DATE FILED: March 13, 2015 8:15 PM
FILING ID: 7A657A065A734
CASE NUMBER: 2014CA1991

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| **Court of Appeals, State of Colorado**<br>**2 East 14th Ave., Denver, CO 80203** | |
| Appeal from District Court, Larimer County, Colorado<br>The Honorable Gregory M. Lammons<br>Case Number: 2013CV31385 | |
| **Appellant:**<br><br>City of Fort Collins, Colorado<br><br>v.<br><br>**Appellee:**<br><br>Colorado Oil & Gas Association | ▲ **COURT USE ONLY** ▲ |
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**APPELLEE COLORADO OIL AND GAS ASSOCIATION'S ANSWER BRIEF**

## 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:

The brief complies with C.A.R. 28(g).

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☑It contains 9247 words (excluding the caption, table of contents, table of authorities, this certificate of compliance, certificate of service, signature block and any addendum).
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☐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 (R. , p. ), 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 Appellee Colorado Oil & Gas Association agrees with the statements of Appellants concerning the applicable standard of review and preservation for appeal, and if not, why not.

☑I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Mark J. Mathews
Mark J. Mathews

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the district court correctly granted summary judgment in favor of Plaintiff and invalidated the City's moratorium as impliedly preempted and operationally preempted by state law.

## STATEMENT OF THE CASE

### A. Nature of the Case

The Colorado Oil and Gas Conservation Commission ("**COGCC**" or "**Commission**") authorizes and regulates hydraulic fracturing to complete oil or gas wells and the associated storage and disposal of wastes created by the hydraulic-fracturing-completion process. Nonetheless, a majority of the citizens of the City of Fort Collins ("**City**" or "**Fort Collins**") voted in favor of Ballot Measure 2A, and the City adopted Ballot Measure 2A as an ordinance. Section 12-135 of the Fort Collins Code ("**Ordinance**") bans for five years the use of hydraulic fracturing and the storage in open pits of wastes and flowback created by the hydraulic fracturing process.

### B. Course of Proceedings and Disposition of the Court Below

COGA filed its Complaint against Fort Collins on December 3, 2013, asserting: 1) a claim for declaratory judgment that the moratorium is preempted by state law, and 2) a claim for an injunction against the enforcement of the

moratorium. R.CF, pp.3–10. The City filed its Answer on February 3, 2014. R.CF, p.21. The parties undertook no discovery. After the district court denied a motion to intervene in support of the Ordinance by Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks ("**Measure Proponents**"), COGA and Fort Collins each filed motions for summary judgment. R.CF, pp.104,108, 268. The district court's order denying Measure Proponents' motion to intervene is the subject of a separate appeal before this Court, captioned *Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks v. COGA*, Case No. 2014CA780 (Colo. App. 2014).

The district court issued its Order Granting Plaintiff's Motion for Summary Judgment on First Claim for Relief and Denying Defendant's Cross-Motion for Summary Judgment. R.CF, p.495. The Honorable Gregory M. Lammons held the Ordinance invalid as preempted by the Oil and Gas Conservation Act (the "**Act**"), C.R.S. § 34-60-101 *et seq.*, and granted summary judgment in the COGA's favor on its claim for declaratory judgment. R.CF, p.503.

In his ruling, Judge Lammons first held that the Ordinance was impliedly preempted under *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992), stating that the City's "five-year ban on hydraulic fracturing substantially impedes the state's significant interest in fostering efficient and equitable oil and gas production for the same reasons that Greeley's ban in *Voss* substantially impeded the state's

interest in oil and gas production." R.CF, p.501. The district court then found that there was also an operational conflict between the Act and the Ordinance: "Because the Ordinance bans the use of hydraulic fracturing for five-years, it necessarily prohibits a technique to chemically treat wells that the Commission is expressly authorized to permit. Indeed, the Commission has promulgated elaborate rules designed so that the process of hydraulic fracturing is used in accordance with the purposes of the Act." R.CF, p.502.

After issuance of the Order, COGA moved to dismiss its second claim for relief. R.CF, p.504. On September 17, 2014, the court dismissed COGA's second claim for relief without prejudice. R.CF, p.507.

### C. Statement of the Undisputed Facts

#### 1. Fort Collins voters approve Ballot Measure 2A

The City is a home-rule city. R.CF, p.240. A majority of the City's voters approved Ballot Measure 2A, which provides: "An ordinance placing a moratorium on hydraulic fracturing and the storage of its waste products with the City of Fort Collins or on lands under its jurisdiction for a period of five years, without exemption or exception, in order to fully study the impacts of this process on property values and human health, which moratorium can be lifted upon a ballot measure approved by the people of the City of Fort Collins and which shall apply retroactively as of the date this measure was found to have qualified for placement

on the ballot." R.CF, pp.120,181,242–43. The City adopted Ballot Measure 2A as an ordinance. R.CF, pp.241,242. The Ordinance provides: "The use of hydraulic fracturing to extract oil, gas or other hydrocarbons, and the storage in open pits of solid or liquid wastes and/or flowback created in connection with the hydraulic fracturing process, are prohibited within the City." R.CF, pp.81,113,182–83. The Ordinance went into effect on August 5, 2013 and does not expire until August 5, 2018. R.CF, p.243.

