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SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, CO 80203 Colorado Court of Appeals, Case No. 03CA2523 Pitkin County District Court, Case No. 01CV124	▲ COURT USE ONLY ▲
Petitioner: THE TOWN OF CARBONDALE, a Colorado home rule municipal corporation, v. Respondent: GSS PROPERTIES, L.L.C., a North Carolina limited liability company,	
Attorney for Amicus Curiae: Geoffrey T. Wilson, #11574 COLORADO MUNICIPAL LEAGUE 1144 Sherman Street Denver, CO 80203-2207 Telephone: 303.831.6411 Fax: 303.860.8175 E-mail: gwilson@cml.org	Case Number: 05SC749
BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE IN SUPPORT OF THE TOWN OF CARBONDALE	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE(S)

STATUTES

OTHER AUTHORITIES

COMES NOW, the Colorado Municipal League (the "League") through its undersigned attorney and submits this Brief as *amicus curiae* in support of Petitioner, the Town of Carbondale ("Carbondale" or the "Town").

STATEMENT OF FACTS AND OF THE CASE

The League hereby adopts and incorporates by reference the statement of facts and of the case in the opening brief of Petitioner, the Town of Carbondale.

STATEMENT OF ISSUES ON APPEAL

As announced in its Order of July 17, 2006 granting the Town's petition for certiorari, the issues before the Court in this appeal are:

(1) Whether the trial court erred in refusing to permit the defendant to raise preemption for the first time by motion for summary judgment, under the circumstances of this case, and

(2) Whether the Court of Appeals erred in remanding for the defendant to have an opportunity to establish that Carbondale's watershed protection ordinance, as applied in this case, was preempted by an operational conflict with one or more state statutes.

SUMMARY OF ARGUMENT

This case presents an important opportunity to clarify the operational conflict prong of the three part preemption analysis described by this Court in

Board of County Commissioners of La Plata County v. Bowen/Edwards Associates, Inc., 830 P.2d 1045 (Colo. 1992). "Operational conflict" preemption analysis occurs when a party protesting a local legislative act is unable to demonstrate either an express or implicit intent on the part of the General Assembly to preempt local government authority. In such circumstances, this Court has directed that a party protesting a local enactment must show that such enactment, in operation, "materially impairs" or "destroys" the state's interest. This high standard, coupled with an absence of legislative intent to preempt, supports consideration of "operational conflict" preemption arguments in a manner deferential to the challenged exercise of local authority.

As part of that deference, courts should not too readily to find conflict between a local enactment and state statutes. Indeed, it is consistent with well established rules of construction that state and local legislative acts be read harmoniously and effect be given to both, whenever possible.

The various environmental statutes cited by Respondent as the basis for "operational conflict" preemption of the Town of Carbondale's watershed protection ordinance do not reflect any state interest that would be impaired by operation of the Town ordinance. There is, in short, no conflict between the town ordinance here at issue and the cited statutes. As there is no conflict, there is no

need for remand of this case. It would be a waste of judicial resources, as well as local government fiscal resources, to spend time in the lower court developing a full evidentiary record concerning whether such non-existent conflict "materially impairs" or even "destroys" the state interest reflected in the statutes cited.

ARGUMENT

The League hereby adopts by reference the argument of the Town of Carbondale in its Opening Brief, and further submits the following argument.

The League will focus its argument on the second issue identified by the Court in its order granting the writ of certiorari, i.e., whether the Court of Appeals erred in remanding this case, in order to give Respondent an opportunity to establish "operational conflict" preemption of the Town's watershed protection ordinance.

I. "Operational conflict" should be treated as a preemption standard deferential to the challenged exercise of local legislative authority; a party challenging a local law on this basis should make a clear, threshold showing of apparent conflict between the local law and a state interest, before development of a full evidentiary record exploring the extent of such conflict is required.

This case presents an important opportunity to clarify the "operational conflict" prong of this Court's three-part preemption analysis, which directs Colorado courts in the critical function of determining the appropriate division of powers between the state and local governments.

