District Court, Adams County, State of Colorado 1100 Judicial Center Drive, Brighton, CO 80601 303-659-1161 DATE FILED: April 24, 2018 5:07 PM CASE NUMBER: 2017CV31640	
Plaintiffs: Colorado Oil and Gas Association; American Petroleum Institute Defendant: City of Thornton	Case 2017 CV 31640 Div. C Courtroom 506

Order Granting in Part and Denying in Part
Plaintiffs' Motion for Partial Summary Judgment

As Colorado's residential areas expand into what was once agricultural or grazing land, conflicts have arisen between those who own surface rights (typically involving residences) and those who own subsurface mineral rights (typically involving oil and gas development).

Local government efforts to resolves conflicts between surface estate owners and oil and gas mineral estate owners have generated a number of lawsuits. For example, *Town of Frederick v. North American Resources Co*., 60 P.3d 758 (Colo.App. 2002); *Board of County Commissioners v. BDS International, LLC*, 159 P.3d 773 (Colo.App. 2006); *Colorado Mineral Assn v. Board of County Commissioners*, 199 P.3d 718, 725 (Colo. 2009); *Colorado Oil and Gas Assn v. City and County of Broomfield*, 2014 CV30232 (District Court 2014); *City of Longmont v. Colorado Oil & Gas Assn*, 369 P.3d 573 (Colo. 2016); and *City of Fort Collins v. Colorado Oil and Gas Assn*, 369 P.3d 586 (Colo. 2016).

Plaintiffs Colorado Oil and Gas Association and American Petroleum Institute challenge Thornton Ordinance No. 3447, adopted on August 22, 2017 (Motion Exhibit 1). Much like the other cases cited above, the City of Thornton's ordinance attempts to regulate oil and gas development within its boundaries.

The ordinance consists of 48 single-spaced pages having hundreds of discrete regulatory provisions. The partial summary judgment Motion concerns only 15 of them. The Motion argues that the 15 are trumped (or in legalese, "preempted") by federal and/or state law. [1] The 15 provisions generally fall into the following categories:

1. Gathering pipeline standards claimed to be preempted by federal and state law.
2. Setback standards claimed to be preempted by state law.
3. Well consolidation standards claimed to be preempted by state law.
4. Surface disturbance standards claimed to be preempted by state law.

[1] The preemption doctrine has applied since James Monroe was President. *Gibbons v. Ogden*, 22 U.S. 1 (1824) (Federal laws "made in pursuance of the constitution, are supreme, and the State laws must yield to that supremacy, even though enacted in pursuance of powers acknowledged to remain in the States.").

Plaintiffs Joint Motion for Partial Summary Judgment was filed on February 2, 2018. Thornton's Response was filed March 17, 2018; and a Reply was filed on March 22, 2018.

I.
Gathering pipeline standards – federal preemption

Ordinance §18-870 and §18-881 establish "minimum standards" for oil and gas operations, including specific standards for gathering pipelines.

The ordinance defines a gathering pipeline at §18-864 as "a pipeline that transports gas or oil from a current production facility to a transmission line or main…." In turn, a production facility is defined to include any storage, pumping, monitoring flowline and other equipment directly associated with an oil or gas well. *Id.*

Natural gas gathering lines

Thornton's definition of a gathering pipeline is effectively the same as that of the Colorado Public Utilities Commission which regulates natural gas pipelines. At 4 Colo. Code Regs. §723-4:4901(i), a gathering pipeline is defined as "a pipeline that transports gas from a current production facility to a transmission pipeline or main." A similar definition is used in the Code of Federal Regulations at 49 C.F.R. §192.3 ("Gathering line means a pipeline that transports gas from a current production facility to a transmission line or main").

Colorado has adopted the federal pipeline safety standards as its own. *See* 4 CCR 723-4:4902(a) ("The Commission adopts by reference the minimum federal safety standards for the transportation of natural gas and other gas by pipeline…."). No one disputes that the Thornton ordinance is more stringent than either State or federal regulations.

The federal Natural Gas Pipeline Safety Act (PSA) includes a preemption provision by which a "State authority" may require more stringent safety standards if the State authority has submitted a current certification.

> **(c) Preemption.**--A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for *intrastate* pipeline facilities and *intrastate* pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter.
>
> 49 U.S.C.A. §60104 (emphasis added).

