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 Carrie M. Daggett, Atty. Reg. #23316 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: jduval@fcgov.com, cdaggett@fcgov.com	**COURT USE ONLY** Case Number: 2013CV31385 Division/Courtroom: 5B

DEFENDANT CITY OF FORT COLLINS'

REPLY IN SUPPORT OF 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 Reply in Support of Amended Motion for Stay Pending Appeal.

I. INTRODUCTION

In characterizing the City's request for a stay, COGA disregards the uniqueness of the main issue raised in this case, and undervalues the harm to the City and the public interest. There are no published appellate opinions setting forth the standards employed to determine whether a stay pending appeal should be issued on the facts of this case, although *Odd Fellows Building & Investment Company v. City of Englewood*, 667 P.2d 1358 (Colo. 1983) recognizes that a trial court has authority to stay the effect of its judgment invalidating a city ordinance while the city appeals. As COGA notes, the Court in *Romero v. City of Fountain*, 307 P.3d 120, 122 (Colo. App. 2011) used the federal "traditional standard" that includes four factors a court considers in determining whether or not to impose a stay pending appeal. It is not clear whether the *Romero* test applies in this case because *Romero* involved a request to stay an order denying injunctive relief while here, the Court dismissed COGA's claim for injunctive relief.[1] Nor did *Romero* involve an order striking down a legislative act. But if the federal test were applied to the City's request, it would favor the stay. *Romero*, and the case it relies on, *Michigan Coalition of Radioactive Material Users Inc.* v. *Griepentrog*, 945 F.2d 150 (6th Cir. 1991), shows that the four factors are interrelated, and that the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the party will suffer absent the stay. *See Romero*, 307 P.3d at 123. The greater the irreparable injury to the movant, the less weight will be given to success on the merits. Ultimately, the decision to issue a stay is left to the

[1] *See* Order Granting Plaintiff's Unopposed Motion to Dismiss Second Claim for Relief dated September 17, 2014.

discretion of the court based upon the circumstances of each case. *Niken v. Holder*, 556 U.S. 418, 433 (2009) (cited in *Romero*, 307 P.3d at 122).

II. ARGUMENT

A. The Merits of the City's Appeal.

The substantive merits of the City's appeal justify this Court exercising its discretion to stay its August 7 Order for several reasons. First, the questions on appeal are questions of law bearing on the validity of a legislative enactment. Where the issue on appeal concerns only legal questions, as opposed to factual ones, the trial court's judgment is subject to *de novo* review by the Court of Appeals. *Evans v. Romer*, 854 P.2d 1270, 1274 (Colo. 1993); *Bd. of County Comm'rs of La Plata County v. Colorado Oil and Gas Conservation Commission*, 81 P.3d 1119, 1122. (Colo. App. 2003) ("*La Plata County*"). Under this standard of review, the City does *not* have the burden shouldered by the movant in *Romero* to prove that the Court's decision was arbitrary and capricious. Instead, COGA has the burden to prove that the Moratorium is invalid because legislative enactments are presumed to be valid. *See Sellon v. City of Manitou Springs*, 745 P.2d 229, 232 (Colo. 1987); *Sundance Hills Homeowners Ass'n v. Bd. of County Comm'rs*, 188 Colo. 321, 329, 534 P.2d 1212, 1217 (1975); *Ford Leasing Dev. Co. v. Bd. of County Comm'rs*, 186 Colo. 418, 426, 528 P.2d 237, 241 (1974); *Bd. of County Comm'rs v. Simmons*, 177 Colo. 347, 351, 494 P.2d 85, 87 (1972). Moreover, "temporary moratoria consistently are *not* subject to the same degree of judicial scrutiny as are permanent regulations." *Williams v. Central City*, 907 P.2d 701, 706 (Colo. App. 1995) (emphasis added). The burden on COGA to prove that the Moratorium is invalid weighs in favor of the City's likelihood of success on appeal.

Second, the City's appeal presents a case of first impression: whether a city's temporary moratorium on hydraulic fracturing is impliedly preempted or creates an operational conflict with the Colorado Oil and Gas Conservation Act (the "COGCA") has never been litigated. "[T]he probability of success is demonstrated when the appellant seeking the stay has raised 'questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation."' *Romero,* 307 P.3d at 122 (quoting *FTC v. Mainstream Marketing Services, Inc*., 345 F.3d 850, 852 (10th Cir. 2003)). *See also Sweeney v. Bond*, 519 F.Supp. 124, 132 (E.D. Mo. 1981), *aff'd*, 669 F.2d 542 (8th Cir. 1982), *cert. denied sub nom*., *Schenberg v. Bond*, 459 U.S. 878 (1982) (appeal has a strong likelihood of success "where the legal questions were substantial and matters of first impression"). The fact that the City's appeal is a case of first impression involving substantial legal questions increases the likelihood that the City will succeed on appeal.

