THE ROCKY MOUNTAIN LAND USE INSTITUTE

CONCURRENT SESSION

Recent Land Use Decisions in the Rocky Mountain West

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Sturm College of Law

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ROCKY MOUNTAIN LAND USE INSTITUTE

RECENT LAND USE DECISIONS IN THE ROCKY MOUNTAIN WEST

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SUPREME COURT OF THE UNITED STATES

City of Littleton v. Z.J. Gifts, L.L.C., 541 U.S. 774, 124 S.Ct. 2219 (2004).

Adult book store owner challenged the City's adult business licensing ordinance on First Amendment and 42 U.S.C. § 1983 grounds. The ordinance required adult bookstores, novelty stores, and video stores to obtain an adult business license and listed eight specific criteria, which included separation and zoning requirements, which, if present, required the City to deny the license. The ordinance also set forth time limits, typically amounting to approximately 40 days, within which City officials must reach a final licensing decision. The Tenth Circuit Court of Appeals held that the ordinance and the judicial review process for disputes under the ordinance violated the constitutional requirement for prompt consideration of applications under the First Amendment. The Supreme Court reversed, holding that even though the First Amendment requires adult business licensing decisions to be made promptly both at the administrative level and upon judicial review, it was not necessary to impose special time limits on courts in cases where ordinary judicial review procedures suffice, as long as courts remain sensitive to the need to prevent First Amendment harms and administer review procedures accordingly. The Supreme Court further held that First Amendment requirements were satisfied by an adult business licensing scheme that did not seek to censor content, that conditioned the operation of adult businesses on compliance with neutral and nondiscretionary criteria, and where the language in the ordinance provided for judicial review of adverse licensing decisions in accordance with a state's ordinary review procedures. The Court stated: "We presume that courts are aware of the constitutional need to avoid 'undue delay result[ing] in the unconstitutional suppression of protected speech' ." *City of Littleton* at 2224.

NINTH CIRCUIT

Fleck and Associates, Inc., v. City of Phoenix, 2005 WL 352639 (D. Ariz. 2005).

A corporation operating a social club, which offered facilities for gay men to engage in consensual sex, sued the City, claiming that the ordinance banning businesses providing opportunities for engaging in or viewing live sex acts was unconstitutional. The District Court for the District of Arizona held that the corporation lacked standing to represent customers, that the corporation had standing to assert its own interests and that, since only individual patrons could assert privacy claims, the corporation did not have a constitutionally protected privacy interest violated by the ordinance. The Court also held that the patrons did not have an expectation of privacy in club activities to support a claim that their privacy rights were violated by the ordinance because privacy rights attached to activities conducted at home and do not follow patrons when they go to a public place.

Dream Palace v. County of Maricopa, 384 F.3d 990 (9th Cir. 2004).

Adult nude dancing establishment and some of its managers and employees brought an action challenging the constitutionality of the county's adult entertainment ordinance. The District

Court for the District of Arizona entered judgment in favor of the county and the plaintiffs appealed. The Court of Appeals held (1) the ordinance's licensing requirement satisfied First Amendment requirements for prior restraints on speech, (ii) the ordinance's requirement that the managers and dancers exhaust their administrative remedies prior to seeking judicial review of a denial of a work permit was not a prior restraint on free speech, (iii) the chilling effect on protected expression created by the ordinance required an injunction prohibiting the county from disclosing personal information about adult entertainers under state public records law and, (iv) the ordinance's hours of operations restrictions served the substantial government interest in curbing the secondary effects associated with adult entertainment establishments. The Court of Appeals also held that the ordinance's requirement that the managers of adult entertainment establishments obtain work permits was a reasonable time, place, and manner restriction on free speech, but that the ordinance, by effectively banning nude and semi-nude dancing through its prohibition on "simulated sex acts" during the course of a performance, violated First Amendment free speech protections. Regarding the Court's conclusion that Section 13(e) of the ordinance violated First Amendment free speech protections, the Court stated:

> Maricopa County cannot avoid the constitutional prohibition on proscribing non-obscene speech 'by regulating nude dancing with such stringent restrictions that the dance no longer conveys eroticism nor resembles adult entertainment.'… Section 13(e), in preventing erotic dancers from practicing a protected form of expression, does precisely that. We therefore apply strict scrutiny to section 13(e). To survive strict scrutiny, the provision must be tailored to "serve a compelling state interest and is narrowly drawn to achieve that end" …Section 13(e) is not necessary to serve Maricopa County's unquestioned significant interest in ameliorating secondary effects. The county can, and does, utilize a variety of less restrictive and more direct means to fight those effects. Nor has the county explained how the restriction will in fact further its interest in curbing secondary effects. Therefore, we must conclude that section 13(e) is an unconstitutional burden on the enjoyment of protected expression.

Dream Palace at 1021.

Center For Fair Public Policy v. Maricopa County, Arizona, 336 F.3d 1153 (9th Cir. 2003) (certiorari denied by Center For Fair Public Policy v. Maricopa County, Arizona, 124 S.Ct. 1879, 158 L.Ed.2d 468 (2004)).

The owners and operators of sexually-oriented businesses brought civil rights action against the city, county, and state, seeking declaratory and injunctive relief and asserting that the state statute prohibiting sexually-oriented businesses from operating during late night hours violated the First Amendment. The District Court for the District of Arizona entered judgment for the defendants and the plaintiffs appealed. The Court of Appeals held that the statute did not violate the First Amendment under intermediate scrutiny because a state's interest in curbing the secondary effects associated with adult entertainment is substantial and because the government's interest in the amelioration of the secondary effects associated with the late night operation of sexually-oriented businesses, including prostitution, drug use, and littering, would

be achieved less effectively in the absence of the statute. The Court also found that the statute did not unreasonably limit alternative avenues of communication because it permitted the businesses within its purview to operate seventeen hours per day, Monday through Saturday, and thirteen hours on Sunday.

Worldwide Video v. City of Spokane, 368 F.3d 1186 (9th Cir. 2004).

Adult oriented retail business, Worldwide Video, challenged the City of Spokane zoning ordinance on First amendment and 42 U.S.C. § 1983 grounds. The ordinance regulated the location of sexually oriented businesses in proximity to certain land use categories and provided a one-year period during which nonconforming stores were required either to relocate or change the nature of their retail operations. The District Court for the Eastern District of Washington entered summary judgment for the City. Worldwide appealed. The Court of Appeals held that the zoning ordinance survived intermediate scrutiny under the First Amendment because the ordinance was narrowly tailored to serve the City's substantial interest in reducing the undesirable secondary effects of adult stores. The Court also found that the ordinance did not substantially reduce speech by forcing stores to close because it provided adequate alternative locations.

San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004).