The case at bar illustrates the practical significance of the Court's preemption analysis in operation. This case involves a preemption challenge to the Town's effort to protect its citizens' public water supply from contamination. It would be difficult to identify a subject of more central importance to Colorado municipalities than the ability to protect the health and safety of their citizens by protecting their water supply.

In Board of County Commissions of La Plata County v. Bowen/Edwards Associates, Inc., 830 P.2d 1045 (Colo. 1992), a case involving the appropriate division of land use authority between local governments and the state in the area of oil and gas regulation, this Court set forth its three-part approach to analyzing claims of preemption of local government authority.

> There are three basic ways by which a state statute can preempt a county ordinance or regulation: first, the express language of the statute may indicate state preemption of all authority over the subject matter [citations omitted]; second, preemption may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest [citation omitted]; and third, a local law may be partially preempted where its operational effect would conflict with the application of the state statute [citations omitted].

Bowen/Edwards, 830 P.2d at 1056-1057. In elaborating on the "operational conflict" aspect of this analysis, the Court explained that:

> State preemption by reason of operational conflict can arise *where the effectuation of a local interest would materially*

> *impede or destroy the state's interest* [citation omitted]. Under such circumstances, local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest.

Id., 830 P.2d at 1059 (emphasis added).

The Bowen/Edwards Court emphasized that any determination of whether the conflict between a local regulation and the state interest rises to the level where full or partial preemption is appropriate "must be resolved on an ad-hoc basis under a fully developed evidentiary record." Bowen/Edwards, 830 P.2d at 1060.

This Court in Bowen/Edwards did not focus on the threshold issue of possible conflict between the local county regulations and the state interest reflected in the state statutes regulating oil and gas drilling practices. The statutes reflected a state interest in promoting the development, production and utilization of oil and gas resources, Bowen/Edwards, 830 P.2d at 1048, while the county regulations at issue were motivated by a desire to protect, among other things, the health, safety and convenience of residents of La Plata County. Bowen/Edwards, 830 P2d at 1050. The effectuation of the county's interest, through application of the county's broad and detailed oil and gas regulations, had the very real potential to conflict with the state's interest.

Because a fully developed evidentiary record had not been developed in the trial court, the Bowen/Edwards' Court remanded the case for development of such

a record. Consequently, the Bowen/Edwards' Court focused on what must be shown on remand to warrant preemption of the local regulation, that is, that operation of the local regulation would "materially" impair, or "destroy" the state's interest.

The League urges that "operational conflict" should be construed as a standard deferential to the challenged exercise of local government authority. After all, a court only considers the possibility of operational conflict preemption after it has determined that the General Assembly has neither *expressly* preempted local government authority in the area in question, nor may such an intent be *inferred* from the statutory scheme. At this point, the party objecting to an exercise of local authority must show not simply that the local rule requires more than a state statute or rule, nor simply that the local rule might somehow complicate fulfillment of the state's interest. Rather, the party seeking preemption must demonstrate that operation of the local ordinance will "materially impede" or "destroy" the state's interest. Bowen/Edwards, 830 P.2d at 1059.

These are strong words. The League respectfully urges that this Court, in Bowen/Edwards, chose those words deliberately, intending to establish a heavy burden for those seeking preemption of local government authority, when there is no evidence that the General Assembly intended such preemption.

It is consistent with this deference that, in the context of an operational conflict challenge, courts not too readily find conflict between state statutes and local legislation. In such circumstances, the party seeking to avoid application of a local ordinance should be obliged to make a clear, threshold showing of apparent conflict between the local ordinance, in operation, and the specific state interest reflected in the state statutes.[1] This showing should be made before local citizens are obliged to pay for development of a full evidentiary record in defense of their ordinances, which record is intended to establish whether the particular local requirement at issue, as applied, "materially" impairs or "destroys" the state's interest.

