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## Otten Johnson Alert -

### Colorado Supreme Court Deals Blow to Municipal-Level Oil and Gas Regulations

On May 2, 2016, the Colorado Supreme Court issued opinions in the companion cases of [City of Longmont v. Colorado Oil and Gas Association](#) and [City of Fort Collins v. Colorado Oil and Gas Association](#). Both cases arose out of the widespread and highly-publicized trend of citizens using the initiative process at the local government level to exercise greater control over the impacts of oil and gas development. At issue in each case was the extent to which state legislation has preempted the power of local governments to regulate certain fracking-related activities.

Longmont citizens passed a charter amendment to prohibit the use of hydraulic fracturing within city limits, storage in open pits or disposal of waste products created in connection with the hydraulic fracturing process. Fort Collins voters passed an ordinance placing a moratorium on hydraulic fracturing and storage of associated waste products within city limits or on lands under its jurisdiction for a period of five years “in order to fully study the impacts of this process on property values and human health.”

The Colorado Oil and Gas Association sued the cities, seeking to overturn the bans. The lower court in each case ruled that the measure was preempted by state oil and gas laws regulating fracking and thus void. The Colorado Supreme Court assumed jurisdiction over the appeals in the interests of time and preservation of public resources. The central inquiry in each case was the proper test to be applied in determining when a municipal enactment “operationally conflicts” with and must yield to an applicable state law.

The Court began by restating the general rule that in matters of purely local concern, a municipal ordinance supersedes a conflicting state statute, but when an ordinance conflicts with a state law on a matter of statewide concern or mixed state and local concern, the state law supersedes the ordinance. Applying longstanding case law, the Court held that the need for statewide regulation and the extraterritorial impact of banning fracking favor the state’s interest in regulating oil and gas development, but because both state and local governments have historically regulated matters related to fracking’s localized impacts, the bans at issue address a matter of mixed state and local concern.

The parties disagreed over the test a court should use to determine whether an ordinance addressing conflicts with state law. The cities emphasized an analysis of whether the municipal ordinance expressly forbids something that is authorized under state law or authorizes something that is expressly forbidden under state law. The association argued that the proper test is whether the municipal ordinance “materially impedes” the state’s interest in regulating the subject activity.

The Court reconciled the proposed tests and held that it will analyze an operational conflict in light of “whether the effectuation of a local interest would materially impede or destroy a state interest, recognizing that a local ordinance that authorizes what state law forbids or forbids what state law authorizes will necessarily satisfy this standard.” The Court went on to explain that, “in virtually all cases”, this will involve “a facial evaluation of the respective statutory and regulatory schemes, not a factual inquiry as to the effect of those schemes ‘on the ground’.” Because current Colorado statutes, on their face, regulate the process of fracking and storage and disposal of associated waste products, the local interest in banning these activities would materially impede or destroy the state’s interest in regulating them. Thus, the enactments were preempted and voided by the Court.

The *Fort Collins* case presented another novel question: whether a temporary moratorium should be treated differently from a permanent ban for purposes of the preemption analysis. Fort Collins argued that a moratorium of limited duration and scope that merely “preserves the status quo” was within the city’s zoning power and should effectively be exempt from preemption. The Court declined to carve out an exception for a moratorium that, though temporary, would still materially impede the effectuation of the state’s interest. In doing so, the Court sent a message to other municipalities that they cannot rely solely on their zoning authority to promulgate oil and gas-related regulations or moratoria that conflict with state law.

These opinions have several important consequences. First, they convey to other municipalities that have enacted or are considering enacting similar measures that such measures will not hold up in court. Second, given the Court’s perceived deference to state-level regulation of oil and gas development, we will likely see a push in the state legislature for laws addressing local impacts of mineral development. Finally, we will continue to see a host of ballot initiatives seeking to amend the state constitution to grant municipalities greater regulatory authority over oil and gas development. Several topical initiatives have already been filed for the November 2016 ballot, including [Initiative #40](#) (Right of Local Community to Self-Government), [Initiative #63](#) (Right to a Healthy Environment), [Initiative #78](#) (Mandatory Setback from Oil and Gas Development), though they will only appear on the ballot if initiative proponents obtain the required number of signatures by the August 8, 2016 deadline.

The Court’s clarification of the operational conflict preemption test and its pronouncement that municipal-level moratoria are not exempt from preemption analysis are important developments in the state’s oil and gas law. However, they may ultimately do little to deter the impassioned citizens seeking relief from the localized impacts of oil and gas development.

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