COURT OF APPEALS, STATE OF NEW YORK

NORSE ENERGY CORP. USA,

Petitioner-Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents.

Docket No. 515227

Tompkins County Sup. Ct.
Index No. 2011-0902

PROPOSED BRIEF BY PROFESSORS VICKI BEEN, RICHARD BRIFFAULT, NESTOR DAVIDSON, CLAYTON GILLETTE, MICHAEL HELLER, RODERICK HILLS, ERIC LANE, JOHN NOLON, ASHIRA OSTROW, EDUARDO PEÑALVER, PATRICIA SALKIN, CHRISTOPHER SERKIN, AND STEWART STERK AS *AMICI CURIAE*

Susan J. Kraham, Esq.
Columbia Environmental Law Clinic
Morningside Heights Legal Services, Inc.
435 West 116th Street
New York, New York 10027
(212) 854-4291
skraha@law.columbia.edu

Counsel for *Amici Curiae*

March 28, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

New York State Constitutional Provisions

Regulations

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

The *amici* are professors of local government and land-use law at law schools in New York. Specifically, the *amici* are:

- Vicki Been, New York University Law School
- Richard Briffault, Columbia Law School
- Nestor Davidson, Fordham Law School
- Clayton Gillette, New York University Law School
- Michael Heller, Columbia Law School
- Roderick M. Hills, Jr., New York University Law School
- Eric Lane, Hofstra Law School
- John Nolon, Pace University Law School
- Ashira Ostrow, Hofstra Law School
- Eduardo Peñalver, University of Chicago Law School
- Patricia Salkin, Touro Law School
- Christopher Serkin, Brooklyn Law School
- Stewart Sterk, Benjamin N. Cardozo Law School

The *amici* have all devoted their scholarly careers to analyzing how authority over land use regulation ought to be divided between state and local governments. Their research interests are reflected by their scholarship analyzing (among other

topics) the effects of neighbors' abutting land uses on each other's neighbors' property values,[1] local governments' adjustment of their level of zoning regulation to take into account the benefits and burdens imposed by land uses,[2] effects of high-intensity, industrial uses on the character of a community,[3] and the extent to which local governments can be expected to take into account regional and state-wide interests in proposed land uses when deciding whether to permit or exclude such uses within their territory.[4]

The *amici* do not have a direct personal stake in this litigation. They have instead a scholarly interest, based on decades of teaching and researching local government law and land- use regulation, in limiting the preemption of local government law to circumstances where local law interferes with some substantial state interest. Although each *amicus* has focused on different legal problems in their individual writing, all amici endorse the principle that, when an activity's

---

[1] *See, e.g.,* Stewart E. Sterk, *Neighbors in American Land Law,* 87 Colum. L. Rev. 55 (1987).

[2] *See, e.g.,* Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection,* 107 Colum. L. Rev. 883 (2007); Stewart E. Sterk, *Municipal Competition as a Constraint on Land Use Exactions,* 45 Vand. L. Rev. 831 (1992); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine,* 91 Colum. L. Rev. 473 (1991).

[3] *See, e.g.,* Vicki Been, *Analyzing Evidence of Environmental Justice,* 11 J. Land Use & Envtl. L. 1 (1995); John R. Nolon, *Discovering Local Environmental Law,* 25 Zon. & Plan. L. Rep. 73 (Nov. 2002).

