

# WHEN IT ALL GOES WRONG: REFERENDUM AND INITIATIVE, AND LAND USE LITIGATION

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## INITIATIVE AND REFERENDUM

- I. Background; purpose.
  - A. Referendum and initiative
    1. Initiative: citizen-initiated adoption of legislation
    2. Referendum: citizen-initiated *electoral* challenge to legislative action (as compared to a *judicial* challenge)
  - B. Purposes of referendum and initiative in contemporary land use matters
    1. Stated purpose of initiative and referendum: pure democracy!
    2. Referenda may be used to challenge local legislative body's actions (i.e. an unpopular rezoning or other land use approval); initiative may be used by a neighborhood group or other organization to undertake action that the local legislative body refuses to take (i.e. rezoning a certain parcel of land in the neighborhood).
      - a. Threat of initiative/referendum is much like a threat of a lawsuit: may encourage the legislative body to take action that it otherwise would not.
      - b. Cost of initiative/referendum may be high on both petitioners and governments, depending on various factors: (1) popularity/unpopularity of the issue to be referred/initiated; (2) population/geographic size of the jurisdiction; (3) methods used as part of the campaign; (4) other characteristics of the local population.
      - c. Initiative/referendum—at least in the theoretical sense—does not carry the same hurdles that feature in judicial challenges under C.R.C.P. Rule 106(a)(4) or declaratory judgments (i.e. burdens of proof and persuasion, deference to the legislature, etc.).
- II. Law on initiative and referendum
  - A. The law on initiative and referendum comes from three sources:

1. State constitution. *See, e.g.*, Colo. Const. Art. V, § 1 (“The first power hereby reserved by the people is the initiative, and signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election shall be required to propose any measure by petition, and every such petition shall include the full text of the measure so proposed. . . . The second power hereby reserved is the referendum. . . .”); and Colo. Const. Art. V, § 9 (“The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed by general laws; except that cities, towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten percent of the registered electors may be required to order the referendum, nor more than fifteen per cent to propose any measure by the initiative in any city, town, or municipality.”). The Colorado Supreme Court has declared that the power of initiative is a *fundamental right*. Colo. Project-Common Cause v. Anderson, 178 Colo. 1, 495 P.2d 220 (1972). *See also*
2. State statutes. *See, e.g.*, C.R.S. § 1-40-101 *et seq.* (statewide initiative and referendum); C.R.S. § 31-11-101 *et seq.* (municipal initiative and referendum). Note: C.R.S. § 30-11-103.5 (home-rule county initiatives and referenda are governed by C.R.S. § 31-11-101 *et seq.*). In Colorado, electors in statutory counties do not have a right of initiative and referendum (with some exceptions). Dellinger v. Board of County Commr’s, 20 P.3d 1234 (Colo. App. 2000).
3. Local code/ordinance. *See, e.g.*, Denver, Colo. Charter Art. VIII, Part 3.

B. Relationship between initiative and referendum, and other constitutional norms

1. Fifth Amendment Due Process Clause of the Federal Constitution is intended to provide countermajoritarian protection. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 688 (1976). *Eastlake* held that referendum on a rezoning of a single property to multi-family designation comported with the Due Process Clause, because the referendum was (a) to the entire municipality, and (b) state and federal law provided relief in the event that the referendum was arbitrary and capricious. 426 U.S. at 678-79.
2. The U.S. Supreme Court may have inadvertently extended the power of initiative and referendum to administrative or quasi-judicial acts. *See* City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188, 199 (2003). Question: does this comport with the Due Process Clause, other countermajoritarian principles in the Constitution?

### III. Applicability of initiative and referendum

- A. The referendum powers reserved to the people under Article V of the Colorado Constitution apply "only to acts which are legislative in character." City of Aurora v. Zwerdinger, 571 P.2d 1074, 1076 (Colo. 1977); accord Witcher v. Canon City, 716 P.2d 445, 449 (Colo. 1986); Margolis v. District Court, 638 P.2d 297, 303 (Colo. 1981).
1. The determinative inquiry is whether the action "announces new public policy or is simply the implementation of a previously declared policy." City of Idaho Springs v. Blackwell, 731 P.2d 1250, 1253 (Colo. 1987).
- B. In distinguishing between legislative and non-legislative acts, Colorado courts make an *ad hoc* determination by applying the following three pronged test. Witcher, 716 P.2d at 449-450; accord Zwerdinger, 571 P.2d at 1077; Blackwell, 731 P.2d at 1254 (Colo. 1987).
1. First, actions that relate to subjects of a permanent or general character are legislative, while those that are temporary in operation and effect are not.
  2. Second, acts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative.
  3. Third, if an original act was legislative, then an amendment to the original act must also be legislative.
- C. An amendment to a legislative act is a legislative act. Margolis, 638 P.2d 297 (Colo. App.1981) (expressly overruling Snyder v. City of Lakewood, 542 P.2d 371 (Colo. 1975) to the extent inconsistent).
- D. Colorado statutes and case law provides some insight into the types of actions that are subject to initiative and referendum:
1. Statutory counties in Colorado: no power of initiative and referendum. Dellinger, 20 P.3d 1234.
  2. Municipal annexation: may occur by vote of the registered electors in the area proposed to be annexed. C.R.S. § 31-12-101 *et seq.*
  3. Repeal of annexation may be initiated. McKee v. City of Louisville, 616 P.2d 969 (Colo. 1980).
  4. Annexation may be referred to voters of the entire municipality. Minch v. Town of Mead, 957 P.2d 1054 (Colo. App. 1998).

