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DISTRICT COURT, LARIMER COUNTY, COLORADO Address: 201 La Porte Avenue, Suite 100 Fort Collins, CO 80521 Phone: (970) 494-3500	
PLAINTIFF COLORADO OIL & GAS ASSOCIATION v. **DEFENDANT** CITY OF FORT COLLINS, COLORADO and **PROPOSED INTERVENORS** CITIZENS FOR A HEALTHY FORT COLLINS, SIERRA CLUB, AND EARTHWORKS ("MEASURE PROPONENTS")	▲ COURT USE ONLY ▲ Case Number: 2013CV31385 Div.: 5B
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MEASURE PROPONENTS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

INTRODUCTION

The Measure Proponents have requested a stay of this case until the Court of Appeals can resolve their appeal of this Court's denial of Measure Proponents' request to intervene. The Measure Proponents intend to seek an expedited appeal of this issue; hence the stay they are seeking from this Court would be limited to the time it takes to resolve the appeal.

However, if the proceedings in the trial court continue apace, a final judgment invalidating the fracking moratorium championed by the Measure Proponents—which was actively opposed by both the City and COGA—might be entered by this Court, before the intervention issue is resolved in the Court of Appeals. Such a judgment would substantially impair the rights and interests of the Measure Proponents, who seek to protect themselves from the irreparable harm that would result if fracking were to occur in their dense urban community. This harm substantially outweighs any alleged burden on COGA, which has come forward with no specific evidence of any plans to conduct fracking operations within Fort Collins during the duration of the moratorium, much less during the limited stay of these proceedings sought by Measure Proponents. Furthermore, if the City's interest really is in upholding the moratorium, then a stay of the proceedings supports that interest. And, if the Measure Proponents' appeal is successful, it would put this Court in the position of having to vacate any summary judgment entered for COGA during the appeal and to reconsider and repeat those proceedings, resulting in waste of judicial resources.

Measure Proponents' participation in this litigation is necessary for a full and vigorous defense of the fracking moratorium. The City's recent response to COGA's Motion for Summary Judgment shows that the City is not adequately representing Measure Proponents' interest, as was reasonably predicted in the Motion to Intervene. The City has failed to raise many factual issues that would preclude summary judgment, even though Colorado Supreme Court precedent on preemption makes clear that whether an issue is of local, state, or mixed concern involves issues of fact and requires and *ad hoc* determination based on the totality of the circumstances. Those factual issues to be considered include the extensive local impacts of fracking that is conducted in densely populated urban

communities, as well as the minimal interest the State has in ensuring that fracking occurs in Fort Collins even over the objections of its citizens.

This Court will recall that, with their Motion to Intervene, the Measure Proponents filed a Motion to Dismiss COGA's lawsuit based on its lack of standing. One reason this Court gave in denying the Motion to Intervene was that the City had raised the defense of standing in its Answer. However, in its response to COGA's Motion for Summary Judgment, the City has now failed to assert the obvious defense of standing, even though COGA has come forward with no evidence of harm to itself or its members. Thus, the City is not adequately defending this case or representing the Measure Proponents' interest.

The City's decision to avoid engaging in discovery and instead to seek resolution of this case on summary judgment only highlights that the City's interest, as stated publicly by the City Council, is to avoid spending money on litigation defending the moratorium or facing hypothetical takings challenges. In fact, the City's interest is much broader than the Measure Proponents', and includes representing oil and gas interests, mineral rights holders, businesses, and taxpayers whose interests diverge significantly from the Measure Proponents' interest in protecting their health, safety, and property from the impacts of fracking. Given the City's lack of an adequate defense, its decision to forego basic discovery, and its divergence of interest with Measure Proponents, Measure Proponents have raised serious questions for appeal, and a stay of this case pending that appeal is in the interest of justice and judicial economy.