Deference to local legislation by courts considering "operational conflict" based preemption challenges to local ordinances is appropriate, not just because of the lack of preemptive intent on the part of the General Assembly, but also because

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[1] The test for determining whether a conflict exists is "whether the ordinance in question either licenses or permits that which the state statute prohibits or whether it proscribes, burdens or limits that which the statute authorizes." Lakewood Pawnbrokers, Inc. v. City of Lakewood, 183 Colo. 370, 374, 517 P.2d 834, 836 (Colo. 1973); *see also* Denver & Rio Grande Western R.R. v. City and County of Denver, 673 P.2d 354, 361 n.11 (Colo. 1983); National Advertising Co. v. Dept. of Highways, 751 P.2d 632, 638 (Colo. 1988); Sant v. Stephens, 753 P.2d 752, 756-57 (Colo. 1988).

such an approach is consistent with well established rules governing the construction of statutes and ordinances.[2]

Under such rules, "[a] statute and an ordinance will not be held to be repugnant to one another if any reasonable construction upholding both can be reached." 1A Singer, Statutes and Statutory Construction (6th ed.) §30:5. Accord: People v. Smith, 971 P.2d 1056 (Colo. 1999); Smith v. Zufelt, 880 P.2d 1178 (Colo. 1994); (when interpreting more than one statute, court will favor a construction that avoids potential conflict between the relevant provisions); Riley v. People, 828 P.2d 254 (Colo. 1992) (when possible, apparently conflicting statutory provisions should be construed harmoniously together); Sigman, et. al., v Seafood Limited Partnership I, 817 P.2d 527 (Colo. 1991) (statutory constructions which defeat obvious intent of legislature must be avoided and courts must construe statutes harmoniously whenever possible).

That courts should endeavor to avoid finding conflict between state and local legislative acts, and should attempt to harmonize and give effect to both was also part of this Court's instruction in Bowen/Edwards and in its companion decision (issued on the same day as Bowen/Edwards), Voss v. Lundvall Brothers, Inc., 830 P.2d 1061 (Colo. 1992).

[2] "As a general rule, courts apply the same rules of construction to municipal ordinances and they do to statutes." 1A Singer, Statutes and Statutory Construction (6th ed.) §30:6, citing Catholic Archdiocese of Denver v. City and County of Denver, 741 P.2d 330 (Colo. 1987).

The Bowen/Edwards Court, in the course of rejecting an oil and gas industry's field preemption argument based on the state oil and gas statutes, observed that the state's interest, reflected in those statutes:

> . . .is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.

Bowen/Edwards, 830 P.2d at 1058.

Voss concerned a Greeley ordinance that completely prohibited oil and gas development anywhere in the city. The Court found the city ordinance preempted due to "operational conflict" with the state interest reflected in the oil and gas statutes. Citing to those statutes, the Court found that Greeley's exercise of local land use authority, in this particular case, "substantially impeded" the state's interest in "fostering the efficient development and production of oil and gas resources in a manner that prevents waste and furthers the co-relative rights of owners and producers in a common pool or source of supply to a just and equitable share of profits." Voss, 830 P.2d at 1068. The Court was careful to add, however, that:

> In so holding, we do not mean to imply that Greeley is prohibited from exercising any land use authority over those areas of the city in which oil and gas activities are occurring or are contemplated.
>
> . . .

> If a home-rule city, instead of imposing a total ban on all drilling within the city, enacts land use regulations applicable to various aspects of oil and gas development and operations within the city, and if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulation should be given effect.

Voss, 830 P.2d at 1068-69.

This language from Voss (which brackets an extensive quotation of language from the Bowen/Edwards' opinion reciting how state and local interests are not so irreconcilably in conflict as to eliminate by necessary implication any prospect for harmonious application of both regulatory schemes) provides importance guidance as to what this Court had in mind in referring to "operational conflict."

In both Bowen/Edwards and Voss, this Court strongly implied that if local regulations "do not frustrate and can be harmonized with" the state interest reflected in the statutory scheme, the local regulations will not be preempted by reason of "operational conflict."

