FRIDAY SESSION: 1:15–2:30 PM

Constitutional and Statutory Limits on Local Zoning Authority

Sponsored by Kaplan Kirsch & Rockwell

1:15—2:30 p.m.
Friday, March 10, 2006
Sturm College of Law/Frank J. Ricketson Law Building

The speakers present an overview of the constitutional and statutory limits of local zoning authority, as well as a discussion of home rule powers and limitations. Legal principles will be applied to innovative zoning and regulatory techniques to guide land use.

Moderator: **Sarah Rockwell, Esq.**
Partner
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Denver, Colorado

Panelists: **Diane Barrett**
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Karen Aviles, Esq.
Assistant City Attorney
City and County of Denver, Colorado

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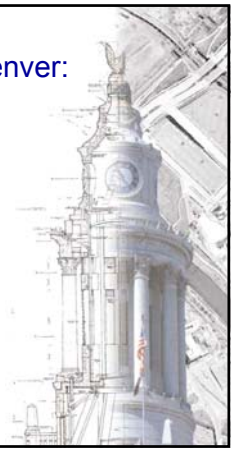
County Attorney
Douglas County
Castle Rock, Colorado

Rocky Mountain Land Use Institute

Plan Implementation Through Regulatory Revision

Implementing Blueprint Denver: Zoning Code Update



Blueprint Denver

An Integrated Land Use and Transportation Plan

Stability in Existing Residential Neighborhoods

Preserving Neighborhood Character

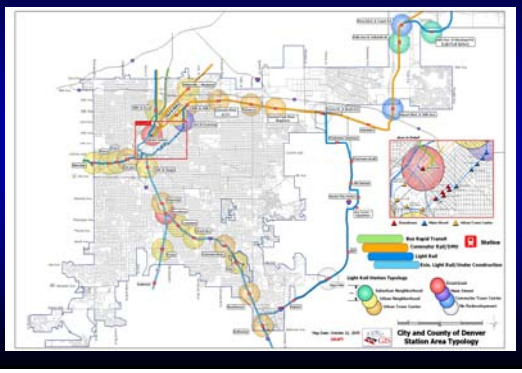
Reuse and Redevelopment

New Neighborhoods

New Neighborhoods

Transit centers

Transit centers



Transit centers

Transit centers

Transit centers

Why is Blueprint Denver Important?

- Represents collective vision of the people of Denver
- Promotes the preservation and creation of URBAN patterns of diverse land use, multi-modal streets and unique places.

Implementing Blueprint Denver:

- Strategic Transportation Plan
- Permit Process Improvement
- Transit Oriented Development
- Zoning Code Update

Zoning Code Improvements to Date

- Created the Transit Mixed Use zoning district (TMU) to promote transit oriented development.
- Consolidated the number of land uses from 400 to 100.
- Consolidated fourteen administrative zoning procedures into one standard procedure.
- Created Main Street zoning districts (MS I-III) to promote revitalization of commercial corridors.

Zoning Code Task Force and Citizen Advisory Group

- Appointed by Mayor Hickenlooper and former Council President Wedgeworth to oversee this multi-year effort.
- Membership represents neighborhood, business, and development interests.

Zoning Code Task Force and Citizen Advisory Group

- The Task Force will meet regularly and provide overall direction.
- Working with city staff and the Duncan team, the Task Force will conduct public listening sessions to define issues and problems with the current zoning, examine various strategies, evaluate alternatives, and recommend language and map improvements to the Planning Board and Council.

Zoning Code Task Force and Citizen Advisory Group

- The Citizen Advisory Group will meet periodically to assist the Task Force.
- They will provide early review of the Task Force recommendations and provide broader perspectives.

Why update Denver's Zoning Code?

- Framework of the current code was developed in 1950's
- Zoning districts were changed to accommodate growth but ignored historic development patterns
- Automobile-oriented

Why update Denver's Zoning Code?

- The current zoning code is INCONSISTENT with achieving the preferred development patterns identified in many adopted city plans.
- Denver citizens called for reform of the City's Zoning Code in the 1989 Comprehensive Plan and again in the Denver Comprehensive Plan 2000. Blueprint Denver (2002) provided the vision and initial strategy to begin this effort.

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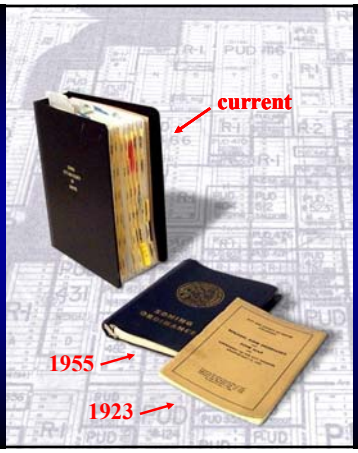
Why update Denver's Zoning Code?

