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FOR

Local Government Regulation of Land Use: Issues Raised by New Regulations Promoting Smart Growth, New Urbanism and Affordable Housing

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Ms. Rockwell has advised the redeveloper of the former Stapleton International Airport in Denver on land use and environmental issues associated with one of the largest urban redevelopment projects in the country. She has served as part of a project team that is preparing a master plan and zoning for Denver’s Union Station. She has advised several airport clients on land use compatibility issues associated with land adjacent to the airports. She also has advised both public and private entities on the preparation of habitat conservation plans under the federal Endangered Species Act and other endangered species issues.

Ms. Rockwell’s education includes: B.A., Stanford University, 1980; J.D., Boston University, 1985; and a Master of City Planning, M.I.T., 1985. She is admitted to the Colorado and California bar associations. She is on the Board of Directors of the Lowry Redevelopment Authority (1996-present).

David W. Broadwell, Esq., was appointed an Assistant City Attorney/Supervisor in the Land Use and Revenue Section of the City and County of Denver’s Department of Law in 1999. He is now in charge of special projects for the Department. Prior to joining the City, he served for seven years as the staff attorney for the Colorado Municipal League. He is the principal author of TABOR: A Guide to the Taxpayer’s Bill of Rights (1999), and he contributed to numerous other CML publications while at the League. For the past ten years, he has written the chapter on local government law for the Annual Survey of Colorado Law, published by Continuing Legal Education in Colorado, Inc. Mr. Broadwell also frequently participates as an amicus curiae representing the interests of Colorado municipalities in Colorado appellate courts and regularly appears as a presenter on continuing legal education programs for local government attorneys in Colorado. In 2002, he received the Award for Distinguished Public Service by a Local Government Attorney from the International Municipal Law Association. From 1982 until 1992, Mr. Broadwell served as a planner and city attorney in Glenwood Springs, Colorado. He holds his law degree and master’s degree in Regional Planning from the University of North Carolina.

Susan T. Conaway is the Planning Division Manager for Arapahoe County and has been in the position for two and one-half years. She has worked for the county for seven years and has held previous positions as a current planner, supervisor of the current planning
section, and also as Comprehensive Plan manager. Most recently she assumed the assignment of staff team coordinator for the county’s new open space program. Prior to working for the County, Sue had a two-year stint as planning consultant in San Francisco, CA. She was instrumental in developing a reuse plan for Oak Knoll Navy Hospital, which is located in the Oakland hills. Ms. Conway also worked as a public planner for three Colorado cities: Aurora, Englewood, and Commerce City. She has a Master of Urban and Regional Planning from University of Colorado at Denver and her B.S. from Iowa State University. In the middle of her 17-year planning career, she took a 5-year hiatus to design and knit sweaters, schlepping her creations to Colorado mountain arts and craft fairs.

Herbert S. Klein, Esq., has practiced in Aspen and the western slope since 1974. He was born in New York, New York, June 16, 1948. He was admitted to the bar in 1974 in Colorado and the U.S. District Court, District of Colorado. Mr. Klein’s education includes American University (B.S. 1970) and George Washington University (J.D., cum laude, 1974). He was the former Chairman of the Aspen/Pitkin County Clean Air Advisory Board. He is a member of the Pitkin County and Colorado Bar Associations.

Mr. Klein has specialized in land use law, zoning and subdivision, and litigation related to government control of land development. He has represented developers of raw land subdivisions, office, residential, hotel and commercial condominium projects, and recreational country club type projects. The representation has involved all facets of the projects from initial property and land use investigations, to finance, acquisition, necessary development approvals and registrations, liquor licensing, project documents, marketing, sales, and ongoing project and homeowners association matters. Mr. Klein has also been involved in several large office park acquisitions and single family lot subdivisions in the Denver area. His reported cases include Lot 34 Venture v. Town of Telluride, 3 P3d 30 (Colo. 2000), which struck down rent control regulations as violative of state law, and Cooper v. The Aspen Skiing Co., 48 P 3d 1299 (Colo. 2002), which found that a parent’s execution of a pre-injury release on behalf of a minor child did not bar the minor child’s claims for injury. He is the founding member of the law firm of Herbert S. Klein and Associates, P. C.
LOCAL GOVERNMENT REGULATION OF LAND USE:
Issues Raised by New Regulations Promoting Smart Growth, New Urbanism and Affordable Housing

Sarah M. Rockwell
Kaplan Kirsch & Rockwell LLP
Moderator

I. Introductions

II. The definition of “smart growth” varies significantly in different parts of the state. It depends on the overall goals of the community and the tools the community has chosen to meet those goals.

a. In urban areas like Denver, “smart growth” may mean promoting appropriate new urban infill development to increase the City’s tax base and encourage new employment opportunities and affordable housing.

b. In large counties like Arapahoe County, “smart growth” may mean strengthening and promoting development in existing communities, preserving open space and other sensitive lands and providing a variety of transportation choices.

c. In popular mountain communities like Pitkin County, “smart growth” may mean imposing severe limits on the type, size and location of new development, encouraging affordable housing and increasing transportation options.

III. Our panelists bring three different perspectives to the “smart growth” discussion

a. David Broadwell, the Assistant City Attorney for the City and County of Denver, will discuss new urbanism in the context of an older “urban core” city, and the land use and infrastructure financing techniques that Denver is using to promote appropriate new development.

b. Sue Conaway, the Planning and Zoning Division Manager for Arapahoe County, will discuss smart growth principles in Arapahoe County and the ways that they are being implemented in the County’s land use regulations.

c. Herb Klein, a principal in the law firm of Herbert S. Klein & Associates in Aspen, Colorado, will discuss the recent Colorado Supreme Court decision in Town of Telluride v. Lot Thirty-Four Venture and how it affects local efforts to promote affordable housing and implement creative land use regulations. He will also analyze the effectiveness of other efforts in Pitkin County to encourage smart growth.
I. Introduction: “New urbanism” in an “old urban” core city

The City and County of Denver was created as a distinct unit of local government in Colorado through a 1902 amendment to the state constitution, an amendment that also vested the City and County with broad home rule authority. Colo. Const. Art. XX. Until recently, Denver was the only combined city and county in the state. Prior to 1974, Denver was permitted to annex territory using the same procedures as are allowed to municipalities throughout the state, i.e. the Municipal Annexation Act of 1965. §§ 31-12-101, et seq., C.R.S. However, in 1974 two state constitutional amendments made further annexation to the City and County virtually impossible. Colo. Const. Art. XIV, § 3; Art. XX, §1. In the last twenty-eight years, there has been only one annexation to Denver—the inclusion of territory necessary for the construction of the Denver International Airport—and it required a special act of the legislature to accomplish. § 30-6-109.5, C.R.S.

Notwithstanding the limitation on its ability to annex, the City’s population increased by approximately 90,000 people in the 1990’s. The City anticipates more robust population growth in the future, due in large part to the availability of several major in-fill redevelopment sites within its 1974 boundaries. The City is also experiencing tremendous gentrification in its traditional residential neighborhoods, often manifested in the form of site-by-site scrape-off and replacement of existing structures with more upscale residences, with the concomitant upward pressure on housing prices.
Denver was among the wave of U.S. cities that originally adopted Euclidian zoning in the 1920’s, even before there was a zoning enabling act in Colorado. In other words, Denver’s land use regulatory authority derives from its own home rule charter (§ 3.2.9, adopted in 1923), and does not depend on state statutes to define the parameters of that authority. *Averch v. City and County of Denver*, 78 Colo. 246, 242 P. 47 (1925); *Colby v. Board of Adjustment*, 81 Colo. 344, 255 P. 443 (1927). Under this authority, Denver has charted its own course for many years in tailoring land use regulations to meet its own “local concerns,” within the bounds of the constitution. However, recent years have seen increasing efforts at the state level, both threatened and real, to intrude into home rule regulatory authority over land use and zoning.

