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**Principles Preemption in an Age of Interest Convergence: Preserving the Distinction between Pennsylvania's Environmental Regulation and Local Land Use Regulation**

Nancy D. Perkins

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Principled Preemption in an Age of Interest Convergence: Preserving the Distinction Between Pennsylvania’s Environmental Regulation and Local Land Use Regulation

Nancy D. Perkins*

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INTRODUCTION

In the spring of 2008, Pennsylvanian Governor Ed Rendell vowed to veto a statewide smoking ban if it preempted Philadelphia's more stringent ordinance.¹ Lawyers certainly understood what preemption of local authority meant. Many non-lawyers arguably had a basic understanding of the news story as well, realizing that in some situations state law overrides local authority. The concept of preemption may be generally accessible to both the legal and lay communities, but behind this accessibility lies a doctrine that some scholars claim is in a state of confusion.²

It is within the larger topic of federalism that preemption finds its home, as a constitutional doctrine that resolves conflicts between the regulatory power of the federal government and the states' police powers.³ To say that a federal law preempts state law is to say that state law on the same topic is foreclosed altogether. Any state law that addresses the same area, even if it does not conflict with the federal law, is foreclosed.⁴ Preemption is not always intended, however, and in these cases federal and state laws coexist in a state of concurrency.⁵ In these situations, the Supremacy Clause nevertheless dictates that state law must give way to federal regulation if it conflicts with federal law.⁶ Otherwise, a state is free to regulate in the same area as the federal government.⁷ Importantly, conflict is not relevant to preemption, but it is central to a supremacy, or conflict, analysis.⁸ The confu-

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³. Spence & Murray, supra note 2, at 1127.
⁴. Gardbaum, supra note 2, at 771.
⁵. Id.
⁶. Id. Professor Gardbaum posits that the doctrine originates under the Necessary and Proper Clause, rather than the Supremacy Clause. Gardbaum, supra note 2, at 773, 782.
⁷. Id.
⁸. Id. at 772-73. This article will use the phrases "supremacy analysis" and "conflict analysis" interchangeably.
sion found in case law typically arises when courts intermingle or conflate these distinct concepts.9

To a significant extent, the same analysis applies to competing state and local regulation. States are free to enact legislation that preempts local action, meaning that no local legislation of any kind is permitted in the target area.10 However, states may instead contemplate concurrent activity with local governments, in which case municipalities may regulate freely as long as their ordinances do not conflict with state law.11 Key to any preemption and conflict analysis is an understanding of what local powers are being exercised and what powers, if any, state law usurps. If it is found that state law is meant to override local authority altogether, preemption exists, and no further analysis is needed. If, instead, state law contemplates concurrency, the question becomes one of supremacy, and a court must determine whether the local ordinance conflicts with the state law by relying on conflict principles. In this regard, nothing is more important to preemption and supremacy analyses than statutory interpretation.12

In recent decades, a rash of preemption disputes have arisen in Pennsylvania. Many cases involve local attempts to regulate activity that is otherwise addressed by the Commonwealth’s environmental laws. Some of these disputes centered on local police power regulations that were meant to supplement state environmental regulation,13 while others involved local zoning legislation.14 The preemption analysis generally remains the same regardless of whether the type of local legislation is companion environmental or nuisance legislation, or zoning. The outcomes, however, vary. This variance occurs because preemption and supremacy questions ask whether state regulation strips municipalities of powers that they may otherwise exercise. The Commonwealth’s

9. Gaurdbaum, supra note 2, at 768, 807.
10. See, e.g., Duff v. Northampton Twp., 532 A.2d 500, 504 (Pa. Commw. Ct. 1987) (noting that Pennsylvania municipalities have limited police power over local matters that does not extend to activities in need of uniform regulation or matters of “general public interest which necessarily require an exclusive state policy”) (emphasis added), aff’d, 550 A.2d 1919 (Pa. 1988).
11. See, e.g., W. Pa. Rest. Ass’n v. City of Pittsburgh, 77 A.2d 616, 620 (Pa. 1951) (setting forth the basic supremacy analysis, which bans local regulation that is inconsistent with or contradicts state law).
12. Gardbaum, supra note 2, at 770 (“Preemption claims should be resolved through application of ordinary rules of statutory interpretation . . . .”).
decision to establish an environmental regulatory program, for example, may preempt all or part of a locality’s environmental authority but leave untouched any local attempts to address very similar concerns by way of nuisance or zoning regulation. Therefore, it is legitimate to ask whether the outcome of a preemption or conflict dispute should hinge on the label affixed to local legislation. The question becomes even more valid when one acknowledges that those labels are becoming frayed at the edges as the line between environmental protection and land use planning continues to blur.\textsuperscript{15} It is imperative that the preemption and supremacy doctrines remain true to their underpinnings to avoid indeterminacy in this age of interest convergence.

This article asks whether Pennsylvania’s preemption jurisprudence should be adjusted to enable it to better address the challenges brought upon the Commonwealth and its municipalities by the growing overlap between environmental and land use concerns. It will focus on preemption cases brought under the Commonwealth’s Solid Waste Management Act (“SWMA”),\textsuperscript{16} and this author will ultimately suggest that some revision is in order. Suggestions include bringing more consistency and clarity to preemption and conflict analyses through careful legislative drafting and consistent analytical methodology that acknowledge the very real differences between statewide environmental initiatives and municipal action intended to preserve and protect local environmental and social values. It is also important to bear in mind environmental law’s encouragement of devolution of authority to governmental entities that are closest to the problem at hand.\textsuperscript{17} These suggestions may prevent outcomes that are doctrinally flawed or inefficient, or that reflect political ideologies that have no place in these decisions.\textsuperscript{18}


\textsuperscript{18}. See Spence & Murray, \textit{supra} note 2, at 1130. Although the discussion here is primarily limited to preemption under one of Pennsylvania’s environmental laws, it will nevertheless be of value to practitioners in all jurisdictions, since the preemption doctrine is fundamentally the same in every state, 3 RATHKOPF’S \textit{THE LAW OF ZONING & PLANNING} § 48:4 (4th ed. 2007-2008), and the intermingling of environmental and land use regulation is a nationwide trend. \textit{See supra} text accompanying note 15.
A necessary starting point for this discussion is a review of the municipal powers that are typically at issue in these cases. Those powers include the authority to address nuisances, the more general police powers, and zoning authority. The summary below will make it clear that each of these three seemingly distinct powers is broad enough to target certain land use and environmental matters. A discussion of Pennsylvania's most significant preemption cases will follow, presented in three categories: cases involving state and local regulation in the same area, cases resolving conflicts between local land use regulations and broad state regulatory programs that include limited land use powers, and cases where state environmental regulations are pitted against conflicting municipal land use regulations. A review of pertinent portions of the SWMA and regulations will then be presented, followed by a discussion of selected preemption and supremacy decisions under the Act. The final portions of this article will summarize various themes and concerns that emerge from these authorities and will elaborate on the suggestions alluded to earlier.

I. LOCAL GOVERNMENT AUTHORITY IN PENNSYLVANIA

The objective here is not to present a comprehensive primer on local government law in the Commonwealth; rather, it is to highlight the range of powers municipalities may exercise in relation to solid waste management. In Pennsylvania, those powers depend on the type of municipality involved. Philadelphia, for example, is a city of the first class with home rule authority, empowering it to exercise "all powers . . . of local self-government and . . . complete powers of legislation and administration in relation to its municipal functions." The city is as free to enact legislation as is the General Assembly, as long as its ordinances are consistent with the federal and Pennsylvania constitutions. Other municipalities in the Commonwealth, which include second and third class cities, first and second class townships, boroughs, and incorporated towns, are governed by their own enabling acts. The

20. § 13131.
primary authority for land use for the vast majority of local governments is set forth in the Commonwealth's Municipalities Planning Code ("MPC").

Local regulations on solid waste management are typically grounded in the police power, which was originally held exclusively by the Commonwealth to promote the health, safety, and welfare of its citizens. The General Assembly has since delegated its police power to the Commonwealth's municipalities in different ways and to varying extents, authorizing them to combat public nuisances, act in cooperation with the state in relation to solid waste management, and engage in land use planning. It is hornbook law that Pennsylvania's municipalities possess only those powers that have been expressly given to them. Enabling act language thus is crucial, and grants of authority tend to be narrowly construed. Although there is a presumption that local land use ordinances are valid, a municipality must exercise its powers reasonably.

Local authority to address environmental matters and nuisances is clearly established. All municipalities in Pennsylvania have the power to abate nuisances and to ban nuisances and to ban nuisances per se.
They are also free to regulate offensive activities that do not create a nuisance, a power they have used to regulate solid waste activities. Municipalities are also free to enact local environmental ordinances under their general police powers. More commonly, local governments choose to enact environmental ordinances when a state environmental statute authorizes them to do so. The Municipal Waste Planning, Recycling and Waste Reduction Act, for example, specifically authorizes municipalities to regulate the transportation, collection, and storage of municipal waste within their boundaries.

At times, however, municipalities have sought to regulate solid waste facilities under neither a nuisance rationale nor an express delegation of power from the SWMA. They have instead used their land use authority. That authority is both broad and specific, and regardless of the type of municipality involved, the opportunity exists to employ land use powers in ways that further environmental as well as land use policies.

The land use powers of Pennsylvania's cities of the first and second class (Philadelphia and Pittsburgh, respectively) are virtually identical and appear in their respective enabling acts. The cities may zone to promote the police powers and are free to restrict land uses, the size and height of buildings, and the amount of land that can be occupied by structures. These broad powers exist to enable the Commonwealth's largest cities to respond to their unique geography and character.
erning first and second class cities each include a conflict-of-laws provision, which states that city standards will govern in the event a city land use ordinance imposes stricter requirements than those imposed by a state statute.40

All other municipalities in Pennsylvania are governed by the MPC,41 the objectives of which are expansive.42 The aim of the MPC is not simply to authorize municipalities to determine land uses, sizes and heights of buildings, open space dimensions, and other matters relevant to the general welfare,43 but also to consider a municipality’s “character” and “special nature” by zoning to preserve natural, agricultural, and historic amenities.44 Although a municipality’s zoning restrictions generally must be uniform across all of its districts, special classifications are permitted for “places having a special character or use affecting and affected by their surroundings.”45 The purposes of zoning are as much directed at fighting blight, overcrowding, and traffic congestion as they are at protecting various environmental amenities, including wetlands, forests, and floodplains.46

The land use authority for all of Pennsylvania’s municipalities includes the use of zoning to address their unique character and topography as well as local environmental concerns. The MPC goes even further by embracing a broader conception of land use that references the economic and social parameters of sustainable development.47 While the scope of the zoning power under the MPC is remarkable, the crucial point for the purposes of this discussion is that the Code unquestionably reflects an understanding that zoning exists, in large part, to enable municipalities to deal with unique local features and environmental conditions.

peculiar suitability for particular uses, and with a view to conserving [property values] and encouraging the most appropriate use of land throughout such city”).

40. 53 PA. CONS. STAT. ANN. §§ 14762, 25058 (2008). Both of these statutes also provide that a state statute will prevail if stricter than the city ordinance. Id.

41. The MPC’s definition of “municipality” includes all local governmental entities except first and second class cities. 53 PA. CONS. STAT. ANN. § 10107 (2008) (including second class A and third class cities, boroughs, incorporated towns, and all classes of township, among other entities).

42. Section 10105 of the MPC includes the usual goals of promoting health, safety, and morals. 53 PA. CONS. STAT. § 10105 (2008).

43. 53 PA. CONS. STAT. ANN. § 10603(a) (2008).

44. Id. at (a)-(b) (noting that these powers exist unless preempted by a list of specific environmental laws, not including the SWMA).

45. 53 PA. CONS. STAT. ANN. § 10605(1)-(2).

46. See, e.g., §§ 10105, 10605. Section 10105 further links the general welfare prong of the police powers to “economic, practical, and social and cultural facilities . . . .”.

47. 53 PA. CONS. STAT. ANN. § 10105 (including the protection and promotion of economic, social, and cultural facilities and growth among the purposes of land use planning).
A number of well-settled legal principles and rules of construction are ubiquitous in zoning cases. A zoning ordinance's validity depends on compliance with the procedural requirements of the MPC. Furthermore, a zoning ordinance will be found substantively invalid if it is arbitrary, unnecessary, or unreasonable, or if it is enacted solely to restrict future development, even if it is intended to promote the police powers. Finally, although courts construe a municipality's zoning power liberally, they will interpret zoning ordinances narrowly because they are in derogation of the common law.

Pennsylvania's municipal land use powers are heavily codified and well developed by case law. These powers are often the subject of preemption cases, where their strength and distinctiveness can play a pivotal role in resolving competing state and local authority.

**II. PENNSYLVANIA'S PREEMPTION AND SUPREMCY LAW**

The following cases are representative of Pennsylvania's preemption case law. Some of these cases do not deal with conflicts between state environmental laws and local land use ordinances; nevertheless, they are cited in preemption cases of all kinds. Together, they affirm the importance of a multi-step analysis in these disputes and reveal a degree of confusion about the distinction between preemption and conflict.

To recap, in cases of state preemption, a locality has no power to regulate in the area; in the case of concurrency, however, a locality may regulate as long as its regulation is consistent with state law. It is notable that Pennsylvania has found total preemption in only three areas: liquor control, anthracite strip mining, and

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48. *Longenecker*, 543 A.2d at 216-17 (invalidating a local ordinance mandating landfill setbacks due to noncompliance with the MPC).


50. *Exton Quarries*, 228 A.2d at 173-74. This rule is echoed in the MPC, which provides that, in case of doubt about the meaning of a zoning ordinance, it should be interpreted in a property owner's favor. 53 PA. CONS. STAT. ANN. § 10603.1 (2003).

51. Throughout this article, the phrases "preemption case law" and "preemption cases" will be used to refer to cases dealing with preemption as well as those dealing with conflict under supremacy principles.

52. See supra text accompanying notes 4-7; see also 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 48:4 (4th ed. 2007-2008).


banking. The meager number of cases in which total preemption has been found underscores the harshness of the doctrine and the rarity of its existence.

These core cases might be presented based on the type of preemption involved: express preemption, where statutory language clearly states local action is forbidden; field preemption, where the legislature intends for the state to occupy the field; or conflict/supremacy cases, where local law conflicts with state law. This article will instead categorize these cases by distinguishing between those that deal with state and local laws that attempt to regulate in the same area, those where state and local agencies with overlapping yet distinct land use powers attempt to regulate the same activity, and those where state regulation in an area unrelated to land use conflicts with a local land use regulation. In this latter category, the disputes often involve state environmental regulations that conflict with local land use ordinances. These categories will be referred to as “companion regulation cases,” “overlapping land use authority cases,” and “environmental-land use disputes,” respectively.