2. Hydraulic fracturing of oil and gas wells in Colorado

Hydraulic fracturing is a well-completion technique. R.CF, pp.159,170. Fluid is pumped under high pressure into a cased wellbore that is perforated where it passes through an oil-and-gas-bearing rock formation, creating small fissures in the target rock formation and allowing trapped hydrocarbons to be produced. R.CF, pp.159,170. The fluids used in hydraulic fracturing consist primarily of water, with sand or silica added as a proppant to keep the fissures from re-sealing and a small percentage of chemical additives. R.CF, pp.159,170. Hydraulic fracturing has been used to complete wells in Colorado for many decades, and tens of thousands of wells have been hydraulically fractured in Colorado. R.CF, p.159.

## SUMMARY OF ARGUMENT

The City focuses its entire Opening Brief on attempting to rebut positions that COGA does not take. 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 *Bowen/Edwards* 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 valid land use measures, 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 here. 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 when a home-rule government is attempting through a moratorium or a ban to negate the state's regulatory authority.

While the City devotes its energy to rebutting these "straw man" positions, it ignores entirely the conflict test used consistently by Colorado courts from at least 1941 through *Webb v. Black Hawk* last year to address whether prohibitions passed by home rule municipalities are preempted by state law. In each of these decisions,

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*, 2013 CO 9, ¶ 43; *see also infra* § III.A. 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 Judge Lammons' ruling that the moratorium is impliedly preempted, it does not do so convincingly. The City distorts the language in *Voss*, 830 P.2d 1061, ignoring the clear holding in *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." 830 P.2d at 1068 (emphasis added). The City also does not address the holding in *Colorado Mining Ass'n v. Board of County Commissioners*, 199 P.3d 718 (Colo. 2009), even though that decision relied upon and discussed *Voss* extensively, and held 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.* at 725.

In order to prevail, the City must demonstrate that hydraulic fracturing and the storage of associated waste are matters of purely local concern. This the City cannot do. 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 are preempted and therefore unenforceable.

## STANDARD OF REVIEW/STATEMENT UNDER C.A.R. 28(K)

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."). Where, as here, the material facts are all undisputed, the issues for summary judgment are pure questions of law.[1] *Id.* 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 facts that are in dispute, the

[1] COGA admits the City's undisputed facts for purposes of this appeal, except that COGA disputes that it failed to identify COGA members who own oil and gas interests within Fort Collins and did not allege that certain of its members intended to use hydraulic fracturing with the City's jurisdiction prior to the commencement of the five-year ban.

district court appropriately ruled on summary judgment that the City's five-year ban on hydraulic fracturing is preempted by state law.

## ARGUMENT

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

The City argues that "[l]egislative acts are presumed to be valid, and the party challenging them has the burden of proving invalidity beyond a reasonable doubt." City Op. Br. at 12. No Colorado case has ever applied the City's proposed "beyond a reasonable doubt" standard to resolve state preemption issues. Rather, the "beyond a reasonable doubt" standard applies only to *constitutional* challenges to otherwise validly enacted statutes and ordinances and not to a preemption analysis. *See, e.g.*, *Sellon v. City of Manitou Springs*, 745 P.2d 229 (Colo. 1987) ("[A] party challenging a zoning ordinance on constitutional grounds assumes the burden of proving the asserted invalidity beyond a reasonable doubt."); *Trinen v. City & Cnty. of Denver*, 53 P.3d 754, 758–60 (Colo. 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*, 976 P.2d 303, 307 (Colo. App. 1998) (same), *aff'd*, 3 P.3d 30 (Colo. 2000).

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. Mining Ass'n.*, 199 P.3d at 723 (quoting *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 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.

## II. The Ordinance is Impliedly Preempted.

### A. For Purposes of Preemption, the City's Moratorium is the Equivalent of a Ban.

The City's Ordinance imposes a total *ban* on hydraulic fracturing within the City for five years "without exemption or exception." R.CF, pp.120,181,242-43. While the City refers to moratoria as "stop gap" measures and a "temporary or interim land use tool" (City Op. Br. at 14–15), the City's five-year moratorium hardly qualifies as either of these. As Judge Lammons held: "[A]lthough no Colorado appellate court has published an opinion analyzing preemption in regards

to a moratorium, the analysis does not differ from that of a permanent ordinance. . . . A moratorium ordinance and a permanent ordinance can both be preempted." R.CF, p.498.

To reach this holding, Judge Lammons cited several court decisions from other states which tested whether a local moratorium was preempted under each state's traditional preemption test. R.CF, p.498. The court confirmed that there is nothing sacrosanct about a moratorium and a number of courts have invalidated moratoria on preemption grounds. *See City of Buford v. Ga. Power Co.*, 581 S.E.2d 16 (Ga. 2003) (one-year moratorium on construction of electric substations within 500 feet of residentially-zoned property impliedly preempted by state law); *Mayor & City Council of Baltimore v. New Pulaski Co. Ltd. P'ship*, 684 A.2d 888, 893–94 (Md. Ct. Spec. App. 1996) (five-year moratorium that automatically renews unless city meets recycling goals and which prohibits the construction, reconstruction, replacement and expansion of incinerators within Baltimore City impliedly preempted by state environmental laws); *Town of E. Greenwich v. O'Neil*, 617 A.2d 104 (R.I. 1992) (three-year moratorium on the construction of electric transmission lines exceeding 60 kilovolts was impliedly preempted by state law); *Plaza Joint Venture v. City of Atlantic City*, 174 N.J. Super. 231, 237–39

(1980) (city's one-year moratorium on the conversion of any rental unit into a condominium was impliedly preempted by state law).