- The current Zoning Code is COMPLICATED and the result of years of incremental change
  - Cumbersome Documents
  - Inconsistent Processes
  - Considerable complexity in the form of waivers and conditions, PUDs, limitations, procedures, etc.



How does simplification of the zoning code help Denver?

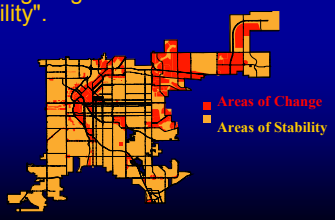
- The complexity of the current zoning code makes it difficult for property owners to easily identify what is allowed to be built on a given property.
- Unnecessary complexity can add cost to development, lessen quality and make Denver less competitive.

What is the relationship between adopted plans and the zoning code?

- Adopted plans express the community vision and provide the conceptual basis for regulations.
- The Zoning Code is the legal MEANS of implementing adopted plans.
- Land development regulations should not be mysterious but should clearly broadcast what Denver wants.
- Standards and Processes should recognize and facilitate all CUSTOMER needs.

How can the zoning code help implement Blueprint Denver?

- The zoning code can better reflect the vision of Blueprint Denver by promoting proper development in “Areas of Change” while enhancing neighborhood character in “Areas of Stability”.



Zoning Code Update Scope

Phase I: Analysis and Problem Definition

Phase 2: Alternative Approaches

Phase 3: Drafting New Code

Phase 4: Code Adoption and Implementation

Zoning – Sources of Authority and Constitutional Challenges to That Authority

Karen A. Avilés
Assistant City Attorney
City and County of Denver

I. Sources of Zoning Authority

Prior to the beginning of the 20th century, most land use regulations relied upon the common law theory of nuisance, which prohibited unreasonable uses of land that impacted the public's health and safety. Beyond these modest limitations, a landowner could improve and use land without governmental interference. However, the mere prohibition of nuisances was not sufficient to cure the blight and decay found in 19th century urban areas and to address uncontrolled development.

The "City Beautiful" movement of the late 19th century provided momentum for reform of this unregulated growth. Influenced by the 1893 Chicago World's Fair, planners began looking at the physical layout of parks, streets, civic centers and transportation with an emphasis on aesthetic consideration. After Works War I, planning moved from the "window dressing" of the "City Beautiful" movement to a "City Practical" movement with a focus on the engineering, legal, social and administrative aspects of community problems. In 1916, New York City adopted the nation's first comprehensive zoning ordinance, in conjunction with its planning for transportation improvements as part of the "City Practical" movement.

The “City Practical” idea was endorsed by the Federal Government who actively sponsored planning at the municipal level. As a result, in the 1920's, the Department of Commerce published the Standard State Zoning Enabling Act. The Standard State Zoning Enabling Act was the template followed by most states where the state legislatures vested local governments with the power to adopt and enforce zoning ordinances to further the comprehensive plan for development of the community. Some states like Vermont, Maine and Hawaii have retained significant zoning powers. However, most states, including Colorado, vest the power to zone in its local governments.

Colorado grants zoning authority in two different ways: constitutionally and statutorily. Colorado’s Constitution, allows for the creation of home rule cities. Under Article XX of the Colorado Constitution, home rule cities derive their power to zone through the constitution and by adoption of a home rule charter. The Charter of the City and County of Denver vests City Council with the power to zone. Much of Denver’s 1923 Charter language was taken from the Standard State Zoning Enabling Act.

In Colorado, if home rule cities are not involved, the power to zone is authorized statutorily. The power of counties to plan and zone is derived exclusively from C.R.S. §§ 30-28-101 through 30-28-139. The power of statutory, non-home rule cities to zone is provided for in C.R.S. §§ 31-23-301 through 31-23-314. These statutory provisions generally follow the Standard State Zoning Enabling Act and authorize counties to create zone districts to regulate building height, size, and location, lot coverage, open space, density, landscaping, and uses. The

statutes set up the procedures for adopting zoning regulation with required notice and hearing. The statutes and most home rule charters also provided for a Board of Adjustment to make special exceptions or variances to the zoning code in harmony with the zoning's general purpose and intent. This "safety valve" to alleviate the potential harsh impact of an absolute application of zoning to a particular situation was seen as, and still is, critical to due process. *Marker v. City of Colorado Springs*, 336 P.2d 305, 307-308 (Colo. 1959).

Whether the basis of zoning authority is the Enabling Act or a home rule charter, all zoning derives from governments' inherent police powers to promote the health, safety, morals or the general welfare of the community. Based upon this, zoning allows the government to regulate structures and their location and to regulate uses. It allows the municipality to be divided into districts with regulations to be uniform within such district so that all owners of the same "class" will be treated alike.

