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Carbondale v. GSS Properties, LLC, No. 03CA2523, 2005 Colo. App. LEXIS 1473 (Colo. App. Sept. 8, 2005)

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held that the anti-speculation doctrine requires a threshold showing of non-speculative, beneficial use to acquire groundwater rights in designated groundwater basins. However, the court explained that the anti-speculation doctrine does not apply to nontributary groundwater outside of designated basins for three primary reasons. First, the protection of potential appropriators is unnecessary because only overlying landowners have potential development rights. Second, protection against waste at the adjudication stage is unnecessary because any decreed rights will still be subject to state engineer approval. Third, and most importantly, to require a threshold showing of non-speculative, beneficial use would “thwart a clearly expressed legislative intent to permit adjudication for future uses without a corresponding obligation to develop them.” Finally, the court held the applicants complied with procedural requirements to adjudicate nontributary rights, so no procedural challenge could undermine the application.

As a result, the court upheld the Water Court’s ruling that Rangeview’s claim did not require a showing of non-speculative, beneficial use.

Christopher Jensen

Carbondale v. GSS Properties, LLC, No. 03CA2523, 2005 Colo. App. LEXIS 1473 (Colo. App. Sept. 8, 2005) (holding that operational conflicts allowing for the preemption of local watershed ordinances by state or federal law were matters of fact to be resolved through the evidentiary record).

In 1999, GSS Properties, LLC (“GSS”) purchased a fifty-five acre parcel located above Carbondale, Colorado’s Nettle Creek water plant. When GSS began construction and earthmoving activities on the property, it used herbicides and other chemicals to eradicate noxious weeds. In 2001, the town of Carbondale (“Town”) sued GSS seeking damages and preliminary and permanent injunctive relief. The Town alleged that GSS’s construction activities led to a rupture of the Town’s water main and that GSS’s use of chemicals and herbicides constituted a public nuisance that the Town’s watershed ordinance entitled it to abate. In 2003, GSS moved to amend its answer to the Town’s complaint to add an affirmative defense that state law preempted the Town’s ordinance. The trial court denied the motion, stating that it would “substantially change the nature of the trial and put the trial date in jeopardy.”

At a bench trial, the court addressed whether the Town could enjoin GSS’s use of herbicides and chemicals as allowed by its ordinance. The trial court, based on its denial of GSS’s motion to amend, refused to allow GSS to introduce evidence regarding state and federal standards for water quality and agricultural use of chemicals, or evidence regarding the Town’s authority to enforce its ordinance. The trial

court found for the Town, ordering GSS to cease using chemicals in violation of the Town's ordinance. GSS appealed, claiming that the trial court erred in denying GSS's motion to amend and precluding the introduction of evidence regarding the preemption of the Town's ordinance by state and federal law.

In its review of the case, the Colorado Court of Appeals addressed GSS's contention that five state statutes preempted the Town's ordinance. The Town claimed that even if the trial court's preclusion of GSS's evidence was in error, the ordinance did not conflict with the statutes and therefore the error was harmless. The court noted that ordinances may be within a municipality's authority to enact but might be invalid due to conflict with state law. The court stated a three-part test to determine whether an ordinance might conflict with, and therefore be subject to preemption by state law. First, the language of the statute might expressly indicate state preemption of local authority. Second, an implied preemption may exist based on the legislature's intent in passing the statute. Third, the operational effect of a local ordinance may conflict with or materially impede the application of a state statute, partially preempting the ordinance. The court concluded that none of the five statutes GSS cited expressly or impliedly prohibited all local authority over their subject matter. However, the court pointed out that an operational conflict may exist between any one of the cited statutes and the Town's ordinance.

In its review of the Colorado Water Quality Control Act ("CWQCA"), the court noted that an operational conflict might exist even though the Town's ordinance imposed more stringent requirements than those under state law rather than allowing activities prohibited by state law. The trial court precluded GSS from introducing any evidence of an operational conflict between the ordinance and the CWQCA. The trial court also precluded introduction of any evidence of an operational conflict between the ordinance and the Colorado Drinking Water Quality Act ("CDWQA"). The CDWQA states that the standards for the quality of water supplied to the public shall not be more stringent than those of the federal Safe Drinking Water Act. The court remanded to allow GSS to present evidence showing an operational conflict for both statutes.

The court also pointed out that the trial court's preclusion of GSS's evidence prohibited GSS from showing that its pesticides were acceptable under state and federal law. In regards to the Pesticide Applicator's Act, the court concluded that GSS might have been able to make an evidentiary showing that its use of agricultural chemicals was consistent with state and federal regulation of drinking water supplies.

The remaining two statutes might also have an operational conflict with the Town's ordinance. One of the statutes allows local governments to protect groundwater drinking water supplies so long as its regulation was in accordance with state and federal law. The other

statute requires that in order for a court not to find a certain practice a public nuisance, the practice must be reasonably associated with agricultural production. The court again concluded that the trial court's preclusion of GSS's evidence prevented it from determining whether it could find an operational conflict that would preempt the local ordinance by state and/or federal law.

The court concluded that identifying an operational conflict was a matter of fact that must be resolved using the evidentiary record. The court reversed and remanded the case for further proceedings consistent with its opinion.

William S. Hoebel, III

CONNECTICUT

Osborn v. Town of Easton Conservation Comm'n, No. CV030406547S, 2005 Conn. Super. LEXIS 999 (Conn. Super. Ct. Apr. 1, 2005) (holding the Easton Conservation Commission's regulations do not require a public hearing for the Commission to grant an inland wetlands permit to conduct a regulated activity, when the activity did not have a significant impact on the wetlands).

Leslie and William Osborn ("Osborn") filed suit in the Superior Court of Connecticut to appeal the Easton Conservation Commission's ("Commission") grant of a building permit to property owner Paul Russo and builder Rami Rachamkin. Osborn sued the Connecticut Department of Environmental Protection, the Commission, Russo, and Rachamkin (collectively "CDEP"), alleging the Commission abused its own discretion by not requiring a public hearing before granting the permit and that the permit was incomplete. Osborn had statutory standing to bring the appeal because Osborn owned property abutting the proposed building site.

Easton, Connecticut's Inland Wetlands and Watercourses Regulations require a public hearing for an inland wetlands permit when the "application involves a significant activity which may have a significant impact on the area for which the application has been filed." CDEP's application involved the construction of a house within a designated inland wetlands area. The court evaluated the application to determine whether the construction of a house qualified as a significant activity. A significant activity can include: (1) deposition or removal of material that will have a major effect on the inland wetland; (2) a substantial change to the natural channel or natural dynamics of a watercourse system; (3) substantial diminishment of the natural capacity of the inland wetlands to support wildlife and prevent flooding; (4) an activity which causes siltation or sedimentation in the wetlands; or (5)