These cases make clear that the temporary nature of a local moratorium will not prevent a determination that the moratorium is preempted where the moratorium intrudes upon or impermissibly conflicts with state law. For example, in *Plaza Joint Venture*, the court held that the "ordinance before us effectively albeit temporarily eliminates conversion as a ground for eviction. The ordinance is therefore 'invalid as having been preempted by state enactments. '" 174 N.J. Super. at 242; *accord New Pulaski Co. Ltd. P'ship,* 684 A.2d at 894 (rejecting city's reliance on statutory section that provides that relevant statute does not limit or supersede local authority, finding that section "does not operate to allow a county to veto state law") (citation and internal quotation marks omitted).

None of the cases relied upon by the City contradicts this precedent. The City relies upon *Williams v. Central City,* 907 P.2d 701, 706 (Colo. App. 1995), for the proposition that "[m]oratoria are, by their very nature, of limited duration and are designed to maintain the status quo pending study and governmental decision making." City Op. Br. at 15. As an initial matter, it is highly questionable that five years is "of limited duration," and that precluding any hydraulic fracturing without exception anywhere in the City maintains the status quo for oil and gas companies

operating within the City prior to the ban. Moreover, as noted by Judge Lammons, the *Williams* court examined a moratorium in the takings context and "[t]he court's analysis is inapplicable to the instant case given that *Williams* did not determine the validity of Central City's moratorium." R.CF, p.498 n.3. *See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (moratoria treated differently than bans for purposes of applying the takings clause: two local ordinances imposing a moratorium on development to permit the planning agency to study the impact of development on Lake Tahoe did not constitute a *per se* taking of property requiring just compensation).[2]

The City's argument also fails because it doesn't recognize that a moratorium is subject to preemption if it addresses an area in which the state has a

[2] The City also cites to *Droste v. Board of County Commissioners of Pitkin County*, 159 P.3d 601, 606 (Colo. 2007) and *Deighton v. City Council of Colorado Springs*, 902 P.2d 426 (Colo. App. 1995), but these cases also do not address a preemption challenge to the validity of a moratorium. In *Droste*, the plaintiffs sought a declaration that a statutory county simply lacked authority to enact a ten-month moratorium on land-use application review 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 Local Government Land Use Control Enabling Act ("LUCEA"). *Id.* at 607. And *Deighton* concerned a challenge to a resolution imposing a moratorium preventing new adult business pending study of a thousand-foot separation requirement. The court struck down the resolution because it altered the current zoning ordinance which, the Court determined, could only be changed by another ordinance and not by resolution. 902 P.2d at 429. As with the other cases relied upon by the City, *Droste* and *Deighton* did not undertake a preemption analysis or analyze a competing state interest.

substantial interest. While moratoria may be used with respect to the regulation of land use issues that are matters of purely local government concern, the Ordinance intrudes upon a confirmed state interest. The Colorado Supreme Court has recognized that the state has a significant interest in mineral development and in the associated 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. Mining Ass'n*, 199 P.3d at 730.

The City's entire argument hinges on the incorrect premise that local land-use laws cannot be impliedly or operationally preempted, even if they operate in an area of state interest. That premise turns the preemption doctrine on its head. While home-rule cities have traditionally enjoyed broad authority to enact purely local land-use regulations without regard to conflicting state laws, Colorado courts have routinely held that this authority may not extend to matters of state or mixed concern. *See infra* § III. 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.").

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. 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 infra* § II.B.

### B. *Voss* Controls the Determination of this Case.

The City argues that Judge Lammons erred in relying upon *Voss* in holding that the Ordinance was preempted. As an initial matter, Judge Lammons relied on a number of key decisions in striking down the Ordinance, including *Bowen/Edwards*, 830 P.2d 1045, *Webb*, 2013 CO 9, and *Colorado Mining Ass'n.*, 199 P.3d 718. His opinion did not strike down the Ordinance solely on the basis of the *Voss* decision.

Nonetheless, the holding in *Voss* is central to this dispute. In *Voss*, the citizens of the City of Greeley, a home-rule municipality, voted to adopt an ordinance banning the drilling of any oil and gas well within the city limits. 830 P.2d. at 1063. The Greeley City Council adopted a similar measure. *Id.* The court evaluated four factors to assess whether Greeley's ban was preempted. It found that "the first factor—the need for statewide uniformity of regulation of oil and gas

development and production—weighs heavily in favor of state preemption of Greeley's total ban on drilling within city limits." *Id.* at 1067. The court stated that "the state's interest in the efficient and fair development and production of oil and gas resources in the state, including the location and spacing of individual wells, militates against a home-rule city's total ban on drilling within the city limits." *Id.*

With regard to the second factor—whether the municipal regulation has an extra-territorial impact—the court held that "extraterritorial effect of the Greeley ordinances also weighs in favor of the state's interest in effective and fair development and production." *Id.* The court relied upon the fact that limiting production to only one portion of a pool of oil and gas outside the city limits can result in increased production costs and that the drilling operation may be "economically unfeasible." *Id.* at 1067–68. Greeley's drilling ban, the court found, affected the ability of those with mineral interests both within and outside the city boundary to obtain an equitable share of production profits in contravention of the Act. *Id.* at 1068.