As mentioned above, zoning had its beginnings in common law nuisance. Since 1916, zoning has expanded well beyond the common law of nuisance with its narrow focus on removing obnoxious impacts, over crowded tenements and unsightly uses. Zoning quickly became the mechanism for curing all urban problems. The first case challenging this expanded role of zoning in regulating private property reached the United States Supreme Court in 1926 in *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926). Ambler Realty Company owned land in the Village of Euclid that was zoned residential when Euclid adopted its first comprehensive zoning. Ambler sued, saying the land would be worth four times as much if it was zoned industrial and thus zoning constituted an unconstitutional taking of its property rights. The United States Supreme Court upheld the zoning as it was based on the Village's inherent police power. While the Court found that the exact line between the legitimate and illegitimate use of the police power cannot be clearly delineated because it varies with the facts and circumstances, the Court nonetheless held that zoning could be based on more than the narrow prevention of common law nuisance. The Court held that before a zoning ordinance can be declared unconstitutional, the provisions must be clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare.

Euclid settled the constitutionality of comprehensive zoning in general. Now challenges relate to specific zoning regulations and the application of such regulations to specific parcels of land – Due Process, Regulatory Taking and Equal Protection.

II. Zoning and Due Process Challenges

Plaintiffs, in zoning disputes, often raise due process claims under the Fourteenth Amendment of the United States Constitution. Such claims are attractive because challenges to the constitutionality of a zoning decision can be the basis for a claim under 42 U.S.C. § 1983 where attorney fees are available to successful plaintiffs. Due process claims generally are classified as either procedural or substantive.

A. **Substantive Due Process**. The application of a substantive due process claim to land use decisions is more tenuous than procedural due process claims and is much less common.

Substantive due process prohibits the government from depriving an owner of a property interest in a manner that shocks the conscience regardless of the procedure used.

To state a substantive due process claim, a landowner must first establish the deprivation of a protected property interest by the government. *Hillside Community Church v. Olson*, 58 P.3d 1021, 1025 (Colo. 2002); *Sundheim v. Board of County Comm'rs*, 905 P.2d 1337, 1346 (Colo. App. 1995). In essence, the landowner cannot establish a due process violation without proving that a taking (a deprivation) has occurred. *First Bet Joint Venture v. Central City*, 818 F. Supp. 1409 (D. Colo. 1993). Regulatory taking claims are discussed in Section III below.

In addition to showing that a property interest has been "taken", a plaintiff must show that the substantive due process claim being brought under the Fourteenth Amendment has not been subsumed in a more specific constitutional provision such as the Fifth Amendment. Most claims for violation of substantive due process under the Fourteenth Amendment, and the related Section 1983 claim, fail because due process claims are subsumed in the Fifth Amendment. The court in *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991) stated:

> Because the Just Compensation Clause of the Fifth Amendment imposes very specific obligations upon the government when it seeks to take private property, we are reluctant in the context of a factual situation that falls squarely within that clause to impose new and potentially inconsistent obligations upon the parties under the substantive or procedural components of the Due Process Clause. It is appropriate in this case to subsume the more generalized Fourteenth Amendment due process protections within the more particularized protections of the Just Compensation Clause.

See also, Albright v. Oliver, 510 U.S. 266, 271 (1994) (The Court has always been reluctant to expand the concept of substantive due process especially where a particular amendment provides an explicit source of constitutional protection.); *J.B. Ranch, Inc. v. Grand County,* 958 F.2d 306, 309 (10th Cir. 1992) (no due process rights implicated beyond the Fifth Amendment because the facts of the case fell squarely within the Fifth Amendment. Where the County wrote letters to owner and to the newspaper announcing that roads across owner's land were public roads.)

Since most regulatory actions by a government fall squarely within the Fifth Amendment as a taking of property without compensation, the more generalized Fourteenth Amendment substantive due process claims are subsumed within the more particularized Fifth Amendment. Few substantive due process claims in the zoning context pass this test.

If an aggrieved landowner survives the two issues (proving a deprivation and that the claim is not subsumed in the Fifth Amendment) discussed above, she still must prove that the government's action shocks the conscience or is arbitrary and capricious in order to prevail on a substantive due process claim. Unless the government action complained of involves invidious discrimination, a suspect class or the infringement of a fundamental right, a landowner must demonstrate that the government's action "shocks the conscience" and is not merely the result of "improper motives", *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *United Artists Theatre Circuit Inc. v. Township of Warrington*, 316 F.3d 392 (3rd Cir. 2003); *Clark v. City of*

Draper, 168 F.3d 1185, 1190 (10th Cir. 1999); *Abeyta by Martinez v. Chama Valley Independent Sch.*, 77 F.3d 1253 (10th Cir. 1996); *Uhlrig v. Harder,* 64 F.3d 567, 473 (10th Cir. 1995); *Henderson v. Gunther*, 931 P.2d 1150, 1160-1161 (Colo. 1997); *County of Adams v. Hibbard*, 918 P.2d 212, 220-221 (Colo. 1996); *Wark v. Board of Cty Commr's*, 47 P.3d 711, 716 (Colo. App. 2002), or that the government's action is arbitrary and capricious with no rational basis for the actions. *Crider v. Bd of County Commr's of Boulder County*, 246 F.3d 1285, 1289-1290 (10th Cir. 2001); *Norton v. Village of Corrales*, 103 F.3d 928, 932 (10th Cir. 1996); *Jacobs, Visconsi & Jacobs. Co v. City of Lawrence*, 927 F.2d 1111, 1119 (10th Cir. 1991); *In Re Marriage of Smith*, 7 P.3d 1012, 1018 (Colo. App. 1999); *Sundheim*, 704 P.2d at 1346-1347.

