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City of Longmont Colorado v. Colorado Oil & Gas Association

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City of Longmont Colorado v. Colorado Oil & Gas Association, 369 P.3d 573 (Colo. 2016).

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In Colorado, the oil and gas industry's use of hydraulic fracturing, and municipalities' attempts to restrict where the practice can be done, are at odds. Those in favor of hydraulic fracturing laud the economic benefits and natural gas's ability to burn cleaner than coal, while those in opposition warn of potential adverse environmental impacts including the strain on water resources in the arid west. The City of Longmont was sued following its enactment of an amendment outlawing hydraulic fracturing within city limits. The City's amendment was found to be preempted by state law, and thus could not remain in force. While this case plays out in Longmont, Colorado, hydraulic fracturing's prevalence in the U.S. today ensures the battle between the industry and local governments will remain a common saga.

I. INTRODUCTION

In 2012 the City of Longmont, Colorado passed Article XVI[1] prohibiting hydraulic fracturing ("fracking"), and the storage and disposal of fracking wastes within city limits.[2] Colorado Oil and Gas Association sued the City of Longmont to prevent the Article's enforcement.[3] Establishing that fracking regulation is a matter of mixed state and local concern, the Colorado Supreme Court found an operational conflict existed between the state's interest and Article XVI.[4] The Court held that Article XVI conflicted with state law, and was therefore preempted by the state's interest in the "efficient and responsible development of oil and gas resources."[5] Finally, the Colorado Constitution's inalienable rights provision did not save Article XVI because it was inapplicable to preemption analysis.[6]

II. FACTUAL AND PROCEDURAL BACKGROUND

Article XVI was passed by the voters of Longmont amending its home-rule charter. It reads:

> It shall hereby be the policy of the City of Longmont that it is prohibited to use hydraulic fracturing to extract oil, gas, or other hydrocarbons within the City of Longmont.

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1. Longmont, Colo., Code of Ordinances, Article XVI (2012).
2. City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 577 (Colo. 2016).
3. *Id.*
4. *Id.* at 581.
5. *Id.* at 585.
6. *Id.* (citing COLO. CONST. art. II, § 3).

> In addition, within the City of Longmont, it is prohibited to store in open pits or dispose of solid or liquid wastes created in connection with the hydraulic fracturing process, including but not limited to flowback or produced wastewater and brine.[7]

Not long after the Article's passage Colorado Oil and Gas Association ("Association") sued seeking declaratory judgment and a permanent injunction to enjoin the City of Longmont from enforcing Article XVI.[8] The Association is a nationally recognized trade association promoting the extraction of oil and natural gas in the region.[9] Several interveners joined in support of both the plaintiff and defendant including the Colorado Oil and Gas Conservation Commission joining as plaintiffs.[10]

The district court granted summary judgment to the plaintiffs.[11] The court found an operational conflict between Article XVI and the Oil and Gas Conservation Act that was "obvious and patent on its face."[12]

The case was transferred from the Colorado Court of Appeals to the Colorado Supreme Court pursuant to Colo. Rev. Stat. § 13-4-109 (2016).[13] While the "virtues and vices" of fracking were hotly contested, the Court confronted the narrow question of "whether the City of Longmont's bans on fracking and the storage and disposal of fracking waste within its city limits are preempted by state law."[14] The Colorado Supreme Court reviews grants of summary judgement by the district court de novo.[15]

III. ANALYSIS

Tackling the question of preemption, the Court began by clarifying prior cases that may have led to confusion.[16] The Court examined *Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs.,*[17] and *Voss v. Lundvall Bros., Inc.*,[18] to explain the first step in the Court's preemption analysis: a determination of whether "the matter was one of statewide, local, or mixed state and local concern." This inquiry is distinct from the analysis of whether state and local law conflict.[19]

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7. *Id*. at 577.
8. *Id.* at 585.
9. Colo. Oil & Gas Ass'n, ABOUT: MISSION & VALUE STATEMENT, http://www.coga.org/about/ (last visited July 22, 2016).
10. *City of Longmont*, 369 P.3d at 585.
11. *Id.* at 577.
12. *Id.*
13. *Id.*
14. *Id.* at 577-78.
15. *Id.* at 578.
16. *Id.*
17. 830 P.2d 1045, 1056-60 (Colo. 1992).
18. 830 P.2d 1061, 1064-69 (Colo. 1992).
19. *City of Longmont*, 369 P.3d at 579.

An understanding of home-rule cities and their regulatory power is required to determine whether the matter is one of statewide, local, or mixed statewide and local concern.[20] Home-rule cities, such as the City of Longmont, are sovereign entities with the power to pass municipal ordinances.[21] Consequently, matters of local concern supersede any state law.[22] In contrast matters of statewide and mixed statewide and local concern "may coexist with state statutes as long as the ordinances do not conflict with the state statutes."[23] Therefore, the analysis of whether a state law and a local law conflict is only required when the law or regulation invokes a matter of statewide or mixed statewide and local concern.

