FRIDAY SESSION: 2:45–4:00 PM

Recent Land Use Decisions in the Rocky Mountain West

Sponsored by Jorden, Bischoff, McGuire & Hiser

2:45—4:00 p.m.
Friday, March 10, 2006
Sturm College of Law/Frank J. Ricketson Law Building

Hear the details and analysis of recent court decisions
from top regional experts on land use law.

Moderator/ **Douglas Jorden, Esq.**
Speaker: Attorney
Jorden, Bischoff, McGuire & Hiser
Scottsdale, Arizona

Panelists: **Anita Miller, Esq.**
Anita P. Miller Attorney of Law
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ROCKY MOUNTAIN LAND USE INSTITUTE

RECENT LAND USE DECISIONS IN ARIZONA

Presented by:

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March 10, 2006

ARIZONA CASES

Pima County v. Clear Channel Outdoor, Inc., 2006 WL 169293 (Ariz. Jan 25, 2006).

Pima County filed an action against Clear Channel, seeking a declaratory judgment, injunctive relief and civil penalties, contending that its new billboards violated various zoning ordinances and building codes. Clear Channel defended and counterclaimed, asserting that its billboards, although located within Pima County, were not subject to Pima County's ordinances. The trial court granted judgment in favor Clear Channel. Pima County appealed. The Court of Appeals reversed, holding that the state's governmental function exemption from local zoning regulations did not transfer to Clear Channel when the state transferred real property to it as just compensation in a condemnation action because such an exemption would conflict with the legislature's intent that local jurisdictions retain the power to impose billboard regulations.

Mobile Community Council for Progress, Inc. v. Brock, 211 Ariz. 196, 119 P.3d 463 (App. 2005).

Community residents and a not-for-profit corporation filed suit against a five member county board of supervisors, alleging that the board's 3-1 vote on a major plan amendment, with one member abstaining due to a conflict of interests, violated the two-thirds vote requirement imposed by ARIZ. REV. STAT. § 11-824(C). The Superior Court granted the board's motion for judgment on the pleadings. Plaintiffs appealed. The Court of Appeals affirmed the decision, holding that upon disqualification of the board member, only three affirmative votes were needed to pass the amendment because the remaining members constituted the full membership of the board for that particular vote.

Powell v. Washburn, 2006 WL 22416 (Ariz. Jan 05, 2006).

Property owners in a planned residential community brought action against a developer, seeking an injunction prohibiting the use of recreational vehicles as single-family residences within the community. The community's CC&Rs declared that the community was to be developed as an aviation related residential and commercial center, and the land was zoned for manufactured housing, which permitted only three residential uses: manufactured homes, low density residential and mobile homes. Years later, the city amended its zoning ordinance to permit the use of recreational vehicles as residences on land zoned for manufactured homes. The Superior Court granted summary judgment in favor of the property owners, finding that the CC&Rs did not permit the use of recreational vehicles as residences. The developer appealed, arguing that the trial court erred by not interpreting the restrictive covenants strictly in favor of the free use of land. The Court of Appeals agreed, holding that because the covenants did not expressly prohibit recreational vehicles as single family residences, they were permitted. The property owners sought review by the Supreme Court, arguing that party intent should supersede any policy in favor of strict construction of restrictive covenants. The Supreme Court reviewed the case and overturned existing rule that

ambiguities in restrictive covenants must be interpreted strictly in favor of the free use of land. Instead, the Court held that a servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding the creation of the servitude. Thus, the Supreme Court affirmed the Superior Court's decision granting an injunction against the use of recreational vehicles as residences in the community.

ARIZONA LEGISLATION (2005)

S.B. 1287 Municipal Business Incentives.

This bill prohibits municipalities from enacting a development agreement as an emergency measure and states that such agreements are not effective for at least 30 days from final approval.

H.B. 2255 Timeshare Management Act.

This bill adds a new chapter, the "Timeshare Owners Association and Management Act" ("TOAMA") to the ARIZ. REV. STAT. to govern timeshare plans, property and associations. TOAMA establishes: (i) powers of the timeshare board and the developer, (ii) procedures for voting and (iii) the enforcement of assessments.

H.B. 2308 Land Divisions Airfield Disclosure.

