DISTRICT COURT, LARIMER COUNTY, COLORADO

201 La Porte Avenue, Suite 100
Fort Collins, CO 80521
Phone: (970) 494-3500

Plaintiff:

COLORADO OIL AND GAS ASSOCIATION,

v.

Defendant:

CITY OF FORT COLLINS, COLORADO

Attorneys:

SULLIVAN GREEN SEAVY, LLC
Barbara J. B. Green, Atty. Reg. #15022
John T. Sullivan, Atty. Reg. #17069
3223 Arapahoe Avenue, Suite 300
Boulder, Colorado 80303
Telephone Number: (303) 440-9101
Facsimile Number: (303) 443-3914
E-mail: barbara@sullivangreenseavy.com
john@sullivangreenseavy.com

Stephen J. Roy, Atty. Reg. #0893
John R. Duval, Atty. Reg. #10185
Fort Collins City Attorney's Office
300 La Porte Avenue
P. O. Box 580
Fort Collins, CO 80522-0580
Telephone Number: (970) 221-6520
Facsimile Number: (970) 221-6327
Email: sroy@fcgov.com
jduval@fcgov.com

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Case Number: 2013CV31385

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DEFENDANT CITY OF FORT COLLINS' REPLY BRIEF IN SUPPORT OF CITY'S CROSS MOTION FOR SUMMARY JUDGMENT

Defendant City of Fort Collins, Colorado, (the "City") by and through its undersigned attorneys, Stephen J. Roy, City Attorney, John R. Duval, Assistant City Attorney, and Sullivan Green Seavy LLC, submits its Reply Brief in Support of the City's Cross Motion for Summary Judgment filed on May 9, 2014, and states as follows:

I. INTRODUCTION

Plaintiff Colorado Oil and Gas Association ("Plaintiff" or "COGA") does not dispute any of the material facts set forth on pages 3-10 of the City's Combined Brief filed on May 9, 2014 in support of its Cross Motion for Summary Judgment ("City's Combined Brief"). *See* COGA's Brief filed May 27, 2014 ("Plaintiff's Opposition Brief"), at p. 4.[1] As a home rule city under Article XX, Section 6 of the Colorado Constitution, Fort Collins possesses all powers granted to home rule municipalities under the Constitution and laws of Colorado, together with all the implied powers necessary to execute the City's powers. The City's powers include (but are not limited to) the power to regulate planning and zoning within its boundaries, as well as implied powers necessary to enact and implement such regulations. *See* Article I, Sections 4-5 of City Charter, **Exhibit A** to City's Combined Brief.

Colorado statutes, Colorado case law, and even the rules of the Colorado Oil and Gas Conservation Commission ("Commission") unequivocally recognize that the City has the power to regulate the land use impacts of oil and gas development within Fort Collins, *unless* there is an "operational conflict" between such regulations and the state's interest in oil and gas

[1] Although Plaintiff argues that whether the City will amend its existing subarea plan for the northern and northeastern parts of the City is in dispute, Plaintiff provides no facts to support this assertion. Therefore, all of the City's facts are undisputed. *See, e.g., Brown v. Teitelbaum,* 830 P.2d 1081, 1084-85 (Colo. App. 1991) (party cannot rest on mere allegations or argument of counsel to create disputed issues of material fact, but must set forth specific facts by affidavit or otherwise).

development. *See* C.R.S. § 29-20-102 (1), (2); C.R.S. § 34-60-128 (4); C.R.S. § 34-60-127 (4) (c). *See Voss v. Lundvall Bros.*, 830 P.2d 1045, 1064-65, 1068-69 (Colo. 1992) ("*Voss*"); *Bd. of County Comm'rs of La Plata County v. Colorado Oil and Gas Conservation Commission*, 81 P.3d 1119, 1124 (Colo. App. 2003) (citing *Voss* and stating: "Local governments have a legally protected interest in enacting and enforcing their land use regulations governing the surface effects of oil and gas operation."). *See* Commission Rule 201, 2 CCR 404-1.

