

WHO RULES?

STATE-LOCAL GOVERNMENT PREEMPTION CONTROVERSIES IN LOUISIANA

By:

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*Presented to
Louisiana City Attorneys Association
October 14, 2016*

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State-Local Government Preemption Controversies in Louisiana

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Quick Guide to Some Common Issues

Goal = Practical tips and forewarning to consider when drafting or amending ordinances to make sure no avoidable conflicts exist.

FEDERAL PREEMPTION	
Federal Preemption under Supremacy Clause, Art VI, Clause 2 – “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land...”	
Requirement to consult – “To the greatest extent practicable, urban land transactions entered into for the General Services Administration and other federal agencies shall be consistent with zoning and land use practices and with the planning and development objectives of local governments and planning agencies.” Pub. L. 107-217, August 21, 2002, 116 Stat. 1127)	
Aviation <ul style="list-style-type: none">▪ Individual Drones▪ Land use and height restrictions (Height restrictions affect cell towers)	
Antitrust	
Cell Towers	
Religious Uses <ul style="list-style-type: none">▪ RLUIPA	
Group Homes and Subsidized Housing <ul style="list-style-type: none">▪ Fair Housing Act (Title VIII of Civil Rights Act of 1968)▪ New Federal concerns about “exclusionary zoning”▪ May include zoning regulations that specify the number of unrelated persons who can occupy a single family home	
Environmental <ul style="list-style-type: none">▪ Clean Water Act (as reorganized and expanded in 1972)▪ Wetlands (Corps of Engineers)▪ National Environmental Policy Act of 1969 (NEPA)▪ Coastal Wetlands Planning, Protection and Restoration Act 1990▪ Farm Bill 1996 (Wetlands on agricultural land)	
Anti-Discrimination Laws <ul style="list-style-type: none">▪ Civil Rights Act of 1964 (Protected classes: Age, Pregnancy, National Origin, Race, Ethnic Background, Religious Beliefs, Sexual Orientation)	
<ul style="list-style-type: none">▪ Age Discrimination in Employment Act of 1967	
<ul style="list-style-type: none">▪ Voting Rights Act of 1965	

Flood Plain Management	<p>NFIP – National Flood Insurance Program</p> <ul style="list-style-type: none"> ▪ Adoption of FEMA's model ordinance. ▪ Check for conflicts with zoning, land use, and building codes. (Communities who do not adopt the program and the model ordinance may lose their eligibility for any Federal funds) <p>CRS – Supplemental Community Rating System</p> <ul style="list-style-type: none"> ▪ Additional regulations and policy requirements ▪ Higher standard program that can reduce residents' flood insurance premiums. Administered by State
Bureau of Land Management	<ul style="list-style-type: none"> ▪ Funded many local and state parks with perpetual encumbrances on the land. If use changes or land sold, costly replacement required.

STATE PREEMPTION

Louisiana Constitution, Art. VI, local government, Sec. 9(B) "Notwithstanding any provision of this Article, the police power of the state shall never be abridged."

Alcohol & Tobacco Control (ATC)	<ul style="list-style-type: none"> ▪ Alcohol sales – distance measurement
Department of Natural Resources	<ul style="list-style-type: none"> ▪ Oil and Gas Drilling ▪ Pipelines ▪ Coastal Zone Boundary
State Uniform Code Council	<ul style="list-style-type: none"> ▪ Building Standards and Required Inspections, post-Katrina – Louisiana State Uniform Code Council
State Fire Marshal	<ul style="list-style-type: none"> ▪ National Fire Code (State Fire Marshal) ▪ Americans with Disabilities Act (Federal laws administered through State Fire Marshal)
DEQ	<ul style="list-style-type: none"> ▪ Landfills – see Jindal executive order
La. R.S. 33:3601 - 3612	<ul style="list-style-type: none"> ▪ Right to Farm
Environmental DEQ & DHH La. R.S. 30:2011, R.S. 40:5	<ul style="list-style-type: none"> ▪ Sewerage system regulation – municipal, domestic, and permitting of individual and public and private community-type systems ▪ Industrial discharges
LaDOTD	<ul style="list-style-type: none"> ▪ Access control on State and Federal Highways
Cemetery Board	<ul style="list-style-type: none"> ▪ Act 417 of 1974 – Title 8 of the Revised Statutes, Chapters 1-13 ▪ Licensing and monitoring,

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LCAA Fall 2016 Conference
October 14, 2016

Two Questions eventually asked of every Local Government Attorney

It is safe to say that every attorney who advises a local government likely will be asked two questions sooner or later:

#1: **“Do we have the authority to do this?”**

#2: **“Can’t you figure out a way for us to do this legally?”**

This presentation paper will help prepare you for answering these questions by providing some common, non-exclusive, ways in which the authority of local governments in Louisiana may be found to collide with, or be in conflict with, statutes adopted by what would be considered a superior governmental unit – either the federal or state governments.

Color-coded checklists of these commonly encountered preemption topics are provided for your quick reference, including for use at meetings with your client where the two questions are likely to arise. If the superior government’s statute prevails, the result is preemption and the answer to Question No. 1 must be, “No, we don’t have the authority to do this exactly the way we had in mind because the feds or the state are in charge of that area of law.”

But the test for the attorney in this situation comes with the Question No. 2, “Can’t you find a way for us to do this legally?” This is where a practical, creative approach to avoiding the conflict by finding a way to cooperate instead of competing with the feds or the state in a way that still satisfies most of what the governmental client wants to do may win the day. The cooperation can go both ways, as we’ll see.

We'll conclude with 3 practice tips, including a recommendation on a way to strengthen your local government's position in the inevitable contests of regulatory strength with state government.

