Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: November 18, 2014 4:04 PM CASE NUMBER: 2014CA1991
Larimer County 2013CV31385	
Plaintiff-Appellee: Colorado Oil and Gas Association, v. Defendant-Appellant: City of Fort Collins Colorado, and Intervenors-Appellants: Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks.	⚠ COURT USE ONLY ⚠ Case Number: 2014CA1991

Order

DEFERRED.

The motion is deferred pending resolution of the jurisdictional issue raised in this Court's order of 11-18-14.

jb/sa

Issue Date: 11/18/2014

BY THE COURT

COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80203

Appeal from Larimer County District Court
The Honorable Gregory M. Lammons
Case No. 13CV31385

Appellant:
CITY OF FORT COLLINS, COLORADO

v.

Appellee:
COLORADO OIL AND GAS ASSOCIATION

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COURT USE ONLY

Case Number: 2014CA001991

APPELLANT CITY OF FORT COLLINS' MOTION FOR STAY PENDING APPEAL

Appellant 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, submits the City's Motion for Stay Pending Appeal pursuant to C.A.R. 8., and states as follows:

I. INTRODUCTION

The City filed its Notice of Appeal with this Court on October 13, 2014. In the August 7, 2014 Order that is the subject of the City's appeal ("August 7 Order"), Judge Lammons of the Larimer County District Court ruled that the City's voter-approved temporary moratorium on hydraulic fracturing and the storage of its waste products ("Moratorium") was preempted by the Colorado Oil and Gas Conservation Act (the "Act") under the doctrine of implied preemption, or in the alternative, because it created an operational conflict with the Act. Although the District Court did not enjoin the Moratorium in its August 7 Order, the effect of the District Court's ruling is to make the Moratorium "utterly inoperative" because it was based on a facial challenge to the enactment. *Sanger v. Dennis*, 148 P.3d 404, 410-411 (Colo. App. 2006). In order to avoid the irreparable injury caused by this outcome, the City filed a Motion for Stay Pending Appeal with the Larimer County District Court on October 6, 2014 pursuant to C.R.C.P. 62(c). On November 6,

2014, the District Court entered its Order denying the City's Motion for Stay Pending Appeal. The District Court did not state any reasons for its denial of the Motion. *See* November 6, 2014 Order attached as **Exhibit 1**.

II. LEGAL ARGUMENT

C.A.R. 8(a) provides in pertinent part as follows:

> Application for a stay of the judgment or order of a trial court pending appeal [. . .] must ordinarily be made in the first instance in the trial court. A motion for such relief may be made to the appellate court or to a judge or justice thereof, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or that the trial court has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. . . .

The Colorado Court of Appeals recently applied the federal "traditional standard" that includes four factors a court may consider in determining whether or not to impose a stay pending appeal. *See Romero v. City of Fountain*, 307 P.3d 120, 122 (Colo. App. 2011) ("*Romero*"). Whether the *Romero* test also applies in this case is not clear because *Romero* involved a request to stay an order denying injunctive relief. Here, the District Court dismissed the claim for injunctive relief

asserted by Appellee Colorado Oil and Gas Association ("COGA").[1] Nor did *Romero* involve an order striking down a legislative act. Nevertheless, if the *Romero* test applies here, it would favor a stay of the August 7 Order.

Romero and the case it relies on, *Michigan Coalition of Radioactive Material Users Inc*. v. *Griepentrog*, 945 F.2d 150 (6th Cir. 1991), show that the four factors are interrelated, and that the probability of success on the merits that must be demonstrated is inversely proportional to the amount of irreparable injury the movant 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 the success on the merits factor. Ultimately, the decision to issue a stay is left to the discretion of the court based upon the circumstances of each case. *Romero,* 307 P.3d at 122 (citing *Niken v. Holder,* 556 U.S. 418, 433 (2009)). The purpose of a stay is to preserve the status quo pending appeal. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996).

A. The Merits of the City's Appeal.

The substantive merits of the City's appeal justify this Court exercising its discretion to stay the August 7 Order for several reasons.

First, the City's appeal presents a case of first impression involving serious

[1] *See* Order Granting Plaintiff's Unopposed Motion to Dismiss Second Claim for Relief dated September 17, 2014, that is attached to the City's Notice of Appeal.

questions of law with far-reaching legal and policy implications. The issue of whether a city's temporary moratorium on hydraulic fracturing is preempted by the Act 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.

Second, 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.

Third, the District Court invalidated the Moratorium primarily under the theory of implied preemption, a ruling that is at odds with all Colorado cases interpreting the Act.[2] *See* August 7 Order at 7-8. Implied preemption occurs when a "statute impliedly evinces a legislative intent to completely occupy a given field

[2] In reaching its implied preemption ruling, the District Court erroneously evaluated the Moratorium as if it were "a total ban" even though it is a temporary measure.

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 Act occupies the entire field of oil and gas regulation. In fact, Colorado courts have repeatedly rejected implied preemption arguments. *See Bowen/Edwards*, 830 P.2d at 1058 (rejecting arguments that the Act 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. The weight of controlling precedent against implied preemption increases the likelihood that this Court would rule that the Act does *not* impliedly preempt the Moratorium.

