COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80203

Appeal from Larimer County District court
The Honorable Gregory M. Lammons
Case No. 13CV31385

Appellant:
CITY OF FORT COLLINS, COLORADO

v.

Appellee:
COLORADO OIL AND GAS ASSOCIATION

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Case Number: 2014CA001991

APPELLANT CITY OF FORT COLLINS' OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).
It contains **9,390** words.

The brief complies with C.A.R. 28(k).

_X___For the party raising the issue:

The brief contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (CF, p. #), not to an entire document, where the issue was raised and ruled on.

_____For the party responding to the issue:

The brief complies with C.A.R. 28(k). It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

By: s/ John T. Sullivan
John T. Sullivan, Atty. Reg. No. 17069

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Defendant-Appellant City of Fort Collins, Colorado (the "City" or "Fort Collins") by and through its undersigned attorneys, Carrie M. Daggett and John R. Duval of the Fort Collins City Attorney's Office, and Barbara J. B. Green and John T. Sullivan of Sullivan Green Seavy LLC, submits its Opening Brief to the Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the district court incorrectly rule that the City's Moratorium is the same as a permanent ban?

B. Did the district court incorrectly rule that the City's citizen-initiated moratorium ordinance (the "Moratorium") is impliedly preempted by the Colorado Oil and Gas Conservation Act (the "Act")?

C. Did the district court fail to apply the correct test for determining an operational conflict (*i.e.*, whether the Moratorium materially impedes or destroys the state's interest in oil and gas development)?

D. Did the district court incorrectly rule that the Moratorium creates a *per se* "operational conflict" in the absence of a fully developed evidentiary record?

STATEMENT OF THE OF CASE

COGA commenced this case as a declaratory judgment action in the Larimer County District Court on December 3, 2013, four weeks after the City's voters

approved a citizen-initiated ordinance known as "Ballot Measure 2A" to place a moratorium on hydraulic fracturing and storage of its waste products for a period of five years while the City studies the impacts of this process on property values and human health. COGA asserted two claims for relief: (1) a claim for declaratory judgment that the moratorium is preempted by state law; and (2) a claim for an injunction against the enforcement of the moratorium. *See* Record, Court File ("CF"), pp. 3-10. The City filed its Answer on February 3, 2014, denying COGA's claims. CF, pp. 21-26.

After the district court denied a motion to intervene by the supporters of Ballot Measure 2A,[1] COGA and Fort Collins filed cross motions for summary judgment. CF, p. 107(Order Setting Summary Judgment Deadlines); pp. 108-201 (COGA Summary Judgment Motion, Brief and Exhibits); pp. 238-379 (City's Cross Motion for Summary Judgment, Combined Brief in Support of Cross Motion for Summary Judgment and Opposing COGA Motion, and Exhibits A-G); pp. 420-446 (COGA Combined Response and Reply); pp. 448-466 (City's Reply in Support of Cross Motion for Summary Judgment). On August 7, 2014, the district court entered its Order Granting Plaintiff's Motion for Summary Judgment on First

[1] The district court's Order denying the motion to intervene is the subject of a separate appeal before this Court, captioned as *Citizens for a Healthy Fort Collins, Sierra Club and Earthworks, v. COGA*, Case No. 2014-CA-780.

Claim for Relief and Denying Defendant's Cross Motion for Summary Judgment ("August 7 Order"). CF, pp. 495-503. On October 16, 2014, Fort Collins filed its Notice of Appeal of the August 7 Order.

STATEMENT OF FACTS

The relevant material facts in this case are undisputed.

1. Fort Collins is a home rule city under Article XX of the Colorado Constitution located in Larimer County, Colorado. CF, p. 4 (Complaint, ¶¶ 6-7); p. 22 (Answer, ¶¶ 6-7); pp. 343-79 (City's Charter).

2. On August 20, 2013, following certification of a citizen-initiated petition by the City Clerk on August 5, the Council of the City of Fort Collins ("Council") adopted Resolution 2013-072. Resolution 2013-072 submitted to the registered electors of the City, at a special municipal election on November 5, 2013, a proposed citizen initiated ordinance placing a five-year moratorium on the use of hydraulic fracturing to extract oil, gas, and other hydrocarbons and on the storage of the waste products of hydraulic fracturing within the City of Fort Collins or on lands under the City's jurisdiction. CF, pp. 338-342.

3. On November 5, 2013, the registered electors of the city voted to approve this citizen-initiated ordinance, identified as "Ballot Measure 2A," by a

count of 24,176 to 18,591. CF, p. 4, (Complaint, ¶ 11); p. 22 (Answer, ¶ 11); p. 241, n.2.

4. The City adopted Ballot Measure 2A as an ordinance upon certification of the November 5, 2013 election results pursuant to the City's Charter. CF, p. 6 (Complaint, ¶ 30); p. 23 (Answer, ¶ 30).

5. The Moratorium became effective on August 5, 2013, the date the City Clerk certified the measure for the ballot. The Moratorium expires on August 5, 2018, unless it is lifted before then by a ballot measure approved by the people of the City of Fort Collins. CF, p. 341-42.

6. On March 18, 2014, the Council adopted Resolution 2014-025 authorizing the retention of a consultant to recommend to the City the appropriate studies to help determine the impacts on property values and human health in the City that could be caused by the hydraulic fracturing process and its waste products. To accomplish this, the City retained two consultants to research what relevant studies already exist and analyze whether they address the facts and circumstances present in Fort Collins. One of the consultants will do this with respect to the likely effects on property values and the other consultant will do this with respect to the effects on human health. The consultants' identification and analysis of these existing studies will help the City decide what additional studies

are needed and how long it will take to complete these additional studies. CF, pp. 291, 298-99 (Affidavit of Laurie Kadrich, ¶¶ 7-9).

7. In preparation for its own studies, the City identified a list of ongoing regional and national studies of the impacts of hydraulic fracturing. CF, p. 291, 296, 297 (Kadrich Affidavit, ¶ 7, and attached charts).

