MEMORANDUM FROM THE LAW OFFICES OF
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TO:	John Elsesser, Town Manager
FROM:	Duncan J. Forsyth Richard P. Roberts Kelly C. McKeon
DATE:	September 17, 2015
RE:	Review of Proposed Town Ordinance

I. BACKGROUND

It is our understanding that the Town has received a petition requesting a Town meeting to vote on a proposed ordinance that prohibits (1) any natural gas waste or oil waste on any road or real property located within the Town, whether or not such waste has received beneficial use determination or other approval for use by the Department of Energy and Environmental Protection ("DEEP"); (2) the introduction of natural gas waste or oil waste into any wastewater treatment facility or solid waste management facility within or operated by the Town; and (3) the storage, disposal, sale, acquisition, handling treatment and/or processing of waste or natural gas or oil extraction within the Town (the "Proposed Ordinance").[1] The Proposed Ordinance also requires that any bids and contracts related to the purchase or acquisition of materials or the retention of services to be used to construct or maintain any road or real property within the Town include a provision stating that no materials containing natural gas or oil waste were used.

In accordance with § 9.5 of the Town Charter, the Proposed Ordinance must be examined by the town attorney, who is authorized to correct any illegalities and unconstitutional provisions that may exist. Based on the foregoing, we offer the following legal opinion on the Proposed Ordinance.

II. CONNECTICUT STATUTE REGULATING FRACKING WASTE

[1] The Proposed Ordinance attempts to regulate both "natural gas waste" and "oil waste" by consistently differentiating between the two terms. "Natural gas waste" is defined as, among other things, waste that is generated as a result of natural gas extraction activities. *See* Proposed Ordinance, § 5.4. "Oil waste" is defined as, among other things, waste that is generated as a result of oil extraction activities. *See* Proposed Ordinance, § 5.5.

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In Public Act 14-200 (2014), codified at Conn. Gen. Stat. § 22a-472, the Connecticut Legislature established a moratorium on certain fracking activities. The statute provides that "[n]o person may accept, receive, collect, store, treat, transfer or dispose of waste from hydraulic fracturing, including, but not limited to, the discharge of wastewaters into or from a pollution abatement facility, until [DEEP] adopts regulations" that (1) subject fracking wastes from energy production to the state's hazardous waste management regulations; (2) ensure any radioactive components of fracking waste do not pollute the air, land, or waters or otherwise threaten human health or the environment; and (3) require disclosure of the composition of the waste. *See* C.G.S. § 22a-472(b). The DEEP must submit these regulations to the legislative review committee sometime between June 30, 2017 and July 1, 2018. *Id*. After the regulations are adopted, the statute requires any person collecting or transporting fracking waste for receipt, acceptance or transfer in Connecticut to obtain a DEEP permit prior to any such collection or transportation in this State. *Id*. at § 22a-472(c). The statute also provides that no person may "sell, offer, barter, manufacture, distribute or use any product for anti-icing, de-icing, pre-wetting or dust suppression" that is derived from or contains fracking waste until DEEP adopts regulations. *Id*. at § 22a-472(d).

The moratorium in § 22a-472 only extends to waste from hydraulic fracturing of natural gas, not oil. The statute defines "hydraulic fracturing" as "the process of pumping a fluid into or under the surface of the ground in order to create fractures in rock for exploration, development, production or recovery of *gas*." *See* C.G.S. § 22a-472(a)(4) (emphasis added). *See* C.G.S. § 22a-472(a)(3). The legislative history confirms that the Act is only concerned with placing a moratorium on the fracking of gas and not oil. *See* Sen. Meyer, 5/5/14 ("We were concerned here that if we were not careful with our language, we were going to be prohibiting fracturing that's used for other good purposes, and so the focus, the clear and sole focus of this bill is on the fracturing hydraulic, means water under pressure with chemicals that focuses on hydraulic fracturing of natural gas, not on the fracturing of other substances."); ("there is hydraulic fracturing in some instances with respect to minerals and with respect to crude oil. This bill does not attempt to regulate or have a moratorium on those kinds of activities"). Our research found no Connecticut statute that places a similar moratorium on accepting, receiving, collecting, storing, treating, transferring or disposing of waste from hydraulic fracturing for oil. We did find C.G.S. § 22a-473, which prohibits any person from engaging in exploratory drilling for oil or gas until the DEEP promulgates regulations as required under § 22a-472. However, nothing in §22a-473 or any other statute suggests that the Connecticut legislature has prohibited persons from accepting, receiving, collecting, storing, treating, transferring or disposing of waste from hydraulic fracturing for oil.