The following are example of how Denver has promoted quality in-fill redevelopment within the last decade, promoting “smart growth” and “new urbanism” principles, while attempting to preserve a supply of affordable housing.

II. **Mixed-Use Zone Districts and Transit Mixed-Use Zone Districts**

- Mixed-use zoning categories adopted in 1998 and 1999 as an alternative to standard Euclidian zoning (with its traditional segregation of residential and non-residential uses) or PUD zoning (with its more complex procedures for adoption). § 59-301, *et seq.*, D.R.M.C.

- Transit mixed-use zoning category adopted in 2001 to provide additional flexibility and incentive for higher-density transit oriented development around major transit facilities (e.g. light rail stations).

- Mixed-use districts include special provisions for: enclosure of uses; adjacency of uses; uses allowed only by special review; setback, height and other dimensional requirements for structures; signs; and off-street parking requirements.

- In particular, mixed-use districts enjoy greater flexibility in meeting off-street parking requirements, with the TMU district receiving an automatic 25% reduction in the normal requirement, with the option of seeking up to a 50% reduction.

- To ensure quality design and development, a special site-specific development plan review process is integrated into the mixed-use zone district regulations.

- How has mixed-use zoning worked or not worked in practice in Denver so far?

III. **Preserving the character of traditional residential neighborhoods.**

- Land economics, the market for close-in residential living, and the desire to have the “best of both worlds” (i.e. a large suburban style house in a more traditional urban setting) have driven the “scrape-off” phenomenon in Denver and other American cities in recent years. Given the fact that the new housing styles situated in older neighborhoods differ so radically from the existing housing stock, Denver was motivated to adopt a series of amendments to its
longstanding R-0, R-1 and R-2 zone district regulations in 2002 and 2003. These changes, which are primarily codified in §§ 59-116, *et seq.*, D.R.M.C., include:

- **Requirement for *alley access*** to residential lots where this is the predominant character of the neighborhood.

- **Limiting the dominance of front garages** (i.e. placing a limit on the width of front garages expressed as a proportion of the total width of the façade of the house).

- **Tree preservation**, at least in the front setback area where many mature trees are located, when residential property is being scraped and redeveloped.

- Requiring **more open space** on the overall lot as residential structures are expanded or redeveloped.

- Requiring a degree of **rear-area open space** to preserve some semblance of a traditional back yard.

- Providing an open space credit as an incentive for **traditional front porches**.

- Providing an open space credit as an incentive for **traditional detached garages**.

- **Liberalized height and bulk plane requirements in the center of the lot** to allow for the construction of more traditional housing styles, like the “Denver Square.”

- **Stricter height and bulk plane requirements in the rear of the lot** to require structures to at least be stepped-down in the rear, and ameliorate the “long house” style of construction which intrudes upon the privacy of adjacent property owners.

**IV. Inclusionary housing ordinance.**

- This ordinance, adopted in 2002, basically requires new, for-sale residential developments in excess of 30 units to provide that at least ten percent of the units are affordable to households earning 80% of the adjusted median income in the Denver-metro area, with certain exceptions. See: §§ 27-101, *et seq.*, D.R.M.C.

- Developers may pay a fee-in-lieu of the foregoing requirement, equal to the amount of fifty percent of the price of each affordable dwelling unit that would have otherwise been provided.

- Ordinance was consciously designed to take both a “carrot and stick” approach, moderating the regulatory requirements with various incentives, including: a cash bonus of at least $5,000 per unit produced, up to fifty percent of the units required; a density bonus in some zone districts; a parking reduction; and expedited permit processing.

- Given the limited ability of the City to regulate rental housing (versus for-sale housing) due to the ruling by the Colorado Supreme Court in *Lot 34 Venture v. Town of Telluride*, the
ordinance does not purport to control rental projects. However, it includes voluntary incentives for rental projects, as well as projects involving less than thirty units.

- The key implementation issue in the ordinance is procedures for ensuring “long-term affordability” of the moderately priced dwelling units provided thereunder. Thus, the ordinance includes a great deal of detail addressing how the re-sale of affordable units will be controlled and monitored in the future.

V. **Infrastructure financing techniques for in-fill redevelopment.**

- Although Title 32 special districts are more commonly thought of as a device to fund infrastructure and services in unincorporated, suburban areas, and although Denver has traditionally resisted their use within its own boundaries, they have increasingly become the financing vehicle of choice for large-scale redevelopment projects in the urban setting. (See Stapleton and Central Platte Valley Examples below.

- Denver has traditionally and extensively used tax-increment financing through the Denver Urban Renewal Authority to promote urban in-fill redevelopment. §§ 31-25-101, *et seq.* C.R.S. (See Lowry and Stapleton examples below.) The viability of urban renewal under this statute is currently under siege in the Colorado General Assembly, however, particularly as relates to the ability to use eminent domain to assemble land for redevelopment, as typified by HB 04-1203.

VI. **In-fill redevelopment case study #1: former Lowry Air Force Base**

- The site consists of 1,800 acres in east-central Denver on the boundary with the City of Aurora.

- The base was closed as a result of the Defense Base Closure and Realignment Act of 1990, 10 U.S.C.A. § 2687.

- Early on, major public attention focused on the requirements of the base closure law derived from the McKinney-Vento Homeless Assistance Act, requiring that surplus properties at former military bases be evaluated as to suitability for homeless housing. Threats of litigation from the Colorado Coalition for the Homeless and Catholic Charities resulted in a settlement providing for 217 “affordable units” to be developed at Lowry, including 70 transitional units for formerly homeless families.

- The Lowry Redevelopment Authority (LRA) was created by an intergovernmental agreement between Denver and the City of Aurora. Colorado law liberally allows local governments to enter into IGA’s, including the power to create separate legal entities to perform public functions. Colo. Const. Art. XIV, § 14; §§ 29-1-201, *et seq.*, C.R.S. The Authority essentially acts like a private developer in coordinating the planning, sell-off, and build-out of the property.
• LRA is also treated as a “constituted state authority” for purposes of its ability to issue tax-exempt bonds under Revenue Ruling 57-187. It is also treated as an “enterprise” exempt from the state constitutional limitations on spending and debt imposed by Colorado’s TABOR amendment. Colo. Const. Art. X, § 20.

• Major infrastructure funding for the project is provided by TIF revenue bonds issued by LRA in cooperation with the Denver Urban Renewal Authority. See: §§ 31-25-101, et seq., C.R.S. The City has agreed to back the bonds by considering an appropriation to make up for shortfalls in TIF revenues should the need arise.

• Disposition of the property by the Air Force is being handled in four ways: (1) Economic Development Conveyance (578 acres) directly to LRA for redevelopment; (2) Public Benefit Conveyance (417 acres) to government and non-profit entities, including City parkland; (3) Negotiated Sale (576 acres) of a golf course and an old landfill site to LRA; (4) Retained Property (115 acres) for continuing Air Force activities at the site.

