Tug of War Over Colorado's Energy Future: State Preemption of Local Fracking Bans

by Colin C. Deihl, Jamal L. Knight, Alexander F. Logemann, and Ann E. Prouty

Colin C. Deihl is a Partner and Jamal L. Knight, Alexander F. Logemann, and Ann E. Prouty are Associates at Faegre Baker Daniels LLP.

Summary

Colorado is one of the epicenters of hydraulic fracturing in the United States. In addition to promising a lower carbon fuel source and increased domestic energy security, this development has attracted opposition from local citizens and governments worried about the local impact of the natural gas activities. The authors review the state of play in Colorado hydraulic fracturing and suggest that local efforts to restrict hydraulic fracturing should themselves be prohibited due to comprehensive state regulation in this arena.

In the past decade, hydraulic fracturing and horizontal drilling have significantly expanded Colorado's production of clean-burning natural gas, natural gas liquids, and oil, but have also generated public concern about perceived environmental and public health risks associated with exploration and development of hydrocarbon reserves. While fracking in Colorado is specifically permitted at the statewide level, subject to regulation by the Colorado Oil and Gas Conservation Commission, some municipalities have responded to local concerns by passing moratoria and other restrictions intended to prohibit the practice within their geographic limits. These moratoria raise significant legal questions regarding the authority of local governments to ban natural resource production within their jurisdiction.

This Article explores the history of hydraulic fracturing and its regulation, the recent attempts to ban hydraulic fracturing in certain parts of the state, and the legal limits of local governments' ability to do so. While opposition to hydraulic fracturing in the state is likely to persist, efforts to ban the practice at the city and county level should be preempted by Colorado's statewide regulatory structure.

I. The History of Hydraulic Fracturing

Hydraulic fracturing—the use of pressurized fluids to extract oil or natural gas from tight rock formations—has been used in oil and gas development for more than 60 years.[1] To implement the process, fluid is pumped down a well into formations often located one mile or more beneath the surface. The hydraulic pressure created by the fluids creates small cracks in the formation, at which time small granular solids, such as sand or ceramic beads, are pumped into the cracks to keep the cracks open after the hydraulic pressure is removed.[2] The cracks are then utilized to extract otherwise inaccessible oil or gas from the formation. Hydraulic fracturing increases the rate at which a well is capable of producing oil or gas. In fact, many wells require hydraulic fracturing to permit any economic extraction of hydrocarbons.

While the use of hydraulic fracturing technology is not new, recent advances in drilling technology have led to a surge in the use of hydraulic fracturing in the past decade. Using so-called horizontal drilling, operators are now able to access and recover more oil or natural gas from a single wellhead. Instead of only drilling straight down from the wellhead, operators can now drill down to the formation that they want to tap, and then turn the drill 90 degrees to

1. *See, e.g.*, Dennis C. Stickley, *Expanding Best Practice: The Conundrum of Hydraulic Fracturing*, 12 Wyo. L. Rev. 321, 323 (2012).
2. *See* Stickley, *supra* note 1, at 323-24.

drill horizontally or laterally through the formation.[3] Horizontal drilling often permits an operator to use a single well pad to access oil and natural gas that could previously have required up to 16 vertical wells and corresponding well pads.[4] This efficiency reduces the surface impact of drilling and, in some cases, permits operators to recover hydrocarbons from beneath particular lands without ever accessing the surface to drill a well on those lands. The combination of hydraulic fracturing and horizontal drilling has been extremely successful in Colorado. According to the agency charged with regulating oil and gas development, more than 90% of the oil and gas wells in Colorado currently utilize hydraulic fracturing.[5]

II. Regulation of Oil and Gas Development in Colorado

Like the practice of hydraulic fracturing itself, the statewide regulatory structure governing its use has been in effect for decades. Colorado regulates the development of oil and gas within the state under the Oil and Gas Conservation Act (OGCA), which permits the Colorado Oil and Gas Conservation Commission (COGCC) to implement widespread rules of statewide applicability. While COGCC regulates oil and gas development at the state level, local governments also have a role in the regulation of development within their boundaries. Specifically, local governments have constitutional and statutory authority to regulate the practice through the use of zoning and land use laws, but cannot do so in a way that frustrates statewide regulation.

A. *The OGCA*

Colorado enacted the OGCA in 1951.[6] OGCA's Legislative Declaration identifies multiple purposes for OGCA.[7] Specifically, OGCA is intended to:

1. Foster 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;
2. Protect the public and private interests against waste in the production and utilization of oil and gas;
3. Safeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas to the end that each such owner and producer in a common pool or source of supply of oil and gas may obtain a just and equitable share of production therefrom; and
4. Plan and manage oil and gas operations in a manner that balances development with wildlife conservation in recognition of the state's obligation to protect wildlife resources and the hunting, fishing, and recreation traditions they support, which are an important part of Colorado's economy and culture. . . . [I] t is the policy of the state of Colorado that wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and its visitors.[8]

The OGCA created COGCC to carry out these goals. COGCC is empowered to make rules, regulations, and orders to carry out the provisions of the Act.[9] COGCC is further authorized to regulate the drilling, producing, and plugging of wells and all other operations for the production of gas, as well as prevent significant adverse environmental impacts.[10] COGCC has executed these authorities through the publication of extensive rules governing all oil and gas development statewide.[11] As described in more detail later in this Comment, COGCC has also developed rules specifically targeted at hydraulic fracturing, including requirements that companies disclose the components of the fluid used during hydraulic fracturing,[12] that companies notify COGCC of their intent to hydraulically fracture wells,[13] and that companies monitor and record pressure during injection.[14]

B. *Local Government Authority for Land Use Regulation*

While the state possesses broad authority to regulate all aspects of oil and gas development under OGCA, local governments retain the power to regulate local matters, including land use and zoning issues. Under Article XX,

3. *Id.*
4. U.S. Dep't of Energy, Office of Fossil Energy, Modern Shale Gas Development in the United States: A Primer 47 (Apr. 2009), *available at* http://energy.gov/sites/prod/files/2013/03/f0/ShaleGasPrimer_Online_4-2009.pdf.
5. Bob Randall, Colo. Dep't of Natural Res., Colo. Oil & Gas Conservation Comm'n Rules and Regulations (Mar. 7, 2012), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/co/resources/resource_advisory/2012_super_rac.Par.83149.File.dat/COGCC.pdf.
6. C.R.S. §§34-60-101 et seq.
7. C.R.S. §34-60-102.
8. C.R.S. §34-60-102(1)(a).
9. C.R.S. §34-60-105(1).
10. C.R.S. §34-60-106(2).
11. 2 Colo. Code Regs. §§404-1 et seq.
12. 2 Colo. Code Regs. §404-1(205A).
13. 2 Colo. Code Regs. §404-1(316C).
14. 2 Colo. Code Regs. §404-1(341).

