DISTRICT COURT, BROOMFIELD COUNTY, STATE OF COLORADO Court Address: 17 Des Combes Drive Broomfield, CO 80020 Phone: (720) 887-2100	DATE FILED: April 6, 2020 2:22 PM CASE NUMBER: 2020CV30106
Plaintiff: EXTRACTION OIL AND GAS, INC., v. Defendant: THE CITY AND COUNTY OF BROOMFIELD.	Δ COURT USE ONLY Δ Case No. 2020 CV 30106 Division: B; Courtroom: 3
ORDER	

A. INTRODUCTION AND PROCEDURAL POSTURE

In response to the growing concerns about the rapid spread of the deadly COVID-19 pandemic, the Governor of the State of Colorado, Jared Polis, on March 11, 2020, issued Executive Order D 2020 003, and invoked the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq*. Under the Act, the Governor is empowered to "issue executive orders, proclamations, and regulations and amend or rescind them." C.R.S. § 24-33.5-704(2). "Executive orders, proclamations, and regulations have the force and effect of law." *Id*.

Under the Act, "[a] disaster emergency shall be declared by executive order or proclamation of the governor if the governor finds a disaster has occurred or that this occurrence or the threat thereof is imminent." C.R.S. § 24-33.5-704(4). Further, a "disaster" is defined, as pertinent here, to mean "the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural cause or cause of human origin, including but not limited to . . . epidemic . . ." (interlineation added). And an "emergency epidemic" "means cases of an illness or condition, communicable or noncommunicable, caused by bioterrorism, pandemic influenza, or novel and highly fatal infectious agents or biological toxins." C.R.S. § 24-33.5-703(4).

On March 27, 2020, Extraction moved for—and was granted—a Temporary Restraining Order (TRO) by this court. The court's TRO restrained and enjoined the City and County of Broomfield's Board of Health from enacting any emergency ordinance or public health order that required Extraction to suspend its scheduled flowback operations at the Livingston Well Site until after the cessation of the COVID-19 pandemic.

On March 30, 2020, Broomfield moved this court to reconsider its order granting Extraction's request for a TRO, which the court explained that it would treat as a motion to dissolve the TRO pursuant to C.R.C.P. 65(b). Also, on March 30, 2020, the court held a phone hearing with Extraction and Broomfield's counsel. During that hearing, counsel agreed that the issues presented in this case possibly could be disposed of by way of mutual briefing on two issues:

> (1) Whether the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq*., as implemented by Governor Polis' Executive Orders, preempts Broomfield's ability to enact an emergency ordinance or public health order that requires Extraction to temporarily suspend its scheduled flowback operations at its Livingston Well Site until after the COVID-19 disaster has ceased?
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> (2) Whether this case is ripe for adjudication since Broomfield has not yet enacted an emergency ordinance or public health order that requires Extraction to temporarily suspend its scheduled flowback operations at its Livingston Well Site?

On March 31, 2020, the City of Broomfield's Board of Health conducted a meeting, at which it considered exercising its police power by issuing a public health order to temporarily suspend oil and gas operations "due to resident concerns amidst the COVID-19 outbreak." After discussion, the Board proposed a public health order ("PHO") calling for the immediate suspension of all flowback operation within the City of Broomfield.

Counsel submitted their briefs on the above two issues on Friday, April 3, 2020. After reviewing the parties' briefs, and otherwise being fully advised in the premises, the court determines as a matter of law that the Colorado Disaster Emergency Act, as implemented by Governor Polis' Executive Orders, does not

preempt a local government from enacting an emergency ordinance or public health order that is more protective of its citizens against the pernicious effects of the COVID-19 pandemic; and that Extraction's request for a temporary restraining order and preliminary injunction is not yet ripe for adjudication, notwithstanding the fact that Broomfield seems poised to enact an emergency ordinance or public health order that would require Extraction to temporarily suspend its scheduled flowback operations at its Livingston Well Site.

B. SUMMARY OF THE PARTIES' ARGUMENTS

1. Broomfield's Preemption Arguments.

The City first argues that the Broomfield Board of Health is the proper party here, not the City and County of Broomfield. The Board of Health is a separate and distinct legal entity from the City, which was created by Colorado's public health statutes that authorize the Board to issue orders and to adopt rules consistent therewith. Thus, because Extraction seeks to prevent the issuance of a public health order by the Broomfield Board of health, the Board of Health is the proper party defendant.[1]

There are three types of preemption: express, implied, and operational conflict. As mentioned, Colorado law specifically grants local public health boards with authority to issue public health orders, so in this case there can be no express or implied preemption. There is also no conflict between the proposed PHO and executive orders of the Governor and CDPHE, because the stay-at-home order contains the following language:

> Nothing in this Executive Order prevents a local public health authority from issuing an order more protective of public than this Executive Order. For clarity, any stay at home or similar order issued by a local jurisdiction remains in full force and effect.

