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COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80203

Appeal from Larimer County District Court
The Honorable Gregory M. Lammons
Case No. 13CV31385

Appellant:
CITY OF FORT COLLINS, COLORADO

v.

Appellee:
COLORADO OIL AND GAS ASSOCIATION

COURT USE ONLY

Case Number: 2014CA001991

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APPELLANT CITY OF FORT COLLINS' RESPONSE TO ORDER TO SHOW CAUSE

Appellant City of Fort Collins, Colorado (the "City") by and through its undersigned attorneys, Carrie M. Daggett and John R. Duval of the Fort Collins City Attorney's Office, and Barbara J. B. Green and John T. Sullivan of Sullivan Green Seavy LLC, submits the City's Response to the Order to Show Cause issued on November 18, 2014, and states as follows:

I. INTRODUCTION

The City filed its Notice of Appeal with this Court on October 13, 2014. The City attached the District Court's August 7, 2014 Order that is the subject of the City's appeal ("August 7 Order") to its Notice. In addition, the City attached the District Court's September 17, 2014 Order Granting Unopposed Motion to Dismiss Second Claim Against The City of Fort Collins, Colorado Without Prejudice and For Entry of Final Judgment ("September 17 Order"). On November 18, 2014, this Court issued its Order to Show Cause directing the City to show why this appeal should not be dismissed without prejudice for lack of a final, appealable order within 14 days (December 2, 2014).

II. LEGAL ARGUMENT

While the District Court's September 17 Order dismisses the second claim for injunctive relief without prejudice, the September 17 Order also states: "This order together with this court's August 7, 2014 Granting Plaintiff's Motion for

Summary Judgment on First Claim for Relief and Denying [the City's] Cross-Motion for Summary Judgment, shall constitute a final judgment for purposes of C.R.C.P. 54 (b) and 58(a)." This language demonstrates that the District Court intended its orders to constitute a final judgment for purposes of appeal.

In addition, Plaintiff Colorado Oil and Gas Association's Unopposed Motion, which the District Court granted in its September 17 Order, states: "COGA now desires to withdraw its remaining claim so that final judgment may be entered on its first claim. COGA therefore requests that this court dismiss COGA's second claim for relief without prejudice so that final judgment may be entered as to COGA's first claim." *See* COGA's Unopposed Motion filed on September 12, 2014, attached hereto as **Exhibit 1**. Thus, Plaintiff, like the City and the District Court, also believes that the August 7 Order and the September 17 Order fully resolved all claims in this case and these two orders constitute a final judgment for purposes of appeal.

The cases cited in this Court of Appeals' Order to Show Cause are distinguishable from the instant case. None of those cases involved a facial challenge to a legislative enactment where the trial court held that the law or

ordinance in question was invalid as in this case.[1] There are no claims or counterclaims for monetary damages (punitive or otherwise), or multiple parties here, as there were in *Harding Glass Company v. Jones*, *Brody v. Bock, Blackburn v. Skinner*, or *Rabbi Jacob Joseph School*.

The Colorado Supreme Court recognized in *Brody v. Bock*, 897 P.2d 769 (Colo. 1995), a case in which the plaintiff asserted seven separate claims for relief against multiple defendants, that *in general* a trial court's dismissal of claims without prejudice does not constitute a final judgment for purposes of appeal because the factual and legal issues underlying the dispute have not been resolved. But *Brody* continues: "However, a trial court's decision to dismiss a claim without prejudice *is not dispositive*." 897 P.2d 777 (citing *People v. Proffitt*, 865 P.2d 929, 931 (Colo. App. 1993). "*If a judgment in fact completely resolves the rights of the parties before the court with respect to a claim* and no factual or legal issues remain for judicial resolution, *the judgment is final as to that claim*." *Brody*, 895 P.2d 777 (citing *Proffitt*, *supra*; *Kempter v. Hurd*, 713 P.2d 1274, 1277 (Colo. 1986); *Snyder v. Sullivan*, 705 P.2d 510, 512, n. 2 (Colo. 1985)) (Emphasis added)

[1] While *District 50 Metropolitan Recreation District v. Burnside*, 157 Colo. 183, 401 P.2d 833 (1965) involved a challenge to the constitutionality of a Colorado statute, the trial court granted the defendants' motion to dismiss the complaint and the issue on appeal was whether the plaintiff needed to file a motion for a new trial before appealing the dismissal order.

