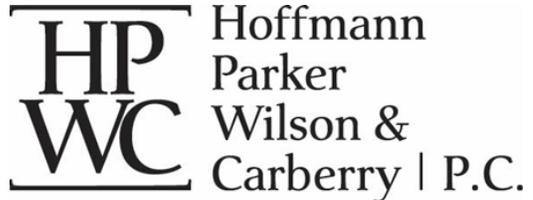


Colorado Land Use Court Decisions
2020 RMLUI Land Use Conference

Presented By

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1. Regulatory takings litigation can now be brought straight to federal court under § 1983, and no longer needs to exhaust state remedies

In *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2019), the United States Supreme Court reversed longstanding precedent to decide that a takings claim seeking just compensation for a regulatory taking can proceed directly to federal courts under USC § 1983 because a property owner has an immediately actionable Fifth Amendment takings claim when the government takes his property without paying for it. Prior to this decision, plaintiffs seeking just compensation for takings had to first exhaust any inverse condemnation remedies in state court before proceeding through the federal courts. While this ruling does not change the basic framework of regulatory takings for determining when a regulation has gone "too far," the practical effect of this ruling will be to increase the complexity and costs associated with takings litigation in the future and expose regulatory entities to the payment of attorney's fees.

2. Condemnation of private property by a metropolitan district is valid even if not for immediate and essential public purpose

In *Carousel Farms Metropolitan District v. Woodcrest Homes*, 442 P.3d 402 (Colo. 2019), a developer entered into an agreement with the Town of Parker conditioning approval of annexation and a development plan on the acquisition of the entirety of the subject property. When the owner of a small strip of land refused to sell, the developer created a metropolitan district to condemn the property. The Supreme Court overturned an Appeals Court decision and held that the metropolitan district's condemnation of private property did have an *ultimate* public purpose and was therefore valid, even though the property was condemned by the district to first facilitate the developer's compliance with an annexation agreement with the Town of Parker. Because the condemned property was to be dedicated to the Town for eventual public use as roads and sewers for the development, the Court found that the "fundamental and intrinsic nature of the taking" was for a public benefit, despite the most immediate reason for condemnation being to meet the private developer's agreement's conditions with the Town of Parker.

The Court also found that absent fraud or bad faith, the condemning authority's necessity determination is final and conclusive and will not be disturbed by the courts. Furthermore, a state statute that prohibits the taking of private property by a public entity for transfer to a private

entity for the purpose of economic development did not apply because the condemned property was never transferred to a private entity and was instead to go from the metropolitan district to the Town. This was true even if the developer would also benefit from the taking. Though the opinion was unanimous, the property owner filed for certiorari to the United States Supreme Court to address the issue of "abuse of eminent domain power", but has not yet been granted this review. However, if granted, the Supreme Court's decision could have far-reaching impacts upon Colorado's metropolitan districts, which are already under increasing scrutiny.

3. Online Travel Company lodging taxes still an unsettled issue

In 2017, the Colorado Supreme Court decided in *Expedia II* that, under the language of Denver's tax code, municipal lodging taxes must be collected by online travel companies ("OTC") that act under the merchant model, and that the tax rate would apply to the full markup price of the visit, and not just to the amount remitted to the hotel by the company. The merchant model consists of OTCs facilitating reservations between a customer and the hotel, but never actually booking the hotel itself. In other words, the hotel issues reservations, but once issued, sends confirmation to the OTC, who then forwards confirmation to the customer and collects payment. At the conclusion of the stay, the OTC remits payment to the hotel.

In *Town of Breckenridge v. Egencia*, 441 P.3d 1020 (Colo. 2019), the Colorado Supreme Court was equally divided over the opinion of a division of the court of appeals, which distinguished Denver's lodging tax from Breckenridge's accommodation tax to reach a different result. OTCs in the *Breckenridge* case also used the merchant model that was at issue in the *Expedia* case, but Breckenridge's code provided that taxes should be collected "on the price paid for the leasing or rental of any hotel room." The court determined that under this language, OTCs do not have to collect tax because they are not lessors or renters but are instead intermediaries with no possessory interest in those rooms and who do not themselves "furnish" the room. In contrast, Denver's code requires "vendors" to collect and remit the tax, with "vendors" defined as "a person making sales or furnishing lodging" for consideration. Because the Supreme Court was equally divided over the appeals' court decision, it was upheld by operation of law, leaving open the question of whether OTCs are responsible for lodging taxes. For now, the answer to this question appears to rely heavily on the precise language and requirement under a municipality's code.

4. Zoning protest procedures may apply to other non-zoning regulatory land use actions

In *O'Connell v. City Council of Denver*, 2019 WL 2108760 (Colo. App. 2019), the Court of Appeals found that establishment of a historic district under Denver's landmark preservation code was an exercise of the City Council's zoning powers under its Charter to create "districts," even though Denver's landmark preservation code is separate and distinct from its zoning code. Thus, aggrieved property owners in a newly-created landmark preservation district were able to invoke the statutory and Charter-adopted zoning remedy of filing a petition by the landowners of at least twenty percent (20%) of the area included in the proposal, which petition then triggers the requirement that the regulatory "zoning" change obtain a supermajority vote of the City Council to pass. *See* § 31-23-305. This is the first instance that this statute has been applied to

what has been typically considered a non-zoning regulatory action and greatly expands the potential uses of this zoning remedy by property owners.

