COLORADO LAND USE CASES – 2008

Presented by

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2008 was not a year for ground-breaking judicial decisions in Colorado land use law. However, as usual, there were interesting cases decided that are worthy of mention and discussion.

Perhaps the predominant theme of Colorado appellate decisions in 2008 had to do with issues of preemption, determination of matters of statewide concerns and the examination of the exercise of the powers of various levels of government vis a vis each other. Foremost among these cases is the Supreme Court's decision (actually announced January 12 of 2009) in Colorado Mining Association v. Board of County Commissioners, ___ P.3d ____ (No. 07SC497), which reversed the Court of Appeals, whose opinion was discussed at last year's conference.

As you might recall, in 2004 the Summit County Board of County Commissioners adopted an ordinance prohibiting the use of "cyanide or other toxic/acidic ore-processing reagents in heap or vat leach applications" in any mining operation. Enactment of this ordinance came 11 years after the adoption by the General Assembly of the Mined Land Reclamation Act which, among other provisions, delegated to the Mined Land Reclamation Board the authority to review, authorize and regulate the use of toxic or acidic chemicals in mining operations. The district court originally ruled that the county's ordinance was invalid as being preempted by the MLRB's promulgated rules. The Court of Appeals reversed that ruling, finding that the MLRA does not expressly or impliedly preempt the local ordinance. The Supreme Court reversed the Court of Appeals.

In its opinion, the Court extensively reviews its jurisprudence relating to preemption. After a review of preemption involving enactments of a home rule municipality (more on that later), the Court focuses on presumptive preemption of the enactments of a county. After reiterating the status of a county as having no more powers than those specifically delegated to it, the Court restates its prior holdings that there are three basic ways to evaluate and determine whether a state enactment preempts a county ordinance or regulation, those being express preemption, implied preemption and operational preemption. In this case the Court found the state's enactment of the MLRA and the MLRB's rules and regulations promulgated thereunder had impliedly preempted the county's authority to prohibit use of cyanide or other toxic/acidic agents or processes in mining operations. The Court was clear however, in avoiding any inference that its

holding in this case diminished its prior rulings in such cases as County Commissioners v. Bowen/Edwards Assocs., 803 P.2d 1045, which upheld the power of counties to regulate land use matters not regulated by enactments containing assertions of statewide concern. While reiterating that the county retained the authority to enact land use regulations that preserve the health and safety of the county and its residents, the Court warned that "[t]hough counties have broad land use planning authority, that authority does not generally include the right to ban disfavored uses from all zoning district."

An interesting internal debate is contained in the opinions announced in this case. While 6 of the 7 justices agreed as to the result, Justice Eid, joined by Justice Coats, argued that this case was not a preemption case at all, but was instead a statutory construction case. Justice Eid particularly chastised the majority for even referring to cases involving home rule municipalities, since the jurisprudential disconnect between the law controlling home rule/state preemption differs widely from the rules governing county/state preemption. On the other hand Justice Martinez, who dissented from the decision, not only felt that this was a preemption case, but that the county was not preempted from adopting and enforcing the ordinance in question.

Department of Transportation v. City of Idaho Springs, 192 P.3d 490, likewise deals with and discusses issues of preemption. In this case the city adopted regulations under the Areas and Activities of State Interest Act (AASIA), §24-65-1-101 to -502, C.R.S. 2008), with which regulations it asserts CDOT must comply. CDOT disagreed, asserting that it was not a "person" as defined under AASIA for purposes of these regulations and that Title 43, C.R.S. preempted enforcement against it of the city's AASIA regulations. As to the preemption argument, the court reviewed the three means of preemption identified in Colorado Mining above, found that there was no preemption under any of the three tests and that the authority delegated to CDOT under Title 43 could be exercised in a manner consistent with and not impaired by the city's AASIA regulations.

