

FRIDAY SESSION: 10:30—11:45 AM

A Primer on Local Government Regulation of Land Use and Development

Sponsored by Isaacson Rosenbaum

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The legal and procedural basics for professionals and public officials
involved in land use development

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The Rocky Mountain Land Use Institute

15^h Annual Conference

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LOCAL GOVERNMENT LAND USE REGULATION

I. Basic Sources of Authority

A. Municipalities

1. Statutory cities and towns obtain their authority from statutes and are limited to those powers explicitly granted to them.
2. Home rule cities and towns derive their authority from the Colorado constitution and have the power to create their own laws as to matters of local concern. Colorado Constitution Article XX, Section 6.
3. Matters of local concern versus matters of statewide concern.

B. Counties

1. Statutory counties obtain their authority from statutes and are limited to those powers explicitly granted to them.
2. Home rule counties have governance powers similar to home rule cities and towns but are generally bound by substantive statutory provisions such as land use regulations.

II. Specific Enabling Legislation

A. Local Government Land Use Control Enabling Act. C.R.S. §29-20-101, *et seq.*

1. General authorization for development control
2. Impact fees
3. Local intergovernmental agreements
4. Impairment of property rights

B. Municipal Planning and Zoning Authority. C.R.S. §31-23-101, *et seq.* and §31-23-301, *et seq.*

1. Authorized to create a planning commission. C.R.S. §31-23-202, *et seq.*
2. Requirement to create a master plan. C.R.S. §31-23-206, *et seq.*
3. Authority to plan for certain extraterritorial matters. C.R.S. §31-23-206, *et seq.*

4. Regulation of public improvements and public utilities. C.R.S. §31-23-209, *et seq.*
 5. Authority to regulate land uses. C.R.S. §31-23-301, *et seq.*
 6. Authority to divide municipality into districts to regulate development. C.R.S. §31-23-302, *et seq.*
 7. Requirement to appoint a board of adjustment. C.R.S. §31-23-307, *et seq.*
- C. County Planning and Building Codes. C.R.S. §30-28-101, *et seq.*
1. Required to create a master plan. C.R.S. §30-28-106, *et seq.*
 2. Creation of a planning commission. C.R.S. §30-28-103, *et seq.*
 3. Authority to regulate public improvements and public utilities. §30-28-110, *et seq.*
 4. Authority to create a zoning plan. C.R.S. §30-28-111, *et seq.*
 5. Authority to create a board of adjustment. C.R.S. §30-28-117, *et seq.*
- D. Planned Unit Developments. C.R.S. §24-67-101, *et seq.*
- III. Miscellaneous Statutory Authority
- A. Areas and Activities of State Interest – "1041" Regulation. C.R.S. § 24-65.1-101, *et seq.*
 - B. Annexations. C.R.S. §31-12-101, *et seq.*
- IV. Zoning Concepts
- A. Standard Zoning Category
 1. Permitted Uses Heights
 2. Set-backs
 3. Parking requirements
 - B. Planned Unit Developments
 1. As an overlay district

2. As the underlying zoning district
 3. Nature of PUDs is a trade of more amenities or other greater public benefit for more flexibility for the developer
- C. General Development Plans
1. Identifies planning areas
 2. Each planning area contains permitted uses and development standards
 3. What is not addressed by the development standards typically is governed by general code provisions
- D. Conditional Uses / Uses Subject to Special Review
1. Identified as a possible use in a zoning district
 2. Requires additional hearing
- E. Variances
1. To boards of adjustment
 2. For relief from hardships of zoning requirements
- F. Site Plans. Showing the detail of:
1. Building elevations
 2. Building footprints
 3. Landscaping detail
 4. Access points
 5. Parking location
 6. Signage
- G. Nonconforming Uses and Structures

V. Comprehensive Plans/Master Plans

A. Municipalities. C.R.S. §31-23-206(4)

1. Every municipality with a population of 2,000 or more, and that is located in a county for which a master plan is required, shall have adopted a master plan by January 8, 2004.
2. The master plan of a municipality is generally advisory by statute and case law.

B. Counties. C.R.S. §30-28-106(4)

1. Certain counties are required to prepare and adopt a master plan by January 8, 2004.
2. The master plan of a municipality is generally advisory by statute and case law.

C. Components of a Master Plan

1. Typical components historically include such things as a land use map, water and sewer plan, parks and open space plan, economic development plan, community facility plan and transportation plan.
2. A master plan for a county or a municipality must include a section on recreational and tourism uses (C.R.S. §30-28-106(5)) and a plan for extraction of commercial mineral deposits (C.R.S. §34-1-304).