[4] *See, e.g.,* Patricia E. Salkin, 2 Am. Law. Zoning§ 10 (5th ed. 2012) (on metropolitan and regional land use planning); Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes,* 48 Harv. J. on Legis. 289, 319-21 (2011); Ashira Pelman Ostrow, *Land Law Federalism,* 61 Emory L.J. 1397, 1410-22 (2012); Nestor M. Davidson, *Cooperative Localism: Federal-Local Cooperation in an Era of State Sovereignty,* 93 Va. L. Rev. 959 (2007).; Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law,* 80 Va. L. Rev. 625 (1994); Richard Briffault, *Our Localism: Part 1--The Structure of Local Government Law,* 90 Colum. L. Rev. 1 (1990).

effects are confined within a local government's boundaries and when local officials have incentives to consider the extra-local benefits of the activity, then the officials presumptively best suited to regulate those effects are those who are elected by residents of the local jurisdiction most affected by that activity. *Amici's* brief advances this scholarly interest in insuring that state preemption of local zoning goes no further than necessary to protect state interests in controlling inter-local effects of zoning, while leaving intact local protections for residents' quiet enjoyment of their property.

INTRODUCTION

This case raises the issue of how courts should construe local governments' zoning power when the state legislature has expressed no unambiguous purpose to repeal such power and when local communities have taken different positions about whether to use that power to exclude an activity over which they are deeply divided. *Amici* respectfully urge a simple principle by which to resolve the impasse when state legislative purpose is unclear: Presume that state law does not preempt local zoning laws, unless those laws encroach on some substantial state interest that local residents are likely to ignore. This presumption allows each local government to make up its own mind about controversial development activities until the state legislature squarely addresses whether and how to protect

landowners' quiet enjoyment of their property from the collateral effects of a controversial industrial use.

There can be no doubt that New Yorkers have strongly differing views about the extraction of natural gas through hydraulic fracturing. Some communities regard hydraulic fracturing as an economic boon and a source of clean, abundant energy. Based on these beliefs, over forty municipalities over the Marcellus Shale have passed resolutions in support of hydraulic fracturing. Brief *Amici Curiae* of Business Council *et al.* in *Norse Energy Corp. v. Town of Dryden*, 108 A.D.3d 25, 964 N.Y.S.2d 714, at 25-26. By contrast, other communities believe that hydraulic fracturing poses unknown but potentially grave environmental risks as well as the certainty of noise, traffic, aesthetic blight, and loss of community character. One such community, the Town of Dryden, has enacted zoning amendments to exclude gas and oil drilling based on such traditional zoning considerations.

There can also be no serious pretense that the state legislature, through the Oil, Gas, and Solution Mining Law ("OGSML") has resolved this division of opinion among localities by expressing some unambiguous purpose to repeal local governments' power to exclude gas drilling through zoning law. When the OGSML was enacted in 1981, neither the widespread use of hydraulic fracturing

nor its exclusion through local zoning law existed: As a result, neither the text nor the legislative history of the OGSML specifically reference local zoning power's exclusion of such a use of land.

In these circumstances of statutory ambiguity, both deeply rooted legal tradition and democratic accountability point in the same direction: Allow each local government to make a democratically accountable decision about whether to allow or forbid gas drilling. Such a presumption against preemption is required by Article IX, §3(c) of the New York Constitution, which provides that the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed." The presumption against preemption is also required by the longstanding canon against implied repeal, because preemption of zoning power by the OGSML would repeal *pro tanto* pre-existing state statutory delegations of zoning power contained in enabling laws like New York's Municipal Home Rule Law and Town Law.

This presumption against preemption has special force when one local government's exclusion of an industrial activity does not prevent other communities from permitting the activity and when each local government has incentives to balance the activity's costs and benefits. Under such circumstances, each community can make up its own mind until the state legislature speaks

clearly about whether and how to address traditional zoning concerns at the state level. Any implied preemption of the zoning laws at issue here would destroy democratic accountability, by sweeping away zoning laws on which neighbors depend for the quiet enjoyment of their real property in the name of a judicially invented purpose of maximizing resource extraction over all else. That purpose appears nowhere in OGSML: Democratic accountability requires that the enforcement of such an unwritten purpose should not be imposed by judicial fiat but instead await the state legislature's clear endorsement.

ARGUMENT

I. ECL §23-0303(2) SHOULD BE CONSTRUED IN LIGHT OF A PRESUMPTION AGAINST PREEMPTION OF LOCAL LAW BY AMBIGUOUS STATE STATUTES.

