SUPREME COURT, STATE OF COLORADO

Case No. 91 SC 169

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

GAYLE VOSS, CITY CLERK OF THE CITY OF GREELEY, a municipal corporation; VITUS EINSPHAR, FIRE CHIEF, CITY OF GREELEY FIRE DEPARTMENT; THE ELECTION BOARD OF THE CITY OF GREELEY, a municipal corporation; THE CITY COUNCIL OF THE CITY OF GREELEY, a body politic; and THE CITY OF GREELEY, a municipal corporation,

Petitioners,

v.

LUNDVALL BROTHERS, INC., a Colorado corporation, d/b/a LUNDVALL OIL AND GAS, INC.; BELLWETHER EXPLORATION COMPANY; HERTZKE BROTHERS, a partnership; COLORADO OIL AND GAS CONSERVATION COMMISSION; CONQUEST OIL COMPANY; and LANGFORD RESOURCES, a Colorado General Partnership,

Respondents.

District Court, Case No. 85 CV 846
Opinion By: The Honorable Jonathan W. Hays

Court of Appeals, Case No 89 CA 1282
Opinion By: The Honorable Peter H. Ney
The Honorable Karen S. Metzger and Edwin G. Ruland
participating.

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2. Whether the Colorado Court of Appeals erred in holding that the regulation of oil and gas drilling was of statewide concern, and thus not subject to independent regulation by home rule cities.

3. Whether the Colorado Court of Appeals erred in holding that the Greeley ordinance was in conflict with the Oil and Gas Conservation Act.

4. Whether the finding of preemption by the Colorado Court of Appeals violates Colorado Constitution Article V, Section 35, which prohibits delegation of municipal functions to a special commission.

II. STATEMENT OF THE CASE

The Colorado Municipal League, hereby adopts and fully incorporates by reference the statement of the case in the Brief submitted by Petitioners, City of Greeley, et al.

III. SUMMARY OF ARGUMENT

The Court of Appeals holding that the General Assembly's delegation to the Colorado Oil and Gas Conservation Commission of certain authority to regulate oil

and gas drilling practices leaves "no room for local regulation," including land use regulation, by municipalities, is without any foundation in the Commission statute. The Court of Appeals' holding is also directly contrary to the legislative history of the statute upon which the Court of Appeals relied.

In finding that regulation of all aspects of oil and gas drilling, including all land use aspects of such activity, is a matter of statewide concern, the Court of Appeals failed to adequately balance legitimate municipal interests as directed by this Court in City and County of Denver v. State, 788 P.2d 764 (Colo. 1990); hereafter Denver v. State). The Court of Appeals' finding of total preemption, even of land use authority to control well location within a municipality, was unnecessary and not compelled by prior decisions of this Court.

There is, in any case, no conflict between the Commission's issuance of a drilling permit and a municipality's land use control over the permitted activity. There is no basis for viewing a Commission drilling permit as a license to ignore local land use requirements.

Land use regulation over the location of industrial activity within a municipality is a classic "municipal function" and the Commission is a "special commission" within the text and contemplation of Article V, Section 35 of the Colorado Constitution. If the Commission statute is construed to be a delegation of this traditional municipal function to the Commission, then the statute violates Article V, Section 35.

IV. INTRODUCTION

This case concerns whether Colorado municipalities shall retain any

authority to regulate any aspect of oil and gas drilling activities anywhere within their corporate limits. This is thus a case of profound importance to municipalities, whether home rule or statutory, across the state of Colorado.

The case at bar arises out of a challenge to a City of Greeley (City) land use ordinance that prohibited oil and gas drilling activity within its corporate limits. The Court of Appeals characterized regulation of oil and gas drilling activity as a matter of "statewide concern." This Court has recently stated that "in matters of statewide concern, the General Assembly may adopt legislation and home rule municipalities are without power to act unless authorized by the Constitution or by state statute." Denver v. State, 788 P.2d at 767 (Colo. 1990). In the case at bar, the Court of Appeals held that a section of the state statute granting certain regulatory authority over oil and gas drilling activity to the State Oil and Gas Conservation Commission (Sections 34-60-101 et seq. C.R.S.; hereafter the "Commission statute"), completely preempted local authority to regulate such activity. Applying language from its recent decision in Bowen/Edwards Associates v. Board of County Commissioners, _____ P.2d _____, XIV Brief Times Reporter 879, 881, (Colo. App. 1990), the Court of Appeals concluded that, by enacting Section 34-60-106(11), C.R.S., "the General Assembly has left no room for local regulation."

The Court of Appeals' finding of preemption is without any support whatsoever in the actual text of the Commission statute, and the Court of Appeals finding is *directly* contrary to the legislative intent in enacting the statute upon which that Court relied.