D. Requirements and Advisory Nature. Notwithstanding that master plans are advisory, the case of *Larimer County Commissioners v. Conder*, 927 P.2d 1339 (Colo. 1996) provided that counties can incorporate master plan provisions in to their subdivision regulations to provide for some regulatory authority for a master plan, and some home rule municipalities have done the same.

VI. Subdivision

A. Basic Requirement to Subdivide

1. Municipalities

- a. Typically required whenever land is divided into two or more parcels for the purpose of sale or development.

2. Counties

- a. C.R.S. §30-28-101(10) sets forth requirements for when subdivision is required.
- B. Properties over 35 acres are exempt from subdivision in unincorporated areas of counties. But see *Boone v. Board of County Commissioners*, 03CA1850, 2004 (Colo. App.) which has referred back to the trial court the question of whether a county can require more than 35 acres for the minimum size of a parcel needed for a single family residence in an agricultural zoning category.
- C. Dedications
 1. Streets
 2. Utility Easements
 3. Other Public Dedications
- D. Creation of Lots and Blocks for Future Conveyance
- E. Distinguishing Subdivision from Zoning

VII. Annexation

- A. In Colorado 1/6 contiguity is required for annexation. C.R.S. §31-12-104.
- B. An annexation agreement is typically negotiated and describes land use issues, public dedication requirements, public improvements, including streets and utilities, storm drainage and other matters.
- C. The time of annexation is the most level playing field available to landowners regarding land use development issues. It is also an advantageous time for a municipality because an annexation agreement can include requirements voluntarily accepted by a landowner, but which could not otherwise be imposed by the governmental entity.
- D. An annexation petition has certain statutory requirements but will also typically contain a condition that the petition can be withdrawn if the landowner does not receive acceptable zoning and an acceptable annexation agreement. Without that condition, the municipality may not be required to allow the petition to be withdrawn. See *Midcities Co. v. Town of Superior*, 933 P.2d 596 (Colo. 1997).
- E. The annexation process is statute-driven, but courts have allowed municipalities to require all annexations to be referred to a vote of its citizens.

- F. Counties have little influence in annexations except to require that statutory procedures are followed.

VIII. Miscellaneous Issues Regarding the Regulation of Land Use and Development

A. Vesting. C.R.S. 24-68-101, *et seq.*

1. Three year vesting
2. Development agreements in excess of three years are authorized.
3. Abutting or adjoining landowners to a property have no vested right in the zoning remaining unchanged.
4. Common law vesting
 - a. *Crawford v. McLaughlin*, 473 P.2d 725 (Colo. 1970) held that the issuance of a building permit and commencement of a foundation in reliance on the permit precluded the City from limiting the height of the building by a subsequently adopted view ordinance.
 - b. But *Landmark Land Company v. City and County of Denver*, 728 P.2d 1281 (Colo. 1986) held that a pending application for development was insufficient to provide vested rights to a project that otherwise would be limited by the adoption of a view ordinance.
5. The case of *Geralnes, B.V. v. City of Greenwood Village*, 583 F. Supp. 830 (1984) upheld the enforceability of a 1975 pre-annexation agreement that limited the City's powers to rezone certain property through 1999.

B. Initiative and Referendum. Colorado Constitution Article V(1)(9) and C.R.S. §31-11-101, *et seq.*

1. Initiative is to "initiate" an ordinance by petition through a vote of the citizens.
2. Referendum is a referral of a matter to a vote of the citizens.
3. Available in cities and towns but not statutory counties.
4. *Margolis v. District Court*, 638 P.2d 297 (Colo. 181) ruled that the rezoning of a particular property is subject to the right of referendum.

C. Discussion of Level of Discretion.

1. Annexation

2. Zoning
 3. Site plans
 4. Subdivisions
- D. Exactions and Impact Fees
1. Exactions: are applicable as a discretionary requirement imposed on an individual property in the development process.
 - a. *City of Colorado Springs v. Smartt*, 620 P.2d 1060 (Colo. 1980) held that the City could impose a condition limiting access during the zoning of the property.
 - b. *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981) held that the city could condition a church gymnasium building permit on the dedication of additional street right of way and construction of sidewalk improvements.
 - c. In the case of *Cherry Hills Resort Development Company v. City of Cherry Hills*, 790 P.2d 827 (Colo. 1990) the Colorado Supreme Court reviewed a list of 20 development conditions, upheld many, but invalidated a requirement of the developer to fund certain road improvements and fire equipment because local regulations did not include adopted standards to support such an exaction. The Court, however, did uphold those conditions that were part of the developer's application, even though the City would not have otherwise had the authority to impose them.
 - d. The rule regarding exactions will generally not apply in the context of a PUD or annexation, since those are entered into willingly by a developer.
 2. An impact fee is a fee imposed for public improvements or a public service and is legislatively applied to new development, as opposed to an exaction that is applied on a case-by-case basis.
 - a. C.R.S. 29-20-104.5 codifies Colorado law with regard to the ability to impose impact fees.
 - b. Under that statute, impact fees must apply to a class, must be only at a level to cover the impacts of the particular development, must be for capital improvements (public improvements with a useful life of more than five years), can not be to correct past public improvement deficiencies.

