DISTRICT COURT, LARIMER COUNTY, STATE OF COLORADO 201 LAPORTE AVENUE, SUITE 100 FORT COLLINS, CO 80521-2761 PHONE: (970) 494-3500 **Plaintiff:** Colorado Oil and Gas Association v. **Defendant:** City of Fort Collins	DATE FILED: August 7, 2014 CASE NUMBER: 2013CV31385 FOR COURT USE Case No. 13CV31385 Courtroom: 5B

Order Granting Plaintiff's Motion for Summary Judgment on First Claim for Relief and Denying Defendant's Cross-Motion for Summary Judgment

This matter comes before the Court on Colorado Oil and Gas Association's ("COGA") Motion for Summary Judgment on its First Claim for Relief and the City of Fort Collins's ("City") Cross-Motion for Summary Judgment. The Court has reviewed the Parties' briefs, along with the supporting documentation and the applicable law, and finds and orders:

COGA challenges the City's five-year moratorium on hydraulic fracturing arguing that the Oil and Gas Conservation Act, C.R.S. §§ 34-60-101 to 118, preempts the moratorium. The Parties do not have any disagreements on the material facts of the case.

Undisputed Facts

Fort Collins is a home-rule city, as permitted by Article XX of the Colorado Constitution. City's Ex. A. The City's Charter provides that the City may appropriately plan and zone areas within the City's boundaries. *Id.* at 8–9.

Pursuant to Article X of the City's Charter, "[t]he registered electors of the city shall have the power at their option to propose ordinances or resolutions . . . [and] to adopt or reject such ordinance or resolution at the polls." *Id.* at 29.

In the municipal election of November 5, 2013, the City's voters passed a citizen-initiated ordinance that placed a five-year moratorium (referred to as the "Ordinance" or "five-year ban") on using hydraulic fracturing in oil and gas wells and storing hydraulic fracturing waste products within the City's boundaries. City's Ex. D. ¶ 6; City's Ex. E at 3.

The City adopted the Ordinance upon certification of the November 5, 2013 election results pursuant to the City's Charter. Answer ¶ 30.

The Ordinance defines hydraulic fracturing as a well-stimulation process "used to extract deposits oil, gas, and other hydrocarbons through the underground injection of large quantities of water, gels, acids, or gases; sands or other proppants; and chemical additives . . . ." City's Ex. B at 4, § 2.

The Ordinance finds that the "people of Fort Collins seek to protect themselves from the harms associated with hydraulic fracturing, including threats to public health and safety, property damage and diminished property values, poor air quality, destruction of landscape, and pollution of drinking and surface water." *Id.* The stated purpose of the Ordinance is to allow for the study of impacts of hydraulic fracturing on the citizens of the City. *Id.* at 4, § 1.[1]

By its terms, the Ordinance will expire on August 5, 2018. *See* Ex. B §§ 3, 4.

Hydraulic fracturing is used in "virtually all oil and gas wells" in Colorado. COGA's Ex. 2 (Colorado's Oil and Gas Conservation Commission: Information on Hydraulic Fracturing).

COGA claims that the Ordinance impedes its and its members' ability to "promote, develop, and produce oil and gas in Larimer County in conformity with the Oil and Gas Conservation Act." Compl. ¶ 37. Also, it claims that the Ordinance adversely affects oil and gas production because it prohibits "COGA's members and/or operators from drilling a permitted well to recover oil and gas." *Id.* ¶ 38. Finally, COGA states that the Ordinance "adversely affects and 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." *Id.* ¶ 44.

In May 2013, Prospect Energy, LLC (a member of COGA) signed an operator agreement with the City to allow it to use hydraulic fracturing in wells within the City's boundaries. City's Ex. C. The initial term of the operator agreement is five years, ending on May 29, 2018. *Id.* at 8, ¶ 5. Thus the Ordinance and the operator agreement are in direct conflict.