8. The Fort Collins City Plan (February 15, 2011) (also available at www.fcgov.com) expresses the local values of the community in its policies and goals to protect and enhance a healthy lifestyle. For example, the community vision is for "[A] safe, non-threatening city in which to live, work, learn, and play; opportunities to lead active and healthy lifestyles; access to healthy, locally grown or produced food." City of Fort Collins City Plan, p. 102. "Wellness is related to environmental health in that active lifestyles and food production foster interaction with the natural environment." *Id*. The City has a goal to protect "view corridors and public access to the Foothills, continuing to allow recreational opportunities provided that they do not threaten the area's environmental integrity." *Id.* at 94. And regional cooperation is encouraged "to develop cooperative regional solutions for land use, transportation, open space and habitat protection, environmental, economic, fiscal sharing, and other planning challenges." *Id*. at p. 118. CF, p. 293 (Kadrich Affidavit, ¶ 15).

9. The citizens of Fort Collins have high expectations for careful planning and development of the City. The City is renowned for being one of the best places to live in the United States, and has received local and national recognition and awards for innovation in planning to address issues that threaten the environment, a healthy lifestyle, and the vitality of the community. *See e.g.*, *A Town Envisions the Future on Its Own Terms***,** by Kirk Johnson, The New York Times, November 17, 2011. http://www.nytimes.com/2011/11/18/us/fort-collins-colorado-envisions-the-future-on-its-own-terms.html?pagewanted=all&_r=0. The City's many awards for smart growth, innovative planning and land use regulation bear out the quality of the City's land use efforts. A list of awards is available on the City's website. http://www.fcgov.com/advanceplanning/awards.php. CF, pp. 293-94 (Kadrich Affidavit, ¶ 16).

10. Before and after the Moratorium was approved, the City was aware of increased planning and zoning issues arising from the closer proximity of oil and gas operations to residential development and other uses of property within the City. Oil and gas development is classified as an industrial use of property under the City's zoning code. Consequently, it has the potential to create impacts upon adjacent properties with less intense uses such as residential or recreational uses. To separate residential land uses from some of the nuisance impacts of existing oil

and gas operations, Section 3.8.26 of the Fort Collins Land Use Code requires new residential development to establish a buffer yard between occupied buildings and the impact area of any pre-existing oil and gas operation. If residential development is proposed within five hundred (500) feet of an existing oil and gas operation, a fence must be erected by the developer along the property boundary between the oil and gas operation and the development that restricts public access to the oil and gas operation. Additionally, if any residential development is to be located within one thousand feet of an existing oil and gas operation, then the plat must contain a note that certain lots are in close proximity to an existing oil and gas operation. CF, pp. 291-92, 300-303 (Kadrich Affidavit, ¶¶ 10-11 and Fort Collins Land Use Code Section 3.8.26 attached thereto).

11. The City has not yet amended its existing subarea plan for the northern and northeastern parts of the City to address those areas of Fort Collins where future oil and gas development is likely to occur in close proximity to residential development. This amendment of the subarea plan will be developed through a public process informed by the outcome of the impact studies required by the Moratorium. CF, p. 292 (Kadrich Affidavit, ¶ 12).

12. COGA does not own any oil and gas mineral interests within the City's jurisdiction that may be impacted by the Moratorium. COGA does not

specifically identify any other member of COGA who owns such interests. CF, pp. 3-10.

13. COGA does not allege that COGA or any COGA member has approval for, or plans to use, hydraulic fracturing to stimulate wells within the City's jurisdiction during the duration of the Moratorium. CF, pp. 3-10. *See also* CF, pp. 292-93 (Kadrich Affidavit, ¶ 13).

14. Since August 5, 2013, the date the Moratorium became effective, the Colorado Oil and Gas Conservation Commission (the "Commission") has not approved any applications for permits to drill in the Fort Collins Field, which includes the City of Fort Collins as well as areas outside the City. CF, p. 293 (Kadrich Affidavit, ¶ 14).

SUMMARY OF ARGUMENT

This case involves the City's constitutional and legislative authority to regulate oil and gas development within its jurisdiction and to use a moratorium to temporarily stay (not ban) hydraulic fracturing and waste disposal while the City studies the impact to human health and property values, as Colorado law permits. Since COGA mounts a facial challenge to the Moratorium in this declaratory judgment action, COGA bears a heavy burden to show that the Moratorium is preempted. Legislative enactments are presumed to be valid, and the party

challenging them has the burden of proving the asserted invalidity beyond a reasonable doubt. The fact that a law *might* be invalid under some conceivable set of circumstances is insufficient to render it wholly invalid. Here, COGA failed to demonstrate beyond a reasonable doubt that the Moratorium is preempted.

Moratoria are, by their very nature, *temporary* or *interim* land use tools incidental to local land use authority. Moratoria are used by local governments to preserve the status quo during formulation of more permanent land use regulations; they are an essential tool of successful development. Colorado courts recognize the qualitative difference between a moratorium and a ban. Moratoria function as interim development controls and merely suspend the use to which the property may be put while land use control studies are conducted

The numerous inconclusive and on-going studies of the impacts of hydraulic fracturing in Colorado and across the country warrant a time out for Fort Collins to better understand the potential impacts on its own citizens. Fort Collins' Moratorium, on its face, provides the breathing room to conduct studies on the impacts of hydraulic fracturing and waste disposal on public health and property values in Fort Collins and to develop a more permanent development strategy addressing those impacts before granting vested rights to new operations.

The district court incorrectly held that the Moratorium is impliedly preempted by the Act. This holding contradicts Colorado statutes, the Colorado Supreme Court in *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992) ("*Voss*") and *Bowen/Edwards v. Board of County Comm'rs of La Plata County*, 830 P.2d 1045 (Colo. 1992) ("*Bowen/Edwards*"), and even rules of the Colorado Oil and Gas Conservation Commission ("Commission"). *Bowen/Edwards* and *Voss* hold that the Act and rules promulgated thereunder do not impliedly preempt local government land use regulation. Local regulation is preempted by the Act only if the local enactment creates an "operational conflict," which the Colorado Supreme Court defines as "the effectuation of the local interest materially impedes or destroys the state interest." *Bowen/Edwards*, 830 P.2d 1059; *Voss*, 830 P.2d 1068-69.

Colorado law clearly recognizes that: (1) the City has an interest in land-use control within its municipal borders, (2) local governments have a legally protected interest in enacting and enforcing their land use regulations governing the impacts of oil and gas operations, and (3) the state's interest in oil and gas development does not impliedly preempt a local government's authority to regulate land use within its boundaries simply because the land is an actual or potential source of oil and gas development. The district court's ruling that Fort Collins' Moratorium is

impliedly preempted by the Act ignores the General Assembly's intent that land use matters be addressed by local governments, negates Fort Collins' rights to regulate the use of land under its jurisdiction through the use of moratoria, and disregards Colorado case law, statutes, and rules affirming local land use authority over the impacts of oil and gas operations.

