

<p>COLORADO COURT OF APPEALS  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	
<p>Appeal from Larimer County District Court  The Honorable Gregory M. Lammons  Case No. 13CV31385</p>	
<p><b>Plaintiff-Appellee:</b>  <b>COLORADO OIL AND GAS ASSOCIATION</b></p> <p>v.</p> <p><b>Defendant-Appellant:</b>  <b>THE CITY OF FORT COLLINS, COLORADO</b></p>	<p><b>▲ COURT USE ONLY ▲</b></p>
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<p><b>BRIEF OF THE BOARD OF COUNTY COMMISSIONERS  OF THE COUNTY OF BOULDER, STATE OF COLORADO  IN SUPPORT OF THE DEFENDANT-APPELLANT  THE CITY OF FORT COLLINS, COLORADO</b></p>	

## 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 \_\_\_ words
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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.

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....iv

STATEMENT OF ISSUES PRESENTED FOR REVIEW ..... 1

STATEMENT OF THE CASE & STANDARD OF REVIEW ..... 1

INTEREST OF THE AMICUS CURIAE ..... 1

SUMMARY OF THE ARGUMENT ..... 1

ARGUMENT ..... 3

    I.    The district court erred by concluding the Ordinance was  
          implicitly preempted..... 3

    II.   The district court incorrectly applied the operational conflict  
          test.....7

    III.  The district court’s out-of-hand invalidation of the City’s  
          moratorium threatens the use of a land use planning tool that  
          ensures successful development planning. ....9

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

### Cases:

<i>Board of County Commissioners v. Bowen/Edwards Associates, Inc.</i> , 830 P.2d 1045 (Colo. 1992) .....	2, 3, 4, 5, 6, 7, 8, 11
<i>Board of County Commissioners of La Plata County v. Colorado Oil &amp; Gas Conservation Commission</i> , 81 P.3d 119, 1125 (Colo. App. 2003).....	5
<i>Colorado Mining Association v. Board of County Commissioners of Summit County</i> , 199 P. 3d 718 (Colo. 2009) .....	8
<i>Droste v. Bd. of County Comm’rs</i> , 159 P.3d 601, 606 (Colo. 2007).....	10
<i>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency</i> , 535 U.S. 302, 337-38 (2002).....	9, 10
<i>Voss v. Lundvall Bros., Inc.</i> , 830 P.2d 1061 (Colo. 1992) .....	5, 6, 7
<i>Webb v. City of Blackhawk</i> , 295 P. 3d 480 (Colo. 2013).....	8, 9
<i>Williams v. Central City</i> , 907 P.2d 701, 706 (Colo. App. 1995) .....	10

### Statutes:

Colo. Rev. Stat. § 34-60-101 .....	1-2
------------------------------------	-----

### Rules:

Colorado Appellate Rule 28 .....	ii
Colorado Appellate Rule 29 .....	1
Colorado Appellate Rule 30(f).....	12
Colorado Appellate Rule 32 .....	ii

**TABLE OF AUTHORITIES (Cont.)**

**Rules (cont.)**

Colorado Oil and Gas Conservation Commission Rule 201 ..... 7

**Other:**

2007 Colo. Sess. Laws, ch. 20, Sec. 1 (H.B. 07-1341) ..... 6

1994 Legis. Serv. No. 314, § 1 (S.B. 94-177)..... 6

The Board of County Commissioners of the County of Boulder, State of Colorado, (“Boulder County”) respectfully submits this Brief, pursuant to C.A.R. 29, as *amicus curiae* in support of Appellant, the City of Fort Collins, Colorado (the “City” or “Fort Collins”).

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Boulder County adopts the statement of the issues presented by the City.

### **STATEMENT OF THE CASE & STANDARD OF REVIEW**

Boulder County adopts the City’s statement of the case and the City’s statement regarding the standard of review.

### **INTEREST OF THE AMICUS CURIAE**

Boulder County is a statutory Colorado county with oil and gas resources underlying and within a close proximity to residential development in a similar manner to Fort Collins. Boulder County also currently has in place a temporary moratorium over oil and gas development to allow it to explore the impacts of oil and gas drilling on its citizens and to the health, welfare and environment that make up its community.

