FRACK OFF! IS MUNICIPAL ZONING A SIGNIFICANT THREAT TO HYDRAULIC FRACTURING IN MICHIGAN?

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The state may mould local institutions according to its views of policy or expediency; but local government is [a] matter of absolute right; and the state cannot take it away.

Thomas M. Cooley[1]

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1. People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44, 108 (1871).

I. INTRODUCTION

The United States is on a mission to explore and develop alternative sources of energy.[2] This has led to a boom in natural gas development that now stretches across thirty-one states.[3] As such, numerous conflicts have sprung up between state and local governments related to whether and how natural gas development should occur. Such conflicts have recently been playing out in New York, Pennsylvania, and West Virginia.[4] In response to natural gas development in those states, and gas operators' use of a controversial method of extraction known as high-volume hydraulic fracturing, or "fracking," municipalities have attempted to draw on their home rule and zoning authorities in order to zone out gas operators.[5] These local efforts met stiff resistance from states asserting that regulating gas mining is a state function and not a local function.[6]

Fracking is the most common technique for tapping natural gas reserves in underground shale formations. It is used in approximately "nine out of ten natural gas wells in the United States."[7] Here is how it

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2. *See* President Barack Obama, Address at the State of the Union (Jan. 25, 2012), *available at* http://www.whitehouse.gov/photos-and-video/video/2012/01/25/2012-state-union-address-enhanced-version#transcript:

> Nowhere is the promise of innovation greater than in American-made energy. Over the last three years, we've opened millions of new acres for oil and gas exploration, and tonight, I'm directing my administration to open more than 75 percent of our potential offshore oil and gas resources . . . . We have a supply of natural gas that can last America nearly [one hundred] years. And my administration will take every possible action to safely develop this energy. Experts believe this will support more than 600,000 jobs by the end of the decade. And I'm requiring all companies that drill for gas on public lands to disclose the chemicals they use. Because America will develop this resource without putting the health and safety of our citizens at risk. The development of natural gas will create jobs and power trucks and factories that are cleaner and cheaper, proving that we don't have to choose between our environment and our economy.

Id.

3. *Gas Drilling: The Story So Far*, PROPUBLICA (June 26, 2010), http://www.propublica .org/article/gas-drilling-the-story-so-far.

4. Erica Levine Powers, *Home Rule Meets State Regulation: Reflections on High-Volume Hydraulic Fracturing for Natural Gas*, STATE & LOCAL LAW NEWS, SECTION OF STATE & LOCAL GOV'T OF THE ABA (2012), http://www.americanbar.org/publications/state_local_law_news/2011_12/winter_2012/home_rule_state_regulation.html.

5. *Id.*

6. *Id.*

7. *What is Hydraulic Fracturing?*, PROPUBLICA, http://www.propublica.org/special/hydraulic-fracturing-national.

works. Generally, after a well has been drilled, cement casings are poured into the well in order to protect the integrity of the well, separate it from any nearby aquifers, and prevent methane migration from any nearby old, abandoned wells.[8] Gas operators then use hydraulic pressure to inject thousands of gallons of water[9] and proprietary chemical combinations into the well in order to break through the sealed cement casings and open up fissures in the shale to increase the flow of gas trapped between the shale rock.[10] Drilling generally begins vertically, and then the well turns horizontally in order to create better access to the shale rock.[11] The depth of such wells ranges from a few hundred feet to 10,000 feet or more.[12]

The most controversial aspect of fracking is the combination of chemicals that operators use. In addition to water and sand, operators also add a variety of chemicals that dissolve rock, prop open the fissures, prevent clay from shifting, prevent corrosion of the pipe, eliminate bacteria in the water, and so forth.[13] Because these chemicals are shot underground at high force and in high volumes, one potential problem is that they will find their way into drinking water supplies, or contaminate the land in some other way.[14] Such problems have been associated with fracking in several states.[15]

A second aspect of the pollution or migration problem is that operators are mainly exempt from federal environmental laws protecting drinking water.[16] Any wastes resulting from the fracking process may also be exempt from regulation under a variety of other federal laws.[17]

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8. Powers, *supra* note 4.

9. *Id.* It has been estimated that operators need between 300,000 gallons and 600,000 gallons of water for each stage of drilling a horizontal well, and because the wells are drilled in multiple stages, this could require millions of gallons of water at each drill site. *Id.*

10. Powers, *supra* note 4.

11. PROPUBLICA, *supra* note 7.

12. *Id.*

13. *See generally Hydraulic Fracturing: The Process*, FRACFOCUS, http://www.fracfocus.org/hydraulic-fracturing-how-it-works/hydraulic-fracturing-process (last visited Dec. 22, 2012).

14. Abrahm Lustgarten, *Years After Evidence of Fracking Contamination, EPA to Supply Drinking Water to Homes in Pa. Town*, PROPUBLICA (Jan. 20, 2012), http://www.propublica.org/article/years-after-evidence-of-fracking-contamination-epa-to-supply-drinking-water (detailing the plight of Dimock, Pennsylvania, where a number of drinking wells were allegedly compromised during hydraulic fracturing in the area.).

15. *Id.*

16. *See generally* 42 U.S.C.A. § 300h(d) (West 2006) (exempting hydraulic fracturing from regulation under the Safe Drinking Water Act).

17. *See generally* 42 U.S.C.A. § 6921(b)(2)(A) (West 2011). *See also* 58 Fed. Reg. 15284-01 (Mar. 22, 1993) (clarifying the natural gas mining exemptions):

Importantly, as fracking has recently become more of a mainstream issue, gas operators are now voluntarily disclosing the majority of the chemicals they use in the process in an effort to educate the public.[18] Regardless of such voluntary or mandated disclosures, however, this method of gas extraction still generates anxiety in the communities where it occurs.[19]

As discussed below, Michigan communities have started to feel this anxiety in light of the current push by the State to create more opportunities for gas companies to drill new wells.[20] Accordingly, it is only a matter of time before Michigan municipalities attempt to zone out gas operators who are intent on developing natural gas in Michigan. Thus, a major question addressed in this Article is whether Michigan zoning law, in combination with local authority under the home rule doctrine, permits municipalities to zone out natural gas operations. Part II briefly explains the history of hydraulic fracturing in Michigan. Part III then explores the municipal home rule doctrine and discusses the background of home rule in Michigan, including the constitutional and statutory provisions that established municipal entitlement to home rule. Part III also discusses local authority to enact zoning regulations under the Michigan Zoning Enabling Act[21] and a recent legislative enactment that appears to limit local power and autonomy related to restrictions on

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> A simple rule of thumb for determining the scope of the exemption is whether the waste in question has come from down-hole (i.e., brought to the surface during oil and gas E&P operations) or has otherwise been generated by contact with the oil and gas production stream during the removal of produced water or other contaminants from the product. . . . If the answer to either question is yes, the waste is most likely considered exempt.

Id. at 15285.

18. *See generally Chemical Disclosure Registry,* FRACFOCUS, http://www.fracfocus.org (last visited Dec. 22, 2012) (featuring background on the fracking process, explanation of why it is used, an inventory of gas wells by state with reports of the chemicals used at those wells, and a catalogue of state regulations related to fracking).

19. Abrahm Lustgarten, *Fracking Cracks the Public Consciousness in 2011*, PROPUBLICA (Dec. 29, 2011), http://www.propublica.org/article/fracking-cracks-the-public-consciousness-in-2011 (stating that 2011 was "the year that 'fracking' became a household word."). *See also* Bryan Walsh, *Mark Ruffalo, Anthony Ingraffea, Robert Howarth,* TIME, Dec. 14, 2011, http://www.time.com/time/specials/packages/article/0,28804,2101745_2102309_2102323,00.html (declaring that hydraulic fracturing was "the biggest environmental issue of 2011").

20. Jay Greene, *Fracking in Michigan Appears on the Upswing*, CRAIN'S DETROIT BUSINESS, May 27, 2011, Froit.com/article/20110527/STAFFks/hydraulic-fracturing-process. FRACTURING IN MICHIGAN? http://www.crainsdetroit.com/article/20110527/STAFFBLOG10/110529913/fracking-in-michigan-appears-on-the-upswing#.

21. Mich. Comp. Laws Ann. §§ 125.3101-:3702 (West 2010).

natural resource extraction. Finally, Part III concludes that in most cases, Michigan's grant of authority to municipalities under home rule and the Zoning Enabling Act is likely insufficient to sustain local zoning regulations related to natural gas mining and production because such zoning would be subject to heightened judicial scrutiny. Additionally, Michigan's home rule doctrine is unlikely to provide much assistance in bolstering local power and autonomy in the face of such searching judicial review.

Assuming a municipal ordinance managed to survive a searching judicial inquiry, the regulations would also be vulnerable to a preemption challenge. Part IV therefore discusses the legislation that gave the State the authority to regulate oil and gas mining and court decisions interpreting the conflict between state environmental legislation and local zoning. Part IV concludes that a local ordinance that survives heightened judicial scrutiny is still likely to be struck down under preemption principles in light of the State's broad policy priorities related to regulating the environment and natural resources.

