

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:

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Case Number: 2013CV31385

Division/Courtroom: 5B

DEFENDANT CITY OF FORT COLLINS'
AMENDED 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 Amended Motion for Stay Pending Appeal pursuant to C.R.C.P. 62. In support hereof, the City states as follows:

Certification pursuant to C.R.C.P. 121, § 1-15(8): The City's counsel has conferred with counsel for Plaintiff COGA regarding this Amended Motion for Stay Pending Appeal. COGA's counsel stated that COGA opposes the Amended Motion.

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.¹ *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

¹ 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.

ultimately agrees that the moratorium is necessary before hydraulic fracturing should be conducted.

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, 2014.² 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

² 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.

injunction against the enforcement of the ban requested by COGA and other parties would be 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.³ 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 6th day of October, 2014.

³ 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

By: /s/ John T. Sullivan

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 6th day of October, 2014, a true and correct copy of the foregoing **DEFENDANT CITY OF FORT COLLINS' AMENDED 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:

Mark J. Mathews (mmathews@bhfs.com)

John V. McDermott (jmcdermott@bhfs.com)

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BROWNSTEIN HYATT FARBER SCHRECK, LLP

410 Seventeenth Street, Suite 2200

Denver, Colorado 80202-4437

/s/ Mary Keyes

Mary Keyes

EXHIBIT A

RESOLUTION 2014-082
OF THE COUNCIL OF THE CITY OF FORT COLLINS
DIRECTING THE INTERIM CITY ATTORNEY AND THE CITY'S SPECIAL COUNSEL
TO FILE AN APPEAL WITH THE COLORADO COURT OF APPEALS
IN THE *COLORADO OIL AND GAS ASSOCIATION V. CITY OF FORT COLLINS* LAWSUIT

WHEREAS, on November 5, 2013, the voters passed a citizen-initiated ordinance that placed a five-year moratorium on the use of hydraulic fracturing and the storage of its waste products within the City of Fort Collins and on City-owned land (the "Moratorium"); and

WHEREAS, on December 2, 2013, the Colorado Oil and Gas Association ("COGA") filed in Larimer County District Court its complaint in *COGA v. City of Fort Collins*, Case No. 2013CV31385, (the "Lawsuit") asking the Court to declare the Moratorium unlawful and invalid on the ground that it is preempted by the Colorado Oil and Gas Conservation Act (the "Act"); and

WHEREAS, on August 7, 2014, District Court Judge Gregory Lammons issued in the Lawsuit his "Order Granting Plaintiff's Motion for Summary Judgment on First Claim for Relief and Denying Defendant's Cross-Motion for Summary Judgment" declaring that the Moratorium is preempted by the Act (the "Order"); and

WHEREAS, the City Council has determined, based on its review of the Order and consideration of the implications for the City of the Order, and after conferring in an executive session with the Interim City Attorney and the City's special counsel in the Lawsuit, that it is in the City's best interests that it file an appeal with the Colorado Court of Appeals asking the Court of Appeals to reverse Judge Lammons's decision in the Order; and

WHEREAS, in conjunction with this appeal, the Council has also determined that it will advance the public interest and the interests of the City to file with the District Court a motion asking it to stay the effect of the Order pending the outcome of the appeal and, if a stay is not granted by the District Court, to file a motion for the stay with the Colorado Court of Appeals.


NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF FORT COLLINS, that the Interim City Attorney and the City's special counsel in the Lawsuit are hereby directed to timely file with the Colorado Court of Appeals an appeal of the Order asking the Colorado Court of Appeals to reverse the Order and to also timely file with the District Court a motion for a stay of the effect of the Order and, if denied by the District Court, to file a motion for the stay with the Colorado Court of Appeals.

Passed and adopted at a regular meeting of the Council of the City of Fort Collins this 23rd day of September, A.D. 2014.

Karen Wickert
Mayor

ATTEST:

[Signature]
City Clerk

The seal of the City of Fort Collins is circular with the text "CITY OF FORT COLLINS" around the top edge and "1876" at the bottom. In the center, the word "SEAL" is written in a stylized font. A signature is written across the seal.