COLORADO LAND USE DECISIONS – 2010

Presented By

Jefferson H. Parker
Hayes, Phillips, Hoffmann & Carberry, PC
1530 Sixteenth Street, Suite 200
Denver, Colorado 80202-1468
(303) 825-6444
jhparker@hphclaw.com

CASE LAW[1]

1. CDOT used to be authorized to take mineral rights

In *Gypsum Ranch Co. v. Bd. of County Comm'rs of County of Garfield*, 219 P.3d 365 (Colo. App. 2009), the Colorado Court of Appeals held that Colorado Department of Transportation ("CDOT") takings do not include mineral rights even when the condemnation decree awards the property in fee simple absolute and does not include any language severing the mineral estate. The court based its decision upon language added in 2008[2] to the statute governing the use of eminent domain to acquire rights-of-way for highway purposes, which provides as follows:

> "No right-of-way or easement acquired by condemnation shall ever give the petitioner any right, title, or interest to any vein, ledge, lode, or deposit found or existing in the premises condemned, except insofar as the same may be required for subsurface support." C.R.S. § 38-1-105(4).

The court held that CDOT's ability to acquire mineral deposits under the statute did not extend beyond "those required for subsurface support." *Gypsum*, 219 P.3d at 368. This issue was important, because CDOT had leased the subsurface rights to an oil and gas company, and Gypsum Ranch, the property owner, was asserting that the subsurface rights belonged to Gypsum Ranch.

The Colorado Supreme Court granted certiorari and reversed the decision of the Court of appeals, holding that the 2008 version of C.R.S. § 38-1-105(4) only applies prospectively, and that the 2008 amendments did, indeed, change the meaning of the statute when a right-of-way was being condemned for highway purposes. *Dep't of Transp. v. Gypsum Ranch Co., LLC*, 244 P.3d 127 (Colo. 2010). Therefore, prior to the 2008 amendments, CDOT did have the authority to condemn the full subsurface rights. *Id.* However, after 2008, CDOT may only condemn those subsurface rights necessary for subsurface support.

---

[1] The first six cases addressed in this handout were addressed in last year's handout. Additional developments in the cases merit follow-up in this year's handout.

[2] The Court of Appeals concluded that the statutory language, added in 2008, clarified the intent of the predecessor statute, rather than changed the meaning of the statute. *Department of Transp. v. Gypsum Ranch Co., LLC*, 244 P.3d 127, 129 (Colo. 2010).

2. Compensation for taking of property even if property would otherwise need to be dedicated for development

In *Palizzi v. City of Brighton*, 228 P.3d 957 (Colo. 2010), the City of Brighton brought an eminent domain action to obtain a 0.8 acre strip of land to widen a roadway. The strip was a part of a larger parcel of agricultural land. For the larger parcel to be developed, it would need to be annexed into Brighton, and the strip of land would undisputedly need to be dedicated to Brighton for free. Under longstanding Colorado law, in a condemnation action, property is valued at its highest and best use even if a rezoning is required. In this case, the highest and best use of the strip would be as commercial land. However, the City contended that because the strip of land the City sought in condemnation would need to be dedicated to the City for free prior to any development of the larger parcel, it should not be valued as commercial, developable land. Rather, the City contended, it should be valued based on its current agricultural use.

The Court of Appeals agreed, and held as follows:

> As noted, where rezoning is probable, it is ordinarily appropriate to value condemned property in accordance with the highest and best use as rezoned. However, the consequences and costs of such rezoning also must be taken into account. Here, it is undisputed that one such consequence or cost is dedication of the condemned strip to the City. Further, as noted, the overarching purpose of awarding compensation in an eminent domain case is to make the landowner whole, and nothing more. There is simply no real world scenario in which the landowners, or a willing buyer, could develop the strip upon annexation and rezoning, or sell the strip (or the larger parcels of which it is a part) for a price which assumes that the strip will be developed.

City of Brighton v. Palizzi, 214 P.3d 470, 476 (Colo. App. 2009).