This bill states that the affidavit of disclosure required for the sale of five or fewer land parcels in an unincorporated area must disclose whether the land is located in a high noise, accident-potential or sound-standard zone of a military airport or facility.

S.B. 1274 Municipal Tax Incentives.

This bill places conditions on municipalities that offer tax incentives to attract retail businesses to locate within their borders. It states that a municipality must: (i) determine that the business would not locate in the municipality without the incentives, (ii) find that the proposed tax incentives raise more revenue than the amount of the incentives during the duration of the agreement, (iii) issue a report on incentive revenues and expenses every two years and (iv) not act on a proposed incentive as an emergency measure or as part of a consent calendar.

H.B. 2364 Transfer of Development Rights.

This bill allows a county board of supervisors to establish procedures for the transfer of development rights from unincorporated property that the county desires to protect to property more suitable for development.

H.B. 2066 Municipal Development Fees.

This bill requires municipalities that impose development fees to make an annual report available to the public within 90 days after the end of each fiscal year. The report must include: (i) the amount charged for each type of fee, (ii) beginning and ending balances in all accounts, (iii) the amount of interest earned on each account and (iv) a description of projects paid for with the development fees.

S.B. 1393 Aggregate Mined Land Reclamation Act.

This bill adds a new chapter to the ARIZ. REV. STAT. governing the requirements for reclamation on land mined for aggregate (sand and gravel). In addition to establishing a division of mined land reclamation within the state mine inspector's office, this act requires an approved reclamation plan to be in place for each aggregate mining unit or mining exploration operation by January 1, 2007.

H.B. 2154 Homeowners Associations.

This bill requires a majority vote, rather than a two-thirds vote, of board members in attendance at a home owners association meeting to remove a board member.

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EMINENT DOMAIN LEGISLATION IN 2006 NM LEGISLATURE

Anita Miller

As of January 30, there are 11 pieces of legislation concerning eminent domain. Some have already been determined to be not germane for this budget session. If some or all of these bils are determined to be “not germane”, they can be reintroduced as amendments to the New Mexico Constitution, so “germaneness” won’t apply.

SM 3 (Carraro) and **HM 6** (Youngberg) - Requests our congressional delegation work to limit violations against protected intellectual and physical property.

Rep. Park **(HJR 2)** and Sen. Adair **(SJR 7)** want New Mexicans to amend the N.M. Constitution to limit the use of eminent domain only when private property is necessary for the possession, occupation or enjoyment by the public -- and not for private commercial enterprise, or economic development or any other private use. Private property shall not be taken from one owner and transferred to another on the grounds that the public will benefit from a more profitable private use. The question of "public use" will be decided by the courts, not the legislature.

Rep. Tom Anderson **(HJR 11)** and Sen. Carraro **(SJR 4)** want New Mexicans to amend the N.M. Constitution to define what "public use" means. This legislation has same intent as HJR 2 and SJR 7 except that Anderson and Carraro don't believe the determination of "public use" should be left to the courts. "Public use" means the possession, occupation or enjoyment of property by the public at large, public agencies, public utilities, pipeline common carriers, and those seeking to put water to beneficial use. In addition, "public use" means the addressing of a threat to the personal health or safety of members of the public from structures or activities on or in property. Except for public use, private property shall not be taken for use by private commercial enterprise for economic development or for any other private use, unless the owner consents to the taking. Private property shall not be taken from one owner and transferred to another private owner on the grounds that the public will benefit from a more profitable use of the property.

Rep. Larranaga **(HJR 7)** proposes a constitutional amendment which clarifies that "private property shall not be taken for use by a private commercial enterprise or for any other private use, for economic development or for the purpose of raising the taxable value of property. Private property shall not be taken form one owner and transferred to another private owner on the grounds that the public will benefit from a better planned or more profitable use of the property."

Sen. Rawson **(SJR 1)** also proposes to amend the constitution with the same intent of limiting eminent domain powers by reversing the takings clause from "private property shall not be taken unless ....." to "private property may be taken only upon payment of just compensation by public agencies when necessary for the possession, occupation or enjoyment of land by the public at large, or by public utilities, pipeline common carriers, those seeking to put water to beneficial use. Private property shall not be taken for use by a private commercial enterprise, for economic development or for any other private use, except with the consent of the owner. Private property shall not be taken from one owner and transferred to another, on the grounds that public will benefit from a more profitable private use."

