

LOCAL GOVERNMENT AUTHORITY TO REGULATE OIL AND GAS OPERATIONS

Senate Bill 19-181. Senate Bill 19-181 (“SB 181”) is a major Colorado oil and gas regulatory reform bill. SB 181 amended the Colorado Oil and Gas Conservation Act (COGCA) to change, among other provisions, the Colorado Oil and Gas Conservation Commission’s (COGCC) mission from “fostering” the oil and gas industry to “regulating” it to protect public health, safety, welfare, the environment, and wildlife. SB 181 also amended the Local Government Land Use Enabling Act to clarify the scope of municipal and county authority land use authority over oil and gas operations within their jurisdictional boundaries. The COGCC conducted a comprehensive rulemaking process during 2020 to overhaul its regulations to conform to the mandate of SB 181. The COGCC Rules now expressly provide for coordination with local governments who choose to exercise their authority to regulate oil and gas development.

Local Authority Prior to SB 181. Prior to SB 181, the scope of local government authority was frequently litigated under the doctrine of preemption.¹ The propriety of specific local regulations was left to the court to decide on a case-by-case basis.² In a series of lawsuits between the oil and gas industry and local governments, the court struck down local government regulations that imposed security fees on oil and gas operations,³ that banned oil and gas development⁴ and hydraulic fracturing,⁵ or that imposed a moratorium for more than five (5) years.⁶

Scope of local government authority after SB 181. Among other reforms, SB 181:

a. Itemized local government authority. The Land Use Enabling Act was amended to grant express power to regulate the "surface impacts" of oil and gas "in a reasonable manner" for the following itemized matters:

- Land use;
- The location and siting of oil and gas facilities and oil and gas locations;
- Impacts to public facilities and services;

¹ *City of Longmont Colorado v. Colorado Oil & Gas Ass'n*, 369 P.3d 573 (Colo. 2016)(“Longmont”); *City of Fort Collins v. Colorado Oil & Gas Association*, 369 P.3d 586 (Colo. 2016)(“Fort Collins”); *Board of County Comm’rs of La Plata County v. Bowen/Edwards Assoc. Inc.*, 830 P.2d 1045 (Colo. 1992); *Voss v. Lundvall Brothers, Inc.*, 830 P.2d 1061 (Colo. 1992) (“Voss”); *Board of County Comm’rs of Gunnison County v. BDS International*, 159 P.3d 773(Colo. App.2006); *Bd. of County Comm’rs of La Plata County v. Colorado Oil and Gas Conservation Commission*, 81 P.3d 1119, 1124 (Colo.App. 2003); *Town of Frederick v. North American Resources Co.*, 60 P.3d 758 (Colo. App.2002)(cert den’d)(“Frederick”).

² *Voss* at 1060.

³ *Town of Milliken v. Kerr-McGee Oil & Gas Onshore*, 12CA1618 (2013).

⁴ *Voss* at 1069.

⁵ *Longmont* at 585.

⁶ *Fort Collins*.

- Water quality and source, noise, vibration, odor, light, dust, air emissions and air quality, land disturbance, reclamation procedures, cultural resources, emergency preparedness and coordination with first responders, security, and traffic and transportation impacts;
- Financial securities, indemnification, and insurance as appropriate to ensure compliance with the regulations of the local government;
- other nuisance-type effects of oil and gas development; and
- Otherwise planning for and regulating the use of land so as to provide planned and orderly use of land and protection of the environment in a manner consistent with Constitutional rights.⁷

b. General authority. In addition to the itemized list, local governments are generally authorized to regulate the surface impacts of oil and gas "to *protect* and *minimize adverse impacts* to public health, safety welfare and the environment."⁸

c. More protective. Local government regulations "may be more protective or stricter" than state requirements.⁹

d. County authority over noise. Allows County governments to regulate the noise impacts of oil and gas operations.¹⁰

e. Protect and minimize adverse impacts to the extent necessary and reasonable. In addition to the itemized powers in C.R.S. § 29-20-104(h), local governments have general power to "*protect and minimize adverse impacts* to public health, safety welfare and the environment."

