

DISTRICT COURT, GUNNISON COUNTY, COLORADO Court Address: 200 East Virginia Avenue Gunnison, CO 81230-2248	EFILED Document CO Gunnison County District Court 7th JD Filing Date: Jan 3 2012 10:40AM MST Filing ID: 41653667 Review Clerk: Ashley Burgemeister ▲ COURT USE ONLY ▲
Plaintiff: SG INTERESTS I, LTD.,  v.  Defendants: BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO.	Case Number: 11CV127  Division: 2
ORDER ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT	

Pending before the Court is Defendant Gunnison County's Motion for Partial Summary Judgment filed October 7, 2011 and Plaintiff's Cross Motion filed October 27, 2011. The briefing has now been completed.

This case was commenced on June 2, 2011. The Court granted leave to file the Second Amended Complaint August 25, 2011. By consent, the Parties briefed a partial motion for summary judgment rather than conducting a preliminary injunction hearing. This Court entered an Order on the first partial summary judgment/preliminary injunction on September 16, 2011, which was clarified on September 23, 2011.

This case is brought by the owner and operator of certain oil and gas interests within Gunnison County challenging the County's Regulations, permitting process and fees imposed for oil and gas operations, arguing generally that they are preempted, expired, invalid seek to improperly monitor and inspect its operations and certain fees are in effect a tax. They also seek to have the County comply with its own Regulations, particularly as to timeliness of review of permit applications.

The Second Amended Counterclaim seeks declaratory and injunctive relief on the basis of claims of express, implied and operational conflict preemption with state and federal law and regulations, particularly the COGCC Rules (Colorado Oil and Gas Conservation Commission) (First and Third Claims), the lack of County timeliness pursuant to the County's Regulations (Second Claim), and a Fourth Claim resolved by the September 16, 2011 Order on a condition of the most recently issued permit requiring Plaintiff to pay for inspection and monitoring of its operations by a third party hired by Defendant, which condition the Court found to be invalid as an operational conflict with the COGCC obligation to conduct such observation, inspection and monitoring of the technical operations.

The County's Motion for Summary Judgment argues that its interest in the development of oil and gas operations is not preempted, that both a prior case initially heard in this Court and reversed in part and affirmed in part by the Court of Appeals, *Board of County Commissioners of Gunnison County v. BDS*, 159 P.3d 773 (Colo. App. 2006), as well as both cases before and after that decision expressly hold that counties have not been expressly or impliedly preempted from exercising regulation over their legitimate land use concerns in this area; further, that the MOU entered into with federal interests expressly says that it is not preempted; and that the oil and gas operations in this case are not on federal land. Further, the County argues that in light of County Regulation 1-107P, the Plaintiff has failed to exhaust its administrative remedy by not seeking waiver based on a claim of operational conflict, that no operational conflict exists as evidenced by 27 permits, 5 waivers, and a related entity's receipt of 16

permits. The County argues that the request for injunctive and mandamus relief are moot and that the Gunnison Land Use Resolution and statutory provisions permit recovery of the fees and costs of third party experts hired by the county for reviewing applications for oil and gas operation permits.

The Response and Cross Motion acknowledges that the Court has already ruled that the County is not “wholly preempted,” that the Motion to Dismiss for failure to exhaust administrative remedies was denied based on the concept of futility, that there are operational conflicts, that the County has consistently failed to comply with its own regulations particularly as to timeliness, and that the requested payment for a third party to inspect the application is unlawful, duplicative, costly, is a hostile process, and pursuant to C.R.S. § 30-28-104, the County is obliged to utilize public entities for any such review. Plaintiff further argues that numerous regulations are unenforceable and that there is a risk of ongoing future failures of the County to timely consider applications. The Plaintiff argues that in areas of water quality, fish and wildlife, timing and duration, notice and miscellaneous provisions, the County is, in fact preempted.

Defendant, in its Reply and Response to Plaintiff’s Motion for Partial Summary Judgment, argues that permits are feasible, admits that the County should comply with the law and its own Resolutions and Regulations, and that the issues surrounding operational conflict, based on the holding in *BDS*, cannot be addressed by summary judgment. They argue that the fees are permitted pursuant to C.R.S. § 30-28-104 and applicable provisions of the County Land Use Resolution and that any such fee and cost is not in violation of RIPRA.

For the Reply on the Cross Motion, Plaintiff argues that the fees being exacted benefit Gunnison County not the Plaintiff such that they are, in fact, subject to RIPRA. Further, Plaintiff contends that the review by the “expert” relates to the technical operations, not just land use, such that this again conflicts with the responsibilities of the Colorado Oil and Gas Conservation Commission. Further, they submit that the County’s use of the phrase “development paying its own way” demonstrates that it is, in fact, an exaction.

### PROCEDURAL HISTORY

The Court’s September 16 Order found that there was no express or implied preemption as to state or federal law as it relates to the Gunnison County regulations. The Court concluded that pursuant to C.R.S. § 34-60-106(15), no local government may impose a fee to inspect or monitor oil and gas operations, a function specifically the task of COGCC. Third, the Court found that respective positions were such that it would be futile to require a waiver based on operational conflict pursuant to Regulation 1-107P. Fourth, the Court found that the County Regulations were not invalid as expired “Temporary” regulations.

