District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3792	DATE FILED: November 1, 2020 4:35 PM CASE NUMBER: 2020CV30033
OUR HEALTH, OUR FUTURE, OUR LONGMONT; AND FOOD & WATER WATCH, PLAINTIFFS v. **STATE OF COLORADO; COLORADO OIL AND GAS CONSERVATION COMMISSION; AND CITY OF LONGMONT** DEFENDANTS AND **COLORADO OIL AND GAS ASSOCIATION**, DEFENDANT-INTERVENOR	**▲ COURT USE ONLY ▲**
Attorney for Plaintiffs: Joseph A. Salazar, Esq. *Attorneys for Defendant City of Longmont*: Phillip Barber, Esq.; Eugene Mei, Esq; and Atasi Bhavsar, Esq. *Attorneys for Defendants Colo. Oil and Gas Conservation Comm'n*: Kyle Davenport, Esq. A*ttorney for Defendant-Intervenor*: Mark Matthews, Esq.; Julia Rhine, Esq.; and Benjamin Saver, Esq.	Case Number: 20CV30033 Division 2 Courtroom S
ORDER RE: PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT-INTERVENOR'S CROSS-MOTION FOR SUMMARY JUDGMENT	

This Matter comes before the Court on both the Plaintiffs' Motion for Summary Judgment ("Motion"), filed June 22, 2020, and Defendant-Intervenor's Defendant-Intervenor Colorado Oil & Gas Association's Response to Plaintiffs' Motion for Summary Judge and Cross-Motion for Summary Judgment ("Cross-Motion"), filed on July 24, 2020.

On July 24, 2020, Defendant City of Longmont ("Defendant City") filed City of Longmont's Response to Plaintiffs' Summary Judgment ("Defendant City's Response"). On August 7, 2020, Plaintiffs filed Plaintiffs' Reply in Support of Motion for Summary Judgment to Defendant City of Longmont's Response ("Reply to Defendant City's Response") and Plaintiffs' Reply In Support of Motion for Summary Judgment to Defendant-Intervenor Colorado Oil & Gas Association's Response to Plaintiffs' Motion for Summary Judgment and Response to Cross-Motion for Summary Judgment ("Plaintiffs' Response to Cross-Motion"). Defendant State of Colorado and Colorado Oil and Gas Conservation Commission's ("Defendant State and Commission")

Consolidated filed its Response to Motions for Summary Judgment ("Defendant State's Consolidated Response"), August 14, 2020. Defendant-Intervenor filed its Reply in Support of Cross-Motion for Summary Judgment ("Defendant-Intervenor's Reply") on August 21, 2020. Plaintiffs filed Plaintiffs' Reply in Support of Motion for Summary Judgment to State of Colorado's and Colorado Oil and Gas Conservation Commission's Consolidated Response to Motions for Summary Judgment ("Plaintiffs' Reply to Consolidated Response") on August 28, 2020.

The Court, having carefully considered the Motions, file, and applicable law and for the reasons cited herein, DENIES the Plaintiffs' Motion and GRANTS the Defendant-Intervenor's Cross-Motion.

I. BACKGROUND

Hydraulic fracturing, or fracking, is the process where a fluid containing a proppant, like sand, and other chemicals is injected into an existing well at high pressure causing fractures emanating from the wellbore. *City of Longmont v. Colo. Oil and Gas Ass'n*, 369 P.3d 573, 576 (Colo. 2016). Pressure is released and the proppants "prop" open the fractures. *Id.* When the fluid is drained, oil and gas flow into the wellbore. *Id.* The process is controversial. Supporters of fracking praise the process as it allows the capture of previously inaccessible oil; opponents of fracking argue the practice is detrimental to human health, the environment, and seismic stability. *Id.*

In November 2012, Longmont voters passed Question 300 – codified in Longmont's municipal charter as Article XVI – which bans hydraulic fracturing activities within Longmont. Article XVI provides:

> 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. 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.

Article XVI, therefore, consists of two pieces: 1) the Fracking Ban and 2) the Fracking Waste Storage and Disposal Ban.

After the vote, the Colorado Oil and Gas Association sued the city of Longmont seeking a permanent injunction enjoining the enforcement of Article XVI and a declaratory judgment invalidating the charter. The Colorado Oil and Gas Conservation Commission ("Commission") and TOP Operating company joined as plaintiffs. Our Health, Our Future, Our Longmont, and Food and Water Watch intervened as defendants. Plaintiffs separately moved the court for summary judgment.