The City argues that the PHO is permitted and not preempted because it is more protective of public health, and thus it cannot possibly conflict with the executive orders and can indeed be read in harmony therewith.

[1] Broomfield may very well be correct, but this oversight is readily cured by amendment of the pleadings.

Further, although oil and gas extraction and production are labeled as critical infrastructure, neither the Governor's executive orders nor the CDPHE Order implementing them create a requirement that such crucial infrastructure remain open during the pandemic. In fact, there is nothing in the executive orders preventing local governments from fully closing "critical business," as numerous local public health jurisdictions around the state have closed hotels and other lodging. Therefore, there is no operational conflict between the executive orders and the proposed PHO, and as such the latter is not preempted.

2. Extraction's Preemption Arguments.

Extraction argues that the City is preempted from passing the proposed PHO by both the State Constitution and the Colorado Disaster Emergency Act, in conjunction with the recent executive orders of the Governor and CDPHE. Extraction admits that as a home rule municipality, the City has authority to regulate matters of purely local concern. On the other hand, however, where a state legislature exercises supreme authority over matters of statewide concern, the City may only legislate in that area where authorized by the Constitution or a statute.

Here, a pandemic such as the one presented by COVID-19 is an issue of statewide concern, as confirmed by the language of the Disaster Emergency Act and the various executive orders addressing the pandemic. Thus, in the absence of constitutional or statutory provision authorizing such legislation, the City is prevented from legislating or otherwise issuing *any* orders regarding a pandemic response. That authority is instead vested exclusively in the Governor and CDPHE during the state of emergency. Indeed, the COVID-19 pandemic is a quintessential situation where state authority wholly preempts local government authority. In support, Extraction cites to cases from other states supporting the notion that where a field of legislation has been fully occupied by the state, preemption exists and there is no room for any local legislation.

Extraction further argues that the language in the executive orders allowing local public health agencies to issue orders "more protective of public health" does not apply here—Extraction states that the language clearly creates only a narrow exception to the State's total preemption on pandemic response regarding matters like social distancing and stay-at-home requirements. Thus, because the City does

not contend social distancing or stay-at-home requirements are an issue at Extraction's disputed well site, the County's proposed PHO exceeds the limited authority granted by that exception. Lastly, Extraction asserts that the COVID-19 executive orders designated oil and gas operations like Extraction' as critical infrastructure businesses that *must* stay open to ensure public functioning.

3. Broomfield's Ripeness Arguments.

The City argues that the Court lacks subject matter jurisdiction in this case because Extraction's claim is not ripe. Extraction has not suffered any actual injury—its alleged injury is entirely speculative because the Board of Health has not yet approved any final action. There is simply no justiciable controversy or issue unless and until the Board adopts a PHO that impacts Extraction's operations.

The City argues a further lack of subject matter jurisdiction through Extraction's failure to exhaust the administrative remedies contained in C.R.S. § 25-1-515. Under that statute, a person "aggrieved and affected" by a decision of a health board is entitled to judicial review by filing an action requesting such a review in district court. So, because such relief is statutorily provided, Extraction must pursue those remedies before filing in district court. Thus, in the absence of subject matter jurisdiction, the Court should vacate its TRO.

4. Extraction's Ripeness Arguments.

Extraction asserts that the matter is ripe for injunctive relief because there is nothing speculative about the City's intention to shut down Extraction's operations—the pleadings and evidence before the Court, including the proposed order, confirm that the City will forcibly and immediately shut down Extraction's well sites in the absence of a TRO. The City's long-standing plan to ultimately shut down Extraction's operations poses it an imminent threat of immediate and vast financial harm. Extraction argues that the matter became ripe for adjudication in September 2019, where the City Manager announced at a public forum that the City intended to "penetrate" its contract with Extraction in order to halt its operations.

