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I. Introduction

Today, the regulation of oil and gas exploration and production activities by substate governmental units has reemerged after a lengthy quiescent period.[1] Oil and gas activities obviously take place where the oil and gas is located. Historically that has been in rural areas, although there are clear exceptions.[2] Population growth and urban sprawl has brought the citizenry to where the oil and gas wells are. People who move to the country not only want urban amenities, they also want the "peace and quiet" that they believe exists in the idyllic rural surroundings. One does not want to exchange the noise of the bus or emergency medical vehicle for the noise of the "pump jack" and the drilling rig. An additional factor causing this increase in substate unit regulation is the expansion of land use powers from municipalities to counties. Historically, municipalities were the substate units that engaged in land use regulation. Counties, the usual provider of governmental services in the rural regions of the United States, were often the stepchild of substate units lacking most of the traditional police powers exercised by the cities. In addition, counties were often left out of the home rule movement that transformed local governmental law in the 20th Century. As will be explained later, the concept of home rule gives substate units substantially greater freedom to exercise the t of home rule gives substate units substantially greater freedom to exercise the police power than had existed prior to the adoption of constitutional and statutory home rule regimes. All of these developments now make the understanding of local land use regulatory mechanisms important for all of the interested parties in oil

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[1] Throughout this paper I will be referring to either substate or local governmental units. For purposes of this paper those terms refer to any governmental unit such as a county, parish, borough, township, city, regional special district or the like.

[2] Various Kansas municipalities and Oklahoma City have been regulating oil and gas operations within their jurisdictions starting in the 1920s. American Bar Association, *Legal History of Conservation of Oil and Gas* 55-56 (1938).

and gas development, royalty interest owners, working interest owners and surface owners.

II. Primer On Local Governmental Zoning Powers

Land use regulation through zoning, planning and subdivision regulatory mechanisms has a reasonably long history.[3] New York City enacted the first comprehensive zoning ordinance in 1916. But it was two subsequent events that led to the widespread use of zoning throughout the urban areas of the United States. The most important of the two was the Supreme Court's "blessing" of zoning as being a constitutionally valid exercise of the police power in the landmark decision of *Village of Euclid v. Ambler Realty Co.*[4] The second event was the development of the Standard Zoning Enabling Act and the Standard Planning Enabling Act by the United States Department of Commerce under the guidance of Herbert Hoover in 1924. Within a few years of these two events, over 45 states had adopted statutes authorizing at least some of their substate units to engage in comprehensive zoning and/or planning efforts.[5] *Euclid* and the SZEA eliminated the legal or constitutional constraints on the exercise of comprehensive land use regulatory powers by substate units. Clearly the political climate was such that within a relatively short period of time, zoning at the city level became a nearly universal practice.[6]

Home Rule Authority

For local governmental units that have home rule authority, either granted by the State Constitution or by state legislation, the power to zone arises from the charter of the local governmental unit. Essentially a home rule provision transfers to the substate unit, the full breadth and extent of the police power that otherwise resides in the State Legislature. Grants of home rule power differ from state-to-state, but for our purposes, the major categories of home rule power deal with whether that power is preemptible or non-preemptible. Most states provide for preemptible home rule power.[7] Texas is a good example of a preemptible

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3 Earlier instances of zoning for individual uses, rather than in a comprehensive manner, were prevalent in the latter part of the 19th Century and the early decades of the 20th Century. In 1919, the Supreme Court validated a "single use" zoning ordinance prohibiting oil storage facilities within 300 feet of a dwelling house. Pierce Oil Corp. v. City of Hope, 248 U.S. 498, 39 S.Ct. 172, 63 L.Ed. 381 (1919). Other examples of "single use" zoning ordinances being challenged include: Reinman v. City of Little Rock, 237 U.S. 171 (1915); *Ex parte* Hadacheck, 132 P. 584 (Cal. 1913), *aff'd*, Hadacheck v. Sebastian, 239 U.S. 394 (1915); *Ex parte* Kelso, 82 P. 241 (Cal. 1905).

4 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

5 U.S. Department of Commerce, Survey of Zoning Laws and Ordinances 2 (1928).

6 Houston, Texas is one of only a few urban areas not covered by a comprehensive zoning ordinance.

7 Osborne Reynolds, *Local Government Law* §§ 35-39 (2d ed. 2001).

home rule state.[8] A preemptible home rule system means that while sub-state units have all of the power that the State has, the State may, through the exercise of its legislative prerogative, limit, condition, or abrogate the substate unit's power. But there are powerful political forces in play that in many cases prevent the enactment of state statutes that deprive sub-state units of their powers. In Ohio, the Legislature originally enacted a statute designed to set forth the limits of certain sub-state unit's powers to regulate oil and gas operations.[9] The statute, however, did not attempt to preempt all local regulation of oil and gas drilling operations. It provided in part::

> This chapter or rules adopted under it shall not be construed to prevent any municipal corporation, county, or township from enacting and enforcing health and safety standards for the drilling and exploration for oil and gas, provided that such standards are not less restrictive than this chapter or the rules adopted thereunder by the division of mineral resources management. No county or township shall adopt or enforce any ordinances, resolutions, rules, or requirements relative to the minimum acreage requirements for drilling units; minimum distances from which a new well or related production facilities may be drilled or an existing well deepened, plugged back, or reopened to .... No county or township shall require any permit or licenses for the drilling, operation, production, plugging, or abandonment of any oil or gas well, not any fee, bond or other security, or insurance for any activity associated with the drilling, operation, production, or abandonment of a well, except for the permit provided for in section 4513.34 of the Revised Code and any bond or other security associated therewith.[10]

The Legislature authorized partial preemption of some sub-state units' powers but clearly did not intend to remove sub-state regulation.[11] But even this attempt to set up a preemption regime was repealed by the Legislature in 2004. Nonetheless it remains clear that the State Legislature may preempt sub-state unit regulation by either general law cities or preemptible home rule cities should it so choose. To date, however, only Louisiana,[12] Michigan,[13] New York[14] and Wyoming[15] have statutes that

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8 Tex. Const. art. XI, § 5. *See also* Idaho Const. Art. XII, § 2; Utah Const. Art. XI, § 5.

9 Ohio Rev.Code § 1509.39, repealed by 2004 H 278.

10 Ohio Rev.Code § 1509.39, repealed by 2004 H 278.

11 A more in-depth analysis of this preemption issue is provided *infra* at text accompanying notes 42-98.

12 La. R. S. § 30:28(F).

13 Mich.Comp.L. § 125.3205.

14 N.Y.Env.Cons.L. § 23-0303(2).

15 Wyo.Stat.Ann. § 18-5-201.

totally preempt one or more substate units from regulating oil and gas operations.

Two oil and gas producing states, California,[16] and Colorado[17] have non-pre-emptible home rule constitutional provisions. In theory, that means that as to matters relating exclusively to local or municipal affairs, the state has no power to act. In other words, the home rule unit has sole authority to regulate on matters relating to local or municipal affairs. As to matters of statewide concern or hybrid state/local concern, these two states treat local powers as preemptible. As a practical matter, the regulation of oil and gas operations is not going to be treated as a matter of exclusive local concern, therefore the preemption analysis for these states is similar to the analysis in preemptible home rule states.

General Law Authority

Prior to the adoption of home rule authority, all substate units were treated as essentially "creatures" of the state.[18] General law local governmental units could only exercise such power as was expressly granted them by the State Legislature. In addition, under Dillon's Rule, a common law doctrine employed by many courts, the grant of power to substate units is to be narrowly interpreted.[19] The principal purpose underlying the development of the SZEA in the 1920s was to provide a model enabling act to be passed by state legislatures clearly giving substate units the power to zone and plan. Without such an enabling act, substate units may not have had the authority to zone. Concurrent with the trend towards the granting of home rule authority, many state legislatures have granted general law cities equivalent powers without the need to attain home rule status. For example, Texas provides that all general law municipalities in the state have the power "to adopt ordinances for good government, peace or order which are necessary or proper for carrying out a power granted by law."[20] While cities in most states have substantial home rule or enabling authority to engage in zoning and planning regulation, other types of sub-state units, including counties, do not possess analogous authority. Thus counties in Texas, in general, lack the power to zone and plan.[21] But in some 37 states, counties may possess

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16 Cal.Const. art IX, § 5(a).fs

17 Colo. Const. art. IX, § 9.

18 *See e.g.*, City of Trenton v. New Jersey, 262 U.S. 182 (1923); Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

19 O.Reynolds, note 7 *supra* at § 49. The classic definition of Dillon's Rule provides that substate units have (1) those powers expressly conferred upon them by the state constitution or by state statute, (2) those powers necessarily or fairly implied in or incident to the powers expressly granted and (3) those powers essential to the declared objects and purposes of the substate unit. *Id.*

20 Tex.Loc. Gov't Code Ann. § 51.001. See also N.D. Cent. Code § 40-05-01

21 Tex.Loc. Gov't Code Ann. §§ 231.001 et seq. The State Legislature has given a

home rule or very broad enabling act power.[22] Whether or not such power is exercised will depend on many factors but as counties gain population the pressure to regulate oil and gas drilling and production activities will undoubtedly increase.

Constitutionality

As discussed above, the constitutionality of zoning regulation was a hotly debated issue until *Euclid* was decided. Prior to *Euclid* several state supreme courts had invalidated zoning efforts using a substantive due process argument.[23] *Euclid* involved a facial substantive due process attack on a zoning ordinance that divided the City into a hierarchy of zoning districts from single family residential to industrial. Even though the owner of the land in question alleged that the market value of the land would be diminished from $ 10,000/acre to $ 2500/acre, the Supreme Court found that the comprehensive zoning ordinance on its face had a substantial relation to the public health, safety, morals or general welfare. At that time the regulatory takings jurisprudence set in motion by Justice Holmes' opinion in *Pennsylvania Coal Co v. Mahon,*[24] had not fully blossomed so that the *Euclid* opinion may not be a definitive statement on the regulatory takings limits on zoning of oil and gas operations.

While *Euclid* involved a facial attack on a zoning ordinance, the Supreme Court shortly after *Euclid* decided *Nectow v. City of Cambridge,*[25] an as-applied challenge to a zoning ordinance. While *Euclid* had taken a "soft glance" or deferential approach to judicial review of zoning decisions, such as where to draw the district lines and what uses to allow in each district, *Nectow* clearly suggested that the federal courts would be taking a "hard look" at zoning decisions. In *Nectow* the court invalidated on substantive due process grounds a municipal zoning ordinance that placed the owner's parcel in a residential zone. The decision suggested that the federal courts will act as super-boards of adjustment to second-guess local districting decisions. What followed, however, was a long period of time in which the Supreme Court refused to grant writs of certiorari on appeals from state court zoning decisions, thus effectively removing the Supreme Court from the zoning arena.

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few counties limited power to zone by virtue of individual enabling acts that define the geographic area to be covered. *See e.g., id.* at §§ 231.011-.023 authorizing two counties to zone and plan on Padre Island.

22 O. Reynolds, note 7 *supra* at 111.

23 *See e.g.*, Goldman v. Crowther, 147 Md. 282, 128 A. 50 (Md.App. 1925); Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (Tex. 1921). Eleven years after *Spann,* the Texas Supreme Court reversed its position and upheld the general constitutionality of zoning in Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475 (1934).

24 260 U.S. 393 (1922).

25 277 U.S. 183 (1928).

The "Typical" Zoning Bureaucracy

One of the impacts of the adoption of the SZEA by nearly all of the states was the reasonably uniform way in which land use decisions were made. That near-uniformity, however, has dissipated over time with home rule and changing enabling legislation. Therefore, before one can make any determination about how a zoning ordinance operates, one must take care and review the relevant statutes, charter provisions and ordinances. The legislative body is the only entity that can adopt a land use or zoning ordinance. In addition to the adoption or amendment of ordinances, legislative bodies increasingly participate in the final approval decision concerning discretionary permits or other administrative decisions.[26] Typically, a zoning ordinance will create a citizen-staffed commission sometimes called the Planning Commission, Zoning Commission or Planning and Zoning Commission. This administrative body is oftentimes delegated the power to develop the comprehensive plan and to make decisions on subdivision plat applications. It also may have the power to make recommendations regarding zoning ordinance amendments. In larger substate units, the Commission will be supported by a professional staff of planners. In addition, most substate units involved in zoning will have another citizen-staffed agency known by a myriad of terms including Board of Adjustment, Board of Zoning Appeals, Zoning Board of Adjustment or Board of Appeals. The Board usually has the power to grant variances and to hear appeals from orders or decisions made by governmental officials working in the land use field.

The basic framework for zoning regulation comprises two main pillars, use regulation and area or bulk regulation. From the onset, zoning's major regulatory device was the creation of districts where only certain uses were allowed. Historically, these use districts were cumulative or "Euclidean" in nature, meaning that less intense development was allowed in the more intense development districts. As an example, while a multi-family dwelling could not be placed in a single-family residential district, a single-family home could be placed in a multi-family residential district. As zoning and planning progressed, however, it is now much more common for districts to be use-exclusive, meaning that only those uses listed within a particular district are allowed. Within each use district there will probably be two types of uses. The first category will be those uses permitted as "of right" where the permit applicant is entitled to build that type of use without further approval. The second category encompasses discretionary permits whereby the permit applicant will have to seek approval from either and administrative or legislative body before the use will be allowed. These discretionary uses will be

[26] Throughout this paper the term "discretionary permit" is used to describe what zoning ordinances may call conditional use permits, special exceptions, special exception permits, special uses or special use permits. The term, however, does not include variances.

specifically listed by the zoning ordinance. It is not surprising that many zoning ordinances treat oil and gas drilling and production facilities as discretionary uses because they involve "negative externalities" especially when located in a populous area. In most circumstances the substate unit will be authorized to grant these discretionary permits, grant with conditions these discretionary permits or deny these permits. In some jurisdictions, court decisions have begun to give these discretionary permit uses greater protection than in the past, raising a presumption that the discretionary use is allowed and placing the burden on the substate unit to justify why the use should not be allowed in its specific location.[27] Discretionary permits are to be distinguished from variances. Almost all, if not all, zoning ordinances allow for the requirements of the ordinance, be they use or bulk requirements, to be waived in cases where the applicant can show unnecessary hardship or practical difficulties. Decisions relating to variances are usually made by the Board of Adjustment with direct appeal to the courts. Decisions relating to discretionary permits may be made by the Planning Commission, Board of Adjustment or legislative body and if made by the Commission or Board the legislative body will often have the chance to review and/or approve the permit decision. Finally, zoning ordinances, because they deal with an already-built environment encompass the concept of a non-conforming use (NCU). A NCU is a use in existence at the time that the zoning ordinance or amendment is enacted that is normally allowed to continue, although with some restrictions.[28]

Oil and gas uses are treated as any other prospective use under a zoning ordinance. The traditional rules relating to judicial review of zoning decisions also apply. For example, in *Wood v. City Planning Commission*,[29] an oil and gas lessee sought a zoning ordinance amendment to classify his land as being eligible for a drilling permit. The ordinance authorized the city council to establish drilling districts after a review by the planning commission. After the required review by the commission, the council opted not to amend the ordinance. The oil and gas lessee argued that by following the procedural steps necessary to amend the ordinance he was entitled to the amendment. A legislative body cannot be mandated to amend an ordinance. Otherwise, any owner would be able to demand an amendment by following the procedures set out in the zoning ordinance. The line-drawing contest that is the essence of classical zoning is a legislative function that should not be interfered with by the judicial branch in the absence of some constitutional infirmity or a clear abuse of discretion. The California court adopted the "Euclid" view that if the legislative decision is merely "fairly debatable" it should be up-

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27 *See generally*, Daniel Mandelker, Land Use Law §§ 6.53-.56 (5th ed. 2003).

28 *See* Mandelker, Land Use Law *supra* note 27 at §§ 5.78-5.86.

29 130 Cal.App.2d 356, 279 P.2d 95 (1955).

held.[30] In many jurisdictions, courts have adopted the "soft glance" or *Euclid* approach towards zoning decisions, although in recent decades courts have tended to take a "hard look" at certain types of zoning decisions, especially ones involving variances or discretionary permits.

What makes the zoning of oil and gas drilling operations unique is the fact that unlike most uses you cannot drill for oil where it is not located.[31] Thus, if the reservoir is located in an area where drilling is not allowed, it is likely that litigation will ensue. Several cases decided in the middle of the 20th Century dealt with that problem. In *Beveridge v. Harper & Turner Oil Trust*,[32] an oil and gas lessee challenged the validity of the Oklahoma City zoning ordinance which placed its land in a district where oil and gas drilling was totally prohibited. The proposed drill site was located only 900 feet from the district boundary line and only 600 feet from an area where mineral owners were entitled to share in the proceeds from development within the oil and gas drilling district. The court, however, refused to second guess the decision of the city to draw the line where it did and thus provide a 300-foot buffer zone. The court observed:

> Fire hazard and danger alone is not the only effect that an oil filed extension may have upon property. When the possible effects of oil drilling extension are considered, one who seeks to foresee the effect thereof must consider oil derricks as possible substitutes for shade trees in residence sections; slush pits as possible substitutes for ornamental fishponds in the back yards; the rythmatic[sic] but

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[30] Particular states have the reputation of being "hard look" or "soft glance" jurisdictions based on the amount of deference given to local land use decisions. For example, Illinois has the earned reputation of being a "hard look" state. See La Salle National Bank v. County of Cook, 12 Ill.2d 40, 145 N.E.2d 65 (1957); *but cf.*, Adkins v. City of West Frankfort, 51 F.Supp. 532 (E.D.Ill. 1943)(local zoning and conservation ordinances are to be upheld under the deferential "fairly debatable" test). Most other states take a "soft glance" approach, giving substantial deference to local governmental zoning decisions. *See e.g.*, City of University Park v. Benners, 485 S.W.2d 773 (1972), *appeal dism'd*, 411 U.S. 901, *reh'g denied*, 411 U.S. 977 (1972). There may be inconsistent views taken by the same state court regarding the appropriate scope of judicial review. Even though California is normally viewed as a state that rarely invalidates local land use regulations, several California decisions apply a *Nectow* hard look approach to individual decisions not to grant oil and gas drilling permits. *See e.g.*, Sindell v. Smutz, 100 Cal.App.2d 10, 222 P.2d 903 (1950); Bernstein v. Smutz, 83 Cal.App.2d 108, 188 P.2d 48 (1947).

[31] With the advent of horizontal drilling techniques, among other technological advances, this statement is no longer as true as it was when many of these cases were decided. Other mineral extractive activities run into the same problem. See generally, Bruce M. Kramer, *Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches*, 14 U.C.L.A. J. of Envt'l L. & Policy 41 (1996); Prohibiting or Regulation Removal or Exploitation of Oil and Gas, Minerals, Soil or Other Natural Products Within Municipal Limits, 10 A.L.R.3d 1226 (1966).

[32] 1934 OK 398, 168 Okla. 609, 35 P.2d 435 , *overruled on other grounds*, Oklahoma City v. Harris, 1941 OK 331, 191 Okla. 125, 126 P.2d 988.

