilling).
 23. See Joyner, *supra* note 17, at 114–15 ("The natural gas trapped in the shale formation is located in the 'pore space' of the shale . . . Operators utilize the process of fracking to stimulate the shale, thus increasing its permeability and, ultimately, the efficiency and efficacy of the gas extraction.").

of cost-effective energy production.²⁴ Once a well is drilled into the Marcellus Shale, the fracking process pumps water, sand, and a mixture of chemicals—which are often kept secret by the company²⁵—into the rock in order to crack it and release the natural gases.²⁶ A major concern with fracking is its effects on the local environment and people’s health, especially its effects on drinking water supplies such as ground wells and local bodies of water.²⁷

Less than one month before the Morgantown City Council started the process to ban fracking, Northeast obtained permits from the West Virginia Department of

24. U.S. DEP’T OF ENERGY, *supra* note 7, at ES-3 (stating that horizontal drilling is the other major technological advancement); *see also* *Shale Gas, Hydrofracking, and Managing Risk*, HUDSON RIVER ENVTL. SOCIETY, http://www.hres.org/joomla/index.php?option=com_content&view=article&id=78:shale-gas-hydrofracking-and-managing-risk-&catid=54:opinion&Itemid=64 (last visited Mar. 2, 2013).

[T]he combination of [hydraulic fracturing and horizontal drilling] stimulated growth within the shale gas industry. Between 2000 and 2006, U.S. shale gas production grew at an average annual rate of 17 per cent, while the average annual rate between 2006 and 2010 grew to 48 per cent. U.S. shale gas production is projected to grow almost fourfold above 2009 levels by 2035, when it is expected to represent 47 per cent of total U.S. gas production, up from its 16 per cent share in 2009.

LINLEY, *supra* note 6, at 7 (quoting ANNUAL ENERGY OUTLOOK, *supra* note 6).

25. Private drilling companies that use fracking to obtain gas, when faced with information requests—often from government agencies and environmental groups—claim that the chemicals used are confidential business information (CBI), which effectively shields that information from the public. Toxic Substances Control Act (TSCA) § 14(c)(1), 15 U.S.C. § 2613(c)(1) (2006) (“In submitting data under this chapter, a manufacturer, processor, or distributor in commerce may (A) designate the data which such person believes is entitled to confidential treatment under subsection (a) of this section”). The Toxic Substance Control Act § 8(e) requires U.S. chemical manufacturers, importers, processors, and distributors to notify the EPA immediately after obtaining information regarding any of their chemical substances or mixtures that reasonably supports a conclusion that such substance or mixture presents a substantial risk of injury to health or the environment. However, the company may claim that this information is proprietary. *See* 15 U.S.C. § 2607(e) (2006); *see also* OFFICE OF RESEARCH & DEV., U.S. ENVTL. PROT. AGENCY, PLAN TO STUDY THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES 30 (2011), http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/upload/hf_study_plan_110211_final_508.pdf (explaining that “[i]n September 2010, EPA issued information requests to nine [fracking] companies seeking information on the identity and quantity of chemicals used in [fracking] fluid in the past five years Much of the data collected from this request have been claimed as [CBI]”).

26. Joyner, *supra* note 17, at 118 (“The fluid used in fracking contains a myriad of additives to enhance its properties, including friction reducers, biocides, acids, and scale inhibitors.”); *see also* EARTHWORKS, *Hydraulic Fracturing 101*, <http://www.earthworksaction.org/FracingDetails.cfm> (last visited Mar. 21, 2013).

27. *See* MORGANTOWN, W. VA. ORDINANCE § 721 (2011) (“It is [found] that the drilling for oil and gas is an activity which adversely impacts the environment, interfered with the rights of citizens in the enjoyment of their property, and has the potential for adversely affecting the health, well being and safety of persons living and working in and around areas where drilling operations exist. It is also [found] that [fracking] has an increased level of potential harm which includes . . . contamination of ground water”); *see* U.S. ENVTL. PROT. AGENCY, *supra* note 25, at 1 (“[A]s the use of hydraulic fracturing has increased, so have concerns about its potential human health and environmental impacts, especially for drinking water.”); *see also* Osborn et al., *supra* note 8 (linking increased levels of flammable methane gas in drinking water to the wells’ proximity to fracking cites).