The district court also erred in finding that the Moratorium creates a *per se* operational conflict with the Act. The only test to determine whether a local regulation creates an operational conflict with state oil and gas laws is whether "the effectuation of the local interest would materially impede or destroy the state interest." *Bowen/Edwards*, 830 P.2d at 1059-60; *Voss*, 830 P.2d at 1068-69. A fully-developed evidentiary record is required to determine whether the local regulation creates an operational conflict. Such a record is absent in this case. COGA presented no evidence in support its claims other than references to the Moratorium. COGA does not own any mineral interests within the City's jurisdiction. COGA presented no evidence that it had applied for or been granted a permit to drill from the Commission, or that it intended to use hydraulic fracturing to complete a well during the Moratorium period. COGA presented no evidence that any other person had done so, or had plans to do so, during the Moratorium. COGA presented no evidence regarding the operational effect of the Moratorium

on the state's interest in oil and gas development. On its face, the language of the moratorium ordinance does not "materially impede or destroy" the state's interest in oil and gas exploration and development. Under these circumstances, the district court erred in granting COGA's motion for summary judgment.

ARGUMENT

I. Standard of Review.

This appeal involves the district court's interpretation of the Act, the City's moratorium ordinance, and the application of the Act and Colorado case law to the material facts in the context of a summary judgment motion. Therefore, the proper standard of review is *de novo*. *See Klinger v. Adams County School Dist. 50*, 130 P.3d 1027, 1031 (Colo. 2006) (statutory interpretation is a question of law which the court reviews *de novo*); *Meyerstein v. City of Aspen*, 282 P.3d 456, 461 (Colo. App. 2011) (*de novo* review of order granting summary judgment).

II. Burden of Proof When Challenging Legislative Enactments.

Legislative acts are presumed to be valid, and the party challenging them has the burden of proving the asserted invalidity beyond a reasonable doubt. *Sellon v. City of Manitou Springs*, 745 P.2d 229, 232 (Colo. 1987); *JJR v. Mt. Crested Butte*, 160 P.3d 365, 372 (Colo. App. 2007); *Best v. La Plata Planning Commission*, 701 P.2d 91, 94-95 (Colo. App. 1984); *Moore v. City of Boulder*, 20 Colo. App. 248,

252, 484 P.2d 134, 136 (1971). Therefore, the Moratorium is presumed to be valid and COGA must demonstrate that it is preempted beyond a reasonable doubt.

When considering a preemption challenge, courts must first try to harmonize the local regulation with the state statute or regulation. Only where no possible construction of a local enactment may be harmonized with the state regulatory scheme would the local enactment be preempted. *See Board of County Comm'rs of Gunnison County v. BDS International, LLC*, 159 P.3d 773, 778-79 (Colo. App. 2006) ("*BDS*"); *Bowen/Edwards*, 830 P.2d 1060. When the correct law is applied to the undisputed facts of this case, COGA has failed to prove that the Moratorium is impliedly preempted or that it would materially impede or destroy the state interest. *See BDS,* 159 P.3d 779.

III. There Is No Implied Preemption.

A. The Moratorium is Not a Ban.

The district court concluded that the Moratorium is the same as a ban and it is impliedly preempted because it prohibits what state law allows. CF, pp. 500-501. The district court's conclusion ignores the fact that moratoria are tools used to temporarily stay a particular land use activity, as opposed to permanently banning such an activity. The district court's conclusion also ignores Colorado case law, statutes, and Commission rules.

1. A Moratorium Is An Essential Aspect of Local Government Land Use Authority.

Moratoria are, by their very nature, *temporary* or *interim* land use tools incidental to local land use authority. "[M]oratoria [. . .] are used widely among land use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337-38, (2002) ("*Tahoe-Sierra"*). "Zoning boards, cities, counties and other agencies use [moratoria] all the time to 'maintain the status quo pending study and governmental decision making.'" *Tahoe-Sierra*, 535 U.S. 316 (quoting lower U.S. district court opinion, 34 F. Supp. 2d at 1248-49, and *Williams v. Central City*, 907 P.2d 701, 706 (Colo. App. 1995)). A moratorium "counters the incentive of landowners to develop their land quickly to avoid the consequences of an impending land use plan for the jurisdiction." *Droste v. Board of County Comm'rs of Pitkin County*, 159 P.3d 601, 606 (Colo. 2007) (citing *Tahoe-Sierra*).

"Generally speaking, a moratorium is used when a novel type of business or construction----not foreseen in the city's 'general plan'- arrives in the jurisdiction." Skye L. Daley, *The Gray Zone In The Power Of Local Municipalities: Where*

Zoning Authority Clashes With State Law, 5 JOURNAL OF BUSINESS, ENTREPRENEURSHIP & THE LAW 221 (May 2012). With planning protected by a moratorium, "there is no need for hasty adoption of permanent controls in order to avoid the establishment of nonconforming uses, or to respond in an *ad hoc* fashion to specific problems. Instead, the planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view." Garvin & Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, 48 LAND USE LAW & ZONING DIGEST 3 (June 1996) (quoted in *Tahoe-Sierra*, 535 U.S. 338, n. 33).

Colorado courts recognize the qualitative difference between a moratorium and a ban. A moratorium is not permanent, it is "a suspension of activity; a temporary ban on the use or production of something." *Deighton v. City of Colorado Springs*, 902 P.2d 426, 428 (Colo. App. 1994). Moratoria are "stop gap" measures, a "useful procedure in local government land use planning" when of a "temporary and reasonable duration." *Deighton*, 902 P.2d at 429. "'Stop-gap' regulations are, by their very nature, of limited duration and are designed to maintain the *status quo* pending study and governmental decision making." *Williams*, 907 P.2d at 706 (citation omitted). Every delay is not the same as a total

ban. *See Tahoe-Sierra,* 535 U.S. at 331-32. "Moratoria which function as interim development controls merely suspend the use to which the property may be put while land use control studies are conducted." *Williams,* 907 P.2d at 706 (citation omitted).