There are, of course, appropriate circumstances in which a municipality should be obliged to answer an operational conflict preemption challenge to an exercise of its authority. The opportunity of those who have failed to show either express or implied legislative intent to preempt to launch an "operational conflict"

attack on local authority should not, however, be completely unfettered. Some limit is reasonable and appropriate. Something more than citation of a state statute regulating the same general subject as the local regulation should be required.

Preemption challenges based on "operational conflict" are serious business. The judicial branch is being asked, in the absence of any preemptive intent by the General Assembly, to address the division of legislative authority between two levels of government.

Furthermore, the possibility of preemption challenges to all manner of municipal ordinances is of immense concern to municipalities for a very practical reason. There are now a state statutes addressing virtually every potential topic of local legislation; any one or more of these statutes potentially provides the basis for an "operational conflict" preemption defense to a local ordinance violation. Having to pay counsel and expert witnesses for development of the full evidentiary record that is required in these operational conflict-based preemption attacks is not cheap. Colorado towns often find themselves confronted by powerful, well-heeled commercial, industrial or development interests. For example, in the leading case construing §31-15-202(1)(b) C.R.S., (the municipal "watershed protection statute") pursuant to which the Town of Carbondale enacted the ordinance that is the target of preemption here, the small town of Crested Butte was pitted against

molybdenum mining giants AMAX, Inc., and the Mt. Emmons Mining Company, in a challenge to the town's efforts to protect its water supply from pollution. Mt. Emmons Mining Company, et. al., v. Town of Crested Butte, 690 P.2d 231 (Colo. 1984). It would be regrettable if adding an operational conflict preemption challenge became a routine litigation gambit, certain to drive up a town's (and thus the taxpayers) costs and encouraging capitulation or settlement in these important challenges to municipal authority.

This appeal presents this Court with an opportunity to clarify what sort of threshold, prima-facie showing of conflict between the state's interest and a local ordinance or regulation should be required of a party seeking to avoid application of local legislation through an operational conflict preemption challenge. Failure to make such a threshold showing of conflict should result, not in remand, but in an end to the preemption challenge. Such a result would appropriately conserve local government and judicial resources.

The statutes cited as the basis for proposed "operational conflict" preemption of the Town's watershed protection ordinance in the case at bar illustrate why this case presents such an ideal opportunity to address these important issues.

II. There is no apparent conflict between the Town's ordinance and any of the statutes cited by Respondent; consequently, remand to explore whether such non-existent conflict rises to the level of an "operational conflict" is not warranted.

None of the statutes relied upon by Respondent reveal a state interest that will be impaired in *any way* by operation of the Town's ordinance. There is simply no conflict here. Further exploration, on remand, of whether this non-existent conflict is so substantial as to constitute a *material* impairment, or *destruction*, the state's interest is not warranted.

Colorado Water Quality Control Act

In adopting the Colorado Water Quality Control Act (CWQCA), §25-8-101-703, C.R.S., the General Assembly was explicit about the state interest being served.

> [I]t is declared to be the policy of this state to prevent injury to beneficial uses made of state waters. . . and, within this context, to achieve the maximum practical degree of water quality in the waters of the state consistent with the welfare of the state. It is further declared that pollution of state waters may constitute a menace to public health and welfare, may create public nuisances, . . . and may impair beneficial uses of state waters.

§25-8-102(1), C.R.S.

Turning particularly to the subject of the case at bar, the protection of public water supplies, the General Assembly continued:

> [I]t is further declared to be the public policy of this state to conserve state waters and to protect, maintain, and improve, where necessary and reasonable, the quality thereof for public water supplies, for domestic, and for other beneficial uses, [and] to provide for the prevention, abatement, and control of new or existing water pollution.

§25-8-102(2), C.R.S.