§6 of the Colorado Constitution, cities that obtain home-rule status have "the full right of self-government in both *local and municipal matters* and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right."[15] Moreover, ordinances of home-rule cities pertaining to local and municipal matters "shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith."[16] Applying this so-called home-rule authority, the Colorado courts have held that "[h]ome-rule cities . . . are constitutionally granted every power possessed by the General Assembly as to local and municipal matters, unless restricted by the terms of the city's charter."[17] Specifically, the Colorado Supreme Court has "recognized that the exercise of zoning authority for the purpose of controlling land use within a home-rule city's municipal borders is a matter of local concern."[18]

The Colorado Constitution's home-rule provisions are not the only source of a municipality's land use authority. The Local Government Land Use Control Enabling Act of 1974 also grants a "local government"[19] the "authority to plan for and regulate the use of land."[20] Local governments are provided with a number of land use powers, including the authority to regulate "the use of land on the basis of the impact thereof on the community or surrounding areas."[21]

Thus, in the area of oil and gas regulation, local governments have traditionally possessed authority with regards to specific land use and zoning decisions, as well as other decisions of exclusively local concern.[22] The courts have not interpreted these authorities, however, to grant localities the power to completely ban drilling within their limits.[23] Instead, as discussed later in this Comment, Colorado precedent indicates that cities' authority can be outweighed by the "state's interest in efficient oil and gas development and production throughout the state. . . ."[24] Cities have the authority to control land use within their boundaries, but when these land use regulations interfere with and frustrate statewide interests in oil and gas development, they will be preempted by state law.[25]

15. Colo. Const. art. XX, §6 (emphasis added).
16. *Id.*
17. VFW, Post 4264 v. Steamboat Springs, 575 P.2d 835, 840, 8 ELR 20391 (Colo. 1978).
18. Voss v. Lundvall Bros., 830 P.2d 1061, 1064 (Colo. 1992) (citing Nat'l Advertising Co. v. Dept. of Highways, 751 P.2d 632, 635 (Colo. 1988); *VFW Post 4264*, 575 P.2d at 840; City of Greeley v. Ells Jr., 527 P.2d 538, 541 (Colo. 1974)).
19. The term "local government" is defined as "a county, home rule or statutory city, town, territorial charter city, or city and county." C.R.S. §29-20-103(1.5).
20. C.R.S. §29-20-104(1).
21. C.R.S. §29-20-104(1)(g).
22. *Voss*, 830 P.2d at 1064-65 (identifying the Local Government Land Use Control Enabling Act as "confirmation of a home-rule city's authority to control land use within its municipal borders").
23. *Id.* at 1068.
24. *Id.*
25. *Id.* at 1068-69.

III. Recent Conflicts Resulting From Increased Use of Fracking

As the use of hydraulic fracturing has increased in Colorado and throughout the country, a number of environmental interest groups have challenged its use. Fearing that the process may be causing air and water pollution in their communities, a number of local and national citizen groups have emerged to challenge the technique and seek its regulation or elimination. Issues pertaining to the regulation of hydraulic fracturing have moved from COGCC to city council chambers and the voters' booth, and now to the courts.

A. *Local Attempts to Ban Fracking*

Since 2012, some cities north of Denver have attempted to assuage citizen fears by passing bans or moratoria preventing hydraulic fracturing within their boundaries. The city of Longmont started this trend in 2012, when its voters approved a ballot measure that banned hydraulic fracturing within city limits.[26] During 2013's local elections, four other Colorado municipalities—Boulder, Broomfield, Fort Collins, and Lafayette—followed suit, introducing ballot measures that banned or placed moratoria on hydraulic fracturing for five years or more.[27] In Fort Collins, the voters approved an amendment to the city code prohibiting the "use of hydraulic fracturing to extract oil, gas or other hydrocarbons" within the city of Fort Collins for the next five years "in order to fully study the impacts of this process on property values and human health. . . ."[28] Another, the city of Lafayette, made it unlawful for companies to deposit, store or even transport fracking wastewater through the "land, air or waters" of the city.[29] Lafayette also declared that its ban could not be preempted by fed-

26. Jack Healy, *With Ban on Drilling Practice, Town Lands in Thick of Dispute*, N.Y. Times, Nov. 25, 2012, http://www.nytimes.com/2012/11/26/us/with-ban-on-fracking-colorado-town-lands-in-thick-of-dispute.html (last visited Apr. 29, 2014).
27. Michael Wines, *Colorado Cities' Rejection of Fracking Poses Political Test for Natural Gas Industry*, N.Y. Times Nov. 7, 2013, http://www.nytimes.com/2013/11/08/us/colorado-cities-rejection-of-fracking-poses-political-test-for-natural-gas-industry.html (last visited Apr. 29, 2014).
28. 2012 Ballot Measure 2A provides:
> An ordinance placing a moratorium on hydraulic fracturing and the storage of its waste products within 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 approve 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.

The City adopted Ballot Measure 2A as an ordinance upon certification of the Nov. 5, 2013, election results. City of Fort Collins Home Rule Charter art. X, §6(d).
29. The Charter Amendment adds a new §2.3 to the City's Home Rule Charter, entitled "Community Bill of Rights and Obligations," which will, in pertinent part, "prohibit corporations, or persons from extracting gas and oil within the city limits, except through currently active wells." Colorado Oil and Gas Association v. City of Lafayette, Colorado, Case No. 2013CV031746, In the District Court, Boulder County, Colorado (Dec. 3, 2013).

eral or state laws,[30] though it is unclear what, if any, effect the declaration will have. The city of Boulder extended an existing fracking moratorium until June 3, 2018, citing the need for health studies and the pending litigation challenging the authority of home-rule cities to ban fracking.[31] It further required the development of legal standards that must be applied before the ban is lifted.[32]

B. Lawsuits Challenging Legality of Municipal Bans

In response to these sweeping bans on hydraulic fracturing, COGCC and Colorado oil and gas industry groups have filed suits challenging the legality of the city ordinances. While the specifics of each ban and each case vary slightly, each alleges that the municipalities' actions are preempted by OGCA and its implementing regulations.

1. *Colorado Oil and Gas Conservation Commission v. Longmont*

On July 17, 2012, the Longmont city council passed an ordinance that updated its regulations on oil and gas within city limits (the Ordinance).[33] Without banning hydraulic fracturing, the Ordinance recommended stricter standards for oil and gas companies wishing to operate in Longmont, including an increased setback from occupied structures, a drilling ban in existing and planned residential neighborhoods, and increased water quality testing and wildlife protections.[34]

COGCC filed a complaint against Longmont, and the Colorado Oil and Gas Association (COGA) soon joined the suit as well.[35] COGCC claimed that Longmont had no authority to enforce the new rules regarding oil and gas operations because COGCC's authority to regulate oil and gas statewide preempts any local authority.[36] The lawsuit also alleges that the Ordinance was superseded by COGCC's comprehensive regulatory process.[37]

2. *Colorado Oil and Gas Association v. Longmont*

Concerned that the Ordinance did not sufficiently protect against the citizens' safety concerns over hydraulic fracturing in residential areas, in November 2012, Longmont citizens also passed a voter-initiated ban on the practice.[38] The state did not challenge the Longmont ban, but it did publicly offer to support any private entity that chose to do so.[39] COGA filed a complaint, alleging that the ban, like the Ordinance, attempted to regulate technical aspects of oil and gas operations reserved to the state and that the prohibition on hydraulic fracturing operates as an illegal de facto ban on oil and gas drilling.[40]

3. *Colorado Oil and Gas Association v. City of Fort Collins*

In response to Fort Collins' successful November 2013 ballot initiative, which imposed a five-year moratorium on hydraulic fracturing, COGA sued the city.[41] As in Longmont, COGA alleged that state law preempts the local moratorium because there is an express or operational conflict between the local measure and OGCA and its implementing rules.[42]

4. *Colorado Oil and Gas Association v. City of Lafayette*

COGA likewise challenged the ballot question approved in November 2013 by the city of Lafayette voters that bans oil and gas extraction within the city's borders.[43] Just as in the Fort Collins case, COGA argued that state law preempts the local measure.[44] Colorado indicated that it did not intend to intervene in the cases challenging the 2013 local bans; instead, it will await the outcome of the July 2012 COGCC lawsuit challenging the city of Longmont restrictions on hydraulic fracturing.

