DISTRICT COURT, LARIMER COUNTY, COLORADO 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521	DATE FILED: November 27, 2014 4:46 PM FILING ID: 1798E3638FB0425 CASE NUMBER: 2013CV31385
Plaintiff: COLORADO OIL & GAS ASSOCIATION v. **Defendant:** CITY OF FORT COLLINS, COLORADO	▲ **COURT USE ONLY** ▲
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COLORADO OIL & GAS ASSOCIATION'S COMBINED BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE CITY'S CROSS-MOTION

The Colorado Oil & Gas Association ("COGA") submits this combined brief as a reply in support of COGA's April 18, 2014 Motion for Summary Judgment and in response to Defendant City of Fort Collins' (the "City") Combined Brief in Response to Plaintiff's Motion for Summary Judgment and in Support of City's Cross Motion for Summary Judgment (the City's "Combined Brief").

EXHIBIT C

I. INTRODUCTION

The City focuses its entire Combined Brief on attempting to rebut positions that COGA has not taken in this litigation. The City argues, in order, that moratoria can be a valid land use measure in the right circumstances, that local governments have a role in the regulation of oil and gas and hydraulic fracturing operations, and that the operational conflict test is applicable when specific oil and gas regulations are challenged under a preemption analysis.

COGA disputes none of this. COGA admits that moratoria can be a valid land use measure, but disagrees that moratoria can be used to ban an activity in which the State has a significant interest, as it does in the regulation of hydraulic fracturing. COGA agrees with the City that local governments have some role in regulating oil and gas activities, but local governments may not ban these activities either permanently or temporarily, and certainly not for five years "without exemption or exception," as the City did in its moratorium. COGA recognizes that the *Bowen/Edwards* operational conflict test, relied upon by the City, is applicable when specific oil and gas regulations are challenged under a preemption analysis. No court, though, has held that this test applies in a ban or moratorium context when a home-rule government is attempting through a moratorium or a ban to nullify the entirety of the State's regulatory authority.

While the City devotes its energy to rebutting these "straw man" positions, it ignores entirely COGA's detailed analysis of the conflict test used consistently by Colorado courts from at least 1941 through *Webb v. Black Hawk* last year to address whether laws passed by home rule municipalities are preempted by State law. In *every* one of these decisions examining an area where both the State and local governments have an interest, Colorado courts have examined whether "the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes" to determine whether State law preempts the local law. *Webb v. City of*

Black Hawk, 295 P.3d 480, 492 (Colo. 2013); s*ee also* § III.C *infra*. The City also completely ignores the host of cases cited by COGA in its Motion for Summary Judgment establishing that the regulation of oil and gas is at least a matter of mixed state and local concern, and is not a matter of purely local law. *See* COGA's Summ. J. Br. at 10–11. This precedent leaves no doubt that the City's five-year ban on hydraulic fracturing is preempted by the State's regulations governing this area.

While the City *does* address COGA's argument that the moratorium is impliedly preempted, it does not do so convincingly. The City distorts the language in *Voss v. Lundvall Brothers, Inc.*, 830 P.2d 1060 (Colo. 2002), ignoring the fact that *Voss* clearly holds that the "state's interest in efficient oil and gas development 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 well within the city limits." 832 P.2d at 1068 (emphasis added). The City also attempts to brush off as "mere dicta" the holding in *Colorado Mining Association v. Board of County Commissioners*, 199 P.3d 718, 725 (Colo. 2009), even though that decision relied upon and discussed *Voss* extensively, holding that the "sufficient dominancy test," as articulated in *Voss* and other decisions "is one of several grounds for implied state preemption of a local ordinance." *Id.*

Under both the *Webb* conflict test and the *Voss* implied preemption analysis, the Ordinance's five-year bans on the use of hydraulic fracturing and the storage of hydraulic fracturing wastes is preempted and therefore unenforceable. COGA requests the Court to grant its summary judgment motion and deny the City's cross motion for summary judgment.

II. PROPER STANDARD OF REVIEW

A. SUMMARY JUDGMENT IS APPROPRIATE WHEN THE FACTS ARE NOT IN DISPUTE.

Summary judgment is appropriate when there is no dispute of facts material to the rendering of judgment. *See, e.g., W. Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002) ("Summary judgment is appropriate when the pleadings and supporting documentation demonstrate that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law."); *Edwards v. Price*, 550 P.2d 856, 858 (Colo. 1976) ("A summary judgment is proper, even when factual matters are involved, if the record indicates that the factual matters are not in dispute."). "[T]he existence of a difficult or complicated question of law, when there is no issue as to the facts, is not a bar to summary judgment." *Jones v. Dressel*, 623 P.2d 370, 373 (Colo. 1981).

Where (as here) the material facts are all undisputed, the issues for summary judgment are pure questions of law.[1] *See Frontier Exploration, Inc. v. Blocker Exploration Co.*, 709 P.2d 39, 41 (Colo. Ct. App. 1985) (affirming grant of summary judgment and holding that, because facts were not in dispute, question of existence of partnership was question of law on summary judgment), *aff'd in part, disapproved in part on other grounds*, 740 P.2d 983 (Colo. 1987); *see also W. Elk Ranch*, 65 P.3d at 481 (*all* summary judgments are rulings of law in the sense that they may not rest on the resolution of disputed facts). Because the City has identified *no* material

[1] COGA admits the City's undisputed facts for purposes of summary judgment, except that COGA disputes whether, as the City claims, it "will" amend its existing subarea plan for the northern and northeastern parts of the City. City's Combined Br. at 8, Undisp. Fact 17. Nothing in the Ordinance mentions that master planning process, and it seems plausible that the City's new-found interest in that planning effort is a litigation tactic to try to save the Ordinance by attempting to comply with the requirement that a valid moratorium be part of a master planning process. *See Droste v. Bd. of Cnty. Comm'rs of Cnty. of Pitkin*, 159 P.3d 601, 607 (Colo. 2007). Regardless, whether the City indeed intends to amend its subarea plan is not material to whether COGA's summary judgment motion should be granted because the Ordinance is nonetheless preempted by the State's interest in regulating oil and gas operations.

facts that are in dispute, there is no barrier to this Court's determination of the critical legal issues—whether the state has an interest in oil and gas development generally, and specifically in hydraulic fracturing of wells, and whether the City's five-year ban on hydraulic fracturing is preempted—or to its issuing of summary judgment in COGA's favor.

