DISTRICT COURT, LARIMER COUNTY, COLORADO 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521	
Plaintiff: COLORADO OIL & GAS ASSOCIATION v. **Defendant:** CITY OF FORT COLLINS, COLORADO	▲ **COURT USE ONLY** ▲
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COGA'S RESPONSE IN OPPOSITION TO AMENDED MOTION FOR STAY PENDING APPEAL	

Plaintiff Colorado Oil & Gas Association ("COGA"), by and through counsel, Brownstein Hyatt Farber Schreck, LLP, respectfully submits this response in opposition to the Amended Motion for Stay Pending Appeal (the "Motion") filed by Defendant City of Fort Collins (the "City").

I. INTRODUCTION

The City seeks to stay this Court's August 7, 2014 Order granting COGA's motion for summary judgment (the "Order") in an attempt to preserve the City's unlawful ban on hydraulic

fracturing during the lengthy appeal period. This Court has already determined that Ballot Measure 2A, a citizen-initiated ordinance (the "Ordinance") to place a five-year moratorium on the use of hydraulic fracturing and the storage of its waste products within the City, is preempted under state law. A stay of the Court's order invalidating the ban would only perpetuate the City's unlawful conduct.

The Motion should be denied for four reasons. *First*, the City is not likely to succeed on the merits of its appeal. The issues that will be presented to the Court of Appeals will involve precisely the same questions this Court has already decided in COGA's favor: whether the Ordinance is preempted by the Colorado Oil and Gas Conservation Act and related state regulations. Under well-established Colorado law, in order to succeed on the merits of its appeal, the City must demonstrate to the Court of Appeals that hydraulic fracturing activities are matters of purely local concern and that the state has no interest in their regulation. And to justify a stay, the City must show that the Court of Appeals is likely to reject this Court's conclusions as stated in the Order. The City cannot make this showing, and indeed, the City fails to even address the merits of its appeal in its Motion.

Second, the City cannot show that it will suffer irreparable harm without a stay. The City admits that it does not believe hydraulic fracturing to be imminent, and, even if it were, such activity would have to conform to the state's exhaustive regulatory scheme. Further, absent a stay during the appeal, the City will still be able to conduct studies regarding the public health and property value impacts of hydraulic fracturing and develop rules and regulations that are permissible under state law.

Third, COGA and its members would suffer hardship if a stay is granted. Companies such as Prospect Energy—which, as the Court acknowledged in its Order, has an operator

agreement with the City to allow the use of hydraulic fracturing in wells within the City's boundaries—would be precluded from lawfully completing wells in accordance with its contractual rights. A stay would also exacerbate legal uncertainty and negatively impact operators outside of Fort Collins, as operators around Colorado would be hesitant to complete wells or enter into operator agreements until the appeal is resolved.

Finally, the public interest would be disserved by a stay. The Colorado legislature—through the Colorado Oil and Gas Conservation Act—has declared it to be in the public interest to promote the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare. Granting a stay would undermine the Act and hinder the public policies supporting it, and would also contravene judicial economy.

Accordingly, there is no justification for staying the Court's decision regarding summary judgment. The City's Motion should be denied.

II. ARGUMENT

The decision whether to stay or continue proceedings is "an exercise of judicial discretion." *Romero v. City of Fountain*, 307 P.3d 120, 122 (Colo. App. 2011). "This discretion derives from 'the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *In re Water Rights of U.S.*, 101 P.3d 1072, 1080–81 (Colo. 2004) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Under this "highly deferential standard," a trial court's decision regarding a motion to stay will not be overturned "[a]bsent a finding that the lower court's actions were manifestly arbitrary, unreasonable, or unfair." *Id.* at 1081.

In order to justify a stay of the proceedings pending appeal, courts have held that a movant must show: (1) a likelihood of success on the merits of its appeal, (2) that it will suffer

irreparable harm absent a stay, (3) whether other parties will be harmed or prejudiced by a stay, and (4) whether the public interest favors a stay. *See Romero*, 307 P.3d at 122. "A stay is not a matter of right, even if irreparable injury might otherwise result," and the party seeking a stay bears the burden of showing that the circumstances justify imposing a stay. *Id.* at 122.