### CONCLUSIONS OF LAW

The Court accordingly, consistent with its prior Order, finds concludes and orders as follows:

1. In the briefing, it seems that the County has acknowledged its obligation to comply with its own Regulations and state law. County’s Combined Reply p. 18. Accordingly, there is no further necessary judicial involvement on the

- Plaintiff's request for injunctive relief or relief related to mandamus. See *Kempton v. Hurd*, 713 P.2d 1274, 1279 (Colo. 1986), See also 29A Am. Jur. 2d Evidence § 787 (judicial admission made by a party in pleadings removes that matter as an issue in the case).
2. There is no express or implied preemption. As stated in the Order of September 16, 2011, the Court is persuaded that *BDS* is still good law and has not been limited or reversed by subsequent cases or statutory changes. State laws and regulations do not express a legislative intent to prohibit county land use authority over oil and gas operation and development such that the County Regulations pertaining to oil and gas activities are expressly preempted. *BDS, supra* at 778, *Board of County Com'rs, La Plata County v. Bowen/Edwards*, 830 P.2d 1045, 1058 (Colo. 1992). Further, the state's interest in oil and gas activities is not so dominant nor do the interests of state and county regulation of oil and gas activities conflict as to impliedly preempt county authority to regulate the development and operation of such activities. *Bowen/Edwards, supra* at 1057, 59, see also *Colorado Min. Ass'n v. Board of County Com'rs of Summit County*, 199 P.3d 718, 724 (Colo. 2009).
  3. An operational conflict between county regulations and state law exists when the local regulation materially impedes or destroys the state interest. *Bowen/Edwards, supra* at 1059. A county regulation is in operational conflict with state law on its face when no possible construction of the regulation can be harmonized with the state regulatory scheme. *BDS, supra* at 779;

*California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

However, when a county regulation may be harmonized with the state regulatory scheme, an evidentiary hearing is necessary to determine the extent of operational conflicts in the particular case. *BDS, supra* at 779 (expanding upon the requirement for a fully developed evidentiary record to determine the existence of an operational conflict articulated in *Bowen/Edwards, supra* at 1055). There is no operational conflict as a matter of law. A hearing on those assertions will be necessary.

4. Summary judgment on the argument of failure to exhaust administrative remedies is denied. The fact that there have been waivers previously, and permits issued as well, suggest that the County may indeed have a meritorious argument. The communications between the parties, particularly as noted in the communications between counsel, suggest that the Parties in this instance, at least for purposes of summary judgment, have reached a posture where a request for a waiver would appear futile. This issue too shall require an evidentiary hearing.
5. For the reasons articulated above, the requests for injunctive relief or mandamus are deemed moot based on the judicial admission that the County shall comply with the law in future permitting requests.
6. Recovery of technical or expert fees for review of technical permit applications does not constitute an exaction or charge prohibited by RIPRA, a tax, or a contravention of the County's statutory authority pursuant to C.R.S. §


30-28-104. RIPRA, which codifies the *Nollan/Dolan* test for land use regulations that result in regulatory takings. That principle is narrowly applicable to exactions by which the government conditions development on the forfeiture of private land, and perhaps a specific class of monetary exactions, for public use. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697-98 (Colo. 2001), see also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). RIPRA authorizes local governments to charge property owners fees determined on an individual basis so long as there is an essential nexus between the fee paid and a local government interest. C.R.S. § 29-20-203. The Court concludes that there is an essential nexus between the fees charged by the County pursuant to Regulations 1-104C.2 and 106A.4 and the County's interest in land use regulation, which necessitated expert review of technical permit applications such as this one. Unlike a tax, which is imposed in order to raise revenue to defray the general expenses of government, a fee is imposed to defray the cost of a particular government service provided to a particular individual. *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008). The charges authorized by County Regulations 1-104C.2 and 106A.4 are a means to assess a particular benefit, review of a permit application, received by a particular applicant and, accordingly, are fees. *Id.* (the purpose for which the charge is imposed determines the characterization of the charge as a fee or a tax). While C.R.S. § 30-28-104(1) directs the County to obtain advice and information from other

government agencies, it also grants the County authority to employ and pay experts necessary to carry out its duties. It is in areas such as oil and gas operations where a County might reasonably be expected to engage an expert, as contrasted to a request for a single family residence building permit for which the County staff may more likely be competent to review the application. While the fees for expert review of the technical permit applications are properly recoverable, Plaintiff may at trial dispute the reasonableness of the fees or whether the scope of services exceeds those discussed in this Order. Such dispute may be not only as to the amount but also whether they relate to inspection and maintenance of its oil and gas operations, which fall within the jurisdiction of the COGCC.

7. Each side to pay its own costs and attorney's fees.
8. This matter is set for a status conference to discuss case management issue on January 10, 2012 at 3:00 p.m. The Parties may appear by phone by contacting the Court at (970) 641-3500, extension 410 at that time.

Dated this 3<sup>rd</sup> day of January, 2012.

BY THE COURT:



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J. Steven Patrick  
District Judge

cc: Green, Sullivan, Tooley, Pincus, Wonstolen, Baumgarten