Sen. Neville **(SB 231)** and Rep. Cheney **(HB 27)** wants to amend the eminent domain code to provide that "The state or a local public body shall not condemn private property if the taking is to promote private or commercial development and title to the property is transferred to another private entity."

Sen. Boitano **(SB 370)** wants to repeal the Community Development Act; and amend the Metropolitan Redevelopment Act and Urban Development Act to exclude improper planning or

multiple ownership from the legal definition of blight. It removes economic development as a reason to address slum and blighted conditions. Substantial other changes in this 34 page bill.

LEGISLATION RELATED TO LAND USE INTRODUCED IN THE "SHORT"

NEW MEXICO 2006 LEGISLATIVE SESSION

Anita Miller

NOTE: As of January 31, 2005, none of these bills has been passed. A "final" list of bills passed will be distributed on March 10th. A Tax Increment Financing bill is expected to be introduced, as well.

Eminent Domain bills: See separate page!

The eminent domain bills, in addition to HB 639, discussed below, reflect concerns with the use of eminent domain by local government for economic development purposes, in response to the Kelo v. City of New London case.

HB 32 - Northwest NM Environmental Justice Program

SB 61 - School Districts 40 year Water Plans

SB 146 - Community Land Grant Comprehensive Planning

SB 166 - Mainstreet Act Provisions
SB 168 - UNM Mainstreet

HB 111 - Renewable Energy Transmission Authority
SB 269 - Solar Market Development Income Tax Credit

HB 151 - Growth Management Plan for Taos County
HB 152 - Sustainable Development Testing Site Act
HB 153 - Taos County Articulated Land Use Map

HB 163 - Allow Certain Water Rights Transfers
HB 173 - Agriculture Conservation Program

HB 188 - Land, Wildlife & Clean Energy Act
HJR 4 - Limit City-County Merger Elections
SJM 10 - Action Plan for Public Lands

SB 242 - Dept. of Transportation Expenditures Cap

HB 595 – Relating to Taxation, Creating the Transit Fund; Providing for Distribution of a Percentage of the Motor Vehicle Excise Tax to the Transit Fund; Making an Appropriation

HB 188 - Land, Wildlife & Clean Energy. Directs that a portion of oil and gas tax revenues be Directed to a new Land and Wildlife Conservation Fund to fund conservation projects and clean energy development projects; supports the maintenance of working farms and ranches, and approves public access to land, water, wildlife and open space recreational opportunities. Creates a new board to administer the funds.

HB 639 - Authorizes transit-oriented development on land owned by the New Mexico Department of Transportation in Santa Fe County; Does not require compliance with County zoning] but requires County review and comment; Also does not require compliance with

New Mexico Procurement Code, but does require competitive bidding. Also requires that when the State DOT uses eminent domain for acquisition of land for roads and highways, and intends to lease land condemned partially for commercial activities, the intended projects should “generally” comply with local zoning and land use policies, including affordable housing and historic preservation, a negotiated agreement with the local public water provider and consultation with affected neighborhoods.

Reflects Kelo concerns.

HB 746: amends the Eminent Domain Code and also appropriates $20,000 to the Local Government Division to hold meetings around the state to educate local public bodies on the proper use of eminent domain.

HJM ("Joint Memorial") 52: Requests a joint legislative committee to study and review all relevant New Mexico eminent domain statutes, to determine whether, indeed, private property rights are endangered by eminent domain, in the context of the need for local governments to have the ability to plan, plat and grow in order to maintain economic development in their communities. Would "slow down" the Kelo hysteria!

NEW MEXICO LEGAL AND LEGISLATIVE UPDATE

ROCKY MOUNTAIN LAND USE INSTITUTE

March 10, 2006

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New Mexico Cases

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, December 9, 2005.

This case is a real Ablockbuster@. It=s the best examination and explanation of the difference between quasi-judicial and legislative actions affecting land use by a local government ever to be issued by a New Mexico Court.