III. PREEMPTION

The doctrine of preemption is based upon the premise that a legislature may reserve to itself exclusive jurisdiction over an entire subject area thereby preventing local action in that area. "A local ordinance is preempted by a state statute whenever the legislature has demonstrated an intent to occupy the entire field of regulation on the matter…or…whenever the local ordinance irreconcilably conflicts with the statute….Whether an ordinance conflicts with a statute or statutes can only be determined by reviewing the policy and purposes behind the

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statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives." *Bauer v. Waste Mgmt. of Connecticut, Inc.*, 234 Conn. 221, 232 (1995) (citations omitted). "That a matter is of concurrent state and local concern is no impediment to the exercise of authority by a municipality through local regulation, so long as there is no conflict with the state legislation." *Town of Rocky Hill v. SecureCare Realty, LLC*, 315 Conn. 265, 295 (2015).

"A test frequently used to determine whether a conflict exists is whether the ordinance permits or licenses that which the statute forbids, or prohibits that which the statute authorizes; if so, there is a conflict. If, however, both the statute and the ordinance are prohibitory and the only difference is that the ordinance goes further in its prohibition than the statute, but not counter to the prohibition in the statute, and the ordinance does not attempt to authorize that which the legislature has forbidden, or forbid that which the legislature has expressly authorizes, there is no conflict." *Aaron v. Conserv. Comm'n*, 183 Conn. 532, 544 (1981). "[M]erely because a local ordinance, enacted pursuant to the municipality's police power, provides higher standards than a statute on the same subject does not render it necessarily inconsistent with the state law." *Greater New Haven Property Owners Ass'n v. City of New Haven*, 288 Conn. 181, 191 (2008).

IV. ANALYSIS

a. The Town's ban on the transportation of natural gas waste from extraction activities in § 1.1 of the Proposed Ordinance is preempted by § 22a-472.

Section 1.1 of the Proposed Ordinance bans natural gas waste from extraction activities on "*any road* … within the town for any purpose." (emphasis added). The language on "any road" should be stricken from the Proposed Ordinance because it is preempted by C.G.S. § 22a-472.

As previously noted, a test frequently used to determine whether a conflict exists is whether the ordinance prohibits that which the statute authorizes; if so, there is a conflict. *Aaron v. Conserv. Comm'n*, 183 Conn. 532, 544 (1981). In making this determination, courts frequently review the legislative history of the statute for guidance. *See, e.g., Bell Atlantic Mobile, Inc. v. Dep't of Public Utility Control*, 253 Conn. 453, 479 (2000); *Modzelewski's Towing and Recovery, Inc. v. State Dep't of Motor Vehicles*, WL 4494312, *5 (Schuman, J., 7/29/14) (citing *Huntington Branch, NCAA v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988)).

A review of the legislative history of C.G.S. § 22a-472 suggests that the legislature deliberately decided not to prohibit the transportation of fracking waste through the State of Connecticut. *See, e.g.*, Rep. Albis, 5/7/14 ("the transport of [fracking] materials would not be prohibited under this act….the department currently has regulations to deal with those types of spills, so they would be able to address that instance should it occur"); Sen. Meyer, 5/5/14 ("we had to look at the question whether or not Pennsylvania might be shipping fracturing waste from Pennsylvania to Massachusetts through the State of New York, through the State of Connecticut, and we do not prohibit that interstate transportation because the legal advice we were given was

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that could interfere with the interstate commerce"); Sen. Meyer, 5/5/14 ("there was an early version this winter of this bill that I think did have a reference to prohibition of export or import….We struck that on our lawyers' recommendations."); Sen. Meyer, 5/5/14 ("Our counsel…advised us that it would be a violation of the Commerce Clause if we prohibited the transportation of fracking waste through the State of Connecticut, and therefore, an earlier version of this bill was amended to take away any reference to transporting, exporting or importing to avoid that interstate."); Sen. Meyer, 5/5/14 ("[O]ur LCO pointed out to us that we would be violating the Interstate Commerce Clause if we actually prohibited the transportation of fracking waste across the State of Connecticut. And so in the bill you'll see there's nothing that refers to transportation or exporting or importing. We're not going to be able to interfere with fracking waste that's going say, from Pennsylvania to New Hampshire."). This legislative history demonstrates that the legislature consciously deliberated on whether or not to include a ban on the transportation of fracking waste through Connecticut via roads, and decided that such a ban was unwise given the potential for constitutional violations of the Commerce Clause.