- E. Impairment of Property Rights. C.R.S. §29-20-201, *et seq.*
 - 1. Requires an essential nexus between the development and the exaction.
 - 2. Requires that the exaction be roughly proportional to the impact of the development.
 - 3. This is essentially the Colorado codification of the ruling in the US Supreme Court Case of *Dolan v. City of Tigard*, 512 US 374 (1994).

- F. State-wide Regulation
 - 1. Areas and activities of state interest, "1041 Regulation"
 - a. Identifies areas and activities of state interest such as natural hazards, key public facilities, siting of major utility plants, mass transit, and nuclear detonations.
 - b. The local government can designate those areas and activities as a matter of state interest within their jurisdiction.
 - c. The local government can then adopt guidelines for the permitting of such areas and activities.
 - 2. Mineral, oil and gas exploration. See C.R.S. §34-1-304.
 - a. C.R.S. §34-1-305 provides that a local government having zoning control shall not permit the use of an area known to contain a commercial mineral deposit in a manner that would interfere with the extraction of such deposit.
 - b. The Colorado courts have held that the state, through the Colorado Oil and Gas Conservation Commission, has preempted the field and that no local government can impose restrictions that would prevent the drilling of wells, while still leaving local authority to adopt regulations regarding development and operational activities. This jurisdictional line is in significant flux.
 - 3. State preemption of certain matters
 - a. Group homes for developmentally disabled or mentally ill. C.R.S. §31-23-301(4)
 - b. Manufactured homes. C.R.S. §31-203-301(5)

- c. The case of *City of Northglenn v. Ibarra*, 62 P.3d 151 (Colo. 2003) overturned a city ordinance regarding unrelated registered sex offenders living together based upon a determination that the ordinance was preempted by state law.

G. Intergovernmental Agreements

H. Special Taxing Districts

1. Special districts pursuant to C.R.S. §31-25-101, *et seq.*
2. Business improvement districts. C.R.S. §31-25-1201, *et seq.*
3. Urban renewal districts. C.R.S. §31-25-101, *et seq.*
4. Various local improvement districts.

CLAIMS AND PROCEDURAL ISSUES REGARDING LOCAL GOVERNMENT LAND USE REGULATION

I. Certiorari Review. Colorado Rules of Civil Procedure §106(a)4

A. Definition of Quasi-Judicial Actions

1. C.R.C.P. §106(a)(4) provides that where any governmental body "exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion" that the review will be in accordance with Rule 106(a)(4).
2. The case of *Snyder v. Lakewood*, 542 P.2d. 371 (Colo. 1975), ruled that reviewing a rezoning decision as to an individual property is a quasi-judicial action and should be reviewed under Rule 106(a)(4).
3. In *Snyder v. Lakewood*, the court developed a three-part test to determine if a government's action was quasi-judicial. Those factors to be present are:
 - a. A requirement that adequate notice be given before acting.
 - b. A public hearing pursuant to said notice, at which time citizens have an opportunity to be heard.
 - c. A requirement that the governmental authority determine the case by applying the facts of the particular case to criteria which are established by law.
4. By contrast, a rezoning of a larger area, such as a jurisdiction-wide rezoning pursuant to a revision of a zoning code, would not be a quasi-judicial act subject to Rule 106. See *Jafay v. Boulder County Commissioners*, 848 P.2d 892 (Colo. 1993).
5. Where an action is quasi-judicial in nature, the decision must be based on the evidence presented at the hearing and members of the local governing body should not pre-judge that decision before hearing the evidence. Flowing from this are the limitations on contract zoning and the limits some jurisdictions place on discussions with board members on a matter after an application has been filed.

B. Standard of Review for a Quasi-Judicial Action

1. The standard of review for a quasi-judicial action is that the challenge is in the nature of an appeal, and the court's review of the governing body's decision is made on a review of the record and the evidence presented at the local hearing. The governing entity's decision will only be overturned if there is no competent evidence to support the decision.

