COURT OF APPEALS, STATE OF COLORADO Court Address: 2 E. 14th Ave., 3rd Floor Denver, CO 80203 Phone Number: (303) 861-1111	
Appeal form the Gunnison County District Court Honorable J. Steven Patrick, District Court Judge Civil Action No.: 2003 CV 76	
Plaintiff-Appellant(s): THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO, a political subdivision of the State of Colorado v. **Defendant-Appellee(s):** BDS INTERNATIONAL, LLC, A Nevada limited liability company **Defendant-Intervenor Appellee:** COLORADO OIL AND GAS CONSERVATION COMMISSION	**▲COURT USE ONLY▲**
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COMBINED *AMICUS CURIAE* BRIEF OF THE COLORADO MUNICIPAL LEAGUE AND COLORADO COUNTIES, INC. IN SUPPORT OF THE APPELLANT THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO

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I.

STATEMENT OF ISSUES ON APPEAL

Colorado Counties, Inc. ("CCI") and the Colorado Municipal League (the "League") adopt and incorporate by reference the statement of the issues as stated in the Appellants' Opening Brief.

II.

STATEMENT OF THE CASE

CCI and the League adopt and incorporate by reference the statement of the case as stated in the Appellants' Opening Brief.

III.

SUMMARY OF ARGUMENT

This case involves the proper allocation of state and local government regulatory jurisdiction over oil and gas operations. The Colorado Supreme Court last addressed this issue over a decade ago. *Board of County Commissioners, La Plata County v. Bowen/Edwards Associates Inc.,* 830 P.2d 1045 (Colo. 1992) *(Bowen/Edwards)* was a case remarkably similar to the one at bar that involved a challenge to La Plata County's oil and gas regulations on the grounds that the state's regulatory program displaced all local authority in this area. In *Voss v. Lundvall Brothers Inc.,* 830 P.2d 1061 (Colo. 1992) *(Voss)*, the Court also considered, and, utilizing analysis set forth that same day in *Bowen/Edwards,* overturned a Greeley initiated ordinance banning all oil and gas drilling activity within the City.

The present case misapplies the "operational conflict" analysis set forth in *Bowen/Edwards*, holding that any time an "operational conflict" might be inferred to exist on the

face of a County regulation, the court may find that regulation preempted. The District Court improperly construes *Bowen/Edwards* in this case as creating such a narrow rule. CCI and the League find error in the Court's application of *Bowen/Edwards* to these facts. The District Court correctly recognized that, in *Bowen/Edwards,* the Supreme Court reviewed the grant of land use regulatory authority to local government by the General Assembly and found no intent (express or implied) to preempt local government authority through a state regulatory program. In the absence of any intent to preempt, a partial preemption standard deferential to local governments' traditional authority to assure the compatibility of land uses within the community was announced in *Bowen/Edwards*. The analysis may subject some local regulations to "operational conflict" preemption. However, the *Bowen/Edwards* Court also acknowledged the important interests served by local regulations and required those seeking preemption to show, in a "fully developed evidentiary record," that any challenged local regulation would "materially impede or destroy" the state's interest in the development of oil and gas resources.

No such showing was made in this case and no such record exists. The trial court received no evidence that Gunnison County regulations materially impede or destroy any regulatory or other interest of the state. Moreover, the Order of the District Court specifically notes the absence of a fully developed evidentiary record in this case. (Order on Motions for Summary Judgment, April 27, 2004, at pp. 4, 13. Hereafter "Order"). In particular, the District Court recognizes that the failure of BDS to apply for a permit makes it difficult to determine whether an operational conflict exists. (Id. at p. 4) Despite this admitted lack of any evidence, the District Court found that "operational conflict" preemption of the County's regulations occurs wherever a state rule on the same subject exists. This conclusion was erroneous.

The decision below alarms local governments across Colorado, as many state communities wrestle with the challenge of assuring the compatibility of a multitude of land uses, including oil and gas operations. Even though the General Assembly intended no "field" preemption of local land-use authority, the necessary implication of this District Court decision is to threaten that all local regulatory authority may be vulnerable to claims of preemption whenever a state rulemaking commission issues administrative rules that do no more than address the same subject matter as might be implicated by a local regulation.

Such concerns prompt CCI and the League to urge a reversal of this decision made by the District Court. The Court's decision misapplies and misconstrues the instruction provided for inferior tribunals by the decision in *Bowen/Edwards.* The deference to be shown local government regulations is ignored by the District Court.

IV.

ARGUMENT

I. *Bowen/Edwards* and *Voss* mandate that a fully developed evidentiary record must exist before a court can determine whether there is an operational conflict between county regulations and state statutes and rules, and, before a court may determine whether a local regulation materially impedes or destroys the state's interest

The District Court correctly held that the Gunnison County regulations are neither expressly nor implicitly preempted under Colorado statutes, regulatory rules or case law. However, the District Court misapplied the "operational conflict" test of preemption in finding some of the Gunnison County regulations facially invalid in the absence of a fully developed evidentiary record indicating that the state's interest is materially impeded or destroyed by such regulations.