Religiously-affiliated college sought a zoning amendment to change the allowable uses within an existing public utilities district ("PUD") to allow a religious educational facility. The PUD originally only allowed hospital use. Because the college failed to provide a site plan, building elevations, and landscaping plan, the City rejected the college's application and requested additional details about the anticipated sizes and types of various gatherings and uses. While the college was preparing its application for re-submittal, a City-formed community health care task force recommended that the property remain zoned for hospital use. The college's application was subsequently denied. The college sued the City for injunctive relief, alleging that the City's zoning process violated the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA). The District Court for the Northern District of California granted the City's motion for summary judgment and the college appealed. The Court of Appeals affirmed, holding that the denial of the rezoning application did not violate RLUIPA and did not deprive the college of its free exercise rights under the First Amendment. In rejecting the college's free exercise claim, the Court stated:

> [t]he City's regulations in this case do not render religious exercise effectively impracticable…[W]hile the PUD ordinance may have rendered College unable to provide education and/or worship at the Property, there is no evidence in the record demonstrating that the College was precluded from using other sites within the City. Nor is there any evidence that the City would not impose the same requirements on any other entity seeking to build something other than a hospital on the Property.

Morgan Hill at 1035.

Gammoh v. City of La Habra, 395 F.3d 1114 (9th Cir. 2005).

Owner of adult entertainment club and dancer-employees brought action challenging constitutionality of the City's ordinance that required adult cabaret dancers to remain two feet away from patrons during performances. The District Court for the Central District of California dismissed certain claims and granted summary judgment in favor of the City on others. The plaintiffs appealed. The Court of Appeals held that the City ordinance was not void for vagueness, was not overbroad, and that the plaintiffs failed to demonstrate that the ordinance violated the Takings Clause because they could not show any constitutionally protected property interest. Because the City's primary concern in enacting the ordinance was the secondary effects of adult cabarets, the Court applied intermediate scrutiny to the plaintiffs' First Amendment claim and held that the ordinance did not violate the First Amendment because it was narrowly tailored to serve the substantial government interest of preventing secondary effects of adult businesses. *See also Center For Fair Public Policy v. Maricopa County,* 336 F.3d 1153 (9th Cir. 2003) (discussed above).

Recreational Developments of Phoenix v. City of Phoenix, 2003 WL 22383511 (9th Cir. 2003) (memorandum decision).

In *Recreational Developments of Phoenix*, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of the City of Phoenix involving the City's ordinance prohibiting the operation of a business "or purposes of providing the opportunity to engage in, or the opportunity to view, live sex acts." Specifically, the Court of Appeals held that because the plaintiffs mentioned constitutional issues only in passing in their opening brief, which was insufficient to preserve those issues on appeal, the plaintiffs waived any challenge to the District Court's decision on the constitutionality of the City's ordinance. In the District Court case, the owners and members of "swingers" clubs brought an action challenging the constitutionality of the above ordinance. The District Court held that the ordinance did not constitute a taking because the City was substantially advancing a legitimate state interest given that the ordinance's asserted purposes of combating the transmission of sexually transmitted diseases and preserving societal order and morality were clearly legitimate purposes. The District Court observed that its holding was driven, in part, because the prohibition on the swingers clubs did not deprive the property owners of all economically viable use of their property, but merely *that* use of their property. In addition, the District Court upheld its prior order in this case that the activity of the swingers in the public clubs was not a protected form of expression.

ARIZONA CASES

***Raven Rock Construction v. Board of Supervisors of Maricopa County,* 207 Ariz. 135, 83 P.3d 613 (App. 2004).**

In *Raven Rock*, the Court of Appeals held that because the property owner, Raven Rock, did not obtain an agricultural classification from the state or a certificate of agricultural exemption from the county, it was subject to a county zoning ordinance prohibiting the use of "non-accessory vehicles," such as a front-end loader, in a residential zone. Raven Rock challenged the county's authority to enforce the ordinance, contending that the county's exemption requirement constituted a regulation of its property in violation of ARIZ. REV. STAT. § 11-830(A)(2), which excludes from zoning requirements "the use or occupation of land or improvements for . . . general agricultural purposes, if the tract concerned is five or more contiguous commercial acres." Raven Rock argued that ARIZ. REV. STAT. § 11-830 is self-executing and, as a result, the county lacked authority to determine and apply the exemption. The Court reasoned that since ARIZ. REV. STAT § 11-802 authorizes a county to "adopt and enforce such rules, regulations, ordinances and plans as may apply to the development of its area of jurisdiction," the county was within its authority to adopt reasonable procedures to establish the means by which property is exempt from compliance with county ordinances.

***Washburn v. Pima County,* 206 Ariz. 571, 81 P.3d 1030 (App. 2004).**

After the Washburns were denied a permit to build a home, they filed a declaratory judgment and special action complaint seeking a declaration that the county lacked statutory authority to adopt an ordinance requiring builders of single-family homes to incorporate design features based on selected construction standards from the American National Standards Institute's (ANSI) publication A117.1, which allows for greater wheelchair access. The Washburns also claimed that the county violated their rights under the privacy clause and the equal protection clause of the Arizona Constitution. The lower court granted the county's motion for summary judgment. The Washburns appealed. The Court of Appeals held (i) the county did not exceed its statutory authority in adopting the ordinance, (ii) the ordinance did not violate the Washburn's rights under the privacy clause of the Arizona Constitution because homeowners do not have a right to be completely free from governmental regulation of the use and occupancy of their real property, and (iii) the ordinance did not violate the equal protection clause of the Arizona Constitution because the board of supervisors could have rationally concluded that the benefit to the community of the required design justified the minimal cost of implementing it. The Court observed that although legislation authorizes counties to adopt building codes, that authority is limited under ARIZ. REV. STAT. § 11-861 to the adoption of "[a]ny building, electrical or mechanical code that has been promulgated by any national organization or association that is organized and conducted for the purposes of developing codes." The Court then rejected the Washburn's argument that the county could not adopt the ANSI standards under ARIZ. REV. STAT. § 11-861 because the International Code Council neither titled nor classified such standards as a "code," stating that it could find no policy-based explanation as to why the legislature would have intended to limit the breadth of the word "code," as it is used in ARIZ. REV. STAT. § 11- 861(C)(1). The Court subsequently concluded that ARIZ. REV. STAT. § 11-861(C)(1) enables counties to adopt individual building design criterion promulgated by any national organization or association that is organized and conducted for the purpose of developing codes, which the county determines advances the general health, safety, and welfare of its residents.

Wonders v. Pima County, 207 Ariz. 576, 89 P.3d 810 (App. 2004).

To comply with Pima County's native plant protection ordinance, Wonders submitted a native plant preservation plan. He later filed a lawsuit challenging the ordinance on preemption and taking grounds and also claimed that the ordinance was an invalid exaction under *Dolan* (the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government). The trial court granted summary judgment for the county. Wonders appealed. The Court of Appeals affirmed, holding that the state native plant act expressly allows consistent county regulations, that Wonders' takings claim was precluded by his right to construct 167 lots on approximately 174 acres, and that the ordinance did not effect an invalid exaction of any of Wonders' constitutional rights. In its reasoning, the Court observed that although the U.S. Supreme Court in *Palazzo* expressed discomfort with the rule that requires the court to look at the parcel as a whole in determining whether a regulatory taking has occurred, that rule has not been changed. Because the regulatory taking analysis required consideration of whether the regulation left Wonders' entire 174 acres economically unfeasible, the Court concluded that the county's requirement that Wonders set aside thirty acres of undisturbed land to comply with the native plant preservation ordinance was not a taking.

