

A CAUSE WORTH FIGHTING FOR: THE BATTLE FOR LOCAL CONTROL OVER COLORADO’S OIL AND GAS INDUSTRY

I. “NEVER AGAIN”¹

On April 17, 2017, a volatile, odorless gas composed of methane and propane finally found an ignition source in the Firestone, Colorado basement that it had been seeping into for months.² Within seconds, the gas “erupted [in] a sudden and violent explosion,” leveling the home and killing the homeowner and his brother-in-law.³ Following the fatal explosion, fire investigators quickly found the cause: a small, severed plastic pipeline stemming from a gas well located a mere 178 feet from the Firestone home.⁴ The gas valve on the well connected to the pipe had been left in the “on” position, allowing gas to leak from the sliced pipe, saturate the soil, and steadily migrate into the Firestone home.⁵ In the deadly event’s aftermath, Anadarko Petroleum Corporation—the operator that owned the fatal well—announced that it would close 3,000 wells across Colorado.⁶ But for Firestone, this action was too little, too late.

Days after the explosion, Colorado Governor John Hickenlooper proclaimed that “never again” could a fatal explosion like that in Firestone be allowed to happen.⁷ State Senator Matt Jones (D-Boulder) also commented on the explosion, remarking that “[a]s more information has come to light, it has become clearer that these oil wells, pipes, and tanks are simply too dangerous to be in close proximity to homes, businesses, and schools.”⁸ And, seeking to do more than merely make sympathetic public statements, local municipalities began taking action to ensure that such a tragedy would never happen again.⁹

1. Bruce Finley, *Hickenlooper on Fatal House Blast: “Never Again,” but State Fighting Ruling that Public Safety, Environment Must be Protected*, DENV. POST (May 3, 2017, 9:27 p.m.), <https://www.denverpost.com/2017/05/03/firestone-explosion-hickenlooper-court-ruling/>.

2. Bruce Finley, *Deadly Firestone Explosion Caused by Odorless Gas Leaking from Cut Gas Flow Pipeline*, DENV. POST (May 2, 2017, 2:51 p.m.), <https://www.denverpost.com/2017/05/02/firestone-explosion-cause-cut-gas-line/>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Timeline of Fatal Gas Explosion at House in Firestone*, CBS DENV. (June 4, 2017, 11:49 a.m.), <http://denver.cbslocal.com/guide/timeline-firestone-explosion/>.

7. *Hickenlooper on Fatal House Blast*, *supra* note 1.

8. *Deadly Firestone Explosion Caused by Odorless Gas*, *supra* note 2.

9. Bruce Finley, *Fed-Up Colorado Towns Fight Oil and Gas Ops by Making New Rules, But Industry is Ready to Fight Back*, DENV. POST (Aug. 24, 2017, 12:01 a.m.), <https://www.denverpost.com/2017/08/24/oil-gas-colorado-erie-broomfield-thornton-new-rules-industry-fights-back/>; RealVail Staff, *Colorado Towns Set New Oil and Gas Policies but Industry Fights Back*, REALVAIL (Oct. 26, 2017, 4:35 p.m.), <http://www.realvail.com/colorado-towns-set-new-oil-and-gas-policies-but-industry-fights-back/a4440>.

II. LOCAL GOVERNMENTS TAKE ACTION TO PROTECT THEIR COMMUNITIES

In the months after the fatal Firestone explosion, cities and towns across the Front Range mobilized to pass new ordinances and regulations designed to exert better local control over the oil and gas industry and prevent further loss of life.¹⁰ Arguing that municipalities “must be able to protect health, safety and the environment within urban boundaries” and decrying the many loopholes that have long favored oil and gas companies, some Colorado municipalities, such as Erie, Broomfield, Lafayette, and Thornton, have passed laws legalizing local control over the production of oil and gas within their borders.¹¹

