DISTRICT COURT, WELD COUNTY, COLORADO

901 9th Ave.
Greeley, CO 80631

Plaintiff: COLORADO OIL & GAS ASSOCIATION

Defendant: CITY OF LONGMONT, COLORADO

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CITY OF LONGMONT'S MOTION TO DISMISS ALLEGATIONS OF UNCONSTITUTIONAL TAKINGS AND VIOLATIONS OF THE REGULATORY IMPAIRMENT OF PROPERTY RIGHTS ACT

The City of Longmont ("City" or "Longmont") by and through its undersigned counsel, moves this Court for an order dismissing portions of the Complaint regarding unconstitutional takings and the Regulatory Impairment of Property Rights Act under C.R.C.P. 12(b)(1) and (5).

C.R.C.P. 121 § 1-15(8) CERTIFICATION

Counsel for the City conferred with counsel for the Colorado Oil & Gas Association ("COGA") regarding this motion. Opposing counsel advised the City that COGA would oppose this motion.

ARGUMENT

I. COGA'S ALLEGATIONS OF UNCONSTITUTIONAL TAKINGS MUST BE DISMISED FOR FAILURE TO STATE A CLAIM

COGA fails to state a claim regarding its allegations of unconstitutional takings, and lacks standing as to those claims. Accordingly, those portions of the Complaint alleging unconstitutional takings should be dismissed pursuant to C.R.C.P. 12(b)(1) and (5).

COGA alleges that Article XVI of the Longmont Municipal Charter is a taking of private property for public use without just compensation, in violation of the Colorado Constitution, article II, section 15. Complaint ¶ 38. For this reason, inter alia, COGA apparently seeks declaratory judgment that Article XVI is invalid because it is unconstitutional. Complaint ¶ 41, p. 10. COGA does not seek money damages for takings.

COGA fails to state a takings claim because (a) a claim for takings cannot be maintained as a declaratory judgment action to invalidate an official act; (b) COGA has failed to allege that it has been damaged by the City's actions and has failed to seek just compensation; (c) COGA does not allege that the City has taken any particular property owned by any particular person;

and (d) as association like COGA has no standing to assert takings claims on behalf of its members.

A. DECLARATORY JUDGMENT INVALIDATING A GOVERNMENTAL ACTION IS NOT A PROPER REMEDY FOR AN UNCONSTITUTIONAL TAKING

Longmont vigorously contests COGA's suggestion that any taking has occurred by virtue of the recent amendment to the Longmont Municipal Charter. Nonetheless, it is beyond dispute that if such a claim theoretically existed, an action for declaratory judgment is an improper vehicle for a takings claim. The remedy for an unconstitutional taking is compensation, not overturning the allegedly offensive law.

The takings clause of the Colorado Constitution, like the U.S. Constitution, "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 314 (1987).

> This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation.

Id. at 315 (internal quotation marks removed); *see The Mill v. State, Dep't of Health*, 787 P.2d 176, 180 (Colo. App. 1989), *rev'd on other grounds*, 809 P.2d 434 (Colo. 1991) (applying the *First English* holding to Colo. Const. art. II, § 15). As one federal court bluntly explained, "the takings clause is not a basis for directly overturning a form of regulation. Rather, it is a mechanism for attaching a price tag to certain action the government seeks to undertake." *Gilbert v. City of Cambridge*, 745 F. Supp. 42, 51 (D. Mass. 1990), *aff'd*, 932 F.2d 51 (1st Cir. 1991).

Therefore, to the extent that COGA seeks to invalidate Article XVI of Longmont's Municipal Charter on the grounds that it is an unconstitutional taking, COGA's complaint fails to state a claim. *C.f. Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001) (on inverse condemnation proceeding seeking just compensation as proper method for adjudicating takings dispute). Accordingly, this Court should dismiss the First Claim for Relief in the Complaint, which alleges that the City has unconstitutionally taken property without just compensation.

