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## LOCAL REGULATION OF MINERAL DEVELOPMENT IN WYOMING

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Extraction of oil, gas, and solid minerals can significantly affect the use and enjoyment of the surface of the land. Wyoming has recently addressed conflicts between oil and gas developers and surface owners by adopting a surface damage act.<sup>1</sup> But such statutes only deal with harms to the surface overlying the mineral estate being developed.<sup>2</sup> Extractive industries may affect not only the surface above, but also neighboring land and the entire area.

City and county governments traditionally have regulated land uses to manage the types of external impacts caused by extractive industries. But the state also has an interest in facilitating such industries and uniformly regulating them. This article discusses the resulting scope of local power to regulate extractive industries on private land in Wyoming. Part I describes the relevant grants of power to Wyoming cities and counties. Part II discusses express state limitations on that authority, while Part III discusses implied limitations arising from conflicts with comprehensive state regulatory schemes for mineral development. Finally, Part IV summarizes common types of local regulations and discusses their validity under the principles developed in Parts II and III.

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<sup>1</sup> See WYO. STAT. ANN. §§ 30-5-401 to -410 (2009) (effective July 1, 2005). Ten other states have also adopted such statutes. See Christopher S. Kulander, *Surface Damages, Site-Remediation and Well Bonding in Wyoming—Results and Analysis of Recent Regulations*, 9 WYO. L. REV. 413, 414 n.1, 417 (2009).

<sup>2</sup> See generally Kulander, *supra* note 1.

## I. GRANTS OF AUTHORITY TO LOCALITIES

Localities are subdivisions of the state and have only the powers granted to them by the state.<sup>3</sup> Therefore, the first step in describing the extent of local authority to regulate extractive industries is to identify relevant sources of local regulatory power granted by the state.

Unless specifically restricted, zoning enabling acts generally authorize cities and counties to apply zoning regulations to extractive industries, just as to any other land uses. The Standard State Zoning Enabling Act, which the Wyoming enabling act adopts verbatim in relevant part, authorizes local regulation of

the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.<sup>4</sup>

Authorized governments may accomplish these purposes by dividing the municipality into districts, with uniform restrictions applying to properties within each district.<sup>5</sup> The typical enabling act therefore allows localities to regulate mineral development, just as they may regulate other land uses.<sup>6</sup>

However, the original Wyoming zoning enabling act, like the Standard State Zoning Enabling Act, only authorized “cities and incorporated villages” to zone.<sup>7</sup> A separate state statute, section 18-5-201 of the Wyoming Statutes, authorizes counties to regulate land use in unincorporated areas of the county.<sup>8</sup> Section

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<sup>3</sup> See, e.g., *KN Energy, Inc. v. City of Casper*, 755 P.2d 207, 210 (Wyo. 1988) (“Municipalities, being creatures of the state, have no inherent powers but possess only the authority conferred by the legislature.”); *Gueke v. Bd. of County Comm’rs*, 728 P.2d 167, 170 (Wyo. 1986) (“In Wyoming the board of county commissioners for any county has only those powers prescribed by law or reasonably implied therefrom.” (citations omitted)); *Schoeller v. Bd. of County Comm’rs*, 568 P.2d 869, 876 (Wyo. 1977).

<sup>4</sup> DEP’T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 1 (rev. ed. 1926); WYO. STAT. ANN. § 15-1-601(a) (2009).

<sup>5</sup> DEP’T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 2; WYO. STAT. ANN. § 15-1-601(b).

<sup>6</sup> See, e.g., *Blancett v. Montgomery*, 398 S.W.2d 877, 881 (Ky. 1966) (holding that city’s zoning authority included power to prohibit oil and gas exploration); *Addison Twp. v. Gout*, 460 N.W.2d 215, 217 (Mich. 1990) (observing that in the absence of a specific preclusion, the relevant zoning enabling acts authorized localities to regulate oil and gas land uses); D.E. Ytreberg, Annotation, *Prohibiting or Regulating Removal or Exploitation of Oil and Gas, Minerals, Soil, or Other Natural Products Within Municipal Limits*, 10 A.L.R. 3d 1226 (1966).

<sup>7</sup> DEP’T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 1; accord WYO. STAT. ANN. § 15-1-601.

<sup>8</sup> See WYO. STAT. ANN. § 18-5-201 (2009).

18-5-201 authorizes counties to “regulate and restrict the location and use of buildings and structures and the use, condition of use or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use and other purposes in the unincorporated area of the county.”<sup>9</sup> Even though this language largely comes from the Standard State Zoning Enabling Act, the county enabling statute does not include many of the Standard Act’s provisions. In fact, unlike the Standard Act, the county enabling statute does not even expressly grant the actual power to zone—to create districts with uniform regulations.<sup>10</sup> Nevertheless, the county enabling statute clearly was intended to grant traditional zoning powers to counties. Not only does section 18-5-201 draw from the Standard State Zoning Enabling Act, the statute as a whole refers repeatedly to zoning authority and county zoning resolutions.<sup>11</sup>

Wyoming cities and towns may also regulate extractive industries pursuant to their home rule powers. The state constitution gives cities and towns home rule power “to determine their local affairs and government,” subject to “statutes uniformly applicable to all cities and towns, and to statutes prescribing limits of indebtedness.”<sup>12</sup> Counties, on the other hand, do not have such home rule powers. Although the Wyoming Supreme Court has not considered whether this constitutional provision authorizes regulation of mineral development, courts in other states have generally held that such home rule provisions do authorize such regulation.<sup>13</sup> Such courts have reasoned that, while mineral development is not purely a “local affair,” it has significant local impacts, and consequently may be regulated under a home rule provision without specific authorization.<sup>14</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> See DEP’T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 2 (“[T]he local legislative body may divide the municipality into districts . . . All such regulations shall be uniform for each class or kind of buildings throughout each district . . .”). Curiously, another statute, adopted before section 18-5-201, does expressly grant zoning powers to counties. See WYO. STAT. ANN. § 18-5-102 (“Each board of county commissioners may provide for the physical development of the unincorporated territory within the county by zoning all or any part of the unincorporated territory.”). But subsequently that statute was construed to grant a very narrow power to counties to regulate sanitary facilities, while section 18-5-201 was construed to more generally grant zoning authority. See *Carter v. Bd. of County Comm’rs*, 518 P.2d 142, 143–44 (Wyo. 1974).

<sup>11</sup> See WYO. STAT. ANN. §§ 18-5-201 to -208; 1980 Wyo. Op. Att’y Gen. 433 (arguing that section 18-5-201 grants only zoning powers to counties).

<sup>12</sup> WYO. CONST. art. XIII, § 1; *cf.* *Coulter v. City of Rawlins*, 662 P.2d 888 (Wyo. 1983) (discussing home rule provision and exception for fees).

<sup>13</sup> See Bruce M. Kramer, *Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches*, 14 UCLA J. ENVTL. L. & POL’Y 41, 90 (1996) (“Oil and gas well drilling can be regulated by local governments under their police power.”).

<sup>14</sup> See, e.g., *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1066 (Colo. 1992) (stating that oil and gas land uses are a local matter that a city may regulate under Colorado home rule provision, although state may preempt local regulation); *City of Carmel v. Martin Marietta Materials, Inc.*, 883 N.E.2d 781, 787–88 (Ind. 2008) (holding that city could regulate mining pursuant to home rule authority rather than zoning authority).