> somewhat harsh pulsation of a rotary drilling rig as a substitute for the gentle sigh of balmy Oklahoma breezes passing through the foliage of landscaped yards; the odor of escaping gases and flowing crude oil as substitutes for the fragrance of residential rose gardens; oil well appliances and machinery as competitors of the playground apparatus usually provided for the neighborhood children; the rumble of oil field trucks as a substitute for the tinkling bell of the ice cream vendor; and the worry and apprehension that springs from the knowledge of the increased fire hazard, be it great or small, as a substitute for the feeling of security which permeates the household removed from the oil field.[33]

With these pungent words, the court chose to find the line drawing done by the city sufficiently within the bounds of reason and not capable of being disturbed. Yet the court still noted that the nature of the area so restricted was already developed with residences and was likely to be the subject of future development. The review of the nature of the surrounding neighborhood suggests a more intrusive scope of judicial review than the prior excerpt connotes.[34]

In *Clouser v. City of Norman*,[35] the Oklahoma Supreme Court revisited the issue of drawing district boundary lines relating to oil and gas well drilling operations. The City had annexed several tracts of land and then zoned them for single-family residential (SFR) use. A second ordinance prohibited the drilling of oil and gas wells in SFR districts. At the same time as the city was prohibiting such drilling, the mineral owner was leasing the land for development. A well was commenced by the lessee. While applying a deferential scope of judicial review, the court appeared to be second-guessing the city's choice of placing rural land into a SFR district. The court reviewed the same factors discussed in *Harper & Turner*, including existing population, proximity to existing improvements and downplayed both the earlier court's emphasis on the "negative externalities" of oil drilling and the need to plan for the future. Thus, the city's restriction on oil and gas drilling was overturned as being arbitrary and unreasonable because it bore no relation to the public health, safety, morals or general welfare. Clouser reflects the *Nectow*

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[33] 35 P.2d at 439. *In accord*, Anderson-Kerr, Inc. v. Van Meter, 1933 OK 156, 162 Okla. 176, 19 P.2d 1068, *overruled on other grounds*, Oklahoma City v. Harris, 1941 OK 331, 191 Okla. 125, 126 P.2d 988. (denial of variance to lessee to drill within buffer zone upheld even though claim is made that oil will be drained to adjacent tract outside of the no-drill buffer zone).

[34] The language suggesting that the court would take a soft-glance approach to zoning decisions was affirmed in Keaton v. Brown, 1935 OK 207, 171 Okla. 38, 45 P.2d 109 (1935) which upheld the rezoning of land so as not to allow oil and gas drilling operations as being within the sound discretion of the legislative body.

[35] 1964 OK 109, 393 P.2d 827.

"hard look" doctrine while *Beveridge* is clearly more consistent with the *Euclid* "soft glance" doctrine.

In *Indian Territory Illuminating Oil Co. v. Larkins*,[36] the court was faced with a request for a variance to allow the drilling of an oil well on a parcel that did not meet the minimum well-spacing requirements of the zoning ordinance. The parcel was located in a district that allowed oil or gas wells. There was substantial oil and gas drilling operations in the immediate vicinity of the proposed well. The Oklahoma City zoning ordinance authorized the board of adjustment to grant variances that were not contrary to the public interest if the application of the ordinance would cause an owner unnecessary hardship. The language of the ordinance is typical for variance provisions. The board must weigh the harm to the public versus the harm to the individual landowner. The board voted not to grant the variance. In what can best be described as a "hard look" review, the court, in a 4-to-3 decision overturned the board's decision. Without a variance, or the power to pool, the owner of the small tract would lose its oil to the adjacent owners, creating the requisite unnecessary hardship. This problem relating to the impact of the rule of capture differentiates oil and gas variance requests with the more typical surface use variance request. Notwithstanding, the potential loss of minerals, the dissent argued that the requirement that the public interest not be harmed by the issuance of the variance had not been proven. The minimum well spacing requirements serve an important public purpose which should not be easily waived. According to the dissent the equities did not lie with the small tract owner since most of the oil that would be produced from a well on that tract would be drained from under the lands of the adjacent owners.

An earlier Oklahoma Supreme Court decision, *Van Meter v. Westgate Oil Co.*,[37] set forth the following requirements before the Board may issue a variance:

> First, that the granting of such permit would not be contrary to public interest; second, that the literal enforcement of the provisions of the ordinances will result in unnecessary hardship; third, that by granting the permit contrary to the provisions of the ordinance, that "the spirit of the ordinance shall be observed"; fourth, that by granting of such permit "substantial justice be done."[38]

In *Westgate Oil* the court affirmed the denial of the variance while in *Indian Territory Illuminating*, the court overturned the denial of the variance. There is little predictability in the area of how a court will review a variance decision. This case illustrates that lack of predictability in de-

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[36] 1934 OK 125, 168 Okla. 69, 31 P.2d 608.

[37] 1934 OK 287, 168 Okla. 200, 32 P.2d 719.

[38] 32 P.2d at 721.

termining how a court will review a local land use variance decision. While ostensibly applying a deferential role, courts often review *de novo* these decisions trying to determine which side has the greater equities.

Another general land use principle that occasionally applies to oil and gas land use decisions involves the concept of vested rights. This concept is a subset of regulatory takings jurisprudence that will be discussed later in the paper. Vested rights basically involves the acquisition of a protectible property interest in a project or development that can only be changed or taken with the payment of compensation. Vested rights operates on two levels, the first protects a vested rights owner from having the legislative body change the "rules of the game" after the vested right attaches. Thus, an oil and gas lessee with a drilling permit issued by a city would not be subject to a zoning ordinance amendment that no longer allowed drilling permits in the location where the lessee has permission to drill. The second level recognizes that once a vested right attaches, a property interest arises that receives the protection of the Due Process and Just Compensation clauses of either the federal or state constitution.

In *Trans-Oceanic Oil Corp. v. City of Santa Barbara*,[39] the recipient of a drilling permit issued in 1941 before the onset of World War II, challenged the city's decision to revoke the permit after it enacted a zoning ordinance amendment limiting drilling to industrial zoning districts. The plaintiff's drilling permit covered lands located in a residential zone. At the time the permit was issued, such drilling was authorized by the ordinance then in effect. While normally a five-year delay in implementing a drilling or building permit is too long, the court took into account the many restrictions on oil and gas development that occurred after World War II commenced. Revocations of permits must be reasonable and cannot take place after the permit holder has expended substantial sums in reliance of the permit's continued validity. Modern land use practice usually imposes time limits on the effectiveness of various permits, so the five-year hiatus between getting the permit and actually drilling a well would probably not involve a vested right today. The court allowed the lessee to drill in the residential location, further supporting its decision by finding that there had been no residential development in the area immediately surrounding the proposed well location that might justify the permit being revoked because the well might constitute a public nuisance.

Related to the concept of vested rights is the issue of nonconforming uses (NCUs). As discussed earlier, a NCU is a use that antedates the adoption or amendment of a zoning ordinance, which under its terms prohibits that use within the appropriate use, height or area regula-

[39] 85 Cal.App.2d 776, 194 P.2d 148 (1948).

tions.[40] While NCU issues raise certain constitutional questions, it is the generally accepted view that in many states a NCU may be terminated if a reasonable amortization period is given.[41] A good example of what constitutes a NCU is the situation just discussed in *Trans-Oceanic*. The oil and gas lessee with its permit to drill under the earlier ordinance can drill and operate its oil and gas well even though such operations are now prohibited in the zoning district under the later-amended ordinance. A common issue with NCUs is whether they can be expanded or rebuilt. Many zoning ordinances place severe restrictions on the ability of an owner of a NCU to either expand or rebuild a NCU. In *Beverly Oil Co. v. City of Los Angeles,*[42] many of the NCU concepts were discussed. The plaintiff owned and operated several oil and gas wells in an area that was unincorporated at the time of the original drilling operations. After annexation, the wells were placed in zoning districts where well drilling was expressly prohibited. The ordinance, however, recognized the right of NCUs to continue to operate. In 1946, the City amended its zoning ordinance and expressly limited the right of oil and gas well NCUs to drill additional wells or to deepen existing wells. Plaintiff challenged the 1946 ordinance that led to the issuance of a variance by the City permitting the lessee to drill as many as four new wells, provided that for each new well drilled, an existing well be plugged and abandoned. In 1949, the zoning ordinance was further amended to provide for a five-year amortization period for certain NCUs. The City interpreted the 1949 amendment, however, as not applying to plaintiff's oil and gas well production operations.[43] The court denied the plaintiff's request for injunctive relief to prevent the enforcement of the zoning ordinance on its oil and gas operations. The limitation on the deepening of existing wells and the prohibition against the drilling of new wells was treated as a reasonable exercise of the police power. There was no unreasonable, oppressive or unwarranted interference with property rights. Given the fact that the City issued a variance to ameliorate the potentially harsh effects of the NCU provisions of the ordinance, the court found that the ordinance, as applied, was a valid exercise of the police power and would not be enjoined.

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[40] *See* Mandelker, note 27 *supra*; Kramer, Local Land Use Regulation, note 31 *supra* at 72-84.

[41] A number of states, either by statute or common law decision, do not allow for amortization of NCUs. *See e.g.*, Minn.Stat.Ann. § 394.21; State v. Bates, 305 N.W.2d 426 (Iowa 1981); De Mull v. City of Lowell, 364 Mich. 247, 118 N.W.2d 232 (1962).

[42] 40 Cal.2d 552, 254 P.2d 865, 2 O.&G.R. 477 (1953).

[43] An amendment enacted after the litigation was instituted apparently did apply to oil and gas wells and set a 20-year amortization period. The effect of that amendment was not before the court.

Oil and gas drilling and production operations are like any land use that generate substantial "negative externalities." There is likely to be public opposition to such uses, especially where there are nearby residential uses. Zoning ordinances will normally require such uses to get discretionary permits, giving neighborhood opposition a chance to voice their opinion during the public hearing process. In addition, where residential development moves into rural or ex-urban areas that are already dotted with oil and gas development, political pressure will undoubtedly arise that will attempt to prohibit further development and restrict existing development. While NCU status will protect the extant operations, the zoning ordinance may lawfully place restrictions, such was occurred in *Beverly Oil* that will discourage oil and gas development and lead to the possible premature abandonment of production activities.

Types of Zoning Regulation

From the beginning of municipal regulation of oil and gas drilling operations, municipalities have regularly restricted such operations to non-residential zones. The types of use districts where one can drill wells is typically broader than for other industrial-type uses but nonetheless there will be locational problems caused by use district regulation.

Almost all municipal regulations that I have seen borrow a regulatory device used for sexually oriented businesses, namely a minimum setback requirement. In many circumstances there will be a minimum distance requirement between the wellbore and a residence or inhabitable dwelling or other specified use such as a school, hospital, religious institution or the like. Ordinances may have multiple setback requirements as well so that distances between property lines and/or tank batteries may also be covered. These distances may range from 300 to 1000 feet and the better written ordinances will deal with measurement issues, including whether dedicated rights of way are to be included or excluded from the measurements. Changes to the setback requirement may involve a discretionary use permit, a variance, or consent of the adjacent landowner. Obviously depending on which mechanism is used, the decision may be made by the Planning and Zoning Commission, the Board of Adjustment or the local legislative body. In some jurisdictions there may be a specially-created oil and gas administrative body that deals with both permit and variance decisions.

Many zoning ordinances also regulate noise levels. The most typical type of regulation sets a decibel limit at a specified distance from either the property line or the wellbore. It is important that the ordinance specify how the distance is to be measured. The ordinances I have seen range from a decibel limit of 70 to 90 at distances ranging from 300 to 500 feet. The ordinance instead of setting a maximum decibel level may require that the noise level not exceed the ambient noise level for the drillsite. That would benefit drillsites located in areas where there are non-

residential uses where the ambient noise level is likely to be higher than the level found in residential areas. Again, the ordinance should spell out how the ambient noise levels are to be determined since the overall noise level will be set based on those ambient levels.

Because oil and gas drilling operations typically involve the movement of heavy trucks and machinery over municipal streets, many municipalities impose some type of road maintenance agreement or payment requirement. In some cases the ordinance requires the operator to enter into a formal agreement with the municipality that will specify the payments that the operator will need to make in order to use municipal streets and may include a schedule for individual repairs, such as potholes, that the operator will also have to reimburse the municipality for. The agreement may also include a bond requirement, ranging anywhere from $ 50,000 to $ 200,000 for road maintenance purposes. Some communities do not require agreements, but do impose bond requirements.

Again due to the fact that most residents do not want to see a pumpjack or drilling rig as they look out their home or car window, many local ordinances contain landscaping and screening performance standards. The most widespread requirement is that there be a solid or masonry wall that surrounds the wells and tanks, typically at a height of 8 feet so as to block the drillsite from the public vista. Landscaping requirements are also designed to create a buffer zone and, if the municipality already has such requirements applicable to commercial and/or industrial uses, those same requirements will be imposed upon oil and gas operations. Each ordinance will differ as to the type of plant material that may be used and the type of fencing that must be installed.

Other regulations that a municipality may apply to oil and gas operations include prohibitions against salt water disposal wells inside city limits. Some municipalities also regulate the disposal of produced water and/or drilling mud by imposing a "closed-loop" system requirement, rather than the more ubiquitous lined pit requirement required by state conservation agencies. Closed-loop systems are quite a bit more expensive than lined pits. Where lined pits are allowed, many municipalities require that the pits be closed after drilling and the original contour of the land be restored. Where municipalities have flood plains there may be regulation ranging from a total prohibition against locating wells therein to a system where a Corps of Engineers permit is required to one where a well may be drilled only upon the receipt of a discretionary permit. Finally, because municipalities may impose regulatory fees to recover the cost of implementing any regulatory program, it is likely that there will be some type of permit fee imposed upon the operator. In the Barnett Shale area, the permit fees range from a low of $ 1500/well to a high of $ 9200/well. There need not be enabling authority allowing such fee ordinances to be enacted because the power to impose such fees derives from

the power to regulate. Given that limitation, however, the fees cannot be a tax in disguise and must be reasonably related to the cost of regulation.[44]

III. The Preemption Problem

General Principles

As noted earlier, an initial issue that must be analyzed before one can determine if a state statue preempts a substate ordinance is whether the substate entity is a home rule or general law city. If the entity is a general law entity, one must locate a statutory enabling act giving that entity the power to regulate. If there is such an enabling act so that the actions are not *ultra vires*, the issues are the same as one would ask when a preemptible home rule unit is involved. If a nonpreemptible home rule unit is involved, the first question that must be asked is whether the regulatory program is one concerning local or municipal affairs.

There are three basic preemption doctrines that generally apply in the state/substate unit context. The first is express preemption. As noted above, state preemption of local power is oftentimes not a politically palatable idea. The second is implied preemption by conflict. The third is implied preemption by occupation of the field.

The clearest form of state preemption occurs where the legislature expressly preempts substate power. The now-repealed Ohio statute quoted above is an example of an attempt at limited, but express preemption. The Louisiana statute is the clearest form of express preemption.[45] Another occurred in *Billy Oil Co., Inc. v. Board of County Commissioners*,[46] where the county sought to impose what it called a regulatory fee on oil and gas drilling operations. A Kansas statute expressly preempted county regulation of oil and gas drilling operations to the extent to which those operations were within the regulatory powers granted the state Corporation Commission.[47] While there was some flexibility concerning the extent to which the Corporation Commission regulated certain as-

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[44] O. Reynolds, note 7 *supra* at § 105.

[45] La.Rev.Stat.Ann. 30:28(F) provides in part: The issuance of a permit by the commissioner of conservation shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. No other agency or political subdivision of the state shall have the authority and they are hereby expressly forbidden to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.

[46] 240 Kan. 702, 732 P.2d 737, 91 O.&G.R. 470 (1987).

[47] Kan.Stat.Ann. § 19-101a(22). This statute was amended while the outcome of the litigation was pending to clarify the withdrawal of regulatory power from the counties over the "production or drilling of any oil and gas well in any manner which would result in the duplication of regulation by the state corporation commission." The subsection has subsequently been renumbered. Kan.Stat.Ann., § 19-101a(21). A similar express preemption provision exists in Wyoming. Wyo.Stat.Ann. § 18-5-201.

pects of the oil and gas drilling and production activities of the plaintiff, there was no doubt that where there was overlapping or duplicative regulation, state power would control.[48] Express legislative statements regarding preemption, however, are the exception, not the rule. That leaves the judiciary with the often difficult task of determining whether they should find that there is an implied preemption of substate unit regulatory powers.

In dealing with implied preemption by conflict, an initial question that adds another layer of complexity to the problem is the determination of whether the state and substate powers actually conflict. Having duplicative regulatory schemes does not necessarily create a conflict or inconsistency with state law. The approach taken by a court in defining what constitutes a conflict may be critical. It is often stated that a conflict exists "where a local ordinance prohibits an act that a state statute permits, or permits an act that the statue statute prohibits."[49] This aphorism, however, can quickly deteriorate into a semantic game.[50]

There can also be implied preemption by occupation of the field. This approach requires the court to determine what the field is, and then whether the state regulatory scheme is so pervasive, either in qualitative or quantitative terms, so as to occupy the field. One might think that with the extensive regulation of oil and gas exploration and production activities engaged in by state conservation agencies that most courts would find that the field has been occupied. The results, however, are to the contrary, as both Oklahoma and Texas courts have specifically found that local zoning regulation of oil and gas operations is not preempted by the state's occupation of the field.[51] Because it involves judicial intrusion into the relationship between states and substate units, many courts are hesitant to find implied preemption by occupation of the field, although in a number of states, such as California the doctrine is applied frequently.

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[48] *In accord*, Dart Energy Corp. v. Iosco Township, 206 Mich.App. 311, 520 N.W.2d 652 (1994), where the court interpreted Mich.Comp.L. § 125.271 as expressly preempting the regulation of brine injection wells. See also Total Minatome Corp. v. Parish of Caddo, 618 So.2d 1088, 126 O.&G.R. 258 (La.App. 1993), where the case involved a dispute between the exercise of the parish's zoning power and the statutory power given the Commissioner of Conservation. The reported decision only dealt with venue problems, not the preemption issue.

[49] Reynolds, note 7 *supra* at 128.

[50] *Id.* at 128-130.

[51] *See e.g.*, Gant v. Oklahoma City, 1931 OK 241, 150 Okla. 86, 6 P.2d 1065, *app. dism'd* 284 U.S. 594 (1932), *on subsequent appeal*, 1932 OK 469, 160 Okla. 62, 15 P.2d 833, *aff'd*, 289 U.S. 98 (1933); Klepak v. Humble Oil & Refining Co., 177 S.W.2d 215 (Tex.Civ.App.--Galveston 1944, writ ref'd w.o.m.). A North Dakota Attorney General's opinion concluded that a county could not require the issuance of a well drilling permit, notwithstanding a broad grant of power to regulate land use. N.D. Att'y Gen. Op. 90-23.