Orsett/Columbia Limited Partnership v. Superior Court , 207 Ariz. 130, 83 P.3d 608 (App. 2004).

Maricopa County leased property for the Peoria justice of the peace court from 1989 to 2003. The county remained in possession of the property after the parties failed to negotiate a lease extension. The property owner subsequently filed a forcible entry and detainer action and the county filed an eminent domain action, seeking to condemn a 23-month leasehold interest in the commercial property. The Superior Court issued an order granting the county immediate possession of the premises. Orsett appealed. The Court of Appeals held that the statute dealing with limiting the property interest or estate that the county was permitted to take in eminent domain failed to authorize the taking of a leasehold interest. Specifically, the Court found that ARIZ. REV. STAT. § 12-1113 requires a government to take fee title when condemning for public buildings because "fee simple" in the statute refers to an interest that is acquired "in its entirety and as a perpetuity" and, by its very nature, a mere leasehold interest, as commonly understood, cannot be taken in perpetuity. (See the discussion of SB 1197 below.)

Bailey v. Myers, 206 Ariz. 224, 76 P.3d 898 (App. 2003).

The City of Mesa brought a condemnation action against the Baileys to acquire the property on which their family business, Bailey's Brake Service, was located for a redevelopment project involving a privately-owned retail center. The Superior Court entered judgment in favor of the City. The Baileys petitioned for special action relief. The Court of Appeals vacated the lower court's decision, holding that because the condemnation of the Bailey's property for the redevelopment project was not a "public use" as envisioned by Article 2, Section 17 of the

Arizona Constitution, the City could not take the Bailey's property for the privately owned retail center. The Court stated:

> [W]hen a proposed taking for a redevelopment project will result in private commercial ownership and operation, the Arizona Constitution requires that the anticipated benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is "really public." The constitutional requirement of "public use" is only satisfied when the public benefits and characteristics of the intended use substantially predominate over the private nature of that use.

Bailey at 230.

State of Arizona v. Mutschler, 204 Ariz. 520, 65 P.3d 469 (App. 2003).

Defendants were convicted in municipal court of operating a live sex act business in violation of a local ordinance. Defendants appealed. The Superior Court affirmed. Defendants appealed, claiming that the ordinance was vague and overbroad. The Court of Appeals held that the terms "may" and "consideration" in the ordinance did not render the ordinance unconstitutionally vague and that the ordinance was not overbroad where it defined live sex act business as "any business in which one or more persons may view, or may participate in, a live sex act for consideration."

Aegis of Arizona v. The Town Of Marana, 206 Ariz. 557, 81 P.3d 1016 (App. 2003).

Aegis entered into a contract to purchase industrially zoned land in the Town for a medical waste facility. During the due diligence period, Aegis's representative met with the Town's acting planning director, who informed the representative that medical waste disposal was a permitted use in the industrial zone. After finalizing its purchase of the land and filing an application for development review, Aegis was told that a conditional use permit was required for the medical disposal use. Aegis subsequently applied for and was denied the conditional use permit. Aegis then brought substantive due process and equal protection claims under 42 U.S.C. § 1983 against the Town. The Superior Court entered judgment on a jury verdict of $428,199 for Aegis. The Town appealed. The Court of Appeals vacated the verdict and ordered that judgment be entered in favor of the Town, concluding that there was nothing improper about the Town requiring Aegis to apply for a conditional use permit because the oral statement of the acting planning director was not a final determination. The Court also rejected Aegis's substantive due process and equal protection claims on the grounds that Aegis did not have a protectable property interest in the acting planning director's oral representation and that Aegis failed to show that the Town treated Aegis differently than other conditional use permit applicants. Addressing Aegis's contention that the denial of the conditional use permit was based solely on negative publicity and vocal public opposition to the proposed medical waste disposal facility, the Court stated:

> [L]istening to public opposition to proposed land uses is part of the legislative process of rezoning. Indeed, "nothing is more common in zoning disputes than selfish opposition to

> zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operations of democratic…governments, operations which are permeated by pressures from special interests."

Aegis at 1028.

In reaching its decision on Aegis's substantive due process claim, the Court considered the Town's conditional use permit process to be a legislative function.

Zajec v. City of Casa Grande, 102 P.3d 297, 441 Ariz. Adv. Rep. 16 (2004).

The City passed a rezoning ordinance involving property owned by Wal-Mart. The ordinance was upheld by the local electorate in a referendum. Zajec subsequently filed a lawsuit alleging that the City failed to give him the required notice of the rezoning and requesting that City be enjoined from issuing construction permits to the applicant. The evidence indicated that notice was not sent to Zajec. The Superior Court dismissed Zajec's claim and Zajec appealed. The Court of Appeals, applying a strict compliance analysis to the mailed notice requirement, reversed. The City and the applicant petitioned for review. The Supreme Court of Arizona held that a duty is imposed upon one who would question the correctness or regularity of an election to act promptly. Because Zajec had information before the referendum of procedural defects in the referendum and failed to challenge the defects before the referendum vote, he waived his right to object under the equitable doctrine of estoppel by laches.

Redelsperger v. City of Avondale, 207 Ariz. 430, 87 P.3d 843 (App. 2004).

Redelsperger applied for and received a conditional use permit to construct a storage facility on commercially zoned land. Citizens for Better Avondale (CBA) collected sufficient referendum signatures to refer the matter to the voters. Redelsperger brought an action seeking relief in the form of a writ of mandamus declaring that, under *Wennerstom v. City of Mesa,* 169 Ariz. 485 (1991), the conditional use permit grant was not a legislative matter subject to referendum. The action also sought to permanently enjoin the City from certifying or placing the matter on an election ballot. The Superior Court entered judgment against Redelsperger and he appealed. The Court of Appeals reversed, holding that the issuance of the City's conditional use permit was an administrative act. In reaching its decision, the Court distinguished other cases where the courts have held the granting of special use permits to be the functional equivalent of a rezoning and thus legislative. In contrast, the Court found that Avondale's conditional use permit process was administrative because, even though the process granted discretion to issue a conditional use permit, that discretion was limited by certain specific standards set forth in the Avondale zoning ordinance. The Court stated:

> Legislative powers cannot be delegated to administrative bodies….A legislative body may, however, 'confer authority upon an agency or department to exercise its discretion in administering the law.'…The powers given an administrative board must, by the provisions of the act, be surrounded by standards, limitations, and policies. Only within such boundaries may the board act.'…Without standards to guide an administrative

> agency, there may be an unconstitutional delegation of legislative powers. …That is not the situation in this case, since Section 108 of the Zoning Ordinance provides an objective standard for the Commission to follow.

Redelsperger at 848.

City of Tucson v. Clear Channel Outdoor, Inc., 2005 WL 319682 (Ariz. Feb. 10, 2005).