The lower court's holding regarding express preemption turns on the meaning of the supersedure clause of New York's Oil, Gas, and Solution Mining Law ("OGSML"), codified at ECL §23-0303(2), which provides that

> The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.

Amici agree with the court below that the plain meaning of this text does not preempt the Town of Dryden's zoning prohibitions of gas and oil drilling. If,

however, this court finds that this text is ambiguous on the question of preemption, then *amici* respectfully urge this court to resolve the ambiguity by applying a presumption against state preemption of local law described below.

There is a need in New York for such a judicial clarification of the basic framework within which disputes about preemption are analyzed. The problem of preemption frequently recurs before New York's courts. Patricia E. Salkin, 1 N.Y. Zoning Law & Prac. § 4:22 (describing conflicts between state law and local zoning laws). Although each such case turns on the details of the particular disputed state statute and local law, such decisions also implicate larger principles of local democracy immanent in the state constitution and the state's legal traditions. Those principles and traditions can easily be lost in the competing litigants' exhaustive, exhausting, and ultimately fruitless parsing of often ambiguous textual minutiae.

Toward the end of bringing these principles and traditions to bear on the problem of preemption, *amici* respectfully urge a canon of construction, drawn from legal principles and traditions defining local democracy in New York, that disfavors state preemption of local zoning laws. Under this presumption, where state statutes are silent about the statute's effect on zoning laws and provide no substitute protection for property owners' quiet enjoyment of land, then such

statutes should be presumed not to preempt local zoning laws, unless local law encroaches on some substantial state interest that local residents are likely to ignore. *Amici* urge that such a presumption against preemption is required not only by Article IX, §3(c) of the New York Constitution and the canon against implied repeal but also implied by the likely intent of the state legislature as well as basic principles of democratic accountability. If the state legislature has expressed no clear view on some local law, then judicial preemption of such a law under the aegis of the ambiguous state statute deprives local voters of the benefits of local democracy without advancing any democratically ratified policy of state lawmakers. By staying the judicial veto of local law until state lawmakers have plainly spoken, the courts best assure that some democratically elected body, state or local, will speak directly to the interests in quiet enjoyment of land protected by zoning.

A. Article IX §3(c) of the New York Constitution requires a presumption against state statutory preemption of local law.

Article IX, §3(c) of the New York Constitution provides that "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed." This constitutional requirement has also been codified by section 51 of the Municipal Home Rule Law, which provides that home rule powers "shall be liberally construed." These requirements of liberal

construction apply to towns' powers to enact zoning laws, which are derived not only from specific delegations of power contained in the Town Law but also the Municipal Home Rule Law. *See, e.g., Kamhi v. Town of Yorktown,* 74 N.Y.2d 423,432-33 547 N.E.2d 346, 351, 548 N.Y.S.2d 144, 149 (1989) (recognizing towns' power to enact zoning rules pursuant to §10 of the Municipal Home Rule Law); *Pete Drown Inc. v. Town Bd. of Town of Ellenburg,* 188 A.D.2d 850, 852, 591 N.Y.S.2d 584, 585-586 (3d Dept. 1992) (same).

Article IX, §3(e) necessarily implies that the state statutes' preemption clauses, where ambiguous, be narrowly construed, because towns' "[r]ights, powers, privileges and immunities" are defined by those state laws that abrogate such powers just as much as by state laws delegating such powers. Put simply, local governments' powers cannot be "liberally construed" unless state statutes' preemption clauses are narrowly construed.