COGA also recognizes the difference between a temporary moratorium and a ban. COGA informed the district court that this case is the "only litigation in Colorado in which the party has raised a preemption challenge to a moratorium on hydraulic fracturing," and that it is "precedent-setting litigation which will determine the legality of moratoria on hydraulic fracturing in Colorado." CF, p. 388.

Section 1 of the Moratorium states that the purpose is "to protect property, property values, public health, safety and welfare by placing a five year moratorium on the use of hydraulic fracturing to extract oil, gas, or other hydrocarbons within the City of Fort Collins in order to study the impacts of the process on the citizens of the City of Fort Collins." CF, p. 341. Sections 2 and 3 of the Moratorium expressly reference the Act, indicating the intent to harmonize the regulation of such impacts with the requirements of the Act. CF, p. 341.

Fort Collins' Moratorium, on its face, is a temporary "time out" to conduct studies on the impacts of hydraulic fracturing and waste disposal on public health

and property values and to develop a more permanent regulatory strategy addressing those impacts. This time will allow "widespread citizen input and involvement, public debate, and full consideration of all issues and points of view" about the results of the studies and planning and regulatory responses that might be lawfully available to the City." *See Tahoe-Sierra*, 535 U.S. at 338, n. 33 (quoting Garvin & Leitner.) Responses are likely to include an area plan for the northeast portion of the City where oil and gas and residential development are likely to occur in close proximity to each other, a situation not foreseen when the area plan was first adopted. CF, p. 292 (Kadrich Affidavit, ¶ 12).

The City has been aware of public concerns about hydraulic fracturing since before the Moratorium was approved by its voters. CF, pp. 291-292 (Kadrich Affidavit, ¶¶ 10-11). For example, the City adopted regulations for new residential development designed to mitigate impacts of oil and gas operations. CF, pp. 291-292. The City also adopted regulations in 2013 that prohibit hydraulic fracturing unless an operator has entered into an operator agreement with the City. CF, pp. 285-87 (Fort Collins Municipal Code §§ 12-135, 12-136).

Following approval of the Moratorium, the City researched existing studies regarding the impacts of hydraulic fracturing as a result of the degree of public concern about this activity. CF, pp. 291-292 (Kadrich Affidavit, ¶ 7). The City

identified eight ongoing studies of various impacts from fracking. Five of these studies have received funding of one million dollars or more, and many of these studies will take 3-5 years to complete. CF, pp. 296-97 (Attachments A and B to Kadrich Affidavit). In the 2014 legislative session, the Colorado General Assembly failed to pass a bill to study oil and gas impacts deferring to other on-going studies instead. CF, pp. 282-84. In September 2014, Governor Hickenlooper established a large task force to study the impacts of fracking in order to craft recommendations to minimize land use conflicts that can occur when siting oil and gas facilities near homes, schools, businesses and recreational areas. CF, p. 583, n. 3. All of these facts demonstrate that the public concerns in Fort Collins about the impacts of fracking are genuine and that the need for the Moratorium is consistent with the time lines for ongoing studies that will be supplemented by Fort Collins' own studies.

2. *Voss* Does Not Control This Case Because the Moratorium Is Not the Same As Greeley's Total Ban on All Oil and Gas Development.

The district court relied on *Voss* in reaching its ruling but *Voss* does not control this case. *Voss,* decided on the same day as *Bowen/Edwards*, invalidated the City of Greeley's total ban on all oil and gas development. The distinction between the purpose and scope of the Moratorium and Greeley's total ban,

however, is so significant that the ruling in *Voss* does not control whether the Moratorium is preempted in this case. The Moratorium applies *temporarily* - and only - to the hydraulic fracturing phase[2] of oil and gas development so that the City can study impacts of that activity on human health and property values in Fort Collins. By contrast, Greeley's ban had the effect of permanently and "totally excluding all drilling operations within the city limits." *Voss*, 830 P.2d 1069.

Unlike Fort Collins' temporary Moratorium, Greeley's ban prohibited "[t]he drilling of any well for the purpose of exploration or production of any oil or gas or other hydrocarbons within the corporate limits of the [c]ity." *Voss*, 830 P.2d 1063. The ban "represented an attempt by the City to render permits" issued by COGCA "null and void." *Lundvall Bros. v. Voss*, 812 P.2d 693, 694 (Colo. App. 1990). The Colorado Supreme Court emphasizes throughout *Voss* that its holding is limited to Greeley's total ban. Indeed, every time the court framed what issue it was deciding, it clarified that its analysis applies only to Greeley's "total ban." *See Voss*, 830 P.2d at 1062-64 and 1067-69.

[2] The information available from Fracfocus.org indicates that hydraulic fracturing is a stage of oil and gas development that is implemented after site development, well drilling, and testing stages have been completed to stimulate production of oil andgas. https://fracfocus.org/hydraulic-fracturing-how-it-works/hydraulic-fracturing-process

Fort Collins' Moratorium is not a total ban on all oil and gas exploration and development; it is a temporary freeze on any new hydraulic fracturing and waste disposal activities. Its express purpose is to provide an opportunity to study the local impacts of those activities on public health and property values. The Moratorium can be terminated by a vote of the electors. CF, p. 341. It is not an attempt to render permits issued by the Commission "null and void." In fact, there are no permits affected by the Moratorium. Sections 2 and 3 of the Moratorium expressly reference the Act, showing the intent to develop regulations in harmony with the Act.CF, p. 341. *See Bowen/Edwards*, 830 P.2d at 1058; *Voss*, 830 P.2d at 1068-69. Existing wells can continue to produce oil, and exploration and drilling can begin for new operations as long as those operations do not involve hydraulic fracturing or waste disposal while the Moratorium is in effect. Because the Fort Collins' Moratorium is temporary, "*courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism*." *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F. 3d 764, 777 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002) (emphasis added).

B. The Act Does Not Impliedly Preempt the Moratorium.

1. The District Court Contradicts Colorado Case Law In Holding That the Moratorium Is Impliedly Preempted.

Implied preemption occurs when there is a legislative intent to occupy an entire field to the exclusion of all other regulation. *See Bowen/Edwards*, 830 P.2d at 1058; *BDS*, 159 P.3d at 778. "A legislative intent to preempt local control over certain activities cannot be inferred merely from the enactment of a state statute addressing certain aspects of those activities." *Bowen/Edwards*, 830 P.2d at 1058 (citing *City of Aurora v. Martin*, 181 Colo. 72, 76, 507 P.2d 868, 869 (1973)). "On the contrary, the determination of whether a legislative intent to completely occupy a field to the exclusion of all other regulation must be measured not only by 'the language used but by the whole purpose and scope of the legislative scheme,' including the particular circumstances upon which the statute was intended to operate." *Bowen/Edwards*, 830 P.2d at 1058 (citation omitted).

