COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
District Court, Larimer County, State of Colorado 2013CV31385 Opinion by: Judge Gregory M. Lammons	
Defendant-Appellant: CITY OF FORT COLLINS, COLORADO, **v.** **Plaintiff-Appellee:** COLORADO OIL AND GAS ASSOCIATION.	▲COURT USE ONLY▲
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BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANT-APPELLANT

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:

1. The brief complies with C.A.R. 28(g).
   Choose one:

   [√] It contains 3,767 words.

   [ ] It does not exceed 30 pages.

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

   [√] For the party raising the issue:

   It 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, not to an entire document, where the issue was raised and ruled on.

   [ ] For the party responding to the issue:

   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.

/s/ Geoff Wilson
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COMES NOW the Colorado Municipal League ("CML" or the "League") by undersigned counsel and, pursuant to RULE 29, C.A.R., submits this brief as *amicus curiae* in support of Appellant, the City of Fort Collins ("the City").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The League hereby adopts and incorporates by reference the statement of the issues presented for review in the City's Opening Brief.

STATEMENT OF THE CASE & STANDARD OF REVIEW

The League adopts and incorporates by reference the statement of the case in the City's Opening Brief, as well as the City's statement regarding the standard of review, which appears in the City's Opening Brief.

INTRODUCTION AND INTEREST OF AMICUS

The League is a statewide, voluntary association of Colorado's cities and towns, which was formed in 1923. CML's membership is comprised of 267 of Colorado's 271 incorporated municipalities, representing 99.97% of our state's population, and including every incorporated municipality in Colorado's "oil patch."

CML has been filing briefs as *amicus curiae* before this court and the Colorado Supreme Court for decades in cases of importance to Colorado municipalities. For example, concerning the division of regulatory jurisdiction between the state and local governments with respect to oil and gas development, CML appeared in *Voss v. Lundvall Bros., Inc*., 830 P.2d 1061 (Colo. 1992), one of a pair of Colorado Supreme Court decisions issued in 1992 that still provide much of the guidance for courts addressing this issue. In the years after *Voss*, the League appeared in several cases before this court in which the direction of the Supreme Court was applied: *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758 (Colo. Ct. App. 2002); *Bd. of Cnty. Comm'rs v. BDS Int'l, LLC*, 159 P.3d 773 (Colo. Ct. App. 2006); *Bd. of Cnty. Comm'rs v. Colo. Oil & Gas Conservation Comm'n*, 81 P.3d 1119 (Colo. Ct. App. 2003).

The last decade has seen a marked drop off in reported appellate decisions involving conflicts over local oil and gas regulations, as local governments and operators have come to rely more on government's contracting power, rather than simple exercise of the police power to assure protection of the public interest. Geoff Wilson, Getting to yes on oil & gas development, Colorado Municipalities, October 2014, at 18.; Cathy Proctor, First meeting of Hickenlooper's task force digs into local control of oil and gas operations, Denver Business Journal, Sept. 25,

2014. Naturally, reliance on these land use development agreements, often referred to as "memoranda of understanding" has led to far less conflict and use of public treasure on litigation. The exact outer limits of local police power or land-use authority with respect to noise regulation, zoning district exclusions, well setbacks and the like are no clearer now than they have ever been, but in a world of agreements, these matters are largely beside the point.

While many local governments and this industry have developed a *modus vivendi* within current legal strictures, a dramatic increase in drilling activity near residential areas has resulted in passionate conflict between citizens and the oil and gas companies. Recently, concerned citizens in four municipalities (Fort Collins, Broomfield, Lafayette and Longmont) utilized their reserved power of initiative to place bans and moratoria on hydraulic fracturing ("fracking") onto local ballots. These measures were approved by voters, and each jurisdiction has been sued.