II. WE'VE BEEN HERE BEFORE: A BRIEF HISTORY OF HYDRAULIC FRACTURING IN MICHIGAN

Hydraulic fracturing is not a new process for mining gas in Michigan. In fact, gas companies have been hydraulically fracturing in Michigan for approximately fifty years.[22] Since the 1960s, more than 12,000 wells have been hydraulically fractured in the State, and it has been heralded as a model for responsible gas and oil production.[23] Importantly, the Michigan Department of Environmental Quality (MDEQ) recently asserted it had not documented any cases during those fifty years where fracking caused adverse impacts to the environment or public health.[24] Most, if not all, of the drilling during those five decades was into the Antrim Shale, which sits 500 to 2,000 feet below the ground.[25]

Now, however, in an effort to further develop Michigan's natural gas potential, the State and gas operators have their sights set on drilling into the previously untapped Collingwood-Utica shale, which is approximately

22. Greene, *supra* note 20.

23. *Id.*; *Natural Gas Drilling & Water: An Overview of Hydraulic Fracturing for Natural Gas and Oil in Northern Michigan*, TIP OF THE MITT WATERSHED COUNCIL, http://www.watershedcouncil.org/learn/hydraulic-fracturing/ (last visited Dec. 22, 2012).

24. MICHIGAN DEP'T OF ENVTL. QUALITY, HYDRAULIC FRACTURING OF NATURAL GAS WELLS IN MICHIGAN (2011), *available at* www.michigan.gov/documents/deq/hydrofrac-2010-08-13_331787_7.pdf.

25. Greene, *supra* note 20.

10,000 feet below the surface.[26] As part of that development, a new state house subcommittee was formed to study Michigan's natural gas industry and the potential for increasing production and growth in the future.[27] Additionally, in 2010, the State auctioned off 120,000 acres of state land for hydraulic fracturing, and eighteen new leases were granted in the Collingwood-Utica shale.[28] These developments resulted in the State taking in $178 million from gas companies during 2010.[29] Accordingly, because of the potential to make more money from leases, further develop gas resources and create new jobs, there has been speculation that as much as 500,000 acres of additional land could be made available for gas leases in the coming years.[30]

Critics of hydraulic fracturing in Michigan are mainly concerned that new wells would be much deeper and involve more water, chemicals, and pressure, which could lead to contamination of underground water reservoirs.[31] Clearly, reports of water contamination in other states have fueled some of these concerns.[32] The MDEQ has recently attempted to address some of these concerns by issuing a new set of "regulations" directed at hydraulic fracturing.[33] The MDEQ claims it issued the

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26. Aaron Levitt, *Michigan Adds New Fracking Regulations*, BENZINGA (May 26, 2011), http://www.benzinga.com/etfs/commodities/11/05/1116016/michigan-adds-new-fracking-regulations. *See* Greene, *supra* note 20 (quoting Michigan Representative Ken Horn as stating, "The state has immense reserves of natural gas that need to play more of a part in solving Michigan's energy needs.").

27. Peter Payette, *Legislative Panel To Promote Natural Gas Drilling In Michigan*, INTERLOCHEN PUBLIC RADIO (June 2, 2011), http://ipr.interlochen.org/ipr-news-features/episode/13940.

28. Greene, *supra* note 20.

29. *Id.*

30. *Id.*

31. *Id. See* TIP OF THE MITT WATERSHED COUNCIL, *supra* note 23.

32. TIP OF THE MITT WATERSHED COUNCIL, *supra* note 23 ("Incidents of surface and ground water contamination from the fracking process have been reported in other states. In Pennsylvania, state regulators found that gas drilling using high-volume fracking has caused contaminated drinking water, polluted surface waters, polluted air, and contaminated soils.").

33. On May 25, 2011, the MDEQ issued a new set of "regulations" related to the process of fracking in the oil and gas industry in Michigan. *See* MDEQ, *supra* note 24. The MDEQ stated the new regulations were issued as "permitting instructions" and require operators to meet additional requirements for public disclosure and protecting water resources. *Id.* First, operators are required to conduct a water withdrawal evaluation, provide a supplemental plat of the well site, and provide data and records on: the total volume of water needed for the fracking process, the number of water withdrawal wells, the aquifer type, the depth of withdrawal wells, and the pumping rate and frequency of withdrawal wells. *Id.* Second, operators have to conduct routine monitoring of any potential impact to freshwater wells, and manage freshwater and flowback water. *Id.* Third, operators are required to monitor and record surface pressures

regulations to increase public disclosure and better protect public health and the state's natural resources.[34] The new instructions became effective on June 22, 2011.[35]

In light of these potential risks, there is a strong likelihood that Michigan localities will attempt to take matters into their own hands and use their home rule or zoning authority to keep hydraulic fracturing to a minimum. The real question then is whether these local "powers" will be sufficient to keep gas development from occurring.

III. HOME RULE AND ZONING IN MICHIGAN

A. What is Home Rule?

The basic idea of home rule is that localities should have some measure of autonomy apart from the state in order to govern their own affairs with little or no state interference.[36] This is in contrast to Dillon's Rule, which generally provides that localities are merely agents of the state and wholly subject to state legislative control.[37] In the absence of a home rule constitutional provision or statute, Dillon's Rule provides the default relationship between states and localities.[38] States providing for home rule generally do so through a constitutional amendment, through implementing statutes, or both.[39]

Home rule doctrines vary from state to state, but in general, home rule can be classified into two categories—imperio and legislative.[40] Imperio home rule is the original form of home rule, and it encompasses two distinct areas of interests and powers for states and localities

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during fracking operations, but can no longer retain freshwater pits on-site after well completion. *Id.* Finally, operators are subject to new reporting instructions, including providing a public Material Safety Data Sheet with the name and volume of chemical additives used in fracking fluids, the records of service companies used in the mining and transportation process, pressures recorded during fracturing operations, and the total volume of flowback water produced during fracking. *Id.*

34. *Michigan DEQ Announces New Hydraulic Fracturing Regulations*, MICHIGAN OIL & GAS NEWS, May 27, 2011, at 24.

35. *Id.*

36. Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 269-70 (1968).

37. *Id.* at 269.

38. *Id.*

39. RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 317 (7th ed. 2009).

40. *Id.* at 317; St. Louis v. W. Union Tel. Co., 149 U.S. 465, 468 (1893) (describing St. Louis's home rule system as "imperium in imperio").

respectively.[41] Under the imperio system, it is the courts that determine where local authority ends and state authority begins.[42] Early constitutional amendments providing for imperio home rule generally provide that local legislatures can legislate with respect to "municipal affairs," or "local affairs and government."[43] These terms were largely undefined, and so it was up to the courts to determine what was local in nature.[44] Accordingly, this scheme was criticized because of its potential for judicial intermeddling.[45]

As such, in the 1950s and 60s, the American Municipal Association (later the National Municipal League) introduced the concept of "legislative home rule."[46] It envisioned a reduced role for the courts, and was rooted in the idea that "home rule should provide local governments with the full range of government powers that the state is capable of transferring to its political subdivision," with only the state legislature, not the courts, having the ability to limit the reach of such power.[47] Generally, legislative home rule is provided for in a constitutional amendment and incorporates language to the effect that "a city may exercise any legislative power not denied by general law."[48]

Notably, the imperio/legislative dichotomy is not a bright line, and many state constitutional amendments provide for a blend of imperio and legislative home rule.[49] Further, "[d]eferential courts in imperio states may allow as much local experimentation and initiative as courts in legislative home rules states."[50] Regardless of the imperio/legislative classification, courts still have a role to play when deciding legal challenges to local ordinances, including when state and local laws conflict and the question is whether a state law preempts a local law.[51]

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41. Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271, 1275 (2009).

42. BRIFFAULT & REYNOLDS, *supra* note 39, at 332.

43. *Id.* at 317 n. 27.

44. *Id.*

45. Reynolds, *supra* note 41, at 1275.

46. *Id.* at 1276.

47. *Id.* at 1276.

48. BRIFFAULT & REYNOLDS, *supra* note 39, at 333.

49. *Id.* at 335.

50. *Id.*

51. Importantly, preemption analysis in this context depends upon whether the state has provided for a form of imperio or legislative home rule. Reynolds, *supra* note 41, at 1276-77. Generally, a court inquiring whether a state law preempts a local law or act perform a two-step inquiry. *Id.* First, it determines whether the local action was within its home rule powers. *Id.* Second, if the court finds the local action valid, they then it has to determine whether it was preempted by state law. *Id.* While the general two-step framework used by courts may be the same in both imperio and legislative home rule states, the court has to ask different questions within each step depending upon whether

B. Home Rule in Michigan.

Michigan may be classified as an imperio home rule state based on the language of the statutory and constitutional provisions granting home rule authority.[52] In 1908, Michigan became the eighth state to enact home rule principles when it adopted the 1908 Constitution.[53] The constitution gave cities and villages the ability to "pass all laws and ordinances *relating to its municipal concerns*, subject to the constitution and general laws of this state."[54] In 1909, the Michigan Legislature followed suit and enacted the Home Rule City Act[55] and Home Rule Village Act.[56] These laws established the basic framework for municipalities and villages to employ when adopting or amending their charters. These charters established local power to enact laws and ordinances regarding local needs.[57] One provision of the Home Rule City Act mirrors Article VIII, Section 21 of the Constitution and states that the charter may provide: "for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants, and through its regularly constituted

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the locality operates under imperio or legislative home rule. *Id.* In step one under an imperio system, the court inquires whether the matter is inherently "local" in character, or whether it pertains to local affairs. *Id.* If the local act is determined to be "exclusively" local, then under the imperio system, the local act is immunized from preemption. *Id.* The courts accord immunity to the local act even if the legislature has somehow indicated a contrary intent. *Id.* If the local act is not exclusively local, but merely regards a local matter, then in step two, the court applies principles of express, conflict, and field preemption to determine if the local act has been preempted by state law. *Id.* By contrast, under legislative home rule, the court's initial inquiry is not whether the local act is "local" in character, but whether the power exercised by the locality is one that the legislature was capable of transferring. *Id.* If so, then the court determines whether the legislature has clearly articulated its intent to supersede local law, either by prohibiting a specific act at the local level or by expressly stating that state law is exclusive on the matter. *Id.*

52. Although, as discussed in Part I.A., *supra*, the imperio/legislative dichotomy is not a bright line and it may be the case that in some instances courts may allow for more local experimentation and in other instances courts may strictly look to whether an action pertained to municipal affairs. *See* Home Rule City Act of 1909, Pub. L. No. 279, § 117.4j; MICH. CONST. of 1908, art. VIII, § 21 (1909).