The Supreme Court of Arizona vacated the opinion of the Court of Appeals, which held that a newly-enacted two-year statute of limitations on billboard enforcement actions applied retroactively to cases filed before the effective date of the new statute of limitation. The issue before the Supreme Court was whether an action that was timely when filed is barred because it would have been untimely under a statute of limitations that became effective after the filing. In reaching its decision, the Supreme Court relied on ARIZ. REV. STAT. § 12-505 (C), which provides that "[i]f an amendment of pre-existing law shortens the time of limitation fixed in the pre-existing law so that an action under pre-existing law would be barred when the amendment takes effect, such action may be brought within one year from the time the new law takes effect, and not afterward."

ARIZONA LEGISLATION (2004)

H.B. 2140. Air Base Facilities.

This bill requires notice to the attorney general whenever a local government adopts or re-adopts the general plan or a major amendment to the general plan that includes property in the high noise or accident potential zone of a military airport or ancillary military facility. The bill authorizes the attorney general to determine compliance or non-compliance with the state standards for land uses surrounding military airports as found in ARIZ. REV. STAT. § 28-8481. In addition, the bill creates a military affairs commission that provides recommendations to the governor and the legislature on military issues and recommends the use of a newly created military installation fund.

H.B. 2141. Military Airport; Restricted Zones.

This bill creates a definition of "ancillary military facility" and imposes various notification requirements whenever there is a rezoning, development approval, proposed subdivision, variance or other development activity that might conflict with its operation.

H.B. 2149. Airport Authority, Joint Powers.

This bill expands the authority of the joint powers airport authority and the financing options available to that authority.

H.B. 2539. Eminent Domain, Attorney Fees.

This bill changes condemnation procedures for acquisition of owner-occupant residential property by requiring, if requested by the condemnee, the government to pay for a second appraisal, requires disclosure of all appraisals, requires certain additional relocation benefits, and allows a court to award fees and other expenses to the condemnee. The law does not apply to "actions for acquisition of property for public safety, transportation, flood control or utility purposes."

S.B. 1197. Eminent Domain.

This bill codifies the holding in the *Orsett* case, discussed above. The bill provides that a "leasehold interest in a building may be taken in fee title or easement only if the underlying property is taken."

H.B. 2478. Homeowners' Associations, Political Signs.

This bill exempts the indoor or outdoor display of a political sign with a maximum dimension of 24 X 24 inches from any regulation whatsoever by a homeowners' association rules and regulations.

H.B. 22492. Homeowners' Associations, Parking.

This bill modifies the existing parking exemption from homeowners' association rules and regulations so that they now apply to vehicles with a gross vehicle weight rating of 20,000 lbs. or less owned by a public service corporation or to a gross vehicle weight rating of 10,000 lbs. or less owned by public safety agencies, which includes ambulance service providers.

H.B. 2070. Counties, Rezoning Ordinance.

This bill adds the following definition of "rezoning ordinance" to the county zoning enabling statute: "Rezoning ordinance' means that portion of a zoning ordinance adopted by the board of supervisors that identifies the requirements for amending or changing the zoning district boundaries or regulations within an area previously zoned."

OKLAHOMA CASES

City of Midwest City v. House of Realty, Inc., 100 P. 3d 678, 2004 OK 56 (6/29/04).

City brought condemnation proceedings to acquire properties for economic development purposes. The District Court, Oklahoma County, overruled the landowners' objections to the City's takings and confirmed compensation awards. The landowners appealed. The Supreme

Court of Oklahoma reversed, holding that the City, which was acting jointly with a public trust, did not possess authority pursuant to its general eminent domain powers to condemn properties for the purpose of economic redevelopment and blight removal where the City's Local Development Act contained no express, or necessarily implied, grant of an eminent domain power to a municipality. The City agreed that the Local Development Act did not contain any express grant of eminent domain authority to municipalities. However, the City argued that when considered within the framework of its statutorily-granted general power of eminent domain, its authority to exercise its eminent domain power when executing provisions of the Local Development Act was implied and not limited unless the City decided to follow a redevelopment statutory scheme that limited its general condemnation power. In opposition, the landowners claimed that specific statutes on economic development must be followed by a municipality when it seeks to exercise eminent domain for economic development. The Supreme Court of Oklahoma stated:

> [a] municipality is not possessed with an unfettered discretion to condemn property for economic redevelopment projects outside of the scope of statutory schemes that the legislature has provided for removal of blighted property…Many redevelopment statutes use condemnation to economically redevelop areas that have become blighted. These statutes frequently authorize private use of property after the blighted conditions are removed…*the public use or public purpose is legitimately served by the legislative object of slum or blighted area clearance*, and the fact that private interests benefit incidentally or that private parties acquire ownership *after the public purpose of the elimination of the undesirable conditions has been served* is merely incidental to the main legislative purpose…[removal of blight] is the public purpose that constitutionally justifies the subsequent sale of the property for private use.

City of Midwest at 685 (internal citations omitted).

Department of Transportation v. Little, 100 P.3d 707, 2004 OK 74 (2004).

The Department of Transportation brought condemnation proceeding to acquire a tract of land from property owners. Both parties took exception to the court-appointed commissioners' report regarding just compensation and demanded a jury trial. The trial court entered judgment on a jury verdict of $265,000. The Department appealed. The Court of Civil Appeals dismissed the appeal. Upon grant of certiorari, the Supreme Court of Oklahoma vacated the dismissal and remanded. Upon remand, the Court of Civil Appeals affirmed the judgment in part, reversed in part, and remanded. The Department sought certiorari. The Supreme Court of Oklahoma subsequently held that the property owners were entitled to seek relocation expenses in the condemnation proceeding. The Court further held that the Federal Uniform Relocation Assistance Act (FURA), which provides relocation assistance to property owners forced to relocate after a condemnation, did not provide the exclusive remedy by which property owners could obtain relocation expenses. The Court also concluded that the landowners were not required to exhaust administrative remedies before seeking relocation expenses where there was

no evidence that the property owners ever invoked the administrative process for determining relocation benefits under the relocation assistance program. The Court stated:

> The relocation assistance acts do not add or subtract from the components of value or damage due a condemnee as just compensation under the state law of eminent domain…This court should never be unmindful that a landowner is *entitled to be compensated fully* when the latter's property is taken by the government in the exercise of the eminent domain power. The mandate of both the state and federal constitutions strongly supports full indemnification by just compensation. The command requires that the condemnee be placed as fully as possible in the same position as that occupied before the government's taking.

Little at 718.

Holtzen v. Tulsa County Board of Adjustment, 97 P.3d 1150 (Okla. App. 2004)

Residents near proposed amusement park expansion sought review of decision by county board of adjustment granting amusement park owner a special exception to expand the park. The county's zoning laws clearly allowed the board to grant the special exception to the amusement park owner. The lower court granted summary judgment to the residents based on the conflict between the zoning code and the comprehensive plan. The board and amusement park owner appealed. The appellate court held that the board's power under the county zoning code was not limited by the fact that the comprehensive plan designated the proposed expansion site as low density because the overwhelming weight of authority held that where a conflict exists, the zoning laws prevail over the comprehensive plan. The Court observed that, as a general rule, a comprehensive plan is considered a guide, is advisory in nature and not the equivalent of a zoning law.