The plain language of Article IX, §3(c), therefore, calls for a presumption against preemption when state statutory text is ambiguous. While there is little relevant New York precedent construing Article IX, §3(c), precedents from other states construing analogous "liberal construction" clauses follow the common-sensical reading of the clause as containing a presumption against preemption. In *Neri Bros. Canst. v. Village of Evergreen Park,* 363 Ill. App. 3d 113, 841 N.E.2d

148 (Ill. App. 3d 2005), for instance, the court held that a village's power to impose liability on persons who released hazardous natural gas as a result of damaging a utility line was not preempted by an Illinois statute making the prevention of damage to utility lines a matter of exclusive state-wide concern. The Illinois statute contained a lengthy preemption clause providing that "[t]he regulation of underground utility facilities . . . damage prevention . . . is an exclusive power and function of the State" and that "[a] home rule unit may not regulate under-ground utility facilities . . . damage prevention . . . ." Despite this explicit language, the *Neri Bros.* court held that the village's ordinance imposing the cost of cleaning up discharge of natural gas on a subcontractor who broke a gas line was not preempted by state law, because the village's law was aimed at a goal different from the purpose of state law—recouping remediation expenses rather than preventing negligent damage to utility lines. In rejecting preemption of local law, *Neri Bros.* relied on Article VII, § 6(m) of the Illinois Constitution's clause, which provided that the "[p]owers and functions of home rule units shall be construed liberally," a provision that, according to *Neri Bros.*, required that "any limitation on the power of home rule units by the General Assembly must be specific, clear, and unambiguous." *Neri Bros. Canst.*, 363 Ill. App. 3d 113, 119, 841 N.E.2d 148, 152 (Ill. App. Ct. 2005).

Neri Bros.' approach to the state constitutional admonition that local powers be "liberally construed" is compelled by the plain terms of the constitutional phrase and should be adopted by this court. As a matter of plain logic, the court cannot "liberally construe[]" local power without narrowly construing limits on that power. It follows that this court should not find preemption of the Town's zoning laws unless ECL §23-0303(2)'s application to those laws is, in *Neri Bros.'* phrase, "specific, clear, and unambiguous."

B. The canon against implied repeal requires a presumption against state statutory preemption of local zoning authority.

The presumption against preemption of local zoning authority is not only a constitutional principle but also a specific application of the well-established canon of statutory construction that "[r]epeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given effect." N.Y. Stat. Law§ 391 (McKinney 2012); 97 N.Y. Jur. 2d Statutes§ 78 (2d ed. 2012). State statutes such as the Town Law or Home Rule Law must authorize every valid exercise of valid zoning authority in New York. Patricia E. Salkin, 1 Am. Law. Zoning§ 2:8 (5th ed. 2012) (explaining that towns' zoning power in New York is derived from "zoning enabling statutes or from charters promulgated by special act of the state legislature, or adopted pursuant to the Municipal Home Rule Law, a state

legislative act"); Patricia E. Salkin, 1 N.Y. Zoning Law & Prac. §§2.08, 2:12 (2012) (describing zoning authority of towns under Town Law and Municipal Home Rule Law respectively). The judicial inference that a state statute preempts a local zoning law, therefore, also constitutes, by definition, an inference that the same state statute repeals an earlier state statutory delegation of zoning authority. Under the canon against implied repeal, such an implied repeal of a state statutory delegation of zoning power should be disfavored unless plainly required by the text or unwritten purpose of the allegedly preemptive state law. *See* Patricia E. Salkin, 4 Am. Law. Zoning at§ 41:13; *Fammler v. Board of Zoning Appeals of Town of Hempstead,* 254 A.D. 777,4 N.Y.S.2d 760 (2d Dept. 1938) (holding that four-month time limit for filing petition in Article 78 of Civil Procedure Law did not repeal 30-day time limit contained in §267 of Town Law for petitions to boards of zoning appeals and noting that "[w]here statutory construction in seeking the intent of the Legislature will have such far-reaching effect as would be the case here, the repeal of workable statutes by implication is not favored"); *Emerson College v. City of Boston,* 393 Mass. 303, 306, 471 N.E.2d 336, 338 (1984) (holding that Boston's zoning law was not preempted by state law on ground that "local regulations are presumed valid unless a sharp conflict exists between the local and the State regulation").