The *Bowen/Edwards*' Court identified three ways a local ordinance or regulation may be preempted by state statute.

> [F]irst, the expressed language of the statute may indicate state preemption of all local authority over the subject matter (citations omitted); second, preemption may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest (citations omitted); and third, a local law may be partially preempted where its operational effect would conflict with the application of the state statute. (Citations omitted)

Bowen/Edwards, 830 P.2d at 1056-1057.

The Court first addressed the respective interests served by state and local regulation of oil and gas activity, concluding that state oil and gas statutes contain no express preemption of local authority:

> The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state. A county's interest in land-use control, in contrast, is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns.

Bowen/Edwards, 830 P.2d at 1057.

The Court then observed that:

> Given the rather distinct nature of these interests, we reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be clearly and unequivocally stated.

> We, however, find no such clear and unequivocal statement of legislative intent in the Oil and Gas Conservation Act.

Ibid.

The importance of local interests served by local regulations is also discussed at length in the analysis of "implied preemption," which involves determining whether anything in the oil and gas statutes evinces an intent by the General Assembly to prompt state regulations to "occupy the field" and displace all local regulations, by reason of a "dominant state interest." *Bowen/Edwards*, 830 P.2d at 1056-1057.

The oil and gas industry's "field" preemption argument in *Bowen/Edwards* was based largely on the fact that in C.R.S.§ 34-60-106(11), the General Assembly granted the Colorado Oil and Gas Conservation Commission (COGCC) what appears broad authority to write rules to protect the "health, safety and welfare" of the general public in connection with oil and gas activity.

The Supreme Court rejected the industry's "field" preemption argument (unanimously reversing the Court of Appeals on the point) pointing out that "a legislative intent to preempt local control over certain activities cannot be inferred merely from the enactment of a state statute addressing certain aspects of those activities." *Bowen/Edwards*, 830 P.2d at 1058 (quoting: *City of Aurora v. Martin*, 181 Colo. 72, 76, 507 P.2d 868, 869 (1973)). The Supreme Court found nothing in the text of C.R.S.§ 34-60-106(11) or the legislative history that "evinces a legislative intent to preempt all aspects of a county's land-use authority." *Bowen/Edwards*, 830 P.2d at 1059.

This element of the *Bowen/Edwards* opinion also concludes:

> The state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for the harmonious application of both regulatory schemes.

Bowen/Edwards, 830 P.2d at 1058 (citing *Colorado State Board of Land Commissioners v. Colorado Mine Land Reclamation Board*, 809 P.2d 974, 982-985 (Colo. 1991)).

Finding no express or implied intent by the General Assembly to preempt local government authority, *Bowen/Edwards* elaborates on "operational conflict" preemption:

> State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest (citing *National Advertising Company v. Department of Highways*, 751 P.2d 632, 636 (Colo. 1988)). Under such circumstances, local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest.

Bowen/Edwards, 830 P.2d at 1059.

The District Court in the instant case correctly determined that the Gunnison County regulations were not expressly or impliedly preempted by state laws or regulations. However, the District Court never applied the full analysis required under the operational conflict preemption standard before determining that an operational conflict could be decided.

In *Bowen/Edwards* the Supreme Court emphasizes that any determination of "operational conflict" must be resolved on "an ad-hoc basis under a fully developed evidentiary record." *Bowen/Edwards*, 830 P.2d at 1060. The case was remanded because, although the COGCC rules

and a very detailed local oil and gas ordinance were available, the Court could not determine whether the La Plata County regulations were preempted by operational conflict absent a fully developed evidentiary record. Inexplicably, the District Court in the instant case ignored this binding Supreme Court precedent to find, under similar circumstances and with an admitted lack of an evidentiary record, that operational conflict may be decided by means of a side-by-side comparison of local to state regulations.

While the *Bowen/Edwards* Court defined the standard for determining operational conflict preemption (a record demonstrating that the local regulation would "materially impede or destroy" the state's interest) the case gave the Supreme Court no opportunity to apply the announced standard because there was no evidentiary record. However, in *Voss v. Lundvall Brothers Inc., supra,* an opinion issued the same day as *Bowen/Edwards*, the Supreme Court applied the analysis to be used in a case implicating the "operational conflict" preemption standard.

In *Voss*, a Greeley ordinance completely prohibited oil and gas development anywhere in the city. The Court found that this particular exercise of local land use regulation "substantially impedes the interest of the state in fostering the efficient development and production of oil and gas resources in a manner that prevents waste and that furthers the correlative rights of owners and producers in a common pool or source of supply to a just and equitable share of profits." *Voss*, 830 P.2d at 1068. Declaring preemption, the Court was careful to add:

> The state's interest in oil and gas activities is not so patently dominant over a county's interest in land use control, nor are the respective interests of both the state and the county so irreconcilably in conflict as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes. (citations omitted).

> If a home rule city, instead of imposing a total ban on all drilling within the 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 regulation should be given effect.

Voss, 830 P.2d at 1068-1069.

