

SULLIVAN GREEN SEAVY LLC

LOCAL GOVERNMENT AUTHORITY TO REGULATE OIL AND GAS DEVELOPMENT – April 29, 2018

Following is a summary of the scope of local government regulatory authority over the impacts of oil and gas development and, based on current case law, an assessment of the validity of different types of regulations. The different types of regulations assessed below are color-coded: **green** indicates types of local land use regulations that are not per se preempted by state law; **yellow** indicates types of local land use regulations that may or may not be preempted, depending on whether the regulation creates an operational conflict; and **red** indicates types of local land use regulations that would be preempted by state law and therefore, would not be enforceable.

This memo is intended to provide a general understanding of the law as of this date, and is **not** intended to provide, and should not be relied upon for, specific legal advice. Please contact your municipal or county attorney for advice on specific legal questions.

SCOPE OF LOCAL GOVERNMENT AUTHORITY TO REGULATE OIL AND GAS DEVELOPMENT

CAN LOCAL GOVERNMENTS REGULATE IMPACTS OF OIL AND GAS DEVELOPMENT?

Yes. Local governments can regulate the impacts of oil and gas development in the same way they regulate any other development through land use permits and regulations that are within the scope of their ordinary land use authority as delegated by the Colorado General Assembly and/or home rule powers under Article XX of the Colorado Constitution.¹

Local government regulations are presumed to be valid. To win on a facial challenge to local

¹ City of Longmont Colorado v. Colorado Oil & Gas Ass'n, 369 P.3d 573 (Colo. 2016)("Longmont"); City of Fort Collins v. Colorado Oil & Gas Association, 369 P.3d 586 (Colo. 2016)("Fort Collins"); Board of County Comm'rs of La Plata County v. Bowen/Edwards Assoc. Inc., 830 P.2d 1045 (Colo. 1992)("Bowen/Edwards"); Voss v. Lundvall Brothers, Inc., 830 P.2d 1061 (Colo. 1992) ("Voss"); Board of County Comm'rs of Gunnison County v. BDS International, 159 P.3d 773(Colo. App.2006)("BDS"); Bd. of County Comm'rs of La Plata County v. Colorado Oil and Gas Conservation Commission, 81 P.3d 1119, 1124 (Colo.App. 2003)("La Plata County"); Town of Frederick v. North American Resources Co., 60 P.3d 758 (Colo. App.2002)(cert den'd)("Frederick").

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regulations, the challenger would have to show that the state and local regulations conflict under all possible scenarios.² If the local government “prohibits what the state authorizes” as is the case with a ban or 5-year moratorium on oil and gas development, then such regulation would be preempted.³

WHAT IS THE SOURCE OF LOCAL GOVERNMENT AUTHORITY TO REGULATE IMPACTS OF OIL AND GAS DEVELOPMENT?

The authority to regulate impacts of oil and gas development is derived from local government land use authority delegated to municipalities and counties by the Colorado General Assembly, and home rule authorities under Article XX of the Colorado Constitution.

In addition to the specific powers granted to counties and municipalities to regulate the use and development of land under the planning statutes, the Local Government Land Use Control Enabling Act⁴ gives local governments the authority to regulate development and activities in hazardous areas, to protect land from activities that would cause immediate or foreseeable material damage to wildlife habitat, to preserve areas of historical and archaeological importance, to regulate the location of activities and development which may result in significant changes in population density, to provide for the phased development of services and facilities, to regulate land use on the basis of its impact on the community or surrounding areas, and to otherwise plan for and regulate land use so as to provide for the orderly use of land and the protection of the environment consistent with constitutional rights.⁵ Local regulatory authority is also recognized in provisions of the Colorado Oil and Gas Conservation Act.⁶

WHEN DOES STATE LAW PREEMPT LOCAL GOVERNMENT REGULATIONS?

Local government regulations that apply to impacts of oil and gas development are preempted by the Colorado Oil and Gas Conservation Act (COGCA) and Colorado Oil and Gas Conservation Rules (COGCC Rules) if the COGCA expressly says so, or when the operational effect of those regulations results in an operational conflict with state requirements.⁷

² Colorado Mining Association v. Board of County Commissioners of Summit County, 170 P.3d 749 (Colo.App.2007) (rev'd on other grounds, 199 P.3d 718 (Colo. 2009)); Department of Transportation v. City of Idaho Springs, 192 P.3d 490, 495 (Colo.App.2008); BDS at 779; California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987).