Preemption Defined

"Preemption" is the legal principle that a superior governmental body may preempt, either explicitly or implicitly, the law of the subordinate governmental body through legislating in the same field. In the case of federal preemption, the superior authority derives from the Supremacy Clause of Art. VI, Clause 2 of the U. S. Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ." See *Oneok, Inc. v. Learjet, Inc.*, 135 St. Ct. 1591 (U.S. 2015).

In Louisiana, the issue of state-local preemption arises when it is claimed that a local ordinance abridges the police power of the state in violation of Art. VI, Sec. 9(B) of the Louisiana Constitution of 1974: "Notwithstanding any provision of this Article [addressing Local Government], the police power of the state shall never be abridged." The Louisiana Supreme Court also has found jurisprudentially that preemption can occur either expressly or implicitly (applied when express preemption is lacking):

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

Palermo land Co., Inc. v. Planning Comm'n of Calcasieu Parish, 561 So. 2d 482, 497 (La. 1990).

Who Rules? A Louisiana Preemption Conflict that serves as a Window on a Rising National Battle for Local Control

For a real world example of the immediacy of the issue of preemption, consider a Louisiana story of a legal controversy pitting two sides of notable contenders and which, since it is in Louisiana, contains both a whiff of scandal and an ironic punchline ending.

The story has played out in St. Tammany Parish since late 2014 and aids in finding the current judicially defined limits of local governmental authority under the Louisiana Constitution and the legal principle of state preemption. It also serves as a window on what is becoming a rising tide of such preemption disputes nationally, mirroring the growing political polarization of the “not-always United” States and the increasing interest in local solutions based on a local consensus.

The Latest Preemption Battleground in Louisiana

St. Tammany Parish, with both a home rule charter and a comprehensive land use plan, has been since late 2014 the site of the state’s latest preemption battle. It has pitted on one side the team made up of the traditional state heavyweight champion, the oil & gas industry, in this case Helis Oil Co. of New Orleans, and the Louisiana Commissioner of Conservation, the official responsible for issuing drilling permit. On the other side has been the duo of an energetic local government, the St. Tammany Police Jury, and an organized and vocal group of citizens concerned over fracking activity (see attached photo) in the Tuscaloosa Marine Shale (see attached map) that they believed represented a threat to the aquifer that is the sole source of drinking water in the area.

The battleground was the drill site Helis planned for an exploratory well on vacant land used as a tree farm for over 30 years (see attached photo) but zoned as reserved solely for single-family residential use. Despite the residential zoning, no structures were situated within a 1-mile radius of the drill site.

The Contenders

Anti-Frackers

The fracking opponents had in their legal arsenal a parish home rule charter, a comprehensive land use plan, and a zoning ordinance adopted consistent with the master plan.

The opponents argued in their lawsuit against the Commissioner of Conservation (St. Tammany Parish Government v. James H. Welsh, in his capacity as Commissioner of Conservation) for declaratory relief, eventually followed by a motion for summary judgment, to prevent the issuance of a drilling permit. The opponents argued that two underlying constitutional grounds for their legal arsenal of home rule charter, master plan, and zoning ordinance called for a halt to the state's planned action:

- 1) That the Louisiana Constitution of 1974 in Art. VI (Local Government), Sec. 17 grants to all local governments, whether having a home rule charter or not, the right to adopt zoning ordinances by uniform procedures under the Revised Statutes. Local zoning ordinances represent the authorized exercise of state police powers over matters of local health, safety, and general welfare, see *City of New Orleans v. Bd. Of Comm'rs of Orleans Levee District.*, 93-0690 (La. 7/5/94), 640 So.2d 237, 249-250. Therefore, the permit issuance violated the parish's authorized police powers expressed through its zoning ordinance limiting the use of the property to single family residences.
- 2) That Louisiana Constitution Art. VI, Sec. 5 (E) grants local governments with home rule charters the separate right to exercise any power or perform any function as long as such power or function is not denied by general law or inconsistent with the

Constitution. “General law” helpfully is defined right in Art. VI, Sec. 44, as “a law of statewide concern enacted by the legislature which is uniformly applicable to all persons or to all political subdivisions in the state or which is uniformly applicable to all persons or to all political subdivisions within the same class.”

The opposition argued that their zoning ordinance, combined with their home rule charter powers, was neither an encroachment on the regulation of drilling nor inconsistent with the Constitution because the Parish, as a home rule charter local government, may also exercise police powers along with the state. Citing *Palermo Land Co., Inc. v. Planning Comm'n of Calcasieu Parish*, supra, it was argued that the local zoning ordinances were not preempted by state statutes regulating the production of oil and gas because local land use planning ordinances, by striving to protect a desired quality of life, address a distinct subject matter and therefore are not duplicative of state law or denied by general state law in this instance.

Frackers

On the pro-fracking side, the Commissioner of Conservation and Helis Oil Company had in their favor in support of summary judgment a statute appearing to be a general law which superseded the local zoning ordinance. La. R.S. 30:28F states:

The issuance of the permit by the [C]ommissioner . . . shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. **No other agency or political subdivision of the [S]tate shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling**

of a well or test well in search of minerals by the holder of such a permit. (Emphasis added.)

Also, the pro-fracking side cited Art. VI, Sec. 9(B), the Article addressing Local Government, providing “notwithstanding any provision of this Article, the police power of the state shall never be abridged.” Supreme Court Justice Knoll subsequently found this Constitutional provision in Article VI regarding the police powers of the state to be “in tension” with the police powers granted to local governments in the same Article VI, particularly citing the parish’s home rule charter.

Who Rules?

A: The Frackers, but in a contested decision.

The Commissioner of Conservation issued the drilling permit. The Trial Court granted summary judgment in favor of Helis Oil Company, determining that La. R.S. 30:28F expressly preempted the parish zoning ordinances and finding them unconstitutional insofar as they prohibited or interfered with the drilling of Helis Oil’s exploratory well.