State-by-State Analysis

A. California

California is a non-preemptible home rule state.[52] There is a state conservation agency with somewhat limited powers when compared to the major producing states.[53] It also has a history of substate regulation of oil and gas drilling activities that overlap with the state agency's power. The state statute does not contain any express preemption language. In the many cases dealing with local zoning regulations, the issue of preemption has never arisen, the courts and/or parties presuming that local governments have the concurrent power to regulate oil and gas drilling and production activities.[54] Thus, a total prohibition against the drilling of wells in a residential zone was upheld as a valid exercise of the police power.[55]

B. Colorado

Colorado is another non-preemptible home rule state.[56] But unlike California, there has been active litigation in the state on the preemption issue, both as it applies to home rule units and to non-home rule units. Two cases illustrate the different approaches to the preemption problem depending on whether a home rule or general law substate unit is involved. The leading case dealing with a general law government is *Board of County Commissioners, La Plata County v. Bowen/Edwards Associates*.[57] The County adopted a zoning ordinance that restricted the location of oil and gas drilling operations. The ordinance was authorized by a state zoning enabling act for counties. In addition, Colorado has delegated to the Oil and Gas Commission the traditional regulatory powers over oil and gas drilling, production and exploration activities. The court

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52 Calif. Const. art. IX, § 5(a).

53 *See* Cal.Pub.Res. Code §§ 3300 et seq.

54 *See e.g.*, Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir.), *cert. denied*, 284 U.S. 634 (1931); No Oil, Inc. v. City of Los Angeles, 196 Cal.App.3d 223, 242 Cal.Rptr. 37, 97 O.&G.R. 504 (1987); Friel v. County of Los Angeles, 172 Cal.App.2d 142, 342 P.2d 374, 11 O.&G.R. 155 (1959); Bernstein v. Smutz, 83 Cal.App.2d 108, 188 P.2d 48 (1947).

55 *See* Friel v. County of Los Angeles, note 50 *supra*. The several instances where California courts have struck down municipal ordinances deal with procedural and substantive due process and takings claims. *See e.g.*, Pacific Palisades Association v. Huntington Beach, 196 Cal. 211, 237 P. 538 (1925); Braly v. Board of Fire Commissioners, 157 Cal.App.2d 608, 321 P.2d 504 (1958); Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal.App.2d 776, 194 P.2d 148 (1948).

56 Colo. Const. art. IX, § 9.

57 830 P.2d 1045, 118 O.&G.R. 417 (Colo. 1992). For a complete history of the tension between state and local regulation of oil and gas operations in Colorado, see Angela Neese, *The Battle Between the Colorado Oil and Gas Conservation Commission and Local Governments: A Call for a New and Comprehensive Approach,* 76 U.Colo.L.Rev. 561 (2005).

analyzed the three ways in which a general law government's expressly delegated powers may be preempted by state statute. The first way is through an express legislative statement that was not present in the Colorado oil and gas conservation statute. The second methodology is the occupation of the field theory.[58] Occupation of the field analysis relies in part on defining the regulatory field as one involving state, state/local or local interests.[59] The third preemption methodology deals with the reality of two complementary statutory schemes that can coexist as long as there are no operational conflicts. The *Bowen/Edwards* court found no express preemption and no occupation of the field. On the operational conflicts issue, the court had to remand for further fact finding to determine if there were such conflicts. The court noted that the County regulation was not a total prohibition on locating oil and gas wells, but merely a requirement that the producer get a county permit and comply with certain performance standards before drilling a well.

The *Bowen/Edwards* approach to preemption was carefully followed in *Town of Frederick v. North American Resources Co.*[60] Frederick, a non-home rule unit, enacted a comprehensive drilling ordinance that required all parties to get a special use (discretionary) permit prior to drilling within the Town. In addition, there was a $ 1000 application fee and certain performance standards relating to well location, setbacks, noise mitigation, visual impact and aesthetic impacts. The ordinance also imposed penalties for failure to comply. NARCO drilled a well in the Town without submitting a special use permit application, based upon its receipt of a Colorado Oil and Gas Conservation Commission (COGCC) permit.

The tri-partite approach to preemption analysis used in *Bowen/Edwards* governed. While there have been changes in state statutes and regulations dealing with the powers of the COGCC and non-home rule units, the court found that they do not affect the application of *Bowen/Edwards*. The court easily concluded that state statutes delegating power to the COGCC did not contain any express preemption provision. While there was some strengthening of COGCC's powers, the statutory

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[58] In an earlier case, the Colorado Court of Appeals had used the "occupation of the field" theory to find a general law government's zoning ordinance inapplicable to an oil and gas lessee. Oborne v. County Commissioners of Douglas County, 764 P.2d 397, 102 O.&G.R. 1 (Colo.App. 1988), *cert. denied*, 778 P.2d 1370 (Colo. 1989).

[59] Only four years prior to *Bowen/Edwards*, the Colorado Court of Appeals found that a county regulation imposing substantial conditions on an oil and gas operator who had received a state drilling permit was preempted under the occupation of the field theory. Oborne, note 54 *supra*. The conditions related to the need for a dirt berm for the sediment ponds, a bond to cover the cost of reclamation and potential damages in the event of an accident, a system of groundwater contamination prevention and cement casing. 764 P.2d at 399.

[60] 60 P.3d 758, 157 O.&G.R. 716 (Colo.App. 2002, cert denied).

changes merely expanded the area for potential operational conflicts and did not contain language of express preemption. In fact, there was clear statutory language showing that the Legislature intended that local regulation of oil and gas operations continue. Likewise, the court found that there should be no change in the *Bowen/Edwards* position that the Legislature did not intend to impliedly preempt local control by the application of the occupation of the field theory. While the COGCC has been given greater power and has exercised that power through expanded regulations, there was still no implied preemption by the occupation of the field.

The court , however, did, find that in applying the "operational conflicts" test, several of the Town's regulations were preempted. The court quoted from *Bowen/Edwards* to determine the scope and extent of these operational conflicts. It said:

> the efficient and equitable development and production of oil and gas resources within the state *requires uniform regulation of the technical aspects of drilling,* pumping, plugging, waste prevention, safety precautions, and environmental restoration. Oil and gas production is closely tied to well location with the result that the *need for uniform regulation extends also to the location and spacing of wells.*[61]

The existence of a discretionary permit system per se, does not violate the "operational conflicts" test of *Bowen/Edwards*, especially where the Town provided that the permit cannot be denied when it met the performance standards imposed by the ordinance. Thus, it was clear that NARCO would have to file a permit application and pay the accompanying fee in order to drill a well within the Town. The court also upheld the Town's regulations insofar as they require building permits for above-ground structures, access roads, response costs and similar items. Those matters were found not to conflict with any extant COGCC regulations. On the other hand, after doing a regulation-by-regulation analysis of several other Town requirements, the court invalidated the Town's setback requirements, noise abatement rules and visual impact rules as directly conflicting with specific COGCC rules. In addition, the court invalidated the Town's efforts to incorporate existing COGCC rules and allow for independent Town enforcement. The court held that while Colorado statutes allow any person to sue to enforce COGCC rules, that person must comply with various procedural safeguards, none of which were present in the Town's enforcement mechanism. Thus, the attempt to have Town penalties for violating COGCC rules was also found preempted by state law.

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[61] 60 P.3d at 763 quoting from *Bowen/Edwards*, 830 P.2d at 1058.

The "operational conflicts" test is necessarily an ad hoc approach to determining whether there is state preemption. The COGCC sought to provide some certainty to the test by promulgating a rule that provided: "The permit-to-drill shall be binding with respect to any conflicting local governmental permit or land use approval process."[62] In *Board of County Commissioners of La Plata County v. Colorado Oil & Gas Conservation Commission*, [63] several counties challenged the validity of the rule. As a preliminary matter, the COGCC argued that the plaintiff counties lacked standing to challenge the rule amendment. Colorado applied a two-part test to determine standing. The plaintiff must first have suffered an injury in fact and secondly, the injury must be to a legally protected interest as contemplated by statutory or constitutional provisions. The court found that counties have asserted an injury in fact because the COGCC rule would strip them of their powers to regulate oil and gas drilling activities. No specific injury in fact needed to be shown because the counties are asserting a facial attack on the validity of the rule. The legally protected interest was the counties' power to enact and enforce their land use planning powers within their borders. Furthermore a specific statutory grant to counties authorized them to seek judicial review of any agency action which is directed to either a county or its employees.[64] The counties' had standing to seek a declaratory judgment regarding the effectiveness of the COGCC rule.

On the merits the court had to determine whether the amended rule was consistent with the operational conflicts test. While normally the interpretation of a rule by the agency charged with its enforcement is entitled to substantial deference,[65] this rule essentially involved an attempt to codify the *Bowen/Edwards* test, a uniquely judicial function for which no deference should be given. The rule provided that the COGCC permit shall preempt "any conflicting" local land use regulation. *Bowen/Edwards* only allowed preemption where there is an operational conflict determined by the application of the ad hoc balancing test. Thus, on its face the rule went too far in defining what local land use regulations may be preempted and exceeded the COGCC's authority to promulgate rules.

The alleged preemption of a home rule unit's zoning ordinance was analyzed in *Voss v. Lundvall Brothers, Inc.*[66] The City ordinance totally prohibited the drilling of oil and gas wells within city limits. The City argued the ordinance was a matter affecting local or municipal affairs

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62 COGCC Rule 303(a).

63 81 P.3d 1119, 158 O.&G.R. 216 (Colo.App. 2003, cert. denied).

64 Colo.Rev.Stat. § 24-4-106(4,5).

65 *See* Halverstadt v. Department of Corrections, 911 P.2d 654 (Colo.App. 1995).

66 830 P.2d 1061, 120 O.&G.R. 245 (Colo. 1992).

and was therefore insulated from state statutory preemption under Colorado's non-preemptible home rule provision. The State countered by arguing that oil and gas drilling and production practices were matters of statewide concern. The Colorado Supreme Court found that the oil and gas conservation was a matter of both state and local concern. As a hybrid state/local matter, oil and gas conservation regulation may be exercised by both the state and the home rule substate unit. The issue then returned to the same arena as for the general law unit, was the ordinance preempted. Because the ordinance involved a total prohibition, the court found that there was an implied preemption by conflict. There is a significant state interest in the efficient development and production of oil and gas resources in a manner that prevents waste and protects correlative rights. A total prohibition against drilling directly conflicted with those goals by removing large areas of potential oil and gas production from state control. That would frustrate the important state interests as reflected in the Colorado Oil and Gas Conservation Act. Therefore the ordinance was preempted due to the operational conflict with the Act.

The difficulty in applying the *Bowen/Edwards* operational conflicts test is reflected in *Board of County Commissioners of Gunnison County v. BDS International, LLC.*[67] The County enacted an ordinance that regulated oil and gas development by imposing various performance standards, bonding requirements and a permit fee. An operator, joined by the Colorado Oil & Gas Conservation Commission challenged the ordinance on preemption grounds. The trial court found that much of the ordinance was preempted under the operational conflicts test as a matter of law. These regulations included permit submittal requirements relating to wildlife and wildlife habitat analysis, vegetation, water quality and drainage and erosion control plans. Further County regulations imposing standards including waterbody setbacks, geological hazards, wildlife hazards, financial guarantees and protection for cultural and historic resources were also invalidated. The operator had not applied for a permit so the attack seem to be facial in character.

Because it was a facial and not an as applied challenge, the court attempted to harmonize the State and County regulatory programs so as not to find preemption.[68] The operational conflicts test necessarily requires the court to take an ad hoc and "hard look" approach in reviewing the ordinance and the state statute and regulations. In most situations, summary judgment would be inappropriate in resolving an operational conflicts claim. Notwithstanding the general rule regarding the need for

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[67] 159 P.3d 773 (Colo.App. 2006, cert. denied).

[68] A similar approach was taken in Colorado Mining Association v. Board of County Commissioners of Summit County, 170 P.3d 749 (Colo.App. 2007), *cert. granted*, 2007 WL 3343001 (Colo. Nov. 13, 2007), rev'd, --- P.3d ---, 2009 WL 60506 (Colo. 2009). *See also* California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987).

an ad hoc balancing approach, the court did find that the County regulations imposing financial requirements and providing access to records to County employees were preempted because they were directly inconsistent with COGCC regulations covering the same areas. As to the other permit and performance standards, the Court of Appeals remanded the case for a trial on the merits.[69] Preemption in general, and operational conflicts and occupation of the field theories in particular, necessarily require courts to engage in balancing tests. Judicial balancing of public policy interests, which are at the heart of many preemption claims not only leads to inconsistent approaches but also to the judicial branch stepping into the shoes of the legislative branch.[70] This intrusiveness is not necessarily to be blamed on an "activist" state court but on the Legislature's inability to clearly demarcate regulatory powers as between the State and its substate units.

The *Bowen/Edwards* operational conflict approach to preemption has been muddied somewhat in a recent decision of the Colorado Supreme Court dealing with the Mined Land Reclamation Act.[71] In *Colorado Mining Association v. Board of County Commissioners of Summit County*,[72] Summit County adopted an ordinance that effectively prohibited certain types of mining techniques that involve the use of such chemicals as cyanide to leach out precious metals, including gold. The Act also regulated mining operations and techniques which regulates, but does not prohibit the type of operations that Summit County bans. As noted above Colorado has non-preemptible home rule power as to matters of local concern, but in both the mining and oil and gas areas the matters are clearly not matters of local concern so that the analysis should be the same presuming that the general law substate unit has been given the authority to regulate.[73]

The majority opinion treats the issue of whether a matter is of local or state concern as a "preemption" analysis when it reality it is an ultra vires analysis. The cites says that an implied preemption by conflict analysis is guided by a four part test that looks to see whether there is a

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[69] To show the uncertainty of this ad hoc approach, the court remanded for a trial on the merits the issue of whether certain local fire protection regulations were preempted, even though it had found similar regulations preempted in Oborne v. Board of County Commissioners, 764 P.2d 397, 102 O.&G.R. 1 (Colo.App. 1988), *cert. denied*, 778 P.2d 1370 (1989).

[70] *See* O. Reynolds, note 7 *supra* at §§ 38-44.

[71] Colo.Rev.Stat. §§ 34-32-101 et seq.

[72] --- P.3d ---, 2009 WL 60506 (Colo. 2009).

[73] Justice Martinez in a dissenting opinion accurately describes the paradox raised by the majority opinion which first concludes that there has been an implied preemption by occupation of the field, but then also finds that the County regulation is not a land use regulation for which the County has clear authority to enact but is a reclamation regulation for which there is express preemption. Id. at ___ (Martinez, J. dissenting).

need for statewide uniformity, whether the municipal regulation has an extraterritorial impact, whether the subject matter is one traditionally governed by state or local government and whether the Colorado Constitution specifically commits the particular matter to state or local regulation.[74]

C. Kansas

Kansas has a long history of substate unit regulation of oil and gas drilling and production activities.[75] The first major municipal regulatory effort to deal with oil and gas activities in the United States occurred in Winfield, Kansas in 1927.[76] It involved spacing and pooling regulation and served as a precursor to state regulatory efforts in those fields. As noted earlier in the *Billy Oil* case, counties which have a form of legislative home rule power are expressly preempted from duplicating the regulation imposed by the State Corporation Commission. Counties are expressly excluded from requiring operators from applying for licenses or permits in order to drill and oil and gas well.[77] Thus, the State has spoken clearly in depriving counties of almost any power to regulate oil and gas operations. No such limitation appears for cities, however, leaving them open to regulate subject to the usual three-pronged preemption analysis of express preemption, implied preemption by occupation of the field and implied preemption by conflict. Those factors are relevant under Colorado's non-preemptible home rule regime to determine whether the state has any power to regulate in that area. If the matter is one of local concern, the state has no power to act. If the matter is one of statewide concern, or a mix of state and local concern that the issue should be resolved using traditional preemption analysis such as was utilized in *Bowen/Edwards*.

The majority opinion also notes that preemption is more likely to be found where the substate unit effectively prohibits something that the state allows or regulates. The old local governmental maxim that a substate unit may not forbid that which the state has explicitly authorized is merely a restatement of the implied preemption by conflict dogma.[78] While further analyzing the *Bowen/Edwards* ad hoc operational conflicts test, the court seems to be applying a per se conflict test where total prohibitions are involved. The majority opinion, however, appears to be un-

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[74] Id. at ___ citing Voss v. Lundvall Bros, Inc., 830 P.2d 1061 (Colo. 1992) and City of Northglenn v. Ibarra, 62 P.3d 151 (Colo. 2003).

[75] One Kansas statute, enacted in 1907, authorized counties to appoint an "inspector of natural gas, gas wells and gas pipe lines." American Bar Association, *Legal History of Conservation of Oil and Gas* 41 (1938).

[76] ABA History, note 71 *supra* at 55-56. *See also* Marrs v. City of Oxford, 24 F.2d 541 (D.Kan. 1928), *aff'd* 32 F.2d 134 (8th Cir. 1929), *cert. denied,* 280 U.S. 573 (1929).

[77] Kan.Stat.Ann. § 19-101a(21).

[78] *See* Johnson v. Jefferson County Board of Health, 662 P.2d 463 (Colo. 1983).

comfortable with the notion that a general law county's express grant of power to regulate land use, a matter that is traditionally one of local concern, has been totally preempted by the Act. It therefore attempts to bolster its argument by accepting the argument made by the Mined Land Reclamation Board that the County's regulation is really not a land use standard but a reclamation standard for which there is an express statutory preemption provision. It further roils the water by also suggesting that something less than a total prohibition in terms of area might be an acceptable land use regulation. In dissent, Justice Martinez points out the inconsistency of a finding that an ordinance has been partially preempted by a state statute. If the County has been delegated land use power by the state, as it clearly has in this case, its choice not to allow a specific land use anywhere in the County clearly falls within that grant of power. By classifying the prohibition as a reclamation standard, however, the majority opinion leaves open to the County the possibility that it can now prohibit mining in some zoning districts and allow it in others without having its land use powers preempted.[79]

D. Kentucky

In *Blancett v. Montgomery*,[80] an oil and gas lessee challenged a municipal ordinance which restricted drilling within residential districts. The lessee argued that its inability to drill was causing oil and gas to drain to an adjacent well that was located outside of the city. The city was a general law city that had the power to zone expressly granted it by a state enabling act. The court found that the Kentucky Oil and Gas Conservation Act[81] did not preempt municipal zoning power. The issuance of a state well drilling permit did not prevent the city from applying its zoning ordinance to the proposed well location. There was no express preemption and no implied preemption since the state statute did not evince an intent to oust the city from exercising its zoning power.

E. Louisiana

Louisiana's preemption jurisdiction is both similar to, and different, from the rest of the states. The 1974 Louisiana Constitution set up a bi-

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[79] A concurring opinion finds that as to general law substate units the issue is not preemption but a matter of statutory interpretation. The concurring justices conclude that as to reclamation standards the State has not that power to counties. I disagree with the notion that an ordinance prohibiting a specific use contained within the County's zoning ordinance is a "reclamation" standard rather than a land use standard. Id. at ___. (Eid, J. concurring). The concurring opinion ignores the fact that the Legislature has granted to the state agency certain powers and granted to general law counties other powers without resolving the dispute except as to reclamation standards. The preemption analysis should be the same for matters of statewide concern whether it involves a home rule unit or a general law unit that has been granted the power to regulate.