C. DISCUSSSION

1. Preemption Doctrine.

In instances where a home-rule city regulates a matter in which the state also has an interest, state law ***may preempt*** a home-rule city's ordinance or regulation either expressly, impliedly, or because of an operational conflict. *City of Fort Collins v. Colorado Oil*, 369 P.3d 586, 591 (Colo.2016). To determine whether a regulatory matter is one of statewide, local, or mixed state and local concern, courts must weigh the relative interests of the state and the municipality in regulating the particular issue in the case, making the determination on a case-by-case basis considering the totality of the circumstances. *City of Longmont v. Colorado Oil & Gas Ass'n*, 369 P.3d 573, 580 (Colo.2016). The pertinent factors that guide a court's inquiry include (1) the need for statewide uniformity of regulation, (2) the extraterritorial impact of the local regulation, (3) whether the state or local governments have traditionally regulated the matter, and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation. *City of Longmont*, 369 P.3d at 580.

Whether an ordinance is expressly or impliedly preempted is primarily a question of statutory interpretation. *City of Fort Collins*, 369 P.3d at 591; *Colo. Mining Ass'n v. Bd. of Cty. Comm'rs*, 199 P.3d 718, 723 (Colo.2009).

A home-rule ordinance may be expressly preempted when the legislature clearly and unequivocally states its intent to prohibit a local government from exercising its authority over the subject matter at issue. *City of Fort Collins*, 369 P.3d at 592.

Preemption may be implied when a state statute 'impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest. *City of Fort Collins*, 369 P.3d at 592. A legislative intent to preempt local control over certain activities cannot be inferred, however, merely from the enactment of a state statute addressing certain aspects of those activities. *Id.* Rather, courts must consider the language used and the scope and purpose of the legislative scheme. *Id.*

Finally, a state law may preempt a home-rule ordinance when the operational effect of that ordinance conflicts with the application of the state law. *Id.* Preemption by reason of an operational conflict can arise when the effectuation of a local interest would materially impede or destroy a state interest. *Id.* "Under such circumstances, local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest." *City of Fort Collins,* 369 P.3d at 592, quoting *Bd. of Cty. Comm'rs, La Plata Cty. v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1059 (Colo. 1992). Any perceived operational conflict requires a court to "assess the interplay between the state and local regulatory schemes. Accordingly, in virtually all cases, this analysis will involve a facial evaluation of the respective statutory and regulatory schemes, not a factual inquiry as to the effect of those schemes 'on the ground.' " *City of Fort Collins*, 369 P.3d at 592.

a. Executive Order 2020 003.

According to Executive Order D 2020 003, the COVID-19 outbreak constitutes a disaster under the Act. And in so recognizing, Executive Order D 2020 003 provides for the following:

- That the Colorado Department of Public Health and Environment (CDPHE) is "coordinating its response to this emerging epidemic through [its Emergency Operations Center] ***and collaborating with local public health agencies across the State to conduct disease surveillance and control activities.***" *Executive Order D 2020 003, Section I, Page 2, ¶ 1* (emphasis added).
- [That the Governor] "verbally authorized employing the Colorado National Guard to support and provide planning resources to State and local authorities as they respond to the presence of COVID-19 in the State." *Executive Order D 2020 003, Section I, Page 2, ¶ 2*.
- [That] "[p]ursuant to C.R.S. § 24-33.5-704(5), [the Governor] hereby activate[s] the disaster response and recovery aspects of applicable State, local, and interjurisdictional disaster emergency plans." *Executive Order D 2020 003, Section II, Page 3, ¶ E*.

Based on the language of Executive Order D 2020 003, the Governor plainly contemplated a coordinated effort between the state and local public health agencies to combat the COVID-19 pandemic.

b. Executive Order 2020 017.

On March 25, 2020, in further response to the COVID-19 pandemic and outbreak, the Governor issued Executive Order D 2020 017, which orders **"Coloradans to Stay at Home Due to the Presence of COVID-19 in the State."** Several of the pertinent provisions of Executive Order 2020 017 are:

- "My administration, along with other ***state, local, and Federal authorities***, has taken a wide array of actions to mitigate the effects of the pandemic, prevent further spread, and protect against overwhelming our health-care resources." *Executive Order 20220 017, Section I, Page 1, ¶ 2 (emphasis added).*
- "This Executive Order requires Coloradans to stay at home, and subject to certain limited exceptions, orders the Executive Director of the CDPHE to issue a public health order defining ***critical emergency*** personnel, ***infrastructure***, government functions, and other activities that are exempt from the directives of this Executive Order." *Executive Order 20220 017, Section I, Page 1, ¶ 4 (emphasis added).*
- "I direct all Coloradans to stay at home, subject to limited exceptions such as obtaining food and other household necessities, going to and from work at ***critical businesses***, seeking medical care, caring for dependents or patents, or caring for a vulnerable person in another location." *Executive Order 20220 017, Section II, Page 2, ¶ B.*
- "I direct the Executive Director of the CDPHE to issue a public health order consistent with the directives in this Executive Order." *Executive Order 20220 017, Section II, Page 2, ¶ D.*
- "Certain individuals must continue to work outside their residences to provide goods and services critical to our response to the COVID-19 epidemic emergency. The public health order must therefore identify:

a. critical emergency personnel and infrastructure necessary to ensure continuity of critical healthcare, government functions, public safety, manufacturing, and supply chain operations;

b. certain critical businesses exempt from this Executive Order, provided they comply with social distancing requirements;

c. steps all critical businesses must take to comply with social distancing requirements;

d. A process by which a local public health authority may obtain relief from this Executive Order or any related Public-Health Order issued by CDPHE to more effectively meet local conditions and needs without burdening public health resources and other parts of the state; and

e. Nothing in this Executive Order prevent a local public health authority from issuing an order more protective of public than this Executive Order. For clarity, any stay at home or similar order issued by a local jurisdiction remains in full force and effect.

Executive Order D 20220 017, Section II, Page 2, ⁋ D(1)(a) through (e) (emphasis added).

Importantly, subpart (d) quoted above specifically provides for and commands the Executive Director of the Colorado Department of Public Health and Environment, in implementing the Executive Order, to ensure that a mechanism is in place ***"by which a local public health authority may obtain relief from this Executive Order or any related Public-Health Order issued by CDPHE to more effectively meet local conditions and needs without burdening public health resources and other parts of the state."*** (emphasis added).

Further, subpart (e) quoted above is a clear grant of authority to public health authorities that they may issue public health stay-at-home or similar orders that may be more protective of its citizens than Executive Order 2020 017.

Like Executive Order D 2020 003, Executive Order D 2020 017 clearly contemplates a cooperative effort between the state and local health agencies/authorities to combat the COVID-19 pandemic.

Contrary to Extraction's contentions, Executive Orders D 2020 003 and D 2020 017 seemingly are the antithesis of the State of Colorado's intent to either expressly or impliedly preempt local government action. *See City of Fort Collins*, 369 P.3d at 592.

c. Public Health Order 20-24, Updated April 1, 2020.

As directed by Executive Order 2020 017, on March 26, 2020, the Executive Director of the Colorado Department of Public Health and Environment, issued Public Health Order 20-24, which implemented the Governor's aforesaid Executive Order. Public Health Order 20-24 was updated on April 1. 2020.

As pertinent to the instant discussion, Extraction indisputably is a **"Critical Business"** as defined in Public Health Order 20-24. Indeed, Section C of Third Updated Public Health order 20-24 provides that a **"Critical Business"** means **"Critical Infrastructure"**, including, but not limited to, "[o]il and gas extraction, production, refining, storage, transport and distribution." But what is the real import of Extraction being critical infrastructure? That inquiry begins with an analysis of the precise language of the Governor's stay-at-home order and the Executive Director's implementation thereof under Third Updated Public Health Order 20-24, as well as a review of several of Colorado's public health statutes, which unquestionably contemplate concurrent state and local government action in circumstances such as the outbreak of the COVID-19 pandemic.

Contrary to Extraction's suggestions, Executive Order 2020 017 and Third Updated Public Health Order 20-24 do not both positively command that Extraction's Livingston Well Site ***must*** remain open during the COVID-19 pandemic. On the contrary, Executive Order 2020 017 and Third Updated Public Health Order 20-24 must be read together. While Executive Order 2020 017 clearly states that certain critical businesses/infrastructure are exempt from the stay-at-home order, *see Executive Order 2020 017, Section II, Page 2, ¶ D.*, Third Updated Public Health Order 20-24 Section III, C. simply provides that "[a]ny business . . . listed below [meaning critical business infrastructure] ***may*** continue to

operate as normal." *(intelineation added and emphasis added)*. This latter language definitively is not a positive command that Extraction's Livingston Well Site **must** remain open during the COVID-19 pandemic. It means nothing more than Extraction, as a critical business/infrastructure, if it so chooses to remain open, that its necessary employees are exempt from the stay-at-home order.

d. Home-Rule under Article XX, § 6 and § 10 of the Colorado Constitution.