The present case concerns an initiated moratorium on fracking in the City of Fort Collins. Opening briefs have been filed in this court in the appeal of a challenge to the City of Longmont's ban on fracking in that city. *Colo. Oil and Gas Assoc. v. City of Longmont*, No. 2014CA1759 (Colo. App. filed Jan. 15, 2015). CML is participating in the appeals concerning each of these initiatives to respectfully urge a conservative course. The issues presented by these fracking

initiatives can and should be addressed through conventional "operational conflict" and home rule preemption analysis. Specifically, CML urges that reliance upon a finding of "implied preemption" in the Colorado Oil and Gas Conservation Act, COLO. REV. STAT. § 34-60-101 et seq. (2014), ("the Act") to resolve the issues in these appeals is unsupported by the law.

SUMMARY OF ARGUMENT

In 1992, the Colorado Supreme Court issued two decisions regarding preemption of local regulation of oil and gas development. Both decisions rejected lower court orders that found "implied" legislative intent to preempt local authority in the Act. Since 1992, when amending the Act, the General Assembly has explicitly sought to avoid implied preemption of local authority. In rejecting categorical preemption in the oil and gas area, the Supreme Court provided for preemption on an *ad hoc*, fact-based "operational conflict" basis. This has become the conventional way to resolve preemption issues in the oil and gas area.

Notwithstanding the legislative record, the trial court found an implied legislative intent to preempt local government authority in the Act. This finding is literally unprecedented. It is contrary to the direction of the Colorado Supreme Court and unsupported by the legislative history of the Act. The trial court's

reliance on implied preemption was thus error, and should not serve as a basis for this Court's resolution of the case at bar.

ARGUMENT

The League hereby adopts and incorporates by reference the argument in the opening brief of Appellant, the City of Fort Collins, and respectfully submits the following additional argument.

I. The Trial Court finding of implied preemption in the Colorado Oil and Gas Conservation Act was error.

On June 8, 1992, the Colorado Supreme Court issued a pair of very important decisions concerning the division of authority to regulate oil and gas development between the State and local governments. In *Bd. of Cnty. Comm'rs of La Plata Cnty. v. Bowen/Edwards Associates, Inc.*, the Court described three ways in which preemption of local authority may be accomplished: by express declaration, by implication, or by "operational" conflict of the local act with the State's interest. *Bd.of Cnty. Comm'rs of La Plata Cnty. v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1060 (Colo. 1992). In *Voss*, the Court found a citizen initiated ban on oil and gas development in the City of Greeley preempted using standard home rule conflict analysis. *Voss*, 830 P.2d 1061, 1069.

Twenty-two years later, the *Bowen/Edwards* and *Voss* opinions remain the leading legal authority for courts and counsel alike in this important area. Much of

the focus in reported decisions of this Court since 1992 has been on whether a local enactment, in operation, "materially impaired or destroyed" the State's interest , and was thus subject to "operational conflict" preemption. *See BDS*, 159 P.3d 773, 785; *see also Frederick*, 60 P.3d 758, 767.

For purposes of a discussion of implied preemption, however, another aspect of the Court's pivotal 1992 decisions is especially significant: in both *Bowen/Edwards* and *Voss*, the Supreme Court unanimously reversed lower court decisions that were based upon findings of "implied preemption" in the Act. *Bowen/Edwards*, 830 P.2d at 1060; *Voss*, 830 P.2d at 1065.

In the case at bar, the trial court found the City's ordinance preempted based on "operational" conflict, as well as upon a finding that the ordinance was "impliedly preempted" by the Act. R. CF, p. 501. In the course of finding implied preemption in the Act, the trial court acknowledged that "the Act has remained largely unchanged" since the *Bowen/Edwards* and *Voss* decisions were issued, and that "the state's interest in the field of oil and gas development and production has not changed [] materially" in that time. *Id.*

The League respectfully urges that the trial court finding of implied preemption in the Act was error. While we agree with the trial court that, in so far as implied preemption is concerned, not much in the Act or the disposition of the

General Assembly has changed since 1992, we submit that that record undercuts, rather than supports, any finding of implied preemption.

The *Bowen/Edwards* Court described "implied preemption" as "preemption [that] may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest." *Bowen/Edwards*, 830 P.2d at 1056-1057, *citing City of Golden v. Ford*, 348 P.2d 951, 953-54 (Colo. 1960).