IV. Preemption of Local Bans on Hydraulic Fracturing

Each of these cases raises the same question: can Colorado municipalities ban hydraulic fracturing within their limits, or are the cities' rules for oil and gas operations preempted by state regulations? A careful analysis of Colorado's preemption doctrine indicates that these moratoria should not stand. Instead, binding state precedent states that COGCC must be permitted to implement OGCA at the

30. *Id.*
31. 2013 Ballot Measure 2H, Ordinance No. 7915, extending Ordinance No. 7907 on new oil and gas exploration until June 3, 2018. On June 4, 2013, the Boulder City Council adopted Ordinance No. 7907, an emergency ordinance imposing a moratorium until June 3, 2014, on applications for any city permit requesting oil or gas exploration or for any application for use review under Title 9 of the Boulder Revised Code for new "Mining Industries" involving oil and gas extraction or exploration.
32. *Id.*
33. Colorado Oil and Gas Conservation Commission v. City of Longmont (Colo. Dist. Ct., filed July 30, 2012); Ordinance O-2012-25, *available at* http://www.ci.longmont.co.us/city_council/agendas/2012/documents/071712_8A.pdf.
34. Colorado Oil and Gas Conservation Commission v. City of Longmont (Colo. Dist. Ct., filed July 30, 2012).
35. City of Longmont, Colo., Ordinances O-2012-25; C.R.S. §§34-60-100 et seq. (as amended 2007).
36. *Id.*
37. *Id.*
38. *See* City of Longmont, Colo., Resolutions R-2012-67, *available at* http://www.ci.longmont.co.us/city_council/agendas/2012/documents/082812_9F.pdf.
39. Samantha Peaselee, *Home-Rule Cities: The Future of Fracking in Longmont, Colorado*, JURIST—Dateline, Feb. 22, 2013.
40. *See* Colorado Oil and Gas Association v. City of Longmont, Colorado, Case No. 2012CV960, In the District Court of Weld County, Colorado (Dec. 17, 2012) (transferred to Boulder County on May 11, 2013).
41. Colorado Oil and Gas Association v. City of Fort Collins, Colorado, Case No. 2013CV031385, In the District Court, Larimer County, Colorado (Dec. 3, 2013).
42. *Id.*
43. Colorado Oil and Gas Association v. City of Lafayette, Colorado, Case No. 2013CV031746, In the District Court, Boulder County, Colorado (Dec. 3, 2013).
44. *Id.*

statewide level, in a manner that protects health and safety while consistently regulating an important industry.

A. *Preemption Framework for Home-Rule Ordinances*

The Colorado Supreme Court has outlined the framework that Colorado courts apply when determining whether state law preempts a home-rule municipal ordinance. To determine whether such an ordinance is preempted, a court must first assess whether the issue being addressed is a matter of local, statewide, or mixed local and statewide concern.[45] Four factors guide this inquiry[46]:

1. The need for statewide uniformity of regulation;
2. The extraterritorial impact of local regulation;
3. Whether the matter has traditionally been regulated at the state or local level; and
4. Whether the Colorado Constitution specifically commits the matter to state or local regulation.[47]

In addition to these factors, a legislative declaration that a matter is of statewide concern is "relevant," though not decisive.[48] The Supreme Court has accorded such legislative declarations "significant weight."[49]

If a court concludes that the matter is of local concern, the Colorado Constitution empowers both the municipality and the state to legislate.[50] To the extent the home-rule ordinance conflicts with the state statute, the ordinance will control within the jurisdiction of the municipality.[51] In matters of statewide concern, the state legislature "exercises plenary authority, and home-rule cities may regulate only if the constitution or statute authorizes such legislation."[52] For matters of mixed state and local concern, a home-rule ordinance may "coexist" with state law "only as long as there is no conflict."[53] Accordingly, for matters of mixed local and statewide concern, a reviewing court must perform a "stage two" conflict analysis between the ordinance and state law. "The test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes."[54] The Colorado Supreme Court has also found conflict when a local ordinance "materially impedes" or "substantially impedes" the state interest.[55]

Applying this test, Colorado courts have refused to permit total bans on oil and gas development within a city, holding that they are preempted by OGCA. In the seminal case *Voss v. Lundvall Brothers, Inc.*,[56] the Colorado Supreme Court considered a pair of ordinances passed by the city of Greeley, a home-rule municipality, which called for a "total ban on the drilling of any oil, gas, or hydrocarbon wells within the city."[57] The court began its analysis by recognizing that home-rule municipalities derive their zoning or land use authority from two sources: (1) their home-rule status under Colorado Constitution Article XX, §6; and (2) the Local Government Land Use Control Enabling Act of 1974.[58] According to the court, under these authorities, home-rule municipalities may "control land use" and "plan for and regulate the use of land" within their jurisdiction.[59] However, the court also found that

> [t]here is no question that the Oil and Gas Conservation 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 in a manner calculated "to prevent waste and to protect the correlative rights of common-source owners and producers to a fair share of the production profits."[60]

45. Webb v. City of Black Hawk, 295 P.3d 480, 486 (Colo. 2013).
46. These four factors are derived from the Supreme Court's opinion in *Denver v. State*, 788 P.2d 764 (Colo. 1990). The Supreme Court has stated that there is no "specific test" to determine whether a matter is one of local, statewide, or mixed concern, and a court may consider other relevant factors. City of Commerce v. State, 40 P.3d 1273, 1280 (Colo. 2002); City of Northglenn v. Ibarra, 62 P.3d 151, 155-56 (Colo. 2003). However, the Supreme Court has consistently employed these four factors in its analysis. *Id.*; *Denver*, 788 P.2d at 768; Voss v. Lundval Bros., Inc., 830 P.2d 1061, 1066-67 (Colo. 1992); *Webb*, 295 P.3d at 486.
47. 295 P.3d at 486.
48. *Id.*
49. Colo. Mining Assoc. v. Bd. of County Comm'rs, 199 P.3d 718, 731, 39 ELR 20017 (Colo. 2009).
50. *Webb*, 295 P.3d at 486.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 492 (citing City of Commerce City v. State, 40 P.3d 1273, 1284 (Colo. 2002)). Conventional preemption analysis requires that the court consider whether the ordinance is preempted by one of three methods: express preemption; implied (or field) preemption; or conflict preemption. *See* Board of County Comm'rs v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1056-57 (Colo. 1992). The Colorado Supreme Court has provided mixed guidance with respect to whether this conventional preemption analysis provides an additional overlay when determining whether state law preempts a home-rule municipal ordinance. While some opinions, such as *Webb*, suggest that an analysis of whether an ordinance is expressly or impliedly preempted has no place in the home-rule context, other opinions indicate that the stage two conflicts analysis could involve any of the three conventional forms of preemption. *Compare Webb*, 295 P.3d at 486-87 (failing to discuss conventional forms of preemption); *Denver*, 788 P.2d at 767 (same); and *Colo. Mining Assoc.*, 199 P.3d at 723-24 (contrasting preemption analysis applicable to home-rule municipalities and counties and suggesting that they are distinct), *with Voss*, 830 P.2d at 1066 (addressing express, implied, and conflict preemption in home-rule context), and *Ibarra*, 62 P.3d at 165-66 (Coats, J., dissenting) (analyzing all three forms of preemption after concluding that a legislated matter was of mixed local and statewide concern). However, with respect to OGCA, this discussion is largely academic. In *Voss*, the Supreme Court reiterated its holding from *Bowen/Edwards* and stated that OGCA does not either "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." 830 P.2d at 1066. Accordingly, the four-part test relied on in both *Voss* and *Webb*, followed by a conflict analysis, is the appropriate framework to apply in a case involving a home-rule municipal ordinance's possible preemption by OGCA.
55. Voss v. Lundvall Brothers, Inc., 820 P.2d 1061, 1068 (Colo. 1992).
56. The ordinances were nearly identical except that they had different effective dates and provided substantively different penalties for a violation. *Voss*, 830 P.2d at 1063 n.1.
57. 830 P.2d at 1062.
58. *Id.* at 1064-65.
59. *Id.*
60. *Id.* at 1065-66 (quoting *Bowen/Edwards*, 830 P.2d at 1058). At the time the Court rendered the decision in *Voss*, OGCA focused primarily on the efficient development of oil and gas resources, the minimization of waste, and the protection of correlative rights. The statute did not include a mandate to consider public health or the environment.