ARGUMENT

As COGA has stated, Colorado state courts have not articulated a definite standard for deciding a motion to stay. However, even under the standard COGA puts forward, a stay is warranted in this case because a stay would preserve the *status quo* while allowing

Measure Proponents' appeal to be decided. COGA suggests that this Court should consider: "(1) potential prejudice to the nonmoving party; (2) hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by avoiding duplicative litigation." COGA's Resp. in Opp'n to Mot. to Stay Proceedings ("COGA Response") at 3. Yet COGA has not come forward with any concrete harm that would result from a reasonable and necessary stay of this case, instead pointing simply to its desire for "legal guidance" and "prompt resolution of precedent-setting litigation." *Id.* at 4. In contrast, Measure Proponents face great hardship and inequity if a stay is not granted, particularly if the appeal is successful. A successful appeal would mean that the Court of Appeals found that the City does not adequately represent the Measure Proponents' interest. COGA's entire argument appears to rest on the incorrect assumption that the City actually does and will adequately represent the Measure Proponents' interest. Finally, if this Court proceeds to rule on the pending summary judgment motions, the time and resources spent by the Court and the parties will have been wasted if the appeal is successful and the Court of Appeals orders that Measure Proponents were improperly excluded from the litigation. If instead the Court stays this litigation, then no further judicial resources will be used, and the case can proceed once the appeal is resolved. Therefore, a stay will minimize the risk of harm to all the parties, most of which is borne by Measure Proponents, while also avoiding the potential of duplicative litigation.

I. ANY HARM FROM A STAY IS MINIMAL.

At most, a stay would mean that this case could not be resolved on summary judgment during the pendency of Measure Proponents' appeal. While this may be a delay of the case, it would not be an "undue" delay because it is limited to the time necessary for an appeal (which could be expedited), and is no more delay than needed to preserve Measure

Proponents' rights. COGA does not have a right to have this Court rush to judgment without presentation of a full and vigorous defense of the fracking moratorium that was passed by Measure Proponents over the City's opposition.

All that COGA has identified is an unsubstantiated, vague, and nebulous harm due to lack of "legal guidance with respect to their ability to conduct oil and gas operations in and around Fort Collins during the entire appeal period" and a desire for "a prompt resolution of this precedent-setting litigation." *See* COGA Response at 4. However, the precedential nature of this litigation only highlights the need for the Court to avoid rushing to judgment and include interested parties who are not adequately represented. Furthermore, as explained in the next paragraph, COGA has not explained why it needs "guidance" from the Court in such a hurry, as it has come forward with **no evidence** of any plans to frack that are prevented by the moratorium. If this is the only "harm" that COGA could identify, it is not nearly enough to outweigh the potential harm to Measure Proponents should this litigation proceed apace and Measure Proponents prevail on their appeal and are allowed to intervene.

More striking is what COGA did not say. Just as it did in its Motion for Summary Judgment, COGA has failed to come forward with any evidence that one of its members has concrete plans to conduct fracking operations during a stay. Nor has it come forward with any evidence that one of its members has concrete plans to conduct fracking operations within the City of Fort Collins during the five years of the moratorium. COGA's failure to come forward with any evidence of actual harm not only means that a stay should be granted, it also shows that COGA has not proven it has standing to bring this current lawsuit (as Measure Proponents argued in the proposed Motion to Dismiss filed along with their Motion to Intervene).

The City would not be harmed by a stay. If the City's interest truly is in defending the moratorium so that it can remain in place, then a stay only supports that interest. The moratorium will remain on the books as long as this litigation is stayed, and the City can stop expending resources to defend the moratorium, at least temporarily.

Although COGA points to potential takings claims as a harm to the City from a stay, that is hypothetical at best. Measure Proponents believe that, given the nature of this moratorium, those takings claims would not necessarily be brought. And if they were brought, they would not be successful. The U.S. Supreme Court and the Colorado Supreme Court both recognize that temporary moratoria of reasonable duration are legitimate exercises of local governments' authority to preserve the *status quo*, and protect the public health, safety, and welfare, while developing a long-term plan for development. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337-38 (2002) (upholding "rolling moratoria" totaling 32 months against takings claim);[1] *Droste v. Bd. of Cnty. Comm'rs of Cnty. of Pitkin*, 159 P.3d 601, 606 (Colo. 2007) (county had authority to adopt ordinance imposing ten-month moratorium on county processing of land-use applications). Mineral-rights owners cannot establish a takings claim simply by showing that they have been denied the ability to use a certain practice (fracking) to exploit a property interest. Rather, a company would have to show that its "reasonable investment-backed expectations" were adversely impacted. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of La Plata*, 38 P.3d 59, 67 (Colo. 2001)(en banc). The leaseholders of subsurface mineral rights in Fort Collins should be especially susceptible to this defense to the extent that their leases include *force majeure* language or other language that indicates