Broomfield entered into a memorandum of understanding with Extraction Oil & Gas, Inc. “that places limits and conditions on company extractions at several proposed drilling sites.”¹² As part of this memorandum, Extraction Oil & Gas, Inc. agreed to build new wells at least 1,000 feet away from any homes and to monitor the soil near plugged and abandoned wells for gas leaks like those that caused the Firestone explosion.¹³ Erie passed an odor ordinance that makes smells from oil and gas production “illegal and a public nuisance if they are detected offsite.”¹⁴ Lafayette passed a six month fracking moratorium, staying all new oil and gas development until May 2018.¹⁵ And Thornton went the furthest of the four municipalities, passing a slew of new ordinances seeking to regulate almost every aspect of oil and gas drilling.¹⁶

Thornton’s new collection of regulations, Ordinance No. 3477, are the toughest of those passed in the wake of the Firestone disaster.¹⁷ Ordi-

10. *Fed-Up Colorado Towns Fight Oil and Gas Ops*, *supra*, note 9.

11. *Id.*

12. John Aguilar, *Broomfield Approves Oil and Gas Deal After Knock-Down, Drag-Out Fight*, DENV. POST (Oct. 24, 2017, 10:25 p.m.), <https://www.denverpost.com/2017/10/24/extraction-oil-gas-drilling-memorandum-broomfield-city-council-meeting>.

13. *Id.*; see also Jennifer Rios, *Extraction's Proposal for 99 Broomfield Wells Draws Support, Ire*, BROOMFIELD ENTER. (Oct. 10, 2017, 10:34 p.m.), http://www.broomfieldenterprise.com/news/ci_31367328/extractions-proposal-99-broomfield-wells-draws-support-ire.

14. Anthony Hahn, *Erie Approves 'Odor' Ordinance, A Win for Advocates of Local Oil and Gas Regulation*, BOULDER DAILY CAMERA (July 25, 2017, 10:11 p.m.), http://www.dailycamera.com/erie-news/ci_31168995/erie-approves-odor-ordinance-fete-advocates-local-oil.

15. Anthony Hahn, *Lafayette Approves 6-Month Fracking Moratorium on Eve of Election*, BOULDER DAILY CAMERA (Nov. 6, 2017, 9:01 p.m.), http://www.dailycamera.com/lafayette-news/ci_31433472/lafayette-oil-gas-moratorium.

16. John Aguilar, *Thornton Passes Strict Oil, Gas Rules as Tensions Over Drilling in Neighborhoods Rise*, DENV. POST (Aug. 23, 2017, 6:42 a.m.), <https://www.denverpost.com/2017/08/22/thornton-passes-oil-gas-rules/>; Sarah Sorum, *The Battle Over Local Control Heats Up Again as Thornton's Oil and Gas Regulations are Challenged in Court*, WELLBORN SULLIVAN MECK & TOOLEY BLOG (Oct. 25, 2017), <https://www.wsmtlaw.com/blog/the-battle-over-local-control-heats-up-again-as-thornton-s-oil-and-gas-regulations-challenged-in-court.html>.

17. See Sorum, *supra* note 16.

nance No. 3477 “provides for much stricter standards” than state law, mandating that well pads be at least 750 feet away from all buildings and at least 500 feet away from bodies of water.¹⁸ Additionally, multiple oil and gas wells “must be located on a multi-well pad,” operators must maintain “general liability insurance of \$5 million per occurrence,” and all abandoned flowlines—like those responsible for the fatalities in Firestone—must be removed.¹⁹ Each of these new rules regulates the production of oil and gas at a much higher level than state law does.²⁰

In passing Ordinance No. 3477, the Thornton City Council made it clear that the impetus for exerting more control over the oil and gas industry was “the health, safety[,] and welfare of the city’s “residents and businesses,” a noble goal for any municipality.²¹ However, in passing these regulations, the City of Thornton was also aware of the potential legal minefield that the city was inserting itself into and the strong possibility that its regulations would quickly be challenged in court.²²