Fourth, in alternatively ruling that the Moratorium creates a *per se* operational conflict with the Act, the District Court applied the wrong test, and overlooked important undisputed facts. To support its ruling, the Court stated that the Moratorium "prohibits what the Act permits" and "creates an operational

conflict between what Prospect Energy contracted for, as permitted by state law, and what the five-year ban prohibits."[3] August 7 Order at 8. The proper operational conflict test, however, is not whether the local law prohibits what the Act permits, but whether "the effectuation of a local interest would materially impede or destroy the state interest." *Bowen/Edwards*, 830 P.2d at 1059. Additionally, the extent of an operational conflict should be determined "on an ad-hoc basis under a fully developed evidentiary record." *Id.* at 1060. There is no fully developed record in this case. *See Bd. of County Comm'rs of Gunnison County v. BDS International, LLC*, 159 P.3d at 779 (evidentiary hearing necessary to determine extent of operational conflict between local and state regulatory scheme).

The undisputed evidence that is available shows that the Moratorium does not, as the District Court found, prohibit all oil and gas development; it is temporary and does not prevent drilling that was begun prior to its effective date. The undisputed evidence also shows that the Colorado Oil and Gas Conservation Commission (the "COGCC") has not issued Prospect Energy an approval to drill

[3] In May 2013, Prospect Energy, LLC signed an operator agreement ("Operator Agreement") with the City to allow it to use hydraulic fracturing in wells within the City's boundaries subject to certain conditions. *See* August 7 Order at 2. *See also* Exhibit C of City's Combined Brief in Response to Plaintiff's Motion for Summary Judgment and in Support of City's Cross Motion for Summary Judgment, attached hereto as **Exhibit 2**.

within the City, a condition precedent under both state law and the Operator Agreement to Prospect Energy's ability to conduct hydraulic fracturing. These facts are not sufficient to prove that the Moratorium on its face "materially impedes or destroys the state interest."

Finally, COGA has the burden to overcome the presumption of validity that attaches to the Moratorium and prove that the Moratorium "materially impedes or destroys the state interest." COGA's burden of proof, coupled with 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 favors staying the August 7 Order. *See Bowen/Edwards*, 830 P.2d at 1060.

B. The City Will Be Irreparably Injured Absent a Stay.

The City will suffer irreparable injury in the absence of a stay. "[A]ny 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 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 at 410-411.

The City also suffers irreparably injury if the ruling is not stayed because the Order extends beyond the Moratorium by casting doubt on the City's authority to impose any regulation on oil and gas development. The District Court's implied preemption ruling means that the State *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 August 7 Order departs from *Bowen/Edwards*, *Voss* and subsequent appellate cases rejecting implied preemption, the City's authority to apply its oil and gas regulations to hydraulic fracturing operations, or oil and gas development of any kind, is no longer a given. Staying the August 7 Order during the appeal would prevent the irreparable injury to the City that would occur if oil and gas operators entirely disregard the City's land use authority during the pendency of the appeal.

Finally, a stay would avoid irreparable harm to the City by preserving the status quo. 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. This harm is irreparable because even if the City ultimately prevails on the merits of this case, oil and gas development commenced between today and the end of the appeal would not be subject to any City land use regulations that might take effect at the end of the Moratorium, thereby defeating the purpose of the Moratorium altogether. The Court can avoid these irreparable injuries by allowing the Moratorium to remain in effect during the pendency of appeal and "preserve the *status quo.*" *See Tahoe-Sierra*, 535 U.S. 337-38. In this case, the *status quo* is the oil and gas development occurring in Fort Collins at the time this litigation began.

C. The Stay Will Not Substantially Injure COGA.

The third prong of the *Romero* test is "whether the issuance of the stay will *substantially injure* the other parties interested in the proceeding." 307 P.3d at 122 (emphasis added). COGA will suffer no harm if the Court stays the effect of the August 7 Order while the City pursues its appeal. COGA owns no oil and gas wells in the City, and the evidence on the record shows that none of its members

has either notified the City of intent to conduct hydraulic fracturing within the City's jurisdiction or received COGCC approval to do so since the Moratorium took effect. *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.[4] Thus, staying the August 7 Order will not harm COGA. Staying the August 7 Order could potentially affect only those COGA members who might apply for and receive approvals to drill from the COGCC *and* want to commence hydraulic fracturing within the City during the pendency of the appeal. 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").

Finally, staying the August 7 Order has no effect on COGA members who are currently producing oil and gas within Fort Collins, or the ability of COGA members to conduct operations outside of Fort Collins' jurisdiction.

[4] The City attaches another copy of this Affidavit hereto as **Exhibit 3**. 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 2, attached hereto as **Exhibit 4**.

D. The Stay Furthers the Public Interest.

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 twenty (20) years and involves serious and substantial public policy concerns. More recently, the impacts from the increased use of hydraulic fracturing in Colorado have aroused intense public interest. Staying the August 7 Order is consistent with the public interest expressed by 57% of the Fort Collins voters who approved Ballot Measure 2A's five-year moratorium in 2013 to allow the City to study the impacts of hydraulic fracturing. Staying the August 7 Order would further the public 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 this Court recognized 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 Act, while local governments have such authority under different statutes. *See id.*

Indeed, 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 the District 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 task force 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."[5] Staying the District Court's August 7 Order during the City's appeal recognizes these serious and substantial public policy concerns. Staying this Order also furthers the public interest expressed by Governor Hickenlooper, the voters of Fort Collins and by the Colorado Supreme Court in *Bowen/Edwards* and *Voss*.

Accordingly, the City requests this Court to enter an order staying the effect and operation of the District Court's August 7 Order during the pendency of the City's appeal.

Dated this 17th day of November, 2014.

[5] 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

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CERTIFICATE OF SERVICE

I do hereby certify that on this 17th day of November, 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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