Article XX, § 6 of the Colorado Constitution provides that the people of a home-rule municipality "are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters"; [and that] "[s]uch charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith." *See also*, Colorado Constitution, Article XX, § 10. And C.R.S. § 31-15-103 provides that municipalities have the power to make all ordinances—not inconsistent with state law—that "are necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such municipality and the inhabitants. . ." (interlineation added).

It is well-settled Colorado law that home-rule municipalities possess the power to make and publish ordinances for the public good, including those reasonably expected to protect the lives, health, and safety of their citizens. *See* § 31–15–103, C.R.S. (1986 Repl.Vol. 12B). Thus, a municipal ordinance which is rationally related to an area of legitimate local concern will not be disturbed. *U.S. Disposal Systems, Inc. v. City of Northglenn*, 193 Colo. 277, 567 P.2d 365 (1977); *see also Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 761 (Colo. App. 2002) (As a statutory town, Frederick has the power to enact ordinances not inconsistent with state law that are necessary and proper to provide for the health, safety, prosperity, order, comfort, and convenience of the municipality). In addition, the Local Government Land Use Control Enabling Act, § 29–20–101, et seq., C.R.S.2001, grants local governments broad authority to plan for and regulate the use of land within their respective jurisdictions.

As a general rule, a local ordinance which is in conflict with state law will be declared void. However, contrary provisions in an ordinance and a state statute do not necessarily indicate a true conflict. *See generally Ray v. City & County of Denver*, 109 Colo. 74, 121 P.2d 886 (1942). The test to determine whether a true conflict exists is whether both the ordinance and the state statute contain conditions, express or implied, that are inconsistent and irreconcilable with one another. *C & M Sand & Gravel v. Board of County Commissioners*, 673 P.2d 1013 (Colo.App.1983); *see also R.E.N. v. City of Colorado Springs*, 823 P.2d 1359 (Colo.1992). If possible, statutes and ordinances should be reconciled and effect must be given to both. *Lewis v. Town of Nederland*, 934 P.2d 848, 850–51 (Colo. App. 1996); 6 E. McQuillin, Municipal Corporations §§ 21.32–21.35 (3d ed.1988 rev. vol.).

Here, contrary to Extraction's contention, the effect of Executive Order 2020 017 is that those individuals who work for a critical business or infrastructure are exempt from the stay-at-home order, not that they are ordered to go to work.

Furthermore, C.R.S. § 25-1-507 provides that "the mayor and council of each incorporated town or city, whether incorporated under general statutes or special charter in this state, may establish a municipal public health agency and appoint a municipal board of health [; and if] appointed, the municipal board of health shall have all the powers and responsibilities and perform all the duties of a county or district board of health as provided in this part 5 within the limits of the respective city or town of which they are the officers." *(interlineation added)*. The import of C.R.S. § 25-1-507 is that it invests local public health authorities such as Broomfield's Board of Health with all of the powers and duties provided in C.R.S. § 25-1-506.

And, pursuant to C.R.S. § 25-1-506, local health boards have the duty to "[t]o investigate and control the causes of epidemic or communicable diseases and conditions affecting public health," C.R.S. § 25-1-506(2)(b)(V); "[t]o establish, maintain, and enforce isolation and quarantine, and in pursuance thereof, and for this purpose only, to exercise physical control over property and over the persons of the people within the jurisdiction of the agency as the agency may find necessary for the protection of the public health, C.R.S. § 25-1-506(2)(b)(VI); "[t]o close schools and public places and to prohibit gatherings of people when

necessary to protect public health," C.R.S. § 25-1-506(2)(b)(VII); "[t]o investigate and abate nuisances when necessary in order to eliminate sources of epidemic or communicable diseases and conditions affecting public health, C.R.S. § 25-1-506(2)(b)(VIII); and "[t]o initiate and carry out health programs consistent with state law that are necessary or desirable by the county or district board to protect public health and the environment," C.R.S. § 25-1-506(2)(b)(XI).

e. The Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq*., as implemented by Governor Polis' Executive Orders and Third Updated Public Health Order 20-24, <u>do not</u> preempt Broomfield's Board of Health's ability to enact an emergency ordinance or public health order.