Environmental Protection (WVDEP) to drill at the Morgantown Industrial Park.²⁸ The property is situated within one mile of the city and is just across the Monongahela River from Morgantown Water Supply Lake, a main water supply to the city.²⁹ After entering into a lease agreement with Enrout Properties, the owner of the industrial park, for the right to drill, develop, and extract natural gas from the Marcellus Shale located under the property, Northeast applied to WVDEP for drill permits.³⁰ In March 2011, WVDEP approved the site and issued permits to Northeast to drill two wells on the property.³¹

In the spring of 2011, the Morgantown Utility Board (MUB) began questioning Northeast's permits.³² MUB launched an investigation into the impact Northeast's drilling might have on the nearby Monongahela River.³³ Specifically, MUB was concerned about spill containment and prevention, well integrity, waste disposal, and the environmental impact of fracking chemicals.³⁴ In May 2011, Northeast agreed to add safeguards to its well sites at MUB's request.³⁵ The safeguards included a system to contain fluid during times when chemicals would be used in the drilling process, an interior containment structure, and a lined waste pit, among other safety mechanisms.³⁶ Including the modifications, Northeast claimed to have put a total of \$7 million worth of safeguards into the property.³⁷ However, in June 2011, the city council enacted the ordinance banning fracking.³⁸

On June 23, 2011, Northeast asked the circuit court for a temporary restraining order to prohibit the City from enforcing the ordinance and thus prevent the ordinance from going into effect.³⁹ The circuit court denied Northeast's motion

28. *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, slip op. 6285, at *2-4 (Cir. Ct. Monongalia Cnty. Aug. 12, 2011).

29. *See id.* at *2 (describing the industrial park as located just west of the Monongahela River). The industrial park is also located approximately 0.388 miles from the Morgantown Water Supply Lake. *Google Maps Distance Locator*, DAFT LOGIC, <http://www.daftlogic.com/projects-google-maps-distance-calculator.htm> (last visited Mar. 21, 2013); *see also Marcellus Gas Wells Move in Near Morgantown's Water Supply*, CITY OF MORGANTOWN BLOG (Mar. 24, 2011, 12:24 PM), <http://www.thecityofmorgantown.com/?p=559>. The City Council's concern largely dealt with the effects that drilling might have on the environment and nearby water sources. MORGANTOWN, W. VA. ORDINANCE § 721.01(a) (2011) (noting that "drilling for oil and gas is an activity which adversely impacts the environment," and "fracking has an increased level of potential harm which includes, but may not be limited to, contamination of ground water").

30. *See Ne. Natural Energy*, slip op. 6285, at *3.

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.*

36. *See* Complaint ¶¶ 31-32, *Ne. Natural Energy*, slip op. 6285.

37. *See id.* ¶ 9.

38. *Ne. Natural Energy*, slip op. 6285, at *3.

39. *Id.* at *2.

because Northeast's fracking operations were not scheduled to begin for another two months.⁴⁰ Meanwhile, Northeast and the City agreed to submit briefs to the circuit court solely on the issue of whether the state's oil and gas regulations preempted the ordinance banning fracking.⁴¹

Northeast argued that the City overstepped the power that the state granted to it when the city council enacted the ordinance because oil and gas regulation is under the state's exclusive control.⁴² Further, Northeast argued that, because WVDEP regulated drilling and Northeast's fracking was permitted by WVDEP, the City's ban on fracking was unconstitutional and unlawful.⁴³

Morgantown argued that the state constitution explicitly grants power to the City to enact "all laws and ordinances relating to its municipal affairs"⁴⁴ and provides that such laws and ordinances may be set aside only if they are "inconsistent or in conflict with this constitution or the general laws of the state."⁴⁵ The City argued that the ordinance did not conflict with, and was therefore not preempted by, existing laws because nothing in current state law precluded local regulation of fracking.⁴⁶ Further, the City argued that the state's power to protect the environment is not exclusive and does not prohibit supplemental regulation at a local level.⁴⁷

Ultimately, the circuit court held that Morgantown did not have the authority to enact the ordinance banning fracking.⁴⁸ In so holding, the circuit court stated that a municipality is a creature of the state and only has the powers granted to it by the state legislature and constitution.⁴⁹ It further stated that the power to ban fracking was not granted to the City.⁵⁰ The circuit court adopted Northeast's argument that the state provided a complete regulatory scheme for oil and gas drilling and, because

40. *See id.*

41. *Id.*

42. *See* Complaint, *supra* note 36, ¶ 1.