However, the Colorado Supreme Court granted certiorari and disagreed with the City and the Court of Appeals, holding as follows:

> In accordance with our expansive evidentiary rules for property valuation in condemnation cases, we hold that all evidence relevant to the determination of the present market value of condemned property is admissible, including evidence of the most advantageous potential future use of the entire property, even if the condemned property would need to be dedicated as part of annexation and rezoning of the entire property in the future.

Palizzi, 228 P.3d at 959. The court held that the Court of Appeals erred in holding that evidence of valuation should be limited solely to a property's use in its undeveloped state. *Id.* at 964. The court held that the fact finder should weigh any dedication requirement along with all the other valuation evidence when determining just compensation:

> The court of appeals' holdings-that the condemned seventy-foot-wide road improvement strip must be valued at its existing use and that the entire property's most advantageous potential future use may not be considered by the fact finder-contravene Colorado's established rules of valuation. The jury is tasked with

> determining the present market value of the condemned property, taking into consideration the entire property's reasonably probable potential future use even if such potential future use would trigger a dedication requirement. The dedication requirement, instead of triggering a preclusive evidentiary rule, goes to the weight of the valuation evidence before the jury. Thus, we reject California's preclusive approach to valuation evidence in favor of Nevada's inclusive approach, and entrust the determination of just compensation to the fact finder.

Id. at 964-65 (internal citations omitted). Consequently, the court ordered that the strip of land be valued as part of the entire parcel of land to be developed (which would be zoned commercial) and not on its own.

3. Certiorari granted to determine whether private oil pipeline operator may condemn private property for pipeline

In *Sinclair Transportation Co., v. Sandberg*, 228 P.3d 198 (Colo. App. 2009), the Colorado Court of Appeals held that Sinclair Transportation Company had the power to condemn private property for a pipeline. This case was discussed in last year's handout. Subsequently, the Colorado Supreme Court granted certiorari to review whether the court of appeals erred in concluding that C.R.S. § 38-5-105 grants Sinclair Transportation Company the power of eminent domain. *Larson v. Sinclair Transp. Co.*, 2010 WL 1436236 (Colo. 2010).

4. Certiorari granted to determine whether "municipality" lacking ability to provide water service may veto attempt of another municipality to provide such service

In *South Fork Water and Sanitation Dist. v. Town of South Fork*, 2009 WL 2527853 (Colo. App. 2009), the Colorado Supreme Court held that one municipality[3] cannot exercise its veto so as to deny another municipality the lawful exercise of its lawful powers to provide water, where the first municipality has failed to provide such water. Here, the South Fork Water and Sanitation District (the "District") brought an action to enjoin an the Town of South Fork (with overlapping boundaries) from obtaining water rights and private water systems without the District's consent.

Although the District had authority to provide water service, it had never done so, it had never owned any water rights, and it lacked the financial means to acquire existing private water systems. Effectively, the District was a "water" district in name only. However, when the town, which also had never owned any water rights nor provided any water services, sought to acquire water rights through development dedications and other means, the District objected. The District relied on C.R.S. § 31-35-402(1)(b) for the proposition that the District, as another "municipality", has the power to veto the Town's provision of water in areas of overlap. The trial court and appellate disagreed. They held that where one municipality has not yet provided water service within its territory, another municipality may use its police powers to protect the health, safety, and welfare of its residents by requiring dedications of water which may be used for the provision of water service.

[3] The South Fork Water and Sanitation District was treated as a "municipality" in this case. *See Id.* at *6 n. 2.

The Colorado Supreme Court has granted certiorari to review this decision. *South Fork Water and Sanitation Dist. v. Town of South Fork*, 2010 WL 1436237 (Colo. 2010). At issue are the following two issues:

> 1. Whether C.R.S. § 31-35-402(1)(b) grants the South Fork Water and Sanitation District veto power over the Town of South Fork's acquisition of water rights and private water systems; and
>
> 2. Whether the court of appeals erred in holding that the District acted unreasonably in exercising its veto power under C.R.S. § 31-35-402(1)(b).