The City of Albuquerque/Bernalillo County Comprehensive Plan of 1988 designated the Uptown Sector as one of several urban centers in the City. An urban center is characterized by high density mixed use and socio-economic activities designed to reduce urban sprawl, auto travel needs and service costs, enhancing the urban experience. In 1981, the City had implemented the Uptown Sector Plan (A81USP@) which zoned the property which is the subject of this case as SU-3, which requires a site plan to be submitted for development. (Land in SU areas is specifically zoned in Sector Plans.) The 81USP did not mandate development densities or limit the amount of retail use in the SU-3 area, nor did it mandate parking structures. It did refer to pedestrian-friendly landscaping, open space and building orientation. Revisions to the 81 USP began in 1989, with revisions presented to agencies for comment in 1994.

ACP was the leaseholder of 27 acres in the SU-3 area, owned by the Archdiocese of Santa Fe. It submitted a site development plan under the 81USP, consisting of a hotel, multi-story office buildings, retail facilities and an arboretum, which was approved by the City but never built. In 1991, ACP selected Opus Southwest to purchase or take over the leasehold , which it would do if it could develop the property. In 1994 Opus submitted a site development plan for a 28 acre low density Abig box@ shopping center. The proposal included adjoining land zoned as SU-2, which allowed lower density office and retail uses, so the zoning of that area had to be changed toSU-3. A map change amendment and amendment of the 81 USP was also requested. The public opposed the proposed changes to accommodate a big box center, expecting high density urban development on the subject site. Opus withdrew its application in the summer of 1984, and in

mid-September, 1984, while the City decided to review the 81USP. Two weeks later Opus submitted an application for a smaller big box project, entirely in the SU-3 zone, requiring no zoning or map amendments.

The City then pursued 81USP changes, while Opus pursued getting its site plan approved.. In October it deferred its application to January, 1995. In January, the City deferred the application because it was considering a moratorium; a 4 month moratorium, passed a few weeks later, pending revision to 81USP. The City=s Environmental Planning Commission (AEPC@) deferred the Opus development Plan until after the moratorium was to expire. Amendments were Afast-tracked@, and would now require higher Afloor area ratios (FAR=s)@ or higher buildings with structured parking, and a more pedestrian friendly environment, among other requirements. When these amendments were discussed in public hearings before the EPC and Land Use Planning and Zoning Committee of the City Council (LUPZ), Opus participated and objected vehemently to them.

The issue arose in hearings as to whether the new requirements in a 95USP would require a zone map change; the City Attorney said that this was not necessary. The LUPZ approved the changes, sending them to the City Council, which after hearings approved the 95USP. In July, 1995, the EPC deferred the Opus application indefinitely because it didn=t comply with the 95USP. ACP, as lessee, filed a petition in District Court for review of the approval and adoption of the 95USP, and review of the City=s refusal to hear its application under the 81USP. The District Court ruled that the 95USP didn=t apply to the Opus Plan, and remanded to the City to consider the Opus Plan under the 81USP. In November, 1999, the EPC denied the Opus Plan on the basis that it didn=t comply with the Comprehensive Plan, since it wasn=t the urban place that the Comprehensive Plan envisionedBan Aurban center@.

ACP appealed the denial of the Opus Plan to District Court which held that the Opus site plan did comply with 81USP and ordered the City to approve it. The City appealed this decision to the Court of Appeals which held that the appeal was premature. In a jury trial on ACP=s claims of constitutional taking and violation of due process, the jury was instructed that the law of the case was that ACP >s property had been downzoned by the 95USP, and that ACP was entitled to a quasi-judicial hearing before the downzoning. Finding that ACP=s due process rights were violated, the jury awarded damages against the City of $8 2 million! The City filed 2 petitions for writ of certiorari with regard to the two administrative decisions on the adoption and application of the 95USP, and also filed a notice of appeal from the jury verdict; all three appeals were consolidated.

The Court of Appeals held that a district court may only determine if the City acted fraudulently, arbitrarily or capriciously, whether the decision was supported by substantial evidence and whether the City acted in accordance with the law, and cannot substitute its judgment for that of the City. It may only review the record regarding the adoption of the 95USP.

In reviewing the City=s appeal of the District Court=s finding that the 95USP changes created a Anew zone@, and was thus a Adownzoning@, the Court of Appeals held that the City=s action in

adopting the 95USP was legislative in nature; therefore the District Court=s focus on the effect of the City=s adoption of the 95USP on ACP=s property was erroneous. ACP said that the 95USP only impacted its property and was thus Azoning@ and quasi-judicial. The Court of Appeals held that it applied to all of the property in the ASU-3 Intense Urban Core@, and although the undeveloped property in the plan area was only owned by 3 property owners, any redevelopment in the area would also be subject to the 95USP. The 95USP was not site specific; it was general in character and not restricted to specific identifiable persons or groups, and thus legislative, and not quasi-judicial.

