

<p>COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: February 6, 2015 8:51 PM FILING ID: 69C0B01F13D80 CASE NUMBER: 2014CA1991</p>
<p>Appeal from Larimer County District Court The Honorable Gregory M. Lammons Case No. 13CV31385</p>	
<p>Appellant: THE CITY OF FORT COLLINS, COLORADO</p> <p>v.</p> <p>Appellee: COLORADO OIL AND GAS ASSOCIATION</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>AMICUS CURIAE BRIEF OF CONGRESSMAN JARED POLIS</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 4,965 words
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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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Congressman Jared Polis by and through his undersigned attorney, Courtney J. Krause, respectfully submits this Brief under C.A.R. 29, as amicus curiae in support of Appellant, the City of Fort Collins, Colorado (the City).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Congressman Polis hereby adopts and incorporates by reference the statement of the issues presented by the City of Fort Collins, Colorado in its Opening Brief.

STATEMENT OF THE CASE & STANDARD OF REVIEW

Congressman Jared Polis hereby adopts and incorporates by reference the statement of the case in the City of Fort Collins, Colorado's Opening Brief, as well as the City of Fort Collins, Colorado's statement regarding the standard of review, which appears in the City of Fort Collins, Colorado's Opening Brief.

SUMMARY OF THE ARGUMENT

On November 5, 2013, the citizens of Fort Collins, Colorado passed Ballot Measure 2A, creating a five year moratorium on hydraulic fracturing and the disposal of hydraulic fracturing waste within the City. The purpose of the moratorium is to study the impacts of the hydraulic fracturing process on the citizens of the City. Plaintiff, Colorado Oil and Gas Association (COGA) sued the City on December 3, 2013 seeking to challenge the five-year moratorium on hydraulic fracturing. The Larimer County District Court granted summary

judgment in favor of Plaintiffs, finding that the moratorium was impliedly preempted by state law. The City filed this appeal.

Congressman Polis' interest in this case is based on his representation of the citizens of Colorado's Second Congressional District, which includes the entire City. The questions at issue in this case are of district-wide concern because the Second Congressional District of Colorado also includes other localities that have considered or imposed similar moratoria. Congressman Polis also has specific and particular knowledge regarding congressional interest and ongoing scientific research on the federal level that are relevant to this case.

The Congressman's interest is further enhanced by the preemption issues presented in this case. Preemption issues involving hydraulic fracturing have led to questions concerning the relationship between state and local laws as well as federal and state authority. In his role as a Member of the U.S. House of Representatives, Congressman Polis has been actively involved in hydraulic fracturing policy on a federal and state level. Congressman Polis is filing this amicus brief in his capacity as a Representative of Colorado's Second Congressional District and Member of the U.S. House of Representatives.

Congressman Polis' brief aims to address two issues: (1) the importance and validity of local land use tools, including the use of short term moratoria; (2) preemption law in an oil and gas context.

ARGUMENT

I. The City properly used its land use authority to enact a short term moratorium that is based on a legitimate purpose to study and plan for the development of hydraulic fracturing.

The City may properly use its land use authority to control hydraulic fracturing operations within the City. Over eighty-five years of Supreme Court jurisprudence support local governments' ability and responsibility to enact zoning codes and land use ordinances that fit the needs of their communities. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

The Colorado Constitution and applicable laws also support local governments' land use authority. Under Article XX of the Colorado Constitution, home rule cities such as Fort Collins may properly plan and zone for matters of local concern and pass self-governing laws. Colo. Const. art. XX, § 6. In addition, the Local Government Land Use Control Enabling Act provides that local governments may plan for and regulate land use within their jurisdiction. Colo. Rev. Stat. § 29-20-101, et seq.; *Board of County Commissioners, La Plata County v. Bowen/Edwards*, 830 P.2d 1045, 1056 (Colo. App. 1992) (*Bowen/Edwards*); see also *Voss v. Lundvall Brothers, Inc.*, 830 P.2d 1061, 1064 (Colo. 1992) (*Voss*).

Taken cumulatively, these laws expressly allow a local government like the City to

control land use within its municipal boundaries as a matter of local concern. *See Voss*, 830 P.2d at 1064.

