

# FRIDAY SESSION: 8:45–10:15 AM

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## Land Use Litigation

8:45—10:15 a.m.

Friday, March 10, 2006

Sturm College of Law/Frank J. Ricketson Law Building

This session is an exploration of strategies and techniques for handling land use litigation ranging from the standard zoning challenges through constitutional challenges.

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Moderator: **Tom MacDonald, Esq.**

Director

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Panelists: **Jack Reutzel, Esq.**

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**LAND USE LITIGATION**  
**TECHNIQUES AND STRATEGIES**

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**I. Preparing for Litigation**

- A. There is a great premium on winning at the administrative or level.
  - 1. Once in court, all presumptions are in favor of upholding the initial decision.
  - 2. If you win at the local government level, there is at least a 90% chance the court will uphold the decision. If you lose, you have an uphill battle.
  
- B. Review applicable law.
  - 1. If you win at the administrative level, it is important to make sure the local government has complied with all applicable laws.
  - 2. If you lose, your best chance on appeal is demonstrating the local government failed to follow applicable law.
  - 3. Applicable law may come from the following sources:
    - a. State constitution.
    - b. Enabling statutes.
    - c. Charter provisions.
    - d. Local regulations.
    - e. Master plan.
    - f. Zoning ordinance.
    - g. Prior approvals affecting property.
    - h. Procedural rules.
  
- C. Creating an Adequate Record.
  - 1. In most land use cases, the only judicial remedy is certiorari review of the administrative record. Therefore, it is critical to make sure it is complete.

2. Items which should be included in the record.
  - a. The application and all required submittals.
  - b. Evidence that all required notices have been properly given.
  - c. Evidence that all required referral to other agencies have been properly made along with all responses from such agencies.
  - d. Staff memoranda.
  - e. Planning and zoning commission memoranda, findings, etc.
  - f. Prior subdivision, development, tap agreements, etc.
  - g. Evidence that the applicant has addressed all matters required to be addressed.
  - h. Transcripts of public hearings.
  - i. Findings and decision of governmental body - **timing of the Resolution**
  - j. **Discussion: How much is too much?**
3. Consider including:
  - a. Applicable law.
  - b. Portions or all of record of prior approvals relating to the property.
  - c. Evidence of lack of neutrality of decision makers.
  - d. Findings and factual data from proceedings relating to similar applications.
4. Quality of record.
  - a. When there is no record, a reviewing court cannot review as to whether a board abused its discretion and must remand for a new hearing. Bd. of County Comm'rs v. Salardino, 318 P.2d 596 (Colo. 1957).
  - b. Once a record has been certified, the burden shifts to the person seeking review to show that there are inaccuracies or imperfections in the certified record that prejudiced him. Save Park County v. Bd. of County Comm'rs, 990 P.2d 35 (Colo. 1999).

- c. The record may include not only the transcript of the public hearing but also (1) minutes; (2) documents admitted into the record; (3) all motions, resolutions and ordinances of the Board and Planning Commission; (4) all notices sent or published for all meetings and hearings; (5) all planning staff memoranda and recommendations; and (6) all written materials sent or received by the Board and its staff. Id. In Save Park County, the Court held that although the tapes and transcripts of the proceeding were “admittedly deficient,” the record, as a whole, was sufficient to allow for meaningful review.

D. Procedural Matters.

1. Due Process.

- a. Does it apply? See Olson v. Hillside Baptist Church, 58 P.3d 1021 (Colo. 2002)
- b. What must an administrative proceeding offer to provide due process?
  - i. Notice reasonably calculated under the circumstances to apprise interested parties.
  - ii. Opportunity to present your case – very minimalist view.
    - a) No need to apply the rules of evidence.
    - b) You may cross examine witnesses, but this right may be limited.
    - c) No guarantee that you can present all of the evidence you would like.