• The property was master planned, and a combination of standard City zone districts was then applied to the site in conformance with the plan.

VII.  **Infill redevelopment case study #2: Former Stapleton International Airport**

• The site consists of 4700 acres in the northeastern quadrant of Denver.

• The site became available for redevelopment when the City relocated its aviation operations to the new Denver International Airport in February, 1995.

• In anticipation of the closing of the Stapleton International Airport and the redevelopment of the site, several public, quasi-public, or private groups were formed to assist in the redevelopment planning for the site including: Stapleton Tomorrow (1989), the Stapleton Foundation (1990), and a 42-member Mayor-appointed Citizen’s Advisory Board. The public process culminated in the adoption of the Stapleton Development Plan (1995) as an amendment to the City’s Comprehensive Plan.

• In 1995, the City and DURA created a private non-profit corporation—the Stapleton Development Corporation (SDC)—to formally oversee the leasing and disposition of the remaining development property at Stapleton. The basic nature of this entity and its relationship to the City is discussed in *Denver Post Corp. v. Stapleton Development Corp.*, 19 P.3d 36 (Colo. App. 2000). The City entered into a Master Lease and Disposition Agreement with SDC has the option to take title to the property for resale.

• After a competitive selection process, SDC chose Forest City Enterprises, Inc. as the master developer for the project and entered into a Purchase Contract with Forest City. The agreement provides for a phased sell-off of approximately 3000 acres of the property at a price of $79.4 million (adjusted for inflation), plus payment of a “system development fee” of $15,000 per acre for parkland development. Two key conditions of the sale were sought by Forest City: (1)
Demolition and environmental remediation by the City must be complete before transfer of title; (2) the property must be zoned and a vested development right must be granted.

- To set the stage for TIF financing of the major regional infrastructure necessary to allow development of the site, an urban renewal plan was adopted as provided in §§ 31-25-101, et seq., C.R.S.

- To provide for financing of local infrastructure special property taxing districts (“Metropolitan Districts”) were created on the site pursuant to Title 32, C.R.S.

- The City is financing environmental remediation at a cost of $100 million through a combination of proceeds from the property sale, contributions from airline companies, and other airport proceeds (including environmental insurance proceeds).

- The City adopted innovative new Mixed Use Zoning classifications (see above) for use at Stapleton and elsewhere in the City, and applied these new zoning classifications to most of the Stapleton site.

- The City entered into a Development Agreement with Forest City vesting the right to develop the property in accordance with the existing zoning for a period of fifteen years. As at Lowry, a major point of negotiation was affordable housing, and the Development Agreement included requirements that at least 20% of the rental housing and 10% of the for-sale housing to be developed must be affordable to households earning below the median family income for the area.

- The City has also entered into a series of detailed “Facilities Development Agreements” with Forest City to address the phasing of infrastructure financing and construction to keep pace with the needs of the new development.

VIII. In-fill redevelopment case study #3: Central Platte Valley and Lower Downtown (LoDo)

- The Central Platte Valley and LoDo comprise a large area near the confluence of the Platte River and Cherry Creek in the historic heart of Denver. Unlike Lowry and Stapleton, there is no single coordinating agency or master developer for the area, and instead the overall redevelopment of the area is the sum of many diverse parts, as highlighted below. Much of the current redevelopment activity is focused on the Commons neighborhood comprising approximately 80 acres, between the Union Station and the River, and between 15th St. and 20th St.

- LoDo is arguably the City’s most important historic district, designated as a landmark preservation district in 1988 and given a special B-7 zoning designation specifically designed to encourage adaptive reuse of the many historic structures in the neighborhood. §§59-231, et seq., D.R.M.C. All new construction is subject to extensive review by the Lower Downtown Design and Demolition Review Board.
Also adopted in 1988 was a special Platte River Valley (PRV) zoning designation to encourage redevelopment of other industrial areas between LoDo and the river. §§ 59-321, et seq., D.R.M.C. However, the PRV zoning has proven to be unworkable and most individual developments in the valley have sought rezoning on a case-by-case basis. The Commons area northwest of Union Station received and continues to operate under a PUD designation.

Perhaps the most important infrastructure investment setting the stage for redevelopment of the Valley was the elimination of old viaducts and the construction of new bridges criss-crossing the valley. This was primarily accomplished through funding agreements between the City, the Regional Transportation District, and state and federal government.

The second most important infrastructure investment was the City’s massive expenditure on parks and open space to enhance the riverfront area--$12 million for land acquisition alone. This effort was assisted, in part, by the fact that Colorado reserves state lottery proceeds for parks and other outdoor investments, and the City funneled some of these proceeds into the Central Platte Valley. Colo. Const. Art. XXVII; § 29-21-101, C.R.S.

Infrastructure financing in the Commons area in particular is accomplished through City capital improvement funds, federal funds, and a cost sharing agreement between the City and the Central Platte Valley Metropolitan District (a property tax district organized under Title 32, C.R.S.), formed in 1998.

A major player in the Central Platte Valley redevelopment process is the independent Regional Transportation District (RTD). §§32-9-101, et seq., C.R.S. This special statutory district finances transit improvements and services through the collection of a sales tax in the six-county metropolitan area. Significant activities of the RTD in the CPV just within the past three years include: (1) extending light rail service to the valley; (2) extending the 16th Street Mall shuttle into the valley; and (3) acquisition of the Union Station (with financial assistance by the City, the Denver Regional Council of Governments, and the Colorado Department of Transportation) for redevelopment as the hub of the region’s multi-modal transportation network. Master planning is currently occurring at the Union Station site, as well as plans for the long-term governance of the facility through and IGA.

Although urban renewal and TIF financing has not played a major role in redevelopment of the area, it has been used selectively for certain projects such as the relocation of the Elitch amusement park from its historic northwest Denver location to the present site (1995) and the redevelopment of the 1901 Denver Tramway Company building by REI (2000).

The Colorado Ocean Journey Aquarium (1999) was financed primarily with private donations and tax-exempt conduit financing issued by a state authority. However, the City did provide a HUD § 108 loan guarantee in the amount of $7 million dollars on behalf of the facility. The aquarium recently came out of bankruptcy, and is slated for expansion with a new private owner/developer.

The baseball stadium, Coors Field (1995), was financed through sales tax revenue bonds issued by an independent statutory district that collected a sales tax across the six-county metropolitan
Likewise, the new football stadium named Invesco Field at Mile High (2000) was financed through sales tax revenue bonds issued by yet another regional taxing district, the Metropolitan Football Stadium District. §§ 31-15-101, et seq., C.R.S. The tax collections for the football stadium began upon the early expiration of the tax used to finance Coors Field, and the early retirement of the Coors Field bonds, all of which was helped by the booming increases in sales tax revenue that occurred prior to 2001.

The other major sports and entertainment venue in the valley, the Pepsi Center (1999) was privately financed and developed by Ascent Arena and later Kroenke Arena and Development, L.L.C. The land for most of the Pepsi Center site is owned by the City and leased to Kroenke pursuant to a long-term lease and revenue sharing arrangement.
AFFORDABLE HOUSING AND SMART GROWTH: LOCAL GOVERNMENT AND DEVELOPER OPTIONS AFTER TOWN OF TELLURIDE V. LOT THIRTY-FOUR VENTURE., 3 P.3d 30 (Colo. 2000)

Submitted for the Rocky Mountain Land Use Institute Land Use Conference, March 11-12, 2004 by Herbert S. Klein, Esq.

