

ISSUES RELATED TO A POTENTIAL BAN AND A TWO-YEAR MORATORIUM ON FRACKING

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Have any bills been adopted by the General Assembly this past session which negatively or positively affect local control of oil and gas operations?

- ▶ No
- ▶ With no new legislation, existing appellate court decisions related to limits on local control of oil and gas activities remain unaffected

What is the status of the fracking bans in Longmont and Fort Collins?

- ▶ The Colorado Oil and Gas Association's lawsuit against Longmont is still in the trial court and no significant court rulings have been issued
- ▶ The Fort Collins Council adopted a fracking ban in March, but exempted oil and gas wells and pad sites existing in the city on February 19, 2013, provided the operator has entered into an operator agreement with the city. Fort Collins has so far entered into one operator agreement, but has not yet been sued.

Are there any advantages or disadvantages to Council placing a fracking ban on the ballot versus it happening through a citizen initiative?

- ▶ No procedural advantages or disadvantages
- ▶ Unlike Fort Collins' charter which **only** allows its council to amend or repeal a voter-approved ordinance if the ordinance is placed on the ballot by the council, Loveland's charter has no such limitation
- ▶ Loveland Charter § 7-4(a) allows Council to amend or repeal voter-approved ordinances, regardless of whether placed on the ballot by the Council or by citizen initiative, at any time by a two-thirds vote of the entire Council (six votes) or by a majority vote of the entire Council (five votes) at any time one year after the election
- ▶ An amendment to Loveland's charter can also be placed on the ballot by Council or by a citizen initiative, which, if approved, can only be amended or repealed by a subsequent vote of the citizens
- ▶ One substantive advantage to Council placing a fracking ban on the ballot is the ability to control the wording of the proposed ordinance or charter amendment

What is the Council's deadline for placing a ballot question for a fracking ban on the November 5 ballot?

- ▶ If Council wishes to place a fracking-ban question on the ballot, whether as an ordinance or as a charter amendment, it must adopt on second reading by its August 20 meeting an ordinance submitting that ballot question to the voters

What are the important deadlines for placing on the November ballot, the citizen-initiated ballot question to amend the Charter to impose a two-year moratorium on fracking?

- ▶ The proponents of the Charter amendment will probably need to file with the City Clerk by August 1, their petitions with the requisite number of valid signatures
- ▶ If Council does not adopt the proposed ordinance, the Council will need to adopt on or before its September 3rd meeting a resolution submitting the ordinance ballot question to the voters on November 5

What might be the legal implications to the City in enforcing a voter-approved ban or a two-year moratorium on fracking?

- ▶ Both are likely to be challenged in the courts by the State, the Colorado Oil and Gas Association, an oil and gas operator wishing to drill in Loveland or by a mineral-interest owner in Loveland, but moratorium less likely to be challenged
- ▶ Under existing appellate court decisions, *Voss v. Lundvall* in particular (the Greeley decision), a fracking ban is likely to be struck down by the courts
- ▶ If the ban is struck down, the City may be subject to “temporary taking” claims from affected oil and gas operators and mineral-interest owners and the City would likely have to pay the suing party’s attorney fees and court costs
- ▶ Moratoria on land uses are generally upheld by the courts “so long as the duration is reasonable under the circumstances and the enactment was made in good faith without discrimination” and, in such circumstances, there is no “temporary taking”
- ▶ The City would also be required to pay its attorney fees if it retains outside legal counsel and to pay its court costs in defending either a ban or a moratorium

If a ban or two-year moratorium on fracking is enacted by the voters, would the City be required to defend them in the courts?

- ▶ Nothing under State law or in the City's Charter or Code requires that a defense be asserted by the City in the courts
- ▶ Consideration would need to be given as to whether a "good faith" defense could be asserted by the City in the litigation
- ▶ Under Rule 11 of the Colorado Rules of Civil Procedure, the City's legal counsel would be required to certify in any pleadings filed with the court in defense of the ban that such defense "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"
- ▶ Rule 3.1 of the Colorado Rules of Professional Conduct governing lawyers has the same requirement for being able to assert a good faith defense, the violation of which could subject the City's legal counsel to disciplinary action ranging from public censure to disbarment
- ▶ *Voss v. Lundvall* calls into question the availability of a good faith defense to a home rule city's fracking ban
- ▶ It is more likely that a good faith defense would exist with regard to a two-year moratorium to be used by the City to study the impacts of fracking

Questions?