Moreover, Colorado case law recognizes that "the exercise of zoning authority for the purpose of controlling land use within a home-rule city's municipal borders is a matter of local concern." *Voss*, 830 P.2d 1064. *See also Town of Telluride v. San Miguel Valley Corporation*, 185 P. 3d 161, 168 (Colo. 2008). This is because "[l]egislative attempts to address local land use legislation on a statewide basis largely failed." *Droste v. Bd. of County Comm'rs*, 159 P.3d 601, 605 (Colo. 2007). *See also* C.R.S. § 29-20-102 (1) ("The General Assembly hereby finds and declares that in order to provide for planned and orderly development within Colorado and a balancing of basic human needs of a changing population with legitimate environmental concerns, *the policy of this state is to clarify and provide broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions*.") (quoted in *Droste*, 159 P.3d 605-06 (emphasis in original)).

In spite of these legal authorities and the vital public policies they uphold, Plaintiff continues to argue that the City's moratorium (the "Moratorium") is impliedly preempted. However, this argument is based on a flawed interpretation of *Voss* and subsequent cases involving home rule cities. If this Court adopts Plaintiff's argument that a home rule city like Fort Collins cannot use the "time out" of a moratorium to study and enact land use regulations

whenever there is a state interest in the activity that is the subject of the moratorium, such a ruling would contradict existing law and eviscerate the land use authority of home rule cities throughout Colorado. Prohibiting home rule cities from enacting land use moratoria any time a state interest may be present, would deprive these cites of an essential tool for land use planning, resulting in ineffective local land use regulation to the detriment of their citizens.

The Moratorium is not preempted under an operational conflicts analysis because Plaintiff has not shown that the Moratorium materially impedes or destroys the State interest in oil and gas development. Plaintiff also fails to show that the Moratorium has caused sufficiently palpable and direct injury to Plaintiff to warrant injunctive relief. This Court should therefore enter judgment for the City on its cross motion for summary judgment.

II. ARGUMENT

A. Plaintiff Bears the Burden of Proving Its Claims that the Moratorium Is Preempted and that Plaintiff Is Entitled to Injunctive Relief.

Plaintiff attempts to avoid or minimize its burden of proof on its claims for declaratory and injunctive relief in this facial challenge to the Moratorium. It is undisputed that the ordinance imposing the Moratorium was passed and adopted by a citizen initiative pursuant to the City's Charter. It is also undisputed that Fort Collins is a home rule city under Article XX, Section 6 of the Colorado Constitution, which gives the City the power and authority to control land use within its borders as a matter of local concern. *See* Article I, Sections 4-5 of City Charter, **Exhibit A** to City's Combined Brief. *See also Voss*, 830 P.2d at 1064.

As the City pointed out on page 11 of its Combined Brief, government regulations and other enactments are presumed to be valid, and the party challenging them assumes the burden of proving the asserted invalidity beyond a reasonable doubt. Plaintiff attempts to distinguish

Sellon v. City of Manitou Springs, 745 P.2d 229, 232 (Colo. 1987) and *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) because these cases did not involve a preemption claim. Plaintiff's Opposition Brief, pp. 5, 7. As Plaintiff acknowledges, however, *Sellon* and *Salerno* did involve facial challenges to government enactments based on allegations that they violated the Colorado and U.S. Constitutions respectively.

The Plaintiff also has overlooked *McCarville v. City of Colorado Springs*, 2013 Colo. App. LEXIS 1877 (Colo. App. 2013). In *McCarville*, the plaintiff challenged Colorado Spring's code provisions governing election procedures for amendments to its charter as being in conflict with, or preempted by, certain state statutes. Colorado Springs countered by arguing, among other things, that its adoption of these election procedures was a matter of local concern under its home rule powers as found in Article XX, Section 6 of the Colorado Constitution. After noting that the plaintiff was contending that the city's ordinances violated the "Colorado Constitution because they conflict with a state statute expressly required by the constitution," the Court observed that it reviews "de novo a *constitutional challenge* to a municipal ordinance." *Id.* at 1879 (emphasis added). It then stated: "Municipal ordinances are presumed constitutional. [citation omitted]. Thus, we must uphold the ordinance unless the party challenging it proves beyond a reasonable doubt that the ordinance is unconstitutional." *Id.* (citation omitted). Clearly, in *McCarville* the Court considered a state-law preemption challenge to a home rule city's ordinance to be a "constitutional challenge" to which these review standards are applicable.

Here, Plaintiff is making a constitutional challenge because Plaintiff argues that the Moratorium is not within the City's land use authority, which originates in Article XX, Section 6 of the Colorado Constitution and the City's home rule charter. So Plaintiff's attempt to

distinguish *Sellon* and *Salerno* fails. *See also Tri State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 677 (Colo. 1982) (holding that Thornton PUD ordinance is a legislative enactment and is presumed valid, and the party assailing the constitutionality of that ordinance has the burden of proving its invalidity beyond a reasonable doubt) (citations omitted).