In *Voss*, the Supreme Court rejected findings by the Court of Appeals that the State's regulatory scheme left no room for local regulation of oil and gas development activity, saying that its decision issued that day in *Bowen/Edwards* had "settled…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." *Voss*, 830 P.2d at 1066. "We thus do not conclude, as did the court of appeals, that there is no room whatever for local land-use control over" this activity. *Id.* at 1069.

The lower court decision in *Bowen/Edwards* was also based on implied preemption. *Bowen/Edwards*, 830 P.2d at 1052. The Court of Appeals had found that the portion of the Act granting authority to the Colorado Oil and Gas

Conservation Commission (COGCC) to adopt regulations aimed at protecting the public health, safety and welfare indicated an intent on the part of the General Assembly to "preempt the field", and that the statutory scheme thus "has left no room for local regulation." COLO. REV. STAT. § 34-60-106(11) (2014); *Bowen/Edwards Assoc., Inc., v. Bd. of Cnty. Comm'rs of La Plata Cnty.,* 812 P.2d 656, 659 (Colo. Ct. App. 1990). The Court of Appeals stated:

> The Act demonstrates a legislative intent to occupy the field of oil and gas regulation. Sole authority to regulate that area is vested in the Oil and Gas Conservation Commission, and any local regulation addressing the subject is barred.

Id. at 659.

The Supreme Court agreed that the search for implied preemption is exclusively an exercise in discerning legislative intent, but unanimously reversed. The Court began by pointing out that legislative intent to impliedly preempt local authority will not be inferred from the mere enactment of a State law on the same subject; rather, attention will be given to the language of the statute in question, as well as to the "whole purpose and scope of the legislative scheme." *Bowen/Edwards,* 830 P.2d at 1058.

The Court then examined the provisions of the Act in considerable detail and concluded that provisions of the Act "read singly or together, fail to establish an

implied total preemption of a county's authority to enact land-use regulations for oil and gas developmental and operational activities within the county." *Id.* at 1059. Indeed, "nothing in the statutory text [upon which the Court of Appeals had relied], or for that matter in the legislative history of that section evinces a legislative intent to preempt." *Id*. Having found neither express preemption in the Act, nor any evident implied intent on the part of the General Assembly to limit local authority over oil and gas operations, the Court moved on to the portion of its opinion where "operational conflict" preemption is explained. *Id.*

The League respectfully urges that nothing in the legislative history of the Act since *Bowen/Edwards* and *Voss*, indicates that anything has changed: the Act continues to lack any evidence of intent on the part of the General Assembly, either express or implied, to preempt local government authority.

The most extensive judicial discussion of implied preemption, in the context of the Act, during the years since *Bowen/Edwards*, occurred in *Frederick*, 60 P.3d 758, 767. In that case, oil and gas producer NARCO challenged various oil and gas regulations in the Town of Frederick. The trial court "rejected NARCO's argument that post-1992 statutory amendments and rules establish that, contrary to *Bowen/Edwards*, all local regulation of oil and gas operations is now impliedly

preempted." *Id.* at 762. NARCO appealed this ruling, and the Court of Appeals affirmed.

The Court of Appeals began its examination of post- *Bowen/Edwards* amendments to the Act with 2004 legislation that broadened the regulatory responsibilities of the COGCC. The 2004 legislation directed the Commission to "prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource," ensure proper well site reclamation, and adequate financial assurance to assure such reclamation, among other provisions. Far from buttressing the case for implied preemption, however, the 2004 Act includes language in which the General Assembly plainly sought to avoid its legislation being given preemptive effect. The *Frederick* court referred to this language in reaching its conclusion about the 2004 legislation:

> We do not agree that these amendments establish that contrary to *Bowen/Edwards*, state law now impliedly preempts all local regulation of oil and gas drilling. The amended language itself does not compel such a conclusion. Further, the legislative declaration at the beginning of S.B. 94-177 includes a statement that "nothing in this act shall be construed to affect the existing land use authority of local governmental entities."

Id. citing 1994 Colo. Sess. Laws p. 1978.