On appeal (since there is no direct appeal to the Louisiana Supreme Court upon a finding of unconstitutionality of a local ordinance due to preemption), the First Circuit Court of Appeal affirmed, with the appellate court finding both express and implicit preemption. *St. Tammany Parish Government v. James H. Welsh, in his Capacity as Commissioner of Conservation*, 2015 CA 1152 (La. App. 1st Cir. 3/9/16), 2016 WL 918361.

Citing *Palermo Land Company*, supra, in reviewing La. R.S. 30:28F, the First Circuit found express intention by the state to preempt “that area of law” (which, by the terms of 30:28F would have to be “the drilling of a well” that has received a drilling permit from the Commissioner of Conservation). The appellate court found implied preemption through “the pervasiveness of the legislation [30:28F], which addresses every aspect of oil and gas exploration as well as the need for uniformity and the danger of conflicts between the enforcement of local laws.”

For this finding, the appellate court cited *Vanguard Environmental, LLC v. Terrebonne Parish Consol. Gov't*, 2012-1998, p. 2 (La. App. 1st Cir. 6/11/13) (unpublished opinion), writ denied, 2013-2165 (La. 11/22/13).

Additionally, the Court of Appeal found the constitutionally granted authority of local governments to adopt zoning ordinances could not stand up to the alleged superior police power of the state to grant drilling permits because the state's police power which "can never be abridged" under Art. VI, Sec. 17 includes the term "notwithstanding any provision of this Article." Therefore, local government's zoning ordinances adopted under police powers in the same Art. VI must yield to the state's police powers, period.

Further, given the finding that R.S. 30.28F is a general law, the parish's home rule charter did not shield the zoning ordinance from preemption since the limit of home rule charter powers adopted under Art. VI, Sec. 5(E) is a finding that such powers are not denied by general law.

Louisiana Supreme Court denies writ, then balks on Reconsideration

The Anti-Frackers vigorously applied for a writ from the Louisiana Supreme Court, and came within a single vote of having their writ application granted. Justices Knoll, Guidry, and Clark dissented from the writ denial, with two of them, Justices Knoll and Guidry, assigning reasons. These included the failure of the Court of Appeal to acknowledge and analyze the tension between the Commissioner's police power on behalf of the state to issue drilling permits, and the parish's zoning ordinance adopted under its home rule charter, which the Louisiana Supreme Court in the *Bd. of Comm'rs of Orleans Levee Dist.* case, *supra*, found also to be exercises of state police power.

Justice Knoll found no grounds for preemption, adopting the argument that zoning and land use planning is wholly distinct from oilfield regulatory statutes. Justice Guidry, too, found that the parish was not attempting to regulate the production of oil and gas, but instead was enforcing constitutionally-authorized

zoning ordinances “which are fundamental to our system of self-governance and of great importance to our citizenry.” 194 So.3d 1108 & 1109 (Mem), 2016-0650 & 0657 (La. 6/17/16).

About this time, the LMA and the Police Jury Association were solicited and were about to swing into action to file amicus briefs in support of the anti-frackers application for reconsideration that had been filed Friday, June 24. The hope was that if one more justice would join the 3 dissenters who favored a “more thorough and appropriate analysis” of the competing constitutional issues bearing on preemption then the case would be reconsidered by the Louisiana Supreme Court. Helis Oil Company filed its opposition to reconsideration on Monday, June 27.

Then something very unusual happened. Within 24 hours of the Helis Oil opposition, Chief Justice Johnson did switch over in favor of granting the writ. However, reconsideration still was denied because one of the original 3 dissenters, Justice Clark, switched the other way and joined the 3 original justices who denied the writ, thereby nullifying the Chief Justice’s own switch.

A whiff of scandal ensued when one of the New Orleans television station’s investigative reporters found that Justice Clark, who made the “switch in time” had received “a dime” through separate political contributions totaling \$3,000 from Helis Oil and its attorneys, Taylor, Porter, immediately before and then on the same day of the filing of the writ by the anti-frackers with the Louisiana Supreme Court. As pointed out in the news story, before the two donations neither Helis Oil nor Taylor Porter ever had contributed to Justice Clark.

The Punchline

This being Louisiana, the punchline is that following a year and half of litigation in which Helis Oil Company was represented by two large law firms, Taylor, Porter and Liskow & Lewis (a total of 5 attorneys on pleadings), and with Taylor, Porter receiving unwanted publicity over its political contribution to Justice Clark, only three months after the Supreme Court balked at reconsideration of a writ Helis Oil abandoned the St. Tammany fracking project, finding it “lacks appropriate

commercial viability.” The company stated in the “Times-Picayune” news report of September 20, 2016 that it “intends to permanently abandon the well and secure the site.”

Critique

What could the local government have done differently to achieve a better result?

First, it should have reviewed its own zoning ordinance for basic conflict of law problems. The zoning ordinance represented a total ban on drilling activity in all but industrially zoned areas of the parish, and then only by implication as “Commercial Excavation.” A basic analysis of case law and Attorney General Opinions would have shown that the State of Louisiana has jealously guarded its right to determine through issuance of drilling permits where an oil & gas well can be drilled. Without addressing oil & gas drilling and other natural production uses directly in its zoning ordinance, or at least a variance procedure should the need arise, the parish was opening itself up to just the kind of legal challenge that occurred.

Second, it should have targeted its local regulations at mitigating the impact of the drilling and fracking activities rather than denying the right to drill under a state permit, thereby avoiding an argument of preemption. Justice Knoll signaled this in dissent to the Louisiana Supreme Court’s writ denial by saying ordinances carrying out zoning and land use planning are not duplicative of state law regulating drilling activity and therefore not subject to preemption by state oil and gas laws.

