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Plaintiffs: COLORADO OIL AND GAS ASSOCIATION and COLORADO OIL AND GAS CONSERVATION COMMISSION

Plaintiff-Intervenor: TOP OPERATING CO.

Defendant: CITY OF LONGMONT, COLORADO

Defendant-Intervenors: OUR HEALTH, OUR FUTURE, OUR LONGMONT; SIERRA CLUB; FOOD AND WATER WATCH; and EARTHWORKS

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Case No.: 2013 CV 63

Division: 3

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**CITIZEN INTERVENORS' CONSOLIDATED RESPONSE TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

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Citizen Intervenors submit this consolidated response brief to the motions for summary judgment filed by TOP Operating Company ("TOP"), the Colorado Oil and Gas Association ("COGA") and the Colorado Oil and Gas Conservation Commission ("COGCC"), collectively referred to as the Plaintiffs. Additionally, Citizen Intervenors hereby incorporate the entirety of the City of Longmont's Consolidated Response to Summary Judgment Motions ("City Response").

## I. INTRODUCTION

The boom in oil and gas production in Colorado in recent years has transformed once quiet and peaceful communities into hubs of dangerous industrial activity. In many cities along the Front Range, including Longmont, oil and gas development that is fueled by the evolving completion technique of hydraulic fracturing ("fracking") has encroached upon residential areas, park, schools, and churches. Not only has the fracking boom disrupted the quality of life for local residents, who now must deal with the noise, light, constant activity, traffic, and pollution from these facility, but a growing body of research has documented the harms that fracking has on the health and environment of nearby communities. As a result of these fears, people understandably do not want to live near fracking operations, and as a result nearby property values drop.

Despite repeated outcries from citizens across the state, the state government has failed to protect communities from the impacts of fracking. Instead, the state appears more interested in capitalizing on the short term boom associated with oil and gas development rather than protecting the long term health of our communities and economy. Local governments too have largely been unresponsive, afraid of taking on a powerful industry

which threatens to sue them for takings. As a result, citizens have had to rely on their ultimate authority in our democracy, and in Longmont the citizens became the first city in Colorado to ban the dangerous industrial practice of fracking through a vote of the people.

The oil and gas industry, understandably, wishes to remain free to frack whenever, wherever, and however it pleases. Industry believes that it should be able to bring its disruptive and dangerous fracking operations right into the heart of communities like Longmont, even though it has shown that it cannot be trusted to act responsibly. A history of spills and leaks that went undetected in Longmont have contaminated the area near schools and threatened public recreational areas such as Union Reservoir. But these actions by the industry, apparently in reckless disregard of the harm they impose on their neighbors, has led to a public backlash as the residents of Longmont have said "no more." Industry has now appealed to the courts to overturn the democratic will of the people in Longmont, in an attempt to take away their inalienable rights to health, safety, welfare, and protection of their property.

The state government, particularly the COGCC, has utterly failed the people of Colorado by allowing the practice of fracking to grow virtually unchecked. No oil and gas company is required to seek permission from the COGCC to frack – that decision is left entirely up to industry. The COGCC also does not limit when or where a company may frack, how many times it may frack, how much water may be used, or which toxic chemicals it may transport through communities with inevitable spills and leaks. Rather than responding to the public outcry over fracking by imposing substantive regulation, the

COGCC has instead chosen to join with industry in suing to overturn the democratic will of the people of Longmont.

The citizens of Longmont are justified to be concerned over fracking in their community. They can see the impact that fracking has had on other communities. Some people even moved to Longmont in the hopes of escaping the fracking boom that was transforming other parts of the Front Range. They know that a growing body of scientific literature has documented a wide variety of serious health impacts associated with fracking, ranging from birth defects in the very young to cancer in adults. They know that the boom currently being experienced will inevitably be followed by a bust, and they will be left to clean up the mess as industry moves on to the next big thing. And they know that property values will drop as their quiet and peaceful community is transformed into an industrial worksite.

The Plaintiffs filed their motions for summary judgment in this case before discovery even commenced. They argue that the impacts of fracking on the local community in Longmont are not even relevant to the case. Yet preemption cases must be decided on a case-by-case basis, not by relying on outdated cases when the impacts of oil and gas were so much less. Any decision in this case must consider the totality of circumstances, carefully weighing the local interest in protecting its community against the state's minimal interest in allowing industry free reign to frack the few oil and gas reserves beneath Longmont. This decision can only be reached after a full evidentiary hearing, as required by the Colorado Supreme Court. Even if the state does have an interest in this case, the fracking ban can be harmonized with the state interest, which after all is simply in

the responsible and balanced production of oil and gas that protects public health, safety, and welfare. The fracking ban in Longmont affirms the state's interest, protects the local interest, and validates the inalienable rights of the citizens of Longmont. Therefore, each of the Plaintiffs' motions for summary judgment should be denied.

## II. STATEMENT OF FACTS

The City has laid out a comprehensive discussion of the facts in this case, showing that genuine disputes of material fact remain, that many facts preclude summary judgment in favor of the plaintiffs, and plaintiffs' conclusory assertions do not hold water upon close examination. All of this highlights the need for an evidentiary hearing in this case, after the discovery process has played out. Citizen Intervenors will not repeat all of the factual background provided by the City, but will instead focus on those facts of particular interest to the citizen groups as well as those relevant to their members or their affiants.

### A. Fracking Threatens the Health, Safety, and Environment of Local Communities

1. Numerous studies have addressed the health impacts of oil and gas operations, including fracking.[1] Affidavit of Carol Kwiatkowski, Ex. A ("Kwiatkowski") ¶ 7 and Ex. A.1.

2. Endocrine disrupting chemicals are associated with natural gas operations and modern fracking techniques in particular. Kwiatkowski ¶¶ 8, 20. These chemicals are associated with adverse health effects at very low concentrations. *Id.* ¶ 6. Exposure to

[1] Because of the short timeframe for responding to these motions for summary judgment, as well as time devoted to taking depositions of plaintiffs' affiants, these studies are not discussed in detail. However, Citizen Intervenors believe that all of these studies will be admissible as evidence and should be considered by the Court.

endocrine disrupting chemicals is most harmful prenatally or in early childhood, and the damage can be irreversible. *Id.* ¶ 6.

3. Air contamination is perhaps a more serious threat from natural gas operations than water pollution. Kwiatkowski ¶ 11. The regulatory entities (such as the COGCC) is not adequately addressing the impacts of air pollution from natural gas operations on the surrounding local communities. *Id.* ¶ 11.

4. Over 353 chemicals used in natural gas operations have been reviewed for their health effects. Kwiatkowski ¶ 12, Ex. A.5. Those chemicals are used during the drilling or fracking processes. *Id.* ¶ 15.

5. These chemicals are reported to have numerous health effects, including skin, sensory, and organ effects, respiratory effects, effects on the gastrointestinal system, and effects on the brain and nervous system. Kwiatkowski ¶ 13. A substantial number of the chemicals are also known carcinogens. *Id.*

6. Many of the chemicals that were reviewed are dispersed through the air and can therefore affect surrounding communities as air pollution. Kwiatkowski ¶ 14.

7. Besides those chemicals introduced by industry in the drilling and fracking processes, other chemicals are released into the environment. These chemicals may be released from underground during production, used for the development and maintenance of the well pad, or generated from mobile or stationary sources used in the oil and gas operations. Kwiatkowski ¶ 15.

8. Air sampling research in Garfield County, Colorado, was conducted to assess what the average citizen living amongst industrial natural gas development might be

exposed to. Kwiatkowski ¶¶ 16-17. 61 chemicals were identified in this sampling, many of them associated with natural gas development. *Id.* ¶¶ 19-20. Methane, ethane, propane, toluene, formaldehyde, acetaldehyde, and naphthalene were detected in every sample, and many other chemicals were identified in at least half of the samples. *Id.* ¶ 19, Ex. A.6. One resident of Garfield County tested positive for benzene in her bloodstream. Affidavit of Mary Ellen Denomy, Ex. B ("Denomy") ¶ 12.