A. The City is not likely to succeed on the merits of its appeal because the Ordinance is preempted.

Courts have held that a party seeking a stay "is *always* required to demonstrate more than the mere 'possibility' of success on the merits." *Id.* at 123 (emphasis added) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153–54 (6th Cir. 1991)). The City essentially concedes that it cannot meet this prong of the stay analysis, as it did not even address the merits of its appeal in its Motion—much less make the requisite showing that it is likely to succeed on appeal.

In its August 7, 2014 Order, this Court found that the Ordinance is preempted. Order at 7–9. There has been no intervening change in controlling law in Colorado with respect to preemption since the Court's Order, and preemption analysis in Colorado is well-settled. Accordingly, in order to find that the City is likely to succeed on appeal, the Court would have to effectively overrule its own Order. The Court need not and should not do so. Not only is the Ordinance unlawful for the reasons set forth in the Court's Order and COGA's briefs in support of its motion for summary judgment,[1] no Colorado case has ever held that any aspect of oil and gas development is a matter of purely local concern. Nor has any Colorado court ever held that, for purposes of preemption analysis, a moratorium is somehow qualitatively different from a permanent ban. Finally, as this Court has recognized, courts outside of Colorado have held that,

[1] For the sake of efficiency, COGA incorporates the arguments set forth in its April 18, 2014 Brief in Support of Its Motion for Summary Judgment and in its May 27, 2014 Combined Brief in Support of Its Motion for Summary Judgment and in Opposition to the City's Cross-Motion. COGA also incorporates the Court's findings from its August 7, 2014 Order.

in analyzing preemption in regards to a moratorium, "the analysis does not differ from that of a permanent ordinance." Order at 4 (citing *City of Claremont v. Kruse*, 100 Cal. Rptr. 3d 1 (Cal. Ct. App. 2009); *City of Buford v. Ga. Power Co.*, 581 S.E.2d 16 (Ga. 2003); *Plaza Joint Venture v. City of Atl. City*, 416 A.2d 71 (N.J. Super. Ct. App. Div. 1980)).

Therefore, the City is unlikely to succeed on the merits of its appeal.

B. <u>The City will not be harmed, irreparably or otherwise, absent a stay.</u>

Denying a stay would not result in immediate or irreparable injury or hardship to the City. Courts require parties seeking a stay, "like a party seeking a preliminary injunction, [to] satisf[y] the irreparable harm requirement by demonstrating a danger of *real*, *immediate*, and *irreparable* injury that may be prevented by the requested relief." *Romero*, 307 P.3d at 123 (emphasis added). The City argues that, if the stay is not granted, it will suffer irreparable harm because "[o]il 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." Mot. ¶ 5. This argument is flawed. A denial of a stay would in no way prevent the City from continuing its studies, including its studies of studies that have already been completed. *See* City's Combined Br. in Resp. to Pl.'s Mot. for Summ. J. and in Supp. of City's Cross-Mot. for Summ. J. at 7 (stating that the City seeks "to research what relevant studies already exist and analyze whether they address the facts and circumstances present in Fort Collins" during the five-year ban). Nor would denial of a stay preclude the City from "develop[ing] a more permanent development strategy" or silence public debate regarding hydraulic fracturing. *Id.* at 15. The City can continue to develop and impose rules regarding hydraulic fracturing that are consistent with the scope of its authority under *Bowen/Edwards* and *Voss*; it just cannot ban hydraulic fracturing while doing so.

Finally, the City itself asserts that no oil and gas drilling is imminent. *See* Mot. ¶ 7 ("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."). In other words, the City admits that there is no immediate need for a stay, and even if any well-completion activity were planned, such activity would have to conform to the "comprehensive regulations covering drilling, developing, producing and abandoning wells, safety, aesthetics and noise control, waste management, [and] protection of wildlife," among other regulations. Order at 5 (citations omitted).

There is nothing "real" or "immediate" about the claimed injuries that the City relies on, and accordingly, the City cannot satisfy the "irreparable harm" requirement for obtaining a stay.

C. <u>A stay would cause hardship to COGA and the City.</u>

Granting a stay would harm COGA and its members by delaying for an extended period of time resolution of a controversy that is of critical importance to the oil and gas industry in Colorado. The Colorado Supreme Court has held that "[p]arties have the right to a determination of their rights and liabilities without undue delay." *In re Water Rights of U.S.*, 101 P.3d at 1081. Courts should be mindful of the problems associated with delay because delay "devalues judgments, creates anxiety in litigants and uncertainty for lawyers, results in loss or deterioration of evidence, wastes court resources, needlessly increases the costs of litigation, and creates confusion and conflict in allocation of court resources." *Todd v. Bear Valley Vill. Apartments*, 980 P.2d 973, 976 (Colo. 1999).

