

The background image shows a serene outdoor scene. In the foreground, there is a calm pond with several lily pads floating on its surface. The pond is bordered by a low, curved stone wall. In the background, a large, multi-story brick building with a prominent central tower is visible, surrounded by lush green trees. The sky is overcast with soft, grey clouds. The entire scene is set against a solid blue background where the text is overlaid.

Rocky Mountain Land Use Institute

Friday, March 6, 2009

1:30-2:45

University of Denver, Sturm College
of Law

Oil and Gas Regulation at the County
Level: Santa Fe County, New Mexico

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American Planning Association 2008

From Sprawl to Sustainable Growth

American Bar Association 2009

Cases and Materials on Land Use, 5th Edition

Thompson-West 2008



Miller Barondess was retained by
the County of Santa Fe, New
Mexico to regulate the
exploration, extraction, and
transportation of oil and gas
within the County.

MILLER **B**ARONDESS, LLP

The Oil and Gas Problem

- How to protect and promote responsible use of property rights
- How to balance developers' rights to productive use of their land with the health, safety and welfare of the community

Step One – Rezoning

- All oil and gas operations must apply for rezoning to the Oil and Gas Overlay District
- Backbone of the ordinance, authorizes review, calls for resource protection, sets standards and requirements
- Process:
 - Pre-application meeting with specified surrounding property owners/lessees and groups
 - Submit studies and plans to Administrator
 - Follow typical County rezoning process

Land Suitability Analysis

- Designed to protect community resources by limiting oil and gas development in sensitive areas
- Protects resources such as:
 - Farms/ranches
 - Native plant and animal species
 - Surface and ground water
 - Important physical characteristics
 - Areas of cultural, historical and archaeological importance
 - Lands with scenic value
 - Lands near conservation areas

Sensitivity Areas

- High Sensitivity
 - Because these areas are the most sensitive to oil/gas development the number of well pads is limited to 1.6 per square mile, with a TDR allocation of up to .5 additional pads per square mile
- Medium Sensitivity
 - Well pads limited to 3.2 per square mile, TDR allocation of up to .75 additional pads per square mile
- Low Sensitivity
 - Well pads limited to 6.4 per square mile, TDR allocation of up to 1.25 additional pads per square mile

Assessments, Reports, Plans & Studies

- Environmental Impact Report
- Adequate Public Facilities and Services Assessment
- Water Availability Report
- Traffic Impact Analysis
- Geohydrological Report
- Emergency Response and Preparedness Plan
- Fiscal Impact Analysis

Environmental Impact Report

- Comprehensive analysis of the environmental impacts likely to occur
- Designed to inform the County and public of the significant environmental effects of a project, identify possible ways to minimize significant adverse impacts or effects and describe reasonable alternatives to the project
- Provides support for whatever the County's decision may be and allows for a more informed decision
- Includes measures to protect/mitigate impacts to historical, cultural and archaeological resources
- Also takes into account cumulative impacts which may go unnoticed with project-by-project decision-making

Adequate Public Facilities & Services

Assessment

- Ties approval to the availability of infrastructure and public service capacity required for the project
- Used to time approval based on the availability of infrastructure and services to an adopted capital improvements plan (CIP)
- Takes into account services required by oil and gas projects such as:
 - Fire protection
 - Law enforcement
 - Emergency response
 - Water
 - Roads
- All of these services must be available at an adequate level of service (LOS) for the project to proceed

Water Availability & Geohydrological Reports

- Water availability report requires applicant to show it has planned for and made available adequate water supplies
- Geohydrological report details the geohydrology of the site and surrounding area
 - Sets baseline water quality measurements
 - Ensures minimal impacts

Traffic Impact Analysis (TIA)

- Provides information necessary for the Board to assess the transportation effects and impacts of the traffic associated with an oil/gas project
- Oil/gas traffic involves heavier vehicles and loads than regular passenger traffic, impacting roads on a different scale
- A TIA measures this impact and reveals any mitigation required

Emergency Response & Preparedness Plan

- A plan to handle possible emergency situations related to oil and/or gas development
- Includes planning to prevent emergency situations too
- Specifies contact person, map of the area, facilities, pipes, etc.
- Ensures everything emergency personnel need to respond is planned for ahead of an emergency situation

Fiscal Impact Analysis

- A study of the fiscal implications of an oil/gas project
- Determines how much the project will cost the County to provide services (fire, police, etc.)
- $\text{Costs to County} - \text{revenues the County will receive from the project} = \text{fiscal impact}$

Development Agreements

- Provide a mechanism for the County and owners/lessees to form agreements regarding development, financing and land use of the oil and gas project;
- Allow the County to include terms, conditions, and other provisions that may not otherwise be able to be mitigated or implemented;
- Provide stability through enforceability
- Provide a procedure that ensures participation and comment of the public and elected officials
- Provide a partial mechanism for the financing of all capital facilities and public services as provided for in the ordinance.

