

LAND USE LEADERSHIP ALLIANCE

TRAINING PROGRAM



Guidance Manual

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PLANNING

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Introduction

The act of land use planning is separate and distinct from the act of zoning. Planning activities are usually initiated by the planning commission (sometimes called the planning board in home rule municipalities). The land use plan sets forth the planning commission's recommendation as to the most desirable use of land from the community's perspective, while zoning provides the detailed means for giving legal effect to the plan's policies and principles.¹ Although C.R.S. § 31-23-303(1) provides that, in statutory municipalities, zoning regulations "shall be made in accordance with a comprehensive plan" the position of this statute within the article suggests that it is intended to apply to the enactment of a comprehensive zoning scheme affecting all or a substantial part of the jurisdiction, and not to individual rezonings.

There are no cases interpreting this provision to require consistency between a plan and a zoning ordinance. In the past, Colorado case law provided that adopted land use plans are advisory only, and do not bind the discretion of the legislative body making specific zoning decisions. This fact is repeated in C.R.S. § 31-23-206(1). Local governments may, of course, require that their zoning be in accordance with their master plan. More recently, Colorado courts have held that state law does not prohibit local governments from adopting or incorporating land use plans as part of their land use regulations, provided these plans are sufficiently detailed. Once adopted in that manner, plans are treated by the courts as regulatory documents, and if challenged, may be reviewed by the courts under C.R.C.P. 57. See the *Introduction* to this book for more discussion about Rule 57 challenges. For a more detailed discussion of when and how an advisory plan can become a regulatory document, see Chapter 2, *Zoning*.

In 2007, the Colorado General Assembly adopted the Predictability in Planning Act, which revised C.R.S. §§ 30-28-106 and 31-23-206 to specifically state that the master plan of a local government constitutes an advisory document to guide land development decisions, but that the plan (or any part of it) may be made binding by including it in the local government's adopted subdivision, zoning, platting, planned unit development (PUD), or other similar land development regulations after satisfying notice, due process, and hearing requirements for legislative or quasi-judicial processes as appropriate.

¹ Theobald v. Summit County Comm'rs, 644 P.2d 942 (Colo. 1982).

General Planning Provisions

Traditionally, all municipalities in Colorado have been expressly authorized—but not required—to create a planning commission.⁶ Once a planning commission has been created, however, it is required to develop and adopt a land use master plan.⁷ In 2001, the Colorado General Assembly amended the municipal planning and zoning statutes to require that all municipalities in certain categories adopt a master plan no later than January 7, 2004.

Statutory municipal planning commissions must consist of not less than five nor more than seven members. Home rule cities and towns are not limited in the size of their planning commission.⁹ All members of the planning commission must be bona fide residents of the municipality.¹⁰ The terms of office and qualifications of commission members are set forth in C.R.S. §§ 31-23-203 and 31-23-204. In spite of the different functions of planning and zoning, municipalities are generally directed to consolidate the functions of the planning commission and the zoning commission into one governmental body.¹¹

It is the duty of the planning commission to make and adopt a master plan for the physical development of the territory within the municipal boundaries. More particularly, the planning commission is directed to develop a master plan for the general purpose of “guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote the health, safety, order, convenience, prosperity, and general welfare”¹² of the citizens. In preparing a master plan, a planning commission is directed to “make careful and comprehensive surveys and studies of present conditions and future growth of the municipality, with due regard to its relation to neighboring territory.”¹³

A planning commission is also authorized to plan with respect to areas outside of the boundaries of the municipality that, in the commission’s judgment, bear relation to the planning of the territory within the municipal boundaries. Any master plan that purports to affect territory outside the boundaries is subject to the approval of the municipal or county planning body with primary jurisdiction over that territory.¹⁴ The master plan is subordinate to land use plans adopted by the municipal or county planning body with primary jurisdiction over such territory.¹⁵ Throughout this chapter, references to how the adoption of a master plan

⁶ C.R.S. § 31-23-202.

⁷ C.R.S. § 31-23-206.

⁹ C.R.S. § 31-23-203(1).

¹⁰ C.R.S. § 31-23-203(2).

¹¹ C.R.S. § 31-23-211.

¹² C.R.S. § 31-23-207.

¹³ C.R.S. § 31-23-207.

¹⁴ C.R.S. § 31-23-206(1).

¹⁵ *Adams County Comm’rs v. City of Thornton*, 629 P.2d 605 (Colo. 1981); *Robinson v. City of Boulder*, 190 Colo. 357, 547 P.2d 228 (1976), *overruled on other grounds*, *Bd. of County Comm’rs v. Denver Bd. of Water Comm’rs*, 718 P.2d 235 (Colo. 1986).

affects a municipality should be read to include any territory beyond its boundaries covered by the plan and approved by the planning body for that adjacent government.

Before adopting or amending a master plan, the planning commission must hold at least one public hearing on the proposed plan. Notice of the time and place of the hearing must be published in a newspaper of general circulation in the municipality, and in the official newspaper of the county where the municipality is located. Adoption or amendment of a master plan must be by resolution approved by not less than two-thirds of the entire membership of the commission.¹⁸

After the planning commission has adopted a master plan for a municipality, the master plan must be submitted for approval to each local governmental entity outside the municipal boundaries that may be affected by the plan.²⁰ There are no statutory penalties for failure to complete the certification and approval process by other governments. Although some municipalities submit their master plans for approval by their municipal council, there is no statutory requirement to do so.

Intergovernmental Cooperation

All local governmental entities in Colorado are encouraged “to make the most efficient and effective use of their powers and responsibilities by cooperating and contracting with” other local governmental entities.⁴⁹ Local governmental entities are empowered to contract with one another to provide any function, service, or facility that each entity is lawfully authorized to provide.⁵⁰ For example, Colorado has given municipalities express authority to enter into agreements with adjoining counties for joint participation in land use planning, subdivision , and zoning for specific areas designated in the intergovernmental agreement (IGA). However, municipalities retain the authority to approve any actions taken pursuant to the IGA when the action will directly affect land within the boundaries of the municipality.⁵¹

Regional Planning Commissions

State legislation authorizes cooperation in the creation of regional planning commissions between or among: (1) a group of municipalities together with the county or counties encompassing those municipalities; (2) a group of municipalities acting independently of the county or counties encompassing those municipalities; or (3) a group of two or more adjoining counties.⁵⁸

Generally, regional planning commissions are independent political and corporate bodies empowered to perform planning functions similar to those performed by county planning

¹⁸ C.R.S. § 31-23-208.

²⁰ C.R.S. § 31-23-208.

⁴⁹ C.R.S. § 29-1-201.

⁵⁰ C.R.S. § 29-1-203(1).

⁵¹ C.R.S. § 31-23-227(2).

⁵⁸ C.R.S. § 30-28-105(1).

commissions.⁶¹ The composition of the membership of each regional planning commission is generally left to the determination of the governmental entities comprising the commission, but each participating county or municipality is entitled to at least one voting representative.⁶² The regional planning commission must elect its chairman, whose term will be one year, with eligibility for reelection,⁶³ and the term of membership must be at least three years.⁶⁴ Counties and municipalities are expressly authorized to participate in more than one regional planning commission.⁶⁵

It is the duty of the regional planning commission to make and adopt a regional plan for the physical development of the territory within the region.⁶⁶ A regional plan will not constitute an official advisory plan for any county or municipality within the region, however, unless the regional plan is officially adopted by the planning commission for the county or municipality.⁶⁷ The standards and procedures to be followed by a regional planning commission in preparing a regional plan must generally comply with the procedures applicable to county master plans and county planning commissions.⁶⁸

Regional plans are certified by the regional planning commission to each board of county commissioners lying wholly or partially within the territory encompassed by the region and then to all municipalities lying wholly or partially within the territory encompassed by the region. Each municipality receiving any such certification may (but need not) incorporate the applicable provisions of the master or regional plan into its own land use plan.⁶⁹

In addition, all county and municipal planning commissions within the common planning jurisdiction of any regional planning commission that has adopted a regional plan must submit any proposed new or revised land use planning decisions to the regional planning commission if the proposed land use planning decision may affect another local governmental entity within the region. Within 30 days after the submission, the regional planning commission must report to the county or municipal planning commission its conclusions regarding the consistency of the proposed decision with the existing regional plan.⁷⁰

If the regional planning commission determines that an inconsistency exists, the inconsistent aspects of the county or municipal decision may be adopted by the county or municipal planning commission and made part of its formal master plan only upon the affirmative vote of two-thirds of its total membership. County and municipal planning commissions may choose not to refer land use planning decisions to the regional planning commission only if the

⁶¹ C.R.S. § 30-28-105(7), (9).