Based on these facts, the Court finds that COGA has established standing.[2]

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[1] As a result of the passage of the Ordinance, the City has engaged its staff to retain consultants to evaluate the impacts of hydraulic fracturing and the storage of hydraulic fracturing's waste products within the City. City's Ex. D ¶¶ 4–9.

[2] The City has not argued that COGA lacks standing, though the Court addresses it here. To establish standing, one of COGA's members need not apply for, and be denied, a permit to use hydraulic fracturing on an oil or gas well. "Rather, the injury-in-fact element of standing is established if the regulatory scheme 'threatens to cause injury to the plaintiff's present or imminent activities.'" *Id.* at 1017, quoting

COGA and the City each have moved for summary judgment. COGA argues that the Oil and Gas Conservation Act preempts the five-year ban. The City disagrees, arguing that COGA has not shown the five-year ban is preempted and that its power to impose moratoria allows the five-year ban to exist regardless of the Oil and Gas Conservation Act.

Applicable Law

Summary Judgment

C.R.C.P. 56(c) provides that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Similarly, C.R.C.P. 56(h) provides that "[i]f there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question."

On summary judgment, "[t]he nonmoving party is entitled to all favorable inferences that may be drawn from the undisputed facts, and all doubts as to whether a triable issue of fact exists must be resolved against the moving party." *AviComm, Inc. v. Colorado Pub. Utilities Comm'n*, 955 P.2d 1023, 1029 (Colo. 1998).

Presumptions

The Court must presume that government regulations are valid. *Bd. of Cnty. Comm'rs of Jefferson Cnty. v. Mountain Air Ranch*, 192 Colo. 364, 369 (1977). Accordingly, the Court must presume that both the Oil and Gas Conservation Act and the Ordinance are valid.

The Home Rule Amendment and Preemption of Municipal Ordinances

Section six of Article XX of the Colorado Constitution provides home-rule cities "the full right of self-government" on local and municipal matters. Therefore, a home-rule city's ordinance on a local matter "shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith." Colo. Const. art. XX, § 6

Consistent with Article XX, Colorado Courts have held the "exercise of zoning authority for the purpose of controlling land use within a home-rule city's municipal

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Bd. of County Comm'rs v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1053 (Colo. 1992). The Court finds that Prospect Energy's operator agreement with the City shows sufficient intention of a COGA member to use hydraulic fracturing on an oil or gas well within the City's boundaries. Imposition of the five-year ban therefore threatens to cause injury to Plaintiff's imminent activities.

border is a matter of local concern." *Voss v. Lundvall Bros., Inc*., 830 P.2d 1061, 1064 (Colo. 1992) (citing cases).

Article XX, however, does not permit a home-rule city to enact an ordinance in an area of mixed state and local concern, or in an area of statewide concern, that intrudes on state law. *Webb v. City of Black Hawk*, 2013 CO 9, ¶ 18. Rather, Colorado courts hold that a local ordinance that infringes on a matter of mixed state and local concern, or a matter of statewide concern, may be preempted in three possible ways: express preemption, implied preemption, and operational conflict. The state legislature may preempt a local ordinance by expressly indicating preemption over local laws in a statute. *Bd. of Cnty. Comm'rs, La Plata Cnty. v. Bowen/Edwards Associates, Inc*., 830 P.2d 1045, 1056 (Colo. 1992) (referred to as "*Bowen/Edwards*"). The legislature may impliedly preempt a local ordinance "if the state statute impliedly evinces a legislative intent to occupy a given field by reason of a dominant state interest." *Id.* at 1056-57. And a local ordinance may be preempted where giving the ordinance operational effect would conflict with the operation of a state statute. *Id.* at 1057.

To aid a court in determining whether a home-rule city's ordinance is preempted, the Colorado Supreme Court announced a four-part examination to determine the state's interest in the relevant matter. Court are to look at "whether there is a need for statewide uniformity of regulation; whether the municipal regulation has an extraterritorial impact; whether the subject matter is one traditionally governed by state or local government; and whether the Colorado Constitution specifically commits the particular matter to state or local regulation." *Voss*, 830 P.2d at 1067, and quoted in *Colorado Min. Ass'n v. Bd. of Cnty. Comm'rs of Summit Cnty*., 199 P.3d 718, 723 (Colo. 2009).