St. Tammany Parish was completely unaware that such mitigation ordinances already had been adopted by the City of Shreveport, Caddo Parish, and the City of Bossier in 2009 during the Haynesville Shale fracking boom (copy of Caddo Parish ordinance attached). The Caddo Parish ordinance is limited to wells drilled after January 1, 2008, on well pads over one acre, and does not address where a well can be drilled but rather how its effects can be mitigated through measures such as noise,

dust, and smoke abatement, particularly as to activities close to protected uses such as schools and hospitals. The Caddo Parish ordinance, based on a Ft. Worth, Texas, model in the Barnett Shale, was not and has not been challenged by the Office of Conservation but instead was used in significant part of a fieldwide order (“Order U-HS”) issued in June, 2009, addressing “exploration for and production of gas from the Haynesville Shale Zone in urban areas” in obvious response to the local ordinances adopted in Northwest Louisiana. In this way, the state itself decided to cooperate with local authorities, at least as to urban drilling activity, since the ordinances did not challenge the state’s authority to issue drilling permits where it chose.

A Window on Wider Preemption Conflicts

The contentiousness of the St. Tammany fracking case simply is a window on a rising tide of preemption disputes that are mirroring the country’s growing political polarization.

This polarization is resulting in a desire for localism rather than centralized decision-making. In a 2015 Gallup poll, 72% of Americans trust their local governments more than they do their state institutions. By a wide margin, 64% to 26%, Americans feel that “more progress” comes from the local level than the federal level.

As a result, the number of preemption disputes is growing. An article dated October 3, 2016, from “The Atlantic Citylab” blog (attached) reports cities nationally are fighting back against state efforts to limit local authority in areas of regulation from plastic-bag fees to smoking bans and local minimum-wage increases. Even in Louisiana, an effort was made in the 2015 legislative session to cut off state construction and building project funding from any city deemed by the Attorney General to be a “sanctuary city” for undocumented immigrants. The bill passed the House 69-26, but was killed in the Senate, with help from the Louisiana Sheriffs’

Association which argued passage would force local law enforcement to take on immigration law responsibilities which are the duty of the federal government.

So preemption is a legal topic about which we'll be hearing more.

In closing, three practice tips as epigrams:

In a lawsuit involving governmental issues, analyze the political deck of cards to see who holds the best hand.

In the St. Tammany Parish case, given the State of Louisiana's budget crisis and its dependence on oil and gas royalties for a significant part of its revenues (although smaller than during the 1980's), who would one think would hold the stronger hand: the Commissioner of Conservation who issues drilling permits, or the advocates of a faulty local ordinance which, if upheld, could totally ban drilling activity by local veto?

"It is a strange game. The only winning move is not to play."

"Wargames" – 1983 film

Don't compete, coordinate. If possible, look for a practical, creative way to achieve the goal of the local government without directly challenging state authority. For instance, regulate to mitigate the effects of water trucks on local roads during fracking activity instead seeking to duplicate state regulation of drilling activities, which by their nature are temporary uses.

"You're going to need a bigger boat!"

"Jaws" – 1975 film

Seriously consider adopting a home rule charter.

The St. Tammany case is a useful reminder of the distinction made by the Louisiana Constitution and the courts between local governments with home rule charters and those without.

Without a home rule charter, the Louisiana Constitution is abrupt: local governments are limited to “the powers authorized by this constitution or by law.” Art. VI, Sec. 7(A)

With a home rule charter, the presumption of local governmental authority shifts from “Am I authorized to act?” to “Why shouldn’t I act?” since home rule charter powers are limited constitutionally only through a denial by general state law or inconsistency with the constitution. Art. VI, Sec. 5(E).

Attachments:

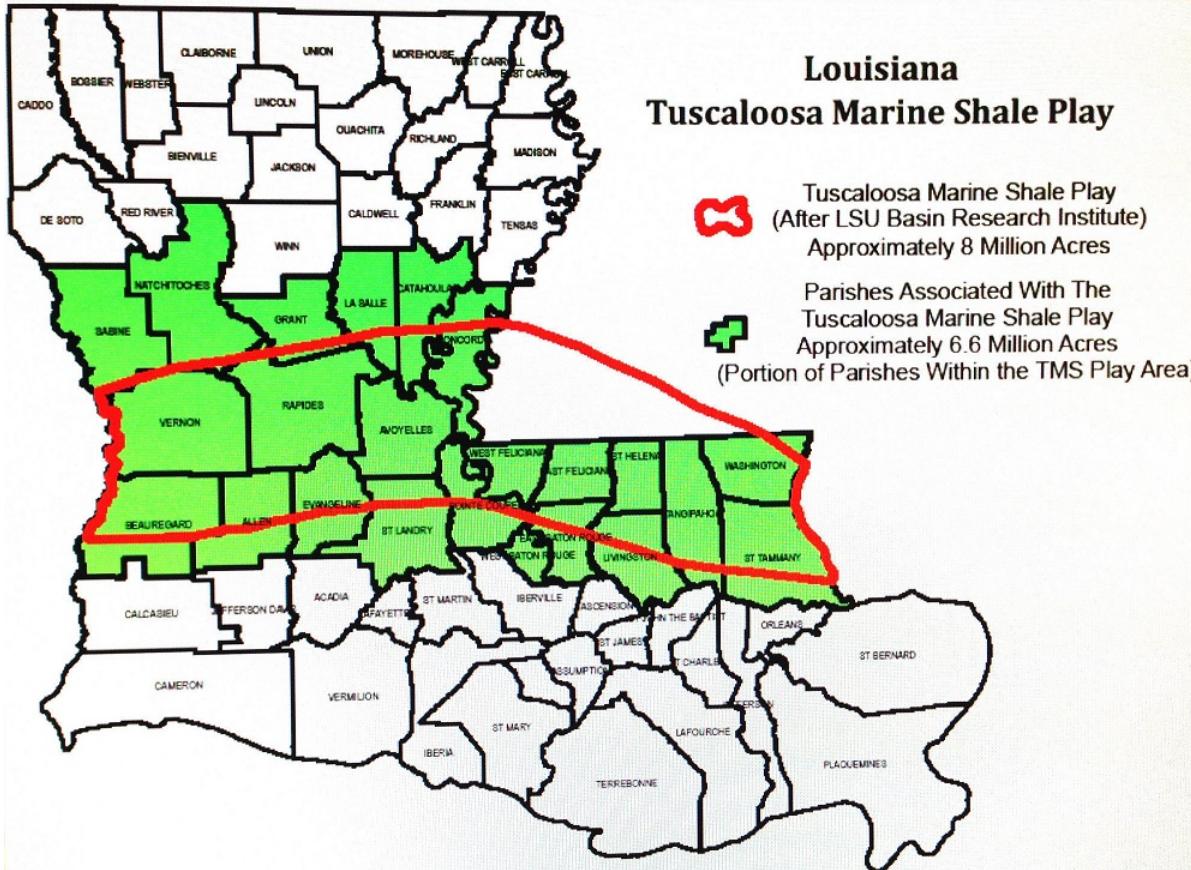
Map of Tuscaloosa Marine Shale Play

Photo of St. Tammany concerned citizens against fracking

Photo of proposed Helis Oil Co. exploratory drillsite in St. Tammany Parish (vacant tree farm zoned for single-family residential use)

Oil, Gas, and Hydrocarbon Well regulations, Caddo Parish, adopted September 17, 2009 (from Caddo Parish Commission website)

Article dated October 3, 2016 from “The Atlantic CITYLAB”: “The Cities that are Fighting Back against State Intervention”





Chapter 34 - OIL, GAS AND HYDROCARBON WELLS

ARTICLE I. - IN GENERAL

Sec. 34-1. - Definitions.

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Drill pad means the total land cleared, exclusive of roadbeds and pipeline rights-of way, for the drilling of a well.

FIRM means flood insurance rate map.

Gas means any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at standard temperature and pressure conditions and/or the gaseous components or vapors occurring in or derived from petroleum or natural gas.

Oil means crude petroleum oil and other hydrocarbons, regardless of gravity, which are produced at the well head in liquid form by ordinary production methods.

Protected use means a residence, religious institution, commercial building, public building, hospital building, school or public park.

Public building means all buildings used or designed to and intended to be used for the purpose of assembly of persons for such purposes as deliberation, entertainment, amusement, or health care. The term "public building" includes, but shall not be limited to, theaters, assembly halls, auditoriums, armories, mortuary chapels, dance halls, exhibition halls, museums, gymnasiums, bowling lanes, libraries, skating rinks, courtrooms, restaurants, shopping malls, stores, and hospitals.

Public park means any land area dedicated to and/or maintained by the parish for traditional park-like recreational activities, but does not include privately owned amusement parks or privately owned or privately managed golf courses.

Religious institution means any building in which persons regularly assemble for religious worship and activities intended primarily for purposes connected with such worship or for propagating a particular form of religious belief.

Residence means a house, duplex, apartment, townhouse, condominium, mobile home, or other building designed for dwelling purposes.

Right-of-way means public rights-of-way including streets, easements, servitudes, and other property within the parish which is dedicated to the use and benefit of the public.

Rural area means any area outside the limits of a municipality and outside the administrative jurisdiction of the Shreveport Metropolitan Planning Commission of Caddo Parish where operations are conducted outside a radius of 500 feet of a protected use. The measurement of the 500-foot distance shall be made from the well bore, in a straight line, without regard to intervening structures or objects, to the closest point of the building or property line of the protected use, or as otherwise measured under regulation of such distances by the Louisiana Office of Conservation.

School means any public and private, primary through post-secondary educational facility, and any licensed day care center.

Street means any street, highway, sidewalk, alley, avenue, public parking area, or other public right-of-way, including the entire right-of-way.

Urban area means any area other than a rural area.

Well means a hole or bore to any horizon, formation, or strata for the purpose of producing gas, liquid hydrocarbon, brine water or sulphur water, or for use as an injection well for secondary recovery, disposal or production of gas or other hydrocarbons from the earth.

(Ord. No. 4916, § 29-1, 9-17-2009)

Secs. 34-2—34-20. - Reserved.

ARTICLE II. - OPERATIONS AND ACTIVITIES

Sec. 34-21. - General regulations.

