

DISTRICT COURT, LARIMER COUNTY, COLORADO

201 La Porte Avenue, Suite 100
Fort Collins, CO 80521
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Plaintiff:

COLORADO OIL AND GAS ASSOCIATION,

v.

Defendant:

CITY OF FORT COLLINS, COLORADO

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DEFENDANT CITY OF FORT COLLINS' RESPONSE TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant City of Fort Collins, Colorado, (the "City") by and through its undersigned attorneys, John R. Duval, Senior Assistant City Attorney, and Sullivan Green Seavy LLC, submits its Response to the Plaintiff's Notice of Supplemental Authority filed on July 30, 2014, and states as follows:

1. In its Notice of Supplemental Authority, Plaintiff Colorado Oil and Gas Association (“Plaintiff” or “COGA”) directs this Court’s attention to the Order of the Boulder District Court in the case *COGA v. City of Longmont*, Case No. 2013-CV-63, in which the Honorable D.D. Mallard ruled that state law preempts Article XVI of Longmont’s Municipal Charter banning hydraulic fracturing and the storage and disposal of fracking wastes within the City of Longmont. Judge Mallard’s ruling is not binding upon this Court and was made in response to a completely different set of facts than those before this Court.

2. First, the City of Fort Collins has not banned fracking. Rather, the City ordinance at issue here only places a temporary moratorium on hydraulic fracturing and storage of its waste products within the City of Fort Collins on and under lands within its jurisdiction in order to fully study the impacts of this process on property values and human health. The moratorium can be lifted upon a ballot measure approved by the people of the City of Fort Collins. The difference between the Longmont ban and the City’s ordinance is a crucial factual distinction between the Longmont case and this case, as discussed on pages 12-18 of the City’s Combined Brief in Response to Plaintiff’s Motion for Summary Judgment and in Support of the City’s Cross Motion for Summary Judgment filed on May 9, 2014 (“Fort Collins Combined Brief”).

3. Second, Judge Mallard refused to accept COGA’s argument that the Longmont ban should be invalidated under a theory of implied preemption, the same argument COGA makes against the Fort Collins moratorium in this case. Instead, Judge Mallard correctly recognized that under the relevant case law, local regulation of the impacts of oil and gas development is not impliedly preempted. *See* Ex. 1 to Plaintiff’s Notice, p. 4 (citing and discussing *Bowen/Edwards*) and p. 6 (citing and discussing *Voss*). *Voss* and *Bowen/Edwards*

hold that a local ordinance is only preempted where there is an operational conflict in which the Plaintiff shows that the local ordinance “materially impedes or destroys the state interest” manifested in a state statute. *See* Ex. 1 to Plaintiff’s Notice, p. 15. As Fort Collins pointed out in its Reply brief filed on June 13, 2014, there is *no* evidence of an operational conflict in this case. This was not true in the Longmont case, however, where there was evidence that one of the plaintiff operators had drilled a well and could not extract oil and gas from the section of the well bore underneath the City of Longmont because of the ban. Judge Mallard found that this evidence supported a finding of an operational conflict. *See* Ex. 1 to Plaintiff’s Notice, p. 15-16.

4. Judge Mallard recognized that *Voss* does *not* say there could be no land use control over areas within a municipality where there are oil and gas operations. *See* Ex. 1 to Plaintiff’s Notice, p. 6. A municipal ordinance that delays drilling, but does not prevent it entirely or impose arbitrary conditions that would materially impede or destroy the state’s interest *does not* create an operational conflict. *See* Ex. 1 to Plaintiff’s Notice, p. 8 (quoting *Town of Frederick v. North American Resources Co.*, 60 P.3d 758, 766 (Colo. App. 2002)).

5. Here, the stated purpose of the moratorium is “to protect property, property values, public health, safety and welfare by placing a five year moratorium on the use of hydraulic fracturing to extract oil, gas, or other hydrocarbons within the City of Fort Collins in order to study the impacts of the process on the citizens of the City of Fort Collins.” *See* Fort Collins Combined Brief, **Exhibit B**, p. 2, Section 1. In the absence of any evidence that the moratorium materially impedes or destroys the state’s interest in oil and gas development, there is no operational conflict and the moratorium should be upheld so the City can determine when,

where and how it can exercise its land use powers to regulate the impacts that fracking has upon its citizens and their properties.

Dated this 7th day of August, 2014.

SULLIVAN GREEN SEAVY LLC

By: /s/ John T. Sullivan
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CITY OF FORT COLLINS

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OF FORT COLLINS

CERTIFICATE OF SERVICE

I do hereby certify that on this 7th day of August, 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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