5. Jurisdiction for land use appeals called into question under precise language of authorizing legislation for municipal court

Burger Investments Family LP v. City of Littleton, 2019 WL 394250 (Colo. App. 2019) involved an adjacent landowner's complaint to review a City Council decision to approve an application for a PD development plan to allow an assisted living facility. The appeal came up on 106(a)(4) review, and was filed by the plaintiff in the district court. However, the district court dismissed the complaint for lack of subject matter jurisdiction and found that the City of Littleton's Charter vests exclusive original jurisdiction in its municipal court over all violations of the charter and ordinances of the city. The Colorado Court of Appeals, in overturning this decision to dismiss the complaint, determined that the district court had concurrent subject matter jurisdiction over the landowner's complaint because the municipal court did not have exclusive jurisdiction in civil cases under City Charter.

In doing so, the Court distinguished Frisco's Charter language in the longstanding *Frisco v. Baum* case (municipal court shall have exclusive jurisdiction over "all matters arising under [Frisco's] Charter, the ordinances, and other enactments of the Town") from Littleton's language ("There shall be a municipal court vested with exclusive original jurisdiction of all violations of the Charter and the ordinances of the City"). The Court's decision turned on Littleton's use of the word "violation" and looked at the legislative history of the charter provision to find that Littleton's language limits the municipal court's reach to criminal or quasi-criminal cases, and therefore the municipal court does not have jurisdiction over 106(a)(4) appeals.

6. Pre SB-181: "Wrongful approval" of COGCC permits easy to bring and hard to win

Weld Air & Water v. COGCC, 2019 WL 2375889 (Colo. App. 2019) involved the Colorado Oil and Gas Conservation Commission's approval of two wells near a school in Greeley, which approval was challenged by non-profit environmental and community rights organizations. Prior to the approvals, the Commission accepted public comments on the application that showed three main areas of concern: (1) the health risk to students playing outdoors where the proposed development was less than 1000 feet from the school's playgrounds and fields; (2) the applicant's emergency response plan given the proposed development's proximity to the school; and (3) consideration of alternative locations farther from the school. After the permits were granted, the plaintiffs sued arguing that the Commission acted arbitrarily and capriciously in granting the permits because it failed to consider public comments and that its decision to grant the permits violated the Commission's setback rules.

This appellate court decision ruled that the third parties had standing to bring the suit on the basis that they were members of organizations that have aesthetic, recreational, health, and environmental interests in the proposed development location, and they offered numerous declarations from members on how the expected air and noise pollution from Extraction's proposed development would negatively impact their interests. Thus, the plaintiffs established

that the Commission's approval of the applications would create an injury-in-fact. However, as to the substantive challenge, the appellate court found that because the record evidences the Commission's consideration of public comments on site-specific concerns, as required by the COGCC rule, it could not conclude that the Commission acted arbitrarily and capriciously in authorizing the permits. Once again, the court would not substitute its own judgment for that of the Commission's.

The finding of standing in this case may indicate where the courts are headed in allowing these challenges to proceed, but the bar remains very high for aggrieved parties to succeed in cases challenging agency action, including approval of COGCC permits.

7. Temporary cessation of mine is a factual status, not a legal status

In another natural resources case, *Information Network for Responsible Mining v. Colorado Mined Land Reclamation Board*, 451 P.3d 1245 (Colo. App. 2019), the Colorado Supreme Court found the Colorado Mined Land Reclamation Board abused its discretion by approving a request for second consecutive period of temporary cessation for a uranium mine that had not produced since 1989 by ignoring the plain language of the Colorado Mined Land Reclamation Act. The Act allows a mining permit to continue despite temporary cessation, but provides that "[i]n no case shall temporary cessation of production be continued for more than ten years without terminating the operation and fully complying with the reclamation requirements of this article." The Court found that temporary cessation is consistently defined as a period of nonproduction, rather than as a status granted to a particular mining operation only after the Division of Reclamation, Mining, and Safety approves a request for recognition of that status. Thus, temporary cessation occurred in 1989 and not 2012, when the first request for that status was granted, and the ten-year limitation period began to run at that time.

8. Homeless camping bans on public and private property violate Eighth Amendment to U.S. Constitution in certain circumstances

In *People of the City and County of Denver v. Jerry R. Burton*, No. 19GS004399 (December 27, 2019), a Denver County judge followed the 9th Circuit ruling of *Martin v. City of Boise*, 920 F.3d 617 (9th Cir. 2019) to find that Denver's homeless camping ban violates the Eighth Amendment to the U.S. Constitution. The *Martin* decision heavily relied upon by the Denver County judge states that: "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters], the jurisdiction cannot prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public." This holding is premised on the principle that a municipality cannot criminalize homelessness when a homeless individual has no choice in their current state.