[80] 398 S.W.2d 877 (Ky.App. 1966).

[81] Ky.Rev.Stat. §§ 353.500 et seq.

furcated system by which pre-1974 home rule substate units are treated differently than post-1974 home rule units.[82] The post-1974 home rule substate units are given broad home rule powers that are "not denied by general law or inconsistent with this constitution."[83] But notwithstanding that broad constitutional grant of power, there is another constitutional provision that provides, somewhat inconsistently, that "the police power of the state shall never be abridged."[84] Prior to the adoption of the 1974 Constitution, it was commonplace for courts to invalidate substate police power regulations under an implied preemption by conflict theory.[85] The courts, however, seemed to make an exception from the presumptive preemption rule for matters relating to local taxation.[86]

The Louisiana Supreme Court, however, in its pronouncements in the past 20 years has taken positions more consistent with the views espoused in most states relating to state preemption of substate unit police power. The court described the following preemption analysis:

> Local power is not preempted unless it was the clear and manifest purpose of the legislature to do so, or the exercise of dual authority is repugnant to a legislative objective: if there is no express provision mandating preemption, the courts will determine the legislative intent by examining the pervasiveness of the state regulatory scheme, the need for state uniformity, and the danger of conflict between the enforcement of local laws and the administration of the state program.[87]

This language appears to embrace the traditional notions of state preemption although the issue of state uniformity can be used in both the implied occupation of the field theory and the analysis of whether a particular subject matter is a matter of local or state concern.

When it comes to express statements of state preemption relating to oil and gas regulatory matters, Louisiana is the one state with the clearest and most wide-ranging preemption language. Its statute provides:

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82 La. Const. art. VI, § 5. *See* Kenneth M. Murchison, *Local Government Law*, 64 La.L.Rev. 275, 279 (2004)

83 *Id.*, art. VI, § 5(E).

84 *Id.*, art. VI, § 9(B).

85 *See* Savage v. Prator, 921 So.2d 51, 54-55 (La. 2006).

86 *See* Walker, City of Baton Rouge v. Williams: The Louisiana Supreme Court Expands Home Rule Police Power, 70 Tulane L.Rev. 1751 (1996)

87 Palermo Land Co., Inc. v. Planning Commission of Calcasieu Parish, 561 So.2d 482, 497 (La. 1990), citing Hildebrand v. City of New Orleans, 549 So.2d 1218, 1227 (La. 1989). There is some contrary language that harkens back to the "creature" theory of local governments in Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury, 371 So.2d 1127 (La. 1979) that in my opinion has been overruled sub silentio by Palermo Land, *op cit.* and Savage v. Prator, note 85 *supra*.

> The issuance of a permit by the commissioner of conservation shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. No other agency or political subdivision of the state shall have the authority and they are hereby expressly forbidden to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.[88]

On its face the statutory language would clearly prevent a substate unit from prohibiting or interfering with a oil and gas operator who possesses a state permit to drill. There is, however, some wiggle room in the language to suggest that a substate unit might be able to regulate oil and gas operations, especially the surface externalities, so long as it neither prohibited nor interfered with the operator. For example could a parish or municipality impose a road use agreement requirement on an oil and gas operator or a screening easement/fencing requirement as do many substate units that regulate oil and gas operations. Likewise could they impose a noise restriction at the property line in areas where the oil and gas drilling operation is within a designated distance of a residence, school or business? These are unanswered questions that recent Louisiana Supreme Court decisions suggest cannot be simply decided in favor of state preemption.

Notwithstanding this express preemption language relating to substate unit prohibitions, the City of Shreveport attempted to prohibit drilling within 1,000 feet of a city-owned lake that served as its drinking water supply. The City had gained title to the lake from the State, but the State reserved the minerals underlying the lake. The City had express authority to regulate the lake and the surrounding land for the purposes of protecting the drinking water supply. In *Energy Management Corp. v. City of Shreveport,*[89] the state's lessee challenged the City's power to prohibit its exploration for, and production of, State minerals located beneath the lake. In this federal litigation the court noted that in recent times Louisiana generally follows the tri-partite view of preemption looking at express preemption, implied preemption by occupation of the field and implied preemption by conflict. This case should have applied a simple express preemption analysis. The state statute clearly preempted local prohibitions against a party with a state permit to drill from exercising its right to drill. A 1000 foot no-drill zone, as imposed by the City, would prohibit EMC from drilling where the Commissioner of Conservation said it could drill. Instead of relying solely on the express statutory preemption language the Fifth Circuit spoke in terms of the need for uni-

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[88] La.Rev.Stat.Ann. § 30:28(F). An earlier version of this statute was the subject of an Attorney-General's opinion concluding that substate units were preempted from regulating oil and gas operators. Attorney General Opinion No. 82-1021 (Oct. 22, 1982).

[89] 397 F.3d 297, 161 O.&G.R. 963 (5th Cir. 2005).

formity in state regulation, a policy properly used in implied preemption by occupation of the field situations.[90] The court also noted that state regulation of oil and gas operations are "clearly pervasive addressing every phase of the oil and gas exploration process from exploration and prospecting to cleanup of abandoned oilfield waste sites."[91] The pervasiveness or lack thereof is irrelevant given the express statutory language. While other state statutes dealing with conservation agencies have similar regulatory schemes, the Fifth Circuit appears to be about the only court that has suggested that the field of oil and gas regulation has been occupied by the state. As noted above, the state conservation agency is typically charged with dealing with matters relating to prevention of waste, protection of correlative rights and conservation of natural resources and not surface externalilties, environmental and otherwise, that oil and gas drilling and production operations entail.

The City argued that its home rule status provided it with insulation from state preemption. The court noted that home rule status does provide the substate unit with all of the powers of the state subject to constitutional and statutory limitations, but that the City's home rule charter only gave it such powers as relates to the territorial boundaries of the City. The lake was outside of those boundaries, even though the surface was owned by the City. Again the court should have simply stated that home rule powers may be expressly preempted by the State under the Louisiana constitutional provision that reserves all police power to the State.

Upon remand to the District Court, the Court only invalidated the City ordinance insofar as it regulated lands within 1000 feet of the lake.[92] The Fifth Circuit, however, set the record straight by finding that the entire ordinance was preempted.[93] The City argued that the other provisions in the ordinance which related to such matters as minimum casing requirements, insurance requirements, plugging and abandonment requirements, well location diagram requirements and drilling fluid program approval requirements were not invalidated by the earlier decision. While a number of those provisions appear to deal with matters regulated by the state, others do not and overall these provisions do not necessarily lead to a prohibition against drilling. Relying on language from the earlier opinion that dealt with implied preemption the Fifth Circuit reaffirmed its earlier conclusion that any substate regulation of drilling op-

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90 397 F.3d at 303-04.

91 397 F.3d at 303.

92 2006 U.S.Dist. LEXIS 80925 (W.D.La. Nov. 6, 2006). *See also* Holland v. Questar Exploration & Production Co., 2006 U.S.Dist LEXIS 9492 (W.D.La.).

93 Energy Management Corp. v. City of Shreveport, 467 F.3d 471, 169 O.&G.R. 716 (5th Cir. 2006). The court, however, did not award EMC any damages even though it apparently lost its lease during the litigation.

erations and/or activities was impliedly preempted by the state's occupation of the field.[94] There is a difference between prohibition and regulation that the court's opinion blurs. While citing the Louisiana Supreme Court's recent jurisprudence that creates a presumption against finding state preemption, the Fifth Circuit takes the older view that the occupation of the field doctrine should apply with a very expansive definition of what is the field that has been occupied.

F. Michigan

Michigan used to have an express preemption provision for general law townships that prohibited them from regulating or controlling the drilling, completion, or operation of oil or gas wells.[95] In 2006, that provision was repealed and re-enacted to cover both townships and counties.[96] As with Louisiana, the preemption language is quite broad and general in nature. The statute provides:

> 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.[97]

Notwithstanding the express preemption of the earlier statutory provision, a Michigan court utilized an occupation of the field theory to deny a township the power to regulate the conversion of an oil and gas well to a brine injection well.[98] In fact as analyzed by the court, the issue really wasn't a preemption issue but an *ultra vires* issue because the statute excepted from the grant of zoning enabling authority, the authority to regulate oil and gas wells. [99]Under the new statute, no county or town-

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[94] The court relied on Greater new Orleans Expressway Commission v. Traver Oil Co., 494 So.2d 1204 (La.App. 1986) and the Louisiana Attorney General's opinion. La. Op. Att'y Gen. 88-418 (1988)

[95] Mich.Comp.L. § 125.171(1), repealed by Pub. Acts 2006, No. 110, Art. II, § 205 and replaced with Mich.Comp.L. § 125.3205.

[96] Mich.Comp.L. § 125.3205.

[97] *Id.*

[98] Dart Energy Corp. v. Iosco Township, 206 Mich.App. 311, 520 N.W.2d 652 (1994). *See also* Addison Township v. Gout, 435 Mich. 809, 460 N.W.2d 215 (1990). New York has an express preemption provision in its oil and gas conservation laws. See N.Y. Env.Cons.L. § 23-0303(2). In Envirogas, Inc. v. Town of Kiantone, 112 Misc.2d 432, 447 N.Y.S.2d 221 (Sup.Ct.), *aff'd* 89 A.D.2d 1056, 454 N.Y.S.2d 694 (1982), *app. denied*, 58 N.Y.2d 602, 458 N.Y.S.2d 1026, 444 N.E.2d 1013 (1983), the court invalidated an attempt to get around the preemption language by tying the regulation to municipal streets, the one area where local regulation is not expressly preempted. Prior to the enactment of the statute local regulation was allowed. Envirogas, Inc. v. Town of Westfield, 82 A.D.2d 117, 442 N.Y.S.2d 290, 70 O.&G.R. 34 (1981).

[99] Prior to the statutory amendment expanding the preemption coverage to counties, the court applied traditional ultra vires doctrine to deny a county the power to regulate

ship in Michigan has any power to regulate oil and gas operations even though they have the authority to engage in zoning and other land use controls by virtue of various state enabling acts.

G. North Dakota

While North Dakota, in general, has not adopted home rule as the prevailing source of power for its substate units, it does give counties extensive powers to zone and otherwise engage in land use regulation.[100] There are no reported judicial opinions regarding conflicts between the Industrial Commission's authority and County zoning authority. In 1990 an opinion by the Attorney-General concluded that while a close question, the state had occupied the field of regulating oil and gas operations preempting County regulation.[101] Yet shortly thereafter that same Attorney-General hedged his bets when he responded to an inquiry by a County official regarding such regulation. The letter stated in part:

> Attorney General Opinion 90-23 stated that a county could not regulate the production of oil and issue drilling permits as this function was specifically delegated to the Industrial Commission. However, if the county does not attempt to intrude into the Industrial Commission's jurisdiction over the business of oil production, instead making decisions regarding use permits based upon land use considerations, the laws will be compatible.[102]

This clarification makes it difficult to determine the scope and extent of county power to regulate in ways that do not deal with the issuance of permits or regulation of production. Bonding requirements, environmental requirements, road requirements, noise regulation and landscaping requirements all might fit under the rubric of land use, not oil and gas, regulation.

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some aspects of oil and gas drilling activities. County of Alcona v. Wolverine Environmental Production, Inc., 233 Mich.App. 238, 590 N.W.2d 586 (1998). In *Wolverine*, the County attempted to require an oil and gas operator who had a drilling permit to apply for a soil erosion permit and be subject to other performance standards. The Court of Appeals determined that even though the County had authority to implement state environmental standards, it did not have authority to require soil erosion permits.

100 N.D.Cent. Code §§ 11-33-01 *et seq.*

101 Attorney General Opinion 90-23 (October 5, 1990).

102 Letter from Nicholas J. Spaeth, Attorney General to Steven Wild, Bowman County State's Attorney dated December 16, 1991, reproduced in Perry Pearce, The Spectrum of Choices: Formulation and Implementation of Regulatory Land Use Decisions Affecting Mineral Development, Rocky Mtn. Min.L.Fdn. Special Institute on Mineral Development and Land Use Law (May 1995).

H. Ohio

While Ohio used to have an express preemption statute,[103] the scope of the preemption of local zoning regulation under that statute created the same type of problems as does the judicial doctrine of operational conflicts that is applied in Colorado. In *Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc.*,[104] the Supreme Court attempted to draw the line between allowed local regulation for health and safety and disallowed regulation of well spacing and location. The Township zoning ordinance prohibited drilling in most residential zones, required a minimum setback from streets and highways and a 300-foot setback from inhabited structures. The court applied a balancing test by looking at the individual application of the ordinance to the proposed drilling operations. The court noted that much of the Township was rural in character, yet the largely uninhabited areas currently being used in agricultural pursuits were zoned for residential development. This had the effect of precluding almost all oil and gas drilling operations within the Township. Thus, the Township had effectively vetoed the state's choice for drill sites by limiting the areas where wells could be drilled. The court also found that the Township setback requirements were not preempted even though the state had adopted its own setback requirements that were less stringent. The court labeled the Township's standards as involving health and safety concerns, thus not coming under the express preemption language. In response to *Newbury Township,* the legislature amended the statutory preemption provision to make sure that setback requirements from buildings would be a matter preempted by the state.[105] In 2004, the Legislature repealed the preemption provision, presumably returning to substate units their traditional land use powers over oil and gas operations.

I. Oklahoma

Oklahoma, like Ohio, has had some difficulty in defining the scope and extent of preemption, although in Oklahoma no express statutory preemption language exists. In *Gant v. Oklahoma City*,[106] oil and gas operators sought an injunction to prevent the city from enforcing its ordinance requiring a $ 200,000 bond for each well drilled within city limits. The city also sought injunctive relief to prevent the operators from drilling wells until such time as the bonding requirements were satisfied.

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[103] Ohio Rev.Code § 1509.39 repealed by 2004 H 278. A more clearly worded express preemption provision covers the regulation of mineral extraction operations by counties in Wyoming. Wyo.Stat.Ann. § 18-5-201.

[104] 62 Ohio St.3d 387, 583 N.E.2d 302, 117 O.&G.R. 107 (1992).

[105] St. Croix, Ltd. v. Bath Township, 118 Ohio App.3d 438, 693 N.E.2d 297, 139 O.&G.R. 363 (Ohio App. 1997).

[106] 1931 OK 241, 150 Okla. 86, 6 P.2d 1065, *app. dism'd* 284 U.S. 594 (1932) , *on subsequent appeal,* 1932 OK 469, 160 Okla. 2, 15 P.2d 833 , *aff'd,* 289 U.S. 98 (1933).

The operators argued that the Corporation Commission regulated oil and gas drilling operations, including the setting of minimum bonding requirements. Those state statutes and Commission regulations preempted the city's ordinance according to the operators. The court reviewed several early preemption cases and concluded:

> [The cases do] not disclose anything in them, that would warrant us in holding that the general police power of Oklahoma City to provide for the safety and health of its inhabitants, is in any way taken away by virtue of the jurisdiction conferred upon the corporation commission, to superintend the drilling for oil and gas.[107]

Without express language, the court was not going to presume implied preemption of the local police power. The court was concerned with the safety threat to the citizens of Oklahoma City created by the presence of substantial numbers of oil wells, located in close proximity to residences.

Gant follows the traditional view that implied preemption is not to be easily found. Instead, concurrent regulation, especially in the absence of operational conflicts, is to be tolerated. Nonetheless, the Oklahoma Supreme Court three years after *Gant* decided that a local regulation was preempted. In *Indian Territory Illuminating Oil Co. v. Larkins*,[108] the court faced a challenge to a municipal decision not to grant a variance to the minimum well-spacing requirements of the city zoning ordinance. Instead of labeling the well-spacing requirement as a health and safety issue, which it easily could have given the *Gant* opinion stressing the problems of dense development in residential districts, the court instead labeled this type of regulation, a prevention of waste regulation. The court distinguished *Gant* by stating:

> We want to emphasize the fact . . . that the Legislature, in delegating to certain cities the power to restrict the drilling of wells within the boundaries thereof, was dealing with the police power insofar only as the health, morals, safety, and general welfare of the public might be injuriously affected by such drilling. The Legislature did not confer authority upon cities to prevent the commission of waste of natural resources or to prevent the inequitable taking of oil from a common source of supply. Such authority was delegated by other statutory provisions to another tribunal.[109]

Thus the key is to place the municipal regulation in its appropriate cubbyhole, a cubbyhole that is different than the state's cubbyhole. Well

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[107] 6 P.2d at 1068. The court in C.C. Julian Oil & Royalties Co. v. City of Oklahoma City, 1934 OK 88, 167 Okla. 384, 29 P.2d 952, 955 said: "The delegation of power to the corporation commission did not operate to deprive the Legislature of power to delegate to cities the power [to regulate oil and gas operations]."

[108] 1934 OK 185, 168 Okla. 69, 31 P.2d 608 .

[109] 31 P.2d at 611.

spacing is just as relevant to the public safety as bonding requirements, yet the court refused to treat them as the functional equivalent of each other.

J. Pennsylvania

The Oklahoma approach which emphasizes that substate regulation will only be preempted where it intrudes into matters relating to the statewide regulation of oil and gas operations in order to prevent waste and to conserve natural resources appears to be followed in Pennsylvania. Pennsylvania's Oil and Gas Act contains an express preemption provision that states:

> Except with respect to ordinances adopted pursuant . . . [to the Pennsylvania Municipalities Planning Code and Flood Plain Management Act], all ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which imposed conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or accomplish the same purposes as set forth in this act. The Commonwealth, by this act, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.[110]

While the first sentence provides a large exemption from preemption, the second and third sentences, which were added in 1992, greatly narrow that exemption and require the court to examine what regulations deal with the same features as does the state statute. Prior to the addition of the second and third sentences, the Pennsylvania courts noted that widespread exemption from preemption for local zoning ordinances adopted pursuant to the MPC. That was the conclusion of the court in *Nalbone v. Borough of Youngsville*,[111] which found that a local zoning ordinance could be applied to oil and gas operations since the ordinance was adopted pursuant to the zoning enabling act and was not a general police power regulation that would be preempted. So long as the zoning regulation was adopted for the purpose of land use under the pre-1992 statute, it could be enforced.

With the addition of the "features" language of the second and third sentences, however, courts now have to examine ordinances on a case-by-case basis to determine whether they have been preempted. In *Commonwealth v. Whiteford*,[112] the owner of a mineral estate challenged the municipality's authority to issue a cease and desist order preventing him

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110 68 Pa.Stat.Ann. § 601.602.

111 104 Pa.Cmwlth. 623, 522 A.2d 1173 (1987).

