DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO Adams County Justice Center 1100 Judicial Center Dr. Brighton, CO 80601	DATE FILED: March 16, 2015 2:02 PM CASE NUMBER: 2014CV31057
CONAGRA FOODS FOOD INGREDIENTS CO. INC. Plaintiff, v. **CITY OF COMMERCE CITY, COLORADO** Defendant.	**COURT USE ONLY** Case No. 14-CV-31057 Division: C Courtroom: 506
ORDER	

Plaintiff ConAgra Foods Food Ingredients Co., Inc. ("ConAgra") filed a Motion for Summary Judgment (TABOR Claims) on November 25, 2014. On January 6, 2015, the court granted Defendant City of Commerce City, Colorado's ("Commerce City" or "the City") C.R.C.P. 56(f) Request to Delay and permitted Commerce City to file a Response by January 31, 2015. Commerce City filed a Response on January 30, 2015. On February 3, 2015, the court granted ConAgra's Unopposed Motion for Extension of Time to File Summary Judgment Reply Brief. ConAgra filed a Reply on February 13, 2015. On February 9, 2015 Commerce City filed its Cross-Motion for Summary Judgment. On February 24, 2015 ConAgra filed its Response. Commerce City filed an untimely Reply on March 10, 2015. The Court takes judicial notice of the file and contents therein under C.R.E. 201(c), and being fully informed, finds and orders as follows:

Background

According to ConAgra's Complaint and Notice of Appeal, Commerce City

incorrectly taxed ConAgra for transportation service charges incurred by W.W. Transport, Inc. (WWTI). Specially, ConAgra alleged that the City should not have taxed ConAgra for these services under the "Rental or Use of Tangible Personal Property of Another" provisions of the city's regulations because, amongst other reasons, those taxes violate the Colorado Taxpayer Bill of Rights (TABOR).

In 2008, the City issued a tax assessment to ConAgra which included such taxes. In 2009, and after a local hearing, the City's Finance Director upheld the assessment. Later that year, ConAgra appealed that decision to the Colorado Department of Revenue. However, the City later reversed the assessment.

Here, ConAgra alleges that the City "expand[ed] its sale/use tax." In 2012, the City audited ConAgra and, in 2013, issued another assessment, which included interest and penalties. Although ConAgra protested the assessment, after a hearing on the protest in 2014, the Finance Director affirmed the assessment. Pursuant to Colorado law, ConAgra posted a bond equal to twice the amount of taxes, interest, and penalty the City alleges it owes and filed this action which includes five separate claims for relief.

Nature of Relief Sought

ConAgra seeks an Order that there are no genuine issues of material fact surrounding its first, second, fourth and fifth claims for relief stated in the complaint. In its Cross-Motion for Summary Judgment, the City opposes ConAgra's Motion alleging that there are clearly material facts in dispute, and further that the City is entitled to summary judgment.

Brief Summary of the Parties' Arguments

ConAgra's Motion for Summary Judgment

Motion

ConAgra argued that W.W. Transport, Inc. (WWTI) merely provided "transportation services" to ConAgra, and that ConAgra exercised no supervisory

powers of WWTI and did not use any of WWTI's equipment. Additionally, the exclusion under the tax code applies because WWTI never rented any property to ConAgra; instead, the parties were engaged in a services contract. Another division of this court's grant of summary judgment in *Waste Management of Colorado, Inc. v. City of Commerce City*, 250 P.3d 722 (Colo. App. 2010), which was affirmed by the Court of Appeals, controls. However, in attempting to tax service contracts with Ordinance 1838, Commerce City violated TABOR because the voters did not approve of this tax. Additionally, amongst other jurisprudence, Judge Moss's ruling in *Pub. Serv. Co. of Colorado v. City of Commerce City*, No. 2012cv1405 (Colo. D. Ct. Nov. 13, 2013) which held this very tax ordinance in question to be unconstitutional, also controls.