On July 24, 2014, the District Court of Colorado granted the plaintiffs' motions for summary judgment, ruling that Colorado's Oil and Gas Conservation Act ("the Act"), §§ 34-60-101 30 – 130, C.R.S. (2015), preempted Longmont's Article XVI because of "an obvious and patent on its face" operational conflict between the state and the local law. The Colorado Supreme

Court affirmed that Article XVI was in operational conflict with Colorado Oil and Gas Conservation Act. *City of Longmont v. Colo. Oil and Gas Ass'n ("Longmont")*, 369 P.3d 573 (Colo. 2016). Under the ruling, the city of Longmont is enjoined from enforcing Article XVI.

In April 2019, the Colorado General Assembly amended the Act and the Local Government Land Use Control Enabling Act (hereinafter referred to in conjunction with the Colorado Oil and Gas Conservation Act as "the Act") with the passage of Senate Bill 19-181 ("SB 19-181"). SB 19-181 changed the law affecting local government's power to regulate land use, as codified in the amendment under § 29-20-104(1)(h)(I)-(VI), C.R.S. (2019), which provides that local governments have the authority to regulate the use of land by "[r]egulating the surface impacts of oil and gas operations in a reasonable manner to address matters specified in this subsection (1)(h) and to protect and minimize adverse impacts to public health, safety, and welfare and the environment." § 29-20-104(h), C.R.S. (2019). "Minimize adverse impacts" is defined as "to the extent necessary and reasonable, to protect public health, safety, and welfare and the environment by avoiding adverse impacts from oil and gas operations and minimizing and mitigating the extent and severity of those impacts that cannot be avoided." *Id.* Matters covered include, among others: land use, location of oil and gas facilities, impacts to public facilities and services, water quality, noise, vibration, odor, light, dust, air quality, land disturbance, and reclamation procedures. *Id.* SB 19-181 also added language codified as § 34-60-131, C.R.S. (2019), entitled "No land use preemption[,]" which provides that "[l]ocal governments and state agencies, including the commission and agencies listed in section 34-60-105(1)(b), have regulatory authority over oil and gas development" and that a "local government's regulations may be more protective or stricter than state requirements."

Plaintiffs filed their Complaint for Declaratory Judgment on January 14, 2020 in which they requested a declaratory ruling that due to the passage of SB 19-181, Article XVI is no longer in operational conflict with and no longer preempted by state law. On June 24, 2020, Plaintiffs filed their Motion, seeking summary judgment and contending that SB 19-181 changed the state's oil and gas policy by "prioritizing protection of public health, safety, welfare, environment, and wildlife resources over oil and a gas development." Motion, 5. Plaintiffs posit that the changes to the legislative declaration, codified in § 34-60-102, C.R.S (2019), "changes the mission of the Commission from 'fostering' the oil and gas industry to 'regulating' the industry, prioritizing health, safety, and environmental concerns." *Id.* They urge that the Colorado General Assembly "created new powers that gave enormous authority to local governments to regulate oil and gas activities. . ." as promulgated in § 34-60-131 and § 29-20-104, C.R.S. (2019), and as suggested in the legislative history of SB-19-181. Motion 14, 11.

Defendant-Intervenor filed its Cross-Motion on July 24, 2020, moving the Court to deny Plaintiffs' Motion and grant summary judgment in its favor. Defendant-Intervenor argues that Article XVI continues to be unenforceable even after the passage of SB 19-181 because Article XVI remains in operational conflict with the Act, and thus, is preempted by state law under the standard articulated in *Longmont*. Cross-Motion 3. Defendant-Intervenor contends the amended Act's grant of power to local governments is limited to certain matters affecting surface impacts of oil and gas operations as specified in § 29-20-104 (1)(h)(1), C.R.S. *Id.* at 13, 16, 20. It emphasizes that the Act explicitly grants authority for subsurface oil and gas regulation to the Colorado Oil and Gas Conservation Commission but that Article XVI continues to materially

impede state law because it prohibits fracking, a subsurface activity. Defendant-Intervenor points to the legislative history, and the obvious state oil and gas policy announced in the Act, and the language of the Act including the requirement that local governments only regulate surface impacts of oil and gas development using reasonable means. *Id.*

Defendant City responded by moving the Court to deny Plaintiffs' Motion, arguing that the injunction announced in *Longmont* can only by lifted by judicial reversal or overrule by the Colorado Supreme Court and that a declaratory judgment in Plaintiffs' favor would violate the doctrines of separation of power and prosecutorial discretion.

