COLORADO LAND USE CASES – 2007

Presented by

John E. Hayes
Hayes, Phillips, Hoffmann & Carberry, P.C.
1350 17th Street, Suite 450
Denver, Co 80202
303-825-6444

2007 brought a continuation of the drought that has plagued Colorado, and brought with it a virtual drought in ground-breaking or even significant Colorado land use cases. Indeed, a land use case that held great promise for resolution of RLUIPA issues fizzled before our very eyes. A brief review of the leading Colorado land use cases in 2007 is as follows:

As many of you will recall, at last year's RMLUI conference a great deal of time was spent discussing the case of *Town of Foxfield v. Archdiocese of Denver*, upon which Certiorari had been granted to review the Court of Appeals 2006 decision that an ordinance adopted by the Town of Foxfield could not be enforced on a uniform basis, which thus precluded the constitutionality of the ordinance because the ordinance could not be generally applied by the Town. The Supreme Court received briefs on the issue and heard oral argument at Cherry Creek High School on May 1, 2007 during its Law Day observance. However, after hearing oral argument and apparently conferring amongst themselves, the justices on that same day dismissed the case upon determining that "certiorari had been improvidently granted."

Another case discussed last year upon which certiorari was granted was decided by the Supreme Court. In *Wheat Ridge Urban Renewal Authority v. The Cornerstone Group XXII, LLC,* __ P.3d ___ , WL 4225821 (Colo., 2007), decided December 3, 2007, the Supreme Court reversed in part the prior Court of Appeals decision and held that the Urban Renewal Authority could not be compelled under specific performance to exercise a core function of government (i.e. undertake a condemnation of real property) and that the doctrine of equitable estoppel likewise did not apply in this case to require the Authority to continue to pursue actions in eminent domain that the Authority had previously determined to abandon.

In *Wolf Creek Ski Corporation v. Board of County Commissioners of Mineral County*, 170 P.3d 821 (Colo. App 2007), the Court of Appeals engaged in a lengthy and thorough discussion of the standards of review applicable to local land use decisions and the standards for review of local land use ordinances. Based on that review, the Court determined that the decision of the Board of County Commissioners finding adequate access to the proposed development as required by both the local regulation and state statute was not supported by the evidence in the record.

The Court of Appeals considered two cases involving the question of standing during 2007. In *Reeves v. City of Fort Collins*, 170 P.3d 850 (Colo. App. 2007) the Court reiterated that a person has standing "if he or she has suffered an injury to a legally protected interest. An interest is legally protected if the constitution, common law, or a statue, rule or regulation provides the plaintiff with a claim for relief. A plaintiff establishes an injury in fact by alleging facts that show the defendant caused harm to the plaintiff's legally protected interest." In this matter, plaintiff owned property 8 blocks from a proposed development, and appeared at and participated in a public hearing to file his objections to the proposed development. Because the local Fort Collins Land Use Code describes as a "party in interest" anyone who appears at an initial hearing, the Court found that Plaintiff met the standing requirement.

In *JJR 1, LLC v. Mt. Crested Butte*, 160 P.3d 365, (Colo. App., 2007) plaintiff filed suit more than 30 days after a public hearing at which a decision was made to issue a building permit on an approved development project. Plaintiff sought review under C.R.C.P. 106(a)(4), C.R.C.P. 57 and 42 U.S.C. §1983. The Court affirmed the district court's dismissal of the claims, finding that plaintiff's claims under both 106(a)(4) and Rule 57 were barred by plaintiff's failure to file within 30 days of the date of the decision complained of , and that a plaintiff possesses a "protected property right" for §1983 purposes only when the plaintiff possesses a legitimate claim of entitlement to the right which has allegedly been infringed. In the land use context, such a right (here the right asserted is the right to procedural due process) depends upon the degree of discretion vested in the decision maker. Citing *Hillside Community Church v. Olson*, 58 P.3d 1021 (Colo. 2002). Because there was an abundance of discretion reserved to the decision maker in the local enactment in question, plaintiff filed to establish standing to sustain his §1983 action.

The issue of preemption was again addressed in 2007 by the Court of Appeals in the case of *Colorado Mining Association v. Board of County Commissioners of Summit County*, 170 P.3d 749 (Colo. App 2007). In this instance the Board of County Commissioners adopted a ban on use of cyanide and other reagents in leaching field applications. Plaintiff sought a determination that such a prohibition was preempted by the terms of the Mined Land Reclamation Act, §34-32-101, et seq. ("MLRA"). In deciding that such a ban was not preempted, the Court of Appeals recited the familiar rules that local and state regulations may coexist "as long as they do not contain express or implied conditions that irrevocably conflict with one another", and that the means by which a state statute may be deemed to preempt a local regulation include circumstances in which "the express language of the statute may indicate preemption of local authority; second, preemption may be inferred if the statute impliedly evinces a legislative intent completely to occupy a given field; and third, a local law may be partially preempted where its operational effect conflicts with the application of the statute." In analyzing the local enactment in question, the Court found that the ban on use of cyanide and other reagents in leaching was not contrary to the provisions of the LMRA, and could therefore stand. Additional restrictions contained in the county enactment, however, were found to be preempted by the RMLA and were accordingly stricken.

In *Sierra Club v. Billingsley*, 166 P.3d 309 (Colo. App 2007), the Court of Appeals sustained a finding by the Boulder County Board of Adjustment that a previously approved special use permit had not been allowed to lapse. The Court undertook an analysis of the rules governing review of a local agency's determination under C.R.C.P 106(a)(4), and specifically held that it considered an administrative agency's interpretation of its own regulations advisor, not binding. After reviewing both the specific language of the local regulation and the application of that language to the record on appeal, the Court upheld the agency's determination. Of equal interest in this matter is the Court's discussion of the application of the Open Records Act. In this matter, Plaintiff asserts that the County Attorney intentionally withheld a specific record that might have altered the Court's decision in this matter. Although the Court found that the document in question would not have altered the ultimate decision, it did go on to hold that mere disclosure by stipulation after an objection to its production has been asserted of a document previously requested to be produced under the ORA does not forestall potential imposition of an award of fees and costs as to that document.

Finally, the Supreme Court decided *Droste v. Board of County Commissioners of Pitkin County*, 159 P.3d 601 (Colo. 2007) by holding that a county has authority under the provisions of the land Use Enabling Act, §29-20-101 et seq., C.R.S., to enact a temporary moratorium in order to enable the local government to prepare and enact a county-wide master plan. The Court found that such authority was not contrary to the provisions of §30-28-121, C.R.S. Although there is a dissent in this matter authored by Justice Eid and joined by Justice Coats, this case clearly establishes the authority of both counties and statutory municipalities to enact limited moratoria following public hearings for the purpose of enacting local regulations that are related to master planning.