Response

Commerce City asserted that WWTI furnished tangible personal property, not just transportation services. Additionally, Commerce City did not, in fact, impose a "new tax" upon ConAgra, because the transactions taxed would have been taxable before the passage of Ordinance 1838; at most, the change was a permissible modification of tax policy. Further, *Waste Management* does not control since that case involved strictly the transportation of trash, while this matter involves the furnishing of tangible personal property which had to meet numerous specifications set forth by ConAgra. Finally, ConAgra's fourth claim for relief fails to state a claim upon which relief can be granted because this court cannot force Commerce City to amend its municipal code.

Reply

ConAgra replied that, under the "true object" test for contracts, the contract between ConAgra and WWTI is clearly for the furnishing of transportation services. Because WWTI did not sell, rent, lease, or license its trucks or trailers or trucks to ConAgra and owned them, no tangible personal property was furnished.

ConAgra also replied to each of Commerce City's arguments contained in its response. Additionally, ConAgra's fourth claim for relief is merited because Commerce City's City Charter permits a court to granny relief such as the removal or elimination of local laws that are unconstitutional.

Commerce City's Cross-Motion for Summary Judgment

Motion

Commerce City argued that its tax assessment was lawful and appropriate. The WWTI charges would have been taxable under the 2006 version of the Code in effect immediately prior to the 2010 Code. As such, these are not "new taxes" and do not violate TABOR. Because TABOR has not been violated, the rest of ConAgra's claims fail. ConAgra's request for issue preclusion is meritless as *Waste Management* has very limited application herein.

Response

The City's Motion is both untimely and duplicative. Ordinance 1838 dramatically expanded the City's sales and tax code regulations without voter approval which unquestionably violated TABOR.

Reply

As discussed above, Commerce City's Reply was not timely filed. Commerce City reiterated that WWTI did, in fact, furnish tangible personal property to ConAgra and that *Waste Management* does not control. Additionally, the tax imposed by Commerce City was lawful and existed pre-TABOR.

Issues Presented

1. Are there genuine issues of material fact that preclude consideration of the present Motions?
2. Did the City's modification of their sales tax code and regulations through Ordinance 1838 in November, 2010 create an unconstitutional tax on ConAgra?

3. Did the City's modification of their sales tax code and regulations through Ordinance 1838 in November, 2010 create a "new tax" in violation of TABOR?
4. If violations are found, what remedies are appropriate?

Principles of Law

Summary Judgment

C.R.C.P. 56(c): Summary Judgment and Rulings on Questions of Law—Motion and Proceedings Thereon

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

TABOR

The TABOR amendment applies to covered events which occur after the amendment's November 4, 1992 effective date. "[T]he voter-approval requirements of section 4(a) apply only to new taxes . . . adopted by legislative bodies after November 4, 1992." *Huber v. Colo. Mining Ass'n*, 264 P.3d 884, 891 (Colo. 2011). Section 4(a) of TABOR requires governmental entities to obtain voter approval before imposing "any new tax . . . or a tax policy change directly causing a net tax revenue gain to any district." *Id*.

Citizen initiative constitutional provisions

> Because TABOR was added to our constitution by a citizen initiative, we do not employ all the interpretive principles we use when analyzing legislative acts. However, we apply many standard principles. Our aim is to give effect to the voters' intent. We do so by according words found in the constitutional provision their plain, common, and ordinary meanings.
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> *HCA-Healthone, L.L.C. v. City of Lone Tree,* 197 P.3d 236, 240 (Colo. App. 2008).

After considering the plain, common and ordinary meaning, if a TABOR provision requires additional interpretation, "TABOR provides . . . guidance on how to interpret it: 'Its preferred interpretation shall reasonably restrain most the growth of government.'" *Id*. at 240-41 (quoting Colorado Const., Art. X, Section 20(1)). If multiple interpretations are possible, courts are bound to "choose the one that would create the greatest restraint on government's growth." *Id*. at 241. The above special rules of interpretation apply to interpretation of the constitutional TABOR amendment as a citizen initiative.

Interpretation of municipal ordinances

In contrast to the rules for interpreting constitutional provisions, "[w]hen reviewing municipal ordinances, we apply the same rules of construction used for interpreting statutes." *Silva v. Wilcox*, 223 P.3d 127, 136 (Colo. App. 2009).