B. THE COMPLAINT IS SILENT AS TO JUST COMPENSATION, AN ESSENTIAL ELEMENT OF A TAKINGS CLAIM

COGA cannot seek a declaratory judgment simply to prove that an unconstitutional taking has occurred, without seeking damages. In takings claims, damages are not just a remedy, but an element of the claim. In *Gilbert, supra*, property owners sought a declaration that restrictions on the removal of rental units from the rental market constituted a taking. *Id.* at 43. The court declined, explaining, "A takings clause claim has two essential components: the taking itself and the lack of just compensation." *Id.* at 51. The court refused to adjudicate only half of the regulatory takings equation, in part because "[d]etermining whether a regulatory taking affects part of the complex bundle of rights which constitute a real property interest requires some inquiry into the compensable value of those rights." *Id.* at 52. Accordingly, the *Gilbert* court dismissed the plaintiff's claims for a declaratory judgment that a taking had occurred. *Id.* at 51.

The *Gilbert* court is not alone. In another case, a property owner argued that a town committed an unconstitutional taking by revoking his special use permit for operation of a bed and breakfast. *Langan v. Town of Cave Creek*, No. Civ-06-0044-PHX-SMM, 2006 WL 1722316, at *1 (D. Ariz. June 22, 2006). The owner requested a declaration that the denial of a special use permit was an unconstitutional taking. *Id.* Following the reasoning in *Gilbert*, the

court dismissed the case for failure to state a claim. *Id.* at *5. As the *Langan* court explained, "This court agrees with the *Gilbert* court that a declaratory judgment takings claim only addresses the 'takings' element, without addressing the other essential component of just compensation, thus precluding full development of the constitutional questions." *Id.* at *6.

To state a proper claim, COGA must allege a lack of just compensation, and must seek just compensation as the remedy. A failure to make these averments constitutes a failure to state a claim. Accordingly, this Court should dismiss the First Claim for Relief in the Complaint, which alleges that the City has unconstitutionally taken property without just compensation.

C. THE COMPLAINT IMPROPERLY FAILS TO ALLEGE THAT A SPECIFIC PROPERTY HAS BEEN TAKEN

The Colorado Supreme Court has held, "It is only when some *specific* private property, or some right or interest therein or incident thereto, *peculiar to the owner*, is taken or damaged for public or private use that the constitution guaranties compensation therefor." *Gilbert v. Greeley, S.L. & P. Ry. Co.*, 13 Colo. 501, 508, 22 P. 814, 816 (1889) (emphasis added).

This accords with the U.S. Supreme Court's holding that, to bring a takings claim, especially one founded on assertions that a specific regulation caused the taking, the plaintiff must assert that the government took "specific" property in a "specific" location. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496 (1987); *see also E. Enterprises v. Apfel*, 524 U.S. 498, 554 (1998) (Breyer, J., dissenting, but voicing the opinion of five justices on this issue) ("The 'private property' upon which the [Takings] Clause traditionally has focused is a *specific* interest in physical or intellectual property." (emphasis added)).

Any takings claim must present "plaintiff-specific facts," and "the 'owner' must demonstrate the regulation's effect on 'his land.'" David Zhou, *Rethinking the Facial Takings Claim*, 120 Yale L.J. 967, 970 (2011) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260

(1980)). In this vein, federal plaintiffs must "identify the specific property interest alleged to have been taken by the United States." *Gal-Or v. United States*, 93 Fed. Cl. 200, 205 (Fed. Cl. 2010). Complaints failing this test must be dismissed for failure to state a claim. *Id.*; *see also Retzlaff v. I.R.S.*, 728 F. Supp. 1304, 1305 (E.D. Tex. 1989) ("In cases alleging violations of constitutional rights, specific facts must be averred in support of the claim." (citing *Blinder, Robinson & Co. v. U.S. S.E.C.*, 748 F.2d 1415, 1419 (10th Cir. 1984)); *City of Houston v. HS Tejas, Ltd.*, 305 S.W.3d 178, 184 (Tex. App. 2009) (dismissing a regulatory takings case for failure to state a claim, because there was "no concrete injury alleged" to the plaintiff's property); Michael A. Zizka et al., *State and Local Government Land Use Liability* § 12:23 (2011) ("For a regulatory taking, the allegations should consist of (1) an identification of the protected property interest allegedly taken; (2) a precise identification of the type of taking claim being made . . . .").