Based on these conflicting interests, the *Voss* court applied the four-part test for preemption of a home-rule municipal ordinance. The Colorado Supreme Court concluded that the first factor—the need for statewide uniformity of regulation—"weighs heavily in favor of state preemption of Greeley's total ban on drilling within city limits."[61] The court focused on the "intended effect of the Greeley ordinances," which was to "prohibit all oil and gas development and operations at any location within the city."[62] Such a ban would disrupt the practical realities of developing oil and gas resources because "oil and gas are found in subterranean pools, the boundaries of which do not conform to any jurisdictional pattern."[63] Further, the location and method of extraction of oil and gas is "dictated by the pressure characteristics of the pool."[64] Municipal-level ordinances would create an "irregular drilling pattern" that would jeopardize the efficient recovery of the resource and lead to waste.[65] Likewise, the Supreme Court concluded that the second factor—the extraterritorial effect of Greeley's ordinances—also weighed in favor of the state.[66] A municipal ban would likely shift oil and gas development to neighboring parcels of land when reservoirs extend beyond the boundary of a municipality, thus creating an extraterritorial impact.[67]

With respect to the third factor—the traditional allocation of regulation of the subject matter—the Supreme Court concluded that oil and gas development "has traditionally been a matter of state rather than local control."[68] However, it did emphasize that while the state has historically "exercised significant control over these activities" it had not done so "in a manner preemptive of all local government land-use authority."[69]

Finally, the Supreme Court concluded that the Colorado Constitution did not commit oil and gas development and production to state regulation, nor did it "relegate[ ] land-use control exclusively to local governments."[70] It then clarified that a home-rule city could exercise its land use authority over oil and gas development as long as the municipal ordinance did not "materially impede the significant state goals expressed" in OGCA.[71]

Having considered the four factors for preemption of a home-rule ordinance, the *Voss* court concluded "that the state's interest in efficient oil and gas development and production throughout the state, as manifested in the [OGCA], 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."[72] However, the *Voss* court emphasized that OGCA does necessarily preempt any form of home-rule regulation that would impact oil and gas operations. Instead, "if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the [OGCA], the city's regulations should be given effect."[73]

The Colorado Supreme Court decided a companion case, *Board of County Commissioners v. Bowen/Edwards Associates, Inc.*,[74] the same day it issued its opinion in *Voss*. *Bowen/Edwards* involved oil and gas regulations enacted by La Plata County.[75] The regulations generally divided oil and gas facilities into two categories—major and minor facilities—and required permitting and approval of a facility prior to the commencement of construction or operation.[76] Bowen/Edwards filed suit seeking a declaratory judgment and injunctive relief, arguing that OGCA preempted the county's regulations. Employing the conventional preemption framework based on express, implied, and conflict preemption, the court concluded that OGCA did not expressly or impliedly preempt all aspects of a county's land use authority over areas where oil and gas activities occur.[77] It determined that the state interest in oil and gas activities:

> [I]s 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.[78]

Turning to the issue of conflict preemption, the court held that local regulations would be preempted due to an operational conflict with state law when they would "materially impede or destroy the state interest."[79] However, the court concluded that the evidentiary record was inadequate and remanded the case for further proceedings.[80]

The Colorado Court of Appeals applied *Voss* and *Bowen/Edwards* in *Town of Frederick v. North American Resource*

61. *Id.* at 1067.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 1067-68.
67. *Id.*
68. *Id.* The Supreme Court noted that state control of oil and gas development dates back to 1915, when the General Assembly created the Office of the State Oil Inspector, and 1927, when the General Assembly created the Gas Conservation Commission.
69. *Id.* at 1068.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 1069.
74. 830 P.2d 1045 (Colo. 1992).
75. *Id.* at 1049-50.
76. *Id.* at 1050.
77. *Id.* at 1057-59.
78. *Id.* at 1058.
79. *Id.* at 1059. It is noteworthy that both *Voss* and *Bowen/Edwards* use the phrase "materially impede" when describing whether a state statute preempts a local regulation. *Voss*, 830 P.2d at 1068; *Bowen/Edwards*, at 830 P.2d at 1059. Given this identical language, it appears that the determinative inquiry with respect to preemption will be similar, if not identical, for both home-rule cities and counties when the issue is whether the state statute "conflicts" with local regulation. This will occur when the following conditions are met: (1) for home-rule municipalities, the matter is one of mixed local and statewide concern; and (2) for counties, the state statute does not expressly or impliedly preempt the local regulation. Given the holdings in *Voss* and *Bowen/Edwards*, these conditions will probably always be met with respect to the regulation of oil and gas activities (assuming there are no significant statutory or constitutional amendments). This point is significant because while this Article has primarily focused on the issue of whether home-rule municipalities may ban hydraulic fracturing, the analysis is likely to apply with equal force to a county ban on hydraulic fracturing.
80. 830 P.2d at 1059-60.

Company.[81] In *Town of Frederick*, the court considered whether OGCA preempted an ordinance passed by a statutory town.[82] The town had passed an ordinance "prohibiting the drilling of oil and gas wells within the town limits unless a special use permit was first obtained."[83] Plaintiff North American Resource Company (NARCO) drilled a well within the town limits after obtaining a permit from COGCC, but without having applied for a special-use permit from the town.[84] The town then filed suit against NARCO seeking to: (1) enjoin NARCO from operating its well; (2) require NARCO to remove the well; and (3) compel NARCO to pay fines for its violation of the ordinance.[85]

Relying on *Bowen/Edwards*, the Court of Appeals reasoned that "the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as 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."[86] Considering the specific provisions of the ordinance at issue, the Court of Appeals concluded that "the setback, noise abatement, and visual impact provisions" of the ordinance violated *Bowen/Edwards* and created an operational conflict.[87] However, the Court of Appeals rejected NARCO's argument that the town's permitting process created an operational conflict with OGCA, and suggested that a local government may properly require an operator to "obtain building permits for above-ground structures, maintain access roads, submit emergency response and fire protection plans, and regulate the distances that buildings must be set back from existing wells."[88]

B. Amendments to OGCA

As both *Voss* and other home-rule preemption cases make clear, the magnitude of the state's interest depends in part on the relevant legislation. OGCA has been amended several times since *Voss* was decided, and each amendment has increased the importance of the state's interest in public health and the environment.