Third, this Court invalidated the Moratorium, in part, under the theory of implied preemption, a ruling that is at odds with all Colorado cases interpreting the COGCA. *See* August 7, 2014 Order at pp. 7-8. Implied preemption occurs when a "statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest." *Bowen/Edwards v. Bd. of County Comm'rs of La Plata County*, 830 P.2d 1045, 1056-57 (1992) ("*Bowen/Edwards*"). No court has ever ruled that the COGCA occupies the entire field of oil and gas regulation. In fact, courts have repeatedly rejected implied preemption arguments. *See Bowen/Edwards*, 830 P.2d at 1058 (rejecting arguments that the COGCA impliedly preempts local control because the state's interest "is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably

in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.") *See also Voss v. Lundvall Bros.*, 830 P.2d 1061, 1068 (Colo. 1992) ("*Voss*"); *Bd. of County Comm'rs of Gunnison County v. BDS International*, LLC, 159 P.3d 773, 778 (Colo. App. 2006); *La Plata County*, 81 P.3d at 1124-1125. Given the weight of precedent against implied preemption, the Court of Appeals is likely to rule that the COGCA does *not* impliedly preempt the Moratorium.

Finally, COGA has the burden both to overcome the presumption of validity and prove that the Moratorium "materially impedes or destroys the state interest." COGA's burden of proof and the absence of a "fully-developed evidentiary record" in this case increases the likelihood that the City will succeed on its appeal of the operational conflict ruling, and warrant a stay of the August 7 Order. *See Bowen/Edwards*, 830 P.2d at 1060. [2]

B. The City will be irreparably injured absent a stay.

COGA improperly discounts the irreparable injury that would be suffered by the City in several ways. First, COGA ignores the fundamental principle that "any time a State [or local government] is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Maryland v. King*, ___ U.S. ___, 133 S. Ct. 1, 3 (July 30, 2012) (Roberts, C.J., in chambers). The City of Fort Collins "has a legally protected interest in enacting and enforcing [its] land use regulations governing the surface effects of oil and gas operations." *La Plata County*, 81 P.3d 1124. The City will suffer

[2] In this regard, the City does not need to prove, nor has it attempted to argue, that regulation of oil and gas development is a matter of purely local concern because even if oil and gas regulation is a matter of mixed state and local concern, the City can succeed on the operational conflict issue.

irreparable injury if the stay is not granted because the Moratorium is "utterly inoperable" as long as the August 7 Order is in effect. *See Sanger v. Dennis*, 148 P.3d 404, 410-411 (Colo. App. 2006).

COGA also contends that the City will not be injured because the "City can continue to develop and impose rules regarding hydraulic fracturing …" COGA Response at 5. The Court's implied preemption ruling, however, means that COGCA *occupies the entire field of oil and gas regulation*, leaving no room for local regulation of oil and gas. *See Bowen/Edwards*, 830 P.2d at 1056-57. Because the Court's August 7 Order departs from *Bowen/Edwards*, *Voss* and subsequent appellate cases rejecting implied preemption, the City's authority to regulate hydraulic fracturing, or oil and gas development of any kind, is no longer a given. Staying this Order during the appeal would avoid any uncertainty regarding the City's authority to regulate the impacts of oil and gas development consistent with *Bowen/Edwards, Voss* and subsequent opinions of the Colorado Court of Appeals.

Finally, COGA disregards the real-world effect of the Court's Augusts 7 Order when calculating injury to the City. As the City explains in its briefs, a moratorium "counters the incentive of landowners to develop their land quickly to avoid the consequences of an impending land use plan for the jurisdiction." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 302 U.S. 302, 316 (2002) ("*Tahoe-Sierra*"). If the Court does not stay the August 7 Order, then operators have an incentive to quickly obtain approvals for hydraulic fracturing operations to avoid the consequences of any legislation the City might ultimately enact to address the impacts of hydraulic fracturing on local health and property values. Because the Court's August 7 Order calls into question the City's authority to regulate hydraulic fracturing,

and because impacts on human health and property values of hydraulic fracturing in Fort Collins remain undefined, new hydraulic fracturing operations approved during the pendency of the appeal would expose the citizens of Fort Collins to the very risks and impacts that the Moratorium is designed to prevent while studies are being conducted. The Court can avoid these irreparable injuries by allowing the Moratorium to remain in effect during the pendency of appeal to "preserve the *status quo*." *See Tahoe-Sierra*, 535 U.S. 337-38.