5. County can exempt self from sign regulations

In *Mountain States Media, LLC v. Adams County, Colo.*, 389 Fed. Appx. 829 (10th Cir. 2010), the plaintiff was in the outdoor advertising business. Adams County regulates the construction of outdoor signs. It exempts those signs which promote "civic events" from the county's permit requirements. The county refused to allow the plaintiff to construct its billboard-sized signs, finding that the "civic events" exception was inapplicable to the plaintiff, because it was limited to smaller fixtures and available only to governmental entities. The plaintiff sued, alleging the county drew an unconstitutional distinction favoring government over private speakers on matters of civic events.

The 10th Circuit Court of Appeals upheld the district court's decision against the plaintiff on all its claims. On plaintiff's First Amendment claim, the court ruled as follows:

> It is well established that requiring all billboards to be authorized by a conditional use permit prior to their construction does not offend freedom of speech provided the permitting process does not delegate excessive discretion to the licensing authority, or allow the licensing authority to indefinitely postpone decision making. On its face [the Adams County sign regulation] sets out reasonable standards to guide a decision maker in determining whether a conditional use permit is appropriate. Further, the County did not unreasonably delay in deciding plaintiffs' requests. Each of plaintiffs' applications and letters to the County were responded to in a timely fashion. Thus, plaintiffs' § 1983 claims based solely on the First Amendment fail.

Id. at 834 (citations omitted).

On plaintiff's Equal Protection claim, the court ruled against the plaintiff, holding that "[r]equiring all billboards to be authorized by a conditional use permit prior to their construction does not violate equal protection." *Id.* at 835. Moreover, the court also concluded that grandfathering in nonconforming signs while banning the construction of new signs can survive an equal protection challenge. *Id.* at 836. Consequently, the court upheld Adams County's special treatment of governmental civic event signs over private party civic event signs.

6. More smiting of Boulder County with RLUIPA claim by church

In *Rocky Mountain Christian Church v. Bd. Of County Comm'rs of Boulder County*, 612 F. Supp. 2d 1163 (D. Colo. 2009), a jury ruled against the Boulder County in finding that the county violated the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, *et seq.* ("RLUIPA") when the county denied a church's application to expand its facilities. Although no damages were awarded, a permanent injunction was entered ordering Boulder County to approve the church's special use application.

The Tenth Circuit Court of Appeals affirmed the jury's decision for the church and the issuance of the permanent injunction in *Rocky Mountain Christian Church v. Board Of County Comm'rs Of Boulder County*, 613 F.3d 1229 (10th Cir. 2010). Moreover, even though the church did not prevail on its claims, it did obtain a majority of the relief it sought. Consequently, the church was awarded approximately seventy percent of its reasonable attorney fees, which was an award of $1,252,327, and $89,664 in expenses. *See Rocky Mountain Christian Church v. Board Of County Comm'rs Of Boulder County*, No. 06CV00554-REB-BNB, 2010 WL 148289 (D. Colo. January 11, 2010). The church also received an additional $207,630 in attorney fees and $9,822 in expenses incurred by the church defending against Boulder County's appeal. *See Rocky Mountain Christian Church v. Board Of County Comm'rs Of Boulder County*, 06-CV-00554-REB-BNB, 2010 WL 3703224 (D. Colo. Sept. 13, 2010).

7. RLUIPA safe harbor provision allows Pitkin County to avoid further damage award

In a similar case, *Grace Church of Roaring Fork Valley v. Bd. of Comm'rs of Pitkin County*, No. 05-cv-01673-RPM, 2010 WL 3777286 (D. Colo. Sept. 20, 2010), a church brought action against county board of commissioners, and others, challenging the denial of church's application for special use permit to construct new church under the Religious Land Use and Institutionalized Persons Act (RLUIPA).