The reference to 49 USC §60105(a) is important. That statute indicates that federal preemption is waived for *intrastate* pipelines only to the extent that the regulating authority (whether state or municipal) files an annual certification with the U.S. Secretary of Transportation. The statute also indicates that the federal government will not interfere with municipal regulations:

> to the extent that the safety standards and practices *are regulated by a* State authority (including a *municipality* if the standards and practices apply to intrastate gas pipeline transportation) *that submits to the Secretary annually a certification for the facilities and transportation ….*
>
> 49 U.S.C.A. §60105(a) (emphasis added).

Thornton does not claim that it has submitted the required certification to the Secretary of Transportation. The ordinance's natural gas gathering line regulations are preempted by 49 U.S.C.A. §60104 of the federal Natural Gas Pipeline Safety Act. [2]

Oil ("hazardous liquid") gathering lines

Oil gathering lines are subject to a similar regulatory scheme. Colorado regulations incorporate by reference federal oil pipeline standards. *See* 2 CCR § 601-18:1.6.1.5, which incorporates by reference 49 CFR Part 195, titled "Transportation of Liquids by Pipeline; Minimum Safety Standards."

The federal Natural Gas Pipeline Safety Act (PSA), 49 USC §§60101, *et seq*., covers both gas pipelines and crude oil pipelines. At 49 USC § 60101(18), a "pipeline facility" is defined to include "a gas pipeline facility and a *hazardous liquid* pipeline facility…." The definition of hazardous liquid at 49 CRS §60101(4) includes petroleum: "hazardous liquid means … petroleum or a petroleum product."

Related regulatory definitions likewise consider crude oil to be a hazardous liquid. "Petroleum means crude oil…." 49 C.F.R. § 195.2. "Hazardous liquid means petroleum…." 49 C.F.R. § 195.2.

Because the Natural Gas Pipeline Safety Act includes hazardous liquids within it scope, the PSA's federal preemption likewise bars Thornton's more stringent standards for oil gathering pipelines.

II.
Legal standards – State preemption

"The purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government." *County Comrs. v. Bowen/Edwards Assocs.* 830 P.2d 1045 (Colo.1992). To determine whether State preemption applies in a specific situation, two questions must be answered. The first is whether the subject of the regulatory action involves a matter of a primarily state, local, or mixed state and local interests. Where

[2] *See Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 878–79 (9th Cir. 2006) ("Assuming arguendo that municipalities can seek agreements under § 60105(a) and § 60106(a) as they relate to hazardous liquid pipelines, Seattle did not seek any such agreement. …We conclude, therefore, that the PSA expressly preempts the City's attempt to impose safety regulations on the Seattle Lateral.").

mixed state and local interests are involved, the second question is whether the state interest preempts local control.

State, local, or mixed state and local interest

The Colorado supreme court's 2016 decisions in *City of Longmont* and *City of Fort Collins* established that local regulation of oil and gas development involves a matter of mixed state and local interest. In *Longmont*, the supreme court concluded that regulation of oil and gas development within city limits "involves a matter of mixed state and local concern." *Id.* ¶31. In *Fort Collins* it was concluded that oil well fracking was "a matter of mixed state and local concern." *Id.*, ¶2. Our supreme court's determination is binding on this district court.

Express, implied, and operational conflict preemption

Colorado "has recognized three forms of such preemption, namely, express, implied, and operational conflict preemption." *Longmont* ¶33. The *Longmont* and *Fort Collins* decisions agreed that express and implied preemption do not apply to local regulation of oil and gas development. That leaves operational conflict preemption. Operational conflict preemption occurs "when the operational effect of the local law conflicts with the application of the state law." *Id.*

An often cited definition of operational conflict preemption focuses on whether enforcement of the local interest will "materially impede" the state interest. As stated at *Longmont* ¶27: "preemption by reason of an operational conflict can arise when the effectuation of a local interest would materially impede or destroy a state interest."

In *Longmont* at ¶42, the supreme court explained that a local ordinance which either authorizes what state law forbids or forbids what state law authorizes "will necessarily satisfy" the preemption standard of impeding or destroying the state interest:

> For the sake of clarity and consistency, we will analyze an operational conflict by considering 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 that forbids what state law authorizes will necessarily satisfy this standard*.
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> *Longmont at ¶42* (emphasis added). [3]

Many cases not involving oil and gas development apply the same "forbids/authorizes" standard. *City of Commerce City v. State*, 40 P.3d 1273, 1284 (Colo. 2002) (vehicle identifications); *Colorado Min. Assn v. Bd. of County Cmmrs.*, 199 P.3d 718, 725 (Colo. 2009) (mining); *Webb v. City of Black Hawk*, 295 P.3d 480 (Colo. 2013) (bicycles); *Ryals v. City of Englewood*, 364 P.3d 900 (Colo. 2016) (sex offender registry).