I. COLORADO’S RENT CONTROL STATUTE:

38-12-301. Control of rents by counties and municipalities prohibited. The general assembly finds and declares that the imposition of rent control on private residential housing units is a matter of statewide concern; therefore, no county or municipality may enact any ordinance or resolution which would control rents on private residential property. This section is not intended to impair the right of any state agency, county, or municipality to manage and control any property in which it has an interest through a housing authority or similar agency.

38-12-302. Definitions. As used in this part 3, unless the context otherwise requires: (1) "Municipality" means a city or town and, in addition, means a city or town incorporated prior to July 3, 1877, whether or not reorganized, and any city, town, or city and county which has chosen to adopt a home rule charter pursuant to the provisions of article XX of the state constitution.

What this statute regulates:

a. Only private housing units - publicly owned housing units are not prohibited. The statute specifically states that it does not restrict the ability of local government to have rental projects in which it has an interest through a housing authority or similar agency.

b. Rent control of residential units. Affordable commercial is not prohibited.

c. The statute applies to any ordinance or resolution which would control rents. No distinction for development impact mitigation exactions.¹

d. Restrictions which limit purchase or occupancy to persons of specified income levels, residency or employment requirements are not specifically addressed by the statute, but are brought into question by the Telluride case.²

¹ See excerpt # 2

² See excerpt # 2
d. Restrictions which limit sale prices of units are not subject to the statute's prohibition.

e. Rent control must be imposed — does this mean a voluntary rental restriction is allowed?3

f. Particular problems in mixed use buildings and single family lot developments. End users of mixed use buildings typically operate first floor commercial space and want employee apartments on upper floors. They want to own and control this housing and rent it or otherwise make it available to their employees. A sale restriction does not work well for the employer. The local government does not want this housing to be unrestricted and will not trust the employer to keep it occupied with its employees.

g. How to provide rental housing despite the Telluride case holding. Keep in mind that these suggestions have not been tested in the courts. Assume the local government regulations require the provision of sale price restricted housing.

1. Convey a nominal interest in the property to a local housing authority. Include a provision in the deed restriction that is placed on the property that requires the property to become subject to sale price and occupancy restrictions in the event the conveyance to the housing authority is challenged as violating the Telluride case. This has merit where the affordable housing is not integrated into a mixed use building or located on a free market single family lot where, unless it is condominiumized, the default to a sale restriction will not work.

2. The developer can include a private rental restriction in its deed to the buyer and name the local government as a beneficiary of the restriction, with enforcement rights. The local government agrees not to enforce the sale restrictions so long as the private rental restriction is honored.

3. An employer can sell the unit to the employee at the sale restricted price, take back 100% purchase money financing, with payments tailored to mirror what the rent controlled rate would be and take back an option to purchase the property at the original sale price and sell it to another qualifying employee in the unit. This scenario has problems in the event the employer is unable to find another qualifying employee. In such case, the unit would be sold by the housing authority to someone in the general pool of qualifying employees in the community.

II. HOME RULE ISSUES: WHAT ARE THE IMPLICATIONS OF THE TELLURIDE CASE’S HOLDING ON LOCAL OR REGIONAL EFFORTS TO ADDRESS GROWTH?

3 See excerpt # 3
a. The Telluride case contains a detailed discussion by the Court of local vs state wide considerations in a determination of whether to uphold a local ordinance in the face of a conflicting state statute. The dissent by Chief Justice Mullarky argues the opposite side of the issue and demonstrates how the Court struggled with these issues and how it might look at future local vs state regulatory challenges.

The standards for determining whether a state statute can survive a home rule challenge are:

1. If it is a matter of purely local concern, a local regulation will trump a conflicting state statute.

2. If it is a matter of state wide concern, home rule cities may legislate in that area only if the constitution or a statute authorizes the legislation. Otherwise, state statutes take precedence over home rule actions.

3. If the matter is one of mixed local and statewide concern, a home rule provision and a state statute may coexist, as long as the measures can be harmonized. If the home rule action conflicts with the state legislature’s action, however, the state statute supercedes the home rule authority.

The Court determined that regulations addressing affordable housing are a mixed question of state and local interests, and since the Telluride ordinance was found to control rents, it was in direct conflict with the state statute.

b. Although land use regulations are traditionally thought of as being of purely local concern, there is no one factor that is dispositive in a home rule analysis. The court conducts a de novo, ad hoc review and applies the facts as it sees them to the legal principles involved. In determining that rent control was not a matter of purely local concern, the Court found that it was more like economic regulation than zoning or land use regulations, areas traditionally left to local authority.

c. How does the Telluride case’s home rule analysis affect the ability of local government to devise creative land use regulations or those which deal with growth on a regional basis? Assuming local governments are given authority to deal with the subject matter of the regulation under one of Colorado’s land use acts, there must be a conflicting

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4 See excerpt # 5
5 See excerpt # 6
6 See excerpt # 4
7 See excerpt # 5
state statute or constitutional provision before a Court will divest the local government of authority. However, where a conflict exists between a statute and a local land use regulation, an argument can be made that the Telluride case’s analysis has weakened local government authority. In determining whether a matter is a purely local or a matter of state wide concern, the Court utilized a four pronged standard:

(1) the need for statewide uniformity of regulation;
(2) the impact of the measure on individuals living outside the municipality;
(3) historical considerations concerning whether the subject matter is one traditionally governed by state or local government; and
(4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation.

Since modern notions of Smart Growth involve complex regulatory schemes that are designed to have effects beyond the boundaries of individual municipalities and counties and often seek regional solutions, it will be difficult for a local government to successfully argue that a matter is of purely local concern when faced with a challenge based on a conflicting state statute. However, where there is no clear conflict with a statute, the Court has generally found that the various land use acts provide substantial express or implied authority for local governments to regulate land use and to experiment with creative solutions.

III. THE TELLURIDE CASE HOLDING ON RIPENESS - YOU DO NOT ALWAYS HAVE TO FILE AN APPLICATION AND GET TURNED DOWN BEFORE GOING TO COURT.

The appellate decision in the Telluride Case, 976 P.2d 303 (Colo. App.1998), reversed the trial court’s dismissal of several claims related to the effect of prior agreements and the impact of new regulations on them. The trial court dismissed the claims on the basis of lack of ripeness because an application had not been filed with the local government. The appeals court found that the developers rights were put in doubt by Telluride’s affordable housing regulations and were a proper subject for declaratory relief.8

IV. OTHER GROWTH CONTROL ISSUES - A FEW PITKIN COUNTY EXAMPLES - DO THESE FOSTER OR HINDER SMART GROWTH@
a. Vested Rights - a Mechanism to Either Accelerate or Slow the Pace of Development

Competing interests - the local government’s desire to impose new regulations from time to time vs. providing certainty to property owners so they can develop at their own pace and develop less than their entitlements.

Pitkin County wants to slow the pace of development in its rural areas. It wants to keep vesting periods short so it can down zone properties periodically and thereby reduce the pace of development. However, fear based regulations usually result in pre-maturely stimulating full build-out development.

Many clients want development rights for future use, estate planning, financing, conservation easements (phasing them over time). If they have a long time to exercise their development rights, there is usually less development and what gets developed is spread over many years. They frequently will not build out all their square footage or all their units. When they fear that their rights will be taken away by new regulations, they build the maximum allowed as soon as they can.