9. These samples were traced back to natural gas operations, not road-based air pollution. Kwiatkowski ¶ 20.

10. The professional and scientific literature reveals that the 61 chemicals that citizens in Garfield County were exposed to have numerous adverse health effects, including effects on the brain and central nervous system, headaches, dizziness, confusion, memory loss, tingling in extremities, and numbness in arms and legs. Kwiatkowski ¶ 21. These effects are similar to the complaints from residents and workers in the affected area. *Id.* Other effects which may not be as noticeable to the people are damage to the liver and the metabolic system, damage to the endocrine system, as well as effects on reproductive health, development in the womb, the immune system, the respiratory system, and the heart. *Id.* The chemicals also are known to irritate the skin, eyes, and other sensory organs. *Id.* These health problems may not become apparent until much later in life, long after the exposure. *Id.*

11. One chemical of particular concern is methylene chloride, found in 73% of the air samples in Garfield County and at times in extremely high concentrations. Kwiatkowski ¶ 22. The lab conducting the study suspected contamination due to the high

levels found and was concerned about exposure to such high levels. *Id.* Methylene chloride is a powerful solvent that is stored on well pads for cleaning purposes and for use when the drill bit gets stuck. *Id.* As a result, this chemical is generally not disclosed to the public because it is not one of the chemicals injected during fracking. *Id.*

12. Another group of chemicals of concern are polycyclic aromatic hydrocarbons (PAHs). Kwiatkowski ¶ 23. Although these chemicals were found in low concentrations, they can still have significant adverse effects even at these low levels. *Id.* The concentrations of PAHs were 8 times higher in Garfield County than in New York City, even though they are normally associated with combustion and not typically found in rural areas. *Id.* ¶ 24. PAHs are associated with increases in preterm births, low birth-weight babies, babies with smaller skull circumferences, lower scores of mental development among children, lower IQ scores, attention and behavioral problems, and childhood obesity. *Id.* ¶ 25.

13. Research has shown an association linking the density of and proximity to wells with adverse health outcomes such as congenital heart defects. Kwiatkowski ¶ 28. These types of studies show that caution should be exercised with respect to limiting exposure and controlling the overall population risk. *Id.* ¶ 29.

14. Residents living less than a half mile from wells are at greater risk of experiencing health effects than those residents who live further away. Kwiatkowski ¶ 31. Setback rules from the COGCC allow wells within a half mile of schools, homes, apartment buildings, and other places where people can be exposed to dangerous chemicals. Citizens' Motion to Intervene, Affidavit of Jean Ditslear ("Ditslear") ¶¶ 5-6.

15. Probable health effects from exposure to air emissions from natural gas development include headaches, neurological symptoms, and airway and mucous membrane irritation. Kwiatkowski ¶ 32. Possible long term health effects include cancer, birth defects, asthma, chronic obstructive pulmonary disease, and cardiac disease. *Id.* Local residents are fearful that fracking in their community will increase their cancer risk. Fissinger ¶ 17.

16. COGCC inspection/incident records contain reports by residents living within a half mile of wells experiencing symptoms including headaches, nausea, upper respiratory irritation, and nosebleeds. Kwiatkowski ¶ 33.

17. Symptoms that have been associated with oil and gas development, including fracking, can have a major impact on quality of life. Kwiatkowski ¶ 34. Local communities have been forced to take matters into their own hands because state government agencies have failed to protect them from the impacts of fracking. *Id.* ¶ 35.

18. Local citizens suffer from chronic obstructive pulmonary disease, thyroid conditions, and asthma; they fear that fracking will harm their health. Citizens' Motion to Intervene, Affidavit of Kaye Fissinger ("Fissinger") ¶ 17; Citizens' Motion to Intervene, Affidavit of Judith Blackburn ("Blackburn") ¶ 7; Ditslear ¶ 7.

19. Fracking operations emit smog-inducing compounds which have an effect on the local and regional environment. Fissinger ¶ 17; Citizens' Motion to Intervene, Affidavit of Shane Davis ("Davis") ¶ 6.

20. Water contamination is also a concern related to fracking due to spills at wells and other releases of chemicals that enter important water bodies. A study by

University of Colorado School of Public Health researchers showed that water samples from sites in Garfield County near wells with spills or areas of intense natural gas drilling had more hormone activity than control sites. Kwiatkowski ¶ 27. Specific chemicals are known to be used during natural gas operations, some of which were found in the water. *Id.*

21. Fracking utilizes huge volumes of water that could otherwise be used for less harmful or even beneficial purposes. Citizens' Motion to Intervene, Affidavit of Sam Schabacker ("Schabacker") ¶ 4; Blackburn ¶ 5.

22. Local residents fear that explosions at fracking sites, which have happened in other places in the state, would endanger their safety. Fissinger ¶ 17; Blackburn ¶ 5.

23. Fracking is more dangerous to local residents' health, safety, and welfare than other methods for extracting oil and gas. Fissinger ¶ 13; Citizens' Motion to Intervene, Affidavit of Rod Brueske ("Brueske") ¶ 4.

24. Many residents moved to Longmont to enjoy a quiet, healthy, beautiful, and safe environment. Fissinger ¶ 4; Blackburn ¶ 2. Fracking threatens to undermine this expectation. Brueske ¶ 5.

25. Fracking operations negatively impact ecosystems and wildlife. Davis ¶ 8.

26. Fracking operations near Union Reservoir and other open spaces in Longmont would interfere with recreational use of those places, endanger the health of people using the area, and threaten wildlife and their habitats. Brueske ¶ 7; Blackburn ¶ 7; Citizens' Motion to Intervene, Affidavit of Michael Bellmont ("Bellmont") ¶¶10-11; Ditslear ¶ 10.

27. In an effort by citizens to protect their public health, safety, and welfare, the Longmont City Charter was amended to ban fracking. Fissinger ¶ 9.

28. Inadequate regulatory oversight and enforcement related to fracking and oil and gas development has motivated citizens to protect their health, safety, and welfare. Brueske ¶ 8; Schabacker ¶ 8; Affidavit of Nanner Fisher, Ex. C ("Fisher") ¶ 8. The COGCC does not have adequate inspection capacity even to enforce the regulations it has in place, as each inspector is responsible for inspecting, on average, nearly 3,000 wells each year, but is only able to inspect about 1,000 wells each year. Baizel ¶ 4.

29. Fracking is an inherently unsafe activity that poses threats to health, safety, and welfare when conducted in densely populated urban communities. Schabacker ¶ 8; Fissinger ¶¶ 14, 17; Davis ¶ 4; Bellmont ¶ 8;

30. Some Longmont residents moved to the City to escape the booming oil and gas development happening elsewhere in the region, such as in Weld County or the city of Firestone. Davis ¶ 5. One resident suffered health problems that he attributes to the oil and gas activities surrounding his home. *Id.* Moving away from areas of intense drilling and fracking have allowed this resident to recover from his previous health problems. *Id.*

31. Use, storage, and transportation of fracking fluids creates a risk of spills and leaks in the local community. Davis ¶ 7; Blackburn ¶ 5; Citizens' Motion to Intervene, Affidavit of Bruce Baizel ("Baizel") ¶ 4. Numerous spills have occurred across Colorado, including in Longmont and nearby communities. Davis ¶ 7. These spills foul water with oil and contaminate water and soil with toxic chemicals such as benzene, toluene, and xylene. Davis ¶ 7.

32. The emissions, noise, and traffic created by fracking operations negatively impacts the local community's health and safety. Brueske ¶ 4; Bellmont ¶ 9; Ditslear ¶ 9.

33. Fracking sites would affect the views the local citizens have from their homes. Bellmont ¶ 6.

**B. Fracking Decreases Property Values and Imposes Costs on Local Communities**

34. Fracking in Longmont would have negative impacts on small businesses. Bellmont ¶¶ 13-14.

35. Fracking operations in Longmont may cause some residents to move away out of fear of the risks to their health and safety. Ditslear ¶ 12; Bellmont ¶ 15.

36. The noise and disruption caused by the heavy industrial activity of fracking and associated activity reduce local citizens' use and enjoyment of their homes and property. Fissinger ¶17; Schabacker ¶ 5; Blackburn ¶ 6.

37. Fracking causes a decrease in property values. Affidavit of Ron Throupe, Ex. D ("Throupe") ¶¶ 5, 8, 9, 10, 12, 14; Fisher ¶¶ 5, 7, 9; Fissinger ¶ 17; Schabacker ¶ 7; Blackburn ¶ 6; Ditslear ¶ 11; Baizel ¶ 5. The decrease in property values has been attributed both to proximity to wellsites and views of the sites from homes. Throupe ¶¶ 9, 10; Fisher ¶ 6.

38. Nearby fracking operations reduce the willingness of prospective homebuyers to submit a bid on a home. Throupe ¶ 13; Fisher ¶ 4. For those buyers who would submit a bid despite proximity to fracking operations, the offers are greatly discounted. Throupe ¶ 13; Fisher ¶ 4.

39. Many prospective homebuyers are not comfortable purchasing a home within 1,000 feet of existing or proposed well sites, and some would not consider purchasing a home within a mile or more of those sites. Fisher ¶ 10. Thus, many properties that are well beyond state setback standards are unattractive to prospective homebuyers.