⁶² C.R.S. § 30-28-105(2).

⁶³ C.R.S. § 30-28-105(2).

⁶⁴ C.R.S. § 30-28-128.

⁶⁵ C.R.S. § 30-28-105(10).

⁶⁶ C.R.S. § 30-28-106(2)(a).

⁶⁷ C.R.S. § 30-28-106(2)(a), (b).

⁶⁸ C.R.S. §§ 30-28-107, 30-28-108.

⁶⁹ C.R.S. § 30-28-109.

⁷⁰ C.R.S. § 30-28-110(2)(c).

commission determines the matter to be purely local in nature. Even so, the regional planning commission may, on its own initiative, review county and municipal land use planning decisions that it deems to affect more than one local governmental entity in the region and report its findings to the governing bodies of the jurisdictions affected.⁷¹

Metropolitan Planning Organizations

In order to comply with federal laws on transportation planning and funding (currently SAFETEA-LU), the Colorado General Assembly declared it to be the policy of the state that local government participation in transportation planning is critical to the overall statewide transportation planning process. Twenty-year transportation plans are required for “each transportation planning region that includes the metropolitan area of a metropolitan planning organization.”⁸⁵ In addition, other transportation planning regions may propose and submit similar transportation plans through IGAs.⁸⁶ Regional planning commissions are expected to work with the Colorado Department of Transportation to devise a workable plan that can be implemented into the statewide transportation plan. The statewide plan should address, but is not limited to, multi-modal transportation considerations, coordination with county and municipal land use planning, and area-wide multi-modal management plans.⁸⁷

⁷¹ C.R.S. § 30-28-110(2).

⁸⁵ C.R.S. § 43-1-1103(1).

⁸⁶ C.R.S. § 43-1-1103(1).

⁸⁷ C.R.S. § 43-1-1103.

ZONING

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Introduction

“Zoning” is generally defined as the division of an area into zones or districts to facilitate regulation of land use, buildings, and other improvements.¹ Zoning is the fundamental planning tool used by most local governments to balance the interest of the public welfare with private landowners’ rights to use their land as they see fit. Zoning powers are generally deemed to be matters of local concern rather than matters of statewide interest.

Historical Development of Zoning

The general principle of zoning is claimed to have existed during Roman times. Some form of zoning was in use in this country as early as 1692.² Nevertheless, due to a prevailing hostility towards limiting the use of private land, the common law of nuisance and private restrictions were the chief means of regulating private land use until early in the twentieth century.

In 1926, the U.S. Supreme Court conclusively settled any doubts regarding the constitutionality of zoning in *Village of Euclid v. Ambler Realty Co.*³ In this seminal case, the Court found zoning to be a legitimate exercise of a local government’s police power. Like many other states, Colorado followed suit by upholding the constitutionality of the exercise of zoning powers the next year.⁴ Today it is clear that reasonable zoning regulations are a legitimate, constitutional exercise of a local government’s police power.⁵

¹ 101A C.J.S. Zoning § 1.

² *Lumund v. Bd. of Adjustment*, 73 A.2d 545 (N.J. 1950).

³ 272 U.S. 365 (1926).

⁴ *Colby v. Denver Bd. of Adjustment*, 81 Colo. 344, 255 P. 443 (1927).

⁵ *See Levy v. Arapahoe County Bd. of Adjustment*, 149 Colo. 493, 369 P.2d 991 (1962).

Although Euclidean zoning is the most common form of zoning, other forms have developed. Planned unit developments (PUDS), are one example.

Purpose of Zoning

The general purpose of zoning is to regulate uses of land and the physical improvements to land in the interest of the public welfare,⁶ without imposing undue burdens on landowners.

Among other things, the regulation and segregation of land uses is a legitimate purpose of zoning. Courts have upheld zoning regulations that permit a limited number of uses in certain zone districts,⁷ or that specify minimum residential lot sizes in order to preserve the rural atmosphere of an area.⁸ Similarly, zoning regulations prohibiting residential uses in an agricultural zone district,⁹ or limiting the occupancy of dwellings in a zone district to a single family,¹⁰ have been approved by the courts.

Regulation of the density and intensity of land uses and regulation of improvements upon the land are also legitimate purposes of zoning. A municipality may adopt reasonable regulations with respect to the height of structures;¹¹ assign restrictions on the use of a street in order to reduce traffic volume, accidents, and street maintenance costs;¹² regulate the size of building plots in order to prevent destabilization of steep slopes;¹³ and establish setback ordinances to benefit the public and enhance the aesthetic value of the municipality.¹⁴

The Nature of Zoning

A local government acts in a legislative capacity (as opposed to a quasi-judicial or administrative capacity) when it initially enacts a zoning ordinance or regulation.¹⁵ The adoption of a general zoning ordinance text or map represents a legislative judgment applicable to an open class of individuals, interests, or situations, concerning the use of land within a municipality.¹⁶ Since legislative activities involve a judgment by elected officials about what is in a municipality's or county's best interest, and since reasonable people can differ about what is best, courts generally defer to legislative judgments.

⁶ C.R.S. § 30-28-115; 101A C.J.S. Zoning & Land Planning § 3.

⁷ See, e.g., *Famularo v. Adams County Comm'rs*, 180 Colo. 333, 505 P.2d 958 (1973).

⁸ See, e.g., *Nopro Co. v. Cherry Hills Village*, 180 Colo. 217, 504 P.2d 344 (1972).

⁹ See, e.g., *Jefferson County Comm'rs v. Mountain Air Ranch*, 192 Colo. 364, 563 P.2d 341 (1977).

¹⁰ See, e.g., *Rademan v. City & County of Denver*, 186 Colo. 250, 526 P.2d 1325 (1974).

¹¹ See, e.g., *Baysinger v. City of Northglenn*, 195 Colo. 99, 575 P.2d 425 (1978).

¹² *Carl Ainsworth, Inc. v. Town of Morrison*, 189 Colo. 223, 539 P.2d 1267 (1975); *Town of Grand Lake v. Lanzi*, 937 P.2d 785 (Colo. App. 1996).

¹³ *Sellon v. City of Manitou Springs*, 745 P.2d 229 (Colo. 1987).

¹⁴ *City of Leadville v. Rood*, 198 Colo. 328, 600 P.2d 62 (1979).

¹⁵ See *City of Louisville v. Dist. Court*, 190 Colo. 33, 543 P.2d 67 (1975); *Nopro Co. v. Cherry Hills Village*, 180 Colo. 217, 504 P.2d 344 (1972); *Orth v. Boulder County Comm'rs*, 158 Colo. 540, 408 P.2d 974 (1965).

¹⁶ *City of Greeley v. Ells*, 186 Colo. 352, 527 P.2d 538 (1974).

On the other hand, the adoption of an ordinance rezoning one or a few parcels of land is often found to be a quasi-judicial activity. A quasi-judicial activity is one that involves applying a set of conditions to specific individuals, interests, or situations. Since a specific rezoning may grant a landowner property rights different than those of his or her neighbors or deprive a landowner of rights enjoyed by his or her neighbors, fundamental principles of fairness and equal treatment come into play. Quasi-judicial actions are reviewable by certiorari under C.R.C.P. 106(a)(4), and courts will generally scrutinize both the process and outcome of quasi-judicial activities more closely than legislative activities.¹⁷ Even though decisions to rezone individual properties are generally quasi-judicial decisions, a decision to rezone an entire area with many properties has been held to be a legislative act.¹⁸ See the discussion on Appeals from Local Government Decisions in the *Introduction*.

The Authority to Zone

The authority to zone is an aspect of a local government's police power—i.e., the power to regulate activities in order to protect the public health, safety, morality, and general welfare.

Reasonableness and Nexus

Generally, zoning is subject to those constitutional limitations applicable to any exercise of police power.¹⁹ Zoning regulations must bear a reasonable relationship to some legitimate government interest, such as protecting the health, safety, morals, or welfare of the public.²⁰ This nexus between zoning and the public welfare provides the basis for the constitutionality of land use regulation. Thus, an ordinance that does not bear a reasonable relationship to a legitimate government interest is unconstitutional.²¹ In the past, some courts restated this test by holding that a regulation that is so unrelated to a legitimate public purpose as to be "arbitrary and capricious" is unconstitutional.