### **SUMMARY OF THE ARGUMENT**

The district court’s order incorrectly invalidated the Ordinance as impliedly preempted by the Oil and Gas Conservation Act (“OGCA”), C.R.S. § 34-60-101, *et*

*seq.* However, implied preemption only occurs where a state statute by implication “evinces a legislative intent to completely occupy a given field by reason of a dominant state interest.” *Board of County Comm’rs v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045, 1056-1057 (Colo. 1992). In Colorado, neither express nor implied preemption has occurred in the field of oil and gas regulation because the Colorado Oil and Gas Conservation Commission (“COGCC”) does not completely occupy the field. *Id.*

The district court’s alternative conclusion that the Ordinance is invalid because of an operational conflict should be overturned because the Court did not use the correct operational conflict analysis. It also failed to hold a hearing to establish a fully developed evidentiary record on the Ordinance and its impact to the State’s interests.

Finally, moratoria are an important land use tool. Invalidation of these tools under a theory of implied preemption or an inaccurate operational conflict analysis would fundamentally alter the delicate balance the legislature has struck concerning the authority of local and state governments over oil and gas development.

## ARGUMENT

### **I. The district court erred by concluding the Ordinance was implicitly preempted.**

The district court determined that the State has a significant interest in the field of oil and gas development and production and “[t]he five year ban on hydraulic fracturing substantially impedes the state’s interest in fostering efficient and equitable oil and gas production”, [CF, p. 501].<sup>1</sup> Based on these findings, it concluded the Ordinance was impliedly preempted and invalid.

The district court’s analysis was flawed. Implied preemption is not the correct test in analyzing whether a local ordinance related to oil and gas development is preempted by a state regulatory scheme. Since 1992, the correct test has been whether in operation the application of the local regulation materially impedes or destroys the state’s interest. *Bowen/Edwards*, 830 P.2d at 1059. The Supreme Court enunciated this test in *Bowen/Edwards*, where an oil and gas operator brought a facial challenge to the validity of La Plata County’s land use regulations governing oil and gas operations. The operator argued that the OGCA preempted any local regulation of oil and gas operations. The Supreme Court held that total preemption of local authority was neither expressly *nor impliedly* established by the OGCA. In particular, “[t]he state’s interest in oil and gas

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<sup>1</sup> “[CF, pp. \_\_]” refers to the page of the electronic Record on Appeal.



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 Supreme Court’s holding was based in part on its finding that state and local governments have distinct interests in regulating oil and gas operations:

The state’s interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state [whereas a] county’s interest in land-use control ... is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns. *Id.* at 1057.

The Court found that these interests could, for the most part, be harmonized. However, local regulatory authority could be required to yield to the state’s authority upon a proper finding of preemption due to “the operational effect of the county regulations conflict[ing] with the application of the state statute or state regulations”. *Id.* at 1059. Such “operational conflict” arises “where the effectuation of a local interest would materially impede or destroy the state interest”. *Id.* The determination of an existence of an operational conflict between state and local regulations would be made by future courts on an ad hoc basis on a full evidentiary record. *Id.*

This operational conflict standard allows local governments to enact land use regulations that protect the “orderly development and use of land in a manner consistent with local demographic and environmental concerns.” *Id.* at 1057. The Supreme Court implicitly recognized that facial challenges using an express or implied preemption standard would essentially negate the ability of local governments to adopt and enforce moratoria or local land use regulations over the oil and gas development. As a result, local governments are entitled to protect their interests because of the critical importance of the State/local balance. *See, Board of County Commissioners of La Plata County v. Colorado Oil and Gas Conservation Commission*, 81 P.3d 119, 1125 (Colo. App 2003) (the State cannot grant “oil and gas operators license to disregard local land use regulation [and] erode the delicate balance between local interests and state interests set forth by *Bowen/Edwards.*”).