112 884 A.2d 364, 164 O.&G.R. 826 (Pa.Cmwlth. 2005), *app. denied*, 588 Pa. 753, 902 A.2d 1243 (2006).

from engaging in further activities in drilling an oil and gas well and fining him for violating various provisions of the municipality's zoning ordinance. The court found that the purposes served by the Oil and Gas Act did not fall within the purposes served by the local regulation. The municipality argued that the owner's actions affected nearby roadways and that his failure to apply for a surface grading permit violated the ordinance. The court agreed with the municipality that both roadways and surface disturbing activities were matters covered by the zoning ordinance and not part of the Commonwealth's purposes in regulating oil and gas operations.

In *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*,[113] the Borough was not allowing an oil and gas lessee to drill a well in a residential zoning district. The Council had determined that natural gas is not a "mineral" within the terms of the ordinance and thus did not qualify for a discretionary permit for mineral extraction activities. The Council also determined that the purposes of the drilling operation would be commercial in nature and thus totally prohibited from a residential zoning district. Finally, the Council determined that its ordinance was not preempted. The Commonwealth Court disagreed with the conclusion that natural gas extraction is not authorized as a discretionary use because natural gas is a mineral for purposes of the ordinance. In then analyzing the preemption claim, the court noted that the state statute specifically deals with location criteria through the state permit system. There are no restrictions on drilling a well other than it cannot be within 200 feet of an existing building or water well. The proposed well location met that criteria and under the terms of the statute, the ordinance was regulating the same feature, location, as did the state statute. Thus, as to the ordinance prohibition against placing wells in residential districts, the ordinance was preempted. As to the other aspects of the zoning ordinance, the court remanded the case back to the trial court for the kind of ad hoc determination that must be made to see whether there is preemption.

In *Great Lakes Energy Partnership v. Salem Township*,[114] the requirement that substate regulation of oil and gas operations takes place within the context of the enabling act was made clear. The Township enacted an ordinance regulating surface and land development associated with oil and gas drilling operations. The ordinance was immediately challenged as not falling with the statutory exception for preemption. The Township then enacted a comprehensive subdivision and land development ordinance that included the provisions of the earlier, and now-repealed oil and gas land use regulations. Instead of engaging in a regula-

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113 929 A.2d 1252 (Pa.Cmwlth. 2007).

114 931 A.2d 101 (Pa.Cmwlth. 2007).

tion-by-regulation analysis, akin to the Colorado operational conflicts approach, the Commonwealth Court merely affirmed the decision of the trial court invalidating all of the regulations impacting oil and gas operations. Under the terms of the statute there must be some local regulation that is allowed, as was shown in the *Whiteford* and *Huntley* decisions. *Great Lakes*, while relying on the trial court opinion, appears to ignore the limited preemption authorized by the statute that only invalidates substate regulation interfering with the "features" of the state regulatory scheme.

K. Texas

While the Railroad Commission of Texas has been delegated substantial authority to regulate the oil and gas industry, local regulation of oil and gas drilling and production activities has been widespread since the 1930s.[115] Early municipal regulation was more than zoning or land use in nature, and oftentimes involved compulsory pooling by requiring the creation of drilling blocks within the municipality where only a single well could be drilled.[116] Texas also gives home rule status to most larger cities and in recent years has given broad police power powers to general law cities. Counties, on the other hand, possess minimal police power regulation and no power to zone with few exceptions. In the only frontal attack on a substate unit's zoning and conservation ordinance based on preemption, the court easily dismissed the operators arguments and observed:

> However, it is held that the Legislature—in so delegating that authority [oil and gas conservation] to the Railroad Commission—did not thereby intend to nor accomplish the repeal of the fundamental law theretofore, as well as subsequently, existing, that municipalities in Texas have, under the police power, authority to regulate the drilling for and production of oil and gas within their corporate limits, when acting for the protection of their citizens and the property within their limits, looking to the preservation of good government, peace, and order therein.[117]

A recent decision, *City of Mont Belvieu v. Enterprise Products Operating, L.P.*,[118] reinforces the basic doctrine that even though there is

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[115] *See e.g.*, Tysco Oil Co. v. Railroad Commission of Texas, 12 F.Supp. 195 (S.D.Tex. 1935)(City of South Houston sued as a defendant after adopting a zoning ordinance restricting the density and location of wells).

[116] *See* Scott Lansdown, *Municipal Ordinances That Compel or Encourage the Pooling or Unitization of Oil and Gas Interests,* 14 State Bar of Texas Oil, Gas and Mineral Law Section Report 1(1989).

[117] Klepak v. Humble Oil & Refining Co., 177 S.W.2d 215, 217 (Tex.Civ.App.—Galveston 1944, writ ref'd w.o.m.). *In accord* Unger v. State 629 S.W.2d 811 (Tex.App.—Ft. Worth 1982, writ ref'd).

[118] 222 S.W.3d 515 (Tex.App.—Houston [14th Dist.] 2007).

extensive state regulation over various aspects of the oil and gas industry, there is no preemption of municipal regulation. Enterprise received a permit from the Railroad Commission in order to drill a well to operate and maintain an underground hydrocarbon storage facility in a salt dome. It already had a permit to operate the storage facility. After participating in the Railroad Commission hearings on the permit, the City did not appeal the permit decision. It did, however, file suit against Enterprise for failing to apply for a City permit to drill the injection well. The Court clearly found that the Legislature did not intend to give the Railroad Commission exclusive jurisdiction over hydrocarbon storage facilities. It remanded the case to determine if there was implied preemption by conflict as to any of the specific City regulatory requirements.

IV. Federal Preemption of Substate Unit Regulation

It is beyond the scope of this paper to analyze the issue of federal preemption of state conservation agency powers.[119] In recent years, however, there have been a number of cases where substate unit regulation has run afoul of the Supremacy Clause of the United States Constitution. As noted earlier, while the federal preemption doctrine is mandated by the Constitution, the parameters of the tests relating to federal preemption are almost identical to the tests applied in the state/local preemption scenario. There are three ways in which the Federal Government may preempt state or local powers: express preemption, implied preemption by occupation of the field and implied preemption by conflict.[120] Federal courts more explicitly recognize that preemption, especially implied preemption is a matter of discerning legislative intent.[121] Also analogous to state/local preemption is the presumption in favor of local regulation, in the federal context requiring a "clear and manifest" intent to preempt the historic police powers reserved to the states.[122]

Exercise of substate unit police powers are most readily preempted when the matters relate to powers exercised by the Federal Government pursuant to the Natural Gas Act.[123] For example, in *AES Sparrows Point LNG, LLC v. Smith*,[124] a Maryland county amends its zoning ordinance

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[119] The issues are explored in Bruce M. Kramer & Patrick H. Martin, The Law of Pooling and Unitization § 24.04 (3d ed. 2009).

[120] *See* e.g., Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 103 O.&G.R. 56 (1988); Franks Investment Co. v. Union Pacific RR Co., 534 F.3d 443 (5th Cir. 2008).

[121] *See* Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

[122] Pacific Gas & Electric Co. v. State Energy Resource Conservation & Development Commission, 461 U.S. 190 (1983).

[123] *See* Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board, 474 U.S. 409 (1986); Schneidewind v. ANR Pipeline Co., note 120 *supra*.

[124] 470 F.Supp.2d 586, 165 O.&G.R. 287 (D.Md. 2007). For other recent cases following the Schneidewind view that the NGA occupies the field as it relates to the wholesale sales and transmission of natural gas see Northern Natural Gas Co. v. Munns, 254

that places limits on the location of LNG facilities in response to AES' application before the Federal Energy Regulatory Commission for a certificate of public convenience and necessity. As noted above, preemption under the Natural Gas Act has been found on numerous occasions. The NGA, as amended by the Energy Policy Act of 2005 (EPAct)[125] attempts to streamline the energy facility siting process relating to LNG facilities. The district court, in a case of judicial overkill, finds that the NGA as amended by EPAct, expressly preempts County regulation of LNG siting decisions, impliedly preempts by occupation of the field relating to LNG siting decisions and impliedly preempts by conflict the County decision not to allow an LNG facility to be located where the FERC has authorized its siting.[126]

Where other federal statutes are involved, however, the results are more mixed when it comes to finding federal preemption. In *Algonquin LNG v. Loqa*,[127] Algonquin operates an LNG facility in a zoning district where such uses are not allowed. The LNG facility is a valid nonconforming use which under traditional zoning doctrine may not be expanded. It seeks a Federal Energy Regulatory Commission certificate of public convenience and necessity to modify and expand its facility. The FERC issues the certificate but the City refuses to issue a building permit because it would violate its zoning ordinance. The key statute is the Natural Gas Pipeline Safety Act.[128] There are express preemption provisions that prohibit states from adopting or enforcing safety standards of interstate pipelines and for intrastate pipelines unless the state authority has been certified by the United States Department of Transportation.[129] The court finds that the City's zoning ordinance is not a safety measure and therefore the express preemption language is not applicable. But the court does find that the extensive regulation under the NGPSA relating to pipeline safety and the extensive regulation under the NGA relating to

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F.Supp.2d 1103 (N.D.Iowa 2003); Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council, 583 F.Supp.2d 259 (D.R.I. 2008).

125 Energy Policy Act of 2005, Pub.L. No. 109-58, § 311, 119 Stat. 594, 685 (2005).

126 The express preemption provision states that: "[t]he Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." 15 U.S.C. § 717b(e)(1). While preempting local control in some areas, however, EPAct also embodies the notion of cooperative federalism by allowing State participation in these types of decisions through their roles under the Clean Air Act, the Clean Water Act and the Coastal Zone Management Act. See Island East Pipeline Co., L.L.C. v. Connecticut Department of Environmental Protection, 482 F.3d 79 (2d Cir. 2006).

127 79 F.Supp.2d 49, 147 O.&G.R. 128 (D.R.I. 2000).

128 42 U.S.C. §§ 60101-60137. The current statute is a combination of two earlier statutes, the Natural Gas Pipeline Safety Act of 1979 and the Hazardous Liquids Pipeline Safety Act of 1979.

129 42 U.S.C. § 60104(c).

the transportation of natural gas occupies the field.[130] Another factor that favors a finding that the field has been occupied is the need for uniform regulation of both pipelines and LNG facilities. Furthermore the court finds a direct conflict between the FERC order authorizing the LNG facility to expand and the City requirement that it seek a variance from the no expansion of a nonconforming use regulation.

The *Algonquin LNG* court used a broad brush approach to both the occupation of the field and conflict doctrines. A closer look at how these doctrines apply that is analogous to the operational conflicts approach that Colorado takes pursuant to *Bowen/Edwards* was taken by the court in *Texas Midstream Gas Services, L.L.C. v. City of Grand Prairie.*[131] TMGS wants to build a natural gas compressor on a parcel it owns within the City. The City's zoning ordinance is amended after the plans are announced so that natural gas compressor stations are made discretionary uses that are subject to a host of performance standards including a minimum setback from adjoining parcels, fencing, sound amelioration requirements, façade requirements and architectural review. TMGS makes a facial attack on the ordinance, arguing among other grounds that the regulations are preempted under the Natural Gas Pipeline Safety Act.[132]

The court agrees with the Algonquin LNG court that the express preemption provisions of the NGPSA do not apply because the provi-

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[130] *See* also National Fuel Gas Supply Corp. v. Public Service Commission, 894 F.2d 571 (2d Cir. 1990); ANR Pipeline Co. v. Iowa State Commerce Commission, 828 F.2d 465 (8th Cir. 1987); Northern Border Pipeline Co. v. Jackson Couty, 512 F.Supp. 1261 (D.Minn. 1981). There is a tension between the occupation of the field and conflict preemption theories when it comes to federal statutes that embody some form of cooperative federalism whereby states or substate units play some role in the decision making process. *See e.g.*, Weaver's Cove Energy, L.L.C. v. Rhode Island Coastal Resources Management Council, 583 F.Supp.2d 259 (D.R.I. 2008); Islander East Pipeline Co., LLC v. Blumenthal, 478 F.Supp.2d 289 (D.Conn. 2007); Islander East Pipeline Co., L.L.C. v. Connecticut Department of Environmental Protection, 467 F.3d 295, 163 O.&G.R. 159 (2d Cir. 2006); NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 153 O.&G.R. 121 (3rd Cir. 2001).

[131] 2008 WL 5000038 (N.D.Tex.). The careful analysis shown by Judge Fitzwater in this case is also mirrored in the latest Supreme Court opinion on the preemption issue, Altria Group, Inc. v. Good, 129 S.Ct. 538 (2008) which reiterates the assumption that Congress must show a clear and manifest purpose to preempt the historic police powers of the State.

[132] Another theory used by TMGS is the "eminent domain" theory whereby an entity having the eminent domain power may not have its power thwarted through the exercise of the police power by a governmental entity. The court rejects that claim by distinguishing two Texas Supreme Court decisions that seemingly adopt that theory that had been earlier rejected by a Texas Court of Appeals. *Compare* Austin Independent School District v. City of Sunset Valley, 502 S.W.2d 670 (Tex. 1973) and City of Lubbock v. Austin, 628 S.W.2d 49 (Tex. 1982) *with* Porter v. Southwestern Public Service Co., 489 S.W.2d 361 (Tex.App. 1972, writ ref'd n.r.e.).

sions deal with matters of pipeline safety. Just as with the occupation of the field theory, the definition of the field, or in this case, the scope and extent of the express preemption language is critical. The court explores the legislative history of the NGPSA and its principal focus on the area of pipeline safety. The court distinguishes the earlier cases that had found preemption under the NGPSA because they all involved matters more directly related to public safety.[133] The court then distinguishes *Algonquin LNG* on several grounds including the regulation of LNG facilities not only under the NGPSA but also under the NGA. The zoning ordinance in *Algonquin LNG* covered many of the same areas as the FERC review of the LNG facility siting application.

Even though there is some overlap in the subject matter between the Federal and local regulation, that overlap does not make the local regulation a preempted safety ordinance. Compressor stations, being aboveground facilities, have aesthetic impacts that are not found with underground pipelines. While a number of the City discretionary permit performance standards do deal with the physical structure that will house the compressor, only those standards that attempt to regulate safety issues will be subjected to the express preemption provision. Aesthetic regulation is not covered by the NGPSA and the court by looking at the motivation behind the substate unit regulation may determine whether the regulation does indeed serve an aesthetic, rather than a safety, purpose.[134] The court looks at each of the performance standards contained in the City's zoning ordinance and concludes that the only one that is a safety standard is an iron fencing requirement. That provision is preempted and cannot be enforced but the remaining standards may be severed and enforced because they are not preempted.

V. The Constitutional Problem: Due Process and Regulatory Takings

As substate governmental units become more active in regulating and/or prohibiting oil and gas drilling and production activities, the likelihood arises that there will be an increase in the amount of constitutional challenges filed. Modern challenges, however, face the backdrop of cases decided under what I have earlier called the "sausage" approach to constitutional law.[135] In these cases, substantive due process, equal protection and regulatory takings analysis tend to be blended into one big sausage. These early cases deal with both conservation and zoning regula-

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[133] *See* cases cited in note 130 *supra*.

[134] See English v. General Electric Co., 496 U.S. 72 (1990); Pacific Gas & Electric, note 122 *supra*; Georgia Manufacture Housing Association v. Spalding County, 148 F.3d 1304 (11th Cir. 1998).

[135] Bruce Kramer, *The Pit and the Pendulum, The Pit and the Pendulum: Local GOvernmentall REgulation of Oil and Gas Activities Returns From the Grave*, 50 Inst. of Oil & Gas L. & Taxn (1999) at 4-11.

tory programs. A very perceptive and knowledgeable oil and gas academic and attorney commented on this "sausage" approach in the 1930s as follows:

> The more recent decisions clearly recognize that the power of a state to enact regulations designed to protect the public's interest in these natural resources is unaffected by the private property theory entertained in the jurisdiction enacting or promulgating the regulation. The only manner in which the nature of the landowner's property interest becomes pertinent in determining the validity of a police regulation enacted for this purpose is upon the issue of its reasonableness. If the public interest so demands, a landowner can be completely denied the privilege of producing the oil or gas beneath his land or realizing, in any way, the value thereof. However, the state has no right to interfere with private property rights to any greater extent than is reasonably necessary to accomplish the public purpose. Hence, an attack may be made upon any police regulation, designed to protect the public's interest, as unreasonable on the ground that correlative common-law property rights have been unduly interfered with and discrimination caused which are unnecessary to the accomplishment of the public purpose. It would be the duty of the court to strike down a regulation subject to this objection as an unreasonable taking of private property despite the valid purpose of the regulation . . . the question is the same: Has this common-law property right been interfered within an unreasonable manner not necessary for the accomplishment of the avowed public purpose.[136]

This excerpt was written sixteen years after the decision in *Pennsylvania Coal Co. v. Mahon*[137] that ushered in the modern era of regulatory takings jurisprudence. *Penn Coal* stands for the proposition that notwithstanding the reasonableness of the government's objectives and the means chosen to achieve those objectives, governmental regulation that "goes too far" will violate the Fifth Amendment's prohibition against the taking of private property without the payment of just compensation. Whether a regulation goes too far will depend on the application of an ad hoc balancing test, looking in part to the impact of the regulation and the public purposes served by the regulatory program. Notwithstanding *Penn Coal*'s separation of the regulatory takings and substantive due process claims, A. W. Walker's article reflected at the time the two leading Supreme Court decisions that antedated *Penn Coal* and which applied the "sausage" approach to determining the constitutional validity of police

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136 A. W. Walker, Jr., *Property Rights in Oil and Gas and Their Effect Upon Police Regulation of Production*, 16 U.Tex.L.Rev. 643, 650-51 (1938)(footnotes omitted).

137 260 U.S. 393 (1922).

power regulation affecting oil and gas production activities.[138] These early decisions rely, in part, on the assumption that the owner of the right to produce oil and gas does not have a corporeal interest in the oil and gas in the ground. That is not the case as a majority of the major producing states have now adopted the "ownership in place" theory that gives to the mineral owner a corporeal interest in the minerals, subject of course to the rule of capture.[139] The choice of ownership regimes, however, is not critical to either substantive due process or regulatory takings claims. Governmental regulation of oil and gas drilling and production activities should be judged under the Fifth or Fourteenth Amendments regardless of the choice of ownership regime. State ownership definitions, however, clearly have an impact because the Federal Constitution does not create property rights, it merely recognizes state-created property rights.[140] Regulating an activity that does not constitute a recognized or protected property interest does not implicate either the Fifth or Fourteenth Amendments. Just as the state may prohibit a property owner from operating a nuisance, a state may prohibit a mineral owner from engaging in activities that its ownership interest does not authorize.

The Early Approach

Decisions from the pre-1950 period reflect a sausage grinder approach to constitutional challenges to municipal regulations affecting or prohibiting oil and gas activities. The courts tended to combine substantive due process analysis in the *Lochner*[141] mode, equal protection analysis and takings analysis. Nowhere is the sausage made more palatable for regulatory bodies than in both the district court and court of appeals decisions in *Marrs v. City of Oxford.*[142] Both opinions reject the mineral owner's claim that the mandatory pooling provisions, as well as the other regulations, deprive them of a vested property interest. Relying on *Euclid* and ignoring *Mahon* the court focuses on the reasonableness of the city's actions. In addition, the court focuses on the nature of the incorporeal nature of the ownership of oil and gas, a canard that infects both the *Ohio Oil* and *Walls* decisions. As noted above, even if one does not own the corporeal oil and gas, one does own the right to capture it, which is what is being regulated by the city. What is relevant is how the

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138 *See* Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900). *See also* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) and Brown v. Spilman, 155 U.S. 665 (1895).