The Court of Appeals cited its recent opinion in *KOB v. City of Albuquerque,* 2005-NMCA-049, which had stated that the fact that the City had a particular property in mind when it takes action does not change the nature of the decision from legislative to quasi-judicial, and thus that ACP proposed a big box development influenced the City=s revision of the USP was not determinative. The record in the case was replete with evidence that the City was considering strengthening the 81USP.

ACP and the District Court had maintained that the 95USP had, in fact, created a Anew zone@, since it was a Afundamental change@and thus required a change to the Zoning Map. The Court held that it did not change the uses allowed in the subject area, and was thus a Atext change@, not requiring a map change. Although there must be Auniformity@ within a zoning district, this does not prohibit different classifications within a district as long as they are reasonable and based on the public policy to be served.. For example, within a residential district there could be different requirements for residential uses on a steep slope. In this case, there was substantial evidence that revisions of the 81USP were necessary to meet the Comprehensive Plan=s objective of creating an intense urban core in the Urban Center and prevent urban sprawl.

There was also evidence in the record that big box retail development might increase air pollution, even though quantification of the air quality impact was not conclusive.

ACP alleged that the City did not follow its Resolution 270-1980 which sets forth conditions which must be met for a zone change, including that there must be a Achange or mistake@ in the existing zoning.. The Court of Appeals found that the policies in the Resolution applied only to Zone Map changes, which it had already decided was not at issue; only a change to a Sector Plan. was at issue in this case. ACP=s allegation of targeting of its property was also not proved by substantial evidence, as discussed above.

The Court of Appeals held that the 1995 USP revisions were legislative, establishing policy for future development in the Uptown Sector. It reversed the District Court=s holding that the revisions downzoned ACP=s property, reversed the District Court=s remand to the City for approval under the 1981USP, and reversed the District Court=s verdict (damages!!) since there was no quasi-judicial requirement and no Atakings@ or due process violations of the United States Constitution.
Needless to say, a Motion for Rehearing has been filed by ACP. It alleges an Aerror@ in the Court of Appeals= identifying the subject property as being in a ASpecial Center Zone,@ and that

the 81USP provided for an Intense Core. It alleges other mischaracterizations by the Court of Appeals, and errors concerning the whole record review and the findings of the jury in District Court. It also requests clarification concerning the takings issue.

The City in its response to ACP=s Motion for Rehearing rehashes its arguments made in its Brief in Chief, as adopted by the Court of Appeals.

Let=s see what happens! If the Motion for Rehearing is denied, it=s likely that ACP will try to appeal to the New Mexico Supreme Court. So, it ain=t over until it=s over!

One final note: ACP sold its leasehold interest to the Hunt Development Corporation, which is now building an eagerly awaited upscale mixed use retail/office center in compliance with 95USP!

KOB-TV, L.L.C. v. City of Albuquerque, 2005 NMCA 49

Note: This case was decided a few months before the *ACP* case, above, providing a precedent on the issue of allegations of Atargeting@ property affected by a change is a land use regulation.

KOB-TV, LLC (hereinafter "KOB"), the owner of a TV stations was granted a building permit to construct a permanent helipad on the property occupied by the station, which had utilized a helicopter on a temporary helipad on the property to cover Abreaking news@. Residents of the area near the property complained about both noise and potential danger from a crash.. Thereafter the City adopted an ordinance which restricted the use of helicopters to certain zones which did not include the zone in which the station was located. While the legislation was pending, the owner=s building permit for the helipad was revoked. KOB appealed both the adoption of the ordinance and the revocation of its building permit. The district court ruled in favor of the City, and KOB sought review by the New Mexico Court of Appeals. On appeal, the Court of Appeals determined that KOB's previous use of the helicopter on the property was a nonconforming use, which was not subject to immediate termination. The City was authorized to regulate the use of helicopters when it found that they had potential adverse impacts on the health, safety and general welfare of the users and surrounding property. Next, the court held that the City=s action was not quasi-judicial because the restrictions were applicable to all properties and future helicopter use in the City. Other TV stations happened to be located in zones where helicopters were permitted, or had located their helicopters at the Albuquerque International Airport, but the court found that this didn=t indicate that KOB=s property was Atargeted@ by the restriction.