One can only surmise that the only reason why Colorado courts have not issued more caselaw reinforcing this rule is that it is rare for a plaintiff to pursue a takings claim without alleging what property was taken, or who owned it.

COGA is the rare exception. COGA does not allege that it has suffered an unconstitutional taking itself. Nor has COGA alleged which of its members, if any, have suffered unconstitutional takings. Nor has COGA alleged what property interests have been taken. Because COGA alleges no specific private property to have been taken, nor any particular property owners to have suffered takings, it cannot maintain a takings cause of action, and the claim must be dismissed per C.R.C.P. 12(b)(5).

D. AN ASSOCIATION HAS NO STANDING TO BRING A TAKINGS CLAIM ON BEHALF OF ITS MEMBERS

As federal courts have held, an association such as COGA cannot bring a takings claim on behalf of its members. Clearly, an organization has no standing to seek damages on behalf of its members. Where an association "alleges no monetary injury to itself, nor any assignment of the damages claims of its members," and where "the damages claims are not common to the entire membership, nor shared by all in equal degree . . . each member of [the association] who claims injury as a result of respondents' practices must be a party to the suit, and [the association] has no standing to claim damages on his behalf." *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).

One corollary of this *Warth* rule is that it denies standing to associations bringing takings claims on behalf of their members – even where the association does not seek damages in its complaint. *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 314 (1st Cir. 2005); *Greater Atlanta Home Builders Ass'n, Inc. v. City of Atlanta, Ga.*, 149 F. App'x 846, 848 (11th Cir. 2005); *Rent Stabilization Ass'n of City of New York v. Dinkins*, 5 F.3d 591, 596-97 (2d Cir. 1993); *Rivell v. Private Health Care Sys., Inc.*, CV 106-176, 2012 WL 3308901 (S.D. Ga. Aug. 13, 2012); *S. Lyme Prop. Owners Ass'n., Inc. v. Town of Old Lyme*, 539 F. Supp. 2d 524, 535 (D. Conn. 2008); *Pharm. Care Mgmt. Ass'n v. Rowe*, CIV. 03-153-B-H, 2005 WL 757608 (D. Me. Feb. 2, 2005); *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 365 F. Supp. 2d 1146, 1165 (D. Nev. 2005) ("We think the better and wiser course is to leave it to the individual homeowners to decide when, and if, to raise an as-applied takings claim in their individual capacities when such claims are ripe for review.").

The reason behind this rule is that a takings claim requires an "an *ad hoc* factual inquiry" for each property owner, involving individualized inquiries into economically viable use of the property, return on investment, financial data over time, and quality of the administration of the

property. *E.g.*, *Rent Stabilization Ass'n*, 5 F.3d at 596 (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Therefore, a takings claim "requires the participation of individual members of the lawsuit;" each property owner must join the suit in order for an association to bring a takings claim. *Id.* Without the members' joinder into the lawsuit, the association cannot state a takings claim on their behalf. *Id.* Without standing to bring a claim, a plaintiff cannot successfully invoke a court's jurisdiction. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) ("In order for a court to have jurisdiction over a dispute, the plaintiff must have standing to bring the case.").

As the only plaintiff in the case, COGA's takings claims on behalf of itself and its members fail for lack of standing and failure to state a claim, and must be dismissed pursuant to C.R.C.P. 12(b)(1) and (5).

II. COGA'S FOURTH CLAIM FOR RELIEF MUST BE DISMISSED UNDER C.R.C.P. 12(b)(1) and (5)

On August 28, 2012 the City passed Resolution R-2012-67, "Concerning an Amendment to the Longmont Home Rule Charter to Prohibit Hydraulic Fracturing and the Storage of Open Pits or Disposal of Solid or Liquid Wastes Created in Connection with Hydraulic Fracturing in the City of Longmont" ("Resolution"). A signed copy of the Resolution is attached hereto as Exhibit 1.

COGA's Fourth Claim for Relief alleges that the passage of the Resolution violated the Regulatory Impairment of Property Rights Act ("RIPRA"), which is found at sections 29-20-201 to -204, C.R.S. RIPRA provides in part:

> Within thirty days after a decision or action of a local government imposing a condition in granting a land-use approval, the owner of such property may notify the local government in writing of an alleged violation of section 29-20-203.