5. Zoning is subject to initiative and referendum. Margolis v. District Court, 638 P.2d 297 (Colo. 1981); Fort Collins v. Dooney, 496 P.2d 316 (Colo. 1972). Zoning to PUD is also presumably subject to initiative and referendum. Citizens for Quality Growth Petitioners Committee v. City of Steamboat Springs, 807 P.2d 1197 (Colo. App. 1990). Note that other state courts have held that zoning is *not* subject to initiative. *See, e.g.*, Kaiser Hawaii Kai Development Company v. City and County of Honolulu, 777 P.2d 244 (Haw. 1989).
6. Comprehensive plans are not subject to referendum (not typically adopted by the legislative body). Margolis v. District Court, 638 P.2d 297 (Colo. 1981).
7. Conditional use permits are subject to referendum. Citizens for Quality Growth Petitioners Committee v. City of Steamboat Springs, 807 P.2d 1197 (Colo. App. 1990).
8. Formation of government contracts, including real estate sales, is not subject to initiative or referendum. Vagneur v. City of Aspen, 295 P. 3d 493 (Colo. 2009); Friends of Denver Parks, Inc. v. City and County of Denver, No. 13CA1249 (Colo. App., Dec. 26, 2013).
9. Site plans are not subject to referendum. Committee of the Petitioners North Boulder Village Center v. City of Boulder, Case Nos. 96CV923, 96CV1567, Boulder County District Court.
10. A grant of vested property rights is subject to referendum. C.R.S. § 24-68-103(1)(c).
11. Approvals of vested property rights may be modified or terminated by initiative or referendum, but the local government may be liable to the holder of the vested property right for compensation in accordance with C.R.S. § 24-68-105. Villa at Greeley v. Hopper, 917 P.2d 350 (Colo. App.1996).
12. No court has ruled on the issue of whether a subdivision plat is subject to referendum. Some jurisdictions do not require the legislative body to approve subdivision plats, although others do.

#### IV. Process (per C.R.S. § 31-11-101 *et seq.*)

##### A. Initiative

1. Petition (form prescribed by C.R.S. § 31-11-106)
  - a. Must be approved by clerk of the jurisdiction; must have at least two proponents; must contain a summary of the issue to be

initiated or referred; must contain the full text of the initiated measure or referred ordinance; affidavits of circulators.

b. Signature verification by the clerk, with an opportunity for protest by any registered elector in the jurisdiction.

2. Submission to the legislative body may occur within 180 days of the approval of the petition; the legislative body has 20 days to act on the legislation.

3. Referral of the issue to the voters.

4. Ordinance takes effect upon approval by a majority of the voters.

#### B. Referendum

1. Petition (form prescribed by C.R.S. § 31-11-106)

a. Must be filed within 30 days of the legislature's approval of an ordinance to be referred.

b. Must be approved by clerk of the jurisdiction; must have at least two proponents; must contain a summary of the issue to be initiated or referred; must contain the full text of the initiated measure or referred ordinance; affidavits of circulators.

c. Signature verification by the clerk, with an opportunity for protest by any registered elector in the jurisdiction.

2. Reconsideration of the ordinance by the elected body following submission and approval of the petition.

3. Referral of the issue to the voters.

4. Ordinance takes effect upon approval by a majority of the voters.

#### V. Strategy considerations

A. Team assembly: lawyers, strategists, role of principals (if any), advertisers/marketers, fundraisers, "boots on the ground," etc.

B. Coordination with the local government: elected officials, administrative staff, lawyers, etc.

C. Modes of communication/publicity: person-to-person, focus groups, flyers/bulletins, newspapers, robo-calls, television advertising, website, etc.