43. *Id.* at ¶ 11.

44. Defendant's Memorandum on Preemption ¶ 1, *Ne. Natural Energy*, slip op. 6285.

45. *Id.* ¶ 5; *see also* W. VA. CONST. art. VI, § 39(a) (amended 1936) (stating that a municipality "may pass all laws and ordinances relating to its municipal affairs: **Provided**, That any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this constitution or the general laws of the state"); *see also* W. VA. CODE § 8-12-2 (1969) (implementing the power granted in the state constitution).

46. *See* Defendant's Memorandum on Preemption, *supra* note 44, at ¶ 4.

47. *Id.* ¶ 5.

48. *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, slip op. 6285, at *9-10 (Cir. Ct. Monongalia Cnty. Aug. 12, 2011).

49. *See id.* at *7-9.

50. *Id.* at *9 ("These regulations do not provide any exception or latitude to permit the City of Morgantown to impose a complete ban on fracking or to regulate oil and gas development and production.").

the state and City enacted conflicting legislation on the subject, the city ordinance could not be maintained.⁵¹ The court's holding therefore overturned the ordinance.⁵²

This case comment contends, first, that Morgantown had the authority to enact the ordinance banning fracking and, second, that there was no conflict between the West Virginia regulatory scheme for oil and gas and the city ordinance banning fracking. First, the state code and constitution grant local governments broad power to protect their environment and citizens. The court construed this authority too narrowly, stripping Morgantown of its important role in protecting, at a local level, the environment and the health and safety of its citizens. Second, although West Virginia has a regulatory scheme for oil and gas drilling, the state laws are not exclusive of supplemental regulation at a local level or in conflict with the Morgantown ordinance. The court was incorrect in finding that the state's oil and gas laws preempted Morgantown's ordinance and, in doing so, further removed from the City its more specific authority to regulate fracking.

First, the West Virginia State Code yields a regulatory scheme governing oil and gas issues.⁵³ The code provides as follows:

- (1) Restoring and protecting the environment is fundamental to the health and welfare of individual citizens, and our government has a duty to provide and maintain a healthful environment for our citizens. (2) The state has the primary responsibility for protecting the environment; other governmental entities, public and private organizations and our citizens have the primary responsibility of supporting the state in its role as protector of the environment.⁵⁴

The secretary of WVDEP also has "full charge" of matters relating to oil and gas,⁵⁵ including the power to "perform all duties as the permit issuing authority for the state in all matters pertaining to the exploration, development, production, storage, and recovery of this state's oil and gas."⁵⁶

Furthermore, the code provides that the purpose of WVDEP is "[t]o consolidate environmental programs into a single state agency" and "[t]o provide a comprehensive program for the conservation, protection, exploration, development, enjoyment and use of the natural resources of the state."⁵⁷ In July 2011, West Virginia Governor Earl Tomblin directed WVDEP to promulgate "emergency" environmental regulations governing drilling in Marcellus Shale.⁵⁸ The governor stated that the order was "the

51. *See id.* at *8–9.

52. *Id.* at *10 ("[The ordinance] is preempted by State legislation, and is invalid.").

53. *Id.* at *6.

54. *See* W. VA. CODE § 22-1-1(a)(1)–(2) (2001).

55. *See* W. VA. CODE § 22-6-2(c) (2011).

56. *Id.*

57. *See* W. VA. CODE § 22-1-1(b)(2)–(3) (2001).

58. *See Ne. Natural Energy*, slip op. 6285, at *9–10 (stating that West Virginia regulatory scheme was comprehensive in part because of the governor's emergency drilling regulations); Exec. Order No. 4-11 ¶ 16 (Jul. 5, 2011) ("[I]t is necessary to order the WVDEP to take certain immediate actions outlined

first step in [his] long-term plan to ensure responsible development in Marcellus Shale.”⁵⁹

At the same time, the state constitution and code each provides general powers to local governments to pass ordinances in a set of provisions entitled the “Home Rule for Municipalities.”⁶⁰ A municipality in a state that has not adopted a Home Rule provision does not have power other than that granted by the state.⁶¹ The opposite is true once a Home Rule provision is adopted.⁶² “Under Home Rule, it is assumed that a municipality has a power unless it is expressly denied by state statute or state constitution.”⁶³