The county had originally denied the church's special use request. Asserting similar claims under RLUIPA as in the *Rocky Mountain Christian Church* case, the church claimed that the denial imposed a substantial burden on religious exercise, was applied in a manner treating the church on less than equal terms with nonreligious assembly, discriminated against the church on the basis of religion, and imposed unreasonable limitations on the church's exercise of religion. Years after the denial decision, on the eve of trial, the county settled the declaratory and injunctive relief claims brought by the church, and approved the permit application. Further, the county bought portions of the property from the church and paid the church's attorney fees. After this settlement, the church sought monetary damages for the county's delay in approving the special use permit, during which the church was precluded from using the property for religious purposes.

The county defended the monetary damage claims under RLUIPA's safe harbor provision, which provides governments the opportunity to avoid judicial enforcement of RLUIPA by taking action to eliminate the violation:

> A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

42 U.S.C. § 2000cc-3(e). The court noted that although the language appears to be limited to a policy or practice that results in a substantial burden on religious exercise, it has been read to include the other prohibitions of RLUIPA. *Grace Church*, 2010 WL 3777286 at *1.

The court then sided with the county in holding that the county took satisfactory measures under the safe harbor provision:

> The plaintiffs argue that the BOCC's concession should not preclude them from recovering consequential damages caused by the delay in their opportunity to make religious use of property purchased in September, 2003. The counter to that argument is the recognition that the BOCC did more than grant the special use application. The Church has received a reasonable amount for reimbursement of its costs and attorney fees for preparing its case for injunctive relief and a substantial sum for granting restrictions on future use and development under the terms of the Settlement and Release. While the parties expressly excluded the plaintiffs' damages claims from the release, the result of the BOCC's actions is a fair resolution of the adverse effects of the earlier denial decision.

Id. at *2.

Although the court decided the case based on the safe harbor provision of RLUIPA, the court continued on to decide the merits of the church's damages claims. The remainder of the case provides a good analysis of the various types of claims a governmental entity may be subjected to under RLUIPA. In contrast to the *Rocky Mountain Christian Church* case, the court found no RLUIPA or constitutional violations. This case provides some good analysis of RLUIPA issues in a light more favorable to the government than *Rocky Mountain Christian Church*.

8. Primary purpose of land zoned agricultural is agricultural

In *Shupe v. Boulder County*, 230 P.3d 1269 (Colo. App. 2010), landowners sought a determination by Boulder County that the principal use of their land was agricultural rather than residential. The Shupes owned and resided on a 4.8 acre parcel of land that was zoned agricultural. For years, the Shupes had used a barn on their 4.8 acre parcel of property to host weddings and special events. Boulder County issued a cease and desist order asserting that a special use permit was required for such activity. In order to qualify for such a permit, the county's land use code required the principal use of the property to be agricultural. The county zoning administrator found that the principal use was residential, and therefore, refused to

process the Shupe's special use application. The County Board of Adjustment agreed with the County's zoning administrator.

The Shupe's sought district court review under C.R.C.P. 106(a)(4), under which review is limited to determining whether the BOA abused its discretion or exceeded its jurisdiction. The Court of Appeals held that because the issue was a matter of interpretation of the County's land use code, the general canons of statutory construction apply. *Id.* at 1272. Notably, because the County's land use code was not ambiguous, no deference was given to the BOA's decision, even though the review was conducted under C.R.C.P. 106(a)(4):

> Here, the BOA upheld the director's determination that "[t]he primary purpose of this parcel is a residential use with Open Agriculture as an Accessory Use." However, we conclude this determination is not consistent with the plain language of the code, and accordingly, we do not defer to the director's and BOA's interpretation of the code.

Id. at 1273. The court went on to interpret the plain language of the Boulder County Land Use Code to mandate that the principal use of the property was agricultural given the particular facts relating to the Shupe's use of the property. The Shupes, therefore, qualified to apply for the special use permit.

9. *De Facto* taking during plotting and planning of condemnation

In two cases, the Colorado Court of Appeals addressed when a *de facto* taking may occur before a governmental entity actually files an eminent domain action. *City of Colorado Springs v. Andersen Mahon Enterprises, LLP*, No. 09CA1087, 2010 WL 1238873 (Colo. App. April 1, 2010) and *G & A Land, LLC v. City of Brighton*, 233 P.3d 701 (Colo. App. 2010). Interestingly, the court reached different holdings in each case.