40. Proximity to existing or proposed wellsites is a dealbreaker for some prospective home purchasers, and they would even withdraw an offer on a home they otherwise love if they learn that a proposed wellsite is nearby. Fisher ¶ 11.

41. Drilling leases on a property can create problems for homeowners or prospective buyers in terms of mortgage financing, lender's insurance, and homeowners insurance. Throupe ¶ 6.

42. Nearby fracking sites can cause properties to remain on the market for extended periods of time or the ultimate failure of sales. Throupe ¶ 7. Extended sales periods incur costs for property owners in terms of maintenance, mortgage payments, property taxes, insurance, and HOA fees. *Id.*

43. Real estate agents advise clients to consider existing and proposed fracking sites as comparable to industrial zoned areas, airports, or railroad tracks. Fisher ¶ 3.

### C. Longmont's Fracking Ban Does Not Have Any Meaningful Impact on the State Interest

44. State and county tax records show that there are 12 wells currently producing in Longmont, some in Boulder County and some in Weld County. Denomy ¶ 7.

45. Longmont occupies only a tiny fraction of the land in the state of Colorado, 27.6 square miles out of a total 104,000 square miles, and oil and gas drilling within

Longmont has had only a minor contribution to statewide production. Denomy ¶ 8. Yet the population density in Longmont is much higher than in other areas, especially rural areas. *Id.*

46. The City of Longmont receives only an insignificant amount of tax payments from oil and gas development, ranging from $40,000 in 2010 to a high of $142,000 in 2009. Denomy ¶ 11. Severance tax payments are distributed by the state according to where workers in the industry reside rather than where the production occurs. *Id.*

**D. Longmont's Fracking Ban Does Not Prevent All Oil and Gas Activity**

47. Noble Energy drilled wells in Weld County that were never fracked, but which have generated large incomes from the oil and gas produced. Denomy ¶ 9. Lack of fracking did not affect the economics of these wells, which were much more profitable and productive than the currently producing wells in Longmont. *Id.*

48. Scientists and industry have been working on alternatives to fracking. Denomy ¶ 10.

49. There is little reason to believe that banning fracking will amount to a total ban of all oil and gas development within Longmont. Denomy ¶ 13.

## III. RESPONSE TO PLAINTIFFS' "UNDISPUTED" FACTS

Citizen Intervenors incorporate by reference the City's Response to Plaintiffs' "Undisputed" Facts contained in Section III of its brief, and do not repeat those responses here.

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## IV. LEGAL BACKGROUND

### A. Standard of Review

#### 1. Summary Judgment

A movant for summary judgment must prove that no material fact is in dispute. C.R.C.P. 56(c). "Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Bd. of Cnty. Comm'rs of Gunnison Cnty. v. BDS Int'l, LLC.*, 159 P.3d 773, 778 (Colo. App. 2006). Due to the "drastic" nature of the remedy, "the absence of dispute as to all issues of material fact must be clearly shown, and all doubts as to the presence of disputed facts must be resolved against the moving party." *KN Energy, Inc. v. Great W. Sugar Co.*, 698 P.2d 769, 776 (Colo. 1985); *accord Amos v. Aspen Alps 123, LLC*, 2012 CO 46, ¶ 13 ("The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party.").

#### 2. Facial versus as applied challenges

In assessing the constitutionality of a statute, there are two kinds of challenges: "facial" and "as applied." *Sanger v. Dennis*, 148 P.3d 404, 410-11 (Colo. App. 2006). For facial challenges, this is a high bar, and courts traditionally disfavor facial challenges. *Independence Inst. v. Coffman*, 209 P.3d 1130, 1136 (Colo. Ct. App. 2008) (finding that facial challenges force courts to rely on speculation, there is a risk of premature statutory interpretation; challenger must establish that a regulation is invalid in all respects). In the oil and gas context, courts have stated the legal standard as "[w]here **no possible**

**construction** of the [local] [r]egulations may be harmonized with the state regulatory scheme, we must conclude that a particular regulation is invalid." *Gunnison,* 159 P.3d at 779 (emphasis added). In *Gunnison*, the court further stated: "we will construe the County Regulations, if possible, so as to harmonize them with the applicable state statute or regulations." *Id.* Notably, the court rejected the plaintiff's contention that a same-subject analysis applies in determining whether a conflict exists, and relied on *Bowen/Edwards* and *Frederick* in rejecting plaintiff's proposition that if a state regulation concerns a particular aspect of oil and gas operations, then any county regulations in that area are automatically invalid. *Id.*

Put another way, a "facial" challenge is one that seeks to render a regulation "utterly inoperative" by requiring the plaintiff to establish beyond a reasonable doubt that "**no set of circumstances**" exists in which the regulation can be applied in a permissible manner. *Sanger*, 148 P.3d at 411 (referencing *Evans v. Romer,* 854 P.2d 1270, 1274 (Colo. 1993)); *People v. Vasquez,* 84 P.3d 1019, 1021 (Colo. 2004) (en banc).

"A plaintiff bringing an 'as-applied' challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposes to act." *Sanger*, 148 P.3d at 410. Put another way, any "as applied" challenge must wait until a city permit has been applied for, and denied or issued with conditions in conflict with a state permit. Otherwise, there is no permit to which the court can "apply" the law. *Cf. Bd. of Cnty. Comm'rs, La Plata Cnty. v. Bowen/Edwards Assocs., Inc.,* 830 P.2d 1045, 1060 (Colo. 1992) ("*If La Plata County denies Bowen/Edwards' preemption claim* . . . [then] the district court should permit [the applicant] and the county to develop an adequate evidentiary

record…") (Emphasis added). That aspect of a local ordinance – requiring a permit applicant to submit its permit to the local government to initially decide the preemption issue – was **upheld** in *Town of Frederick v. N. Am. Res. Co*., where the court affirmed the utility of requiring an administrative appeal process of a permit condition prior to judicial review. 60 P.3d 758, 766 (Colo. App. 2002). The court did so even if it resulted in drilling delays and affirmed that it did not impede the state's interest in oil and gas development. *Id.* The City of Longmont has a procedure for an applicant for an oil and gas company drilling within its borders to submit its preemption claim to the City, like that in *Town of Frederick* and *Bowen/Edwards*.[2]

**B. Preemption Law**

Despite a somewhat muddled collection of precedent, a preemption analysis in Colorado follows a clear and largely consistent pattern as laid out by the Colorado Supreme Court. First, the court must conduct an ad hoc determination of whether the matter is one of local, state, or mixed interest. If the court deems the matter to be one of local concern, that ends the matter, at least in a home rule municipality such as Longmont – the local law is upheld. Even an express statement by the state legislature to preempt local laws cannot override the home rule municipality's authority to regulate matters of local concern. If the court finds that the matter is one of state or mixed interest, then a conflict analysis must be

[2] The City's "Variances and Operational Conflicts Special Exceptions" ordinance is a valid and necessary component of the Longmont Ordinance. See Longmont Ordinance O-2012-25, § 2(m), Ex. E. This Ordinance is the subject of the litigation in Longmont I, which this Court stayed pending the outcome of the instant case. This Ordinance is in full force and effect in the meantime.

conducted to determine if the local law can be harmonized with the state interest. A local law is only preempted if it cannot be reconciled with the state interest.

**1. Courts Must Weigh the Local Interest Versus the State Interest**

The initial inquiry for any preemption case is whether the matter is one of local, mixed, or state concern. If a local ordinance conflicts with a state statute in a matter of purely local concern, the ordinance validly supersedes state law. *Webb v. City of Blackhawk*, 295 P.3d 480, 486 (Colo. 2013). Only if the matter is one of statewide or mixed concern does the court need to conduct a conflicts analysis. *Id.* The determination of whether a matter is local, state, or mixed requires "a court to consider the totality of the circumstances in reaching its conclusion." *Id.* However, because the categories are not perfectly separate, "categorizing a particular matter constitutes a legal conclusion involving considerations of both fact and policy." *Id.* This determination is made "on a case-by-case basis considering the totality of the circumstances based on enumerated factors and any other factors" deemed relevant. *Id.* at 486-87.

The Colorado Supreme Court has looked to a variety of factors in assessing whether a matter is one of local or of mixed/state concern. In *Voss v. Lundvall Bros., Inc.*, the court looked to 1) whether there is a need for uniform statewide regulation; 2) any extraterritorial impacts; 3) whether the subject was traditionally governed by state or local government; and 4) whether the Colorado Constitution specifically commits the matter to state or local regulation. 830 P.2d 1061, 1067 (citing *City and County of Denver*, 788 P.2d at 768 (Colo. 1990)). In *City and County of Denver v. State*, the court did mention those factors but it actually applied a different set of factors, looking to "other state interests" and "local

interests" in addition to uniformity and extraterritoriality. 788 P.2d. at 769-72. Further, any list of factors that has been generated "is not an exhaustive list", and the process "lends itself to flexibility and consideration of numerous criteria." *City of Northglenn v. Ibarra*, 62 P.3d 151, 156 (Colo. 2003). This really is an ad hoc determination that depends on the totality of circumstances for each particular case. *Webb*, 295 P.3d at 487-88.