Who is right?

Colorado law has not caught up with the realities of modern development. The statute on vested property rights (CRS 24-68-103, et. seq.) gives three years and the opportunity to enter into a development agreement for a longer term.

The statute recognizes the concept of common law vesting, however, case law requires issuance of a building permit and substantial construction in reliance on the permit. Although the doctrine of equitable estoppel is recognized in Colorado, its application is rare and uncertain, especially in cases where land use regulations change before construction has commenced.

There is no clear recognition, for example, that construction of the initial phase of a development vests future phases. Nor, in the case of raw land subdivisions where significant exactions based on impacts from future full buildout have been given the local government, is there protection against a downzoning designed to eliminate the impacts that the exactions were designed to mitigate.

After 3 years, if downzoning has taken place, the developer (or his buyers) cannot build what was originally approved and cannot get back what was given as an exaction for the impacts from the development that was not built.

A legislative amendment to the vested rights statute addressing these issues would be appropriate to avoid injustice and allow development to proceed based on market conditions.
conditions and the desires of the property owner.

b. Pitkin County’s Unique Interpretation of State Law Concerning Water Rights as a Way to Slow down Growth.

Pitkin County has recently adopted a policy of requiring subdivision applicants to provide at the time of the initial application, a final decree or necessary well permits demonstrating that all water rights necessary for the proposed development have been obtained. This is contrary to most counties' requirement that only evidence of the availability of the necessary water rights is needed at the time of initial application and the requirement of final decrees and permits is imposed at the final plat stage of review.

The problems with this requirement are obvious. Developers will be delayed for at least one year and significant sums of money will be spent trying to obtain water rights which are merely speculative since no development plan has been approved.

Pitkin County bases its policy on the state statute CRS ’ 30-28-133. Subdivision Regulations, which states in part:

(6) No board of county commissioners shall approve any preliminary plan or final plat for any subdivision located within the county unless the subdivider has provided the following materials as part of the preliminary plan or final plat subdivision submission:

(a) Evidence to establish that definite provision has been made for a water supply that is sufficient in terms of quantity, dependability, and quality to provide an appropriate supply of water for the type of subdivision proposed;

The County interprets the statute as prohibiting the processing of a preliminary plan application even though the statute has the word ‘or’ in its first sentence. As a result of this policy, several large ranch subdivision plans are being revised from PUD plans with smaller lots and common agricultural open space, to 35 acre lot plans so that exempt well permits will be readily obtainable. Clearly, this form of land use regulation does not foster smart growth. A legislative amendment to the statute to clarify that final decrees and permits are not required would solve this problem.

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1. Issues on Appeal.

We granted certiorari to consider whether Ordinance 1011 is a form of rent control within the purview of section 38-12-301, and if so, whether section 38-12-301, enacted by the General Assembly in 1981, constitutionally supercedes Ordinance 1011.
2. What types of regulations are included in the statute’s prohibition of rent control?

The General Assembly did not define rent control. Further, no published opinion of a Colorado court, with the exception of the court of appeals decision in this case, has addressed this statute, much less addressed the scope of its proscription against rent control. Thus, we first must interpret the meaning of the phrase rent control.

Rent control statutes come in all types, shapes and sizes. Richard A. Epstein, Rent Control and the Theory of Efficient Regulation, 54 Brook. L. Rev. 741, 742 (1988). Generally, however, rent control statutes peg allowable rent to the historic rent in an area at some fixed point in time, and permit increases in rent payments only on the basis of the consumer price index or some other neutral yardstick. See id. at 743. Rent control statutes do not isolate particular units for special treatment, but usually apply to a broad class of rental properties. See id. at 745. Every rent control statute has only one raison d'être to insure that the landlord’s rent is kept below the fair market rental of the property. Id. at 746. The result is that such statutes effectively compel a landlord to convey a portion of his property interest to the tenant for the tenant’s benefit. See id. at 744.

We find the term rent control to be clear on its face. Rent control is commonly understood to mean allowable rent capped at a fixed rate with only limited increases. See Epstein, supra, at 742. Because Ordinance 1011 sets a base rental rate per square foot and then strictly limits the growth of the rental rate, the ordinance constitutes rent control. The scheme as a whole operates to suppress rental values below their market values. Therefore, the court of appeals correctly concluded that the ordinance restricts the property owner’s ability to develop his land as he sees fit.

Although the ordinance has the laudable purpose of increasing affordable housing within the communities where lower income employees work, the ordinance nevertheless violates the plain language of the state prohibition on rent control. The prohibition in section 38-12-301 on rent control is unambiguous and complete, encompassing any ordinance or resolution which would control rents. (Emphasis added.) The term rent control is not used as a term of art, and the broad language of the statute plainly encompasses any mandate that would operate to control rents.

We note that the General Assembly enacted the provision in 1981 in response to a citizen initiative in Boulder that would have imposed rent controls within that city. However, the broad language of the statute does not suggest an intent to limit the ban on rent control to the types of local measures proposed at the time of enactment. Moreover, we note that statutes remain in force, even as the circumstances that led to the creation of a statute change. See AT&T Communications of Mountain States, Inc. v. State, 778 P.2d 677, 682 (Colo. 1989) (concluding that a statute was not frozen in time as of its enactment date). The General Assembly is not required to reenact a statute whenever new technology or changed conditions . . . might affect the scope of the statute’s coverage. Id. Therefore, we assess the rent control statute on its face, as it applies to current conditions.

Ordinance 1011 cannot be saved on the grounds that it applies only to new construction while existing housing units are not subject to the controls. The salient fact is that the ordinance caps rental rates for a class of housing at a price below what the market can bear. The effect of the ordinance is the same, regardless of whether new or existing units are exempt: namely, a section of the housing market is removed from the competitive marketplace. In addition, the statutory ban on rent control makes no distinction between existing units and those subsequently developed. See ’ 38-12-301. The absence of a distinction in the statute between existing and new units is evidence of the broad nature of the statute.

3. Does giving the developer several options for providing affordable housing, some of which do not involve rent control, save the rent control provisions by making them voluntary and thus, not
The fact that the ordinance offers developers several options for satisfying the affordable housing requirement does not change the character of, or redeem, the rent control provisions. Either the provisions constitute rent control and cannot be enforced, or they do not. What we examine here is whether the options for constructing new housing or deed restricting existing housing constitute rent control.

Once owners decide to develop their property, they must engage in a program that effectively redistributes the value of the rental property from landlord to tenant—a hallmark of rent control. Because Ordinance 1011 imposes a base price for rental values, and thereafter limits the rate growth, we conclude that the ordinance constitutes rent control within the plain meaning of section 38-12-301.


Home rule cities are granted plenary authority by the constitution to regulate issues of local concern. See Colo. Const. art. XX, § 6. If a home rule city takes action on a matter of local concern, and that ordinance conflicts with a state statute, the home rule provision takes precedence over the state statute. If the matter is one of statewide concern, however, home rule cities may legislate in that area only if the constitution or a statute authorizes the legislation. Otherwise, state statutes take precedence over home rule actions. If the matter is one of mixed local and statewide concern, a home rule provision and a state statute may coexist, as long as the measures can be harmonized. If the home rule action conflicts with the state legislature’s action, however, the state statute supercedes the home rule authority.