Although no Colorado appellate court has published an opinion analyzing preemption in regards to a moratorium, the analysis does not differ from that of a permanent ordinance. *See e.g., City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1168, (2009) (using the well-settled "principles governing state statutory preemption" to determine whether Claremont's moratorium on marijuana dispensaries was preempted); *see also Plaza Joint Venture v. City of Atl. City,* 174 N.J. Super. 231, 237-39 (App. Div. 1980) (in determining the validity of Atlantic City's moratorium on apartment conversion, the court used New Jersey's traditional preemption analysis, including determining if "the local regulation conflicts with the state statutes"); *City of Buford v. Georgia Power Co*., 276 Ga. 590, 590 (2003) (in determining whether Buford's moratorium on construction of electric substations the court used Georgia's standard express/implied preemption analysis). A moratorium ordinance and a permanent ordinance can both be preempted.[3]

[3] A division of the Colorado Court of Appeals has examined a moratorium in the takings context, in *Williams v. City of Cent.*, 907 P.2d 701 (Colo. App. 1995). The court's analysis is inapplicable to the instant case given that *Williams* did not determine the validity of Central City's moratorium.

The Oil and Gas Conservation Act

The Oil and Gas Conservation Act ("Act") created the Oil and Gas Conservation Commission ("Commission"), which is vested with the authority to enforce provisions of the Act, and to adopt and enforce regulations pursuant to the Act. C.R.S. §§ 34-60-104, 105. The Commission has the authority to regulate throughout the state: the drilling, producing, and plugging of wells and all other operations for the production of oil or gas; the shooting and chemical treatment of wells; the spacing of wells; the operation of oil and gas wells so as to prevent and mitigate significant adverse environmental impacts. *Id.* § 34-60-106(2). The Commission also has the authority to allocate production from an oil or gas pool on an equitable basis amongst multiple land owners. *Id.* § 34-60-106(3).

Pursuant to the Act, the Commission has adopted comprehensive regulations covering drilling, developing, producing and abandoning wells (300 Series), safety (600 Series), aesthetics and noise control (800 Series), waste management (900 Series), protection of wildlife (1200 Series), among other areas. COGA's Ex. A.

The purposes of the Oil and Act Conservation Act are manifold, and include: fostering the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado; protecting and enforcing the coequal and correlative rights of owners and producers in a common source or pool of oil and gas; and planning and managing oil and gas operations in a manner that balances development with wildlife conservation in recognition of the state's obligation to protect wildlife resources and the hunting, fishing, and recreation traditions. *Id.* § 34-60-102.

Pertinent Colorado Supreme Court Cases Regarding Preemption

In 1992, the Colorado Supreme Court issued two cases deciding the validity of two local governments' restrictions on oil and gas operations: *Bowen/Edwards* and *Voss*.

In *Bowen/Edwards*, the court held that a local government may enact land-use restrictions on oil and gas operations so long as they do not impermissibly conflict with the Oil and Gas Conservation Act. 830 P.2d at 1058. The court noted that if the regulations "impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation," those regulations could impermissibly conflict with the state interest. *Id.* at 1059–60.[4]

[4] The 2007 Amendments to the Oil and Gas Conservation Act are consistent with this holding. Codified at § 34-60-128(4), the Act states that: "Nothing in this section shall establish, alter, impair, or negate the authority of local and county governments to regulate land use related to oil and gas operations." Similar language is contained in § 34-60-127(4)(c).