- (a) *Site access.* No site access shall be allowed across any public park or any other property owned or maintained by the parish, except for public roads or street which may be designated as either truck routes or commercial delivery routes by the parish as provided in this ordinance, without the prior consent of the parish commission.
- (b) *Drilling within floodplain or floodway.* Drilling activities as well as activities associated therewith within any floodplain or floodway identified by FEMA on the most current FIRM shall recognize the legal responsibilities of the parish to FEMA.
- (c) *Abatement of dust, vibration, or odors.*
 - (1) All drilling, production, compression and transmission operations shall be conducted in such a manner as to minimize, so far as practicable, dust, vibration, or noxious odors, and shall be in accordance with the best accepted practices incident to drilling for the production of oil or gas and other hydrocarbon substances in urban areas. All equipment used shall be so constructed and operated so that vibrations, dust, odor or other harmful or annoying substances or effect will be minimized by the operations carried on at any drilling or production site or from anything incident thereto. The site or structures located thereon shall not be permitted to become dilapidated, unsightly or unsafe. Proven reasonable and feasible technological improvements in industry standards of drilling and production in this area shall be adopted if capable of reducing factors of dust, vibration, and odor that may create a nuisance.
 - (2) In addition to the foregoing, the placement of fill material may not cause the release of dust and/or odor that may create a nuisance, or damage any public improvements or public infrastructure. Further, no fill material shall be placed in a floodplain or floodway identified by FEMA on the most current FIRM without the prior consent of the director of public works.
- (d) *Lighting.* No person shall permit any lights located on the site of any well to be directed in such a manner to that they shine directly on public roads or streets, adjacent property, or property within 300 feet of the site. Additionally, to the extent practicable, and taking into account safety considerations, site lighting shall be directed downward and internally so as to avoid glare on public roads and streets, adjacent dwellings and buildings, and dwellings and buildings within 300 feet of the site.
- (e) *Abatement of exhaust fumes.* Exhaust from any internal combustion engine or compressor, stationary or mounted on wheels, used in connection with the drilling of any well or for use on any production equipment shall not be discharged into the open air unless it is equipped with an exhaust muffler or mufflers, or an exhaust muffler box, sufficient to suppress noise and disruptive vibrations and minimize the escape of gases, fumes, or ignited carbon or soot in order to prevent the creation of a nuisance. This equipment shall be maintained and kept in good operating condition according to the manufacturer's specifications.
- (f) *Electric pumping.* Only electric prime movers or motors shall be allowed for the purpose of pumping wells after drilling. No electric power shall be generated on location unless otherwise

approved by the director of public works. All electrical installations and equipment shall conform to the ordinances of the parish and the appropriate national codes.

- (g) *Signage.* A sign shall be immediately and prominently displayed at the gate of the site of any oil or gas well. Such sign shall be of durable material, maintained in good condition and shall have a surface area of no less than two square feet nor more than four square feet and shall be lettered with the following:
 - (1) Well name and number;
 - (2) Name of operator;
 - (3) 24-hour emergency number for operator.
- (h) *Required incident reporting.* In the event of a fire or discovery of a fire, smoke, or unauthorized release of flammable or hazardous materials on any property, or any other event requiring evacuation of residences or businesses, voluntary or mandatory, the operator shall immediately upon discovery report such condition to the Caddo Parish Sheriff's Office and applicable Fire District having jurisdiction at the site through the 911 Communications District of Caddo Parish in addition to any other required notification. Additionally, the operator shall give notice as soon as practicable to the parish administrator for the Parish of Caddo. Pursuant to R.S. Title 30, § 23-75, the Caddo Parish Sheriff's Office is hereby designated as the local response agency to have access to all facilities with the parish pursuant to said section.
 - (i) *Venting.* No person shall allow, or cause or permit gases to be vented into the atmosphere or to be burned by open flame except as provided by law or as allowed by the state.
 - (j) *Installation of pipelines or flowlines on, under or across public property.* Except as may otherwise be specifically addressed by agreement with the parish regarding use of public rights-of-way, installation and operation of flowlines and pipelines (those not exempt from parish regulation under federal or state rules and regulations regarding mapping, inventorying, location or relocation, including pipelines over, under, along, or across a public street or alley) shall be subject to the requirement that the operator:
 - (1) Not interfere with or damage existing utilities, including, but not limited to, water, sewer or gas lines, storm drains, electric lines or the facilities of any public utilities located in public rights-of-way, utility easements, or other public property.
 - (2) Furnish the director of public works, prior to commencement of work, with a plat showing the location of such pipelines or flowlines, including GIS information sufficient to locate the pipelines or flowlines in the future, including the beginning and end points of the pipeline or flowline and sufficient points in between the pipeline or flowline route and the depth of cover information; and detailed cross section drawing for all public rights-of-ways and easement crossings as allowed by the parish. Failure to provide necessary GIS information shall act as a release of the parish from responsibility for any damages or cost of repair to such pipelines or flowlines arising from any activity by or under authority of the parish.
 - (3) Comply with parish codes and regulations.
 - (k) *Use of public water supplies.* No person may use public water supplies in drilling and production operations of an oil or gas well (specifically including fracturing operations) unless the operator has complied with all regulations set forth in this section as well as any water conservation regulations which may be imposed by the parish and/or state.
 - (l) *Discharge.* Unless otherwise specifically allowed by state regulation or private contract, no person shall place, deposit, discharge, or cause or permit to be placed, deposited or discharged, any oil, naphtha, petroleum, asphalt, tar, hydrocarbon substances or any refuse including wastewater or brine from any oil or gas operation or the contents of any container used in connection with any oil or gas operation in, into, or upon:

- (1) Any public right-of-way, alley, street, lot, storm drain, ditch or sewer, or sanitary drain without permits from the appropriate parish departments;
 - (2) Any body of water; or
 - (3) Any private property.
- (m) *Disposal wells and compressor stations limited to industrial locations.* Commercial salt water disposal wells and compressor stations shall be limited to industrially zoned locations but in no case shall be located within 500 feet of a protected use. The operator of the compressor station shall be responsible for establishing and reporting to the director of public works the pre-development ambient noise levels.
- (n) *Explosives.* Use of surface explosive charges within the parish shall require advance notification to the director of public works.
- (o) *No debris, grass, weeds, or trash.* The public street or road entrance and property on which a well site is located shall at all times be kept free of mud, debris, pools of water or other liquids, contaminated soil, weeds, brush, trash or other waste material within a radius on site of 100 feet around any separators, tanks and producing wells. All drill and operation sites shall be kept clear of high grass, weeds, and combustible trash within a radius on site of 100 feet around any gas tanks or producing wells.
- (p) *Accessibility to emergency shut-off valves.* All wells shall have emergency shut-off valves clearly labeled as such accessible to the district fire chief having jurisdiction at the site. However, such access shall be limited to those emergencies when the operator has failed to respond within the time frames established under its emergency response plan which shall be provided prior to commencement of drilling operations to the district fire chief having jurisdiction at the site and the parish sheriff's office through the 911 Communications District of Caddo Parish.