For over 20 years, Colorado courts have held without exception that nothing in the Act impliedly preempts local government authority to enact land use regulations applicable to oil and gas development. *See Bowen/Edwards*, 830 P.2d at 1058-1059; *Voss*, 830 P.2d at 1068-69; *BDS*, 159 P.3d at 778-79; *La Plata County v. Colorado Oil & Gas Conservation Commission*, 81 P.3d 1119, 1123, 1125 (Colo. App. 2003) ("*La Plata County*"); *Town of Frederick v. North*

American Resource Co., 60 P.3d 758, 763 (Colo. App. 2002) ("*Frederick*"). This is because both the state and local governments have distinct interests in regulating oil and gas operations and the primary goal is to achieve harmonious application of both the state and local regulatory schemes. *Bowen/Edwards*, 830 P.2d at 1055-56; *La Plata County*, 81 P.3d at 1123.

Fort Collins is a home rule city established pursuant to Article XX of the Colorado Constitution. CF, pp. 4, 22 and 343-379. In analyzing a home rule city's land use powers, *Voss* declares: "There is no question that [a home rule city] has an interest in land-use control within its municipal borders . . ." [and Colorado] "has recognized that the exercise of zoning authority for the purpose of controlling land use within a home-rule city's municipal borders is a matter of local concern." *Voss*, 830 P.2d 1064, 1066. Like *Bowen/Edwards*, *Voss* also holds that "[t]he state's interest in uniform regulation of [certain] matters [in oil and gas development] *does not militate in favor of an implied legislative intent to preempt all aspects of a county's statutory authority to regulate land use within its jurisdiction* merely because the land is an actual or potential source of oil and gas development and operations." *Voss*, 830 P.2d 1068 (quoting *Bowen/Edwards*, 830 P.2d 1058) (emphasis added). In this area of mixed state and local concern, *Voss* states: "[If local regulations] do not frustrate and can be harmonized with the

development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the [local] regulations should be given effect." *Voss,* 830 P.2d 1068-1069.

2. The District Court Contradicts Colorado Statutes and Commission Rules In Holding That the Moratorium Is Impliedly Preempted.

When it amended the Act in 2007, the General Assembly reemphasized that the *Bowen/Edwards* line of cases continues to be the law in Colorado by including express language in two separate provisions of the Act. House Bill 07-1341, concerning the conservation of wildlife habitat in connection with oil and gas development, provides that "[t]he general assembly hereby declares *that nothing in this act shall establish, alter, impair, or negate the authority of local governments to regulate land use related to oil and gas operations*." 2007 Colo. Sess. Laws (emphasis added). This language was codified in C.R.S. § 34-60-128 (4). Similar language is contained in C.R.S. § 34-60-127 (4) (c), which was also added as part of the 2007 amendments to the Act.

The General Assembly's intent that local governments have the power to exercise land use authority over industrial uses like oil and gas development also is expressed in the Local Government Land Use Control Enabling Act of 1974, C.R.S. §§ 29-20-101, *et seq.* C.R.S. § 29-20-102 (1) states: "The General

Assembly hereby finds and declares that in order to provide for planned and orderly development within Colorado and a balancing of basic human needs of a changing population with legitimate environmental concerns, *the policy of this state is to clarify and provide broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions*." (emphasis added). *See also Droste v. Board of County Comm'rs*, 159 P.3d at 605-06 (quoting statute); *Voss*, 830 P.2d 1065 (discussing C.R.S. §§ 29-20-101, *et seq.* and land use authority granted to local governments). The General Assembly has never amended Section 29-20-102(1) to prohibit local governments from regulating the impacts of oil and gas operations; there is no intent to impliedly preempt local government land use authority.

Following the 2007 amendments to the Act, the Commission amended its Rules. Rule 201 clarifies that the amended Rules are not intended to preempt local land use authority over oil and gas operations unless there is an *operational conflict* with the Act or the Rules, stating:

> Nothing in these rules shall establish, alter, impair, or negate the authority of local and county governments to regulate land use related to oil and gas operations, *so long as such local regulation is not in operational conflict with the Act or regulations* promulgated thereunder. Rule 201, 2 CCR 404-1 (emphasis added).

In 2012, the Commission amended Rule 303 to explain the relationship between the Commission's Permit-to-Drill and local permits and approvals: "The Permit-to-Drill shall be binding with respect to any provision of a local governmental permit or land use approval that is in *operational conflict* with the Permit-to-Drill." Rule 303a(2), 2 CCR 404 (emphasis added).

In the same rulemaking, the Commission stated: "These Setback Rules are not intended to alter, impair or negate local government authority to regulate matters of local concern, including land use, related to oil and gas operations, or to regulate matters of mixed state and local concern, provided such local regulations are not in *operational conflict* with these rules." CF, p. 273 (emphasis added). Finally, the Commission's Form 2A governing approvals to drill states: "Approval of this Assessment will allow for the construction of the below specified location; however, *it does not supersede any land use rules applied by the local land use authority*." https://cogcc.state.co.us/forms/PDF_Forms/Form2A-20090306.pdf (emphasis added).

In this case, the district court specifically held that a home rule city is not permitted "to enact an ordinance in an area of mixed state and local concern . . ." CF, p. 498. This ruling contradicts the intent of the General Assembly and the Commission's own Rules.

3. The District Court Adopted the Wrong Test For Implied Preemption.

The district court's implied preemption analysis is incorrect because it relied on cases unrelated to oil and gas regulation and misinterpreted *Voss*. The district court erroneously found implied preemption because the Moratorium "substantially impedes" [3] state law and regulations. CF, p. 501-02. The district court made this statement after discussing whether the City's ordinance authorizes what the state forbids, or forbids what the state authorizes, citing *Webb v. City of Black Hawk*, 295 P.3d 480 (Colo. 2013), a case that has nothing to do with oil and gas regulation. CF, pp. 498, 500, 503. The proper test for implied preemption, however, is whether there is a legislative intent to occupy an entire field "to the exclusion of all other regulation." *Bowen/Edwards*, 830 P.2d 1058.

