COLORADO COURT OF APPEALS 2 East 14th Ave., Denver, CO 80203	DATE FILED: November 24, 2014 6:46 PM FILING ID: 192B1E94F7638 CASE NUMBER: 2014CA1991
Appeal from Larimer County District Court The Honorable Gregory M. Lammons Case Number: 2013cv31385	
Appellant: **City of Fort Collins, Colorado** **v.** **Appellee:** **Colorado Oil & Gas Association**	▲ **COURT USE ONLY** ▲
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APPELLEE COLORADO OIL & GAS ASSOCIATION'S RESPONSE IN OPPOSITION TO APPELLANT CITY OF FORT COLLINS' MOTION FOR STAY PENDING APPEAL

Appellee Colorado Oil & Gas Association ("COGA"), by and through its undersigned counsel, respectfully submits this response in opposition to the

Amended Motion for Stay Pending Appeal (the "Motion") filed by Appellant City of Fort Collins (the "City").

I. INTRODUCTION

The City seeks to stay the district court's August 7, 2014 Order granting COGA's motion for summary judgment (the "Order") in an attempt to preserve the City's unlawful ban on hydraulic fracturing during the lengthy appeal period. The district court determined that Ballot Measure 2A, a citizen-initiated ordinance (the "Ordinance") to place a five-year moratorium on the use of hydraulic fracturing and the storage of its waste products within the City, is preempted under state law. A stay of the Order invalidating the ban would only perpetuate the City's unlawful conduct.

The Motion should be denied for four reasons. *First*, the City is not likely to succeed on the merits of its appeal. As the district court decided, the Ordinance is preempted by the Colorado Oil and Gas Conservation Act and related state regulations. Under well-established Colorado law, in order to succeed on the merits of its appeal, the City must demonstrate that hydraulic fracturing activities are matters of purely local concern and that the state has no interest in their regulation. In fact, Colorado decisions have repeatedly held that hydraulic fracturing activity is at least a matter of mixed state and local concern and that the state has a strong, even dominant, interest in regulating this activity. To justify a stay, the City must

show that this Court is likely to reject the district court's conclusions as stated in the Order, a showing that the City cannot make.

Second, the City cannot show that it will suffer irreparable harm without a stay. The City has previously admitted that it does not believe hydraulic fracturing activity will be occurring in the near future within its boundaries, and, even if it were, such activity would have to conform to the state's exhaustive regulatory scheme. Further, even without a stay during the appeal, nothing prevents the City from developing rules and regulations that are permissible under state law.

Third, COGA and its members would suffer hardship if a stay is granted. Companies such as Prospect Energy—which has an operator agreement with the City to allow the use of hydraulic fracturing in wells within the City's boundaries—would be thwarted from lawfully completing wells in accordance with their contractual rights without legal recourse.

Finally, the public interest would be disserved by a stay. The Colorado legislature—through the Colorado Oil and Gas Conservation Act—has declared it to be in the public interest to promote the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare. Granting a stay would undermine the Act and hinder the public policies supporting it, and would also contravene judicial economy.

Accordingly, there is no justification for staying the district court's decision regarding summary judgment. The City's Motion should be denied.

II. ARGUMENT

The decision whether to stay or continue proceedings is "an exercise of judicial discretion." *Romero v. City of Fountain*, 307 P.3d 120, 122 (Colo. App. 2011). "This discretion derives from 'the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *In re Water Rights of U.S.*, 101 P.3d 1072, 1080–81 (Colo. 2004) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).

In order to justify a stay of the proceedings pending appeal, courts have held that a movant must show: (1) a likelihood of success on the merits of its appeal, (2) that it will suffer irreparable harm absent a stay, (3) whether other parties will be substantially harmed or prejudiced by a stay, and (4) whether the public interest favors a stay. *See Romero*, 307 P.3d at 122. "A stay is not a matter of right, even if irreparable injury might otherwise result," and the party seeking a stay bears the burden of showing that the circumstances justify imposing a stay. *Id.* at 122.

This Court has previously denied a similar motion to stay a judgment invalidating a ban on oil and gas activity. *See* Order of Court, *COGA v. City of Lafayette*, Case No. 2014CA1036 (Colo. App. Oct. 6, 2014). The Court should similarly exercise its discretion here to deny the City's Motion.