Occasionally courts will find express or implied preemption. As the Colorado Supreme Court has explained, "the express language of the statute may indicate state preemption of all local authority over the subject matter; second, preemption may be inferred if the state statute *impliedly* evinces a legislative intent to completely *occupy a given field* by reason of a dominant state interest..." *Bowen/Edwards*, 830 P.2d at 1056-57. Where the state statute does not contain express preemptive language, implied preemption must be measured "not only by 'the language used but by the whole purpose and scope of the legislative scheme,' including the particular circumstances upon which the statute was intended to operate. *Id.* at 1058 (citing *City of Golden v. Ford*, 348 P.2d 951, 954 (Colo. 1960)). Notably, the *Bowen/Edwards* court found that the Oil and Gas Conservation Act did not expressly or impliedly preempt local regulation of oil and gas operations. 830 P.2d at 1057-59. The Court found that the state's interest was "primarily on the efficient production and utilization of the natural resources of the state", while the local interest included "orderly development and use of land in a manner consistent with local demographic and environmental concerns." *Id.* at 1057. Furthermore, the OGCA contained "no such clear and unequivocal statement of legislative intent" to preempt local regulation.

*Id.* As will be discussed below, amendments to the OGCA since 1992 have only weakened any claim that it expressly or implied preempts local regulation of fracking.

In cases where implied preemption is found, in contrast, the state statute contains language which supports a finding that the legislature intended preemption in an area. For example, in *Colorado Mining Ass'n v. Board of County Commissioners of Summit County*, the Colorado Supreme Court found implied preemption based on statutory language that assigned authority to authorize and comprehensively regulate the use of toxic or acidic chemicals for mining operations, which had been banned by the local government. 199 P.3d 718 (Colo. 2009). The state statute there contained detailed provisions discussing the types of processes that were banned and requiring the creation of an environmental protection plan with substantive requirements to be set by the state agency. *Id.* at 726. This case stands in stark contrast to cases under the OGCA, where no express or implied preemption has been found – certainly not in the field of fracking.

Furthermore, even a clear expression of intent to preempt local regulation does not empower the state to prohibit home rule municipalities from regulating an area of local concern. *City & Cnty. of Denver*, 788 P.2d at 767. Even if the state has a relatively minor interest, that is not enough to overcome the local nature of the issue. *Id.* "Thus, even though the state may be able to suggest a plausible interest in regulating a matter to the exclusion of a home rule municipality, such an interest may be insufficient to characterize the matter as being even of 'mixed' state and local concern." *Id.* This is particularly relevant where the local law would have only a de minimis impact on the rest of the state. *Id.* at 769. As a result, the Colorado Supreme Court has upheld residency requirements for

local government employees even when the state legislature attempted to expressly prohibit such requirements. *Id.* at 772.

**2. For State or Mixed Issues Only, A Conflict Analysis Follows**

Similar to the analysis of whether the matter is local or state/mixed, the determination of whether a conflict exists "must be resolved on an ad-hoc basis under a fully developed evidentiary record." *Bowen/Edwards*, 830 P.2d at 1060. Courts must permit local governments an opportunity to "develop an adequate evidentiary record on the preemption issue." *Id.* If the state **statute** expressly authorizes an activity that the local ordinance forbids, then a conflict will be found. *Webb*, 295 P.3d at 492. But absent a direct conflict with the state statute, courts must attempt to harmonize the state and local law to the extent possible. *Droste v. Board of County Commissioners of County of Pitkin*, 159 P.3d 601, 607 (Colo. 2007); *see also Bowen/Edwards*, 830 P.2d at 1058 (noting that the state interest in that case did not "eliminate by necessary implication any prospect for harmonious application of both regulatory schemes").

**C. OGCA and Legislative History**

The current incarnation of the Oil and Gas Conservation Act ("OGCA") states that the public interest includes "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**." C.R.S. § 34-60-102(1)(a)(I) (emphasis added). The Act further states that its intent is to "permit each oil and gas pool in Colorado to produce **up to** its maximum efficient rate of production, subject to the prevention of

waste, **consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources**." C.R.S. § 34-60-102(b) (emphasis added). Furthermore, this language has changed since the time of the *Voss* decision in 1992, to include the explicit language recognizing the need for balance and the protection of health, safety, and welfare of local communities (the emphasized language). *See Voss*, 830 P.2d at 1065 (citing the OGCA language before these changes). In 1994, the legislature added the language "in a manner consistent with protection of public health, safety, and welfare" while in 2007 it went further to add: "including protection of the environment and wildlife resources." 1994 Colo. Legis. Serv. S.B. 94-177; 2007 Colo. Legis. Serv. Ch. 320 (H.B. 07-1341). Furthermore, while the OGCA previously (at the time of *Voss*) stated its intent to "encourage, and promote" the development of oil and gas resources, now the statute seeks to ensure "responsible, balanced" production. Thus, the state no longer recognizes only an interest in promoting the production of oil and gas, but requires that production to be conducted in a way that protects the local interests of communities affected by oil and gas development.

In addition to the changes made to the text of the OGCA, the legislative declaration for those changes made clear that "the purpose of this act is to address the regulatory and enforcement authority of the Colorado oil and gas conservation commission and nothing in this act shall be construed to affect the existing land use authority of local governmental entities." 1994 Colo. Legis. Serv. S.B. 94-177, § 1. This statement was included to get the support of local governments, which would have otherwise fought to defeat the amendments to the OGCA in 1994. Nicole R. Ament, *A Perplexing Puzzle: The Colorado Oil*

*and Gas Commission Versus Local Government*, 27-FEB Colo. Law 73, 76 (1998) (based on an interview with a state senator). The legislature made a similar statement when enacting the 2007 amendments. Laws 2007, Ch. 320, § 1.

Furthermore, as explained by the City in its Consolidated Response, the OGCA nowhere mentions fracking or any interest of the state to ensure that fracking occurs even in communities that object to its use. Thus, the relevant state statute not only does not authorize fracking, it does not even mention it.

**D. COGCC Failure to Regulate Fracking**

As the City outlines in its brief, the COGCC does not actually regulate fracking. It requires a few notices to be given when fracking operations are being conducted, but no COGCC rule requires a permit for fracking, nor sets any limitations on how much fluid can be used, what chemicals can be contained in the fluid, how many stages of a well may be fracked, or where the fracking may take place and where it may not. In fact, the head of permitting at COGCC admits that they do not issue permits for fracking operation, and that he cannot recall a permit to drill ever being denied. City Response, Ex. 3, pp. 114, 147-48. Thus, the state has no history of regulating fracking, which is the subject matter of this litigation.

**E. The Colorado Constitution**

The Colorado Constitution guarantees certain inalienable rights for its citizens, and these rights cannot be taken away by the state legislature. Specifically, the Bill of Rights to the Colorado Constitution states "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and

liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness." Colo. Const. art. II, § 3. This provision has received relatively little attention in Colorado courts previously,[3] but that does not mean it is an empty provision—a hollow promise. A recent decision by a plurality of the Pennsylvania Supreme Court is instructive. There, a similarly broad constitutional provision, which had not previously been applied by the courts, was interpreted in a way to prohibit the legislature in Pennsylvania from preempting local regulations on fracking. *Robinson Twp., Washington Cnty. v. Commonwealth*, 83 A.3d 901, 946-50 (Pa. 2013) (discussing environmental rights as an indefeasible right guaranteed to all citizens of Pennsylvania).

In addition to the inalienable rights of all citizens, those citizens living in home-rule municipalities have additional authority under the Colorado Constitution. The Home–Rule Amendment, Colo. Const. art. XX, § 6, grants home-rule cities a "right of self-government in both local and municipal matters," and further provides these local ordinances "shall supersede within the territorial limits ... any law of the state in conflict therewith." Whether a home-rule city's ordinance is preempted is a constitutional question. *See Voss*, 830 P.2d at 1062, 1064;[4] *Summit County*, 199 P.3d at 723 (discussing how Colorado law

[3] Many of the cases interpreting this provision deal with limitations placed on the ability to use public roads, such as a case that found there was no inalienable right to travel upon and use highways (even when intoxicated). *See People v. Brown*, 485 P.2d 500, 518 (Colo 1971).