57. Spence & Murray, supra note 2, at 1134.
58. Id.
59. Id. For example, in the three cases referred to above where preemption was found to exist, the courts were convinced of the General Assembly's intent to occupy the field. Hilovsky, 108 A.2d at 707; Harris-Walsh, 216 A.2d at 336; Allegheny Valley Bank, 412 A.2d at 1369. Some courts have characterized Allegheny Valley Bank as one that found preemption based on commercial necessity. See, e.g., Council of Middletown Twp. v. Benham, 523 A.2d 311, 314 (Pa. 1987). However, a review of the case makes clear that it, too, was based on field preemption. See Allegheny Valley Bank, 412 A.2d at 1369.
60. See, e.g., Miller & Son Paving, Inc. v. Wrightstown Twp., 451 A.2d 1002 (Pa. 1982) (Court called upon to determine whether the Surface Mining Conservation and Reclamation Act setback provisions preempted those in a local zoning ordinance).
Of these three types of cases, the environmental-land use dispute is unique in that the Commonwealth's and municipality's respective powers do not overtly overlap (or at least have not been traditionally understood to coincide with one another). Furthermore, when overlap does occur, it is not as patent or as broad as in other types of preemption disputes, and the overlap arguably is not as threatening to statewide regulation as might be the case in a companion regulation case or in an overlapping land use authority case. In this third category, the powers being exercised by the state and local government promote two different things: environmental protection and responsible land use planning, respectively. Absent express or field preemption, these cases should easily be resolved under a supremacy analysis. Logic suggests that, because environmental regulation and land use regulation serve different objectives, no conflict would exist, leaving local regulation intact. Although this observation is generally accurate, the cases are not consistently analyzed in this manner. The preemption analysis at times fails to distinguish between the general objectives of land use and environmental regulation and instead focuses narrowly on the specific provisions of competing state and local laws.

A. Companion Regulation Cases

The seminal case of Western Pennsylvania Restaurant Association v. City of Pittsburgh⁶¹ involved a dispute over allegedly con-

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⁶¹. 77 A.2d 616 (Pa. 1951).
flicting provisions of a state law and a Pittsburgh ordinance, both of which regulated restaurants. The Pennsylvania Supreme Court found no preemption, partially because the state law expressly authorized consistent, supplemental local legislation. In upholding portions of the city ordinance and invalidating others, the Court recited rules of preemption and conflict in language that has been quoted in numerous subsequent decisions:

It is of course self-evident that a municipal ordinance cannot be sustained to the extent that it is contradictory to, or inconsistent with, a state statute. But, generally speaking "it has long been the established general rule, in determining whether a conflict exists between a general and local law, that where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipal corporation with subordinate power to act in the matter may make such additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable." National Milk Producers Association v. City & County of San Francisco, 20 Cal.2d 101, 109, 124 P.2d 25, 29. Thus it has been held in our own Commonwealth that municipalities in the exercise of the police power may regulate certain occupations by imposing restrictions which are in addition to, and not in conflict with, statutory regulations. But if the general tenor of the statute indicates an intention on the part of the legislature that it should not be supplemented by municipal bodies, that intention must be given effect and the attempted local legislation held invalid.

This language can be analyzed in reference to the preemption/supremacy distinction. The Court does not address preemption first. Instead, it begins by stating the basic supremacy rule: a municipal ordinance cannot be "contradictory to, or inconsistent with, a state statute." The Court then provides a rule to help resolve conflicts between state and local legislation in the same area: municipalities may enact companion or supplemental regulations "in aid and furtherance of" a state statute "as may seem appropriate to the necessities of the particular locality and which

63. Id. at 620.
64. Id. at 621.
65. Id. at 620 (citations omitted).
66. Id.
are not in themselves unreasonable." Only then does the Court mention the possibility of total preemption, noting that if the “general tenor” of a state law reveals an intent “that it should not be supplemented by municipal bodies,” then local legislation is prohibited. This final statement reflects the field preemption doctrine, under which a locality would not be free to legislate at all. The Court’s distinction between total preemption and concurrency is both correct and important.

The language could have been more clear. The Court never mentioned preemption by express statutory language, most likely because the state law did not expressly preempt local law. The Court might also have clarified that the supremacy rule applies when there is no express or field preemption. Nevertheless, its analysis reflects a basic analytical progression, first rejecting preemption and then turning to supremacy and conflict. In addition to providing a rule generally fixing the reach of local regulation in the case of concurrency, the Court emphasized the importance of statutory language in any preemption case.

To the extent that any ambiguity remained after Western Pennsylvania Restaurant Association, it was resolved forty-eight years later in Mars Emergency Medical Services, Inc. v. Township of Adams. That case resolved a conflict between Pennsylvania’s Emergency Medical Services (“EMS”) Act and two local ordinances designating local EMS providers. The Court cited the rules from Western Pennsylvania Restaurant Association and emphasized the rarity of preemption. Unlike the statute at issue in Western Pennsylvania Restaurant Association, however, the EMS Act was silent as to local authority to legislate in the area. Accordingly, the Court scrutinized the statutory language for restrictions on local legislation. Finding none, it proceeded to consider whether the municipalities involved—a second class township and a borough—had the authority to designate EMS providers. After reviewing the relevant enabling legislation, the Court concluded

68. Id.
69. Id. at 620-21.
70. Id. at 619-20.
72. Mars, 740 A.2d at 193.
73. Id. at 195-96 (noting the three instances where total preemption exists).
74. Id. at 196.
75. Id.
76. Id.
that both municipalities acted within their authority. The case was thus reduced to a supremacy issue and, in determining whether the local ordinances were consistent with the state law, the Court stated that it was necessary to consider "whether the [local ordinances] advanced or thwarted the purposes of the act." The case was remanded for the trial court to make that determination.

*Mars* is notable for the progression of its analysis. The Court dealt with possible preemption first and, finding no express or implied preemption, proceeded to the issue of municipal authority. Having determined that the necessary authority existed, it then addressed the supremacy issue. The opinion also elaborated on considerations that are relevant to a conflict or consistency analysis, directing the lower court to determine whether the local ordinances further the purposes of the state law. Thus, a local law, even if enacted with authority, will be held to be inconsistent with a state law—and therefore overridden—if it thwarts the state law's objectives. *Mars* not only filled the gap left by *Western Pennsylvania Restaurant Association* by inquiring into both express and implied preemption, but it elaborated on relevant supremacy considerations.

In 2003, the Pennsylvania Supreme Court had the opportunity to hear a companion regulation case involving a state environmental statute. In *Hydropress Environmental Services, Inc. v. Township of Upper Mt. Bethel*, the Court considered whether a local ordinance regulating the application of biosolids to agricultural lands was preempted by the SWMA. This case will be described more fully below, but a few points should be mentioned here. Although *Hydropress* was a plurality decision on the matter of preemption, it reaffirmed the doctrine set forth in *Western Pennsylvania Restaurant Association*. The justices in *Hydropress* who believed the SWMA did not preempt local legislation stated that, because of the harshness of preemption, the intent to

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77. *Mars*, 740 A.2d at 196.
78. *Id.* at 196-97 (noting that the objectives of the EMS Act included the provision of "effective and efficient emergency medical services on a uniform basis throughout the Commonwealth").
79. *Id.* at 197.
80. 836 A.2d 912 (Pa. 2003) (plurality opinion).
81. *Hydropress*, 836 A.2d at 920. Three justices found that the SWMA did not preempt local legislation; three others disagreed. *Id.* at 918-19.
82. *Id.* at 918.
preempt must be clearly expressed or otherwise certain. They relied heavily on statutory language contemplating state and local cooperation and power sharing in the area of solid waste management. Their rationale echoed a factor that was also relevant in *Western Pennsylvania Restaurant Association*: in cases where there is no express preemption, courts will be less likely to find implied preemption if the state legislation creates a partnership between state and local authorities in the regulated area.

A final companion regulation case is *Duff v. Northampton Township*, which preceded both *Mars* and *Hydropress*. The Commonwealth Court was called upon to determine whether a local firearms ordinance conflicted with a Pennsylvania statute that restricted hunting with firearms within a certain distance of a dwelling. The court addressed whether the ordinance was preempted by the game law, or in the alternative, whether it was unlawful as an unreasonable exercise of the municipality's police powers. In doing so, and in ultimately invalidating the ordinance, the court unfortunately intermingled the preemption and supremacy concepts, thereby creating an unclear decisional framework that has reappeared in subsequent decisions.

Several times throughout the opinion, Senior Judge Narick interchangeably referred to preemption and supremacy without clearly delineating the two. The court claimed that the ordinance conflicted with the state law, yet at the same time maintained that the game law reflected a need for uniform statewide regulation. However, as noted earlier, a conflict requires a supremacy analysis, whereas an intent to create a statewide regulatory program invokes field preemption. If preemption is found, local legislation is forbidden, even if it does not conflict with the state scheme; therefore, a supremacy analysis is irrelevant. Later in *Duff*, the court correctly noted that express or implied preemption strips a municipality of its power to regulate but then immedi-
ately cited the portion of *Western Pennsylvania Restaurant Association* that addressed conflict in cases of concurrent regulation.\(^{91}\) The court then promptly reverted to the preemption rule, stating that "a municipality may be foreclosed from exercising power it would otherwise have if the state has sufficiently acted in a particular field."\(^{92}\)

The back-and-forth references to preemption and conflict culminated in a presentation of five questions that the court stated were pertinent in finding preemption:

1. Does the ordinance conflict with the state law, either because of conflicting policies or operational effect, that is, does the ordinance forbid what the legislature has permitted?
2. Was the state law intended expressly or impliedly to be exclusive in the field?
3. Does the subject matter reflect a need for uniformity?
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?\(^{93}\)

Like other portions of the opinion, these questions mingled factors relevant to both preemption and supremacy without setting them within an analytical progression. Questions 2, 3, and 4 address field preemption, while questions 1 and 5 concern supremacy and conflict in cases of concurrency. Unfortunately, the court never made that distinction and presented all five questions as relevant to "preemption" alone. *Duff* is not unique. It reflects a lack of clarity common in preemption case law.\(^{94}\) Ironically, because the court eventually held that the state's game law preempted the field of firearm regulation,\(^{95}\) supremacy was not an issue, and two of the five questions need not have been presented.

To be sure, *Duff* correctly stresses the importance of statutory construction,\(^{96}\) and it is helpful in noting that no presumption of preemption arises merely because the General Assembly passes a

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\(^{91}\) *Id.* at 504.

\(^{92}\) *Duff*, 532 A.2d at 504.

\(^{93}\) *Id.* at 505.

\(^{94}\) See supra text accompanying note 2.

\(^{95}\) *Duff*, 532 A.2d at 506.

\(^{96}\) *Id.* at 504.
Nevertheless, the case’s five questions are an unfortunate legacy that has tainted later decisions.

B. Overlapping Land Use Authority Cases

A second series of cases deals with conflicts between local land use ordinances and state land use powers that are embedded within larger regulatory programs. Because these cases are ones of limited overlap in land use authority, they could properly be labeled companion regulation cases. Indeed, the basic preemption analysis remains the same. However, these cases are treated separately because of the special deference given to municipal land use authority. As will soon be shown, local land use powers are treated specially when compared to the police powers exercised in the companion dispute cases addressed above.

School District of Philadelphia v. Zoning Board of Adjustment illustrates this deferential treatment. In the 1960’s, the Philadelphia School District, which operated under the Public School Code, proposed a plan for a new school building and parking lot that would violate the height and rear-yard limits of the city’s zoning ordinance as well as off-street parking restrictions. When the school district was denied a building permit, it sued unsuccessfully, despite its argument that it was “exempt” from the city’s zoning ordinance. The district relied in part, on statutory language that obligated it to provide schools and grounds as needed to administer a statewide program of public education and which gave it discretionary authority over both the location and size of schools.

In School District of Philadelphia, much of the Court’s preemption and conflict analysis was familiar. The sequence of analytical steps, however, differed, and special attention was given to the city’s land use authority. Rather than beginning with a discussion of preemption and supremacy rules, the Court addressed the scope of the city’s zoning powers. It explained that Philadelphia had extensive powers of self-government, virtually enabling it to legis-

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97. Id. at 503.
99. Sch. Dist. of Phila., 207 A.2d at 865-66. The case was ultimately brought as a challenge solely against the off-street parking provisions. Id. at 866.
100. Id.
101. Id. at 868.
102. Id. at 867.
late as would the General Assembly. Nevertheless, the city could not act in a manner "contrary to, or in limitation or enlargement of, powers granted by acts of the General Assembly" that related to the regulation of public schools. The Court determined that the zoning restrictions at issue did not deal with the regulation of public schools, which focuses on the quality of public education rather than the buildings in which that education is provided.

In essence, by carefully considering the objectives of zoning and finding those objectives different from the aims of the Public School Code, the Court rejected the district's supremacy argument. The Court characterized zoning as "peculiarly a local matter," while the Code dealt with matters of "state-wide concern." Not only did the Court find no conflict because the off-street parking restrictions did not interfere with the Public School Code, but it also held that the Code did not give the school district "plenary power over its physical plants." Thus, the Court found no pre-emption of local land use authority and no conflict, based on the nature of the powers at play. Philadelphia was free to impose more stringent restrictions on schools to address "congestion and other peculiarly local problems[]."

A similar case arose on the other side of the Commonwealth a few years later. In *City of Pittsburgh v. Commonwealth*, the Pennsylvania Bureau of Corrections sought to lease city land for a women's prison pre-release center without seeking zoning ap-
The Bureau relied on the land use powers included in its expansive enabling legislation that gave it the power to establish the location of pre-release centers throughout the state as it felt they were needed. The Court found no legislative grant of site selection powers to the Bureau, nor any other language implying that the Bureau was not bound by local zoning powers. The case was thus one of conflict, and the Court ultimately held that the Bureau was not "immune" from Pittsburgh's zoning ordinance.

The conflict analysis in *City of Pittsburgh* included a number of new observations. Because the Bureau and the city were both state entities with legislative power, the Court considered them equal agents exercising state-given powers. As such, the state agency would not automatically prevail over the city. The Court noted that, although the two entities could exercise only those powers given to them by the General Assembly, local zoning powers are often more comprehensive than those given to state agencies. More importantly, the Court acknowledged the need to examine legislative intent in resolving the conflict between the Bureau's and the city's land use authority, crafting a balancing test that looked to the nature and purpose of each entity's legislative grant of power and the circumstances of the case. In ruling for the city, the Court focused on the city's powers to engage in comprehensive planning, the conflict-of-laws provision in the Second Class City Code, and the fact that the Bureau was not given the power of eminent domain.