Interpretation of taxing acts

"In construing tax provisions, we do not extend the statute's operation beyond its clear import, or deprive the taxpayer of a legitimate favorable construction of the statutory regulatory provision at issue." *Washington Cnty. Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 150 (Colo. 2005).

> There is a long-standing rule of statutory construction in this state that taxing powers and taxing acts will not be extended beyond the clear import of the language used, nor will their operation be enlarged by analogy. . . All doubts will be construed against the government and in favor of the taxpayer.
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> *Noble Energy, Inc. v. Colo. Dep't of Revenue*, 232 P.3d 293, 296 (Colo. App. 2010) (internal citations omitted).

In contrast to *Noble*'s restrictive statement that taxing acts "will not be extended beyond the clear import of the language used," in *A.D. Store Co., Inc. v. Executive Director of Dep't of Revenue*, 19 P.3d 680, 682 (Colo. 2001), our

Supreme Court stated that "Colorado applies its sales tax provisions broadly, with taxation the rule and exemption the exception." Notwithstanding any possible inconsistency between (1) not extending taxing acts "beyond the clear import of the language used," and (2) applying tax provisions "broadly," both cases agree that courts "must honor the plain meaning of the words when they are clear." *A.D. Store Co., Inc. v. Exec. Dir. of Dep't of Revenue of State of Colorado*, 19 P.3d 680, 682 (Colo. 2001).

Interpretation of statutes when the plain language is clear

"Where the statutory language is clear and unambiguous, we do not resort to legislative history or further rules of statutory construction." *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1191 (Colo. 2010). "When the plain language of a statute is clear and unambiguous, we will not resort to interpretive rules of statutory construction and we will apply the statute as written." *Vaughan v. McMinn*, 945 P.2d 404, 408 (Colo. 1997). "If the legislative intent is clear from the plain language of the statute, a court must give effect to the statute according to its plain language." *Flooring Design Assocs., Inc. v. Novick*, 923 P.2d 216, 218 (Colo. App. 1995).

Constitutional challenges

> [Courts] presume legislative enactments... to be constitutional. Overcoming this presumption requires a showing of unconstitutionality beyond reasonable doubt. Such a high burden acknowledges that declaring a statute or a constitutional amendment to be unconstitutional is one of the gravest duties impressed upon the courts . . . "[I]f two constructions are possible - one constitutional, the other unconstitutional - we choose the construction that avoids reaching the constitutional issue
>
> *Huber*, 264 P.3d at 889.

Standard of Review

Summary judgment is appropriate when the pleadings and supporting

documents clearly demonstrate that no issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004). The moving party bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record and of the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact. *Quist v. Specialties Supply Co., Inc.*, 12 P.3d 863, 868 (Colo. App. 2000).

Once this initial burden has been met, the burden shifts to the non-moving party to establish that there is a triable issue of fact. *City of Aurora v. ACJ Partnership*, 209 P.3d 1076 (Colo. 2009). The non-moving 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. *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002). Once the movant shows the absence of a genuine issue of material fact, the burden shifts to the nonmovant to show that a dispute exists concerning a material fact. *Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008). A material fact is one that will affect the outcome of the case. *Struble v. American Family Ins. Co.*, 172 P.3d 950, 955 (Colo. App. 2007).

Analysis

1. Are there genuine issues of material fact that preclude consideration of the present Motions?

ConAgra lists a statement of "undisputed facts" on p. 3-17 of their Brief in Support of the Motion. Commerce City's Responsive Brief describes both disputed and undisputed facts on p. 7-21. Commerce City indicates that it disputes many of ConAgra's "characterizations" regarding the contractual arrangements between the parties as well as the characterizations made by ConAgra as to the nature and use of the subject trailers. The court notes that the contract itself has

been incorporated into the pleadings by the Parties. *Brief in Support of Motion*, p. 6; *Motion*, Ex. A. For reasons which will become apparent in the analyses below, the court finds that even assuming *arguendo* that there exist disputes between the Parties as to their respective *characterizations* of the contract (as well as the nature and use of WTTI trailers), the court finds that any disputes do not rise to the level of legal materiality under a C.R.C.P. 56 analysis. As such, the court finds that it may properly consider the subject Motion.