Officials acting in a quasi-judicial capacity are held to the constraints imposed on judicial officers regarding impartiality, conflict of interest, ex parte contacts. **Discussion: Does that apply to Planning Commission Members?**

E. Burden of Proof.

- 1. Applicant for a variance from local zoning law has burden of proving variance would avoid unnecessary hardship or is reasonably necessary for convenience or welfare of public. Monte Vista Professional Bldg., Inc. v. City of Monte Vista, 531 P.2d 400 (Colo. App. 1975). Burden is on party seeking a variance to show that prescribed conditions are met. Pelican Production Corp. v. Mize, 573 P.2d 703 (Okla. 1977); Whitcomb v. City of Woodward, 616 P.2d 455 (Okla. Ct. App. 1980).

- F. Discovery. Formal discovery generally not permitted unless authorized by statute or ordinance. The Freedom of Information Act is a useful tool for applicants to obtain information.

## II. The Litigation Process.

### A. Certiorari Review.

- 1. Issue is whether a governmental body or officer exercising quasi-judicial functions has exceeded its jurisdiction or abused its discretion. C.R.C.P. 106(a)(4); Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975), overruled on other grounds, Margolis v. District Court, 638 P.2d 297 (Colo. 1981).
  - a. “Quasi-judicial action...generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interest in question.” Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village, 757 P.2d 622, 625 (Colo. 1988).
  - b. Examples.
    - i. Site specific rezoning.
    - ii. Use by special review.
    - iii. Variance.
    - iv. Subdivision plats.
- 2. Types of claims.
  - a. No evidentiary support in the record.
  - b. Bias.
  - c. Conflict of interest.
  - d. Failure to apply appropriate land use standards.
  - e. Illegal conditions of approval.
  - f. Illegal exaction.
  - g. Preemption by federal statute or regulation.
- 3. Scope of review.

- a. Limited to whether the governmental body exceeded its jurisdiction or abused its discretion based on the evidence in the record. C.R.C.P. 106(a)(4)(I).
- b. Decision of governmental body will only be reversed if there is no competent evidence in the record to support it. Board of County Commissioners v. O'Dell, 920 P.2d 48 (1996) (reviewing court must defer to county commissioners on factual findings).
- c. A reviewing court also must reverse if the governmental body misconstrued or misapplied the applicable law. Anderson v. Board of Adjustment for Zoning Appeals, 931 P.2d 517, 520 (1996). If there is a reasonable basis for the agency's interpretation, the decision may not be set aside on this ground. Save Park County v. Bd. of County Comm'rs., 969 P.2d 711, 714 (Colo. App. 1998), aff'd 1999 Colo. LX 1193. But a court cannot allow an administrative agency to amend its regulations in the guise of interpreting them. Id.
- d. An appellate court in a Rule 106(a)(4) proceeding must review the decision of the agency, rather than the decision of the district court. Id.

4. Remedy.

- a. Reversal of the decision and remand for appropriate action depending on the error.

5. Indispensable Parties.

- a. Governmental body which rendered the decision is an indispensable party. Tri-State Generation and Transmission Co. v. City of Thornton, 647 P.2d 670, 675-76 (Colo. 1982).
- b. Owner of rezoned property is an indispensable party in an action to set aside a rezoning. Hidden Lake Development Co. v. District Court, 183 Colo. 168, 173, 515 P.2d 632, 635 (1973).

6. Effect of Certiorari Review on Development

- a. Timeliness of decision
- b. Satisfactory Outcome

B. Declaratory Judgment.

- 1. Any person whose rights, status, or other legal relations have been affected by a statute or local regulation may have determined any

questions of construction or validity arising under the statute or regulation and may obtain a declaration of rights. C.R.C.P. 57(b).