The General Assembly was careful to make it clear that no provision of the CWQCA, nor "anything done by virtue of this article [shall] be construed as stopping individuals, cities, towns, counties, city and counties, or duly constituted political subdivisions of the state from the exercise of their respective rights to suppress nuisances." §25-8-612(3), C.R.S.[3] On the other hand, while expressly preserving municipal authority to *limit* discharge of water pollutants to prevent nuisances, the General Assembly also expressly preempted municipalities from using their authority to regulate water pollution to *authorize* discharge of pollutants, other than as provided in the CWQCA.

> [N]o municipal corporation. . . having jurisdiction over water pollution prevention, abatement, and control, shall issue any authorization for the discharge of pollutants into state waters unless authorized to do so in accordance with this article.

§25-8-102(4), C.R.S.

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[3] Pollution of water supplies is well established as a nuisance in Colorado law. Section 16-13-305(1)(e), C.R.S., declares "any unlawful pollution or contamination of surface or subsurface waters" in Colorado a Class 3 public nuisance. Notably, the state nuisance statutes provides that no action shall be brought under the statue if any local government "acting pursuant to statute or duly adopted regulation [has] assumed jurisdiction by the institution of proceedings on that pollution or contamination." *See* also State Dept. of Health v. The Mill, 887 P.2d 993, 1002 (Colo. 1995).

Taken together, these provisions of the CWQCA make it clear that the policy of the state is to prevent and control water pollution that could interfere with domestic and other beneficial uses of water. A role for municipal and other local governments in furtherance of this policy is clearly contemplated. Municipal authorization of pollution beyond that permitted by the CWQCA is what would conflict with and likely "materially" impair the state interest reflected in the CWQCA. Additional local *limits* on discharge of pollutants, to the extent necessary to abate nuisances, are expressly contemplated; indeed, the General Assembly urged courts not to construe the Act to diminish this important municipal authority.

By contrast, one searches in vain in the CWQCA for any indication whatsoever that it is the policy or "interest" of the state to license, encourage or facilitate certain levels of pesticides, herbicides and fertilizers in public water supplies.

Far from conflicting with the state policy reflected in the CWQCA, the Carbondale ordinance here at issue is entirely consistent with and complimentary to the state policy. Both Carbondale and the State seek to protect water quality and avoid pollution.

As there is no conflict here, there is no need to remand this issue for development of a fully developed evidentiary record to determine whether Carbondale's ordinance would, in operation, "materially impair or destroy" the state's interest. Bowen/Edwards, 830 P.2d at 1059.

Colorado Drinking Water Quality Act

GSS proposes that "operational conflict" between Carbondale's watershed protection ordinance and the state's interest in drinking water quality, as reflected in the Colorado Drinking Water Quality Act (CDWQA) §25-1.5-201-209, C.R.S., should result in preemption of the town's ordinance, permitting GSS to continue discharge of pesticides, herbicides and fertilizers into the town's watershed.

Rather than supporting Respondent's position, the text of the CDWQA reflects the General Assembly's intent that protection of public drinking water be a *shared* responsibility, involving both the state and local governments. Under this sensible arrangement, local government is expected to take a lead role in protecting water *supplies* (above the water treatment plant), and in treating water at the treatment plant to meet "tap standards." These tap standards are, in turn, promulgated by and primarily enforced by the State.

Consistent with this approach, the focus of regulation under the CDWQA is not individuals, such as Respondent, but "each public water system in this state"

§25-1.5-206(1), C.R.S. Colorado's Department of Public Health and Environment (the "Health Department") is directed to "adopt and enforce minimum general sanitary standards and regulations to protect the quality of *drinking water supplied to the public*" §25-1.5-203(1)(b), C.R.S., (emphasis added).

Thus, the clear object of the CDWQA is state development and enforcement of "tap standards." The Carbondale ordinance regulates pollution of the town's source water supply, above the water treatment plant. The ordinance simply does not set tap standards or regulate water "supplied to the public" *at all.*

The shared role of state and local governments contemplated by the General Assembly is reflected in the CDWQA authorization of the Health Department to assist local governments in their roles of protecting water supplies and treating drinking water. The CDWQA authorizes the Department to "advise municipalities. . . concerning the methods or processes believed best suited to provide the protection or purification of water to meet minimum general sanitary standards adopted pursuant to [the Act]." §25-1.5-205, C.R.S.