The cases Plaintiff cites on page 5 of its Opposition Brief do not address the burden of proof for preemption cases at all. And while Plaintiff quibbles with the City's citation to *Williams v. Central City*, 907 P.2d 701, 706 (Colo. App. 1995), for the proposition that intentionally temporary regulations like moratoria are not subject to the same degree of judicial scrutiny as are permanent regulations, Plaintiff reluctantly acknowledges that this is the law.

Plaintiff has a heavy burden of proof in this case because of its decision to mount a facial, constitutional challenge to a home rule city's legally enacted ordinance. As set forth below and in the City's Combined Brief, Plaintiff does not meet its burden.

B. The Moratorium Is Not a Ban, Plaintiff Acknowledges This Fact, and That Is a Critical Distinction between This Case and *Voss*.

This Court should scrutinize Plaintiff's assertion that the Moratorium is the same as the total ban addressed in *Voss*. Plaintiff attempts to avoid the substantial amount of legal authority discussed on pages 13-17 of the City's Combined Brief that recognizes the distinction between a temporary moratorium and a permanent ban and points out the significance of that distinction. But Plaintiff cannot avoid acknowledging this distinction in its own pleadings.

On page 4 of Plaintiff's Response in Opposition to Measure Proponents' Motion for Stay filed May 19, 2014, Plaintiff states "that this is the *only* litigation pending in Colorado in which a party has raised a challenge to a moratorium on hydraulic fracturing [. . .] and COGA [is] entitled to a prompt resolution of this precedent-setting litigation which will determine the

validity of moratoria on hydraulic fracturing in Colorado." (emphasis added). Plaintiff's statement necessarily admits that the other cases in which it challenges the enactment of a local government ordinance against hydraulic fracturing do not involve a moratorium like the one in this case.[2]

The City agrees that this litigation is unique and precedent setting because the facts of this case are not the same as the facts of *Voss*. In addition, the applicable law also differs because this case involves a temporary moratorium on only one aspect of oil and gas operations, fracking, and not a "total ban" on *all* oil and gas operations as in *Voss*.

C. The State's Interest in Oil and Gas Does Not Invalidate the City's Moratorium.

1. State interest in a subject matter is not enough to preempt a moratorium.

Plaintiff asserts that the City has not identified facts "that would support a conclusion that the State has no interest in the regulation of oil and gas activities." Plaintiff's Opposition Brief at p. 10. This statement misses the point because the City does not dispute that the State has an interest in the regulation of oil and gas development. *See Bowen/Edwards v. Board of County Comm'rs of La Plata County*, 830 P.2d 1045, 1058 (Colo. 1992) ("*Bowen/Edwards*"). However, *Voss* and *Bowen/Edwards* both recognize that the State's interest in uniform regulation of matters in oil and gas development "*does not militate in favor of an implied legislative intent to preempt all aspects of a county's statutory authority to regulate land use within its jurisdiction* merely because the land is an actual or potential source of oil and gas development and operations." *Voss*, 830 P.2d at 1068 (quoting *Bowen/Edwards*, 830 P.2d at 1058) (emphasis

[2] COGA is challenging citizen initiatives involving actual bans on fracking in *COGA v. City of Lafayette*, Case No. 2013-CV-31746, Boulder District Court; *COGA v. City of Longmont*, Case No. 2012-CV-702, Boulder District Court.

added). Thus, *Voss* and *Bowen/Edwards* actually uphold the City's power to regulate land use impacts of oil and gas development on lands within the City's jurisdiction.