Defendant State and Commission move the Court to deny Plaintiffs' Motion and grant Defendant-Intervenor's Cross-Motion, arguing that the Commission's statutory charge to protect correlative rights and prevent waste require statewide uniform fracking regulation; that SB 19-181 did not diminish the Commission's authority to regulate all aspects of oil and gas; that SB 19-181 creates a scheme where both local governments and that Commission may regulate surface impacts; and SB 19-181 does not change *Longmont's* holding.

II. STANDARD OF REVIEW

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." C.R.C.P. 56(c). Summary judgment "permits prompt disposition of actions which lack a genuine issue of material fact . . . and is designed to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial." *Ginter v. Palmer & Co.*, 585 P.2d 583, 584 (Colo. 1978). Summary judgment is a drastic remedy, and, therefore, it is only properly entered upon a clear showing that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pueblo W. Metro. Dist. v. Se. Colorado Water Conservancy Dist.*, 689 P.2d 594, 600 (Colo. 1984). A fact is material if it "will affect the outcome of the case." *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). "In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party." *Id*. at 376.

"The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party." *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987); *see also* C.R.C.P. 56(e). "Once a movant makes a convincing showing that genuine issues are lacking, C.R.C.P. 56(e) requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists." *Ginter*, 585 P.2d at 585. When the "facts are undisputed, or so certain as not to be subject to dispute, the court is in [a] position to determine the issue strictly as a matter of law." *Rogerson v. Rudd*, 345 P.2d 1083 (Colo. 1959). Summary judgment is not proper if under the evidence a reasonable person might reach different conclusions. *Morlan v. Durland Trust Co.*, 252 P.2d 98, 100 (Colo. 1952). "A motion for summary judgment supported by an affidavit, to which no counter-affidavit is filed, establishes the absence of an issue of fact, and the court is entitled to accept the affidavit as true." *Witcher v. Canon City*, 716 P.2d 445, 457 (Colo.1986).

III. APPLICABLE LAW – PREEMPTION ANALYSIS

a. *Home-Rule Municipalities' Regulatory Authority*

Home-rule cities are guaranteed independence from state control in governing local and municipal matters under the Colorado Constitution, art. XX, § 6. *Ryals v. City of Englewood*, 364 P.3d 900, 905 (Colo. 2016). In matters of local concern, home-rule ordinances supersede conflicting state statute. *Longmont*, 369 P.3d at 579. However, when a home-rule ordinance conflicts with state law in a matter of statewide or mixed state and local concern, the conflicting provision of the home-rule ordinance is preempted by the state law. *Id.*; *Voss v. Lundvall Bros., Inc*, 830 P.2d 1061, 1066 (Colo. 1992).

b. *State, Local, or Mixed State and Local Concern*

The analysis of whether a home-rule charter is preempted by a state statute, then, begins with the determination of whether a matter is of a state, local, or mixed state and local concern. *Id.* In answering this, courts must consider the totality of the circumstances, weighing the interests of the state and the city in regulating the particular matter. *Id.* (quoting *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013)). Several factors guide courts in their inquiry:

> (1) the need for statewide uniformity of regulation;
> (2) the extraterritorial impact of the local regulation;
> (3) whether the matter has traditionally been regulated at the state or local level; and
> (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation.

Webb, 295 P.3d at 486. *See also Longmont*, 369 P.3d at 580.

With respect to the first factor and in cases involving regulation of drilling and hydraulic fracturing, the Colorado Supreme Court has consistently determined that "the need for statewide uniformity of the regulation of oil and gas development and production suggests that the matter was one of state concern." *Longmont*, 369 P.3d at 580. *See also City of Fort Collins*, 369 P.3d 586, 591 (Colo. 2016); *Voss*, 830 P.2d at 1067 (recognizing the *Voss* court's conflation of the issues of local, state, or mixed matters but finding guidance in its analysis of the four factors as it relates to preemption of Greeley's drilling ban). In concluding that "the state's interest in the efficient and fair development of oil and gas resources in the state suggests that Longmont's fracking ban implicates a matter of statewide concern[,]" the *Longmont* court considered the following: that operators determined fracking is necessary to ensure productive recovery or gas and oil; that a fracking ban could result in a waste of oil and gas and a poor recovery; and that a ban would adversely impact the rights of owners of the gas and oil by depressing production in Longmont and could cause uneven and wasteful production of gas from pools underlying and extending beyond the limit of Longmont. 396 P.3d at 580.