## II. EXPRESS LIMITATIONS ON LOCAL REGULATORY AUTHORITY

To the extent that the state legislature is the source of local regulatory authority, the legislature can also limit the authority it grants. For example, a state legislature could simply declare by statute that localities may not regulate certain aspects of oil and gas well operations.<sup>15</sup>

### A. *Counties May Not Prevent Uses Reasonably Necessary for Extraction or Production*

Although such express limits are uncommon,<sup>16</sup> Wyoming law does expressly limit the authority of counties to regulate extractive industries. Section 18-5-201, the statute authorizing county land use regulation, says that “no zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any lands subject thereto.”<sup>17</sup> “Mineral resources” refers to substances that are “rare and exceptional in character,” and does not include sand, gravel, and limestone that do not have “a peculiar property giving them special value.”<sup>18</sup> Even though the text does not directly say so, in context this limitation clearly applies only to zoning resolutions or plans adopted pursuant to this statutory article, and therefore applies only to county zoning, not city zoning. The limitation also applies only to “zoning” resolutions or plans, textually leaving open the possibility that other types of authorized regulations would not be restricted. But again, the text is not ambiguous in context. The limitation is clearly meant to restrict whatever power was granted by this section. In fact, the wording of the limitation is a further suggestion that the legislature intended this section to grant only traditional zoning powers to counties.

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<sup>15</sup> See, e.g., 58 PA. CONS. STAT. ANN. § 601.602 (West 1996) (“Except with respect to ordinances adopted pursuant to the . . . Municipalities Planning Code, and the . . . Flood Plain Management Act, all local 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 impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.”).

<sup>16</sup> See Kramer, *supra* note 13, at 95 (“But it is the rare exception, rather than the general rule, that a state expressly preempts sub-state regulation of the extractive industry.”).

<sup>17</sup> WYO. STAT. ANN. § 18-5-201 (2009). Oklahoma restricts some counties’ authority to zone oil and gas operations even more. See 19 OKLA. STAT. ANN. § 866.30 (West 2000) (“The zoning power conferred herein [on certain counties] shall not apply to . . . the extraction of oil or natural gas . . .”); *id.* § 868.11 (“The zoning power hereby conferred [on counties over 500,000] shall not . . . apply to . . . the extraction of minerals.”).

<sup>18</sup> River Springs L.L.C. v. Bd. of County Comm’rs, 899 P.2d 1329, 1333 (Wyo. 1995).

Section 18-5-201 does not prohibit county regulation of extractive industries altogether. But it clearly prevents counties from adopting ordinances that would directly prohibit extraction or production of mineral resources on any lands. So while cities may have authority to prohibit mineral development altogether or in certain areas,<sup>19</sup> counties do not. Counties also may not adopt regulations that would prevent uses or occupancy that are “reasonably necessary” for “extraction or production.”

“Reasonably necessary” is vague. A 1980 Wyoming Attorney General opinion concluded that the phrase means simply filling an extraction or production need.<sup>20</sup> According to this interpretation, even though there may be a variety of ways to meet a particular extraction or production need, a county may not restrict any of those possible ways. Storage facilities for equipment or supplies, for example, are reasonably necessary to extraction and production. Therefore, the opinion reasoned, counties may not regulate such storage facilities.<sup>21</sup>

On the other hand, the phrase can be interpreted less restrictively. A “reasonably necessary” use or occupancy might be one for which there is not a reasonable alternative. The lack of a reasonable alternative is what makes the particular use “reasonably necessary,” rather than merely useful or convenient. Therefore, if a county restricts storage facilities in some way, the question would be whether the restriction makes some aspect of extraction or production unreasonably burdensome or costly. If so, the regulation prevents a reasonably necessary use and is invalid. If not, then the restricted use is not reasonably necessary, because other reasonable alternatives are available.

Despite the Attorney General’s opinion, courts should follow this latter interpretation.<sup>22</sup> The evident purpose of the statute as a whole favors interpreting the section 18-5-201 limitation to allow regulation of essential aspects of extraction and production as long as reasonable alternatives are available. The Wyoming Supreme Court has stated that, “[i]n deciding whether authority has been granted to a municipality to pursue a claimed governmental purpose, we apply a rule of strict construction, resolving any doubt against the existence of the municipal power.”<sup>23</sup> Presumably that same rule would apply to construing grants

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<sup>19</sup> See *infra* Part IV.A.

<sup>20</sup> See 1980 Wyo. Op. Att’y Gen. 433.

<sup>21</sup> See *id.*

<sup>22</sup> The Attorney General’s opinion does not bind the courts, of course. But the Wyoming Supreme Court has said that such an opinion is “entitled to some weight” when state officials have acted on the opinion. *Dir. of Office of State Lands & Invs. v. Merbanco, Inc.*, 70 P.3d 241, 256 (Wyo. 2003); see also *Dep’t of Revenue & Taxation, Motor Vehicle Div. v. Shipley*, 579 P.2d 415, 417 (Wyo. 1978) (“[W]e may also give some weight to a Wyoming Attorney General’s opinion . . .”).

<sup>23</sup> *KN Energy, Inc. v. City of Casper*, 755 P.2d 207, 211 (Wyo. 1988).

of authority to counties. However, the court has also stated that the “primary objective in construing a statute is to discern the intent of the legislature,” and that intent “is to be found, if possible, first in the express language of the statute.”<sup>24</sup>

The Wyoming Supreme Court has described the express language of section 18-5-201 as “a broad grant of authority.”<sup>25</sup> The limitation concerning mineral extraction and production is simply intended to ensure that county regulations will not prevent extraction and production. The statute as a whole gives no reason to construe the limitation more broadly than that. If the purpose were broader, to prevent counties from regulating mineral extraction and production at all, or even to prevent counties from regulating essential aspects of extraction and production at all, the legislature could have said so more directly. The statute could simply have said something like, “no zoning resolution or plan shall regulate the extraction or production of the mineral resources in or under any lands subject thereto.”<sup>26</sup> The statute could even have said that “no zoning resolution or plan shall regulate any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any lands subject thereto.” But instead the statute says that “no zoning resolution or plan shall *prevent* any use or occupancy reasonably necessary to the extraction or production of the mineral resources.”<sup>27</sup> That choice of words clearly indicates an intention to allow zoning that regulates but does not prevent reasonably necessary uses, such as specifying locations and sizes of reasonably necessary uses. The intent of the legislature is clear, and there is no doubt to be resolved against county authority.

Furthermore, the Wyoming Supreme Court has indicated that, contrary to the Attorney General’s opinion, counties may regulate even essential aspects of extraction and production. In *Bonnie M. Quinn Revocable Trust v. SRW, Inc.*,<sup>28</sup> the plaintiffs argued that the county zoning ordinance required a conditional use permit before the defendants could explore and develop coalbed methane gas underneath the plaintiffs’ property. The court affirmed the dismissal of the

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<sup>24</sup> *Id.* at 214.

<sup>25</sup> *Snake River Venture v. Bd. of County Comm’rs*, 616 P.2d 744, 752 (Wyo. 1980).

<sup>26</sup> The Montana Supreme Court followed similar reasoning in concluding that the state zoning enabling act did not preclude local zoning regulation of gravel extraction. The state enabling act said that “[n]o resolution or rule adopted pursuant to the provisions of this part . . . [shall] prevent the complete use, development, or recovery of any mineral, forest, or agricultural resources by the owner [thereof].” MONT. STAT. ANN. § 76-2-209 (2009). The court contrasted this language with another section of the statute that declared: “No planning district or recommendations adopted under this part shall regulate lands used for grazing, horticulture, agriculture, or the growing of timber.” *Id.* § 76-2-109. Since the statute did not say local zoning laws could not regulate mineral development, the court reasoned that a zoning code could regulate mineral development as long as the code “allow[s] the activities necessary to develop the resource to a point at which it can be effectively utilized.” *Missoula County v. Am. Asphalt, Inc.*, 701 P.2d 990, 992 (Mont. 1985).

<sup>27</sup> WYO. STAT. ANN. § 18-5-201 (2009) (emphasis added).

<sup>28</sup> 91 P.3d 146 (Wyo. 2004).

plaintiffs' action for failure to exhaust administrative remedies. However, the court's opinion noted the issue of whether the county zoning ordinance violated section 18-5-201, and stated: "We have no idea how the board would enforce the resolution in this area. It is possible that the commission would enforce the resolution in a manner that no such question will exist."<sup>29</sup> Although the court did not have to decide the question, the court thus suggested that a county may regulate extraction and production without violating section 18-5-201, rather than suggesting that any direct regulation of extraction itself would violate section 18-5-201.