The City does not agree that its inherent authority to impose a moratorium on hydraulic fracturing on lands within its jurisdiction is preempted simply because the State also has an interest in regulating oil and gas development. There is always a state interest involved, or at least alleged, in a preemption claim. Otherwise there would be no dispute to litigate. And the Colorado Supreme Court has expressly rejected the idea that "the mere enactment of a state statute constitute(s) pre-emption by the state of the matter regulated." *See City of Aurora v. Martin*, 180 Colo. 72, 76, 507 P.2d 868, 870 (1973). Moratoria regularly apply to entire categories of land uses, such as industrial or commercial, which sweep in a plethora of state-regulated activities from marijuana dispensaries to mining operations. *See* Laura Hurmence McKaskle, *Land Use Moratoria and Temporary Takings Redefined After Lake Tahoe*, 30 Pepp. L. Rev. 273, 284 (2003). The City has previously explained the critical importance and widespread use of moratorium powers to the exercise of land use authority. *See* City's Combined Brief at pp. 13-15. *See also* Matthew G. St. Amand and Dwight H. Merriman, 43 Nat. Resources J. 703, 745 (2003). If courts were to apply the preemption doctrine to defeat a local government moratorium every time the moratorium applied to state-regulated activity, such a ruling would have far-reaching public policy implications beyond the circumstances of this case. It would deprive local governments of a vital planning tool, have a chilling effect on the use of moratoria, and raise questions about the authority of municipalities and counties to enact moratoria in all sorts of circumstances.

While no reported case in Colorado has yet addressed this exact issue, in *Williams v. City of Central,* 907 P.2d 701 (Colo. App. 1995) the Court of Appeals did address a closely related issue. In *Williams,* Central City imposed in 1992 a temporary moratorium on most land use development in the "gaming district" that Central City had established in reaction to the State's voters legalization of limited gaming in Central City and certain other communities by the addition of Section 9 to Article XVIII of the Colorado Constitution. Central City adopted its moratorium to complete studies "concerning Central City's capacity to absorb the growth spawned by the approval of limited stakes gambling," 907 P.2d at 703. The plaintiff in *Williams*, a landowner affected by the moratorium, brought an inverse condemnation claim under Article II, Section 15 of Colorado Constitution against Central City for a temporary regulatory taking. In rejecting the plaintiff's claim, the Court remarked positively on the need for land use moratoria "in order to bring about effective governmental decision making", 907 P.2d at 704, and further observed that they "play an important role in land use planning and are commonly employed", 907 P.2d at 706. The Court made these statements and rendered its decision in a context involving a constitutional question (a taking), and concerning a matter of arguably strictly statewide interest, limited gaming. While *Williams* did not address an issue of preemption, it illustrates the type of problems, not unlike the sudden change in the nature and intensity of oil and gas operations in Colorado, that local governments can be unexpectedly called on to address. Not having the tool of a land use moratorium to address such important public policy concerns whenever a state interest is present, would put local governments and their citizens at the mercy of events. This cannot be the law in Colorado.

2. Cases from other jurisdictions show that a moratorium is not impliedly preempted unless the state occupies the entire field of the subject of the moratorium.

Plaintiff identifies one Maryland case in which courts applied the traditional preemption analysis to a moratorium. *See* Plaintiff's Combined Brief, p. 14. In that case, the court found that Baltimore's moratorium on incinerators was impliedly preempted because the moratorium would usurp the state's "exclusive authority" over county plans and permitting process for solid waste incinerators. *Mayor v. City Council of Baltimore v. New Pulaski Co. Ltd. P'ship*, 684 A.2d 888, 893-94 (Md. Ct. Spec. App. 1996) (cert. denied 690 A.2d 523 (Md. 1997).

The City has found other cases where the preemption analysis has been applied to a moratorium. These cases are consistent with *New Pulaski*: the moratorium is impliedly preempted if the state *occupies the entire field* of the subject matter of the moratorium. *See, e.g.*, *Plaza Joint Venture v. City of Atlantic City*, 416 A.2d 71 (N.J. Super. A.D. 1980). Where the state does *not* occupy the entire field of regulation, courts routinely uphold an otherwise valid local moratorium against preemption claims. *See also City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 56 Cal.4th 729, 300 P.3d 494 (2013) (municipal moratorium on medical marijuana establishments not preempted because state did not occupy entire field); *City of Claremont v. Kruse*, 177 Cal.App.4th 1153, 100 Cal.Rptr.3d 1 (2009) (municipal moratorium on marijuana establishments not preempted because state leaves room for local regulation and moratorium and state laws do not conflict); *PNE AOA Media, L.L.C. v. Jackson County*, 554 S.E. 2d 657, 146 N.C. App. 470 (N.C. App. 2001) (upholding municipal moratorium on outside advertising).

In Colorado, no court has ever held that the State has exclusive authority over all aspects of oil and gas development – quite the contrary. As explained on pages 20-23 of the City's Combined Brief, the Colorado Oil and Gas Conservation Act (the "Act") and Commission Rules expressly allow for and recognize local land use authority over oil and gas. Thus, in keeping with moratorium decisions in other jurisdictions, and Colorado law, the Moratorium should be given effect.