The court noted, however, that the district court had failed to conduct a proper balancing analysis when it set the amoritization period after which the station had to move its helicopter to a district which allowed helipads. Finally, the decision to revoke the station=s permit was not moot. The City was not allowed to revoke the permit so as to remove the owner=s right to amortization. Although the court affirmed the adoption of the ordinance, it found that a one-year amortization period was not reasonable. The case was remanded for consideration of the factors necessary to

determine a reasonable amortization period. Finally, the revocation of the building permit was reversed. The helicopter, by the way, is now located at the airport!

Paule v. Santa Fe County Board of County Commissioners, 2005 NMSC 21, 117 P. 3rd 240 (2005), 2005 N.M. LEXIS 337.

The New Mexico Supreme Court held that the County Commission had not failed to comply with its procedural rules when it voted on an application for a variance at a public hearing. The Supreme Court held that there was substantial evidence to support the grant of a variance, and that the district court=s decision that the variance should have been denied was premised on a mistaken belief that the activity that the applicant company had wanted to conduct on the property, the construction and operation of a telecommunications tower, was prohibited by the County Code. The County Code actually permitted the use of telecommunications facilities anywhere within the county. The court held that the benefits provided by the construction of the 198- foot telecommunications tower to the county outweighed the possible burdens placed upon individual county residents.

LEGISLATION RELATED TO LAND USE INTRODUCED IN THE ASHORT@ 2006

NEW MEXICO LEGISLATIVE SESSION

NOTE: **As of January 31, 2005, none of these bills has been passed. A Afinal@ list of bills passed will be distributed on March 10th.**

COLORADO 2005

Presented by

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The fact that the Colorado appellate courts had few occasions to hear and decide significant land use cases during the latter portion of 2004 and the entirety of 2005 perhaps indicates that Colorado's land use jurisprudence has established itself, or perhaps indicates that the economic downturn from which the state seems to be emerging caused the litigation of land use cases to be deferred. However, the United States Supreme Court decided three significant "takings" cases which will reverberate throughout the land use jurisprudence for decades to come. An analysis of these cases and trends follows.

Boone v. Board of County Commissioners, 107 P.2d 1114 (Colo. App., 2004, rehearing denied 2005) discusses the interrelation between a county's zoning and subdivision authorities. In *Boone*, a landowner owned approximately 143 acres of property, which he divided into 4 lots, each of which exceeded 35 acres. The county zoning resolution provided that all parcels of land greater than 60 acres in size were to be zoned Agriculture (A), while all parcels between 35 and 59.99 acres were to be zoned Agriculture-1 (A-1). Property zoned A enjoys uses by right that are not enjoyed by properties zoned A-1. The property owner asserted that the county was unlawfully attempting to use zoning criteria in lieu of subdivision criteria to regulate his property, which is exempt from subdivision regulation pursuant to §30-28-101(10)(b), C.R.S. (exempting parcels over 35 acres from subdivision regulation). On reconsideration of a joint motion for summary judgment, the trial court entered partial summary judgment for the property owner holding that the property in question is exempt from subdivision regulation under the statute cited above. On appeal the court of appeals cited established authority as to the fundamental differences in purpose between zoning and subdivision regulations, and found that the prohibition against imposing subdivision regulations and requirements on parcels of property in excess of 35 acres did not preclude a county from subjecting those same parcels to zoning requirements, even when some of the criterion applicable to the zoning requirements will be similar or identical to those that would be required in subdivision regulation.

Quaker Court Limited Liability Company v. Board of County Commissioners, 109 P.3d 1027 (Colo. App., 2004) (*cert.* denied, March 21, 2005) contains an excellent exposition of settled Colorado jurisprudence relating to standards of review of both legislative and quasi-judicial actions, the presumptions attendant to each, and the ripeness requirement for inverse condemnation actions.