The supreme court defines the second factor, extraterritorial impact, "as a ripple effect that impacts state residents outside the municipality." *City of Northglenn v. Ibarra*, 62 P.3d 151, 161 (Colo. 2003). The extraterritorial impact of the local regulation must have serious consequences to non-residents, and those consequences must be more than incidental or *de minimus* to satisfy the "ripple effect" definition. *Id.* (citing *City and County of Denver v. State,* 788 P.2d 764, 769 (Colo.1990)). The supreme court reasoned in *Voss* that Greeley's drilling ban weighed in favor of the state's interest in fair and effective development of oil and gas because pools of gas and oil that underlie the city also extend beyond the city, such that limiting development to the portion of a pool outside city limits could result in increased production costs and could affect nonresident owner's right to an equitable share of the profits. *Voss*, 830 P.2d at 1067-68. Similarly, in *Longmont*, the supreme court found that the second factor weighed in favor of the state's interest in fracking because the ripple effect could include increase production costs, reduce royalties, and encourage other municipalities to enact their own fracking bans. 369 P.3d at 581.

As to the third factor, whether the matter is traditionally regulated at the state or local level, the supreme court recognized that oil and gas development has traditionally been a matter of state control, noting that the state's control of oil and gas development began in 1915 when the Office of the State Oil Inspector was created and that the office imposed certain regulations on gas and oil development. *Voss*, 830 P.2d at 1068. It also noted that home-rule cities are authorized to control land use through its zoning authority. *Longmont*, 369 P.3d at 581. The court concluded as to the fracking ban in *Longmont* and the drilling ban in *Voss*, that the third factor does not weigh in favor of either the state's interest in oil and gas development or local concerns, finding that fracking and drilling touches both the regulation of oil and gas development and land use. *Id.*

As to the fourth factor, the *Longmont* and *Voss* courts found that the Colorado Constitution does not commit regulation of oil and gas development nor land-use control exclusively to the state or to municipalities. *Id.*; *Voss*, 830 P.2d at 1068. Thus, the fourth factor did not weigh in favor of either statewide or local concerns as it relates to drilling and fracking bans. *Id.*; *Voss*, 830 P.2d at 581.

Finally, considering that the first and second factors, i.e., the need for uniform statewide regulation and the extraterritorial impact of the fracking ban, weighed in favor of the state's interest, and that the third factor, whether the matter is traditionally regulated at the state or local level, partially weighed in favor of Longmont's traditional zoning authority, the *Longmont* court found that the fracking ban was a matter of mixed state and local concern, which necessitated the determination of whether the ban was preempted by state law. *Longmont*, 369 P.3d at 581.

c. *Express, Implied, and Operational Conflict Preemption*

Upon a finding that the home-rule city's regulation is a matter of mixed state and local concern, the validity of the local rule turns on whether it conflicts with state law. *See Longmont*, 369 P.3d at 581-82; *Ryals*, 364 P.3d at 905 (citing *Webb*, 295 P.3d at 486). Where there is conflict, the state law preempts and supersedes the local ordinance. *Id.*

Under Colorado law, there are three forms of preemption: express, implied, and operational conflict preemption. *Bd. Cty. Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1056-57

(Colo. 1992). 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." *Longmont*, 369 P.3d at 582. Implied preemption can be inferred when a "state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest[.]" *Bowen/Edwards*, 830 P.2d at 1056-57.

Operational conflict preemption applies where a state law preempts a local law because the operational effect of the local law "would conflict with the application of a state law." *Ryals*, 364 P.3d at 911 (quoting *Bowen/Edwards*, 830 P.2d at 1059). See also, *Longmont*, 369 P.3d at 582. Preemption by operational conflict can arise when "the effectuation of a local interest would materially impede or destroy a state interest." *Longmont*, 369 P.3d at 582. To the extent that they conflict with the state's interest, local regulations may be partially or totally preempted by state law. *Id.*; *Bowen/Edwards*, 830 P.2d at 1059. Operational conflict analysis requires the examining court to "assess the interplay between the state and local regulatory schemes[,]" which in virtually all cases "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.'" *Id.*

The court in *Longmont*, after finding no express or implied preemption, examined Article XVI to determine whether the Act preempted it due to an operational conflict. 369 P.3d at 584. The court found that the state's interest in oil and gas development was declared as follows:

> It is the intent and purpose of this article to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources, and subject further to the enforcement and protection of the coequal and correlative rights of the owners and producers of a common source of oil and gas, so that each common owner and producer may obtain a just and equitable share of production therefrom.