West Virginia’s constitution provides the framework for the Home Rule.⁶⁴

Each municipal corporation . . . shall have power and authority to . . . pass all laws and ordinances relating to its municipal affairs; **Provided**, That any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this constitution or the general laws of the state.⁶⁵

The state subsequently adopted this authority in the state code, providing that

any city shall have plenary power and authority . . . by ordinance not inconsistent or in conflict with such constitution [or] other provisions of this chapter . . . to provide for the government, regulation and control of the city’s municipal affairs, including . . . (5) The acquisition, care, management and use of the city’s . . . property; . . . (9) The government, protection, order, conduct, safety and health of persons of property therein; . . . and (11) The imposition and enforcement of penalties for the violation of . . . any of its ordinances.⁶⁶

Furthermore, a municipality has the authority to pass ordinances to prevent injury or annoyance to the public or individuals from anything dangerous, to provide for the elimination of hazards to public health and safety, to abate anything which is a public nuisance by majority opinion, and to protect the public safety, health, and

herein, including the promulgation of emergency rules, to protect the public health, safety, and welfare of our citizens.”). The West Virginia Code provides that an emergency rule expires after just fifteen months if the legislature has not adopted it permanently. *See* W. VA. CODE § 29A-3-15 (1994).

59. Press Release, Office of the Governor, Governor Announces Marcellus Shale Regulation (July 12, 2011), *available at* <http://www.governor.wv.gov/media/pressreleases/2011/Pages/GovernorAnnouncesMarcellusShaleRegulation.aspx>.

60. *See generally* W. VA. CONST. art. VI, § 39(a) (amended 1936); *see also* W. VA. CODE § 8-12-2(a) (1969).

61. *See* Lori Schwartzmiller, *This Land Is Whose Land? The Feasibility of Extraterritorial Jurisdiction in West Virginia’s Land Use Planning Laws*, 109 W. VA. L. REV. 929, 931 (2007).

62. *See id.* at 932.

63. *Id.* at 932–33.

64. *See* W. VA. CONST. art. VI, § 39(a) (amended 1936).

65. *See id.*

66. *See* W. VA. CODE § 8-12-2(a)(1)–(11) (1969).

welfare.⁶⁷ The city may also extend its powers one mile beyond its city limits with the permission of the neighboring municipality if its powers cannot be reasonably exercised within the confines of the city limits.⁶⁸ The West Virginia legislature has expressed its intention to grant broad powers to local government. For example in 2007 it enacted a law entitled the “[p]ilot program to increase powers of municipal self-government.”⁶⁹ It declared that “[t]he future economic progress of the State of West Virginia is directly related to the success of its municipalities in that stronger municipalities will make for a stronger West Virginia.”⁷⁰ Its primary purpose was to allow selected municipalities to enact any ordinances and resolutions not contrary to state law to encourage municipalities to explore new regulations in a more cost-effective, efficient, and timely manner.⁷¹

Although the West Virginia state regulatory scheme for oil and gas appears comprehensive, the state legislature has also granted broad power to municipalities to complement the state’s efforts to protect the environment and its citizens. Most importantly, the code grants the state “primary responsibility” for protecting the environment.⁷² While the State provides a program regulating the exploration and development of oil and gas resources, it is not expressly at the exclusion of programs at the local level.⁷³

Moreover, among those powers granted to the City of Morgantown is the power to prevent injury from anything dangerous, to eliminate hazards to public health, to abate public nuisances, and to protect and promote public health, safety, and welfare,⁷⁴ and the City may enact an ordinance for “the government, protection, order, conduct, safety and health of persons or property therein.”⁷⁵

Based on these broadly granted powers, Morgantown enacted its ordinance banning fracking as a public nuisance on grounds that drilling would substantially

67. See W. VA. CODE § 8-12-5(23) (2008).

68. See W. VA. CODE § 8-12-19 (1969).

69. W. VA. CODE § 8-1-5A (2007).

70. *Id.*

71. *Id.*

72. W. VA. CODE § 22-1-1(a)(2) (2001) (emphasis added). The use of the word “primary” logically implies that there is a “secondary” authority, which is provided to local governments. See, e.g., W. VA. CODE § 22-1-1(a) (2001).