53. MICHIGAN MUNICIPAL LEAGUE, HOME RULE IN MICHIGAN—THEN AND NOW (2006), *available at* http://www.mml.org/advocacy/resources/homerule-paper.pdf.

54. MICH. CONST. of 1908, art. VIII, § 21 (1909) (emphasis added). *See* John A. Fairlie, *Home Rule in Michigan*, 4 AM. POLITICAL SCI. REVIEW 119-23 (1910) (illustrating the 1850 Constitution also gave the legislature the ability to delegate legislative and administrative powers to the counties).

55. Home Rule City Act of 1909, Pub. L. No. 279, § 117.

56. Home Rule Village Act of 1909, Pub. L. No. 278, § 118.

57. Home Rule City Act of 1909, § 117 (emphasis added); MICHIGAN MUNICIPAL LEAGUE, *supra* note 52.

authority to pass all laws and ordinances *relating to its municipal concerns* subject to the constitution and general laws of the state."[58]

In 1963, Michigan adopted a new constitution and included additional provisions that seemed to broaden the scope of local home rule. For example, Article VII, Section 22 of the 1963 Constitution basically mirrored Article VIII, Section 21 of the 1908 Constitution verbatim, but added the caveat that "[e]ach such city and village shall have the power to adopt resolutions and ordinances relating to its municipal concerns, property and government, *subject to the constitution and law*."[59] Notably, the Convention Comment discussing the adoption of Section 22 stated: "[t]his . . . revision . . . reflects Michigan's successful experience with home rule.[60] The new language is a more positive statement of municipal powers, giving home rule cities and villages "*full power* over their own property and government, subject to this constitution and law."[61]

Section 22's "full power" to cities and villages rationale also seemed to be evident in another new addition to the 1963 Constitution. Article VII, Section 34 similarly appears to broaden the grant of power to municipal authorities by stating: "The provisions of this constitution and law concerning counties, townships, cities, and villages shall be liberally construed in their favor."[62] That section also included a grant of additional authority to counties and townships: "Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."[63]

In sum, the original statutory and constitutional grants of authority to Michigan municipalities and villages were broad in scope and were to be liberally construed. They gave localities power over their property, government and any other local concerns that advanced the interests of the city or its inhabitants.[64] The only express limitations on this power were constitutional or statutory. In other words, so long as a local

58. Home Rule City Act of 1909, § 117.4j (emphasis added).

59. MICH. CONST. art. VII, § 22 (emphasis added).

60. *Id.*

61. *Id.* (emphasis added).

62. *Id.* § 34.

63. MICH. CONST. art. VII, § 22, Convention Cmt. (emphasis added).

> This is a new section intended to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments. Home rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statutes.

Id.

64. Home Rule City Act of 1909, § 117.4j.

ordinance pertained to "municipal concerns," the legislature had not prohibited it, or it was not violative of the constitution, it was at least theoretically permissible.

Based on the constitutional and statutory language providing for home rule, Michigan could likely be classified as an imperio home rule state.[65] Local enactments in the imperio scheme are inevitably subject to judicial review.[66] For example, if a local ordinance was challenged on the grounds that it was preempted by state law, judicial review would first focus on whether the local ordinance was inherently local in character or pertained to local affairs.[67] If a court were to determine that the ordinance pertained to a matter that was exclusively local, then the act would be immunized from any preemption challenge.[68] However, if the ordinance was not exclusively local but merely related to local affairs, then in the preemption context, a reviewing court would conduct standard preemption analysis.[69]

Whether a challenge to zoning is on preemption grounds, or is based on the scope of local zoning power under some statutory grant, the court has a significant role to play in determining whether an ordinance was validly enacted and lawful in scope. The Michigan Zoning Enabling Act (MZEA) is likely to be at the center of any litigation involving a local ordinance because that statute provides localities with the power to enact ordinances like those potentially at issue here related to hydraulic fracturing.[70]

C. Zoning in Michigan.

Michigan's current zoning legislation, the Michigan Zoning Enabling Act,[71] was cobbled together from three previous zoning acts:

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65. *Compare* MICH. CONST. art. VII, §§ 22, 24, *with* ALASKA CONST. art. X, § 11 ("A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.").

66. BRIFFAULT & REYNOLDS, *supra* note 38.

67. Reynolds, *supra* note 41, at 1277.

68. *Id.*

69. *Id.*

> [A] municipality is precluded from enacting an ordinance if (1) the ordinance is in direct conflict with the state statutory scheme, or if (2) the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, even where there is no direct conflict between the two schemes of regulation.

People v. Llewellyn, 257 N.W.2d 902, 904 (Mich. 1977).

70. MICH. COMP. LAWS ANN. §§ 125.3101-.3702 (West 2006).

71. *Id.*

the City and Village Zoning Act,[72] the County Zoning Act,[73] and the Township Rural Zoning Act.[74] The MZEA appears to be very generous in its grant of zoning powers to localities. As relevant here, the MZEA states that localities may zone in order to meet needs for "energy, and other natural resources, . . . to ensure that use of the land is situated in appropriate locations and relationships," and "to promote public health, safety, and welfare.[75] The MZEA also more directly states:

> A zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare, to encourage the use of lands in accordance with their character and adaptability . . . *to conserve natural resources and energy* . . . to ensure that uses of the land shall be situated in appropriate locations and relationships, . . . to *reduce hazards to life and property*, to facilitate adequate provision for a system of transportation including, . . . *safe and adequate water supply* . . . .[76]

Additionally, a portion of the MZEA regulates the interplay between zoning and gas and oil mining.[77] For example, Section 205(2) pertains directly to counties and townships (not cities or villages) that try to zone such mining:

> A *county or township shall not regulate or control the drilling, completion, or operation of oil or gas wells or other wells drilled for oil or gas exploration purposes* and shall not have jurisdiction with reference to the issuance of permits for the location, drilling, completion, operation, or abandonment of such wells.[78]

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72. Pub. L. No. 207 (1921) (codified at MICH. COMP. LAWS ANN. §§ 125.581-.600 (West 2006), *repealed by* MZEA, MICH. COMP. LAWS ANN. § 125.3702(1)(a) (West 2006)).

73. Pub. L. No. 183 (1943) (codified at MICH. COMP. LAWS ANN. §§ 125.201-.240 (West 2006), *repealed by* MZEA, MICH. COMP. LAWS ANN. § 125.3702(1)(b) (West 2006)).

74. Pub. L. No. 184 (1943) (codified at MICH. COMP. LAWS ANN. §§ 125.271-.310 (West 2006), *repealed by* MZEA, MICH. COMP. LAWS ANN. § 125.3702(1)(c) (West 2006)).

75. MICH. COMP. LAWS ANN. § 125.3201 (West 2006).

76. *Id.* § 125.3203.

77. *Id.* § 125.3205.

78. *Id.* at § 125.3205(2) (emphasis added).

This section clearly prohibits counties and townships from zoning out gas mining, but the MZEA does not contain a similar provision for cities and villages.[79] In other words, the legislature has not expressly prohibited cities and villages from zoning out gas mining.[80] However, in 2011, the legislature amended the MZEA to include an important limitation on all zoning related to mining, including in cities and villages.[81] The new provisions state in part:

> *An ordinance shall not prevent the extraction, by mining, of valuable natural resources from any property unless very serious consequences would result from the extraction of those natural resources.* Natural resources shall be considered valuable for the purposes of this section if a person, by extracting the natural resources, can receive revenue and reasonably expect to operate at a profit.
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> * * * *
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> In determining under this section whether very serious consequences would result from the extraction, by mining, of natural resources, the standards set forth in Silva v. Ada Township shall be applied and all of the following factors may be considered, if applicable:
>
> (a) The relationship of extraction and associated activities with existing land uses.
>
> (b) The impact on existing land uses in the vicinity of the property.
>
> (c) The impact on property values in the vicinity of the property and along the proposed hauling route serving the property, based on credible evidence.
>
> (d) The impact on pedestrian and traffic safety in the vicinity of the property and along the proposed hauling route serving the property.