III. OIL AND GAS COMPANIES SUE, ARGUING STATE PREEMPTION OF ALL OIL AND GAS REGULATIONS

Before Thornton’s new oil and gas regulations were even introduced, oil and gas companies went on the defensive, drafting a letter to the Thornton City Council and threatening legal action if the city passed the proposed ordinance.²³ And sure enough, less than two months after Thornton passed their new ordinance, the Colorado Oil and Gas Association (COGA) and the American Petroleum Institute (API) filed their threatened suit.²⁴ According to the complaint, COGA and API’s lawsuit

18. *Id.*; see also Thornton, Colo. Ordinance No. 3477, § 18-881(a)(1)-(3) (Aug. 22, 2017). State law requires that wells be just 500 feet from a building and only mandates that wells be setback from bodies of water in certain cases. Sorum, *supra* note 16. State law also allows local governments to pass ordinances making it okay for wells to be less than 500 feet from structures. See *Deadly Firestone Explosion Caused by Odorless Gas*, *supra* note 2.

19. Sorum, *supra* note 16; see also Thornton, Colo. Ordinance No. 3477, § 18-881(b)(1), (y), (c)(1) (Aug. 22, 2017).

20. Sorum, *supra* note 16. According to state oil and gas law, wells only need to be consolidated on multi-well pads in certain special areas, operators only need to carry \$1 million of liability insurance per occurrence, and flowlines “may be abandoned in place if disconnected, buried, and permanently sealed.” *Id.*

21. Thornton, Colo., Ordinance No. 3447 (Aug. 22, 2017).

22. See *Thornton Passes Strict Oil, Gas Rule*, *supra* note 16; see also John Aguilar, *Thornton Overreaching with Proposed Oil and Gas Rules, State Officials Warn*, DENV. POST (Aug. 16, 2017, 10:20 a.m.), <https://www.denverpost.com/2017/08/15/thornton-oil-gas-regulations-attorney-general/>.

23. *Thornton Overreaching with Proposed Oil and Gas Rules*, *supra* note 22.

24. John Aguilar, *Oil and Gas Industry Groups Sue Thornton Over Strict Drilling Regulations, Say Rules Conflict with Colorado Law*, DENV. POST (Oct. 11, 2017, 2:37 p.m.), <https://www.denverpost.com/2017/10/11/oil-gas-industry-groups-sue-thornton-over-strict-drilling-regulations-rules-conflict-colorado-law/>; Nick Snow, *COGA, API Council Jointly Sue City of Thornton Over New Regulations*, OIL & GAS J. (Oct. 16, 2017), <http://www.ogi.com/articles/2017/10/coga-api-council-jointly-sue-city-of-thornton-over-new-regulations.html>. Erie, Colorado’s odor ordinance is also being challenged in the courts. See Amelia Arvesen, *Oil Company with 200 Wells in Erie Sues to Overturn Town’s Odor Ordinance*, DENV. POST (Dec. 1, 2017), <https://www.denverpost.com/2017/12/01/crestone-first-odor-ordinance->

“challenges the validity of [Thornton’s] ordinance in light of the broad authority granted to” the Colorado Oil and Gas Conservation Commission to regulate oil and gas production.²⁵ The lawsuit also argues that “the regulations are in operational conflict with” state law, and thus preempted, “because they forbid what state law authorizes and materially impede the state’s interest in the uniform regulation of oil and gas operations.”²⁶

IV. THE LAW SURROUNDING OIL AND GAS PREEMPTION IN COLORADO

Preemption is the idea that “a higher authority of law will displace the law of a lower authority . . . when the two authorities come into conflict.”²⁷ In other words, when a state and local law on the same topic conflict, the state law will supersede and invalidate the local law. There are three general types of preemption: express preemption, implied preemption, and operational preemption.²⁸ Express preemption occurs when “the legislature clearly and unequivocally states its intent to prohibit a local government from exercising its authority over the subject matter at issue.”²⁹ Preemption is implied when “a state statute ‘impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest.’”³⁰ And operational preemption exists when “the operational effect of [a] local law conflicts with the application of [a] state law,” meaning, essentially, that it is impossible to follow both laws because “a local ordinance has prohibited conduct that . . . state law allows” or vice versa.³¹