139 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* § 203 (2007).

140 Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

141 Lochner v. New York, 198 U.S. 45 (1905).

142 Marrs v. City of Oxford, 24 F.2d 541 (D.Kan. 1928), *aff'd,* 32 F.2d 134 (8th Cir. 1929), *cert. denied,* 280 U.S. 573 (1929) (citing Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900) and Walls v. Midland Carbon Co., 254 U.S. 300 (1920)).

state defines the property interest, be it corporeal or incorporeal. If the interest is subject to the correlative rights of other property interest owners in the common source of supply, there can be no taking of property if the legislature merely seeks to protect each individual owner's correlative rights. All property rights are held subject to the exercise of the police power. The court observed:

> Necessarily these regulations will encroach, when the power is exercised, on private rights; but that does not render them void. The power has its limitations and when submitted for judicial review it must appear that its exercise appropriately affords protection to the public against threatened evils. Arbitrary and unreasonable regulations, clearly ineffective in accomplishment of the claimed public interest, will be stayed; but the presumption is in favor of a law or ordinance passed in the exercise of the power, until the contrary is shown.[143]

A more clear statement of classic substantive due process analysis would be hard to come by. Thus, even 7 years after *Mahon* the courts apparently did not understand the monumental change it had wrought.

The Oklahoma Supreme Court followed the *Marrs* approach in *Patterson v. Stanolind Oil & Gas Co.*[144] This case involved a well spacing and compulsory pooling statute, that required royalty owners within a spacing unit to have their interests pooled and thus diminished based on a surface acreage formula. The royalty owner of a drill site tract argued that the reduction in his royalty violated his federal and state constitutional takings, due process and equal protection rights. The court, however, followed the sausage grinder, pre-*Mahon* approach by focusing totally on the police power of the state without looking at the diminution in value to the private property interest. The court observed:

> . . . the lawful exercise of the state's power to protect the correlative rights of owners in a common source of supply of oil and gas is not a proper subject for the invocation of the provisions of either the State or Federal Constitution which prohibit the taking of property without just compensation or without due process of law. . . As we view it, the property here involved has not been taken or confiscated: its use has merely been restricted and qualified. This does not violate the due process clause of either Constitution. And this would be true even though the plaintiff were able to prove a distinct loss to himself through the operation of the statutes putting said police power into force and effect.[145]

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143 Marrs, 32 F.2d at 139.

144 Patterson v. Stanolind Oil & Gas Co., 1938 OK 138, 182 Okla. 155, 77 P.2d 83, *appeal dismissed*, 305 U.S. 376 (1939).

145 77 P.2d at 89. The court also relied on a Texas Supreme Court decision finding the

While relying in part on the correlative rights definition of a property interest, the Oklahoma Supreme Court's decision was clearly based on a pre-*Mahon* analysis of regulatory takings claims. Although I believe that well spacing and compulsory pooling programs would meet a *Penn Coal* or *Lucas* challenge, the major oil and gas conservation programs did not have to undergo that type of analysis in their formative years.[146]

Similar analyses were forthcoming in constitutional challenges to municipal zoning ordinances that affected oil and gas operations. For example, in *Cromwell-Franklin Oil Co. v. Oklahoma City*,[147] an oil and gas lessee challenged the validity of an ordinance restricting oil and gas development in a newly-annexed area. Upon annexation the land was zoned in a residential district. Oil and gas drilling activities were limited to those areas zoned for industrial uses. The lessee argued that the zoning ordinance interfered with his vested property right to drill, relying in large part on *Penn Coal*. He also argued that the ordinance was unreasonable since the tract in question was largely in a rural area while some of the industrial zoned districts had residences included therein.[148] He also asserted that his drilling activities can be placed so as not to be close to any existing or planned residence.

The court rejected all of these arguments, relying in large part on *Euclid* and *Hadachek v. Sebastian*.[149] The sole issue for the court was the reasonableness of the city's action in wanting to prevent oil and gas development from occurring in portions of the city that are devoted to, or will be devoted to, residential uses. The court dismissed, almost without note the claim that the lessee had a property interest to drill for oil and gas that could not be interfered with by the exercise of the zoning power. Ignoring the *Mahon* balancing test which would have required the court to look at the effect of the regulation on the lessee's property interest, the court affirmed the application of the zoning ordinance to the lessee's right even where the lease was executed prior to the time the land was annexed into the city.

The Oklahoma Supreme Court applied a similar analysis in upholding the general validity of the Oklahoma City zoning ordinance that pro-

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Dallas zoning ordinance constitutional, using the uni-dimensional approach of focusing solely on the validity of the government's actions without looking to the loss in value and restrictions placed on the private property interest. *Id.* at 89-90 citing Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475 (1934).

146 For a similar treatment of Oklahoma's ratable take statute, which was applied to set minimum takes and prices, see Cities Service Gas Co. v. Peerless Oil & Gas Co., 1950 OK 4, 203 Okla. 35, 220 P.2d 279, *aff'd*, 340 U.S. 179 (1950).

147 Cromwell-Franklin Oil Co. v. Oklahoma City, 14 F.Supp. 370 (D.Okla. 1930).

148 The Oklahoma City ordinance is a classic Euclidean zoning ordinance which allows lesser intensive uses in more intensive use districts. 14 F.Supp. at 373-4.

149 Hadachek v. Sebastian, 239 U.S. 394 (1915).

hibited oil and gas drilling in various districts throughout the city in *Beveridge v. Harper & Turner Oil Trust.*[150] An oil and gas lessee whose lease was located only 900 feet from the district boundary line where drilling was allowed and only 600 feet from the boundary line where compulsory pooling was authorized challenged the zoning ordinance as a taking of his property interest. The court made several powerful statements regarding the power of government to restrict private property interests without relying on the non-ownership doctrine. The court observed:

> The right of an individual to use his property as he pleases is a qualified as distinguished from an absolute right. It is at all times circumscribed by the authority of the state under its police power to fairly and reasonably restrict the use of private property to the end that the public health, welfare and safety will be promoted and such uses of private property prevented as would injuriously affect the rights of others in the use and enjoyment of their property. This power is an attribute of sovereignty and rests inherently with the state. . .[151]

The court further added that the police power was not merely limited to regulations prescribing how oil and gas was to be produced, but whether it was to be produced at all. The Court applied a form of reciprocal advantage argument regarding regulatory takings that had been espoused by Justice Brandeis in dissent in *Penn Coal.* The fact that others were being restricted was a form of compensation and limited the court's ability to find such actions unconstitutional. This statement was all the more surprising given the fact that the owner's land was located so close to the drilling district boundary line that drainage was undoubtedly going to occur so that the owner would essentially lose all of its oil and gas through the operation of the rule of capture to the adjoining owners.

Another facet of the regulatory takings doctrine deals with the concept of "vested rights." A person having a vested right to develop is said to be immune from later changes in the regulatory scheme.[152] Such an

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[150] Beveridge v. Harper & Turner Oil Trust, 1934 OK 398, 168 Okla. 609, 35 P.2d 435. The year before *Beveridge*, the court applied a similar analysis in upholding a decision not to issue a well drilling permit to an operator where the well would be located in a no-drilling buffer zone, even though there is evidence that the oil and gas would be drained to an adjacent operator. Anderson-Kerr, Inc. v. Van Meter, 1933 OK 156, 162 Okla. 176, 19 P.2d 1068.

[151] 35 P.2d at 439.

[152] The early judicial decisions on vested rights often had late vested rights rules, requiring the developer to obtain a building permit or the last required permit before vesting. *See e.g.*, Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976), *cert. denied*, 429 U.S. 1083 (1977). The cases are collected in Dan Mandelker, Land Use Law, note 27 *supra* at §§ 6.15-6.16. The cases often reflect a later vested rights rule than the last discretionary

argument was made as it applied to the bonding requirement imposed by Oklahoma City in *C.C. Julian Oil & Royalties Co. v. City of Oklahoma City.*[153] The oil and gas operator complained that the order enjoining the continued drilling of a well came only days before the well was to be completed and thus interfered with its vested right to complete the well. The City's bonding requirement was a valid exercise of the police power. The operator's failure to comply with the ongoing regulatory requirements cannot be excused by the fact that it may have owned the oil and gas interest prior to the effective date of the municipal ordinance. The court stated: " . . . a permit does not exempt applicant from the operation of subsequent ordinances and regulations legally enacted by the corporation in the exercise of its police powers."[154] Where the city took an appropriate period of time to adopt a comprehensive zoning scheme, it may enact a temporary moratoria or ordinance designed to effectuate the purposes of the proposed zoning ordinance.[155] The role of the court was limited in reviewing the validity of a police power enactment clearly designed to protect the public health, safety, morals or general welfare. Courts will not easily exempt from police power regulations, private actors whose actions may threaten the public health.

The high point for zoning regulation of oil and gas operations was reflected in *Marblehead Land Co. v. City of Los Angeles.*[156] Marblehead was the lessor of a 291 acre tract located on the outskirts of the City of Los Angeles. The lessee had erected a derrick on the lease when the city sought to enjoin further operations since their recently enacted zoning ordinance did not allow such a use in a residential district. The nearest existing home to the derrick was some 1130 feet away. Evidence was adduced at trial showing the hazards associated with oil and gas drilling and production operations. Further testimony was introduced showing the deleterious impact of oil and gas wells on residences and other uses. The owner argued that the zoning ordinance's prohibition against drilling was no different than the state prohibition against mining which caused subsidence in *Penn Coal.* While noting that unlike traditional businesses

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permit rule of *Avco*. Increasingly, state legislatures are enacting vested rights statutes that provide for an earlier vested rights rule. *See e.g.*, Tex.Loc. Gov't Code §§ 245.001 et seq. (Vested rights attach at time when the initial permit application is filed).

153 1934 OK 88, 167 Okla. 384, 29 P.2d 952. *See also* Hud Oil & Refining Co. v. City of Oklahoma City, 1934 OK 94, 167 Okla. 457, 30 P.2d 169.

154 29 P.2d at 953.

155 *See* McCurley v. City of El Reno, 1929 OK 306, 138 Okla. 92, 280 P. 467. The United States Supreme Court has held that a temporary moratorium does not constitute a regulatory taking even if it lasts for over 2 years. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 533 U.S. 302 (2002).

156 Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir.), *cert. denied*, 284 U.S. 634 (1931).

which can move, oil and gas extraction activities must take place where the oil and gas is located.[157] The court observed:

> If there is any difference between the taking of the unearned increment by zoning ordinances and the taking of the inherent value of the soil or its contents, it arises from the fact that it might be deemed unreasonable to prevent a man from developing natural gas upon his property and reasonable to prohibit the erection of gas works, because in the form former or latter? case gas works can be erected in other suitable zones or districts in the city, while in the case of natural gas it must be produced from the land in which it exists. . . In either event, however, there can be no question of the inherent right of the city to control or prohibit such production, provided it is done reasonably and not arbitrarily.[158]

Thus the argument is still couched in terms of reasonableness even where a clear takings claim was made. When you go further and add *Euclid's* strong presumption of validity and fairly debatable scope of judicial review, attacking zoning ordinances prohibiting oil and gas development in residential districts became nearly impossible. The court also rejected a vested rights claim notwithstanding the expenditure of substantial sums by the oil and gas lessee at a time when the acreage was outside of the purview of the zoning ordinance. But the court found no vested right to the existing state of zoning, otherwise no zoning amendments or boundary changes would ever be valid. One cannot have a vested right to existing zoning, but one can have a vested right upon either the issuance of a permit or the expenditure of substantial sums in reliance on the extant zoning. The court summarily dismissed the owner's claims and concludes:

> ...but a mere change of policy or of legislation, however unfortunate the result may be to appellants, does not justify the courts in declaring void an ordinance exercising legitimate police power. The loss suffered by the appellants by reason of this change in legislative policy is no more a taking of their property than is the loss resulting to them by reason of being deprived of the right to develop the oil on their property or the right to use their land for other than residence purposes.[159]

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[157] This argument is regularly made in mineral cases, although starting with Hadachek v. Sebastian, 239 U.S. 394 (1915), it has not been very persuasive, except perhaps in the non-conforming use cases. Kramer, Local Land Use Regulation, note * *supra* at 77-84.

[158] 47 F.2d at 532.

[159] *Id.* at at 534. A dissenting judge would have followed *Mahon* and found that the prohibition against drilling "went too far" insofar as it affects the rights of the mineral lessee and royalty owner. *Id.* at 537 (Sawtelle, J. dissenting).

Similar results were reached in other jurisdictions relying on *Euclid* and its highly deferential scope of judicial review of local zoning decisions.[160]

It was not only the early cases which found no regulatory taking in the application of a zoning ordinance to a mineral owner which had the effect of prohibiting all drilling operations over a known reservoir. In *Blancett v. Montgomery*,[161] the Kentucky Court of Appeals turned back a challenge to a zoning ordinance that totally prohibited oil and gas drilling operations in residential zones. The oil and gas lessee of a tract of undeveloped land located adjacent to a reservoir being produced from wells located outside of the city's boundaries, argued that the total prohibition amounts to a regulatory taking by preventing the lessee from producing the hydrocarbons which are being drained to the already-producing wells. Without citing *Mahon* and relying on *Marblehead Land* the court applied the general substantive due process reasonableness test and found no regulatory taking without a mention of the effect of the zoning ordinance on the property interests of the mineral owner.

A similar approach was taken by a California court in a constitutional attack on the Los Angeles County zoning and oil drilling ordinances in *Friel v. County of Los Angeles.*[162] The county ordinance only authorized oil and gas drilling in industrial zones as a matter of right. The county retained some flexibility and acknowledged that oil and gas reservoirs do not necessarily follow the boundaries of industrial zones by allowing discretionary permits to be issued to allow such drilling in other zones where appropriate.[163] In *Friel* the oil and gas lessee sought variances to drill in residential zones in order to produce oil that the lessee was claiming was being drained from nearby wells located in an industrial zone. While the lots in question were residentially zoned, the area in general was surrounded by industrial uses. In addition, the lessee urged that oil and gas was being drained from under his tract to the adjacent wells. Notwithstanding the allegations of drainage and the assertion that the residential zoning district was an "island" amidst an ocean of indus-

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[160] *See e.g.*, Friel v. County of Los Angeles, 172 Cal.App.2d 142, 342 P.2d 374, 11 O.&G.R. 155 (1959); Wood v. City Planning Commission, 130 Cal.App.2d 356, 279 P.2d 95 (1955); Blancett v. Montgomery, 398 S.W.2d 877 (Ky. App. 1966); Van Meter v. Westgate Oil Co., 1934 OK 287, 168 Okla. 200, 32 P.2d 719.

[161] Blancett v. Montgomery, 398 S.W.2d 877 (Ky.App. 1966).

[162] Friel v. County of Los Angeles, 172 Cal.App.2d 142, 342 P.2d 374, 11 O.&G.R. 155 (1959).

[163] The discretionary permit system was attacked after several permits were issued in No Oil, Inc. v. City of Los Angeles, 196 Cal.App.3d 223, 242 Cal.Rptr. 37 (1987, cert. denied). The operator not only had to seek a discretionary permit but also had to prepare a state environmental impact report before the City Council could create a drilling district and issue a drilling permit.

trial uses, the court found that the ordinance as applied is neither "confiscatory, arbitrary, oppressive, unreasonable or void. . . "[164]

While a clear majority of courts were upholding both per se and as applied constitutional attacks against municipal zoning ordinances that restricted or prohibited the drilling of oil and gas wells, a number of judicial decisions invalidated, typically on an as applied basis, municipal zoning decisions. For example, in *City of North Muskegon v. Miller,*[165] the Michigan Supreme Court essentially "second-guessed" a municipal zoning decision to place the plaintiff's land in a zone where oil and gas drilling was prohibited. The court found that after a careful inspection of the zoning map, the city's decision to place the land in question in a residential district was unreasonable. The land was more suited to industrial development and the location of an oil and gas drilling operations would not cause grave negative externalities to the surrounding neighborhood. This type of judicial interference with legislative line-drawing was foreshadowed by the Supreme Court of the United States' decision in *Nectow v. City of Cambridge,*[166] which two years after *Euclid* invalidated a municipal zoning ordinance on an as applied basis, in what can only be described as a less deferential view as to what constitutes the general welfare that is served by a zoning ordinance. As noted earlier, the prevailing view in the United States is that of *Euclid* and not *Nectow* insofar as judicial review of "line-drawing" contests are concerned.

In *Nalbone v. Borough of Youngsville,*[167] an oil and gas owner challenged the validity of two Borough ordinances, one requiring that a discretionary permit be issued before any oil and gas drilling or reworking operations be conducted and the second requiring all wells to be located in "oil production districts" as designated on the official zoning map. Because the trial court, for unknown reasons, did not take any evidence as to whether the application of the ordinance to the plaintiff's property constituted a regulatory taking, the issue would be remanded to the trial court so that a proper record may be created that would support the trial court's finding that the ordinances were not confiscatory. The court merely stated that the ordinance may be "so restrictive" as to be unconstitutional, but left to the trial judge the determination of that issue.

In *Braly v. Board of Fire Commissioners,*[168] the takings argument was successfully made as the court ignored the *Marblehead Land* ap-

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[164] 342 P.2d at 383. The court relies on *Marblehead Land*, note 126 *supra* and distinguishes the several California cases which had found oil drilling ordinances invalid as applied. *See* note 30 *supra*.

[165] City of North Muskegon v. Miller, 249 Mich. 52, 227 N.W. 743 (1929).

[166] Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[167] Nalbone v. Borough of Youngsville, 104 Pa.Cmwlth. 623, 522 A.2d 1173 (1987).

[168] Braly v. Board of Fire Commissioners, 157 Cal.App.2d 608, 321 P.2d 504, 8 O.&G.R. 849 (1958).

proach and focused on the true impact that drilling prohibitions have on oil and gas owners. The owners of a ½ acre tract of land challenged a board regulation which prohibited the drilling of oil wells within 75 feet of any existing public street or within 50 feet of the boundary of an existing drilling unit. The tract was so situated that no drillsite could be located that met the dual spacing requirements. A takings claim was made by the owner. While California is a non-ownership jurisdiction, the court accurately noted that the mineral owner has a property interest in searching for and reducing to possession oil and gas. That right to search for oil was just as valuable a property right as the right that attaches once the oil was captured.[169] While a well spacing regulation may be valid per se, an as applied attack has to be reviewed in light of the individual circumstances of the case. Here the municipal ordinance did not provide for a compulsory pooling of small tract owners. Even if voluntary pooling was theoretically available to the small tract owner, that would not meet the constitutional burden imposed by the takings clause. Where a small tract is surrounded by existing producing properties, a well spacing ordinance that does not provide for compulsory pooling cannot be applied to deny the oil and gas owner the right to drill.