Less than ten years later, the Pennsylvania Supreme Court partially overruled *City of Pittsburgh* in *Commonwealth Department of General Services v. Ogontz Area Neighbors Association*. *Ogontz* was another overlapping land use authority dispute in which a state agency was denied a local land use permit—this

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111. *City of Pittsburgh*, 360 A.2d at 612.

112. *Id.*

113. *Id.* at 609, 614.

114. *Id.* at 610.

115. *Id.*

116. *City of Pittsburgh*, 360 A.2d at 611.

117. *Id.* at 611-12.

118. *Id.* at 613.

time, for a daycare center for mentally handicapped individuals in Philadelphia. As in School District of Philadelphia, the Court first examined the city's powers, focusing on Philadelphia's home rule authority and the conflict-of-laws provision. By statute, the Department of Public Welfare could use eminent domain to further its program to integrate patients from a hospital and school into the community. The Court recognized the case as one of conflict between a state agency's land use powers and a municipality's zoning ordinance, echoing City of Pittsburgh's characterization of the case as one involving two equally positioned governmental authorities.

After emphasizing the equal footing of the Department and the city, the Court engaged in statutory interpretation to determine whether either entity had "preeminent powers." Underscoring that the "common thread" in this type of case is the need to ascertain legislative intent, the Court rejected City of Pittsburgh's balancing test as both uncertain and irrelevant to legislative intent. The Court then turned to Pennsylvania's Statutory Construction Act, particularly that section which directs courts to consider "the consequences of a particular interpretation" when addressing conflicting state laws. The Court rationalized that the city's zoning policies would be frustrated if the Department prevailed; if the city prevailed, however, the Department would merely need to find another location. A decision in the city's

120. Ogontz, 483 A.2d at 449-50.
121. Id. at 451-52. Again, the conflict of laws provision provides that, in cases where Philadelphia's zoning ordinance is more stringent than those of any other state or local ordinance, the city's more stringent provisions will prevail. Id. at 451.
122. Id. at 452.
123. Id.
124. Id. The conflict-of-laws provision applicable to cities of the first class did not resolve the dispute, because it does not apply to land use restrictions. Id. at 452-53 (noting the provision instead applies to "setback, height, and similar restrictions").
125. Ogontz, 483 A.2d at 453-54.
126. Id. at 454. The City of Pittsburgh balancing test had been expanded to include six factors relevant to a conflict analysis. Id. at 452-53. The Court noted that Twp. of South Fayette v. Commonwealth, 385 A.2d 344, 347 (Pa. 1978), included these factors in the conflict balancing test: whether the intended use violates the zoning ordinance; the significance of the state's ownership in the property; "the parens patriae responsibility of the Commonwealth," the authority in the statute to establish state agency facilities; the absence of a conflict of laws provision in the enabling legislation; and the particular circumstances of the case. Id. at 453. The Court was particularly skeptical of the factor focusing on eminent domain power. Id. at 454.
127. Id. at 455 (citing 1 PA. CONS. STAT. ANN. § 1921(c)(6) (2003)).
128. Id.
favor would uphold both statutes, which the Court wrote, "seems advisable."\textsuperscript{129} Immediately after it held that the Department was subject to the local zoning ordinance, the Court stated, "We decline to infer a legislative intent that the Commonwealth agency has preemptive land use powers."\textsuperscript{130} This reference to preemption is unfortunate. \textit{Ogontz} is a case of supremacy and conflict, not preemption. The Court should have—after addressing the powers of the respective parties—briefly established that the Department's enabling legislation neither expressly nor impliedly preempted local land use authority. That conclusion would have placed the conflict analysis where it belongs—after a determination that preemption does not exist.

The uncertainty surrounding preemption and conflict in these three cases should not overshadow their contributions to this discussion. Unlike the companion regulation cases, the overlapping land use cases deal with similar powers being exercised by state and municipal authorities in different contexts. State agencies with broad programmatic authority that are given some degree of land use authority must exercise that authority in furtherance of the overall objectives of their programs. This restriction applied to the agencies involved in the cases noted previously. In a conflict analysis, the exercise of the state agency's land use power will likely succumb to local land use authority, assuming that there is no preemption of local land use authority. The outcome is dependent on the type of municipality involved, but municipalities generally prevail either because 1) the agency's authority is tied to state policies that are distinct from those underlying land use power (as in \textit{School District of Philadelphia}) or 2) state law does not precisely give an agency site selection or other land use powers (as in \textit{City of Pittsburgh}). The comprehensiveness of local zoning power and the recognition that municipal land use powers serve peculiarly local concerns are prominent factors in these cases. Interestingly, in both \textit{School District of Philadelphia} and \textit{Ogontz}, the Court addressed local powers before proceeding to the preemption and conflict discussion.

\textsuperscript{129} \textit{Id.}  
\textsuperscript{130} \textit{Ogontz}, 483 A.2d at 455.
C. Environmental-Land Use Disputes

A third type of preemption case involves conflicts between Pennsylvania’s environmental laws and local land use ordinances. Absent express or implied preemption, and based on cases such as City of Pittsburgh, there would seem to be few supremacy successes for the state because the power it exercises under these laws is distinguishable from municipal zoning power. Even though local land use authority touches on environmental concerns, it does so only as to local conditions. The Pennsylvania Supreme Court had the opportunity to make that distinction in two cases but failed to do so.

In Miller & Son Paving, Inc. v. Wrightstown Township, the Pennsylvania Supreme Court avoided a conflict analysis altogether. Instead, it focused on whether regulations under the Surface Mining Conservation and Reclamation Act (“SMCRA”), which established setbacks for quarries, preempted preexisting local zoning setbacks, and if not, whether the local setbacks were arbitrary and capricious and hence unreasonable. The relevant portion of SMCRA expressly provided, “[e]xcept with respect to Zoning Ordinances, all local ordinances and enactments purporting to regulate surface mining are hereby superseded. The Commonwealth by this enactment hereby preempts the regulation of surface mining operations as herein defined.” Reasoning that “superseded” meant replacing something that is already in existence, the Court held that the local setbacks, although preexisting, were not affected because of the zoning ordinance exception in the first clause of the statutory provision. Moreover, “preempt” refers to the preclusion of something that would otherwise come into effect in the future, and again, because the local setbacks predated SMCRA, they were not preempted under the provision’s second clause.

Having dispensed with preemption, the Court turned to the reasonableness of the township’s zoning ordinance. It determined

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132. Miller & Son Paving, 451 A.2d at 1004 (referencing 52 PA. CONS. STAT. ANN. § 1396.4b (2008) and 25 PA. CODE § 77.102(f)(6) (1998)).
133. Id.
134. Id. at 1005 (citing section 17 of SMCRA).
135. Id. The Court also relied on provisions of the state’s Statutory Construction Act that call for interpretation of statutes by relying on the common usage of terms and giving effect to all of a statute’s provisions. Id.
136. Id. at 1005.
137. Miller & Son Paving, 451 A.2d at 1006.
that the Commonwealth did not meet its burden of proving that the zoning ordinance failed to promote the public health, safety, or welfare, and thus never addressed whether the ordinance conflicted with the SMCRA setback. \(^{138}\) \textit{Miller Paving} is nevertheless important for distinguishing between statutory supersession and preemption. The case suggests that, when choosing to override local authority, the General Assembly should take care to include both terms—"supersede" and "preempt"—where it intends to usurp future legislative activity by municipalities as well as legislation that antedates state law.

In \textit{Council of Middletown Township v. Benham},\(^ {140}\) the Pennsylvania Supreme Court dealt with a similar issue, this time suggesting that a state environmental regulation may override a local zoning ordinance in certain instances. The case involved a conflict between Pennsylvania's Sewage Facilities Act and a township zoning ordinance that required residential developments to be serviced by "public sanitary sewer systems."\(^ {141}\) A developer who had no access to a public system submitted a planned residential development application to the township that included private sewage treatment.\(^ {142}\) Relying on the public service mandate of the ordinance, the township denied the application.\(^ {143}\) The Court held that the Sewage Facilities Act did not preempt local legislation, primarily because the Act made municipal legislation "an essential component of the statewide regulatory scheme."\(^ {144}\) The Act did, however, expressly provide that any local regulations enacted in furtherance of local permitting, inspection, and enforcement authority had to be consistent with the Act and the rules promulgated thereunder.\(^ {145}\)

\(^{138}\) \textit{Id.}

\(^{139}\) \textit{Id.} It is likely the DEP did not raise this issue. If so, one can only wonder why the DEP failed to make the argument. Had the DEP been able to demonstrate a conflict between the state and local setbacks, the state law and regulations would prevail. Perhaps the DEP saw no inherent conflict between environmental regulation and land use regulation.

\(^{140}\) 523 A.2d 311 (Pa. 1987).

\(^{141}\) \textit{Benham}, 523 A.2d at 311-12.

\(^{142}\) \textit{Id.} at 312-13. Municipal service would not be extended to the area for at least 20 years. \textit{Id.} at 313.

\(^{143}\) \textit{Id.} at 313.

\(^{144}\) \textit{Id.} at 314. The Court also took the time to carefully review the three cases in which total preemption was found: \textit{Hilovsky}, 108 A.2d 705 (Pa. 1954) (liquor), \textit{Harris-Walsh}, 216 A.2d 329 (Pa. 1966) (anthracite strip mining), and \textit{Allegheny Valley Bank}, 412 A.2d 1366 (Pa. 1980) (banking). The point was to demonstrate that "[t]otal preemption is the exception and not the rule." \textit{Benham}, 523 A.2d at 314-15.

\(^{145}\) \textit{Benham}, 523 A.2d at 313-14 (citing 35 PA. CONS. STAT. ANN. § 750.8 (2003)).
Because the Sewage Facilities Act did not expressly preempt local land use authority, and because the Act's power-sharing provisions militated against a finding of implied preemption, the Court was left to address the supremacy issue.\(^{146}\) In doing so, it noted that in a regime of concurrent state and local regulation, local legislation would be overridden only if it "directly and inherently" conflicted with state law.\(^{147}\) Furthermore, although courts consistently defer to local zoning authority, giving it "great play,"\(^{148}\) the Sewage Facilities Act expressly forbids municipalities from enacting "inconsistent" ordinances.\(^{149}\) With this statement, it appeared that the Court read the consistency provision of the Act to apply to all local regulation, including land use and companion regulation alike. Beyond giving deference to local zoning authority, the Court never considered whether a land use ordinance might address matters distinct from those at the heart of the Sewage Facilities Act. Regardless, the Court determined that, under a broad interpretation of "public sanitary sewer system," the ordinance was consistent with the Act.\(^{150}\)

The *Benham* Court worked hard to interpret the zoning ordinance in a way that would allow it to coexist with the Sewage Facilities Act. Yet, the case implied that when courts are dealing with possible conflicts between state environmental regulations and local zoning ordinances, the specific provisions of each law—rather than the laws' overarching objectives—are the primary focus. Although the Court did not discuss, in general terms, whether the goals of zoning conflict with the Commonwealth's environmental policies, its acknowledgment that courts give "great play" to zoning ordinances and typically interpret them to preserve their validity adds to the mix of principles used in these types of disputes.

The Commonwealth Court has more readily embraced the distinction between environmental regulation and land use regulation, albeit with mixed results. In two cases, the court expressly

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\(^{146}\) *Id.* at 315.

\(^{147}\) *Id.*

\(^{148}\) *Id.*

\(^{149}\) *Id.* (referring to 35 PA. CONS. STAT. ANN. § 750.8(b)(9) (2003)).

\(^{150}\) *Benham*, 523 A.2d at 315-18. The phrase "public sanitary sewer system" was not specifically defined in the ordinance. *Id.* at 315. The Court freely applied the principles of the Statutory Construction Act, despite the fact that, by its own terms, the Act does not apply to ordinances. *Id.* Three of the interpretive rules the Court applied were the application of plain meaning to undefined statutory terms, the strict construction of zoning ordinances "because they are in derogation of common law and restrict the use of land," and the interpretation of zoning ordinances sensibly "to preserve their validity." *Id.* at 315-17.
focused on the difference between environmental and land use objectives to allow zoning restrictions and environmental regulatory programs to coexist. In *Warner Co. v. Zoning Hearing Board*, the court upheld the setback and special exception portions of a zoning ordinance that applied to a quarry, despite the quarry owner's argument that they were preempted by the Noncoal Surface Mining Conservation and Reclamation Act. Based on express language in the Act that preempted all regulation of surface mining, the court, in an opinion authored by President Judge Craig, invalidated those portions of the ordinance that regulated surface mining operations but upheld the setback and special exception provisions as “traditional land use regulations” that were neither preempted nor unreasonable. Later in the same year, the court rejected a preemption challenge under the state Flood Plain Management Act in *Appeal of Hoover*. The focus in that case was a township zoning ordinance that imposed numerous floodplain conservation controls, including one that restricted land uses in floodplains. Judge Smith, writing for the court, held that the Act neither preempted local legislation nor conflicted with the ordinance, reasoning that the ordinance regulated land use, rather than the structural components of public utility service facilities, which were the focus of the Act.