B. THE EVIDENTIARY STANDARDS CITED BY THE CITY ARE INAPPLICABLE IN A PREEMPTION ANALYSIS.

1. COGA need not prove its case "beyond a reasonable doubt."

The City first argues that that "Government regulations and enactments are presumed to be valid, and the party challenging them assumes the burden of proving the asserted invalidity beyond a reasonable doubt." City's Combined Br. at 11. No Colorado case has ever applied the City's proposed "beyond a reasonable doubt" standard to resolve state preemption issues.[2] Rather, the "beyond a reasonable doubt" standard applies only to *constitutional* review of otherwise validly enacted statutes and ordinances and not to preemption analysis. *See, e.g., Trinen v. City & Cnty. of Denver*, 53 P.3d 754, 758–60 (Colo. Ct. App. 2002) (applying "beyond a reasonable doubt" standard to constitutional review, but not in preemption analysis); *Lot Thirty-Four Venture, L.L.C. v. Town of Telluride ("Telluride I")*, 976 P.2d 303, 307 (Colo. Ct. App. 1998) (same), *aff'd*, 3 P.3d 30 (Colo. 2000) *("Telluride II")*; *U.S. W. Commc'ns, Inc. v. City of Longmont*, 924 P.2d 1071, 1079–80 & 1084 (Colo. Ct. App. 1995) (same), *aff'd*, 948 P.2d 509 (Colo. 1997); *Cherokee Water & Sanitation Dist. v. El Paso Cnty.*, 770 P.2d 1339, 1341–42 (Colo. Ct. App. 1988) (same).

[2] The City cites *Sellon v. City of Manitou Springs*, 745 P.2d 229, 232 (Colo. 1987) for the proposition that government enactments of any sort are presumed valid and a party challenging them on any grounds must prove their invalidity "beyond a reasonable doubt." *See* City's Combined Br. at 11. But *Sellon* did not involve a preemption claim, and explicitly limited the "beyond a reasonable doubt" standard to constitutional challenges. *Id.* ("Thus, a party challenging a zoning ordinance *on constitutional grounds* assumes the burden of proving the asserted invalidity beyond a reasonable doubt.") (emphasis added).

The reason that this heightened standard does not apply in preemption cases is because the "'purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government.'" *Colo. Min. Ass'n.*, 199 P.3d at 723 (citing *Bd. of Cnty. Comm'rs of La Plata Cnty. v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1055 (Colo. 1992)). Under the City's proposed standard, the outcome of a court's preemption analysis would depend entirely on which party brought the claim because the state statutes and regulations under which a local regulation might be preempted must *also* be presumed to be valid. In this case, COGA is entitled to a presumption that the Colorado Oil and Gas Conservation Act and the COGCC regulations are valid at least to the same extent the Ordinance is presumed valid, and the only question before the Court is the legal question of whether the state laws preempt the Ordinance. That determination does not depend on proof of any fact beyond a reasonable doubt by either COGA or the City.

2. The Court need only evaluate one set of circumstances: the City's imposition of a five-year ban on hydraulic fracturing and the storage and disposal of waste.

The City also asserts that COGA must prove that "state law or regulation would preempt any possible set of conditions that the City could place on its operations." City's Combined Br. at 11. But COGA need only show either that the City's Ordinance is impliedly preempted or, in the event the Court determines that the regulation of hydraulic fracturing is a matter of mixed state and local concern, that the Ordinance conflicts with the COGCC's regulations permitting hydraulic fracturing. The City's distinction between facial and "as applied" challenges, and the corresponding assertion that COGA must prove that "no set of circumstances exists under which the moratorium would be valid," is inapplicable in the context of the City's outright ban on hydraulic fracturing, which necessarily places only one "possible set of conditions" on hydraulic fracturing operations in the City: it forbids them entirely.

Colorado cases have rarely applied a "no set of circumstances" test in the preemption context, because it generally applies only to *constitutional* challenges.[3] *See* § III.III.C. *infra* (in which none of the Colorado preemption cases cited employed a "beyond a reasonable doubt" standard or the "no set of circumstances" test). Courts that have considered the test have done so only in evaluating permitting requirements. For example, in *Board of County Commissioners of Gunnison County v. BDS International, LLC*, the court held that where a party challenging specific permitting regulations has not applied for a permit, the court must interpret the permitting requirements to harmonize with state law if possible. 159 P.3d 773, 779 (Colo. Ct. App. 2006). Here, COGA does not challenge permitting requirements. Nor can the Ordinance be "harmonized" with state regulations because, as discussed in more detail below, it prohibits what the state allows. *See* § III.B. *infra*.