Regarding the third factor which focuses on whether the subject matter is one traditionally governed by state or local government, the court found that "[t]he regulation of oil and gas development and production has traditionally been a matter of state rather than local control." *Id.* In evaluating the fourth factor, the

court held that the Colorado Constitution does not direct that oil and gas operations be regulated at the state or local level. *Id.*

As a result of its analysis, the Court concluded that Greeley's ban on oil and gas drilling was preempted by state law:

> [T]he state's interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is *sufficiently dominant* to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits.

*Id.* (emphasis added).

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. Like Greeley's ban in *Voss*, however, the City's moratorium is 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 while the Ordinance is in effect. *See Voss*, 830 P.2d at 1068.

The City's also argues that, unlike the ban in *Voss*, "there are no permits affected by the Moratorium" because the Ordinance demonstrates the City's intent to develop regulations in harmony with the Act. City Op. Br. at 20. But the City cannot harmonize the five-year ban on hydraulic fracturing with the Act's specific language evidencing a significant state interest in the efficient and fair development, production, and utilization of oil and gas resources. *See infra* § III.D. Moreover, the City's moratorium has affected operators. The City makes much of the fact that neither Prospect Energy LLC, a COGA member which executed an operator agreement with the City in 2013, nor any other party has informed the City that it plans to use hydraulic fracturing on any wells within the City. City Op. Br. at 8. But it is not surprising that no operator has attempted to obtain permission from the City to hydraulically facture wells in Fort Collins in light of the fact that 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. Prospect's 2013 agreement with the City demonstrates its keen interest in employing hydraulic fracturing – indeed, the entire purpose of the agreement is "to authorize Prospect to conduct its operations . . . and to utilize hydraulic fracturing during the course of its operations." R.CF, p.309.

### C. The Act Impliedly Preempts the City's Moratorium.

In *Voss*, as discussed above, the Colorado Supreme Court held that the state's interest "in the efficient and equitable development and production of oil and gas," as manifested in the Act, was "sufficiently dominant" to override Greeley's ban on oil and gas operations. *Voss*, 830 P.2d at 1068. The *Voss* court, though, did not make clear whether the home-rule city's ban was impliedly preempted due the state's dominant interest, or whether the ban was preempted due to its irreconcilable conflict with state law.

The answer to the precise basis for the *Voss* decision came 17 years later in *Colorado Mining Ass'n*, 199 P.3d 718, which the City fails to address in its Opening Brief. In that case, the court held that Summit County's ban on the use of cyanide in heap and vat leach mining operations was impliedly preempted by the state's "sufficiently dominant" authority in the controlled use of chemicals in mining operations. *Id*. at 732. The court extensively discussed and relied on *Voss* to void the county's ban as impliedly preempted and confirmed that its holding in *Voss* was based on implied preemption: "We found [Greeley's] ban to be unenforceable because 'the state's interest in efficient development and production of oil and gas in a manner preventative of waste and protective of correlative rights. . . preempts a home-rule city from totally excluding all drilling operations within the city limits. We held [in *Voss*] that the state interest manifested in the

state act was 'sufficiently dominant' to override the local ordinance. [Citation omitted.] Sufficient dominancy is one of the several grounds for implied state preemption of a local ordinance." *Id.* at 724 (quoting *Voss*, 830 P.2d at 1061).

Rather than addressing the holding in *Colorado Mining Ass'n*, the City argues that implied preemption does not apply here because of the Court's pronouncement in *Bowen/Edwards* that the Act does not preempt "all aspects" of a home-rule municipality's land-use authority. City Op. Br. at 21–22. But the City misconstrues COGA's implied preemption argument. COGA agrees that the Act does not impliedly preempt the ability of local governments to regulate some aspects of oil and gas activity. As the City points out, Colorado courts have held for the past twenty years that the Act does not impliedly preempt local governments from regulating *any* aspect of oil and gas law. City Op. Br. at 21.

But under *Colorado Mining Ass'n* and *Voss*, local governments are impliedly preempted from enacting regulations that impact the state's "sufficiently dominant interest" in "the efficient and equitable development and production of oil and gas." *Voss*, 830 P.2d at 1068; *Colo. Mining Ass'n*, 199 P.3d at 732. The City's five-year ban on hydraulic fracturing goes to the heart of the state's interest in promoting efficiency and avoiding waste of these valuable mineral resources. *See Voss*, 830 P.2d at 1067; *see also* C.R.S. § 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.[3]

The City seeks support in the provisions of the 2007 amendments to the Act 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 Op. Br. at 23 (citing C.R.S. § 34-60-128(4)). 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.

