

**MCGC Neighbors' Notes to Provide Context: The legal opinion below was written by Interim City Attorney, Michael J. Hyman, in response to questions that have been raised about the processing of Oil and Gas Waivers in the City. We received this from the City via email on September 5, 2014.**

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*It has come to my attention that there exists a popular misconception that City Code Section 146-1207(H) provides an exclusive procedure for waivers of development standards for oil and gas facilities in the City. On the contrary, that section is merely intended to supplement the authority granted by City Code Section 146-204(B). Indeed, Section 146-1207(H) is intended to be used by an applicant for an oil and gas permit only as a "last resort" to avoid an operational conflict with state oil and gas regulations or a taking of private property in violation of the federal or state constitution.*

*City Code Section 146-204(B) sets forth the standard process for permit applicants to request waivers from development standards. According to that section, the authority to waive a development standard rests with the Planning Department. It is the responsibility of the Department to "analyze the request and make an individualized determination concerning which standards shall be waived." The Department shall also consider whether it is appropriate to require "a roughly proportional increase in other standards to mitigate the impact of the proposed waiver."*

*Any administrative decision concerning the waiver of a development standard is subject to appeal under City Code Section 146-204(E). An appeal may be submitted by an affected applicant, the owner of the property affected by the decision, or the owner of any property that abuts the property affected. Once submitted, the appeal is brought forward to a public hearing before the Planning and Zoning Commission. It is the task of the Commission to ensure that the intent and specific requirements of Chapter 146 are met. In turn, the Commission's decision may be appealed by the applicant or any abutting property owner at a public hearing before the City Council.*

*The following language of City Code Section 146-204(B) acknowledges the existence of alternate procedures for requesting the waiver of a development standard under Chapter 146 of the City Code:*

*Requests for waivers shall be considered following the development application procedures described in this section **or** in accordance with procedures and criteria described in specific provisions of this chapter." (Emphasis added.)*

*One such procedure exists in the supplemental regulations governing oil and gas facilities. City Code Section 146-1207(H)(1) provides, in pertinent part, that:*

*An applicant for an oil and gas permit under this section may apply for a waiver to a development standard if the application of this section creates an operational conflict with [State Oil and Gas Conservation Commission] regulations or constitutes a taking in violation of the United States or state constitutions.*

*An application for waiver that is submitted under this section is brought directly to the Planning and Zoning Commission for consideration at a public hearing. City Code § 146-1207(H)(2). An applicant may appeal the denial of a waiver to the City Council, which may overrule the Planning and Zoning Commission by majority vote. City Code § 146-1207(H)(4).*

*It should be noted that the waiver procedures found in Section 146-1207(H) were put into place in 2012 with the adoption of Ordinance No. 2012-24. As one of the attorneys who helped draft this ordinance, I can help shed some light on the reasons for including this alternate procedure.*

*Historically, the Colorado courts have been active in striking down attempts by cities and counties to regulate the oil and gas industry. In *Bd. of County Com'rs v. Bowen/Edwards* 830 P.2d 1045, 1059 (Colo. 1992), the Colorado Supreme Court found that:*

*[T]he efficient and equitable development and production of oil and gas resources with the state requires uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration.*

*Accordingly, it is a generally accepted principle of Colorado law that the state's interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is sufficiently dominant to override a home-rule city's attempt to regulate and/or prohibit the drilling of oil and gas wells within the city limits. Voss v. Lundvall Bros., Inc., 830 P. 2d 1061 (Colo. 1992).*

*Home-rule cities, such as Aurora, however, are not totally bereft of power with respect to the regulation of oil and gas facilities. If a home-rule city enacts land-use regulations applicable to various aspects of oil and gas development and operations within the city, and if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect. Voss, supra, at 1068-69.*

*Our office has opined that the City Council may lawfully regulate the land use aspects of oil and gas activity, provided such regulations can be harmonized with the State's goal of oil and gas development. At the time we drafted Ordinance No. 2012-24, the Attorney General's Office expressed concern that certain of the development standards contained in the ordinance would create an operational conflict with the state's oil and gas regulations. The waiver procedure was included, in part, to address the Attorney General's concerns. For instance, if the Planning Department and the applicant cannot reach agreement as to the waiver of a development standard, particularly with respect as to whether the denial of such waiver would create an operational conflict with state regulations, the applicant would have one final opportunity for a public hearing at which to raise this objection.*

*In conclusion, I recognize that there is disagreement within the community regarding the interpretation of City Code Sections 146-204(B) and 146-1207(H). In interpreting an ordinance, Colorado law is quite clear that deference should always be given to the construction of a statute by the administrative officials charged with its enforcement. City and County of Denver v. Board of Adjustment for City and County of Denver, 55 P.3d 252 (Colo. App. 2002). With regard to the processing of requests for the waiver of development standards for oil and gas facilities, it is my opinion that the Planning Department is acting well within its authority under the City Code.*