A somewhat more tradition preemption/statewide concern case arose in Berger v. City of Boulder, 195 P.3d 1138. In that case Boulder granted a liquor license to a licensee who operated his business within an area in which the zoning required that no business be operated after 11:00 p.m. Berger sought and was granted a use review which contained the condition that there was to be "no consumption of alcohol on the premises after 11:00 p.m." After determining, apparently, that such a prohibition was not conducive to a successful bar business, Berger sued asserting the City had abused its discretion and exceeded its authority by including the time limitation, which is contrary to the provisions of the Colorado Liquor Code. Here, the court of appeals found that the Liquor Code, which is promulgated pursuant to Article XXII, section 1 of the Colorado Constitution, preempted the City's attempt to limit the hours of Berger's operation.

Clearly, notwithstanding the fact that we have discussed preemption cases at this session of the RMLUI Annual Conference for at least the past 5 years, questions of preemption will remain with us for the foreseeable future.

In Hygiene Fire Protection District v. Board of County Commissioners, ___ P.3d. ____, 2008 WL 5173657 (not released for publication as of February 6, 2009), the question of the authority of a county to regulate the building activities of a special district under the Planned Unit Development Act is considered. In this case the district wished to construct a fire station which was located within an area subject to a PUD. The County declined to approve the district's plans because the county preferred a different entity to provide fire services in that area. Following further discussions, the district submitted a Location and Extent Review petition to the county for approval. The county refused to accept the petition for Location and Extent Review, requiring instead an application to amend the PUD. The district brought suit asserting a PUD amendment was not required, and that the county abused its discretion in failing to accept and approve the Location and Extent Review petition. The district prevailed at both the district court and court of appeals level. The court of appeals specifically found that a district must comply only with those provisions of the Planning Act (§§30-28-101 to -139, C.R.S. 2008) in constructing its own facilities. Reber v. South Lakewood Sanitation District, 362 P.2d 877 (1961); Cottonwood Farms v. Board of County Commissioners, 725 P.2d 57 (Colo. App. 1986) rather than the provisions of the PUD Act. An interesting note about this decision, however, is that it was decide by a vote of 2-1. Notice should be taken of the dissent of Judge Russel which calls into question the traditional rule adopted by the majority. It will be interesting to observe whether this case continues to the Supreme Court, and if so how the Court resolves this issue.

In a highly publicized case not directly on point to land use *per se* but highly relevant to issues of statewide vs. local control, the Supreme Court decided in Town of Telluride v. San Miguel Valley Corporation, 185 P.3d 161, that the General Assembly did not have the authority to prohibit extraterritorial takings of private property for open space purposes by home rule municipalities. After a very public and highly contentious dispute involving acquisition for open space purposes of 572 acres of privately owned property adjacent to the Town of Telluride, the General Assembly adopted as subsection 4b of §31-1-101, C.R.S. a provision prohibiting home rule municipalities from acquiring through the use of eminent domain property outside the municipality's boundaries for parks, recreation, open space or other similar purposes. After a thorough review of the Court's previous holdings on this matter, the Court adhered to its previous holdings that once a power is vested by the Constitution in a governmental entity, the General Assembly may not prohibit exercise of that power.

What is most interesting about this case is the concurrence of Justice Coats and the dissent of Justice Eid. Justice Coats stresses the ability of the General Assembly to *regulate*, but *not prohibit*, exercise by municipalities of such constitutionally granted powers, while Justice Eid finds that the exercise of extraterritorial condemnation power is not as extensive as the condemnation power within the municipality's boundaries, and should be subject to greater scrutiny and potential regulation by the General Assembly.

Given the positions stated by Justices Coats and Eid in Colorado Mining and Telluride, and the dissent of Judge Russel in Hygiene, it is probably fair to say that we will see more discussion of these issues for years to come.

Wolf Ranch LLC v. City of Colorado Springs, ___ P.3d ____, 2008 WL 4878388 (Colo. App.) (not released for publication as of February 6, 2009) is a case of first impression regarding the application of the Regulatory Impairment of Property Rights Act (§§ 29-20-201 to -205, C.R.S. 2008). The land in question was annexed into the City in 1982 as part of a larger annexation. The City had been imposing and collecting drainage and other surface water collection fees city-wide since the 1960s. Owner sought exemption from a specific drainage fee applicable to the drainage area in which its property was situated. The City rejected this request, and owner sued asserting that subjecting it to such payment requirement invoked the protection of the Act. The district court, in a decision appealed by both parties, dismissed owner's complaint, but found that refusal to exempt owner from the provisions of the drainage fee invoked the protections of the Act.