In Colorado, the requirements for a *de facto* taking are "a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property." *Colorado Springs*, 2010 WL 1238873 at *3.

In the *Colorado Springs* case, the city filed a petition in condemnation and the landowner counterclaimed for inverse condemnation based upon the city's delay in acquiring the property. The landowner alleged that the city's pre-condemnation conduct clouded the property and caused the owner to lose rental income. The court held that the city's conduct did not establish the city had assumed dominion or control over the property or legally interfered with the landowner's use of the property as required for a *de facto* taking. The intent to condemn and a protracted delay alone are not sufficient to constitute a *de facto taking* even if they hinder a landowner's ability to lease its property.

The court held that "[t]he mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a

Taking so as to warrant awarding compensation." *Id.* at *4 (citing *Lipson v. Colorado State Department of Highways*, 588 P.2d 390, 391-92 (Colo. App. 1978)). It further held:

> The reasons most frequently assigned by the courts for the general rule that mere plotting or planning in anticipation of a public improvement does not constitute a taking or damaging of the property affected are "that mere plotting and planning does not, in itself, amount to an invasion of property or deprive the owner of his use and enjoyment thereof; that the projected improvement may be abandoned by the condemnor and the property never actually disturbed; that the threat of condemnation is one of the conditions upon which an owner holds property; and that the general rule is in aid of the growth and expansion of municipalities."

Id. at *5.

In contrast, the court in the *Brighton* case held that a *de facto* taking had occurred, because the city's conduct did rise to the level of exercising dominion and control over the property at issue. In *Brighton*, the City spent years planning to use the property at issue for a water treatment plant. During that time period, Brighton made certain statements and took certain actions that went beyond the mere plotting and planning that does not give rise to an inverse condemnation claim. The court addressed the matter as follows:

> To summarize, we agree with the divisions in *Lipson* and *Andersen Mahon Enterprises* that it furthers public policy if a governmental entity is free to announce its intention to acquire private property before filing a petition and serving a summons pursuant to sections 38-1-102 and 38-1-103, C.R.S.2009. It is also inevitable that delays will occur during which property owners may be unable to develop, lease, or sell their properties because of the uncertainty created by the impending condemnation.
>
> Therefore, we conclude that damages arising from protracted delay alone are not compensable and that mere plotting and planning do not, without more, amount to an invasion of property or deprive the owner of the use and enjoyment of the property. Andersen Mahon Enterprises, --- P.3d at ----; Lipson, 41 Colo. App. at 570, 588 P.2d at 392.
>
> However, the rights of a condemning authority are not unlimited, and we further conclude that Landowners have alleged facts in this case which are distinguishable from both *Lipson* and *Andersen Mahon Enterprises*. They have alleged that (1) Brighton officials have interfered with Landowners' power of disposition or use of their properties by representing to third parties in public meetings involving the proposed water treatment facility that Brighton "already owns" Landowners' properties; and (2) Brighton has posted a sign adjacent to Landowners' properties stating that the new water treatment facility would be built there.

Brighton, 233 P.3d at 710-11.

10. Prejudgment interest not included in eminent domain award for purposes of thirty percent attorney fee threshold

In *City of Colorado Springs v. Andersen Mahon Enterprises, LLP*, No. 09CA1467, 2010 WL 2853757 (Colo. App. July 22, 2010), the court of appeals addressed how to calculate when attorney fees are awarded in a condemnation action. Under C.R.S. § 38-1-122(1.5), property owners are entitled to their attorney fees if the final condemnation award exceeds the condemning authority's last written offer by thirty percent. In this case, the award was 28.5 percent of city's last written offer. When prejudgment interest was added to the award, the amount exceeded the thirty percent threshold. The court, in a divided decision, held that prejudgment interest should not be included in the calculation. Hence, the landowner was not entitled to its attorney fees.