The court rejects Extraction's preemption arguments because they are predicated on an erroneous construction of the Governor's Executive Orders and Third Updated Public Health Order 20-24, and overlook other Colorado statutes that clearly grant local governments and health agencies/authorities the concomitant authority to act in times of epidemics. *See, e.g.*, Colorado Constitution, Article XX, § 6 and § 10; C.R.S. § 25-1-506(2)(b)(V); C.R.S. § 25-1-506(2)(b)(VI); C.R.S. § 25-1-506(2)(b)(VII); C.R.S. § 25-1-506(2)(b)(VIII); and C.R.S. § 25-1-506(2)(b)(XI). What local governments may not do is thwart the State of Colorado's overall objective for eradicating COVID-19.

On pages 11 and 12 of its preemption brief, Extraction writes:

> There is no question that the State Constitution and the Colorado Disaster Emergency Act fully preempts local government authority here. A pandemic like this one is a quintessential emergency of statewide concern because the novel coronavirus does not stop at local government orders. *Denver v. Qwest Corp.*, 18 P.3d at 754; *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 37 (Colo.2000); *Spears Free Clinic and Hosp. for Poor Children v. State Bd. Of Health*, 220 P.2d 872, 874 (Colo.1950) ("Infectious diseases in particular recognize no city lines, and under its police power and state retains the right to regulate such matters affecting public health as are of general concern . . . " (holding Denver's home rule authority was preempted by state authority in hospital licensing).
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> The city and County of Broomfield is a home rule municipality, which gives it plenary authority to regulate matters [sic] solely impacting local concerns. *See* Colo. Const. art. XX, §§ 6 and 10. In matters that involve

> both local and statewide concern, home rule cities may legislate; and in matters of solely local concern, home rule enactment will control in the event of any conflict with state legislation. *Town of Telluride*, 3 P.3d at 37; *City and County of Denver v. State*, 788 P.2d 764, 767 (Colo.1990). However, the state legislature continues to exercise supreme authority over matters of statewide concern, and home rule cities may legislate in that area only if the Constitution or a statute authorizes such legislation. *Telluride*, 3 P.3d at 37; *City and County of Denver*, 788 P.2d at 767 (for mixed questions of statewide and local concern, local action is invalid if it conflicts with the state law). A pandemic is an issue of statewide concern as confirmed by the plain language of the Colorado disaster emergency act, and as demonstrated by the Governor's declaration of emergency and orders issue[d] in conjunction with the CDPHE.
>
> The Governor and CDPHE have designated oil and gas operations like Extraction's operation at its Livingston Well Sites as a critical infrastructure business that must stay open to ensure public functioning. These orders comport with federal guidance confirming that oil and gas operations are critical infrastructure business; and that local governments should consider the big picture and not just their own provincial concerns when responding to the COVID-19 pandemic. The natural gas produced by companies like Extraction powers the Colorado electric grade, keeps heat in people's homes, and provides the power that runs this state's hospitals.
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> The Colorado Supreme Court has repeatedly held that in this situation, "home rule cities may legislate in an area of statewide concern **only if the Constitution or a statute authorizes such legislation**." *Qwest*, 18 P.3d at 754 (emphasis added). As developed, there are no constitutional provisions, state statutes, rules, or administrative code regulations authorizing Broomfield to legislate or otherwise issue orders regarding a pandemic response. That authority is vested exclusively in the Governor and the CDPHE. Broomfield is thus fully preempted from issuing its proposed public health order suspending Extraction's operations.

(Extraction's Preemption Brief, Pages 11 and 12).

The court rejects Extraction's arguments for several reasons. First, Extraction's citation to, and reliance on, *Spears Free Clinic and Hosp. for Poor Children v. State Bd. Of Health*, 220 P.2d 872, 874 (Colo.1950) is incomplete. What Extraction's fails to acknowledge is that the *Spears* court also wrote as follows:

> "At the same time, congested living conditions within cities may produce health problems justifying further regulation than those deemed necessary by the legislature, **and as to such matters cities may possess the police power of further regulation within their limits.** We are not here confronted with any conflicting mandate of statute and ordinance or with challenge to any particular statutory command, but only with challenge to the broad right of the legislature to provide for the licensing of hospitals within the limits of home-rule cities, in the interest of the general health. That challenge cannot be sustained.

Spears, 220 P.2d at 874 (emphasis added).