Whether Telluride is authorized to impose rent controls, therefore, turns on the question of whether rent control should be characterized as a local, statewide, or mixed issue. Further, whether a matter is one of state or local concern is a legal issue. We, therefore, must conduct a de novo review.

There is no litmus-like indicator for resolving whether a matter is of local, statewide, or mixed concern. Courts should take the totality of the circumstances into account in reaching this legal conclusion. As part of the totality of the circumstances, this court has considered a number of issues, all directed toward weighing the respective state and local interests implicated by the law.

We have looked at whether the General Assembly declared that the matter is one of statewide or local concern. Although such a declaration is not conclusive, it will be afforded deference in recognition of the legislature’s authority to declare the public policy of the state in matters of statewide concern.

Even if a home rule city has considerable local interests at stake, a particular issue may be characterized as mixed if sufficient state interests also are implicated. In determining whether the state interest is sufficient to justify preemption of home rule authority, this Court has articulated various factors that drive the analysis. These include:

1. the need for statewide uniformity of regulation;
2. the impact of the measure on individuals living outside the municipality;
3. historical considerations concerning whether the subject matter is one traditionally governed by state or local government; and
4. whether the Colorado Constitution specifically commits the particular matter to state or local regulation.

5. Home Rule Analysis

The first consideration is whether the state has a pervading interest in statewide uniform regulation. Here,
both the municipality and the state have significant interests in maintaining the quality and quantity of affordable housing in the state. Ordinances like Telluride's can change the dynamics of supply and demand in an important sector of the economy the housing market. A consistent prohibition on rent control encourages investment in the rental market and the maintenance of high quality rental units. Although economic conditions may vary in housing markets across the state, the legislature has seen fit to enact a uniform ban on rent control as a matter of public policy.

In addition, the rent control statute is part of the state statutory scheme regulating landlord and tenant relations. See ' 38-12-101, to -302, 10 C.R.S. (1999). Landlord-tenant relations are an area in which state residents have an expectation of consistency throughout the state. Uniformity in landlord-tenant relations fosters informed and realistic expectations by the parties to a lease, which in turn increases the quality and reliability of rental housing, promotes fair treatment of tenants, and could reduce litigation.

The second factor is the closely related question of whether the home rule municipality's action will have any extraterritorial impact. An extraterritorial impact is one involving state residents outside the municipality. In Denver & Rio Grande Western Railroad Co., this court looked at the potential ripple effect from a local ordinance that directed the construction of a viaduct and apportioned the costs for the project. 673 P.2d at 358-59. The court realized that the municipality's efforts to impose costs on the railroads could impact the railroads' overall ability to serve their customers, resulting in a reduction, or even termination, of service in areas outside the municipality. See id. Because of the potential impact beyond the municipality's borders, the court concluded that the ordinance presented a matter of mixed local and statewide concern. See id. at 361.

The findings in Telluride's ordinance itself recite that the issue is one that impacts other communities: Maintaining permanent and long-term housing in proximity to the source of employment generation serves to maintain the community, reduce regional traffic congestion, and minimize impacts on adjacent communities. See Ordinance 1011, '3-710.A. The General Assembly recognized the potential extraterritorial impact of rent control when it passed section 38-12-301. Representative Chaplin, the sponsor of the bill in the House of Representatives stated: We are facing future disasters. Any rent control lowers the availability of housing stock . . . . This would have a disastrous effect, and a rippling effect throughout our entire state of Colorado. @House Bill 1604-81: Discussion Before the Senate Comm. on Local Government, 42d Legis., 1st Reg. Sess. (Apr. 21, 1981).

Managing population and development growth is among the most pressing problems currently facing communities throughout the state. Restricting the operation of the free market with respect to housing in one area may well cause housing investment and population to migrate to other communities already facing their own growth problems. Although such a ripple effect may well be minimal in Telluride because of its geographic isolation, it is absolutely true that the growth of other mountain resort communities has impacted neighboring communities greatly. The fact that the Telluride ordinance is an affirmative effort to mitigate that impact does not change the fact that the growth of the one community is tied to the growth of the next, thereby buttressing the need for a regional or even statewide approach.

The third factor inquires as to whether the matter traditionally has been regulated at the state or the local level. Because our courts have not yet confronted the characterization of the state's interest in rent control, we can look only to other states to determine how they regulate rent control. A number of other state legislatures have prohibited rent control. Some of these states specifically have concluded that rent control is an issue of statewide concern. See Ariz. Rev. Stat. ' 33-1329 (2000); Mass. Gen. Laws ch. 40P, ' 5 (2000); Or. Rev. Stat. ' 91.225 (1999); City of New York v. State, 291 N.E.2d 583, 584 (N.Y. 1972). Telluride argues that Ordinance 1011 is an exercise of the municipality's police power to regulate land use, an area traditionally regulated by local government. See City of Colorado Springs v. Smartt, 620 P.2d 1060, 1062 (Colo. 1980) (holding that land use regulation and zoning are local concerns). We reject this
contention. Even though the measure amended the Telluride Land Use Code, the ordinance does not dictate permissible uses of real property; rather, it dictates the rate at which the property may be used for a permissible purpose. See supra, Part II. It is, therefore, properly characterized as economic legislation.

The fourth factor similarly focuses on whether the constitution commits the matter either to state or local regulation. The constitution does not assign the issue of rent control, or economic regulation generally, either to state or local regulation.

Where does this analysis lead us, then, in assessing and measuring the various interests at stake? The state’s interests include consistent application of statewide laws in a manner that avoids a patchwork approach to problems. Further, the state has a legitimate interest in preserving investment capital in the rental market, ensuring stable quantity and quality of housing, maintaining tax revenues generated by rental properties, and protecting the state’s overall economic health. Telluride, on the other hand, has a valid interest in controlling land use, reducing regional traffic congestion and air pollution, containing sprawl, preserving a sense of community, and improving the quality of life of the Town’s employees.

On the whole, we cannot conclude that this matter is so discreetly local that all state interests are superceded. Given the legitimacy of both the state interests and Telluride’s interests, we conclude that rent control represents an area of mixed state and local concern.

After determining that this is an issue of mixed local and state concern, the next step in the analysis is to ask whether the home rule ordinance conflicts with the state legislation. Since we find Ordinance 1011 to be a form of rent control, the ordinance clearly conflicts with the state statute. Because the two measures conflict, the local ordinance must yield to the state statute. Therefore, Ordinance 1011 is invalid. The corollary to this determination is the question of whether sections 38-12-301 and -302 are constitutional. Because the issue of rent control is one of mixed concern, the state may regulate in the area. Therefore, the rent control statute is constitutional, and does not violate the home rule amendment.

6. Chief Justice Mullarkey’s Dissent

The crux of my disagreement with the majority is its characterization of Ordinance 1011. The majority finds Ordinance 1011 to be economic legislation: “Even though the measure amended the Telluride Land Use Code, the ordinance does not dictate permissible uses of real property; rather, it dictates the rate at which the property may be used for a permissible purpose. It is, therefore, properly characterized as economic legislation.” Maj. op. at 23 n.9. To the contrary, I contend that Ordinance 1011 is fundamentally a land use regulation, an area that the General Assembly and this court have consistently recognized to be a matter of local concern.