3. The preemption test Plaintiff urges this Court to apply is not the correct test.

Plaintiff's assertion that the proper preemption test in this case is whether the City's ordinance authorizes what the state forbids, or forbids what the state authorizes (citing *Webb v. City of Black Hawk*, 295 P.3d 480 (Colo. 2013)) is incorrect and misleading. In fact, the parties agree that the only case in Colorado to weigh local home rule authority against the state interest in oil and gas is *Voss*. After going through the four factor analysis upon which Plaintiff places such great emphasis in its briefs, *Voss* states: "We, however, have previously held that a home rule city can exercise control over outdoor advertising within its borders under its zoning authority only to the extent that the local ordinance does not materially impede the significant state goals expressed in the Outdoor Advertising Act, C.R.S. §§ 43-1-401 to 43-1-420. *National Advertising Co. v. Department of Highways*, 751 P. 2d 632, 635 (Colo. 1988). The same principle applies to a home rule city's exercise of land use authority over oil and gas development and production within its territorial limits." *Voss*, 830 P. 2d at 1064-65.

This is the same test *Bowen/Edwards* applied to the La Plata County oil and gas regulations before the court in that case. *See Bowen/Edwards*, 830 P.2d at 1059 (also citing *National Advertising Co. v. Department of Highways*, 751 P. 2d at 635-36). Thus, the correct

test is (as *Voss* and *Bowen/Edwards* clearly hold): whether the local interest manifested in the local ordinance "materially impedes or destroys the state interest" manifested in a state statute. This is how *Bowen/Edwards* and *Voss* define an "operational conflict" in the context of local and state laws regulating oil and gas development.

D. Plaintiff Cannot Show that the Moratorium Operationally Conflicts with the State's Interest.

For the reasons stated above, the City questions whether a moratorium is even subject to a preemption analysis since it is essentially a "time out" and not a permanent regulation. If the Court concludes to the contrary, however, the proper preemption analysis to apply to the City's Moratorium, as discussed above, is whether it "materially impedes or destroys the state interest" in oil and gas development (i.e., is there an "operational conflict" between the Moratorium and state laws regulating oil and gas development). Before finding an operational conflict exists, the trial court must first determine whether the local regulation can be "harmonized" with state law. *See Bowen/Edwards*, 830 P.2d at 1059-60. "If a home rule city, instead of imposing a total ban on all drilling within the city, enacts land use regulations applicable to various aspects of oil and gas development within the city, and if such regulations do not frustrate and can be harmonized with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect." *Voss*, 830 P.2d 1069.

The legal authorities discussed on pages 13-17 and 23-24 of the City's Combined Brief show that the Moratorium is not a regulation *per se*, but an essential planning tool to preserve the *status quo* while more permanent land use regulations are formulated. The City also provided evidence of data gaps related to oil and gas development's potential effect on human health that warrant further study (*see* **Exhibit G and Exhibit H** to City's Combined Brief), and that the City

is moving forward with the necessary studies. *See* **Exhibit D** to City's Combined Brief. And, the Moratorium's language indicates an intent to harmonize with the goals of the Act. Combined Brief at pp. 24-27.

In paragraphs 37-43 of its Complaint, Plaintiff alleges that COGA or its members are "adversely affected" or "adversely impacted" by the Moratorium. But the Complaint contains no specific factual allegations in this regard, and Plaintiff does not provide specific facts in the form of affidavits or otherwise as part of its summary judgment motion. For example, Plaintiff alleges in paragraph 38 that the Moratorium prohibits COGA's members from drilling a permitted well to recover oil and gas. A plain reading of the Moratorium's language shows that this is not true. *See* **Exhibit B** to City's Combined Brief, p. 2, Section 3.

In addition, it is undisputed that COGA does not own any oil and gas interests in the City. It is undisputed that COGA has not identified any member who has approval for or plans to use hydraulic fracturing to stimulate wells during the period of the Moratorium. It is undisputed that the Commission web site confirms that there have been no new or approved applications for permits to drill in the Fort Collins Field (which includes the northern areas of the City) since the Moratorium went into effect on August 5, 2013. *See* City's Combined Brief at pp. 7-9, and Affidavit of Laurie Kadrich, **Exhibit D** to Combined Brief. Thus, the only way the Moratorium could potentially create an operational conflict with the state interest in oil and gas development is if a yet-to-be identified operator applied for and received approval of an Application for Permit to Drill from the Commission to conduct oil and gas operations on lands within Fort Collins' jurisdiction, *and* the operator decided to conduct hydraulic fracturing while the Moratorium was still in effect.