Extraction's also argues that "there are no constitutional provisions, state statutes, rules, or administrative code regulations authorizing Broomfield to legislate or otherwise issue orders regarding a pandemic response." *(Extraction's Brief, Page 12)*. The court also rejects this contention because it ignores the authority granted to local public health agencies/authorities/boards by virtue of C.R.S. § 25-1-506. As noted above, C.R.S. § 25-1-506 confers the following powers on local public health boards:

- "[t]o investigate and control the causes of epidemic or communicable diseases and conditions affecting public health," C.R.S. § 25-1-506(2)(b)(V);
- "[t]o establish, maintain, and enforce isolation and quarantine, and in pursuance thereof, and for this purpose only, to exercise physical control over property and over the persons of the people within the jurisdiction of the agency as the agency may find necessary for the protection of the public health, C.R.S. § 25-1-506(2)(b)(VI);
- "[t]o close schools and public places and to prohibit gatherings of people when necessary to protect public health," C.R.S. § 25-1-506(2)(b)(VII);
- "[t]o investigate and abate nuisances when necessary in order to eliminate sources of epidemic or communicable diseases and conditions affecting public health, C.R.S. § 25-1-506(2)(b)(VIII); and
- "[t]o initiate and carry out health programs consistent with state law that are necessary or desirable by the county or district board to protect public health and the environment," C.R.S. § 25-1-506(2)(b)(XI).

C.R.S. § 25-1-506.

Contrary to Extraction's contentions, neither Executive Order 2020 017—which expressly permits local public health agencies/authorities to enact more protective public health orders—nor Third Updated Public Health Order 20-24—which enables local public health agencies to apply for a variance from any Executive Order of CDPHE public health order—evinces the Governor's intent, through the invocation of the Colorado Disaster Emergency Act, to completely occupy the filed in Colorado's fight against the COVID-19 pandemic.

Indeed, the most harmonious and sensible reading of the Governor's Executive Orders, much like President Trump's, is the acknowledgment that local governments and public health agencies/authorities will play an integral role in combating the spread of COVID-19 and halting its pernicious effects. Were it otherwise, the Executive Order D 2020 017 would not have expressly and unambiguously stated that "[n]othing in this Executive Order prevents a local public health authority from issuing an order more protective of [the] public than this Executive Order [and for] clarity, any stay at home or similar order issued by a local jurisdiction remains in full force and effect." (interlineation added). The same holds true for Third Updated Public Health Order 20-24, which provides that "local public health agencies may apply for relief from the Executive Order or this Public Health Order to more effectively meet local conditions and needs through a process established by CDPHE."

For the above reasons, the court rejects Extraction's preemption arguments that local governments and public health agencies/authorities may not simultaneously enact their own laws and/or regulations or public health orders to combat COVID-19. Therefore, the court determines as a matter of law that local governments and their boards of health are not preempted by the Governor's invocation of the Colorado Disaster Emergency Act and may enact emergency ordinances or public health orders that are congruent with the state's interests in combating COVID-19.

3. Ripeness.

As will be explained below, the court finds that Extraction's request for a temporary restraining order and for preliminary injunctive relief is not ripe for

adjudication since Broomfield has not yet enacted an emergency ordinance or public health order that requires Extraction to temporarily suspend its scheduled flowback operations at its Livingston Well Site.

It is well-settled that a court lacks subject matter jurisdiction to decide an issue that is not ripe for adjudication. *Bd. of Directors v. Nat'l Union Fire Ins. Co.*, 105 P.3d 653, 656 (Colo. 2005). "The doctrine of ripeness recognizes that courts will not consider uncertain or contingent future matters because the injury is speculative and may never occur." *DiCocco v. Nat'l Gen. Ins. Co.*, 140 P.3d, 316 (Colo. App. 2006). To be ripe, the issue must be "real, immediate, and fit for adjudication." *Id.* (citing *Nat'l Union*, 105 P.3d at 656). With this requirement in mind, the Court must "refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur." *Nat'l Union*, 105 P.3d at 656.

Here, Extraction does not point to anywhere in the record demonstrating that a final public health order has been issued by the Broomfield Board of Health, nor does Extraction allege that the Board of Health has actually attempted to halt Extraction's flowback operations. The court therefore concludes that that the issue of whether it should temporarily, preliminarily, or permanently enjoin the Board of health is not ripe for adjudication.