73. A city can act even where the state did not grant express authority so as the city’s authority can be reasonably implied. See W. VA. CODE § 8-1-7 (“The enumeration of powers and authority in this chapter shall not operate to exclude the exercise of other powers and authority fairly incidental thereto or reasonably implied and within the purposes of this chapter. . . .”); see also *McCallister v. Nelson*, 411 S.E.2d 456, 461 (1991) (holding that a charter provision which authorizes a mayor’s veto to a city ordinance is reasonably implied and fairly incidental to the granted or enumerated powers within the code, and is therefore a valid exercise of municipal authority); *Toler v. City of Huntington*, 168 S.E.2d 551, 554 (1969) (“[A municipality has] such implied powers as are necessary to carry into effect those [powers] expressly granted.”).

74. See W. VA. CODE § 8-12-5(13), (23), (44) (2008).

75. See W. VA. CODE § 8-12-2(a) (1969).

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interfere with residents' right to use and enjoy their land safely.⁷⁶ In doing so, it worked well within its authority under state law, based on growing concerns for the health and welfare of the city's residents, as well as the environment. Indeed, other localities in West Virginia have passed ordinances for similar health and safety reasons.⁷⁷

Second, West Virginia state laws are not exclusive of supplemental regulation at a local level or in conflict with the Morgantown ordinance. Preemption provides that if a local law conflicts with a state law, the state law prevails and the local law will be void.⁷⁸ In *Northeast Natural Energy*, the circuit court considered whether the Morgantown ordinance must be struck down based on implied preemption, of which there are two types: field preemption and conflict preemption.⁷⁹ Field preemption occurs when the state statutory scheme is so comprehensive that it leaves no room for

76. See MORGANTOWN, W. VA., BUSINESS AND TAXATION CODE § 721 (2011). Similarly, in a recent case, *Tucker v. Southwest Energy Co.*, No. 1-11-cv-44-DPM (E.D. Ark. Feb. 16, 2012), multiple plaintiffs alleged that fracking was a nuisance. After fracking began on a nearby property, they alleged that their drinking water wells began to smell, and a test of the water revealed a poisonous chemical sometimes used in fracking fluid, making it dangerous to use the well that supplied their home with fresh water. *Id.*

77. See, e.g., LEWISBURG, W. VA., ORDINANCE 221 (2011) (prohibiting “locating, drilling, equipping, or producing of any oil and gas”); Lewisburg City Council Res. 360 (W. Va. 2011) (stating a concern for, among other things, the fact that “state regulations currently do not adequately protect public water systems . . . from contamination from liquid byproducts of hydraulic fracking technologies being released into public bodies of water”). For more examples of local bans on fracking in jurisdictions outside West Virginia, see sources cited *supra* note 5.

78. See W. VA. CONST. art. VI, § 39(a) (amended 1936) (providing that any local ordinance that conflicts with state law or the state constitution shall be void); see also W. VA. CODE § 8-12-2(a) (1969) (giving cities the authority to enact ordinances not inconsistent or in conflict with the constitution or other state laws). This is distinguished from the related topic of preemption between federal and state laws under the Supremacy Clause of the U.S. Constitution, which is interpreted to provide that if a state law conflicts with a federal law, the federal law is supreme. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”); see also *Gibbons v. Ogden*, 22 U.S. 1, 157–58 (1824) (“The constitution [provides] that the laws of the United States shall be the supreme law of the land, anything in the constitution of any State of the contrary notwithstanding. In case of collision, therefore, the State laws must yield to the superior authority of the United States.”). However, the Supreme Court has held that “the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.” *S. Blasting Servs., Inc. v. Wilkes Cnty.*, 288 F.3d 584, 589 (4th Cir. 2002) (citing *Hillsborough Cnty., Fla. v. Automated Med. Lab.*, 471 U.S. 707, 713 (1985)).

79. *Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 84 (W. VA. 2009) (“There are two recognized types of implied preemption: field preemption and conflict preemption.”). A third type of implied preemption is “obstacle preemption,” which is closely related to conflict preemption and occurs when the local law becomes an obstacle to the accomplishment of some state objective. See *Smith v. BAC Home Loans Serv., LP*, 769 F. Supp. 2d 1033, 1040 (S.D. W. Va. 2011). This third type of implied preemption was also not at issue in *Northeast Natural Energy*. Note also the significance of the fact that the circuit court did not address the issue of whether the ordinance was expressly preempted, jumping directly to a discussion of implied preemption. Nothing in the state laws expressly provided for the preemption of supporting laws at the local level. If the state legislature intended to preempt local laws on gas drilling, it would have done so expressly. This principle, that if the legislature meant to say something, it should have done so explicitly, is clearly established. See, e.g., *Regan v. Wald*, 468 U.S. 222, 255 (1984) (“[I]f Congress had meant ‘restrictions’ it would have said so explicitly.”).