Moreover, the legislature defined "transfer" in C.G.S. § 22a-472(a)(8) as "to move from one vehicle to another or to move from one mode of transportation to another." During debate on the Senate floor, Senator Meyer explained the very "limited" scope of this definition. He stated that "transfer" as used in § 22a-472(b) would not incorporate the kind of transportation which would invade the Commerce Clause; rather, it is limited only to processes whereby a person may be exposed to the waste via a change in transportation vehicle (for example, from a train to a different train or from a train to a truck). By intentionally limiting the ban on fracking waste only to its "transfer" and not to its "transportation," the legislature has impliedly authorized the transportation of fracking wastes through Connecticut.

Lastly, while § 22a-472's moratorium is limited to hydraulic fracturing waste for natural gas, and does not include waste from hydraulic fracturing for oil, we believe that the Town should nevertheless strike the language on "any road" from § 1.1 of the Proposed Ordinance because of potential constitutional violations with the Interstate Commerce Clause.

b. The Town's ban on the introduction of natural gas waste from extraction activities on real property (portion of § 1.1), wastewater treatment facilities (§ 1.2), and solid waste management facilities (§ 1.3) within the Town are not preempted by § 22a-472.

In determining whether a municipality has the authority to enact an ordinance, the state Supreme Court has held that courts are not to look for statutory prohibition against such an enactment. Instead, they must look for statutory authority for it. *Simons v. Canty*, 195 Conn. 524, 530 (1985). While the Town does not have the specific authority to regulate fracking wastes, the general statutory grant of police powers is likely sufficient to authorize the Town to undertake the proposed regulations in (1) the portion of § 1.1 of the Proposed Ordinance that prohibits any fracking wastes on any real property located within the Town; (2) § 1.2 of the Proposed Ordinance that prohibits the introduction of fracking waste into any wastewater treatment facility within or operated by the Town; and (3) § 1.3 of the Proposed Ordinance that prohibits the introduction of fracking waste into any solid waste management facility within or

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operated by the Town. Unlike the conflict between § 22a-472 and the portion of § 1.1 of the Proposed Ordinance that attempts to regulate the transportation of waste from natural gas fracking, we could find no similar conflict with the foregoing provisions of the Proposed Ordinance. We are of the opinion that the general statutory grant of police powers is sufficient to authorize the enactment of these subsections.

Connecticut courts have upheld the validity of local ordinances based on the general statutory grant of police powers found in C.G.S. § 7-148. For example, in *Modern Cigarette, Inc. v. Orange*, 256 Conn. 105 (2001), the issue was whether a local ordinance banning all cigarette vending machines within the town was preempted by a state statute that regulated the location of cigarette vending machines, restricting their location from any area which was "frequented primarily by minors." The trial court declared the ordinance invalid and enjoined the town from enforcing it, but the state Supreme Court reversed, determining that the state statute does not prohibit the town, acting within its powers to protect the health, safety and welfare of its citizens. The court held that "when a statute authorizes a municipality to regulate a certain activity, a prohibition of that activity will be valid if it is rationally related to the protection of the community's public health, safety and general welfare." *Id*. at 127. The court further noted:

> Every intendment is to be made in favor of the validity of [an] ordinance and it is the duty of the court to sustain the ordinance unless its invalidity is established beyond a reasonable doubt.... [T]he court presumes validity and sustains the legislation unless it clearly violates constitutional principles.... If there is a reasonable ground for upholding it, courts assume that the legislative body intended to place it upon that ground and was not motivated by some improper purpose.... This is especially true where the apparent intent of the enactment is to serve some phase of the *public welfare.*

Id. at 118 (emphasis added).

In *Modern Cigarette*, because the legislature's concern in enacting the state statute was to prevent tobacco products from being used by minors (i.e., for the public welfare), the court held that the local ordinance, which simply went further and was more comprehensive than the statute, was rationally related to that purpose. *Id*. at 131. Finally, the court noted that if the legislature had wanted to preempt the town from enacting such an ordinance, it could have done so expressly. *Id*. at 132.

