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Overview Of Local Government Regulatory Authority Over Oil & Gas Development

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"We got a great buy on the apartment, but, unfortunately, it didn't include the mineral rights."

Local Government Regulatory Issues

Local Government role in regulating oil and gas development:

- Counties and statutory towns are subordinate governmental units of the state. As such only have authority as determined by the state constitution and state statutes. Home rule cities may have additional authority under their home rule charter, however, in the area of oil and gas development (a mixed state/local concern), home rule citiy authority is the same as counties and statutory towns.
- Local governments have express statutory authority to regulate the **land use aspects** of oil and gas operations.
- The Colorado legislature has delegated authority to the Colorado Oil and Gas Conservation Commission (COGCC) to regulate the **"downhole"** aspects of oil and gas development. Recent amendments to the Act provide COGCC additional authority to regulate environmental and wildlife impacts.
- Under this established legal framework, the Colorado courts have consistently ruled that local government's land use authority coexists with COGCC authority to regulate the technical aspects of oil and gas operations.
- Local regulations are considered valid as long as they do not create an **"operational conflict"** with the state's regulations.

GOVERNMENT AUTHORITY OVER OIL & GAS DEVELOPMENT

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I. State Authority to Regulate Oil and Gas Development

The Colorado Oil and Gas Conservation Act (COGCA) delegates authority to the Colorado Oil and Gas Conservation Commission (COGCC) to foster and regulate oil and gas development and production consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources. The COGCC also regulates to ensure that oil and gas resources are developed to prevent waste and protect correlative rights of owners and producers.[2] The COGCC enacts rules to carry out its duties.

II. Local Government Authority to Regulate Oil and Gas Development

The authority of local governments to regulate oil and gas development comes from their authority to regulate the use and development of land under the local government police power – the power to regulate activities to protect the public health, safety, morality, general welfare and the environment.

A. Statutory Authority Common to All Municipalities and Counties

The Local Government Land Use Control Enabling Act[3] gives local governments the authority to regulate land use on the basis of its impact on the community or surrounding areas, and to plan for and regulate the use of land so as to provide for the orderly use of land and the protection of the environment, consistent with constitutional rights. The Area and Activities of State Interest Act (1041) allows local governments to designate areas and activities from a list of matters that includes mineral resource areas, and to develop regulations and permit requirements for those matters. If a local government designates a mineral resource area containing oil and gas resources, the COGCC must first "identify" the area. The purpose of the Areas and Activities of State Interest Act is to regulate land use to protect health, welfare, safety and the environment.

B. Statutory Authority Granted to Counties

Statutory counties only have the authority granted by state laws. The County Planning Code[4] grants counties the power to provide for the physical development of the county. This includes the authority to regulate the use of land, buildings and structures, and to adopt a zoning plan that regulates, among other things, the uses of land for trade, industry, recreation, or other purposes. Regulation must be for the "purpose of promoting the health, safety, morals, convenience, order, prosperity or welfare of the present and future inhabitants of the state."[5]

C. Statutory Authority Specific to Municipalities

Statutory municipalities only have the authority granted by state laws. The municipal powers statute authorizes municipalities to regulate the use of land, to regulate buildings and structures, and to adopt a zoning plan that regulates, among other things, the uses of land for trade, industry, recreation, or other purposes. Regulations must be for the purpose of promoting health, safety, morals, or the general welfare of the community.[6]

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[1] Disclaimer: The opinions expressed herein are those of the author and not necessarily those of the Attorney General.

[2] C.R.S. § 34-60-101 et seq.

[3] C.R.S. § 29-20-101 et seq.

[4] C.R.S. § 30-28-101 et seq.

[5] C.R.S. § 30-28-115 et seq.

[6] C.R.S. § 31-23-301 et seq.

D. Home Rule Municipal Authority

Article XX of the Colorado Constitution "reserves" for home rule municipalities "the full right of self government in local and municipal matters."