Following *Voss*, the legislature amended OGCA in 1994 by passing Senate Bill 94-177. Significantly, these amendments altered OGCA's purpose, as stated in C.R.S. §34-60-102(1), and the power and makeup of COGCC. While OGCA had previously focused on the efficient development of oil and gas, elimination of waste, and protection of the correlative rights of owners, the 1994 amendments added that oil and gas development should be performed "in a manner consistent with the protection of public health, safety, and welfare."[89] The 1994 amendment also altered the powers of COGCC under C.R.S. §34-60-106(2)(d), and explicitly authorized the Commission to regulate:

> Oil and gas operations so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, taking into consideration cost-effectiveness and technical feasibility.[90]

In addition, the 1994 amendments changed the composition of the Commission itself. The amendments changed OGCA to mandate that two (rather than one) members of the Commission must not be employed by the oil and gas industry. It also added that the two non-industry members "shall be individuals with formal training or substantial experience in agriculture, land reclamation, environmental protection, or soil conservation."[91]

In 2007, the General Assembly passed House Bills 07-1298 and 07-1341. Through House Bill 07-1298, the legislature amended OGCA to declare that oil and gas resources should be developed in a manner consistent with the protection of wildlife resources.[92] The legislature also instructed COGCC to promulgate new rules to minimize adverse impacts to wildlife resources and guaranty reclamation of wildlife habitat.[93] House Bill 07-1341 enhanced COGCC's existing environmental mandate, piggybacking on the 1994 amendments to provide that oil and gas development should occur "in a manner consistent with protection of public health, safety, and welfare, *including protection of the environment and wildlife resources*."[94] The revised legislative declaration of OGCA was also changed to state:

> It is the intent and purpose of this article 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, and welfare, including protection of the environment and wildlife resources."[95]

COGCC's powers were also amended to include "protection of the environment and wildlife resources."[96] Consistent with its enhanced environmental mandate and environmental authority, House Bill 07-1341 required COGCC to promulgate new rules, "in consultation with the Department of Public Health and Environment, to protect the health, safety, and welfare of the general pub-

81. 60 P.3d 758 (Colo. App. 2002).
82. 60 P.3d at 760-61.
83. *Id.* at 760.
84. *Id.*
85. *Id.*
86. *Id.* at 765.
87. *Id.*
88. *Id.* at 766.
89. 1994 Colo. Sess. Laws 1978.
90. *Id.* at 1980-81. The prior version of C.R.S. §34-60-106(2)(d) authorized COGCC to regulate "[t]he disposal of salt water and oil field wastes."
91. *Id.* at 1979-80 (amending C.R.S. §34-60-104).
92. 2007 Colo. Sess. Laws 1328.
93. *Id.* at 1330.
94. 2007 Colo. Sess. Laws 1357. Additions made through the 2007 amendments are italicized.
95. *Id.* at 1357-58 (amending C.R.S. §34-60-102(1)).
96. *Id.* at 1359 (amending C.R.S. §34-60-106(2)(d)).

lic in the conduct of oil and gas operations."[97] House Bill 07-1341 also altered the makeup of COGCC by increasing the total membership of the Commission to nine members from seven members, and reducing the number of industry members to three from five.[98] In addition, the Executive Director of the Department of Natural Resources and the Executive Director of the Department of Public Health and Environment (CDPHE) were added as required COGCC members.[99]

Finally, in 2013, the legislature passed House Bill 13-1278, which changed OGCA's spill reporting requirements. House Bill 13-1278 added C.R.S. §34-60-130 and required that certain spills of oil or exploration and production waste beyond secondary containment be reported within 24 hours.[100]

C. Rulemakings by COGCC

Following the 2007 amendments to OGCA, COGCC initiated a rulemaking as required by statute, stating, "[a] major reason for adopting these regulations was to address concerns created by the unprecedented increase in the permitting and production of oil and gas in Colorado in the past few years."[101] COGCC acknowledged that "as the level and extent of drilling activity has increased, so has the public concern for the health, safety, and welfare of Colorado's residents."[102] In this context, COGCC explained the 2007 statutory amendments that prompted the rulemaking and emphasized that the changes to C.R.S. §34-60-102(1) had "increase[d] the Commission's regulatory authority and oversight obligations to better address the potential adverse impacts that can accompany oil and gas development."[103] Equipped with that understanding of its objective, COGCC promulgated new rules addressing: (a) requirements that operators maintain an inventory of chemicals kept onsite for use downhole (Rule 205[104]); (b) restrictions on operations near drinking water sources (Rule 317B); (c) requirements to install emission control devices on certain equipment near occupied buildings (Rule 805); (d) measures to improve stormwater management (Rule 1002); (e) requirements to avoid adverse impacts to wildlife (Rules 1201-05); (f) incentives to encourage landscape level planning (Rule 216); and (g) measures to increase transparency with respect to permit applications (Rule 305).

In addition to the rules passed pursuant to OGCA in 2007, on December 13, 2011, COGCC promulgated additional rules that specifically address hydraulic fracturing.[105] These rules created new hydraulic fracturing chemical disclosure requirements (Rule 205A), a mandate to provide landowners with COGCC's hydraulic fracturing information sheet prior to commencing a hydraulic fracturing treatment (Rule 305E.(1)A.), and a requirement for operators to provide COGCC with 48 hours' advanced written notice prior to the hydraulic fracturing treatment of a well (Rule 316C.).

On January 7, 2013, COGCC relied on its enhanced environmental authority under C.R.S. §34-60-106(2)(d) to implement a new Statewide Water Sampling and Monitoring Rule "to gather baseline water quality data prior to oil and gas development occurring in a particular area, and to gather additional data after drilling and completion operations."[106] Under the new rule, this data is publicly available.[107]

The following month, COGCC promulgated a new rule governing setback requirements "to protect the safety and welfare of the general public from environmental and nuisance impacts resulting from oil and gas development in Colorado, including spills, odors, noise, dust, and lighting."[108] Among the most significant changes made by COGCC was an increase in setback distances to a uniform statewide standard of 500 feet.[109] In addition, the setback distance for "High Occupancy Buildings," which includes schools, day care centers, hospitals, nursing homes, and correctional facilities, was set to 1,000 feet, unless COGCC granted approval for a shorter distance following a public hearing.[110] As part of the setback rulemaking, COGCC also implemented a new fugitive dust rule specifically aimed at hydraulic fracturing.[111]

Finally, in December of 2013, COGCC implemented more-stringent spill reporting requirements.[112] In addition to the changes required by statute, COGCC also amended their regulations to require operators to report all spills of exploration and production wastes or produced fluids of five barrels or more within 24 hours.[113]

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97. *Id.* (amending C.R.S. §34-60-106(11)(a)(II)). This rulemaking was required to be coordinated with the rulemaking required by House Bill 07-1298.
98. *Id.* at 1358 (amending C.R.S. §34-60-104(2)(a)(I)).
99. *Id.*
100. 2013 Colo. Sess. Laws 759-60.
101. Statement of Basis, Specific Statutory Authority, and Purpose at 1 (Dec. 11, 2008), *available at* http://cogcc.state.co.us/RuleMaking/FinalRules/COGCCFinalSPB_121708.pdf.
102. *Id.* at 2.
103. *Id.*
104. All COGCC regulations cited herein are located at 2 Colo. Code Regs. §404-1. This Article will refer to COGCC's regulations by rule number.
105. Colo. Oil & Gas Conservation Comm'n, Order No. 1R-114, *available at* http://cogcc.state.co.us/rr_HF2011/Order1R-114FinalFracingDisclosureRule.pdf.
106. Statement of Basis, Specific Statutory Authority, and Purpose, Cause No. 1R Docket No. 1211-RM-03, at 2 (Jan. 7, 2013), *available at* http://cogcc.state.co.us/RR_HF2012/Groundwater/FinalRules/StatementofBasisPurpose_Rule609_FINAL_012513.pdf; *see also* Rule 609f (requiring sampling before and after drilling of well).
107. *Id.*
108. Statement of Basis, Specific Statutory Authority, and Purpose, Cause No. 1R Docket No. 1211-RM-04 at 1 (Feb. 11, 2013), *available at* http://cogcc.state.co.us/RR_HF2012/setbacks/FinalRules/Final_SetbackrulesStatementOfBasisAndPurpose.pdf.
109. *Id.* at 1-2; Rule 604a.(1).
110. Rule 604a.(3).
111. Rule 805c.
112. Statement of Basis, Specific Statutory Authority and Purpose, Cause No. 1R Docket No. 1312-RM-02 Reporting of Spills and Releases at 2 (Dec. 20, 2013), *available at* http://cogcc.state.co.us/RR_Docs_New/SpillRelUpdate2013/StatementofBasisPurpose_Spill_Report_Rules_FINAL_20131217.pdf.
113. *Id.* at 3; *see also* Rule 906b.(1)C.