As a general rule, a regulation as applied to specific property must not create an unreasonable burden on the owner, even if the regulation is reasonably related to a legitimate government interest.²² If a regulation burdens the use of land so much that it becomes confiscatory (i.e., a "taking"), the regulation will be vulnerable to a constitutional takings challenge. In performing this analysis, it must be kept in mind that a landowner is not entitled to the most profitable or

¹⁷ *Snyder v. City of Lakewood*, 189 Colo. 421, 542 P.2d 371 (1975), *overruled in part as it applies to initiative and referendum*, *Margolis v. Dist. Court*, 638 P.2d 297 (Colo. 1981).

¹⁸ *Jafay v. Boulder County Comm'rs*, 848 P.2d 892 (Colo. 1993).

¹⁹ *See Wright v. City of Littleton*, 174 Colo. 318, 483 P.2d 953 (1971).

²⁰ *Colo. Manufactured Housing Ass'n v. City of Salida*, 977 F. Supp. 1080 (D. Colo. 1997); *Boulder County Comm'rs v. Echnacht*, 194 Colo. 311, 572 P.2d 143 (1977); *Wilkinson v. Pitkin County Comm'rs*, 872 P.2d 1269 (Colo. App. 1993); *see Sellon v. City of Manitou Springs*, 745 P.2d 229 (Colo. 1987); *Combined Communications Corp. v. City & County of Denver*, 189 Colo. 462, 542 P.2d 79 (1975).

²¹ *See Combined Communications Corp. v. City & County of Denver*, 189 Colo. 462, 542 P.2d 79 (1975); *Colby v. Denver Bd. of Adjustment*, 81 Colo. 344, 255 P. 443 (1927).

²² *Apple v. City & County of Denver*, 154 Colo. 166, 390 P.2d 91 (1964).

best use of his or her property. Prior court decisions have held that where a landowner has not been deprived of all reasonable economic uses of his or her land, a zoning regulation will generally be upheld.²³ C.R.S. § 29-20-203(1) provides that:

In imposing conditions upon the granting of land-use approvals, no local government shall require an owner of private property to dedicate real property to the public, or pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis, unless there is an essential nexus between the dedication or payment and a legitimate local government interest, and the dedication or payment is roughly proportional both in nature and extent to the impact of the proposed use or development of such property. This section shall not apply to any legislatively formulated assessment, fee, or charge that is imposed on a broad class of property owners by a local government.

In addition, C.R.S. § 29-20-203(2) states:

No local government shall impose any discretionary condition upon a land-use approval unless the condition is based upon duly adopted standards that are sufficiently specific to ensure that the condition is imposed in a rational and consistent manner.

Conformance with Comprehensive Plan/Spot Zoning

In addition to conforming to a general standard of reasonableness, a zoning regulation should conform to the applicable municipal or county master plan (sometimes called a comprehensive plan).²⁴ In Colorado, master plans typically are merely advisory documents. Although zoning regulations in statutory municipalities must “be made in accordance with a comprehensive plan” in compliance with C.R.S. § 31-23-303(1), the position of this statute within the article suggests that it is intended to apply to the enactment of a comprehensive zoning scheme affecting all or a substantial part of the statutory municipality, and not to individual rezonings.

The master plan of a county or region shall be an advisory document to guide land development decisions; however, the plan or any part thereof may be made binding by inclusion in the county’s or region’s adopted subdivision, zoning, platting, planned unit development, or other similar land development regulations after satisfying notice, due process, and hearing requirements for legislative or quasi-judicial processes as appropriate.²⁵

²³ C. F. Lytle Co. v. Clark, 491 F.2d 834 (10th Cir. Colo. 1974); Jafay v. Boulder County Comm’rs, 848 P.2d 892 (Colo. 1993); Sellon v. City of Manitou Springs, 745 P.2d 229 (Colo. 1987); Jefferson County Comm’rs v. Mountain Air Ranch, 192 Colo. 364, 563 P.2d 341 (1977); Bird v. City of Colorado Springs, 176 Colo. 32, 489 P.2d 324 (1971); Baum v. City & County of Denver, 147 Colo. 104, 363 P.2d 688 (1961).

²⁴ See Theobald v. Summit County Comm’rs, 644 P.2d 942 (Colo. 1982).

²⁵ C.R.S. § 30-28-106(3)(a); see C.R.S. § 31-23-206(1) (municipalities).

Even if a master plan is considered only an advisory document, zoning that does not conform with the plan may be subject to an attack as “spot zoning.” Spot zoning is prohibited in Colorado on the theory that a local government cannot act merely to benefit a single landowner, but must act to benefit the general public. The test for determining whether a particular action constitutes spot zoning is whether the action is designed to relieve a certain piece of property from zoning restrictions in spite of—rather than in conformance with—the jurisdiction’s comprehensive plan.²⁶ The risk of spot zoning means that even an advisory master plan cannot be ignored. Planned unit developments are legislatively authorized exceptions to the general prohibition against spot zoning, but they are nevertheless statutorily required to conform to comprehensive plans.²⁷ See Chapter 4, *Planned Unit Developments*.

Development Agreements

Local governments may enter into development agreements with private developers in order to give more certainty to the development process. If the development agreement is approved according to state statutory procedures set out in C.R.S. §§ 24-68-101 to 24-68-106, the developer may vest its rights to develop according to the agreement. Some development agreements include pledges not to rezone a property within a specific period of time. If a local government has pledged in a development agreement not to rezone property, and it later does so, it may be liable to compensate the developer for any costs subsequently incurred in reliance on the vested right (or for other damages provided in the Development Agreement), provided however, that the agreement is not held to be an unreasonable “bargaining away” of the police powers. In Colorado, the validity of a development agreement limiting the local government’s power to rezone the property for over 20 years was upheld, although this time period is much longer than those upheld in many other jurisdictions.²⁸ This topic is discussed in more detail in Chapter 7, *Vested Rights*.

Solutions to Specific Zoning Problems

Rezoning is the process by which the current permitted uses and land use regulations applicable to a particular property—or in all or part of the municipality or county—are changed by amending the local government’s zoning regulations or zoning map. Rezoning is merely another aspect of a local government’s power to zone property within its jurisdiction²⁹. A rezoning can usually be initiated by a property owner, the governmental jurisdiction itself, or at the initiative of the county or municipal electors.³⁰

²⁶ King’s Mill Homeowners Ass’n v. City of Westminster, 192 Colo. 305, 557 P.2d 1186 (1976).

²⁷ C.R.S. §§ 24-67-101 to 24-67-108; Canyon Area Residents for the Env’t v. Jefferson County Comm’rs, 172 P.3d 905 (Colo. App. 2006).

²⁸ Geralnes B.V. v. City of Greenwood Village, 583 F. Supp. 830 (D. Colo. 1984).

²⁹ Bird v. City of Colorado Springs, 176 Colo. 32, 489 P.2d 324 (1971).

³⁰ See Bird v. City of Colorado Springs, 176 Colo. 32, 489 P.2d 324 (1971); Frankel v. City & County of Denver, 147 Colo. 373, 363 P.2d 1063 (1961); Westwood Meat Market, Inc. v. McLucas, 146 Colo. 435, 361 P.2d 776 (1961); Hoffer v. Town of Carbondale, 662 P.2d 495 (Colo. App. 1983).

In evaluating a rezoning application, a local government usually asks whether the proposal complies with the comprehensive plan. If so, the proposed rezoning need only bear a reasonable relationship to the general welfare of the community. If the rezoning would be in conflict with the comprehensive plan, however, the applicant generally needs to show either that: (1) an error was made in establishing the current zoning; or (2) there has been a change in the conditions of the neighborhood that supports the requested zoning change.³¹ In the absence of past error or a material change in the character of the neighborhood that requires a rezoning to benefit the public interest, property owners can generally rely on existing zoning regulations.³²

Again, however, it should be noted that past errors or changed conditions are not a prerequisite for the adoption of a PUD rezoning, and that PUD rezonings must comply with adopted comprehensive plans.