supplemental regulation at the local level.⁸⁰ Conflict preemption occurs when compliance with both state and local law is impossible due to inconsistencies between them.⁸¹ The circuit court blurred the line between these two types of implied preemption, discussing both, but not explicitly using one to overturn the ordinance.⁸²

The circuit court reiterated that the West Virginia state code sets forth a comprehensive regulatory scheme on oil and gas and concluded that the Morgantown ordinance must yield.⁸³ But the state constitution and code mention nothing about fracking; only in late August 2011, after the circuit court decided this case, did WVDEP promulgate an emergency rule requiring fracking companies to detail how they will protect area land and respond to accidents.⁸⁴ Although West Virginia state law does provide a regulatory scheme for oil and gas activities generally, many aspects of fracking are not addressed.⁸⁵

In *Sharon Steel Corp. v. City of Fairmont*,⁸⁶ the Supreme Court of Appeals of West Virginia held that a city ordinance banning permanent hazardous waste disposal as a public nuisance was valid, despite a comprehensive regulatory program for hazardous waste at the state, and even federal, level.⁸⁷ The City of Fairmont framed its ordinance as a public nuisance ban in response to hazardous wastes that were stored improperly by plant operators and as a result created a potentially serious threat to the health of the citizens of Fairmont.⁸⁸ Sharon Steel, the plant operator, argued that Fairmont lacked

80. *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, slip op. 6285, at *7 (Cir. Ct. Monongalia Cnty. Aug. 12, 2011) (“When a state law fully occupies a particular area of legislation, indicated by the State’s comprehensive regulatory scheme, no local ordinances will be permitted to contravene it.”).

81. *Id.* at *7–8 (“Where both the state and a municipality enact legislation on the same subject matter, it is generally held that if there are inconsistencies, the municipal ordinance must yield.”); *Morgan*, 680 S.E.2d at 84 (stating that conflict preemption occurs where compliance with both federal and state regulations is impossible). The state code further clarifies that an ordinance conflicts with the state constitution or law for preemption purposes if it “(i) permits or authorizes that which the constitution or general law forbids or prohibits, or (ii) forbids or prohibits that which the constitution or general law permits or authorizes.” W. VA. CODE § 8-1-2(9) (1969).

82. *Ne. Natural Energy*, slip op. 6285, at *6–7 (“The doctrine of preemption is applicable law when the State has assumed control of a particular subject of regulation, and a local government has enacted an ordinance in the same field. When a state law fully occupies a particular area of legislation, indicated by the State’s comprehensive regulatory scheme, no local ordinances will be permitted to contravene it.”) (citations omitted).

83. *See id.* at *7–9.

84. *See generally* Horizontal Well Development Rule, 35 C.S.R. 8 (proposed Aug. 22, 2011). The rule does not go into effect until it is approved by the Secretary of State and, as previously noted, it expires if not approved within fifteen months. *See* W. VA. CODE § 29A-3-15(a) (1994).

85. Two examples of unanswered questions arising from this emergency WVDEP regulation promulgated are: What level of protection against hazards is enough on the part of the drilling company? What will be deemed a proper cleanup response after an accident (e.g., a chemical spill)?

86. 334 S.E.2d 616 (W. Va. 1985).

87. *See id.* at 618.

88. *See id.* at 619–20.

the power to enact an ordinance prohibiting permanent disposal of hazardous waste because hazardous waste was already regulated at the federal and state levels through the Resource Conservation and Recovery Act (RCRA) and the West Virginia Hazardous Waste Management Act (WVHWMA), respectively.⁸⁹

The court of appeals found that the RCRA and the WVHWMA were primarily regulatory statutes—meaning that they explained the technical legal details necessary to implement laws⁹⁰—and that they were enacted to regulate the improper treatment, storage, transportation, and disposal of hazardous waste based on available technologies to deal with hazardous waste. In contrast, the court also found that the local Fairmont ordinance was not regulatory in nature, but rather was a narrow penal statute designed to target and punish persons improperly storing hazardous wastes. Accordingly, the court found that the ordinance did not conflict with the state and federal laws⁹¹ and held that it was not preempted by the state or federal regulatory scheme.⁹²