D. Rulemakings From Other Agencies

Recent actions taken by the Colorado Air Quality Control Commission (AQCC) suggest that OGCA may not be the only statute that informs courts of the statewide interest in environmental issues related to oil and gas operations. On February 23, 2013, AQCC passed new rules restricting methane and volatile organic compound (VOC) emissions from oil and gas operations. These regulations will require operators to find and repair methane leaks and install pollution control equipment that captures 95% of emissions of VOCs and methane.[114] When enacting these new regulations, the Commission relied on its authority under the Colorado Air Pollution Prevention and Control Act.[115] The legislative declaration in this statute indicates that the maintenance of air quality is a matter of statewide interest.[116] With these new rules, Colorado became the first state in the nation to regulate emissions of methane from oil and gas operations.

E. Application to Pending Litigation Challenging Hydraulic Fracturing Bans

In light of the law outlined in the preceding sections, home-rule municipal bans or moratoria on hydraulic fracturing are likely to be preempted by OGCA. Municipal bans may directly violate *Voss* because, by prohibiting a practice used in nearly all oil and gas development in the state, a prohibition on hydraulic fracturing is a de facto ban on oil and gas development itself. In addition, municipal bans on hydraulic fracturing appear to irreconcilably conflict with or materially impede the objectives of state law.

1. A Ban on Hydraulic Fracturing Is Tantamount to a Ban on Oil and Gas Development and Production

The first problem with municipal bans or moratoria on hydraulic fracturing is that they have the practical effect of prohibiting oil and gas development in general. Essentially, hydraulic fracturing bans or moratoria present the question of whether a city may ban an activity, by proxy, that it cannot directly prohibit.

COGCC has stated that over 90% of wells drilled today utilize hydraulic fracturing treatment,[117] while the Colorado office of the Bureau of Land Management has estimated this figure is over 95%.[118] Accordingly, hydraulic fracturing is essentially a proxy for oil and gas development in general, and a ban on hydraulic fracturing is functionally equivalent to a ban on oil and gas activity. If *Voss* is therefore to have any practical significance, it must be read to bar ordinances that effectively (as opposed to facially) ban all oil and gas development and production within a city. Otherwise, a municipality could simply choose any proxy that is correlated with oil and gas activity, and ban the proxy activity to evade *Voss*.

2. Municipal Bans Irreconcilably Conflict With State Law

If a court chooses to undergo the full-scale preemption analysis applicable to home-rule municipal ordinances, bans or moratoria on hydraulic fracturing are still problematic. In accordance with the preemption analysis outlined above, a court would first analyze the four factors applied in *Voss* to determine whether the matter is of local, statewide, or mixed concern. However, the opinions in *Voss* and *Bowen/Edwards* appear to be emphatic that oil and gas activities implicate both state and local interests, and that local regulation is preempted insofar as it conflicts with state regulation.[119] It is therefore not clear whether a trial court would fully perform the *Voss* analysis, or simply accept that regulations affecting oil and gas activities present an issue of mixed concern. In any event, the analysis of the four factors set forth in *Voss* demonstrates that the state's interest in oil and gas is sufficiently dominant such that conflicting home-rule municipal regulations regarding hydraulic fracturing must yield to state regulation.

As explained above, the *Voss* court was particularly concerned with the fact that oil and gas reservoirs do not conform to the political or jurisdictional boundaries that govern the surface. This no less true for the tight rock deposits that have brought on today's surge of oil and gas activity than it was for traditional reservoirs being developed at the time *Voss* was decided. Likewise, municipal bans would have the practical effect of shifting the locations at which wells are drilled, creating an extraterritorial effect and making tight rock deposits susceptible to inefficient and wasteful extraction. The third and fourth factors also have not changed since *Voss* was decided, as the historical regulation of oil and gas is essentially a fixed factor favoring the state, and the Colorado Constitution has not been amended to commit oil and gas or land use to exclusive state or local control. Accordingly, the *Voss* court's analysis of the four factors is equally applicable to today's environment and unlikely to be disturbed in a contemporary legal challenge.

The focal point of a court's analysis is likely to shift to the degree of conflict between such bans and state law. This is problematic for municipal bans on hydraulic fracturing because they specifically prohibit a practice that is permitted by OGCA and COGCC. As outlined above, a home-

114. 5 Colo. Code Regs. §§1001-9.XVII.C.1., 1001-9.XVII.F, 1001-9.XVII.G.

115. 5 Colo. Code Regs. §1001-9.XIX.N (citing C.R.S. §§25-7-101 et seq.).

116. *See* C.R.S. §25-7-102.

117. Bob Randall, Colo. Dep't of Natural Res., Colo. Oil & Gas Conservation Comm'n Rules and Regulations (Mar. 7, 2012), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/co/resources/resource_advisory/2012_super_rac.Par.83149.File.dat/COGCC.pdf.

118. Bureau of Land Management, Fracking on BLM Colorado Well Sites, *available at* http://www.blm.gov/pgdata/etc/medialib/blm/co/information/congressional_briefings.Par.14069.File.dat/Fracking_March11.pdf.

119. *Voss*, 830 P.2d at 1066; *Bowen/Edwards*, 830 P.2d at 1057-59.

rule municipal ordinance conflicts with state law when "the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes" or the ordinance "materially impedes" significant state goals. The legislature has, at a minimum, tacitly approved of the continued use of hydraulic fracturing. As COGCC explained in its Statement of Purpose to the 2008 rule change, the 2007 amendments to OGCA were a direct response to the oil and gas boom, which was instigated by a surge in the use of hydraulic fracturing. Rather than ban the practice, the legislature responded to these concerns by enhancing COGCC's authority to include greater oversight of environmental and public health issues. Accordingly, the legislature appears to have declared that the environmental and public health issues that accompany oil and gas development and production are primarily matters of statewide concern that are properly regulated by COGCC. COGCC has capitalized on its expanded authority to implement a variety of measures that balance the oil and gas surge prompted by hydraulic fracturing with public health and the environment.

There is also no question that the practice is permitted by COGCC's regulations, as a number of COGCC rules specify how operators may conduct hydraulic fracturing. In addition, public health and environmental issues related to air emissions from oil and gas development lie within the ambit of the Colorado AQCC pursuant to the Colorado Air Pollution Prevention and Control Act. AQCC has utilized this authority to regulate emissions of VOCs and methane, but has not attempted to ban oil and gas development or hydraulic fracturing. Therefore, a municipal ban or moratorium directly conflicts with the state's laws and regulations by prohibiting a practice authorized by the state.[120] Likewise, bans on hydraulic fracturing "materially impede" the state's objective of balancing oil and gas development with the protection of the environment and public health. Regulatory agencies have utilized their authority to strike this delicate balance without prohibiting the practice, and local prohibitions substantially disrupt this equilibrium.