The canon against implied repeal as applied to zoning authority reflects not only deeply rooted legal tradition but also the likely intent of the state legislature. Zoning authority is one of the most frequently exercised forms of local power, pervasively affecting virtually every resident of New York. Towns have exercised such zoning power for over eight decades, since the New York legislature delegated zoning authority to them in 1926. *See* Act of Apr. 30, 1926, ch. 714, 1926 N.Y. Laws 1280 (amending Town Law to authorize towns to create zoning districts). The tenacious character of towns' zoning authority is not an accident; it is the result of the popularity of local control with local voters who seek power over matters immediately affecting their vital interests—in particular, power over changes in the character of their neighborhood that could affect the value of owner-occupied homes. *See* William A. Fischel, The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School, Finance and Land Use Policies 80-82 (Harvard University Press 2001)(describing incentives of homeowners to be attentive to local land-use policies to protect value of owner-occupied housing); Richard Briffault, *Smart Growth and American Land Use Law,* 21 St. Louis U. Pub. L. Rev. 253,267-68 (2002); Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes,* 48 Harv. J. on Legis. 289, 295-98 (2011). It is not plausible that the state legislature would

casually and by mere implication cast aside the popular and deeply entrenched principle of local control over land use. Instead, courts should presume that, if the state legislature intended to uproot such a longstanding power of local governments, then the legislature would have said so explicitly. *Town of Brookhaven v. New York State Bd. of Equalization and Assessment,* 88 N.Y.2d 354,361, 668 N.E.2d 407, 412 (1996) (holding that town's right to receive transition assessments under RPTL § 545 is not preempted by Long Island Power Authority Act and noting that "the Legislature is hardly reticent to repeal statutes when it means to do so"); *Hunter v. Warren County Bd. of Supervisors,* 21 A.D.3d 622, 624, 800 N.Y.S.2d 231, 234 (3d Dept. 2005) (holding that county's authority under state enabling act to impose tax is not repealed by implication by specific grants of power to other counties).

That the zoning power over mineral extraction is, in particular, protected by the canon against implied repeal is implicitly recognized by *Frew Run Gravel Products v. Town of Carroll,* 71 N.Y.2d 126, 518 N.E.2d 920 (1987), the precedent most closely analogous to the dispute in this case. In *Frew Run,* the Court held that the supersedure clause of the New York Mined Land Reclamation Law, MLRL§23-2703(2), which provided that "this title shall supersede all other state and local laws relating to the extractive mining industry," did not preempt the Town of Carroll's ban on sand and gravel mining in AR2 zoning districts. In

reasoning that the Town's zoning classification did not "relat[e] to the extractive mining industry," the *Frew Run* court noted that "read[ing] into ECL 23-2703(2) an intent to preempt a town zoning ordinance prohibiting a mining operation in a given zone . . . would drastically curtail the town's power to adopt zoning regulations." To avoid such "drastic[] curtail[ment]" of towns' zoning powers, the *Frew Run* court adopted a presumption holding that any interpretation of the Mined Land Reclamation Law "should be avoided" if it would "preclude the town board from deciding whether a mining operation—like other uses covered by a zoning ordinance—should be permitted or prohibited in a particular zoning district." *Frew Run,* 71 N.Y.2d at 133-34. In adopting this presumption that state regulation of mining does not oust local governments from simultaneously regulating land use, *Frew Run* is consistent with similar presumptions against preemption of adopted by other states. *See, e.g.,* Jan G. Laitos & Elizabeth H. Getches, *Multi- Layered, and Sequential, State and Local Barriers to Extractive Resource Development,* 23 Va. Envtl. L.J. 1, 15 (2004) ("Typically, local governments are not totally preempted by state oil and gas agencies, unless 'the effectuation of a local interest would materially impede or destroy the state interest.'"); Patricia E. Salkin, 3 Am. Law. Zoning§ 18:55 (5th. ed. 2012) ("State mining laws generally do not preempt local governments from enacting more stringent requirements . . .").