On the same day that the Supreme Court issued *Bowen/Edwards*, it also decided *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992). In *Voss*, an operator challenged a home-rule municipality’s ordinance prohibiting all oil and gas development anywhere within the city limits. The Court invalidated the ordinance because it conflicted in operation with the state’s interest in efficient development and production of oil and gas resources. However, as in

*Bowen/Edwards*, the Supreme Court did not base its decision on express or *implied preemption*: “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.” *Voss*, 830 P.2d at 1069.

In fact, since the 1992 decisions in *Bowen/Edwards* and *Voss*, the OGCA has been amended three times, in 1994, 2007, and 2013.<sup>2</sup> Each amendment preserved local land use authority as vital to the regulatory environment of Colorado’s oil and gas development.<sup>3</sup> Thus, the Colorado Legislature has not provided any express or implied intent that the COGCC is to completely occupy the field of oil and gas regulation, nor has there been a legislative pronouncement that the COGCC solely regulates the recent advent of the operational use of hydraulic fracturing. In fact, the General Assembly indicated the opposite: that

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<sup>2</sup> The district court correctly determined that the OGCA “has remained unchanged since 1992” and that “the state’s interest in the field of oil and gas development and production has not change (sic) materially since the Supreme Court issued *Voss*.” [CF, p. 501]

<sup>3</sup> The Colorado legislature, in passing the 2007 Amendments, specifically declared “that nothing in this act shall establish, alter, impair, or negate the authority of local governments to regulate land use related to oil and gas operations. 2007 Colo. Sess. Laws, ch. 20, Sec. 1 (H.B. 07-1341). The 1994 amendments similarly declare, “that nothing in this act shall be construed to affect the existing land use authority of local governmental entities.” 1994 Legis. Serv. No. 314, § 1 (S.B. 94-177). The 2013 COGCC rulemaking Statement of Basis and

there continues to be room for both state and local government regulation of oil and gas development.

Indeed, even the COGCC recognizes that the proper preemption analysis is one of operational conflict rather than implied preemption. COGCC Rule 201 states:

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

Based upon the foregoing, the district court incorrectly found the Ordinance to be invalid as a result of implied preemption. The *Bowen/Edwards* case controls and implied preemption can only occur where there is implicit legislative intent to occupy the field. The *Voss* Court found this was not the case in 1992, and this court correctly noted that nothing has changed in the OGCA since that time. Therefore, the Ordinance cannot be found to be invalid due to implied preemption.

**II. The district court incorrectly applied the operational conflict test.**

After undertaking its implied preemption analysis, the district court erroneously applied the operational conflict analysis as an alternate justification for voiding the Ordinance. Specifically, it stated that the Ordinance “prohibits what

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Purpose contains a similar provision.

the [OGCA] expressly authorizes the Commission to permit.” [CF, p. 502]. The Court relied on two non-oil and gas cases, *Webb v. City of Blackhawk*, 295 P. 3d 480 (Colo. 2013) and *Colorado Mining Association v. Board of County Commissioners of Summit County*, 199 P. 3d 718 (Colo. 2009), for the proposition that preemption occurs where the local government authorizes what the state prohibits or forbids what the state authorizes. This “prohibit/authorize” test is an inaccurate reflection of the *Bowen/Edwards* “operational conflict” test.

The correct operational conflict test requires an analysis of whether application of the local regulation to a proposed oil and gas development materially impedes or destroys the state’s interests as set forth in the OGCA not whether the local ordinance prohibits what the state authorizes. *Bowen/Edwards Assoc., Inc.*, 830 P.2d at 1059. A court can only reach a decision about an operational conflict after consideration of the facts surrounding the actual effect of application of the local regulations to the State’s interests. Thus, proper application of the operational conflict test requests a hearing and a fully developed evidentiary record. *Id.* at 1060. The district court erred in both instances when it substituted the “prohibit/authorize” test for the more detailed inquiry required by operational conflict analysis and when it did so without providing for a hearing and a fully developed evidentiary record.