Finally, the subjects that Colorado courts have suggested are appropriate for local regulation are not similar to prohibitions on hydraulic fracturing. In *Town of Frederick*, the Colorado Court of Appeals suggested that local governments could properly enact regulations requiring oil and gas operators to "obtain building permits for above-ground structures, maintain access roads, submit emergency response and fire protection plans, and regulate the distances that buildings must be set back from existing wells."[121] These activities are more traditionally associated with local land use regulation because they relate to building construction and the location of structures. Most importantly, they do not address the development of the oil and gas well or reservoir. Unlike the activities identified by the Court of Appeals in *Town of Frederick*, hydraulic fracturing is a form of well treatment and is performed within the well bore. Thus, hydraulic fracturing appears to fall within areas that the Court of Appeals has stated state law preempts: "'technical aspects of drilling' and similar activities."[122] In sum, existing case law does not support the contention that a local government may regulate practices that are as intimately connected with the development of oil or gas formations as hydraulic fracturing.[123]

3. Impact of the Temporary Nature of the Bans

In an apparent effort to avoid preemption under *Voss* and its progeny, the majority of municipalities enacting bans have termed those moratoria "temporary," and listed a time period after which the bans will expire absent further action. While moratoria that only temporarily prohibit hydraulic fracturing are distinguishable in some ways from ordinances that permanently ban the practice, the nature of oil and gas leases—which have a fixed term (absent the lease being held by production) that can expire during even a temporary ban—suggests the bans should be subject to traditional preemption analysis.

The Colorado Supreme Court has established that local governments have the power to enact moratoria as part of their land use power, at least in certain circumstances.[124] Specifically, in *Droste v. Board of County Commissioners*,[125] the Supreme Court upheld a 10-month moratorium on the processing of land use applica-

120. Alternatively, a court could interpret the revised OGCA to actually expand local authority over oil and gas operations via its land use authority. *Voss* could arguably be read to stand for the proposition that local regulations that prohibit oil and gas development conflicted with the state interest when the state was solely concerned with the efficient extraction of these resources. Because OGCA now seeks the balanced development of oil and gas resources, a court could conclude that local regulation is actually more consistent with OGCA since the Supreme Court decided *Voss*. Consistent with this theory, the Fort Collins moratorium cites the revised purpose of OGCA in its statement of findings. Fort Collins Public Health, Safety & Wellness Act §2. However, this interpretation does not acknowledge that the legislature has continued to vest the authority for environmental regulation in state agencies rather than local governments. This detracts from the position that localities may use their land use authority to manage environmental issues related to oil and gas development. In addition, Colorado courts typically view complete bans on certain types of land use with disfavor and subject them to "particular scrutiny." *Colo. Mining Assoc.*, 199 P.3d at 730. In contrast to complete prohibitions on certain land uses, the proper exercise of zoning authority typically involves "delineating appropriate areas for those uses or activities." *Id.*

121. 60 P.3d at 766.

122. *Id.* at 763 (quoting and interpreting *Bowen/Edwards*).

123. While this Article largely focuses its preemption analysis through the lens of local land use regulation, home-rule municipalities may also invoke their police powers to defend a moratorium or prohibition on hydraulic fracturing. However, in matters of mixed local and state concern, the Supreme Court has held that state law will preempt a conflicting home-rule ordinance "notwithstanding the ordinance's otherwise legitimate intent to exercise municipal police powers." City & County of Denver. v. Qwest Corp., 18 P.3d 748, 755-56, 758 (Colo. 2001). Therefore, even if a court determines that a local government has an interest in regulating environmental impacts to protect the health, safety, and welfare of its citizens via its police powers, the decisive issue is still likely to be whether a municipal hydraulic fracturing ban conflicts with state law.

124. Droste v. Bd. of County Comm'rs, 159 P.3d 601, 606 (Colo. 2007).

125. *Id.* at 607.

tions while the county developed a new master plan, as required by a state mandate. In rejecting a challenge by landowners with pending land use applications, the court held that the Land Use Enabling Act permitted the use of moratoria to suspend development for a "reasonable period of time" necessary to complete pending planning exercises. However, the power to enact moratoria is not unfettered. Instead, "moratoria are often employed to preserve the status quo in a particular area while developing a long-term plan for development."[126]

Here, the municipal moratoria in question do not appear to have been enacted to temporarily suspend the practice of hydraulic fracturing while the city develops a long-term plan for its use. For example, the Fort Collins moratorium states that its purpose is to protect residents from "threats to public health and safety, property damage and diminished property values, poor air quality, destruction of landscape, and pollution of drinking water."[127] The Fort Collins moratorium also states that the moratorium on hydraulic fracturing is necessary "in order to study the impacts of this process on property values and human health."[128] The underlying basis of the moratorium is thus not to halt development while a proper plan is developed, but instead to address environmental impacts, the regulation of which the legislature has delegated to CDPHE and COGCC. Accordingly, it does not appear that a moratorium enacted pursuant to a local government's land use authority would necessarily be any more likely to survive a preemption challenge than an outright permanent ban.

The hydraulic fracturing bans can be distinguished further from the master planning moratoria in *Droste* because, in many instances, they will operate as a permanent ban on oil and gas drilling for certain operators. Unlike rights to develop the surface of property, oil and gas development rights are typically obtained through leases. These leases provide operators the right to drill and recover hydrocarbons for a set period of time, after which the drilling rights can expire. Because the moratoria are sufficiently long—the Fort Collins ban, for example, lasts five years—many operators will permanently lose their drilling rights during the pendency of the bans. Thus, unlike the *Droste* moratoria, which only delayed the development of certain parcels for a set period of time pending the creation of a master plan, the hydraulic fracturing moratoria will foreclose companies that have expended significant resources in obtaining leases from *ever* recovering oil and gas at a location.[129] This is likely precisely the cities' intention. Courts should look past the so-called temporary nature of these bans, however, to give effect to Colorado's preemption law and OAGC.

4. Decisions From Other Jurisdictions

In light of the conclusions reached in this Article with respect to the viability of municipal home-rule hydraulic fracturing bans in Colorado, it is reasonable to question why courts in other jurisdictions have reached different outcomes when ruling on related issues. Both Pennsylvania and New York have recently released well-publicized decisions addressing the allocation of state and local authority with respect to oil and gas development.

Pennsylvania

In *Robinson Township v. Commonwealth of Pennsylvania*,[130] the Supreme Court of Pennsylvania considered whether Act 13, a state statute that attempted to standardize oil and gas regulation, was unconstitutional. Significantly, §3303 of Act 13 declared that environmental statutes were a matter of "[s]tatewide concern and, to the extent they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of local ordinances."[131] The court also characterized Act 13's stated purpose as to "preempt and supersede" local regulation of oil and gas operations that are already regulated by statewide environmental statutes.[132] In a 162-page decision, the court concluded that significant portions of the statute, including §3303, were unconstitutional. The opinion of the court rested primarily on the conclusion that the statute violated the Environmental Rights Amendment (ERA) of the Pennsylvania Constitution.[133] The ERA provides that:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

The Supreme Court of Pennsylvania interpreted this provision expansively and determined that it vested the authority to regulate environmental issues in all levels of the government, including local government. With respect to §3303 of Act 13, the court concluded that the ERA precluded the state from "remov[ing] necessary and reasonable authority from local governments to carry out these constitutional duties."[134]

While the opinion in *Robinson Township* does not rest entirely on the Pennsylvania ERA, it is clearly a signifi-

126. *Id.* (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 337, 32 ELR 20627 (2002)).
127. Fort Collins Public Health, Safety & Wellness Act §2.
128. *Id.* §3.
129. Moratoria that foreclose all oil and gas development until after operators' leases expire may also subject cities to regulatory takings claims. *See Droste*, 159 P.3d at 608 ("The length and conditions of a moratorium are subject to the protection of property owners against uncompensated takings. . . .").
130. Nos. 63 MAP 2012, 64 MAP 2012, 72 MAP 2012, 73 MAP 2012, 2013 Pa. LEXIS 3068 (Pa. Dec. 19, 2013).
131. 2013 Pa. LEXIS 3068 at *181.
132. *Id.* at **181-82.
133. Pa. Const. art. I, §27.
134. 2013 Pa. LEXIS 3068 at **204-05.

cant aspect of the case.[135] Unlike Pennsylvania, Colorado currently does not have an equivalent to the ERA in its constitution.[136] Given this distinction, unless the Colorado Constitution is amended, preemption analysis performed in a Colorado court will revolve around different constitutional considerations.[137]