One pre-*Euclid* decision might have been the harbinger of things to come had it not been for the *Euclid* emphasis on judicial deference to legislative zoning decisions. In *Pacific Palisades Association v. City of Huntington Beach,*[170] the City enacted an ordinance prohibiting the drilling of oil wells in residentially zoned districts. Plaintiff owned some acreage located within that district which was also located over a proven oil-bearing reservoir. Relying in part on *Penn Coal,* the court observed:

> The effect of the ordinance, absolutely prohibiting the maintenance or operation of oil wells within certain designated limits of the city of Huntington beach, is to deprive the owners of real property within such limits of a valuable right incident to their ownership. While the use to which one may put his property may be restricted or regulated by the state, in the exercise of its police power, so far as it may be necessary to protect others from injury from such use, it is elementary that the enjoyment of the property cannot be interfered with or limited arbitrarily.[171]

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[169] The court relies heavily on Bernstein v. Bush, 29 Cal.2d 773, 177 P.2d 913 (1947) which invalidates a state well spacing rule which does not have a pooling component.

[170] Pacific Palisades Association v. City of Huntington Beach, 196 Cal. 211, 237 P. 538 (1925).

[171] 237 P. at 539. Note that the court still talks about arbitrary police power regulation, rather than police power regulation which amounts to a taking, as Justice Holmes had done in *Mahon.* The court relies on a hard rock mining case, In re Kelso, 147 Cal. 609, 82 P. 241 (1905) which invalidates a total prohibition against quarrying. See Kramer, Local Land Use Regulation, note * *supra* at 46-51. The court does not cite Hadachek v. Sebastian, 239 U.S. 394 (1915).

The first major post-*Penn Coal* challenge to oil and gas conservation legislation was heard by the Supreme Court in 1932. In *Champlin Refining Co. v. Corporation Commission*[172] the market demand prorationing regulatory program was attacked by an oil producer asserting that the program was "repugnant to the due process and equal protection clauses..."[173] Simply asserted the plaintiff "insists that it has a vested right to drill wells and to take all the natural flow of oil and gas therefrom so long as it does so without physical waste and devotes the production to commercial uses."[174] As had the earlier cases, the court relied on the state's adoption of the non-ownership and correlative rights doctrines that limit the nature or extent of one's property ownership of oil and gas. The court relied on potential damage to the common source of supply by the premature dissipation of reservoir energy as a limiting factor to the plaintiff's property interest. Thus it simply concluded that the prorationing system which limited the production from Champlin's wells was not an "arbitrary interference with private business or plaintiff's property rights. . . "[175]

In *Bandini Petroleum Co. v. Superior Court,*[176] producers of oil and gas challenged the enforcement of a California statute that made unlawful the unreasonable waste of natural gas. The state had ordered the producer to reduce its daily production of gas from 57,120 MCF to 27,187 MCF. The court relying on the pre-*Mahon* decisions had no difficulty concluding that no constitutional rights were violated in the state's efforts to adjust the correlative rights of those owners who shared in the common source of supply. The reasonableness of the injunction was a question of fact which the Supreme Court would not try anew. The state court opinion, which was affirmed by the Supreme Court was even more explicit in its reliance on the correlative rights approach to ownership to deny that the state regulation constituted either a taking of property without just compensation or a due process violation. The court observed:

> It is the coexistence of these rights (rule of capture, ed.) which authorizes the state to make use of its legislative power. When the rights of one impinge upon the rights of others the state may interpose for the purpose of adjusting and regulating the enjoyment of those rights.[177]

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172 Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932).

173 286 U.S. at 232.

174 286 U.S. at 233.

175 *Id.* at 234 relying in part on Ohio Oil, 177 U.S. 190 (1900) and Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

176 Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 (1931).

177 Bandini Petroleum Co. v. Superior Court, 110 Cal.App. 123, 293 P. 899, 901 (1930), *aff'd*, 284 U.S. 8 1931).

Thus the state court injunction enforcing the administrative order limiting production so as to prevent waste was affirmed

A similar challenge was made to a ratable take and market proration order of the Railroad Commission with much different results in *Thompson v. Consolidated Gas Utilities Corp.*[178] A daily production limit was set for the East Panhandle Field, the West Sweet Panhandle Field and the West Sour Panhandle Field. The total daily allowable then was allocated to individual wells and the pipeline purchasers were required to purchase ratably from those wells. Plaintiffs, under the order, would have to limit production from their own wells and purchase production from other wells in order to fulfill their contract delivery obligations. This was the first Supreme Court decision dealing with an ownership-in-place jurisdiction. While noting that the common law property interests in oil and gas did not provide a remedy against depleting the common source of supply,[179] the court observed that the Legislature has been regulating and prohibiting wasteful conduct since 1899. The lower court, after examining the facts, concluded that the order was not intended to prevent waste, but was merely designed to adjust the correlative rights of the parties in the common source of supply. The Supreme Court applies a *Lochner* substantive due process approach and essentially second guessed the Legislature's and Commission's objectives in regulating takes from independent natural gas producers. The court, however, while striking down the statute and the Commission order, confirmed the general constitutional validity of conservation regulation when it stated:

> Either production greater than the demand or use for an inferior purpose would necessarily involve overground waste of gas. The manner, place or extent of production might lead to underground waste. We assume that the prohibition of any wasteful conduct, whether primarily on behalf of other owners of gas in the common reservoir, or because of? the public interests involved, is consistent with the Constitution of Texas and that of the United States, and that to prevent waste production may be prorated. We assume, also, that the State may constitutionally prorate production in order to prevent undue drainage of gas from the reserves of well owners lacking pipe line connections. If proration were lawfully applied for any such purposes, the fact that thereby other private persons would incidentally and gratuitously obtain important benefits would present no constitutional obstacle.(footnotes omitted)[180]

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178 Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937).

179 300 U.S. at 68 citing Comanche Duke Oil Co. v. Texas Pacific Coal & Oil Co., 298 S.W. 554 (Tex.Comm.App. 1927).

180 300 U.S. at 76-77.

Thus while invalidating the order before it the court reaffirmed its sausage grinder approval for conservation regulation even though it could not rely on the non-ownership theory to bolster the view that property interests are not being taken.

The Modern Regulatory Takings Approach

The following excerpt from the author's treatise[181] gives a thumbnail sketch of modern takings jurisprudence that has evolved since *Penn Coal* was decided in 1922:

> While the modern takings era dates back to 1922,[182] most oil and gas conservation programs that had a direct impact on private property rights had already received the constitutional blessing of the Supreme Court.[183] In post-1922 cases, both the Supreme Court of the United States and various state supreme courts tended to combine the due process and takings analysis while upholding the validity of various state oil and gas conservation regulatory programs.[184]
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> . .
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> Modern takings jurisprudence begins with *First English Evangelical Lutheran Church v. County of Los Angeles*,[185] where the Supreme Court of the United States firmly held that if a regulation went so far

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[181] 2 Bruce M. Kramer & Patrick H. Martin, *The Law of Pooling and Unitization* §24.01[2] (2007).

[182] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), is generally considered the beginning of modern takings jurisprudence. The material that follows is only intended to be a brief introduction to the regulatory takings conundrum which has confounded much greater and lucid minds than me. *See e.g.*, Jan Laitos, *Law of Property Rights Protection* (Aspen Law & Business 1999); William Fischel, *Regulatory Takings* (1995); Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); Joseph Sax, *Private Property and Public Rights*, 81 Yale L.J. 149 (1971); Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv.L.Rev. 1165 (1967).

[183] *See e.g.,* Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).

[184] *See e.g.*, Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932).

[185] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). One of the issues raised by *First English* was whether there would be a "temporary" taking in the inevitable delay between applying for a land use permit and the eventual decision. The Supreme Court specifically eschewed holding that normal delays in obtaining building permits, changes in zoning ordinances, and the like would constitute a taking. *Id.* at 321. A similar argument was made by an unleased mineral owner who asserted that a delay in a compulsory pooling hearing, followed by a dismissal of the application, constituted a taking of his property interest. White v. Amoco Production Co., 1985 OK 55, 704 P.2d 470, 85 O.&G.R. 616. The court concluded that the property owner's interests were not taken during the pendency of the compulsory pooling hearing process. The mineral estate could have been leased at any time, subject to the Commission's exercise of its power to pool. The mere fact that potential lessees might be scared off by the pendency of the pooling order does not constitute a taking of property interests. *Id.* at 473.

as to constitute a taking of property under the Fifth Amendment, then compensation was due the property owner. What ensued following *First English* may aptly be described as attempts to categorize takings cases. It is clear that if the government physically occupies a property interest, there will always be a taking, no matter how small the physical occupation.[186] Likewise, where the government has deprived the owner of all beneficial use of the property interest, there is a per se taking.[187] In addition, there are special rules that apply to governmental permits requiring the transfer of property interests to the government in exchange for permit approval.[188] If one cannot fit within one of the categories, presumably one is back to a balancing test, that is, by judicial admission, ad hoc in nature.[189] After *Agins v. City of Tiburon*,[190] it was presumed that one could show a regulatory taking if one could prove that the regulation did not substantially advance a legitimate state interest. In *Lingle v. Chevron U.S.A., Inc.*,[191] however, the Supreme Court treated the *Agins* substantially advance test as dicta and said that such a regulation would not violate the Takings Clause. Finally, there are procedural rules, most notably the requirement that a final government decision be rendered in order to make a takings challenge ripe, that affect this type of litigation.[192]

The absence of oil and gas cases applying modern takings jurisprudence, rather than the sausage grinder approach, has been changing in recent years. The two major categories of regulatory takings claims are usually referred to by the name of the Supreme Court case that announced the test. The *Lucas* total taking test provides, in a greatly simplified definition, that if the government removes all economically viable or

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186 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The inverse condemnation cases dealing with the flooding of the surface estate which prevents oil and gas drilling activities may, under some circumstances, be treated as a physical invasion. Tarrant County Water Control & Improvement Dist. #1 v. Haupt, Inc., 854 S.W.2d 909, 119 O.&G.R. 580 (Tex. 1993).

187 Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

188 Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

189 Keystone Bituminous Coal Association v. DiBenedictis, 480 U.S. 470 (1987); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

190 447 U.S. 255 (1980).

191 544 U.S. 528 (2005).

192 Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997); Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985). There may be statute of limitations issues as well. Trail Enterprises, Inc. v. City of Houston, 957 S.W.2d 625, 138 O.&G.R. 454 (Tex.App.[14th Dist.] 1997, writ ref'd), *cert. denied* 525 U.S. 1010, *reh'g denied* 525 U.S. 1172 (1999).

feasible uses from a tract of land, that is a per se taking.[193] The *Penn Central* ad hoc balancing test applies to all other regulatory takings claims and requires the court to balance the loss in the owner's reasonable investment-backed expectations with the government's interest in the regulation.[194] It is not surprising that regulation of oil and gas operations can lead to claims that a *Lucas* per se taking has occurred, not only because of the result should the litigant be successful but because of the nature of the regulation of oil and gas operations.

A key issue in determining whether a regulatory taking has occurred under either the *Lucas* or *Penn Central* tests is the so-called "denominator" or the aggregate/disaggregate problem.[195] What the court must do before it makes a regulatory takings determination is to define the nature of the property interest allegedly taken. This is especially true where mineral interests are involved. The predominant test now in use applies the "aggregate" or "parcel as a whole" theory, taking into consideration the economic expectations of the property owner.[196] Factors the courts will look at to determine what the "whole" parcel entails, includes the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the regulated lands enhance the value of the remaining lands.[197]

In *Animas Valley Sand & Gravel Co. v. Board of County Commissioners*,[198] the Colorado Supreme Court provided a model example of how the "aggregate" test should be applied in a minerals context. A county zoning ordinance prohibited certain types of mining activities. Some of the lands owned by the plaintiff fell within the no-mining districts. The court determined that there is neither a *Lucas* nor a *Penn Central* taking because the entire parcel owned by the plaintiff included areas where economically viable uses could take place. There are cases that

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193 Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

194 Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). Penn Central is a refinement of the *Penn Coal* balancing test.

195 Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 (2002); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992); Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 500-01 (1987); Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 130-31 (1978).

196 See cases cited in note 199 *infra*. *See also* Cane Tennessee, Inc. v. United States, 57 Fed.Cl. 115, 121, 161 O.&G.R. 232 (2003), *on reconsideration*, 62 Fed.Cl. 481, 161 O.&G.R. 269 (2003); Forest Properties, Inc. v. United States, 177 F.3d 1360, 1365 (Fed.Cir.), *cert. denied*, 528 U.S. 951 (1999).

197 Cane Tennessee, Inc. v. United States, note 196 *supra*, 57 Fed.Cl. at 121 (2003) citing Ciampitti v. United States, 22 Cl.Ct. 310, 318 (1991).

198 38 P.3d 59, 153 O.&G.R. 222 (Colo. 2001), *rev'g*, 8 P.3d 522, 148 O.&G.R. 291 (Colo.App. 2000).

agree with this approach,[199] and cases that disagree.[200] It is not surprising that cases that apply the aggregate approach are much less likely to find either a *Lucas* or *Penn Central* taking than those that apply the disaggregate approach.

The aggregate/disaggregate problem also arises where there is activity prior to the imposition of a regulation that either diminishes or totally negates the ability of the mineral owner to engage in further production activities. In *RIth Energy, Inc. v. United States*,[201] the owner of a revoked coal mining permit argued that because it was no longer able to mine any coal, it had successfully asserted a *Lucas* total taking. The court rejected that view, concluding that where has been substantial production prior to the permit revocation, that earlier production would defeat a *Lucas* takings claim and required the court to apply the *Penn Central* approach.

As discussed earlier, many zoning ordinances require the issuance of a discretionary permit before oil and gas drilling activities can be conducted. It is typical for zoning ordinances to authorize the imposition of conditions upon the issuance of a discretionary permit in order to enhance the general welfare. In *Mid Gulf, Inc. v. Bishop*,[202] the owner of the surface and mineral estates challenged the City of Lansing's decision to not issue a building permit and for imposing onerous conditions before

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[199] See Cane Tennessee, Inc. v. United States, note 162 *supra*; Forest Properties, Inc. v. United States, 177 F.3d 1360 (Fed.Cir. 1999), *cert. denied* 528 U.S. 951 (2002); Jentgen v. United States, 228 Ct.Cl. 527, 657 F.2d 1210 (1981), *cert. denied* 455 U.S. 1017 (1982); Deltona Corp. v. United States, 228 Ct.Cl. 476, 657 F.2d 1184 (1981), *cert. denied* 455 U.S. 1017 (1982); Karam v. State Department of Environmental Protection, 308 N.J.Super. 225, 705 A.2d 1221 (1998), *aff'd*, 157 N.J. 187, 723 A.2d 943 (1999), *cert. denied,* 528 U.S. 814 (1999); K & K Construction, Inc. v. Department of Natural Resources, 456 Mich. 570, 575 N.W.2d 531 (1998); State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners, 2007-Ohio-5022, 115 Ohio St.3d 337, 875 N.E.2d 59; Machipongo Land & Coal Co. v. Commonwealth, 569 Pa. 3, 799 A.2d 751, *cert. denied,* 537 U.S. 1002 (2002); Zealy v. City of Waukesha, 201 Wis.2d 365, 548 N.W.2d 528 (1996).

[200] *See* Loveladies Harbor v. U.S., 28 F.3d 1171 (Fed.Cir. 1994) ; Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560 (Fed.Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed.Cir. 1991); State ex rel. R.T.G., Inc. v. State, 2002-Ohio-6716, 98 Ohio St.3d 1, 780 N.E.2d 998, 160 O.&G.R. 667 (2002), *reh'g denied*, 2003-Ohio-644, 98 Ohio St.3d 1457, 783 N.E.2d 517, *motion granted by*, 2004-Ohio-449, 101 Ohio St.3d 1451, 802 N.E.2d 1125. The underlying rationale of the R.T.G. decision was undermined by State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners, 2007-Ohio-5022, 115 Ohio St.3d 337, 875 N.E.2d 59 which held where there was a unified estate you did not look to the mineral estate alone to determine if there was a total *Lucas* taking.

[201] 44 Fed.Cl. 108, 146 O.&G.R. 193 (1999), *reconsideration denied,* 44 Fed.Cl. 366 (1999), *aff'd,* 247 F.3d 1355, 156 O.&G.R. 252 (Fed.Cir. 2001), *reh'g denied,* 270 F.3d 1347, 156 O.&G.R. 268 (Fed.Cir. 2001), *cert. denied,* 536 U.S. 958 (2002).

[202] There are two opinions relevant to our discussion in this case, one reported, the other unreported. Mid Gulf, Inc. v. Bishop, 1992 WL 223772 (D.Kan. 1992), 792 F.Supp. 1205, 120 O.&G.R. 480 (D.Kan. 1992).

an oil and gas drilling permit would be issued. At the time that Mid Gulf sought a discretionary permit to drill, no oil and gas drilling ordinance was in place. Two other drilling permits had been issued by the City on an ad hoc basis prior to the time of Mid Gulf's application. Two days after receiving the drilling permit application, the City enacted a 90 day moratorium on the issuance of discretionary permits for oil and gas drilling operations. During the 90 day period, the City conducted a series of public hearings and adopted a drilling ordinance which imposed, at a minimum, the following conditions on the issuance of a drilling permit: 1. Obtaining a $ 100,000 surety bond, 2. Obtaining a $ 2,000,000 general liability insurance policy, 3. Prohibiting maintenance of any tank battery within city limits, 4. Limiting noise to certain defined levels; and 5. Limiting activities on the drillsite during the evening hours.[203]

These conditions were alleged to amount to a regulatory taking of Mid Gulf's mineral estate. Because the case was decided prior to *Lucas*, there was no separate allegation that all economically beneficial uses had been taken, although it may have been possible to make that claim if the mineral owner could show that the mandatory conditions were too onerous for anyone to comply with. The court thus applied the traditional balancing approach to regulatory takings cases; whether the regulation substantially advanced a legitimate state interest and whether it denied an owner all economically viable uses of the land.[204] As noted above the substantially advance test, at least at the Federal constitutional level is no longer appropriate in resolving a 5th Amendment takings claim. The court had no trouble finding that the regulation of oil and gas drilling activities substantially advanced several legitimate state interests. The issue then focused on the balancing of the public and private interests, primarily on the diminution in value or interference with reasonable investment-backed expectations. As discussed above, a key issue in this case involved defining what was the affected property interest. In this case, the issue was whether the court should consider the mineral estate as the affected estate (disaggregate approach) or the combined surface/mineral estate as the affected estate (aggregate approach). The court chose the aggregate approach and looked at the diminution of value to both estates. This issue is especially critical in a *Lucas* challenge since whether there has been a deprivation of all uses clearly depends on what interest has been denied a permit. Thus an unconditional denial of a drilling permit might constitute a regulatory taking under *Lucas* if the owner

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[203] 1992 WL 223772 at page 2.

[204] Agins v. City of Tiburon, 447 U.S. 255 (1980). That portion of *Agins* dealing with the substantially advance test has been repudiated. *Lingle*, note 157 *supra*. One still must consider, however, the governmental interest in the regulation when one applies the *Penn Central* balancing approach. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

merely owned the mineral estate, but would not a *Lucas* taking if the owner retained economically viable uses of the surface estate.

