

DISTRICT COURT, LARIMER COUNTY, COLORADO

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Fort Collins, CO 80521  
Phone: (970) 494-3500

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**Plaintiff:**

**COLORADO OIL AND GAS ASSOCIATION,**

v.

**Defendant:**

**CITY OF FORT COLLINS, COLORADO**

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**Attorneys:**

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Case Number: 2013CV31385

Division/Courtroom: 5B

**DEFENDANT CITY OF FORT COLLINS'  
MOTION FOR STAY PENDING APPEAL**

Defendant 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, submit the City's Motion for Stay Pending Appeal pursuant to C.R.C.P. 62. In support hereof, the City states as follows:

1. On August 7, 2014, the Court entered its Order Granting Summary Judgment on Plaintiff's First Claim for Relief and Denying Defendant's Cross Motion for Summary Judgment ("August 7 Order"). On September 17, 2014, the Court entered its Order Granting Plaintiff's Unopposed Motion to Dismiss Second Claim Against Defendant City of Fort Collins Without Prejudice and for Entry of Final Judgment ("September 17 Order"). As set forth in the September 17 Order: "This Order, together with the Court's [August 7 Order] . . . shall constitute a final judgment for purposes of C.R.C.P. 54(b) and 58(a)."

2. On September 23, 2014, the Fort Collins City Council voted 6-1 to pursue an appeal of the Court's August 7 Order and to request this Court to stay its August 7 Order while the case is on appeal. *See* Resolution No. 2014-082, attached hereto as **Exhibit A**. The City is in the process of preparing its Notice of Appeal, which is due on November 5, 2014 under C.A.R. 4.

3. C.R.C.P. 62(c) permits the trial court to "suspend, modify, restore, or grant an injunction during the pendency of an appeal" when an appeal is taken from a final judgment granting, dissolving, or denying an injunction." In this case, the Plaintiff's claim for injunctive relief has been dismissed without prejudice by the Court's September 17 Order. Nevertheless, the City requests this Court to stay the operation or enforcement of its August 7 Order during the

pendency of the City's appeal for the reasons stated herein.<sup>1</sup> *See also Odd Fellows Building & Investment Company, v. City of Englewood*, 667 P.2d 1358 (Colo. 1983) (Trial court has authority to consider City's application to stay effect of its judgment invalidating City ordinance while City appeals).

4. The Court ruled in its August 7 Order that the City's voter approved five year moratorium on hydraulic fracturing and the storage of its waste products was preempted by the Colorado Oil and Gas Conservation Act (the "Act") under the doctrine of implied preemption and the moratorium was preempted because it created an operational conflict with the Act. Although the Court did not enjoin the moratorium in its August 7 Order, the effect of the Court's ruling is to make the moratorium "utterly inoperative" for the remainder of its five year duration because it was based on a facial challenge to the moratorium. *Sanger v. Dennis*, 148 P.3d 404, 410-411 (Colo. App. 2006).

5. Because the ruling makes the moratorium "utterly inoperative," the City would suffer irreparable harm if the stay is not granted. Oil and gas operators could conduct hydraulic fracturing operations in Fort Collins before the City can complete its studies of impacts to public health and property values and determine how to address and mitigate those impacts. Such an outcome would defeat the entire purpose of the moratorium even if the Court of Appeals ultimately agrees that the moratorium is necessary before hydraulic fracturing should be conducted.

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<sup>1</sup> C.R.C.P. 62(e) provides: "When an appeal is taken by the State of Colorado, or by any county or municipal corporation of this state, [ . . . ] and the operation or enforcement of the judgment is stayed, no bond, obligation, or other obligation shall be required from the appellant unless otherwise ordered by the court."

6. The impacts from the increased use of hydraulic fracturing in Colorado have aroused intense public interest. Staying the effect of the Court's rulings in its August 7 Order would be consistent with the public interest, as expressed by 57% of the Fort Collins voters who approved Ballot Measure 2A's five year moratorium to allow the City could study the impacts of hydraulic fracturing.

7. COGA will suffer no harm if the Court stays the effect of its August 7 Order while the City pursues its appeal. COGA owns no oil and gas wells in the City and there is no evidence on the record that after the effective date of the moratorium any person has notified the City or received state approval to construct wells within the City's jurisdiction. *See* Affidavit of Laurie Kadrich at ¶¶ 13-14, attached as Exhibit D to the City's Combined Brief in Response to COGA's Motion for Summary Judgment and in Support of the City's Cross Motion for Summary Judgment, filed on May 9, 2014.<sup>2</sup> Thus, staying the August 7 Order will not harm COGA or any other person.

8. The public debate over a local government's authority to regulate the impacts of oil and gas development within their jurisdictions dates back more than 20 years and involves serious and substantial public policy concerns. In the case of *COGA, et al v. City of Longmont, et al*, Case No. 2013-CV-63, Boulder District Court Judge D.D. Mallard entered an order on July 24, 2014, ruling that Longmont's permanent ban on hydraulic fracturing was preempted on the basis of operational conflicts with the Act. However, Judge Mallard also ruled that the injunction against the enforcement of the ban requested by COGA and other parties would be

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<sup>2</sup> COGA did not rebut or dispute this factual evidence in its Reply Brief filed on May 27, 2014. *See also* Fort Collins Reply Brief filed on June 13, 2014, at p. 2.

stayed during the time for filing an appeal pursuant to C.R.C.P. 62, and that if Longmont requested the stay be continued during the pendency of the appeal, she would grant such a request.<sup>3</sup> Judge Mallard recognized the serious and substantial public policy concerns involved in this issue, stating: “In other words, there shall be no hydraulic fracturing activity in the City of Longmont until further order of Court, either this Court *or a higher Court.*” (Emphasis added)

9. The City submits that this Court should preserve the same *status quo* in Fort Collins while the City pursues its appeal in this case, as Judge Mallard found appropriate in the Longmont case. Accordingly, the City requests the Court to enter an order staying the effect and operation of its August 7 Order from the present time through November 5, 2014, when the City’s must file its Notice of Appeal, and during the pendency of the City’s appeal after November 5, 2014.

Dated this 3rd day of October, 2014.

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<sup>3</sup> COGA filed a copy of Judge Mallard’s Order with this Court on July 30, 2014, as part of its Notice of Supplemental Authority. Judge Mallard’s ruling on the stay pending appeal is on page 17 of her Order.

SULLIVAN GREEN SEAVY LLC

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Barbara J. B. Green, No. 15022  
John T. Sullivan, No. 17069

CITY OF FORT COLLINS

By: /s/ John R. Duval  
Carrie Daggett, No. 23316, City Attorney  
John R. Duval, No. 10185, City Attorney

ATTORNEYS FOR DEFENDANT CITY  
OF FORT COLLINS

**CERTIFICATE OF SERVICE**

I do hereby certify that on this 3rd day of October, 2014, a true and correct copy of the foregoing **DEFENDANT CITY OF FORT COLLINS' MOTION FOR STAY PENDING APPEAL** was served electronically via ICCES or e-mail, or placed in the U.S. Mail, addressed to the following persons:

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