By declaring the entire field of oil and gas drilling activity exclusively a matter of statewide concern and adopting the broad language of its Bowen/Edwards opinion, the Court of Appeals went too far. The preeminence of any

statewide interests that may be reflected in the Commission statute over conflicting home rule ordinances could have been effectively assured through a holding that regulation of oil and gas drilling practices is a matter of mixed state and local concern. By so holding the Court of Appeals could have avoided ruling that the state regulatory scheme preempts any control (including land use control) by municipalities over any aspect of oil and gas drilling activity within their corporate limits. Local land use control over such activity would have been preserved while inconsistent drilling practice requirements avoided. The Court of Appeals' unfortunate decision is compelled neither by the language of the Commission statute, applicable legislative history, nor prior decisions of this Court.

V. ARGUMENT

A. The Court of Appeals erred in holding that the Colorado Oil and Gas Conservation Act, Section 34-60-101, C.R.S. et seq. preempts any regulation, including well location, by a local land use ordinance.

The Court of Appeals construed the statutory grant of authority to the Commission to "promulgate rules and regulations to protect the health, safety and welfare of the general public in the drilling, completion and operation of oil and gas wells and production facilities," Section 34-60-106(11), C.R.S. as completely extinguishing any land use or other authority traditionally exercised by municipal government over such activity (See Appendix A: Court of Appeals' opinion at 2). This reading of the Commission's statute as absolutely without foundation, either in the actual language of the Commission statute itself or in

the legislative history of the particular statute upon which the Court of Appeals based its finding. In fact, as will be developed below, the legislative history of the Act by which Section 34-60-106(11), C.R.S. was added to the Commission statute demonstrates conclusively that preemption of municipal authority to regulate oil and gas drilling activity was considered and rejected by the General Assembly.

1. Nothing in the Commission statute supports the Court of Appeals finding of preemption.

Nothing of the text of the Commission statute indicates that the purpose of the statute is to bar local regulation, and certainly not local land use regulation, of oil and gas drilling activity. Section 34-60-106(11), C.R.S. upon which the Court of Appeals relied to find preemption of all municipal authority to regulate any aspect of oil and gas drilling, merely confers authority upon the Commission to promulgate regulations to protect health and safety. It does not follow that because the Commission may issue regulations for this purpose, a municipality may not. The fact that the General Assembly has enacted legislation in a given area does not, ipso facto, mean that all municipal authority to regulate, including traditional land use control, is preempted. City of Aurora v. Martin, 181 Colo. 72, 507 P.2d 868 (Colo. 1973).

This Court has often stated that "the first goal of a court in construing a statute is to ascertain and give effect to the intent of the General Assembly," People v. Terry, 791 P.2d 374, 376 (Colo. 1990); People v. District Court, 713 P.2d 918, 921 (Colo. 1986) and "if the legislative intent is clear from the plain language of the statute, the courts must give effect to the statute according to

its plain language," Danielson v. Castle Meadows, Inc., 791 P.2d 1106, 1111 (Colo. 1990); B.B. v. People, 785 P.2d 132, 138 (Colo. 1990). If the statutory language is clear and the intent appears with reasonable certainty, there is no need to resort to other rules of statutory construction. People v. District Court, 713 P.2d at 921. Only when a statute is ambiguous will the Court look to extrinsic aids to construction, such as legislative history. See: Section 2-4-203, C.R.S.; People v. Davis, 799 P.2d 159, (Colo. 1990); an ambiguity exists where the statute "is reasonably susceptible to more than one meaning." Danielson v. Castle Meadows, Inc., 791 P.2d at 1111 (emphasis added).

There is nothing ambiguous about Section 34-60-106(11), C.R.S. This is a straightforward grant of rulemaking authority to the Commission. This statute is clear and there is simply no language anywhere in the statute indicating that it was the legislature's intention to preempt or eliminate municipal authority, and certainly not land use authority, over oil and gas drilling activity.

By reading into the statute a preemptive affect, the Court of Appeals' opinion clearly departs from this Court's well established rule that "[i]f the statutory language is plain, it should not be subjected to a strained interpretation or interpreted to mean that which it does not express." Colorado Civil Rights Commission v. Regents of the University of Colorado, 759 P.2d, 726, 735 (Colo. 1988); Rancho Colorado, Inc. v. City of Broomfield, 196 Colo. 444, 586 P.2d, 659, 661 (Colo. 1978); See also: Dawson v. PERA, 664 P.2d 702, 707 (Colo. 1983) (when statute plain and unambiguous, "court cannot substitute its opinion as to how the law should read in place of the law already enacted.") The rule that statutes should not be construed to mean that which they do not express has also been applied in many Court of Appeals decisions, including decisions of Division III (which issued the decision in the case at bar). See, e.g.: Sulzer

v. Mid-Century Insurance Company, 765 P.2d 606, 607 (Colo. App. 1988) (Div. III), aff'd. 794 P.2d 1006 (Colo. 1990); Burns v. Denver City Council, 759 P.2d 748, 749 (Colo. App. 1988) (Div. III); Sandomire v. City and County of Denver, 794 P.2d 1371, 1372 (Colo. App. 1990) (Div. II).