C. The presumption against preemption of local law advances local democratic accountability without interfering with the state legislature's power over matters of statewide concern.

It is a truism of local government law in New York and other states that local governments are creatures of state law the powers of which can be destroyed or altered by the state legislature. Patricia E. Salkin, 1 Am. Law. Zoning § 1:1 (5th ed. 2012) ("It is the prevailing view that such a corporation is a creature of the state, possessed of those powers granted to it by constitution or by statute."). Under the New York Court of Appeals' longstanding interpretation of Article IX, § 2(b)(2), the state legislature may, if it chooses, preempt a local law dealing with a local government's "property, affairs, and government" just so long as some substantial state interest justifies such preemption. *Adler v. Deegan,* 251 N.Y. 467,489-90, 167 N.E. 705,713 (1929) (Cardozo, C.J., concurring). There is, moreover, no doubt that state legislation dealing expressly with zoning of land can address a matter of statewide concern. *Wambat Realty Corp. v. State ofNew York,* 41 N.Y.2d 490,492,393 N.Y.S.2d 949, 951, 362 N.E.2d 581, 583 (1977).

The presumption against preemption, however, in no way constrains the state legislature's power to preempt local zoning measures, because the

presumption applies only where state statutes are ambiguous enough to require judicial construction. Where a state statute *unambiguously* preempts local law, then the latter must give way to the former. *Town of Islip v. Cuomo,* 64 N.Y.2d 50, 56,473 N.E.2d 756,759,484 N.Y.S.2d 528,731 (1984) (Article IX, §3(e)'s "liberal construction" provision has no application to state statute unambiguously barring landfill). Where state statutes are less clear about their preemptive purpose, however, Article IX, §3(c) instructs the court to presume that the state legislature intended not to preempt local governments' powers. Far from limiting the state legislature's supremacy over local government, such a rule of construction actually protects the state legislature's likely intent by insuring that the courts do not transform the state legislature's silence into a judicially crafted veto on local laws. If mere silence in a state statute constituted a veto over local laws, then "the power of local governments to regulate would be illusory," destroying "the essence of home rule." *People v. Cook,* 34 N.Y.2d 100, 109, 356 N.Y.S.2d 259, 266, 312 N.E.2d 452, 457 (1974).

There is no reason to assume that the state legislature would desire such a result. Given that the state legislature enacts statutes against a backdrop of New York's traditions of strong local democracy, the safest assumption to make about vague statutory language is that the state legislature intended to leave local laws

in place. By requiring some plain statement of an intention to supersede a particular category of state law, the presumption against preemption safeguards the state legislature's likely unspoken intention that local officials shall continue controlling matters of local concern until the state legislature has had the opportunity to deliberate specifically about the costs and benefits of such local policy-making.

D. The presumption against preemption applies with special force when the state statute alleged to preempt local zoning provides no substitute protections for neighbors' quiet enjoyment of their property.

The presumption against preemption of local law is especially appropriate when a state statute alleged to preempt local zoning law contains no substitute protections for landowners' quiet enjoyment of their property. Preemption of zoning laws by such statutes so burdens local landowners' property rights that it is implausible to attribute to the legislature a preemptive purpose.

By protecting landowners' rights of quiet enjoyment against nearby activities that would otherwise impose noise, traffic, and aesthetic harms, zoning laws serve the same purposes as the common law of nuisance. *See, e.g., Euclid v. Ambler Realty,* 272 U.S. 365,387-88 (1926) ("[T]he law of nuisances likewise may be consulted not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the [zoning] power."); *see*