Under Colorado’s case law on oil and gas preemption, of which there is a plentiful amount, the first step in determining whether a local law conflicts with a state law is to figure out whether the issue in question is one of local, state, or mixed concern.³² Oil and gas regulations are of mixed concern,³³ meaning that, generally speaking, when a local oil and gas law and a state oil and gas law conflict, “the state law supersedes [the] conflicting ordinance.”³⁴ However, “in matters of mixed state and

violation/. However, this article only focuses on the constitutionality of Thornton, Colorado’s new regulations.

25. Sorum, *supra* note 16.

26. *Id.* (internal citations omitted).

27. *Preemption*, LEGAL INFO. INST.: WEX LEGAL DICTIONARY, <https://www.law.cornell.edu/wex/preemption> (last visited Feb. 7, 2018).

28. *City of Longmont v. Colo. Oil & Gas Assoc.*, 369 P.3d 573, 582 (Colo. 2016).

29. *Id.* (quoting *Bd. of Cty. Comm’rs, La Plata Cty. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1057 (Colo. 1992)).

30. *Id.* (quoting *Bowen/Edwards*, 830 P.2d at 1056–58).

31. *Id.* at 582–83; *see also Bowen/Edwards*, 830 P.2d at 1059 (“State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest. Under such circumstances, local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest.”) (internal citations omitted).

32. *See id.* at 579.

33. *Id.* at 581.

34. *Id.* at 579.

local concern, local ordinances may coexist with state statutes as long as the local ordinances do not conflict with the state statutes.”³⁵ Therefore, a local oil and gas regulation is not automatically preempted by a state regulation merely because both regulations exist. For a local regulation to be preempted, it must first come into conflict with a state regulation and then either be expressly, impliedly, or operationally preempted by that state law.³⁶

Colorado’s authority to regulate oil and gas companies at the state-level is vested in the Oil and Gas Conservation Act.³⁷ But this Act does not expressly preempt local governments from regulating the oil and gas industry: “The Oil and Gas Conservation Act does not expressly preempt any and all aspects of a county’s land-use authority over those areas of a county in which oil and gas activities are occurring or are planned.”³⁸ Thus, express preemption is not at issue with oil and gas preemption. The same is true when it comes to implied preemption: “[T]he Oil and Gas Conservation Act does not impliedly preempt a local government’s authority to enact land-use regulations for oil and gas development and operations within the locality.”³⁹

However, local oil and gas regulations can be operationally preempted by the Oil and Gas Conservation Act.⁴⁰ While the Colorado Oil and Gas Conservation Commission⁴¹ (COGCC) does not have “the exclusive authority to regulate the technical aspects of oil and gas operations,” it is wholly possible that “local regulations imposing technical conditions on” oil and gas production “might operationally conflict” with the Commission’s many state-level “rules and regulations governing the technical aspects of oil and gas operations.”⁴² Based on the concept of operational preemption, in 2016 the Colorado Supreme Court struck down two local-level ordinances banning fracking.⁴³ Because the Colorado Oil and Gas Conservation Act “evinces state control over numerous aspects of fracking, from the chemicals used to the location of waste pits,” local laws prohibiting fracking in its entirety “materially impede[d]

35. *Id.*

36. *See id.* at 581–82. (“In matters of mixed local and state concern, a home-rule municipal ordinance may coexist with a state statute as long as there is no conflict between the ordinance and the statute, but in the event of a conflict, state law preempts any conflicting local regulation.”)

37. *Id.* at 583.

38. *Id.* at 583 (quoting *Bowen/Edwards*, 830 P.2d at 1058).