Longmont, 369 P.3d at 584 (quoting § 34-60-102(1)(b), C.R.S.). The court also looked to the Commission's empowerment under the Act to make and enforce rules including "drilling, producing, and plugging of wells and all other operations for the production of oil and gas," "and shooting chemical treatment of wells," and spacing of wells. *Id.* at 584-85. And it considered the Commission's role in regulating fracking, including that Commission promulgated extensive rules and regulations, which include definitions related to fracking, requirements that operators disclose substantial information about wells they have fracked, and regulations related to the disposal of waste associated with fracking. *Id.* at 585.

The supreme court found that the purpose of the Act announced by the legislature in § 34-60-102(1)(b) and the pervasive rules and regulations related to fracking, which were made and enforced by the Commission "evinced state control over numerous aspects of fracking, from chemicals used to location of waste pits," establishing that "the state's interest in the efficient and responsible development of oil and gas resources includes a strong interest in the uniform regulation of fracking." *Id.* Because Article XVI, an absolute ban on fracking, prevented operators from fracking even under the Commission's rules and regulations, the court found it materially impeded the effectuation of the Act, and thus, the Act preempted Article XVI.

IV. ORDERS AND ANALYSIS

a. *The General Assembly May Enact Laws that Supersede or Abrogate Colorado Supreme Court Decisions*

Preliminarily, the Court disagrees with Defendant City's argument that the decision announced in *Longmont* cannot be overturned by this Court and can only be modified by the Colorado Supreme Court. "It is unquestionably within the legislature's purview to enact legislation which modifies or abrogates decisions of this court so long as the legislation is constitutional." *Gallegos v. Phipps*, 779 P.2d 856, 861 (Colo. 1989). Thus, if any portion of SB 19-181 abrogates or modifies the decision in *Longmont*, it supersedes the court's decision. Therefore, this Court, under Rule 57, may determine the relative rights of the parties as prescribed by SB 19-181, which may supersede decisions announced in *Longmont*.

b. *Longmont Is a Home-rule City*

Longmont is a home-rule municipality, and Article XVI is a home-rule charter. *Longmont*¸ 369 P.2d at 577. The Court therefore, begins its examination of the validity of Article XVI with a determination of whether fracking is a matter of local, state, or mixed state and local concern.

c. *Longmont's Article XVI Is a Matter of Mixed State and Local Concern*

Considering the relative interests of the state and Longmont in regulating fracking, considering the totality of the circumstances, and finding guidance in the supreme court's reasoning in *Longmont*, this Court finds that fracking is a matter of mixed state and local concern.

First, the need for statewide uniformity of the regulation of oil and gas development and production suggests that fracking is a matter of state concern. Fracking may be necessary for the productive recovery of oil and gas in pools under Longmont, and the fracking ban could prevent the optimal recovery of those resources and ultimately result in the uneven and wasteful production of oil and gas. Article XVI could also negatively impact the correlative rights of oil and gas owners, exaggerating production for owners outside Longmont city limits and depressing production for owners in the city limits.

Second, the extraterritorial impact of Longmont's fracking ban suggests that fracking is a matter of state concern. Limiting fracking to portions of oil and gas pools outside the limits of the city of Longmont increases the costs of producing and decreases royalties. Longmont's fracking ban could also encourage other municipalities to adopt local fracking bans, causing a "de factor statewide ban." *Longmont*, 369 P.3d at 581. Thus, the ripple effect of Article XVI could seriously impact residents who reside outside of Longmont.

Third, the state has traditionally regulated oil and gas development and production, and Longmont, under its authority as a home-rule city, regulates land use through zoning. Fracking touches both the state's regulatory control in oil and gas development and production, and

Longmont's regulation of land use. Thus, the third factor does not suggest that fracking is either a pure state nor local matter.

Fourth, the Colorado Constitution does not commit the regulation of fracking to state or to local regulation, nor does it commit "land-use control exclusively to local governments." *Voss*, 830 P.2d at 1068. The fourth factor, therefore, does not weigh in favor of a finding that fracking is a either a state or local concern.