79. *See generally id.* § 125.3205.
80. *Id.*
81. MICH. COMP. LAWS ANN. § 125.3205(3) (West 2006).

(e) The impact on other identifiable health, safety, and welfare interests in the local unit of government.

(f) The overall public interest in the extraction of the specific natural resources on the property.[82]

As referenced in the statute, a 1982 Michigan Supreme Court decision, *Silva v. Ada Township*, provided the legal framework for the "very serious consequences rule" and the 2011 amendments quoted above.[83] However, the catalyst for the recent legislative amendments was actually a 2010 Michigan Supreme Court decision overruling *Silva*.[84] Accordingly, a brief history of the Michigan Supreme Court's treatment of zoning regulations generally, and the very serious consequences rule in particular, including the 2010 decision leading to the MZEA amendments, would be helpful.

1. Development of the Very Serious Consequences Rule.

As a general rule, zoning regulations in Michigan must be reasonable to be valid and to comport with substantive due process.[85] Accordingly, a city's power to zone is not absolute[86]—the regulations still have to be reasonable and comport with due process—but courts apply a presumption of reasonableness when reviewing the validity of an ordinance.[87] One exception to this presumption of reasonableness is the very serious consequences rule.[88]

In Michigan, the very serious consequences rule was initially mentioned in *City of North Muskegon v. Miller*, which fittingly dealt with a local zoning regulation prohibiting the development of oil wells.[89] In that case, after oil was discovered within the city limits, the city passed an ordinance making it unlawful to drill for oil or gas without a permit and vesting discretion for issuing such permits in the city

82. *Id.* §§ 125.3205(3), (5) (emphasis added).

83. 330 N.W.2d 663 (Mich. 1982), *overruled by* Kyser v. Kasson Twp., 786 N.W.2d 543 (Mich. 2010) (noting *Silva* was actually two consolidated cases).

84. *Kyser*, 786 N.W.2d at 543.

85. *See Silva*, 330 N.W.2d at 665 n.2 (rationalizing that a citizen may be denied substantive due process by a city ordinance that has no reasonable basis for its very existence).

86. Kropf v. City of Sterling Heights, 215 N.W.2d 179, 186 (Mich. 1974).

87. *Id.* at 185.

88. MICH. COMP. LAWS ANN. § 125.3205(3) (West 2006).

89. 227 N.W. 743 (Mich. 1929).

council.[90] The council previously issued drilling permits for drilling in other parts of town.[91] The defendants, who owned land zoned for residential and other community-type uses, were twice denied a permit to drill but drilled anyway.[92] The city brought suit to enjoin the drilling.[93] The defendants claimed the zoning ordinance and the drilling ordinance were both unreasonable and not within the city's police power.[94]

The court first concluded that the zoning ordinance (marking the land for residential and other community-type uses only) was unreasonable because the land was basically an unusable marshland next to a trash dump.[95] Thus, the residential/community-only ordinance was invalidated.[96] The court also emphasized "the importance of not destroying or withholding the right to secure oil, gravel, or mineral from one's property, through zoning ordinances, *unless some very serious consequences* will follow therefrom."[97] The court did not say whether such consequences were present in that case, and it ultimately upheld the drilling ordinance as reasonable, basing its decision on the fact that evidence regarding potential danger to the city's water supply was in dispute.[98] The court emphasized that it may have been possible for the defendants to later persuade the town council that the drilling was safe, but that the city's decision to withhold the permit in light of conflicting evidence was reasonable.[99]

Importantly, the opinion is unclear regarding the extent to which the court relied on the very serious consequences rule to hold that the drilling ordinance was reasonable. The court did not expressly say it was relying on that rule to make its determination, although, because water safety appeared to be the dispositive issue, one may infer that the rule played a role in the court's reasoning.[100] Further, the court also emphasized the great deference courts should give to such local matters, stating: "[T]his is a matter which is purely administrative, and it is not within our province to regulate the action of the city officials when they act within

90. *Id.* at 743.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Miller*, 227 N.W. at 744.
96. *Id.*
97. *Id.* (citing Vill. of Terrace Park v. Errett, 12 F.2d 240 (6th Cir. 1926)) (emphasis added).
98. *Id.* at 746.
99. *Id.*
100. *Id.* (holding that drilling the oil well "might . . . result in contamination of the water well[, which] would be sufficient reason for the refusal to give a permit to [the] defendants.").

their legal rights."[101] Clearly, the court believed judicial review should be limited and deferential if the city was not acting illegally when enacting or enforcing ordinances. This level of deference to local actors would eventually be eroded in subsequent decisions, and it would be replaced by a more searching judicial review of local acts affecting natural resource extraction.[102]

Thirty years after *Miller*, the very serious consequences rule was again discussed in two cases, *Township of Bloomfield v. Beardslee*,[103] and *Certain-Teed Products Corp. v. Paris Township.*[104] In *Certain-Teed*, a company wanted to develop a gypsum mine in an area zoned for a variety of other uses.[105] A city ordinance required that the company get a special permit before developing the mine.[106] The Company filed two applications with the township board to construct the mine, but the board denied the applications.[107] The Company later filed a declaratory judgment action, in part alleging that the Township did not have the authority to prevent or interfere with gypsum mining performed reasonably and seeking an injunction against application of the ordinance.[108] Similar to *Miller*, part of the Township's defense for having denied the permits were fears about health and safety—*inter alia*, that gypsum dust would become a nuisance to surrounding neighborhoods, underground blasting would create residential damage, and truck and automobile traffic would increase.[109] The Company responded to the Township's allegations with arguments about dust mitigation systems, off street parking, and job creation.[110]

The court considered the evidence on both sides and held in part that the Township's denial of at least one of the applications was arbitrary and capricious because there was no showing that the mining would result in injury to the public health or welfare given the Company's showing that it could (at least in theory) protect against most of the

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101. *Miller*, 227 N.W. at 746.

102. *See id. But see* Certain-Teed Prods. Corp. v. Paris Twp., 88 N.W.2d 705 (Mich. 1958); Twp. of Bloomfield v. Beardslee, 84 N.W.2d 537 (Mich. 1957).

103. 84 N.W.2d 537 (Mich. 1957). For the sake of brevity, this Article only details the *Certain-Teed* opinion because the *Beardslee* decision does not alter the overall analysis of how these cases developed and led to formal adoption of the very serious consequences rule in *Silva*.

104. 88 N.W.2d 705 (Mich. 1958).

105. *Id.* at 707-08.

106. *Id.*

107. *Id.* at 708.

108. *Id.*

109. *Id.* at 709.

110. *Certain-Teed Prods. Corp.* 88 N.W.2d at 709-10.

Township's concerns.[111] The court reasoned that because zoning is founded on the locality's police power, any restrictions on land use would have to be justified by a detriment to the "health, morals and welfare of the people of the surrounding community."[112] It therefore concluded: "[T]he test of constitutionality of a zoning ordinance is its reasonable relationship to the good and welfare of the general public."[113]

The majority also affirmed that a heightened standard of review should be used for zoning related to mining, arguing, "To sustain the ordinance in such case, there must be some dire need which, if denied the ordained protection, will result in 'very serious consequences.'"[114] But the majority did not expressly rely on this standard to find the permit denial was arbitrary and capricious.[115]

Notably, *Certain-Teed* presented a different role for courts reviewing municipal zoning related to mining than what the *Miller* court espoused. In *Miller*, the court expressly took a hands-off, deferential approach to reviewing a drilling ordinance in the face of conflicting evidence about the danger to community health and safety through potential contamination of the water supply.[116] The court expressly announced that it was not the province of the courts to second-guess local authorities acting lawfully, and thus gave complete deference to the city council's decision to deny the drilling permit even though there was evidence that the defendants could drill safely.[117] By contrast, under very similar circumstances, the *Certain-Teed* court took on the task of weighing conflicting evidence about the safety of the mining, and on the basis of that evidence, declared the township's permit denial arbitrary and capricious.[118] Arguably, the *Certain-Teed* court believed courts should play a much more active role in reviewing local ordinances and decisions related to mining. In fact, the majority opinion remanded the case to the chancery court with instructions to oversee the mining and assure that the company followed through on its promises.[119] Certainly, this type of judicial oversight was not present in *Miller* and is contrary to the *Miller* court's express rationale.[120]

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111. *Id.* at 716.
112. *Id.* at 717.
113. *Id.* at 718.
114. *Id.* at 722 (Black, J., concurring in part, dissenting in part).
115. City of Muskegon v. Miller, 227 N.W. 743 (Mich. 1929).
116. *Id.*
117. *Certain Teed*, 88 N.W.2d at 716.
118. *Id.* at 721.
119. *Id.*
120. *Id.*; *Miller*, 227 N.W. at 746.