Not only is local governments' robust land use authority supported legally, it also makes sense from a policy perspective. A local government is elected to represent its community members and is ultimately responsible for preserving the character of the community. *See Daniel R. Mandelker, Land Use Law* § 4.16, 113–114 (3d ed. 1993); *see also Village of Euclid*, 272 U.S. at 388 (1926). Local governments are best suited to meet the unique land use needs of their community through transparent public processes. *See id.* Local planning involves widespread citizen input and broad stakeholder involvement. When addressing contentious issues, local governments have more opportunities for public participation than a state or federal government. As such, land use tools allow local governments to act consistently with their constituents' expectations.

Colorado courts have found that a local government may use its land use powers to control oil and gas development because such operations are “quintessential matters of local concern” that directly involve the use of land. *Bowen/Edwards*, 830 P.2d at 1056. Hydraulic fracturing is exactly the type of industrial activity that should be regulated under a local government's land use authority because it generates many quintessential matters of local concern. Hydraulic fracturing produces increased noise, light, and imposes burdens on a

municipality's transportation infrastructure, local resources, and environment.

Using land use tools to address hydraulic fracturing is a legitimate exercise of the City's land use authority granted by state law and supported by Supreme Court jurisprudence.

A. A short term moratorium is a valid exercise of the City's land use authority.

Short term moratoria have been accepted by the Supreme Court and Colorado courts as a valid land use management tool to address matters of local concern. Short term moratoria temporarily suspend development to allow localities to formulate a more permanent development strategy. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337-38 (2002) (Tahoe-Sierra). In *Tahoe-Sierra*, the Supreme Court found that localities use moratoria all the time to "maintain the status quo pending study and governmental decision making." *Id.* In addition, Colorado courts have upheld moratoria because short term moratoria are an implicit part of local governments' land use authority. *Dill v. Bd. Of County Comm'rs*, 928 P.2d 809, 814 (Colo. App. 1995).

From a policy prospective, moratoria are necessary to provide time for communities that are working through difficult land use concerns. Moratoria allow cities time to hold public forums to better understand and address community concerns. When addressing a controversial issue like hydraulic fracturing, public

processes may take several years before coming to a resolution that is appropriate for the community.

In this case, a short term moratorium is the most logical land use tool available to the City. Since hydraulic fracturing technology has developed so quickly and the subsequent boom was so unexpected, the City has not had an opportunity to update its land use plan to accommodate the significant increase of oil and gas development that may occur within the City's boundary. The moratorium provides the City with an opportunity to collect data and enact land use regulations if necessary.

B. The City's short term moratorium is based on the legitimate purpose of studying possible public health and environmental impacts from hydraulic fracturing development.

This moratorium is reasonable considering the legitimate and unanswered questions about the health, safety, environmental, and other community impacts that may be caused by hydraulic fracturing and the lack of scientific information currently available on this matter.

The purpose of the City's moratorium is "to protect, public health, safety and welfare by placing a five year moratorium on the use of hydraulic fracturing to extract oil, gas, or other hydrocarbons within the City of Fort Collins in order to study the impacts of the process on the citizens of the City of Fort Collins." Ballot Measure 2A, Court File, p. 341. The citizens' concerns and desire for additional

information are understandable considering the general lack of scientific studies of the health and environmental impacts of hydraulic fracturing. In order to preserve our nation's democratic process, it is imperative that the legal system uphold the will of these citizens who voted to give the City an opportunity to evaluate the merit environmental and health concerns and create land use and zoning plans.

The recent boost in natural gas development in Colorado and across the country is largely due to technological advancements—particularly horizontal drilling and hydraulic fracturing. *See* U.S. Gen. Accounting Office, *GAO-12-732, Oil and Gas: Information on Shale Resources, Development, and Environmental and Public Health Risks* 29 (2012) . This technology allows operators to recover natural gas from unconventional reservoirs such as shale, tight sandstone, and coalbed methane. *Id.* As a result, operators are able to economically recover oil and gas from previously unattainable reservoirs, opening up vast areas of land to oil and gas development. *Id.*

Until recently, residents on the Front Range who built homes above unconventional gas formations could not have reasonably anticipated that advancements in hydraulic fracturing technology would lead to robust and disruptive drilling in densely populated communities or even on their own property. Many community members in the Second Congressional District, including residents of Fort Collins, have expressed concerns that hydraulic

fracturing operations near residences, schools, and agricultural land may affect public health, environment, and property values. This has led to an undeniable friction between homeowners who want to protect community health and safety and operators who want to develop oil and gas resources.