Conditional and Special Uses

In general, “permitted” uses or “uses by right” are uses that cannot be denied unless they fail to meet applicable development criteria.³³ In contrast, a “conditional” or “special” use is a use that is generally compatible with the permitted uses in a particular zone under certain circumstances, but which can be denied if it does not fit in with its specific surroundings or meet certain conditions.³⁴ A conditional or special use often involves potentially deleterious or noxious aspects associated with the use, such as additional traffic, obnoxious smells, increased noise, or the presence of hazardous materials. Before allowing a conditional or special use, a municipality or county often requires additional review of the proposed use and sometimes imposes specific conditions in order to mitigate the potential problems associated with the use.

Administrative Review

The executive branch of a city, town, or county is responsible for the enforcement of its zoning ordinances. The decision of an administrative official may generally be appealed to the board of adjustment by an affected party.³⁵ Only after the board of adjustment has reviewed the case and made a decision can the affected party seek judicial review of the zoning decision.³⁶

³¹ See *King’s Mill Homeowners Ass’n v. City of Westminster*, 192 Colo. 305, 557 P.2d 1186 (1976); *Roosevelt v. City of Englewood*, 176 Colo. 576, 492 P.2d 65 (1971); *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714 (Colo. App. 2008); *Applebaugh v. San Miguel County Comm’rs*, 837 P.2d 304 (Colo. App. 1992).

³² *Coleman v. Gormley*, 748 P.2d 361 (Colo. App. 1987).

³³ *City of Colorado Springs v. SecurCare Self Storage, Inc.*, 10 P.3d 1244 (Colo. 2000).

³⁴ *Penrose Hosp. of Colorado Springs v. City of Colorado Springs*, 802 P.2d 1167 (Colo. App. 1990).

³⁵ *Gramiger v. Crowley*, 660 P.2d 1279 (Colo. 1983).

³⁶ *Hansen v. Keim*, 650 P.2d 1313 (Colo. App. 1982).

PLANNED UNIT DEVELOPMENTS

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Introduction

Local zoning regulations generally dictate permissible uses, densities, floor areas, setback requirements, roadway, and open space requirements on a district-by-district basis. In practice, however, they sometimes do not allow certain mixtures of residential, commercial, public, and recreational uses. Only recently have they begun to permit clustering of residences within broader expanses of shared open space.

In recognition of the fact that the rigid separation of uses characteristic of common zoning ordinances sometimes does not allow the flexibility necessary to meet current needs, the Colorado General Assembly in 1972 adopted the Planned Unit Development Act (the PUD Act). The planned development process also provides an opportunity to integrate design of the buildings and uses approved for a site (traditionally a zoning item) with the design of the site and individual lots (often governed by subdivision regulations).

Perhaps the most important aspect of the PUD Act, however, is that it enables municipalities and counties wide discretion to negotiate almost every aspect of the proposed development in return for PUD approval. In theory, the planned development process protects the public interest by trading off more flexible local government regulations for a higher level of forethought and design concern on behalf of the landowner. To take advantage of the additional flexibility provided by the PUD Act, for example, the landowner or developer often needs to prepare a more detailed application and development guide than would be required under standard zoning. The development guide often lists specific controls, such as uses, density, setbacks, and dedications for the PUD project, as well as the means for control and enforcement of those provisions. Because PUDs allow greater flexibility than traditional zoning, more emphasis is placed on site planning for PUDs than in single use districts.³⁷ Although PUDs allow local governments wide freedom in negotiating development parameters, they do not exempt local governments from mandatory legislated requirements applicable to development approvals. For example, 2008 legislation mandating that local governments require a demonstration of adequate water supply for developments containing more than 50 units or single family equivalents applies to PUDs as well as other forms of development approval.³⁸ Similarly, the statutory requirement for year-round wheeled access

³⁷ *Applebaugh v. San Miguel County Comm'rs*, 837 P.2d 304 (Colo. App. 1992).

³⁸ C.R.S. §§ 29-20-301 *et seq.*

from a public highway to a subdivision applied to a PUD, and preliminary approval of the PUD without that form of access was invalid.³⁹

PUDs can be implemented either as a rezoning that replaces the prior zone district, or as an overlay district that supplements the underlying zone. The PUD Act is broad enough to allow either method, and different Colorado local governments have used each approach.

Authority for Planned Unit Developments

The essence of a PUD is a deal—an exchange of flexibility by the local government for extra quality, amenities, or something else the community would not otherwise get from the developer. Since neither side is forced to accept the deal if it feels the deal is not fair, there are few limits on what the deal can address. The prime requisites to establishment of a PUD are that it: (1) is compatible with the existing zones from which it was carved; (2) is in general conformity with the comprehensive plan for the community, and (3) complies with and satisfies all of the standards, procedures, and conditions of the local government’s PUD ordinance.⁴⁰

Statutory Requirements of a PUD Enabling Ordinance

A local government authorizes the establishment of PUDs in its jurisdiction by passing a resolution or ordinance that sets forth the standards, procedures, and conditions for a PUD in that jurisdiction. Each municipality and county must set forth the standards and conditions for evaluation of a proposed PUD. The local government is required to find that the PUD plan is in general conformity with any master plan or comprehensive plan for the county or municipality.⁴¹ An application for a PUD must meet all standards, procedures, and conditions of the local government’s PUD ordinance.⁴²

Further, no PUD may be approved without the written consent of the landowner whose properties are included within the PUD.⁴³ Some local governments’ ordinances or resolutions may define the term “landowner,” but where the term is undefined or ambiguous, the legislative intent must be ascertained. In one situation, where an applicant submitted an application for a zoning change after the applicant had conveyed the property, but before recording of the deed, the court determined that the applicant was not the “true” owner of the land and that only a person with an interest in the property may seek a zoning change.⁴⁴ Frequently, the municipality or county will require proof of ownership of the property from the applicant who requests the PUD.

³⁹ *Wolf Creek Ski Corp. v. Mineral County Comm’rs*, 170 P.3d 821 (Colo. App. 2007).

⁴⁰ *Applebaugh v. San Miguel County Comm’rs*, 837 P.2d 304 (Colo. App. 1992); *Coleman v. Gormley*, 748 P.2d 361 (Colo. App. 1987); *Moore v. City of Boulder*, 29 Colo. App. 248, 484 P.2d 134 (1971).

⁴¹ C.R.S. § 24-67-104(1)(f).

⁴² *Ford Leasing Dev. Co. v. Jefferson County Comm’rs*, 186 Colo. 418, 528 P.2d 237 (1974); *Dillon Cos. v. City of Boulder*, 183 Colo. 117, 515 P.2d 627 (1973).

⁴³ C.R.S. § 24-67-105(1).

⁴⁴ *Brown v. Arapahoe County Comm’rs*, 720 P.2d 579 (Colo. App. 1985).

The local ordinance must also include the following standards and conditions by which a PUD plan will be evaluated:

- The uses permitted in a PUD and the minimum number of units or acres that may constitute a PUD.⁴⁵
- Standards governing the density or intensity of land use, or methods for determining such density or intensity in a PUD.⁴⁶
- Information that must be submitted with the PUD application to ensure full evaluation of the application, provided that the reviewing board may require additional relevant information that it deems necessary.⁴⁷

The local ordinance may also include the following standards and conditions for approval, although these are not required:

- The sequence of development among the various types of uses.⁴⁸
- Standards for inclusion of common open space.⁴⁹

Common Open Space

A local PUD ordinance or resolution may require that common open space be included in the PUD.

Ownership and Maintenance of Common Open Space

A resolution or ordinance that requires inclusion of common open space may also require that the landowner provide for and establish an organization for the ownership and maintenance of that common open space, or that other adequate arrangements be made for the ownership and maintenance.⁵⁰

Procedure for Approval of a PUD Plan

Each county or municipality allowing PUDs must have a procedure for the submission and review of a PUD application. The PUD Act allows municipalities and counties considerable flexibility in designing their application and approval system.

Review and Consideration of Application

Once an application has been completed and submitted, it will usually be reviewed by the local government's planning department staff, who will make a recommendation to the planning commission. The planning commission will hold a public hearing to review the application and

⁴⁵ C.R.S. § 24-67-105(2).

⁴⁶ C.R.S. § 24-67-105(4).

⁴⁷ C.R.S. § 24-67-105(5).

⁴⁸ C.R.S. § 24-67-105(3).

⁴⁹ C.R.S. § 24-67-105(6).

⁵⁰ C.R.S. § 24-67-105(6)(a), (b).

its conformance with the local PUD regulations, and will recommend approval or denial of the PUD to the governing body.