The court also considered the section 18-5-201 limitation in *River Springs L.L.C. v. Board of County Commissioners*.<sup>30</sup> The court held that counties cannot prohibit mineral "extraction and production activities," but can regulate them as long as they are not regulated under the Wyoming Environmental Quality Act.<sup>31</sup> The court thus further indicated that section 18-5-201 does not prohibit county regulation of activities essential to mineral extraction.

Not only should the statute be construed to allow regulation of necessary uses as long as the permitted uses are reasonable, the statute also allows any regulation of uses that are not "reasonably necessary" to extraction or production, even if the regulation "prevents" such uses. Therefore, as the Attorney General's 1980 opinion reasons, counties can regulate "buildings and structures which are only incidental" to the extraction of minerals.<sup>32</sup> The opinion mentions roads for transportation and processing facilities as examples of useful but not directly necessary uses to extract and produce minerals.<sup>33</sup>

#### *B. Localities May Not Regulate Facilities Permitted by the Industrial Siting Council*

The Industrial Development Information and Siting Act (the Siting Act) also specifically restricts both county and city regulatory authority. The Siting Act declares that "no state, intrastate regional agency or local government may require any approval, consent, permit, certificate or other condition for the construction, operation or maintenance of a facility authorized by a permit issued pursuant to this chapter," with certain state agency exceptions.<sup>34</sup> Facilities authorized by the Industrial Siting Council are those with an estimated construction cost of

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<sup>29</sup> *Id.* at 152.

<sup>30</sup> 899 P.2d 1329 (Wyo. 1995).

<sup>31</sup> *See id.* at 1331.

<sup>32</sup> 1980 Wyo. Op. Att'y Gen. 433.

<sup>33</sup> *See id.*

<sup>34</sup> WYO. STAT. ANN. § 35-12-115 (2009).

\$96 million, adjusted annually by the Council.<sup>35</sup> However, oil and gas drilling facilities, producing facilities, wellfield activities, and pipelines are exempt from the Siting Act, so only other types of extractive industries might be subject to the Industrial Siting Council's jurisdiction and therefore not subject to requirements of local approval.<sup>36</sup>

### III. IMPLIED LIMITATIONS ON LOCAL REGULATORY AUTHORITY

Even if the state has not expressly limited local authority, state regulatory schemes may implicitly limit local regulation. The Wyoming Supreme Court has resisted characterizing such implied limitations as “preempting” municipal authority, reasoning that preemption occurs when a sovereign power prevails in a conflict with another sovereign power, and municipalities have no inherent or reserved sovereign powers.<sup>37</sup> The same reasoning applies to counties.<sup>38</sup> Nevertheless, similar circumstances may result in state law implicitly limiting the powers otherwise granted to localities. Unlike some state home rule provisions, Wyoming's constitution grants general municipal regulatory authority over local affairs, but home rule authority is still “subject . . . to statutes uniformly applicable to all cities and towns.”<sup>39</sup> The state legislature therefore can restrict municipal authority over even purely local affairs.<sup>40</sup> “To the extent that a statute of the state in some way conflicts with a claimed power of the municipality, the municipal provision must yield, even with respect to any police power.”<sup>41</sup> And since counties have no such constitutional grant of police power, the state legislature can limit their regulatory authority likewise.

#### *A. Local Regulation Is Not Permitted When State Regulation Is Intended to Be Exclusive*

One way that the state legislature may implicitly limit local authority is by indicating its intent for state authority to be exclusive. For example, the state legislature has granted the Public Service Commission (PSC) “general and exclusive power to regulate and supervise every public utility within the state.”<sup>42</sup> The statute does not expressly say that localities may not license public utilities.

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<sup>35</sup> See *id.* § 35-12-102(a)(vii).

<sup>36</sup> See *id.* § 35-12-119(c)–(d).

<sup>37</sup> See *KN Energy, Inc. v. City of Casper*, 755 P.2d 207, 210 (Wyo. 1988).

<sup>38</sup> See *River Springs L.L.C. v. Bd. of County Comm'rs*, 899 P.2d 1329, 1335 (Wyo. 1995); *Dunnegan v. Bd. of County Comm'rs*, 852 P.2d 1138, 1141 (Wyo. 1993); *Schoeller v. Bd. of County Comm'rs*, 568 P.2d 869, 875 (Wyo. 1977).

<sup>39</sup> WYO. CONST. art. XIII, § 1(b).

<sup>40</sup> See *KN Energy*, 755 P.2d at 213; *Stewart v. City of Cheyenne*, 154 P.2d 355, 360 (Wyo. 1944).

<sup>41</sup> *KN Energy*, 755 P.2d at 213.

<sup>42</sup> WYO. STAT. ANN. § 37-2-112 (2009).



Nevertheless, the Wyoming Supreme Court held that the grant of the exclusive power to regulate to the PSC “demonstrates a legislative intent that the police power of the state, to the extent that it relates to public utilities, shall be exercised by the PSC and to preserve none of that power for municipalities.”<sup>43</sup>

The legislature may indicate such an intention even without expressly declaring that state authority is exclusive.<sup>44</sup> In *River Springs L.L.C. v. Board of County Commissioners*,<sup>45</sup> the Wyoming Supreme Court held that the Wyoming Environmental Quality Act (WEQA) gives the Department of Environmental Quality (DEQ) exclusive authority to regulate extraction and production of solid minerals.<sup>46</sup> Unlike the grant of exclusive power to the PSC, the WEQA does not expressly say that the DEQ shall have “exclusive” power to regulate solid mineral extraction and production. Nevertheless, the court concluded that the “statutory scheme is exhaustive in its requirements relating to the extraction and production of ‘minerals.’”<sup>47</sup> Consequently, the court in effect inferred a legislative intention to exclude local regulatory power, except in the narrow circumstances when the WEQA does not apply, such as the extraction of sand and gravel for a landowner’s own noncommercial use,<sup>48</sup> and surface mining of sand, gravel, and the like, from an area of ten acres or less.<sup>49</sup> In those circumstances, the court held, a county may “regulate these activities so long as regulation by the county does not conflict with a regulation by the state.”<sup>50</sup>

## *B. Local Regulation Is Not Permitted When It Would Conflict with State Regulation*

### *1. Localities may not regulate matters that the state uniformly regulates*

As the court in *River Springs* said, even if the state has not somehow declared its intention to preclude local regulation, localities may not regulate in a way that would conflict with state regulation. Such a conflict may result simply from

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<sup>43</sup> *KN Energy*, 755 P.2d at 213; see also *Vandehi Devs. v. Pub. Serv. Comm’n*, 790 P.2d 1282 (Wyo. 1990) (affirming PSC authorization of overhead utility line along county roads despite county commission’s denial of permission).

<sup>44</sup> See *City of Green River v. Debernardi Constr. Co.*, 816 P.2d 1287, 1291 (Wyo. 1991) (noting that legislative history or “the pervasiveness of the state regulatory scheme” may indicate legislative intention to deny local regulatory authority).

<sup>45</sup> 899 P.2d 1329 (Wyo. 1995).

<sup>46</sup> The WEQA does not give the land division of the DEQ any regulatory authority over oil and gas operations. See WYO. STAT. ANN. § 35-11-401(a) (2009) (“Nothing in this act shall provide the land quality division regulatory authority over oil mining operations . . .”).

<sup>47</sup> *River Springs*, 899 P.2d at 1336.

<sup>48</sup> See WYO. STAT. ANN. § 35-11-401(e)(iii).

<sup>49</sup> See *id.* § 35-11-401(e)(vi).

<sup>50</sup> *River Springs*, 899 P.2d at 1336.

the fact that the state law regulates a matter of statewide concern that requires uniformity.<sup>51</sup> In such a circumstance, any local law would conflict with state law.