The standards for both the "shocks the conscience" and "arbitrary and capricious" tests are exceedingly high. Under the "shocks the conscience" standard, the conduct must "violate the decencies of civilized conduct" (*County of Sacramento*, 523 U.S. at 846) and

> requires that a "plaintiff to do more than show that a state actor 'intentionally or recklessly caused' injury to the plaintiff by abusing or misusing governmental power." *Uhlrig*, 64 F.3d at 574. In order to satisfy this standard, a plaintiff must demonstrate a "high level of outrageousness, because the Supreme Court has specifically admonished that a substantive due process violation requires more than an ordinary tort . . .." *Id.*

Henderson, 931 P.2d at 1161 (Colo. 1997). *See also*, *Collins v. City of Harkner Heights*, 503 U.S. 115, 128 (1992).

The "arbitrary and capricious" test is difficult to meet as well. This test is not the same as arbitrary and capricious under C.R.C.P. Rule 106. *Sundheim*, 904 P.2d at 1347. For a governmental action to violate substantive due process

> it must be arbitrary, capricious, or irrational such that no articulated basis for the decision bears any rational relationship to a legitimate governmental interest.

In Re Marriage of Smith, 7 P.3d at 1018 (emphasis added); *Sundheim*. *See also*, 904 P.2d at 1348; *Jacobs*, 927 F.2d at 1119; *Crider*, 246 F.3d at 1289; *Norton*, 103 F.3d at 932. Because the "arbitrary and capricious" and "shocks the conscience" standards are so difficult to prove in the zoning context, very few substantive due process claims survive preliminary motions.

B. **Procedural Due Process**. Procedural due process is another type of Fourteenth Amendment challenge to zoning. Procedural due process claims are more common in land use and zoning disputes than substantive due process claims. To prevail on a procedural due process claim, a landowner must prove that she has been deprived of a protected property interest. As discussed above, this is difficult to do.

If a deprivation of a protected property interest is shown, the owner must then prove that the process provided by the government for the deprivation was unfair or that the fair process was not followed by the government in that particular case.

Procedural due process generally requires notice and an opportunity to be heard before an impartial tribunal. *Van Sickle v. Boyes*, 797 P.2d 1267 (Colo. 1990). In land use matters, Colorado courts have held that a hearing before a local governmental board or body, coupled with an opportunity for judicial review under C.R.C.P. 106(a)(4), is sufficient process to protect a landowner's due process rights. *Hillside Community Church v. Olson*, 58 P.3d 1021 (Colo. 2002); *Van Sickle*; *Sundheim*; *Zavala v. City and County of Denver*, 759 P.2d 664 (Colo. App. 1988).

An available procedure is sufficient only where the standards applied in a particular case have been duly adopted and are sufficiently specific to ensure rational and consistent decision-making and to ensure that judicial review of the action will be effective. *Elizondo v. State Dept. of Revenue*, 570 P.2d 518 (Colo. 1977); *Cottrell v. City and County of Denver*, 636 P.2d 703 (Colo. 1981). There is no precise definition of what regulations are sufficiently specific. Broad standards, such as "compatible with the neighborhood" have been upheld. *Larimer Board of County Comm'rs v. Condor*, 927 P.2d 1339 (Colo. 1997); *Tri-State Generator and Transmission Co. v. City of Thornton*, 647 P.2d 670 (Colo. 1982); *City of Colorado Springs v. SecureCare Self Storage, Inc.*, 10 P.3d 1244 (Colo. 2000); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 872 P.2d 1269 (Colo. App. 1993); *Colorado Dog Fanciers Inc. v. City and County of Denver*, 820 P.2d 644 (Colo. 1991). While the standards must not be so broad as to be void for vagueness, courts give great deference to the legislative body and the administrator charged with administering the standards. *Exotic Coins v. Beacom*, 699 P.2d 930 (Colo. 1985); *Landmark Land v. Denver*, 728 P.2d 1281 (Colo. 1986); *Zavala v. Denver*, 759 P.2d 664 (Colo. 1988); *Colorado Dog Fanciers*; *Lee v. Smith*, 772 P.2d 82 (Colo. 1989); *Parrish v. Lamm*, 758 P.2d 1356 (Colo. 1988).