[1] *Tahoe-Sierra* is the leading federal case on moratoria and takings, and Colorado law tracks federal law when it comes to takings. *Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990); *Williams v. Central City*, 907 P.2d 701, 707 (Colo. App. 1995); *Dill v. Bd. of Cty. Comm'rs of Lincoln Cnty.,* 928 P.2d 809, 813.

knowing they are subject to City regulation, or that their leases might be temporarily suspended due to regulation.

In any event, a mere hypothetical future lawsuit against the City based on questionable claims by non-parties is not grounds to deny the limited stay that Measure Proponents seek. The specter of takings claims actually reinforces Measure Proponents' position—given the City Council's fear of takings claims, it is motivated to avoid these claims and not defend the moratorium as fully as it might. Simply put, it cannot adequately represent the interest of Measure Proponents.

II. DENIAL OF A STAY WOULD PREJUDICE MEASURE PROPONENTS BECAUSE THE CITY IS NOT ADEQUATELY REPRESENTING THEIR INTERESTS.

As opposed to any harm to COGA, which must be assessed in the event that the appeal is denied, the harm to Measure Proponents must be assessed in the event that the appeal is granted. In that case, the Court of Appeals will have determined that Measure Proponents' interest is not adequately represented by the City. Thus, the continued inadequate representation of Measure Proponents' interest will cause serious harm. This harm is much greater than any supposed harm to COGA because it is anxious to have the case resolved. The resources expended by the Court and the parties will have been wasted, as Measure Proponents will not have been afforded an opportunity to participate in any dispositive briefing, discovery, or hearings. Further, summary judgment proceedings would be inappropriate where disputes over genuine issues of material fact have not been identified through discovery or raised by the City. Finally, any judgment by the Court that impairs Measure Proponents' interests would have to be vacated. Any other result would mean that Measure Proponents were improperly denied the opportunity to defend those interests in court.

Additionally, the City's defense of this case thus far only highlights the inadequacy of its representation of Measure Proponents' interest. This is not a surprise, since the City has never indicated that it would represent those interests. Instead, COGA simply asserted, and the Court assumed, that the City would adequately represent the Measure Proponents' interest. But the City's Response to COGA's Motion for Summary Judgment shows otherwise. The City failed to assert standing as an affirmative defense in its Response, even though COGA did not come forward with a scintilla of evidence that would support its conclusory allegations of harm in its complaint.[2]

The City also failed to present any evidence of why fracking is a matter of local and not statewide concern, even though ample evidence exists regarding harm to water quality, increased cancer risk, increased smog, induced earthquakes, decreased property values, noise, light pollution, traffic problems, road and other infrastructure impacts, emergency response costs to local governments, etc. *See* Studies and Reports on the Dangers of Fracking and the Need for More Health Data That Support a 5 Year Moratorium, Ex. 1. Nor has the City addressed the limited State interest that fracking occur beneath Fort Collins, given the relatively small amount of oil and gas beneath the City and the availability of safer alternatives to fracking. These issues are all being advanced the City of Longmont and the citizens who have intervened in comparable litigation regarding a fracking ban in Longmont. If the City really believes that this case should be resolved on summary judgment, now is the time to raise all the defenses. The City's failure to present a full and vigorous defense has proven Measure Proponents' fear of inadequate representation to be correct.

[2] The City did allege undisputed facts that might support a defense based on standing grounds, but did not mention standing anywhere in its argument. *See* City's Combined Brief at 8-9.