Step 2 – Oil and Gas Special Use and Development Permit (SUDP) Process

- Permit required in addition to rezoning process above and subsequent Grading and/or Building Permits and a Certificate of Completion
- Process:
 - Application to Administrator
 - Completeness Review
 - Planning Commission hearing and decision

General Requirements

- Ordinance requires reclamation and re-vegetation plan to return surface to mirror of pre-project appearance
- Adequate bonds and insurance required for project approval, including pollution liability insurance
- Adequate fire prevention equipment required on-site, fire preventing storage and operational standards

Performance Standards

- Appearance and maintenance of site
- Storage tanks and closed-loop systems
- Noise
- Light
- Fracturing and acidizing
- Setbacks
- Hours of operation
- Visual impacts
- Well pads

Performance Standards

...continued

- Flaring of gas
- Landscaping
- Fencing
- Water quality
- Disposal of salt and other deleterious substances
- Abandonment, Plugging and Site Remediation
- Violations
- Enforcement
- Penalties, including permit revocation

Beneficial Use or Value Determination

- Used to ensure that a denial of an Oil and Gas Overlay Zoning District Classification application or a denial of a subsequent Special Use and Development Permit application does not result in an unconstitutional deprivation of private property rights
- Administrative variance process used to resolve any claims that application of the Ordinance has had an unconstitutional effect on property

Step 3 – Additional Permits

- Obtain Grading and/or Building Permit and Certificate of Completion

U.S. District Court for the District of New
Mexico

Approach Oil & Gas, Inc.

v.

Board of County Commissioners, Rio Arriba
County, New Mexico

SANTA FE COUNTY AMICUS BRIEF FILED
IN OPPOSITION TO INJUNCTION
MOTION

Robert H. Freilich

Bruce M. Kramer

Stephen C. Ross, County Attorney

- I. Injunction request in federal court against state or local government must respect integrity and function of the entity in accord with principles of federalism.¹
- II. State preemption occurs by
 - a. express preemption
 - b. implied preemption by occupation of the field
 - c. implied preemption by conflict with general state law
 - d. must be clearly stated²

1. Signature Properties International, L.P. v. City of Edmond (10th Cir. 2002)

2. San Pedro Mining Corp. v. BCC Santa Fe County 909 P. 2d 754 (N.M. App. 1996)

II. State preemption occurs by (continued)

- e. N.M. Oil and Gas Act provides Oil & Gas State Commission with comprehensive powers and does not expressly or impliedly preempt³
- f. State Executive Order directing OGC to work with Santa Fe County belies occupation of the field
- g. Well spacing rules of OGC apply to protection of oil and gas leases and not to interests of off-site safety, compatibility with surrounding uses and other matters left unaddressed by legislation.⁴

3. Rancho Lobo, Ltd v. De Vargas 303 F. 3d 1195, 1201 (10th Cir. 2002)

4. San Pedro Mining 909 P. 2d. at 759-60

III. National Case Law: Preemption or Conflict Decisions

- Vinson v. Medley 737 P. 2d 392 (Okla. 1987)
- Climons v. Shenango Township 529 A. 2d 562 (Pa. Commonwealth 1987)
- Bauer v. Waste Mgt. of Connecticut 662 A. 2d 1179 (Conn. 1995)
- Willow Creek Ranch v. Town of Shelby 611 N.W. 2d 693 (Wis. 2000)
- City of Annapolis v. Annapolis Water Co. 396 A. 2d 1080 (Md. 1979)
- Southern N.E. Corp. v. Township of Burlington 490 N.E. 2d 451 (Mass. 1986)
- City of Alpharetta v. Estate of Sims 553 S.E. 2d 692 (Ga. 2000)