The governing body will generally consider the PUD rezoning application at a public hearing, held after notice is given to the public and adjoining landowners in accordance with the PUD Act. The hearing must be expeditious and will conclude when all those desiring to testify have done so. No public hearing may continue for more than 40 days without the applicant's written consent.⁵¹

⁵¹ C.R.S. § 24-67-105.5(3).

SUBDIVISION

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Introduction

Subdivision is the process by which land is divided or combined into parcels appropriate for development. For a variety of reasons, the public has a strong interest in how this is done. First, since developed land is bought and sold more often than raw undeveloped land, it is important that the location of the boundaries of each parcel be precisely defined, and that the possibility for future mistakes in the legal description is minimized. Second, it is important that each lot offered for sale is large enough (or not too large), is appropriately shaped for its intended use, and has access to the public road system. Third, the layout of lots offered for sale needs to make adequate provision for required parks, street rights-of-way, storm drainage areas, and utility infrastructure. By requiring landowners to prepare an official map of their land identifying the size and location of lots offered for sale and identifying the boundaries of each parcel for the public record, and by providing that the local government review, approve, and record that map in the public records, all of these goals can be achieved.

Counties and municipalities in Colorado are mandated by state statute to enact and enforce subdivision controls through their planning commissions. County subdivision regulations govern the land within county boundaries and outside the boundaries of the incorporated areas of municipalities. Subdivision regulations of statutory cities and towns govern land within their boundaries and may also govern the relation of lots to streets shown on the city's street plan for up to three miles outside the city boundaries (or halfway to the next city, if the land is within five miles of both cities).⁵² Home rule cities and towns also regulate subdivision of property but procedures and requirements vary substantially.

In the last 40 years, while the enabling authority for this form of land use regulation has changed very little, the use of subdivision regulations has become one of the primary tools governing the development of land subsequent to zoning. This has given rise to an entire body of law on the subject of exactions and dedications, which are normally imposed at the time of subdivision review.

Subdivision Plat

A subdivision plat is a map showing how a given parcel of property is to be divided into lots and blocks (or sometimes plots) and identifying streets, easements, and other lands intended to be dedicated to public use. The subdivision plat concept was developed to achieve two

⁵² C.R.S. § 31-23-212.

goals: (1) to avoid the need to repeat the cumbersome metes and bounds legal description of a parcel of land each time it is sold; and (2) to ensure that each parcel of land sold for development has sufficient size, shape, utilities, and access to function for its intended purpose.

On the face of the plat is the statement of dedication signed and acknowledged by the owner and holders of interests in the land and a statement of acceptance by the local government. This document is recorded and becomes the basis of property described by lots and blocks. Among other things, subdivision regulations establish the minimum standards for such plats.

Subdivision Review Process

Subdivision review in both counties and municipalities generally involves:

- *An application, with supporting data.* This normally occurs in two or three phases—sketch plan or plat, preliminary plat, and final plat. The subdivision regulations of the individual local government control what the applicant must submit and in what detail, and the review process, to the degree not addressed in the statutes. The statutes do not mandate that local governments review all the items listed in the statutes. Rather, it is left to the discretion of the local government to specify the types of documentation to be submitted—and when and how such information should be updated—by local ordinances.⁵³
- *Public hearing or hearings.* A public hearing or hearings, must be held first before the planning commission, and then (usually) before the county commissioners or city council. Such a hearing must be carried out expeditiously and allow each party wishing to testify to do so. In no event may the public hearing exceed 40 days in length without the applicant's consent. If the county fails to approve, deny, or conditionally approve the plat or plan within a timeframe mutually agreed upon by both parties, the plat or plan will be deemed approved unless the county requests additional time to review it.⁵⁴
- *Final action accepting or rejecting the subdivision plat.* Denial of the plat or plan must be in accordance with the resolutions, ordinances, or regulations provided to the applicant.⁵⁵ Any conditions imposed must be based on duly adopted standards.⁵⁶ For counties, once the subdivision plan is finalized, the developer's obligations are embodied in either: (1) an enforceable public improvements agreement that is recorded with the plat; or (2) other agreements or contracts setting out each party's responsibilities in the construction of the subdivision.⁵⁷

⁵³ *Save Park County v. Park County Comm'rs*, 990 P.2d 35 (Colo. 1999).

⁵⁴ C.R.S. § 30-28-133.5.

⁵⁵ C.R.S. § 30-28-133.5.

⁵⁶ C.R.S. § 29-20-203(2).

⁵⁷ C.R.S. § 30-28-137(1); *Douglas County Comm'rs v. Bainbridge*, 929 P.2d 691 (Colo. 1996).

- *Appeal.* If the subdivision is not approved (or if it is approved), the owner or a disapproving party may appeal the decision under C.R.C.P. 106(a)(4).⁵⁸ For a discussion of Rule 106 appeals, see the *Introduction*.

Dedication Requirements

One of the principal interests of the local government during subdivision is the dedication of specific lands to public use. Public use dedications made by subdivision plats normally include streets, parks, school sites, and easements for public utilities. Colorado counties have the authority to require subdivision developers to dedicate land or pay fees-in-lieu of dedication for parks and schools, when the parks and schools are reasonably necessary to serve the proposed subdivision and its future residents.⁵⁹ Counties may also require fees-in-lieu to be paid directly to school districts. Cities do not have the same explicit authority to assess fees-in-lieu as counties, but many do so based on their home rule powers or the Local Land Use Control Enabling Act.⁶⁰ Fees-in-lieu collected for schools may only be assessed against the developer during the subdivision phase. A Colorado county may not assess fees for schools directly against homebuyers in the form of impact fees or exactions.⁶¹

Any dedications of property or payments of fees as a condition to land use approvals, including subdivision approval, must meet certain requirements. There must be an “essential nexus” between the dedication or payment and the impact of the development. In addition, the dedication or payment must be roughly proportional to the burdens created by the development.⁶² This requirement parallels standards established by the U.S. Supreme Court for exactions. Much of the litigation relative to subdivision plats has taken place on this point—i.e., whether required dedications are roughly proportional to the anticipated impacts of the proposed development.

⁵⁸ *Larimer County v. Conder*, 927 P.2d 1339 (Colo. 1996); *Routt County Comm’rs v. O’Dell*, 920 P.2d 48 (Colo. 1996).

⁵⁹ C.R.S. § 30-28-133(4).

⁶⁰ C.R.S. §§ 29-20-101 to 29-20-108.

⁶¹ C.R.S. § 22-54-102(3); *Douglas County Comm’rs v. Bainbridge*, 929 P.2d 691 (Colo. 1996).

⁶² C.R.S. § 29-20-203.

EXACTIONS, DEDICATIONS, IMPACT FEES, AND REGULATORY TAKINGS

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Introduction

Local governments often place the costs of public improvements and community facilities required to serve new development onto the development itself through the land use approval process. In Colorado, the most common tools used to achieve this goal are land dedication, improvement dedication, fees-in-lieu of dedication, which will collectively be referred to in this chapter as “exactions,” and development impact fees. Exactions are the result of a discretionary adjudicative determination by which the governing body conditions future development on the exaction of private property for public use.⁶³ Exactions may include specific requirements placed on the developer by the local government as a condition of development approval, such as requiring the developer to construct a shopping center as a condition of shopping center rezoning approval,⁶⁴ or limiting access to new development as a condition of rezoning.⁶⁵ Impact fees, on the other hand, are legislatively created, generally applicable, one-time fees applied to all new development that will be served by the public improvements or services for which the fee is collected.⁶⁶ It is important to keep this distinction between “exactions” and “impact fees” in mind throughout this chapter, because the laws governing their adoption, enforcement, and defensibility differ, depending on whether an exaction or an impact fee is at issue.

The rationale behind exactions and impact fees is that the benefit of public improvements or facilities made necessary by the new development principally flows to the new development, and that the developer can pass the cost of the improvement to the ultimate user of the improvement, the developer’s customer. This philosophy is often summarized in the adage that “growth should pay its own way.” If the developer feels that the “price” of paying for public improvements necessary to serve the land is too high, the developer may decide not to develop until the value of the land rises.

⁶³ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

⁶⁴ *King’s Mill Homeowners Ass’n v. City of Westminster*, 192 Colo. 305, 557 P.2d 1186 (1976).

⁶⁵ *City of Colorado Springs v. Smartt*, 620 P.2d 1060 (Colo. 1980).

⁶⁶ *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 692 (Colo. 2001).