ROCKY MOUNTAIN LAND USE INSTITUTE

April 22, 2005

RECENT LAND USE DECISIONS IN THE ROCKY MOUNTAIN WEST

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NEW MEXICO

I. Recent Cases

Alba v. Peoples Energy Resources Corporation, 2004-NMCA-084, 136 NM 79, 94 P. 3rd 822 (Ct. App. 2004)

This case discusses the finality of an order and when it=s not appropriate for the Court of Appeals to review a case on certiorari. Peoples Energy Resources Corporation's proposed power plant had been approved in an I-3 Industrial Zone by the Zoning Commission. Appellant had stated that he never had notice of the zone change, but the County said that since the entire county had been rezoned, publication was all that was necessary. Appellant appealed to the County Commission, claiming that a power plant is not a permissive or conditional use in the I-3 zone. The Commission denied the appeal.

Appellant appealed to the District Court, again maintaining that a power plant is not a permissive use in the I-3 zone, and that there was not sufficient evidence that the land was actually zoned I-3, and that the Commission=s decision was arbitrary and capricious. The District court reversed the Commission, holding that the power plant was not a Apermitted use@ in I-3, and that the county had not followed proper procedures in rezoning the property I-3. The district court remanded the case to the county so that the Appellant and the public could present evidence that the property was zoned I-3. Peoples appealed to the Court of Appeals.

Alba maintained that the remand was not a Afinal@ appealable order, citing High Ridge Hinkle Joint Venture v. City of Albuquerque, 119 NM 29, 888 P. 2d 479. The Court of Appeals reversed the District Court. It distinguished this case from Hinkle, holding that the district court=s finding that the power plant was not permitted in I-3 was, indeed, Afinal@. The Court of Appeals also found that the proposed use, although not specifically listed as a Apermitted use@, was Asimilar in character, scale and performance to the permitted uses specified@, and that the

ordinance allowed such Asimilar@ uses to those listed, based on the Aplain meaning@ rule of construction. Also, the Court of Appeals gave Apersuasive weight@ to the construction n of the ordinance by the County Planner**,** even though the ordinance had only been in effect since 2002, based on other interpretations by the County on what was allowed in I-3 as Asimilar uses@ to those specifically allowed. The County Commission, when it had made its decision, also did not commit error when it refused to admit a map offered by Alba, since that map was not the Aofficial@ county map. Therefore the Commission was correct in finding that the property was I-3 and that the power plant was a permitted use in that district.

Cerrillos Gravel Products, Inc. et al. v. Board of County Commissioners of Santa Fe County, et al., 2004-NMCA-096, 136 N.M. 247, 96 P. 3d 1167 (Ct. App. 2004)

The Court of Appeals upheld a county ordinance which provided that the county could revoke or suspend a mining permit. The County had revoked a mining permit which it had issued to Cerillos because it did not comply with conditions attached to the permit. Cerrillos appealed to District Court, alleging that the County could not revoke the permit, but could only seek an injunction or file an abatement action. The District Court ruled for Cerrillos. The Court of Appeals reversed the District Court, finding that the County Ordinance pursuant to which the mining permit had been granted specifically allowed the County to revoke the permit if conditions were not met. The County had authority to enact its mining ordinance pursuant to its zoning power, which it exercised pursuant to the State=s zoning enabling statute. That the mining permit had been issued before new mining requirements had been adopted by the county also did not affect the county=s power to enforce the conditions of the permit. Cerrillos also had no >vested right@ to operate without meeting the conditions attached to the permit. Other issues raised by Cerrillos, including that it had been denied due process, had not been addressed by the District Court once it ruled for Cerrillos. The Court of Appeals remanded the case to the District Court to consider these other issues.

Valles v. Silverman, 2004 NMCA 019, 135 N.M. 741, 84 P. 3d 1056 (Ct. App. 2004)
The Court of Appeals held that a non-litigant could be held liable for civil abuse of process. Silverman (dba Geltmore) had proposed a shopping center in Albuquerque which Wal-Mart was to be the largest store. Valles and neighborhood associations had opposed the project which was approved by the City. When the City approved the project, Valles et al. appealed to district court and lost, but the case was overruled on other grounds. Silverman and other property owners then sued Valles, et al. for violation of several statutes and malicious abuse of process. Then district court dismissed the lawsuit and the Court of Appeals affirmed the dismissal. Walmart was not a party to the lawsuit. Saylor v. Valles, 2003- NMCA 037, 133 NM 432, 63 P. 3d. 1132. While Saylor was on appeal, the Plaintiffs sued Geltmore, Wal-Mart and other defendants for malicious abuse of process, alleging that Saylor was a SLAPP suit (Suit Against Public Participation, outlawed in New Mexico). Valles alleged that although Wal-Mart wasn=t a party to othe underlying lawsuit, it supported, encouraged and funded litigation against Valles. Wal-Mart moved to dismiss, saying it couldn=t be liable because it wasn=t a litigant in Saylor. The District Court dismissed the claims against Wal-Mart. The Court of Appeals reversed, holding that if a non-litigant participated in a conspiracy with the other plaintiffs in the SLAPP suit, or

that Was-Mart was united with the other parties to accomplish the tort of malicious abuse of process, it could be sued, and remanded the case to the District Court to determine whether there was sufficient evidence of Wal-Mart=s involvement.

Gallup Westside Development, LLC v. City of Gallup, 2004 NMCA 010, 135 N.M. 30, 84 P. 3d 78 (Ct. App. 2004).

In 1975, Plaintiff developer had obtained approval of a 4-unit subdivision, subject to an Assessment Procedure Agreement, (APA), which would expire in 1995. Unit 3 of the subdivision had not been built, and the Plaintiff had not performed the conditions of that agreement. In 1997, the City signed a Letter Agreement which would extend the APA, but also required that the developer move utilities and dedicate land for a park, among other provisions, to conform to new city regulations. The Plaintiff neither signed the Letter Agreement nor appealed it. In 1998, the developer proposed its own version of a Letter Agreement, which the City turned down, and the developer, appealed to the District Court, which ruled for the Plaintiff, ordering the City to comply with the terms of the original APA. The City appealed. The developer claimed vested rights in the original subdivision approval and APA. The Court of Appeals reversed, holding that as long as the City had retained the authority to revoke the original approval of the subdivision, which had done based on the APA which set forth specific conditions that had to be met, the developer had no vested rights to build Unit 3 pursuant to the original approval and expired APA.