The district court also erred in interpreting and applying *Voss*. In *Voss*, the Colorado Supreme Court *over-ruled* the Court of Appeals' implied preemption ruling. After going through the four factor analysis mentioned by the district court, *Voss* finds that oil and gas regulation is a matter involving local and state concerns, and concludes:

[3] "Impeding" state law is part of the operational conflicts test, not the test for implied preemption. Under the doctrine of implied preemption there is no need to analyze whether the local enactment materially impedes state law because all local regulation is excluded. *See Bowen/Edwards*, 830 P.2d at 1058.

> "We, however, have previously held that a home rule city can exercise control over outdoor advertising within its borders under its zoning authority only to the extent that the local ordinance does not *materially impede* the significant state goals expressed in the Outdoor Advertising Act, C.R.S. §§ 43-1-401 to 43-1-420. *National Advertising Co. v. Department of Highways*, 751 P. 2d 632, 635 (Colo. 1988) [emphasis added]. The same principle applies to a home rule city's exercise of land use authority over oil and gas development and production within its territorial limits." *Voss*, 830 P. 2d at 1068.

In *Voss* the "same principle" is the "operational conflict" test *Bowen/Edwards* applied to the county oil and gas regulations before the court in that case. *See Bowen/Edwards*, 830 P.2d at 1059 (also citing *National Advertising Co. v. Department of Highways*, 751 P. 2d at 635-36). Thus, there is no implied preemption of local land use authority over oil and gas development.

IV. The Moratorium Is Not Preempted As a Matter of Law Under the Operational Conflict Test.

A. The Moratorium Can Be Harmonized With the State Interest.

The Moratorium does not conflict with the state's interest. The legislative declaration of the Act describes the state's interest in oil and gas development:

(I) Foster "balanced development, production and utilization" of oil and gas while protecting "public health, safety, and welfare, including protection of the environment and wildlife resources,"

(II) Prevent "waste in the production and utilization of oil and gas;"

(III) Protect the "correlative rights of owners and producers in a common source or pool of oil and gas;" and

(IV) "Plan and manage oil and gas operations in a manner that balances development with wildlife conservation." C.R.S. § 34-60-102(1)(a).

None of these interests is inconsistent with the fact that hydraulic fracturing cannot be conducted within Fort Collins' jurisdiction for a limited period of time.

To begin with, the Moratorium and the Act are both concerned that oil and gas development be conducted in a manner that protects public health, safety, and welfare. The ballot initiative expressly states that the "best way to … ensure the 'protection of public health, safety and welfare, including protection of the environment and wildlife resources' is to take the time to "fully study the impacts" of hydraulic fracturing. CF, p. 341-42. In addition, there is no evidence that the temporary delay in hydraulic fracturing that might result from the Moratorium causes waste or interferes with correlative rights of any owner or producer. The Act itself recognizes that the rate of production may be limited to protect other interests: Each pool "may produce up to its maximum efficient rate of production subject to the prevention of waste, consistent with the protection of public health, safety and welfare, including protection of the environment and wildlife

resources." C.R.S. § 34-60-102(1)(b). Finally, courts already have established that the interest of local governments in land use regulation is not inherently contrary to the state's interests expressed in the Act. *See, e.g., Bowen/Edwards*, 830 P.2d at 1058.

B. The District Court Failed to Apply the Correct Operational Conflict Test.

The test to determine whether local land use legislation creates an operational conflict with Colorado oil and gas laws or regulations has been in effect since 1992: "State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest." *Bowen/Edwards*, 830 P.2d 1059. *See also Voss*, 830 P.2d at 1068. Where, as here, the challenge to the local legislation is purely facial, the Court must narrow the focus of inquiry. *Bowen/Edwards*, 830 P.2d 1054; *BDS*, 159 P.3d 778. "Any determination that there exists an operational conflict between the county regulations and the state statute or regulatory scheme, however, *must be developed on an ad-hoc basis under a fully developed record*." *Bowen/Edwards*, 830 P.2d at 1060; *BDS*, 159 P.3d at 778. In other words, whether a specific local enactment is preempted by operational conflict can only be determined on a case-by-case basis, under the particular facts of each case. This Court applied the same operational conflict test in *Frederick*, *La Plata County*, and *BDS*.

In this case, the district court never considered whether the Moratorium "materially impedes or destroys the state interest" because it applied the wrong operational conflict test. In its operational conflict analysis, the district court found that the Moratorium "is preempted because it conflicts with the application of the Act." CF, p. 502. The district court went on to rule that the Moratorium "conflicts" with the Act because it "prohibits what the Act expressly authorizes the Commission to permit." CF, p. 502. This conflicts test, however, was rejected in *Frederick*.

In *Frederick*, the Town relied on *Ray* and *National Advertising* to support its contention that its regulations did not authorize any act that the state prohibits so they did not create an operational conflict. The Court of Appeals rejected this approach by stating: "The Town's reliance on *Ray* and *National Advertising* for these propositions is misplaced. The operational conflicts test announced in *Bowen/Edwards* and *Voss* controls here." *Frederick*, 60 P.3d 765.

A year after *Frederick*, this Court reconfirmed the proper operational conflict test in *La Plata County*, when it invalidated a COGCC rule that stated: "The permit-to-drill shall be binding with respect to any conflicting local government permit or land use approval process." *La Plata County* held that the words "any conflicting" have a much broader meaning than "operationally

conflicting" and the only conflict that preempts local regulation is an "operational conflict" described in *Bowen/Edwards* and *Voss*. *La Plata County*, 81 P.3d at 1125. This Court invalidated the rule because it "would preempt local government actions beyond those that materially impede or destroy the state interest and would give oil and gas operators license to disregard local land use regulations. This result erodes the delicate balance between local interests and state interests set forth by *Bowen/Edwards*." *Id.*

Because the district court evaluated the City's legislation under the wrong test, it never analyzed whether the Moratorium materially impedes or destroys the state interest. Instead, the district court pointed to a "conflict" with the Commission's "authority to regulate 'shooting and chemical treatment of wells' along with a host of other means the Commission uses to comprehensively regulate the development and production of oil and gas wells in Colorado." CF, p. 502. Had the district court applied the correct test, it would have analyzed whether the Moratorium "materially impedes or destroys" the Commission's authority to regulate oil and gas, not whether the state "comprehensively regulates" oil and gas. The fact that a local government enacts an ordinance that applies to a particular aspect of oil and gas operations does not equate to an operational conflict. There is no "same-subject" preemption. *See BDS*, 159 P.3d 779.