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[3] The City argues that Judge Lammons erred in his implied preemption ruling because he relied upon cases outside of the oil and gas context in holding that the Ordinance is impliedly preempted. City Op. Br. at 26. But Judge Lammons, for his implied preemption analysis, substantially relied upon *Voss*: "The five-year ban on hydraulic fracturing substantially impedes the state's significant interest in fostering efficient and equitable oil and gas production for the same reasons that Greeley's ban in *Voss* substantially impeded the state's interest in oil and gas production." R.CF, p.501. The City also claims that Judge Lammons misinterprets the holding in *Voss*, which the City claims struck down Greely's ordinance under the *Bowen/Edwards* operational conflict test. City Op. Br. at 26–27. The City ignores entirely that *Voss* concluded that the state's interest "in the efficient and equitable development and production of oil and gas," was "sufficiently dominant" to override Greeley's ban on oil and gas operations, *Voss*, 830 P.2d at 1068, as well as the holding in *Colorado Mining Ass'n* that "sufficient dominancy is one of the several grounds for implied state preemption of a local ordinance." 199 P.3d at 724 (quoting *Voss*, 830 P.2d at 1061).

The amendments to the Commission's Rule 201, in response to the 2007 amendments, similarly did not alter local government authority. That Rule only states that local governments may regulate land use related to oil and gas operations, so long as the local regulation is not in operational conflict with the Act or COGCC regulations. 2 Colo. Code Regs. § 404-1:201. Nothing in these provisions authorizes a local government to ban, on a permanent or temporary basis, operations necessary for the efficient and equitable development and production of oil and gas.

Finally, the Ordinance is also not insulated from preemption analysis by LUCEA, C.R.S. § 29-20-101 *et seq.* City Op. Br. at 23–24. Nothing in LUCEA confers authority on the City to ban—either temporarily or permanently—hydraulic fracturing, and 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 Pitkin Cnty.*, 159 P.3d 601, 608 (Colo. 2007); *Colo. Mining 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*).

## III. The City's moratorium operationally conflicts with the Act.

### A. A home-rule city's ban of activities that the state allows is preempted, except in matters of purely local concern.

In evaluating whether legislation by a home-rule municipality, such as the City, is operationally preempted by state law, the Court must first determine the "legal issue" of whether the subject matter of the legislation is of statewide concern, of mixed state and local concern, or of purely local concern. *Webb*, ¶ 16. If a matter is found to be of statewide concern, "the state legislature exercises plenary authority, and home–rule cities may regulate only if the constitution or statue authorizes such legislation." *Id*. By contrast, home-rule municipalities may "legislate in areas of local concern that the state General Assembly traditionally legislated in, thereby limiting the authority of the state legislature with respect to local and municipal affairs." *Id*. Finally, where matters involve mixed state and local concerns, a home-rule regulation may "exist with state regulation only so long as there is no conflict; if there is a conflict, the state statute supersedes the conflicting local regulation." *Id*. The relevant test applicable in this case 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.* ¶ 43 (citing *City of Commerce City v. State*, 40 P.3d 1273, 1284 (Colo. 2002)).

Thus, the City can only prevail in this appeal if it demonstrates its moratorium on hydraulic fracturing addresses solely a matter of local concern. The City cannot make this showing.

### B. The state has a significant interest in the regulation of oil and gas and hydraulic fracturing.

#### 1. Colorado courts have repeatedly recognized the state's interest.

*Every* Colorado case that has considered the issues has held that the state has a substantial interest in oil and gas regulation. Even outside of the context of a ban on oil and gas development as discussed in *Voss*, Colorado courts have consistently recognized the state's significant interest in oil and gas regulation.

Contemporaneously with *Voss*, the court issued the companion opinion of *Bowen/Edwards*, in which it reaffirmed the state's interest in efficient and fair development and production of oil and gas, the prevention of waste, and the protection of common-source owners and producers. 830 P.2d at 1058. While the court did not find that the Act evidenced a legislative intent to preempt "*all* aspects of a county's statutory authority to regulate land use" involving oil and gas operations (emphasis added), it held that a local government could not regulate matters involving technical aspects of oil and gas or the location of wells:

> 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 such operational conflicts might exist, the county regulations must yield to the state interest.

*Id*. at 1060.

Similarly, in *Town of Frederick v. North American Resources Co.*, this Court relied on the "state's interest in oil and gas development and operations as expressed in the [Act]" to void several of the Town's oil and gas regulations as a matter of law. 60 P.3d 758, 761 (Colo. App. 2002). Citing to *Bowen/Edwards*, the court held that "the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts and requires that the local regulations yield to the state interest." *Id.* at 765; *see also Colo. Mining Ass'n*, 199 P.3d at 723, 730 (relying upon *Bowen/Edwards* and *Voss* and noting the "common themes" that "the state has a significant interest in both mineral development and in human health and environmental protection")

2. <u>The state's comprehensive regulatory scheme demonstrates a significant interest in the regulation of oil and gas activity.</u>

The City does not address the state's comprehensive statutory and regulatory scheme regulating oil and gas. As the Colorado Supreme Court has determined: "There is no question that the [Act] evidences a significant interest on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources . . . ." *Voss*, 830 P.2d at 1065–66 (citing *Bowen/Edwards*).