[4] The issue in *Voss* was whether a city's "total ban on drilling" (which is **not** presented by Longmont's Charter Amendment) was preempted by the OGCA. 830 P.2d at 1062. In *Voss*, the court held that the state's interest in efficient oil and gas development was sufficiently dominant to override a city's imposition of a **total ban** on drilling within city limits only. *Id.* at 1068. However, the court emphasized that it was addressing only the "total exclusion of all drilling operations" and the "total ban" within city limits. *Id*. at 1069. In *Summit County,* 199 P.3d at 730, the court explained that *Voss* left open the possibility for home-rule municipalities to regulate oil and gas operations provided there is not a "total ban."

follows federal preemption law); *see also id*. at 737-738 (Martinez, J., dissenting) (discussing how a home-rule city, with its constitutionally granted independent authority, has more authority than a county to regulate actions).

Citizen Intervenors are not aware of any portions of the Colorado Constitution that commit regulation of fracking, or even of oil and gas, to the state, and Plaintiffs have pointed to none.

**F. Claims Not Contained in the Pleadings**

Summary judgment motions should be based upon claims and defenses set forth in the pleadings. 6 Colo. Prac., Civil Trial Practice § 8.10 (2d ed.). Pleadings such as complaints are required to set forth all claims for relief. C.R.C.P. 8(a). The requirement includes both a statement of the relief sought and the grounds thereof. *People ex rel. Bauer v. McCloskey*, 150 P.2d 861, 862 (Colo. 1944). This rule is designed to give notice to the opposing party concerning that which he is expected to defend. *Bryant v. Hand*, 404 P.2d 521, 524 (Colo. 1965). For a party to assert a new claim, he must amend his pleading within a specified timeframe or by leave of the court. C.R.C.P. 15(a).

**G. Areas and Activities of State Interest Act**

The AASIA lays out procedures by which a local government may designate matters of state interest, after a public hearing, and then hold hearings, grant or deny permits, and communicate with state agencies or other local governments. C.R.S. § 24-65.1-301. No provision in the AASIA allows for local citizens, acting through the initiative process, to take action under the Act.

## V. ARGUMENT

Citizen Intervenors hereby incorporate all of the arguments presented by the City in its Consolidated Response. Thus, the remainder of this brief will emphasize key points that were addressed by the City and also raise additional arguments related to the same claims and defenses.

### A. An Evidentiary Hearing Is Required to Resolve Disputes of Fact

Discovery had not even commenced in this case when Plaintiffs filed their motions for summary judgment. Expert disclosures by the defendants in this case are not due until 14 weeks before the trial date, which would be on January 5, 2015, over 7 months from now. C.R.C.P. 26(a)(2)(C)(II). Many months of discovery remain in this case as well. Yet preemption necessarily turns on many issues of fact, both regarding whether a matter is of local or state/mixed concern, and if it is a state matter, whether a conflict exists. *See Webb*, 295 P.3d at 487-88; *Bowen/Edwards*, 830 P.2d at 1060. Therefore, Citizen Intervenors have participated in the depositions on Plaintiffs' affiants and brought forward evidence from its own affiants in order to demonstrate the numerous genuine disputes of material fact that remain in this case. Those disputes include, but are not limited to, the following: what the local interest is in this case; what the state interest is in this case; whether the factual basis underlying the *Voss* case remain valid; whether alternatives to fracking exist that could be used in Longmont; and whether the Longmont fracking ban can be harmonized with the state interest. Each of these issues requires further factual development through discovery and are properly decided only after an evidentiary hearing

or trial in this case. Only then can this Court reach the legal conclusions required by Colorado Supreme Court precedent in preemption cases.

Plaintiffs sought to overcome these issues and force a premature ruling on summary judgment by providing affidavits purporting to prove that a ban on fracking is a de facto ban on all oil and gas development. Yet these contentions fall apart upon closer inspection. City Response at 28-30 (noting that Mr. Herring had no basis for most of his contentions); *Id.* at 30 (noting that Mr. Hollway stated that Synergy has actually drilled several wells that COGA said they would not); *Id.* at 33 (noting that portions of Herring and Holloway affidavits cited either were not correct or had no basis). None of Plaintiffs' affiants had conducted any analysis to see if alternatives to fracking might be used in Longmont. Instead, they revealed that they simply were unaware of other ways to get at the resources in a way they deemed sufficiently profitable. At best, Plaintiffs have established that their affiants are not familiar with alternative completion techniques being used in the Wattenberg Field and around the country that allow companies to extract oil and gas resources without fracking. This is not nearly enough to establish that no genuine dispute of material fact exists. Nor is it enough to meet the heavy burden of showing that no alternatives do in fact exist.

Even though Plaintiffs fail to meet their burden on summary judgment, the City and Citizen Intervenors have come forward with evidence to the contrary. Alternatives to fracking have been used historically in the Wattenberg Field, and they are being used on highly productive wells that were drilled within the past few years. City Response, Ex. 44 ("Hughes") ¶ 7; Denomy ¶ 10. Major oil and gas companies are using the alternative

technique of underbalanced drilling as an alternative to fracking. Hughes ¶ 11. Many companies and scientists are also investing in developing new technologies that could make fracking obsolete. Denomy ¶ 10. At a minimum, the affidavits presented by the City and Citizen Intervenors have demonstrated a genuine dispute of material fact that precludes summary judgment at this time.

Going beyond the issue of whether a fracking ban is a de facto ban on all oil and gas development, numerous disputed issues remain regarding the local interest, the state interest, and whether a conflict exists. The Plaintiffs did not address the local interest at all, even though a ruling on preemption is impossible without weighing the local interest. The City and the Citizens are entitled to an opportunity to present evidence in a full evidentiary hearing on the local impact of fracking. Furthermore, the state interest was ill-defined by the Plaintiffs and does not adequately take into account all the changes to the OGCA since the time of the *Voss* decision. Only through discovery followed by a full evidentiary hearing can the state interest be adequately assessed and weighed against the local interest. Some of the outstanding issues that remain include: how much oil and gas is beneath Longmont, compared to how much is in the state; how much oil and gas could be recovered in Longmont without using fracking; how much risk of harm would be caused by fracking in Longmont; and how much property values might decrease in Longmont were fracking to occur. Without a clearly defined state interest, it is impossible for this Court to assess whether a fracking ban is harmonious with that interest.

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### B. The Longmont Fracking Ban Is a Matter of Local Interest

Any finding by this Court that regulation of fracking in Longmont's borders is a matter of local, state, or mixed interest must be based on the totality of circumstances. Colorado Supreme Court precedent has identified a variety of factors to consider, but the ultimate weighing that must be conducted is the local interest against the state interest. The local interest in this case is very strong, because fracking in a dense urban community threatens to endanger public health, safety and welfare; reduce property values; and strain the resources of local governments. In stark contrast, the state interest in ensuring that fracking occurs in Longmont is minimal at best. Longmont contains only a de minimis amount of all the oil and gas in Colorado. Conditions in the industry have changed dramatically since *Voss* was decided in 1992, with the development of horizontal drilling, massively increased fracking, as well as the exploitation of shale reserves that do not form a common pool. Therefore uniformity and extraterritorial impacts are no longer a significant concern to the state. Finally, a fracking ban only prohibits one completion practice among many options, and thus oil and gas development can still occur in Longmont using methods that have been deemed sufficiently safe by both the state and the local community. When the strong local interest is weighed against the limited interest of the state, this Court should find that regulation of fracking in Longmont is a matter of local interest.

In addition to comparing the state and local interest, several cases have looked to a tradition of regulation in the area as well as any guidance from the constitution. In this case, neither the state nor local governments had substantively regulated fracking before

Longmont's citizens passed the ban at issue. Because historically both the state and local government have regulated oil and gas development, this factor is neutral. Finally, the Colorado Constitution makes clear both that home rule municipalities have authority to regulate matters of local concern and that citizens have an inalienable right to protect their lives and liberties, property, and safety and welfare. Thus, the constitutional analysis favors local control of fracking.

### 1. The Local Interest in Banning Fracking Is Strong

None of the Plaintiffs addressed the local interest in this case or introduced any evidence to show what the local interest is. However, the Citizens and the City have come forward with ample evidence showing that fracking is a matter of great concern to the local community.

#### a. Fracking Threatens the Health and Safety of the Local Community

The evidence introduced by the Citizens and the City shows that fracking in Longmont poses an unacceptable risk to the health and safety of the community. Fracking has been linked to increases in cancer risk; irritation of eyes, skin, and other sensory organs; headaches, dizziness, confusion, memory loss, and tingling extremities, nausea, and nosebleeds; congenital heart defects and other birth defects; asthma, chronic obstructive pulmonary disease, and cardiac disease; and smog. Fracking turns once peaceful residential communities into industrial complexes. Residents of Longmont rightly fear that they will be affected if fracking comes to their community. Some residents moved to Longmont to escape the oil and gas boom in other parts of the state – how many times must

they move as industry encroaches on their communities? If Plaintiffs wish to dispute these harms, then an evidentiary hearing is necessary.