In this matter, landowner purchased parcels of property that were subject to limitations as to the number of homes that were allowed to be built on the property, which property was in a documented and designated landslide area (three houses had previously been damaged in a landslide which occurred on the property). When

landowner's application for building permits to construct more than the maximum permitted number of homes on the property was denied, he appealed to the Board of Adjustment, which upheld the administrator's denial. Landowner sued the administrator, the BOA, and the Board of County Commissioners seeking a determination under C.R.C.P. 106(a) (4) that the BOA decision was an abuse of discretion and seeking declaratory judgment that the regulation promulgated by the Board as to the permissible number of homes to be allowed on the property was taken in excess of the Board's authority and constituted an inverse condemnation. The trial court granted summary judgment in favor of the County, and the landowner appealed. The Court of Appeals affirmed. In so doing the Court of Appeals provided a thorough review and analysis of the standards for review of both quasi-judicial and legislative determinations as well as the presumptions which attach to each such determination (see 109 P.3d pp. 1030 – 1033). In particular, the Court of Appeals restated the requirement that land use regulations must be sufficiently specific "'to ensure that any action taken by a county in response to a land use proposal will be rational and consistent and that judicial review of that action will be available and effective' and 'to provide all users and potential users of the land with notice of the particular standards and requirements imposed by the county'" at p. 1032, quoting *Board of County Commissioners v. Conder*, 927 P.2d 1339, 1348 (Colo. 1996) and *Beaver Meadows v. Board of County Commissioners,*709 P.2d 928, 936 (Colo. 1985). As to the inverse condemnation claim, the Court reaffirmed the Colorado rule that until an agency has made a determination that it "lacks the discretion to permit any development, or the permissible uses of the property are know to a reasonable degree of certainty", *quoting Palazzolo v. Rhode Island*, 533 U.S. 606, at 620 (2001), an action in inverse condemnation is not ripe for determination.

Olson v. Hillside Community Church, 124 P.3d 874 (Colo. App. 2005) (*cert.* denied, December 5, 2005), culminates a long-standing dispute involving the construction of an addition to a church structure in the City of Golden, and recognizes and continues a jurisdictional trend involving municipal courts in home rule municipalities. In *Olson*, the City of Golden, after numerous prior hearings including one at which the City was found to be in contempt of a prior court order, invoked the authority of its municipal court under the provisions of the city's Home Rule Charter as possessing exclusive jurisdiction for resolution of disputes involving questions arising under the charter and ordinances of the City. The Court of Appeals, applying the holding in *Town of Frisco v. Baum*, 90 P.3d 845 (Colo. 2004) (which case was decided after the institution of this civil action and after the prior decisions rendered in the case), found that this exclusive jurisdiction may be exercised at any time, and that invocation of such jurisdiction divests the district courts of jurisdiction over the matter.

Droste v. Board of County Commissioners of the County of Pitkin**,** ___ P.3d ____, 2005 WL 2456901, *cert.* pending (Colo. App. 2005) (decided October 6, 2005) affirmed the authority of a county to enact a moratorium under the provisions of the Areas and Activities of State Interest Act (AASIA), §24-65.1-101 *et seq.* C.R.S, and the Local Land Use Enabling Act, §29-20-101, et seq., C.R.S. In this matter, the property owners in 1963 acquired approximately 925 acres of property in Pitkin County. In 1974, the County enacted a zoning resolution that allowed for development of single family

residences on lots of at least ten acres as a use by right. Subsequently the owners sold separate conservation easements to both the Town of Snowmass Village (1996) and Pitkin County (1999) relating to approximately 600 acres of their total property. Subsequently owners filed several development applications seeking permission to develop a 15,000 square foot residential dwelling, an access road for that dwelling, and a 14 unit planned unit development on another portion of the property. In March 2003 the Board of County Commissioners adopted an emergency moratorium precluding the acceptance, processing or approval of applications on certain properties, including owner's property, in the county. The owner brought suit seeking declaratory judgment that the moratorium was void as beyond the authority of the county. The Trial court found in favor of the county, as did the Court of Appeals. Both courts found that the AASIA and the Enabling Act contain sufficient authority to enable a county to implement moratoria.

UNITED STATES SUPREME COURT TAKINGS DECISIONS

2005 was a seminal year for Supreme Court takings decisions, with the Court handing down three judgments that may rival 1986's "Takings Trilogy" in ultimate importance.