11. Damages for condemnation of greenbelt for roadway based on impact to appurtenant property

In *Steamboat Springs v. Johnson*, No. 09CA2520, 2010 WL 3035202 (Colo. App. August 5, 2010), the City sought to convert a greenbelt originally dedicated to the City into a roadway. The City began condemnation proceedings against the property interests in the greenbelt possessed by the lot owners in the subdivision. The question at issue was how to calculate compensation to the private lots for the loss of the greenbelts.[4] The trial court erred in its calculation of damages. It had attempted to ascertain the fair market value of the greenbelt itself and apportion its value among the various lots in the subdivision. The court of appeals held that greenbelt was an easement appurtenant to the various lots. *Id.* at *3. It then held that damages should be calculated based on the reduction in value to the lots due to the loss of the greenbelt, rather than the effect of the taking on the greenbelts themselves. *Id.*

12. Frederick prevails over Erie in flagpole annexation dispute

In *Town of Erie v. Town of Frederick*, No. 09CA1066, 2010 WL 2306702 (Colo. App. June 10, 2010), the Town of Frederick annexed property via a serial flagpole annexation, using a county road as the flagpole. The Town of Erie filed suit, alleging a number of defects in Frederick's annexation. The Colorado Court of Appeals upheld Frederick's annexation in a ruling that should prove highly favorable to future annexing municipalities on a number of issues.

Inadvertent Failure to Provide Proper Notice

First, Colorado's Municipal Annexation Act, C.R.S. § 31-12-101, *et seq*., requires notice to abutting landowners ninety days before the date of an annexation hearing when a public road is being used to establish contiguity. C.R.S. § 31-12-105(1)(e.3). The statute further provides that an inadvertent failure to comply with the notice requirement may be excused. *Id.* Frederick stipulated that it only provided twenty-five days notice. The Court of Appeals upheld the trial

[4] Actually, only one owner in the subdivision was involved in the lawsuit.

court's finding that Frederick's failure to provide adequate notice was inadvertent. 2010 WL 2306702 at * 2.

Municipal Standing to Challenge Annexation

Second, the Annexation Act provides that if "any municipality within one mile of the area proposed to be annexed believes itself to be aggrieved by the acts of the governing body of the annexing municipality in annexing said area to said municipality, such acts or findings of the governing body may be reviewed by certiorari in accordance with the Colorado rules of civil procedure." C.R.S. § 31-12-116(1)(a). Erie argued this provision altered the traditional law regarding standing, and attempted to assert claims that aggrieved landowners could have asserted. The court rejected Erie's argument and held that Erie only had standing to contest the annexation "to the extent that it is actually aggrieved." 2010 WL 2306702 at * 3. The court held the Annexation Act "does not allow a municipality located within one mile of a proposed annexation to contest the proposed annexation on behalf of landowners." *Id.* at *4.

Contiguity and landowner consent

Third, the Annexation Act requires one-sixth contiguity between the municipal boundaries and the property to be annexed. C.R.S. § 31-12-104(1)(a). The existence of a public right-of-way does not affect contiguity. *Id.* Erie argued that parts of the county road used by Frederick for the flagpole annexation was owned by private landowners, and therefore, the landowners' consent to the annexation was required. 2010 WL 2306702 at * 3. The court of appeals upheld the trial court's finding that the county road was a public right-of-way. The court also disagreed with Erie and held that landowner consent was not required for Fredrick to use the roadway for the flagpole annexation.

Three mile plan requirement

The Annexation Act requires a municipality to develop and maintain a three-mile plan prior to completion of an annexation:

> Prior to completion of any annexation within the three-mile area, the municipality shall have in place a plan for that area that generally describes the proposed location, character, and extent of streets, subways, bridges, waterways, waterfronts, parkways, playgrounds, squares, parks, aviation fields, other public ways, grounds, open spaces, public utilities, and terminals for water, light, sanitation, transportation, and power to be provided by the municipality and the proposed land uses for the area.

C.R.S. § 31-12-105(1)(e)(I).