[3] Where a comprehensive state regulatory scheme exists (such with oil and gas operations) there may be little or no difference between the result of a "forbids/authorizes" analysis for operational conflict preemption and the result of an implied "field preemption" analysis where the regulatory scheme is found to "completely occupy a given field…." *Longmont* §35.

In nearly all cases, determination of an operational conflict is decided by a comparison of the text of the state regulation with the text of the local ordinance: "In virtually all cases, this analysis 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.'" *Longmont at ¶42.*

The preference for determining operational conflicts by considering only the texts of the state and local provisions is not an invariable requirement. For example in *Board of County Commrs. v. Bowen Edwards Assoc*., 830 P.2d 1045 (Colo. 1992), the supreme court rejected the trial court's ruling and because there was not a fully developed *evidentiary* record: "Any determination that there exists an operational conflict between the county regulations and the state statute or regulatory scheme, however, must be resolved on an *ad-hoc* basis under a fully developed evidentiary record." *Id*. at 1060.

Nonetheless, the 2016 supreme court decisions clearly evince a preference to determine operational conflicts by "a facial evaluation of the respective statutory and regulatory schemes, not a factual inquiry as to the effect of those schemes 'on the ground.'" *Longmont* ¶42.

III.
Waiver provisions and operator agreements

The introductory provisions of ordinance §18-881 state that Thornton may waive any of the listed minimum setbacks "for operational conflict, technical infeasibility or environmental protection in accordance with Section 18-882." Thornton argues that the waiver provisions eliminate any facial operational conflict because "the Ordinance provides multiple mechanisms to avoid any conflicts, and when viewed within the context of the Ordinance as a whole, the permit regulations can be harmonized with state law." Response, p. 11.

The argument misses the point. If a provision is preempted, no waiver is necessary. The preempted provision simply cannot be the basis for municipal action or enforcement. [4]

The same analysis applies to the ordinance's provision for a negotiated agreement between the city and an oil or gas developer. Regardless of what might be negotiated, if a provision is preempted, a preempted provision simply cannot be the basis for municipal action or enforcement.

IV.
Setback requirements

The challenged setback provisions appear at ordinance Sections 18-881(a)(1), 18-881(a)(2), and 18-881(a)(4). Plaintiffs argue that the ordinance's setback requirements are

[4] *Cf., National Fuel Gas Supply Corp. v. Public Service Commn.,* 894 F.2d 571 (2nd Cir. 1990), which noted that a discretionary waiver provision does not save a state law which is federally preempted. The court observed that if a discretionary waiver provision could save a preempted provision, "no state law, no matter how inconsistent with a federal law would ever be facially preempted…."

preempted due to operational conflicts with State regulations. According to §18-881, the listed setbacks "are the minimum standards that apply to all oil and gas operations."

Subsection 18-881(a)(1), wells and above ground production facilities.

The ordinance requires a minimum setback of 750 feet from the nearest occupied building or proposed building. §18-881(a)(1). The State regulation provides a minimum setback of 500 feet from the nearest "building unit." 2 CCR §404-1:604. The definition of "building unit" includes "a building or structure designed for use as a place of residency by a person…." 2 CCR §404-1:100. A "building unit" also includes commercial structures. *Id.*

With regard to the City's 750 foot setback from a "proposed building," plaintiffs assert that there is no State setback requirement for proposed buildings. The City does not contest this assertion.

The 750 foot setback ordinance forbids what the state regulation would allow. As an example, a well or above ground production facility set back 600 feet from the nearest occupied building or proposed building is forbidden under the ordinance. The well would be allowed under the State regulations. This setback provision is preempted.

Subsection 18-881(a)(2), platted residential lots

The ordinance requires a minimum setback of 750 feet from the nearest platted residential lot. Plaintiffs assert that there is no State setback requirement from any platted residential lot. The City does not contest this assertion. The ordinance forbids what the State regulation would allow. As an example, a well or above-ground production facility set back 600 feet from the nearest platted residential lot would be forbidden under the ordinance but allowed under the State regulation. This setback provision is preempted.