III. Preemption of Local Government Laws by the Oil and Gas Act

The purpose of the preemption doctrine is to establish priority between conflicting laws enacted by state and local governments. Preemption is never presumed and the party claiming preemption has the burden to show that a law is preempted. Colorado courts agree the state has a significant interest in both mineral development and in human health and environmental protection. They also agree the state has an interest in uniform regulation by the state of the technical aspects of oil and gas development. Courts also agree that local governments have a significant interest in enacting and enforcing land use regulations governing the surface effect of oil and gas development. There are three types of preemption: express preemption, implied preemption and operational conflict preemption.

- Express preemption occurs where a statute explicitly says that it is intended to preempt local authority. The COGCA expressly preempts local governments under limited circumstances.[7]
- Implied preemption exists where the state legislative enactment demonstrates an intent "to occupy the entire field" of regulation to the exclusion of local regulation. The Colorado Supreme Court says that the Act does not "militate in favor of an implied legislative intent to preempt all aspects of [local government's] statutory authority to regulate land use within its jurisdiction merely because the land is an actual or potential source of oil and gas development and operations."[8] The COGCA also acknowledges local land use authority.[9]
- Operational conflict is when the operational effect of a local regulation conflicts with the state statute or regulation. "State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest."[10] Questions of express and implied preemption are resolved by examining the underlying statute, without a rigorous analysis of the underlying facts of a case. Operational conflict preemption, on the other hand, is a fact-intensive inquiry determined on a case-by-case basis.

Where there is a potential conflict between a local government law and a state law, the court must first attempt to harmonize the conflicting laws. If harmonizing is not possible, then the person advocating preemption must demonstrate that the application of the local government law would materially impede or destroy the state's interest in oil and gas development. To the extent such an operational conflict exists, the local law must yield to the state law. Whether there is an operational conflict must be determined on a case-by-case basis on a fully developed evidentiary record. When the local law is an ordinance of purely local concern enacted by a home rule municipality, the home rule ordinance supersedes conflicting state law. However, the COGCA implicates many areas of *mixed* state and local concern, and in those circumstances, a home rule ordinance is treated as if it were a law of a statutory local government and is subject to the operational conflict analysis.

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[7] C.R.S. § 34-60-106(15) precludes local government from charging an operator for the cost of the local government to inspect operations regulated by the COGCC; C.R.S. § 34-60-106(17)(a) gives the Commission "exclusive authority to regulate the public health, safety, and welfare aspects, including protection of the environment, of the termination of operations and permanent closure . . . of an underground natural gas storage cavern."

[8] Bd. Of County Commissioners of La Plata County v. Bowen/Edwards, 830 P.2d 1045, 1058 (Colo. 1992).

[9] C.R.S. § 34-60-128(4) and C.R.S. § 34-60-127(4)(c).

[10] Bowen/Edwards, 830 P.2d 1045, 1059 (Colo. 1992).

Colorado Oil and Gas Commission (COGA) Legal Analysis

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For over 60 years the Colorado Oil and Gas Conservation Commission ("COGCC" or "the Commission") has been the primary authority regulating oil and gas operations. During this time, tens of thousands of wells have been drilled in Colorado and regulations have been promulgated to ensure that the resource is efficiently recovered, to protect "correlative" property rights, and to protect the health, safety and welfare of the public, including the protection of the environment and wildlife. These regulations constantly evolve to address new plays, new technologies, and citizen concerns. Industry has also become more efficient, continuously using technological advancements to minimize environmental impacts while increasing energy production.

Recently, public concern regarding oil and gas development has led local governments to consider adopting local oil and gas regulations. This concern has been driven by increased activity in new locations, apprehension about the effects on the community, and unfamiliarity with state regulations. Unfortunately, public concern has also been stimulated by organized campaigns of misinformation by opponents of oil and gas development. It is important that local governments review their regulatory choices considering the:

- Property rights regime affecting oil and gas development
- Balance between state regulatory primacy and local government land use authority
- Differentiation of actual impacts of oil and gas development and common misperceptions about such activity

This memorandum addresses the first two, and resources regarding the third are provided at the end of this document.