Twenty-four years after *Certain-Teed*, the court again addressed the "very serious consequences" rule in *Silva v. Ada Township*.[121] Also, the Michigan Legislature relied on this case in 2011 to codify the very serious consequences rule.[122] In *Silva*, the court expressly relied on this rule in invalidating two different zoning ordinances.[123] To open its opinion the court stated, "We reaffirm the rule of *Certain-[T]eed Products Corp. v. Paris Twp.* . . . that zoning regulations which prevent the extraction of natural resources are invalid unless 'very serious consequences' will result from the proposed extraction."[124] Later, the court reiterated, "We again reaffirm the 'very serious consequences' rule of *Miller* and *Certain-[T]eed.*"[125] Arguably, this was the first time the court expressly held the very serious consequences rule was outcome-determinative. In the three prior cases, the court recited the rule in the opinion but did not squarely hold that the rule was dispositive or in any way controlled the outcome.[126] As such, recitation of the rule in those opinions could be seen as dicta. Regardless, the *Silva* majority did not think this was the case. The majority gave short shrift to the actual factual nuances of the cases it was deciding and instead focused much of its opinion on the policy reasons for adopting a heightened standard of review for zoning regulations related to natural resource extraction:

> Preventing the extraction of natural resources harms the interests of the public as well as those of the property owner by making natural resources more expensive. Because the cost of transporting some natural resources (*e.g.*, gravel) may be a significant factor, locally obtained resources may be less expensive than those which must be transported long distances. It appears that the silica sand involved in one of the cases here on appeal is unique in quality and location.
>
> In most cases, where natural resources are found the land will be suited for some other use and can reasonably be devoted to that use. *Unless a higher standard is required*, natural resources

121. 330 N.W.2d 663 (Mich. 1982) (noting *Silva* was actually two consolidated cases).

122. JEFF STOUTENBURG, HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS OF HOUSE BILL 4746 AS ENACTED (2011), *available at* http://www.legislature.mi.gov/documents/2011-2012/billanalysis/house/pdf/2011-HLA-4746-7.PDF.

123. Silva v. Ada Twp., 330 N.W.2d 663, 664 (Mich. 1982).

124. *Id.*

125. *Id.* at 666.

126. *See generally City of N. Muskegon*, 227 N.W. at 743; *Twp. of Bloomfield*, 84 N.W.2d at 537; *Certain-Teed Prods. Corp.*, 88 N.W.2d at 710.

> could be extracted only with the consent of local authorities or in the rare case where the land cannot be reasonably used in some other manner. The public interest of the citizens of this state who do not reside in the community where natural resources are located in the development and use of natural resources *requires closer scrutiny of local zoning regulations* which prevent development. In this connection, we note that extraction of natural resources is frequently a temporary use of the land and that the land can often be restored for other uses and appropriate assurances with adequate security can properly be demanded as a precondition to the commencement of extraction operations.[127]

A separate opinion in the case questioned the majority's reliance on the rule and argued that in *Miller* and *Certain-Teed*, discussion of the rule was *obiter dictum*.[128] Despite these concerns, it was clear that the *Miller—Certain-Teed—Silva* line of cases made it much more difficult for localities to use zoning to limit the extraction of natural resources. Twenty-eight years after *Silva*, in 2010, the court took notice of this difficulty and expressly overruled *Silva* in *Kyser v. Kasson Township*.[129]

In *Kyser*, Kasson Township, which was rich with gravel and sand, tried to establish a gravel mining policy by creating a gravel mining district.[130] Edith Kyser owned land ripe for gravel mining, but her land was adjacent to the gravel mining district.[131] She petitioned the Township to expand the district to incorporate the area of her property she wished to mine, but the Township denied her application.[132] The Township reasoned that expanding the district would undermine its comprehensive plan and would also prompt other property owners to request similar extensions.[133] Kyser filed an action challenging the denial of her application and arguing that "no very serious consequences" would have resulted from the mining thus the denial was unreasonable.[134] The Township countered with arguments alleging that allowing the mining would result in traffic safety problems, noise issues, and negative impacts "on surrounding property values" and residential development.[135] The trial court applied *Silva's* heightened scrutiny and

127. *Silva*, 330 N.W.2d at 666 (emphasis added).
128. *Id.* at 668 (Ryan, J., concurring in part, dissenting in part).
129. 786 N.W.2d 543, 546 (Mich. 2010).
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Kyser*, 786 N.W.2d at 547.

agreed with Kyser that the mining "would result in no 'very serious consequences' and enjoined enforcement of the zoning ordinance."[136]

The case, and the Township's challenge to *Silva's* "very serious consequences rule," ended up in the Michigan Supreme Court.[137] The Supreme Court began its analysis by emphasizing zoning's legislative character and reinforcing, akin to the 1929 case *Miller*, that judicial review of zoning should be limited, stating: "The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life."[138] The court also discussed that zoning has certain other limitations, most predominantly constitutional due process, that may not require the kind of heightened standard of review applied in earlier cases.[139] After setting forth a brief history of the very serious consequence rule, the court made three separate points on its way to overruling *Silva* and striking down the rule.[140] The court held that the rule was not constitutionally required, violated separation of powers principles, and was preempted by M.C.L.A. section 125.3207 (dealing with zoning that totally prohibits a land use).[141]

First, with respect to constitutional requirements, the court reasoned that the "very serious consequences" rule was not required to satisfy due process, but in fact elevated the natural resources aspect of public interest above other public interests.[142] The court concluded that such a rule was not required to satisfy due process, but that the standard rule for reviewing local ordinances for consistency with due process would suffice.[143] According to the court, that rule requires "a zoning ordinance be reasonably designed and administered to protect the public health, safety, and welfare of the community, and that fair procedures be accorded to participants in the process."[144]

Next, the court reasoned that the *Silva* court's adoption of the "very serious consequences" rule was essentially a judicial declaration establishing a statewide policy preferring natural resource extraction to alternative policies and therefore ran afoul of separation of powers

136. *Id.*
137. *Id.*
138. *Id.* at 548 (quoting Brae Burn, Inc. v. Bloomfield Hills, 86 N.W.2d 166, 169 (Mich. 1957)) (internal quotation marks omitted).
139. *Id.* at 560.
140. *Id.*
141. *Kyser*, 786 N.W.2d at 560.
142. *Id.* at 552-55.
143. *Id.* at 554.
144. *Id.*
145. *Id.* at 554.

principles.[145] The court argued that the constitution vested decisions about the environment and natural resources in the legislature.[146] Accordingly, the "'no very serious consequences' rule usurps the responsibilities belonging to both the Legislature and to self-governing local communities."[147] The court also argued that the rule requires courts to become involved in land-use planning issues that concern communities across the state, and then to balance those issues in order to reach a conclusion about whether the "very serious consequences" rule has been satisfied or not.[148] This is an area, the court concluded, where courts have little expertise.[149]

Finally, the court reasoned that the legislature preempted the common law "no very serious consequences" rule when it enacted the exclusionary zoning provision in the MZEA.[150] That provision provides that an ordinance cannot "totally prohibit" a particular land use where there is a demonstrated need for the use, unless there is no "appropriate" location or the use is unlawful.[151] The court concluded:

> [T]he ZEA is a comprehensive law that empowers localities to zone, sets forth in detail the development of zoning plans within a community, and specifically limits the zoning power in particular circumstances. The Legislature clearly intended for localities to regulate land uses, including the extraction of natural resources other than oil and gas.[152]

By overruling *Silva* and invalidating the "very serious consequences" rule, the *Kyser* decision arguably reinvigorated local power and autonomy to enact zoning limitations with respect to natural resources.[153] Additionally, in a throwback to the *Miller* decision, it reinforced the limited role of the courts in reviewing local ordinances.[154] But the effects of *Kyser* were short-lived. Immediately after *Kyser* overruled *Silva* and dispatched the "very serious consequences" rule, the legislature acted to

146. *Id.* at 556.
147. *Kyser*, 786 N.W.2d at 556.
148. *Id.* at 557.
149. *Id.*
150. *Id.* at 560; MICH. COMP. LAWS ANN. § 125.3207 (West 2006).
151. *Kyser*, 786 N.W.2d at 558; MICH. COMP. LAWS ANN. § 125.3207.
152. *Kyser*, 786 N.W.2d at 560.
153. *Id.*
154. *Id.*; *City of N. Muskegon*, 227 N.W. at 743.

codify the rule in order to return the law to its pre-*Kyser* state.[155] As stated below, the MZEA now reads:

> *An ordinance shall not prevent the extraction, by mining, of valuable natural resources from any property unless very serious consequences would result from the extraction of those natural resources.* Natural resources shall be considered valuable for the purposes of this section if a person, by extracting the natural resources, can receive revenue and reasonably expect to operate at a profit.
>
> * * * *
>
> In determining under this section whether very serious consequences would result from the extraction, by mining, of natural resources, the standards set forth in Silva v Ada Township . . . .[156]

Accordingly, municipalities again face significant hurdles defending zoning ordinances that prohibit or prevent natural resource extraction, including gas drilling.[157] Basically, the legislature has created two statutory barriers for any zoning ordinance directed at mining—the "very serious consequences rule" and the exclusionary zoning prohibition (an ordinance cannot "totally prohibit" a particular land use where there is a demonstrated need for the use).[158]

Thus, in order for a municipality to defeat a challenge to its fracking related zoning, it would first have to argue that very serious consequences would result from the drilling.[159] For example, it would have to allege ground water contamination or some other impact on health, safety and welfare of the people.[160] But even this allegation may not suffice because there is nothing in the case law illuminating precisely

155. MICH. COMP. LAWS ANN. §§ 125.3201, 125.3205(3), (5).

156. *Id.*

157. The statute itself and the "Legislative Analysis" that accompanied the bill indicates that the rule is not meant to limit local regulation of hours of operation, blasting hours, noise levels, dust control measures, and traffic, "not preempted by Part 632 of the Natural Resources and Environmental Protection Act." STOUTENBURG, *supra* note 122, at 1. The Analysis also states that "House Bill 4746 would . . . return to the . . . standard that existed prior to the 2010 Supreme Court decision. *Id.* This presumably *would restore a higher standard* for local units of government to meet when regulating mining." *Id.* at 2 (emphasis added).