The court of appeals thoroughly and effectively reviewed the history of the Act and the U. S. and Colorado Supreme Court precedents it was intended to address. After that review, the court determined that

> two threshold questions must be answered affirmatively to trigger the Act: (1) was the action one "imposing conditions upon the granting of land-use approvals?" and (2) did the local government "require an owner of private property to dedicate real property to the public, or pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis?"

After finding it need only resolve the second question in this specific instance, the court concluded that imposition of the basin-wide fee is not the type of exaction which triggers the coverage of the Act. Specifically, it found that

> Drainage fees are determined under a formula set out in City ordinances, and are imposed by City Council resolutions for each individual basin. Here, the City has simply required Wolf Ranch to pay the same legislatively determined fee imposed on an equal per-acre basis on all developers in the Cottonwood Creek basin. This uniform fee was *not* "determined on an individual and discretionary basis", §29-20-203(1). Rather it was a "legislatively formulated assessment, fee or charge that is imposed on a broad class of property owners by a local government." (citing Krupp v. Breckenridge Sanitation District, 19 P.3d 687, at 697-98).

This is another case which, although correctly decided in this writer's opinion, deserves to be watched for further appellate consideration.

There was the usual smattering of cases decided in 2008 relating to standards of judicial review and related issues. Lieb v. Trimble, 183 P.3d 702, is a comprehensive review and restating of the established rules of judicial review of agency determinations

under C.R.C.P. 106(a)(4). Likewise City of Commerce City v. Enclave West, Inc., 185 P.3d 174 (although this case is somewhat more interesting given the additional consideration that the landowner operates a sexually oriented business) and IBC Denver II, LLC v. City of Wheat Ridge, 183 P.3d 714 (which is more interesting because of the reaffirmation of the longstanding rule first articulated in Colorado in King's Mill Homeowners Ass'n v. City of Westminster, 557 P.2d 1186 (1976) that to justify a change in zoning there must be shown a change in the character of the neighborhood). See also Covered Bridge, Inc. v. Town of Vail, 197 P.3d 281. Re-acquaintance with the rules governing judicial review of land use decisions is never a bad idea, and these cases offer that annual opportunity.

The final case for notice involves a mixture of eminent domain and zoning law, and will be of interest to municipal attorneys as well as private property owners whose land is not yet though likely to be annexed into, zoned by and platted by an adjoining city but which is currently subject to acquisition by that city through eminent domain. City of Brighton v. Palizzi, ___ P.3d ____, 2008 WL 4742074 (not released for publication as of February 6, 2009) concerns the valuation of real property which is adjacent to the City of Brighton but in unincorporated Adams County, and which would become subject to zoning and dedication requirements at the time of annexation. Brighton had previously acquired parcels adjacent to and on either side of the subject properties, which remained zoned agricultural under Adams County zoning. The adjoining parcels had been annexed, zoned and platted by Brighton previously. It was undisputed that when the subject parcels are ultimately annexed into Brighton a required roadway dedication of 70' will be a condition of annexation, zoning and platting. After immediate possession had been agreed upon, the parties proceeded to the valuation hearing. At that hearing the landowner's appraiser valued the 70' strip which would be required to be dedicated as though it had been annexed, zoned and platted, while the city's appraiser valued the subject parcels as agricultural. The jury accepted the landowner's valuation. The City appealed and the Court of Appeals reversed, finding that property in such a circumstance must be valued at its current, not projected future, value. To hold otherwise would be to ignore the fact that since the property in question will be required to be dedicated, it can never have a future up-zoned value. Rather, the property must be valued based on uses to which it could be put in the absence of such rezoning/platting.