39. *Id.*; *see also* *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1066 (Colo. 1992) (“[N]othing in the Oil and Gas Conservation Act manifests a legislative intent to expressly or impliedly preempt all aspects of a local government’s land-use authority over land that might be subject to oil and gas development and operations within the boundaries of a local government.”).

40. *Id.* at 584.

41. The Colorado Oil and Gas Conservation Commission enforces The Oil and Gas Conservation Act. *See* COLO. REV. STAT. § 34-60-102(2) (2018); COLO. REV. STAT. § 34-60-105(1) (2018); *see also* COLO. REV. STAT. § 34-60-104(1) (2018).

42. *City of Longmont*, 369 P.3d at 584.

43. *See* *City of Fort Collins v. Colo. Oil & Gas Assoc.*, 369 P.3d 586, 589 (Colo. 2016); *City of Longmont*, 369 P.3d at 585.

the application of . . . superseding state law.”⁴⁴ In other words, because it is impossible to follow both the local-level fracking bans and state law saying that fracking is permissible, local-level bans on fracking are preempted by the Oil and Gas Conservation Act and therefore unconstitutional. It is based on this very same legal analysis that the COGA and API are now suing to invalidate the City of Thornton’s local-level oil and gas regulations.

V. THE CONSTITUTIONALITY OF THE CITY OF THORNTON’S ORDINANCE

In their lawsuit against the City of Thornton, the COGA and API claim that Thornton’s new oil and gas regulations are operationally preempted⁴⁵ by state law and therefore unconstitutional.⁴⁶ This position is strongly supported by Colorado case law on oil and gas preemption. In *City of Longmont*, the Supreme Court stated that while the Colorado Oil and Gas Conservation Commission does not have “exclusive authority to regulate the technical aspects of oil and gas operations . . . local regulations imposing technical conditions on the drilling or pumping of wells [can] operationally conflict with state law.”⁴⁷

Relying on this case law, the COGA and API will likely argue that Thornton’s ordinance is preempted by the COGCC’s many state-level regulations because the local regulations imposed by Thornton conflict with the COGCC’s regulations on oil and gas drilling and pumping. For example, the COGCC only requires that wells be located at least 500 feet from a building while Thornton’s new ordinance mandates that wells be at least 750 feet away from any current or planned structure.⁴⁸ Thornton’s new ordinance also requires oil and gas companies to have a greater amount of liability insurance than required by the COGCC and directs that abandoned flowlines must be removed while the COGCC allows such flowlines to remain in place if certain conditions are met.⁴⁹ Focusing heavily on these components of Ordinance No. 3477, the COGA and API will likely assert that Thornton’s regulations prohibit conduct that state law allows by requiring oil and gas companies to do more than is required by the COGCC, an action that creates “a material

44. *City of Longmont*, 369 P.3d at 585; see also *City of Fort Collins*, 369 P.3d at 589, 594.

45. For reasons explicitly stated in *City of Longmont*, Thornton’s ordinance is neither expressly or impliedly preempted. *City of Longmont*, 369 P.3d at 583–84 (holding that there is no state law that expressly preempts local control over oil and gas regulations and that the legislative intent of the Oil and Gas Conservation Act specifically says that it should not be read to impliedly preempt local control over oil and gas).

46. Sorum, *supra* note 16.

47. *Id.* at 584 (internal quotations omitted).

48. Sorum, *supra* note 16; see also Thornton, Colo. Ordinance No. 3477 § 18-881(a)(1)-(2) (Aug. 22, 2017).

49. Sorum, *supra* note 16; see also Thornton, Colo. Ordinance No. 3477 § 18-881(y), (c)(1) (Aug. 22, 2017).

impediment to the effectuation of the state law” and is therefore preempted.⁵⁰ This argument may indeed prove successful.