The Court of Appeals finding of preemption in the Commission statute is completely without foundation in the text of Section 34-60-106(11), C.R.S., a statute not "reasonably" subject to varying interpretations. The statute is thus clear and unambiguous, and the absence of any legislative intention to preempt municipal regulatory authority, including land use authority, is patent. The decision of the Court of Appeals should be reversed.

2. The legislative history of Section 34-60-106(11), C.R.S. indicates clearly that the legislative intent, contrary to that assumed by the Court of Appeals, was *not* to preempt local government authority, including land use authority.

The Court of Appeals relied on Section 34-60-106(11), C.R.S. to support its inference (as discussed above, no express language indicating a legislative intent to preempt municipal authority appears anywhere in the Commission's statute) of complete elimination of municipal land use authority over oil and gas drilling activity. The legislative history of this statute, far from indicating the legislative intent to preempt presumed by the Court of Appeals, clearly evidences a legislative intent not to preempt municipal authority.

Section 34-60-106(11), C.R.S. was added to the Commission's statute by the General Assembly during its 1985 session as part of Senate Bill (SB) 62; SB 62 was sponsored by Senator Tilman Bishop of Grand Junction and Representative

William Artist of Greeley.

As introduced, SB 62 contained language similar to that ultimately enacted as Section 34-60-106(11), C.R.S. (see Appendix B; SB 62, page 2, lines 5-8). The printed bill contained nothing indicating a preemptive purpose with respect to local regulation, and the testimony of William R. Smith, Director of the Commission at the initial hearing on SB 62 before the Senate Agriculture, Natural Resources and Energy Committee indicates that the purpose of the bill was to empower the Commission to provide through regulation basic "safety measures," because in certain areas of the state there was a "lack of protection." (See Appendix C: Transcript of Senate Agriculture, Natural Resources and Energy Committee Hearing of January 10, 1985, page 9, lines 7 - 20). However, at its subsequent January 22, 1985 hearing on the bill, the Committee approved an amendment that would have added a new subsection (3) to the legislative declaration in the Commission statute at Section 34-60-102, C.R.S. This new subsection provided in pertinent part:

> It is further declared that the safety of the public in drilling, completion and operation of oil and gas wells, or production facilities <u>is a matter of statewide concern</u>. (emphasis added)

(See Appendix D: Senate Committee of Reference Report, lines 16 - 19; Senate Journal of January 31, 1985, lines 52 - 55).

In describing the Committee amendment to the full Senate on Second Reading, Senator Bishop explained that "when we declare something as a statewide concern, it allows the rules and regulations to apply to home rule counties and home rule cities." (See Appendix E: Transcript of Senate Floor Debate, page 3, lines 23 - 25, page 4, lines 1 - 2). The Senate then accepted an amendment by Senator Donley that substituted the following language for the Committee amendment

language set forth above:

> While oil and gas drilling, completion and production are generally declared to be a matter of statewide concern, an exception must be acknowledged on behalf of local entities, such as cities and counties, insofar as local zoning, building, and fire codes affect the above-ground aspects of oil and gas drilling, completion and production operations.

The Donley amendment would also have added the following language to the rulemaking authority portion of the bill that ultimately became Section 34-60-106(11), C.R.S.:

> Such Commission rules and regulations notwithstanding, local entities such as cities and counties may adopt zoning, building, and fire codes affecting the above-ground oil and gas well drilling, completion, and production operations, which are not inconsistent with Oil and Gas Conservation Commission rules and regulations. (emphasis added)

(See Appendix F: Senate Floor Amendment of Senator Donley; Senate Journal for February 13, 1985, lines 38 - 67).

Although Senator Donley argued that it was his intention to continue to permit local land-use control over oil and gas drilling activity and that cities and counties would "have a right to become involved in above-ground zoning issues" relating to such activities, (Appendix E, page 8, lines 2 - 4) he agreed that Senator Noble was "correct" (Id. page 16 - 19) when Senator Noble, commenting on the "not inconsistent" language of the Donley amendment said:

> . . . I think what you have done is, you've effectively taken away any local control by saying what you are not consistent with the Commission rules.
>
> I mean, all the Commission has to do is take your zoning away from you by adopting the rules and regulations.

(Id. page 16, lines 2 - 7)

The bill was subsequently approved and referred to the House with the Donley amendment attached. A copy of the reengrossed (Senate passed) version of the bill is attached as Appendix G.