The mere *possibility* that a *hypothetical* hydraulic fracturing operation *might* be delayed for some unknown period of time in the future is not enough to materially impede the state interest in developing oil and gas resources. *See Town of Frederick v. North American Resources Co.*, 60 P.3d 758, 766 (Colo. App. 2002) (town permitting process "did not materially impede or destroy the state's interest in oil and gas development" even though it could "delay the drilling"). If the Town of Frederick's permit process did not cause an operational conflict in circumstances where the company that actually obtained the permit to drill the well was the party asserting the declaratory judgment claim against the Town, the Court cannot find that an operational conflict exists on the bare factual record in this case.

Moreover, the hypothetical and attenuated nature of the alleged operational conflicts and injuries in this case raises questions about whether Plaintiff is entitled to declaratory or injunctive relief at all. Plaintiff alleges in paragraph 39 of its Complaint that the Moratorium denies its right "to promote the beneficial, efficient, responsible, and environmentally sound development, production and use of Colorado oil and gas in Larimer County" and "to promote the expansion of oil and gas supplies, markets and transportation infrastructure in Larimer County." But the Moratorium applies only to "hydraulic fracturing and storage of its waste products within the City of Fort Collins or lands under its jurisdiction . . . ." It does not apply to lands in Larimer County outside the City's jurisdiction, nor does it apply to oil and gas activities that do not involve fracking. Plaintiff fails to show sufficient facts demonstrating injury or an operational conflict in connection with this allegation.

In paragraph 40, Plaintiff alleges that it will be required to raise member dues in order to respond to the City's "ban" on fracking through litigation and other means. This alleged injury

does not demonstrate the existence of an "operational conflict." The State of Colorado has no interest in whether COGA charges lower or higher dues to its members. [3]

In paragraph 41, Plaintiff alleges that the Moratorium adversely affects its ability to recruit new members, maintain current membership, and to sustain the financing needed to carry out is mission. Again, this does not create an operational conflict because the state's interest is in oil and gas development, not COGA's membership numbers.

In paragraph 42, Plaintiff alleges that the Moratorium hinders COGA's mission and economically affects some of its members' property rights. COGA provides no facts as part of its summary judgment motion to support such allegations. It is an undisputed fact that no person, whether a member of COGA or not, has applied for or received a permit to drill in Fort Collins since the Moratorium went into effect. This demonstrates that there is no injury or operational conflict and refutes this allegation.

Paragraph 43 alleges that the Moratorium adversely affects COGA's and its members' plans for oil and gas development within Larimer County in conformity with the provisions of the Act. COGA provides no facts to support this allegation. So there cannot be an operational conflict in this regard because the Moratorium does not apply to the plans of COGA or its members on lands in Larimer County outside of the City's jurisdiction.

Paragraph 44 alleges that the Moratorium injures COGA members' present and/or future oil and gas activities within the City, including the drilling of wells within the City's territorial

[3] The City notes that according to campaign reports filed with the City Clerk's office on October 15, 2013 and November 1, 2013, COGA spent nearly $400,000 to defeat Ballot Measure 2A. See copies at http://www.fcgov.com/cityclerk/report-2013nov.php (Campaign Reports of Fort Collins Alliance for Reliable Energy). But this fact also does not create an operational conflict under *Bowen/Edwards* and *Voss*, or subsequent cases.

jurisdiction and the extension of horizontal wellbores under the City. Again, COGA provides no facts to support this allegation as part of its motion for summary judgment. In the absence of such evidence, this Court cannot find that there is an operational conflict. *See Bowen/Edwards*, 830 P.2d at 1060. Here, the factual record shows that the City's Moratorium is a valid exercise of local government land use authority that does not create an operational conflict on the facts presented in this case. The Court should grant the City's cross motion for summary judgment.