Considering the four factors, the first and second of which weigh in favor of a finding that fracking is a matter of state concern and the third of which recognizes that fracking is in part a matter of local concern, the Court finds that the Article XVI's fracking and fracking waste storage and disposal bans involve matters of mixed state and local concern.

d. *Article XVI's Fracking Ban Regulates Subsurface Oil and Gas Operations*

The Act as amended under SB 19-181, despite assigning significant regulatory authority over gas and oil development and production to the Commission regulatory power, allocates limited land-use regulatory authority in oil and gas development to local governments. Under changes enacted by SB 19-181, local governments may regulate oil and gas operations "to plan for and regulate the use of land by . . . [r]egulating the surface impacts of oil and gas operations in a reasonable manner to address matters specified in this subsection (1)(h) and to protect and minimize adverse impacts to public health, safety, and welfare and the environment." § 29-20-104(1)(h), C.R.S. (2019). Those matters falling under "surface impacts" are:

> I. Land use;
> II. The location and siting of oil and gas facilities and oil and gas locations, as those terms are defined in section 34-60-103(6.2) and (6.4);
> III. Impacts to public facilities and services;
> IV. Water quality and source, noise, vibration, odor, light, dust, air emissions and air quality, land disturbance, reclamation procedures, cultural resources, emergency preparedness and coordination with first responders, security, and traffic and transportation impacts;
> V. Financial securities, indemnification, and insurance as appropriate to ensure compliance with the regulations of the local government; and
> VI. All other nuisance-type effects of oil and gas development

§ 29-20-104(1)(h) (I)-(VI), C.R.S. (2019). The Commission, as made obvious by the plain language of the Act, retains the singular authority to regulate subsurface oil and gas activity.

Longmont's Article XVI prohibits: (1) "the use of hydraulic fracturing to extract oil, gas, or other hydrocarbons" and (2) the storage or disposal of "solid or liquid wastes created in connection with the hydraulic fracturing process…" The ordinance states that the people of Longmont seek to "protect themselves from the harms associated with hydraulic fracturing, including threats to public health and safety, property damage and diminished property values, poor air quality, destruction of landscape, and pollution of drinking and surface water." LONGMONT, CO., MUN. CODE art. XVI § 2 (2012).

Plaintiffs argue that the enumerated threats from which residents of Longmont are protecting themselves with Article XVI are "inherently surface impacts" of fracking, and thus, fracking is subject to the regulatory authority of local governments as provided in § 29-20-104(1)(h). Pls.' Reply to Consolidated Resp. 10. They dispute Defendant-Intervenor's definition of fracking in part, arguing that there are surface activities related to fracking not named in their Cross-Motion. Pls.' Resp.to Cross-Mot. 2-3; Def.-Intervenor's Cross-Mot. 4. Plaintiffs, however, do not dispute that the following constitutes "one part of the fracking process": fluid containing a proppant is injected into a well causing fractures that emanate from the well-bore; pressure is released from the wellbore allowing fluid to return to the well; the proppant remains in the fractures, preventing them from closing and liquid is drained allowing oil and gas to flow into the wellbore. *Id.*

The Court finds that Article XVI's fracking ban cannot be characterized as regulating the surface impacts of oil and gas; rather, it is a local regulation prohibiting the subsurface process of fracking. This "one part of the fracking process," which Plaintiffs do not dispute is a subsurface activity, was defined in nearly identical terms by the Colorado Supreme Court in Longmont. 369 P.3d at 576. A plain reading of Article XVI makes clear that the subject of the fracking ban is not limited to surface activities related to fracking. Rather, it bans the fracking process itself, which is a subsurface activity. Article XVI also includes language related to the prohibition of storing and disposal of fracking waste, which are surface activities. Simply because there are surface activities related to and necessary for fracking, and a fracking ban would necessarily have surface impacts, does not suggest that Article XVI's ban on fracking is a regulation of the use of land through regulating "the surface impacts of gas and oil operations." Rather, it is a regulation of the subsurface process of fracking.

The authority of local governments to regulate land use and enact zoning laws has a long-established basis in the Colorado constitutional, statutory and case law. *See e.g.*, *Bowen/Edwards*, 830 P.2d at 1056; *Colo. Min. Ass'n v. Bd. Cty. Com'rs of Summit Cty.*, 199 P.3d 718, 723-24 (Colo. 2009). However, despite that SB 19-181 added a provision that local governments may regulate surface impacts of oil and gas operations and specifically listed "land use" among the matters a local government can regulate, the addition of "land use" in SB 19-181 without more substantive changes to the statutory scheme, does not alone demonstrate that SB 19-181 authorizes local governments to prohibit subsurface oil and gas development.

Based on the above, the Court finds there is not a genuine issue of material fact as to whether fracking is a subsurface activity. It is. Nor is there a genuine issue of material fact as to whether XVI bans the subsurface activity of fracking. It does.

e. *Article XVI's Fracking Ban Is in Operational Conflict with State Law*

The parties do not argue, and the Court does not perceive, preemption under the principles of express or implied preemption. There is no state law that expressly forbids local governments from enacting local laws regulating fracking or oil and gas development, and the supreme court has consistently found that the Act does not impliedly preempt local governments from enacting

land-use regulations for oil and gas development. *See e.g. Bowen/Edwards*, 830 P.2d at 1059; *Voss*, 830 P.2d at 1066; *Longmont*, 369 P.3d at 583.