3. Bans on land uses or activities, like the City's Ordinance, are subject to increased scrutiny.

Bans on the use of land for a particular activity, such as the City's five-year ban on hydraulic fracturing, are subject to heightened scrutiny in preemption analysis. "Courts examine with *particular scrutiny* those zoning ordinances that ban certain land uses or activities instead of delineating appropriate areas for those uses or activities." *Colo. Min. Ass'n*, 199 P.3d at 730 (emphasis added). This pronouncement in *Colorado Mining Association* was made in the specific context of a preemption challenge to a local land use regulation. In contrast, the City's

[3] The City cites to *United States v. Salerno*, 481 U.S. 739, 745 (1987), in support of "no set of circumstances test," City's Combined Br. at 11, yet *Salerno* is inapposite because it was not a preemption case. It involved only facial challenges under the Fifth and Eighth Amendments to the U.S. Constitution to a federal bail reform act authorizing arrestees not charged with crimes to be detained in jail in certain circumstances. *See* 481 U.S. at 742 & 745. Moreover, *Salerno* did not involve any sort of "moratorium" and never addresses this issue anywhere in the opinion. *Compare* City's Combined Br. at 11 (purportedly quoting *Salerno* as applying the "no set of circumstances" test to a "moratorium") with *Salerno*, 481 U.S. at 745 (applying test in constitutional challenge to Bail Reform Act).

assertion that moratoria are subject to less judicial scrutiny than other regulations, City's Combined Br. at 11, is based on *dicta* from a case involving only a takings claim in which the validity of the local ordinance was never challenged. *See id.* (citing *Williams v. Central City*, 907 P.2d 701, 706 (Colo. Ct. App. 1995) (validity not challenged where moratorium had been lifted before suit was filed)).[4] The fact that the City's ban may expire, unless renewed, in five years does not warrant any lesser scrutiny.

III. THE ORDINANCE IS AN UNLAWFUL BAN ON ACTIVITY IN WHICH THE STATE HAS AN EXPRESS AND DOMINANT INTEREST AND, AS SUCH, CANNOT BE UPHELD AS A PURELY LOCAL LAND-USE MORATORIUM.

A. THE ORDINANCE IS NOT A REGULATION OF A PURELY LOCAL MATTER AND IS SUBJECT TO PREEMPTION BY CONFLICTING STATE LAW.

Unless granted additional authority by the state, home-rule cities have plenary authority only in purely local matters. *See* § C. *infra*. The City has identified no constitutional or statutory provision, other than the City's generic home-rule authority regarding land-use matters that authorizes the imposition of the Ordinance.

Contrary to the City's assertions, the Ordinance is *not* a traditional zoning measure and cannot be upheld on the basis of the City's zoning or land-use authority, which is itself subject to preemption. *See, e.g., Nat'l Adver. v. Dept. of Highways of State of Colo.*, 751 P.2d 632, 635 (Colo. 1988) (court recognizes that control of land use through zoning is a matter of local

[4] In *Williams*, the court noted that, *in the takings context*, regulations that are temporary by design are treated differently from permanent regulations that are later invalidated. 907 P.2d at 706. The court held that compensation must be paid for the temporary period during which a purportedly permanent but invalid regulation is in place, even though it is later invalidated, to "punish[] the government for its 'lawless' behavior in order to discourage future unconstitutional regulation as a matter of public policy." *Id.* The court also held that intentionally temporary regulations are not subject to the same scrutiny because, *in the takings context*, those public policy concerns are not present. *Id.* These public policy considerations have no bearing on this Court's preemption analysis, because preemption analysis does not involve evaluating the cost of an invalid regulation and is not intended to "punish" a "lawless" government body.

concern, yet denies that control of outdoor advertising signs is a matter of *purely* local concern and preempts local sign ordinance). Similarly, the Ordinance is not insulated from preemption analysis by the Local Government Land Use Control Enabling Act ("LUCEA"), Colo. Rev. Stat. § 29-20-101 *et seq*. Nothing in LUCEA confers authority on the City to ban—either temporarily or permanently—hydraulic fracturing, and that Act only allows general development moratoria for a short time in connection with the formulation of a statutorily required master development plan, which is not applicable here. *See Droste v. Bd. of Cnty. Comm'rs of the Cnty. of Pitkin*, 159 P.3d 601, 608 (Colo. 2007); *Colo. Min. Ass'n*, 199 P.3d at 733 (LUCEA § 29-20-107 codifies rule that other land-use requirements provided by state law, such as provisions of mining regulations authorizing state agency to regulate use of particular chemicals, control over local regulations) (citing *Droste*). Indeed, Colorado courts have routinely determined that a home-rule municipality's ordinance is preempted by state law, despite the municipality echoing time and again the City's exact argument that the local ordinance is not preempted under state law because of its broad land-use and zoning authority under LUCEA. *See* § C *infra*.

Additionally, the City has identified no facts—material or otherwise, disputed or undisputed—that would support a conclusion that the State has no interest in the regulation of oil and gas activities. Instead, the City attempts to cast the Ordinance as an ordinary land-use moratorium of the sort employed regularly by municipalities to aid in development planning. *See* City's Combined Br. at 13–15.

COGA does not dispute that land-use moratoria may usefully be employed in the planning context. But the Ordinance differs from other moratoria the City discusses in one key

respect never addressed by the City: it intrudes upon a confirmed state interest.[5] Indeed, the Supreme Court has recognized that the state has a significant interest in mineral development and in the protection of human health and the environment, and that the exercise of local land use authority "compliments the exercise of state authority but cannot negate a more specifically drawn statutory provision the General Assembly has enacted." *Colo. Min. Ass'n,* 199 P.3d at 730. COGA demonstrated the state's overriding interest in oil and gas activities in its opening brief, and the City is simply silent on this issue. *See* COGA's Summ. J. Br. at 10–11. The great majority of the City's brief hinges on the implicit—and incorrect—argument that the Ordinance is a land-use enactment and that local land-use laws cannot be impliedly or operationally preempted, even if they operate to ban an oil and gas well-completion technique that the state allows.