Further, a landowner challenging the adequacy of a regulation must prove that the process is insufficient beyond a reasonable doubt. *Sellon v. City of Manitou Springs*, 745 P.2d 229 (Colo. 1987). In all contexts, except where a fundamental right is involved, a regulation must be incapable of any valid application or is arbitrary in all of its applications before it will be held unconstitutional.

Proving a procedural due process claim is very difficult. If the land use decision making process includes notice and an opportunity to be heard by an impartial body applying sufficiently specific standards with an opportunity for judicial review, a procedural due process violation will not be found.

III. Zoning and Regulatory Taking Challenges

A. **Regulation of Property and the Fifth Amendment**. The Fifth Amendment of the United States Constitution and Article II, Section 15 of the Colorado Constitution provide that private property shall not be taken for a public purpose without the payment of just compensation. These constitutional provisions were established to protect private property rights against unfettered governmental action. However, the framers of the Constitutions realized that the government, in order to carry out its duties for the greater public good, must act in ways that impact private property. The Constitutions, and 230 years of case law, attempt to find the balance between the exercise of governmental powers and private property rights.

The Fifth Amendment of the United States Constitution provides in part: "nor shall private property be taken for public use without just compensation". The Colorado Constitution, Section 15 of Article II, provides in part:

> Private property shall not be taken or damaged, for public or private use, without just compensation.

These two constitutional provisions protect private property from being appropriated for public use without the payment of just compensation.

Although the Fifth Amendment provides that property shall not be taken and the Colorado Constitution provides that property shall not be taken or damaged, both the Colorado Supreme Court and the United States Supreme Court generally treat the language the same.

Case law has long required that compensation be paid for the damaging of property under the Fifth Amendment even though the language does not specifically say "damaging". The Colorado Supreme Court in *Animas Valley Sand and Gravel, Inc. v. La Plata County*, 38 P.3d 59, 63 (Colo. 2002) stated:

> This court has interpreted the "damage" language in Colorado's takings clause to provide broader rights than does the federal clause but only insofar as it allows recovery to landowners whose land has been damaged by "the making of . . . public improvements abutting their lands, but whose lands have not been physically taken by the government." *City of Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo. 1993) (applying the "damage" clause to the activities of a government entity on the mineral estate underneath the surface estate owned by the plaintiff landowner). The "damage" clause only applies to situations in which the damage is caused by government activity in areas adjacent to the landowner's land. *See Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001) (in applying the "damage" clause to an inverse condemnation claim of landowners adjacent to an above ground electric line, noting, "[t]he word 'damaged' is in the Colorado Constitution in order to grant relief to those property owners who have been substantially damaged by public improvements made upon land *abutting* their lands, but where no physical taking by the government has occurred") (emphasis added); *Troiano v. Colo. Dep't of Highways*, 170 Colo. 484, 488, 463 P.2d 448, 449 (1969) (applying "the rule long established in Colorado" that there may be recovery "[w]hen damages are occasioned an abutting owner by an improvement in the street in front of his property . . ."); *Harrison v. Denver City Tramway Co*., 54 Colo. 593, 131 P. 409 (1913) (applying the "damage" clause to the expansion of an electric street car line to a street abutting the plaintiff's land); *City of Pueblo v. Strait*, 20 Colo. 13, 36 P. 789 (1894) (applying the 'damage' clause to the construction of a viaduct abutting the plaintiff's land).
>
> Other than this specific additional coverage, this court has interpreted the Colorado takings clause as consistent with the federal clause. *See Cent. Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 346 (Colo. 1994).

Regardless of which constitutional provision is invoked, taking issues arise in three different contexts: (1) government suing to take property for a public purpose under its power of eminent domain – condemnation; (2) a property owner claiming its property has been taken, in fact, by an action of the government without the government having exercised its power of eminent domain – inverse condemnation; and (3) a property owner claiming that a government regulation has "taken" its property – regulatory taking.

The focus of this paper is the third context, regulatory taking.

B. **Regulatory Taking**. A regulatory taking claim in the zoning context is usually based on whether the zoning ordinance or related regulation have gone "too far" and therefore have "taken" private property. *Animas Valley*, 38 P.3d at 63. The general rule is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (regulation requiring that 95% of the coal to be left unmined was not a taking). Regulatory takings jurisprudence balances the competing goals of compensating landowners on whom a significant burden of regulation falls and avoiding prohibitory costs to needed governmental regulation. *Animas Valley*, 38 P.3d at 63. Until recently, the Supreme Court's determination of when a regulation went too far was entirely an ad hoc, factual inquiry. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *State Dep't of Health v. The Mill*, 887 P.2d 993 (Colo. 1944). It was much like pornography – they know it when they see it. More recently, the Supreme Court has articulated a hierarchy of "tests" to be applied in the regulatory taking context.

1. *Regulatory Taking Tests*.