C.R.S. § 29-20-204(1)(a). The filing of the 30-day notice "shall be a condition precedent to the owner's right" to file suit under RIPRA. *Id.* § 29-20-204(b). The City does not believe that RIPRA is applicable, and assumes that it may apply to COGA's claims for the purposes of this motion only.

The Complaint alleges that the Resolution imposes inappropriate conditions on COGA's and its members' land use within Longmont, Complaint, ¶¶ 21-23, 63-64, and violates RIPRA. *Id.* However, the Complaint fails to allege that any notice was provided by COGA to the City within 30 days from August 28, 2012 (i.e., by September 26, 2012) as required by section 29-20-204. Therefore, COGA's Fourth Claim fails to allege that the condition precedent to COGA's right to maintain a RIPRA claim was satisfied.[1]

Because the Complaint fails to allege and COGA cannot prove that it complied with the 30-day notice requirement, its Fourth Claim for Relief must be dismissed for failure to state a claim for which relief can be granted. C.R.C.P. 12(b)(5).

Moreover, COGA's failure to allege compliance with the notice requirement divests this Court of subject matter jurisdiction to decide the RIPRA claim.

> In an action which is entirely statutory, the procedure therein prescribed is the measure of the power of the tribunal to which jurisdiction of causes arising under the statute is given. There must be a strict compliance with the provisions of such a statute, which are mandatory, and in the absence of such compliance the court has no jurisdiction to act.

State, Dep't of Revenue, Motor Vehicle Div. v. Borquez, 751 P.2d 639, 644 (Colo. 1988) (alteration omitted). Where the plaintiff does not give timely notice to the defendant before commencing suit, as required by statute, dismissal under C.R.C.P. 12(b)(1) is necessary. *Trinity*

[1] Longmont, in fact, is not aware that COGA has *ever* sent such a notice to the City as required by § 29-20-204, and COGA alleges no such notice. Accordingly, the precise date of the enactment of the Resolution – the actual date of August 28, 2012, or the date alleged in the Complaint of November 6, 2012 (Complaint ¶ 20) – is immaterial.

Broad. of Denver, Inc. v. City of Westminster, 848 P.2d 916, 924, 927 (Colo. 1993); *E. Lakewood Sanitation Dist. v. Dist. Court In & For County of Jefferson*, 842 P.2d 233, 236 (Colo. 1992) ("The General Assembly, by incorporating the word 'shall' [as in the RIPRA requirement], indicated that the 180–day time requirement must be complied with as a jurisdictional prerequisite.").

Colorado courts even have a name for the type of statute embodied in RIPRA's notice provision: a "nonclaim statute," which is a statute "raising a *jurisdictional* bar if notice is not given within the applicable time period." *Trinity*, 848 P.2d at 923 (emphasis added); *see also* 10 Colo. Prac., *Creditors' Remedies – Debtors' Relief* § 8.68 (2012) ("A nonclaim statute imposes a condition precedent to the enforcement of a right of action: the claim must be presented within the time set in the notice to creditors or it is barred. A nonclaim statute operates to deprive a court of jurisdiction.").

Because COGA does not allege that it has given – and has not given – the City the requisite statutory notice, it has not properly invoked this Court's jurisdiction and has failed to state a RIPRA claim. Accordingly, this Court should dismiss the RIPRA claim under C.R.C.P. 12(b)(1) and (5).

Furthermore, the Court should exercise its discretion and award the City its costs and reasonable attorney's fees in responding to COGA's unfounded RIPRA claim. *See* C.R.S. § 29-20-204(2)(f).

CONCLUSION

COGA's First and Fourth Claims for Relief should be dismissed.

Dated this 14th day of January, 2013.

Respectfully submitted,

CITY OF LONGMONT, COLORADO

Eugene Mei, City Attorney

By: */s/ Dan Kramer*
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PHILLIP D. BARBER, P.C.

By: /s/ *Phillip D. Barber*

ATTORNEYS FOR THE DEFENDANT

This document was filed electronically pursuant to C.R.C.P. §1-26. The original signed document is on file at the offices of Phillip D. Barber, P.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing, was served this 14th day of January, 2013 by LEXIS/NEXIS File and Serve on the following:

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