



HOUSE OF REPRESENTATIVES
WASHINGTON, D. C. 20515

January 8, 2013

Matt Lepore, Director
Colorado Oil and Gas Conservation Commission
1120 Lincoln Street, Suite 801
Denver, Colorado 80203

Dear Director Lepore:

Thank you for the opportunity to comment on the Colorado Oil and Gas Conservation Commission's (the "Commission") revised draft Statewide Setbacks and Aesthetic and Noise Control Rules ("Revised Draft Rules") issued December 31, 2012. I am commenting on behalf of the residents of Colorado's Second Congressional District. The outcome of this rulemaking is extremely important to the residents of Colorado's Second Congressional District and consequently, I have been closely following the rulemaking process.

Development of Colorado's oil and gas resources is an important part of Colorado's energy and economic future. At the same time, community members in my district are concerned that oil and gas operations—an inherently industrial activity—near their residences, schools, and agricultural land affects public health and quality of life. I urge the Commission to create rules that strike a harmonious balance between local and state regulations to ensure responsible development of oil and gas in our state. Confirming the existing power of local governments to enact reasonable oil and gas land use controls is essential to the balanced development of our natural resources. Confirming the broad authority of local governments to enact land use controls also reduces any existing uncertainty for localities that have properly enacted such ordinances. While I appreciate the Revised Draft Rules attempt to harmonize its Revised Draft Rules with localities by providing opportunities for involvement to Local Government Designees, it is far more important that the Commission support the local governments that have chosen to update their ordinances to regulate traditionally local land use aspects of oil and gas development.

The current version of Commission Rule 201 states that nothing in the Commission's rules shall alter, impair, or negate the "authority of local and county governments to regulate land use related to oil and gas operations." The Colorado Oil and Gas Conservation Act mandates the same result by using similar language at C.R.S. 34-60-127(3)(c) and 128(4). Since the Commission has not recognized local land use authority in the proposed amendments to its rules and has actually sued at least one municipality over amendments to its land use code, I am extremely concerned that the Commission is using this rulemaking as an opportunity to preempt local governments from enacting reasonable land use measures.¹ Although numerous local governments have requested that the Commission recognize their land use authority over oil and

¹ Complaint, *Colorado Oil and Gas Conservation Commission v. City of Longmont*, (Boulder Co. Dist. Ct. 2012).

gas operations, the Revised Draft Rules do not formally affirm that local governments may properly enact land use regulations over oil and gas operations in their jurisdictions. The final rules promulgated by this Commission should recognize that local governments may enact ordinances that both address land use and that provide greater environmental and public health protections than are available under the Revised Draft Rules.

I. Local governments are best suited and have the legal authority to address concerns of local community members through zoning and local land use planning.

Local governments have long been responsible for enacting zoning codes and land use ordinances that fit the needs of their communities. Over eighty-five years ago, in the seminal case *Village of Euclid v. Ambler Realty Co.*, the Supreme Court recognized that local zoning ordinances are important to prevent the proverbial “pig in the parlor instead of the barnyard.”² To this day, local governments are responsible for preserving the character of local communities by enacting land use controls that designate “districts in which only compatible uses are allowed and incompatible uses are excluded.”³

Local governments “have the authority to regulate land use and development within their jurisdictions under the Local Government Land Use Control Enabling Act, § 29-20-101, et seq., C.R.S. 2002, and the County Planning Code, § 30-28-101, et seq., C.R.S. 2002.”⁴ The Local Government Land Use Control Enabling Act provides local governments with broad authority to plan for and regulate land use within their jurisdiction.⁵ The County Planning Code authorizes counties to enact a zoning plan for the unincorporated territory within the county.⁶ Taken cumulatively, these statutes expressly delegate authority to local governments to regulate oil and gas land use activities because oil and gas operations are quintessential matters of local concern that directly involve the use of land.⁷ For example, if a developer wants to build a skyscraper or a factory, he or she must follow local planning and zoning regulations. Oil and gas operators should be subject to the same zoning ordinances that surface users must follow.

The broad authority of local governments to plan for and regulate land use in Colorado makes sense from a policy perspective. Across the country, local governments are often the first

² 272 U.S. 365, 388 (1926).