A. The City is not likely to succeed on the merits of its appeal because the Ordinance is preempted.

Courts have held that a party seeking a stay "is *always* required to demonstrate more than the mere 'possibility' of success on the merits." *Id.* at 123 (emphasis added) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153–54 (6th Cir. 1991)).[1] In its August 7, 2014 Order, a copy of which is attached hereto as Exhibit A, the district court found that the Ordinance is preempted. Ex. A, at 7–9. There has been no intervening change in controlling law in Colorado with respect to preemption since the district court's Order, and preemption analysis in Colorado is well-settled. In fact, the Boulder County District Court has also recently invalidated two other similar ordinances banning hydraulic fracturing and other oil and gas activity on preemption grounds. *See* Order Granting Mot. for Summ. J. at 12, *COGA v. City of Lafayette*, Case No. 13CV31746 (Boulder Cnty. Dist. Ct. Aug. 27, 2014) (invalidating and enjoining Lafayette's charter amendment banning oil & gas activity); Order Granting Mots.

[1] The City argues that it does not have the burden of showing that it is likely to succeed on the merits because the trial court's judgment is subject to *de novo* review. Mot. at 5–6. This argument makes no sense. If the movant's burden in seeking a stay were dependent upon the standard of review, the *Romero* court would not have plainly stated that "[t]he party requesting a stay bears the burden of showing that the circumstances justify" a stay. *Romero*, 307 P.3d at 122 (citation omitted). The City is also wrong about the burden of proof on the merits. The "presumption of validity" plays no role in preemption analysis, because *both* the Oil and Gas Conservation Act and the Ordinance are presumed valid. This issue was fully briefed and addressed in the lower court's August 7 Order on summary judgment. *See* Ex. A at 3.

for Summ. J. at 17, *COGA v. City of Longmont*, Case No. 2013CV63 (Boulder Cnty. Dist. Ct. July 24, 2014) (invalidating Longmont's charter amendment banning hydraulic fracturing). In order to find that the City is likely to succeed on appeal, the Court would have to effectively rule on the merits of the City's appeal before briefing regarding the district court's decision has been completed. The Court need not and should not do so.

The Ordinance is unlawful for the reasons set forth in the district court's Order and COGA's briefs in support of its motion for summary judgment.[2] Indeed, notwithstanding the City's mischaracterization of the state of preemption law in Colorado and its rehashing of arguments already rejected by the district court, the issue of the lawfulness of municipal bans on oil and gas development has been resolved for 22 years. *See Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992). And it is also well-settled that, in areas of statewide or mixed interest, local governments cannot prohibit what the state allows, which is precisely what the City's five-year ban does. *See Webb v. City of Black Hawk*, 295 P.3d 480, 493 (Colo. 2013); *Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs*, 199 P.3d 718 (Colo.

[2] For the sake of efficiency, COGA incorporates the arguments set forth in its April 18, 2014 Brief in Support of Its Motion for Summary Judgment and in its May 27, 2014 Combined Brief in Support of Its Motion for Summary Judgment and in Opposition to the City's Cross-Motion, which are attached hereto as Exhibit B and Exhibit C, respectively. COGA also incorporates the district court's findings from its August 7, 2014 Order.

2009). No Colorado case has ever held that any aspect of oil and gas development is a matter of purely local concern.

Relying on *Bowen/Edwards* for the proposition that implied preemption occurs when a "'statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest,'" the City argues that the district court's ruling regarding implied preemption "is at odds with all Colorado cases interpreting the Act." Mot. at 6–7 (quoting *Bowen/Edwards v. Bd. of Cnty. Comm'rs*, 830 P.2d 1045, 1056–57 (Colo. 1992)). The City is incorrect. In *Voss*, the Colorado Supreme Court held that the state's interest in the efficient and equitable development and production of oil and gas, as manifested in the Oil and Gas Conservation Act, was "sufficiently dominant" to override Greeley's ban on oil and gas operations. *Voss*, 830 P.2d at 1068. Subsequently, in *Colorado Mining Association*, the Court confirmed that its holding in *Voss* was based on implied preemption: "We held that the state interest manifested in the state act was 'sufficiently dominant' to override the local ordinance. Sufficient dominancy is one of the several grounds for implied state preemption of a local ordinance." 199 P.3d at 724 (citation omitted).