The safety of communities is also threatened by fracking. Fracking operations results in spills and leaks of toxic chemicals. Fracking increases traffic and congestion on roads and erodes their quality. Many explosions have occurred at oil and gas facilities around the state. Fracking operations pose an unacceptable risk to the people of Longmont, and the citizens are within their authority to prohibit it.

One family in Texas was exposed to so much pollution and suffered so many health problems that it recently received a nearly $3M verdict against the local industry operator. *Parr v. Aruba Petroleum, Inc.*, No 11-1650 (Dallas Cnty. Ct. at Law Apr. 22, 2014). Longmont's citizens should not be forced to accept the risk of similar harm to themselves; they have the inalienable right to protect themselves from those harms by banning fracking in their community.

**b. Fracking Reduces Property Values in the Local Community**

Fracking operations reduce nearby property values, and the only way to entirely prevent this harm is by preventing fracking from occurring in the first place. Fracking makes it more difficult to sell homes. Many people, understandably, do not want to live near existing or proposed wells, due to the risks they pose and their unsightly appearance. If fracking operations come to a community, residents may be forced to move elsewhere, if they can find anyone willing to purchase their home. Even if they can find someone to purchase their home, they will receive much less for it than they would have if fracking had

been banned. Even the people who want to live in an area where fracking occurs may have difficulties obtaining mortgages or insurance.

Concern about living near fracking operations is not an extreme position. Even the CEO of Exxon Mobil, Rex Tillerson, has sued over impacts from facilities needed for fracking operations which he alleges have decreased the value of his multi-million dollar ranch in Texas. Richard K. and Susan D. Armey, et al. v. Bartonville Water Supply Corporation et al., No 2012-30982-211 (Denton Cnty. Dist. Ct. filed Mar. 15, 2013), *available at* online.wsj.com/public/resources/documents/water20140220.pdf. The complaint states that the owners selected the area because the local government had zoning and ordinances that prevented undesirable development, but objected when a high-rise water tower (which would supply water to a nearby fracking site) was constructed. *Id.* If even the ultimate industry insider does not want to live near fracking operations, it is reasonable for the citizens of Longmont to seek the same protections for themselves.

**c. Fracking Strains the Resources of Local Communities**

Fracking additionally strains the resources of local communities, who bear the brunt of impacts from fracking and are responsible for responding to any emergencies created when things inevitably go wrong. Longmont receives only a de minimis amount of money from ad valorem and severance taxes due to fracking operations. Denomy ¶ 11. Yet the city's infrastructure is worn down by all the heavy industrial trucks that are needed to construct a well pad and especially to truck in and out all of the fracking fluids and waste. Brueske ¶ 4; Bellmont ¶ 9; Ditslear ¶ 9. City police and firefighters are responsible for responding to emergencies at fracking sites such as leaks, spills, or explosions. City

Response, Ex. 3, pp. 129-30. Finally, Longmont residents rightly fear that their businesses will suffer if fracking is allowed in their community because it will be less desirable for people to stay in or come to Longmont. Bellmont ¶ 13.

### 2. The State Interest in Fracking Occurring in Longmont Is Minimal

#### a. Longmont Contains Insignificant Amounts of Oil and Gas

Longmont occupies a very small amount of the land in the state of Colorado, and it lies on the periphery of the Greater Wattenberg Area. Even though over 50,000 wells have been drilled in the state in recent years, only 10 to 12 wells are currently producing in Longmont. The state would not notice any effect on production, revenue, or the economy if fracking is banned in Longmont, even if the ban did completely halt all oil and gas development, which it would not necessarily do. A statewide ban on fracking might arguably have some impact on the state's interest, but a ban only in Longmont does not.

#### b. Uniformity Is No Longer A Compelling Interest

As the City has demonstrated, the COGCC already has a patchwork of regulations across the state, and this is a sophisticated industry that is competent to comply with the varying state and local regulations that apply to it. Thus, it is not clear that uniformity is even an interest in this context. The state does not have an interest that fracking occur anywhere in the state that industry chooses. The state does not even regulate fracking, and it has no interest in ensuring that fracking is uniformly **unregulated** across the state.

The state of the law and the industry today has changed so much that the reasoning related to uniformity underlying the *Voss* decision no longer applies. In *Voss*, the court was concerned with pooled oil and gas resources that required a pattern of evenly spaced wells

to result in optimal recovery. 830 P.2d at 1067. Those pooled resources have already been exploited, and the technology being used today, in particular directional and horizontal drilling, allow oil and gas to be produced efficiently even with multiple well sites in one well pad. City Response, Ex. 3, p. 61. Companies are even able to drill wells that pass beneath Longmont, and only frack the stages of the well that fall outside of Longmont's jurisidiction, as Synergy has agreed to do. City Response, Ex. 9, pp. 74-76. Thus, a factor that weighed heavily in favor of preemption in the *Voss* case now tips the other way. Uniformity is simply no longer an important factor in the analysis.

**c. The Fracking Ban Does Not Have Extraterritorial Effect**

Similar to uniformity, extraterritoriality now weighs against a finding of preemption in this case. The fracking ban in Longmont only applies within the city and does not have any impact outside of the city. Synergy has demonstrated that this is the case because it has drilled wells from a well pad in Firestone, near Longmont. City Response, Ex. 9, pp. 74, 123. The wells pass beneath Longmont, and the company has contractually agreed not to frack those portions of the well. *Id.* pp 95 (Synergy agreed not to use fracking within Longmont from any well accessed by a particular access road). Yet the wells then continue back beneath Firestone, where they will be fracked. *Id.* pp. 75-76. These wells are expected to be extremely profitable, paying back their costs in under two years and resulting in millions of profit to the company. *Id.* at pp. 85-86 (plan is to receive a payback of $4.5M in 12 to 18 months, after that profit). The fracking ban in Longmont simply has had no impact on the production of oil and gas from outside of Longmont's borders. *Id.* at 77-80 (citing economic reasons rather than the fracking ban). The financial impact on

Synergy is also very small, and the primary limitation on how much Synergy can drill is access to capital, not the fracking ban in Longmont. *Id.* at 124 ("the capital flows to where the highest returns are").

*Voss*'s reliance on extraterritorial impacts also no longer holds water, because it was "again based primarily on the pooling nature of oil and gas." 830 P.2d at 1067. Also, the predictions that the "total drilling operation may be economically unfeasible," impacting non-resident owners of mineral rights outside the city, *Voss*, 830 P.2d at 1067-68, have been proven to be inaccurate in light of Synergy's experience. City Response, Ex. 9, pp 124 (company expects to make large profits on $4.5M investment).

**d. The Fracking Ban Does Not Prohibit Oil and Gas Development**

The state only has an interest in responsible and balanced production that does not endanger public health, safety, or welfare. The state legislature has not expressed any interest in fracking occurring anywhere in the state, in the time, place, and manner of choosing by the industry. Instead, development of the limited oil and gas resources beneath Longmont may occur so long as fracking is not used, either as it was done historically, or using alternative techniques that have been successfully used in the Wattenberg Field and across the country. Hughes ¶ 7; Denomy ¶ 10. Many economic wells have been completed using completion techniques other than fracking. Hughes ¶ 12.

**3. The Constitution Guarantees the Right of Citizens and Home Rule Municipalities to Protect Local Interests of Health, Safety, and Welfare**

The Colorado Constitution is clear: every citizen has the inalienable right to protect his or her life and liberty, property, and safety and welfare. Colo. Const. art. II, § 6. Although Plaintiffs have suggested that the constitution is neutral in this case, they have

not addressed this important component of the bill of rights. COGA MSJ at 10; COGCC MSJ at 14; TOP MSJ at 13. Citizen Intervenors are unaware of any Colorado court decision that has applied this provision in a similar context, and note that V*o*ss and other preemption cases cited by the Plaintiffs also did not address it. However, that does not mean that the provision is not relevant to this case or has no meaning. This Court should give effect to the protections of the Colorado Constitution by declaring that the OGCA does not prevent local communities from banning practices that they deem to be an unacceptable threat to their health, safety, and welfare.