(a) Per se Tests. The United States Supreme Court has established two per se tests under which a regulation can effect a taking absent any physical encroachment onto the land. First, a regulation constitutes a per se taking when it "does not substantially advance legitimate state interests." Second, a per se taking occurs when a regulation "denies an owner economically viable use of his land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

(b) Fact-specific Inquiry Test. In addition to the per se taking tests, the Supreme Court established a fact-specific inquiry test in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457 (2001):

> Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. (citing *Penn Cent.*, 438 U.S. at 124, 98 S. Ct. 2646).
>
> Thus, *Palazzolo* endorses a two-tiered inquiry in a regulatory inverse condemnation claim. First, a court must determine whether a per se taking has

> occurred. Second, if a landowner is unable to prove a per se compensable takings claim (because the regulation has a legitimate purpose and her land has not been rendered economically idle), the landowner still may be able to prove a taking has occurred under a fact-specific inquiry.

The fact-specific inquiry is to provide a safety valve to protect the landowner in the truly unusual case where the diminished economic value of the property in connection with other factors means the property effectively has been taken from its owner. *Animas Valley*, 38 P.3d at 66.

The *Palazzolo* Court did not address what level of interference by a regulation would constitute a taking. The Colorado Supreme Court in *Animas Valley* held that the level of interference must be very high and the property must only retain a value that is slightly greater than de minimis.

> Although the *Palazzolo* Court did not address what level of interference a governmental regulation must have caused to constitute a taking under a fact-specific inquiry, a mere decrease in property value is not enough. This is true because a landowner is not entitled to the highest and best use of his property. (fn omitted). Reading *Palazzolo* together with the Court's prior precedent, it is apparent that the level of interference must be very high.
>
> . . .
>
> Thus the Court's current formulation of the fact-specific inquiry seems to contemplate a situation in which the property in question retains more than a de minimis value but, when its diminished economic value is considered in connection with other factors, the property effectively has been taken from its owner.
>
> . . .
>
> In sum, if AVSG [plaintiff] is to prevail, it must show that it falls into the rare category of a landowner whose land has a value slightly greater than de minimis but, nonetheless, given the totality of the circumstances, has had its land taken by a government regulation.

Animas Valley, 38 P.3d at 65-67(Colo. 2001) (emphasis added). *See also, Grynberg*, 846 P.2d at 179. (In no case has mere depreciation in value been grounds to award just compensation.)

For these reasons, a regulatory taking is difficult to prove.

2. *Defining the Property Involved*. Another interesting aspect of regulatory takings jurisprudence is the determination of what property is to be examined to determine if a taking has occurred. This discussion was settled by the Supreme Court in *Palazzolo* and in Colorado by *Animas Valley*. The Colorado Supreme Court held that a court must look at the entire contiguous parcel of land owned, not merely the portion most drastically affected by the regulation. The property as a whole, the whole "bundle" of property rights, must be examined. To evaluate the effect of the regulation on only one segment of the parcel would mean that

virtually any land use regulation would effect a taking if the landowner redefined the relevant parcel small enough. *Animas Valley*, 38 P.3d at 69. (Examine entire 46 acres on two parcels to determine if plan prohibiting sand and gravel mining on 37 of 46 acres constituted a taking). *Accord*, *Pennsylvania Coal* (impact on mineral estate only not a taking); *Penn Central*, 438 U.S. at 130 (loss of right to develop air space over Grand Central Station not a taking).

Finally, courts have examined whether regulations that temporarily impact the use of land constitutes a taking. Moratoria and other temporary denial of all use of property might not constitute a regulatory taking if the delay is pursuant to the government's safety regulations or if it were normal delays of obtaining permits. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002). Time is another property right in the "bundle of sticks" and since the property as a whole (the entire bundle) must be examined to determine if a taking occurs, temporary denial of property rights is not necessarily a taking.

3. *Development Conditions as Regulatory Takings*. The United States Supreme Court has outlined the tests governments must meet in order to exact land or impose conditions on permits for development without such condition or exaction constituting a regulatory taking.

(a) Essential Nexus. There must be an "essential nexus" between a legitimate governmental interest and the required exaction or permit condition. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Because the underpinnings of zoning authority was common law nuisance the more the governmental interest in the regulation is related to health, safety, and elimination of public nuisances, the more rigorous the conditions can be. *Penn. Central*, 438 U.S. at 124; *Lucas*, 505 U.S. at 1016; *Palazzolo*, 121 S. Ct. at 2457.

(b) Roughly Proportional. The exaction or permit condition must also be "roughly proportional" to the impact of the proposed development. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). A precise mathematical calculation is not required for the roughly proportional analysis. In general, the condition must be reasonably related to the impact of the development.

Nollan and *Dolan* shifted the burden of proof for proving these two tests from the land owner to the government. Now, the government must show that the two tests have been met. Contemporaneous findings by the government are not required, but there must be sufficient evidence that the *Nollan/Dolan* tests are met.