The Court, therefore, examines Article XVI's fracking ban to determine whether it is in operational conflict with state law. The Court is guided by the Colorado Supreme Court's analysis in *Longmont* and *Fort Collins* in finding that subsequent to the enactment of SB 19-181 that Article XVI's fracking ban remains in operational conflict with state law.

Prior to SB 19-181's passage, Colorado jurisprudence on the issue was settled: local fracking bans or moratoriums were in operational conflict with state law, and thus preempted by state law. *Longmont*, 369 P.3d at 585; *Fort Collins*, 369 P.3d at 594. Rather than treating the local fracking bans as basic zoning laws well within the cities' authority, the supreme court reasoned that local fracking bans render the state's uniformity-driven statutory scheme "superfluous . . . because [they] prevent[] operators who abide by the Commission's rules and regulations from fracking[,]" and "materially impede[] the effectuation of the state's interest in the efficient and responsible development of oil and gas resources." 369 P.3d at 593. The reasoning announced in *Longmont* and *Fort Collins* as it pertains to Article XVI's fracking ban remains sound, even after the enactment of SB 19-181.

The state's interest in oil and gas development as declared in the Act's Legislative Declaration, § 34-60-102, C.R.S. (2019), is in large part, the same as announced in *Longmont* and *Fort Collins*. The current version of the Act as amended by SB 19-181 declares that the intent and purpose of the Act is still to produce up to the maximum efficient rate, subject to the protection of public health, safety, and welfare, the environment and wildlife resources and "subject further to the enforcement and protection of the coequal and correlative rights of the owners and producers of a common source of oil and gas, so that each common owner and producer may obtain a just and equitable share of production from the common source." § 34-60-102(1)(b), C.R.S. (2019). SB 19-181 added language to the stated purpose and intent of the act, announcing the added purpose and intent of "the prevention of waste[.]" §34-60-102(1)(b), C.R.S. See also § 34-60-106(2.5) and (3)(a), C.R.S. (2019). This change, however, does not diminish the state's interest in oil and gas development, but rather enhances it.

SB 19-181 added other language to the Legislative Declaration, including directing the commission to regulate oil and gas development and production "in a manner that protects public health, safety, and welfare, including protection of the environment and wildlife resources[,]" to "[p]rotect public and private interest against waste[,]" to "[s]afeguard and enforce coequal and correlative rights of owners[,]" and to "[p]lan and manage oil and gas operations in a manner that balances development with wildlife conservation[.]" § 34-60-102,(1)(a)(I)-(IV), C.R.S. (2019). The changes include that regulations of oil and gas development and production must be done in a manner that protects public health, safety, welfare, the environment and wildlife resources, as well as the legislature's clear direction to the Commission to act in that manner, evincing the intent that the Commission regulate to ensure the purpose of the Act is fulfilled.

Under current versions of § 34-60-105(1), C.R.S., the Commission is empowered to make and enforce rules related to oil and gas development and production, including rules related to fracking. Under § 34-60-106(2), C.R.S., the Commission may regulate: "(a) [t]he drilling, producing, and plugging of wells and all other operations for the production of oil or gas; (b) [t]he

stimulating and chemical treatment of wells; and (c) [t]he spacing and number of wells allowed in a drilling unit." Pursuant to this authority, the Commission has promulgated rules and regulations "to prevent waste and to conserve oil and gas in the State of Colorado while protecting public health, safety, and welfare, including the environment and wildlife resources." 2 Colo. Code Regs. § 404-1:201 (2015).[1] The Commission is also empowered to promulgate rules ensuring wellbore integrity, including rules to "[e]nhance safety and environmental protections during operations such as drilling and hydraulic fracturing." § 34-60-106(18)(c), C.R.S. (2019). Nothing in SB 19-181 has reduced the Commission's authority in promulgating and enforcing rules affecting the fracking process or allocated this authority to local governments.

The Commission has promulgated extensive rules related to drilling, development, and oil and gas development, 2 Colo. Code Regs. § 404-1:301-333; and rules meant to prevent waste, protect correlative rights, promote efficient production, and protect public health, safety, welfare, the environment, and wildlife resources. 2 Colo. Code Regs. § 404-1:201, 315, 322. Rules specifically and solely related to fracking have also been promulgated, and include fracking chemical disclosures, 2 Colo. Code Regs. § 404-1:205A (2015); and definitions related to fracking, 2 Colo. Code Regs. § 404-1:100.