The analysis conducted by the Pennsylvania Supreme Court in a highly analogous situation is instructive. In Pennsylvania, the state legislature had attempted to expressly prohibit local regulation of fracking (unlike here, where the legislature has been silent on the issue). *Robinson Twp.*, 83 A.3d at 970. The court interpreted a similarly broad constitutional provision, the Environmental Rights Amendment, and found that even though it had never been judicially enforced as a limitation on the state, the words of the state constitution had to be given some meaning by the court – they were not empty words. *Id.* at 949-50 (discussing the difficulty of the task of constitutional interpretation, along with its necessity); *see also id.* at 963-64 (discussing how previously this provision had been realized by legislative enactments and executive agency action, but now the court was called upon to address the underlying understanding of the provision). In light of the failure of the state to regulate fracking, the court held that local governments could not be prohibited from regulating themselves to protect their communities. *Id.* at 978, 982, 985

(striking down three provisions of state law, including preemption of local regulation of oil and gas).

This analysis is highly analogous to the situation in Longmont. The citizens used their power to amend the city charter through the initiative process, in order to protect their health, safety, welfare, and property from the damages that would be caused by fracking. The state has failed to regulate fracking in any substantive way, yet now argues that citizens and local governments are powerless to protect themselves. This Court should hold that the Colorado Constitution weighs against a finding of preemption in this case. The citizens of Longmont have the right, guaranteed by the state Constitution, to protect their health, safety, welfare, and property. Since the state has not protected them, they must protect themselves.

**4. The State Has Not Traditionally Regulated Fracking**

The state does not now and has never in the past regulated fracking. Longmont's ban on fracking was the first act by any level of government to limit where fracking could occur. Although both state and local government have traditionally regulated other aspects of oil and gas development, neither has exclusive authority. Thus the tradition of regulating fracking, which is incredibly short, favors a finding of local concern in this case.

**5. Weighing the Local and State Interests, Fracking Is a Matter of Local Concern in Longmont**

A fair consideration of the factors laid out above show that the local interest is very strong, and the state interest is minimal, at best. Fracking will reduce property values and force some residents to move away to escape the dangers from fracking. Those who wish to remain in their homes will be exposed to greater cancer risk and numerous threats to

their health and safety. The local government will be burdened by the traffic, erosion of roads, and the need to develop emergency response plans. Against all this, the production that might be obtained from Longmont is barely noticeable in contrast to the boom in oil and gas occurring statewide at the moment. A fracking ban in Longmont actually supports the state's interest, which in theory if not in practice includes protection of health, safety, and welfare of local communities. Thus, even if the state has some small interest in fracking occurring in Longmont, on balance the local interests are sufficiently dominant that this Court should find the fracking ban to be a matter of local concern.

At the very least, the state interest is not "sufficiently dominant" in this case to support a finding of implied preemption. No court has ever found implied preemption under the OGCA, and the facts of this case, along with the developments of the past few decades, have only made the local interest stronger and the state interest weaker. Thus, Plaintiffs' claims that the fracking ban is impliedly preempted must be denied.

### C. The Longmont Fracking Ban Does Not Conflict with the State Interest

#### 1. The OGCA and COGCC Rules Do Not Authorize Fracking

The City has laid out the numerous reasons why the OGCA does not authorize fracking, let alone mention it, and how the COGCC regulations do nothing more than require notice. Thus, the Longmont fracking ban passes even the test proffered by Plaintiffs in this case.

A ban on fracking in Longmont does not "forbid what state statute authorizes." *See Webb*, 295 P.3d at 492; COGA MSJ at 7; COGCC MSJ at 15; TOP MSJ at 16. Nowhere does the OGCA, or any other state statute, authorize fracking. In contrast, the relevant statute in the

*Webb* case explicitly required local governments to accommodate bicycle traffic, yet the City of Blackhawk had forbidden it without providing an alternate route. *Webb*, 295 P.3d at 483 (citing C.R.S. § 42-4-109(11)). Where the state statute is silent on whether or not a practice is allowed, a local government has authority to ban it. This is particularly the case where, as shown below, the ban actually promotes the state interest that is embodied in the statute – here to foster responsible and balanced development that protects public health, safety, and welfare.

COGCC rules are actually irrelevant under the *Webb* test, which is focused on what state **statute** authorizes. Even so, in this case the rules nowhere authorize fracking. No permit is required to frack. City Response, Ex. 3, p. 114. The COGCC does not have authority to deny a company the right to frack. *Id.* p. 134. No substantive limits are placed on fracking in terms of where it can occur, when it can occur, how much water may be used, or what chemicals may be added to the water. *Id.* p. 113. The COGCC has never denied a permit based on the threat of harm from fracking (or any other reason). *Id.* at 147-48 (head of permitting at COGCC "cannot recall one [permit] specifically denied"). Thus, even if COGCC rules were relevant, they actually show that the state does not have any interest in fracking, and therefore local governments may properly protect their local interests by banning the practice. This is in stark contrast to the system under the Mined Land Reclamation Act, where the state statute required the relevant agency to set substantive requirements regarding the creation of an environmental protection plan. *See Summit County*, 199 P.3d at 726.

Because the OGCA is silent regarding fracking, but does express an interest in protecting public health, safety, and welfare, a ban on a practice deemed by a local community to pose too much danger is well within the scope of authority of a home rule city and its citizens.

### 2. Banning Fracking in Longmont Supports the State Interest in Protecting Public Health, Safety, and Welfare Through Balanced Development

The state interest is no longer ensuring the maximum production of oil and gas in the state; rather, the state interest is in ensuring balanced and responsible development. A ban on fracking in Longmont, where the citizens have decided that it poses too much of a risk to their community, is entirely consistent with responsible and balanced development. Allowing fracking to occur in most of the state, while banning it in Longmont (which occupies only 0.027% of the land in the state), promotes responsible and balanced development. The Plaintiffs' position apparently is that fracking must be allowed everywhere in the state, no matter the risk to health, safety, welfare, and property values, regardless of what the local community thinks on the matter. This cannot fairly be described as responsible and balanced development. In spite of changes to the OGCA that purportedly require protection of public health, safety, and welfare, the COGCC has utterly failed to impose any substantive regulations on fracking. Allowing citizens to decide whether or not they wish to allow a dangerous industrial process to threaten their health and safety, decrease their property values, and destroy the peaceful character of their community is therefore entirely consistent with the state's interest, as expressed by the OGCA. This is particularly the case where the City contributes only a de minimis amount to the oil and gas production in the state. *See City and County of Denver v. State*, 788 P.2d 764,

769 (Colo. 1990) (finding that the economic impact of Denver's residency requirement for city employees had only a de minimis impact on the rest of the state, and therefore the matter was one of local concern). If the state truly is interested in protecting public health, safety, and welfare, then a ban on a dangerous industrial practice within a densely populated urban community supports that interest.

### D. Plaintiffs Have Not Met the Burden for Either a Facial or As Applied Challenge

#### 1. Plaintiffs Have Not Satisfied the "No Possible Construction" and "No Set of Circumstances" Test Applicable to Facial Challenges

Plaintiffs fail to meet their affirmative burden of demonstrating that there are no possible constructions and no circumstances under which the Longmont Charter Amendment and the State interest can co-exist. For instance, Plaintiffs have not established the factual basis of the State's interest in "uniform regulation," the scope of this alleged interest, whether or how this particular Charter Amendment – applicable only within the city limits of Longmont ( a small approximately 5 mile by 2 mile area) – would cause economic hardship to the industry state-wide or to individual operators, much less how Longmont's protecting its citizens from the harms of fracking irreconcilably undermines the State's alleged interest. For that reason alone, the motions should be denied. *See Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987) (en banc) (movant's affirmative duty to demonstrate absence of a genuine issue of material fact).

In fact, although it is Plaintiffs' burden to prove otherwise, as set forth previously, there are constructions and circumstances under which the Longmont Charter Amendment and state regulations are not necessarily in conflict, which means Plaintiffs' "facial"

challenge must be rejected. At a minimum there are questions of fact on the existence of these circumstances, which precludes summary judgment for Plaintiffs.

### 2. Plaintiffs Are Not Entitled to Summary Judgment on Any As Applied Claims

Plaintiffs make no "as applied" claims against the Charter Amendment. Even if Plaintiffs had "as applied" challenges, they would have to be denied summary judgment because they have no application or permit to serve as the basis for such claims. "A plaintiff bringing an 'as-applied' challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposes to act." *Sanger*, 148 P.3d at 410. In this case the plaintiff has not acted, nor is there any evidence of an actual proposal to act, and that is fatal to their case. *Mt. Emmons Mining Co. v. Crested Butte*, 690 P.2d 231, 242 (Colo. 1984) (en banc).