- a. Declaratory judgment is a proper vehicle for challenging quasi-legislative action.
  - i. “Legislative action is usually reflective of some public policy relating to matters of a permanent or general character, is not normally restricted to identifiable persons or groups, and is usually prospective in nature.” Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village, 757 P.2d 622, 625 (Colo. 1988).
  - ii. Examples.
    - a) Amendment to text of zoning ordinance or resolution.
    - b) Comprehensive rezoning involving multiple parcels.
    - c) Adoption of comprehensive plan.
    - d) Adoption of zoning, subdivision, or building regulations.

## 2. Types of claims.

- a. Ordinance or regulation is unconstitutionally vague.
- b. Ordinance or regulation exceeds the authority of the local government.
- c. Local government in reaching a land use decision has misinterpreted applicable statute, ordinance, or regulation.
- d. No actual notice of land use hearing or opportunity to be heard.
- e. Impermissible delegation of legislative authority. See Beaver Meadows v. Bd. of County Comm’rs., 709 P.2d 928, 936 (Colo. 1985) (State statutes and county regulations concerning road improvements were so lacking in specificity as to violate doctrine against impermissible delegation of legislative authority, and therefore, decision which conditioned approval of planned unit development upon developer making certain road improvements had to be reversed).

- f. Regulatory Taking (when seeking remedy of invalidation of offending statute or regulation). See e.g. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Youpee v. Babbitt, 519 U.S. 234 (1997).
3. Scope of review.
    - a. Trial de novo.
  4. Remedies.
    - a. Declaration of rights and further relief “whenever necessary or proper.” C.R.C.P. 57(h).
- C. Section 1983.
1. Deprivation of rights secured by the constitution or laws of the United States by a person acting under color of law. 42 U.S.C. § 1983; Parrott v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984).
    - a. Property interest.
      - i. Right to make reasonable economic use of one’s property. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992); Van Sickle v. Boyes, 797 P.2d 1267 (Colo. 1990); Thompson v. City and County of Denver, 958 P.2d 525 (Colo. App. 1998).
      - ii. Vested development right that is affected by change in regulations.
      - iii. Legitimate investment backed expectations. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994); Ruckelshaus v. Monsanto, 967 U.S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984); Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).
    - b. Procedural due process.
      - i. Notice and hearing is required before deprivation of a property right. Benavidez v. City of Albuquerque, 101 F.3d 620 (10th Cir. 1996); Littlefield v. Afton, 785 F.2d 596, 603 (8th Cir. 1986).
      - ii. Only minimal due process is required in rezoning cases. River Park, Inc. v. City of Highland Park, 23 F.3d 164 (7th

Cir. 1994); First Bet Joint Venture v. City of Central City, 818 F.Supp. 1409 (D. Colo. 1993).

- c. Substantive due process.
  - i. Landowner may need to prove that it had a protected property interest in a favorable land use decision. Sundheim v. Board of County Commissioners, 904 P.2d 1337, 1346 (Colo. App. 1995)
    - a) If such a protected property interest exists, a court must determine whether the land use decision was arbitrary and capricious. Id.
    - b) Whether a property owner has a legitimate claim of entitlement to a favorable land use decision depends on whether there is either a certainty, or a very strong likelihood, that the application would have been granted absent the conduct alleged to be in violation of substantive due process. Sundheim, 904 P.2d at 1347.
    - c) Claim of entitlement must come from some existing legislative or administrative standard. If, under that standard, the application properly could have been denied on non-arbitrary grounds, the federal substantive due process claim will be defeated as a matter of law. Id.
  - ii. At a minimum, a landowner must prove that the decision was “arbitrary, capricious, or irrational.” Sundheim, 904 P.2d at 1347.
    - a) Decision will not be found to be arbitrary, capricious, or irrational unless no articulated basis for the decision bears any rational relationship to a legitimate governmental interest. Sundheim, 904 P.2d at 1348.

## 2. Types of claims.

- a. Denial of procedural due process.
- b. Denial of substantive due process.
- c. Denial of equal protection.
- d. Violation of federal statute or regulation.