Within the general "essential nexus" and "roughly proportional" parameters, the courts have left governments with a fair amount of discretion. The more the exaction or condition is related to health and safety and the more it is directly related to the impact of the proposed development, the more likely the exaction or condition will be upheld so long as proper findings are made as to governmental interest and the development impact.

The body of the Fifth Amendment jurisprudence strives to achieve a balance between protection of a landowners' property rights and the government's need to zone and regulate property for the greater public good. Regulatory takings claims can be avoided by carefully

planning for, and drafting of, zoning laws and regulations and by a reasoned application of such laws and regulations to particular situations.

IV. Zoning and Equal Protection Challenges

In addition to due process and regulatory taking challenges, governmental authority to zone must withstand the occasional equal protection challenge. The equal protection guarantees of the Fourteenth Amendment ensures that persons similarly situated will receive like treatment under the law. *Harris v. The Ark*, 810 P.2d 226, 229 (Colo. 1991). To establish an equal protection violation in the zoning or land use context, a landowner must show that it has been arbitrarily singled out for disparate treatment in comparison to other persons similarly situated. *Industrial Claims Appeal Office v. Romero*, 912 P.2d 62 (Colo. 1996); *State Dept. of Health v. the Mill*, 887 P.2d 993, 1007 (Colo. 1994); *Jaffe v. City and County of Denver*, 15 P.3d 806, 812 (Colo. App. 2000).

Absent a suspect class, a challenge to a land-use decision based upon equal protection will most likely fail because of the unique nature of land development and land use decisions.

> [G]iven the sensitive and peculiarly local nature of land-use decisions and the fact that these decisions usually involve unique parcels of land, it is difficult to imagine a context wherein a land-use decision could be challenged on the grounds of equal protection absent an allegation that the state action created, facially or in application, a suspect class.

Atkinson v. City of Fort Collins, 583 F. Supp. 567 (D. Colo. 1984).

V. Conclusion

The authority to zone and enact other land use regulations is well settled. The application of those laws and regulations to particular parcels of land is more problematic. Constitutional challenges to the application of laws to land are usually couched in terms of a violation of equal protection, substantive or procedural due process, or regulatory takings. The current jurisprudence from both the United States Supreme Court and Colorado courts makes it difficult for landowners to prevail. The balance between private property rights and the need to zone and regulate land and development for the greater public good currently favors zoning and such land use regulations.

"Constitutional Issues in County Zoning"

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Map Amendments vs. Language Amendments

- **Map** amendments change "WHERE" a zoning classification applies
- **Language** amendments change "WHAT" a zoning classification allows

Look at Your Enabling Legislation

- Home-Rule Cities - City Charter and City Code
- Statutory Cities - CRS Title 31, Article 23 and the City Zoning Code
- Counties - CRS Title 30, Article 28, Part 1, the County Zoning Resolution, and County Subdivision Regulations

Determine if Legislative or Quasi-Judicial

- This determination is critical to determining what type of process is required. Ex Parte communications are an issue for quasi judicial.
- *Cherry Hills Resort Development co. v. Cherry Hills Village, 757 P.2d 622 (Colo. 1988)*
- *Denver v. Eggert*, 647 P.2d 216 (Colo. 1982)
- *Landmark Land Company v. Denver, 728 P.2d 1281 (Colo. 1986)*
- *Jafay v. Boulder County*, 848 P.2d 892 (Colo. 1993)

Quasi-Judicial v. Legislative - A Quick Summary

- Legislative Action: Prospective in nature, of general application, and reflects a balancing of judgment and discretion.
- Quasi-Judicial Action: Involves a determination of rights of specific individuals, through the application of preexisting legal standards, to facts developed at a hearing, conducted for the purpose of resolving the particular interests in question.

Stated Another Way…

Legislative IF:

- Many are affected
- New rule or rules being established for approving land use proposals in the future
- Applies to any property with the same zoning designation (except possibly PD's)

Quasi-Judicial IF:

- Only one owner or select few affected by proposed change
- Result depends on specific facts unique to owner's property
- Involves a determination of whether a requested land use approval is authorized under existing rules
- Result applies only to the applicant's property

Legislative Hearings

- The rights of notice and hearing upon rezoning are nearly always provided for under state enabling acts and local ordinances, even where rezoning is, as is usually the case, viewed as a legislative act. See C.R.S. § 30-28-116 (county) and § 31-23-104 and 105 (municipal) but also see C.R.S. § 30-28-121 (no county notice required for temporary zoning of no more than 6 months)
- The fact that all jurisdictions have, from the beginning, attached notice and hearing requirements to zoning ordinance amendments seems to imply a recognition that rezonings involve something other than purely legislative action in the traditional mode.

3 Rathkopf's The Law of Zoning and Planning § 40:23 (4th ed.)

Bottom Line . . .