Here, the appeal of the Court's order regarding summary judgment will likely take a substantial period of time, and an extended stay during the entire appeal period would "eliminate[] the possibility" that COGA's members such as Prospect Energy could lawfully use hydraulic fracturing techniques within the City's boundaries. Order at 8. Additionally, as this is

the only litigation pending in Colorado in which a party has raised a preemption challenge to a moratorium on hydraulic fracturing, COGA and its members would face legal uncertainty with respect to their ability to conduct oil and gas operations around the rest of Colorado. The "status quo" in this case is that the five-year ban is "utterly inoperative," and the City seeks to upset the status quo without compelling justification and to the detriment of COGA and its members. Mot. ¶¶ 5, 9.

Further undermining the City's argument for a stay is the fact that the City and other local governments that have passed similar bans could be harmed if the stay is granted. If the Court grants the stay and if takings cases are filed by operators and mineral interest holders within the City's and other local governments' boundaries, these claims will proceed and potential damages will increase during the stay period. The City and these local governments will also inevitably spend significant time and resources defending multiple claims and, as acknowledged by the City, "if not resolved in the City's favor, could not only work to the detriment of the City, but could also establish legal precedents that would be damaging to the interests of other Colorado municipalities." COGA's Br. in Supp. of Mot. for Summ. J., Ex. 5, at 2 (City of Fort Collins Resolution 2013-085).

The resulting harm to COGA, COGA's members, the City, and other local governments that have passed similar bans if a stay were granted is, alone, a sufficient basis to deny the City's Motion.

D. <u>The public interest favors denying a stay.</u>

The Colorado legislature has "declared [it] to be in the public interest to [f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources." COLO. REV. STAT. §

34-60-102(1)(a)(I). The public interest—which is broader than the majority of voters in Fort Collins—weighs in favor of the Court's Order and denying a stay. The Court's Order is based on longstanding state law and state policy that promotes responsible oil and gas exploration and production in an efficient and effective manner without waste. If the stay is granted, COGA and its members will continue to be denied the opportunity to responsibly develop and produce natural resources in and around Fort Collins, thereby frustrating the purpose and intent of the Oil and Gas Conservation Act and the public policies that support it. A stay would also promote a "patchwork" of local regulations and negate explicit state policy in a manner that violates Colorado Supreme Court preemption principles, as the Court has already found. *See Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs*, 199 P.3d 718, 731 (Colo. 2009).

The City's citation to the case in the Boulder County District Court styled as *COGA, et al. v. City of Longmont*, Case No. 2013-CV-63 is both misleading and unhelpful. It is true that in the *Longmont* case Judge Mallard stayed her summary judgment order, which enjoined the City of Longmont from enforcing a ban on hydraulic fracturing. The City fails to mention that subsequent to her decision in *Longmont*, Judge Mallard issued an almost identical ruling in a case challenging a citizen-initiated ordinance in the City of Lafayette. In that decision, Judge Mallard enjoined Lafayette from enforcing a ban on oil and gas activity, but did *not* indicate a willingness to stay the judgment. *See* Order Granting Mot. for Summ. J., *COGA v. City of Lafayette*, Case No. 13CV31746 (Aug. 27, 2014), attached hereto as Exhibit A. Judge Mallard did not explain the distinction between the two cases, and her decision to stay her judgment in *Longmont* does not provide any meaningful guidance to this Court.

Finally, granting a stay pending appeal would contravene judicial economy, particularly where, as here, the City has little chance of succeeding at the appellate level, and would

contravene the purpose of the Colorado Rules of Civil Procedure, which endorse the expeditious resolution of legal uncertainties and controversies.

III. CONCLUSION

For the foregoing reasons, COGA respectfully requests that the Court deny the City's Amended Motion for Stay Pending Appeal.

Respectfully submitted this 27th day of October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2014, I electronically filed a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO AMENDED MOTION FOR STAY PENDING APPEAL** via the ICCES electronic filing system which will send notification of such filing to the following:

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