- e. Regulatory taking.
    - f. Violation of First Amendment rights.
  - 3. Scope of review.
    - a. Trial de novo.
  - 4. Remedies.
    - a. Invalidation of decision, damages, injunctive relief, attorney's fees.
  - 5. **Discussion: Real Life Applicability to a Land Use Controversy**
- D. Inverse Condemnation.
  - 1. Action brought by a landowner seeking just compensation for land taken for a public use, against a government or private entity having the power of eminent domain where eminent domain proceedings have not been commenced. Ossman v. Mountain States Tel. & Tel. Co., 32 Colo. App. 230, 233-34, 511 P.2d 517, 519-520 (1973), rev'd on other grounds, Ossman v. Mtn. States Tel. & Tel. Co., 184 Colo. 360, 520 P.2d 738 (1974).
  - 2. Types of claims.
    - a. Physical invasion.
    - b. Regulatory taking.
  - 3. Scope of review.
    - a. Trial de novo.
  - 4. Remedy.
    - a. Damages.
- E. Mandamus.
  - 1. Available where plaintiff has a clear right to the relief sought; the defendant has a clear duty to perform the act requested; and there is no other available remedy. C.R.C.P. 106(a)(2), Gramiger v. Crowley, 660 P.2d 1279, 1281 (Colo. 1983).
  - 2. Types of claims.
    - a. Refusal to issue building permit.

- b. Refusal to process land use application.
  - 3. Scope of review.
    - a. Trial de novo.
  - 4. Remedy.
    - a. Order to perform the act and damages. C.R.C.P. 106(a)(2).
- F. Estoppel.
 

Jones v. City of Aurora, 772 P.2d 645 (Colo. App. 1989).

  - 1. Equitable estoppel may be applied against a local government attempting to revoke a building permit upon which the landowner reasonably relied in making substantial expenditures. City and County of Denver v. Stackhouse, 135 Colo. 289, 310 P.2d 296 (Colo. 1957).
  - 2. Types of claim.
    - a. Revocation of building permit.
  - 3. Scope of review.
    - a. Appeal to board of adjustment (zoning) or board of appeals (building code).
  - 4. Remedy.
    - a. Review of administrative decision by board of adjustment or board of appeals.
    - b. Decision of board of adjustment or board of appeals may be reviewed by district court pursuant to C.R.C.P. 106(a)(4).
- G. Standing. The “injury in fact” requirement.
  - 1. Associational standing. See Warth v. Seldin, 95 S. Ct. 2197, 422 U.S. 490, 45 L. Ed. 2d 343 (1975); Hunt v. Washington State Apple Advertising Comm’n, 97 S. Ct. 2434, 432 U.S. 333, 53 L. Ed. 2d 383 (1977); Denver Classroom Teachers Ass’n v. Denver School Dist. No. 1, 738 P.2d 414 (Colo. App. 1987); Conestoga Pines Homeowners Ass’n v. Black, 689 P.2d 1176 (Colo. App. 1984).
  - 2. Adjacent property owner has standing to challenge rezoning which adversely affects his or her property. Board of County Commissioners v. City of Thornton, 629 P.2d 605 (Colo. 1981).

3. Billboard company, as lessee of land where its sign was erected, had a significant economic interest that was adversely affected by zoning ordinance, had standing to apply for a variance. Frank Hardie Advertising v. Dubuque, 501 N.W.2d 521 (Iowa 1993).
4. An economic competitor does not have standing to challenge a rezoning. Westborough Mall, Inc., v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982).

#### H. Forum Considerations.

##### 1. Generally.

- a. Choice will be limited to state district court in many cases.
  - i. An alternative may be U.S. District Court.
    - a) Must have a federal question or diversity of citizenship.
    - b) Must exhaust state remedies before proceeding in federal court.
  - b. Consider your jury pool in takings cases.