To some extent, localities in Wyoming do not have authority to regulate the environmental impacts of extractive industries because of this sort of conflict with a uniform, statewide regulatory scheme. If there were no such conflict, localities would have the power to regulate how land is used for any legitimate, police power purpose: “[t]o promote the public health, safety, morals and general welfare.”<sup>52</sup> Regulating land uses to reduce pollution or other environmental impacts certainly promotes the public health and general welfare.<sup>53</sup>

However, local regulations that directly specify performance standards for environmental impacts might be inconsistent with state regulation of those same environmental impacts. The Wyoming Office of the Attorney General concluded that state regulation of land, air, and water quality is intended to be not only comprehensive, but uniform.<sup>54</sup> The WEQA directs the advisory boards to adopt “comprehensive plans and programs for the . . . prevention, control, and abatement of air, water, and land pollution.”<sup>55</sup> The statute does not expressly state an intention for standards to be uniform. But it does declare that one purpose of the WEQA is “to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state.”<sup>56</sup> This fairly suggests an intention that preservation of the air, land, and water resources throughout the state will be comprehensively planned pursuant to the WEQA, not local regulation. The statute’s policy and purpose is also “to retain for the state the control over its air, land and water and to secure cooperation between agencies of the state, agencies of other states, interstate agencies, and the federal

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<sup>51</sup> See generally 3 EDWARD H. ZIEGLER, JR., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 48:4 (4th ed. 2009).

<sup>52</sup> WYO. STAT. ANN. § 18-5-201 (2009); see also WYO. STAT. ANN. § 15-1-601(d) (“All regulations shall be . . . designed to . . . promote health and general welfare.”).

<sup>53</sup> The 1980 Attorney General’s opinion argued that the grant of regulatory authority to counties only grants authority to regulate the “physical development of land” and not to regulate the operation of mines to control environmental impacts. 1980 Wyo. Op. Att’y Gen. 433. This is an unrealistic distinction, and one not suggested by the text itself, since zoning regulations often have restricted land uses to prevent adverse environmental impacts. See, e.g., Bd. of County Comm’rs v. Bowen/Edwards Assocs., 830 P.2d 1045, 1056 (Colo. 1992) (holding that state grant of zoning authority to counties authorized county land use regulations of oil and gas development that included environmental quality standards); Village of Union v. So. Cal. Chem. Co., 375 N.E.2d 489, 492 (Ill. App. Ct. 1978) (holding that state environmental protection act preempted zoning regulation by village, but acknowledging that village “has the authority to enact zoning ordinances under the avowed statutory purpose of providing pure air for its residents in specific areas of its village”).

<sup>54</sup> See 1980 Wyo. Op. Att’y Gen. 433.

<sup>55</sup> WYO. STAT. ANN. § 35-11-114(a) (2009).

<sup>56</sup> *Id.* § 35-11-102; see also 1980 Wyo. Op. Att’y Gen. 433.

government in carrying out these objectives.”<sup>57</sup> The statute does not mention local governments as cooperating regulators pursuing these purposes. The WEQA thus suggests that land, air, and water quality are matters of statewide concern to be regulated uniformly by the state. Any local regulation of those same matters therefore conflicts with the state statutory purpose. Even stricter local regulation, which would provide even greater protection of land, air, and water quality, would be inconsistent with the statutory purpose of applying comprehensive, uniform rules statewide.<sup>58</sup>

Furthermore, the WEQA suggests that local regulations generally are not allowed, because the Act specifically authorizes certain local regulations. For example, the WEQA directs that state regulations shall include standards for confined swine facilities of a certain size.<sup>59</sup> However, it declares that “[i]f any county adopts a land use plan or zoning resolution which imposes stricter requirements . . . , the county requirements shall prevail.”<sup>60</sup> Similarly, article 16 of the Act, which deals with remediation of contaminated sites, provides a process for creating “use control areas” that establish long-term restrictions on the use of a site.<sup>61</sup> The article specifies that, except as a governmental entity may agree pursuant to a use control petition, “nothing in this section shall contravene or limit the authority of any county, city or town to regulate and control the property under their jurisdiction.”<sup>62</sup> Finally, the water quality provisions direct that if a city or county requests and satisfies specified conditions, the state will delegate to the city or county regulatory authority over sewage and wastewater facilities and public water supplies.<sup>63</sup> If the WEQA generally allowed local regulation, these specific provisions would be unnecessary.

Therefore, the WEQA implicitly denies local authority to regulate the same land use characteristics that the WEQA regulates. For example, one section of the WEQA regulates oil field waste disposal facilities, including their proximity to houses and schools.<sup>64</sup> Were it not for the WEQA, a local zoning code might naturally regulate the same land use feature. Obviously, a county may not authorize

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<sup>57</sup> WYO. STAT. ANN. § 35-11-102.

<sup>58</sup> See, e.g., *Carlson v. Vill. of Worth*, 343 N.E.2d 493, 500 (Ill. 1976) (“It is clear from the Environmental Protection Act itself, its legislative history, and preceding legislation in the same area that the General Assembly intended to thereby exclude any authority of local political entities which could interfere with or frustrate the objective of establishing a unified state-wide system of environmental protection.”).

<sup>59</sup> See WYO. STAT. ANN. § 35-11-302(a)(ix).

<sup>60</sup> *Id.*

<sup>61</sup> See *id.* § 35-11-1609.

<sup>62</sup> *Id.* § 35-11-1609(g).

<sup>63</sup> See *id.* § 35-11-304(a).

<sup>64</sup> See *id.* § 35-11-306.

what the WEQA forbids.<sup>65</sup> But the WEQA further implies that a county also may not impose stricter requirements except when the WEQA expressly authorizes stricter local regulations.<sup>66</sup>

On the other hand, localities may regulate land uses that the WEQA does not regulate, even though the purpose may be to prevent “environmental” impacts. Notably, the WEQA’s land quality provisions, requiring approval of mining and reclamation plans, do not apply to oil and gas operations.<sup>67</sup> Even when the WEQA does regulate a particular land use, localities also may regulate the same land use to address other characteristics that are not the subject of the WEQA, such as traffic and noise.<sup>68</sup> For example, the Court of Appeals of New Mexico observed that the state’s mining act extensively regulated only certain aspects of mining, including damage to the land, pollution caused by mining waste, diversion of streams, impoundment of water, and construction of roads.<sup>69</sup> The court therefore concluded that the county could regulate other land use characteristics of mining, such as traffic, noise, nuisances caused by blasting and dust, and compatibility with other land uses.<sup>70</sup>

The Wyoming Oil and Gas Conservation Act also regulates certain aspects of oil and gas development in a way that requires uniformity across the state. The Act is primarily intended to prevent waste of oil and gas and protect owners’ correlative rights in those resources.<sup>71</sup> Implementing regulations thus govern things like the location, drilling, and operation of wells. The Act also gives the Wyoming Oil and Gas Conservation Commission (the Commission) certain authority to regulate oil and gas activities to prevent water pollution and to reclaim

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<sup>65</sup> See, e.g., *Gueke v. Bd. of County Comm’rs*, 728 P.2d 167, 169 (Wyo. 1986); 56 AM. JUR. 2D, *Municipal Corporations, Counties, and Other Political Subdivisions* § 328 (2000).

<sup>66</sup> See *Colo. Min. Ass’n v. Bd. of County Comm’rs*, 199 P.3d 718, 725 (Colo. 2009) (“[L]ocal governments generally ‘may not forbid that which the state has explicitly authorized.’”); 1980 Wyo. Op. Atty. Gen. 433 (“While more restrictive county requirements are not always viewed as constituting a ‘conflict’, it is a basic principle that local regulation may not exclude what the state has permitted.”).

<sup>67</sup> See WYO. STAT. ANN. § 35-11-401(a) (“Nothing in this act shall provide the land quality division regulatory authority over oil mining operations.”).

<sup>68</sup> See *id.* §§ 35-11-401 to -437.

<sup>69</sup> See *San Pedro Mining Corp. v. Bd. of County Comm’rs*, 909 P.2d 754, 759 (N.M. Ct. App. 1995).