C. The stay will not substantially injure COGA.

COGA misstates the third prong of the four-factor test in *Romero* by characterizing it as "whether the other parties will be harmed or prejudiced by a stay." COGA Response at p. 4. *Romero* actually says that the third prong is "whether the issuance of the stay will *substantially injure* the other parties interested in the proceeding." 307 P.3d at 122 (emphasis added). This difference in language is critical when the effect of the stay on COGA is evaluated.

Under an accurate depiction of the test, the stay will not cause *substantial injury* to COGA. COGA first maintains that the delay caused by a stay would "harm" COGA because it would "'eliminate[] the possibility' that COGA's members . . . could lawfully use hydraulic fracturing techniques within the City's boundaries" during the appeal period (quoting the Order). This possible impact on COGA members, however, is insufficient to establish substantial injury.

COGA members who were conducting hydraulic fracturing prior to the Moratorium can continue those activities whether or not the stay is granted. Staying the August 7 Order could potentially affect only those COGA members who might apply to the Colorado Oil and Gas Conservation Commission for approvals to drill *and* want to commence hydraulic fracturing within the City during the City's appeal. The evidence is undisputed that neither COGA nor any

COGA member has applied for or received such approvals. The possibility that a member might experience a temporary delay in conducting hydraulic fracturing is not "substantial injury." *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").

Staying the August 7 Order also does not affect the ability of COGA members to conduct operations outside of Fort Collins' jurisdiction. Rather, the stay would maintain the *status quo* in Fort Collins and avoid the uncertainty raised by the Order about the scope of local authority over oil and gas development. The possibility that the stay could give rise to "takings" claims against the City is not relevant to evaluating whether the stay would cause "substantial injury to the *other* parties interested in the proceedings." The City is not an "other" party, and in any event, the temporary suspension of development does not equate to a *per se* takings. *See, e.g., Williams v. Central City*, 907 P.2d 701(Colo. App. 1995). In sum, COGA has not shown that the stay would cause any substantial injury to itself or its members.

D. The stay furthers the public interest.

The interests in promoting oil and gas development that COGA points out do not over-ride the interest in regulating the land use impacts of such development at the local government level. *See Bowen/Edwards*, 830 P.2d at 1058; *Voss*, 830 P.2d at 1068. Here, as in *La Plata County*, "the broad question presented is the extent to which *both local governments and the state* can regulate oil and gas operations and development." 81 P.3d at 1124 (emphasis added). *La Plata County* also recognizes that the state has such authority under the COGCA, while local governments have such authority under different statutes. *See id.* The serious and substantial

public policy concerns raised by these parallel grants of authority have aroused such intense public interest that Governor Hickenlooper convened a 19 person task force one month after this Court's August 7 order to study these issues, receive public testimony and make recommendations to the Governor and the legislature. The work of this task force is ongoing today. In announcing the 19 members chosen from nearly 300 applicants, Governor Hickenlooper stated that the task force is "charged with crafting recommendations to help minimize land use conflicts that can occur when siting oil and gas facilities near homes, schools, businesses and recreational areas." [3] Staying this Court's August 7 Order during the City's appeal recognizes these serious and substantial public policy concerns, and it is consistent with the public interest as expressed by Governor Hickenlooper, the voters of Fort Collins and by the Colorado Supreme Court in *Bowen/Edwards* and *Voss*.

III. CONCLUSION

COGA has not shown that the stay would cause substantial injury to itself or any of its members. Weighing the likelihood of success on the merits, the irreparable injury to the City if the stay is not granted, and the public interest in regulating oil and gas development against the speculative impact on COGA supports the issuance of a stay of the Court's August 7 Order.

Dated this 3rd day of November, 2014.

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[3] Cathy Proctor, Denver Business Journal, September 8, 2014 http://www.bizjournals.com/denver/blog/earth_to_power/2014/09/colorado-gov-hickenlooper-names-19-to-new-oil-and.html

CITY OF FORT COLLINS

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CERTIFICATE OF SERVICE

I do hereby certify that on this 3rd day of November, 2014, a true and correct copy of the foregoing **DEFENDANT CITY OF FORT COLLINS' REPLY IN SUPPORT OF 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:

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