DISTRICT COURT, COUNTY OF CITY AND COUNTY OF BROOMFIELD, STATE OF COLORADO Court Address: 17 DesCombes Drive Broomfield, Colorado 80020	DATE FILED: September 25, 2014 4:09 PM CASE NUMBER: 2014CV30092 ▲ COURT USE ONLY ▲
SOVEREIGN OPERATING COMPANY LLC, a Colorado limited liability company Plaintiff v. CITY AND COUNTY OF BROOMFIELD, COLORADO Defendant	**Case Number:** **14CV30092** **Division B**
ORDER	

This matter coming on upon the parties' Cross-Motions for Summary Judgment this 22nd day of September, 2014 the Court having reviewed the Motions, responses, replies, supplemental filings, heard the oral arguments of counsel, the Court's file and deeming itself fully apprised in the premises, DOTH FIND AND CONCLUDE:

Summary judgment is proper by a party prosecuting or defending a claim where the pleadings, affidavits, or discovery show that there is no genuine issue as to any material fact and that a moving party is entitled to judgment as a matter of law. Rule 56(a)(b)(c), C.R.C.P. Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972). The Colorado Supreme Court has held in Mt. Emmons Min. Co. v. Town of Crested Butte, 690 P.2d 231, 238 (Colo. 1984) that:

> Because the grant of summary judgment denies the party opposing the motion the right to a trial, summary judgment is appropriate only in those circumstances where there is no dispute as to material facts and thus no role for the fact finder to play. Thus, a court may enter summary judgment on behalf of a moving or nonmoving party if, in addition to the absence of any genuine factual issues, the law entitles one party or the other to a judgment in its favor. Cool Fuel, Inc. v. Connett, 685 F.2d 309 (9th Cir.1982); Morrissey v. Curran, 423 F.2d 393 (2d Cir.1970), cert. denied 399 U.S. 928, 90 S.Ct. 2245, 26 L.Ed.2d 796 (1970); 6 J. Moore, Moore's Federal Practice § 5612 (2d ed. 1982 & 1982-84 Supp.).

It is only in the clearest of cases that summary judgment should be entered and the court must deny a motion for summary judgment if, under the evidence, reasonable people may reach different conclusions. In making this determination, " . . . all doubts as to the existence of a triable factual issue must be resolved against the moving party, Travelers Insurance Co. v. Savio, 706 P.2d 1258 (Colo.1985), and the opposing party is given the benefit of all favorable inferences that may be drawn from the facts. Kaiser Foundation Health Plan v. Sharp, 741 P.2d 714 (Colo.1987)." Mohr v. Kelley, 8 P.3d 543, 545 (Colo.App. 2000). Issues of credibility, absent existence of extraordinary circumstances, are uniquely jury issues and preclude entry of summary judgment. Andersen v. Lindenbaum, 160 P.3d 237 (Colo.2007).

Once a party has established a *prima facie* showing that that party is entitled to summary judgment, the burden shifts to the non-movant to establish that judgment should not enter. Rule 56(e), C.R.C.P.; Continental Air Line, Inc. v. Keenan , 731 P.2d 708 (Colo.1987).

The Court finds that the parties agree on the salient facts necessary for determination of the issues raised in the motions for summary judgment, that there is no

disputed issue as to any material fact and that judgment as a matter of law should enter in this case.

The undisputed facts in this disclose that the Defendant City and County of Broomfield, (hereinafter referred to as "Broomfield"), had not updated its regulatory scheme for permitting of oil and gas exploration and extraction for a period of approximately twenty years. Broomfield desired to update the regulatory scheme by obtaining input from stakeholders and various experts. The intent was to develop a comprehensive plan that could be implemented by addressing the competing interests involved without illegally limiting the exploration and extraction of oil and gas while simultaneously dealing with safety and health concerns raised by other stakeholders.

Several study sessions, town hall meetings, and public hearings were held in connection with the development of the new Broomfield ordinance regulating the exploration and extraction of oil and gas. The extended process resulted in Broomfield adopting Ordinance 1986 revamping the permitting and regulatory procedures pertaining to oil and gas exploration and extraction.

The revised ordinance permitted those seeking to obtain a permit for exploration and extraction of oil and gas to proceed in one of two ways. An owner of oil and gas rights could seek to proceed under a traditional special permit procedure and only be subject to traditional regulation by the State of Colorado with limited Broomfield supervision.

If an owner elected to subject themselves to significantly stricter supervision, a greater amount of regulation and higher safety standards (hereinafter referred to as "Best Management Practices"), the owner was offered an expedited permitting process upon

execution of a Memorandum of Understanding. The Plaintiff Sovereign Operating Company, LLC (hereinafter referred to as "Sovereign") opted to proceed on a number of its sites under the expedited process. This agreement was approved by Broomfield City Council and signed on August 27, 2013. The permits were issued to Sovereign pursuant to the agreement of the parties.