In *Northeast Natural Energy*, as in *Sharon Steel*, the state had created a regulatory scheme for oil and gas and created WVDEP to implement oil and gas state laws.⁹³ However, this was not at the exclusion of local government authority.⁹⁴ Similar to *Sharon Steel*, the state regulatory scheme on fracking does not preclude a city from enacting a fracking ordinance for the purposes of protecting residents' health and safety and remedying the nuisances caused by fracking.⁹⁵ Because a gas drilling company can comply with both the state and the local laws, the state regulatory scheme and the city ordinance do not conflict, and, therefore, the circuit court erred as a matter of law by overturning the ordinance.

Courts in other jurisdictions have also upheld local ordinances banning fracking despite preemption challenges. In *Anschutz Exploration Corp. v. Town of Dryden*, a New York court upheld a Dryden zoning ordinance that banned fracking, despite the plaintiff oil company's contention that the matter was solely within the state's regulatory power.⁹⁶ Specifically, an ordinance that already precluded heavy industrial activity within Dryden's borders was amended in 2011 to ban all activities related to the exploration for, and production or storage of, natural gas and petroleum.⁹⁷ The

89. *Id.*

90. *Laws and Regulations*, ENVTL. PROT. AGENCY (Aug. 30, 2012), <http://www.epa.gov/lawsregs/>.

91. *Sharon Steel*, 334 S.E.2d at 624.

92. *Id.*

93. *E.g.*, W. VA. CODE § 22-6-2(a) (2011) (providing that the secretary has as his “duty the supervision of the execution and enforcement of matters related to oil and gas as set out in this article”); *Id.* § 22-6-2(c) (providing the secretary with “full charge of oil and gas set out in this article.”).

94. *See* W. VA. CODE § 22-1-1(a)(2) (2001) (giving the state the “primary” authority to protect the environment, but giving local governments the power to support the state in its endeavors).

95. *Sharon Steel*, 334 S.E.2d at 625–26.

96. 940 N.Y.S.2d 458 (Sup. Ct. Tompkins Cnty. 2012).

97. *See Anschutz*, 940 N.Y.S.2d at 461; *see* DRYDEN, N.Y., ZONING ORDINANCE § 2104 (2011) (“No land in the Town shall be used: to conduct any exploration for natural gas and/or petroleum; to drill any well for natural gas and/or petroleum; to transfer, store, process or treat natural gas and/or petroleum; or to dispose

court in *Anschutz Exploration Corp.* noted that the 2011 amendment in effect prohibited fracking.⁹⁸ The purpose of the amendment was to address concerns regarding the protection of the environment and natural resources (including air and water purity) and the effect of drilling on the community's health and welfare.⁹⁹ The plaintiff, who owned thousands of acres of gas leases in the town, argued that the ordinance should be overturned on the basis that it was preempted by the state's Oil, Gas and Solution Mining Law (OGSML).¹⁰⁰ However, the court found that because OGSML regulated—and expressly preempted—local laws regarding mining and drilling operations and that the local ordinance, in contrast, regulated land use and zoning, the two sets of laws did not conflict and the local ordinance was therefore not preempted.¹⁰¹

Like the courts in *Sharon Steel* and *Anschutz Exploration Corp.*, the court in *Northeast Natural Energy* should have determined whether the state and local laws at issue conflicted by examining the purpose of each and the specific behaviors that each sought to regulate. The circuit court in *Northeast Natural Energy* instead made the broad, generalized determination that simply because the state regulated “oil and gas matters,” Morgantown could not regulate fracking.¹⁰² The state code regulating oil and gas is broad and generalized, and its purpose is to restore and protect a healthful environment for its citizens.¹⁰³ The state achieved this by establishing through the WVDEP a comprehensive program for the conservation and exploration of the natural resources of the state.¹⁰⁴ In contrast, the Morgantown ordinance is narrower: it was enacted to protect the citizens' use and enjoyment of the land and,

of natural gas and/or petroleum exploration or production wastes; or to erect any derrick, building, or other structure; or to place any machinery or equipment for any such purposes.”).

98. *Anschutz*, 940 N.Y.S.2d at 462.