In the first of the three 2005 decisions, *Lingle v. Chevron*, ____U.S._____, 125 S. Ct. 2074 (2005) the Court eliminated from the takings calculus the "substantially advance legitimate state interests" test first enunciated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The Court, in Justice O'Connor's final majority opinion on the takings issue (she did, as we will soon explore, leave the court with a powerful minority opinion), the Court found and reiterated that there are two examples of *per se* takings, the first being where government requires an owner to suffer a permanent physical invasion, however minor, of his property, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and the second where regulations completely deprive an owner of "*all* economically beneficial use" of his property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019. In all other circumstances, the tests set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), apply. In analyzing the "substantially advance legitimate state interests" test, the Court concluded that this test had no actual relation to a takings test, and that an action which could clearly be found to "legitimately advance a legitimate state interest" could also arise to the level of a taking. Rather, the *Agins* test rejected as a takings test is in actuality a valid due process test, and should be treated and considered as such.

In *San Remo Hotel, L.P. v. City and County of San Francisco*, ___ U.S. ____, 125 S.Ct. 2491 (2005), the Court held that neither the provisions of 28 U.S.C. §1738, nor the prior holding in *Williams County Regional Planning Authority v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) required that land use disputes previously tried in state courts be re-litigated in federal courts, the court being unwilling to recognize or create an exception to the full faith and credit provisions of statutory and constitutional law. What is most interesting in this case is the fact that three justices (Kennedy, Thomas and O'Connor [but surprisingly not Justice Scalia]) joined the late Chief Justice in calling

for reconsideration, given an "appropriate" case, of the "ripeness" requirement established in *Williamson County.* Given the manner in which cases wend their way to the Supreme Court, it seems probable that such an "appropriate" case will soon materialize.

Given the decision in *Lingle* and the precursor statements contained in the concurrence in *San Remo*, it might be anticipated that the tests for determining takings have been now firmly established, and some of the procedural quirks attendant to takings litigation might be further clarified or adjusted in the near future.

Finally, in the celebrated and much discussed case of *Kelo v. City of New London*, ____ U.S. ____, 125 S.Ct. 2665 (2005) a sharply divided court found that a municipality's taking of one owner's private property for development by another private property owner satisfies the "public purpose" test, and is authorized under the Constitution. In support of its holding, the majority, speaking through Justice Stevens, cites authority including *Berman v. Parker,* 348 U.S. 26 (1954) (use of eminent domain in the urban renewal context to eradicate "blight") and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (in which the state of Hawaii acquired formerly "royally owned" real estate for distribution to other private property owners for the purpose of eliminating the "social and economic evils of a land oligopoly", and in which Justice O'Connor has stated that the sweep of the takings clause was as broad as the police power.) The majority found that public acquisition of private property for the purpose of enhancing and encouraging economic development was in keeping with these economic and legal precedents, and satisfied the "public purpose" test to legally justify such a taking.

A vocal minority consisting of Justices O'Connor, Scalia, Thomas and the late Chief Justice Rehnquist sharply dissented. Stating that "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private property owner, so long as it might be upgraded, . . ." the minority would find that government taking of private property for the purpose of transferring title to that property to another for purely economic reasons is not consistent with the intent of the framers nor of precedent, which has always found a public, as opposed to purely private, use of property so acquired to be an essential component of a "public purpose."

This decision has become a divisive political issue across the United States, including in the Colorado General Assembly. It is anticipated that a bill to eliminate the power of eminent domain for the purpose of acquiring private property for the purpose of transferring title to that property to another private party for economic development purposes will be (if it has not already been) introduced during the current legislative session. Given Governor Owens' well-established identification with the "property rights" movement, there is little doubt any such legislation that is enacted will be signed into law.

What will be interesting on the Supreme Court level is how the changes in the Court's makeup might change the result in the *Kelo* case in the future. Current

conventional wisdom would indicate that the changes which have occurred to date (the late Chief Justice Rehnquist being replaced by Chief Justice Roberts, and Justice O'Connor being replaced by Justice Alito) would foreshadow no immediate change in the underlying philosophies that gave rise to the decision. However, the retirement of Justice O'Connor leaves Justice Kennedy as the one "swing" vote, and it will be interesting to note how the internal lobbying on the Court will affect his votes in the future, if at all. Only time will tell!