The Basic Exaction Tools

Historically, most local governments have required dedications of land to serve the development's future occupants. Dedication may involve the developer donating land necessary for the establishment of public improvements, such as parks, schools, streets, sidewalks, or drainage projects needed to serve the proposed development. Additionally, local governments have required from developers the construction of improvements and the dedication of those improvements to the local government, with the government often taking the responsibility for future maintenance. Common dedications of improvements have included paved streets, sewer, water, and drainage improvements.

As an alternative to compulsory land or improvement dedication, many local governments allow developers to pay a fee-in-lieu of the dedication. The fee-in-lieu is an amount equal to the fair market value of the dedication that would otherwise be required. The payment of a fee-in-lieu of dedication may be more practical than land dedication where the size of the development is small or the public improvement or facility necessitated by the new development will serve a larger area than the new development.

More recently, Colorado governments have begun to enact impact fee programs that require developers to pay a fee to the local government to defray the cost of improvements necessitated by the impact of the new development. The fees are levied against new development to generate revenue needed to build or upgrade municipal facilities and provide services necessitated by the new development. Fees are usually levied against the dwellings and buildings in the development on a per unit basis, rather than against the developer.

Impact fees, which are sometimes referred to as "development fees" or "land development charges," are becoming an increasingly common means of financing public improvements and facilities. Impact fees have been enacted for a wide variety of improvements, such as off-street parking,⁶⁷ storm drainage projects,⁶⁸ water systems,⁶⁹ and sewer systems.⁷⁰ The advantages of impact fees include the ability to exact the fee from all types of development, including low and high density residential, industrial, and commercial projects, based on each development's relative impact on the community services and facilities. The disadvantages are that it can increase the cost of housing, and only the mortgage interest paid on that increased cost is deductible by the homeowner for tax purposes. Homebuilder associations, developers, and public interest groups that lobby for affordable housing legislation often oppose and even challenge impact fee programs⁷¹ and legislation that makes it easier to impose impact fees in part because of their effects on housing prices.

⁶⁷ *Stroud v. City of Aspen*, 188 Colo. 1, 532 P.2d 720 (1975).

⁶⁸ *Zelinger v. City & County of Denver*, 724 P.2d 1356 (Colo. 1986); *Wolf Ranch, LLC v. City of Colorado Springs*, 220 P.3d 559 (Colo. 2009).

⁶⁹ *City of Arvada v. City & County of Denver*, 663 P.2d 611 (Colo. 1983).

⁷⁰ *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001); *Loup-Miller Constr. Co. v. City & County of Denver*, 676 P.2d 1170 (Colo. 1984).

⁷¹ *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30 (Colo. 2000).

Relation Between Impact Fees and the Proposed Development

Impact fees must be directly related to the proposed development. In calculating the impact fee to be assessed, local governments must quantify the reasonable impacts of the proposed development on existing capital facilities and establish the fee at a level no greater than necessary to defray the impacts directly related to the proposed development.⁷²

Impact Fees

As discussed previously, impact fees are legislatively adopted fees that apply to an entire class of property. Because the decision to impose impact fees is not based on a discretionary, adjudicative decision applicable to a single property owner, the test for reasonableness is not as stringent as it would be for an individualized exaction. In general, when a local government imposes an impact fee, it need only show that the fee is reasonably related to the overall cost of the service or improvement to be provided by the governing body.⁷³ This requirement is now codified in C.R.S. § 29-20-104.5(2), which follows the lead of numerous court decisions in not applying the “rough proportionality” standard to impact fees. The same type of quantitative analysis necessary for imposing exactions must be completed before the adoption of the impact fee program to show that the fees that will be generated are necessary to fund future capital improvements and services. In applying the impact fee program to a development, however, the local government need not make an individualized finding that the amount of the fee imposed is reasonably related to the cost of providing the service or improvement. That analysis has already been completed at the adoption stage.

⁷² C.R.S. § 29-20-104.5(2).

⁷³ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 692 (Colo. 2001); *Wolf Ranch, LLC v. City of Colorado Springs*, 220 P.3d 559 (Colo. 2009).

VESTED RIGHTS

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Introduction

Colorado's cities and counties have the power to change their zoning ordinances, subdivision regulations, and other land use regulations from time to time. In addition, cities and counties have some power to revoke development permits issued in error. Sometimes questions arise as to whether landowners who have begun development in reliance on the old rules or permits should be allowed to complete their developments, or should be required to conform to the new rules.

There are two competing public policy interests. One is the public's interest in revising land use regulations to reflect changing goals and demands. The other is the interest of landowners and developers to know with reasonable certainty the uses permitted for their properties and the regulatory restrictions on those uses. Under some circumstances, Colorado law holds that the landowner's rights to complete development under the old rules have "vested," such that the government is prevented from enforcing the new rules. In short, the doctrine of vested rights protects landowners and developers from undue hardships caused by changes in regulatory rules, processes, or decisions. There is no single test for determining when a vested right has accrued to the landowner. Rather, it is a judicial determination based on the facts of the case as to whether the government's action would be inequitable.⁷⁴

Types of Vested Rights

There are two different types of vested rights in Colorado. A "common law vested right" has been defined by the courts to protect a landowner from the imposition of new or different regulations after the landowner has reasonably, and to his or her detriment, relied in good faith on government approvals granted for the project pursuant to earlier regulations.⁷⁵ In such a case, the landowner must obtain a favorable court ruling to prove that a common law vested right exists. Common law vested rights have a long history in Colorado and in the United States generally. As of 1987, Colorado has also created statutory vested rights. Colorado's Vested Property Rights Act⁷⁶ outlines the process that must be followed and the approvals that must be obtained before a statutory vested right exists.

⁷⁴ *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6 (Colo. 1993).

⁷⁵ See Michael M. Shultz, *Vested Property Rights in Colorado: The Legislature Rushes in Where . . .*, 66 DENV. U. L. REV. 31 (1988).

⁷⁶ C.R.S. §§ 24-68-101 to 24-68-106.

Common Law Vested Rights

Legal Theories

At common law, a right to use and develop property “vested” upon the giving by the government of an approval for that development, followed by reliance by the owner. Three distinct legal theories have been used by the courts to establish common law vested rights: equitable estoppel, due process, and taking of private property. The equitable estoppel and due process theories frequently rely on the factors of fairness and reasonable reliance and often result in the same decisions.

Who Has Common Law Vested Rights?

The landowner or developer claiming vested rights can be an individual, a partnership,⁷⁷ or a corporation.⁷⁸ In Colorado, reliance by a prospective purchaser of property on the representations of the city regarding zoning and uses for a site and its subsequent purchase of the property was sufficient to establish a vested right to develop in accordance with the city’s representation.⁷⁹ A lessee of property may be able to claim vested rights for building permits if the lessee relied on the government’s misleading or erroneous communications.⁸⁰

The Colorado Supreme Court has held that neither neighbors nor adjoining property owners have any vested rights in the zoning of adjacent properties. Where a homeowner’s association challenged the rezoning of property within its neighborhood to permit federal low-income housing, the court acknowledged that adjacent property owners have an interest in zoning changes that might diminish the enjoyment, use, and value of their property, but ruled that such an interest does not constitute a vested right.⁸¹

When Do Common Law Vested Rights Vest?

The time of vesting for a vested right depends to some degree on the type of governmental action taken and what future governmental decisions are necessary for the project. Land use decisions that have given rise to vested rights include zoning, subdivision plats, site plans, and building permits.

⁷⁷ Webster Props. v. Jefferson County Comm’rs, 682 P.2d 506 (Colo. App. 1984).

⁷⁸ San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981).

⁷⁹ City & County of Denver v. Stackhouse, 135 Colo. 289, 310 P.2d 296 (1957); *see also* Jones v. City of Aurora, 772 P.2d 645 (Colo. App. 1988).

⁸⁰ LaFollette v. Bd. of Adjustment of Lakewood, 741 P.2d 1262 (Colo. App. 1987).

⁸¹ Spiker v. City of Lakewood, 198 Colo. 528, 603 P.2d 130 (1979).

a. Zoning

A landowner or developer may acquire vested rights to a zone district designation when there has been substantial detrimental reliance and expenditure based on that zone designation. Where Cherry Hills Village annexed a subdivision that had one-half acre lots, water and sewer services had been provided to each lot, and underground utilities had been installed, the city was prevented from rezoning the subdivision to only permit lots that were at least two and one-half acres each.⁸²

b. Subdivisions

The vesting of rights to complete a subdivision depends, to some extent, on the particular subdivision process used by the local government. In Colorado, a three-step subdivision process is commonly used, requiring approval of a sketch plan, preliminary plat, and final plat. Although the Colorado courts have not ruled on the issue, some states have held that approval of only the sketch plan for a subdivision does not create any vested rights.