The *Frederick* court then considered 1996 legislation which amended the Act to limit local government authority to levy fees for monitoring and inspection of wells (generally regarding matters subject to COGCC regulation). The 1996

legislation includes language providing that "nothing in [the new fee limits] shall affect the ability of a local government to charge a reasonable and nondiscriminatory fee for inspection and monitoring "for road damage, fire and building code compliance," and, significantly "land use permit conditions." 1996 Colo. Sess. Laws p. 346; codified at COLO. REV. STAT. §34-60-106(15) (2014). The *Frederick* court concluded that this language not only reinforced the legal conclusion that local government land use permits may be conditioned, but also that it "further supports the conclusion the General Assembly did not intend to preempt all local regulation of oil and gas" by virtue of its post-1992 amendments to the Act. *Frederick*, 60 P.3d at 763. The 1996 legislation also illustrates that the General Assembly is fully capable of express preemption, something that is has otherwise chosen not to do, the years since 1992.

In 2007, the General Assembly approved significant legislation that reconstituted the membership of the COGCC, while once again adding to the Commission's regulatory authority and responsibilities, particularly in the areas of "protection of the environment and wildlife resources." See, for example the amendatory language to COLO. REV. STAT. § 34-60-102 by HB07-1341. 2007 Colo. Sess. Laws p. 1357. Once again, the General Assembly made unmistakable its

intent to avoid any implication of preemption of local authority by its action. The first section of the 2007 Act reads as follows:

> **Legislative declaration**. The 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.

Id.(emphasis in original).

In sum, since *Bowen/Edwards*, the General Assembly has not chosen to add an express preemption provision to the Act (except narrowly, as to fees, discussed above), and nothing in the post- *Bowen/Edwards* amendments to the Act indicates any intent to "impliedly" preempt local authority. To the contrary, the legislative history shows that the General Assembly has repeatedly included language in its legislation designed to assure that grants of authority to the COGCC will *not* later be construed as "impliedly" at the expense of local government authority.

II. Conventional "operational conflict" analysis provides an appropriate and sufficient means to resolve the issues before this court; a foray into "implied preemption" is unnecessary.

The Supreme Court having dispensed with arguments about "implied preemption" in *Bowen/Edwards*, most of the judicial disagreements between the oil and gas industry and local governments in the years since have focused on whether various local enactments regulating matters such as noise, well setbacks, financial

assurance and the like were preempted by virtue of "operational conflict" with the State's interests. Several of these disputes have resulted in reported decisions of this Court. *See BDS*, 159 P.3d at 780 (fines, financial security, water quality, among others); *see also Frederick*, 60 P.3d at 758 (setbacks, noise regulation, visual impact mitigation).

The operational conflict basis for preemption described by the *Bowen/Edwards* Court is a standard appropriately deferential to the exercise of local authority. After all, the question of "operational" conflict arises only in situations where there is no indication of intent on the part of the General Assembly to preempt local authority. Under this standard, local regulations are not preempted unless they "materially impede or destroy" the State's interest. *Bowen/Edwards*, 830 P.3d at 1059. These are strong words. The Supreme Court did not provide for preemption of local regulations that are merely inconvenient to the industry, or which might complicate or make more expensive oil and gas development. Much more than that must be proven. The State's interests must be *materially* impaired, or *destroyed* by the local government action.

Furthermore, the Supreme Court made it clear that preemption on this basis will be an *ad hoc*, case-by-case determination, and no local authority was going to be preempted based on unsubstantiated allegations of "operational" conflict with

the State's interest. Simply saying it will not make it so. Rather, a "fully developed evidentiary record" is required in order to support a finding of operational conflict preemption. *Id.* at 1060. Indeed, in *Bowen/Edwards* the Court remanded the challenge before it to La Plata County's oil and gas regulations, because a fully developed evidentiary record showing conflict of the County regulations *in operation* had not been developed. *Id.*

In setting forth the operational conflict preemption standard, the Supreme Court spoke repeatedly of the need to "harmonize" state and local requirements whenever possible.

> The state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.