<sup>70</sup> *Id.* at 759–60; see also *Bd. of County Comm’rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1058 (Colo. 1992) (“The state’s interest in oil and gas activities is not so patently dominant over a county’s interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.”); *C & M Sand & Gravel v. Bd. of County Comm’rs*, 673 P.2d 1013, 1017 (Colo. Ct. App. 1983); *In re Briarcliff Assocs.*, 534 N.Y.S.2d 215, 217–18 (1988); *Hulligan v. Columbia Twp. Bd. of Zoning Appeals*, 392 N.E.2d 1272, 1274 (Ohio Ct. App. 1978); *Baker v. Snohomish County*, 841 P.2d 1321, 1326 (Wash. Ct. App. 1992).

<sup>71</sup> See WYO. STAT. ANN. §§ 30-5-102, -104(d)(iv), -109(a), -117, -121 (2009).

land.<sup>72</sup> However, even though the Oil and Gas Conservation Act itself does not say whether localities can regulate oil and gas development, the Commission's regulations declare that "[c]ompliance with these rules does not relieve the owner or operator of the obligation to comply with applicable federal, local or other state permits."<sup>73</sup> Of course, the Commission cannot authorize local regulation that the state legislature has implicitly prohibited. But the Commission's rule at least suggests that local regulation does not generally conflict with state law governing oil and gas development. On the other hand, local regulation of technical aspects of drilling, or placement of wells, may fundamentally interfere with the state's declared purposes of preventing waste and protecting correlative rights.<sup>74</sup>

## 2. *Local regulations are invalid if they conflict with state regulations*

Of course, state law prevails whenever any local regulation conflicts with a state regulation.<sup>75</sup> So even if local regulation is generally compatible with a state regulatory scheme, a local regulation will be invalid if it is contrary to state law.

Much local land use regulation of oil and gas development will not conflict with state law and regulations. Although state oil and gas regulations are extensive, they do not regulate most land use characteristics of oil and gas uses. The primary purposes of the Wyoming Oil and Gas Conservation Act are to prevent waste and protect correlative rights.<sup>76</sup> The Commission has the authority and duty to determine "whether waste exists or is imminent."<sup>77</sup> The Commission is given authority to regulate various aspects of oil and gas operations "for conservation purposes."<sup>78</sup> The Commission also regulates oil and gas activities to prevent water pollution and to reclaim land.<sup>79</sup> But the statute does not address other land use concerns at all, and does not empower the Commission to address such concerns.

Localities therefore are free to regulate oil and gas uses, subject to the limitation on county authority in section 18-5-201. Of course, local permission cannot authorize what state law forbids; that would certainly conflict with state

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<sup>72</sup> See *id.* § 30-5-104(d)(vi)–(vii).

<sup>73</sup> Wyo. Oil & Gas Rules ch. 2, § 1(b) (2008).

<sup>74</sup> See *Bowen/Edwards Assocs.*, 830 P.2d at 1060; *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1067–68 (Colo. 1992); 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.'"); *infra* Part IV.A.

<sup>75</sup> See *San Pedro Mining Corp.*, 909 P.2d at 760; *Gueke v. Bd. of County Comm'rs*, 728 P.2d 167, 169 (Wyo. 1986).

<sup>76</sup> See WYO. STAT. ANN. §§ 30-5-102, -104(d)(iv), -109(a), -117, -121.

<sup>77</sup> *Id.* § 30-5-104(b).

<sup>78</sup> *Id.* § 30-5-104(d).

<sup>79</sup> See *id.* § 30-5-104(d)(vi)–(vii).

law.<sup>80</sup> But localities can impose compatible regulations because the state has not indicated an intention to preclude local regulation, because the state act addresses only certain regulatory concerns, and because the state act does not indicate a need for statewide uniformity beyond its requirements intended to prevent waste and protect correlative rights. Localities therefore may further restrict oil and gas uses to address land use concerns.<sup>81</sup>

However, if any such local regulation directly conflicts with state regulations, then the local regulation is invalid. As the Colorado Supreme Court explained:

For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest.<sup>82</sup>

Thus, for example, the Colorado Court of Appeals held that a town's requirements for well setbacks and noise abatement were invalid because they conflicted with more permissive state requirements.<sup>83</sup> On the other hand, the city could regulate access roads and require building permits for above-ground structures because they did not conflict with any state regulations.<sup>84</sup>

In Wyoming, however, a stricter local regulation of oil and gas development would not conflict with a more permissive state oil and gas regulation, because the state regulations expressly declare that “[c]ompliance with these rules does not relieve the owner or operator of the obligation to comply with applicable federal, local or other state permits or regulatory requirements.”<sup>85</sup>

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<sup>80</sup> Localities are very unlikely to intend their land use regulations to authorize land uses that would be forbidden by state or other applicable law anyway. *See, e.g.*, Gillette, Wyo., Zoning Ordinance 979 § 3(b)(5) (Jan. 23, 1979) (“Wherever higher or more restrictive standards are established by the provisions of any other applicable statute, resolution or regulations the provisions of such other statutes, resolutions or regulations shall apply.”).

<sup>81</sup> *See, e.g.*, Warner Co. v. Zoning Hearing Bd., 612 A.2d 578, 585 (Pa. Commw. Ct. 1992) (upholding local regulation that required greater setback than required by state statute); Gueke v. Bd. of County Comm’rs, 728 P.2d 167, 170 (Wyo. 1986) (“[W]here a local ordinance or resolution merely enlarges upon the provisions of a statute by requiring more than the statute, there is no conflict between the two unless the legislature has preempted regulation of the field.”).

<sup>82</sup> Bd. of County Comm’rs v. Bowen/Edwards Assocs., 830 P.2d 1045, 1060 (Colo. 1992).

<sup>83</sup> *See* Town of Frederick v. N. Am. Res. Co., 60 P.3d 758, 765 (Colo. Ct. App. 2002).

<sup>84</sup> *See id.* at 764.

<sup>85</sup> Wyo. Oil & Gas Rules ch. 2, § 1(b) (2008).

#### IV. LOCAL REGULATIONS OF EXTRACTIVE INDUSTRIES

This final part of the article discusses different types of local regulations and their validity under the principles discussed above.

##### *A. Prohibiting Mineral Development in Certain Areas*

Zoning ordinances specify what uses are appropriate in what locations. Local zoning codes naturally may prohibit mineral development in certain zones where such activities would be incompatible with neighboring land uses. The Carbon County zoning ordinance, for example, prohibits oil, gas, and mineral exploration, development, and production in Business Park zones,<sup>86</sup> and allows them only with a conditional use permit in Residential Single-Family zones.<sup>87</sup> The Sweetwater County zoning ordinance allows oil, gas, and mineral development only in Agricultural Districts, Heavy Industrial Districts, and Mining Districts.<sup>88</sup> The Campbell County ordinance allows mineral extraction and production only in Agricultural Districts.<sup>89</sup> Natrona County permits mining, oil and gas exploration and production only in Ranching, Agricultural and Mining Districts.<sup>90</sup>

Although such zoning restrictions are understandable and maybe even desirable, section 18-5-201 does not allow counties to restrict the areas available for extraction or production. As discussed above, section 18-5-201 declares that no county “zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any lands subject thereto.”<sup>91</sup> The Wyoming Supreme Court’s opinion in *River Springs*

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<sup>86</sup> See Carbon County, Wyo., Zoning Resolution of 2003 § 4.11 (Jan. 6, 2004).

<sup>87</sup> See *id.* § 4.7(b)(9). However, the Carbon County Zoning Resolution also quotes section 18-5-201, declaring that the resolution “shall not prevent any use or occupancy reasonably necessary to the extraction or production of mineral resources in or under any lands.” The resolution then says that “prior to actual extraction of the mineral, the area shall be properly zoned and all other applicable requirements of this Zoning Resolution shall be met.” *Id.* § 2.4. This section may indicate that the county is obligated to rezone any land as needed to allow extraction and production of minerals.

<sup>88</sup> See SWEETWATER COUNTY, WYO., ZONING RESOLUTION § 5 (2003). Mineral development is a conditional use in areas of Agricultural Districts that are designated Growth Management Areas. See *id.* § 5(A)(13)(d).