158. MICH. COMP. LAWS ANN. § 125.3207 (West 2006).

159. MICH. COMP. LAWS ANN. § 125.3205(4).

160. *Id.* § 125.3205(5).

what constitutes a very serious consequence.[161] Regardless, a city establishing the existence of a very serious consequence would at least get over that initial statutory hurdle.[162]

Second, so long as the city does not totally prohibit gas drilling, some piecemeal restrictions may be appropriate (subject of course to the very serious consequences rule). Additionally, cities *may* completely prohibit gas drilling if there are no possible locations for such wells to be "appropriately" located (again, presumptively subject to the "very serious consequences" rule).[163] In sum, the precise contours of the rule as applied to fracking are very uncertain and will likely have to be developed through litigation. What *is* clear is that because the rule has been codified, courts will have to apply a heightened standard of review to such zoning,[164] and that this is likely to impose a significant hurdle for localities that want to zone out fracking.

2. Searching Judicial Review Under the Very Serious Consequences Rule Makes It Difficult for Cities and Villages to Rely on Home Rule or Local Zoning Powers to Zone-Out Fracking.

If a Michigan locality were to enact an ordinance completely prohibiting hydraulic fracturing, current law indicates that such an ordinance would be struck down for a number of reasons.[165] First, codification of the "very serious consequences" rule in the MZEA reaffirmed a heightened standard of judicial scrutiny for local regulations that prevent natural resource extraction.[166] This heightened standard requires courts to conduct a case-by-case balancing of the future benefits and harms from any such restriction.[167] This balancing test only adds to

161. *See e.g.*, *Silva*, 330 N.W.2d at 663.

162. MICH. COMP. LAWS ANN. § 125.3205(4).

163. MICH. COMP. LAWS ANN. § 125.3207.

164. MICH. COMP. LAWS ANN. §§ 125.3201, 125.3205(3).

165. *See generally Kyser*, 786 N.W.2d at 543.

166. MICH. COMP. LAWS ANN. § 125.3207.

167. This manner of heightened review is analogous to "Hard Look Review" that courts give to federal administrative agency decisions, only here, rather than giving a hard look to an agency decision, the court is giving a hard look to the city's evidence that very serious consequences would result from the zoned-out activity. *See, e.g.*, Nat'l Lime Assn. v. EPA, 627 F.2d 416, 452 (D.C. Cir. 1980). The United States Court of Appeals for the District of Columbia Circuit provided a summary of this type of review in the context of reviewing an environmental rule:

> [Judicial review should] evince a concern that variables be accounted for, that the representativeness of test conditions be ascertained, that the validity of tests be assured and the statistical significance of results determined. Collectively, these concerns have sometimes been expressed as a need for 'reasoned

uncertainty about the validity of an ordinance at the time a city adopts it.[168] Additionally, the MZEA and relevant case law are unclear with respect to precisely what kind evidence a city would have to bring to show that very serious consequences would result.[169] While the statute establishes that it is initially the burden of the challenger to show that "no very serious consequences would result" from mining, it is equally clear that a city would have to bring some evidence of very serious consequences in order to defeat a challenger's claim.[170] Adding to these difficulties and uncertainties is the fact that any potential injury is probably going to be speculative, likely making it more difficult to prove.

By contrast, the Michigan Supreme Court's *Kyser* decision seemed to bolster the argument for municipal autonomy. The court there declared its distaste for the common law version of the very serious consequences rule and overruled the primary case supporting it—*Silva*.[171] However, a more precise reading of the case shows that the *Kyser* court's main contention with the rule was that it was judicially created, that the judiciary has little expertise in land use planning and that the Michigan Constitution vests decisions about the environment and natural resources

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> decision-making.' . . . However expressed, these more substantive concerns have been coupled with a requirement that assumptions be stated, that process be revealed, that the rejection of alternate theories or abandonment of alternate course of action be explained and that the rationale for the ultimate decision be set forth in a manner which permits the . . . courts to exercise their statutory responsibility upon review.

Id. at 452-53. This analogy to hard look review may provide further guidance to Michigan courts employing the very serious consequences rule in challenges to local zoning especially given the number of statutory factors courts are to employ in undertaking such review.

168. MICH. COMP. LAWS ANN. § 125.3205(5). The statute sets forth the following factors for determining "whether very serious consequences would result from" the mining:

> (a) The relationship of extraction and associated activities with existing land uses; (b) The impact on existing land uses in the vicinity of the property; (c) The impact on property values in the vicinity of the property and along the proposed hauling route serving the property, based on credible evidence; (d) The impact on pedestrian and traffic safety in the vicinity of the property and along the proposed hauling route serving the property; (e) The impact on other identifiable health, safety, and welfare interests in the local unit of government; (f) The overall public interest in the extraction of the specific natural resources on the property.

Id. These factors only further strengthen the analogy between this test and hard look review of federal agency decisions described *supra* in note 167.

169. *See supra* note 167.

170. MICH. COMP. LAWS ANN. § 125.3205(4).

171. *Kyser*, 786 N.W.2d at 555.

in the legislature.[172] According to the court, the "no very serious consequences" rule "usurps the responsibilities belonging to both the Legislature and to self-governing local communities."[173] Thus, while at first glance *Kyser* seems to support the idea that the Michigan Supreme Court would sympathize with a city's defense of its zoning powers, *Kyser* also indicates that the court believed any decisions restricting local zoning power rested with the legislature.[174] The legislature has spoken by adopting the very serious consequences rule.[175] Accordingly, the court may not be as protective of local zoning power as the *Kyser* decision might suggest.

Further, the home rule doctrine is also unlikely to substantially aid Michigan cities trying to restrict fracking. Michigan's home rule doctrine grants broad authority to localities to enact ordinances that relate to municipal concerns, and even completely immunizes local acts that are exclusively local.[176] But the Michigan Constitution vests the State Legislature with the power to legislate for the environment and natural resources, and the legislature's enactment of the Natural Resources and Environmental Protection Act (NREPA) clearly demonstrates that gas mining is not an exclusively local issue.[177]

Further, while the constitution and home rule statute appear to grant broad authority to local actors, under both the constitution and statute, that authority is "subject to the constitution and general laws of this state."[178] Accordingly, even if a fracking ordinance survived heightened judicial scrutiny under the very serious consequences rule, the ordinance would still be subject to preemption challenges based on the Michigan Constitution, the NREPA, and the MZEA.[179] For example, if a local fracking ordinance conflicted with a state-issued drilling permit or with state regulations, the state could assert that the ordinance is invalid because state authority to regulate mining under the NREPA preempts the local ordinance.[180] Accordingly, where a local enactment is

172. *Id.* at 556.

173. *Id.* at 557.

174. *Id.* at 557.

175. MICH. COMP. LAWS ANN. § 125.3205(3), (5).

176. MICH. CONST. art. VII, § 22, cl. 2.

177. *Id.*; MICH. COMP. LAWS ANN. § 324.101-.90106 (West 1994).

178. MICH. CONST. of 1908, art. VIII, § 21 (stating the 1850 Constitution also gave the legislature the ability to delegate legislative and administrative powers to the counties). *See* Fairlie, *supra* note 54, at 119-23.

179. MICH. CONST. art VII, § 22, cl. 2; MICH. COMP. LAWS ANN. § 125.3201 (West 2006); MICH. COMP. LAWS ANN. § 324.61505 (West 1994).

180. MICH. CONST. art VII, § 22, cl. 2; MICH. COMP. LAWS ANN. § 125.3201; MICH. COMP. LAWS ANN. § 324.61505.

challenged on the basis that it is preempted by state law, the NREPA is where a court would look for some indication of the scope of state authority to regulate gas mining.

IV. THE STATE'S AUTHORITY TO REGULATE OIL AND GAS MINING

As mentioned above, the MDEQ has recently attempted to address citizen concerns regarding fracking chemicals, pollution, and migration by issuing a new set of "regulations" directed at hydraulic fracturing.[181] The new instructions became effective on June 22, 2011.[182]

These regulations are just one area where a potential conflict between state and local authority could arise. The regulations themselves suggest that the state has authority to regulate fracking.[183] Thus, any local fracking regulations inherently conflict with this state authority. The state's authority to issues such regulations, as well as permits related to gas mining, is derived from NREPA.[184] Accordingly, where a state regulation conflicts with a local ordinance or where a state issued permit conflicts with a local ordinance, the NREPA would be implicated and the ordinance would be vulnerable to a preemption challenge.[185]

A. The MDEQ's Authority to Regulate Natural Gas Mining

1. NREPA

Oil and gas exploring, drilling, and operating in Michigan are governed by two main sources—the constitution and the NREPA.[186] First, the Michigan Constitution establishes that the legislature shall provide for environmental protection in the interest of public health, safety and welfare.[187] Thus, there is a constitutional mandate that the state provide legislation in the broad area of gas drilling.[188] Second, and more specifically, gas drilling is regulated under the NREPA.[189] The

181. *See* MDEQ, *supra* note 34.
182. *Id.*
183. MICH. COMP. LAWS ANN. § 324.61505 (West 1994).
184. *Id.*
185. *Id.*
186. MICH. CONST. art IV, § 52; MICH. COMP. LAWS ANN. § 324.61505.
187. MICH. CONST. art IV, § 52.
188. *Id.*
189. MICH. COMP. LAWS ANN. §§ 324.61505-.61527 (West 2004). The statute was originally enacted in 1939 as P.A. 61 of 1939. A search for any legislative history of the Act revealed that when it was adopted it was to "provide for a Supervisor of Wells to regulate business of drilling for oil and gas." 2 MICH. HOUSE JOURNAL 2143 (1939).