The City's premise seeks to turn the preemption doctrine on its head. Some land-use measures are purely local, and others are not. And while home-rule cities have traditionally enjoyed broad authority to enact purely local land-use regulations without regard to conflicting

[5] The City asserts that COGA "does not challenge the authority of the City to enact a moratorium" and that, as a result, "the court must assume that the moratorium is within the scope of the City's authority to regulate the use of land." City's Combined Br. at 15 (citing *Dep't of Transp. v. City of Idaho Springs*, 192 P.3d 490, 495 (Colo. Ct. App. 2008)). This argument is without merit. First, COGA does explicitly challenge the City's authority to enact its moratorium—COGA's *entire case* is premised on the assertion that the City's legislative authority is preempted by the Colorado Oil and Gas Conservation Act and by COGCC regulations. Second, the City misconstrues the holding in *Idaho Springs*. In that case, the court noted that because Idaho Springs is a *statutory* city, the court would ordinarily preface its preemption analysis by determining whether the local government had legislative authority to enact the regulation. 192 P.3d at 495. The court declined to do so, however, because statutes granted the City authority to issue regulations, and the Department of Transportation never argued that the city failed to satisfy statutory guidelines governing the adoption of its regulations. *Id.* The court did, however, apply the traditional preemption analysis to examine in depth whether the city's regulations were preempted by statutes governing the state transportation system. *See id.* at 495–96. Nothing in *Idaho Springs* could support a conclusion that this Court may presume the Ordinance to be a valid exercise of land-use authority over a purely local matter.

state laws, Colorado court have routinely held that this authority may not extend to matters of state or mixed concern. *See* § C *infra*. A home-rule municipality may preempt state law only in regard to "its local and municipal matters." Colo. Const. art. XX, § 6. A home-rule city's plenary authority to enact land-use regulations, along with its police power, must yield to conflicting state regulations in all other matters. *See, e.g., City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748, 755 (Colo. 2001) ("Just as with other powers of municipalities, however, a home rule city's police powers are supreme only in matters of purely local concern.").

Against the overwhelming precedent, the City has identified *no* case holding that, as a matter of law, land-use regulations by their nature implicate purely local concerns or that they are otherwise exempt from traditional preemption analysis. Tellingly, *none* of the cases cited by the City involved a moratorium on activities of state interest or upheld a moratorium in the face of conflicting state laws. For example, the City relies on *Town of Telluride v. San Miguel Valley Corp.* for the proposition that the legislature has "repeatedly confirmed that land use policy is a local government function." City's Combined Br. at 17–18 (citing *San Miguel Valley*, 185 P.3d 161, 168 (Colo. 2008)). That case, however, did not involve a preemption claim and specifically distinguished its analysis from the framework that would be applied in a preemption context. *See San Miguel Valley*, 185 P.3d at 167 ("We decline to adopt this line of reasoning, as it conflates the matter of the scope of the article XX eminent domain power with the preemption analysis we use to determine the effect of a conflicting state statute on the acts of a home rule city.") and 169 ("Although we recognize that the analysis of competing state and local concerns is appropriate in evaluating the preemptive effect of a statute on a municipal act, we dispute its relevance in the case at hand, which turns on the conflict between a statute and the state constitution."). Nothing

in *San Miguel Valley* supports the proposition that land-use regulation is exempt from ordinary preemption analysis.

Surprisingly, the City also cites *National Advertising* to support its claim that the exercise of zoning authority for purpose of controlling land use is a matter of local concern. *See* City's Combined Br. at 18 (citing *Nat'l Adver.*, 751 P.2d at 635). In that case, however, the Court explicitly found that the regulation of outdoor advertising signs located within a home-rule municipality along state highways—clearly a land-use issue—is a matter of mixed state and local concern. *See Nat'l Adver.*, 751 P.2d at 633 & 634–35 (recognizing that control of land use through zoning is a matter of local concern, acknowledging that regulation of signage is a valid exercise of zoning power, and nevertheless denying that control of outdoor advertising signs is a matter of *purely* local concern). The *National Advertising* court *explicitly rejected* the City's arguments that the exercise of land-use authority implicates only local concerns.

Other cases the City relies on are *takings* cases and did not involve a preemption challenge to the validity of a moratorium. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the plaintiff asserted that that two local ordinances ordered by the planning agency, which together imposed a moratorium on development for a total of 32 months to permit the planning agency to study the impact of development on Lake Tahoe and to design a strategy for environmentally sound growth, constituted a *per se* taking of property requiring just compensation. 535 U.S. 302 (2002). The case did not involve a preemption challenge or, indeed, *any* challenge to the planning agency's authority to impose the moratoria. Instead, the plaintiff explicitly "did not 'dispute that the restrictions imposed on their properties are appropriate means of securing the purpose set forth in the [Regional Planning] Compact.'" *Id.* at 317. As discussed above, *Williams* was also a takings case that involved no challenge to the validity of the

moratorium. *See Williams*, 907 P.2d at 702 (appealing dismissal of takings and inverse condemnation claims).

The only cases cited by the City that involve a challenge to the validity of a moratorium are *Droste* and *Dill v. Board of County Commissioners of Lincoln County*, neither of which involved a preemption claim. Rather, in each case the plaintiffs sought a declaration that the *statutory* county simply lacked authority to enact the moratorium. The ten-month moratorium on land-use application reviews addressed in *Droste* was imposed in response to a statutory requirement that the county adopt a master development plan for its unincorporated area. 159 P.3d at 602–03. The *Droste* court found that the county had been granted authority to impose the moratorium under the LUCEA. *Id.* at 607. Similarly, the *Dill* court found that the county's authority to impose a two-year moratorium on new landfill projects could be inferred from both the Solid Wastes Disposal Sites and Facilities statute, Colo. Rev. Stat. § 30-20-100.5 (1986) *et seq.*, and the Areas and Activities of State Interest Act ("AASIA"), Colo. Rev. Stat. § 24-65.1-101 *et seq*.,[6] as well as possibly under the county's general police power. *Dill*, 928 P.2d at 813 & 814. In neither decision was a competing State interest raised or a preemption analysis undertaken by the court.