Put another way, any "as applied" challenge must wait until a city permit has been applied for, and denied or issued with conditions in conflict with a State permit. Otherwise there is no permit to which the court can "apply" the law. *Cf.*, *Bd. of Cnty. Comm'rs, La Plata Cnty. v. Bowen/Edwards Assocs., Inc.,* 830 P.2d 1045, 1060 (Colo. 1992): "*If La Plata County denies Bowen/Edwards' preemption claim* . . . [then] the district court should permit [the applicant] and the county to develop an adequate evidentiary record…" (Emphasis added). That aspect of a local ordinance -- requiring a permit applicant to submit its permit to the local government on preemption -- was upheld in *Town of Frederick v. N. Am. Res. Co*., 60 P.3d 758, 766 (Colo. Ct. App. 2002), where the court affirmed the utility of the administrative appeal process of a permit condition before judicial review. The Court did so

even if it resulted in drilling delays, and affirmed that it did not impede the state's interest in oil and gas development. *Id.*

The City of Longmont has a procedure for an applicant for oil and gas drilling within its borders to submit its preemption claim to the City, like that in *Town of Frederick* and *Bowen/Edwards*.[5] And yet it is undisputed that no applicant has applied under this provision, or made a preemption claim, or that the City has denied a preemption claim. The City simply has not issued or denied a permit that is being challenged. Therefore, Plaintiffs have not and cannot bring an "as applied" challenge.

**E. Claims That Were Not Raised in the Pleadings Cannot Be Decided**

Summary judgment is inappropriate where the parties failed to assert a claim or seek relief in the pleadings, and failed to amend their pleadings appropriately. In this case, the Plaintiffs failed to seek relief or state grounds for preemption of the storage ban component of Article XVI. Even more particularly, COGCC failed to even mention federal law or the Safe Drinking Water Act in its complaint, even though it now argues that as a ground for preemption of the storage ban. COGCC MSJ at 17-18. And finally, TOP actually expressly stated it had agreed not to bring a takings claim, yet now incorrectly asserts an "inescapable conclusion" that a takings would occur if the storage ban is withheld. None of these claims may properly be resolved on summary judgment, and if the court wishes to allow the Plaintiffs to amend their complaints, Citizen Intervenors request an adequate opportunity to respond. Citizen Intervenors are prejudiced because Plaintiffs only asserted

[5] The City's "Variances and Operational Conflicts Special Exceptions", Ordinance subparagraph (m), is a valid and necessary component of the Longmont Ordinance. SEE PP. 6-8 OF LONGMONT ORDINANCE ATTACHED AS EXHIBIT____. This Ordinance is the subject of the litigation in Longmont I, which this Court stayed pending the outcome of the instant case. This Ordinance is in full force and effect in the meantime. .

these claims for the first time in the motions for summary judgment, and therefore Citizen Intervenors have not had adequate time to prepare a defense on them, such as by securing witnesses to address the applicability (if any) of the Safe Drinking Water Act.

### 1. No Plaintiff Properly Challenged the Storage Ban In Its Complaint

None of the Plaintiffs challenged the storage ban included in Article XVI of the Longmont Charter as part of their complaints.[6] For example, COGCC's complaint seeks a declaration that Article XVI is preempted because it is an "impermissible ban on the exploration for and extraction of oil and gas resources in the City." COGCC Compl. ¶ 18. COGCC further requests a declaration that "Article XVI's ban on hydraulic fracturing is expressly preempted by AASIA." *Id.* ¶ 22. Alternatively, COGCC seeks a declaration that the fracking ban (not the storage ban) is preempted by the OGCA. *Id.* ¶ 23. TOP's complaint follows a similar pattern. See TOP Compl. ¶¶ 17, Prayer for Relief (1), (2). COGA also refers to the storage ban, but does not actually ask for any relief in relation to the storage ban, instead focusing on the fracking ban. COGA First Amended Compl. ¶¶ 19, 35, Prayer for Relief (1). Because the Plaintiffs did not both provide notice about the relief requested and the grounds for that relief, summary judgment must be denied. *See McCloskey*, 150 P.2d at 862.

Additionally, even if the Court finds that Plaintiffs did properly raise claims related to the storage ban, Citizen Intervenors request an opportunity to present evidence regarding whether the storage ban is severable from the fracking ban.

[6] Some of the complaints refer to the storage ban when describing Article XVI, but none actually include storage in their claims or prayer for relief.

### 2. COGCC Failed to Raise Preemption Under the Federal Safe Drinking Water Act in its Complaint

Even if COGCC had brought a claim for invalidation of the storage ban contained in Article XVI, it nowhere mentioned preemption under federal law until it filed its Motion for Summary Judgment. COGCC's complaint never mentions, federal law, the Safe Drinking Water Act specifically, or regulation of Class II injection wells. *See* COGCC Compl. All that the pleading says is that the COGCC has "promulgated numerous regulations pertaining to hydraulic fracturing and the storage and disposal of E&P waste" and that Article XVI divests the COGCC of authority to regulate the storage and disposal of E&P waste." COGCC Compl. ¶¶ 6, 7.

In addition to raising this objection to the sufficiency of COGCC's complaint and its failure to timely amend its complaint, Citizen Intervenors wish to join and support the City's argument rebutting the claim of preemption based on the Safe Drinking Water Act on substantive grounds. Those arguments will not be repeated here.

### 3. TOP Agreed Not to Bring a Takings Claim and Cannot Resurrect It Now

Not only did TOP fail to bring a takings claim in its complaint, it expressly stated that it had agreed not to assert, either directly or indirectly, any takings claim against Longmont in this action. TOP Compl. ¶ 15. TOP cannot now assert that the fracking ban is preempted because otherwise it would effect a takings, as it has in its briefing on the pending Motion for Summary Judgment. TOP MSJ at 18. Even if it were allowed to do so, Citizen Intervenors strongly dispute TOP's assertion that the fracking ban renders any mineral rights owned by TOP as "essentially worthless" and therefore "taken." As noted previously, alternative means to produce oil and gas without fracking exist or are being developed.

Furthermore, TOP still owns whatever mineral interests it has, and those minerals are not going anywhere, thus they may be exploited in the future. Mineral-rights owners cannot establish a takings claim simply by showing that they have been denied the ability to use a certain practice (fracking) to exploit a property interest. Rather, a company would have to show that its "reasonable investment-backed expectations" were adversely impacted. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of La Plata*, 38 P.3d 59, 67 (Colo. 2001)(en banc). Here, TOP has agreed to comply with Article XVI unless it is ruled preempted by state law, and therefore it has no reasonable investment-backed expectations that it can use fracking to extract its resources. TOP MSJ, Ex. D1 ¶ 23 (contract subject to all applicable local laws). Therefore, arguing that a takings claim supports a finding of preemption is merely a circular – and impermissible – argument.

**F. COGCC's AASIA Claim Must Fail**

The City has laid out extensive reasons why the claim of preemption under the AASIA by COGCC fails, and Citizen Intervenors incorporate those arguments here. In addition, Citizen Intervenors point out that Article XVI of the Longmont City Charter was adopted by a vote of the citizens, in part because the citizens did not feel that the City Council was doing enough to protect them from the impacts of fracking. Yet the AASIA is aimed solely at local government entities, because it requires a local governmental body to hold hearings, grant or deny permits, and communicate with other local government entities. The citizens of Longmont have no means by which they could engage in those procedures, and therefore the AASIA does not apply to any local measure, particularly a charter amendment, that is enacted by a citizen-initiated ballot initiative. A contrary result

would leave local communities with no remedy if their elected local representatives were not being responsive to the desires of the local electorate – and this is precisely the purpose of ballot initiatives, a right reserved to the people by the Colorado Constitution. Furthermore, a ruling that the AASIA preempts the ballot measure would contravene the Colorado Constitution's guarantee of the right of all citizens to protect their lives and liberties, property, and safety and happiness. Colo. Const. art. II, § 3.

## VI. CONCLUSION

Many genuine disputes of material fact remain in this case, which preclude a ruling on summary judgment at this time. Therefore, this Court should deny the pending motions for summary judgment to allow the litigation process to play out before the evidentiary hearing in April 2015. Furthermore, the Plaintiffs have failed to demonstrate that the fracking ban in Longmont is a matter of state, rather than local, concern. Even if the matter is of state or mixed concern, the fracking ban and the state's interest are harmonious because it allows for the development of oil and gas in a responsible and balanced manner that protects public health, safety, and damages from the risks associated when fracking occurs in a densely populated community. The fracking ban is a valid exercise of the city's home rule authority and protects the citizen's inalienable rights. Therefore, the motions for summary judgment must be denied.

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DATED this 30th day of May, 2014.

Respectfully submitted,

/s Kevin J. Lynch
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*This document was filed electronically pursuant to C.R.C.P. §1-26. The original signed document is on file at the offices of the University of Denver Environmental Law Clinic.*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing, was served this 30th day of May, 2014, by ICCES File and Serve on the following:

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