In presenting the bill to the House Agriculture, Livestock and Natural Resources Committee, Representative Artist said that "we've got no way to regulate safety in this state" and that the "key to the bill" was the grant of authority of the Commission to promulgate regulations to protect the public health, safety and welfare. Representative Artist went on to state that "the amendments that were put on in the Senate ended up being more help than we really needed, and nobody seemed to be very happy" and that witnesses would testify "to verify that industry, and counties and cities, . . . agree that this . . . bill ought to be redrafted/rewritten" through an amendment that Representative Artist thereafter presented. (See Appendix H: Transcript of House Agriculture, Livestock and Natural Resources Committee Hearing of March 13, 1985, page 4).

Following testimony, Representative Artist's amendment was offered. The amendment essentially removed the Senate language that declared oil and gas regulation a matter of statewide concern and limited local governments to enacting only zoning, building and fire code requirements "not inconsistent" with the Commission regulations. (See Appendix I: House Agriculture, Livestock and Natural Resources Committee Report of March 13, 1985; House Journal of March 14, 1985, page 681, lines 15 - 53.

Testifying in support of the amendment to remove the preemption language from the Commission statute was Kenneth R. Wonstolen, Esq., General Counsel for the Independent Petroleum Association of Mountain States (IPAMS). Mr. Wonstolen

testified that:

> . . . there has been a void in the statutory authority of the Commission in this area. We think the bill fills that void, and we like Representative Artist's amendment to do that in simple fashion. We urge you to support the bill as Representative Artist has proposed it to you.

(Appendix H, page 7, lines 4 - 9)

Also testifying in support of Representative Artist's amendment were Jack Rigg, representing the Colorado Petroleum Association, a division of the Rocky Mountain Oil and Gas Association (RMOGA) (Id. page 7), William R. Smith, on behalf of the Commission (Id. pages 5 - 6) and Tami Tanoue of the Colorado Municipal League (Id. page 8).

In presenting the bill to the full House on second reading, Representative Artist again stressed that the grant of safety regulation authority to the Commission was the key to the bill and "that's simply what the bill does" (See Appendix J: Transcript of House Floor Debate, March 3, 1985, page 4, lines 3 - 17).

The House then approved the bill as recommended by the House Committee (See Appendix K).

The Senate concurred with the House passed version of SB 62 that contained what is now Section 34-60-106(11), C.R.S. In urging Senate concurrence with the House passed version, bill sponsor Senator Bishop characterized his bill as "the bill on safety regulations being promulgated by the Oil and Gas Commission." Senator Bishop explained that the House:

> . . . removed the language that we had declared this as a statewide concern, and all of the parties, the Municipal League, Colorado

> Counties, the industry itself, have all agreed, people in Weld County who had a lot of concern about this piece of language, to support it in its amended form.

(See Appendix L: Transcript of Senate Discussion on Concurrence with House Amendments to SB 62, page 2, lines 8 - 25).

The legislative history of Section 34-60-106(11), C.R.S. thus shows that it was never the intention of the legislature in enacting this statute to leave, as the Court of Appeals inferred, "no room for local regulation" over oil and gas drilling activity. Even under the Senate's more restrictive version of the bill, local government zoning, building, and fire code regulations "not inconsistent" with Commission regulations were contemplated, and the House rejected the Senate passed declaration of statewide interest and "not inconsistent" limitations on local regulatory authority. IPAMS and the Colorado Petroleum Association, a division of RMOGA, along with the League and the Commission supported the House amendment removing these limitations on local control from the bill.

Whatever arguments might be made concerning the inconvenience of municipal land-use control over oil and gas drilling activity, including well location, it cannot be claimed in good faith that the legislature's intention in enacting Section 34-60-106(11), C.R.S. was to leave "no room for local regulation" of such activity. The Court of Appeals was plainly wrong in so construing 34-60-106(11), C.R.S.; the Court of Appeals decision should be reversed.

B. The Court of Appeals erred in holding that regulation of oil and gas drilling was a matter of statewide concern, and thus not subject to independent regulation by home rule cities.

In its recent decision in Denver v. State this Court reviewed the broad

categories of regulatory matters that it has recognized in determining the respective legislative authority of the General Assembly and home rule municipalities. In matters of local concern, both the state and home rule municipalities may legislate, and if that legislation conflicts, the local ordinance or charter provision will apply. In matters of statewide concern, only the General Assembly may act, unless the home rule municipality is authorized to do so by state statute or the constitution. In matters of mixed local and state concern, both the state and the home rule municipality may legislate, but if there is a conflict the state statute supersedes the conflicting local ordinance or charter provision. Id. 788 P.2d at 767.