New York

In a pair of related cases, the Appellate Division of the Supreme Court of New York ruled that the New York Oil, Gas and Solution Mining Law (OGSML) did not preempt a local ordinance prohibiting oil and gas development.[138] In *Norse Energy Corp. USA v. Town of Dryden*,[139] the town passed a zoning ordinance that banned "all activities related to the exploration for, and the production or storage of, natural gas and petroleum." The appellate court acknowledged that this ban was a reaction to concerns regarding the use of hydraulic fracturing.[140] Like Colorado, New York affords local government significant powers with respect to the regulation of land use through zoning powers, subject to preemption by the state.[141] The court proceeded to explain that because OGSML contained an express preemption clause, the preemption analysis "turns on the proper construction of [the] statutory provision."[142] The preemption clause in OGSML provided that its provisions "[S]hall supersede all local laws or ordinances relating to the regulation of oil, gas and solution mining industries."[143]

The court determined that the town's ordinance does not "regulate" under the meaning of OGSML because it "does not seek to regulate the details or procedure of the oil, gas and solution mining industries."[144] Instead, the ordinance "simply establishes permissible and prohibited uses of land," which have "an incidental effect upon the oil, gas and solution mining industries."[145]

The reasoning in *Town of Norse* would likely be inapplicable to Colorado because: (1) the Colorado OGCA does not contain an express preemption clause; and (2) the outcome in *Town of Norse* is contrary to *Voss*. Unlike *Town of Norse*, the court in *Voss* was unwilling to characterize a ban on oil and gas development and production as a permissible exercise of local land use authority. The opinion in *Voss* also suggests that a ban on oil and gas activity does not result in "incidental" effects on the oil gas industry, but rather creates an irreconcilable conflict with state objectives. Therefore, *Town of Norse* would appear to be of limited relevance in Colorado.

5. Potential Constitutional and Legislative Changes

While the preceding analysis considered the issue of preemption based on the current state of the law, this set of conditions is not fixed, and the preemption analysis could be altered with amendments to either the Colorado Constitution or OGCA.

Under the four-factor test utilized in *Voss*, the constitutional commitment of an issue to state or local control helps a court to determine whether a matter is one of local, statewide, or mixed concern.[146] Proponents of local regulation of hydraulic fracturing have proposed multiple ballot measures that would amend the Colorado Constitution to vest certain powers within local governments. Under one proposal, this would include the power to enact local laws to protect public health and the environment.[147] More recently, advocates of local regulation of oil and gas activities have proposed a ballot initiative that would empower home-rule cities, statutory cities, and counties to place restrictions on the time, place, or method of oil-and-gas development, including but not limited to the use of hydraulic fracturing.[148] The proposed amendment would declare that any local regulations "are deemed not to be in conflict with the state's interests."[149] Either of these changes would almost certainly impact home-rule preemption analysis, as well as the ongoing vitality of the Supreme Court's decision *Voss*.

In addition, the Supreme Court of Colorado has stated that the declaration of the state's interest within the relevant legislation is a significant factor when determining

135. 2013 Pa. LEXIS 3068 at 275 (Baer, J., concurring) (identifying the court's analysis with respect to the ERA as "the heart of the opinion"). Admittedly, the significance of the court's ruling is difficult to discern because Justice Max Baer declined to join the sections of the opinion relying on the ERA, and instead concluded that Act 13 offended due process. *Id.* at **277-79, **287-98. As a result, only three of the six justices that decided the case supported the ERA analysis stated in the opinion of the court.

136. As discussed in Part D.5., *infra*, citizens groups have recently proposed the addition of a "public trust" amendment to the Colorado Constitution. If this amendment is placed on the ballot and passes, it would alter this analysis.

137. The Pennsylvania Supreme Court also held that §3304 of Act 13 violated the Due Process Clauses of the Pennsylvania and U.S. Constitution because it forced local governments to enact zoning ordinances permitting oil and gas operations in all zoning districts. This is not necessarily inconsistent with Colorado law. While *Voss* prohibits a local government from banning oil and gas operations from all zones, the Court has not addressed whether it may prohibit it in certain zones as part of a comprehensive zoning plan.

138. Norse Energy Corp. USA v. Town of Dryden, 964 N.Y.S.2d 714, 108 A.D.3d 25 (N.Y. App. Div. 2013); Cooperstown Holstein Corp. v. Town of Middlefield, 964 N.Y.S.2d 431, 106 A.D.3d 1170 (N.Y. App. Div. 2013). The Appellate Division's opinion in *Cooperstown Holstein* simply reiterated the holding from *Norse Energy*, and the court did not perform any additional preemption analysis. 964 N.Y.S.2d at 432. Both cases are currently before the New York Court of Appeals, and the parties filed final briefs on January 6, 2014.

139. 964 N.Y.S.2d at 716.

140. *Id.*

141. *Id.* at 718.

142. *Id.* at 719 (quoting Matter of Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126, 131 (N.Y. 1987)).

143. N.Y. Envtl. Conserv. §23-0303[2].

144. 964 N.Y.S.2d at 719.

145. *Id.*

146. *Voss*, 830 P.2d at 1068; *Denver*, 788 P.2d at 768.

147. Colo. Ballot Initiative 75 (Feb. 19, 2014), *available at* http://www.leg.state.co.us/LCS/Initiative%20Referendum/1314InitRefr.nsf/acd7e51d3fc2b60b87257a3700571f9f/2e5556fcda6d207887257c8500564ea2/$FILE/2013-2014%20%2375.pdf.

148. Colo. Ballot Initiative 82 (Mar. 17, 2014), *available at* https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2013-2014/82Final.pdf.

149. *Id.*

whether a matter is of local, statewide, or mixed concern.[150] Accordingly, the legislature may alter a court's conclusions by directly addressing what matters should be considered state and local interests. The enactment of legislation stating that public health and/or environmental matters related to oil and gas development are matters of local concern would likely affect preemption analysis under Colorado law and require courts to reconsider the contemporary relevance of *Voss*.

Citizens groups have also recently discussed proposing a "public trust" amendment to the Colorado Constitution, which would require the government to protect natural resources against pollution. It would also make it a criminal offense for private companies or citizens to manipulate data or scientific reports for profit. If such a constitutional amendment were approved, Colorado courts may adopt the Pennsylvania approach and determine that government bodies at all levels have the authority to protect public resources on behalf of their citizens.

V. Conclusion

While the use of hydraulic fracturing has permitted Colorado to recover significant natural gas assets that were previously unattainable, the public concern regarding the practice has led to numerous efforts to prevent its use. In the current iteration, citizens and interest groups obtained the enactment of multiple municipal bans preventing the use of hydraulic fracturing for a set period of time, with the thinly veiled goal of foreclosing the practice indefinitely. COGCC and industry advocates have brought lawsuits in response, on the well-founded grounds that statewide statutes and regulations preempt these municipal bans. An analysis of binding Colorado precedent suggests that these lawsuits are likely to succeed, precluding cities' novel attempts to ban oil and gas development at the municipal level.

Even if these lawsuits are successful, however, opponents of hydraulic fracturing are unlikely to be deterred. Operators and policymakers should therefore prepare for upcoming attempts to prevent oil and gas recovery through the passage of statewide legislation or a constitutional amendment changing the structure of oil and gas regulation in the state. Hydraulic fracturing can provide clean fuel alternatives in the state for generations, but its proponents must remain diligent to ensure that this valuable process is not delayed or precluded by municipal or statewide policy changes.

150. *Webb*, 295 P.3d at 486; *Colo. Mining Assoc.*, 199 P.3d at 731.