In 2006, the Commonwealth Court arrived at a different conclusion in deciding a preemption and conflict challenge under the Nutrient Management Act (“NMA”). In *Burkholder v. Zoning Hearing Board*, a landowner once again targeted a zoning setback that was more stringent than the NMA standard. The NMA includes a confusing preemption provision that states its provisions “are of Statewide concern and occupy the whole field of regulation... to the exclusion of all local regulations.” It further provides, however, that no local ordinance may regulate the “storage, handling or land application of animal manure... or... the construction, location or operation of facilities used for storage of

152. Warner Co., 612 A.2d at 580-81 (relying on Miller & Son Paving to analyze the statute’s language).
153. Id. at 582, 584-85.
155. Hoover, 608 A.2d at 608.
156. Id. at 609.
158. Burkholder, 902 A.2d at 1010.
159. Id. at 1013 (quoting 3 PA. CONS. STAT. ANN. § 1717 (2008)).
animal manure... if the municipal ordinance or regulation is in conflict" with the NMA or its regulations.\textsuperscript{160} This language mistakenly suggests that preemption and supremacy are one and the same and reflects the common misunderstanding of the two concepts. If the intent is to preempt local legislation, then no local laws are allowed, regardless of whether they conflict with the state law. The holding in \textit{Burkholder} echoed the statute's confusion: "In light of... the express language of [the NMA's] preemption provision, ... it is clear the General Assembly intended to preempt local regulation of manure storage facilities which conflicts with and is more stringent than the NMA and its regulations."\textsuperscript{161}

The court focused on the preemption provision language referring to the "location" of facilities and held that the zoning setbacks that applied to any of the landowner's structures governed by the Act were both in conflict with and more stringent than the NMA regulatory setbacks, and they were accordingly "preempted."\textsuperscript{162} \textit{Burkholder} did expressly what \textit{Benham} implied was possible. It invalidated a local land use ordinance that conflicted with a state environmental regulation by examining specific provisions of each law without investigating their arguably different objectives. Judge Friedman's dissenting opinion did not disagree with the majority's approach; rather, it argued that the NMA's setback provisions merely set minimum location standards and that the more stringent zoning setbacks were therefore consistent with the regulations.\textsuperscript{163}

The preemption/conflict confusion in \textit{Burkholder} is not entirely benign. Regarding the majority opinion, one could argue that a misunderstanding or conflation of the two concepts is harmless because the local setback was invalidated. Whether it failed because of preemption or conflict is immaterial. Still, if the court had chosen to consider whether the NMA did, in fact, preempt the field, its analysis may have been more efficient, because a holding

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{Id.} at 1015. The court did not attempt to clarify the preemption provision to determine whether true preemption was intended, or whether it reflected basic supremacy principles. The provision is ambiguous as to whether the legislative intent was to preempt or to establish concurrency; however, given the harshness of preemption and the rule that it must be clearly intended, it is unlikely a court would hold the language establishes either express or implied preemption.

\textsuperscript{162} \textit{Burkholder}, 902 A.2d at 1016.

\textsuperscript{163} \textit{Id.} at 1022 n.8 (Friedman, J., dissenting). The dissent also disagreed with the majority's decision as to whether the landowner's facilities were governed by the NMA. \textit{Id.} at 1019-21.
that the Act preempted local setbacks would obviate the need to address conflict. Efficiency concerns aside, a more substantive danger arises in situations where a local ordinance can be read to be consistent with the state law. The Burkholder dissent, for example, would have upheld the zoning ordinance under such a rationale. However, if the majority had conducted a preemption analysis and found field preemption that was extensive enough to ban local land use laws, no local legislation would be allowed, and there would be no need to discuss conflict. Even though it may have been construed to be consistent with the NMA, the setback provision would have been unlawful. Thus, a failure to properly distinguish between preemption and conflict may, in some cases, lead courts to uphold local laws that should otherwise be invalidated.

Judicial failure to consider the general objectives of competing environmental and land use laws is also a concern. Not only does it offend the interpretive canon that directs courts dealing with conflict to fully consider the consequences of various interpretations,164 but it also ignores the general supremacy principle that permits local regulation when “appropriate to the necessities of the particular locality.”165

D. Synthesis

Pennsylvania’s preemption law is generally stable. After fifty-plus years, Western Pennsylvania Restaurant Association remains the cornerstone of preemption and supremacy doctrine. Over the years, preemption has been increasingly viewed as harsh, and it is clear that state legislation does not, by itself, create a presumption of preemption. Pennsylvania decisional law reflects this grudging attitude toward preemption, recognizing it in only three areas. Despite this stability, cases continue to intermingle preemption and supremacy concepts, a practice that can affect both judicial efficiency and case outcomes. Furthermore, judicial treatment of the distinction between land use and environmental law remains unsettled.

The cases do reflect an analytical progression, although no single process is consistently applied. Cases like Mars, which squarely address conflicts between state laws and municipal ordinances on the same subject, have resolved the preemption issue by

164. See Ogontz, 483 A.2d at 455.
first interpreting the state legislation. If there is no preemption, a court will then consider the nature of the local power at issue using principles of statutory interpretation. If the municipality has acted within its authority, the court will consider whether the ordinance is reasonable, and if so, whether it nevertheless conflicts with the state law. If there is a conflict, the ordinance will fail under supremacy principles. Other cases, such as School District of Philadelphia and Ogontz, which deal with overlapping land use powers, examine local authority before addressing preemption. The significance of the sequence in which the pieces of a preemption analysis are analyzed will be discussed more fully in Parts IV and V.

Regardless of the analytical progression, Ogontz makes clear that statutory construction is the sole tool for dealing with these issues. One notable interpretive rule treats state agencies and local municipalities as equal delegates of state police powers; another resolves disputes by focusing on the consequences of invalidating local law. These rules might play a significant role in resolving disputes if courts would look at competing state and local provisions within the larger context of the policies embodied in enabling legislation. In overlapping land use authority cases, for example, deference to land use authority and the acknowledgment that zoning deals with the peculiarities of local communities have preserved local authority in the face of preemption challenges. In environmental-land use disputes, however, Pennsylvania courts have not consistently considered the distinction between the policies underlying land use and environmental regulation, at times narrowly focusing on specific conflicting provisions in the state and local laws. In these cases, the “great play” that the courts otherwise give local land use authority is not always “in play.” This lack of deference to local authority in environmental-land use disputes is significant because the distinction could defeat a preemption attack if, for example, a court held that express or field preemption encompassed environmental matters rather than land use matters. Even in cases in which courts find concurrency, the distinction might help to avoid the finding of conflict under similar reasoning.

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166. See City of Pittsburgh, 360 A.2d at 610.
167. See Ogontz, 483 A.2d at 455.
168. See Sch. Dist. of Phila., 207 A.2d at 868.
169. See, e.g., Warner Co., 612 A.2d at 578.
III. THE SOLID WASTE MANAGEMENT ACT: STATUTORY PROVISIONS, REGULATIONS, AND CASE LAW

The observations set forth above are played out in SWMA pre-emption case law. However, these cases are given special attention because they involve an area where the line separating land use and environmental regulation is becoming harder to draw. That lack of clarity has had a determinative effect in a number of cases. Before those cases are addressed, however, portions of the Act and regulations will be summarized in order to place the case law in better context.

A. Pennsylvania’s Solid Waste Management Act\textsuperscript{171} and Municipal Waste Planning, Recycling and Waste Reduction Act\textsuperscript{172}

In enacting the SWMA, the General Assembly was mindful of the health and environmental dangers caused by the improper management of solid waste.\textsuperscript{173} One of the Act’s stated objectives is the protection of public health, safety, and welfare from improper solid waste management practices.\textsuperscript{174} The Act envisions a cooperative venture between the state and local governments in a variety of areas, including solid waste planning.\textsuperscript{175} It defines “municipalities” as cities, boroughs, incorporated towns, townships, and counties,\textsuperscript{176} and creates three categories of solid waste: municipal, residual, and hazardous.\textsuperscript{177}

State authority under the Act, which lies with the Department of Environmental Protection (“DEP”), is extensive. The DEP administers a comprehensive solid waste program that addresses the storage, collection, transport, processing, treatment, and disposal of solid waste.\textsuperscript{178} In carrying out these powers, the DEP issues permits for municipal, residual, and hazardous waste management,\textsuperscript{179} as well as for the beneficial processing of waste where “such use does not harm or present a threat of harm to the health,
safety or welfare of the people or environment of this Commonwealth." 180

Additionally, the Act empowers the Environmental Quality Board ("EQB") to promulgate rules in furtherance of the Act's objectives, specifically, to protect the "safety health, welfare, and property of the public and the air, water and other natural resources of the Commonwealth." 181 Like the DEP, the EQB is directed to use its authority under the Act to protect the environment and public health of the Commonwealth as a whole. The EQB also authorizes certificates of public necessity for hazardous waste treatment facilities, which supersede local zoning or other land use laws that might otherwise ban such facilities. 182

Municipal regulatory powers over solid waste are set forth in the Municipal Waste Planning, Recycling and Waste Reduction Act. The law authorizes municipalities (other than counties) to regulate the transportation, collection, and storage of municipal waste within their borders. 183 Additionally, any ordinance enacted pursuant to that authority "shall not be less stringent than, and not in violation of or inconsistent with, the provisions and purposes of the [SWMA]." 184 Notably absent from the powers given to municipalities is the power to regulate the disposal of solid waste.

The SWMA regulations most often at issue in preemption disputes establish setbacks that mandate minimum distances between solid waste facilities and various land uses and geographic formations. Setbacks under those regulations exist for five municipal solid waste activities: landfills, 185 sewage sludge land application, 186 solid waste transfer facilities, 187 general composting facilities, 188 and resource recovery facilities. 189 Setbacks may be as small as 100 feet—the minimum distance between a municipal landfill and a perennial stream or a property line 190—and as large as 10,000 feet—the distance between a landfill and an airport

180. § 6018.104(18) (emphasis added).
181. § 6018.105(a) (emphasis added).
182. Id. at (f), (h).
184. § 4000.304(b).
188. Id. § 281.202.
189. Id. § 283.202.
190. § 273.202(a)(12), (13).
runway. The regulations also mandate setbacks from schools and occupied dwellings. Similar restrictions exist for residual waste processing and disposal facilities. Even though these restrictions are often described as "setbacks," the regulations refer to them as "areas" where various solid waste activities "[are] prohibited." In short, the regulations establish areas where solid waste management activities may not be undertaken based on the DEP's and EQB's determination that those areas must remain open to protect the public health and the environment. As such, they can fairly be described as regulations that restrict the operation of solid waste facilities based on statewide environmental concerns, rather than land use regulations.

B. Preemption Cases

Numerous cases have addressed preemption or conflict under the SWMA. The cases are divided between companion regulation cases, where municipalities sought to regulate solid waste in order to supplement the Act, and environmental-land use disputes, where municipal land use ordinances were challenged as conflicting with the Act.

1. Companion Regulation Cases

In the early 1970s, the Solid Waste Act allowed municipalities to regulate the disposal of solid waste as long as their ordinances did not conflict with the Act. A township's license requirement was challenged under that Act in Greater Greensburg Sewage Authority v. Hempfield Township. The Greensburg Sewage Authority had obtained a state permit for the land application of sewage sludge but was denied a local license. Intertwining pre-
emption and supremacy, the Commonwealth Court stated that the SWMA "resulted in a limited preemption" of sewage sludge disposal because the statute provided that no municipality could enact an ordinance that conflicted with the Commonwealth’s licensure requirement.199 The court cited both the supremacy rule from *Western Pennsylvania Restaurant Association* and the field preemption rule, eventually settling on limited field preemption to support its holding that the local license requirement was invalid.200 It reasoned that "[a]ll phases" of the sewage facility’s operations were governed by the state licensure requirements under the Sewage Facilities Act and the Solid Waste Act.201

Twelve years later, in *Sunny Farms Ltd. v. North Codorus Township*, the Commonwealth Court construed the SWMA to establish concurrency rather than preemption.202 A township’s ordinance, enacted under its police power, banned solid waste incineration and land disposal within 500 yards of certain structures, including dwellings.204 Sunny Farms, which hoped to build a hazardous waste facility within the setback, brought a preemption challenge.205 The court held that the SWMA did not expressly preempt local legislation, with the exception of the certificate of public necessity provisions that would restrict local prohibitions of hazardous waste facilities.206 Aside from that limited preemption, local regulation of solid waste management was permitted as long as it did "not effect stricter geological and engineering standards than the state."207 The court allowed the local ordinance to stand under a supremacy analysis because it believed that the scope of the ordinance, "[a]s with general zoning regulations," included objectives that were broader than the SWMA’s "narrow, technical, engineering concerns."208

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199. *Id.* at 321.
200. *Id.*
203. *Sunny Farms*, 474 A.2d at 58.
204. *Id.* There is some confusion as to whether the ordinance at issue was a police power regulation or a zoning regulation; however, the better conclusion is that the ordinance was a police power regulation. See *Liverpool Twp. v. Stephens*, 900 A.2d 1030, 1040-41 (Pa. Commw. Ct. 2006) (Pellegrini, J., dissenting).
205. *Sunny Farms*, 474 A.2d at 58.
207. *Sunny Farms*, 474 A.2d at 59.
208. *Id.* at 60.
The *Sunny Farms* court elaborated on the scope of a municipality's authority to regulate land use and environmental matters. It reasoned that the ordinance was aligned with traditional land use goals because it promoted "public health, property values and aesthetics." In describing municipal environmental powers, the court noted, "Aesthetics and environmental well-being are important aspects of the quality of life in our society, and a key role of local government is to promote and protect life's quality for all of its inhabitants." The court found no conflict because the ordinance did not address geological and engineering standards and because the Second Class Township Code authorized the township to regulate in furtherance of the public health, property values, and aesthetics. The court drew a clear line between the narrow geological and engineering standards authorized by the SWMA and the broader standards restricting location based on a reasonable exercise of a municipality's police powers.

Although *Sunny Farms* cleared the way for local regulation of the location of solid waste facilities under municipal police powers, the case called for a much more exacting review of local regulation of solid waste facility operations. In the year following the *Sunny Farms* decision, two municipal ordinances that attempted to regulate the operation of solid waste facilities were invalidated, extending the preemptive reach of the SWMA. In *Municipality of Monroeville v. Chambers Development Corporation*, a city ordinance that regulated landfill hours of operation was at issue. The Commonwealth Court noted that case law under the current and prior versions of the Act established that local zoning was not preempted. Monroeville's ordinance, however, attempted to regulate the operation of the landfill. The court noted that the Act called for state and local cooperation and allowed local governments to regulate the storage and collection of solid waste, but was silent on municipal authority to regulate disposal. This silence demonstrated to the court "that the legislature did not intend municipalities to have the power to regulate any aspects of..."
the operation of a sanitary landfill." 217 In a single-paragraph opinion shortly thereafter, the Commonwealth Court invalidated a Ross Township non-zoning ordinance that similarly attempted to regulate landfill operations. 218 Importantly, both cases expressly held that the SWMA preempted local regulation of solid waste disposal, 219 apparently foreclosing local regulation of waste disposal operations, even if consistent with the Act. As such, these cases moved beyond the court's view in Sunny Farms that the SWMA established a regime of concurrency with the sole exception relating to the certificate of necessity.