Takhar v. Town of Taos, 2004 NMCA 072, 135 N.M. 741, 93 P. 3d 762 (Ct. App. 2004)

Plaintiff developer had a permit to build 42 apartment units which had been approved by the Town. She had completed 20 units and was proceeding to build the remaining 22 units, and had submitted an Aas built@ plan for the project. When the Town required the contractor to reapply for a building permit because of a dispute between the Town and the State Construction Industries Division, the Town reissued the same building permit. When the developer fired her first contractor, and hired a new contractor, who applied for a new permit to complete the project, the developer was told that her project exceeded applicable density requirements, and that she would have to apply for a special use permit. She was told to complete a total of 35 units. Having completed 28 units, she applied for a special use permit and was turned down by the city. Developer did not appeal the denial of the permit, but, instead, appealed to district court, alleging vested rights to complete all 42 units, as well as estoppel against the City, and inverse condemnation pursuant to the state inverse condemnation statute, NMSA 1978, Section 42A-1-29 (1983). The district court dismissed the complaint, based on the Town=s argument that she hadn=t appealed the denial of the special use permit, that she hadn=t stated a claim for promissory estoppel, and that it had governmental immunity, and that she had failed to state a claim for inverse condemnation because the claim wasn=t ripe pursuant to Williamson County Regional Planning Commission v. Hamilton Bank 473 U.S. 172 (1985). On appeal, the Court of Appeals found that the state=s inverse condemnation statute did not require an administrative appeal of the denial of the special use permit, and that a vested rights and estoppel claim also didn=t require an appeal of the permit denial, since these issues hadn=t been before the Town

when it turned down the permit and merely reversed the dismissal of the claim, allowing the Plaintiff to pursue her vested rights, estoppel and inverse condemnation claims.

II. Pending Cases in the New Mexico Court of Appeals

Albuquerque Commons Partnership v.City Council of the City of Albuquerque, In the Court of Appeals of the State of New Mexico, No. 24,026.

The Second Judicial District Court , County of Bernalillo entered a final judgment against the City of Albuquerque for $8,349,095.00, at 8.75% interest, on April 11, 2003 after a jury trial in a 42 U.S.C. Section 1983 action claiming denial of procedural due process and a taking. The developer plaintiff=s procedural due process claim addresses whether the City, when it changed a sector plan for Uptown Albuquerque, while the plaintiff= site plan to develop a Abig box@ retail center on property in the Uptown area was pending, failed to provide adequate procedural due process. The amended Sector Plan would add requirements for floor area ratios and other matters to the existing Sector Plan, which had merely provided for an urban center with mixed uses. These new requirements would preclude a Abig box center@. The developer claimed that the amendment to the plan was quasi-judicial, since it=s property was the only one affected, and that the City did not provide the level of due process to which the developer was entitled in a quasi-judicial action. The city claimed that the amendment of a Sector Plan is a legislative action, for which less due process is required, and that, in any event, the developer participated in the hearings at a level which met the standards for quasi-judicial due process.

After the Sector Plan was amended, the developer=s site plan was reviewed pursuant to its new requirements, and was turned down. The developer claimed that it had complied with all requirements of the original Sector Plan, and that it lost the opportunity for a sale of the lease of the property, because a market for the type of development allowed under the original Sector Plan no longer existed.. The District Court, in two separate actions, had found that the developer=s proposal should have been heard under the original Sector Plan, that due process had been denied, and that applying the revised Sector Plan=s requirements to the proposal constituted a taking, since it resulted in a diminution in value of the property and the loss of a pending sale. The Plaintiff elected the remedy for denial of due process, since the damages were higher than they would have been for a taking.

On appeal, the City claims, among other issues, that revision of a Sector Plan is legislative, and that, even if the revision of the Sector Plan was a legislative matter, Plaintiff received all of the privileges of quasi-judicial due process, and that no Ataking@ occurred. Also, the Plaintiff did not have an Aentitlement@ of approval of its proposal. Amicus briefs also argue that the Court should reverse a prior ruling that plans in New Mexico are merely Aadvisory@.

KOB v. City of Albuquerque

KOB-TV claims that it has a vested right to continue using its helipad, which is adjacent to its studio, despite the City=s change in its regulations concerning the location of helipads. The City maintains that the helipad was a legal non-conforming use after regulations for the location of helipads changed, and is subject to a one-year amortization period, and that there are no vested rights in continuing the use of the helipad at its current location.

III. Land Use Legislation in the 2005 New Mexico State Legislature

HB 805: Amending the Development Fees Act (NMSA 1978, Section 5-8-1 et seq. (1995).

This bill would prohibit the use of impact fees as a growth management tool or as a penalty or incentive for development in any particular area within a jurisdiction. It also makes available Acredits@ to developers against impact fees otherwise due to a developer for construction of, contributions to, or dedications of on or off-site improvements, regardless of whether the developer-financed improvements are on the municipality or county=s capital improvements plan, which forms the basis for calculating impact fees. Albuquerque=s adopted Planned Growth Strategy (APGS@) would base impact fees on the actual costs of improvements necessitated by growth, which costs will be higher in areas which have no infrastructure than in those already served. This bill, in requiring that impact fees be Auniform@ city-wide, will eliminate impact fees as a means of implementing the PGS.

HB 805 never made it to the floor of the Senate, although the House had passed it. Senator Cisco McSorley,the Chair of the Senate Judiciary Committee, did not put it on the Committee Agenda for hearing. Representative Dan Silva, who had introduced the bill in the House, attempted to blackmail Senator McSorley by saying that if the impact fees bill didn't make it out of committee, he'd be sure that a medical marijuana bill which Senator McSorley had introduced would not go anywhere, either. Senator McSorley did not budge; thus neither the changes to the Development Fees Act, nor the medical marijuana bill passed.

SB 1017

This bill would authorize impact fees to be assessed for schools, libraries and community centers, which facilities are not allowed by the current Development Fees Act. Schools districts have been particularly burdened financially in meeting the needs of growth because of the inability to assess impact fees.

SB 1017 failed

HB 654 Development Agreements

This bill would provide a statutory procedure for the utilization of development agreements. Currently, there is no statutory authorization for development agreements, which, when used, are

justified under home rule powers available to charter municipalities. Both the development community and the planning community supported this bill, for a change, although the planners opposed an amendment which would have made it available only to Bernalillo County. In any event, it didn't make it.

HB 654 failed

SB 845 Tax Increment Financing

This bill would subject tax increment financing allowed in Metropolitan Redevelopment Districts to elections within the districts. It also clarifies the procedure for tax increment financing, which will make such financing more Aaccessible@ to smaller municipalities.

SB 845 failed

HB 1090 Private Property Protection Act

A perennial Atakings@ bill, which allows the owner of property, when a regulation has reduced the value of the property which existed at the time the developer acquired title, to either require the government to condemn his property and pay just compensation, or hold on to the property and receive compensation for the reduction in value caused by the regulation. The owner can also force the government into binding arbitration. The bill passed the House, but never made it to the Senate floor. Wait 'til next year!

HB 1090 failed

SB 120 and HB 120, SB 451 and HB 500 Domestic Wells in Critical Areas

These identical bills would enable the State Engineer to set a limit on the amount of water which may be permitted for use in a domestic well in Acritical areas@ which have been designated because of limited amounts of water unless the developer obtains an existing water right. SB 451 and HB 500 are similar, however, but would prohibit the State Engineer from setting a limit of more than .5 acre feet a year. Since average use is 3.5 acre feet a year, these bills would prevent the State Engineer from setting meaningful limits on domestic wells in critical areas.