D. Financial considerations (i.e. fundraising, etc.)

- E. Endorsements, statements, etc.
- VI. Campaign finance considerations in Colorado (always changing!)
- A. Campaign finance is governed by Colo. Const., Art. XXVIII (relating to Campaign and Political Finance); the Colorado Fair Campaign Practices Act, C.R.S. § 1-45-101 *et seq.* (the “FCPA”); and the municipal referendum statute, C.R.S. § 31-11-101 *et seq.*; and administrative regulations under 8 C.C.R. 1505-6.
  - B. Types of matters are subject to FCPA
    - 1. “Ballot issues,” per C.R.S. § 1-1-104(2.3), are generally speaking, taxation and multiple fiscal-year obligation matters which are referred to the electorate and which arise under TABOR (Colo. Const. Art X, § 20).
    - 2. “Ballot questions,” per C.R.S. § 1-1-104(2.7), are “a state or local government matter involving a *citizen petition* or *referred measure*, other than a ballot issue.” Local initiatives and referenda are ballot questions.
  - C. Groups that must report under FCPA
    - 1. Colorado campaign finance laws require registration and reporting of the following entities: candidates, candidate committees, issue committees, political committees and small donor committees.
    - 2. “Issue committee” is defined by the Colorado Const., Art. XXVIII, § 2(10)(a) as “any person, other than a natural person, or any group of two or more persons, including natural persons: (I) [t]hat has a major purpose of supporting or opposing any ballot issue or ballot question; or (II) [t]hat has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.” The current Secretary of State interpretation of this provision reads “or” as “and,” thus requiring both of the above requirements to be met. 8 C.C.R. Rule 1505-6, Rule 1.12.2. CAUTION: subject to change.
      - a. “Major purpose” is defined in C.R.S. § 1-45-103(12)(b)(II) as “[a]n organization’s demonstrated pattern of conduct based on its: (A) [a]nnual expenditures in support of or opposition to a ballot issue or ballot question; or (B) [p]roduction or funding, or both, of written or broadcast communications, or both, in support of or opposition to a ballot issue or ballot question.”
        - i. The Secretary of State interpreted a “demonstrated pattern of conduct” as “[a]nnual expenditures in support of or opposition to ballot issues or ballot questions that exceed 30% of the organization’s total spending during the same period” or “[p]roduction or funding of written or broadcast communications in support of or opposition to a ballot

issue or ballot question, where the production or funding comprises more than 30% of the organization's total spending during a calendar year." 8 C.C.R. 1505-6, Rule 1.12.3.

- ii. The Secretary of State's interpretation was found invalid in August 2012 by the Denver District Court Colorado Ethics Watch, Colorado Common Cause, David Paladino et al v. Gessler, 2012 CV 2133.
- D. Issue committees must register with the clerk of the jurisdiction in which the initiative or referendum takes place, or otherwise with the Secretary of State. Registration requirements are set forth in C.R.S. § 1-45-108.
- E. Issue committees must file regular reports to the clerk in accordance with C.R.S. § 1-45-108. Generally speaking, only expenditures must be reported, although some large donations are also subject to the reporting requirement.
- F. There are no contribution limits pertaining to contributions to issue committees. C.R.S. § 1-45-103.7.
- G. Disclosure of issue committee communications is required for communications requiring an expenditure of greater than \$1,000. Such disclosure must be printed on written communications or spoken on broadcast communications, if any, and must be conspicuous. Disclosure is optional on all other campaign communications.

## LITIGATION

### VII. Preparing for Litigation

- A. Recent trends in the land use process require an even greater attention to the possibility of litigation throughout the process.
  - 1. The process has always involved multiple interests, but litigation tended to be between the landowner seeking to develop and the local government.
  - 2. Now, other participants are much more likely to file a lawsuit.
    - a. Other governments.
    - b. Neighbors.
    - c. Interest groups.
  - 3. Local government can be sued whether it approves or denies.
    - a. It incurs costs in defending both approvals and denials.



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 referrals 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.
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.

E. Procedural Matters.

1. Due Process.

- a. 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.

F. 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).

- G. 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.

## VIII. 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 (Colo. 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 990 P.2d 35 (Colo. 1999). 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).

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. JJR I, LLC v. Mt. Crested Butte, 610 P.3d 365, 372 (Colo App. 2007).
- b. Ordinance or regulation constitutes an impermissible prior restraint. See, e.g., Mahaney v. City of Englewood, 226 P.3d 1214, 1220 (Colo. App. 2009).
- c. Ordinance or regulation exceeds the authority of the local government. See, e.g., Bd. of Cty. Comm'rs v. Bainbridge, Inc., 929 P.2d 691, 698 (Colo. 1996).
- d. Local government in reaching a land use decision has failed to follow or misinterpreted applicable statute, ordinance, or regulation. Russell v. City of Central, 892 P.2d 432, 437 (Colo. App. 1995) (general amendment to zoning ordinance invalid due to failure to follow applicable procedures).
- e. No actual notice of land use hearing or opportunity to be heard. Regennitter v. Fowler, 290 P.2d 223, 225 (Colo. 1955).
- f. 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).

- g. 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; Parratt 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, 467 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).
      - 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), aff'd 926 P.2d 545 (Colo. 1996).

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.

d. RLUIPA

i. Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. § 2000cc.

ii. Rocky Mountain Christian Church v. Bd. of Cty. Comm’rs of Boulder Cty., 613 F.3d 1229) 10<sup>th</sup> Cir. 2010) (upholding injunction directing county to issue special use permit

based on finding of violation of RLUIPA's equal terms provision).

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.

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.

- 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.