2. The standard of review means that the wisdom of the decision of the governing body is not reviewed by the court. The court only looks to see whether there was some competent evidence to support the decision that was made, and the court does not look to whether it agrees with that decision.
3. The effect of this is that with a properly conducted hearing, and with evidence in the record to support the decision (even though there was also evidence and testimony in the record to the contrary), it is very difficult to overturn a quasi-judicial decision of a local governing body.
4. Any appeal pursuant to Rule 106(a)(4) must be made within thirty (30) days of the final decision of the local governing body.
5. Discovery in quasi-judicial actions, and presenting additional evidence in the district court are not permitted in the absence of some showing of improper behavior, such as an undisclosed conflict of interest by a participating member of the local governing body.

C. Matters That Constitute Quasi-Judicial Actions

1. Rezoning of individual properties
2. Board of adjustment actions
3. Conditional use hearings
4. Most subdivision approvals. But note that some jurisdictions have created a subdivision review process that does not fall under the three tests of the *Snyder v. Lakewood* case, which may result in those subdivision reviews being legislative actions rather than quasi-judicial actions.

D. Types of Claims

1. No competent evidence exists in the record to support the decision.
2. Conditions imposed as a part of the decision exceed the authority of the local governing body.
3. Inappropriate application of the standard of approval.

E. Nature of the Remedy

1. The remedy under Rule 106(a)(4) is to overturn the decision of the local governing body and reverse the decision.

2. The remedies available to the court do not include mandating the local governing body to approve a particular application.

II. Declaratory Judgment. C.R.C.P. §57

A. Definition

1. Any declaratory judgment action is a challenge of an interpretation of or the validity of an existing ordinance of broad application.

B. Examples of a Declaratory Judgment Claim

1. A challenge to an interpretation of a permitted use description.
2. Imposition of a code application to a property when the landowner believes the code does not apply to his property.
3. Failure of a jurisdiction to follow its own due process or procedural rules.

C. Nature of the Remedy and Review

1. The review is a trial to the district court, with discovery and presentation of evidence.
2. A decision of the court is to "declare" the rights of the parties in the dispute.

III. Federal Civil Rights Land Use Action. 42 U.S.C. §1983

A. Standard of Review

1. Section 1983 provides that every person who, under color of a statute or ordinance, subjects a citizen of the United States to deprivation of a right secured by the constitution will be liable to the injured party.

B. Types of Claims

1. Claim for violation of procedural due process.
2. Claim for violation of substantive due process.
3. Claim for regulatory taking.
4. Claim for denial of equal protection.

C. *City of Rancho Palos Verdes, et al. v. Abrams*, No. 03-1601, slip op. (U.S. March 22, 2005)

1. Section 1983 remedies not available for a claim for violation of the Telecommunication Act of 1996.

IV. Regulatory Takings

A. The United States and Colorado Constitutions prohibit the taking of private property for public use without just compensation.

1. The purpose of this is to keep individual landowners from being required to bear burdens that should be shared by the public as a whole.
2. Some regulatory takings involve natural physical invasion of the property, such as requiring the installation of cable communication fixtures or requiring public easements. But in the land use context, regulatory takings usually deal with cases where there is no physical invasion of the property but only a restriction on how the property can be used.

B. "Facial" Challenge

1. A "Facial" challenge is a challenge to a regulation that is alleged to be a taking. An example of such a challenge would be whether an ordinance prohibiting development on any slopes over a certain grade amounted to a taking if it limited an owner's ability to use the land for any purpose.
2. An "as applied" challenge results when the limitation on use of the property comes from the imposition or conditions placed on a particular land use action.

C. Highest and Best Use Versus Reasonable Use of the Property

1. The law does not require that the owner be able to obtain a land use approval that allows them to obtain the maximum profit or maximum economic value for a parcel of land. See *Cottonwood Farms v. Jefferson County Commissioners*, 763 P.2d 551 (Colo. 1988), where the Colorado Supreme Court upheld a denial of a rezoning from an agricultural district to Planned-Development Mining classification.
2. The question is whether the landowner is left with a "reasonable" use of the property.

V. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc

A. Substantial Burdens.

1. Prohibits government implementation of any land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, unless such imposition:
 - a. Is in furtherance of a compelling governmental interest; and
 - b. Is the least restrictive means of furthering that compelling governmental interest.

B. Discrimination and Exclusion

1. Prohibits government implementation of any land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a non-religious assembly or institution.
2. Prohibits government implementation of a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
3. Prohibits government implementation of a land use regulation that:
 - a. Totally excludes religious assembly from a jurisdiction; or
 - b. Unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.