In the Act, the Colorado legislature "declared [it] to be in the public interest to . . . [f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources." C.R.S. § 34-60-102(1)(a). The General Assembly also declared it is the "intent and purpose of the [Act] to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, welfare, the environment and wildlife resources," and "subject further to the enforcement and protection of the co-equal and correlative rights of the owners and producers of a common source of oil and gas, so that each common owner and producer may obtain a just and equitable share of production therefrom." *Id.* § 34-60-102(1)(b). The *Voss* court relied on these expressions of state policy and public interest, as well as on the Act's definition of waste, to

highlight the state's interest in ensuring the production of oil and gas at maximum efficient rates of production. *Voss*, 830 P.2d at 1067.

As the *Voss* court also noted, the Act vests the COGCC with broad authority to enforce the Act's provisions, including the regulation of hydraulic fracturing. C.R.S. § 34-60-105(1); *Voss*, 830 P.2d at 1065. The Commission took hydraulic fracturing into consideration when it comprehensively updated its regulations in 2008, analyzed groundwater quality trends in 2009, adopted a special notification policy in 2010, and designed a new groundwater sampling and monitoring program during 2011. R.CF, p.142. It amended its rules in December 2011 for the specific purpose of addressing hydraulic fracturing concerns. R.CF, p.170.

As a result, the Commission regulates every aspect of hydraulic fracturing operations. The Commission requires producers to test their well casings in advance to verify that they can withstand the pressures that will be applied during hydraulic fracturing. 2 Colo. Code Regs. § 404-1:317.j. It also mandates that the operator design its well to confine hydraulic fracturing fluids to the objective formations, and monitor and record pressures continuously during hydraulic fracturing operations to assure that hydraulic fracturing fluids are confined to the target formation and that wellbore integrity is maintained. *Id.* §§ 404-1:317, 1:341. Within thirty days after completing or re-stimulating a formation, operators must

file a Completed Interval Report (Form 5A) that summarizes the fracturing treatment. *Id.* § 404-1:308B.

The Commission also regulates the chemicals used in hydraulic fracturing. *See id.* § 404-1:205. Upon the conclusion of a hydraulic fracturing treatment, producers must report the total volume of water or other base fluid that was used in the hydraulic fracturing treatment, information regarding each chemical or additive used in the hydraulic fracturing fluid, the maximum concentration of each chemical added to the fracturing fluid, and the chemical abstract service number for each such chemical. *Id.* § 404-1:205A.

Producers must also notify landowners and local governments in advance of their intention to hydraulically fracture a well. And they must provide landowners with a copy of the Commission's informational brochure on hydraulic fracturing (*see* R.CF, p.159), instruct them on how to access additional information regarding the proposed well on the Commission's website, and inform them of their right to oppose or comment upon the proposed operations. *Id.* § 404-1:305.c.[4]

Importantly, the COGCC itself has argued that the Act authorizes it to regulate hydraulic fracturing and the storage and disposal of related wastes, and

[4] The Commission also extensively regulates the handling, transportation, and disposal of waste products associated with the drilling and operation of oil and gas wells. *See id.* §§ 404-1:316A, 1:323, 1:324A, 1:325, 1:326, 1:901–08.

that its Rules regulate these practices. *See* Combined Answer Brief of the Colorado Oil and Gas Conservation Commission, *City of Longmont, Colorado v. COGA*, No. 2014CA1759 (Colo. App. Mar. 5, 2015). In construing statutes and regulations, the Court should afford the agency tasked with carrying out its mandate deference in its interpretation thereof. *Stell v. Boulder Cnty. Dep't of Social Servs.*, 92 P.3d 910, 915–16 (Colo. 2004). The Commission's decision to not prohibit hydraulic fracturing of wells since the 1970s carries as much interpretive weight as would a decision to regulate the practice in the manner apparently desired by the City. The Court should defer to the Commission's interpretation of its Rules and the Act.[5]

### C. The City's moratorium prohibits conduct that the state allows and is therefore preempted.

As Judge Lammons determined, Colorado's courts have consistently held that in matters of mixed state and local concern, the 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

[5] The City argues that its moratorium does not conflict with the Act because both are concerned with safety, waste, and correlative rights. City Op. Br. at 28. But this argument misses the point that the Act and Rules clearly evidence a significant state interest in the regulation of oil and gas in general and hydraulic fracturing in particular. As Judge Lammons held, this substantial state interest precludes the City from enacting a five-year ban of a practice that the state explicitly authorizes and regulates. R.CF, p.502–03.

authorizes." R.CF, p.500 (quoting *Webb*, ¶ 43); *see also City of Northglenn v. Ibarra*, 62 P.3d 151, 165 (Colo. 2003).

The City argues that the Court erred in employing the *Webb* conflict test. City Op. Br. at 29–30. But Colorado courts have routinely used this test in determining whether a home-rule municipality's ordinance, particularly an ordinance banning certain activity, is preempted by conflicting state statutes or regulations:

- *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*, ¶ 16. Court finds that city ordinance banning bicycles traveling from outside the municipality on streets within municipality regulated in an area of mixed state and local law, and therefore was 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 banning 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.