³ See Longmont and Fort Collins, respectively.

⁴ C.R.S. §§ 29-20-101 to 107.

⁵ C.R.S. § 29-20-104(1); Bowen/ Edwards at 1056.

⁶ C.R.S. §§ 34-60-127(4)(c) and 34-60-128(4); Fort Collins at 592.

⁷ Longmont at 582; Fort Collins at 592; Bowen/ Edwards at 1055-58.

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Express Preemption

The COGCA expressly preempts local governments from charging an oil and gas operator for the cost of the county to inspect operations regulated by the COGCC.⁸ Because of this provision the court struck down local government regulations that sought to impose security fees on oil and gas operations.⁹

Operational Conflict Preemption

A local government regulation that applies to oil and gas operations is preempted when the operational effect of the county regulation conflicts with the state statute or regulation.¹⁰ “State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest.”¹¹ The state’s interest is expressed in the Colorado Oil and Gas Conservation Act and the Colorado Oil and Gas Conservation Commission rules.¹² In 2017, the Colorado Court of Appeals ruled in *Martinez v. Colorado Oil and Gas Conservation Commission* that the state’s interest in fostering the production of oil and gas is “subject to” protection of public health, safety, and welfare.¹³ That case has been appealed to the Colorado Supreme Court.

CAN LOCAL GOVERNMENTS REGULATE THE SAME SUBJECT MATTER AS THE COLORADO OIL AND GAS CONSERVATION COMMISSION (COGCC)?

Yes. Regulations that address the same subject matter as state regulations are *not* automatically preempted. Unless the local regulation would result in an operational conflict with the statutes and rules, county regulations and the state rules addressing the same subject matter may co-exist.¹⁴ According to the Colorado Supreme Court, legislative intent to preempt local control over certain activities cannot be inferred merely from enactment of state statutes addressing certain aspects of those activities.¹⁵

CAN LOCAL GOVERNMENTS BAN OIL AND GAS OPERATIONS?

⁸ C.R.S. § 34-60-106(15).

⁹ *Town of Milliken v. Kerr-McGee Oil & Gas Onshore* 12CA1618 (2013).

¹⁰ *Longmont* at 582-584; *Fort Collins* at 592; *Bowen/Edwards* at 1059.

¹¹ *Longmont* at 583; *Bowen/Edwards* at 636.

¹² C.R.S. § 34-60-104.5(2)(a); *Fort Collins* at 593.

¹³ *Martinez v. Colorado Oil and Gas Conservation Commission*, 2017COA37 (petition for cert. granted).

¹⁴ *Colorado Mining Association v. Bd. of County Comm’rs of Summit*, 199 P.3d 718, 725 (Colo. 2009)(“Colorado Mining Association”); *BDS* at 779.

¹⁵ *Bowen/Edwards* at 1058.

No. Local governments cannot ban all oil and gas development.¹⁶ Local governments cannot ban hydraulic fracturing.¹⁷ Local regulations that have the same effect as a ban also would be preempted.

CAN LOCAL GOVERNMENTS BAN OIL AND GAS OPERATIONS FROM CERTAIN ZONING CLASSIFICATIONS?

Maybe (at least on non-federal lands.) There are no cases that answer this question directly. Local governments have broad land use authority, and courts presume that zoning ordinances are valid.¹⁸ Listing permitted and prohibited uses in various zoning districts is a classic local zoning function. The court has left the door open for the possibility that activities could be prohibited in some, but not all, zoning districts. **in the Colorado Mining Association case, the Supreme Court said that county planning authority “probably does not include the right to ban uses from all zoning districts.”¹⁹**

With directional drilling, operators can access mineral reserves from nearby properties, so prohibiting oil and gas operations in a particular zoning category, such as residential, may be feasible. A problem would arise, however, if the zoning prevented an oil and gas operator from accessing its oil and gas reserves altogether. This would be challenged either as a regulatory taking, and/or as an operational conflict because it arguably would impede the state interest in oil and gas development.

An alternative to prohibiting oil and gas development in certain zoning districts would be to allow a variance from zoning restrictions on oil and gas development where it would be impossible to access oil and gas reserves. Another alternative would be to allow oil and gas operations anywhere under a special use permit, subject to regulatory standards and requirements designed to ensure that impacts of the operation to adjacent uses, the environment, and the community were mitigated.