In Hydropress, previously discussed in Section II, the Pennsylvania Supreme Court issued a plurality opinion on the preemptive scope of the SWMA. 220 On one hand, the case solidified intergovernmental cooperation and power sharing as an anti-preemption indicator. On the other hand, it introduced the threat of balkanization as a rationale for finding implied preemption. The township ordinance at issue required those engaged in the land application of biosolids to be bonded and required landowners, generators, haulers, and applicators who were not owners to pay for road improvements. 221 The ordinance was, in essence, a companion regulation rather than a zoning ordinance. The justices in Hydropress who rejected preemption did so because there was no express language in the SWMA to that effect. 222 They pointed to numerous provisions in the Act that established state and local power sharing and cooperation, leading them to proclaim, "This is the language of intergovernmental coordination and cooperation, not of preemption." 223 These justices never reached the issue of implied preemption nor that of partial preemption of operational regulations. For them, the pivotal concern was whether the municipality had the authority to pass the ordinance, and they held that it did not. 224 Conversely, the justices who held that the Act

217. Id. at 311.
219. Monroeville, 491 A.2d at 311 (barring "any" municipal regulation of landfill operations); Ross, 500 A.2d 1293 (holding that local regulation of landfills was "preempted" by the Act).
221. Id. at 914-15. The township was rural and had numerous dirt roads that had not been improved. Id. at 914.
222. Id. at 918-19.
223. Id. at 919.
224. Id. at 919-20. Relying on Ashenfelder, the Court took a narrow view of municipal powers, noting that the Second Class Township Code does not delegate unlimited powers to townships, especially those powers retained by the state. Id. at 919. Using that principle
prereacted local authority read the Act as merely encouraging cooperation between the state and municipalities, which was considerably less than "an implied delegation of power to units of local government to add levels of regulation beyond that which is specifically authorized in the SWMA." They viewed the Act as establishing a "pervasive" regulatory program to be administered by the DEP "as the expert," and rejected concurrency, in part, because of a fear of a patchwork of "onerous regulations pronounced by the myriad of local governmental entities, unskilled in this area, which exist in this Commonwealth . . . ."

Because it is a plurality opinion, Hydropress has no precedential effect, a point mentioned in Synagro-WWT, Inc. v. Rush Township later that same year. In Synagro, the United States District Court was asked to consider the possible preemption of a local ordinance by various federal and state statutes, including the SWMA. The plaintiff, which treated biosolids and applied them to mine reclamation sites, had obtained DEP permits for its activities. Thereafter, the township enacted an ordinance regulating the land application of sewage sludge, purporting to protect its residents' health, safety, and general welfare by decreasing their exposure to harmful materials.

The federal court recited the rules set forth in Western Pennsylvania Restaurant Association and Mars, as well as the five questions from Duff, describing them as a tool used by "lower Pennsylvania courts" when dealing with "preemption" issues. The court

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as a guide, the justices held the Township Code could not be read to allow the township to impose road improvement charges on those who are general users of the road, and further rejected the bonding requirement because the SWMA gives the DEP the authority to require permit applicants to post financial security. Id. at 920.

225. Hydropress, 836 A.2d at 920-21 (Castile, J., concurring and dissenting).
226. Id. at 920.
227. Id.
228. Id. at 921. Justice Castille, writing for these justices, also agreed that the ordinance was, in any event, ultra vires. Id.
231. Id. at 412-13.
232. Id. at 413.
233. Id. Among other things, the ordinance required applicants to provide the township with two documents: a site registration, which stated that the application site met all federal, state, and local regulations pertaining to biosolid land application, and a second called the land application registration. Id. at 414. To complete the documentation, the applicant had to submit all DEP permit application information, undertake comprehensive testing of soil and groundwater, and furnish reports detailing test results. Id.
234. Id. at 416.
found no express preemption language in the SWMA and proceeded to a conflict analysis without considering the possibility of implied preemption.\textsuperscript{236} The court then perpetuated the confusion that marks many of these cases. It acknowledged precedent that holds that any municipal regulation of solid waste facility operations is “preempted,” but it interpreted those cases to mean that any regulation that is an obstacle to the objectives of the Act or “that would impede the day-to-day operations of a waste facility” was not allowed.\textsuperscript{237} This analysis suggests concurrency, not preemption.

The misunderstanding intertwined itself in the court’s analysis. The court held that one provision of the ordinance was “preempted” by the Act because it duplicated DEP permits and was an obstacle to the Act’s “goal of orderly and efficient land application of sewage sludge.”\textsuperscript{238} However, the court let another provision stand because it was consistent with the purposes of the Act and did not conflict with DEP regulations.\textsuperscript{239} The court failed to recognize that, if the SWMA preempts local supplemental regulation, it would make no difference whether the township’s ordinance was an obstacle or not. Any ordinance that addresses biosolid land application would be invalid. The court’s analysis was clearly clouded by the \textit{Duff} questions, particularly those focusing on conflict.\textsuperscript{240}

In 2006, the Commonwealth Court confronted these issues yet again in \textit{Liverpool Township v. Stephens},\textsuperscript{241} a case that perpetuated the preemption/conflict confusion and strained the distinction between environmental and land use regulation. In \textit{Liverpool}, the township’s ordinance banned the storage, transfer, collection or disposal of solid or residual waste without a permit and also regulated the application of processed municipal waste as fertilizer to farmland by mandating setbacks that were more stringent than

\textsuperscript{236} See \textit{id.} at 418-19.

\textsuperscript{237} \textit{Id.} at 419. The “obstacle” rule was attributed to \textit{Klein v. Straban Twp.}, 705 A.2d 947, 949-50 (Pa. Commw. Ct. 1998).

\textsuperscript{238} \textit{Synagro-WWT}, 299 F.Supp.2d at 419 (invalidating the land application registration). The court also held that provisions in the ordinance setting pH limitations were preempted since they conflicted with those in the Act. \textit{Id.} at 421.

\textsuperscript{239} \textit{Id.} at 421 (upholding the site registration requirement). Enforcement provisions in the ordinance were also held valid because the Act intended municipalities to assist the DEP in compliance matters. \textit{Id.} at 422.

\textsuperscript{240} See \textit{id.} at 419-21.

the setbacks included in the SWMA regulations.\textsuperscript{242} A landowner who had obtained a DEP permit for these activities without obtaining a local permit was sued by the township. Predictably, the landowner claimed that he did not need a township permit because the SWMA preempted local regulation.\textsuperscript{243}

The court, in an opinion by Judge Leavitt, noted that \textit{Hydropress} was not binding, but pointed out that six justices agreed that the township in that case had no authority to duplicate DEP's regulatory program under the SWMA.\textsuperscript{244} The court then turned to Duff's five questions to determine whether there was preemption, claiming that if any one of the questions was answered affirmatively, "then the local ordinance will be found preempted by state law."\textsuperscript{245} Again, the court presented the questions as relevant to preemption alone, not conflict.

The township relied on the absence of preemption language in the statute as well as the \textit{Sunny Farms} decision, in which the same court held that a local setback ordinance did not conflict with the Act's "engineering or geological standards," in part because the locally focused objectives of the ordinance differed from those of the Act.\textsuperscript{246} The \textit{Liverpool} court agreed that the SWMA did not preempt local zoning regulation, opining that \textit{Sunny Farms} involved a zoning ordinance.\textsuperscript{247} However, it construed the \textit{Liverpool} ordinance as one that regulated the activity of sludge application, rather than its "placement," since it included "geological standards" that addressed "how[,] when[,] and where sewage waste may be used to fertilize farmland."\textsuperscript{248} The court reasoned that any such standard, if stricter than those in the state regulations, cannot survive.\textsuperscript{249} As in \textit{Sunny Farms}, the court was willing to uphold local operational regulations that are consistent with the SWMA, unlike \textit{Municipality of Monroeville}, in which the court held that the Act foreclosed all local operational regulation.\textsuperscript{250}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{242} \textit{Liverpool Twp.}, 900 A.2d at 1031-32 (noting that the township ordinance barred land application within 500 yards of a dwelling).
\item \textsuperscript{243} \textit{Id.} at 1032.
\item \textsuperscript{244} \textit{Id.} at 1033.
\item \textsuperscript{245} \textit{Id.}
\item \textsuperscript{246} \textit{Id.} at 1035. \textit{See} discussion of \textit{Sunny Farms}, \textit{infra}, where the court distinguished between the technical objectives of the SWMA regulations and the broader township goals to protect health, property values, and aesthetics. \textit{See supra} text accompanying note 207.
\item \textsuperscript{247} \textit{See} \textit{Liverpool Twp.}, 900 A.2d at 1035-36.
\item \textsuperscript{248} \textit{Id.} at 1036.
\item \textsuperscript{249} \textit{Id.}
\item \textsuperscript{250} \textit{See} \textit{Liverpool Twp.}, 900 A.2d at 1038; \textit{see also} \textit{Municipality of Monroeville}, 491 A.2d at 311.
\end{enumerate}
\end{footnotesize}
The *Liverpool* decision initially appears to hinge on the type of ordinance at issue. Zoning ordinances are permissible, but any ordinance not so labeled which can be construed as dealing with operational activities or geological standards will be invalid if it is more stringent than state law.\(^{251}\) The court broadly defined operational regulations to include provisions that specify where sewage waste may be used as fertilizer.\(^{252}\) Although the opinion initially described *Sunny Farms* as a case dealing with a zoning ordinance, it nevertheless stated that the rule of that case would apply "[r]egardless" of whether Liverpool's ordinance was a zoning ordinance, but only if the ordinance regulated the "placement" of a solid waste facility in order to protect aesthetics and property values.\(^{253}\) As noted, the court instead ruled that the Liverpool ordinance addressed operations. The court arguably was more concerned about what the ordinance addressed than how it was labeled. Local restrictions that address the location of solid waste facilities are permissible whether they are found in environmental or zoning ordinances. Ordinances that address facility operations, however, can be no more stringent than state law.

An intermingling of preemption and supremacy concepts permeate the *Liverpool* opinion. The court seemed to have affirmatively answered two *Duff* questions dealing with conflict, yet concluded that the Act "preempted" the ordinance.\(^{254}\) The court also claimed that the ordinance not only conflicted with the Act but also interfered with the goal of "uniform and comprehensive" state regulation "that leaves no room for side-by-side municipal regulation."\(^{255}\) As in many of these cases, the opinion causes the reader to ask, "Which is it, preemption or conflict?" The court never clearly established that the SWMA preempted local operational regulation of solid waste facilities, and the court strongly suggested it does not. If it had found preemption, the court could have ended the discussion by characterizing the ordinance as imposing a geological standard as opposed to restricting location, and there would have been no need to address conflict.

The court's conclusion that a local setback provision was a geological standard that regulated a solid waste activity is difficult to accept. In a strong dissenting opinion, Judge Pelligrini argued

\(^{251}\) *Liverpool Twp.*, 900 A.2d at 1036.

\(^{252}\) *Id.*

\(^{253}\) *Id.*

\(^{254}\) See *id.* at 1037-38.

\(^{255}\) *Id.* at 1038 (citing *Duff*, 532 A.2d at 505).
that the ordinance dealt with odor, not geology, and that municipalities are authorized to use their police powers to regulate the placement of sewage sludge.\textsuperscript{256} He wrote that the General Assembly understood that “administrative regulations issued by DEP do not take into consideration local conditions and only deal with the operation of waste sites[].”\textsuperscript{257} He felt that the case was no different than \textit{Sunny Farms}, which characterized the DEP’s concerns under the SWMA as narrow and technological, quite distinct from township efforts to regulate solid waste facilities to improve the community’s quality of life.\textsuperscript{258} Importantly, the dissent noted that a local government’s “major responsibility” when regulating environmental matters is to address “[a]esthetics and environmental well-being” as part of community quality of life.\textsuperscript{259}

\textit{Liverpool}, which is one of the most recent pronouncements on preemption and conflict under the SWMA, is also one of the most confusing. Without any analysis of express or implied preemption, the majority opinion set forth a conflict analysis and ultimately concluded that the ordinance was “preempted.” The opinion taxes common sense in its characterization of the township’s setback provision as a geological standard and leaves unresolved the issue of whether the SWMA's preemptive scope is limited to its restriction on hazardous waste facilities under the certificate of necessity provisions (as held in \textit{Sunny Farms} and \textit{Synagro}) or additionally forecloses all local regulation of solid waste facility operations, as held in \textit{Greater Greensburg} and \textit{Municipality of Monroeville}.

\textbf{2. Environmental-Zoning Cases}

The Commonwealth Court has consistently upheld local land use ordinances in the face of preemption challenges brought under the SWMA. Although these cases have uniformly held that the Act does not preempt local land use authority, they have left unresolved the issue of SWMA preemption of operational regulations.\textsuperscript{260}

\textsuperscript{256} \textit{Liverpool Twp.}, 900 A.2d at 1038-40 (Pellegrini, J., dissenting).

\textsuperscript{257} \textit{Id.} at 1038.

\textsuperscript{258} \textit{Id.} at 1040-42.

\textsuperscript{259} \textit{Id.} at 1042 (citing \textit{Franklin Twp.}, 452 A.2d at 720).

\textsuperscript{260} See \textit{Se. Chester County Refuse Auth. v. Bd. of Supervisors}, 545 A.2d 445, 446-47 (Pa. Commw. Ct. 1988) (noting that, under the Act, municipalities may regulate with a goal of keeping communities safe and clean, but may not impose conditions that will interfere with a solid waste facility's operation).
When municipalities have acted within the confines of their delegated land use authority and avoided operational regulation, they have invariably prevailed in SWMA preemption disputes.261 In these cases, the distinction between environmental regulation and land use regulation is often determinative. One landowner learned this lesson twice. In Greene Township v. Kuhl,262 the Commonwealth Court held that a landowner who had obtained a DEP permit for a landfill also had to seek zoning approval from the township.263 The court found no intent in the SWMA to preempt local zoning regulations and cited with approval the trial court's rationale:

[A] local municipality cannot set geological or engineering standards stricter than those established by DER for issuance of its permit. However, factors other than geological ones, such as those involving aesthetics, population density, and accessibility[,] govern the selection of a landfill site, and these factors are the appropriate subject of local land use planning.264

Several years later, the landowner raised the same argument, this time relying on Greensburg Sewage Authority, where the court invalidated a local zoning ordinance that attempted to regulate sewage facilities.265 The court easily dismissed the argument, stating that, unlike the ordinance at issue in Greensburg, the Greene Township ordinance did not “regulate the means by which landfills dispose of their waste; it speaks only to where they may be located.”266

The Commonwealth Court has repeatedly drawn the line between the environmental regulation of the SWMA and local zoning authority. As it stated in a non-preemption case arising under the Act:

261. Outcomes that are favorable to municipalities depend on compliance with the procedural requirements of the MPC. See, e.g., Longenecker v. Pine Grove Landfill, Inc., 543 A.2d 215 (Pa. Commw. Ct. 1988). In Longenecker, a landfill operator challenged a local setback provision that was included in a non-zoning ordinance. Id. The township had no comprehensive plan or zoning ordinance. Id. at 215. The court held that the SWMA preserved a municipality’s power to adopt “appropriate” zoning regulations that address “matters of a purely local character,” but invalidated the ordinance as being an act of zoning that failed to comply with the MPC’s procedural requirements. Id. at 216-17.
263. Greene Twp., 379 A.2d at 1384.
264. Id. at 1385.
266. Kuhl, 467 A.2d at 913.
The grant of a permit by the DER is not tantamount to a zoning permit. To hold otherwise, would undercut the purpose of a zoning board in reviewing whether a proposed use would be contrary to a particular zoning district’s citizens’ health, safety and welfare.\textsuperscript{267}