The *Martin* case and the Denver County Court Decision are consistent with a few cases in other jurisdictions where similar Eighth Amendment challenges were made to urban camping bans. See *Pottinger v. Miami*, 810 F.Supp. 1551 (Fla. 1992) (finding that punishing the homeless for harmless acts they are forced to perform in public because of their involuntary condition of being homeless, is cruel and unusual). However, the majority of jurisdictions have rejected Eighth Amendment challenges where the ordinance itself clearly punishes the act of urban

camping rather than homelessness. *See Allen v. City of Sacramento*, 183 Cal.Rptr.3d 654 (Cal. 2015). Similarly, where there is sufficient homeless services or shelters, an Eighth Amendment challenge is invalidated. Denver is appealing this decision to the higher court, and though the current decision is not binding upon any other jurisdiction in the state or elsewhere, this will be a case to look for in the future as the topic of regulation of homelessness continues to evolve.

9. "New water use" for county review and approval of development permits must consider both additional use as well as use for a different purpose

In *Hajek v. BOCC Boulder County*, 2020 WL 741337 (Colo. App. 2020), the Board of County Commissioners of Boulder County was found to have abused its discretion by granting conditional approval of the application for a development permit without considering the adequacy of the proposed water supply, as required by state law. On a matter of first impression, the Colorado Court of Appeals found that "new water use" encompasses not only the use of additional water, but also includes water put to a different purpose.

In this case, Fair Farm sought to transition the use of its property from primarily grazing and hay production to an organic farm that would include "laying hens in mobile houses in rotation with vegetable production", which required a site plan review under Boulder County's land use regulations. The Board determined that a hearing was not necessary and, in doing so, finalized the Boulder County Land Use Department Director's conditional approval of Fair Farm's application. The Board and Fair Farm concluded that the Colorado statute requiring consideration of water adequacy did not apply to Fair Farm's application because the proposed laying hen operation did not involve a "new water use."

Upon challenge by a neighboring property owner to this procedure, the Appeals Court concluded that the phrase "new water use" in C.R.S. 29-20-103(1)(b) refers to the use of additional quantities of water as well as the use of a similar quantity of water for a different purpose. Thus, a "development permit" as referenced in Section 29-20-303(1) includes approval of an application for a specific project where either (1) an additional use of water is required; or (2) an amount of water is to be used for a different purpose. In so deciding what "new water use" encompasses, the Court concluded that the Board of County Commissioners for Boulder County abused its discretion on this 106(a)(4) review by granting conditional approval without considering the "new water use" in this way.

10. Supreme Court issues three clarifying decisions on reclassification of vacant abutting residential land

In *Mook v. BOCC Summit County*, 2020 WL 769589 (Colo. 2020), the Colorado Supreme Court reviewed three Board of Assessment Appeals ("BAA") determinations relating to reclassifying subject parcels from vacant to residential for property tax purposes. In the first review, the Court found that only parcels of land that physically touch qualify as "contiguous parcels of land," as required for vacant land that is part of multi-parcel assemblage to qualify as "residential land" under the property tax statute. Thus, a vacant lot and a residential lot, separated by a strip of land owned by an HOA for access to open space, could not be combined

for a single property classification as residential because the lots, while close, did not physically touch.

In the *second BAA review*, the Court held that a residential improvement isn't needed on each contiguous and commonly owned parcel of land and that a landowner can satisfy the "used as a unit" requirement by using multiple parcels of land together as a collective unit of residential property. Thus, where a landowner owns three contiguous parcels with only one parcel truly used as residential and another abutting parcel reclassified as residential despite its vacancy, a third parcel only abutting the reclassified parcel but not otherwise touching the residential parcel may still be classified as residential because the three parcels may be "used as a unit."

In the *third BAA review*, the Court held that county records alone dictate whether parcels are held under "common ownership," and thus a petitioner who was the beneficiary of two separate trusts, both owning a parcel of land each that abut, could not claim that the parcels were under "common ownership" for purposes of seeking reclassification of a vacant parcel abutting a residential parcel.

11. FCC rule requiring expedited local review inapplicable for "substantial change" to existing tower

In *BOCC Douglas County v. Crown Castle USA*, 2020 WL 109208 (D. Colo. 2020), the Colorado District Court examined the reaches of a Federal Communications Commission ("FCC") rule that provides that local governments must approve requests to make certain types of improvements to certain types of wireless facilities in an expedited process, "that [do] not substantially change the physical dimensions of such tower or base station." A tower company sought Douglas County's approval to make alterations to an existing tower and proposed to modify the tower by replacing and adding facilities that would expand the concealment shroud from 18 inches to 38 inches wide and from 10 feet to 11 feet high - increasing the height of the tower from 35 feet to 36 feet.

In addition to defining the physical dimensions of what constitutes a "substantial change" under the expediency rule, the FCC's regulations also state that a modification "substantially changes the physical dimensions" of a tower if "[i]t would defeat the concealment elements of the eligible support structure" which the court found present here. Thus, even though the changes to the tower were in reality rather insubstantial, the County prevailed in avoiding expedited review under the concealment exception. Though the company will likely be found in the future to be legally entitled to improve the tower under the federal communications law, this case stands that at least for this situation, expedited 60-day review was not required.