2. Did Commerce City's modification of their sales tax code and regulations through Ordinance 1838 in November, 2010 create an unconstitutional tax on ConAgra?

a. The *Waste Management* Factors

In *Waste Management of Colorado, Inc. v. City of Commerce City*, 250 P.3d 722, 724 (Colo. App. 2010), the lower court determined, and the higher court later agreed, that the hauling transactions therein were not properly subject to the City's sales or use tax.

The City argues herein that it is properly taxing ConAgra because it is imposing a use tax on WWTI's furnishing[1] of tangible personal property. ConAgra responds that the City's tax is both a newly created tax[2] and one that unlawfully taxes transportation services[3]. The contract between WWTI has been characterized differently by the parties. ConAgra asserts that WWTI simply provided a *transportation* service to them. That transportation was the primary object of the contract. *See* Walters Affidavit, ¶ 5; Hartzell Affidavit, ¶ 6; *Motion*,

[1] The court in *Expedia, Inc. v. City and County of Denver*, No. 13CA0779, 2014WL2980979, at *6 (Colo. App. July 3, 2014) defined the verb "furnishing" as "to equip; to provide or supply with something that is necessary, useful, or desired." Thus, in order to comport with Commerce City's argument that "tangible personal property" was "furnished" by WWTI, the court must analyze whether any tangible personal property was "provided" or "supplied" to ConAgra

[2] TABOR prohibits State and local governments from enacting "any new tax" without "voter approval in advance." Colo. Const. art. X, § 20(4)(a).

[3] The Colorado Supreme Court has held that "no service is taxable, except those services specifically listed in the statute itself." *A.D. Store*, 19 P.3d at 682-83.

Ex. A, ¶ 10. The City frames the contract as on in which WWTI contracted with ConAgra to "*furnish* suitable motor carrier *equipment*" with drivers to haul ConAgra's food products (predominantly sacked and bulk flour intended for human consumption) from its mill located in Commerce City. Upon review of the contract and the respective positions of the Parties, the court finds that a mixed transaction analysis is appropriate.

Determining the true nature of a mixed transaction is not new to Colorado courts. In *City of Boulder v. Leanin' Tree, Inc.* 72 P.3d 361, 363, 366–67 (Colo. 2003), the Colorado Supreme Court adopted a multi-factor or totality of the circumstances test for what it deemed "inseparably mixed transactions" (i.e., transactions involving the provision of both tangible personal property and either intangible personal property or services, and in which the property and services were intertwined as part of the transaction). The court held that courts must apply reasonable and common understandings of "tangible" and "other-than-tangible" property to determine whether the transaction at issue was more analogous to a sale of goods or the purchase of a service or intangible right. *Id*. at 366.

Under this test, the court must weigh the "totality of the circumstances," to determine whether the "true object" of the contract herein was the "furnishing of tangible personal property" from WWTI to ConAgra or the provision of a transportation service, based on "reasonable and common understandings" of those concepts. *Waste Management,* 250 P.3d at 727-29, 732.

i. The Purpose of the Contract Factor

First the Court of Appeals assessed the purpose of the contract. *Id*. The WWTI Contract on its face establishes that the purpose is related to *transporting* flour and other commodities. The contract is termed a "Motor Transportation Contract," under which WWTI agrees to provide interstate and intrastate contract carrier transportation services to ConAgra. Hartzell Affidavit; *Motion*, Ex. A. In

addition, the Terms and Conditions of this Contract contemplate the following:

a) "a series of shipments" (*Motion*, Ex. A, ¶ 1),
b) wherein "Carrier shall transport Shippers commodities" (*id.*, ¶ 2),
c) engage in the "performance of transportation service" (*id.*, ¶ 10),
d) and "be compensated" for "transportation services designed to meet the distinct needs of the Shipper" (*id.*, Appendix A).
e) Both parties to the contract concur that its purpose was to provide a service, not tangible personal property. Hartzell Affidavit, ¶ 6; Walters Affidavit, ¶ 5.