At approximately the same time that Broomfield was considering the regulatory scheme referenced above, a citizens' petition initiative was undertaken to place a moratorium on oil exploration and extraction by a process known as fracking on the November, 2013 election ballot. On August 2, 2013, the signed petitions regarding the initiative to amend the home rule charter were filed with the City and County Clerk and on August 9, 2013 the clerk issued his Certificate of Sufficiency placing the issue on the ballot.

After an election held on November 5, 2013 and an election contest trial, this Court upheld the election results adopting the amendment to the home rule charter. The Court will take judicial notice of its Order of February 27, 2014 that became a final judgment twenty days thereafter once the time for appeal had run. *See,* Rule 201(b) of the Colorado Rules of Evidence; §1-11-214(2), C.R.S.

The charter amendment provides, in relevant part:

> Policy.
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> It shall hereby be the policy of the City and County of Broomfield that it is prohibited to use hydraulic fracturing to extract oil, gas or other hydrocarbons within the City and County of Broomfield. In addition, within the City and County of Broomfield, it is prohibited to store in open pits or dispose of solid or liquid wastes created in connection with the hydraulic fracturing process, including but not limited to blowback or produced wastewater and brine.

This prohibition will expire after five years from the date of its implementation, unless it is extended by a majority vote by the people of Broomfield prior to expiration.

Retroactive application.

In the event this measure is adopted by voters, its provisions shall apply retroactively as of the date the measure was found to have qualified for placement on the ballot.

Prior to the final results of the election being certified and pursuant to its agreement, Sovereign commenced preparation for oil and gas exploration and extraction as well as the operation of producing oil and gas well sites. All of these activities were done in compliance with the heightened requirements of the Memorandum of Understanding rather than the less stringent state and federal regulations. The agreement resulted in existing operations also being brought under stricter scrutiny. *See,* Plaintiff's Exhibit 4, paragraph 5. The Court concludes that the undisputed evidence before it is that these operations were at a greater expense to Sovereign and placed a greater burden upon Sovereign's operations than would have otherwise been required.

Central to the resolution of the claims of the parties are the terms and conditions of the Memorandum of Understanding. The parties have urged differing interpretations of the language of paragraph 8 of the agreement that the Court must resolve in order to determine the issues before it.

Paragraph 8 of the Memorandum of Understanding provides that:

> Future Regulations. The City reserves the right in the future to enact and apply prospectively oil and gas regulations that are general in nature and are applicable to all similarly situated oil and gas activities subject to land use regulation by the City, even though such regulations may be more or less stringent than the standards applicable to the Well Sites by virtue of this Agreement.

As a preliminary matter, interpretation of contractual provisions and whether such provisions are ambiguous are questions of law for the Court. Specialized Grading Enterprises, Inc. v. Goodwill Construction, Inc., 181 P.3d 352 (Colo.App.2007). In making such determinations, the Court must strive to ascertain and give effect to the intent of the contracting parties. Pepcol Manufacturing Company v. Denver Union Corporation, 687 P.2d 1310 (Colo.1984).

Where a contract is an integrated written instrument, the intent of the parties must be determined from the language of the contract itself. Ad Two, Inc. v. City and County of Denver ex rel. Manager of Aviation, 9 P.3d 373 (Colo.2000). The Court must review the language of the contract in harmony with the plain and generally accepted meaning of the words used and reference must be made to the entire agreement and all of its parts in determining the intent of the parties. Bledsoe Land Company LLLP v. Forest Oil Corporation, 277 P.3d 838 (Colo.App.2011).

The Court in applying these rules of construction to the instant case finds that the language in paragraph 8 of the agreement set forth above applies to the specialized rules pertaining to Best Management Practices as defined in paragraph 2.b. of the agreement. In making this determination the Court has considered the several factors.

First, in the introductory provisions of the agreement setting forth the purposes for the agreement, the parties expressly stated their intent as follows:

> Whereas, the City and the Operator value a balanced approach to oil and gas development that is protective of public health, safety and welfare, including the environment and wildlife resources. To that end, in order to achieve those goals in a cooperative manner, the City and the Operator enter into this Agreement to identify best management practices ("BMPs") for the operator's drilling and production operations for the Well Sites.

The remaining declarations in the introductory provisions of the agreement all relate to a variety of regulated practices that fall within the Best Management Practices anticipated by the agreement.