This Court cautioned in Denver v. State that these categories "should not be mistaken for mutually exclusive or factually perfect descriptions of the relevant interests of the state and local governments." Id. For example, this Court explained that to characterize a matter as of local concern:

> . . . is to draw a legal conclusion based on all the facts and circumstances presented by a case. In fact, there may exist a relatively minor state interest in the matter at issue but we characterize the matter as local to express our conclusion that, in the context of our constitutional scheme, the local regulation must prevail.
>
> . . .
>
> We have not developed a particular test which could resolve in every case the issue of whether a particular matter is "local," "state," or "mixed." Instead, we have made these determinations on an ad hoc basis, taking into consideration the facts of each case [citing National Advertising Company v. Department of Highways, 751 P.2d 632, 635 (Colo. 1988)]. *We have considered the relative interests of the state and the home rule municipality in regulating the matter at issue in a particular case.* Id. 788 P.2d at 767-768. (emphasis added)

The "matter at issue" in the case at bar is the City's exercise of land use authority over oil and gas drilling activity within the City. As the Court of Appeals acknowledged in its opinion "land use has traditionally been regulated in Colorado at the local level" Appendix A; Op. at 5, citing National Advertising Company v. Department of Highways, 751 P.2d at, 635 (hereafter National Advertising Company); see also: VFW Post 4264 v. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835 (Colo. 1978), Roosevelt v. City of Englewood, 176 Colo. 576, 492 P.2d 65 (Colo. 1971). The Court of Appeals' opinion contains nothing to indicate that any consideration was given to the relative interests of the City in exercising its traditional land use authority over oil and gas drilling activity within its corporate limits. Rather, the Court of Appeals focused entirely upon the state interests that it viewed as reflected in the Commission statute.

In Denver v. State this Court identified several factors that are "useful to consider" in determining whether a sufficient statewide interest exists "to justify preemption of inconsistent home rule provisions" Id. 788 P.2d at 768, and thus whether a matter will be characterized as of statewide, local or mixed concern. These factors include:

(a) "The need for statewide uniformity of regulation," Id. 788 P.2d at 768,

(b) "Whether a particular matter is one traditionally governed by state or by municipal government," Id.

(c) The extraterritorial impact of local requirements.

In its modified opinion (see Appendix A) the Court of Appeals added several paragraphs addressing these factors, and found oil and gas drilling activity to

be a matter of statewide concern. This modification supported the Court of Appeals' initial reliance on its holding in Bowen/Edwards that the Commission statute "left no room for local regulation" of such activity. As with the Court of Appeals opinion generally, the court's discussion of the Denver v. State factors focused on state interests and failed to balance this emphasis with consideration of the legitimate municipal interests in preserving traditional, local land use authority.

It should be emphasized that this Court's instruction in Denver v. State, was that state and municipal interests be balanced. The question is whether an interest of the people of the state of Colorado as a whole is significant enough to justify overriding the expressed will of the citizens of a particular home rule jurisdiction (in the case at bar that will was expressed directly by City electors through their retained constitutional power to initiate ordinances). Thus, in the context of the present case, this balancing should not be between the interests of the municipality and those of the oil and gas industry. That the oil and gas industry may consider local regulations inconvenient, whether these regulations are land use regulations affecting well location, or otherwise, does not necessarily establish that there is a sufficient state interest in eliminating such local regulation.

It is not enough, for example, that, applying this Court's Denver v. State, "need for uniformity" factor, it is shown that statewide, uniform elimination of municipal land use authority to exclude oil and gas drilling activity from residential zoning districts would be convenient to the oil and gas industry. The focus ought to be on whether there is a state interest in extinguishing this traditional local authority.

The failure of the Court of Appeals to weigh legitimate municipal land use

and other interests when concluding that regulation of oil and gas drilling activity is a matter of statewide concern is exemplified by the Court's discussion of the alleged extraterritorial impact of the City's land use ordinance. The Court of Appeals sought to justify its complete elimination of all local land use and other authority over oil and gas drilling activity by citing the possibility that such regulation "may" affect persons living outside the city, and would "ultimately" affect the "statewide oil and gas industry."

This is an extreme, and incorrect application of the "extraterritorial impact" factor enunciated by this Court in Denver v. State. This Court did not say that this factor weighed in favor of preemption of ordinance authority except in those situations where a home rule municipalities' ordinance could never, "ultimately" have some extraterritorial impact. As this Court pointed out in Denver v. State, even if there may exist some minor state interest in the matter at issue (as perhaps evidenced by some extraterritorial impact, for example), the matter may still be characterized as "local and municipal if, taking into account the facts of the given case and our constitutional scheme, local regulation is appropriate. Id. 788 P.2d at 767 - 768.

The City's brief further details the deficiencies in the Court of Appeals' application of this Court's Denver v. State, factors (See City's opening brief, pages 8 - 11) and the League fully adopts and endorses those arguments.

Prior decisions of this Court illustrate that, if the Court of Appeals wished to assure consistency between state and local regulation of drilling practices, it might have done so by declaring regulation of such activity a matter of mixed state and local concern. The Court of Appeals finding that the Commission statute completely eliminated all municipal land use authority was overbroad and unnecessary.