CAN LOCAL GOVERNMENTS IMPOSE A MORATORIUM ON OIL AND GAS OPERATIONS?

No. The Colorado Supreme Court found that a 5-year moratorium on hydraulic fracturing created an operational conflict with state oil and gas requirements.²⁰ The court *did not*, however, say that all moratoria of any duration are automatically preempted. Several local

¹⁶ Voss at 1069.

¹⁷ Longmont at 585.

¹⁸ Colorado Mining Association at 730.

¹⁹ *Id.* at 731.

²⁰ Fort Collins at 594.

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governments have imposed moratoria of shorter duration on oil and gas operations. The United States Supreme Court has noted that moratoria are an essential tool of successful development.”²¹ Colorado courts have ruled that moratoria are a proper exercise of land use authority.²² However, in most cases, a moratorium cannot be applied to oil and gas operations approved by a permit or agreement prior to the moratorium, and a moratorium must be for a specific purpose, such as updating regulations.

CAN LOCAL GOVERNMENTS REQUIRE PERMITS FOR OIL AND GAS OPERATIONS THAT TAKE INTO ACCOUNT CONSISTENCY WITH THE COMPREHENSIVE PLAN, COMPATIBILITY WITH ADJACENT USES, IMPACT ON PUBLIC SERVICES, TRAFFIC, POLLUTION, LANDSCAPING, AND SIMILAR FACTORS WHEN REVIEWING AN OIL AND GAS OPERATION?

Yes. Courts have upheld county special use permit requirements setting out standards for granting or denying special use permits that address consistency with the comprehensive plan, compatibility with adjacent uses, impact on county services, traffic, environmental impacts, and related standards for mining activities. Because state oil and gas regulations do not displace local authority over oil and gas impacts, land use permits applied to oil and gas also are not pre-empted, assuming that the application of the local standards and requirements do not create an operational conflict with state oil and gas requirements.²³

CAN LOCAL GOVERNMENTS REGULATE THE “TECHNICAL ASPECTS” OF OIL AND GAS OPERATIONS?

Local government regulations that address the “technical aspects” of oil and gas development *are not* automatically preempted but they *may* give rise to an operational conflict with COGCC rules that govern technical concerns.²⁴ **If a local government tries to directly regulate the drill casing, fluids injected, process, etc. it may be viewed as regulating in an arena where it has no authority because regulation of these aspects of oil and gas are not really *land use* impacts. Regulation of the land use impacts caused from these processes, however, would be within the scope of local authority and would be valid as long as they did not create an operational conflict.**

²¹ Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 337-38, (2002).

²² Droste v. Board of County Comm’rs of Pitkin County, 159 P.3d 601 (Colo. 2007); Williams v. Central City, 907 P.2d 701(Colo.App.1995); Deighton v. City of Colorado Springs, 902 P.2d 426 (Colo. App. 1994). The City of Lafayette and the Town of Firestone or Frederick recently enacted 6 month moratoriums.

²³ C & M Sand and Gravel v. Bd. of County Comm’rs of Boulder County, 673 P.2d 1013 (Colo.App. 1983); Frederick at 766; BDS at 778.

²⁴ Longmont at 584.

CAN LOCAL GOVERNMENTS IMPOSE SETBACKS FROM BUILDINGS ON OIL AND GAS OPERATIONS?

Maybe - Under decisions by the Court of Appeals, local governments should be able to impose setbacks on oil and gas operations if the setback does not cause an operational conflict with state law. The Court of Appeals in Frederick found that the setback created an operational conflict. But in that case the operator had already received approval of its location from the state.²⁵ No appellate court has ruled that all setbacks are always preempted.

BUT setbacks are one of the biggest concerns for the industry. COGA and API challenged some of the City of Thornton regulations, including setbacks, under the operational conflict theory. Plaintiffs' motion for partial summary judgment was granted in part and denied in part by the Weld County District Court on April 25.th The court granted summary judgment on the City's setback and gathering line standards as preempted on their face, but denied the plaintiffs motion for summary judgment with respect to the well-consolidation and surface site standards.²⁶ The other claims remain unresolved at this time, and trial is set for June 21, 2018. At this time, it is unknown whether the City of Thornton will appeal the ruling.