³ Daniel R. Mandelker, *Land Use Law* § 4.16, 113–114 (3d ed. 1993); *see also Village of Euclid*, 272 U.S. at 388 (1926).

⁴ *Board of County Commissioners, La Plata County v. Colorado Oil and Gas Conservation Commission*, 81 P.3d 1119, 1123 (Colo. App. 2003) (emphasis removed) (addressed the extent to which local governments and the state can regulate oil and gas operations and development).

⁵ The Local Government Land Use Control Enabling Act provides counties with power “to regulate development and activities in hazardous areas, to protect land from activities that would cause immediate or foreseeable material damage to wildlife habitat . . . to regulate the location of activities and development which may result in significant changes in population density, to provide for the phased development of services and facilities, to regulate land use on the basis of its impact on the community or surrounding areas, and to otherwise plan for and regulate land use so as to provide for the orderly use of land and the protection of the environment.” *Board of County Commissioners, La Plata County v. Bowen/Edwards*, 830 P.2d 1045, 1056 (Colo. App. 1992); *see also Voss v. Lundvall Brothers, Inc.*, 830 P.2d 1061, 1064 (Colo. 1992).

⁶ The County Planning Code allows for county zoning regulations that classify land uses and the distribution of land development and utilization. *Bowen/Edwards*, 830 P.2d at 1056.

⁷ *Id.*

governmental entity—and better positioned than federal or state governments—to address contentious public questions. To solve contentious issues, local governments provide increased opportunities for public participation and act consistently with their constituents’ expectations by enacting land use and zoning measures. Recently, cities and counties in my district and throughout Colorado have faced oil and gas development near residences, schools, and public spaces. In response, localities have enacted land use ordinances to address impacts from oil and gas developments and to ensure operators use best management practices.

On December 13th, 2012, Boulder County updated its comprehensive land use code to enact reasonable land use controls to address surface and land use impacts associated with oil and gas development.⁸ In addition, the City of Fort Collins, Garfield County, and many other local governments are considering local regulations to address future oil and gas activity in their communities. While some communities have enacted such regulations, not every county or city will choose to implement additional regulations. As a result, creating strong statewide rules as a statutory baseline is important to protect communities across the state.

Local governments have played a longstanding and important role in developing land use controls that are appropriate for the needs of their community. The Revised Draft Rules should expressly acknowledge local government’s broad authority to enact reasonable land use regulations of oil and gas operations that are more stringent than the Revised Draft Rules. I believe that the absence of these assurances in the Revised Draft Rule constitutes an effort to preempt local control of land use and would create uncertainty that would detrimentally impact both local development efforts and the extraction industry by causing years of litigation.

II. The Commission’s current rules do not preempt local governments from enacting Reasonable land use measures for oil and gas development within their jurisdiction.

It is well settled that as originally enacted, the Oil and Gas Conservation Act and the Commission’s rules do not entirely preempt local oil and gas land use regulations.⁹ In fact, when Colorado courts address oil and gas preemption questions, they have been careful to protect local land use authority over oil and gas activities in the localities’ jurisdiction.¹⁰ Because the courts have not fully defined the parameters of preemption, to reduce remaining uncertainty, the Commission should go on record as not intending to preempt local zoning and land use regulations which may also affect oil and gas operations. Further, as mentioned above, the Local Government Land Use Control Enabling Act and the County Planning Code give local

⁸ See Boulder County Proposed New Article 12 Development Plan Review for Oil and Gas Operations at <http://www.bouldercounty.org/find/library/build/dc120003draftregs20121213.pdf> (last visited January 7, 2013). In addition, La Plata County enacted extensive oil and gas regulations that were last updated in 2008.

⁹ See *Bowen/Edwards*, 830 P.2d at 1049-50; see also *Voss*, 830 P.2d at 1062. (The Oil and Gas Conservation Act does not totally preempt a local government’s exercise of land-use authority over oil and gas operations; however, a locality may not use its land use authority to totally ban drilling of oil and gas within its jurisdiction.)