The Court finds that the Oil and Gas Conservation Act and the Commission, under the authority granted to it by the Act, established pervasive rules that evince state control over oil and gas development and production, which includes fracking. The rules demonstrate the state's interest in the efficient, fair, and safe development of oil and gas resources, which includes the uniform regulation of fracking. This interest remains strong and unchanged even after the enactment of SB 19-181. Article XVI's fracking ban prevents operators from fracking even if they abide by the requirements of the Act and the Commission's extensive regulations, impeding the state's interest in enforcing and protecting coequal and correlative rights of interest owners, preventing of waste, and the producing up to its maximum efficient rate from each pool.

Therefore, the Court finds that the provision of Article XVI banning fracking materially impedes the effectuation of the state's interest; thus, Article XVI's fracking ban is preempted by state law.

f. *Article XVI's Fracking Waste Storage and Disposal Ban Is in Operational Conflict with State Law*

The Plaintiffs, Defendant-Intervenors, and Defendant City provide little in regards to Article XVI's fracking waste storage and disposal ban, and neither party acknowledges in their request for relief Article XVI's two prohibitions: the prohibition of fracking and the prohibition of fracking waste storage and disposal. From this, the Court could infer the parties' understanding that the waste storage and disposal ban is inextricably linked to the fracking ban and that it needs

[1] The Court notes that the Commission was conducting a rulemaking to implement changes enacted by SB 19-181 and that Defendant State "suggested that this case may not be appropriate for a decision under the doctrine of prudential ripeness" explaining that it is still open how the Commission will resolve issues related to SB 19-181. Consolidated Resp., 8 ftnt. 4. The Court finds that Defendant State did not request to stay the proceedings or for a finding that the issue was not ripe; rather, it suggested in Footnote 4 with little argument or allegations, that the issue may not be ripe. The Court cannot find on the facts alleged and law supplied in Footnote 4 that the issue is not ripe and analyzes Article XVI, the Act, and the Commission's rules as they currently exist.

no separate preemption analysis. The Defendant State, however, notes Article XVI's dual prohibitions, and the Court recognizes that only the portions of home-rule ordinances that operationally conflict with state law are preempted. Thus, the Court similarly examines Article XVI's waste storage and disposal ban under a preemption by operational conflict analysis.

Firstly, the Commission is authorized to regulate oil and gas development in a manner that protects public health, safety, welfare, the environment, and wildlife resources, and it is directed to promulgate rules and regulations to administer the Act, prevent waste, and conserve oil and gas. § 34-60-102, C.R.S. (2019); 2 Colo. Code Regs. § 404-1:201, 202, 2020. In exercising its authority, the Commission has promulgated rules relating to production and exploration waste management. The Commission has extensively defined terms and activities related to exploration and production waste, including waste disposal and waste storage. 2 Colo. Code Regs § 404-1:100, Sept. 30, 2020. It has promulgated rules related to safe exploration and production waste storage, including requiring operators to submit a plan for the management of exploration and production waste, 2 Colo. Code Regs § 404-1:216(a),(c)(5); and to evaluate disposal wells for hydrocarbon potential before being used as disposal wells. The Commission's 900-series rules address expansively and with specificity the management of exploration and production waste, including the storage and disposal of it. 2 Colo. Code Regs § 404-1:901-912.

Secondly, the subsurface oil and gas activity, over which the Commission alone has regulatory authority, necessarily requires some surface activity. Article XVI's waste and disposal ban, which in its plain language is a complete ban on those fracking related activities, would render meaningless the limitation provided in § 29-20-104(1)(h) that local governments may only regulate surface impacts, as it could have the operational effect of entirely prohibiting fracking.

The Court finds that the comprehensive rules relating to the regulation and management of exploration and production waste and the operational effect of Article XVI's ban on waste storage and disposal materially impede state law. Thus, Article XVI's fracking waste and disposal ban continues to be in operational conflict with state law.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant-Intervenor's Cross-Motion for Summary Judgment on Plaintiff's Complaint for Declaratory Judgment and DENIES Plaintiffs' Motion for Summary Judgment.

In accordance with its analysis above and its order granting Defendant-Intervenor's cross-motion, the Court enters JUDGMENT declaring that Article XVI remains in operational conflict with state law and is, thus, preempted by it.

DATED: November 1, 2020

BY THE COURT

Judith L. LaBuda

District Court Judge