Under the correct test, the district court also should have considered that the effect of the Moratorium is only temporary, as compared to the permanent effect of a total ban on oil and gas development. Instead, the district court concluded that the Moratorium "bans the use of hydraulic fracturing for five years" because it "prohibits" a technique that the Commission is "authorized to permit." CF, p. 502. Based on its improper conclusion that the Moratorium equates to a ban and its failure to apply the correct test, the district court never evaluated whether the state's interest in oil and gas development would be "materially impeded or destroyed" during the time the Moratorium will be in effect. Such an evaluation would have considered, among other facts, the fact that exploration and drilling activities besides hydraulic fracturing are not affected by the Moratorium, and that no permits to drill in the Fort Collins' field have been applied for or approved by the Commission during the course of the Moratorium. Without a fully-developed evidentiary record on these and other issues, the district court had no information about whether the "effectuation of the local interest" (*i.e.*, a time-out to evaluate the impacts of hydraulic fracturing) has any effect, material or otherwise, on the state's interest.

The district court also misconstrued the facts that it did consider. For example, the district court concluded that the Moratorium "eliminates the

possibility that Prospect Energy can use hydraulic fracturing within the City's boundaries during the remainder of the initial five-year term of its operator agreement with the City…" and concluded that there is an operational conflict "between what Prospect Energy contracted for, as permitted by state law, and what the five-year ban prohibits." CF, pp. 502-03.

In fact, the record shows that the operator agreement does not terminate before the end of the Moratorium. Paragraph 5 states that the agreement "shall be automatically renewed and extended for successive five (5) year terms, unless and until either Party elects to terminate the agreement…" CF, p. 314. The record also shows that Prospect Energy does *not* have approval from the Commission to conduct any exploration or drilling activities in Fort Collins that would be covered by the Moratorium. CF, pp. 292-93. When these undisputed facts are evaluated under the correct operational conflict test, this hypothetical impact to one operator is not sufficient evidence to prove that the Moratorium materially impedes the state's interest.

C. The Record Contains No Evidence to Support the District Court's Premature Ruling of Operational Conflict on Summary Judgment.

The record in this case contains no evidence that the operational effect of the Moratorium would materially impede or destroy the state interest. When faced with a similarly barren record, the Colorado Supreme Court in *Bowen/Edwards*

remanded the case to the trial court rather than rule on the operational conflict issue. In *Bowen/Edwards* the court determined that the plaintiff, a company engaged in oil and gas development in La Plata County, had standing to challenge the validity of the County land use regulations without first filing a permit application. *Bowen/Edwards*, 830 P.2d at 1055. The court found that the County requirements would "undoubtedly force Bowen/Edwards to spend additional time and money in seeking county approval of their present and imminent activities" and that the company had "made a threshold showing that the application of the county regulations could impede its ability to develop and produce oil and gas in La Plata County in conformity with the provisions of the [Act]." *Id.* at 1053. Nevertheless, these facts were not sufficient to show that the County regulations would materially impede or destroy the state's interest as a matter of law. *See id.* at 1060.

The evidence in the record in this case about the effect of the Moratorium on the state interest is even less tangible than the evidence in *Bowen/Edwards*. Here, the record contains no evidence that COGA or any other party has "present and imminent activities" that would be affected by the Moratorium. There is not even a "threshold showing" that the Moratorium would impede the plaintiff's ability to "develop and produce oil and gas." COGA has not identified any member who has

approval for or plans to use hydraulic fracturing to stimulate wells during the period of the Moratorium.

The unsupported allegations of the Complaint are either irrelevant to determining the operational effect of the Moratorium on the state's interest, or are contradicted by undisputed facts. For example, COGA alleges that the Moratorium prohibits COGA's members from drilling a permitted well to recover oil and gas, but the Moratorium on its face only applies to the fracking stage of oil and gas operations. COGA also alleges that the Moratorium denies its right "to promote the beneficial, efficient, responsible, and environmentally sound development, production and use of Colorado oil and gas in Larimer County" and "to promote the expansion of oil and gas supplies, markets and transportation infrastructure in Larimer County." CF, p. 7 (Complaint, ¶ 39). But the Moratorium applies only to "hydraulic fracturing and storage of its waste products within the City of Fort Collins or lands under its jurisdiction . . . ." CF, p. 341. It does not affect lands in Larimer County outside the City's jurisdiction. Importantly, the Moratorium has no effect upon on-going production of oil and gas in the City; the construction of transportation infrastructure; or pre-completion exploration, drilling, or other oil and gas development phases that precede hydraulic fracturing.

COGA alleges that it will be required to "increase member dues" in order to respond to the City's Moratorium through litigation and other means. CF, p. 7, (Complaint, ¶40.) Nothing in the record even hints that the State of Colorado has any interest in whether COGA charges lower or higher dues to its members. In the same vein, COGA alleges that the Moratorium adversely affects its ability to recruit new members, maintain current membership, and to sustain the financing needed to carry out is mission. CF, p. 7 (Complaint, ¶41). Again, this does not create an operational conflict because the state's interest is in oil and gas development, not COGA's membership numbers.

COGA also alleges that the Moratorium hinders its mission and economically affects some of its members' property rights. CF, p. 7 (Complaint, ¶42). The Act does not describe any state interest in supporting COGA's mission. There is nothing in the record describing any actual impact of the Moratorium on a particular member. Indeed, the record contradicts COGA's allegation about the Moratorium's effect on property rights: It is an undisputed fact that no person, whether a member of COGA or not, has applied for or received a permit to drill in the Fort Collins Field since the Moratorium went into effect. CF, p. 293 (Kadrich Affidavit, ¶ 14).

Similarly, COGA alleges that the Moratorium adversely affects COGA's and its members' plans for oil and gas development within Larimer County in conformity with the provisions of the Act. CF, p. 7 (Complaint ¶43). The record is devoid of any information about any plans to develop oil and gas resources either in Fort Collins or Larimer County, and the Moratorium does not apply to the plans of COGA or its members on lands outside of the City's jurisdiction.