Even legislative language amendments to a zoning code usually require notice and hearing.

Adequate Notice

- Date, time and place of hearing
- Subject matter of the hearing
- Nature of proposed change
- Not misleading or capable of multiple interpretations
- Gives accurate summary of before and after condition if ordinance is approved

The 99% Rule

In 99% of all cases, language amendments are LEGISLATIVE actions.

Quasi-Judicial Hearings

- Right to present evidence, cross-examine witnesses, and have an attorney
- Right to have decision based on facts and evidence appearing in the record as developed at the hearing
- Right to have decision based on application of preexisting standards and criteria for approval or disapproval contained in the zoning code (This is one reason ex parte communications are prohibited.)

The Legislative Hearing

- Reasonable notice and reasonable opportunity to be heard.
- Period.
  - No evidence or fact-finding required
  - Focus on general interest of community at large
  - Reasoning behind vote not relevant

City of Edmonds

Limits What Federal Law Permits:

- *City of Edmonds v. Oxford House*, 115 S.Ct 1776 (1995)

  Requiring blood relationship to be a "single family" use violated anti-disability discrimination provisions of Federal Housing Act.

City of Cleburne

Limits What Federal Law Permits/Protects:

- *City of Cleburne, Texas v. Cleburne Living Center,* 105 S.Ct. 3249 (1985)

  Requiring a special use permit for proposed group home for the mentally retarded violated equal protection clause in that requirement appeared to rest on an irrational prejudice against mentally retarded.

Practical Advice

1. Read the cases.
2. Look at the map. See "where" the "what" will apply.
3. Get the notice right. Don't be penny wise, pound foolish.
4. Too much process is never a bad thing.
5. Know the law regarding vested rights.
6. Listen carefully to any opposing views.
7. Prepare a good record, even if a legislative action.
8. Avoid picking on the sick, the weak, or the disabled.

1041 Regulations

Areas and Activities of State Interest

C.R.S. s. 24-65.1-101 et seq.

Purpose of 1041 Authority

- [T]he Colorado legislature adopted [1041] in response to the 'rapid growth and development of the state and the resulting demands on its land resources.' The Act … is designed to protect Colorado's land resources and allocate those resources among competing uses. To accomplish these goals the Act identifies a list of activities of state interest and allows local governments to address local land use concerns by regulating activities which are represented on the list.
- *City and County of Denver v. Bd. of County Comm'rs*, 782 P.2d 753, 755 (Colo. 1989)

Purpose cont.

- The regulatory concepts in 1041 originated in a Model Land Development Code that inspired similar legislation in a number of states across the country. *See* Joseph Dischinger, "Local Government Regulation Using 1041 Powers," Vol. 34 Colorado Lawyer 79 (Dec. 2005). The Commentary on the Model Code cites to a Colorado example, "the inability of rural counties [in Colorado] to control second home subdivisions." *Id.* at 80.

AREAS OF STATE INTEREST

- Mineral Resource Areas
- Natural Hazard Areas
- Areas Around Key Facilities
  - Areas around Airports
  - Areas around major facilities of a public utility
  - Areas around interchanges involving arterial highways
  - Areas around rapid or mass transit

ACTIVITIES OF STATE INTEREST as determined by local governments 24-65.1-203

- Site selection and construction of major new and extensions of domestic water and sewerage treatment systems
- Site selection of airports
- Site selection of mass transit…
- Site selection of alterial highways and interchanges and collector highways
- Site selection and construction of major facilities of a public utility
- Site selection and development of new communities

What 1041 is:

- An additional means of Local Government Land Use Review
- Binding on other jurisdictions, local and state, home rule, constitutionally created, etc.
- Constitutional

What 1041 is not:

- Zoning
- Insignificant

Important 1041 Cases

- *Bd. Of County Comm. V. Gartrell Inv. Co, L.L.C.*, 33 P.3d 1244 (Colo. App. 2001) (nmew communities regulations cannot prohibit annexation by municipalities)
- *Regents of University of Colorado v. Board of Commissioners of Boulder County*, Case No. 2001CV1896 (Bldr. County Dist. Ct. Oct. 5, 2004) (holding that the constitutional status of the University of Colorado does not exempt it from county 1041 regulations);
- *City and County of Denver v. Board of County Commissioners of Grand County*, 782 P. 2d 753, 762-3 (Colo. 1989) (holding that home rule status does not

Important 1041 Cases cont.

- *City of Colorado Springs v. the Board of County Commissioners of the County of Eagle*, 895 P.2d 1105, 1116-7 (Colo. App. 1994) (rejecting the home rule argument).
- *Droste v. Board of County Commissioners of the County of Pitkin, 85 P.3d 585 (Colo. App. 2003)*

Amendment 38

- Impacts on Zoning Decisions
- Timing
- Finality
- Reasonable Expectations