E. Plaintiff Fails to Meet Its Burden for Obtaining Injunctive Relief.

Bowen/Edwards notes the distinction between meeting the threshold requirement for standing to challenge local government regulations and having a right to obtain injunctive relief. In this regard, *Bowen/Edwards* states that even though the court resolved the standing issue in favor of the well operator, "we are not resolving whether Bowen/Edwards is entitled to a permanent injunction against the enforcement of the county regulations. Such a decision depends in the first instance on a determination that the regulations are not preempted by state law--an issue we will presently address--and then on proof by a preponderance of the evidence that the regulations will cause Bowen/Edwards to suffer continuing irreparable injury." 830 P.2d 1055.

In *Bowen/Edwards*, the plaintiff, Bowen/Edwards Associates, was a corporate entity engaged in oil and gas development and operations in La Plata County. In *Voss*, Lundvall Bros. was a Colorado corporation engaged in oil and gas development that obtained permits from the Commission and the City of Greeley to drill four wells on property located in a multi-family residential zone within the city. Both of those plaintiffs were at least in a position to demonstrate possible continuing irreparable harm that might result from the challenged regulation. In the

instant case, Plaintiff is neither a mineral interest owner nor an operator who can apply for or receive a permit to drill an oil and gas well in the City. Plaintiff is not in a position to sustain the kind of "continuing irreparable injury" that would warrant injunctive relief. Therefore, Plaintiff is not entitled to injunctive relief and this Court should grant the City's cross motion for summary judgment.

IV. CONCLUSION

The Moratorium is a legitimate exercise of the City's land use powers as a home rule city under the Colorado Constitution. The evidence is undisputed that the City is using the time-out provided by the Moratorium to determine and conduct the necessary studies to formulate, adopt and implement local regulations to address the understandable concerns its citizens have regarding the potential adverse effects that hydraulic fracturing and its waste products will have on property values and human health in Fort Collins. City's Combined Brief at pp. 6-8, and **Exhibit D**, Kadrich Affidavit. Colorado law recognizes the difference between a moratorium and a ban, and recognizes that a moratorium is an essential land use planning tool for a local government. The Moratorium is not a ban, and even COGA recognizes this truth.

The State has not occupied the field of oil and gas regulation in Colorado; therefore, the Moratorium is not impliedly preempted by state law. The Colorado statutes, Colorado case law and Commission Rules discussed above and in the City's Combined Brief clearly recognize this fact. Nor is the Moratorium preempted under an "operational conflicts" analysis. The Moratorium is not interfering with any operational activities of an oil and gas operator within the City, and Plaintiff has not shown that the Moratorium materially impedes or destroys the State's interest in oil and gas development. Regulation of the same subject matter by a state and local

government does not equate to operational conflict. *See Board of County Commissioners of Gunnison County v. BDS International, LLC*, 159 P.3d 773, 779 (Colo. App. 2006). Further, there is no operational conflict between the Moratorium and the Act because they can be harmonized.

The Court should presume, as Colorado law requires, that the Moratorium is valid because Plaintiff has not met its burden of establishing its invalidity beyond a reasonable doubt. Similarly, Plaintiff has not shown that the Moratorium has caused sufficiently palpable and direct injury to Plaintiff to create an actual case or controversy on Plaintiff's claims for declaratory and injunctive relief. Accordingly, this Court should enter summary judgment in favor of the City on its cross motion for summary judgment.

Dated this 13th day of June, 2014.

SULLIVAN GREEN SEAVY LLC

By: /s/ Original signature on file
Barbara J. B. Green, No. 15022
John T. Sullivan, No. 17069

CITY OF FORT COLLINS

By: /s/ Original signature on file
Stephen J. Roy, No. 0893, City Attorney
John R. Duval, No. 10185, Assistant City Attorney

ATTORNEYS FOR DEFENDANT CITY OF FORT COLLINS

CERTIFICATE OF SERVICE

I do hereby certify that on this 13th day of June, a true and correct copy of the foregoing **DEFENDANT CITY OF FORT COLLINS' REPLY BRIEF IN SUPPORT OF CITY'S CROSS MOTION FOR SUMMARY JUDGMENT** was served electronically via ICCES or e-mail, or placed in the U.S. Mail, addressed to the following persons:

Mark J. Mathews (mmathews@bhfs.com)
John V. McDermott (jmcdermottt@bhfs.com)
Wayne F. Forman (wforman@bhfs.com)
Michal D. Hoke (mhoke@bhfs.com)
BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 Seventeenth Street, Suite 2200
Denver, Colorado 80202-4437

/s/ Mary Keyes
Sullivan Green Seavy LLC