The City also contends without support that the district court employed the incorrect operational conflict test and that, instead of analyzing whether the five-year ban prohibits what is authorized by the state in accordance with *Webb*, the

district court should have determined whether "'the effectuation of a local interest would materially impede or destroy the state interest.'" Mot. at 8 (quoting *Bowen/Edwards*, 830 P.2d at 1059). Again, the City is incorrect. In evaluating whether legislation by a home-rule municipality, such as the City, is preempted by state law, the Court must first determine whether the subject matter of the legislation is of statewide concern, of mixed state and local concern, or of purely local concern. *Webb*, 295 P.3d at 486; *City of Commerce City v. State*, 40 P.3d 1273, 1279 (Colo. 2002). Where, as here, a local regulation involves at least mixed state and local concerns, a home-rule regulation may "exist with a state regulation only so long as there is no conflict; if there is a conflict, the state statute supersedes the conflicting local regulation." *Webb*, 295 P.3d at 486. In this case, the relevant test to determine whether home-rule legislation conflicts with state law "is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* at 493 (citing *Commerce City*, 40 P.3d at 1284); *City of Northglenn* v. *Ibarra*, 62 P.3d 151, 165 (Colo. 2003).

Further, no Colorado court has ever held that, for purposes of preemption analysis, a moratorium is somehow qualitatively different from a permanent ban. While the City cites *Williams v. Central City* for the proposition that "temporary moratoria consistently are not subject to the same degree of judicial scrutiny as are permanent regulations," that quote is misleading and taken out of context. Mot. at

6 (quoting *Williams v. Cent. City*, 907 P.2d 701, 706 (Colo. App. 1995)). The issue presented in the *Williams* case was whether Central City's moratorium on development in its gaming district resulted in a compensatory taking of the plaintiff's real property. That case did not involve preemption, and in fact, in a preemption analysis, "[c]ourts examine with *particular scrutiny* those zoning ordinances that ban certain land uses or activities instead of delineating appropriate areas for those uses or activities." *Colo. Mining Ass'n*, 199 P.3d at 730 (emphasis added); *see also* Ex. B, at 7–8. Further, as the district court recognized, courts outside of Colorado have held that, in analyzing preemption in regards to a moratorium, "the analysis does not differ from that of a permanent ordinance." Ex. A, at 4 (citing *City of Claremont v. Kruse*, 100 Cal. Rptr. 3d 1 (Cal. Ct. App. 2009); *City of Buford v. Ga. Power Co.*, 581 S.E.2d 16 (Ga. 2003); *Plaza Joint Venture v. City of Atl. City*, 416 A.2d 71 (N.J. Super. Ct. App. Div. 1980)).

Therefore, the City is unlikely to succeed on the merits of its appeal.

B. The City will not be harmed, irreparably or otherwise, absent a stay.

Denying a stay would not result in immediate or irreparable injury or hardship to the City. Courts require parties seeking a stay, "like a party seeking a preliminary injunction, [to] satisf[y] the irreparable harm requirement by demonstrating a danger of *real*, *immediate*, and *irreparable* injury that may be prevented by the requested relief." *Romero*, 307 P.3d at 123 (emphasis added).

Despite the City's suggestion that irreparable harm is presumed when a government is enjoined from enforcing laws that were enacted by the representatives of its people, "there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute." *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)); *accord Garden State Equality v. Dow*, 79 A.3d 1036, 323 (N.J. 2013) ("The abstract harm the State alleges begs the ultimate question: if a law is unconstitutional, how is the State harmed by not being able to enforce it?"). Since the five-year ban is preempted, the City suffers no harm by being prevented from enforcing it. Further, the City has not cited any case law for the principle that enjoining a statute's enforcement *always* amounts to irreparable harm.

Nor will the City suffer *irreparable* harm by allowing the Order to "cast[] doubt on the City's authority to impose any regulation on oil and gas development" during the appeal period. Mot. at 10. The court below was quite clear in its Order that "the Act does not prohibit [all] regulation by a municipality" and that the City may continue to exercise ordinary land-use authority that is harmonious with the Act. Ex. A at 8. As a result, the Order casts no doubt on the City's authority;

rather, it is entirely consistent with the Supreme Court's ruling in *Voss*, 830 P.2d 1061, on which the District Court explicitly relied.[3]

The City has previously attempted to justify its five-year ban by claiming it needs that time to review studies conducted by others on hydraulic fracturing and to someday propose its own regulations. *See* City's Combined Br. in Resp. to Pl.'s Mot. for Summ. J. and in Supp. of City's Cross-Mot. for Summ. J. at 7. While COGA suspects that this purported rationale is a mere subterfuge, denial of a stay would in no way prevent the City from reviewing studies that have already been completed or from developing a more permanent development strategy. The City can continue to develop and impose rules regarding hydraulic fracturing that are consistent with the scope of its authority under *Bowen/Edwards* and *Voss*; it just cannot ban hydraulic fracturing while doing so.