Id. at 1058. The *Bowen/Edwards* Court expressly rejected the sort of categorical preemption that is the hallmark of "implied preemption." Those championing such categorical preemption often point to the Court's comments regarding local regulation of the "technical" aspects of oil and gas drilling as indicating the Court's support for carving out this category of regulation as off limits for local

regulation.[1] But a close reading of these portions of the *Bowen/Edwards* opinion reveals that, even as to "technical" matters, the Court was anticipating that local regulations might run afoul of the "operational conflict" standard. For example, towards the close of its opinion the Court makes the following observation, in *dicta*:

> We hasten to add that there may be instances where the county's regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to 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. To the extent that such *operational conflicts* might exist, the county regulations must yield to the state interest.

Id. at 1060 (emphasis added).

In a footnote, the *Bowen/Edwards* Court again signaled disagreement with an implied or categorical preemption approach when evaluating local actions, including in cases involving so-called "technical" regulation. The Court rejected an argument (upon which the Court of Appeals had relied) that an earlier Court of Appeals decision in *Oborne v. BOCC of Douglas Cnty.*, 764 P.2d 397, 402 (Colo.

[1] Notably, the *Frederick* court ended up following *Bowen/Edwards*, likewise rejecting categorical preemption and instead basing its findings of preemption, even as to alleged local regulation of so-called "technical" issues, on operational conflict. *Frederick*, 60 P.3d at 764.

Ct. App. 1988), required field preemption of local government authority in the oil and gas area. *Bowen/Edwards*, 830 P.2d at 1060, n.7. Rather than directing field preemption, the Court said, "we read the *Oborne* decision as turning on the narrow *operational conflict* between conditions imposed by the county on technical aspects of oil and gas operations" and COGCC regulations. *Id.* (emphasis added).

Unlike the sort of categorical preemption that the Court rejected in *Bowen/Edwards*, operational conflict preemption permits the harmonization of regulatory schemes contemplated by the Supreme Court. *Id.* at 1061. Under operational conflict's *ad hoc*, fact based approach, a "local regulation may be partially or totally preempted, to the extent that [it may] conflict with the achievement of the state interest." *Id.* at 1059.

In contrast, implied preemption is a fixed, categorical form of preemption. Once a category of regulation is labeled as off limits, *absolute* preemption occurs. No allowance is made for changes in time, technology or local circumstances. None of the "harmonization" called for by the Court in *Bowen/Edwards* is permitted. The entire focus becomes one of labeling an activity as in or out of the preempted category. If, for example, a categorical preemption were applied to the "technical" aspects of oil and gas extraction, one can imagine the controversies. Do regulations relating to wellhead noise or odors concern "technical" or "land use"

matters? Is regulation of the surface operations related to hydraulic fracturing of a well "technical," "land use," or is some other hybrid label more appropriate? Is the use of process water pits at a well site located over a town's shallow aquifer drinking water supply a "technical" choice of the operator, or is this within the local government's "land use" or police power authority to address?

The General Assembly has wisely chosen not to categorically preempt local authority in the Act, and the *Bowen/Edwards* Court was correct in declining to read such intent into the law. No decision of this Court since *Bowen/Edwards* has relied on implied preemption to resolve the issues before it. The trial court in this case went further than the legislature intended and case law allows. The League respectfully urges that this Court resolve the issues presented without resorting to a finding of implied preemption in the Act.

CONCLUSION

In 1992, the Supreme Court found in the Colorado Oil and Gas Conservation Act no express or implied intent on the part of the General Assembly to preempt local authority to regulate oil and gas operations. Nothing in the legislative history of the Act since 1992 indicates that anything has changed in this regard. Accordingly, the League respectfully urges this court to avoid reliance on "implied preemption" in resolving the issues in this appeal.

WHEREFORE, for the reasons stated herein and in the brief of the City of Fort Collins, the League respectfully urges this Court to reverse the decision of the Larimer County District Court.

Respectfully submitted this 6th day of February, 2015.

COLORADO MUNICIPAL LEAGUE

/s/ Geoff Wilson
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CERTIFICATE OF SERVICE

I hereby certify that on February 6th, 2015, a true and correct copy of the **BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANT-APPELLANT** was filed with the Court and was electronically filed and served through the E-Filing System to the parties named below:

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