<sup>89</sup> See CAMPBELL COUNTY, WYO., ZONING REGULATIONS § 5(C)(11) (2005). Similar to the Carbon County ordinance, the Campbell County ordinance quotes the section 18-5-201 limitation, declaring that the ordinance shall not “prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any lands.” *Id.* § 2(B). The ordinance does not elaborate on the meaning or consequence of this restriction, but the county may thereby mean to indicate that it will rezone any land to agricultural if needed to allow extraction or production of minerals.

<sup>90</sup> NATRONA COUNTY, WYO., ZONING RESOLUTION ch. 6, § 1(b)(17) (2000).

<sup>91</sup> WYO. STAT. ANN. § 18-5-201 (2009); see also *supra* Part II.A.

clearly declared that a county may not prohibit extraction and production of minerals on any lands otherwise subject to a county zoning ordinance.<sup>92</sup>

This does not mean that counties cannot regulate how minerals are extracted and produced, however. *River Springs* also clearly declares that section 18-5-201 allows counties to regulate extraction and production when such local regulation is not otherwise prohibited by state law.<sup>93</sup> As long as county regulation does not prevent activities that are “reasonably necessary” for extraction and production, counties may regulate how minerals are extracted and produced to minimize undesirable land use impacts.<sup>94</sup> Section 18-5-201 apparently led Albany County to exempt mineral development from its zoning ordinance altogether. Albany County’s zoning ordinance cites section 18-5-201 and declares that “[m]ineral mining without processing of the mineral is exempt from zoning.”<sup>95</sup> Section 18-5-201 certainly does not require such an exemption, however.

Because section 18-5-201 does not apply to city zoning ordinances, cities might be free to prohibit mineral development in certain areas. In fact, some Wyoming cities prohibit mineral development anywhere within city limits.<sup>96</sup> Some courts in other states have held that such prohibitions do not conflict with state oil and gas statutes.<sup>97</sup> However, a complete prohibition on mineral development within city limits may conflict with a comprehensive state policy

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<sup>92</sup> See *River Springs L.L.C. v. Bd. of County Comm’rs*, 899 P.2d 1329, 1331, 1333 (Wyo. 1995); *supra* Part II.A.

<sup>93</sup> See *River Springs*, 899 P.2d at 1331, 1334; *supra* Part II.A.

<sup>94</sup> WYO. STAT. ANN. § 18-5-201; see also *supra* Part II.A.

<sup>95</sup> See ALBANY COUNTY, WYO., ZONING RESOLUTION ch. 4, § 6 (2009).

<sup>96</sup> See CASPER, WYO., MUNICIPAL CODE § 9.48.030 (2009) (prohibiting drilling, mining or producing “any oil, gas, coal or other mineral within the city”); LINGLE, WYO., CODE § 2-3-2 (2007) (prohibiting mining, prospecting or drilling for oil within the corporate limits); WORLAND, WYO., CODE § 15-32 (2009) (prohibiting mining, drilling, or producing within the city oil, gas, coal or any other mineral).

<sup>97</sup> See *Blancett v. Montgomery*, 398 S.W.2d 877, 881 (Ky. Ct. App. 1966) (holding that state oil and gas statute did not “preempt[] the authority of municipalities under their police power to regulate oil and gas activities within their city limits,” including local regulation that prohibited all oil and gas development in city); *cf. Huntley & Huntley, Inc. v. Borough Council*, 964 A.2d 855 (Pa. 2009) (holding that state oil and gas law’s explicit limitation on local regulation prohibited regulation of operational features, but did not prohibit local regulations specifying zones in which oil and gas development was permitted).



to authorize and encourage mineral extraction.<sup>98</sup> In *Voss v. Lundvall Bros.*,<sup>99</sup> the Colorado Supreme Court held that state law preempted a home rule city's ban on oil and gas drilling within city limits. The Colorado Oil and Gas Conservation Act does not "expressly or impliedly preempt all aspects of a local government's land-use authority over land that might be subject to oil and gas development."<sup>100</sup> However, the Act declares that it is intended to "[f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado . . . ; [and to] [s]afeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas."<sup>101</sup> The court held that the city's prohibition on oil and gas development within city limits conflicted with these purposes of the state's uniform regulatory scheme. The court observed that "it is often necessary to drill wells in a pattern dictated by the pressure characteristics of the pool, and because each well will only drain a portion of the pool, an irregular drilling pattern will result in less than optimal recovery and a corresponding waste of oil and gas."<sup>102</sup> Prohibiting drilling in certain locations could also interfere with the statutory purpose of protecting owners' correlative rights in a common pool "by exaggerating production in one area and depressing it in another."<sup>103</sup> The city therefore did not have the authority to ban oil and gas development within the city, because doing so conflicted with the state's preeminent interest in efficiently capturing oil and gas and protecting the correlative rights of owners.<sup>104</sup>

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<sup>98</sup> In fact, sometimes local prohibitions on mineral development actually may be intended to accomplish an opposite goal, to limit or prohibit mineral development, rather than simply to avoid unwanted land use impacts. See Laitos & Getches, *supra* note 74, at 13–14 ("Today's environmental ethic and increased citizen involvement are at the forefront of this local assertion of control. Local governments and their regulatory agencies seek to represent the interests of their constituents. In contrast to the state, local populations rarely favor oil, gas, or mining operations."); Michael J. Wozniak, *Home Court Advantage? Local Governmental Jurisdiction Over Oil and Gas Operations*, 48 ROCKY MTN. MIN. L. INST. § 12.08(2) (2002) ("Counties and cities also must deal with local citizens' groups and environmental groups whose goals may be to severely limit, if not prohibit, all oil and gas development.")

<sup>99</sup> 830 P.2d 1061 (Colo. 1992).

<sup>100</sup> *Id.* at 1066.

<sup>101</sup> COLO. REV. STAT. § 34-60-102(1)(a) (2009).

<sup>102</sup> *Voss*, 830 P.2d at 1067.

<sup>103</sup> *Id.*

<sup>104</sup> See *id.* at 1068 ("We conclude that the state's interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is sufficiently dominant to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits. Because oil and gas pools do not conform to the boundaries of local government, Greeley's total ban on drilling within the city limits substantially impedes the interest of the state in fostering the efficient development and production of oil and gas resources in a manner that prevents waste and that furthers the correlative rights of owners and producers in a common pool or source of supply to a just and equitable share of profits."); *Colo. Min. Ass'n v. Bd. of County Comm'rs*, 199 P.3d 718, 731 (Colo. 2009) (holding that local prohibition on certain mining techniques conflicted with state regulatory scheme that authorized

Like the Colorado statute, the Wyoming statute expresses and implements legislative purposes to prevent waste and protect correlative rights of owners.<sup>105</sup> A city's prohibition on oil and gas development could interfere with those purposes in the ways *Voss* described. Such prohibitions therefore may well be invalid because they conflict with the fundamental purposes of the state regulatory scheme.

On the other hand, chapter 2, section 1(b) of the Wyoming oil and gas regulations, adopted by the Wyoming Oil and Gas Conservation Commission pursuant to authority granted by the Wyoming Oil and Gas Conservation Act, says that compliance with those regulations "does not relieve the owner or operator of the obligation to comply with applicable federal, local or other state permits or regulatory requirements."<sup>106</sup> Section 1(b) could mean that even if the state permits a well, the owner must still comply with any local law, even a prohibition on a well in a certain location. More likely, this provision means only that the well owner must comply with local requirements concerning the manner of operation, not prohibitions. But even if section 1(b) requires compliance with any local regulation, including prohibitions, it surely was not intended to independently affirm the validity of all possible local regulations. To simply illustrate, section 18-5-201 prohibits counties from adopting regulations that prevent any use necessary to mineral extraction and production. Section 1(b) obviously does not mean to say that an owner must comply with such a county regulation that the state legislature has prohibited. Rather, section 1(b) only means that complying with the oil and gas regulations does not excuse complying with valid local regulations. But just as another statute might invalidate certain local regulations, the Wyoming Oil and Gas Conservation Act could implicitly invalidate certain local regulations because of their incompatibility with the state's statutory purposes.