The citizens of the City are not alone in questioning the health and environmental impacts of hydraulic fracturing. Members of the U.S. Congress are also intensely interested in the health and safety concerns surrounding hydraulic fracturing. In 2011, Congress also determined the need for further study, and requested that the Environmental Protection Agency (EPA) study the potential impact of hydraulic fracturing for oil and gas on drinking water resources. *See* EPA Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources at http://www2.epa.gov/sites/production/files/documents/hf_study_plan_110211_final_508.pdf (last visited February 6, 2015). The purpose of the EPA's multi-year study, which is now underway, is to "assess the potential impacts of hydraulic fracturing on drinking water resources and to identify the driving factors that affect the severity and frequency of any impacts." *Id.* The EPA study will be based on "best available science, independent sources of information, and a transparent, peer-reviewed process that will ensure the validity and accuracy of the results." *Id.* A draft is expected later this year, and the study is expected to be finalized by 2016.

In addition, there are several other ongoing studies that will likely be completed and available for review before the end of the City's moratorium. The National Institute of Environmental Health Sciences (NIEHS), one of the National Institutes of Health within the U.S. Department of Health and Human Services, is providing funding for research and community outreach to address potential health impacts related to hydraulic fracturing. *See* NIEHS Hydraulic Fracturing and Health at http://www.niehs.nih.gov/health/materials/hydraulic_fracturing_and_health_508.pdf (last visited February 6, 2015). NIEHS studies will be particularly helpful to the City because the agency uses a community-engaged research approach that promotes the active involvement of community residents in the research study. *Id.* Research currently funded by NIEHS includes: (1) a study led by the Geisinger Clinic in Pennsylvania to examine patterns of pregnancy and asthma outcomes among more than 50,000 people in relation to Marcellus shale hydraulic fracturing; (2) an investigation led by the University of Texas Health Sciences Center examining potential pregnancy risks experienced by women living near Barnett shale hydraulic fracturing sites; (3) a study led by the University of Colorado, Denver, aimed at assessing markers of stress, inflammation, cardiovascular health, and quality of life among people in communities with and without hydraulic fracturing; and (4) a University of Pennsylvania-led Inter-Environmental Health Sciences Core Center Working

Group on Unconventional Natural Gas Drilling Operations, which brings together NIEHS grantees to recommend research directions and approaches. *Id.* In addition to reviewing the findings of its own study, the City will be able to review the findings of these federally funded studies before the moratorium is completed.

This Court should uphold the five year moratorium as a valid and necessary tool to address local land use concerns of hydraulic fracturing. The moratorium has a legitimate purpose since there is little scientific data available to the City. Further, five years is a reasonable period of time to delay hydraulic fracturing to allow the City to conduct and review studies and to possibly move forward with land use controls. As such, this court should uphold the City's five year moratorium as a valid and necessary tool to address local land use concerns of hydraulic fracturing.

II. The moratorium should be upheld because it does not affect the state's interest in developing oil and gas.

A. The City's moratorium is not impliedly preempted by state law.

The question before the Court today is a novel issue. No Colorado Appellate Court has published an opinion analyzing a short term oil and gas moratorium. Hydraulic fracturing has led to many unanswered preemption questions concerning the relationship between state and local laws as well as federal and state authority.

Two themes in federal and state preemption law confirm that implied preemption is not the appropriate analysis to apply in this case.

First, the Supreme Court and Colorado courts have been reluctant to adopt implied preemption analyses. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see Bowen/Edwards*, 830 P.2d at 1058-59; *See also Voss*, 830 P.2d at 1068-69 . Unlike the Colorado Constitution, the U.S. Constitution includes a Supremacy Clause, Article VI, clause 2, which states that “[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” Although the Supremacy Clause expressly gives federal laws precedence over state and local law, the Supreme Court’s cases are grounded in a “presumption against preemption.” *Rice*, 331 U.S. at 230. Since Colorado’s Constitution doesn’t include a supremacy clause, it follows that Colorado courts have been even more reluctant to apply implied preemption analysis to overrule local government regulations. *See Bowen/Edwards*, 830 P.2d at 1058.

Second, when deciding a preemption case, and particularly a case involving implied preemption, the Supreme Court has relied on congressional intent. *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1240 (10th Cir. 2004) (citing *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986)). The

Supreme Court has held that an assumption exists in all federal preemption cases that “the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.”

Medtronic, Inv. v. Lohr, 518 U.S. 470, 485 (1996). Further underscoring this theme, the Supreme Court has held that congressional intent is “‘ultimate touchstone’ in every preemption case.” *Id.* (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

Legislative intent is also critical in Colorado courts’ analysis of implied preemption cases. The Colorado Supreme Court has found that “[d]etermining legislative intent to preempt local control is “measured not only by ‘the language used but by the whole purpose and scope of the legislative scheme,’ including the particular circumstances upon which the statute was intended to operate.”