##### 2. Zoning Matters.

- a. Local Zoning Authority.
  - i. Administrative Remedies. If administrative remedies are available, must determine the appropriate quasi-judicial body to which your appeal must be filed.
  - ii. Certiorari Review. If the general zoning ordinance itself is not being challenged, certiorari review pursuant to C.R.C.P. 106(a) is the exclusive remedy for challenging a rezoning determination. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975), overruled on other grounds, Margolis v. District Court, 638 P.2d 297 (Colo. 1981). This type of action must be filed in the district court unless home rule charter proscribes a different forum. Town of Frisco v. Baum, 90 P.3d 845 (Colo. 2004).
  - iii. Declaratory Judgment. If the action is to challenge the validity of a zoning ordinance on constitutional grounds or if the general zoning ordinance itself is being challenged, an action should be filed pursuant to C.R.C.P. 57. Baum v. Denver, 147 Colo. 104, 363 P.2d 688 (1961), Jafay v.

Board of County Commissioners, 848 P.2d 892 (Colo. 1993). This type of action must be filed in the district court.

- iv. Enforcement. If the local zoning authority is enforcing a zoning or other land use regulation, it may file an injunctive action pursuant to C.R.C.P. 65 or a quasi-criminal action. An injunctive action must be filed in district court. A quasi-criminal action must be filed either in municipal court if a municipal ordinance has been violated, or in county court, if a county land use regulation has been violated.
- v. Inverse Condemnation. An inverse condemnation action must be filed in the district court.
- vi. Section 1983. A section 1983 action may be filed in the U.S. district court or state district court.

I. Discovery.

- 1. Generally not allowed in C.R.C.P. 106 proceedings.
  - a. Discovery may be allowed if you can make a threshold showing of impropriety. See Whelden v. Board of County Commr's, 782 P.2d 853 (Colo. App. 1989); Bd. of Education, Dist. No. 6, Arapahoe County v. Dist. Ct., 174 Colo. 255, 483 P.2d 361 (Colo. 1971).
- 2. Depositions of lay witnesses can be valuable to show improper notice/bad faith.

J. Role of Experts.

- 1. Especially important in challenging developer exactions.
- 2. Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994), requires an “individualized determination” that the exaction is “related both in nature and extent to the impact of the proposed development.”

K. Appeals.

- 1. Generally.
  - a. C.R.C.P. 106(a)(4) is an appeal.

- b. Normal appellate paths from trial court to Court of Appeals. Colorado Supreme Court jurisdiction generally limited to writs of certiorari.
  - 2. Direct appeal to Colorado Supreme Court in cases where a state statute, municipal charter provision, or ordinance has been declared unconstitutional. § 13-4-102(1)(b), C.R.S. (1999).
  - 3. Original proceedings in the Colorado Supreme Court under C.A.R. 21.
- L. Federal Claims. Selected Procedural Issues.
- 1. Ripeness.
    - a. Takings claims.
      - i. As Applied. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).
      - ii. Facial Challenges. San Remo Hotel, L.P. v. City and County of San Francisco, 125 S. Ct. 2491 (2005).
    - b. Other federal claims.
      - i. Ripeness requirements apply equally to due process and equal protection claims resting upon same facts as takings claim. Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996).
  - 2. Issue Preclusion.
    - a. Must pursue state inverse condemnation proceeding to ripen federal takings claim. San Remo Hotel, 125 S. Ct. at 2497.
    - b. In subsequent federal proceeding, plaintiff subject to issue preclusion arising from state inverse condemnation proceeding. Id. at 2504-07.
  - 3. Reservation of Federal Claims in State Proceeding.
    - a. When a federal court abstains from deciding federal issue until an antecedent state issue is decided by state court, a plaintiff may reserve right to return to federal court. England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964)
    - b. Reservation not effective if state issue not distinct from reserved federal issue. San Remo Hotel, 125 S. Ct. at 2502.

- c. Reservation not effective if plaintiff freely submits federal claim to state court for decision. Id. at 2502-03 n. 22.