Thus, it is not surprising that in \textit{Hill v. Zoning Hearing Board},\textsuperscript{268} the court allowed a zoning authority, when authorizing the expansion of a solid waste facility that was a preexisting use, to impose land use conditions on the facility even though the use was permitted by the DER.\textsuperscript{269}

In 2006, the Commonwealth Court decided yet another case challenging setback and height restrictions in a local zoning ordinance. In \textit{Southeastern Chester County Refuse Authority v. Zoning Hearing Board},\textsuperscript{270} the Refuse Authority, which had been operating a landfill that failed to comply with a 200-foot zoning setback, applied for an expansion permit.\textsuperscript{271} The township denied the application based on zoning setbacks that were more stringent than the setbacks included in the SWMA regulations.\textsuperscript{272} The court upheld the zoning board’s denial, reiterating that the regulations did not preempt local zoning ordinance provisions “that are consistent with basic land use planning principles promoting and protecting the public health, property values, and aesthetics.”\textsuperscript{273}

In these environmental-land use preemption cases under the SWMA, local action is more easily tolerated than it is in companion regulation cases, where often it is either struck down as operational or subjected to scrutiny under principles of conflict. This difference is illustrated in \textit{Township of Plymouth v. County of Montgomery},\textsuperscript{274} a case involving a challenge brought against four

\begin{itemize}
\item \textsuperscript{267}Abbey v. Zoning Hearing Bd., 559 A.2d 107, 111 (Pa. Commw. Ct. 1989) (emphasis in original) (upholding, against a citizen challenge, a zoning board’s approval of a waste-to-energy facility as a special exception).
\item \textsuperscript{269} \textit{Hill}, 597 A.2d at 1252. The facility was a valid preexisting use. \textit{Id.} at 1248. The conditions prohibited obnoxious odors and mandated that the facility be kept clean and that trash transfers and compacting occur inside the building. \textit{Id.} at 1252. Nevertheless, the court invalidated other conditions purported to address land use because there was no evidence they furthered the promotion of the public health, safety, or welfare. \textit{Id.} at 1252-53 (holding sound barrier requirement unlawful). The case serves as a reminder that any exercise of the zoning authority must be rationally related to the police powers.
\item \textsuperscript{271} Chester County Refuse Auth., 898 A.2d at 683.
\item \textsuperscript{272} \textit{Id.}
\item \textsuperscript{273} \textit{Id.} at 686.
\end{itemize}
ordinances, including both companion environmental ordinances and zoning ordinances. In order for Montgomery County to construct a waste management facility in Plymouth Township, the township amended its zoning ordinance to create a resource recovery district that would allow a 165-foot-high, 1,200-ton-capacity facility.\textsuperscript{275} The county adopted a plan that complied with the amendment, but the township, responding to community opposition, repealed the amended ordinance and enacted three new ordinances in its place.\textsuperscript{276} The first of the three, a non-zoning ordinance, regulated waste processing disposal and required processors to obtain permits; the second was a zoning measure that set maximum height and setback limits and made resource recovery facilities conditional uses with a 250-ton-per-day capacity; and the third shrunk the size of the original district by more than 90 percent.\textsuperscript{277} The township also had another relevant ordinance, enacted under the MPC and township code, which, among other things, required the facility to obtain building and sewer connection permits.\textsuperscript{278}

The court had little trouble invalidating the first ordinance under a pure preemption rationale. It noted that regulations pertaining to the operation of a facility did "not fall within the category of land use controls accomplished by zoning[] under the MPC," and stated that \textit{Municipality of Monroeville} established the difference between operational regulations and those dealing with the location of a facility.\textsuperscript{279} Thus, the first ordinance was invalid, as were the capacity, design, and size limits in the second ordinance.\textsuperscript{280} The court stated that the DER's "pervasive powers" under the SWMA "preempted" local operational regulations that address "transportation processing, treatment and disposal of solid waste."\textsuperscript{281}

The court proceeded to discuss the land use powers of the township. It noted that the only land use matter preempted by the SWMA involved the certificate of public necessity provision.\textsuperscript{282} It further acknowledged the importance of statutory interpretation

\textsuperscript{275} \textit{Plymouth}, 531 A.2d at 51-52.
\textsuperscript{276} \textit{Id.} at 52.
\textsuperscript{277} \textit{Id.}
\textsuperscript{278} \textit{Id.} at 53.
\textsuperscript{279} \textit{Id.} at 53-54 (citing \textit{Municipality of Monroeville}, 491 A.2d 307 (Pa. Commw. Ct. 1985)).
\textsuperscript{280} \textit{Plymouth}, 531 A.2d at 54-55.
\textsuperscript{281} \textit{Id.} at 54.
\textsuperscript{282} \textit{Id.} at 55.
in these cases, especially the canon that authorizes courts to consider, "among other things, the consequences of a particular interpretation." The court feared that a liberal approach to preemption could subordinate local zoning authority and frustrate municipal planning. Furthermore, the imposition of zoning restrictions on a facility owner would not frustrate a state regulatory scheme because one site could be substituted for another. Nevertheless, the court held that the second and third ordinances amounted to spot zoning because they targeted a particular parcel of land without regard for the promotion of the police powers. More specifically, the ordinances imposed exceedingly burdensome requirements on the resource recovery district and significantly decreased its size. The general land use provisions of the fourth ordinance, on the other hand, were permissible as long as they were not abused.

_Township of Plymouth_ neatly captures the strains of preemption and conflict that drive these cases. The opinion emphasized that the SWMA imposed a regime of *partial* preemption by preempting local land use regulation to the extent of the certificate of need provisions as well as local operational regulations. That issue remains unclear, however, because _Liverpool_, also decided in 2006, suggests that consistent municipal operational regulations may be permissible under the SWMA. What is certain from these cases is that legitimate land use regulations are not preempted by the Act and will generally prevail in a conflict dispute, even if specific provisions conflict with similar provisions in a SWMA regulation.

**IV. SYNTHESIS: QUESTIONS, THEMES, SUGGESTIONS**

Although it is possible to elicit some fairly stable legal principles from the SWMA case law and preemption cases, the cases merit further discussion in light of the convergence of land use and environmental policies that marks many of the disputes.

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283. Id. at 55-56 (citing Ogontz, 483 A.2d at 455).
284. Id. at 55-56.
285. Plymouth, 531 A.2d at 56 (citing Ozontz, 483 A.2d at 455).
286. Id. at 56-57 (holding that spot zoning ignores the "community-wide perspective" that is required of any exercise of the zoning power).
287. Id. at 58.
288. Although Township of Plymouth clearly spoke of preemption of local operational regulation, other cases have suggested state and local concurrency in the matter of operational regulations. See, e.g., Sunny Farms, 474 A.2d at 59.
A. Questions and Concerns

1. Preemption/Conflict Confusion

A fair number of the cases discussed previously reflect a lack of clarity about the distinction between preemption and conflict.\textsuperscript{289} The confusion is typically revealed in statements to the effect that, if a local law conflicts with state legislation, then it is preempted.\textsuperscript{290} Other Pennsylvania cases have similarly held that implied preemption exists if a state law materially conflicts with local law.\textsuperscript{291} Yet, a determination of preemption forecloses any and all local law, even if the law is otherwise valid. If the SWMA preempts local regulation of solid waste facility operations, then there can be no local operational legislation at all. If, on the other hand, the Act intends concurrency in the realm of facility operations, a local government may use its police power to enact supplemental operational regulations that are consistent with the SWMA and its regulations. Under this rationale, local companion ordinances that supplement the SWMA with additional documentation requirements have withstood scrutiny.\textsuperscript{292} Even this type of ordinance, however, would be invalid if preemption were intended.

The confusion has become entrenched in Commonwealth Court jurisprudence by way of the Duff questions, which comingle inquiries that are relevant to both preemption and conflict while claiming that they relate solely to preemption.\textsuperscript{293} Because an affirmative answer to any one question results in a finding of preemption,\textsuperscript{294} a court might proclaim a local ordinance to be preempted if it conflicts with a state law, regardless of the intent to preempt.\textsuperscript{295}

Equating conflict with preemption is fairly widespread. It is common to read statements to the effect that a state law that conflicts with federal law is preempted.\textsuperscript{296} Extrapolating this concept to the state-municipality setting would mean that local laws that

\textsuperscript{289} See, e.g., Synagro-WWT, 299 F.Supp.2d at 419; Liverpool Twp., 900 A.2d at 1037.
\textsuperscript{290} See supra text accompanying note 251.
\textsuperscript{291} The cases often refer to this as “conflict preemption.” See Nutter v. Dougherty, 938 A.2d 401, 404 (Pa. 2007).
\textsuperscript{292} See Synagro-WWT, 299 F.Supp.2d at 421 (upholding a local site registration requirement in a local solid waste ordinance).
\textsuperscript{293} See supra text accompanying note 229.
\textsuperscript{294} Liverpool Twp., 900 A.2d at 1033.
\textsuperscript{295} See, e.g., Synagro-WWT, 299 F.Supp.2d at 419. Furthermore, Synagro-WWT showed that the reach of the Duff questions extends beyond the Commonwealth Court.
\textsuperscript{296} Gardbaum, supra note 2, at 809-10.
actually conflict with state laws would also be preempted. Such statements, which encapsulate a rule sometimes referred to as "conflict preemption," are confusing and imprecise because conflict rules are grounded in supremacy and have nothing to do with preemption.\textsuperscript{297} The rationale behind these statements has substance, however, if conflict were to be understood as "provid[ing] the necessary evidence for implying [legislative] intent to preempt [local] law[.]"\textsuperscript{298} Under this reasoning, implied preemption exists if there is a conflict between a state and local land use regulation.\textsuperscript{299} The danger of conflict preemption is that it negates the idea of supremacy. If conflict equates to preemption, then what role is left for supremacy?\textsuperscript{300} Moreover, a search for conflict to establish preemption may distract courts from searching for express preemption language or field occupation.\textsuperscript{301} Because a conflict analysis is proper only where no express or implied preemption is present, the concept of conflict preemption is self-contradictory and should be abandoned.\textsuperscript{302}

The preemption/conflict confusion should be addressed not only for certainty in the law but also for judicial efficiency. If a state statute either expressly or impliedly preempts local legislation, courts have no need to address the scope of local authority or the often thorny question of conflict. If, for example, the SWMA preempts local operational regulations, a court might easily dispense with any local law that it characterized as dealing with operational matters. No further analysis would be required.

2. Analytical Consistency

Further clarity might be accomplished through a consistent progression in preemption and conflict analysis. To a great extent, Pennsylvania's preemption cases suggest such a progression. In some cases, courts have addressed the preemption issue first; if there is no preemption, they proceeded to a supremacy analysis, focusing on local authority to act and, if the action was authorized, the reasonableness of the action.\textsuperscript{303} In other cases, notably those

\textsuperscript{297} Id. at 809 (referring to the misunderstanding as "sloppy and contradictory").
\textsuperscript{298} Id.
\textsuperscript{300} Gardbaum, supra note 2, at 810 (noting that conflict preemption "renders the [Supremacy] clause redundant").
\textsuperscript{301} Id.
\textsuperscript{302} Id.
\textsuperscript{303} See, e.g., Mars, 740 A.2d at 196.
involving overlapping land use authority, courts have focused first on the type of power exercised by the municipality and then considered the preemption issue.\textsuperscript{304}

In a number of cases, however, courts have shortchanged the preemption analysis. They have first looked for express preemption and, finding none, moved to the supremacy issue.\textsuperscript{305} Because preemption can be implied or express, courts need to consider whether a state law that does not expressly preempt local action nevertheless occupies the field. It was a field preemption finding, for example, that led three justices in \textit{Hydropress} to hold that the SWMA preempts all local regulation.\textsuperscript{306} Cases like \textit{Synagro}, however, miss this important step.\textsuperscript{307}

There is perhaps no substantive difference between deciding preemption first and doing so after a discussion of local authority, especially if a court deals with express and implied preemption and carefully distinguishes between preemption and conflict. In either case, the correct result can be obtained. The harshness of and strong presumption against preemption, however, create a legal environment that is generally favorable to local legislative authority.\textsuperscript{308} Analyzing local powers before asking whether those powers have been stripped by state law would place the preemption question in better context than would the reverse analysis. If an examination of the precise local powers at issue comes first, the preemption question is better focused on those powers.

Such an approach would be particularly helpful as state and local environmental and land use interests converge. In cases of conflict between a local land use law and a state environmental law, a local-authority-first approach might assist a court in properly rejecting preemption based on the uniqueness of local land use authority. By the same token, the approach might facilitate a finding of preemption in companion regulation disputes. An examination of local power before a preemption analysis would arguably lead to fuller consideration of the local power at issue and a more conservative approach to preemption.

A final benefit to an analysis that first examines local authority is increased judicial efficiency. By first addressing local authority,

\textsuperscript{304} See, e.g., \textit{Ogontz}, 483 A.2d at 451-52.
\textsuperscript{305} See, e.g., \textit{Hydropress}, 836 A.2d at 918-19 (noting the lack of express terms of preemption in the SWMA); \textit{but see id.} at 920 (plurality opinion, finding field preemption).
\textsuperscript{306} \textit{Id.} at 920.
\textsuperscript{307} \textit{See supra} text accompanying note 230.
\textsuperscript{308} See, e.g., \textit{Mars}, 740 A.2d at 195-96.
courts could avoid dealing with preemption altogether. This scenario would occur if it were determined that a local ordinance was either ultra vires or unreasonable. In either case, courts would never need to address the preemption issue, which would comport with the norm that favors avoidance of constitutional issues whenever possible.309

3. Indicia of Conflict

There is a serious need for Pennsylvania courts to elaborate on the factors that are relevant to conflict. That need is intensifying as land use and state and local environmental legislation continue to overlap. It is clear that, if a state program is intended to operate concurrently with municipal legislation, otherwise-valid local ordinances will nevertheless be struck down if they are inconsistent with or in conflict with state law.310 *Ogontz* makes clear that statutory interpretation is the sole tool to be used in making a conflict determination.311 In that regard, Pennsylvania courts have often turned to Pennsylvania's Statutory Construction Act to help resolve conflict scenarios.