The court would further note that the word "service" appears in the WWTI Contract many times. *See* Hartzell Affidavit.

The City argues extensively that ConAgra contracted for WWTI to "furnish suitable motor carrier equipment" (primarily specialized tractors and trailers with drivers) to meet the "distinct needs" of ConAgra which as a secondary matter allowed them to safely and legally transport food in compliance with a number of requirements and restrictions (*Response Brief*, p. 7-17). The court notes these assertions, but the use of "specialized" equipment to perform a service for its customer does not mean that the vendor is the one that "furnished" the equipment to its customer. Furthermore, though the level of specification in WWTI's equipment is clear, what is also clear is that WWTI sold primarily a service –a transportation service – to ConAgra.

These facts, in totality, are consistent with the claim that ConAgra contracted with WWTO for a service to transport its flour from its mill to its customers.

ii. The Terms of Payment Factor

The Court of Appeals next considered the terms of payment. *Waste Management*, 250 P.3d at 732.

A review of the attachments hereto establishes that WWTI did not charge ConAgra a specific or identified portion of the contract price for any alleged "use" of WWTI's trucks and trailers. Rather, WWTI charged ConAgra a flat rate per transport load, with pre-determined charges based on the nature of the load (bulk or sack flour) and distance (miles) between origin and destination locations. *Opening Brief*, p. 3; *Response*, p. 18, 39 (acknowledging WWTI's "flat rate charges Appendix A to the Contract, entitled 'Service and Compensation Schedule,' defines the 'services for which [WWTI] will be compensated' as 'transportation services designed to meet the distinct needs of the Shipper.'"). These facts, in totality, are consistent with the assertion that ConAgra did not pay for WWTI's trucks and trailers. Rather, ConAgra paid for WWTI to transport ConAgra's flour.

iii. The Ownership Factor

Finally, the Court of Appeals examined who possessed, controlled, and owned the property at issue. *Waste Management*, 250 P.3d at 732. The trucks and trailers used to transport ConAgra's flour at all times were owned by WWTI. *Opening Brief*, p. 3-4. Indeed, the City acknowledges that WWTI did not sell, rent, lease or license its trucks and trailers to ConAgra, and that ConAgra did not take possession of WWTI's equipment. Feb. 13, 2015 Affidavit of Mark E. Medina ("Medina Affidavit"); *Response Brief to Cross-Motion*, Ex. A, p. 48:19-50:2; *Waste Management*, 250 P.3d at 724; *see also Response*, Ex. B (January 14, 2015 Deposition of Neil Hartzell), p. 250:20-251:23; *see also Response*, Ex. C (January 21, 2015 Deposition of Jeffrey S. Walters) p. 208:22-210:13.

It is undisputed that no ConAgra employee ever drove WWTI's trucks or trailers, whether in the mill yard or on public roads. *Opening Brief*, p. 4; *Response*, Ex. B, p. 74:4-14; *Response*, Ex. C, p. 46:2-6. WWTI regularly used the same trucks and trailers for other customers, including Bay State Milling (flour), Cargill

(flour) and Western Sugar (sugar) in Colorado. *Opening Brief*, p. 5; Walters Affidavit, ¶ 12; *Response*, Ex. C, p. 39:5-41:3, 48:20-23. These assertions also do not appear contested. *Response*, p. 15 ("WWTI is permitted to utilize its trailers for other customers' loads."). These facts, in totality, are consistent with the assertion that ConAgra did not own WWTI's property.

The City argues that the property, though owned and utilized by WWTI, is of a very specialized nature. While ConAgra disputes this characterization, but even if the court were to conclude that the equipment utilized is of a specialized nature, the court notes that none of the factors employed by the court of appeals focused on whether the subject equipment is "specialized."