SB 120, HB 120, SB 451 and HB 500 all failed. Thus domestic wells will continue to be unregulated in "critical areas" where there is little water, and developers will not be required to provide water rights for such wells in these areas.

SB 195 Providing for a Strategic Water Reserve

Authorizes the New Mexico Interstate Stream Commission, which administers interstate water compacts, to acquire purchase and lease water rights and provide water storage in order to establish a "strategic water reserve", which will assist the state in complying with interstate compacts and court decrees and also enable the state and water users to comply with the federal Endangered Species Act of 1973. This bill was introduced to enable the State to establish water reserves when, particularly in drought years, the use of already appropriated water by water rights holders could cause the state to default on delivery of water which court decrees have held is owed to other jurisdictions, and/or could lead to the extinction of an endangered species, such as the silvery minnow. The bill authorizes severance tax bonds to be issued to acquire and store water in the strategic water reserve.

SB 195 passed.

SB 234 Billboards

This bill would Afreeze@ the number of billboards, and would also require that billboards be 750 feet apart, rather than 600 feet apart, which is the current requirement, and at least 650 feet from the nearest right-of-way in unzoned areas.

SB 234 failed

HB 723 Administrative Approval of Subdivisions in Bernalillo County

This bill would allow administrative approval of subdivisions in Class A CountiesBof which Bernalillo County is the only one! It was amended to require a public hearing even in administrative approval cases.

HB 723 passed.

MONTANA

Thanks to Andy Epple and Chris Saunders, of the Bozeman Planning Department, and Jim Nugent, Missoula City Attorney, for this summary of Montana land use issues.

A COMPLETE MONTANA LAND USE UPDATE, DATED OCTOBER 7, 2004, IS AVAILABLE FROM

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Bozeman

Southwest Building Industry Association v. City of Bozeman, DV-99-71

Bozeman was sued for enacting impact fees before state legislation for impact fees was enacted. Settlement is pending.

Saccoccia v. City of Bozeman, DV-02-223, Bomont v. City of Bozeman, DV-03-151.,

These cases are Atemporary takings@ cases, in which Loews and other big box retailers sued alleging that a moratorium which was enacted on such retailers pending a study of the economic impact of such retailers on the community.

Fisher Development v,. City of Bozeman, DV-03-150.

This case was brought by motel developers, which, although they had preliminary approval, had to wait for construction until improvements were completed to accommodate them. Still pending??

Missoula

1. There is a controversy concerning the conveyance/development of "antiquated" platted lots which do not meet current zoning standards, in the context a statute which states that only a lot owner may merge lots by filing a new certificate of survey, or some other document indicating lot merger. This controversy is in the context of the City's anti-sprawl/infill policy, adopted by a prior city council and now opposed by current councilors and neighborhood. This policy encourages infill development on these substandard lots.

   The Montana Subdivision and Platting Act is cited as 76-3-101, et. seq. Montana Code Annotated (MCA

   The subdivision exemption statute causing all the litigation is section 76-3-207 MCA, which includes three general statutory factual circumstances in which boundary line relocations are authorized, unless they appear to be intended for the purpose of evading the provisions of the Montana Subdivision and Platting Act.

   The key definitions set forth in the Montana subdivision and Platting Act involved in this controversy are set forth in section 76-3-103 MCA. Subsection 76-3-103(4) MCA sets forth the

definition of “division of land”. The final sentence provides that: “The conveyance of a tract of record or an entire parcel of land that was created by a previous division of land is not a division of land.”

Subsection 76-3-103(16) MCA defines the term “subdivision”.

The most significant and lengthiest definition is the definition of “tract of record” in subsection 76-3-103(17) MCA which starts out defining a “tract of record” in subsection(a) as meaning an individual parcel of land, irrespective of ownership, that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder’s office”. The definition then goes on in subsection (b) to provide that “each individual tract of record continues to be an individual parcel of land” unless “the owner of the parcel has ” joined, merged or aggregated with other contiguous parcels of land, pursuant to an instrument of conveyance “in which the owner expressly declares the owner’s intention that the tracts be merged”; or by a certificate of survey that expunges the prior boundaries and establishes new boundaries.

Further, in the “tract of record” definition subsection 76-3-103(17)© MCA provides: “An instrument of conveyance does not merge parcels of land under subsection (17)(b)(i) unless the instrument states,: “This instrument is intended to merge parcels of land to form the aggregate parcel(s) described in this instrument” or a similar statement, in addition to the legal description of the aggregate parcel, clearly expressing the owner’s intent to effect a merger of parcels.”

2. There is a controversy involving Safeway's acquisition of property on which a hospital is currently located, and Safeway=s intent to build a store on land which, although commercially zoned, already has residences on it. Neighborhood associations oppose the Safeway proposal.

3 . Montana has an Aanti-home rule@ statute, which requires that all local governments must have statutory authorization for all policies/ordinances, and which is thwarting innovative growth management.

RECENT LAND USE DECISIONS IN THE ROCKY MOUNTAIN WEST
COLORADO 2004-PRESENT

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While there were no "ground-breaking" land use cases decided in Colorado in 2004, there were several cases of more than passing interest. Following is a brief discussion of those cases. Each practitioner is urged to review each case for him/herself in order to determine the relative importance of each case and its relevance to issues each practitioner might face in the future.

Perhaps the most interesting land use case of 2004 is *Town of Frisco v Baum*, 90 P.3d 845, in which the Supreme Court considered whether municipal courts in home rule cities possess the requisite jurisdiction to hear and determine land use cases. Since the Court established C.R.C.P. 106(a)(4) as the exclusive means of reviewing quasi-judicial decisions decades prior in *Snyder v. Lakewood*, state district courts had been the exclusive forum for review of local land use decisions. The Town of Frisco, however, invoked the provisions of its Home Rule Charter to vest its municipal court with "exclusive original jurisdiction over all matters arising under [Frisco's Town] Charter, the ordinances, and other enactments of the Town," including appeals of land use decisions. Such appeals are to be determined in accordance with the provisions of C.R.C.P. 106(a)(4), which the Town Council has adopted for use in such appeals. When an adjacent property owner complained of a Town Council land use decision in the District Court, the Town moved to dismiss the action for lack of subject matter jurisdiction. The District Court granted the Motion to Dismiss, but the Court of Appeals reversed. On *cert.* review, the Supreme Court reversed the Court of Appeals and dismissed the action, holding that Article XX, Section 6 of the Constitution vested authority in home rule municipalities to create exclusive jurisdiction as to all matters of purely local and municipal concern in that municipality's municipal court. Citing such well-established precedent as *Roosevelt v. City of Englewood*, 492 P.2d 1204, 1205 (1971) and *Ibarra v. City of Northglenn*, 62 P.3d 151 (Colo. 2003) for the proposition that zoning is a matter of purely local concern, the Court reasoned that Frisco's action was constitutionally permitted, and that its municipal court possessed exclusive original jurisdiction to review the land use matter at hand.

