

**COLORADO SUPREME COURT**

2 East 14th Avenue  
Denver, CO 80203

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Transfer C.A.R. 50 Certiorari to the Colorado Court of Appeals, Case No. 2014CA1991  
District Court, Larimer County, Case No. 2013CV31385

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**Petitioner:**

**CITY OF FORT COLLINS, COLORADO**

v.

**Respondent:**

**COLORADO OIL AND GAS ASSOCIATION**

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**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  
Email: [barbara@sullivangreenseavy.com](mailto:barbara@sullivangreenseavy.com)  
[john@sullivangreenseavy.com](mailto: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: [cdaggett@fcgov.com](mailto:cdaggett@fcgov.com)  
[jduval@fcgov.com](mailto:jduval@fcgov.com)

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Supreme Court Case Number:

2015SC668

**FORT COLLINS' MOTION TO CLARIFY AND CONFIRM ISSUES ON APPEAL**

The City of Fort Collins, Colorado, (“Fort Collins”) 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 its Motion to Clarify and Confirm the Issues on Appeal pursuant to C.A.R. 27 and 50, and states as follows:

1. On September 21, 2015, this Court entered two orders regarding the Motion for Determination of Jurisdiction (“Motion” or “Petition”) filed by Division I and Division V of the Colorado Court of Appeals on August 17, 2015 pursuant to C.A.R. 50 and C.R.S. § 13-4-109(1). In its first order, this Court announced that the issue on which the Petition is granted is as follows: “Whether home-rule cities are preempted from promulgating local land-use regulations that prohibit the use of hydraulic fracturing in oil and gas operations and the storage of such waste products within city limits when the Colorado Oil and Gas Conservation Commission regulates hydraulic fracturing within the state.”

2. Later on September 21, 2015, the Court issued a second order stating that “the entire case on appeal is transferred to this Court” and “the Court accepts the briefs filed by the parties in the Court of Appeals.”

3. In its Motion, the Court of Appeals recognized that the parties strongly disagree whether the City's moratorium, which is a temporary prohibition

rather than a permanent ban, is entirely preempted by state law, and this is central to the dispute. The Court of Appeals did so stating:

“The parties and amici strongly disagree about the test applicable to determine “operational conflict” preemption. They point to Supreme Court cases articulating the test as whether “the effectuation of a local interest would materially impede or destroy the state interest,” *Bowen/Edwards*, 830 P.2d at 1059, and Supreme Court cases articulating the test as “whether the home-rule city’s ordinance authorizes what the state statute forbids, or forbids what the state statute authorizes,” *Webb v. City of Black Hawk*, 2013 CO 9, ¶ 43. Whether these two articulations of the test mean different things, or are reconcilable, or apply in different contexts is central to the parties’ disputes. The Supreme Court is best suited to decide the meaning and applicability of its own precedents. . . . [T]he City and amici distinguish certain of the Supreme Court’s precedents on the ground this case involves a moratorium — a temporary prohibition — rather than a total ban. They thus raise the issue whether Supreme Court preemption analysis even applies to the measure at issue.” Motion, pp 6-7

4. In its briefs filed in the Court of Appeals, Fort Collins did not raise and address the issue on which this Court based its decision to grant the Court of Appeals’ Petition. Rather, the issues Fort Collins raised and addressed in its appeal are set forth in the Statement of Issues in Fort Collins’ Opening Brief. These issues are:

A. Did the district court incorrectly rule that the City’s Moratorium is the same as a permanent ban?

B. Did the district court incorrectly rule that the City’s citizen-initiated moratorium ordinance (the “Moratorium”) is impliedly preempted by the Colorado Oil and Gas Conservation Act (the “Act”)?

C. Did the district court fail to apply the correct test for determining an operational conflict (*i.e.*, whether the Moratorium materially impedes or destroys the state’s interest in oil and gas development)?

D. Did the district court incorrectly rule that the Moratorium creates a *per se* “operational conflict” in the absence of a fully developed evidentiary record?

5. Therefore, the City seeks clarification whether it is this Court’s direction that Fort Collins be prepared at oral argument to address the issue stated by this Court in its first order entered on September 21, 2015, even though Fort Collins did not raise and address this issue in its briefs. In addition, Fort Collins seeks clarification whether any or all of the issues the City identified in its Opening Brief are also part of this appeal and, if so, that Fort Collins may address these issues during the oral argument to be scheduled in this case.

Accordingly, Fort Collins respectfully requests this Court to enter an order that all of the issues the City identified in its Opening Brief are also part of this appeal and that Fort Collins may address these issues during the oral argument to be scheduled in this case, and for such other direction as the Court deems necessary.

Dated this 29th day of September, 2015.

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 M. Daggett, No. 23316, City Attorney  
John R. Duval, No. 10185, Deputy City  
Attorney

ATTORNEYS FOR DEFENDANT CITY  
OF FORT COLLINS

## CERTIFICATE OF SERVICE

I do hereby certify that on this 29th day of September, 2015, 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:

Mark J. Mathews (mmathews@bhfs.com)

John V. McDermott (jmcdermottt@bhfs.com)

Wayne F. Forman (wforman@bhfs.com)

Michal D. Hoke (mhoke@bhfs.com)

**BROWNSTEIN HYATT FARBER SCHRECK, LLP**

410 Seventeenth Street, Suite 2200

Denver, Colorado 80202-4437

/s/ Mary Keyes

Mary Keyes

Sullivan Green Seavy LLC