In *Voss*, the Colorado Supreme Court held that the Colorado Oil and Gas Act preempted Greeley's permanent ban on the drilling of any oil and gas wells within the city's boundaries. *Voss*, 830 P.2d at 1068. The court reasoned that the Oil and Gas Conservation Act preempted the home-rule city's ban on the drilling of any oil or gas wells because the ban "substantially impedes the interest of the state in fostering" efficient and equitable oil and gas production. *Id.*

The court arrived at this conclusion by using the four-factor examination described in *Voss* (and quoted above), finding the field of oil and gas regulation to be an issue of mixed local and state interest. The court detailed: how oil and gas regulations should be uniform throughout the state because the pressure characteristics of each pool of oil and gas require wells to be drilled in a particular pattern, and not necessarily in-line with a city's or county's boundaries; that allowing a city to ban oil and gas development may increase development costs outside of the city boundaries, making development infeasible; that oil and gas development and regulation has traditionally been a matter of state control; and that the Colorado Constitution neither commits the development and regulation of oil and gas to either state or local control. *Id.* at 1067–68. Based on this analysis, the court held that Colorado's "interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is sufficiently dominant to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits." *Id.* at 1068.

In 2009, the Colorado Supreme Court held that the Mined Land Reclamation Act ("MLRA") impliedly preempted Summit County's ban on the use of cyanide and other toxic chemicals for mineral processing because the state legislature "expressed a sufficiently dominant interest by assigning to the [Mined Land Reclamation] Board the field of the use of chemicals and other toxic and acidic reagents in mining operations for mineral processing." *Colorado Min. Ass'n*, 199 P.3d at 733. Additionally, the court held MLRA preempted the ban because "the county bans what the Board may authorize." *Id.* at 733-34.

Most recently, in *Webb v. City of Black Hawk*, the Colorado Supreme Court held that a state law requiring a "bicycle prohibition on city streets [to] be accompanied by suitable alternate bikeways" preempted Black Hawk's ban on those using bicycles on the city's streets. 2013 CO 9, ¶ 46. The court used the four-factor examination described above to determine that both the state and localities have an interest in regulating bicycles on roadways. *Id.* ¶¶ 29–42. The Court then simply stated: "The test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* ¶ 43. Finally, the court held that because Black Hawk's ordinance "negate[d] a specific provision the General Assembly [] enacted in the interest of uniformity" on an issue of mixed state and local concern, state law preempted the city's ban. *Id.* ¶ 45.

Analysis

Express Preemption

The Act does not expressly preempt all local regulation of drilling. *See Bowen/Edwards*, 830 P.2d at 1056. However, the five-year ban on the use of hydraulic fracturing within the boundaries of the City of Fort Collins is preempted by the Colorado Oil and Gas Conservation Act for two reasons: the five-year ban substantially impedes a significant state interest and the ban prohibits what state law allows.

Implied Preemption

The Court finds that the City's Ordinance banning all hydraulic fracturing for five years is impliedly preempted by the Act.

The five-year ban on hydraulic fracturing substantially impedes the state's significant interest in fostering efficient and equitable oil and gas production for the same reasons that Greeley's ban in *Voss* substantially impeded the state's interest in oil and gas production.

The state's interest in the field of oil and gas development and production has not change materially since the Colorado Supreme Court issued *Voss;* it continues to have a significant interest therein because the Oil and Gas Conservation Act confirms it by authorizing the Commission to comprehensively regulate the production and development of oil and gas. *See* C.R.S. §§ 34-60-104 to 106. Indeed, the Act has remained largely unchanged since 1992 and the City points to no change in the Act that would materially affect the state's interest. The four-factor analysis of the state's interest in oil and gas regulation announced in *Voss* remains applicable here: the state requires uniformity in the regulation of oil and gas development; municipal regulation would have a negative extraterritorial impact; and though the Colorado Constitution does not commit the field of oil and gas development to the state or localities, the field has traditionally been an area of state control. *Voss,* 830 P.2d at 1067-68.

Next, the Court determines whether the five-year ban substantially impedes the state's interest in oil and gas development and production. Here the only differences between the ban in *Voss* and the City's five-year ban are: 1) the Ordinance bans hydraulic fracturing, rather than all oil and gas drilling, and 2) the City's ban expires after five years. Neither of these facts negates the impact on the state's interest in oil and gas production and development.