However, Thornton’s position that its regulations are constitutional and are not preempted by the COGCC is not without legal merit. While the Colorado Supreme Court has made it clear that local-level bans on oil and gas production are preempted by the COGCC,⁵¹ Colorado’s highest court has never weighed in on whether municipalities can go above and beyond what state law authorizes. This gap in the case law provides a small opening for Thornton to argue that the regulations imposed by the COGCC are merely minimum standards that must be met, but can also be improved upon, by cities and towns through regulations that go further than those imposed by the state.⁵² In *Ray v. City & County of Denver*,⁵³ the Colorado Supreme Court held that localities can indeed go above and beyond a state law’s minimum standards through local regulations and ordinances, as long as those additional regulations can coexist with the state’s regulations.⁵⁴ And while the challenged ordinance in *Ray* was about interest rates,⁵⁵ and not oil and gas, it is entirely possible that this precedent applies with equal force to local-level oil and gas regulations.

Relying on the right of municipalities to regulate standards beyond what the state has,⁵⁶ Thornton will likely argue that its new regulations on oil and gas companies are not operationally preempted by the COGCC because they merely improve upon the state standards and can easily coexist with those standards. For example, when Thornton mandated that wells must be at least 750 feet away from a building, it was just improving on the state regulation requiring wells to be at least 500 feet away from a building.⁵⁷ And abiding by both of those regulations is entirely possible, because a well can be both 500 and 750 feet away from a building. Therefore, because both the state and local regulations can be complied with simultaneously, the regulations are consistent with one another, and therefore operational preemption is of no consequence.

Thornton will certainly make similar arguments about the ordinance’s other provisions. By requiring oil and gas companies to carry a

50. See *City of Longmont*, 369 P.3d at 583.

51. See *City of Fort Collins v. Colo. Oil & Gas Assoc.*, 369 P.3d 586, 589, 594 (Colo. 2016); *City of Longmont*, 369 P.3d at 576.

52. See *Thornton Passes Strict Oil, Gas Rules*, *supra* 16 (“We think the local community serves an important role as advocates for their citizens. We don’t see Thornton’s regulations as being in conflict with the state—we see them as better.”) (emphasis added) (quoting the president of Adams County Communities for Drilling).

53. 121 P.2d 886 (Colo. 1942).

54. *Id.* at 888.

55. *Id.* at 887.

56. See *id.*

57. Sorum, *supra* note 16; see also Thornton, Colo. Ordinance No. 3477 § 18-881.(a)(1)-(2) (Aug. 22, 2017).

greater amount in liability insurance and to remove abandoned pipelines,⁵⁸ the City is only requiring the oil and gas industry to adhere to a higher standard than the minimum standards laid out by the COGCC. And because cities and towns can go further than state standards,⁵⁹ and Thornton's new standards can co-exist with the less strict state standards, these ordinances are therefore permissible and not preempted.

However, despite the creativity of this possible argument, it may be unlikely to succeed. While the Colorado Supreme Court has never directly ruled on the question of preemption and minimum standards, the Colorado Court of Appeals has. According to the court of appeals, the supreme court's holding in *Ray* is inapplicable in the context of oil and gas regulations because the rules about preemption delineated in *Voss* and *Bowen/Edwards* reign supreme.⁶⁰ And the holdings in *Voss* and *Bowen/Edwards* make clear:

[T]he local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements *contrary to those required by state law*, gives rise to operational conflicts and requires that the local regulations yield to the state interest.⁶¹

Based on this holding, despite the fact that it may technically be possible to abide by both Thornton's and the COGCC's regulations simultaneously, Thornton's ordinance is almost certainly operationally preempted by the COGCC because all of its regulations are "contrary to those required by state law."⁶² While the Colorado Supreme Court could reverse this holding, possibly even in the case between the City of Thornton and the oil and gas industry, such a reversal seems rare based on the supreme court's recent holdings concerning the breadth of preemption in *City of Longmont* and *City of Fort Collins*.⁶³

58. Sorum, *supra* note 16; *see also* Thornton, Colo. Ordinance No. 3477 § 18-881.(y), (c)(1) (Aug. 22, 2017).

59. *Ray*, 121 P.2d at 888.