- *Nat'l Adver. Co. v. Dep't of Highways*, 751 P.2d 632, 635 (Colo. 1988). Court holds that control of outdoor advertising signs within home-rule municipality is a matter of mixed state and local concern, and Colorado

> Outdoor Advertising Act therefore preempted a conflicting city regulation.

In each of these decisions, the court compared the particular state interest with the home-rule municipality's land-use and police powers, and 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* to hold that state law preempted the local ordinance.

Under this precedent, the Ordinance is preempted because the regulation of oil and gas is at least a matter of mixed state land local concern, and the Ordinance forbids what state law authorizes and regulates.

### D. 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 Op. Br. at 27, 29. Colorado courts, however, have not employed this construction of the operational conflict test in circumstances where a home rule municipality bans an activity regulated by the state.

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. 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 in *Bowen/Edwards*, Colorado courts have applied the *Bowen/Edwards* operational conflict test in the context of evaluating whether particular regulations and standards interfere with state requirements.

The City correctly states that the *Bowen/Edwards* conflict test was employed in *Town of Frederick*, 60 P.3d at 763–64, and *Board of County Commissioners v. BDS International*, 159 P.3d 773 (Colo. App. 2006). City Op. Br. at 30–31. But these cases are distinguishable in two respects. First, neither case involved a home-rule municipality, and therefore the *Webb* conflict test was appropriately not employed by the courts. Second, these cases did not involve a local government ban or moratorium, but instead concerned a local government ordinance establishing specific requirements on oil and gas development. In *Town of Frederick*, the court struck down as operationally preempted town requirements imposing setback and noise and visual abatement requirements that conflicted with

COGCC regulations. 60 P.3d at 763–64.[6] And in *BDS International*, the court applied the operational conflict test to void county oil and gas regulations regarding financial requirements and access to records. 159 P.3d at 779.[7]

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

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[6] The City claims that the *Webb* conflict test was rejected by the court in *Town of Frederick* when the court refused to rely on *Ray v. Denver*, 121 P.2d 886 (Colo. 1942). City Op. Br. at 30. But the holding in *Ray* has nothing to do with the *Webb* test. In fact, the Town of Frederick cited *Ray* to argue there was no operational conflict between an ordinance and a statute where the ordinance goes further in its restriction. That situation bears no resemblance to the circumstance here, where an operational conflict arises because "the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Webb*, ¶ 43.

[7] As the City points out (City Op. Br. at 30–31), the court in *Board of County Commissioners of La Plata County, v. COGCC*, 81 P.3d 1119 (Colo. App. 2003), invalidated a COGCC rule which stated that "[t]he permit-to-drill shall be binding with respect to any conflicting local government permit or land use approval process," holding that this conflict test was broader than the *Bowen/Edwards* operational conflict test. 81 P.3d at 1123. Again, though, the court was not addressing a specific ban or moratorium imposed by a local government, but instead was evaluating the appropriate test for whether a state-issued permit would preempt specific local government regulations and restrictions. In that circumstance, the court understandably relied upon the *Bowen/Edwards*, rather than the *Webb*, test.

mixed state and local interest. *See supra* at 29–30. Colorado courts have also repeatedly recognized the distinction between regulation or restriction of a non-technical activity and its total prohibition, finding the former to be within a city's authority while the latter is not. As the Colorado Supreme Court has held, "the power to regulate does not include 'any power, express or inherent, to prohibit.'" *Combined Commc'ns Corp. v. City & Cnty. of Denver*, 542 P.2d 79, 82–83 (Colo. 1975) (quoting *Gen. Outdoor Adver. Co. v. Goodman*, 262 P.2d 261 (Colo. 1953)); *cf. Colo. Mining Ass'n*, 199 P.3d at 731 ("Though counties have broad land use planning authority, that authority does not generally include the right to ban disfavored uses from *all* zoning districts.") (emphasis in original) (citing *Combined Commc'ns*).

Nonetheless, even if the *Bowen/Edwards* operational conflict test did apply in this case, this court should uphold the invalidation of the Ordinance. As the court stated in *Bowen/Edwards*, 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 Act and "materially impedes" the Act's goal of promoting the responsible development and prohibiting the waste of oil and gas resources. It is also irreconcilable with the Commission's

regulations that specifically allow and regulate hydraulic fracturing and the storage of hydraulic fracturing waste and flowback. As Judge Lammons determined, there is simply no way to harmonize the Ordinance's flat prohibition of a well-completion and operational technique that state law explicitly allows and regulates. R.CF, pp.502–03.

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. *See 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). As Judge Lammons held, "[c]ertainly if the City cannot pass conflicting technical conditions, safety regulations or the like, it cannot impose a total ban on hydraulic fracturing while the Act authorizes its use." R.CF, p.503.

Finally, the City claims that the moratorium imposed by the Ordinance can be harmonized with the goals of the Act because it is only a "time-out to evaluate the impacts of hydraulic fracturing." City Op. Br. at 32. 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 either the *Webb* or *Bowen/Edwards* operational conflict standard.