CAN LOCAL GOVERNMENTS REGULATE THE WATER QUALITY IMPACTS OF OIL AND GAS OPERATIONS?

Yes, local governments have authority to protect water quality of surface water supplies. Protection of water supplies is a matter of both state and local concern and may be regulated by local governments.²⁷ The Court of Appeals and the Gunnison County District Court both rejected the industry's claim that Gunnison County's water quality standard was preempted on its face and that an evidentiary hearing would be required to determine if there was an operational conflict between the County standard and COGCC Rules.²⁸

Local governments cannot, however, regulate point source discharges from oil and gas operations. Because the Water Quality Control Division is "solely responsible for the issuance and enforcement of permits authorizing point source discharges into surface waters of the state

²⁵ Frederick at 765.

²⁶ COGA and API v. City of Thornton, Case No. 2017 CV 31640. Plaintiffs challenged setbacks, waivers from standards, and regulations for gathering lines, liability insurance, and surface disturbance.

²⁷ Town of Carbondale v. GSS Props., LLC, 144 P.3d 53 (Colo.App. 2005) [(ev'd on other grounds, 169 P.3d 675)].

²⁸ BDS at 1059-60; Order on Cross Motions for Summary Judgment (January 3, 2012), Dist. Court Gunnison County, 2011 CV 127 ("Order"), pg 5 ¶3

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affected by such discharges,”²⁹ a county ordinance requiring a *point source discharge permit* for an oil and gas development activity would be preempted.

Local governments can regulate non-point source discharges.

Non-point source pollution is not directly addressed by the CWQCA because non-point pollution is associated with land use activities, an area typically regulated by local governments.³⁰

CAN LOCAL GOVERNMENTS REGULATE IMPACTS TO DRINKING WATER SUPPLIES?

Maybe. Local government regulation of impacts of oil and gas operations to drinking water supplies should be valid unless the regulations create an operational conflict with specific state requirements.

The industry has argued that regulation of surface water drinking water supply is preempted by state water quality rules, 5 CCR 1002-31 and -38; ground water drinking water supply protection is preempted by Colorado Water Quality Control Act (“CWQCA”), 5 CCR 1002-42; and that protection of designated public water supply segments is preempted by COGCC Rules.

There are many strong arguments, however, that support a role for local regulations to protect drinking water. For example:

- Water Quality Control Division has a Source Water Assessment and Protection (SWAP) program, approved by EPA, that specifically envisions a shared regulatory approach for source water protection.³¹ The intent of this program is for local governments to create source water protection plans.
- The Water Quality Control Division has entered into at least one Memorandum of Agreement with a land use agency (the US Forest Service) to protect public sources of water supply.³² Again, this is evidence that the Division intends to share responsibility for protecting drinking water sources.
- Regardless of how specific the state agency regulations are, given that the courts have found, repeatedly, that local and state government share an interest in and

²⁹ CWQCA, § 202(7)(b)(I).

³⁰ BDS at 780 (county drainage and erosion regulations promote the state’s interest in protecting the land and topsoil without imposing conflicting requirements; evidentiary hearing required to determine whether there is operational conflict).

³¹ <http://www.cdphe.state.co.us/wq/sw/pdfs/-toc-sum.pdf>.

³² http://www.cdphe.state.co.us/wq/sw/pdfs/-CDPHE_USFS_pdfs/USFS_CDPHE_MOU_Final_1009.pdf.

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authority for protecting water quality, it is unlikely that a court would find preemption of any **local regulation that seeks information about where an activity that may affect water resources or public health is occurring, the nature of the water resources that may be affected, and the protections (i.e., mitigation) that the developer is proposing to protect the resource.**

CAN LOCAL GOVERNMENT IMPOSE SETBACKS FROM WATERBODIES GREATER THAN COGCC SETBACKS?

Maybe –The Court of Appeals found that a waterbody setback greater than COGCC setbacks, on its face, was *not* preempted unless the operator established in an evidentiary hearing that such a setback would materially impede or destroy the state interest.³³ Several local governments have adopted greater water body setback requirements. In spite of the Gunnison County case, **the Weld County District Court ruled on motions for summary judgment in COGA/API v. Thornton that all of the City’s setbacks including setbacks from water bodies, structures, outdoor activity areas, and platted lots are invalid.**

CAN LOCAL GOVERNMENTS REGULATE THE INJECTION OF FRACKING FLUIDS INTO AQUIFERS?