The majority rests its characterization of Ordinance 1011 on an overly restrictive concept of the definitional scope of land use policy by relying on the fact that Ordinance 1011 does not dictate permissible uses of real property; rather, it dictates the rate at which the property may be used for a permissible purpose. Id. Land use policy, however, is not limited to the mere definition of permissible uses; rather, land use policy encompasses conditions implemented within the rubric of zoning and planning decisions. Dedications, for example, have been classified as a land use policy despite the fact that dedications do not dictate permissible uses of real property. Cf. 29-20-203(1), 9 C.R.S. (1999) (addressing dedications); 31-23-206(1), -207, 9 C.R.S. (1999) (addressing Planning and Zoning by municipalities and directing municipalities to consider affordable housing in their master plan for the physical development of the municipality).

Several considerations compel me to view Ordinance 1011 as a land use regulation. As the majority recognizes, Ordinance 1011 amended Telluride’s Land Use Code. While I acknowledge that the existence
of this fact is not dispositive, it is indicative of the intended functioning of Ordinance 1011 as a component of the city’s overall land use policy.

Further, the statement of purpose of Ordinance 1011 lays out the mitigative purposes of the legislation:

Recognizing that new development generates additional employment needs, and consistent with the desire to have new development mitigate impacts attributable to such development, the Town finds it necessary to require new development to provide affordable housing. Maintaining permanent and long-term housing in proximity to the source of employment generation serves to maintain the community, reduce regional traffic congestion, and minimize impacts on adjacent communities. Housing must be affordable to the local labor force in order for the local economy to remain stable.

Ordinance 1011, supra, ’ 3-710.A.

This purpose is consistent with powers granted to local governments by the Local Government Land Use Control Enabling Act of 1974 (Land Use Control Act), sections 29-20-101 to -205, 9 C.R.S. (1999). In the Land Use Control Act, the General Assembly declared:

The general assembly hereby finds and declares that in order to provide for planned and orderly development within Colorado and a balancing of basic human needs of a changing population with legitimate environmental concerns, the policy of this state is to clarify and provide broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions.

’ 29-20-102 (Legislative Declaration). To effectuate this policy, the General Assembly granted to the local governments the authority to plan for and regulate the use of land by:

. . .
(e) Regulating the location of activities and developments which may result in significant changes in population density;
. . .
(g) Regulating the use of land on the basis of the impact thereof on the community or surrounding areas; and

(h) Otherwise planning for and regulating the use of land so as to provide planned and orderly use of land and protection of the environment in a manner consistent with constitutional rights.

’ 29-20-104(1).

Ordinance 1011 requires developers within prescribed zoning districts to mitigate the effect of their developments through the creation of affordable housing units. As such, I view Ordinance 1011 as a component of the city’s overall land use plan, and therefore, it should properly be characterized as land use legislation.

With this distinction in mind, I now turn to the factors established under City & County of Denver to ascertain whether Ordinance 1011 is a matter of state, local, or mixed concern. The majority’s finding of a state interest in the first factor, the need for uniformity, is contrary to the General Assembly’s consistent refusal to consider land use regulations as requiring statewide legislation. This is set forth clearly in the Land Use Control Act, see ’ 29-20-102, and has been implicitly recognized by this court. Under the specific
facts of this case, Ordinance 1011, to the extent that one can construe it as a rent control measure, is integrated into the larger context of Telluride's land use policy—an area demonstrably within the purview of local governmental regulation. As such, the state's interest in uniformity in this area is minimal. There may be a need for uniformity as the majority suggests, but the legislature has yet to assert that need in the area of land use policy.

With respect to the second factor, the extraterritorial impact, the majority raises the specter of a ripple effect on surrounding communities. Maj. op. at 22. Specifically, the majority argues that restricting the operation of the free market with respect to housing in one area may well cause housing investment and population to migrate to other communities already facing their own growth problems. I find the majority's argument unpersuasive for several reasons.

First, in City & County of Denver, this court considered the extraterritorial impact of a city-imposed residency requirement for city employees. We rejected the state's argument that focused on the adverse economic impacts accruing outside of the city, primarily because of the speculative nature of the argument. See id. I view the majority's extraterritoriality analysis to suffer from the same speculative defects.

Second, the majority's extraterritoriality analysis strikes at the fundamental premise of land use planning, zoning, and development regulations by exalting free operation of the housing market over the police power of local government to shape the design of a community. The majority's rationale ignores the fact that the General Assembly, when considering the role of local government in land use control, has consistently decided in favor of local prerogative to employ market restrictions to manage growth. See, e.g., 29-20-102, 104 (Local Government Land Use Control Enabling Act of 1974). The majority's reasoning countermands the express finding and declaration of the General Assembly in the Colorado Land Use Act that Colorado's rapid growth and development demands new and innovative measures to encourage planned and orderly land use development and plan for the needs of residential communities. See 24-65-102(1); see also 29-20-102.

Third, the majority characterizes Telluride's effort to reasonably mitigate the impacts of new development on its community as if it were imposing a burden on other communities. Yet, Telluride's ordinance is aimed directly at mitigating the effects on other localities of an ever-increasing public problem in mountain resorts. Workers cannot afford to live where they work because the housing market left to itself prices out the laborers in favor of tourists and second home owners. Enabling people to live where they work is a key concept in reducing pollution, congestion, and demand on transportation infrastructure, such as new or expanded roads or transit to carry workers from their overnight abodes to where they earn their wages.

The majority misanalyzes the extraterritorial impact of Telluride ordinance. It has precisely the opposite impact: it attempts to contain the effects of growth within Telluride. The ordinance assists the livability of people and communities in the areas surrounding the city of Telluride by addressing the particular concerns that its geography and demographics present. This positive effect is of a different character than the negative effects previously recognized by this court to support a state concern determination.

An analysis of the third factor also favors recognizing a local concern. As discussed supra, Ordinance 1011 is properly classified as a land use regulation. This court has consistently recognized that land use regulations are within the province of the local government.

The City & County of Denver factors do not support the majority's conclusion that the state's interest rises to such a level as to require the legal determination that the matter before us is one of mixed concern. On the other hand, and as stated by the majority, the Town of Telluride has significant interests in this mitigation measure: Telluride . . . has a valid interest in controlling land use, reducing regional traffic.
congestion and air pollution, containing sprawl, preserving a sense of community, and improving the quality of life of the Town's employees. 

Because Telluride's interests so significantly outweigh those of the state, I would hold that Ordinance 1011 constitutes legislation of a matter of local concern. Therefore, to the extent that section 38-12-301 conflicts with the ordinance, the statutory provision is unconstitutional in violation of article XX, section 6. Telluride validly exercised its powers as a home rule city in enacting and enforcing Ordinance 1011. Therefore, I respectfully dissent from the majority's holding in section III.

JUSTICE HOBBS joins in this dissent.

7. THE ISSUE OF RIPENESS TO CHALLENGE THE EFFECT OF AN ORDINANCE ON A PROPERTY PRIOR TO SUBMITTING A DEVELOPMENT PLAN

III.
We also agree with plaintiff's final contention that the trial court abused its discretion in dismissing the first, sixth, and eighth claims for declaratory relief. [23] The decision to grant an anticipatory declaratory judgment is within the sound discretion of the trial court and will only be overturned in the instance of an abuse of discretion. Villa Sierra Condominium Ass'n v. Field Corp., 878 P.2d 161 (Colo. App. 1994). We conclude that there was an abuse of discretion here.