Further augmenting the role of local governments, the General Assembly included in the CDWQA a provision authorizing any political subdivision or public water system to "bring suit to collect damages and for injunctive relief, *in addition to all remedies otherwise available*, to prevent or abate any release or imminent

release of contaminants or substances in water withdrawn for use," in circumstances where the discharge could pose threat to the water plant or the plant's ability to properly treat the water withdrawn for use. §25-1.5-207(1)(a), C.R.S. (emphasis added.) The language used in this section manifests the intent of the General Assembly to supplement, rather than diminish existing local authority, such as that exercised by municipalities pursuant to the watershed protection statute.

Beyond the apparent legislative intent not to diminish local authority, which may be inferred from the foregoing provisions, the CDWQA contains explicit language in which the General Assembly declares its desire that the language of the Act *not* be construed as GSS is here urging:

> [N]othing in this section shall be construed to restrict or preempt any right which. . . any public water system or any other person may have under any other law to seek enforcement, in any court or in any administrative proceeding, of any provision of this section or any other relief regarding contamination of any drinking water supply. In addition, nothing in this section shall be construed to condition, restrict, or prevent any other civil or criminal actions which may be brought by . . . any political subdivision pursuant to any other state or federal statute or regulation or any local ordinance or regulation.

§25-1.5-207(2), C.R.S. (emphasis added).

In this broad language, the General Assembly made it very clear that nothing in the CDWQA was to be read by the courts as supporting a preemption argument

such that made by Respondent here. The historic authority provided to municipalities in the watershed protection statute fits neatly into the evident legislative scheme for shared responsibility between the state and local governments in the provision of safe water to the public. Indeed, any construction of the CDWQA to somehow *impair* the authority of municipalities to protect their drinking water supplies would be directly contrary to the explicit, plainly stated intention of the General Assembly.

The CDWQA simply does not conflict with Carbondale's ordinance. Nothing in the language of the Act reveals a state interest in maintaining, facilitating or encouraging a minimum level of pesticides, herbicides or fertilizer in municipal watersheds, and nothing in the Town's ordinance in any way impairs compliance with CDWQA tap standards.

As there is no conflict, there was no need to remand this case to the Trial Court for exploration, through development of a full evidentiary record, of whether this non-existent conflict rises to the level where preemption might be appropriate.

Department of Agriculture Act

In adopting the Department of Agriculture Act (DAA), §35-1.5-101-103, C.R.S., the General Assembly obviously anticipated just the sort of argument that GSS is making in the case at bar. The General Assembly stated, in no uncertain

terms, that such a construction of the DAA would be contrary to its intent. The General Assembly provided in the opening subsection of the DAA that:

> (1) Nothing in this article shall be construed to limit the authority of a local government to:
>
> (a) Zone for the sale or storage of any agricultural chemical, provide or designate sites for disposal of any agricultural chemical or container, regulate the discharge of any agricultural chemical into sanitary sewer systems, adopt regulations pursuant to a storm water management program that is consistent with federal or state regulation, adopt or enforce building and fire code requirements, or *to protect surface or ground water drinking water supplies in accordance with current state or federal applicable law.*

§35-1.5-101(1)(a), C.R.S. (emphasis added).

Obviously, one way that the DAA might be "construed to limit the authority of local government" to protect drinking water supplies would be to find in the DAA a basis for "operational conflict" preemption of the authority granted to municipalities under the watershed protection statute. This the General Assembly sought explicitly to avoid.

Indeed, the intent of the General Assembly is patent and unambiguous. It is difficult to imagine how the General Assembly might have been more clear.

Respectfully, citation of the DAA as the basis for operational conflict preemption of the town's ordinance need not long detain this Court. Similarly, the League urges that remand, so that Carbondale's taxpayers may foot the bill for development of a "full evidentiary record" exploring whether Carbondale's ordinance somehow "materially" impairs or "destroys" the state interest reflected in the DAA, would also be a waste of judicial and taxpayer resources.