Bowen/Edwards, 830 P.2d at 1058 (citing *City of Golden*, 348 P.2d 951, 954 (1960)). The Colorado Supreme Court has also held that implied preemption only applies when the legislative text or the legislative history “evinces a legislative intent to preempt all aspects of a county’s land-use authority over land that might be subject to oil and gas development or operations.” *Bowen/Edwards*, 830 P.2d at 1059.

Despite these two important themes in federal and state implied preemption jurisprudence, the district court found that the Colorado Oil and Gas Conservation

Act impliedly preempts the City's moratorium. This holding does not follow from Colorado law or case law examining implied preemption questions.

One only needs to look at the face of Colorado's oil and gas laws and regulations to see that there is no statutory attempt to preempt local land use regulations. Instead, Colorado's oil and gas laws and rules seemingly preserve local government's authority to regulate land use aspects of oil and gas operations. For instance, the recent Colorado Oil and Gas Conservation Commission Rule 201 states that nothing in the Commission's rules "shall alter, impair, or negate the authority of local and county governments to regulate land use related to oil and gas operations." COGCC Rule 201, 2 CCR 404-1. The Colorado Oil and Gas Conservation Act, House Bill 07-1341 mandates the same result by using similar language at C.R.S. 34-60-127(3)(c) and 128(4).

Colorado courts interpreting the Colorado Oil and Gas Conservation Act have found that this authority does not impliedly preempt local oil and gas land use regulations. *See Bowen/Edwards*, 830 P.2d at 1049-50; *see also Voss*, 830 P.2d at 1062. In *Bowen/Edwards*, the Court addressed whether the Oil and Gas Conservation Act preempted county land use regulations of oil and gas. *Bowen/Edwards*, 830 P.2d at 1048-49. The Court roundly rejected the argument that the Oil and Gas Conservation Act expressly or impliedly preempted the local regulation. *Id.* at 1058. In *Bowen/Edwards*, the Court found that local

governments have an interest in land use control and “orderly development and use of land in a manner consistent with local demographic and environmental concerns.” *Id.* at 1057. As such, the *Bowen/Edwards* Court held that a local government is able to regulate oil and gas operations pursuant to its land use authority as long as the local regulation is not in operational conflict with state statutes. *Id.* at 1059.

In short, the district court improperly applied implied preemption law. There is no evidence of legislative intent to preempt local land use regulations concerning oil and gas. Instead, the district court should have applied an operational conflict preemption test.

B. The City’s moratorium survives an operational conflict preemption analysis because it does not harm the state’s interest in oil and gas development.

The district court’s finding that the moratorium substantially impeded the state’s interest in oil and gas production was based on a flawed operational conflict analysis. The district court relied on *Voss*’s four factor test to determine whether the state’s interest in prohibiting a local government’s regulation is sufficient to justify preemption of the local regulation. *Voss* at 1067. Under the *Voss* analysis, the court determines whether: (1) there is a need for statewide uniformity of regulation; (2) the municipal regulation has an extraterritorial impact; (3) the subject matter is one traditionally governed by state or local government; and (4)

whether the Colorado Constitution specifically commits the particular matter to state or local regulation. *Voss*, 830 P.2d at 1067. As discussed below, the *Voss* analysis was misapplied because the accepted analysis in local land use law preemption cases involving local oil and gas regulations was set forth in 1993 in the *Bowen/Edwards* case.

Assuming, arguendo, that *Voss* is the appropriate test, the City's moratorium would still stand under the *Voss* analysis. The district court stated that the "only differences between the ban in *Voss* and the City's five-year ban are: 1) the Ordinance bans hydraulic fracturing, rather than all oil and gas drilling, and 2) the City's ban expires after five years." Court File, p. 501-02. The district court went on to say that "[n]either of these facts negates the impact on the state's interest in oil and gas production and development." *Id.* This is patently untrue.

The differences between the facts of *Voss* and the case at hand are substantial. In *Voss*, Greeley's ban was far more expansive. In that case, Greeley permanently banned all forms of hydrocarbon extraction. *Voss*, 830 P.2d at 694. Here, the Fort Collins' ordinance only places a short-term moratorium on hydraulic fracturing, which is one of many hydrocarbon extraction methods. In *Voss*, Greeley permanently banned all forms of oil and gas extraction. Here, Fort Collins merely placed a moratorium on hydraulic fracturing for five years. Importantly, a moratorium is not a ban. Nor is a moratorium permanent. This moratorium is a

mere suspension of activity for five years. The City's moratorium will not deplete the resource nor will it prevent oil and gas operators from recovering the oil and gas at the end of the five years.

