COLORADO LAND USE CASES – 2006

Presented by

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Several interesting and important land use cases were decided by the Colorado appellate courts in 2006, some of which will be reviewed on *certiorari* in 2007.

In *JAM Restaurant, Inc. v. City of Longmont*, 140 P.3d 192 (Colo. App., 2006), *cert. denied* July 31, 2006, the Court of Appeals had occasion to consider whether the General Assembly's 2003 enactment of §38-1-101(3) (a)[1] was applicable to home rule municipalities. JAM commenced operation within the City of Longmont in 2001 as a sexually oriented business. Later in 2001 Longmont enacted an ordinance limiting the locations within which sexual oriented businesses could lawfully operate, and imposing regulations as to the conduct of such businesses. JAM commenced a civil action challenging those enactments in 2002. The General Assembly adopted the provisions of §38-1-101(3) (a) quoted above effective June 6, 2003. The trial court concluded that the General Assembly's enactment preempted the City's zoning authority. The Court of Appeals agreed.

Applying what have become the recognized standards for determining matters of home rule authority *vis a vis* legislative enactments declaring matters to be of "statewide concern"[2], the Court of Appeals found that the legislative enactment did not impair a home rule municipality's authority to enact zoning ordinances (which remain matters of strictly local concern under Article XX), but that the enactment was designed instead to protect a specific state constitutional right that is generally applicable to all property owners within the state. The Court was at pains to acknowledge that the legislative enactment does not preclude the use of amortization as a land use enforcement tool, but merely precludes municipalities from amortizing now-nonconforming uses that were lawful at the time of their inception.

In an interesting but fact-specific case involving the jurisdiction of home rule municipalities' municipal courts to hear and consider appeals from adverse land use decisions, the Court of Appeals in *North Avenue Center v. City of Grand Junction*, 140

[1] "Notwithstanding any other provision of law to the contrary, a local government shall not enact or enforce an ordinance, resolution, or regulation that requires a nonconforming property use that was lawful at the time of its inception to be terminated or eliminated by amortization."

[2] See *City of Northglenn v. Ibarra*, 62 P.3d 151, *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30, *City of Commerce City v. State*, 40 P.3d 1273. See also *Home Rule in Colorado: Evolution or Devolution*, Hayes and Hartl, The Colorado Lawyer, January 2004, pp. 61-65.

P.3d. 308 (Colo. App. 2006) found that the specific language of the Home Rule Charter for Grand Junction providing that the "judge of the municipal court . . . shall have exclusive original jurisdiction to hear, try and determine all charges of misdemeanor as declared by this Charter, and all causes arising under this Charter or any of the ordinances of the city for a violation thereof" did not confer upon that court jurisdiction to hear appeals of land use decisions. The primary teaching of this case is that each individual home rule charter must be separately reviewed in order to determine whether its provisions are sufficiently broad to vest jurisdiction in that court to hear and decide land use appeal issues, or whether the District Courts retain jurisdiction as to the municipality's land use decisions.

Canyon Area Residents for the Environment v. Board of County Commissioners, __ P.3d ____ (Colo. App. 2006) involves the on-going dispute between Jefferson County residents and the television stations seeking to place enhanced antennas on Lookout Mountain. In this matter, numerous public hearings were held at both the planning commission and board of county commissioners level, at which substantial testimony and evidence was introduced. After the last hearing before the Board, the applicants made changes to their submittal, which were adopted and approved by the Board of County Commissioners. Protestants brought suit pursuant to C.R.C.P. 106(a)(4) alleging that, under the Jefferson County Zoning Resolution, "no substantial revisions or additions, except in response to an agency or staff request or those specifically requested by the Planning Commission or the Board of County Commissioners may be made to any application or supporting documents within 21 days prior to any hearing", and that the changes made to the application after the close of the public hearing before the Board were made in violation of that provision. The Court of Appeals agreed and determined that the changes made to the application were substantial and required a subsequent public hearing before due process would be satisfied. The Court also found that the Board's decision was made without proper consideration of the criterion established in the Planned Development Act, §24-67-104, C.R.S., which act the Court found established the county's master plan as mandatory, not advisory.

Two significant cases involving application of the Religious Land Use and Institutionalized Person Act (RLUIPA) were decided in 2006. In a comprehensive decision, the 10th Circuit applied RLUIPA's provisions to sustain the City of Cheyenne, Wyoming's decision to deny permission for a church to operate a day care center in a residential area in *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir., 2006). By applying generally-applicable land use regulations to the application, the City was able to convince the Court that it was not acting based on intent to burden the religious activities of the church. Because the City adopted and enforced generally applicable, content neutral regulations which precluded the operation of any day care center, whether affiliated with a religious institution or a non-sectarian profit-making venture, within designated areas of the city, there was no RLUIPA violation.