NREPA provides in part that the State's Supervisor of Wells, defined as "the department,"[190] *i.e.*, the MDEQ has:

> [A]uthority over the administration and enforcement of . . . *all matters* relating to the prevention of waste and to the conservation of oil and gas in this state . . . [and] *jurisdiction and control of and over all persons and things* necessary or proper to enforce effectively this part and all matters relating to the prevention of waste and the conservation of oil and gas.[191]

Accordingly, NREPA gives the MDEQ authority over the administration and enforcement of "all matters" related to "waste" and "conservation" of natural gas.[192] The term "waste" is defined in the statute,[193] but the term "conservation" is undefined. Additionally, the statute gives the MDEQ control over "all persons and things necessary or

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190. MICH. COMP. LAWS ANN. § 324.61501(a) (West 2004).

191. MICH. COMP. LAWS ANN. § 324.61505 (emphasis added).

192. *Id.*

193. MICH. COMP. LAWS ANN. § 324.61501(q). The statute states "waste" in addition to its ordinary meaning includes all of the following:

> (*i*) "Underground waste", as those words are generally understood in the oil business, and including all of the following:
>
> (A) The inefficient, excessive, or improper use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating, or producing of a well or wells in a manner to reduce or tend to reduce the total quantity of oil or gas ultimately recoverable from any pool.
>
> (B) Unreasonable damage to underground fresh or mineral waters, natural brines, or other mineral deposits from operations for the discovery, development, and production and handling of oil or gas.
>
> (*ii*) "Surface waste", as those words are generally understood in the oil business, and including all of the following:
>
> (A) The unnecessary or excessive surface loss or destruction without beneficial use, however caused, of gas, oil, or other product, but including the loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage, or fire, especially a loss or destruction incident to or resulting from the manner of spacing, equipping, operating, or producing a well or wells, or incident to or resulting from inefficient storage or handling of oil.
>
> (B) The unnecessary damage to or destruction of the surface; soils; animal, fish, or aquatic life; property; or other environmental values from or by oil and gas operations.
>
> (C) The unnecessary endangerment of public health, safety, or welfare from or by oil and gas operations.
>
> (D) The drilling of unnecessary wells.
>
> (*iii*) "Market waste", which includes the production of oil or gas in any field or pool in excess of the market demand as defined in this part.

Id.

proper" to enforce the statute, "and all matters related to the prevention of waste and the conservation of" natural gas.[194] The NREPA defines "person" very broadly as an "individual, partnership, corporation, association, *governmental entity*, or other legal entity."[195]

This appears to be a fairly broad grant of authority to the MDEQ to regulate natural gas mining. In fact, when the Act was originally enacted in 1939, there were concerns that the Oil Bill was "too dictatorial" because it "gave the Supervisor . . . too much power."[196] However, industry representatives at that time backed the measure because they believed it would make Michigan more competitive in oil production.[197] While the statute does not explicitly say that the MDEQ has "exclusive authority" over regulation of gas mining, it clearly makes a very strong argument that the MDEQ has such exclusive authority.

First, with respect to the legislature's grant of authority to the MDEQ over "all matters" related to waste prevention and gas and oil conservation, the central question in a challenge to zoning would be whether the zoning ordinance prohibiting gas drilling is directly related to waste prevention or gas conservation. Because "conservation" is undefined in the statute, it is not completely clear whether such a zoning ordinance would be directly in conflict with the statute, but the legislative policy statement in the statute suggests that the zoning ordinance would conflict with the statutory purpose.[198] Second, with respect to the MDEQ's "control of and over all persons and things necessary and proper" for enforcement of matters related to waste and conservation, assuming the zoning ordinance relates to waste and conservation, the MDEQ would have control of or over the municipality (a governmental entity) in its capacity to regulate gas mining.[199] Accordingly, any zoning ordinance may be invalid on the basis that the NREPA preempts the city's authority to act under some other statute, such as the MZEA.

Importantly, the NREPA also contains a legislative policy declaration regarding gas and oil regulation that helps to define the scope of the statute, as well as precisely what the legislature meant by "waste" and "conservation."[200] The declaration asserts that the State's previous

194. MICH. COMP. LAWS ANN. § 324.61505 (West 2002).

195. *Id.* § 324.301(h) (emphasis added) (including in the definition of a 'person' government or legal entities (prior to 1994, the definition did not include such.)).

196. *Claims Oil Bill Too Dictatorial*, MARSHALL EVENING CHRONICLE, Feb. 22, 1939, at 1.

197. *Id.*

198. MICH. COMP. LAWS ANN. § 324.61505 (West 2002).

199. *Id.*

200. MICH. COMP. LAWS ANN. § 324.61502 (West 2010).

lack of natural resources oversight resulted in the "slaughter and removal" of the State's timber resources, and that the discovery of gas and oil in the state demands more attention so that it is not wasted.[201] Accordingly, the legislature declared:

> It is . . . the policy of the state [to not waste gas and oil, but to] *foster the development* of the industry . . . with a view to the *ultimate recovery of the maximum production* of these natural products . . . [and] this part is to be construed liberally to give effect to sound policies of conservation and the prevention of waste and exploitation.[202]

This provision is merely a general assertion of policy, but it clearly lends support to the idea that "conservation" includes development of gas resources to the point of "maximum production."[203] Unless the ordinance was enacted to prevent "waste" a zoning ordinance prohibiting natural gas mining directly conflicts with the legislature's stated intent because the ordinance limits the development of the gas industry and reducing production levels.[204]

The MDEQ's exclusive authority is further supported by another NREPA provision, which establishes MDEQ's powers "to promulgate and enforce rules," orders, and instructions that are necessary to carry out the Act, and to require the suspension of drilling if there is a "threat to public health or safety."[205] Again, there is no express exclusivity language in this provision, but the powers it establishes should be read against the backdrop of the statute's overarching purposes as set forth above.

In sum, MDEQ's authority under the NREPA to regulate gas mining could potentially be read as exclusive, but the statute is also subject to conflicting interpretations. Thus, a key inquiry here is how broadly Michigan courts have interpreted the legislature's grant of authority to MDEQ.

2. Cases Interpreting the MDEQ's NREPA Authority

There have been very few cases interpreting the scope of the supervisor's authority under the NREPA in the context of local zoning.

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201. *Id.*
202. *Id.* (emphasis added).
203. *Id.*
204. *See id.* § 324.61506(a) (West 2010).
205. MICH. COMP. LAWS ANN. § 324.61506(q).

The two cases presented below suggest that unless the legislature has expressly stated that a locality can enact ordinances related to a particular aspect of the mining process, *i.e.*, drilling, transportation, or soil erosion, then the locality would be prohibited from doing so.

In *Alcona County v. Wolverine Environmental Production, Inc.*,[206] there was a conflict between the Supervisor of Wells' authority under part 615 of the NREPA,[207] and the scope of a county's authority to "administer and enforce" soil erosion regulations under part 91 of the NREPA.[208] Alcona County, acting pursuant to its authority under the NREPA to "administer and enforce" soil erosion rules, adopted an ordinance regarding soil erosion permitted around natural gas mines.[209] But the County's ordinance contained substantive language not found in the MDEQ rules by stating in part: "[A]ccess roads to well production sites shall be subject to permit requirements."[210] In other words, the County ordinance subjected operators to a permitting requirement not found in the NREPA or promulgated under a state issued regulation.