As the Court of Appeals stated in *Proffitt*, 865 P.2d 931: "When determining if an order is final for purposes of appeal, the legal effect of the order, and not merely the form, should be considered. *Levine v. Empire Savings & Loan Ass'n*, 192 Colo. 188, 557 P.2d 386 (1976). If an order has effectively terminated the proceeding in the court below, it should be treated as a final appealable order. *Cyr v. District Court*, 685 P.2d 769 (Colo.1984)."

In this case, the Plaintiff claimed that the Fort Collins voter approved Moratorium was invalid on its face because it was preempted by state law. The District Court agreed and granted the Plaintiff's motion for summary judgment. The effect of the preemption rulings in the District Court's August 7 Order are to make the Fort Collins Moratorium invalid and "utterly inoperative" because the rulings are based on Plaintiff's facial challenge to the enactment. *See Sanger v. Dennis*, 148 P.3d 404, 410-411 (Colo. App. 2006). (Discussing the distinction between an "as applied" challenge and a facial challenge to a law, and stating that in a facial challenge the plaintiff must prove beyond a reasonable doubt that the law is not valid in any set of circumstances). As a result, once the District Court ruled that the Moratorium was preempted on its face, there was no need for the District Court to enjoin the Moratorium because the District Court already determined that it was invalid and unenforceable. Stated differently, once the

District Court ruled that the Moratorium was preempted, Plaintiff's claim for injunctive relief was rendered moot, and there were no further legal or factual issues remaining for judicial resolution. *See Sanger,* 148 P.3d at 410-411.

It would make no sense for Plaintiff to seek an injunction against the enforcement of the Moratorium when the District Court has held it unenforceable because the ordinance is preempted by Colorado statutes. Plaintiff already has what it wants. Thus, there is no risk that the Plaintiff will try to "end run" the trial court's ruling while this case is on appeal, which was a possibility that concerned the court in *Rabbi Jacob Joseph School v. Province of Mendoza,* 425 F.3d 207 (2nd Cir. 2005). Indeed, the City filed a Motion to Stay the District Court's August 7 Order Pending Appeal in this Court on November 17, 2014, because the August 7 Order effectively "enjoins" the enforcement of the Moratorium, even without a formal order for injunctive relief to that effect.

This reality also illustrates the fact that there really are not two separate claims for relief in this case. "A claimant pleads multiple claims for purposes of 54(b) when more than one recovery is possible and when a judgment on one claim would not bar a judgment on other claims." *Richmond American Homes of Colorado, Inc. v. Steel Floors, LLC,* 187 P. 3d 1199, 1203 (Colo. App. 2008). Here, if COGA had lost on the first claim, the second claim for injunctive

relief would not be possible because it is really just a remedy rather than a separate claim. *See id.*

If this Court remains convinced that there is still no final and appealable order in this case because the Larimer County District Court did not expressly state the words in its order "that there is no just reason for delay and . . . express direction for the entry of judgment," the City submits that the better course of action is to allow the City to obtain such an order from the Larimer County District Court, rather than dismissing this appeal altogether. In order to avoid unnecessary delay in this appeal, the City and COGA have filed a joint motion requesting the District Court specifically certify its August 7 Order under C.R.C.P. 54(b) while this Court is deciding the issue regarding appellate jurisdiction. *See Muzick v. Woznicki*, 136 P.3d 244, 251-52 (Colo. 2006). (Trial court may issue an order certifying summary judgment as final pursuant to C.R.C.P 54 (b) after notice of appeal has been filed). *See also Mortgage Investment Corp. v. Battle Mountain Corp.*, 56 P.3d 1104, 1106 (Colo. App. 2001), *rev'd on other grounds*, __ P.3d __ (Colo. 2003). A copy of the Joint Motion is attached as **Exhibit 2**. The City will advise this Court of the District Court's ruling on this motion if it is issued before this Court decides whether to dissolve its Order to Show Cause.

Accordingly, the City requests this Court to dissolve its Order to Show Cause and allow this appeal to proceed.

Dated this 2nd day of December, 2014.

SULLIVAN GREEN SEAVY LLC

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CITY OF FORT COLLINS

By: /s/ John R. Duval
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ATTORNEYS FOR DEFENDANT CITY OF FORT COLLINS

CERTIFICATE OF SERVICE

I do hereby certify that on this 2nd day of December, 2014, a true and correct copy of the foregoing pleading was served electronically via ICCES or e-mail, or placed in the U.S. Mail, addressed to the following persons:

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