- "Minimize adverse impacts" means "to the extent necessary and reasonable, to protect public health, safety, and welfare and the environment by avoiding adverse impact from oil and gas operations and minimizing and mitigating the extent and severity of those impacts that cannot be avoided."¹¹
- "Each locality's application of 'necessary and reasonable' may be different depending on its circumstances, and should be examined on a case-by-case basis."¹²

Questions regarding the scope of local authority. SB 181 leaves open some questions about the scope of local government authority that are yet to be resolved:

⁷ Id. at § 29-20-104 (1)(h).

⁸ Id.

⁹ Id. at § 31-60-131. See also § 34-60-105.

¹⁰ Id. at § 31-15-404

¹¹ Id. at § 29-20-104 (1)(h).

¹² Statement of Sen. Foote April 3, 2019 at 1:13.20; avail:

http://coloradoga.granicus.com/MediaPlayer.php?view_id=42&clip_id=13895

a. What is a "surface impact"? SB 181 limits local government regulatory authority to regulation of the surface impacts of oil and gas. Prior to SB 181, local governments understood that they could not regulate "downhole" and other technical aspects of oil and gas development. The meaning of the term "surface impact" has not been defined by the COGCC or appellate courts.

b. What is a "reasonable manner"? When addressing certain itemized matters, SB 181 requires local government authority to be exercised in a "reasonable manner." Local governments have been well-aware that they must be reasonable any time they regulate the use and development of land. Courts have evaluated the reasonableness of land use regulations by looking to whether there is a reasonable relationship between the regulation and a "legitimate government objective."¹³ Local government permit decisions must be based on duly adopted standards, and cannot be arbitrary and capricious. Post SB 181, courts would likely apply the same analysis to local government regulatory decisions in the context of permitting oil and gas operations.

c. What is "to the extent necessary and reasonable"? SB 181 sponsor Sen. Mike Foote testified that "necessary and reasonable is not intended to mean regulatory authorities can only make a land use decision or enact a regulation once all other options are exhausted. Instead, it is meant to be a guardrail against a regulatory or land use decision without reasonable justification."¹⁴ Courts have yet to weigh in, but most local governments see this provision as a restatement of the principles that apply to any land use regulatory systems.

d. Can local governments ban oil and gas operations within their boundaries? Prior to SB 181, the answer was emphatically "no" because bans caused an "operational conflict" with the COGCA. Now that local regulations can be stricter or more protective than state regulations, bans on oil and gas development would probably be analyzed under "due process" and "takings" doctrines like bans of any other land use. Courts would first have to determine on a case-by-case basis if the ban was rational or necessary and reasonable. Bans also would likely give rise to "takings claims" where courts would probably evaluate the economic impact of the regulation, extent to which the regulation interferes with the industry's investment-backed expectations; and the character of the government action.¹⁵

e. Can local governments deny permits for oil and gas operations? As is the case for other land uses, local governments most likely can deny local government permit applications for oil and gas development if the evidence on the record shows that the applicant failed to satisfy otherwise valid regulatory standards and requirements.¹⁶

¹³ *Dillon v. Yacht Club Condominiums Home Owners Ass'n*, 325 P.3d 1032,1039 (Colo. 2014).

¹⁴ See fn. 12, *supra*.

¹⁵ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104,124 (1978).

¹⁶ *City of Colorado Springs v. Bd. of Cty. Comm'rs*, 895 P.2d 1105, 1110 (Colo. App. 1994).

e. Can local governments establish setbacks more stringent than COGCC setbacks?

Like any other regulation, courts would look at whether the setback is reasonable. SB 181 allows local governments to address land use, location and siting. Setbacks are a traditional local government tool to separate incompatible land uses. Studies show that oil and gas causes impacts at various distances from oil and gas sites.¹⁷ COGCC currently is engaged in monitoring oil and gas locations.

¹⁷ See *e.g.* Physicians for Social Responsibility compendium of health studies, including health impacts in Colorado.