Only the City can explain why it is has not developed the facts and presented these defenses. But the City Council, at least, has made clear that it opposes the moratorium. Therefore, it is reasonable for the Court to conclude that the City wishes to avoid spending the resources necessary to properly defend the moratorium, and that the City Council would be pleased if the moratorium were overturned by this Court. The City Council explicitly stated its opposition to the moratorium. *See* City Res. 2013-085. Furthermore, even though the City Council had previously enacted a moratorium, it demonstrated that it would act on behalf of oil and gas interests to avoid the moratorium by creating a giant loophole allowing Prospect Energy to frack within city limits notwithstanding the moratorium. *See* Motion to Stay, Ex. A, B. In light of all this, the Court of Appeals will likely conclude that the people who pushed for the moratorium over the opposition of City Council—the Measure Proponents—are the only ones who can adequately represent their interest in protecting their health, safety, and property values from the harm of fracking operations.

III. JUDICIAL RESOURCES ARE CONSERVED BY A STAY.

If a stay is granted, this Court will not expend resources reviewing and deciding the pending motions for summary judgment until after resolution of the appeal. Thus, if the Court of Appeals decides that Measure Proponents should have been allowed to intervene, the parties can modify their briefing to accommodate Measure Proponents' participation. If the Court of Appeals affirms the denial of intervention, then the case may proceed. Therefore, a stay promotes fairness and efficiency while conserving judicial resources.

In contrast, if a stay is not granted, then judicial resources may be wasted by unnecessarily duplicative litigation. If the Court of Appeals decides in favor of intervention by Measure Proponents, then any judicial resources spent during the appeal will have been

wasted, particularly if the Court rules in favor of COGA on summary judgment. That judgment would have to be vacated so that it could be re-litigated, wasting the resources not just of the court but of COGA and the City as well. The only way that judicial resources would not be wasted is if the Court of Appeals affirms the denial of intervention. However, as explained previously, that is an unlikely outcome, and any harm caused by the delay would be justified by eliminating the risk of harm to Measure Proponents.

IV. STATE PREEMPTION LAW REQUIRES AN AD HOC COMPARISON OF STATE VERSUS LOCAL INTERESTS BASED ON FACTS.

A long line of precedent from the Colorado Supreme Court makes clear that in preemption cases, first a court must determine if a matter is one of local, state, or mixed concern. This legal conclusion is made after considering the totality of the circumstances of the particular case, including both facts and policy. If the matter is deemed to be of "local concern," then the local law is not preempted and the matter ends there. If instead the matter is determined to be of mixed or statewide concern, then the court will look to whether there is a conflict between the local law and state law.

COGA's Response skips the entire first part of the analysis, and instead jumps directly to the test for whether a conflict exists. However, in the same case relied on by COGA, the Supreme Court stated that it was required to "weigh the relative interests of the state and the municipality in regulating the particular issue in the case." *Webb v. City of Blackhawk*, 295 P.3d 480, 486 (Colo. 2013). In weighing this interest, the court is required "to consider the totality of the circumstances," to make a legal conclusion "involving considerations of both fact and policy," and to make its determination "on a case-by-case basis." *Id.* at 486-87. In this case, therefore, the threshold issue involves a weighing of the state and local interests. That determination necessarily involves consideration of the local impacts of fracking on health, safety, and property values, on which the Measure

Proponents intend to present evidence. The determination also involves questions about the need for uniformity and the extraterritorial impacts of a fracking moratorium, which has changed dramatically since the early 1990s due to the development of horizontal drilling.

The cases COGA relies on to assert that the case at hand can be resolved as a "matter of law" with little or no facts, much less an evidentiary hearing, do not reflect the current applicable law. There is no "field preemption" of state law over local regulation of oil and gas. *Bd. of Cnty. Comm'rs, La Plata Cnty. v. Bowen/Edwards Assoc., Inc.,* 830 P.2d 1045, 1057-1058 (Colo. 1992); *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1066 (Colo. 1992). The validity of a local land-use regulation is a question of operational conflict preemption; such a conflict arises where "the effectuation of a local interest would materially impede or destroy the state interest." *Bowen/Edwards*, 830 P.2d at 1059. That determination "must be resolved on an ad-hoc basis under a fully developed evidentiary record." *Id.* at 1060.