Vicki Been, *"Exit", supra* note 2 ("When it seeks to regulate such harms [imposed by land users on their neighbors], land use regulation is analogous to nuisance law."). Zoning law, however, provides a more complete and administratively efficient remedy against disruptions of quiet enjoyment than private nuisance claims, because the latter traditionally does not protect landowners from aesthetic harms like loss of a neighborhood's character or loss of light and air. *See, e.g., Blair v. 305-313 East 47th Street Associates,* 123 Misc.2d 612, 613, 474 N.Y.S.2d 353,355 (N.Y.Sup.1983) (nuisance law provides no easements for light and air); *Dugway, Ltd. v. Fizzinoglia,* 166 A.D.2d 836, 836, 563 N.Y.S.2d 175, 176 (3d Dept. 1990) (allegation that "assorted debris and an uninhabitable trailer" constitutes "eyesore, insufficient basis for claim of private nuisance); 81 N.Y. Jur. 2d Nuisances§ 17 ("Things merely disagreeable, however, which simply displease the eye or offend the taste, or shock an oversensitive or fastidious nature, no matter how irritating or unpleasant, are not nuisances."). Indeed, supporters of zoning in the early twentieth century defended the constitutionality of zoning by emphasizing "the utter inadequacy of the law of nuisances to cope with the problems of municipal growth." *See, e.g.,* Alfred Bettman, *Constitutionality of Zoning,* 37 Harv. L. Rev. 834, 836-38 841 (1924).

Local zoning laws, therefore, have become a substitute for the common-law

of nuisance on which landowners rely to safeguard their interest in quiet enjoyment of their land. Courts universally recognize that, just as the arbitrary preemption of nuisance law deprives landowners of property without due process of law, *see, e.g., Bormann v. Board of Supervisors,* 584 N.W.2d 309 (Iowa 1998) (holding that "right-to-farm" law unconstitutionally deprived neighboring landowners of property by preempting nuisance law), so too, the arbitrary elimination of zoning's protections can deprive neighboring landowners of their property interest in quiet enjoyment. *See, e.g., Rodgers v. Village of Tarrytown,* 302 N.Y. 115, 123-24, 96 N.E.2d 731, 734-735 (1951) (describing unconstitutional "spot zoning" as the "singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners"); *Morrison v. Matt-A-Mar, Inc.,* 36 A.D.2d 844, 321 N.Y.S.2d 521 (2d Dep't 1971) (allegation that zoning authorizing marina to detriment of neighboring landowners raises triable issue of fact as to illegal spot zoning).

Given the importance of zoning for the protection of landowners' property rights, courts should not lightly infer that a state statute has swept aside local zoning laws without providing any substitute protection for landowners. Such an inference is improbable for two reasons. First, such an interpretation of state law

arbitrarily burdens the property rights of neighboring property owners. Indeed, the states' arbitrarily favoring gas and oil developers' extraction of minerals over neighbors' rights of quiet enjoyment, without any regard for comprehensive planning or the weighing of relative burdens and benefits, could constitute a deprivation of the neighbors' property without due process of law. *See, e.g., Carnal Realty, Inc. v. Town of Islip,* 34 A.D.2d 780, 781, 311 N.Y.S.2d 239, 241 (2d Dep't 1970); *Freeman v. City of Yonkers,* 205 Misc. 947, 956, 129 N.Y.S.2d 703, 710 (Westchester Cnty. Ct. 1954) (illegal spot zoning to grant zoning map amendment for gas station to detriment of neighborhood). At least one judge has observed that even the selective elimination of zoning through a state-wide law benefiting mineral rights over all other forms of property, constitutes a deprivation of right to quiet enjoyment of property without due process of law. *See, e.g., Robinson Twp. v. Commonwealth,* 83 A.3d 901, 1000 (Pa. 2013) (3-judge plurality) (Baer, J., concurring) (affirming due process reasoning of *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 480-86 (Pa. Commw. 2012) that a state statute eliminating local power to impose zoning restrictions on oil and gas drilling unconstitutionally deprived neighboring landowners of property, and not reaching plurality's alternative constitutional grounds).

Second, quite apart from arbitrarily burdening one class of property rights,