In *Town of Foxfield v. Archdiocese of Denver*, __ P.3d ___ (Colo. App. 2006), *cert.* granted, December 18, 2006[3], the Town Board of Trustees reacted to numerous

[3] Summary of Issues:

citizen complaints relating to parking by parishioners on Town streets in order to attend religious services and activities at a residence. The ordinance as enacted "forbids parking more than five motor vehicles for more than 15 minutes on or within one thousand feet of private residential property on more than two occasions during any thirty-one day period." The ordinance's prohibitions are only enforced based upon written citizen complaints. The Town filed suit against the Archdiocese seeking to enforce the ordinance, and the parties filed cross-motions for summary judgment. The trial court ruled in favor of the Town, finding that the jurisdictional prerequisites for invocation of RLUIPA's provisions had not been met, that the ordinance in question was a parking ordinance of general applicability, and that the ordinance as a whole was constitutional. The Court of Appeals reversed.

The lynchpin of the Court of Appeals' decision appears to be its disapproval of the enforcement mechanism of the ordinance. Because the ordinance "shall only be enforced by [Foxfield] upon receipt of written complaints from at least three (3) persons who reside in no less than three (3) separate households located within one thousand five hundred feet (1,500') of such residential property", the Court of Appeals found that the ordinance could not be enforced on a uniform basis, and thus fulfilled the "individualized assessment" test of RLUIPA, thus satisfying the jurisdictional prerequisites for RLUIPA application. This enforcement trigger also precluded the constitutionality of the ordinance because the ordinance could not be generally applied by the Town.

As noted, the Supreme Court has granted certiorari as to each portion of the Court of Appeals decision, thus giving us something to look forward to discussing at next year's conference.

Wheat Ridge Urban Renewal Authority v. The Cornerstone Group XXII, LLC, __ P.3d ___ , WL 2291146, (Colo. App. 2006), decided August 10, 2006, *cert.* granted January 16, 2007[4], stands for the proposition that under principles of estoppel, an urban renewal authority (and presumably any other governmental entity) which has entered into development contracts with third parties may be compelled to exercise its power of eminent domain for the benefit of those third party contractual partners, notwithstanding

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Whether the court of appeals erred when it concluded that a parking ordinance was subject to the Freedom to Gather to Worship Act, section 29-1-1201, C.R.S. (2006), despite the FGWA's explicit exception for generally applicable parking laws.

Whether the court of appeal erred in concluding that Respondents met either of the relevant jurisdictional prerequisites of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. section 2000cc (2006).

Whether the court of appeals erred in concluding that a parking ordinance is subject to strict scrutiny under the United States Constitution.

[4] Summary of Issue:

Whether the court of appeals erred in determining that a condemning authority could be compelled by a redeveloper to exercise its power of eminent domain through principles of estoppel in a situation when the landowners do not want their property condemned.

the fact that the governmental entity has determined to abandon the underlying project for which the property acquisition through the use of eminent domain was required. In coming to this conclusion the Court of Appeals first reviewed the provisions of the Urban Renewal Law, §31-25-101 *et seq.,* C.R.S. and found no statutory indication of intent to allow delegation of an Authority's power to condemn. It did, however, find that a contractually conferred power to require condemnation could be enforced under common law principles of estoppel. In reaching this conclusion the Court applied the reasoning of *Piz v. Housing Authority*, 289 P.2d 905 (1955) that "the right to abandon condemnation proceedings may be relinquished by agreement or lost by estoppel." Finding no reason that the corollary is not also true, the Court remanded the matter for a balancing of the equities between the Authority's contractual partner and the property owners whose land would be acquired through the use of eminent domain.

In *City of Golden v. Parker*, 138 P.3d 285 (2006), the Supreme Court held that development incentives memorialized by contract, payment of which are subject to annual appropriation, do not constitute multiple year fiscal obligations, and are not subject to subsequent voter approval. To that extent, they constitute vested contractual rights which may not be retrospectively annulled.

City of Colorado Springs v. Board of County Commissioners of Pueblo County, 147 P.3d 1 (Colo. 2006), establishes that venue for construction and enforcement of county regulations adopted pursuant to the provisions of §24-65.1-104 -05 (the Areas and Activities of State Interest Act) is proper in the county where the officials adopted the regulations, and not in the county where the ultimate impact of those regulations might be felt.

Board of County Commissioners of Gunnison County v. BDS International, LLC, __ P.3d ____, WL 2337372 (Colo. App. 2006) discusses and applies preemption principles to local regulations affecting oil and gas drilling and operations. After reviewing the underlying legal principles of "operational conflict" and the specific regulations complained of, the court determined that not all local regulations of oil and gas drilling are preempted by either state or federal law, so long as the local regulations do not create an operational conflict with the state or federal regulations.