60. *Town of Fredrick v. N. Am. Res. Co.*, 60 P.3d 758, 764–65 (Colo. App. 2002).

61. *Id.* at 765 (emphasis added); *see also* Bd. of Comm'rs of Gunnison Cty v. BDS Int'l, LLC, 159 P.3d 773, 779 (Colo. App. 2006) ("[A] statute will preempt a regulation where the effectuation of a local interest would materially impede or destroy the state interest. Therefore, a county may not impose technical conditions on the drilling or pumping of wells under circumstances where no conditions are imposed by state law or regulation. In addition, a county may not impose [regulations] that are inconsistent with those imposed by the COGCC.") (internal citations omitted).

62. *Town of Fredrick*, 60 P.3d at 765.

63. *City of Fort Collins v. Colo. Oil & Gas Assoc.*, 369 P.3d 586, 592 (Colo. 2016) ("[A] state law may preempt a home-rule ordinance when the operational effect of that ordinance conflicts with the application of state law. Preemption by reason of an operational conflict can arise when the effectuation of a local interest would materially impede or destroy a state interest.") (internal citations omitted); *City of Longmont v. Colo. Oil & Gas Assoc.*, 369 P.3d 573, 583 (Colo. 2016) (holding that "a local ordinance that authorizes what state law forbids or that forbids what state law authorizes will" create an operational conflict and be preempted by state law).

VI. REGARDLESS OF THE CONSTITUTIONALITY OF THE CITY OF THORNTON'S ORDINANCE, CITIES AND TOWNS SHOULD CONTINUE PASSING LOCAL-LEVEL OIL AND GAS REGULATIONS

The City of Thornton's ordinance imposing stricter regulations on oil and gas production than those imposed by state law may well be operationally preempted by the COGCC and therefore unconstitutional. However, this possible unconstitutionality does not mean that Thornton's efforts to better regulate oil and gas companies within its borders were futile. To the contrary, Thornton was right to pass its new ordinance, even if the end result is that the ordinance is struck down by the courts, if only to continue pressing for better local control over oil and gas companies.

Allowing local governments to exercise greater control over oil and gas production simply makes sense. As the explosion in Firestone shows, the actions of oil and gas operators directly affect the lives of those who live within a town or city's limits. By seeking more control over oil and gas operators to prevent further deadly events, local cities and towns are only trying to do what is best for their citizens and respond to the needs of their communities⁶⁴—basic, essential functions of government.⁶⁵ “[L]ocal governments [can] engage citizens in the political process better than state governments” and provide crucial venues for “debating critical public issues”—including environmental and land-use policies.⁶⁶ Letting the state and oil and gas companies have sole control over regulating the production of oil and gas, when local communities are the ones who bear the most risk from the negative impact of such actions, just puts local communities in danger and disregards their right to engage in the local political process.

Moreover, local communities know what is best for their residents and their land,⁶⁷ much more so than a statewide agency like the COGCC. That knowledge should be allowed to dictate, or at least influence, what oil and gas companies can do within a city's borders. Local land-use laws also “can be adapted to [address] local conditions and local tastes,” including the question of how close residents want their homes to be to

64. See *Fed-up Colorado Towns Fight Oil and Gas Ops*, *supra* note 9. (“What is the concern? It is citizens who are concerned about the drilling activity and everything related to it that is affecting their daily lives.”)

65. Paul S. Weiland, *Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials*, 18 VA. ENVTL. L.J. 467, 499 (1999); Rachel Kitze, Note, *Moving Past Preemption: Enhancing the Power of Local Governments Over Hydraulic Fracturing*, 98 MINN. L. REV. 385, 395 (2013).

66. Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POL'Y REV. 321, 358 (2012).