*Ogontz*, an overlapping land use case, preserved a local land use ordinance by resorting to the canon of construction that asks courts to consider the consequences of invalidating conflicting laws.312 The Court held that local zoning authority would be frustrated if it were routinely subordinated in cases where state programs conflict with municipal action.313 The same rule of interpretation would arguably help preserve local land use authority in environmental-land use disputes as well, but this result would not be guaranteed.314

The matter becomes more complex in environmental-land use disputes where a state environmental law envisions coordination with local authorities. In *Township of Plymouth*, for example, the Commonwealth Court chose not to consider the consequences of usurping local land use powers even though it acknowledged that the SWMA affirms local zoning authority. It did so largely be-

309. See, e.g., Procito v. Unemployment Comp. Bd., 945 A.2d 261, 266 (Pa. Commw. Ct. 2008). For example, the lead *Hydropress* opinion may have avoided its preemption discussion altogether by first determining that the municipality acted beyond its authority. 836 A.2d 912.
311. *Ogontz*, 483 A.2d at 455.
313. *Id.*
314. *See Plymouth*, 531 A.2d at 56.
cause the Act intended local land use powers relating to solid waste facilities to be integrated with the statewide program, an objective the court described as a “complicating factor” in the conflict analysis.\textsuperscript{315} The rationale implies that unfettered land use authority may frustrate the power-sharing objectives of the SWMA. If so, courts should carefully consider not only the consequences to local land use objectives if state law were to prevail but also the consequences to state law objectives if local regulation were freely allowed. Because the Township of Plymouth court ultimately invalidated the local zoning ordinance as spot zoning, the language that gave less deference to local land use goals in light of the cooperative policies of the SWMA is arguably dicta. The concept might nevertheless surface in other environmental-land use disputes over state programs involving coordinated action with municipalities, facilitating a finding of conflict while diminishing local land use authority. The degree to which this derogation of local power is possible has yet to be resolved.

Because conflict is so dependent on statutory interpretation, there are other provisions of the Statutory Construction Act that might prove relevant in environmental-land use cases.\textsuperscript{316} The Act applies only to statutes, which are specifically defined to be acts of the General Assembly.\textsuperscript{317} Thus, within the context of this discussion, the guides set forth in the Statutory Construction Act apply to comparisons between state environmental laws and the legislation that authorizes local land use authority, which in most cases is the MPC. For example, although Pennsylvania courts might rely on the Act to resolve conflicts between DEP setback regulations under the SWMVA and conflicting local zoning setbacks, it is preferable to step back and compare the enabling language of the SWMA with that of the MPC. From that perspective, the question becomes whether a law giving local governments authority to ad-

\textsuperscript{315} Id. at 56.

\textsuperscript{316} Legislative intent is the polestar of statutory interpretation in Pennsylvania, and to the extent that the plain language of a statute indicates intent, it must be followed. 1 PA. CONS. STAT. ANN. § 1921(b). When intent is not clear, courts are to consider not only the consequences of a given interpretation, but also the aim of a statute and what it seeks to prevent. § 1921(c). Because the SWMA (and arguably all of Pennsylvania’s environmental statutes) is concerned with statewide health and environmental protection, and zoning legislation, in contrast, empowers municipalities to address matters that are of a local nature, see supra text accompanying notes 40, 45, courts are not free to discount local land use powers when they conflict with a state environmental law. If at all possible, courts are directed to address interpretive issues in ways that give effect to an entire statute, which again requires courts to uphold legitimate exercises of land use authority. See § 1922.

dress local aesthetics, property values, and general welfare can coexist with one that has a statewide environmental focus. This approach is conceptually quite different from asking whether a state environmental regulation with a 100-foot setback conflicts with a 200-yard setback in a local zoning ordinance. The primary concern in conflict determinations should be the legislative intent of the laws that authorize the state regulations and local ordinances, not the intent behind specific provisions drafted pursuant to those laws.

Even if the conflict is between a state environmental setback and a more onerous setback imposed in a local regulation, there is yet another question: Does the mere fact that a local land use ordinance is stricter than a state regulation create conflict? If the local setback is included in a legitimately enacted land use ordinance, courts will generally uphold the ordinance by distinguishing local land use authority from state environmental objectives. If, however, local setbacks are included in a police power regulation meant to supplement the SWMA, courts may instead find conflict with state law. In Liverpool, for example, the court invalidated a more stringent local setback provision once it determined that it was a geological standard. The court never asked whether the state regulations established a floor beyond which local governments could regulate, a possibility raised in the Burkholder dissent.

4. Negation of Supremacy Analysis

In cases where no preemption exists and courts confront concurrency, disputes are often presented as involving the Commonwealth and a municipality, with the understanding that the Commonwealth will prevail where conflict exists. In a few cases, however, courts have presented the parties as equal agents of the Commonwealth. In these instances, what remains are conflicting exercises of authority under two different enabling acts, and supremacy is no longer the issue. Under this analysis, a municipality might fare better than it would under a traditional supremacy analysis, where it would have to yield if conflict were found. If, instead, a municipality's delegated powers under the

318. See, e.g., SECCRA, 898 A.2d at 683.
319. Liverpool Twp., 900 A.2d at 1036.
320. Burkholder, 902 A.2d at 1022 n.8 (Friedman, J., dissenting).
321. See, e.g., id.
322. See, e.g., City of Pittsburgh, 360 A.2d at 610.
MPC were to be pitted against the DEP’s powers delegated under an environmental law, the issue could be characterized as one of pure conflict without supremacy overtones. Statutory interpretation would still be the determining factor, but no one party would have a superior position. The extent to which the equal-state-agent theme will reappear is uncertain, but local authorities might turn to such a rationale to even the playing field in these disputes.

These issues may well be resolved in the years to come. Ideally, any resolution will preserve the important distinctions between statewide and local objectives and between environmental and land use regulation.

B. Themes, Observations, and State Response

Despite its uncertainties, Pennsylvania preemption and supremacy law offers a number of clear principles and themes. In addition, the Commonwealth has taken steps to coordinate environmental permitting with local land use provisions. These themes and developments are discussed below.

1. Case Law Principles

What drives preemption decisions ranges from a desire to maintain the proper constitutional balance between various levels of government to a desire to implement political ideologies. These objectives are found both in express statements and by reading between the lines.

Nevertheless, the core themes are quite clear. Case law emphasizes the harshness and rarity of preemption and the absence of any presumption of preemptive intent. Increasingly, preemption and supremacy issues are resolved solely by statutory interpretation. In addition to finding cases of total preemption, courts will parse statutes to find instances of limited preemption, as has been done with the SWMA. Scholars further agree that

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323. Spence & Murray, supra note 2, at 1127 (describing preemption as dealing with conflicts between federal and state power).
324. See id. at 1128-29.
325. See Liverpool Twp., 900 A.2d at 1040.
326. See, e.g., Ogontz, 483 A.2d at 455.
327. See, e.g., Hilovsky, 108 A.2d at 707 (holding total preemption of alcohol regulation).
328. See Township of Plymouth, 531 A.2d at 54 (stating that SWMA preempts local operational regulations).
preemption decisions should be guided, at least in part, by a desire to promote stability and certainty.\textsuperscript{329}

Additional themes emerge from cases involving state preemption of local environmental or land use legislation. It is these cases that explore the growing intersection of land use and environmental objectives. Regardless of whether a dispute deals with a local ordinance providing for companion environmental regulation or one expressly tied to land use, courts have consistently recognized municipalities' authority to deal with local concerns and the peculiarities of place.\textsuperscript{330} Courts have acknowledged that local environmental regulations better address "unique local characteristics which higher levels of government are often unable to consider because of the need to generalize regulations across greater geographic areas."\textsuperscript{331} The same is true for local land use ordinances. Courts have not only recognized the uniquely local focus of zoning,\textsuperscript{332} but have deferred to what they see as the lead role local governments play in land use matters.\textsuperscript{333} The special status afforded to local land use powers is embodied in statements to the effect that local land use authority is generally not affected by state environmental laws.\textsuperscript{334} This view has led Pennsylvania courts to protect local land use ordinances against preemption challenges under the SWMA.\textsuperscript{335}

2. \textit{Other Themes and Considerations}

Two final considerations are raised here, one dealing with preemption, one with supremacy. It is clear that, at least to some degree, preemption law reflects political realities. A decade ago, Professor David Spence and Professor Paula Murray conducted an empirical study to determine what drove judicial thinking in federal preemption decisions.\textsuperscript{336} They were curious about a possible link between the large number of Republican judges on the federal

\textsuperscript{329} See Thomas R. Head, III, \textit{Local Regulation of Animal Feeding Operations: Concerns, Limits, and Options for Southeastern States}, 6 ENVTL. LAW. 503, 574 (Feb. 2000); Buzbee, supra note 17, at 1590.

\textsuperscript{330} See, e.g., Abbey, 559 A.2d at 111; see also SECCRA, 898 A.2d at 683 (upholding zoning ordinance based on township authority to address the general welfare of the community).

\textsuperscript{331} See Yanggen & Amrhein, supra note 15, at 7.

\textsuperscript{332} See Greene Twp., 379 A.2d at 1385.

\textsuperscript{333} See, e.g., Benham, 523 A.2d at 315 (giving zoning ordinances "great play"); see also Yanggen & Amrhein, supra note 15, at 43.

\textsuperscript{334} Yanggen & Amrhein, supra note 15, at 47, 49-50; Buzbee, supra note 17, at 1568.

\textsuperscript{335} See SECCRA, 898 A.2d at 683.

\textsuperscript{336} Spence & Murray, supra note 2.
bench and the strong number of cases that preempted state and local laws.\textsuperscript{337} Their findings suggested that, regardless of political affiliation, judges chose to preempt more often than not,\textsuperscript{338} opting for a Coasean outcome of less regulation that favors private solutions.\textsuperscript{339} They also found that the characteristics of a case and personal ideology influenced outcomes,\textsuperscript{339} and that judges typically deferred to agencies in cases where agencies took a position on preemption.\textsuperscript{341} In conclusion, judicial ideologies were clearly at work in preemption cases.\textsuperscript{342}

There is another political motivation in preemption cases that perhaps contributes to the large number of pro-preemption cases. A local authority might challenge the legislation of higher levels of government to score political points, even when its case is weak.\textsuperscript{343} Politically driven litigation strategies and case outcomes fashioned by judicial ideology are realities to consider when determining how, if at all, preemption rules might be modified.

A final consideration addresses supremacy, not preemption, and it relates to legislators, not judges. Legislatures may fail to address preemption and concurrency altogether,\textsuperscript{344} but other times may expressly indicate their intent.\textsuperscript{345} In cases where a legislature intends to allow concurrent local regulation, it may fail to clarify the level of local authority that is authorized. One possibility is to allow local regulation in the same area that is no more stringent than the state standards. In such a case, the state law creates a ceiling above which municipalities may not regulate.\textsuperscript{346}

\textsuperscript{337} See id. at 1165-67.

\textsuperscript{338} Id.

\textsuperscript{339} Id. A Coasean perspective, named after economist Ronald Coase, reflects his influential work, which theorized that private actors can address certain environmental problems more efficiently than the government. A contrasting view is attributed to economist A.C. Pigou, who argued that governmental response was necessary to address the social costs associated with environmental harms. Id. at 1154-55.

\textsuperscript{340} Id. at 1194.

\textsuperscript{341} Spence & Murray, supra note 2 at 1194 (also noting judges pay less deference to the enacting Congress as time passes by).

\textsuperscript{342} Id. at 1130, 1162. Rather than focusing on decisional rules, they sought to explain preemption case outcomes based on numerous variables, including “principles of federalism, . . . statutory interpretation problems, . . . political pressures, and . . . judges’ political or policy preferences and attitudes toward regulation.” Id. at 1162.

\textsuperscript{343} Id. at 1160-61.

\textsuperscript{344} For example, the General Assembly did not expressly deal with preemption in the SWMA. See Sunny Farms, 474 A.2d at 59 (noting that the SWMA’s certificate of need provision is the only exception).

\textsuperscript{345} Warner Co., 612 A.2d at 580-81; see also Buzbee, supra note 17, at 1555 (noting that little attention has been given to the issue).

\textsuperscript{346} See Buzbee, supra note 17, at 1552. Professor Buzbee’s article addresses federal preemption of state and local legislation, but its arguments are no less relevant to state and
The alternative is concurrent regulation where state law serves as a floor that allows local regulation as long as it is no less stringent. When legislatures fail to indicate which type of concurrency is authorized, courts must make the determination by applying principles of conflict, often with inconsistent results. Indeed, the different outcomes in Sunny Farms and Liverpool Township would likely have been avoided had the General Assembly clarified the extent of concurrent municipal authority in the SWMA.

Professor William Buzbee, who has addressed this issue in depth in relation to federal and state concurrency, points out that legislatures should consider whether floor or ceiling regulation schemes best suit the objectives of the law. Environmental regimes often create concurrent, multilayered institutional structures that tap the expertise of various levels of government and diverse decision makers. Because multiple governmental institutions are generally involved in these programs, legislatures should consider to what extent local action should be restricted, if at all.

There are reasons to embrace and reject both models. Statewide standards beyond which local regulation may not venture are efficient because they ensure stability and reduce litigation costs. Not only does the marketplace benefit, but so too do agencies and legislators (who might stand to gain politically). The benefits of

local legislative conflicts. He refers to federal laws that allow state and local concurrency within federal limits as "ceiling preemption" and "unitary federal choice preemption" interchangeably, see id. at 1554-55, when those laws do not preempt state and local law at all. Nevertheless, his arguments may be aptly applied to supremacy issues.

347. See id. at 1551-52 (referring to regulatory floors as "one-way ratchets" that allow more stringent regulation).

348. See Head, supra note 325, at 547-49 (describing two Minnesota cases dealing with state laws that regulated animal feedlot operations, one holding that more restrictive township setbacks conflicted with state law because they would prohibit the construction of the plaintiff's facility, Bd. of Supervisors v. ValAdCo, 504 N.W.2d 267, 269-70 (Minn. Ct. App. 1993), and the other upholding a county setback provision because it did not prohibit what the state law authorized and thus there was no conflict, Blue Earth County Pork Prod., Inc. v. County of Blue Earth, 558 N.W.2d 25, 26, 28-30 (Minn. Ct. App. 1997)).

349. See Buzbee, supra note 17, at 1565 (describing state involvement in federal environmental laws such as the Clean Water Act under the principle of "cooperative federalism").

350. See id. at 1590. Again, although Professor Buzbee’s arguments were made in reference to conflicts between federal and state and/or local regulation, they are also applicable to state and local regulatory conflicts.