I. Property Rights Affecting Oil and Gas Development

County regulatory activity regarding oil and gas development occurs in the context of a unique property rights regime. Oil and gas companies have a right to develop their leasehold. Mineral resources may be severed from surface ownership, often referred to as a "split estate". An oil company's right to use the surface is created by the oil and gas lease or other contract that establishes the company's right to drill. The development of oil and gas resources does not fit traditional notions of land use development because the location of the subsurface resource dictates some of the constraints for surface development.

The surface owner's rights do not extend to preventing a mineral rights owner from accessing the underlying resource. The legislature has addressed the respective rights of surface and mineral

COGA Quote:

"In *Bowen/Edwards v. La Plata County*, 830 P2d 1045 (Colo. 1992), the seminal preemption case concerning the Colorado Oil and Gas Conservation Act, the Colorado Supreme Court articulated that "state preemption by reason of operation conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest."

Leaves out:

"The state's interest in oil and gas activities is 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.**" *Bowen/Edwards*, 830 P.2d at 1058.

"If a home-rule city … enacts land-use regulations applicable to various aspects of oil and gas development and operations within the city**, and 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 Oil and Gas Conservation Act, the city's regulations should be given effect**." *Voss v. Lundval Brothers*, 830 P.2d 1061, 1069 (Colo. 1992).

"In determining whether the County Regulations are in operational conflict with state statute or regulation, **we will construe the County Regulations, if possible, so as to harmonize them with the applicable state statutes or regulations**. Where no possible construction of the County Regulations may be harmonized with the state regulatory scheme, we must conclude that a particular regulation is invalid." *Board of County Comm'rs of Gunnison County v. BDS Intern., LLC.*, 159 P. 3d 773, 779 (Colo. App. 2006)

"Harmonization"

- State and localities have distinct interests in regulating oil and gas.
- As to most issues, no express or implied preemption.
- The "delicate balance…"
- End goal: "harmonize" oil and gas development and operational activities with the county's overall plan for land-use and with the state's interest in those activities.

"Boulder County drafted comprehensive regulations that went up to the line, but didn't cross it. We [the COGCC] have no problems with Boulder County's regulations." –Matt Lepore, Director of the COGCC

COGA Quote

"The Act has been amended on many occasions, each time expanding the state's interest and authority over regulation of oil and gas. The 1994 Amendments via Senate Bill 94-177 produced an expanded definition of oil and gas operations. The 1996 Amendments added language prohibiting local governments from charging 'a tax or fee to conduct inspections or monitoring of oil and gas operations with regard to matters that are subject to rule, regulation, order, or permit condition administered by the commission.' The Act was again amended in 2007. This time, the General Assembly required the COGCC to, among other things, pass new regulations to establish a timely and efficient procedure for reviewing drilling permit applications, to protect public health, safety, and welfare and to minimize adverse impacts to wildlife resources."

Fails to mention:

- Each of these bills contained local government authority savings clauses.
- "Nothing in this act shall be construed to affect the existing land use authority of local governmental entities."

Shared Jurisdictional Areas

- No bright line test to distinguish between an **environmental or public health, welfare or safety regulation** (non-technical areas of authority delegated to the state) on the one hand and a **land use or surface-oriented regulation** on the other hand. Examples of these shared areas of regulatory authority include:
    - Air quality
    - Chemical Records – maintenance of and access to
    - Drainage/Erosion Control
    - Emergency preparedness plans
    - Fencing
    - Lighting
    - Noise abatement
    - Notices
    - Odors and Dust
    - Reclamation
    - Setbacks
    - Visual impact mitigation
    - Waste management associated with oil and gas facilities (other than E & P waste)
    - Water quality and water supply
    - Weed control/Noxious weeds
    - Well siting standards
    - Wildlife mitigation