First, the City's five-year ban effectively eliminates the possibility of oil and gas development within the City. This is so because hydraulic fracturing is used in "virtually all oil and gas wells" in Colorado.[5] COGA's Ex. 2. To eliminate a technology that is used

[5] This claim was not disputed by the City.

in virtually all oil and gas wells would substantially impede the state's interest in oil and gas production.

Clearly, the Act does not prohibit any regulation by a municipality. The *Voss* court stated, " . . . [W]e do not mean to imply that [the home-rule city] is prohibited from exercising any land-use authority over those areas of the city in which oil and gas activities are occurring or are contemplated." *Voss*, 830 P.2d at 1068.

In this case however, the Ordinance does not attempt to exercise any land-use authority that is harmonious with the Act. The Act is a total ban.

Second, although the Ordinance expires after five years, the preemption analysis does not change. A city ordinance is preempted by state law regardless of how long that ordinance has legal effect. *See e.g., City of Buford ,* 276 Ga. at 590. A city can no more pass a preempted ordinance that lasts for five years than it can pass a preempted ordinance that lasts indefinitely.

Therefore, because the City's five-year ban substantially impedes the state's significant interest in oil and gas development and production, it is preempted.

Operational Conflict

If the Court did not find the Ordinance to be impliedly preempted for the reasons stated above, it would still find that the Ordinance is preempted because it conflicts with the application of the Act. *See Bowen/Edwards*, 830 P.2d at 1059.

The City's five-year ban conflicts with the Oil and Gas Conservation Act because it prohibits what the Act expressly authorizes the Commission to permit. Section 34-60-106(2)(b) gives the Commission the authority to regulate the "shooting and chemical treatment of wells," along with a host of other means to comprehensively regulate the development and production of oil and gas wells in Colorado.

The City does not and cannot dispute the fact that hydraulic fracturing is a process of chemically treating an oil or gas well. Hydraulic fracturing is a well-stimulation process that uses "the underground injection of large quantities of water, gels, acids, or gases; sands or other proppants; and *chemical additives* . . . ," to extract oil and gas. City's Ex. B at 4, § 2 (emphasis added). Because the Ordinance bans the use of hydraulic fracturing for five-years, it necessarily prohibits a technique to chemically treat wells that the Commission is expressly authorized to permit. Indeed, the Commission has promulgated elaborate rules designed so that the process of hydraulic fracturing is used in accordance with the purposes of the Act. COGA's Ex. 1.

Additionally, the five-year ban 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 because the operator agreement

ends on May 29, 2018 (prior to the five-year ban's end on August 5, 2018). *See* City's Ex. C at 8, ¶ 5; City's Ex. B at 4, §§ 3, 4. This situation creates an operational conflict between what Prospect Energy contracted for, as permitted by state law, and what the five-year ban prohibits.

A local regulation that conflicts with state law on an issue of mixed local and state concern must fail. For example, a locality cannot impose "technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or . . . impose safety regulations or land restoration requirements contrary to those required by state law or regulation." *Bowen/Edwards*, 830 P.2d at 1060; *see also Colorado Min. Ass'n*, 199 P.3d at 733 (holding that Summit County could not ban the use of cyanide and other chemical reagents in mineral extraction while the MLRA allowed the Mined Lands Reclamation Board to authorize the use of those chemicals in mineral extraction).

Certainly if the City cannot pass conflicting technical conditions, safety regulations or the like, it cannot impose a total ban on hydraulic fracturing while the Act authorizes its use. The five-year ban therefore "forbids what state statute authorizes." *Webb*, 2013 CO 9, ¶ 43.

Conclusion

Based on the foregoing, the City of Fort Collins's five-year ban on the use of hydraulic fracturing and the storage of its waste products within the City's boundaries is preempted by the Oil and Gas Conservation Act.

COGA's Motion for Summary Judgment on the First Claim for Relief is Granted. Defendant's Cross-Motion for Summary Judgment is Denied.

Dated: August 7, 2014.

BY THE COURT:

Gregory M. Lammons
District Court Judge