Finally, despite contending that "operators have an incentive to quickly obtain approvals for hydraulic fracturing operations to avoid the consequences of any legislation the City might ultimately enact," the City states that no oil and gas drilling is imminent. Mot. at 11–12. In other words, the City admits that there is no

[3] The City argues that the Order "departs from *Bowen/Edwards*, *Voss* and subsequent appellate cases rejecting implied preemption." Mot. at 10. The City is wrong. The Supreme Court itself has interpreted *Voss* as an implied preemption case. *See Colo. Min. Ass'n*, 199 P.3d at 724 (discussing *Voss's* holding that the Act was "sufficiently dominant" to override a local ordinance and observing that "[s]ufficient dominancy is one of the several grounds for implied state preemption of a local ordinance.").

immediate need for a stay, and even if any well-completion activity were planned, such activity would have to conform to the "comprehensive regulations covering drilling, developing, producing and abandoning wells, safety, aesthetics and noise control, waste management, [and] protection of wildlife," among other regulations. Ex. A, at 5 (citations omitted).

There is nothing "real" or "immediate" about the claimed injuries that the City relies on, and accordingly, the City cannot satisfy the "irreparable harm" requirement for obtaining a stay.

C. A stay would cause hardship to COGA, its members, and the State of Colorado.

The appeal of the district court's Order regarding summary judgment will likely take a considerable period of time, and an extended stay during the entire appeal period would "eliminate[] the possibility" that COGA's members such as Prospect Energy could lawfully use hydraulic fracturing techniques within the City's boundaries. Ex. A at 8. Prospect Energy has a binding contract with the City permitting it to develop its resources through hydraulic fracturing, which the five-year ban has thwarted. A stay would perpetuate that injury, further compounding Prospect's lost revenue and leaving Prospect Energy with no legal recourse beyond a temporary takings claim against the City. The "status quo" in this case is that the five-year ban is "utterly inoperative," and the City seeks to upset the status quo

without compelling justification and to the detriment of COGA and its members. Mot. at 2, 11.

Further, to the extent that a government suffers a form of irreparable injury "any time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people," as the City argues, the State of Colorado suffered irreparable harm while the ban was in effect and will continue to suffer irreparable harm if the requested stay is granted by not being able to enforce the Colorado Oil and Gas Act, which is itself an enactment of the representatives of the people of Colorado. Mot. at 9 (quoting *New Motor Vehicle Bd. of Cal. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). And unlike the five-year ban, the Colorado Oil and Gas Act is not invalid.

The resulting harm to COGA, its members, and the State if a stay were granted is, alone, a sufficient basis to deny the City's Motion.

D. The public interest favors denying a stay.

The Colorado legislature has "declared [it] to be in the public interest to [f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources." COLO. REV. STAT. § 34-60-102(1)(a)(I). The

public interest—which is broader than the majority of voters in Fort Collins—weighs in favor of the district court's Order and denying a stay.

The district court's Order is based on longstanding state law and state policy that promotes responsible oil and gas exploration and production in an efficient and effective manner without waste. If the stay is granted, COGA and its members will continue to be denied the opportunity to responsibly develop and produce natural resources in and around Fort Collins, thereby frustrating the purpose and intent of the Oil and Gas Act and the public policies that support it. A stay would also promote a "patchwork" of local regulations and negate explicit state policy in a manner that violates Colorado Supreme Court preemption principles, as the district court already found. *See Colo. Mining Ass'n*, 199 P.3d at 731; *see also Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) ("[T]he public interest is better served by following binding Supreme Court precedent . . . ."). Further, a denial of the requested stay would have no impact on Governor Hickenlooper's 19-person task force. *See* Mot. at 13–14. The task force could still receive public testimony and make recommendations to the Governor and the legislature. *See id.*

Finally, granting a stay pending appeal would contravene judicial economy, particularly where, as here, the City has little chance of succeeding at the appellate

level, and would contravene the purpose of the Colorado Rules of Civil Procedure, which endorse the expeditious resolution of legal uncertainties and controversies.

CONCLUSION

For the foregoing reasons, COGA respectfully requests that the Court deny the Appellant City of Fort Collins' Motion for Stay Pending Appeal.

Dated: November 24, 2014.

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CERTIFICATE OF SERVICE

I certify that on November 24, 2014, I electronically filed a true and correct copy of the foregoing **APPELLEE COLORADO OIL & GAS ASSOCIATION'S RESPONSE IN OPPOSITION TO APPELLANT CITY OF FORT COLLINS' MOTION FOR STAY PENDING APPEAL** with the Clerk of Court via the Colorado ICCES program which will send notification of such filing and service upon the following counsel of record:

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