In National Advertising Company v. Department of Highways, this Court considered a challenge to the application of the Colorado Outdoor Advertising Act (43-1-401 to 420, C.R.S.) to a roadside advertising sign licensed by the City of Colorado Springs pursuant to its land use authority.

This Court observed that it had "recognized on numerous occasions that a home rule municipality's control of land use within its borders through zoning legislation is a matter of local concern" and that "a home rule municipality's adoption of a sign code to regulate signs within the municipality is a valid exercise of the City's zoning power," Id. 751 P.2d at 635. While recognizing that the municipality thus had a legitimate interest in controlling road signs, the Court declared that "the state also has an interest in achieving and maintaining those safety, recreational, aesthetic and fiscal goals" (including receipt of federal highway funds) that the Outdoor Advertising Act was designed to further. Id. 751 P.2d at 636. State interests were "entitled to be valued no less than any interest of a home rule municipality in controlling these same signs within its municipal borders." Id. In consideration of the legitimate land use interests of the municipality and the legitimate state interests reflected in the Act, this Court held regulation of road signs along state highways to be a matter of mixed state and local concern.

The National Advertising Company decision reflects a balancing of statewide concerns with preservation of local land use authority that the Court of Appeals failed to utilize in the present case. In National Advertising Company this Court drew its opinion narrowly to preserve local land use authority (over sign location, for example), while assuring that statutory objectives relating to matters of statewide concern were realized. Notably, this Court did not conclude its finding that substantial state interests were furthered by the Outdoor

Advertising Act with a holding that Act "left no room for local regulation" of road signs. Such a holding would have been as extreme and unnecessary under the facts presented in National Advertising Company as was the Court of Appeals' unfortunate decision in the case at bar.

In Denver and Rio Grande Western Railroad Company v. City and County of Denver, 673, P.2d 354 (Colo. 1983) (hereafter Denver and Rio Grande), this Court held that a provision of the Denver charter was superseded by a state statute that gave the Public Utilities Commission authority to establish construction standards and apportion costs for construction of railway viaducts. This Court held that construction of viaducts and apportionment of costs was a matter of mixed state and local concern. Although the Court held the Denver charter provision superseded under the facts presented in Denver and Rio Grande, this Court acknowledged that the construction and apportionment of costs for railroad viaducts had a direct bearing upon Denver's efforts to formulate a local traffic management plan and thus construction of viaducts was "unquestionably a matter of some local concern." Id. 673 P.2d at 358.

Again, by finding that construction standards and cost apportionment relating to railroad viaducts is a matter of mixed state and local concern, this Court assured that legitimate statewide concerns reflected in the statute were not frustrated by conflicting local ordinances, while preserving the municipality's authority to address its legitimate local concerns, such as the land use decision of where a viaduct would be located. Any such balancing of statewide and local concerns is notably absent from the Court of Appeals decision in the case at bar.

City and County of Denver v. Grand County, 782 P.2d 753 (Colo. 1989) (hereafter Grand County) involved a challenge by the Denver Water Board to county

regulations over Board water projects in Grand and Eagle Counties. The Counties' regulations were adopted pursuant to the "Areas and Activities of State Interest" statute (24-65.1-101, C.R.S et seq.). Denver argued that construction of its water projects was a matter of strictly local and municipal concern, and that therefore its charter authority superseded any conflicting state statute (and thus, of course, the Counties' regulations adopted pursuant thereto).

This Court declined to find Denver's construction of extraterritorial water projects a matter of exclusively local and municipal concern, and held instead that such projects were matters of mixed state and local concern. This Court acknowledged the State's interest in site selection and construction of major new water projects, as expressed in the state statute, as well as the "obvious concern" of municipalities served by such projects or in which these projects were to be built. Since this was a matter of mixed state and local concern, Denver's charter authority to construct water projects was superseded to the extent, but only to the extent, that it conflicted with county regulations adopted pursuant to the state act.

It is noteworthy that in its Grand County decision, this Court did not utilize a narrow focus on the relevant state interests to declare construction of water projects exclusively a matter of "statewide concern" and conclude that the legislative scheme "left no room for local regulation." Such an approach would have been unbalanced, extreme and not necessary to further the statewide interest being served by the statute at issue in that case.

In identifying the various statewide and local interests involved in the Grand County case, this Court said that "the respective legislative bodies of a municipality and the state are the judges in the first instance of whether a matter is of local or statewide concern." Id. 782 P.2 at 762. It is obvious in

the case at bar that the City and its citizens have a legitimate local interest in whether and to what degree oil and gas drilling activity occurs in their community. The ordinance at issue in the present case is particularly convincing evidence of this local and municipal concern about oil and gas drilling activity since it was initiated directly by the City's citizens pursuant to the legislative power that they have retained in Article V, Section 1 (9) of the Colorado Constitution.