(Ord. No. 4916, § 29-2, 9-17-2009; Ord. No. 4980, Ch. 29, § 2(8), 4-29-2010)

Sec. 34-22. - Urban areas.

- (a) Any well to be drilled in an urban area must comply with the fencing and screening requirements set forth in this chapter. Additionally, except in industrial zoned districts and areas located within 500 feet of a protected use, storage of pipe, equipment or materials on a drilling or operation site is prohibited except during the drilling or servicing of a well on the site or three days thereafter.
- (b) With the exception of drilling, completion, and reworking operations, work on a drill site, access road, or pipeline, truck deliveries of equipment and materials associated with drilling and/or production, well servicing, site preparation and other related work conducted on the well site shall be subject to the following limitations, except in cases of fires, blowouts, explosions and any other emergencies or where the delivery of equipment is necessary to prevent the cessation of drilling or production:
 - (1) Operations within 500 feet of a protected use: 8:00 a.m. to 5:00 p.m., Monday through Saturday, but only with respect to a well for which a permit has been issued by the Louisiana Office of Conservation authorizing such activities.
 - (2) Operations between 500 feet and 2,500 feet of a protected use: 7:00 a.m. to 7:00 p.m., Monday through Saturday.
 - (3) Operations between 2,500 feet and 5,000 feet of a protected use: 5:00 a.m. to 10:00 p.m., Monday through Saturday.
 - (4) Operations 5,000 feet or more from a protected use: 24 hours, Monday through Saturday.

Measurement of the distances shall be made from the well bore, in a straight line, without regard to intervening structures or objects, to the closest point of the building or property line of the protected use, or as otherwise measured under regulation of such distances by the Louisiana Office of Conservation.

(c) Noise.

- (1) Prior to the commencement of operations, the operator shall submit to the director of public works a noise management plan detailing how the equipment used in the drilling, completion, transportation, or production of a well complies with the maximum permissible noise levels of this section. The noise management plan must:
 - a. Identify operation noise impacts;
 - b. Provide documentation establishing the pre-drilling ambient noise level as required in this section;
 - c. Detail how the impacts will be mitigated. In determining noise mitigation, specific site characteristics shall be considered, including, but not limited to, the following:
 1. Nature and proximity of adjacent development, location, and type;
 2. Seasonal and prevailing weather patterns, including wind directions;
 3. Vegetative cover on or adjacent to the site; and
 4. Topography.

The operator shall be responsible for verifying compliance with this section and the noise management plan after the installation of the noise generation equipment.

- (2) No well shall be drilled, redrilled or any equipment operated at any location within an urban area in such a manner as to create any noise which causes the exterior noise level when measured at a distance of 500 feet from the well head, or other equipment generating noise, that exceeds the ambient noise level by more than seven decibels during daytime hours and more than five decibels during nighttime hours. Fracturing operations may not exceed the ambient noise level by more than ten decibels during daytime hours; no fracturing operations shall be allowed during nighttime hours unless they exceed the ambient noise level by no more than five decibels. Backflow operations may not exceed the ambient noise level by more than five decibels during nighttime hours.
- (3) The operator shall be responsible for establishing and reporting to the director of public works the pre-drilling ambient noise level prior to the commencement of initial operations at the site. This shall be based on measurements during a continuous 72-hour time span, which shall include at least one 24-hour reading during either a Saturday or Sunday. Once the drilling is complete, the operator shall be required to establish a new ambient noise level prior to the installation of any new noise generating equipment.
- (4) Adjustments to the noise standards set forth in subsection (c)(1) of this section may be permitted intermittently in accordance with the following:

Permitted increase (dBA)	Duration of Increase (minutes, in cumulative minutes during any one hour)
10	5

15	1
20	Less than 1

- (5) The exterior noise level generated by the drilling, redrilling or other operations of all wells located with 500 feet of a protected use shall be continuously monitored to ensure compliance. The cost of such monitoring shall be borne by the operator.
- (6) Acoustical blankets, sound walls, mufflers or other alternative methods may be used to ensure compliance. All soundproofing shall comply with accepted industry standards.
- (7) The sound level meter used in conducting noise evaluations shall meet the American National Standard Institute's standard for sound meters or an instrument and the associated recordings and analyzing equipment which will provide equivalent data.

(Ord. No. 4916, § 29-3, 9-17-2009)

Sec. 34-23. - Rural areas.

Any well to be drilled in a rural area must comply with the fencing requirements set forth in this chapter unless otherwise specified by private contract.

(Ord. No. 4916, § 29-4, 9-17-2009)

Sec. 34-24. - Fences and screening.

- (a) With the exception of the periods of drilling operations, permanent chain link fences with a secured gate are required on the site of any well, which fencing shall completely enclose all production equipment. Fences shall meet the following minimum specifications:
 - (1) The fence shall be at least six feet in height.
 - (2) Support posts shall be set in concrete and shall be imbedded into the ground to a depth sufficient to maintain the stability of the fence; provided, however, so long as stability of the fence is maintained, temporary fence points shall not be required to be set in concrete.
 - (3) The chain link fence shall have a minimum thickness of 11 gauge.
 - (4) Posts and rails shall be three-eighths-inch round steel bolt stock. Adjustable tighteners shall be turnbuckle or equivalent having a six-inch minimum take-up. Tension bars shall have a minimum thickness of one-fourth by three-fourths inch.
 - (5) A Knox padlock or Knox box with key shall be provided to the district fire chief having jurisdiction at the site to access the well site in case of emergency, with notification to the operator in accordance with the emergency response plan provided prior to commencement of drilling operations to the fire district having jurisdiction at the site.
- (b) Wells in urban areas will be subject to any additional screening measures as may be provided by the parish commission or director of public works.