### E. The court did not need a "fully developed evidentiary record" to make its decision.

The City argues that the district court was required to hold a fact-intensive, *ad hoc* evidentiary hearing to determine whether an operational conflict exists, and that no evidence supported the court's summary judgment ruling. City Op. Br. at 32–34. As an initial matter, the City neither requested such a hearing from the

district court nor sought to undertake any discovery or otherwise develop evidence suggesting that its five-year ban did not operationally conflict with the Act.[8]

Further, the City relies upon *Bowen/Edwards* (City Op. Br. at 33–34), but nothing in that case purports to require an *ad hoc* evidentiary hearing, or a fully developed factual record, in every preemption matter. City Op. Br. at 34. *Bowen/Edwards* only determined that an *ad hoc* evidentiary hearing was required under the facts of that case because the court could not find an operational conflict in the language or purposes of the relevant statutes and regulations. 830 P.2d at 1059–60. The complaint had alleged express preemption of the entirety of the County's regulations and did not allege that any specific sections of the regulations

[8] The City argues that the court erred in granting summary judgment to COGA because "[t]he record in this case contains no evidence that the operational effect of the Moratorium would materially impede or destroy the state interest." City Op. Br. at 33. The City overlooks Judge Lammons' finding that "[i]n May 2013, Prospect Energy, LLC (a member of COGA) signed an operator agreement with the City to allow it to use hydraulic fracturing in wells within the City's boundaries. The initial term of the operator agreement is five years, ending on May 29, 2018. Thus the Ordinance and the operator agreement are in direct conflict." R.CF, p.496 (internal citations omitted).

Moreover, the City misconstrues the operational conflict test as turning on whether the Ordinance actually impacts the use of hydraulic fracturing within the City. But the *Bowen/Edwards* test addresses whether the language of an ordinance conflicts with the state regulations, not the impacts of an ordinance on actual oil and gas development in a particular municipality. Employing the City's novel approach would require Colorado courts to engage in a separate preemption analysis for each of the more than 200 statutory and home-rule Colorado municipalities based on the level of oil and gas permitting activity in each. No court has applied the operational conflict test in such an irrational manner.

were preempted through an operational conflict. *Id.* The court remanded the case to the district court so that Bowen/Edwards could amend its complaint to specify the particular regulations it was challenging as preempted. *Id.* at 1060 ("Upon remand of the case to the district court, Bowen/Edwards should be afforded the opportunity to specify by appropriate pleading those particular county regulations which it claims are operationally in conflict with, and thus preempted by, the state statutory or regulatory scheme . . . ."). Thus, it was only in this context of comparing the operational application of two competing sets of regulations and the court being unable to discern a conflict on its face that *Bowen/Edwards* required a fully developed evidentiary record. *Id*.

Other Colorado courts have ruled on preemption claims when possible without first requiring development of a factual record. For example, the *Voss* court declared a Greeley ordinance banning oil and gas drilling preempted, despite the fact that no factual record had been developed. 830 P.2d at 1063 n.2 (noting that "no such [factual] record is before us in this case"). *Voss* is particularly instructive on this issue because two years after Greeley banned oil and gas drilling entirely in 1985 (which was seven years before *Voss* was decided), it amended its municipal code to allow drilling and exploration in certain zones in the city, subject to special review and various requirements. *Voss*, 830 P.2d at 1063 n.2.

The court declined to consider the effect of the 1987 amendments in part because determination of those effects would have required "an adequately developed factual record," while evaluation of the 1985 ban on drilling did not require any such record. *Id.* The difference, of course, is that the court was able to determine as a matter of law that the ban would necessarily conflict with the state's interest in oil and gas production, whereas the special review process and other specific restrictions in the 1987 amendments could conceivably be implemented in a way that would not prohibit what the state allows or otherwise frustrate the state's interest.

Similarly, in *Board of County Commissioners v. Vandemoer*, the court specifically noted that "no fully developed record [is] needed for an operational conflict analysis if on [the] existing record the issue can be decided on its face." 205 P.3d 423, 428 (Colo. App. 2008) (citing *BDS Int'l*, 159 P.3d at 779). The court decided that the "total prohibition" against moving agricultural sprinklers on county roads—a clear land-use enactment—operationally conflicted with state statute, based solely on evaluation of the statutory terms and the state policy evinced by the statutory regime. *Id.* at 428–29.

Here, COGA specifically alleged in its complaint that the Ordinance is preempted as a matter of law because it prohibits and negates what the state allows

and regulates. R.CF, p.8. No evidentiary hearing was required because the preemption question can be decided on the basis of the texts of the governing statutes and regulations, as well as the legal holdings in *Voss* and numerous other cases.

## CONCLUSION

For the foregoing reasons, COGA respectfully requests that the Court affirm the district court's order granting Plaintiff's motions for summary judgment.

Dated: March 13, 2015

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## CERTIFICATE OF SERVICE

I certify that on March 13, 2015, I electronically filed a true and correct copy of the foregoing **APPELLEE COLORADO OIL & GAS ASSOCIATION'S ANSWER BRIEF** with the Clerk of Court via the Colorado ICCES program which will send notification of such filing and service upon the following counsel of record:

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