This language regarding the local interest in land use regulation and a "harmonious application" of both the state and regulatory schemes appears in the *Voss* decision in the context of the *Voss* operational conflict analysis. The *Voss* operational conflict analysis determined whether the local ordinance "substantially impeded" the state's interest. In marked contrast to the District Court in the current Gunnison County case, *Voss* does not compare the local ordinance with COGCC rules and declare an operational conflict on the basis that the local ordinance addressed a matter mentioned in the COGCC rules. The Supreme Court in *Voss* clearly held that local regulations should be given effect if they do not frustrate and can be harmonized with the state's goals.

By requiring the demonstration in a "fully developed evidentiary record" that a local ordinance would "materially impede or destroy the state's interest," the *Bowen/Edwards* Court set the bar high for those seeking operational conflict preemption of local requirements. This is an appropriate approach, as multiple important interests are served by local regulation ("orderly development and use of land in a manner consistent with local demographic and environmental concerns," *Bowen/Edwards*, 830 P.2d at 1057). Absent any General Assembly record expressing or implying the intent to create a state regulatory program to "occupy the field" of oil and gas regulation, deference to local regulatory authority remains compulsory.

(A) Side-by Side Analysis.

The District Court preempted some Gunnison County rules and refused to preempt others, apparently relying on the "operational conflicts" analysis as applied in *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 765 (Colo. App. 2002).

However, the analysis used by the District Court in its "side-by-side" comparison on the County's regulations to state authority does not follow this Court's ruling in *Town of Frederick.* The District Court's analysis is devoid of any findings that the County regulation either imposes technical conditions on well drilling where no such conditions are imposed under state regulations, or imposes regulations or requirements contrary to those required by state law. *Town of Frederick*, 60 P.3d at 765. Instead, the District Court merely identifies a facial similarity in the subject matter of the County and State regulations and finds the County regulations facially invalid. This analysis falls far short of the complete operational conflict test required by the Supreme Court in *Bowen/Edwards* and *Voss* and as applied in *Town of Frederick.* Indeed *Bowens/Edwards* deliberately rejected this analysis. The parties in the instant case must be allowed to develop evidence regarding whether the local regulation would "materially impede or destroy" the state's interest.

Rather than requiring a "fully developed evidentiary record" that could demonstrate Gunnison County's rules threaten to "materially impede or destroy" the state's interest, the District Court simply looked to State statues and COGCC rules. A state statute on the subject (e.g., water quality regulation, wildfire hazard) was taken to mean that the existence of any County rule imposing any additional requirement, or even the identical requirements, was found an "operational conflict," not with any State interest, as *Bowen/Edwards* instructs, but with the

statute or COGCC rule itself. Any preemption s declared by the District Court on this basis alone is erroneous.

The approach taken by the District Court abandons the instruction stated in *Bowen/Edwards* and the deference to local regulation inherent in the "fully developed evidentiary record"/"materially impede or destroy" requirement. The *Bowen/Edwards* Court could have pursued a "side-by-side" analysis. After all, that Court was presented with both the local ordinance and the COGCC rules, just as was the District Court here. However, in *Bowen/Edwards* the Supreme Court utilized no such analysis. Rather, the *Bowen/Edwards* dispute was remanded for want of a fully developed evidentiary record. In this case, the District Court failed to undertake the record development process required by *Bowen/Edwards*.

Even as to determinations of any "side-by-side" conflict, the District Court's determination is inconsistent with the statement in *Bowen/Edwards* that a local "ordinance and a statute may both remain effective and enforceable as long as they do not contain express or implied conditions that are irreconcilably in conflict with each." *Bowen/Edwards*, 830 P.2d at 1055-1056 (citing: *Ray v. City and County of Denver*, 109 Colo. 74, 77, 121 P.2d 886, 888 (1942)); *C & M Sand & Gravel v. Board of County Commissioners of Boulder County*, 673 P.2d 1013, 1017 (Colo. 1983). Although several of the Gunnison County rules preempted by the District Court may impose *additional* or *identical* requirements to state statutes or COGCC rules, no findings of irreconcilable conflict were made.

Nothing in *Bowen/Edwards* or its progeny permits local regulation challengers to circumvent the requirement of a fully developed evidentiary record respecting whether a challenged local regulation materially impedes or destroys the state's interest by means of a

finding that the local and state regulations appear to address the same subject matter. The District Court's decision adversely affects the important interest of local governments to protect the communities they serve by applying their land use regulations that do not conflict with state statutes or COGCC rules.

CONCLUSION

For the above reasons and those stated in the Opening Brief of the Appellants, the Order of the Gunnison County District Court finding Gunnison County Rules facially invalid should be reversed and remanded to require the development of an evidentiary record in this case.

Respectfully submitted this 7th day of July, 2005.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **COMBINED *AMICUS CURIAE* BRIEF OF THE COLORADO MUNICIPAL LEAGUE AND COLORADO COUNTIES, INC. IN SUPPORT OF THE APPELLANT BOARDS OF COUNTY COMMISSIONERS** was placed in the U.S. Postal System by first class mail, postage prepared, on the 7th day of July, 2005, addressed to:

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