A. Statewide, local, or mixed state and local concern

A matter is determined to be either of statewide, local, or mixed statewide and local concern by weighing the "relative interests of the state and the municipality in regulating the particular issues in the case."[24] This "totality of the circumstance" test includes a list of relevant factors:

> (1) the need for statewide uniformity of regulation, (2) the extraterritorial impact of the local regulation, (3) whether the state or local governments have traditionally regulated the matter, and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation.[25]

The Court found that the first factor weighed in favor of statewide regulation to encourage the "state's interest in the efficient and fair development of oil and natural gas resources."[26] The Court was concerned about creating a "patchwork of regulation" that would adversely impact the oil and gas industry of Colorado;[27] therefore, it classified the need for uniformity of regulation as a statewide concern.[28]

The Court determined that the fracking ban would cause "serious consequences" felt by those living outside of the City of Longmont.[29] The Court explained that the ban on fracking inside the city limits could increase the cost of fracking outside the city limits.[30] For this reason, the

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* (quoting COLO. CONST. art. XX, § 6).
24. *Id.* at 580 (quoting Webb v. City of Black Hawk, 295 P.3d 480, 485-86 (Colo. 2013)).
25. *Id.* (quoting Ryals v. City of Englewood, 364 P.3d 900, 904-05 (Colo. 2016); *Webb,* 295 P.3d at 486).
26. *Id.*
27. *Id.* at 581.
28. *Id.* at 580 (quoting *Ryals*, 364 P.35 at 904-05; *Webb,* 295 P.3d at 486).
29. *Id. at* 581 (quoting City of Northglenn v Ibarra, 62 P.3d 151, 161 (Colo. 2003)).
30. *Id.*

Court determined the extraterritorial impact of Article XVI was a matter of statewide concern.[31]

For the third factor, the Court found that the creation of the State Oil Inspector in 1915 favored the regulation of fracking at a statewide level. Simultaneously, the sovereignty of home-rule cities favored the regulation of fracking at a local level.[32] Thus, the third factor, addressing the level of government that traditionally regulates fracking, was a matter of mixed statewide and local concern.[33]

The fourth factor looks at whether the Colorado Constitution assigns statewide or local authority to fracking. Like the third factor, the Court found the matter to be one of mixed statewide and local concern because the Colorado Constitution does not charge either the State or local government with fracking regulation.[34]

This analysis revealed that the regulation of fracking within the city limits of Longmont, and the disposal and storage of fracking waste was a matter of mixed statewide and local concern.[35] Following this finding the Court began an analysis of whether Article XVI was in conflict with state law.

B. Preemption

The Colorado Supreme Court began its analysis of whether Article XVI conflicted with state law by an assessment of the "interplay between the state and local regulatory schemes."[36] This analysis involved a "facial evaluation of the respective regulatory schemes."[37]

The Colorado Supreme Court recognizes three types of preemption: express, implied, and operational conflict preemption.[38] Express preemption is a clear and explicit statement by the legislature to restrict a local government's authority.[39] Implied preemption is the legislature implying an intent to "occupy a given field by reason of dominant state interest."[40] Whereas an operational conflict preemption arises when the operational effect of a local ordinance impedes the application of state law.[41] An operational conflict is analyzed to see if the "effectuation of a local interest would materially impede or destroy a state interest."[42]

The Court did not find that express preemption was invoked by Article XVI, nor did it agree with the Association's assertion that implied

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31. *Id.*
32. *Id.* (discussing *Voss*, 830 P.2d at 1068).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 579.
37. *Id.*
38. *Id.* at 582.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 583.

preemption was invoked.[43] However, the Court was persuaded by the Association's argument that an operational preemption conflict existed because the Colorado Oil and Gas Conservation Commission's "pervasive oil and gas rules and regulations . . . includes a strong interest in the uniform regulation of fracking."[44] These interests include the "efficient and responsible development of fracking resources."[45] Thus, Article XVI's prohibition of fracking and the storage and disposal of fracking waste was operationally preempted by the laws established by the Colorado Oil and Gas Conservation Commission.[46] Therefore, Article XVI "materially impeded the effectuation of the state's interest."[47]

C. The inalienable rights provision

On behalf of the City of Longmont, citizen interveners contended that the inalienable rights provision of the Colorado Constitution prevents preemption by any state law that threatens those inalienable rights.[48] The citizen intervenors claim that the ban on fracking was to protect citizens' inalienable rights, and therefore could not be preempted by any state law. Article II, § 3 of the Colorado Constitution provides:

> "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and seeking and obtaining their safety and happiness."[49]

The Court did not agree.[50]

The Colorado Supreme Court noted that if it were to hold that the inalienable rights provision as "supreme over any state statute"[51] any local ordinance that invoked an inalienable right would always supersede state law.[52] The Court found that this would render the "home-rule provision of our constitution unnecessary," and it could not "countenance such a result."[53]

The Court discussed a holding from the Pennsylvania Supreme Court that a state law prohibiting local regulation of oil and gas was in violation of a "relatively rare" Environmental Rights Amendment

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43. *Id.*
44. *Id.* at 585.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 585 (quoting COLO. CONST. art. II, § 3).
50. *Id.*
51. *Id.*
52. *Id.* at 586.
53. *Id.*

contained in the Pennsylvania Constitution.[54] The Environmental Rights Amendment of the Pennsylvania Constitution states that its citizens "have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."[55] The Court explained that Colorado has no similar provision, and the inalienable rights provision does not adopt the "public trust doctrine" whereas, the Pennsylvania Environmental Rights Amendment did.[56] Therefore, unlike the Pennsylvania Constitution that guarantees certain environmental rights to its citizens, the Colorado constitution does not.[57] Thus, "the inalienable rights provision of the Colorado Constitution does not save Article XVI."[58]

IV. CONCLUSION

The Colorado Supreme Court's finding that Article XVI's prohibition of fracking, and the storage and disposal of fracking waste in the City of Longmont was preempted by state law demonstrates its regulatory preference of oil and natural gas at the state level.[59] While the Court refused to weigh in on the merits of fracking, it ended with a discussion of the Environmental Rights Amendment in Pennsylvania.[60] This may suggest that those looking to regulate fracking at the city level in Colorado may be more successful by advocating for an adoption of a similar amendment to the Colorado Constitution.

54. *Id.* (discussing Robinson Twp. v. Commonwealth, 83 A.3d 901, 985 (Pa. 2013)).
55. *Id.* at 586 (quoting PA. CONST. art. I, § 27).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 585.
60. *Id.* at 586.