¹⁰ *Voss*, 830 P.2d at 1068-69 (if a locality “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 [locality’s] regulations should be given effect.”); see also *Town of Frederick v. North American Resources Company*, 60 P.3d 758, 762 (Colo. App. 2002).

governments broad authority to regulate oil and gas operations within their jurisdictions as long as the local regulation is not in operational conflict with state statutes.¹¹

Local governments are careful to avoid operational conflicts with state statutes. For instance, Boulder County's regulations are designed to harmonize the county's land use plans with the state's interest in such oil and gas developmental activities.¹² Even though Boulder County's ordinances are within the county's broad authority to regulate land use, the Commission is subjecting the county to frivolous legal challenges and uncertainty if it does not clarify the Revised Draft Rules. The Revised Draft Rules could be interpreted to operationally preempt matters of local concern traditionally addressed by local government zoning and land use controls, such as traffic, noise, odors, and lighting. No entity would benefit from the costly legal process of untangling these contradictions and invalidating the Commission's forthcoming rules.

In the rules, the Commission should affirm that local governments may regulate local land use issues that arise from oil and gas operations through zoning or other traditional land use tools pursuant to their statutorily granted authority. In addition, the Commission should clarify that its Revised Draft Rules do not preempt local governments on regulatory matters of mixed concern, such as well locations.¹³ Where the Revised Draft Rules address matters of mixed local and state concern, the Commission should make clear that the Revised Draft Rules are a regulatory floor and not a ceiling, enabling local governments to enact more stringent environmental and public health regulations.

If the Commission intends to preempt local law, not only is the Commission overstepping its legal boundaries, it is subjecting local governments to legal challenges from the oil and gas industry.¹⁴ Legal challenges will be numerous and costly to taxpayers, since under *Bowen/Edwards*, determining whether an operational conflict exists between the local regulations and the state regulatory scheme, "must be resolved on an ad-hoc basis under a fully developed evidentiary record."¹⁵ If the Commission does not intend the Revised Draft Rules to preempt local government's ability to exercise its traditional land use and zoning authority, the Commission should expressly clarify the regulatory structure and formally incorporate traditional local land use authority into the Revised Draft Rules to protect local governments from unnecessary and frivolous law suits brought by operators who may misinterpret the Revised Draft Rules.

¹¹ State preemption by operational conflict occurs when the "operational effect of the county regulations conflict with the application of the state statute or state regulations." See *Bowen/Edwards*, 830 P.2d at 1059.

¹² *Bowen/Edwards*, 830 P.2d at 1060; see *Town of Frederick*, 60 P.3d at 762.

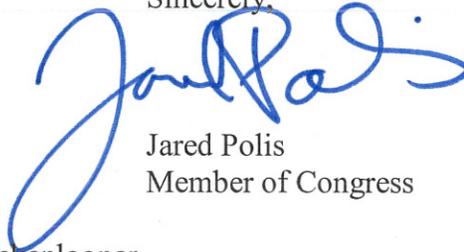
¹³ Under Colorado preemption doctrine, "matters of mixed concern" refers to matters that concern to both state and local levels of government. See *Voss*, 830 P.2d at 1066.

¹⁴ Under *Board of County Commissioners, La Plata County v. Colorado Oil and Gas Conservation Commission*, 81 P.3d at 1125, the Colorado Court of Appeals held that amendments to the rules that facially "preempt local government actions beyond those that materially impede or destroy the state interest and would give oil and gas operators license to disregard local land use regulation" erode the delicate balance between local interests and state interests.

¹⁵ *Id.* at 1123.

In conclusion, the Commission should expressly recognize that local governments are authorized to enact more protective ordinances based on local land use and zoning concerns and that the forthcoming rules are not intended to preempt traditional local land use authority. In addition, the Commission should confirm that the Revised Draft Rules are to be interpreted as a regulatory floor—rather than a ceiling—and that local governments may implement more restrictive oil and gas land use regulations that fit their community. Once again, thank you for the opportunity to comment on the Revised Draft Rules.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jared Polis", is written over the typed name and title.

Jared Polis
Member of Congress

Cc: Governor John W. Hickenlooper