The court did not resolve the balancing test in this case which would have required an examination of the imposed conditions and their effect on the potential uses or value of the mineral estate because the case was not ripe for review. As noted earlier, regulatory takings claims are not ripe for review until such time as a final permit decision has been reached. In this case, Mid Gulf did not seek judicial review of the provisions of the discretionary permit that might have modified them. Modification would obviate a finding of a permanent taking, but still would not answer the question of whether a temporary taking had occurred. Nonetheless, the court refused to find that a regulatory taking occurred when the City imposed its conditions on the discretionary permit.

While many of the cases discussed earlier, upheld without objection total prohibitions against the drilling of oil and gas wells, in *Miller Brothers v. Department of Natural Resources*, [205] the court had little difficulty concluding that a total prohibition against drilling, even for conservation purposes, constituted a regulatory taking. The court was applying Michigan law, not federal law, influenced in part by a doctrine that invalidates total prohibitions against any lawful use without a very strong showing that the prohibition was required to protect the public health, safety, morals or general welfare.[206] The statute that was found to be a regulatory taking prohibited the drilling of wells within the Nordhouse Dunes Area, encompassing some 4000 acres.

In *Trail Enterprises, Inc. v. City of Houston*,[207] the Texas court was confronted with the classic regulatory takings claim. The City enacted an ordinance prohibiting the drilling of oil and gas wells within the watershed of a city-owned lake. There was no variance procedure contained in the ordinance. Trail was a successor in interest to an oil and gas lessee of lands located within the no-drill zone. They petitioned the City for a variance, notwithstanding the lack of a variance mechanism in the ordinance. The City refused to hold a hearing. The plaintiffs asserted various constitutional claims including a regulatory taking. Although not getting to the merits of the takings claim, the court did indicate in *dicta* that it was not going to follow the Michigan approach to total prohibitions

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[205] Miller Brothers v. Department of Natural Resources, 203 Mich.App. 674, 513 N.W.2d 217, 128 O.&G.R. 518, *review denied*, 447 Mich. 1038, 527 N.W.2d 513 (1994).

[206] This land use doctrine is followed in Michigan and Pennsylvania, and has been applied to mineral extraction cases. *See e.g.*, Silva v. Ada, 416 Mich. 153, 330 N.W.2d 663 (1982); Exton Quarries, Inc. v. Zoning Board of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967).

[207] Trail Enterprises, Inc. v. City of Houston, 957 S.W.2d 625 (Tex.App.-Hous.[14th Dist.] 1997, rev. denied), *cert. denied,* 525 U.S. 1010, *reh'g denied,* 525 U.S. 1172 (1999).

against drilling amounting to a per se regulatory taking. After citing a number of Texas cases acknowledging the existence of the regulatory taking cause of action (inverse condemnation), the court observed:

> The United States Supreme Court has stated, "governmental regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase.". . . When a government regulates a right, prohibits some noxious use, or if the public need outweighs the private loss, compensation should not be allowed.[208]

The court did not make a definitive ruling on the merits since it dismissed the regulatory takings claim for being filed after the running of the statute of limitations. In Texas, the 10 year statute of limitations for adverse possession is borrowed in regulatory takings claims dealing with the taking, rather than the damaging of property interests.[209] The cause of action accrued when the ordinance was enacted, not when the variance application was filed. If the ordinance contained a variance procedure, a regulatory takings claim could not have been filed until a variance was sought and presumably denied, otherwise the case would not be ripe for adjudication. But since there was no variance mechanism, the enactment of the ordinance itself, constituted a final decision of the City regarding the issuance of drilling permits. The cause of action arose, and the statute of limitations began to run when the ordinance was enacted, which was more than 10 years prior to the filing of this suit.

The dicta in *Trail Enterprises* is reminiscent of a 40 year old decision with analogous facts that applied the sausage grinder approach to takings analysis. In *City of West Frankfort v. Fullop*,[210] the Illinois Supreme Court was faced with a constitutional challenge to a zoning ordinance which prohibited oil and gas drilling operations within an area in the watershed of a lake which served as the source of drinking water for the city. Without much analysis of the impact of the ordinance on the oil and gas rights, the court focused on the reasonableness of the ordinance and its objective of protecting the public health. The prevention of pollution of the largest source of municipal drinking water was clearly an important public health objective and the court would not second guess the

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[208] 957 S.W.2d at 630 quoting from Andrus v. Allard, 444 U.S. 51 (1979), the most far-reaching of all modern regulatory takings cases insofar as it allows the government to substantially diminish the value of the property interest being regulated without a finding of a taking.

[209] *Id.* at 631. *See generally* Brazos River Authority v. City of Graham, 163 Tex. 167, 354 S.W.2d 99 (1961)(10 year statute applies); Hubler v. City of Corpus Christi, 564 S.W.2d 816 (Tex.App.—Corpus Christi 1978, writ ref'd n.r.e.)(two year statute applies).

[210] City of West Frankfort v. Fullop, 6 Ill.2d 609, 129 N.E.2d 682 (1955).

city council's determination that oil and gas drilling operations posed a threat to the water supply. The court's only discussion of the impact of the ordinance on the oil and gas operation was "For the fact that the exercise of the police power precludes the most profitable use of property in private hands does not make the exercise invalid as such nor render it invalid as a 'taking' of the primary use, and hence the essence of the property."[211] Since the facts did not show whether or not the mineral and surface estates were severed, it is hard to determine how the court presumed that only the highest and best use has been taken, as opposed to all economically beneficial uses. But if the mineral rights and surface rights were not severed, the court's analysis was probably correct if one chose to follow the aggregate approach to takings cases.[212]

Trail Enterprises, undaunted by defeat in the first round, brought a second inverse condemnation claim against the city after it enacted a zoning ordinance amendment that expanded the areal scope of the drilling prohibition. In *Trail Enterprises, Inc. v. City of Houston*, (Trail II),[213] plaintiff sought an inverse condemnation remedy for an oil and gas lease it held in the newly-covered area. The court identified three bases for seeking an inverse condemnation award based on the Texas Supreme Court decision in *Mayhew v. Town of Sunnyvale.*[214] The first basis was whether the regulation substantially advances a legitimate state interest. The second was whether the regulation denies the owner all economically viable uses and the third was whether the regulation unreasonably interferes with an owner's right to use and enjoy the property interest. Because the trial court granted the City's motion for summary judgment, the court treated plaintiff's well-pleaded facts as true and found that as to the second (*Lucas*) and third (*Penn Central*) bases, triable issues of fact existed.

In the third round of litigation the trial court again granted the City's motion for summary judgment on the ripeness issue.[215] The Court of Appeals, however, determined that the case was ripe because the enactment of the ordinance, itself, triggered the regulatory taking in part because there was no variance mechanism contained therein that would allow an oil and gas lessee to drill a well within the no-drill zone.[216] But rather

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211 129 N.E.2d at 687.

212 *See* text accompanying notes 130-136 *supra*.

213 2002 Tex.App. LEXIS 1872 (Tex.App.—Houston [14th Dist.] Mar. 14, 2002) (not designated for publication).

214 964 S.W.2d 922 (Tex. 1998).

215 Trail Enterprises, Inc. v. City of Houston, 255 S.W.3d 105 (Tex.App.—Waco 2008).

216 The earlier appellate decisions were rendered by the 14th Court of Appeals in Houston. This decision, due to a balancing of the caseloads of the Courts of Appeal was rendered by the Waco Court of Appeals.

than remand the case back for a trial on the admittedly ad hoc factual claim that a *Penn Central* taking had occurred, the Court of Appeals rendered judgment in favor of Trail based on an earlier jury verdict. While recognizing the earlier court's use of *Mayhew* to define the regulatory takings tests, the court in this case finds that there has been a compensable damaging of the mineral estate under the Texas Constitution.[217] Because the nature of a damaging inverse condemnation claim is analogous to a taking inverse condemnation claim it is hard to understand how the court could render a monetary judgment on the basis of the appellate record.[218] The damaging occurs because the no-drill ordinance precludes Trail from fully exercising its property rights as owner of the mineral estate. It is hard to understand why the balancing approach of *Penn Central* would not be as applicable to the damaging claim as it would be to the taking claim but the majority opinion believes that the damaging claim has been made by Trail.[219]

The same Houston drilling ordinance challenged in *Trail I* was the subject of an inverse condemnation claim in *Maguire Oil Co. v. City of Houston.*[220] In this case Maguire Oil received several permits to drill within 1,000 feet of Lake Houston, notwithstanding the city ordinance's prohibition against such drilling. The city first argued that since the suit was filed more than 10 years after the enactment of the ordinance, the statute of limitations had run, as it had in *Trail I.* Maguire Oil successfully argued that it was not challenging the ordinance but the revocation of the drilling permits that had been issued within 10 years of the filing of this claim. The court again remanded the case for trial on the merits of the inverse condemnation claim.

The trial court again dismissed the inverse condemnation action, this time based on ripeness grounds. Maguire Oil again seeks judicial review and again the case is remanded back to the trial court for a resolution of the inverse condemnation claim on the merits.[221] As noted earlier ripeness is a key issue in inverse condemnation claims. Under *Hamilton Bank,*[222] an inverse condemnation case is not ripe unless there has been a

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217 Tx.Const.I art. I, § 17.

218 Chief Justice Gray points that out in his dissent to the opinion on the motion for rehearing after the majority changed the original order which required Trail to convey its mineral estate to the City to one where Trail gets to keep the mineral estate and the nearly $ 17 million damage award. 255 S.W.3d at 115.

219 The City of Houston has sought review by the Texas Supreme Court. As of the date of the writing of this paper the Texas Supreme Court has not ruled on the request for discretionary review.

220 69 S.W.3d 350 (Tex.App.—Texarkana 2002).

221 Maguire Oil Co. v. City of Houston, 243 S.W.3d 714 (Tex.App.—Houston [14th Dist.] 2007).

222 Williamson County Regional Planning Commission v. Hamilton Bank, 447 U.S. 255 (1980).

final decision on the development plans and the State has denied compensation. The second prong essentially requires inverse condemnation claims to be brought in state court. The first prong is needed so that the court may determine whether the regulation goes too far. The ripeness issue is not the same as the exhaustion of administrative remedies doctrine. In *Maguire Oil II,* the court finds that the denial of the permit by the city official is the final act necessary to make the claim ripe. There is no need for Maguire Oil to seek City Council relief and there is no variance mechanism provided for in the ordinance which otherwise contains a total prohibition of drilling in the lake or within 100 feet of the boundary of the lake. The court also notes that even if an appeal may have been allowed, given the total prohibition against drilling that appeal would have been futile which renders the issue ripe for review.

Under the modern regulatory takings approach, substate unit regulation of oil and gas drilling and production activities should come under closer scrutiny than in the past. Because many regulatory programs include absolute prohibitions against drilling where oil and gas may be located, the *Lucas* total taking doctrine may be applicable. Interesting questions will have to be answered, however, regarding the scope and extent of the state-created property interest that is allegedly being taken. Nonetheless as the recent Texas cases point out oil and gas operators are trying to attack substate regulation of their activities using the regulatory takings doctrine.

VI. Surface Use and Mineral Severance

Because the surface and mineral estates may be severed, unique problems can arise when dealing with governmental regulation of surface activities that have an impact on mineral extraction operations. As a general rule, where there is a severance of the mineral and surface estates, the respective rights of the two owners should be determined by the express language of the deed severing the two estates.[223] In most circumstances, however, the deed severing the two estates will be silent on the issue of to what extent the mineral owner may use the surface to extract the minerals.[224] The near-universal view taken by most state courts is that upon the severance an implied easement of surface use arises to allow the mineral owner to successfully exploit the mineral resource. The scope and extent of that implied easement varies from state to state, but is often couched in terms of the mineral owner having a right to the "reasonable

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[223] Evangelical Lutheran Church v. Stanolind Oil & Gas Co., 251 F.2d 412, 8 O.&G.R. 911 (8th Cir. 1958); Landreth v. Melendez, 948 S.W.2d 76, 137 O.&G.R. 170 (Tex.App.—Amarillo 1976). See generally, P. Martin & B. Kramer, *Williams & Meyers Oil and Gas Law* § 218 (2003).

[224] 1 Williams & Meyers, note 223 *supra* at 198.7. See generally, Bruce M. Kramer, *The Legal Framework for Analyzing Multiple Surface Use Issues*, 44 Rocky Mtn.Min.L.Fdn. L.Rev. 273 (2007).

use of the surface" subject to having "due regard" for the surface owner's rights or subject to making "reasonable accommodation" to the surface owner.[225] The scope and extent of this common law implied easement doctrine may be critical in dealing with local regulation because the mineral owner may not claim that surface regulation constitutes a regulatory taking if they still retain reasonable means to exploit their mineral estate.[226]

This problem arises under circumstances where the substate unit may exercise its eminent domain authority over a surface estate but intentionally chooses not to condemn the mineral estate. The local governmental body may want to use the surface estate for a use that may be incompatible with oil and gas drilling activities. In Texas, this practice appears to be widespread and has led to a series of cases that have defined the scope of what a local governmental unit may do with its acquired surface estate that will not constitute a regulatory taking.

An important early case, *City of Abilene v. Burk Royalty*,[227] showed that not everything a city may do to make it more difficult to drill for, or produce, oil or gas would necessarily constitute a regulatory taking. The city condemned the surface estate where Burk Royalty owned the mineral estate. The city was expanding its airport. The oil and gas field was utilizing a secondary recovery waterflood project that Burk argued would be adversely impacted by the construction activities and by the eventual expansion of the runways that might require several wells to be dismantled. The court rejected the regulatory takings claims. It first found that the construction activities interference was merely temporary in nature and therefore not a regulatory taking.[228] While temporary regulations may constitute a "temporary" taking, the length of time the regulations are in effect will have to be extraordinary in most cases. On the issue of whether the future height restrictions that will be imposed on structures in order to accommodate the expanded runway would constitute a taking, the court basically said there was no such thing as a future taking. There were no present restrictions in place and whether the future regulations would constitute a taking could only be determined after they were put into effect. There was nothing the City had done that interfered with the

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225 Id. at §§ 218.7 – 218.8.

226 *See* Chambers-Liberty Counties Navigation District v. Banta, 453 S.W.2d 134 (Tex. 1970).

227 470 S.W.2d 643 (Tex. 1971).

228 This concept that temporary interference with property rights may not necessarily be a taking was upheld by the Supreme Court in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) where the court finds that a moratorium on permits is not a per se *Lucas* taking , but may be an ad hoc *Penn Central* taking.

mineral owner's right to make reasonable use of the surface to exploit the mineral estate.

The key decision dealing with whether a severed mineral estate has been taken when there was a condemnation of the surface estate is *Tarrant County Water Improvement District No. One v. Haupt., Inc.*[229] This case involved a rather unique set of facts. The District condemned the surface and existing oil and gas leasehold estates covering some 92 acres, of which 80 acres were to be submerged by a lake. Haupt received compensation for his surface estate and the royalty interest taken. The oil and gas lessee received compensation for its interest. The existing wells were plugged. The District, however, did not condemn Haupt's possibility of reverter so when the lease would be extinguished, Haupt would become the owner of the mineral estate. Haupt then executed a top lease to Bar J.B.Co. before the surface was inundated and the lessee sought to re-open the plugged wells. The District then sought an injunction against Bar J.B. seeking to prevent them from conducting further drilling or re-working operations anywhere within the 80 acres that were to be submerged. In the meantime, an oil and gas lessee drilled a directional well from the "fast" or dry lands to underneath the 80 acre tract. The lower courts found that there had been a regulatory taking of the mineral interests by the inundation of the surface estate that, according to these courts, effectively denied the owners reasonable access to the mineral estate.

The Supreme Court reversed, finding that before one can determine whether or not there has been a denial of access to the surface estate, the court must apply the "reasonable accommodation" doctrine. That doctrine required the mineral owner/oil and gas lessee to accommodate the interests of the surface owner in using the implied easement of access and use, even if it meant that the mineral owner must expend more money in doing so. In this case there was evidence that by using directional drilling or other techniques, the mineral estate underlying the 80 submerged acres could be exploited. The property interest in the implied easement of surface use did not necessarily include the right to use the cheapest means of access if it would cause substantial injury to the surface estate. Insofar as governmental ownership situations are concerned, inverse condemnation actions for the underlying mineral estates will need to be predicated on an almost total denial of access to the minerals.

Finally, Texas has adopted a rather unique statute relating to mineral activities in urban areas.[230] This statute was enacted in 1983 and recognized the inherent conflict between residential subdivisions and oil and gas drilling activities. But the statute is not of statewide application. There are three types of counties where this statute may be applied: 1.

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229 854 S.W.2d 909, 119 O.&G.R. 580 (Tex. 1993).

230 Tex.Nat.Res. Code §§ 92.001-92.007.

Counties with a population in excess of 400,000, 2. Counties with a population in excess of 140,000 that abut a county having a population in excess of 400,000 and 3. Counties located in part on a barrier island.[231] The statute gives the surface owners of a parcel of land that is not to exceed 640 acres the power to designate where potential mineral development may occur. The surface owners must create a "qualified subdivision" by having a plat approved by the Railroad Commission and filing that plat with the clerk of the county in which the subdivision is located.[232]

The plat must designate a two-acre parcel for each 80 acres subdivided as an "operations site."[233] The plat must also comply with the requirements of the relevant substate governmental unit. The Railroad Commission must hold a hearing on the plat application and give notice to all surface and mineral owners within the affected area.[234] The statute also authorizes directional drilling to be utilized from either outside of the "qualified subdivision" or from a designated "operations site" so long as the operations do not unreasonably interfere with the use of the surface.[235] The limitation on drilling outside of the "operations site" will terminate within 3 years of Commission approval unless the surface owner commences actual construction of roads and a lot within the subdivision has been sold to a third party.[236] Once platted, approved and actions taken within the 3 year period there is no time limit on how long the restrictions will apply.

To date there have been no challenges to this statute. One can hypothesize a circumstance where a mineral owner might argue that the designated "operations site" did not allow it to effectively produce the oil and gas lying beneath the subdivision. Such regulatory takings claims will be judged under *Haupt* to determine if the restrictions did anything more than define the scope or extent of the implied easement under traditional regulatory takings doctrine. There is no doubt that the statute clearly serves an important public purpose, the issues would be whether there is a total *Lucas* taking of all economically feasible uses or an ad hoc *Penn Central* taking that looks to such matters as reasonable investment-backed expectations.

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231 Tex.Nat.Res. Code § 92.002(3). Ernie Bruchez states that the following 12 counties meet one of the three tests: Bexar, Dallas, El Paso, Harris, Tarrant, Travis, Brazoria, Denton, Fort Bend, Montgomery, Collin and Galveston. Bruchez, note 1 *supra*.

232 Id. at §§ 92.005, .003, .005.

233 Id. at § 92.002.

234 Id. at § 92.004.

235 Id. at § 92.005(b).

236 Id. at § 92.005(c).