Second, the agreement, in its totality, deals with managing the development and extraction of oil and gas resources through the agreed upon practices exclusive of any other municipal ordinance or regulation relating to subject of the agreement. The only method that Broomfield contractually reserved unto itself to terminate the agreement was if Sovereign fails to comply with the Best Management Practices established by Broomfield. *See,* Plaintiff's Exhibit 4, paragraph 1. Broomfield did not reserve to itself any discretion to refuse to issue permits or administrative approvals so long as Sovereign complied with the Best Management Practices.

Paragraph 4 of the Memorandum of Understanding contains obligatory, not discretionary, language in numerous subsections. For example, paragraph 4.a. provides:

> The Operator *shall not* be required to obtain from the City Council any use by special review approvals or approval under the then existing Oil and Gas Regulations in the Broomfield Municipal Code for any wells subject to the terms and conditions of this Agreement, including any Approved/Pending Wells or any New Wells and/or Refiled Wells on the Well Sites, as long as the Operator complies with the terms and conditions contained herein, and *this Agreement shall control all oil and gas operations conducted by the Operator on the Well Sites during the Term of this Agreement.* (Emphasis supplied).

Likewise, paragraph 4.b. of the agreement provides that "[t]he City shall issue administrative approvals . . . for such operations, including Approved/Pending, New Wells, and/or Refiled Wells on the Well Sites . . ." with limited exclusions and those inure to the benefit of Sovereign. Paragraph 4.d. permits to review amendments to any

submittals required by the agreement but provides that Broomfield " . . . shall review *and approve* . . ." those submittals so long as they comply with the agreement.

Sovereign brought existing facilities under stricter scrutiny and regulatory review under the provisions of the agreement as part of the bargained for exchange. *See*, Plaintiff's Exhibit 4, paragraph 5. Moreover, specific well sites to which the agreement applied were identified by the Memorandum of Understanding.

Broomfield attempts to construe the language of paragraph out of context. First, there are no other similarly situated producers in Broomfield. All parties have conceded at oral argument that the only operator subject to the specialized rules regarding Best Management Practices in Broomfield is Sovereign. Other operators are subject to far less stringent regulatory standards.

Second, contextually, the language was expressly referencing changing regulatory practices to meet the requirements for safe extraction of oil and gas as the scientific evidence and technological advances occurred. The ability to modify the regulatory structure included input from Sovereign. To construe the language otherwise would result in a complete renunciation of the stated intent of the parties to " . . .achieve those goals in a cooperative manner, the City and the Operator enter into this Agreement to identify best management practices . . ." because the enactment of the moratorium by initiative was not part of a "cooperative" negotiation, but rather part of an independent ballot process.

All of these considerations lead the Court to find and conclude that the language of paragraph 8 of the Memorandum of Understanding only applies to Best Management Practices as defined by the agreement.

The Court having determined that the language of paragraph 8 of the agreement does not incorporate the initiative procedure, the Court must, nonetheless, determine whether application of the prohibited activity contained in the Broomfield Charter Amendment violate the Colorado Constitution's prohibition regarding ex post facto laws.

Article II, Section 11 of the Colorado Constitution provides that:

> No ex post fact law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

As a preliminary matter, it has long been the law in the State of Colorado that this provision applies to local governmental entities as well as the state legislature. City and County of Denver v. Denver Buick, Inc., 141 Colo. 121, 247 P.2d 919 (1959); City of Golden v. Parker, 138 P. 3d 285 (Colo.2006). Initially, the Court acknowledges that an enactment is presumed constitutional and must be proven unconstitutional beyond a reasonable doubt. Mesa County Board of County Commissioners v. State, 203 P.3d 519 (Colo.2009).

In the leading case of City of Golden v. Parker, 138 P.3d 285 (Colo.2006), the Colorado set forth the standards for determining whether a citizen enacted charter amendment is retrospective.

> We use a two-step inquiry to determine whether or not a law is retrospective in its operation. DeWitt, 54 P.3d at 854. First, we look to the legislative intent to determine whether the law is intended to operate retroactively. *Id.* We require a clear legislative intent that the law apply retroactively to overcome the presumption of prospectivity. Ficarra, 849 P.2d at 14. However, express language of retroactive application is not necessary to find that a law is intended to apply retroactively. *Id.*
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> If we find intent of retroactive application, the second step of the inquiry is to determine whether the retroactively applied law operates retrospectively. A law is retrospective if it either "(1) impairs a vested

right, or (2) creates a new obligation, imposes a new duty, or attaches a new disability ...." DeWitt, 54 P.3d at 855. We consider each of these prongs of the retrospectivity analysis in turn. In regard to the first prong, we have found that a right is vested only when it has an "independent existence." People v. D.K.B., 843 P.2d 1326, 1331 (Colo.1993). A vested right may be derived from a statute or the common law, but "once it vests it is no longer dependent for its assertion upon the common law or statute under which it may have been acquired." Ficarra, 849 P.2d at 15.