This situation illustrates, in glaring terms, the importance of direction from this Court as to what sort of initial showings must be made by a party who, in the absence of any intent on the part of the General Assembly to preempt local government authority, seeks to avoid application of a local legislative act by preemption, based on alleged "operational" conflict with a state statute.

Pesticide Applicators Act

GSS suggests that its compliance with the town's watershed protection ordinance would conflict with, and indeed would "materially" impair or "destroy" the state's interest reflected in the Colorado Pesticide Applicator's Act (PAA), §35-10-101-128, C.R.S.

As with several of the other environmental statutes cited by Respondent, in the PAA the General Assembly anticipated, and sought to avoid, precisely the sort of argument that Respondent is making here.

While expressly preempting local authority to regulate certain matters, such as labeling, registration, classification, mixing, use and dosage rates for pesticides, §35-10-112.5(2), C.R.S., the General Assembly was also careful to state clearly that *nothing* in the PAA (including any of the foregoing express preemptions) is intended to limit municipal watershed protection authority.

> 3(a) Nothing in this article may be construed to limit the authority of a local government as defined by state law to:
>
> (I) Zone for the sale or storage of any pesticide, provide or designate sites for disposal of any pesticide or pesticide container, adopt or enforce building and fire code requirements, regulate the transportation of pesticides consistently with and in no more strict of a manner than state and federal law, adopt regulations pursuant to a storm water management program that is consistent with federal or state law, or *adopt regulations to protect surface or ground water drinking water supplies consistent with state or federal law concerning the protection of drinking water supplies.*

§35-10-112.5(3)(a)(I), C.R.S.[4]

Once again, the General Assembly apparently anticipated just the sort of argument that GSS is making here, and sought to make it clear that any construction of the PAA that would limit the authority of municipalities to protect their water supplies from pollution would *not* be consistent with legislative intent or state policy. Adoption of the town's watershed protection ordinance "consistent with" §31-15-707(1)(b), C.R.S., and its application to GSS, simply does not conflict with any state interest reflected in the PAA.[5] The taxpayers of Carbondale should not be forced to pay for the development of a full evidentiary record, in the absence of any indication of a bona fide conflict between the town's ordinance and the state interest reflected in the PAA.

Colorado's "Right-to-farm" Law

Finally, Respondent cites §35-3.5-101-103, C.R.S., Colorado's "Right-to-farm" law, as a basis for operational conflict preemption of the Town's watershed protection ordinance.

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[4] It is worth noting that, in connection with preserving local authority to regulate *transportation* of pesticides, the Act provides that such local regulations must be consistent with "and in no more strict of a manner than state or federal law." Local regulations designed to *protect drinking water supplies*, on the other hand, need only be "consistent" with state or federal law. Significantly, there is no provision that such local regulations be no more stringent than state or federal requirements.

[5] Indeed, the PAA likely does not even apply to Respondent, insofar as the Act by its terms does not apply to "any individual who uses a device or applies any pesticide or supervises such acts *at his home* or on his property, when such use or supervision is not compensated and is not in the course of conducting a business." §35-10-104(2)(c), C.R.S. (Emphasis added)

Right-to-farm laws were adopted by many states during the 1980's as a reaction to urban encroachment on agricultural operations.

> As urban development begins to surround farmland, conflicts between the competing land uses frequently result in nuisance lawsuits by residents against farmers. Residential neighbors often complain about the odors, flies, animal control problems, noise, dust, chemical spraying, and other necessary incidents of farming operations. The surrounding residential neighbors may bring a nuisance lawsuit against the farming operation to curtail its interference with surrounding development uses. . .Farmers then find it necessary to defend themselves in court against lawsuits and enforcement of local ordinances. States have responded to remedy the conflict through "right-to-farm" laws. These statutes codify the "coming to the nuisance defense," providing protection to agricultural operations that were in place before the neighboring residential development.