Importantly, by passing a moratorium rather than a ban, the citizens of Fort Collins are acknowledging that they don't know whether or not hydraulic fracturing is safe or unsafe or whether property values will soar or plummet because there is so little scientific data available. The moratorium directs the City to review and gather scientific data to foster an informed debate over a discrete period of time. By the end of the moratorium, both the City's local studies and several national studies will be completed and available for review.

The purpose and time frame set forth in the moratorium also differentiate Greeley's ban from the City's moratorium. The purpose of the moratorium in this case directs and informs the City's actions during the five year moratorium. The City is already using its limited time wisely. On March 18, 2014, the City Council authorized the retention of a consultant to recommend appropriate studies to determine the impacts on property values and human health. The City is finalizing contracts with consultants to determine what relevant studies already exist and to analyze whether any current studies address the facts and circumstances present in Fort Collins. The oil and gas resources will remain in the ground and retain value during this five year period.

The Fort Collins moratorium in this case is vastly different than Greeley's ban in *Voss*, and consequently *Voss* is not applicable to the facts of the case at hand. Instead, the district court should have applied the *Bowen/Edwards* operational conflict analysis to determine whether the local regulation is preempted by state law.

In *Bowen/Edwards*, the Colorado Supreme Court addressed whether La Plata County's land use regulations of oil and gas operations were preempted by the Colorado Oil and Gas Conservation Act. *Bowen/Edwards*, 830 P.2d at 1048-49. The *Bowen/Edwards* court held that an operational conflict analysis must be used to determine whether application of the local regulation of oil and gas development materially impedes or destroys the state's interests. *Id.* at 1059. This determination "must be resolved on an ad-hoc basis under a fully developed evidentiary record." *Id.* at 1060.

The moratorium would also survive the *Bowen/Edwards* operational conflict test because the moratorium does not materially impede or destroy the state's interest in oil and gas development. First, there are currently no outstanding applications for permits to drill within the City limits and because the moratorium is short term. Second, under the short term moratorium, the resource will be ultimately recoverable—in this case in just under four more years. Last, the City's

moratorium does not place any technical conditions on drilling. *Id.*, 830 P.2d at 1059-60.

In conclusion, the district court incorrectly applied Colorado preemption law concerning local land use regulations of oil and gas development. The moratorium survives the proper operational conflict analysis because the City's moratorium does not impede the state's interest in developing oil and gas. By imposing a moratorium the City is not seeking to regulate hydraulic fracturing it is simply seeking time to conduct additional research and analysis. This Court should not force the City to allow certain irreversible activities within the municipal boundaries before the city is able to collect information and review the findings of the forthcoming studies.

CONCLUSION

The five year moratorium is the action of responsible community members who are working to understand and solve questions that have not yet been answered by the scientific community. The moratorium was enacted to conduct studies and review studies requested by the United States Congress and conducted by federal agencies to determine whether hydraulic fracturing will impact the community's health, local environment, and property values. Findings from these studies will allow the City to make informed decisions concerning future hydraulic fracturing planning and development when the moratorium expires.

Not only is a moratorium a legitimate land use tool, in this case it is the only appropriate land use tool because it provides the City with a five year period of time to study hydraulic fracturing's affect on human health and property values. This time will also provide the City with an opportunity to create a community plan for hydraulic fracturing development that would possibly ease community concerns and minimize friction between residents and oil and gas operators.

Furthermore, the moratorium stands under the proper operational preemption test. The moratorium will not harm the state's interest in developing oil and gas because it is short term, it has a legitimate community purpose, and the resource will ultimately be recoverable. While the moratorium will not harm the state's interest, overruling the moratorium may irreparably harm the people and community of Fort Collins by preventing the City from addressing its community's concerns and by limiting the opportunity to study and possibly enact reasonable regulations of hydraulic fracturing. Consequently, this Court should uphold the City's moratorium.

Respectfully submitted this 6th day of February, 2015.

/s/ Courtney J. Krause

Courtney J. Krause, Atty. Reg. #45520

*Printed copy with the original signature on file at the offices of
Congressman Jared Polis and Courtney Krause in accordance with C.A.R. 30(f).*

CERTIFICATE OF SERVICE

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

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