No. Federal law would preempt county regulation of injection of contaminants into aquifers during fracking. Local governments cannot regulate the injection of fracking fluids. Protection of underground drinking water supplies is preempted by the Safe Drinking Water Act and regulation of injection of fracking fluids including benzene, in particular, is preempted by federal Energy Policy Act of 2005.

CAN LOCAL GOVERNMENTS REGULATE THE IMPACTS OF OIL AND GAS DEVELOPMENT ON WILDLIFE HABITAT?

Maybe - Local government regulations addressing impacts to wildlife habitat of oil and gas operations should be valid so long as they do not create an operational conflict with state requirements.³⁴ Local Governments have express statutory authority to control the impacts of development on wildlife habitat under the Local Government Land Use Control Enabling Act³⁵ and Areas and Activities of State Interest (“1041”)³⁶.

COGCC Rules establish wildlife habitat protection standards. The Court of Appeals upheld

³³ Order, pg 5 ¶2; BDS at 780.

³⁴ BDS at 780-781(evidentiary hearing required to determine whether there was an operational conflict).

³⁵ C.R.S. §§ 29-20-101 to 107.

³⁶ C.R.S. 24-65.1-101 *et seq.*

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Gunnison County's wildlife habitat regulations against a facial challenge by the oil and gas industry. The court ruled that it is not clear that these regulations would operationally conflict with state regulations, and that an evidentiary hearing would be required to make that determination.³⁷

CAN LOCAL GOVERNMENTS REGULATE IMPACTS OF OIL AND GAS DEVELOPMENT ON LIVESTOCK?

Maybe - Local government regulations addressing impacts to livestock of oil and gas operations should be valid as long as they do not create an operational conflict with state requirements.³⁸

CAN LOCAL GOVERNMENTS REGULATE IMPACTS OF OIL AND GAS DEVELOPMENT ON CULTURAL AND HISTORIC RESOURCES?

Maybe - Local government regulations addressing impacts to cultural and historic resources of oil and gas operations should be valid as long as they do not create an operational conflict with state requirements.³⁹

CAN LOCAL GOVERNMENTS REGULATE IMPACTS OF OIL AND GAS DEVELOPMENT ON RECREATION?

Maybe - Local government regulations addressing impacts on recreation of oil and gas operations should be valid as long as they do not create an operational conflict with state requirements.⁴⁰

CAN LOCAL GOVERNMENTS REGULATE OIL AND GAS ACTIVITIES OCCURRING ON STATE LAND BOARD LANDS?

Yes. Local governments have the authority to regulate oil and gas activities on State Land Board lands. The Colorado Supreme Court has upheld county zoning authority over state lands.⁴¹ There is no reason that the analysis would be different for oil and gas operations.⁴²

CAN LOCAL GOVERNMENTS IMPOSE NOISE REGULATIONS ON OIL AND GAS OPERATIONS?

³⁷ BDS at 780-781.

³⁸ BDS at 780-781(evidentiary hearing required to determine whether there was an operational conflict).

³⁹ Id.

⁴⁰ Id.

⁴¹ Colorado State Bd. of Land Comm'rs v. Colorado Mined Land Reclamation Bd., 809 P.2d 974, 982-85 (Colo. 1991).

⁴² Bowen/Edwards at 1058.

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No. The Court of Appeals held that a Town’s noise abatement ordinance was preempted on grounds of operational conflict with COGCC noise regulations.⁴³ The County Powers Statute does not allow counties to regulate noise impacts caused by oil and gas operations.⁴⁴

CAN LOCAL GOVERNMENTS REQUIRE FINANCIAL GUARANTEES?

No. According to the Court of Appeals, local governments are expressly preempted from requiring financial guarantees that duplicate or conflict with the state regulations’ financial cap.⁴⁵

CAN LOCAL GOVERNMENTS REQUIRE THAT AN OIL AND GAS OPERATOR PROVIDE ACCESS TO RECORDS?

No. According to the Court of Appeals, local governments cannot require access to records because “the state statute and rule exclude the county by omission as an entity authorized to inspect the records” that the COGCC requires to be kept.⁴⁶

⁴³ Frederick at 765

⁴⁴ C.R.S. § 30-15-401(1)(m)(II)(B).

⁴⁵ BDS at 779.

⁴⁶ Id.