Finally, COGA alleges that the Moratorium injures COGA members' present and/or future oil and gas activities within the City, including the drilling of wells within the City's territorial jurisdiction and the extension of horizontal wellbores under the City. CF, p. 8 (Complaint ¶44). As discussed above, the record contradicts this allegation because it is undisputed that no COGA member has applied for a permit from the Commission to conduct any oil and gas operations subject to the Moratorium since it was enacted, and the Moratorium does not cover phases of oil and gas development such as exploration and drilling that precede the hydraulic fracturing phase of operations.

The record shows that the only operational effect of the Moratorium on the state interest in oil and gas development is hypothetical. Prospect has not sought to intervene in this action and neither has the Commission. The mere *possibility* that a *hypothetical* hydraulic fracturing operation *might* be delayed for some unknown

period of time in the future is not enough to materially impede the state interest in developing oil and gas resources in Colorado. *See Frederick*, 60 P.3d at 766 (town permitting process "did not materially impede or destroy the state's interest in oil and gas development" even though it could "delay the drilling"); *Bowen/Edwards*, 830 P.2d at 1053. If Frederick's permit process did not cause an operational conflict in circumstances where the plaintiff operator had actually obtained a permit to drill, the court cannot find that an operational conflict exists on the bare factual record in this case.

D. Courts Have Found *Per Se* Operational Conflict Between Local Land Use Regulations and State Oil and Gas Requirements In Very Narrow Circumstances That Do Not Exist In This Case.

There are four cases where Colorado courts have considered whether a local enactment creates an operational conflict with oil and gas laws and rules. The Colorado Supreme Court remanded the case to the trial court in *Bowen/Edwards* to determine whether there was an operational conflict because there was insufficient evidence on the record to show that the La Plata County regulations were preempted by operational conflict as a matter of law. In *Voss*, the court ruled that a total ban created a *per se* operational conflict. Following these cases, this Court considered preemption challenges to local land use regulations for oil and gas development in *Frederick* and *BDS*.

In *Frederick*, the plaintiff was an oil and gas operator with Commission approval to drill within the town. The trial court upheld the town's permit requirement against the operator's preemption challenge, but invalidated some of the town's individual regulatory requirements as being in operational conflict with state oil and gas laws and regulations. *See Frederick*, 60 P.3d at 765. For each provision that the trial court invalidated, it carefully explained how the local regulation created an operational conflict with a specific state requirement. *Id*. This Court had a factual record regarding an actual operator that would be affected by the Town's regulations when it reviewed the trial court's rulings on operational conflicts.

In *BDS*, the operator began oil and gas operations without applying for or receiving a permit under the County oil and gas regulations. The trial court upheld the County's oil and gas land use permit requirement, but invalidated many of the individual regulatory provisions as creating *per se* operational conflicts. *BDS*, 159 P.3d 778. This Court upheld the trial court's operational conflict rulings on just three of the individual County regulatory requirements, but determined that the remaining fifteen of the challenged provisions did not, on their face, create operational conflicts, and remanded the case. *Id*. at 780–783.

In both *Frederick* and *BDS*, the party challenging the regulations had mineral interests and a state-approved permit to drill within the local jurisdiction. Also, there was at least some evidence on the record demonstrating that the operation of the local regulations would have an effect on oil and gas operations. Finally, this Court was able to refer to the trial court's detailed analysis of the operational conflict between local regulations and state requirements to determine whether or not the operational conflict ruling was justified. Here, there is no operator approved to drill within the City that would be affected by the Moratorium. There is no evidence or analysis in the record as to how the Moratorium would have any effect on oil and gas production and development, let alone materially impede or destroy the state interest during its limited duration. Under these circumstances, this Court should not affirm the district court's ruling that the Moratorium creates an operational conflict as a matter of law.

By concluding that the Moratorium is *per se* invalid, the district court's ruling means that moratoria are never available to local governments under any circumstances if they apply to oil and gas activities. This ruling effectively repeals by implication an essential aspect of the very land use authority that the Constitution, the General Assembly, the Commission, and the courts confirm belongs to local government. *See Welch v. George*, 19 P.3d 675, 679 (Colo. 2000)

("repeals by implication are not favored."). Thus, the district court's decision improperly "erodes the delicate balance between local interests and state interests set forth by *Bowen/Edwards*." *La Plata County*, 81 P.3d at 1125.

CONCLUSION

In this facial challenge, COGA has the burden of proving beyond a reasonable doubt that the Moratorium is preempted. COGA failed to meet this burden. The district court incorrectly ruled that the Moratorium is impliedly preempted by the Act in spite of Colorado statutes, case law, and Commission Rules stating that there is no implied preemption of local government land use authority to regulate the impacts of oil and gas development. The state has not occupied the entire field of oil and gas regulation leaving no room for local land use authority.

The district court incorrectly equated the City's temporary Moratorium with a complete ban on oil and gas development. Colorado courts recognize the distinction between a temporary moratorium and a permanent ban. Unlike a permanent ban, moratoria are an essential element of local land use authority that allow local governments to call a "time out" on development to study its impacts, and develop prudent responses. Numerous ongoing studies regarding the impacts of hydraulic fracturing are underway and will not be completed until 2016-2018.

Fort Collins also will conduct its own studies of potential local impacts and tailor its planning and regulatory response accordingly. The Moratorium gives the City time to respond appropriately without the risk of new oil and gas operations causing unforeseen impacts to its citizens before studies are completed.

The district court also erred in ruling that the Moratorium creates a *per se* operational conflict with the Act. The district court failed to analyze whether the Moratorium materially impedes or destroys the state's interest. This determination requires a fully developed evidentiary record yet COGA presented no evidence regarding the operational effect of the Moratorium on the state's interest in oil and gas development. A *hypothetical* operational conflict that *might* occur in the future is not enough to materially impede the state's interest in developing oil and gas resources. Without a fully developed evidentiary record, the district court should have denied COGA's motion for summary judgment.

Fort Collins requests this Court to reverse the district court's August 7 Order and enter judgment in favor of the City of Fort Collins.

Dated this 6th day of February, 2015.

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CITY OF FORT COLLINS

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CERTIFICATE OF SERVICE

I do hereby certify that on this 6th day of February, 2015, a true and correct copy of the foregoing pleading was served electronically via ICCES or e-mail, or placed in the U.S. Mail, addressed to the following persons:

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