COGA has located only one case in which the validity of a land-use moratorium was addressed under traditional preemption analysis, and in that case the moratorium was invalidated as preempted because it "usurps the State of its exclusive authority over county plans and the

[6] It is worth noting that the AASIA explicitly provides local governments with a mechanism to regulate oil and gas activities, *see* §§ 24-65.1-201(1)(a) & 24-65.1-202(1)(a), but that the Ordinance did not comply with the AASIA's procedural requirements for doing so. For a municipality to regulate oil and gas activities under the AASIA, it must obtain consent of the COGCC. § 24-65.1-202(1)(d). Because the City did not obtain the consent of the COGCC for its Ordinance, the Ordinance cannot be defended as a valid enactment under the AASIA, and may in fact be preempted under the AASIA as well as under the COGCC's regulations.

relevant permitting process." See *Mayor & City Council of Baltimore v. New Pulaski Co. Ltd. P'ship*, 684 A.2d 888, 893–94 (Md. Ct. Spec. App. 1996) (rejecting claim that moratorium prohibiting the construction, reconstruction, replacement, and expansion of incinerators within Baltimore City for a period of at least five years was a valid land use requirement and holding that the moratorium was impliedly preempted by state environmental laws), *cert. denied*, 690 A.2d 523 (Md. 1997). The same result is warranted here.

Finally, the City seeks support in the provisions of the Conservation Act and Commission 2007 amendments providing 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." City's Combined Br. at 21. But this provision did not enlarge the authority of local governments to regulate certain land use aspects of oil and gas operations into the ability to regulate *all* aspects of oil and gas operation, let alone to ban all such activity. By its terms, this provision did not "establish" or "alter" whatever authority local governments already had to regulate oil and gas operations, and therefore did not expand this authority either.

In 2007, when those provisions were adopted, the legal landscape included *Voss*, *Bowen/Edwards*, *Town of Frederick* and *BDS*, which allowed local governments to regulate certain land use aspects of oil and gas operations while reserving to the State the regulation of "technical" areas of drilling, operations and environmental protection. *See* COGA's Summ. J. Br. at 10–11. With particular regard to matters addressed in those 2007 amendments, which included wildlife habitat stewardship and the reasonable accommodation of surface owners, the legislation made clear that it was not increasing the extent to which local governments could regulate oil and gas under applicable case law. The amendments to the Commission's Rule 201, in response to the 2007 amendments, similarly respects the prior case law. Nothing in these provisions

authorize a local government to negate state regulation of oil and gas operations or render oil and gas operations a matter of purely local concern. *See City and Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748, 756–57 (Colo. 2001) (statutory language that local authority over telecommunication providers is not altered or diminished does not prevent the Court from finding statute governing rights-of-way for telecommunications providers preempts Denver's ordinance requiring companies to obtain special use permits); *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 763 (Colo. Ct. App. 2002) (though 1994 amendments to Conservation Act expressly do not affect existing local land use authority, court finds state preemption of conflicting local regulations of oil and gas activities and finds that COGCC "expanded regulations may give may give rise to additional areas of operational conflict with analogous local regulations").

B. THE CITY MISCONSTRUES THE APPLICATION OF THE OPERATIONAL CONFLICT TEST.

The City mistakenly relies upon the operational conflict standard employed in *Bowen/Edwards* in arguing that its ban can somehow be "harmonized" with and does not "materially impede" the state's comprehensive regulations allowing and regulating hydraulic fracturing. City's Combined Br. at 19–20. Colorado courts, however, have not employed this construction of the operational conflict test in circumstances where a home rule municipality completely bans an activity regulated by the state, as discussed below.

In contrast to the ban in *Voss*, *Bowen/Edwards* involved La Plata County's adoption of a regulatory scheme that required oil and gas operators to obtain county permits and comply with certain performance standards. In finding that the state interest in oil and gas does not impliedly preempt "all aspects" of a county's land use authority over oil and gas operations, the Court held that, outside of areas involving technical conditions on drilling or pumping or safety or land restoration requirements, a local government could regulate oil and gas operations unless its regulations operationally conflicted with state requirements. 830 P.2d at 1060.

As the Supreme Court's own distinctions between the *Voss* and *Bowen/Edwards* cases reveal, *see infra* § D.1, Colorado courts have applied the *Bowen/Edwards* operational conflict test in the context of evaluating whether particular regulations and standards interfere with or, conversely, can be harmonized with state requirements covering the same conduct.[7] *See Town of Frederick*, 60 P.3d at 763–64 (invalidating town ordinances imposing setback, noise and visual impact requirements on oil and gas wells as conflicting with the detailed requirements of the Commission rules); *BDS Int'l*, 159 P.3d at 779 (applying operational conflict test to void county's oil and gas regulations regarding financial requirements and access to records). Contrary to the City's suggestion, the Ordinance does not merely impose land-use or other specific regulations like the setbacks, performance standards, or monitoring requirements addressed in *Bowen/Edwards*. When analyzing home rule government regulations that, like the Ordinance, ban a range of activities, Colorado courts have looked instead to whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes in matters of mixed state and local interest. *See* § C *infra*.

Nonetheless, even if the *Bowen/Edwards* operational conflict test did apply in this case, the Court would be compelled to invalidate the Ordinance. As the Court stated in *Bowen/Edwards*:

> State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the State interest. *National Advertising*, 751 P.2d at 636. Under such circumstances, local regulations may be partially or

[7] It is only in this context of comparing two competing sets of regulations that *Bowen/Edwards* requires a fully developed evidentiary record. *Bowen/Edwards*, 830 P.2d at 1060. And even in that circumstance, the required record involves an "appropriate pleading" specifying "those particular [local government] regulations which it claims are operationally in conflict with, and thus preempted by, the state statutory or regulatory scheme applicable to oil and gas development and operations." *Id.* Nothing more is required.