Accordingly, after Wolverine failed to get permits for its access roads, the County filed for injunctive relief and civil fines.[211] Wolverine defended by stating that under the NREPA, counties only had the authority to enforce state-issued regulations, and if the state did not have a particular regulation, counties had no separate authority for creating additional requirements.[212] The trial court concluded that the legislature did not intend to give the supervisor exclusive authority over ancillary well activities like soil erosion, and further that the "Legislature did not intend" to preempt local regulation of such ancillary activities.[213]

Wolverine appealed and the court of appeals concluded that the plain language of part 91 (the soil erosion provision) limited the County's authority to "administration and enforcement" of regulations and did not give the County authority to promulgate its own regulations.[214] Additionally, the court noted that another provision of part 91 specifically permitted cities, villages, and charter townships (not counties) to enact ordinances to control soil erosion within their

206. 590 N.W.2d 586, 588 (Mich. Ct. App. 1998).
207. *Id.* at 586; MICH. COMP. LAWS ANN. §§ 324.61501-527 (West 1994).
208. *Alcona Cnty.*, 590 N.W.2d at 589; MICH. COMP. LAWS ANN. §§ 324.9101-9123A (West 2002).
209. *Alcona Cnty.*, 590 N.W.2d at 586.
210. *Id.*
211. *Id.* at 588-89.
212. *Id.* at 589.
213. *Id.*
214. *Id.* at 592.

boundaries.[215] The court used the interpretive maxim *expressio unius est exclusio alterius,* to conclude that the legislature's express inclusion of regulatory power for cities, villages, and townships meant that legislature did not intend counties to have that same power.[216] Finally, the court recognized that part 91's overarching purpose was to have a statewide, uniform system to deal with soil erosion, and therefore, allowing counties to regulate in this way would be contrary to that purpose.[217]

Based on this evidence, the court concluded that the counties did not have authority to implement their own rules regarding soil erosion.[218] The court further held that the supervisor had "broad powers over the administration of oil and wells in part 615,"[219] and its powers to regulate waste from such wells included sediments and erosion related to all parts of the production process.[220] Accordingly, the Supervisor's authority under part 615 implicitly limited the County's authority under part 91.[221]

Similarly, in *Addison Township v. Gout*, the Michigan Supreme Court addressed the scope of the Supervisor of Wells' authority, albeit under a pre-NREPA statute,[222] in the face of a township zoning ordinance that appeared to conflict with that authority.[223] Addison Township filed a suit against Mr. Gout after he attempted to construct a gas-processing pipeline outside the gas field that contained his well.[224] The Township asserted that the pipeline violated a local zoning ordinance and special use permit requirement enacted pursuant to the Township Rural Zoning Act,[225] "which gives authority to a municipality to regulate land use."[226]

Accordingly, the court had to decide whether the jurisdiction of the Supervisor of Wells preempted local zoning under the Act. The court held that based on the "clear and unambiguous" language of the Zoning Act, the supervisor had "exclusive jurisdiction to regulate and control the drilling, completion, and operation of 'oil or gas wells.'"[227] However, this "exclusive jurisdiction of the Supervisor of Wells applies only to oil

215. *Alcona Cnty.*, 590 N.W.2d at 592.
216. *Id.*
217. *Id.* at 593.
218. *Id.* at 592.
219. *Id.* at 594.
220. *Id.*
221. *Alcona Cnty.*, 590 N.W.2d at 597.
222. 460 N.W.2d 215 (Mich. 1990). *See* the Oil, Gas, and Minerals Act, MICH. COMP. LAWS §§ 319.1-.27 (repealed 1961).
223. *Addison Twp.*, 460 N.W.2d at 216.
224. *Id.* at 216.
225. MICH. COMP. LAWS ANN. § 125.271 (West 2006) (repealed 2006).
226. *Addison Twp.*, 460 N.W.2d at 216.
227. *Id.* (quoting MICH. COMP. LAWS ANN. § 125.271 (repealed 2006)).

and gas wells and does not extend to all aspects of the production process."[228]

In drawing this conclusion, the court stated that it found unpersuasive Gout's argument that the legislature intended to vest "regulatory control over the entire oil and gas industry" with the Supervisor of Wells.[229] As evidence, the court stated that the Department of Natural Resources conceded that the legislative scheme did not show such broad power.[230] Additionally, in enacting the Township Rural Zoning Act, the legislature only put a limitation on township "jurisdiction relative to wells," which the court interpreted narrowly as only including the well itself and not all other aspects of the production process.[231] Finally, the court noted that the limitation on zoning of wells in the Township Rural Zoning Act was limited to that Act, and no similar limitation was included in the city or village zoning acts.[232] Specifically, the court noted that the city and village zoning acts granted municipalities "the authority to regulate land use and structures consistent with the needs of its citizenry regarding energy and other natural resources generally and without limitation."[233]

Finally, the court conducted a preemption analysis and determined that the legislature expressly preempted zoning only as to the well itself and not as to other aspects of the production process.[234] Further, the legislature's intent did not evidence that it impliedly preempted such zoning. There were no conflicts between the "separate regulatory acts," and the legislature's intent did not show that uniformity of regulation was necessary.[235] In a footnote, the court stated, "We appreciate the burdens the industry may face should a township prohibit land use for a

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228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Addison Twp.*, 460 N.W.2d at 216-17. The Township Rural Zoning Act, and City and Village Zoning Acts are consolidated into a single law, the Michigan Zoning Enabling Act. MICH. COMP. LAWS ANN. §§ 125.3101-.3702 (West 2006).

233. *Addison Twp.*, 460 N.W.2d at 217.

234. *Id.* (citing People v. Llewellyn, 257 N.W.2d 902 (Mich. 1977)). The court established the basic preemption test in Michigan, stating:

> A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation.

Id.

235. *Id.* at 217.

processing facility. However, we cannot invade an exercise of legislative discretion."[236]

Importantly, in *Addison*, the court dealt with the Township Rural Zoning Act, which has since been replaced by the MZEA.[237] And as noted, even the new statute contains the key distinction between townships and cities zoning of gas wells.[238] However, the MZEA also contains the very serious consequences rule related to whether a zoning ordinance "prevent[s]" extraction of natural resources.[239]

In theory then, under the *Addison* court's rationale, because the statute does not expressly prohibit cities and villages from zoning related to the completion, drilling or operation of gas wells, those entities may still be able to enact zoning on such matters. However, as the very serious consequence rule has not been codified, any city and village zoning would still be subject to the heightened scrutiny of that rule. Thus, although the burden is supposed to be on the challenger of the ordinance, the cities and villages would still likely have to show that "very serious consequences" would result from the drilling, and that the drilling is not "totally" prohibited "in the presence of a demonstrated need."[240] The statute makes clear that health and safety considerations, *inter alia*, may be part of a court's "very serious consequences" inquiry.[241]

In sum, a local ordinance that survives the kind of heightened judicial scrutiny described in Parts III.C.1 and III.C.2 is still likely to be struck down under preemption principles if it conflicts with the NREPA or the MZEA. While at least one case, *Addison*, appears to support the authority of cities and villages (not townships or counties which are expressly prohibited from such zoning) to zone gas wells, that case was based on an early version of the Township Rural Zoning Act, now consolidated as part of the MZEA.[242] And while the *Addison* court discussed that the preemption analysis may be different for cities and villages because they were not expressly prohibited from such zoning,

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236. *Id.* at 217 n.6.

237. MICH. COMP. LAWS ANN. §§ 125.3101-.3702.

238. MICH. COMP. LAWS ANN. § 125.3205(2) (West 2010).

239. *Id.* § 125.3205(3).

240. MICH. COMP. LAWS ANN. § 125.3207 (emphasis added).

241. MICH. COMP. LAWS ANN. § 125.3205(5)(e). *See* Dart Energy Corp. v. Iosco Twp., 520 N.W.2d 652 (Mich. Ct. App. 1994) (citing *Addison Cnty.*, 460 N.W.2d at 215) (stating the DNR had "exclusive jurisdiction" to regulate an oil and gas well that had been converted to a brine injection well where a township attempted to regulate the same well). Crucial to the court's decision was that the Township was expressly prohibited by the TRZA from regulating such a well. *Dart Energy*, 520 N.W.2d at 652.

242. *Addison Cnty*, 460 N.W.2d at 217.

the court did not discuss the "very serious consequences" rule. Further, because *Addison* was a 1990 decision, the court obviously did not discuss the implications of the 2011 codification of the "very serious consequences" rule on preemption analysis.[243] Accordingly, a city's power to restrict hydraulic fracturing under the MZEA or home rule is likely insufficient to overcome a challenge to those restrictions based on argument that the zoning is preempted by the Michigan Constitution or the NREPA.

V. CONCLUSION

Hydraulic fracturing is likely to be a hot-button issue in Michigan in the coming years. The potential risks, whether accurate or not, from such mining are already being trumped up in the media and on the internet. Accordingly, it seems likely that concerned communities are going to be looking for ways to prohibit gas development in their areas. For example, they may try to enact ordinances completely or partially prohibiting hydraulic fracturing. Unfortunately, it appears that such local ordinances will be very vulnerable to legal challenges by the state, gas operators, or individuals.[244] First, the legislature's recent amendments to the Michigan Zoning Enabling Act establish a heightened judicial standard of review for zoning that restricts natural resource development.[245] Further, any local zoning related to natural resources that conflicts with state imposed regulations or permitting is vulnerable to a preemption challenge under the Michigan Constitution and NREPA.[246] Finally, Michigan's constitutional and statutory home rule provisions—theoretically giving broad authority to localities—are unlikely to be enough of a legal bulwark for a locality to win a challenge under the MZEA or the NREPA.[247]

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243. *Id.*

244. Individuals intent on leasing their property to gas operators but prohibited from doing so by a local ordinance may also be able to raise a takings claim. An analysis of such claims is beyond the scope of this Article.

245. MICH. COMP. LAWS ANN. § 125.3205.

246. MICH. CONST. art IV, § 52; MICH. COMP. LAWS ANN. § 324.61505 (West 1994).

247. MICH. CONST. art IV, § 52; MICH. COMP. LAWS ANN. § 125.3205; MICH. COMP. LAWS ANN. § 324.61505.