Subsection 18-881(a)(2), outside / outdoor activity areas

The ordinance requires a minimum setback of 750 feet from the nearest boundary line of any outside / outdoor activity area. The ordinance defines an *outdoor* activity area as a park, playground, trail, and similar outdoor entertainment venue. (There is no definition of *outside* activity area).

The State's setback regulation is 350 feet from a "Designated Outside Activity Area," which is defined as

> an outdoor venue or recreation area, such as a playground, permanent sports field, amphitheater, or other similar place of public assembly where ingress to, or egress from the venue could be impeded in the event of an emergency condition at an Oil and Gas Location less than three hundred and fifty (350) feet from the venue due to the configuration of the venue and the number of persons known or expected to simultaneously occupy the venue on a regular basis.
>
> 2 Colo. Code Regs. § 404-1:100.

The 750 foot setback ordinance forbids what the State regulation would allow. As an example, a well or above-ground production facility set back 600 feet from the nearest park, playground, trail or similar outdoor entertainment venue is forbidden under the ordinance but allowed under the State regulation. The setback provision is preempted.

Subsection 18-881(a)(4), boundary line of the property where the location is situated

The ordinance requires a minimum setback of 500 feet from the boundary line of the property where the "oil and gas location" is situated. The ordinance defines "oil and gas location" as "an area of land where an operator intends to disturb the land surface in order to locate an oil and gas operation." The State definition is similar. (The State substitutes the word "facility" for the ordinance's word "operation.").

Absent a waiver allowing a smaller setback, the State regulation provides that "A well shall be located not less than 150 feet from a surface property line." 2 CCR §404-1:603.

The 500 foot setback ordinance forbids what the State regulation would allow. As an example, a well or above-ground production facility set back 400 feet from the property boundary line is forbidden by the ordinance, but allowed under the State regulation. The setback provision is preempted.

V.
Well consolidation and surface/site disturbance

Ordinance §18-881(b)(1) concerns consolidation of multiple wells proposed to be drilled. It appears in a subsection dealing with minimizing surface disturbances. The provision applies without regard to any ordinance setback requirement. The consolidation provision states:

> (b) Surface disturbance. The oil and gas operations shall be located and constructed in a manner that minimizes site disturbance and that minimizes the amount of cut and fill on-site. If the COGCC Rules *do not otherwise require such site disturbance standards* for the oil and gas operation, the following shall apply:
>
> (1) When an applicant is proposing multiple wells, the wells shall be located on multi-well pads and all operations shall be consolidated *wherever possible.*
>
> (emphasis added).

Although the title of the ordinance section refers to *surface* disturbances, the text of subsection (b)(1) refers to *site* disturbances. A rule of legislative construction is that the use of different words may indicate an intent to convey different meanings. *See Jackson v. Moore*, 883 P.2d 622, 626-27 (Colo.App. 1994) ("because it chose to use different language for the seat belt statute, we cannot presume that the legislative intent was to apply the same broad definition as used in the revocation of license statute").

It is not clear that the State has any "***such*** site disturbance" standards, or if it does, what they are. None of the parties have specifically identified a State "site disturbance" standard. The only related State rule identified by plaintiffs is 2 CCR §404-1:604(c)(2)(E)(i). A WestlawNext© word search did not find the words "disturb" or "disturbance" in the State rule.

Without a better understanding of which State standards relate to site disturbances, a facial comparison of the text of the State rule with the city ordinance cannot be made. In resolving a summary judgment motion, "The moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party." *Lombard v. Colorado Outdoor Educ. Center*, 179 P.3d 16 (Colo.App. 2007). Because of the uncertainty of the meaning of ordinance §18-881(b)(1), plaintiffs have not met their burden of proof with respect to §18-881(b)(1).

ORDER:

1. Thornton Ordinance No. 3447 provisions at Section 18-870 and Section 18-881 concerning minimum standards for oil and gas gathering pipelines are preempted and void as set forth above.

2. Thornton Ordinance No. 3447 provisions at Section 18-881(a)(1), Section 18-881(a)(2), and Section 18-881(a)(4) concerning minimum setbacks are preempted and void as set forth above.

3. Summary judgment is denied without prejudice with regard to the challenge to Thornton Ordinance No. 3447 provisions at Section 18-881(b)(1) concerning well consolidation and surface / site conditions.

Dated April 24, 2018

BY THE COURT:

Edward C. Moss
District Court Judge