> totally preempted to the extent that they conflict with the achievement of the state interest. *Id.*

830 P.2d at 1059; *accord Lakewood Pawnbrokers, Inc. v. City of Lakewood*, 519 P.2d 834, 836 (Colo. 1973) (conflict exists where local ordinance "proscribes, burdens or limits that which the statute authorizes"). It is only where local regulation can be "harmonized" with and not "materially impede" State requirements that it may survive. *Bowen/Edwards*, 830 P.2d at 1060.

The Ordinance cannot be harmonized with the Conservation Act, which promotes the responsible development and prohibits waste of oil and gas resources. *See* COGA's Summ. J. Br. at 11–13. It is also irreconcilable with the Commission's regulations that specifically allow, but regulate, hydraulic fracturing and the storage of hydraulic fracturing waste and flowback. *See id.* at 17–21; *see also* COGCC, *Hydraulic Fracturing Information* (including link to *COGCC Rules Related to Hydraulic Fracturing*), http://cogcc.state.co.us/Announcements/Hot_Topics/Hydraulic_Fracturing/Hydra_Frac_topics.html (last visited May 27, 2014). There is simply no way to harmonize the Ordinance, which flatly prohibits these well-completion and operational techniques, with the State laws that explicitly allow them.

Additionally, the Ordinance fails the operational conflict test in *Bowen/Edwards* because it regulates, through its ban, "technical" aspects of oil and gas operations. Colorado courts have recognized that the Commission has exclusive authority to regulate the technical aspects of oil and gas operations, and that local regulations of such matters are preempted because they irreconcilably conflict with the Commission's authority and regulations. *BDS Int'l*, 159 P.3d at 779–80 ("[A] county may not impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed by state law or regulation.")(citing *Bowen/Edwards*); *Town of Frederick*, 60 P. 3d at 764 (distinguishing between provisions of ordinance that regulate technical aspects of drilling, and which are therefore necessarily

preempted, and other non-technical provisions that are subject to an "operational conflicts" analysis). Because the Ordinance bans hydraulic fracturing, which undoubtedly qualifies as a technical aspect of oil and gas extraction, the Ordinance is preempted by the Commission's exclusive authority over such matters.

Finally, the City argues that the moratorium imposed by the Ordinance can be harmonized with the goals of the Conservation Act because the purpose of the moratorium "is to conduct studies and determine exactly what kind of regulations can be adopted to avoid operational conflict." City's Combined Br. at 26. But the City would have the Court apply the operational conflict test not to the Ordinance, but to whatever studies and regulations, if any, the City may pursue at some point in the future. There is no doubt that the City is free to collect and evaluate existing studies on hydraulic fracturing, or conduct its own studies and adopt regulations of oil and gas activities that do not operationally conflict with state law. But the City may not bar operators from undertaking oil and gas activities that the State allows. That is the very definition of an irreconcilable conflict under any operational conflict standard.

C. THE ORDINANCE IS PREEMPTED BECAUSE IT FORBIDS WHAT THE STATE ALLOWS.

In its brief, the City completely ignores a central argument in COGA's summary judgment motion—that the City's Ordinance is preempted because it prohibits what is authorized by the state. That is, a home-rule city may have authority to keep the state's pig out of the city's parlor by confining it to a barnyard, but not by killing it.

As stated in COGA's summary judgment brief, in evaluating whether legislation by a home-rule municipality, such as the City, is preempted by state law, the Court must first determine whether the subject matter of the legislation is of statewide concern, of mixed state and local concern, or of purely local concern. *Webb*, 295 P.3d at 486; *City of Commerce City v. State*, 40 P.3d 1273, 1279 (Colo. 2002). If a local regulation involves mixed state and local

concerns, a home-rule regulation may "exist with a state regulation only so long as there is no conflict; if there is a conflict, the state statute supersedes the conflicting local regulation." *Webb*, 295 P.3d at 486. In such matters of mixed concern, the *relevant* test to determine whether home-rule legislation conflicts with state law "is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* at 493 (*citing Commerce City*, 40 P.3d at 1284); *City of Northglenn v. Ibarra*, 62 P.3d 151, 165 (Colo. 2003).

The City fails address this analysis and conflict test even though it has been used by *every* Colorado court examining whether a home rule municipality's ordinance is preempted under state law. Instead, the City argues that its five-year ban on hydraulic fracturing activity is not preempted under the operational conflict standard because of its zoning and land use authority. *See* City's Combined Br. at 18 ("Home rule cities like Fort Collins have 'unique, constitutionally granted powers' to regulate land use. . . . 'Our case law 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.'") (citations omitted).

The City's claim that the moratorium should survive under its zoning and land-use authority is without merit. Colorado courts have routinely determined that a home-rule municipality's ordinance is preempted by state law, despite the municipality echoing time and again the City's same argument that the local ordinance is not preempted under state law because of its broad land-use and zoning authority or police power:

- *Ryals v. City of Englewood*, 962 F. Supp. 2d 1236, 1249 (D. Colo. 2013). Court holds that regulation of sex offender residency is a matter of mixed state and local concern and therefore the city's effective ban on all felony sex offenders living within its boundaries is preempted by conflicting state law.

- *Webb*, 295 P.3d at 492. Court finds that city ordinance prohibiting bicycles traveling from outside the municipality on streets within municipality was a matter of mixed state and

local law, and therefore preempted by state law allowing home-rule cities to prohibit bicycles only if an alternative route is established.

- *Ibarra*, 62 P.3d at 163. Home-rule city's ordinance prohibiting unrelated or unmarried registered sex offenders from living together in a single-family residence was preempted by conflicting state law.