At present, the Board of Health has not yet acted in a way that halts Extraction's operations and Extraction's fears that the Board may do so is yet merely speculative. The court certainly is not unmindful that most, if not all, of Broomfield's City Council members will, perhaps, stop at nothing in their efforts to shut-down Extraction's oil and gas operations, and in particular Extraction's scheduled flowback operations at its Livingston Well Site. However, the court simply reminds Broomfield that when exercising its police powers, it may not do so in an in a manner that is contrary to constitutional rights or privileges or is arbitrary and capricious and not rationally related to combating the spread of COVID-19, lest it again face Extraction's request for temporary, preliminary, and/or permanent injunctive relief.

However, at present, this court must refrain from entering this sphere of uncertainty. *See Save Cheyenne v. City of Colorado Springs*, 425 P.3d 1174, 1183 (Colo. App. 2018) (holding that claim of zoning violations was not ripe where no

final zoning decision had been made an thus no violation was occurring on subject property); *Developmental Pathways v. Ritter*, 178 P.3d 524, 534-35 (Colo. 2008) (holding that as-applied challenged to gift-ban provision of ethics in government amendment to Colorado Constitution was not ripe for review where commission in charge of enforcing ban was not yet in existence and had not yet acted in furtherance of amendment).

In light of the above, then, the Court finds that Extraction's request for a temporary restraining order and preliminary injunctive relief is not yet ripe for adjudication. Indeed, despite Extraction's assertions that the Board's prospective actions are set in stone, it may never pass a public health order affecting Extraction's operations. But if it does, that is an entirely different situation.

3. Exhaustion of Administrative Remedies.

The court rejects Broomfield's contention that Extraction's ***sole*** remedy is one for judicial review under § 25-1-515. Broomfield's contention ignores the fact that Extraction has asserted claims for declaratory relief with respect to its vested contract rights, several breach of contract claims, and equitable claims, all of which are properly asserted in a complaint for judicial review under C.R.S. § 25-1-515. For example, in *Bd. of Cty. Comm'rs of Douglas Cty. v. Sundheim*, 926 P.2d 545, 548 (Colo. 1996), the Colorado Supreme Court, in the context of a C.R.C.P. 106(a)(4) complaint for judicial review, recognized that C.R.C.P. 106(a)(4) provides the exclusive remedy for reviewing a quasi-judicial decision made by a government entity and that "a C.R.C.P. 106(a)(4) complaint must include all causes of action, including constitutional claims, in a single C.R.C.P. 106(a)(4) action." *Sundheim*, 926 P.2d at 548.

The court see no reason why the *Sundheim* court's rationale is not equally applicable here. Consequently, although Extraction's request for a temporary restraining order and preliminary injunction predicated on a public health order that has not yet been issued is not ripe, its claims for declaratory relief and breach of contract certainly are ripe for adjudication.

D. CONCLUSION AND ORDER

The court concludes as a matter of law that the Governor's invocation of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq*., does not preempt local governments and boards of health (such as Broomfield's) from taking harmonious—but yet more protective—action in Colorado's fight against the spread and pernicious effects of the COVID-19 pandemic.

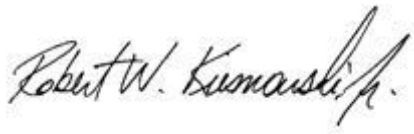
The court further concludes that Extraction's request for a temporary restraining order and preliminary injunction is not yet ripe for adjudication because the Broomfield Board of Health has not yet enacted an emergency ordinance or public health order that temporarily requires Extraction to cease its scheduled flowback operations at its Livingston Well Site.[2]

The court grants Broomfield's motion to dissolve the temporary restraining order because the court finds that, under the circumstances, it was improvidently granted.

The hearing in this matter scheduled for April 7, 2020 is vacated.

SO ORDERED THIS 6TH DAY OF APRIL, 2020.

BY THE COURT:



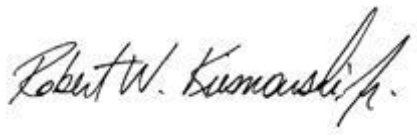
Robert W. Kiesnowski, Jr.
District Court Judge

[2] The court notes that Extraction's motion for a temporary restraining order was predicated on the prospect of Broomfield issuing a public health order—which has not yet occurred—that would require Extraction to temporarily suspend its scheduled flowback operations. Should Broomfield issue such an order, the issue then will be ripe for adjudication and Extraction may again move this court for a temporary restraining order and also request preliminary injunctive relief.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent via E-file to all counsel of record and pro se parties (whose address is listed in JPOD) this 6th day of April, 2020.

BY THE COURT:



Robert W. Kiesnowski, Jr.
District Court Judge