A declaratory judgment action is appropriate when the rights asserted by plaintiff are present and cognizable. See Farmers Insurance Exchange v. District Court, 862 P.2d 944 (Colo. 1993). Plaintiff claims that Ordinance 1011 conflicts with entitlement agreements reached between the Town and plaintiff's predecessor in 1982, and asserts that those agreements establish its only affordable housing mitigation requirement and that the adoption of the new ordinance constitutes a breach of those agreements because it requires plaintiff to increase the amount of mitigation it is required to provide. Here, a comparison of the rights of plaintiff before and after the passage of Ordinance 1011, as previously discussed, shows that the choices available to plaintiff for the use of its land are restricted. Because of this diminution, there is a justiciable controversy here.

The Town, however, has further argued that, because the land owner has not applied for a permit under Ordinance 1011, there is no such controversy as yet. We reject this argument; rather, we conclude there is a controversy and that plaintiff need not apply for a use permit before asking for declaratory relief. See Board of County Commissioners v. Bowen/Edwards Associates, 530 P.2d 1045 (Colo. 1992).
Land Use Approval Process

Rocky Mountain Land Use Institute
Friday, March 12, 2004
Breakout #1
Overview

I. Arapahoe County Characteristics
II. Comprehensive Plan Vision
III. Overall County Land Use Plan
IV. Land Use Approval Process
I. County Characteristics

- Subdivision of the State
- 5 Member Board of County Commissioners
- 520,000 total population
- 13 incorporated cities
- 9 School Districts
- 163 Service Districts

- 1700 employees
- $279.3 million budget
- 12 miles north to south
- 72 miles west to east
- 850 square miles
- 48,000 unincorporated population
II. Comprehensive Plan Vision

- Establishes appropriate land use patterns
- Development based on adequate public facilities and services
- Safe, functional and attractive neighborhoods
- High quality employment
- Transportation choices and mobility
- Resource conservation and environmental quality
- Maintain rural character
- Balanced expenditures and revenues
III. Arapahoe County Comprehensive Land Use Plan
Land Use Plan

Delineates places with distinct characteristics

- Establishes an Urban Service Area with an Urban Growth Boundary
- Recognizes the Eastern Community Planning Areas
- Rural Area covering 2/3 of the County
- Planning Reserve Area covering the State Land Board property/area
Based on Smart Growth Principles

- Create a range of housing opportunities and choices
- Create walkable neighborhoods
- Encourage community and stakeholder collaboration
- Foster distinctive, attractive areas with a strong sense of place
- Make development decision predictable, fair, and cost effective
- Mix land uses
- Preserve open spaces, farmland, natural beauty, and sensitive development areas
- Provide a variety of transportation choices
- Strengthen and direct building toward existing communities
- Take advantage of compact building design
IV. Planning Process

Pre-submittal Meeting

Purpose:
- Meet with a staff planner and engineer to identify land use issues and approval process needed

Information required for pre-sub meeting:
- Letter of intent
- Site plan sketch
- Vicinity map
- Latest approved zoning
- Latest approved subdivision plat
Formal Application Submittal – Phase I

- Internal Staff review for completeness of application – 5 days
- Application content:
  - Application and fee
  - Letter of authorization from property owner
  - Certificate of taxes
  - Title Commitment
  - Legal Description
  - Letter of Intent
  - Proposed Site Plan Exhibits
Formal Submittal – Phase I
Site Plan Exhibit Contents

- Project Name, legal description, total land area
- Vicinity Map, scale, north arrow
- Existing and proposed zoning
- Existing and proposed land uses and densities
- Proposed site development criteria, including setbacks, building heights, open space, maximum lot coverage, parking ratios
- Proposed location of structures
- Proposed criteria for signage types, location and dimensions
- Existing and proposed internal and external roadways
- Topography with contour intervals of 2’
- Signature blocks for Owner of Record, Planning Commission and Board of County Commissioners and County standard notes
Formal Submittal – Phase II

- Once revised plans are ready for outside referrals, applicants prepare referral packets to go to outside agencies for a 30 day review.
- Plans are referred to service districts, i.e. school, fire, water and sewer districts.
- Comments are sent to the planner and engineer and addressed by the applicant after the outside referral period ends.
Public Hearing

- Planning Commission – 14 days prior to hearing, property posted and adjacent property owners notified. Planning Commission makes a recommendation to the Board of County Commissioners.

- Board of County Commissioners - 14 days prior to hearing, property posted, adjacent property owners notified and public notice in newspaper of record. The Board is the final approving body.

- Mylar drawings are prepared and submitted as the final record. Only Final Plats are recorded with the Clerk and Recorder.
**Conventional Zoning (Z), Preliminary (PDP), Final (FDP) and Master Development Plan (MDP) Process**

**Pre-Submittal Conference with Staff**

*The Applicant has 6 months to submit; if 6 months has elapsed, another pre-submittal will be required.*

**Application Submittal**

**Meeting with Applicant**

**Hearing Date Set/Public Notice Posted**

**PC Hearing and Recommendation to the Board**

**Outstanding Issues Addressed**

Yes

**Have issues been addressed, and is the project ready for the PC?**

No

**Application makes all changes required by BOCC, and prints submitted for final review.**

**Mylar (with fee) Submitted to Planning Division for Recordation (within 2 Months of Approval)**

**Staff routes mylar to PC and BOCC, hangs mylar and closes file*"**

**BOCC Hearing Date Set**

**BOCC Hearing**

**Approval**

Denial - End of Process

**Referral Period (30 Days) Potential Issues Identified, and Applicant Notified**

*"Final Plats will be recorded only after Subdivider guarantees public improvements as described in the SIA;*
New and Improved Process

Pre-Submittal Conference with Staff

Within 30 days of Approval, Long Range Planning Division will ensure that Plan Amendments are reflected on all appropriate public documents.

Request Submittal Request presented by Staff before the Planning Commission. If approved, the proposal submitted to Planning Division for review and comment.

The Applicant has 6 months to submit; if 6 months has elapsed, another pre-submittal will be required.

Approval End of Process

PC Hearing

Public Notice for PC Hearing

Application Submittal

Meeting with Applicant

Referral Period (30 Days) Potential Issues Identified, and Applicant Notified

Hearing Date Set/Public Notice Posted

Application

PC Hearing

Mylar (with fee) Submitted to Planning Division for Recordation (within 2 Months of Approval)

Approval

Denial - End of Process

BOCC Hearing

Date Set

Mylar and Address Plat (with fee) Submitted to Planning Manager for Planning Manager's signature.

Staff routes mylar, applicant makes changes and issues are addressed. Applicant submits checkprint for final review.

Referral Period (30 Days) Potential Issues Identified, Planning Manager reviews and comments.

Mylar (with fee) Submitted to Planning Division for Recordation (within 60 Days of Approval)

Approval

Denial - End of Process

BOCC Hearing

Date Set

Mylar and Address Plat (with fee) Submitted to Planning Manager for Planning Manager's signature.

Applicant makes all changes required by BOCC, and print is submitted for final review.

Application

PC Hearing

Mylar and Address Plat (with fee) Submitted to Planning Division for Recordation (within 2 Months of Approval)
Arapahoe County Contacts

- Planning Division – 720-874-6650
- Engineering Division – 720-874-6500

- Development Services and Infrastructure Management
  10730 E. Briarwood Ave., Suite 100
  Centennial, CO 80112
  - www.co.arapahoe.co.us