- *Commerce City*, 40 P.3d at 1284. Statutes governing automated vehicle identification systems preempted conflicting provisions of home-rule ordinances because issue was a matter of mixed state and local law in which both cities and the state have important interests at stake.

- *Qwest*, 18 P.3d at 754. Court holds statute preempts Denver's ordinance granting telecommunications providers a right to occupy public rights-of-way without additional authorization, despite Denver's argument that issue was within its land use authority as a home rule city.

- *Telluride II*, 3 P.3d at 37. Rent control for private residential property was held to be a matter of mixed local and statewide concern, and statute prohibiting municipalities from enacting rent control preempted home-rule town's "affordable housing mitigation" ordinance imposing rent control.

- *Voss*, 830 P.2d at 1068. Court holds that City of Greeley's ban on oil and gas activity was preempted under the State's "sufficiently dominant" interest in oil and gas regulation, despite City's argument that it had broad land use authority to regulate oil and gas under its home rule authority.

- *Nat'l Adver.*, 751 P.2d at 635. Court holds that control of outdoor advertising signs within home-rule municipality is a matter of mixed state and local concern, and state Outdoor Advertising Act therefore preempted a conflicting city regulation allowing erection of a sign in violation of State law.

- *Denver & Rio Grande W.R.R. V. City and County of Denver*, 673 P.2d 354, 361 n.11 (Colo. 1983). Court compares city's interest in construction of certain viaducts with the "paramount" interest of those living outside of Denver and holds that the construction of the viaducts was of mixed local and state concern and state statute preempted conflicting city charter provision.

- *Huff v. Mayor of Colorado Springs*, 512 P.2d 632, 634 (Colo. 1973). Court determines that matter of firefighters' pensions is one of statewide interest and concern and preempts a local government's conflicting provision.

- *People v. Graham*, 110 P.2d 256, 257 (Colo. 1941). Local government ordinance regulating traffic was preempted by statute because "[a]s motor vehicle traffic in the state

> and between home-rule municipalities becomes more and more integrated it gradually ceases to be a 'local' matter and becomes subject to general law."[8]

In every one of these decisions, the court first determined whether the subject matter of the home-rule government's ordinance was of statewide concern, of mixed state and local concern, or of purely local concern. After weighing the particular state interest with the home rule municipality's land use and police powers, the courts determined that the subject matter was at least a matter of mixed local and state concern. The courts then employed the exact conflict test employed in *Webb*—"whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes"—to hold that state law preempted the local ordinance.

Given the consistency of these decisions stretching back to 1941, it is striking that the City fails to address any of these decisions or even acknowledge this analysis and conflict test set forth in detail in COGA's summary judgment motion. It is equally surprising that the City fails to address the fact that *every* oil and gas decision in Colorado examining whether a local government's oil and gas regulation is preempted has held that the regulation of oil and gas is at least a matter of mixed state and local concern, and is not a matter of purely local law. *See*

[8] By contrast to these decisions, courts have on occasion in preemption analysis deemed a matter to be a purely local concern and held that the home rule government's ordinance was not preempted. But in each of these decisions, the court reached this holding only after concluding that the State had very little or no interest in the area subject to the local government regulation. For example, in *City and County of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990), the Court held that a state statute forbidding municipalities from adopting residency requirements for municipal employees unconstitutionally interfered with the power of home rule municipalities to determine conditions of employment for their employees because the Colorado Constitution grants home rule cities the right to regulate the right of municipal employees. *See also Coopersmith v. City & County of Denver*, 399 P.2d 943 (1965) (Denver as home rule city has control over tenure and retirement of employees because issue is a purely local matter in which the State has minimal interest).

COGA's Summ. J. Br. at 10–11. Given these unassailable precedents, the City's five-year ban on hydraulic fracturing is plainly preempted by the State's regulations governing this area.

D. THE ORDINANCE IS IMPLIEDLY PREEMPTED.

1. *Voss* demonstrates that bans on oil and gas activity are impliedly preempted.

The City distorts the language in *Voss* as holding that a local regulation is preempted only where there is an operational conflict of a particular sort between it and the state law. *See* City's Combined Br. at 19–20. That is not a permissible reading of *Voss*. As COGA explains in its summary judgment brief, the holding in *Voss* could not be more clear:

> We conclude that the state's interest in efficient oil and gas development 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 well within the city limits.

832 P.2d at 1068 (emphasis added). Subsequently, in *Colorado Mining Association*, the Supreme Court confirmed that, in *Voss*, "[w]e held that the state interest manifested in the state act was 'sufficiently dominant' to override the local ordinance." 199 P.3d at 724. The Court then clarified that this sufficient dominancy test, as articulated in *Voss* and *Ibarra*, "is one of several grounds for implied state preemption of a local ordinance." *Id.* Though the City attempts to relegate the Court's analysis to "merely *dicta*," *see* City's Combined Br. at 19, the Court in *Colorado Mining Association* relied explicitly on *Voss* in holding that Summit County's ban on toxic or acidic chemicals for mineral processing was impliedly preempted: "Application of the preemption analysis we utilized in *Voss, Ibarra, Banner Advertising,* and other cases leads to the conclusion that Summit County's ban on the use of cyanide or other toxic or acidic reagents for mineral processing impermissibly conflicts with the MLRA, resulting in implied preemption of the Summit County ordinance." *Colo. Min. Ass'n*, 199 P.3d at 733. Contrary to the City's

contention, the Supreme Court's characterization of *Voss* was central to its implied preemption holding in *Colorado Mining Association*.