99. See generally Town Bd. of the Town of Dryden, *Notice of Adoption of Amendments to Zoning Ordinance*, FOOD & WATER WATCH, http://documents.foodandwaterwatch.org/doc/Frack_Actions_DrydenNY.pdf (last visited Mar. 10, 2013).

100. *Anschutz*, 940 N.Y.S.2d at 465.

101. See *id.* at 473–74. A similar case was decided in 2012. See *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. Otsego Cnty. 2012). The court denied plaintiff's challenge at summary judgment that state law preempted the Town of Middlefield's ban on natural gas drilling. *Id.* at 730. The court found that

defendant's Zoning Law is an exercise of the municipality's constitutional and statutory authority to enact land use regulations even if such may have an incidental impact upon the oil, gas and solution drilling or mining industry. The Zoning Law does not conflict with the state's interest in establishing uniform policies and procedures for the manner and method of the industry [n]or does it impede implementation of the state's declared policy with respect to these resources.

Id. Therefore the court, like the court in *Anschutz Exploration Corp.*, looked at the purposes of each law to determine whether there was a conflict between the two.

102. See *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, slip op. 6285, at *9 (Cir. Ct. Monongalia Cnty. Aug. 12, 2011).

103. W. VA. CODE § 22-1-1(a) (2001).

104. *Id.*

more specifically, the city's drinking water.¹⁰⁵ Accordingly, there is no conflict between the state and local laws.

Lastly, although the court in *Northeast Natural Energy* did not address the issue of express preemption, the legislative history provides further evidence of the state legislature's intention that the law not provide the state with sole authority over oil and gas matters. In early 2011, Bill 424 was introduced to the state senate,¹⁰⁶ providing that "the [State] secretary has sole and exclusive authority to regulate permitting, location, spacing drilling, operation and plugging of oil and gas wells and production operations within the state."¹⁰⁷ Thus, the bill, as proposed, explicitly stated that the state would have sole authority over oil and gas issues to the exclusion of municipalities. But the bill was never enacted, which indicates that the legislature did not intend the state to be the sole regulatory authority on fracking or to narrow the scope of municipal power. If the state legislature had intended to limit city governments' power to supplement state laws on fracking at a local level, it could have expressly done so.¹⁰⁸ Indeed, the West Virginia state legislature has included language in other statutes to clearly preempt supplemental local regulation in matters other than gas drilling. For example, in West Virginia Code section 17C-13A-9, a provision that is a part of a broader statutory scheme regulating diesel-powered motor vehicles, the legislature expressly stated that "[t]he provisions of this article preempt and supersede a local ordinance or rule concerning the subject matter of this article."¹⁰⁹ Because the state legislature had several models of preemptive language that it could have used in creating a "comprehensive" scheme for oil and gas regulation that would preempt local regulation, the absence of such language suggests that it did not intend to be the sole regulatory authority on fracking.

In conclusion, the circuit court in *Northeast Natural Energy* failed to acknowledge that the West Virginia grants broad power to local governments like Morgantown to protect its citizens and the environment. In overturning the Morgantown ordinance, the circuit court substantially limited the ability of local governments to regulate against potential harms within their city limits.

105. See MORGANTOWN, W. VA. ORDINANCE § 721 (2011).

106. S.B. 424, 2011 Leg. (W. Va. 2011).

107. Natural Gas Horizontal Well Control Act, S. 424, Comm. Sub. (W. Va. 2011) (emphasis added); see also W. VA. CODE § 22-6A-6 (2011).

108. See *Regan v. Wald*, 468 U.S. 222, 255 (1984) ("[I]f Congress had meant 'restrictions' it would have said so explicitly.").

109. W. VA. CODE § 46A-6J-6 (2011) ("This article preempts any local ordinance prohibiting the same or similar conduct."); W. VA. CODE § 17C-13A-9 (2010); see also W. VA. CODE § 29-25-35 (2009) ("No local law or rule providing any penalty, disability, restriction, regulation or prohibition for operating a historic resort hotel with West Virginia Lottery table games or supplying a licensed gaming facility may be enacted and the provisions of this article preempt all regulations, rules, ordinances and laws of any county or municipality in conflict with this article."); W. VA. CODE § 29-22C-32 (2007) ("No local law or rule providing any penalty, disability, restriction, regulation or prohibition for operating a racetrack with West Virginia Lottery table games or supplying a licensed racetrack may be enacted. . .").