Yet the Court of Appeals chose to dismiss any legitimate municipal interest in regulating oil and gas drilling activity. Rather than holding regulation of drilling practices a matter of mixed state and local concern, and focusing on the narrow issue of whether the land use ordinance at issue in the present case conflicts with the Commission's statute, the Court of Appeals instead foreclosed any authority of Colorado municipalities to regulate any aspect of such activity anywhere within their jurisdictions. This extreme result is neither prudent nor legally compelled.

C. The Colorado Court of Appeals erred in holding that the Greeley ordinance was in conflict with the Oil and Gas Conservation Act.

The Court of Appeals began its opinion by declaring that the City's "land use regulation" prohibiting oil and gas drilling within the City " . . . was in direct conflict with drilling permits previously issued by the Commission." (Appendix A; Court of Appeals opinion at 1) The Court of Appeals cited no portion of the Commission statute or regulations, nor any case authority whatsoever, from Colorado or any other jurisdiction, to support its conclusion.

As this Court has often stated, a conflict between a statute and an

ordinance is determined by examining "whether the ordinance authorizes what the state forbids, or forbids what the state has expressly authorized." City of Aurora v. Martin, 181 Colo. 72, 507 P.2d 868, 870 (Colo. 1973); Vela v. People, 174 Colo. 465, 484 P.2d 1204 (Colo. 1971); Ray v. City and County of Denver, 109 Colo. 74, 121 P.2d 886 (Colo. 1942).

There is no conflict here between the City's ordinance and the Commission statute or regulations. Nowhere in the statute is the Commission "expressly authorized" to permit drilling within a municipality without regard to local land use requirements. The City's ordinance forbids nothing that the state expressly authorizes. See: City and County of Denver v. Waits, 197 Colo. 563, 595 P.2d 248 (Colo. 1979). Issuance of a drilling permit signifies compliance with Commission permitting standards. As with the various other permits issued by State boards and commissions, a Commission drilling permit is not a license to ignore local land use regulation. The statute authorizes the Commission to impose various operational requirements upon oil and gas drilling activity. To the extent that the City places restrictions upon such activity to a greater degree than does the Commission pursuant to its statutory authority, this is no conflict. Ray v. City and County of Denver; Vela v. People, (involving an alleged conflict between a state statute and a more restrictive City of Greeley prohibition); City and County of Denver v. Howard, 622 P.2d 568 (Colo. 1981).

Even if this Court finds a conflict between the particular city ordinance at issue in the case at bar and some identifiable statewide interest, the League respectfully suggests that such a finding need not be framed so broadly as to require, as does the Court of Appeals holding, complete elimination of all municipal land use control over oil and gas drilling activity. At the very least, it seems reasonable that a municipality should retain its authority to

exclude oil and gas drilling activity from single family and multi-family residential zoning districts. It is inconceivable that any fair balancing of municipal and state interests pursuant to this Court's instruction in Denver v. State, could produce a conclusion that the people of the state of Colorado have an overriding interest in seeing oil and gas drilling activity proceed in residential zoning districts.

D. The finding of preemption by the Colorado Court of Appeals violates Colorado Constitution Article V, Section 35, which prohibits delegation of municipal functions to a special commission.

The Court of Appeals held that all municipal authority to regulate oil and gas drilling, including all land use authority over such activity within a municipality, has been delegated by the General Assembly to the Commission. This holding imputes a Constitutional infirmity to the Commission statute, insofar as Article V, Section 35 of the Colorado Constitution provides in pertinent part that:

> The General Assembly shall not delegate to any special commission . . . any power to . . . perform any municipal function whatever.

This Court has held that the purpose of this Constitutional provision is to prevent General Assembly intrusion upon a municipality's "domain of local self-government" Denver Urban Renewal Authority v. Byrne 618 P.2d, 1374, 1385-

1386 (Colo. 1980) and the subjects to which its protection extends are those that properly fall within such domain. City of Durango v. Durango Transportation, Inc. 807 P.2d 1152, 1157 (Colo. 1991).

It would be difficult to identify a more quintessentially municipal function than control over local land use, see: National Advertising Company, 751 P.2d at 635 and cases cited therein; also: McQuillin Municipal Corp., Sec. 24.22, 24.324 (3rd ed.). The Colorado General Assembly is expressly provided in Section 31-23-301(1), C.R.S. that "for the purpose of promoting health, safety, morals or the general welfare of the community . . . the governing body of each municipality is empowered to regulate and restrict . . . the location and use of buildings, structures and land for trade, industry . . . or other purposes."

It is also clear that the State Oil and Gas Conservation Commission, "a body distinct from the city government, created for a different purpose, or one not connected with the general administration of municipal affairs, is a special commission," Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158, 160-161 (Colo. 1924); City and County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982) within the contemplation of Article V, Section 35.