67. Letter from Rep. Jared Polis to Matt Lepore, Colorado Oil and Gas Commission (Jan. 8, 2013), http://cogcc.state.co.us/documents/reg/Rules/2012/setback/CommentDocs/Polis_Comment_on_Revised_Draft_Rules01082013.pdf.

dangerous oil and gas wells.⁶⁸ State laws cannot do that and must often be inflexible and uniform, despite the particular local issues that may affect certain cities or towns.⁶⁹ Local governments should be permitted to solve “inherently local problems,” like those currently presented by the production of oil and gas within their borders, because only local governments can properly “tailor legislation to resolve those [local] problems.”⁷⁰

Local governments throughout Colorado also continue to make it crystal clear that they want to have some semblance of control over what oil and gas operators can do within their city limits.⁷¹ Passing ordinances like those described above is one way for cities and towns to gain that control. To date, cities and towns have been unable to get the issue of local control onto the statewide ballot for electoral approval.⁷² And the state legislature has been more than content to ignore the pleas of communities who desperately want the ability to control their lives by preventing deadly episodes like the Firestone explosion from happening again.⁷³ But by continuing to pass local ordinances like those enacted in Thornton, municipalities can fight for their right to exercise greater authority over oil and gas companies, either through favorable court rulings⁷⁴ or by pushing legislators to finally statutorily grant local governments more authority over the production of oil and gas within their borders.⁷⁵

VII. CONCLUSION

Colorado cities and towns have the most to lose when oil and gas production goes wrong. However, those same cities and towns also have the least authority to prevent such tragedies. The only way to gain that authority is to continue fighting for it. And one way to fight that critical battle is to pass local laws like the one passed by the City of Thornton. Local governments must continue passing ordinances giving municipalities greater control over the very industries that could one day set their

68. Decker, *supra* note 65, at 358.

69. Kitze, *supra* note 64, at 394.

70. Decker, *supra* note 65, at 358.

71. See Jennifer Rios, *Broomfield Officials Sign Letter to Governor, COGCC Asking for More Local Control Over Oil, Gas Issues*, BROOMFIELD ENTER. (Oct. 26, 2017), http://www.broomfieldenterprise.com/news/ci_31406057/broomfield-officials-sign-letter-governor-cogcc-asking-more.

72. *Id.*; see also Mark K. Matthews, *Colorado Anti-Fracking Measures Fail to Make Ballot; Possible Forgery Alleged*, DENV. POST (Aug. 30, 2016, 7:04 a.m.), <https://www.denverpost.com/2016/08/29/colorado-anti-fracking-measures-fail-to-make-ballot/>.

73. See Peter Markus, *Colorado Legislature Kills Fracking Bill that Would Have Given Local Control*, DURANGO HERALD (Apr. 4, 2016, 8:34 a.m.), <https://durangoherald.com/articles/103468>.

74. See *Martinez v. Colo. Oil & Gas Conservation Comm'n*, 2017 COA 37, ¶ 30 (holding that “the development of oil and gas in Colorado [must] be regulated subject to the protection of public health, safety, and welfare, including protection of the environment and wildlife”).

75. See John Fryar, *Matt Jones to Introduce Bill to Give Colorado's Local Governments Control Over Oil and Gas*, TIMES-CALL (Dec. 6, 2017), http://www.timescall.com/longmont-local-news/ci_31505900/matt-jones-introduce-bill-give-colorados-local-governments.

town lines ablaze and, if need be, defend those laws in court until either precedent favorable to local control is established or the state legislature finally grants cities and towns more authority to regulate oil and gas companies. The cost to human life, and Colorado itself, is far too great for local governments to stop fighting for this control.⁷⁶

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⁷⁶ Bruce Finley, A Dozen Fires and Explosions at Colorado Oil and Gas Facilities in 8 Months Since Fatal Blast in Firestone, DENV. POST (Dec. 6, 2017, 7:51 p.m.), <https://www.denverpost.com/2017/12/06/colorado-oil-gas-explosions-since-firestone-explosion/>.

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