We do not employ a fixed formula or a bright-line test for determining whether a right is vested. *Id.* at 17. Rather, we look to three factors: "(1) whether the public interest is advanced or retarded; (2) whether the statute gives effect to or defeats the bona fide intentions or reasonable expectations of the affected individuals; and (3) whether the statute surprises individuals who have relied on a contrary law." DeWitt, 54 P.3d at 855.

A determination that retroactive application of a law impairs a vested right is not dispositive of the retrospectivity inquiry because such a finding "may be balanced against public health and safety concerns, the state's police powers to regulate certain practices, as well as other public policy considerations." *Id.* Retroactive application of a law that implicates a vested right is only permissible, however, if the law bears a rational relationship to a legitimate government interest. *Id.* In past cases, we have "appl[ied] a balancing test that weighs public interest and statutory objectives against reasonable expectations and substantial reliance." Kuhn, 924 P.2d at 1059-60 (quoting *Ficarra*, 849 P.2d at 17).

If a vested right is not implicated, we consider the second prong of the analysis. Under this prong, "retrospectivity may result from the creation of a new obligation, imposition of a new duty, or attachment of a new disability with respect to" past transactions or considerations. DeWitt, 54 P.3d at 855. Application of a law is not deemed retrospective, however, "merely because the facts upon which it operates occurred before" its adoption. City of Greenwood Village, 3 P.3d at 445.

138 P.3d at 290

In the present case, it is absolutely undisputed that the charter amendment is intended to apply retroactively. The amendment on its face provides:

Retroactive application.

In the event this measure is adopted by voters, its provisions shall apply

retroactively as of the date the measure was found to have qualified for placement on the ballot.

No clearer statement regarding the intent to apply retroactively can be made. There is absolutely no intent that the act apply prospectively and any interpretation to the contrary would be highly contorted. The Court concludes that the presumption that the act was intended to act prospectively is overcome by the charter amendment's express language and that the enactment is retroactive.

In considering whether the public interest is advanced or retarded, the Court finds that the public interest in the context of this case is retarded by application of the charter amendment to the Memorandum of Understanding.

The charter amendment is of dubious constitutionality. Two district courts have stricken similar enactments finding they were impliedly preempted or that an operational conflict prohibited enforcement of those enactments. Additionally, Broomfield's own legal staff has advised its governing body that any attempt to regulate oil and gas exploration and extraction that conflicts with the rules and regulations of the Colorado Oil and Gas Commission is in contravention of the Colorado constitution. Accordingly, the stricter regulatory scheme incorporated into the agreement promotes enhanced public health and safety.

In assessing the second consideration, the Court finds that the amendment completely frustrates the contractual expectations and intentions of the parties. The contractual duty of Broomfield is absolute. Unlike the situation in the City of Golden, case, *supra*, Broomfield has no discretion with respect to the issuance of approvals or permits so long as Sovereign complies with the Best Management Practices. The rights created by contract clearly have an independent existence. Nothing more need be done to

exercise the contractual rights, they can only be terminated by the specific procedures set forth in the agreement, and the party seeking enforcement has substantially changed its position in reliance upon the contractual rights granted it. Moreover, Broomfield received significant concessions that enhance public health and safety in the community.

The Court finds that the parties were not completely surprised by the enactment since the ballot issue had been certified at the time of the execution of the agreement. However, the parties clearly relied upon prior law regarding preemption and operational conflict in negotiating the agreement.

Based upon the foregoing City of Golden analysis, the Court concludes that the contractual rights in this case are undoubtedly vested. Both the public interest and reasonable reliance of the parties leads the Court to find that the charter amendment is retrospective. The Court concludes the charter amendment violates Article II, section 11 of the Colorado Constitution beyond a reasonable doubt and cannot be enforced to affect the provisions of the Memorandum of Understanding between the parties.

BASED UPON THE FOREGOING FINDINGS AND CONCLUSIONS, THE COURT DOTH ORDER:

The Plaintiff's motion for summary judgment is GRANTED. The Defendant's motion for summary judgment is DENIED.

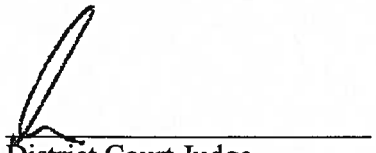
DONE AND SIGNED IN OPEN COURT this 25th day of September, 2014.

BY THE COURT:

Chris Melonakis
District Court Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this order was served on all parties electronically by ICCES on this 25th day of September, 2014.



District Court Judge