The court in *Waste Management* also cited and applied factors considered in a similar hauling case, *Mason Metals Co. v. Indiana Dep't of State Revenue*, 590 N.E.2d 672, 675 (Ind. Tax Ct. 1992). In *Mason Metals* the court considered: (1) the employment of the driver (herein WWTI), (2) the right to direct movement of the vehicle (herein in several regards, WWTI) , (3) the obligation to pay for costs and repairs (herein WWTI), (4) the obligation to pay fuel costs (herein WWTI), (5) the responsibility of garaging the vehicle (herein WWTI), and (6) the payment of insurance and license fees (herein WWTI). *Waste Management*, 250 P.3d at 733. At least five of the six factors point to the performance of a service, and not to the furnishing of property.

For these reasons, the court finds that the City's tax herein constitutes an unlawful tax on transportation services.

3. Did the City's modification of their sales tax code and regulations through Ordinance 1838 in November, 2010 create a "new tax" in violation of TABOR?

The subject *Motion* is based on the Taxpayer's Bill of Rights (TABOR, *et*

seq. Colorado Const., Art. X, Section 20). The first claim for relief alleges that "modifications made by the City to its Code that would impose the City's sales or use tax on the transportation services charges . . . are unlawful, unenforceable and void, under the Code, the Colorado Constitution, or other applicable law." *Complaint* ¶ 73. The sixth claim for relief prays that this court award relief allowable under the Colorado Const., Art. X, Section 20, including its costs and reasonable attorney fees. The parties herein agree that the City did not seek or obtain voter approval for either the 2008 or 2010 amendments to its Code. Because no TABOR election occurred, the disputed legal issue is whether the City's Ordinance 1838 amendments constitute a "new tax," and, if so, whether an election was required

The City argues that Ordinance 1838 may constitute a "tax policy change" but not a "new tax." *Response*, p. 43-44. Any proven TABOR violation that is based on a "tax policy change" would require proof of a "net revenue gain" while a TABOR violation based on a "new tax" does not require such evidence. Medina Affidavit.[4] Upon review of the subject Ordinance, the court finds that Ordinance 1838 materially expanded the scope of the Code by adding new language to reach previously non-taxable transactions. *City of Lone Tree,* 197 P.3d at 236; *see Pub. Serv. Co. of Colorado, supra*, at *12. The amended Code now imposes sales and use tax on all contracts for services in excess of $100 that involve the use of tangible personal property by the service provider. The case law requires the court to assess any meaningful doubt about whether these amendments constitute a new tax resolved in favor of applying TABOR's voter approval mandate. *Havens*, 924 P.2d at 520 ("Interpretations of [TABOR] which would limit the right of the electorate to vote on tax, spending, debt, or other proposals are not favored.");

[4] However, Judge Moss's *City of Commerce City* decision held that a TABOR violation based on a "new tax" did not require a "net tax revenue gain" showing.

Colorado Const. Art. X, Section 20(1) ("[TABOR's] preferred interpretation shall reasonably restrain most the growth of government.").

The City acknowledges that home rule authority does not empower the City to violate TABOR, *City of Lone Tree*, 197 P.3d at 242, but argues that TABOR does not prevent the City to reasonably exercise its home rule taxing powers. The City argues that they have maintained a continuing ability to impose a use tax on the "furnishing of personal property" under its 1990, 2002, 2006 and 2010 ordinances, and as such, ConAgra cannot establish that the ordinance to be unconstitutional. In the alternative, the City asserts that the subject ordinance represents nothing more than a tax policy change which would not violate TABOR. The court is not persuaded.

Following the adoption of City Ordinance 1838, the City's Code taxes "the purchase price paid or charged . . . for the performance of a contract, of a total value in excess of $100, that involves the use . . . of tangible personal property." Medina Affidavit, Ex. I, p. 3. This new Code language clearly taxes a broader range of service transactions that previously were not taxable, including the transportation services at issue in *Waste Management* and herein. Indeed, the new Code language taxes all "haul contracts that require vehicles or equipment to collect, assembl[e] or transport product or materials. . . ." *Id.*, p. 3-4.

The court finds that this expansion of the City's tax base constitutes a "new tax," and not simply a tax policy change. This new tax was admittedly enacted without voter approval, and is therefore in violation of TABOR. Because the subject Code provisions violate TABOR they are invalid, unenforceable and void. *City of Lone Tree*, 197 P.3d at 236; *Pub. Serv. Co. of Colorado*, *supra*.