(Ord. No. 4916, § 29-5, 9-17-2009)

Secs. 34-25—34-51. - Reserved.

ARTICLE III. - ADMINISTRATION AND ENFORCEMENT

Sec. 34-52. - Appeals and variances.

- (a) The director of public works, in addition to his authority to make decisions hereunder, also is authorized to approve minor variances from the provisions of this chapter when by reason of exceptional topographic conditions or other extraordinary and exceptional physical characteristics of particular property, the strict application of a regulation under this chapter would result in peculiar and exceptional practical difficulties to or exceptional or undue hardship to an applicant for a minor variance. Such minor variances may be granted only if approval shall be without substantial detriment to the public good and without substantially impairing the intent and purpose of this chapter. Such minor variances shall be subject to such terms and conditions as may be fixed, in writing, by the director of public works.
- (b) Any appeals from decisions hereunder of the director of public works shall be to the parish administrator. Any appeals from decisions of the parish administrator hereunder shall be to the parish commission. Any decision rendered by the director of public works or parish administrator shall be deemed final if not appealed within ten days of notification thereof to the applicant. Such appeal shall be taken by filing with the director of public works and parish administrator a written notice of appeal specifying the particular grounds upon which the appeal is taken.

(Ord. No. 4916, § 29-6, 9-17-2009)

Sec. 34-53. - Violations.

Failure to comply with the provisions or requirements of this chapter shall be punishable by the parish by a fine, per day, in the maximum amount authorized by the parish, and/or the issuance of temporary restraining orders and injunctive relief, both preliminary and permanent, without the necessity of the parish proving irreparable harm or furnishing bond or other security and with the parish, should it prevail in whole or in part, being entitled to recover all of its reasonable attorney's fees and costs. Additionally, any forbearance by the parish in any instance shall not constitute a waiver of authority to seek enforcement in any other instance.

(Ord. No. 4916, § 29-7, 9-17-2009)

Sec. 34-54. - Application of chapter.

This chapter shall apply only to wells permitted by the office of conservation after January 1, 2008.

(Ord. No. 4916, § 29-8, 9-17-2009)

Sec. 34-55. - Applicability.

The provisions of this chapter shall apply only to wells whose drill pad exceeds one acre.

(Ord. No. 4916, § 29-9, 9-17-2009)



The Cities That Are Fighting Back Against State Intervention

From Cleveland to Birmingham, urban areas are finding ways to maintain local authority over everything from plastic-bag fees to minimum wage laws.

KRISTON CAPPIS | @kristoncapps | Oct 3, 2016 | 3 Comments



Activists in Pittsburgh march for a \$15 minimum wage in April 2016. (Keith Srakocic/AP)

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Despite the nationwide push for preemption, the decision in Ohio as well as other recent court challenges suggest that conservative business interests may not have the final say on local law. Cities may have more authority invested in them than the recent wave of state preemption laws would suggest. In fact, the same train of thought that protects state authority from federal interference may protect local laws under fire in statehouses.

"The Ohio case is particularly noteworthy because it represents a court applying what is a fairly standard home-rule provision in the state constitution in a way that protects municipalities from state interference," Beach says. "It's often assumed that the basic home rule and [Dillon's Rule](#) framework embedded in state constitutions necessarily means that the state has plenary power over all matters. Here's a case where the court is reading, again, a fairly standard home-rule provision in the constitution in a way that's very favorable to city authority."

Largely white state legislatures are stripping powers from largely minority urban centers.

State preemption laws frequently feature similar if not identical language, thanks to ALEC. As a result, they face common challenges, legal and philosophical. One is the simple irony of conservative state legislatures imposing on the rights of residents to decide what's best for themselves in their own communities. State government big-footing citizens' self-determination is not exactly the hallmark of conservatism.

Another implication is more troubling, according to Christine Owens, executive director of the [National Employment Law Project](#): Largely white state legislatures are stripping powers from largely minority urban centers.

"The refusal by the largely white state legislature to allow the largely African-American City of Birmingham to address its residents' economic needs rests on a state constitution that intentionally limited local powers in order to suppress rights and opportunities of African-American residents," Owens says in a [brief](#) on Birmingham's legal challenge.

Several preemption bills are simply a matter of wild overreach. A lawmaker in Wisconsin proposed a concealed-carry bill that would allow any victim of gun violence to [sue local businesses that prohibit weapons](#) on their property. For more than 30 years, municipalities in Florida have been [banned from creating local gun ordinances](#), but only within the last decade has that rule been enforced seriously; penalties for mayors and city councils that try to enforce gun-free zones locally include removal for office and fines reaching up to \$100,000.

A bill proposed by a Republican Arizona state senator would [strip cities of shared state funds](#) if they are found to violate state law or the state's constitution. The bill is an effort to make good on a threat by Republican governor Doug Ducey to withhold tax revenue from cities that enact local minimum-wage laws or other bills.

Local governments have not achieved victory in every fight against state preemption. Late in 2015, a judge in Pennsylvania's Allegheny County [struck down two local labor ordinances in Pittsburgh](#), including a paid sick-leave bill. The SEIU has [appealed](#) the decision, and Pennsylvania's state supreme court may yet have the final word. Cleveland's challenge against the state law in Ohio may follow the same path.

"I am hopeful that, if Cleveland is ultimately successful, that it will embolden other cities to embrace the power that they actually have," Beach says. "And to change the overall perspective of both state and local officials about what's possible."

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