The legislative history of § 22a-472 repeatedly demonstrates that the legislature's motivation for placing a moratorium on the collection, storage, treatment, transfer or disposal of waste from fracking natural gas was because of the "high scientific evidence…that fracking waste is highly toxic," and therefore should be regulated. *See* Sen. Meyer, 5/5/14; *see also* Sen. Meyer, 5/5/14 ("[w]hat we're concerned about is this toxic fracking waste coming in here from another state"); (the state "shouldn't have to have the responsibility for dealing with the toxic material"). We are of the opinion that the portion of § 1.1 banning waste from fracking natural gas on real property within the Town, § 1.2 and § 1.3 simply go further and are more

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comprehensive than § 22a-472, and are rationally related to the purpose of protecting the citizens of this State and the environment from the dangerous toxicity of these substances. Moreover, if the legislature had wanted to preempt the Town from enacting such provisions, it could have done so expressly, or implied as such in the legislative history.

c. Section two of the Proposed Ordinance is not preempted by § 22a-472.

Sections 2.1, 2.2 and 2.3 of the Proposed Ordinance provide that all bids and contracts related to the purchase, acquisition of materials, or retention of services to be used to construct or maintain any road or real property within the Town must include a provision stating that no materials containing waste from fracking natural gas will be used. Nothing in § 22a-472 conflicts with these sections of the Proposed Ordinance. In fact, § 22a-472(d) prohibits the use of waste from fracking natural gas in de-icing and dust suppression products, which are used on roads and real estate. The legislative history demonstrates that the purpose for including subsection (d) in § 22a-472 was that other states were beginning to face water contamination issues where toxic fracking wastes were being used in de-icing and dust suppression materials. In other words, the purpose was again to protect the public welfare. Section 2 of the Proposed Ordinance does not conflict with the state statute; instead, it is rationally related to that purpose of protecting the public welfare.

d. The Town's ban on oil waste from extraction activities on any real property located within the Town (portion of § 1.1), the introduction of oil waste into any wastewater treatment facilities (§ 1.2) or solid waste management facilities (§ 1.3), and the affirmation requirements in § 2 of the Proposed Ordinance are legally valid.

As previously noted, our research found no Connecticut statute that places a similar moratorium on accepting, receiving, collecting, storing, treating, transferring or disposing of waste from hydraulic fracturing for oil. Therefore, the issue is not one of preemption; rather, the question is whether the Connecticut General Statutes governing the scope of municipal powers, or the Town Charter, grants the Town the power to enact such restrictions. We believe that the Town does have such authority. Below is a list of several statutes that we believe provide the Town with the authority to enact restrictions regarding the storage, disposal, treatment and/or handling of extracted waste oil within the Town:

> C.G.S. § 7-148(c)(4)(H): Grants municipalities the power to "[p]rovide for or regulate the collection and disposal of . . . waste material."
>
> C.G.S. § 7-148(c)(7)(E): Grants municipalities the power to "[d]efine, prohibit and abate within the municipality all nuisances and causes thereof, and all things detrimental to the health, morals, safety, convenience and welfare of its inhabitants and cause the abatement of any nuisance…."
>
> C.G.S. § 7-148(c)(7)(H)(xi): Grants municipalities the power to "[p]rovide for the health of the inhabitants of the municipality and do all things necessary or desirable to secure and promote the public health."

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C.G.S. § 7-148(c)(8): Grants municipalities the power to "[p]rovide for the protection and improvement of the environment…."

V. CONCLUSION

Our conclusion is fourfold:

(1) The language on "any road" in § 1.1 of the Proposed Ordinance should be stricken because it is preempted by C.G.S. § 22a-472.

(2) The portion of § 1.1 regulating waste from fracking natural gas on real property within the Town, § 1.2 and § 1.3 of the Proposed Ordinance are not preempted by C.G.S. § 22a-472, and simply go further and are more comprehensive than the state statute.

(3) Section 2 of the Proposed Ordinance is not preempted by C.G.S. § 22a-472.

(4) The Town has the authority to enact restrictions regarding the storage, disposal, treatment and/or handling of extracted waste oil within the Town.

As noted above, §22a-472 requires DEEP to submits proposed regulations by July 1, 2018. Should regulations eventually be promulgated, we strongly urge that any ordinance passed by the Town on these matters be reviewed to determine whether it is still compatible with the state regulatory scheme.

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