4. If violations are found, what remedies are appropriate?

In its Motion, ConAgra seeks two potential remedies:

a. An order directing the City to promptly remove or eliminate from the

Code the provisions violating TABOR: Section 20-4-7 in its entirety, Regulation 20-4-7 in its entirety, and Regulation 20-4-1 (second and third paragraphs);

or

b. An order directing the City to promptly provide plain and conspicuous written notification to City taxpayers (e.g., through an editor's note immediately following Section 20-4-7, Regulation 20-4-7, and Regulation 20-4-1) identifying the portions of the Code found to be unconstitutional under TABOR.

The City counters that ConAgra's Fourth Claim for Relief seeks the truly "extraordinary relief" of the court ordering the City to amend its municipal Code. The City argues that such an order would violate the separation of powers doctrine. When a law is unconstitutional, a court may determine the proper remedy by looking to legislative intent. *People v. Montour*, 157 P.3d 489, 502 (Colo. 2007). The presence of a severability clause creates a presumption that the legislative body intends to accept the portions of legislation which would remain after the court strikes any portion of the legislation deemed unconstitutional. *Id*. This presumption remains "unless the remaining statutory language is so riddled with omissions that it cannot be salvaged as a meaningful legislative enactment." *Id*. Thus, if confronted with unconstitutional law, the court may eliminate problematic sections if the court finds that the legislative intent may be functionally preserved. *Dallman v. Ritter*, 225 P.3d 610, 638 (Colo. 2010). A court may sever and strike any portion of a statute that is unconstitutional and may limit the portion stricken to single words or phrases where appropriate. *Id*. Only if this cannot be done, the court may strike the entire legislation. *Dallman*, 225 P.3d at 638-39; *Montour*, 157 P.3d at 502.

Under this severability doctrine, courts are not authorized to rewrite or actively reshape a law in order to maintain its constitutionality. Id. citing *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329, (2006). It is for the

courts to enforce the law as written. *Dove Valley Bus. Park Assocs., Ltd. v. Bd. of Cnty. Comm'rs of Arapahoe Cnty.*, 923 P.2d 242, 248 (Colo. App. 1995). The court may not make additions or modifications to legislation in order to preserve constitutionality. *Id*. If enforcement is constitutionally impermissible, it is for the legislative body, and not the court, to rewrite the law. *Id*. Thus, under the severability doctrine, courts must exercise judicial restraint in order to protect the lawmaker's intent and courts must "strike as little of the law as possible, with a preference for only partial, not complete, invalidation." *Dallman*, 225 P.3d at 638-39.

ConAgra's replies that the City cannot impose a tax that is not authorized by its own Code. "[A] municipality's powers of taxation can be lawfully exercised only in strict conformity to terms by which they are given." *Denver Feed Co. v. City of Commerce City*, 702 P.2d 285, 287 (Colo. App. 1985). Second, the City may not legislate on tax matters of statewide concern, such as TABOR, nor enact taxes in violation of the Federal or State Constitution, as it has done here. *City of Lone Tree*, 197 P.3d at 236; *Pub. Serv. Co. of Colorado, supra*; Medina Affidavit, Ex. G.

In consideration of the respective arguments of the Parties, the court grants ConAgra's request and directs the City to remove from their Code the provisions which the court has herein found to violate TABOR: Section 20-4-7 in its entirety, Regulation 20-4-7 in its entirety, and Regulation 20-4-1 (second and third paragraphs.

Order

The court finds that the transactions herein at issue are not subject to the City's sales or use tax for the reasons set forth above.

The city's tax assessment against ConAgra is therefore VACATED.

The surety bond filed with the court by ConAgra is therefore RELEASED.

ConAgra's Motion for Summary Judgment is GRANTED in Part as detailed in this Order.

ConAgra's Third Claim (issue preclusion) is deemed MOOT.

The City's cross motion for summary judgment is DENIED.

Dated this 16th day of March, 2015.

By the Court:

F. Michael Goodbee
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was sent via JPOD (e-file) to all counsel of record and to all *pro se* parties this 16th day of March, 2015.

Court