Erie argued that Frederick's annexation must fail because it had no document entitled "Three Mile Plan." 2010 WL 2306702 at *5. The court held that Frederick's comprehensive plan satisfied the requirements of the statute, and simply because it was not designated a "Three Mile Plan" did not matter. *Id*.

Petition compliance

Erie contended that the annexation petitions did not comply with the technical requirements of the Annexation Act. *Id.* Erie argued the petitions for annexation did not contain four copies of the annexation maps, nor did they contain an address for Frederick's mayor or a date accompanying his signature, as required by the Act. C.R.S. § 31-12-107(1)(c)(VI)-(VIII). *Id.* The court held that the standard for annexation petitions is substantial compliance, and Frederick's annexation petitions met this standard. *Id.*

Frederick also received an award of attorney fees.

13. Quiet title action freezes annexation

In *Sensible Housing Co., Inc. v. Town of Minturn*, No. 09CA1824, 2010 WL 3259829 (Colo. App. August 19, 2010), two parties were involved in a quiet title action over 9 parcels of property. During the pendency of the quiet title action, one of the parties, Ginn Battle, LLC, sought their annexation into the Town of Minturn. The other party, Sensible Housing Company, notified the town of its objection to the annexation during the pendency of the quiet title action. Minturn annexed the properties over the objections of Sensible, and included findings that Ginn Battle was the titled owner of each of the disputed parcels.

Sensible filed suit against the Town of Minturn under C.R.C.P. 106(a)(4) alleging that the Town exceeded its jurisdiction or abused its discretion in annexing the disputed properties. Subsequently, in the quiet title action, the district court ruled that Ginn Battle was the titled owner. Sensible appealed that decision. The district court then dismissed Sensible's action against the Town on the grounds that Sensible lacked standing under the Municipal Annexation Act (which only allows a landowner or qualified elector to seek judicial review of a municipality's annexation).

The Court of Appeals held that because the quiet title action was not final (Sensible had filed an appeal), the decision of the district court that Sensible lacked standing was wrong. The court of appeals based its decision upon claim preclusion and issue preclusion doctrines, both of which require the finality of a prior judgment. *Id.* at *3.

Notably, the town argued that determination of property ownership under the Municipal Annexation Act of 1965 is a legislative determination for the municipality to make as part of the annexation process. *Id.* at *4 (citing C.R.S. §§ 31-12-107(1)(a), (1)(g), (2)(c)). The court of appeals rejected this argument, because the quiet title action was pending *prior to* the commencement of the annexation proceedings. *Id.* The court's reasoning indicates that if a quiet title action were commenced subsequent to an annexation petition being filed with a municipality, the municipality would be able to proceed with its determination of ownership, and the quiet title action may be stayed pending the municipality's determination of ownership.

14. Railroad right-of-way not a public right-of-way for enclave annexation purposes

In *Sinclair Marketing v. City of Commerce City*, 226 P.3d 1239 (Colo. App. 2010), the Colorado Court of Appeals addressed whether a railroad right-of-way constituted a public right-of-way under Colorado's Municipal Annexation Act, C.R.S. § 31-12-101, *et seq*.

Under the Act, a municipality may unilaterally annex an enclave (an area entirely surrounded by a municipality) if the enclave has been so surrounded for a period of not less than three years. C.R.S. § 31-12-106(1). To qualify for annexation, the boundary of the enclave cannot be made up of a public right-of-way (including streets and alleys) that is not immediately adjacent to the municipality on the side of the right-of-way opposite to the enclave. § 31-12-106(1.1)(a)(I). The court held that a railroad right-of-way did not constitute "public right-of-way" under Colorado's Municipal Annexation Act. Therefore, Commerce City's annexation of two enclaves was permissible despite the Act's prohibition of enclave annexations when a border of an enclave is a public right-of-way that is not adjacent to the municipality.