*Voss* considered only a city's complete prohibition on oil and gas development. But even a zoning ordinance that merely prohibited oil and gas development in certain zones, like residential zones, might likewise interfere with the state's purposes of efficiently recovering resources and protecting correlative rights.<sup>107</sup> The same reasoning leads to the conclusion that cities cannot prohibit oil and gas development anywhere, but can only regulate the conduct of such development.

Yet cities have legitimate, substantial concerns about where oil and gas development occurs. Cities commonly restrict the zones in which oil and gas

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and regulated such techniques, and observing that "[t]hrough counties have broad land use planning authority, that authority does not generally include the right to ban disfavored uses from all zoning districts").

<sup>105</sup> See *supra* notes 76–79 and accompanying text.

<sup>106</sup> Wyo. Oil & Gas Rules ch. 2, § 1(b) (2008).

<sup>107</sup> See *Newbury Twp. Bd. of Twp. Trs. v. Lomak Petroleum (Ohio), Inc.*, 583 N.E.2d 302 (Ohio 1992) (holding that township regulation prohibiting oil and gas wells in residential zones, as applied to application to drill wells in agricultural areas traditionally appropriate for drilling, was invalid because it conflicted with state statutory policy encouraging capture of oil and gas).

development is permitted.<sup>108</sup> In some situations a city might prevent drilling in incompatible zones, yet not actually interfere with the state's interest in efficiently capturing oil and gas and protecting correlative rights. If so, then local regulations forbidding drilling in certain zones do not inevitably conflict with state regulation. Therefore, cities should be free to zone oil and gas uses unless an aggrieved party demonstrates that the effect of the zoning ordinance is to cause waste or impair a party's correlative rights.

### *B. Prohibiting Mineral Development Within Certain Distances from Other Uses*

Not only might a local zoning ordinance prohibit mineral development in certain zones, it might also prohibit mineral development within a certain distance from incompatible uses, like residential uses.<sup>109</sup> Such prohibitions can further restrict the land available for mineral development by preventing mineral development not just in certain zones, but near certain zones and uses. The locality has an obvious interest in protecting more sensitive uses from the external impacts of mineral development. But just as with prohibitions on mineral development in specified zones, such regulations can interfere with the state's interests in facilitating efficient capture of resources and protecting correlative rights. The same arguments would determine the validity of such local regulations.

### *C. Regulating Operations*

Localities might regulate the operations of extractive industries to minimize adverse impacts on neighboring lands and on the community in general. For example, Gillette and Evanston require a well permit before drilling oil wells.<sup>110</sup> A locality also might regulate extraction methods to reduce noise, dust, and other nuisances.<sup>111</sup>

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<sup>108</sup> See, e.g., Gillette, Wyo., Zoning Ordinance 979 § 6(a)(2)(o), (q)(2)(x) (Jan. 23, 1979), amended by Gillette, Wyo., Ordinance No. 1672 (Jan. 18, 1988) (allowing oil, gas, or mineral exploration and production only in Agricultural and Heavy Industrial Districts); TORRINGTON, WYO., CODE § 18.20.030 (2009) (allowing exploration and extraction of oil and natural gas only in Agricultural Districts).

<sup>109</sup> See Wozniak, *supra* note 98, § 12.08(2) ("Counties often promote increased setbacks from residential development . . ."); Billie Ann Maxwell, Note & Comment, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 349–50 (2008–2009) (citing examples of local regulations in Texas requiring minimum distances between wellbores and inhabitable dwellings).

<sup>110</sup> See EVANSTON, WYO., CODE § 16-4 (2009); GILLETTE, WYO., CITY CODE ch. 12 (2001).

<sup>111</sup> See Wozniak, *supra* note 98, § 12.08(3) (discussing a Colorado county's restriction on type of down-hole pump to mitigate visual impacts, and potential conflict with state interest in maximizing recovery).

However, such regulations may conflict with state regulations. Whenever local regulations conflict with a uniform state policy, or a particular state regulation, the local regulation will be invalid. The Wyoming Supreme Court has held that the Department of Environmental Quality has exclusive authority to regulate extraction of coal and other solid minerals.<sup>112</sup> Any local regulation of such operations would therefore be invalid. While localities may regulate some aspects of oil and gas development, local regulations of air and water quality aspects that are regulated by the state pursuant to the Environmental Quality Act would likewise be invalid.<sup>113</sup> Other local operational regulations of oil and gas development, however, should generally be valid. Colorado cases have held that localities cannot impose stricter local regulations on operational matters regulated by the state.<sup>114</sup> But Wyoming regulations say that compliance with state regulations does not excuse compliance with local regulations, so localities may impose stricter requirements, at least as long as they do not conflict with the fundamental purposes of the Oil and Gas Conservation Act.<sup>115</sup>

#### *D. Regulating External Impacts*

While local prohibitions and operational regulations will often be invalid because of general or specific conflicts with state regulations, local regulations managing the land use impacts of extractive industries will generally be valid.<sup>116</sup>

##### *1. Setbacks and fencing*

Setback and fencing requirements are traditional, common instances of such valid local regulation. The Carbon County zoning ordinance, for example, acknowledges the limitations of section 18-5-201, but requires that prior to actual extraction of the mineral, the area “shall be properly zoned and all other applicable requirements of this zoning resolution shall be met.”<sup>117</sup> One of the applicable requirements is that buildings in Ranching, Agricultural, and Mining

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<sup>112</sup> See *River Springs L.L.C. v. Bd. of County Comm’rs*, 899 P.2d 1329, 1335–36 (Wyo.1995); *supra* Part III.A.

<sup>113</sup> See *supra* Part III.B. As previously noted, the land quality provisions of the WEQA do not apply to oil and gas development. See WYO. STAT. ANN. § 35-11-401 (2009).

<sup>114</sup> See *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 765 (Colo. Ct. App. 2002); *Osborne v. Bd. of County Comm’rs*, 764 P.2d 397, 401–02 (Colo. Ct. App. 1988).

<sup>115</sup> See Wyo. Oil & Gas Rules ch. 2, § 1(a) (2008); *id.* ch. 4, § 1(a) (“Approval by the Commission of applications for permits for reserve or produced water pits does not relieve the owner or operator of the obligation to comply with the applicable federal, local, or other state permits or regulatory requirements.”); *supra* Part III.B.2.

<sup>116</sup> See Maxwell, *supra* note 109, at 349 (listing examples of such local regulation, including “limitations on access (no access through floodplain or residential areas), prohibited uses related to mineral development (no compressors), setback requirements, noise limitations, limitation on hours of operation and illumination, insurance requirements, and operational constraints (24-hour security, leasehold fencing, etc.)”).

<sup>117</sup> See CARBON COUNTY, WYO., ZONING RESOLUTION § 2.4 (2003).

Zones, which allow oil and gas development, must be set back forty feet from property lines.<sup>118</sup> Sublette County specifies fencing requirements for mining activities, though not for oil and gas development.<sup>119</sup>

Such requirements do not prevent mineral extraction, but merely help to buffer the extraction from other uses and thereby reduce the adverse impacts on other uses. If section 18-5-201 is understood as I have argued,<sup>120</sup> it will rarely prevent counties from adopting such requirements. A setback requirement for necessary buildings will rarely impose an unreasonable burden by increasing costs or making the building less useful. Fencing requirements surely would not prevent any use reasonably necessary for extraction or production.

Furthermore, such requirements will not conflict with specific state requirements or with a comprehensive, uniform state purpose. Oil and gas regulations generally address only waste and correlative rights, and do not even regulate in ways designed to manage land use impacts.<sup>121</sup> While the Wyoming Supreme Court has held that the Department of Environmental Quality has exclusive authority to regulate extraction of solid minerals, the court has not clearly decided whether that exclusive authority precludes typical local land use regulations like setback and fencing requirements, which do not regulate operations at all. In *River Springs*, Teton County required a conditional use permit for a sand and gravel operation, and the court held that if the county permitted such extraction at all, then the DEQ would have exclusive authority to regulate “extraction and production” of minerals.<sup>122</sup> But the state statute does not expressly prohibit local regulation, so local regulations that do not regulate extraction and production—the subjects that are comprehensively regulated by the DEQ—should be allowed.