Linda A. Malone, "Right-to-farm laws and the Farm as Nuisance: Land Use Conflicts Between Farmland and Development," 1 Envtl. Reg. of Land Use §6:15 (2006). Furthermore, in describing right-to-farm statutes generally, it has been explained that:

> To be protected by a right-to-farm statute, the operator must be conducting agricultural activities on farmland; the operation must conform to all federal, state, and local laws; and the operation must have been established prior to the inception of the conflicting nonagricultural activities. That which may constitute a nuisance regardless of urban sprawl, such as polluting a stream, is not protected by the statute.

66 C.J.S. Nuisances §14. Finally, even right-to-farm laws are limited in their protections; "[r]ight-to-farm laws protect existing agricultural operations. When

agricultural activities expand or change, a neighbor may have a cause of action notwithstanding any right-to-farm statute." James C. Smith and Jacqueline P. Hand, Neighboring Property Owners §2:13 (2005).

Colorado's right-to-farm statute appears to be well within the description set forth above. In the legislative declaration for the statute, the General Assembly declared its recognition that "when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits." The General Assembly declared the purpose of the statute to be to "reduce the loss to the state of Colorado of its agricultural resources." §35-3.5-101, C.R.S. The Colorado statute provides that an agricultural operation shall not be found to be a public or private nuisance if such agricultural operation "was established prior to the commencement of the use of the area surrounding such agricultural operation for nonagricultural activities." §35-3.5-102(2)(a)(I), C.R.S.

The facts in this case are plainly of a very different sort than the General Assembly had in mind, when it adopted the Colorado right-to-farm statute. This is not a situation where urbanized development is encroaching upon and impairing an agricultural operation. The property in question was used as a hay meadow for many years, and there was never any issue of compatibility of this use with the Town's watershed protection ordinance. This controversy arose only after

Respondent purchased property in an area then subject to the Town's watershed protection ordinance. Respondent substantially changed the use of the property, constructed a luxury home on the site and commencing application of pesticides, herbicides and fertilizers, in violation of the Town ordinance. Obviously, this is not the classic "moving to a nuisance" situation contemplated by the "right-to-farm statute.

It is well established that statutes will be construed in light of the intent of the General Assembly and the object to be obtained. Mishkin v. Young, 107 P.3d 393 (Colo. 2005); Lobato v. Industrial Claim Appeals Office, 105 P.3d 220 (Colo. 2005). Here, as with the other environmental statutes cited by Respondent in this appeal, there is simply no conflict whatsoever between the Town's watershed protection ordinance and the purposes served by Colorado's right-to-farm statute. Consequently, there is no reason to remand this case for purposes of exploring whether the Town ordinance, in operation, would somehow "materially impede" or "destroy" the state interest reflected in adoption of the Colorado right-to-farm statute.

CONCLUSION

The League respectfully urges that the taxpayers in Carbondale, and in other local governments across Colorado, should not be dragooned into development of

a fully developed evidentiary record whenever a party seeking to avoid application of a municipal ordinance discovers a state statute apparently addressing a similar subject to the municipal ordinance, and claims "operational conflict" preemption.

At the very least, the party attacking the local exercise of authority should be required to: (a) clearly identify what the state's interest *is*, and (b) make a clear threshold showing of apparent conflict between the local regulation and the state interest reflected in the state statute. Then, in order to support preemption of the local regulation, under this standard deferential to local regulation, it must be shown by a fully developed evidentiary record that operation of the local regulation in question would "materially" impair, or "destroy" the state's interest.

WHEREFORE, for the reasons stated herein and in the brief of the Town of Carbondale, the League respectfully urges this Court to reverse the decision of the Court of Appeals, and remand the case with directions to affirm the judgment of the District Court.

Respectfully submitted this 30th day of October 2006.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE IN SUPPORT OF THE TOWN OF CARBONDALE was placed in the U.S. Postal System by first class mail, postage prepared, on the 30th day of October 2006.

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