Since the Colorado Supreme Court decided *Voss* and *Bowen/Edwards* in 1992, the Colorado Legislature has passed numerous amendments to the Colorado Oil and Gas Conservation Act ("COGCA") explicitly favoring local control and underscoring the need for greater health and safety protections. 1994 Colo. Sess. Laws, ch. 317, § 1. In 1996, further amendments added language emphasizing the power of local governments to require and ensure compliance with land-use permit conditions. 1996 Colo. Sess. Laws, ch. 88, § 1. The COGCA was amended again in 2007, enlarging the local government authority-savings provision: "nothing in this act shall establish, alter, impair, or negate the authority of local governments to regulate land use related to oil and gas operations." 2007 Colo. Sess. Laws, ch. 320, § 1. The 2007 amendments further changed the public interest from encouraging and promoting development to fostering "responsible, balanced development." They also

eliminated the directive to prohibit waste from the Colorado Oil and Gas Conservation Commission's mission statement and replaced it with a directive to "prevent" waste, "consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources." 2007 Colo. Sess. Laws, ch. 320, §§ 2 and 3. The considerations cited in the COGCA raise issues of fact that should be developed on a full evidentiary record and preclude the hasty summary judgment sought by COGA here.

Even if COGA can prove that this case involves a matter of mixed or statewide concern, facts are still needed to decide if there is a conflict. This case is not as simple as the *Webb* case, where the local ordinance prohibited something that the legislature had explicitly authorized. In *Webb*, the state legislature had enacted a statute requiring cities to provide an alternate bike path if they wanted to prohibit bike traffic on roadways. *See Webb*, 295 P.3d at 483 (citing C.R.S. § 42-4-109 which required municipalities to accommodate bicycle traffic). In contrast, the COGCA does **not** explicitly require local governments to allow fracking within their communities, nor is fracking even mentioned. Further, the Colorado Oil and Gas Conservation Commission does not actually regulate fracking—it simply requires notice be provided before fracking occurs and disclosure of fracking chemicals in an online registry. The Commission does not issue a permit to frack. It does not put any limits on when or where fracking may occur. It does not place any limits on what chemicals may be used in fracking fluids. Instead, the decision of whether, when, where, and how to frack is entirely up to industry. All of these facts will be established through discovery in this case when Measure Proponents are allowed to intervene.

COGA also misleads in arguing that the moratorium passed by the citizens of Fort Collins (over the objection of City Council) is an "outright ban." A moratorium is not a ban. *See Tahoe-Sierra* and *Droste, supra.* Furthermore, the facts in this case will show that even

a ban on fracking is not a ban on all oil and gas development. Alternatives to fracking exist that can be and sometimes are used in Colorado to extract oil and gas without causing as much harm in dense urban communities.

Although COGA and the City might prefer to have this Court resolve the issue without the facts, Measure Proponents insist that those facts are needed in order for a fair decision and an adequate and vigorous defense of this case. The parties cannot simply make up facts for their convenience to support their desired outcome, and the Court cannot assume such facts. The City's failure to press these issues only strengthens the argument that it does not adequately represent Measure Proponents' interest.

CONCLUSION

For the reasons set forth above, Measure Proponents respectfully request this Court to enter a stay of the litigation pending the resolution of Measure Proponents' appeal.

Respectfully submitted this 21st day of May, 2014.

/s Kevin Lynch
Kevin Lynch
Counsel for Intervenors: Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks

This document was filed electronically pursuant to C.R.C.P. 121 § 1-26. The original signed document is on file with the University of Denver Environmental Law Clinic.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2014, a true and correct copy of the above and foregoing **MEASURE PROPONENTS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS** was served via the Integrated Colorado Courts E-Filing System (ICCES), on:

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