In Colorado Land Use Commission v. Board of County Commissioners, 199 Colo. 7, 604 P.2d 32 (Colo. 1979), this Court upheld a statute in the face of an Article V, Section 35 challenge because the statute at issue did not permit a state special commission to "interfere" with local land use decisions that this Court considered a "municipal function." In Colorado Land Use Commission, the Land Use Commission brought an action against Larimer County seeking, inter alia, an order directing the county to designate certain power plant properties as an "area of state interest" pursuant to Section 24-65.1-101, et seq., C.R.S. The purpose of this statute is to allow both state and local governments to supervise

land use that may have an impact on people of the state beyond the local jurisdiction. The statute provides that the local government, however, will make the determination of whether or not to designate property as an "area of state interest" under the statute.

One of the provisions of the statute (24-65.1-407(1)(c), C.R.S.) provides that the State Commission may seek "de novo review" of a local governments' decision whether to designate property pursuant to the statute. An issue in the case was the scope of this review. This Court held that such review would not be on the substantive merits of the local governments' decision of whether to designate an area under the statute or not, but rather was solely "to review the legality and propriety of the [local government] proceedings." Id. 604 P.2d at 36.

Having limited the scope of review available to the Commission to procedural matters only, this Court held the Act not violative of Article V, Section 35 of the Colorado Constitution.

> [Because of] [t]he fact that the review process is limited to issues of legality exclusively, municipal functions are in no way impaired. Thus, the Colorado Land Use Commission cannot "interfere" with the lawful exercise of the powers of a municipality, and the statutory provisions at issue are constitutional. Id. 604 P.2d at 36.

Colorado Land Use Commission is significant for two reasons. First, this Court recognized municipal land use decisions as a "municipal function" under Article V, Section 35 of the Colorado Constitution.[1] Secondly, the clear

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[1] It is also worth noting that this court did not dispose of the Article V Section 35 argument by ruling that the State Land Use Commission was not a "special commission" under Article V, Section 35.

implication of this Court's decision was that, had the Commission possessed authority to "interfere" by seeking review of the merits of a local government's land use decision, "municipal functions" would have been impaired, and Article V, Section 35 likely violated.

If statutory delegation to a state special commission of authority to seek judicial review of the merits of a local land use decision would violate Article V, Section 35, then it follows that delegation to the State Oil and Gas Conservation Commission of authority to actually make land use decisions regarding well location within a local government's jurisdictional area would certainly violate Article V, Section 35. The Court of Appeals held in the case at bar that all municipal regulatory authority, land use or otherwise, was delegated by the Colorado General Assembly to the Commission.

If the Court of Appeals' holding of complete preemption is affirmed by this Court, the League respectfully requests that this Court then find the Commission statute unconstitutional under Article V, Section 35. Such a holding would be essential if the original purpose and limitation embodied in Article V, Section 35 is to retain any viability in our Constitution. To affirm the Court of Appeals decision in the face of Article V, Section 35 would invite the legislature to strip municipalities of their land use and other traditional regulatory authority over various other businesses that consider such regulation inconvenient. One can envision the "Colorado Manufactured Housing Siting Commission," the "Livestock Facility Siting Board," the "Major Industrial Facility Siting Commission." Retention of municipal authority over a wide variety of businesses would come to depend very little upon whether such regulation was a traditional "municipal function" and would depend instead upon whether a given business interest that sufficient lobbying clout at the

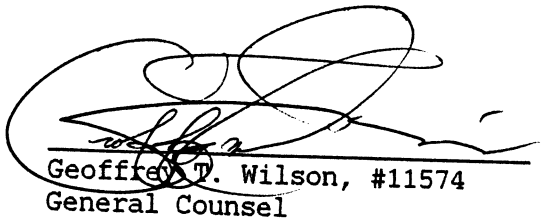
Statehouse. The League respectfully submits that it is not unreasonable to assume that this is just the sort of intrusion that Article V, Section 35 was designed to prevent.

VI. CONCLUSION

The Court of Appeals finding that all municipal authority to regulate oil and gas drilling activity within its jurisdiction, including even land use control over well location, is extinguished by the simple delegation of rule-making authority to the Commission has no foundation in the text of the Commission's statute itself and is absolutely contrary to the legislative history of the section upon which the Court of Appeals relied. Furthermore, any consideration of legitimate municipal interests in regulating the land use aspects of oil and gas drilling activity, including well location, demonstrates that the Court of Appeals went too far in finding such regulation a matter of statewide concern, thus eliminating all municipal land use authority. To the extent there is any requirement that state rules and regulations supersede conflicting local requirements, there is no conflict here between municipal land use control of Commission permitted activity. Finally, if the Commission statute is construed to include a complete delegation of all municipal land use authority over oil and gas drilling activity to the Commission, Article V, Section 35 of the Colorado Constitution is violated.

For the foregoing reasons the League respectfully requests this Court to reverse the most unfortunate decision of the Court of Appeals.

Respectfully submitted this 19th day of August, 1991.



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