A landowner who has received final plat approval but has not received approval of or a permit to construct water and sewer improvements, does not have a vested right to construct water and sewer improvements.⁸³ An application for a final plat that is not consistent with the zoning regulations for an area will not create any vested rights.

c. Site Plans

Neither the Colorado Supreme Court nor the Colorado Court of Appeals has addressed whether common law development rights will vest for a site plan. Even if Colorado were to decide that vested rights arise upon site plan approval, it is likely that some activities in reliance upon that site plan approval would be necessary. For example, the approval of a PUD site plan may not result in vested rights if the applicant has not applied for and obtained any building permits.⁸⁴

d. Building Permits

The City of Denver was estopped from revoking a building permit issued for the construction of a four-plex when the city later determined that it had erred in issuing the permit. In reliance on the representations of the city, the property was purchased, and upon obtaining the building permit, construction had commenced.⁸⁵ Similarly, Denver was not allowed to revoke a building permit for a garage to reconsider whether parking was a permitted use for the building after the landowner had incurred considerable expense to construct the garage.⁸⁶

⁸² *City of Cherry Hills Village v. Trans-Robles Corp.*, 181 Colo. 356, 509 P.2d 797 (1973); *but see Elam v. Alberts*, 44 Colo. App. 281, 616 P.2d 168 (1980).

⁸³ *SK Finance SA v. La Plata County*, 126 F.3d 1272 (10th Cir. 1997).

⁸⁴ *Villa at Greeley, Inc. v. Hopper*, 917 P.2d 350 (Colo. App. 1996).

⁸⁵ *City & County of Denver v. Stackhouse*, 135 Colo. 289, 310 P.2d 296 (1957).

⁸⁶ *Pratt v. City & County of Denver*, 72 Colo. 51, 209 P. 508 (1922).

Denver’s issuance of a building permit for a 14-story apartment building could not be amended to a lower height in order to comply with a view ordinance enacted after issuance of the building permit because the owner had already commenced construction.

Statutory Vested Rights

Colorado’s Vested Property Rights Act was adopted by the Colorado Legislature in 1987. The Act applies to both statutory and home rule local governments, although the issue of whether it truly addresses a matter of state concern sufficient to preclude contrary legislation by a home rule municipality under Article XX of the Colorado Constitution has not yet been litigated. The Act defines a “vested property right” as the “right to undertake and complete the development and use of property under the terms and conditions of a site specific development plan.”⁸⁷ The Act provides that local governments must define what constitutes a “site specific development plan.” Many local governments have not taken such action, the result of which is a default to the definition of that term in C.R.S. § 24-68-102(4). Once a statutory vested right is established, a local government is precluded from taking any zoning or land use action that would “alter, impair, prevent, diminish, impose a moratorium on development, or otherwise delay” the development or use of the property in any way except as set forth in a site specific development plan.⁸⁸ For purposes of subdivision plat approvals, this statute only governs those plats approved on or after January 1988. Any plats approved before that date will not vest development rights in the developer.⁸⁹

Establishing a Vested Right

A site specific development plan can only be approved after notice and a public hearing by the appropriate local government. The approval of a site specific development plan may include terms and conditions that are reasonably necessary to protect the public health, safety, and welfare. Although a conditional approval will result in a vested right, failure to abide by the terms and conditions will result in the forfeiture of the vested property rights.⁹⁰

Within 14 days after the approval of the site specific development plan, a notice must be published regarding the approval of the site specific development plan and that vested rights will attach to said plan, although the statute does not assign responsibility to the local government for its publication. The local government’s approval and grant of vested rights is subject to all rights of the voters for a referendum vote and/or judicial appeals, which do not begin to run until the notice is published.⁹¹

⁸⁷ C.R.S. § 24-68-102(5).

⁸⁸ C.R.S. § 24-68-105(1).

⁸⁹ *SK Finance SA v. La Plata County*, 126 F.3d 1272 (10th Cir. 1997).

⁹⁰ C.R.S. § 24-68-103(1)(c).

⁹¹ C.R.S. § 24-68-103(1)(c).

ENVIRONMENTAL PROTECTION ISSUES

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Colorado's Climate Action Plan

Colorado has considered issues of climate change. In Colorado's Climate Action Plan, a recent strategy to address global warming, Colorado declared statewide goals for reducing emissions.⁹² The Climate Action Plan identifies the transportation and land use sector as a major source of Colorado's greenhouse gas emissions. For example, Colorado's emissions from the transportation and land use sector totaled 28 million metric tons of carbon dioxide equivalents in 2005, accounting for approximately 24% of Colorado's total greenhouse gas emissions.⁹³

Colorado has taken the position that greenhouse gas regulation is best implemented at the national level. However, the Western Climate Initiative provides an example of how several western states—Arizona, California, New Mexico, Oregon, Utah, and Washington—address climate change. These states are developing an emissions trading program designed to reduce greenhouse gases across the region to 15% below 2005 levels by the year 2020.

Some Colorado cities, however, have adopted strategies to address climate change. Denver, Boulder, and Aspen, among others, have developed formal Climate Action Plans. Denver's 2006 plan contained ten recommendations intended to help reduce the city's per capita greenhouse gas emissions by 10% from the 1990 emission rate by 2011. Boulder created a greenhouse gas inventory and a plan to reduce energy consumption in commercial and residential buildings.⁹⁴ The City of Aspen established the Canary Initiative to reduce greenhouse gas emissions.⁹⁵ In connection with these local initiatives, Colorado's Energy Office will identify best practices of communities throughout the state to help other local Colorado communities launch their own climate initiatives.

⁹² In 2007, Colorado's Governor Ritter issued an Executive Order directing the state to reduce overall energy consumption by 20% by 2012 and petroleum use by the state vehicle fleet by 25% by 2012.

⁹³ *Final Report of the Climate Action Panel*, Colorado Climate Project of the Rocky Mountain Climate Organization (November 2007).

⁹⁴ City of Boulder – Climate Action Plan, available at http://www.bouldercolorado.gov/files/LEAD/climate%20and%20energy/cap_final_25sept06.pdf.

⁹⁵ City of Aspen Canary Initiative – Climate Action Plan 2007-2009, available at <http://aspenglobalwarming.com/pdf/CAP.pdf>.

Water Pollution Control

The Colorado Water Quality Control Act governs protection of the quality of state waters and prevention of water pollution. The statute creates the Water Quality Control Commission (Commission),⁹⁶ whose purpose is to develop and maintain an effective program for water quality protection. The Commission's duties include classifying state waters, promulgating water quality standards, establishing regulations, and issuing permit regulations.⁹⁷ The statutes expressly protect water rights from material injury.⁹⁸ The Commission has the power to approve site locations of wastewater treatment facilities and to resolve related issues regarding site approval.⁹⁹ In addition, the Commission may consider future uses of water in its efforts to protect water quality.¹⁰⁰ The Division may obtain a temporary restraining order or injunction to prevent violations or threatened violations of the Act if an action poses imminent and substantial endangerment of water quality that cannot be prevented by modifying or enforcing a permit.¹⁰¹

The statute also provides for regional wastewater management plans to be developed by designated planning agencies. In areas with no designated management agency, the state will develop these plans.¹⁰² A regional wastewater management plan is a requirement of section 208 of the federal CWA. The Denver Regional Council of Governments is the designated planning agency in the Denver area. Other similar agencies, such as the Pikes Peak Area Council of Governments and the Northwest Colorado Council of Governments, exist in many parts of the state.

Water Supply and Runoff Considerations

In general, there are two types of water in Colorado: tributary water and underground water.

"Tributary water" is water that flows in natural surface streams or their alluviums. This water is the property of the public, subject to appropriation for beneficial use.¹⁰³ Tributary water is governed by the priority system, which means "first in time is first in right."

To appropriate a tributary water right, there must be intent to take water for a beneficial use, coupled with an open, physical demonstration or formal showing of intent.¹⁰⁴ The

⁹⁶ C.R.S. § 25-8-201.

⁹⁷ C.R.S. § 25-8-202.