It is clear that the *Voss* decision turned on the application of the "sufficient dominancy" test in finding that Greeley's ban on oil and gas was impliedly preempted. In arguing nonetheless that *Voss* applied an operational conflict test, the City selectively quotes portions of the *Voss* opinion in which the Court quoted from its contemporaneous *Bowen/Edwards* opinion. City's Combined Br. at 20. But the Court made clear that its decision in *Bowen/Edwards* did not resolve the issue of whether a home-rule city could ban oil and gas operations:

> There is no question that the city of Greeley has an interest in land-use control within its municipal borders. It is also settled, as evidenced by our decision in *Bowen/Edwards,* that nothing in the Oil and Gas Conservation Act manifests a legislative intent to expressly or impliedly preempt all aspects of a local government's land-use authority over land that might be subject to oil and gas development and operations within the boundaries of a local government. *See Bowen/Edwards,* 830 P.2d at 1059. To say as much, however, is not to imply that Greeley may totally ban the drilling of any oil, gas, or hydrocarbon well within the city.

Voss, 830 P.2d at 1066 (emphasis added).

In a complete recitation of the paragraph from *Voss* which the City partially quotes, the Court then drew a clear distinction between local ordinances that regulate oil and gas and those that impose a ban:

> If a home-rule city, instead of imposing a total ban on all drilling within the city, enacts land-use regulations applicable to various aspects of oil and gas development and operations within the city, and if such 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 city's regulations should be given effect. We thus do not conclude, as did the court of appeals, that there is no room whatever for local land-use control over those areas of a home-rule city where drilling for oil, gas, or hydrocarbon wells is about to take place. Because, however, both the district court and the court of appeals decided the preemption issue on the basis of Greeley's

> *total exclusion* of all drilling operations, we also resolve this case on the basis of the *total ban* created by Greeley Ordinance Nos. 89 and 90. We hold that the state's interest in efficient development and production of oil and gas in a manner preventative of waste and protective of the correlative rights of common-source owners and producers to a fair share of production profits preempts a home-rule city from totally excluding all drilling operations within the city limits.

Id. at 1068–69 (emphasis in original); *accord Colo. Min. Ass'n*, 199 P.3d at 724 ("*Voss* is the flipside of *Bowen/Edwards*."). The City's ban on hydraulic fracturing goes to the heart of the state's "sufficiently dominant" interest in promoting efficiency and avoiding waste of these valuable mineral resources. *See Voss* 830 P.2d at 1067; *see also* Colo. Rev. Stat. § 34-60-103(11) (defining waste to include the unreasonable diminishment of quantities of oil and gas that can be produced). Accordingly, it is impliedly preempted.

2. The Ordinance is not materially different from the ban considered in *Voss.*

The City seeks to avoid the conclusion that its temporary ban on hydraulic fracturing and the storage of associated waste is preempted without meaningfully addressing the controlling case law. The City attempts to avoid the holding in *Voss* by arguing that the Ordinance is distinguishable from a ban on oil and gas production because it only lasts for five years and only bans hydraulic fracturing, not oil and gas operations in total.

The City's Ordinance imposes a total *ban* on hydraulic fracturing within the City for five years. *See Deighton v. City Council of Colo. Springs*, 902 P.2d 426, 428 (Colo. Ct. App. 1994) ("A moratorium is a suspension of activity; a temporary *ban* on the use or production of something.") (emphasis added, internal quotation omitted). For five years, the Ordinance precludes, "without exemption or exception," the efficient and equitable development and production of oil and gas resources through a ban on hydraulic fracturing and the storage and disposal of wastes. And to no lesser extent than the ban in *Voss*, the Ordinance prohibits entirely

for the next five years the primary well-completion technique available to the oil gas industry. *See* COGA's Summ. J. Br., Ex. 2 at 1 ("Commission Information on Hydraulic Fracturing") ("Hydraulic fracturing . . . is now standard for virtually all oil and gas wells in our state and . . . has made it possible to get the oil and gas out of rocks that were not previously considered as likely sources for fossil fuels."); Ex. 3 at 8 ("Colorado Hydraulic Fracturing State Review") ("Nearly all active wells in Colorado have been hydraulically fractured").

Indeed, as the City notes, Prospect Energy LLC, a COGA member, executed an operator agreement with the City in May 2013, City's Combined Br. at 6, but that since the Ordinance was adopted, neither Prospect nor any other party has informed the City that it plans to use hydraulic fracturing on any wells within the City. *Id.* at 8. It is not surprising that Prospect has not attempted to hydraulically facture wells in Fort Collins, because the Ordinance flatly prohibits it. Because of the Ordinance, it would be *futile* for Prospect to inform the City of any desire to hydraulically fracture a well within the City. The operator agreement itself, however, demonstrates that the whole purpose of the operator agreement Prospect executed with the City was "to authorize Prospect to conduct its operations . . . and to utilize hydraulic fracturing during the course of its operations . . . ." *Id.* Ex. C, Resolution 2013-036.

Like Greeley's ban in *Voss*, the City's moratorium in inimical to state law and policy that promotes efficient and equitable production of oil and gas and that does not allow one local government to bar access to minerals underlying its municipal territory while foisting the impacts of oil and gas operations onto surrounding areas. As such, the Ordinance is impliedly preempted to the same extent as the ban in *Voss*. The fact that the ban will eventually expire in five years does nothing to remove it from the scope of what is impliedly preempted by COGCC regulations while the Ordinance is in effect. *See Voss*, 830 P.2d at 1068.

IV. CONCLUSION

For the foregoing reasons, COGA respectfully requests that the Court grant summary judgment in favor of COGA declaring that the Ordinance's five year bans on the use of hydraulic fracturing and the storage of hydraulic fracturing wastes are preempted and, thus, invalid and unenforceable.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2014, I electronically filed a true and correct copy of the foregoing **COLORADO OIL & GAS ASSOCIATION'S COMBINED BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE CITY'S CROSS-MOTION** via the ICCES electronic filing system which will send notification of such filing to the following:

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