This misapplication of the correct operational conflict standard runs afoul of the important balancing of State vs. local interest concerns discussed in Section I above. Reliance on the “prohibit/authorize” test from *Webb* creates the same problem as the application of implied or express preemption because it disallows a local government from being able to enact regulations that protect the unique local interests recognized by the Supreme Court.

Accordingly, this Court should find that the use of the *Webb* “prohibit/authorize” test was also incorrect.

**III. The district court’s out-of-hand invalidation of the City’s moratorium threatens the use of a land use planning tool that ensures successful development planning.**

Moratoria are an essential planning tool in the local government tool box. According to the United States Supreme Court, “moratoria are used widely among land use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or ‘interim development controls’ as they are often called, are an essential tool of successful development. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337-38 (2002) (“Tahoe-Sierra”). The adoption of moratoria while studies are being made has become general practice across the country. “Zoning boards, cities, counties and other

agencies use [moratoria] all the time to ‘maintain the status quo pending study and governmental decision making.’” *Tahoe-Sierra*, 302 US. 316 (quoting lower U.S. District Court opinion, 34 F. Supp. 2d at 1248-49, and *Williams v. Central City*, 907 P.2d 701, 706 (Colo. App. 1995)). The moratorium “counters the incentive of landowners to develop their land quickly to avoid the consequences of an impending land use plan for the jurisdiction.” *Droste v. Bd. of County Comm’rs*, 159 P.3d 601, 606 (Colo. 2007) (quoting and citing *Tahoe-Sierra*). These legal authorities make clear that a temporary moratorium is not a regulation *per se*; rather, it is an essential planning tool to preserve the status quo while permanent land use regulations are being formulated.

The moratoria tool is not illusory. Boulder County has routinely used moratoria to ensure successful planning for development. For instance, Boulder County codified a provision for the issuance of a moratorium concerning development to address disasters. Similarly, it has imposed a temporary moratorium on land development for properties within its unincorporated boarders that lie within the 100-year flood plain of south Boulder Creek to halt development until the revised flood hazard boundaries maps were developed by the Federal Emergency Management Agency. Like Fort Collins, Boulder County enacted a moratorium over oil and gas drilling while it evaluates the impacts of oil and gas

drilling to its communities. The use of moratoria by Boulder County and other jurisdictions across the country are a critical interim development control planning tool and courts should be wary of invalidating them.

The district court's invalidation of Fort Collins' moratorium over oil and gas development under the implied preemption standard or the inaccurate "operational conflict" test equates to field preemption of a local government's moratorium or regulatory authority over oil and gas development. The district court's order thus removes any ability for a local government to use moratoria in the context of oil and development.

The Ordinance is a valid use of the City's moratorium powers and, as a result, litigation regarding oil and gas development in the City is wasteful and premature. Boulder County requests this Court enter its order that the Ordinance is valid and to direct that the case be dismissed until such time that the moratorium has been lifted based upon the City's development of appropriate land use regulations over hydraulic fracturing and oil and gas development. At that time, if Plaintiff believes the City's regulations conflict in operation with the State's interests or with state regulations, it is free to bring a "ripe" claim to pursue whether the then in effect regulations are invalid under the *Bowen/Edwards* operational conflict analysis.



## CONCLUSION

For the reasons stated herein and in the brief of the City of Fort Collins, Boulder County respectfully requests this Court to reverse the district court's decision and find that the Ordinance is a valid use of the City's moratorium powers.

Respectfully submitted this 6<sup>th</sup> day of February, 2015.

GOLDMAN, ROBBINS & NICHOLSON, P.C.



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*Printed copy with the original signature on file at the offices of Goldman, Robbins & Nicholson, P.C. in accordance with C.A.R. 30(f).*

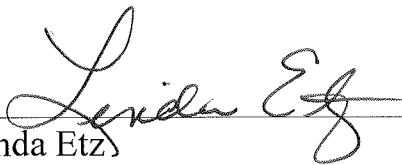
## CERTIFICATE OF SERVICE

I hereby certify that, on this 6<sup>th</sup> day of February, 2015, a true and correct copy of the foregoing was served *via* ICCES on the following:

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