⁹⁸ C.R.S. § 25-8-104; *see also* Denver Bd. of Water Comm'rs v. Grand County Comm'rs, 782 P.2d 753 (Colo. 1989) (neither water rights nor the Land Use Act is restricted by the Colorado Water Quality Control Act).

⁹⁹ Barr Lake Village Metro. Dist. v. Colo. Water Quality Control Comm'n, 835 P.2d 613 (Colo. App. 1992).

¹⁰⁰ Amax, Inc. v. Colo. Water Quality Control Comm'n, 790 P.2d 879 (Colo. App. 1989).

¹⁰¹ C.R.S. § 25-8-607.

¹⁰² C.R.S. § 25-8-105.

¹⁰³ C.R.S. § 37-92-102(1)(a).

¹⁰⁴ Purgatoire River Water Conservancy Dist. v. Witte, 859 P.2d 825 (Colo. 1993); Upper Gunnison River Water Conservancy Dist. v. Arapahoe County Comm'rs, 841 P.2d 1061 (Colo. 1992); City of Thornton Utils. Bd. v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

appropriator must notify interested parties of his or her intent to appropriate. The notice must describe the nature and extent of the proposed demand for the water, but need not state the exact amount of water needed or describe the specific point of diversion.¹⁰⁵ If the water is not actually put to beneficial use at the time of the initial appropriation, the appropriator can obtain a “conditional water right.” A conditional water right is a right to perfect a water right with a certain priority upon completion of reasonable diligence.¹⁰⁶ This conditional water right can be developed for beneficial use over time.¹⁰⁷ The owner of a conditional water right must complete the appropriation in a reasonably expedient and efficient manner under the facts and circumstances¹⁰⁸ and must make a demonstration of diligence to the water court every six years.¹⁰⁹ If diligence is not demonstrated, or the owner fails to meet the filing deadline, the owner loses the conditional water right.¹¹⁰

Once the water is put to use, and the court declares the water right is absolute, no further demonstration of diligence is required. Nevertheless, absolute water rights can be abandoned if there is nonuse of the right coupled with an intention to abandon. Continued unexplained nonuse of the water creates a rebuttable presumption of abandonment that must be disproved by a preponderance of the evidence.¹¹¹ An attempt to sell or transfer a conditional water right should not be construed as an intent to abandon the water right.¹¹²

“Underground water” is water that is not visible on the surface of the ground under natural conditions.¹¹³ “Nontributary ground water” is underground water defined by statute as water outside a designated ground water basin that does not affect the flow of a natural stream at a rate greater than one-tenth of 1% of the amount of water withdrawn on an annual basis.¹¹⁴ This water is not subject to the doctrine of appropriation and is available for use by the overlying landowner. The amount of water available is calculated in accordance with the amount of acreage owned.

Because of the nonrenewable nature of this water, counties and municipalities have been hesitant to approve developments based on the “one hundred year supply” standard. Several

¹⁰⁵ *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996); *City of Thornton Utils. Bd. v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

¹⁰⁶ C.R.S. § 37-92-103(6).

¹⁰⁷ *See Municipal Subdistrict, N. Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701 (Colo. 1999); *Municipal Subdistrict, N. Colo. Water Conservancy Dist. v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986).

¹⁰⁸ C.R.S. § 37-92-301(4)(b).

¹⁰⁹ C.R.S. § 37-92-301(4)(a).

¹¹⁰ *Dallas Creek Water Co. v. Huey*, 933 P.2d 27 (Colo. 1997); *Purgatoire River Water Conservancy Dist. v. Witte*, 859 P.2d 825 (Colo. 1993); *Fort Lyon Canal Co. v. Purgatoire River Water Conservancy Dist.*, 818 P.2d 747 (Colo. 1991); *Town of De Beque v. Enewold*, 606 P.2d 48 (Colo. 1980).

¹¹¹ *See City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996); *Denver Bd. of Water Comm'rs v. Middle Park Water Conservancy Dist.*, 925 P.2d 283 (Colo. 1996); *Consol. Home Supply Ditch & Reservoir Co. v. Town of Berthoud*, 896 P.2d 260 (Colo. 1995); *SRJ I Venture v. Smith Cattle, Inc.*, 820 P.2d 341 (Colo. 1991); *People ex. rel. Danielson v. City of Thornton*, 775 P.2d 11 (Colo. 1989).

¹¹² *Pub. Serv. Co. v. Blue River Irrigation Co.*, 829 P.2d 1276 (Colo. 1992).

¹¹³ C.R.S. § 37-90-103(19).

¹¹⁴ C.R.S. § 37-90-103(10.5).

entities have required reserve supplies substantially in excess of the state engineer's one hundred year standard for approval of development projects.

Statutes passed in 1985 created a unique second type of ground water: "not nontributary water." This water lies in the same aquifers as nontributary water but is closer to the stream system, and therefore affects the surface stream at a rate greater than one-tenth of 1% of the amount withdrawn. The complicated procedures developed regarding this type of water are the subject of continuing litigation. It is sufficient to say that this water is much more difficult to develop. In certain cases, users of this water must provide for replacements of depletions that continue to occur long after pumping of the wells ceases.

The third type of underground water is "designated ground water." This type of ground water, in its natural course, is neither available nor required to fulfill decreed surface rights or diminished ground water in areas not adjacent to a continuously flowing natural stream. Ground water withdrawals may constitute the principal water usage for at least 15 years preceding the date of the first hearing on the proposed designation of the basin.¹¹⁵

Designated ground water is diverted and used in accordance with actions of the Ground Water Commission. The Commission designates certain areas of the state as "designated ground water basins."¹¹⁶ This type of water exists primarily in the plains areas of Colorado. Any person desiring to appropriate ground water for a beneficial use in a designated ground water basin applies to the Commission in accordance with C.R.S. § 37-90-107. The Commission determines whether there are unappropriated waters in that designated source and whether the proposed appropriation would unreasonably impair existing water rights or create unreasonable waste.¹¹⁷ If there is unappropriated water and no unreasonable waste, the application is granted. Any party adversely affected or aggrieved by a decision of the Ground Water Commission may appeal to the district court in the county where the water rights or wells are situated.¹¹⁸ It is generally assumed that nontributary water is the favored source. In fact, the statute provides that mere lowering of the water table is not injury.

Water rights are valuable property rights, though not absolute rights. A holder of a decreed water right may change its use or relocate its point of diversion. A municipality may purchase water rights previously used for agricultural purposes and subsequently devote them to municipal purposes, provided no adverse effect is suffered by other users, including junior priorities.¹¹⁹ The municipality may also impose reasonable regulations on the manner and method of appropriation. Clearly, the value of the water right is in its relative priority and its use.¹²⁰

¹¹⁵ C.R.S. § 37-90-103(6)(a).

¹¹⁶ C.R.S. § 37-90-106.

¹¹⁷ C.R.S. § 37-90-107(4); *Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

¹¹⁸ C.R.S. § 37-90-115(1).

¹¹⁹ *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

¹²⁰ *Concerning Application for Water Rights of Midway Ranches Property Owners' Ass'n*, 938 P.2d 515 (Colo. 1997); *Concerning Application for Water Rights of Turkey Canon Ranch L.L.C.*, 937 P.2d 739 (Colo. 1997); *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

The Colorado Constitution recognizes the value and importance of water rights by stating that the right to divert water for beneficial use shall never be denied.¹²¹ Any person owning a water right or conditional water right is entitled to a right-of-way through the lands that lie between the point of diversion and the point of use for the purpose of transporting water for beneficial use.¹²² However, the requirement to divert water to attain a water right was recently modified. The Colorado Supreme Court affirmed a district water court decree granting water rights for municipal instream flow for a kayaking course and other recreational activities; the decision rests on the premise that recreation can be considered a “beneficial use.”¹²³ Even a private party can have a right-of-way condemned for a ditch through the lands of another in order to convey water to his or her property.¹²⁴ The rights of a ditch owner extend to the bed of the ditch with sufficient ground on either side to maintain a right-of-way.¹²⁵

¹²¹ Colo. Const. art. XVI, § 6.

¹²² C.R.S. § 37-86-102.

¹²³ *State Eng’r v. City of Golden*, 69 P.3d 1027 (Colo. 2003).

¹²⁴ *Downing v. More*, 12 Colo. 316, 20 P. 766 (1888).

¹²⁵ *Shrull v. Rapasardi*, 33 Colo. App. 148, 517 P.2d 860 (1973).