CURRENT ISSUES OF INTEREST

1. Bicycle Legislation

A bill is currently pending in the House that would limit the power of local governments to restrict bicycles from local roadways in the state. *See* House Bill 11-1092. Currently, C.R.S. § 42-4-109(11) allows local authorities to ban bicycle traffic on local roadways if there are alternative routes parallel to and within 450 feet of the restricted roadway. However, another provision of Colorado's motor vehicle code allows local governments to adopt laws inconsistent with this statute (and other provisions of the motor vehicle code) on roadways that are not state highways. *See* C.R.S. §§ 42-4-110(1)(a) and (c); *see also Mobell v. City & County of Denver,* 671 P.2d 433 (Colo. App. 1983) (holding that a home rule municipality is only prohibited from enacting laws in conflict with state motor vehicle laws on state highways).

The City of Black Hawk adopted a local law banning bicycles from certain roadways based on safety and traffic compatibility concerns. The local law contained no requirement that there be parallel routes within 450 feet. It was, therefore, inconsistent with the state motor vehicle code. After a number of bicyclists were convicted for violating the City's ordinance, House Bill 11-1092 was introduced to prohibit a municipality from enacting local laws inconsistent with C.R.S. § 42-4-109(11). An appeal of the municipal conviction of three bicyclists is pending along with the proposed legislation.

2. Medical Marijuana Update

On June 7, 2010, Governor Ritter signed into law HB 10-1284, which created the Colorado Medical Marijuana Code, C.R.S. §12-43.3-101 *et seq.* (the "Code"). The Code creates a statutory framework for regulating the medical marijuana industry similar to liquor licensing, providing for a state licensing authority, the Colorado Department of Revenue ("DOR"), as well as local licensing authorities. Under the Code, three licenses were created:

1. Medical marijuana centers ("MMC") (formerly known as "dispensaries");

2. Optional premises cultivation operations; and

3. Medical marijuana-infused products manufacturing.

The Code provides local governments a number of tools for regulating the medical marijuana industry. Local governments with existing moratoriums on the licensing of medical marijuana centers may extend those moratoriums until the DOR adopts rules concerning licensing, which is anticipated to occur in March of 2011.

Under the Code there are two mechanisms for local governments to prohibit medical marijuana businesses. First, local governments may adopt an ordinance or resolution prohibiting medical marijuana businesses. Second, they may put the prohibition question to the registered electors. According to statistics kept by the Colorado Municipal League, twenty-seven (27)

communities placed the prohibition question on last November's ballot, with twenty-five (25) passing. An additional twenty-two (22) local governments have passed ordinances prohibiting medical marijuana businesses.

The Code also preserves local zoning authority. The Code permits local governments to modify the default one thousand (1,000) foot distance limitation between licensees and schools, an alcohol or drug treatment facility, a principal campus of a college, a university or seminary or a residential child care facility. Additionally, the Code authorizes a local government to enact "reasonable regulations or other restrictions applicable to [licensed facilities] … based on local government zoning, health, safety, and public welfare laws for the distribution of medical marijuana that are more restrictive" than the Code. C.R.S. § 12-43.3-310.

Since passage of the Code, the DOR created an advisory committee consisting of representatives from the medical marijuana industry, law enforcement and local governments to assist in drafting the rules contemplated in the Code. On January 27 and 28, 2011, the DOR held a rulemaking hearing seeking public comment on over 90 pages of proposed rules. The rules address a multitude of issues including storing and transporting medical marijuana, security/video system requirements, licensee discipline, clarification of the 70/30 rule, and record retention.

The 2011 Regular Session of the Colorado General Assembly convened on January 12, 2011. On that same day, H.B. 11-1043 was introduced making various amendments to the Code. Among other changes, the current version of the bill repeals that portion of the Code creating an exemption to public disclosure for the address of an optional premises cultivation operation. It also specifies that new businesses may apply for licensure starting on July 1, 2011. The bill also creates two new licenses: a primary caregiver cultivation license and an infused-products manufacturing facility license. The primary caregiver cultivation license may be issued only to those caregivers who obtain a waiver from the state health agency to care for more than five patients. The bill also limits infused-products manufacturers to five hundred (500) plants on its premises or its optional premises cultivation operation. As it is very early in the legislative session, it is likely many modifications to the bill will occur prior to final passage.