In coming to its conclusion in *Baum*, the Court differentiated its prior decision in *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30 (2000) based on the Court's conclusion that no issue was presented in the case before it as to whether or not the jurisdictional question involved a question of mixed state and local concern. Similarly the Court of Appeals differentiated the *Town of Telluride* holding in the case of *Boulder County Apartment Association v. City of Boulder*, 97 P.3d 322 (Colo. App. 2004), cert. denied Sept. 7, 2004. In this case, an association of apartment owners sought a declaratory judgment that a Boulder ordinance limiting the number of tenants who may occupy individual rental units, and establishing strict

liability for owners who violated those limits, was preempted by state law. The Court of Appeals affirmed the District Court's determination that no state statute addressed the question of occupancy limits within individual rental units, and that it was a matter of local concern and thus within the regulatory authority of a home rule municipality. The Court also determined that, unlike the situation in *Telluride*, there was no statewide concern expressed by the General Assembly in legislation relating either to the maximum number of occupants of a rental unit or the penalties that may be imposed for violation of those limitations, thus making the holding in *Telluride* inapplicable to this case.

Krystkowiak v .W. O. Brisben Companies, Inc., 90 P.3d 859 (2004), while not technically a land use case itself, arose in the context of a land use case in circumstances all too familiar to land use practitioners, whether they represent governmental entities or private citizens. Brisben sought to develop an apartment complex within Colorado Springs, which apartment complex was located directly across the street from Krystowiak's property. Krystowiak and his neighborhood association, for which he was a volunteer spokesman but not an officer, opposed the application. After mediation was suggested, the association, but not Krystowiak personally, executed a settlement agreement by which the association agreed not to oppose the application at future public hearings. Krystowiak, however, continued to be a vocal opponent of the application, which was ultimately denied by the City Council. Brisben sued the City under C.R.C.P. 106(a)(4), but lost that appeal. It thereafter sued Krystowiak for intentional interference with contract (in what was not labeled as such, but which appears to be a classic "SLAPP" [Strategic Litigation Against Public Participation] lawsuit). Krystowiak successfully moved to dismiss the complaint under C.R.C.P. 12b)(1), which the District Court, applying the holding in *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984) ("*POME*"), converted to a motion for summary judgment. The District Court entered summary judgment in favor of Krystowiak dismissing the complaint against him, but declined to award attorney fees to him. The Court of Appeals affirmed in part, reversed in part and remanded. The Supreme Court reasserted the holding and principles of *POME*, but found that in the circumstances presented in this case Krystowiak should have been awarded his attorney fees as well. Practitioners representing property owners/developers and those representing individuals and groups opposing specific developments should review this case closely.

In *Native American Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283 (Colo. App 2004), Certiorari Denied Aug. 16, 2004, the Court of Appeals addressed the scope of review of certain land use decisions and the almost-forgotten concept of contract zoning. In *NARF*, the City of Boulder, acting in accordance with an existing ordinance provision requiring quasi-judicial hearings, considered including various properties, including properties owned by both NARF and the University of Colorado, within a designated Historic Preservation District. Both C.U and NARF objected to having their respective properties included within that District, and appeared at various public hearings declaring that objection. After an ordinance including such properties within the historic preservation district was adopted, the City and CU entered into negotiations to resolve an on-going dispute as to what extent, if any, C.U.'s properties were exempt from municipal regulation. Boulder ultimately adopted an ordinance authorizing the City to enter into Memoranda of Agreement (MOAs) with private property owners (not just C.U.) regarding modification, expansion or demolition of buildings within the historic preservation zone.

Subsequently, the City and C.U. entered into private negotiations relating to C.U.'s properties within the historic preservation district. NARF was excluded from these negotiations. After the City and C.U. came to an agreement regarding C.U.'s property, NARF brought an action alleging that its substantive and procedural due process constitutional rights had been violated by the provisions of the ordinance authorizing MOAs and by the specific MOA entered into outside of the City's established quasi-judicial process between C.U. and the City. The Supreme Court reversed the District Court's denial of all of NARF's claims. In so holding, the Court found that, under circumstances such as presented in this case, review is proper under C.R.C.P 57 instead of 106(a)(4) because the relief sought was intended to protect the rights of an open class of individuals rather than specific individual property owners. Additionally, the protections afforded property owners within the historic preservation zone districts by determinations that are required by existing Boulder ordinances to be made after quasi-judicial hearings were circumvented by the ordinance-granted power to enter into privately negotiated MOAs. The Court found that private negotiations designed to resolve individual property rights and thereby bypass all procedural and substantive procedures applicable to other property owners within the City produced the same concerns the court had previously identified and prohibited relating to contract zoning.

Urban renewal continued to be a subject of judicial review in 2004, with the Supreme Court's decision in *Arvada Urban Renewal Authority v. Columbine Professional Plaza Association, Inc.*, 85 P.3d 1006 (2004). In *AURA* the Authority had previously designated a substantial number of properties as "blighted", thereby entitling AURA to acquire the same through eminent domain and thereafter convey those properties to a developer who would redevelop those properties. The property owned by the Association was a property that had been designated as "blighted" in the original designation, but had been redeveloped in accordance with approved City plans. Ultimately, the City and AURA sought to acquire a portion of the Association's property for the benefit of a re-developer of a portion of the overall redevelopment project. When the Association and AURA could not come to agreement on such a sale, AURA declared a portion of the Association's property as "blighted" under the original study, and sought to acquire that parcel through eminent domain. There was no additional blight study undertaken to establish the subject parcel as "blighted". The Association brought suit seeking a determination that AURA did not have authority to designate property as "blighted" when the same had been developed in accordance with the City's and AURA's original plans. The District Court denied the Association's claims, but the Supreme Court reversed and held that once property originally designated as blighted had been developed in accordance with approved plans, there could be no further reliance on the original blight designation as authorization for acquisition of that same parcel. Rather, a new study and a new finding of blight based on current conditions of the property are required before any acquisition through eminent domain is authorized.

Perhaps it is appropriate that in a state whose economy is retrenching while struggling to reinvigorate itself several cases should arise that allow the appellate courts to restate settled principles of law. The cases of *Trailer Haven MHP, LLC v City of Aurora*, 81 P.3d 1132 (Colo. App 2003), *Quaker Court Limited Liability Company v. Board of County Commissioners*, ____ P.3d ____, 2004 WL 2955047 (Colo. App. 2004), and *Boone v. Board of County Commissioners,*

___ P.3d ___ , 2004 WL 2903513 (Colo. App. 2004) afforded the Court of Appeals just such an opportunity. While none of these cases blazes any new territory whatsoever, they contain helpful and complete refreshers and restatements on such points as void for vagueness, exhaustion of administrative remedies, presumption of validity, quasi-judicial as opposed to legislative actions and review standards as to each, and the differences between "zoning" and "subdivision." Taken together they form a sold trio of cases that review established law which it never hurts to review.