## 2. *Sights and sounds*

Similarly, localities generally have authority to regulate extractive industries to minimize noise and adverse visual impacts. Noise regulations might include requiring buildings to enclose noisy machinery, limiting hours of maximum noise,

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<sup>118</sup> *Id.* § 4.2(d)(2); see also CAMPBELL COUNTY, WYO., ZONING REGULATIONS § 5(G) (2005) (specifying front, side, and rear setback requirements in Agricultural Districts, the only zone in which mineral extraction and production are permitted).

<sup>119</sup> See SUBLETTE COUNTY, WYO., ZONING & DEVELOPMENT REGULATIONS § 21(b)(4) (2008). The City of Evanston also has fencing requirements for oil and gas wells. EVANSTON, WYO., CODE § 16-18 (2009).

<sup>120</sup> See *supra* Part II.A.

<sup>121</sup> See *supra* Part III.B.2.

<sup>122</sup> *River Springs L.L.C. v. Bd. of County Comm'rs*, 899 P.2d 1329, 1336 (Wyo. 1995) (“[T]he EQA is sufficiently broad in this area to control the regulation of the removal of the identified minerals from the earth for reuse or further processing.”).

and requiring acoustic insulation.<sup>123</sup> Visual regulations might include landscaping and screening requirements, limitations on color and size of structures, and lighting requirements.<sup>124</sup> Localities might also regulate the height of structures, to reduce visual impacts or for density or safety reasons. For example, Campbell County limits the height of buildings and structures in Agricultural Districts, the only district in which mineral extraction and production are permitted, to 35 feet whenever the building is within 150 feet of a residential district.<sup>125</sup> The state regulatory schemes do not comprehensively regulate such land use features, and such local regulation does not unreasonably interfere with extracting the resources.

### 3. *Land, air, and water quality*

The state does comprehensively regulate air and water quality, however. Therefore, as discussed above, localities cannot regulate such environmental impacts of extractive industries. The state also exclusively regulates land reclamation for extraction of solid minerals.<sup>126</sup> Before extracting solid minerals, Sublette County requires approval of a plan to minimize water pollution and reclaim the land.<sup>127</sup> Even if such local regulations merely added further restrictions, they would conflict with the state purpose of uniformly and comprehensively regulating such impacts.<sup>128</sup>

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<sup>123</sup> See, e.g., *Bd. of County Comm'rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1050 n.3 (Colo. 1992) (summarizing county land use regulations of oil and gas development, including noise mitigation measures); *Wozniak*, *supra* note 98, § 12.08(3) (discussing a Colorado county's requirement of sound barriers and sound baffles in an oil and gas facility permit); *Maxwell*, *supra* note 109, at 344 (“Drilling, pump stations, compressor stations, and other activities associated with developing and producing natural gas result in noise. The degree of noise and citizen response is a function of several factors such as proximity to the noise and mitigation efforts with sound blankets, sound walls, and sound reduction enclosures.”).

<sup>124</sup> Sweetwater County, for example, requires approval of a lighting plan to minimize adverse impacts in designated Growth Management Areas, and approval of a plan to control noise and dust in Agricultural Growth Management Areas. See SWEETWATER COUNTY, WYO., ZONING RESOLUTION § 5(A)(13)(f)(3)(d) (2003).

<sup>125</sup> See CAMPBELL COUNTY, WYO., ZONING REGULATIONS § 5(H) (2005). The statute excepts “[c]hurch spires, church towers, chimneys, flagpoles, antennas, monuments, water towers, and fire towers.” *Id.* § 5(I).

<sup>126</sup> See *supra* Part III.B.1.

<sup>127</sup> See SUBLETTE COUNTY, WYO., ZONING & DEVELOPMENT REGULATIONS § 21 (2008). The ordinance notes that the county “may accept” a DEQ permit as “evidence of compliance” with the county requirements. *Id.* § 21(d).

<sup>128</sup> See *supra* Part III.B.1.

#### 4. *Roads*

Traffic is another traditional concern of zoning ordinances.<sup>129</sup> The state regulatory schemes do not generally prohibit local regulation of impacts on traffic and roads. Zoning ordinances traditionally manage traffic concerns by specifying different zoning districts. As discussed above, counties cannot allow extractive industries in only certain zones, and, at least in some cases, cities may not either.<sup>130</sup> But localities can regulate traffic impacts in other ways. Sweetwater County, for example, requires approval of an access plan to minimize impacts on nearby residences and other uses in designated Growth Management Areas zoned for agricultural uses.<sup>131</sup> Localities may adopt speed and safety regulations, regulations to avoid or compensate for damages to roads, bridges, and culverts, and regulations to minimize new road construction and to ensure its proper construction.

### V. CONCLUSION

Extraction and production of oil, gas, and solid minerals have substantial impacts on nearby land. Local governments have reason and authority to regulate extractive industries to reduce those impacts. However, the state has potentially conflicting interests in facilitating recovery of those natural resources, as well as uniformly regulating those industries across the state. Unless the state indicates otherwise, those state interests prevail whenever they conflict with local regulation.

Several state laws thus limit local regulatory authority over extractive industries. State law expressly prohibits counties from preventing any use reasonably necessary for extraction or production of minerals, which means that counties cannot prohibit a specific use that is necessary for extraction or production unless a reasonable alternative is permitted. The Wyoming Industrial Siting Act also prohibits cities and counties from requiring approvals or permits for the construction, operation or maintenance of solid mineral facilities that are authorized pursuant to the state act.

Furthermore, the Wyoming Environmental Quality Act implicitly grants exclusive authority to the Wyoming Department of Environmental Quality to regulate extraction and production of solid minerals. The WEQA's comprehensive

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<sup>129</sup> *Cf.* Maxwell, *supra* note 109, at 346 (discussing traffic objections to injection well application).

<sup>130</sup> *See supra* Parts IV.A–B.

<sup>131</sup> *See* SWEETWATER COUNTY, WYO., ZONING RESOLUTION § 5(A)(13)(f)(3)(c) (2003); Town of Frederick v. N. Am. Res. Co., 60 P.3d 758, 764–65 (Colo. Ct. App. 2002) (holding that state law did not preempt local requirements concerning access roads for oil and gas development).

and uniform regulatory scheme also implicitly prohibits local regulation of extractive industries to reduce water and air quality impacts, even when such regulations are stricter than state regulations.

The state oil and gas statute, on the other hand, does not implicitly prohibit local regulation of oil and gas development. So, while the WEQA prevents local air and water quality regulation of oil and gas uses, localities are free to regulate other land use aspects of oil and gas development, except that county regulations may not prevent uses reasonably necessary for extraction and production.

The net result of these statutes is that Wyoming cities and counties may regulate extractive industries to reduce adverse land use impacts other than environmental impacts that are comprehensively regulated by the state. Common local regulations might include setback requirements and other requirements concerning the placement and characteristics of buildings; mitigation requirements for noise and visual impacts; and road and traffic regulations. However, even though zoning ordinances fundamentally accomplish their purposes by specifying districts in which certain uses may be conducted, local power to exclude extractive industries from certain zones is limited. Counties may not prohibit extraction and production anywhere. Cities also may not have the authority to prohibit extraction and production within their boundaries and, perhaps in some cases, not even within certain zones. Such restrictions may be prohibited because they may conflict with a state regulatory scheme that is intended to encourage and facilitate extraction of mineral resources and to protect the correlative rights of mineral owners. If so, cities as well as counties have much less power to manage the land use impacts of extractive industries than other industries. They certainly cannot use their regulatory power to supplant state policy decisions concerning mineral extraction and production. But as long as state regulation is sensitive to local impacts, the combination of state environmental and operational regulation and local regulation of other land use impacts can still adequately protect neighboring landowners while balancing such interests against the interest in capturing valuable mineral resources efficiently and fairly.