351. Buzbee explained: "If Congress or an agency becomes the only game in town, it will attract greater attention from affected industry as well as other supporting or opposed stakeholders. Legislators may benefit from electoral or monetary support. Agencies may be able to secure expanded budgets or even engage in outright favoritism to affected industry in exchange for the usual rewards of regulatory capture . . . ." Id. at 1590 (footnotes omitted).
setting state standards as a floor are equally compelling; they create opportunities for positive interaction among multiple actors, broad-based participation, and a level of accountability that may force program modification when the state, left to its own devices, might choose to maintain the status quo.\textsuperscript{352} State standards that set maximum ceilings ignore the opportunities that multilayered environmental schemes create and may perpetuate regulatory stasis on the part of state actors.\textsuperscript{353} Regulatory floors, on the other hand, visit hardship on industry by imposing multiple local standards that threaten market certainty and place authority in the hands of provincial decision makers who might lack resources or expertise.\textsuperscript{354}

Professor Buzbee offers a detailed decision-making framework to assist legislatures in determining whether a law should set a regulatory ceiling or floor. Among its factors are institutional capabilities, the nature of the regulatory challenge, the regulatory target, "issues of scale," data needs, and the nature of the risk the law targets.\textsuperscript{355} Together, these considerations can lead to better-informed concurrency decisions.

3. \textit{DEP Response to MPC Amendments of 2000}

Recently, the DEP has taken steps to deal with environmental-land use conflicts. The MPC, which applies to all Pennsylvanian municipalities but Philadelphia, Pittsburgh, and Philadelphia County,\textsuperscript{356} was amended in 2000 in an attempt to coordinate state agency actions with local land use planning. Section 10619.2 of the MPC provides:

When a county adopts a comprehensive plan . . . and any municipalities therein have adopted comprehensive plans and zoning ordinances . . . , Commonwealth agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.\textsuperscript{357}

\textsuperscript{352} See id. at 1588-89.
\textsuperscript{353} See id. at 1584-85.
\textsuperscript{354} See id. at 1582-83, 1600.
\textsuperscript{355} Buzbee, supra note 17, at 1601-03.
\textsuperscript{356} See supra note 41; see also Final Revision of Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Permits for Facilities and Infrastructure, Document Number 012-0200-001 (DEP Policy Office March 6, 2004) available at www.dep.state.pa.us [hereinafter DEP Land Use Policy].
\textsuperscript{357} 53 PA. CONS. STAT. ANN. § 10619.2 (2008).
In 2004, the DEP issued its Final Revision of Policy for Consideration of Local Comprehensive Plans and Zoning Ordinance in DEP Review of Permits for Facilities and Infrastructure, which implemented section 10619.2. The Policy instituted a land use review process for specified permit authorizations and requires permit applicants to answer a number of land use questions in a General Information Form (GIF) that all applicants are required to complete as part of the permitting process. The Policy also gives municipalities the opportunity to comment on applicant responses to the questions.

The process is subject to a number of limitations. It only applies if the facility that is the subject of the application satisfies at least one of three conditions: 1) it is in a county with a comprehensive plan, and the municipality has a comprehensive plan or is part of a multi-municipal comprehensive plan, and the municipality has enacted zoning ordinances, and the ordinances and comprehensive plan are consistent with the MPC; 2) the municipality has a joint zoning ordinance; or 3) the municipality has adopted zoning ordinances as part of a cooperative agreement. Furthermore, the review process only applies to permit authorizations for facilities enumerated in the Policy’s Appendix A, which, among others, includes facilities under the air quality and solid waste programs. If these conditions are satisfied, the applicant must respond to a series of questions that ask whether the proposed facility will be consistent with the comprehensive plan, whether the applicant will have to obtain zoning approval, and whether any relevant zoning ordinances are the subject of litigation. Applicants are encouraged to provide the DEP with copies of zoning or other land use approvals. Municipalities may comment on proposed projects, and the DEP will attempt to contact them to discuss relevant planning and zoning matters. The DEP will rely on infor-

358. DEP Land Use Policy, supra note 352.
359. Id. at 3.
360. Id.
361. Id. at ii.
362. Id. at Appendix A. Notably, the land use review process applies to facilities managing hazardous, municipal, and residual waste. Id.
363. DEP Land Use Policy, supra note 352, at 3-4.
364. Id. at 4. Applicants can opt out of the process by submitting land use approval letters from the municipality with the GIF form. Id. at 7.
365. Id. at 5.
mation it obtains from municipalities to determine whether there is a conflict with local planning or zoning.\textsuperscript{366}

The goal of the land use review process is “to avoid or minimize conflicts between department permit decisions and local land use decisions.”\textsuperscript{367} Importantly, the Policy specifically recognizes the difference between regulating certain facilities “as particular regulated activities” and local land use regulation, and the Policy further states that “[l]ocal municipalities can establish valid zoning requirements that can be imposed on these activities where state law preempts local regulation of these activities.”\textsuperscript{368} With this distinction in mind, the Policy imposes a mandatory duty on the DEP to consider comprehensive plans and zoning as part of the permitting process.\textsuperscript{369}

In cases of conflict, permit reviewers must notify the DEP Policy Office, which has numerous response options, including recommending the suspension of the permit review process until the conflict is resolved, and providing guidance to the permit review staff as to whether the permit “should be approved, approved with a condition, or denied.”\textsuperscript{370} The DEP has read the MPC provision to give it discretion in terms of how it chooses to rely on local planning and zoning.\textsuperscript{371}

These new procedures have the potential to avoid the type of disputes that have led to litigation in the past. But they are not a panacea. First, the Policy has no effect on preemption; only the General Assembly and the courts may determine whether state law forecloses all local authority in an area. Furthermore, although the Policy addresses supremacy and conflict, it only reaches conflicts between state environmental programs and land use ordinances. It does not address conflicts between state environmental programs and local supplemental environmental legislation, such as the dispute in \textit{Sunny Farms}. Finally, even if a permit conflicts with a local land use ordinance, the Policy only

\textsuperscript{366} Id. at 5-6. \textit{In Berks County v. Dept. of Envtl. Prot.}, the Commonwealth Court held that the DEP fulfilled its obligations under the MPC by relying on the municipality’s silence and the permittee’s response on the land use questionnaire to the effect that a zoning conflict had been resolved. 894 A.2d 183, 195 (Pa. Commw. Ct. 2006), \textit{appeal denied}, 904 A.2d 1104 (Pa. 2006). The court further held that the MPC provision did not require the DEP to engage in its own legal review of a related settlement agreement between the permittee and municipality. \textit{Id}.

\textsuperscript{367} DEP Land Use Policy, \textit{supra} note 352, at 7-8.

\textsuperscript{368} Id. at 10 (emphasis added).

\textsuperscript{369} Id. at 7-8.

\textsuperscript{370} Id. at 8.

\textsuperscript{371} Id. at 9.
Principled Preemption applies if the facility falls into one of the three geographic categories and if the permit sought is listed in Appendix A.

The DEP's experience with the Policy has been positive—but limited. The process has worked well when a municipality has a zoning ordinance and is aware of the process.\footnote{372} When the Policy Office has chosen to insert permit conditions in cases of conflict, it has been able to clarify that the permit is conditioned on compliance with local land use restrictions.\footnote{373} Still, as of the writing of this article, the Policy Office has yet to deal with a conflict between SWMA setbacks and local zoning ordinance setbacks.\footnote{374} Additionally, it is believed that the DEP needs to engage in more outreach to inform municipalities about their right to participate in the land use review process.\footnote{375} Nevertheless, the Policy takes a significant and positive step toward addressing the convergence of land use and environmental objectives. It acknowledges that DEP permit decisions implicate land use concerns and forces the DEP to directly address conflicts while preserving the independence of local authority. The Policy's statement that local land use authority is viable even when local environmental regulation is preempted strongly suggests that the DEP will recognize a municipality's right to impose zoning restrictions, such as setbacks, that are more stringent than the Department's operational regulations.

V. SUGGESTIONS AND NEW DIRECTIONS

The foregoing discussion of cases, themes, and observations suggests ways in which Pennsylvania's preemption and supremacy doctrines might be modified to ensure that they address the growing intersection of environmental regulation and land use planning. The following remarks address many levels of governance because all of them have a significant stake in ensuring legal sustainability into the future.

First, the General Assembly must consistently recognize its power over preemption and supremacy and rationally consider legislative alternatives and their consequences. It should also carefully look for regulatory overlap in what might seem to be

\begin{itemize}
\item \footnote{372} Telephone Interview with Denise M. Brinley, Executive Assistant, DEP Office of Community Revitalization and Local Government Support (June 27, 2008). Ms. Brinley, who handles the Policy Office review of potential conflicts, reported that she reviews one or two permit applications per month. \textit{Id.}
\item \footnote{373} \textit{Id.}
\item \footnote{374} \textit{Id.}
\item \footnote{375} \textit{Id.}
\end{itemize}
separate legal areas. Nowhere is this cautious approach more important than in areas where a law implicates local land use authority. The initial legislative choice is between preemption and concurrency, with the understanding that, for any given environmental law, a mixed preemption/concurrency regime is also possible. Additionally, the legislature must consider preemption of two types of municipal authority: local land use authority and local police power to address nuisances and environmental matters. In both cases, laws should be specific about the degree to which municipal authority is foreclosed or retained.376 As an alternative, the General Assembly can direct the DEP, with proper guidelines, to clarify the extent of local authority in its rulemaking, or expand MPC provisions to augment state agency review of local land use regulations.377

In cases where the legislature authorizes local concurrent environmental authority, it should decide whether state standards establish a regulatory ceiling or floor, weighing the advantages and disadvantages of each option.378 If a law is not meant to have any impact on local land use authority, it should explicitly say so. In all cases, drafting should proceed with care to ensure that terms such as "preempt," "supersede," and other relevant statutory phrases are clear and accurate.

Like the General Assembly, the EQB and DEP should clarify to what extent local authority can coexist with their regulatory programs. Furthermore, the DEP should continue to vigorously implement its Land Use Policy as it says it will: with an eye toward preserving local land use authority within the permitting process. This effort should include greater outreach to municipalities in cases where the land use review process is triggered.

Courts also need to adjust their approach by consistently employing an analytical framework that distinguishes between preemption and conflict. Because of their co-mingling of those concepts, the Duff questions should be disassembled and repackaged within a multistep analysis that first determines the scope of the municipal authority at issue and whether the exercise of that au-

376. See Yanggen & Amrhein, supra note 15, at 94.
377. Id.
authority is ultra vires or unreasonable. If the ordinance fails for one of these reasons, the analysis ends. If it proceeds, courts should then confront the preemption question narrowly, asking whether a state environmental law forecloses the specific municipal power that has been exercised. If the state law does not expressly preempt the municipality's action, the court should consider the possibility of field preemption by considering legislative intent. Finally, if there is no express or implied preemption, then the court must consider whether there is a conflict between the state law and local ordinance. Ogontz dictates that the essence of this analysis is statutory interpretation, where the statute's objectives are paramount. The distinction between the community-focused objectives of local environmental and land use legislation, and the statewide health and environmental objectives of state environmental laws, should serve as the prism through which courts consider legislative intent.

In this regard, a conflict analysis that asks whether local law allows something prohibited by state law or prohibits something state law allows (a common inquiry that is included in Duff's five questions) may prove to be overbroad. This is especially likely to occur when the competing powers are themselves distinct. For example, that question would certainly be answered in the affirmative if a local land use or nuisance setback is larger than one included in a DEP solid waste rule. Because an affirmative answer to any one of Duff's questions establishes conflict, the state regulation would prevail. However, the allow/prohibit question totally ignores the difference between state environmental authority and local police power and land use authority. Local regulations that allow something prohibited by state law may well establish conflict, but courts should reject the second part of the allow/prohibit question that asks if local law prohibits what state law allows. Instead, courts should determine conflict by looking solely to statutory construction, by examining the consequences of allowing a local ordinance to coexist with state law. A carefully crafted approach to preemption and conflict will foster consistency.

379. Ogontz, 483 A.2d at 454-55.
380. Duff, 532 A.2d at 505 (asking, in ascertaining conflict, "whether the ordinance forbid[s] what the legislature has permitted . . . ").
381. Liverpool Twp., 900 A.2d at 1033.
382. See Ogontz, 483 A.2d at 455.
and may help reduce the influence of judicial political ideologies in matters of preemption. 383

Municipalities should also take steps to integrate land use and environmental regulation in ways that are more efficient and less likely to spur litigation. First, the means used to address the impacts of environmentally offensive facilities matters. Zoning is the best option because it can be used to preserve property values and to promote the general welfare via aesthetic and even environmental regulation. 384 Furthermore, the special play and deference given to zoning regulations, as well as the judicial understanding of its unique objectives, arguably give zoning ordinances an advantage over police power ordinances in preemption and conflict disputes. Local authorities that instead choose to address environmentally offensive facilities by police power regulation should proceed only if they believe that the field is not preempted and that an ordinance is needed to protect specific local—not statewide—environmental well-being. Those municipalities that fall within the DEP Land Use Policy should take advantage of that program by encouraging zoning permit applicants to seek letters of approval for early opt-out status and by promptly responding to DEP inquiries about potential conflict. Both the DEP and local authorities should encourage facility owners to deal with local regulations first, whether they are found in police power or land use ordinances. Municipalities are free to condition land use permits on DEP approval, 385 and early municipal approval can streamline land use review by the DEP.

CONCLUSION

Virtually every environmental decision, whether made by the state or a municipality, has an impact on land use; the reverse is true as well. This reality becomes more apparent with every passing year, and it is certainly evident in the case law reviewed in this article. The benefits of this interest convergence are significant. There is now more holistic planning by the DEP by virtue of its Land Use Policy and a broadened vision on the part of municipalities pursuant to statutes such as the SWMA, which engage

383. See text accompanying notes 330-36.
384. See 53 PA. CONS. STAT. ANN. § 10603(a), (b); Sunny Farms, 474 A.2d at 60 (likening the police power ordinance at issue to zoning ordinances that protect the "public health, property values and aesthetics").
them in important environmental undertakings. These develop-
ments will effect very real progress toward the type of integrated 
planning demanded of sustainability. There are obstacles, how-
ever, including local regulatory initiatives that run afoul of state 
authority under preemption or supremacy principles, and state 
regulatory authority that is interpreted in ways that thwart le-
gitimate police power and land use regulation by municipalities.
Pennsylvania law has done well addressing the former threat, but 
has not been consistent in addressing the latter. It is hoped that 
the discussion and suggestions included in these pages will bring 
attention to these issues and lead to a more principled preemption 
and supremacy framework in Pennsylvania, one that will well 
serve the public health and environment of the Commonwealth as 
a whole and the welfare and concerns of its many diverse commu-
nities.