COLORADO LAND USE DECISIONS – 2014

Presented By

Jefferson H. Parker
Hayes, Phillips, Hoffmann, Parker, Wilson and Carberry, P.C.
1530 Sixteenth Street, Suite 200
Denver, Colorado 80202-1468
(303) 825-6444
jhparker@hpwclaw.com

1. Deadline to file motion to reconsider annexation decision commences on the effective date of the annexation ordinance, not the effective date of the annexation

In *Board of County Comm'rs of the County of Teller v. City of Woodland Park*, No.14SA17, 2014 WL 2025012 (Colo. May 19, 2014), the Colorado Supreme Court held that Teller County's challenge of Woodland Park's annexation was untimely, because the requisite motion for reconsideration was not brought within ten (10) days of the effective date of the annexation ordinance.

In this case, Teller County approved an application to annex land in Teller County by adopting two ordinances. The Woodland Park City Charter provides that all City ordinances are effective within seven days after publication following final passage unless stated otherwise in the ordinance. The Colorado Annexation Act, C.R.S. § 31-12-101, *et seq.*, requires that prior to judicially challenging an annexation, a party must "first have filed a motion for reconsideration within ten days of the effective date of the ordinance finalizing the challenged annexation." C.R.S. § 31-12-116(2)(a)(II). Teller County filed two motions for reconsideration with the City more than 10 days after the annexation ordinances became effective according to the City Charter. Teller County argued that the effective date of the ordinances and the annexation was the date the final act in the annexation process occurred, which was the date the City filed the annexation maps with the County Clerk and Recorder.

In rejecting the County's argument, the Colorado Supreme Court held that there is a difference between the effective date of the *annexation* and the effective date of the *annexation ordinance*: "[U]nder the statute the effective date of the ordinance and the annexation are separate events." *Woodland Park*, 2014 WL 2025012 at *3. "Under the plain language of the statute, the effective date of the ordinance is distinct from and may precede the effective date of annexation. The effective date of the annexation is controlled in part by the effective date of the ordinance-not vice versa." *Id.* In noting that municipalities have authority to determine the effective dates of their own ordinances, the court then held that the time for filing a motion for reconsideration commences on the effective date of the ordinance, as that date is determined by the municipality's own laws. *Id.* at *4. Consequently, the County had lost its opportunity to challenge the annexation.

2. Burden on affected landowners and alternative options not relevant to whether municipality may prohibit parking on town rights-of-way

In *Town of Dillon v. Yacht Club Condo Homeowners Ass'n,* 325 P.3d 1032 (Colo. 2014), the Colorado Supreme Court upheld the Town of Dillon's ban on parking on Town right-of-way adjacent to private condominiums.

In 2009, Dillon enacted two ordinances: One authorizing a road improvements project and the other authorizing the police chief to determine whether to ban parking on Town rights-of-way. The road project made improvements to a Town right-of-way adjacent to the Yacht Club Condominiums. The police chief then prohibited parking on that same portion right-of-way citing safety concerns. The Yacht Club challenged the prohibition arguing that both ordinances were an unreasonable exercise of police power, because they eliminated the ability of the Yacht Club's owners and guests to use the right-of-way for overflow parking, which reduced the value of the Yacht Club's property. *Id.* at 1038. The trial court and the appeals court ruled in favor of the Yacht Club in determining the Town abused its police power. In making this determination, both courts relied on outdated case law and considered the burden of the ordinances on the Yacht Club and the cost and availability of less burdensome alternatives.

The Colorado Supreme Court reversed, and held that the Town did not abuse its police power. In reaching this decision, the court held that a municipal ordinance comports with due process when it bears a reasonable relationship to a legitimate government interest. *Id.* at 1034. The court held that the burden of the ordinances on the Yacht Club and the availability of alternatives that were less burdensome or costly on the Yacht Club were irrelevant. *Id.* at 1038. To consider such factors, a court would be substituting its own judgment for that of the legislative body, and absent fraud, a court should not seek to stand in the government's shoes and decide whether a decision on a legislative issue was the optimal decision. Rather, the court held that "we evaluate the 'reasonableness' of an ordinance by looking to whether there is a reasonable relationship between the ordinance and a legitimate government objective." *Id.* at 1039. "That in operation a police measure may increase their labor, decrease the value of their property, or otherwise inconvenience individuals, does not make the act to offend." *Id.* (citing *In re Interrogatories of the Governor,* 52 P.2d 663, 667 (Colo. 1935)). The court further stated:

> Importantly, in evaluating whether there is a reasonable relationship between the ordinance and a legitimate government objective, we do not inquire into whether less burdensome alternatives exist. Indeed, we have stated that "the question is not whether other solutions to a governmental problem are feasible or superior to the program actually adopted; the question is whether the decision made is itself reasonably and rationally related to the problem being addressed.

Id. at 1040.

The court concluded by holding that the ordinances bore a reasonable relation to the Town's legitimate objectives of improving road safety, improving water drainage, and remedying a missing portion of a recreational bike path. *Id.* at 1042.

3. Municipal ban on fracking invalid because of state preemption

The Boulder County District Court in *Colorado Oil & Gas Ass'n, et al. v. City of Longmont*, No. 13 CV 63 (July 24, 2014), invalidated a City of Longmont Charter provision that banned fracking and the storage and disposal of fracking waste in the City.

In 2012, the Longmont electors passed an amendment to the City Charter banning fracking and the storage and disposal of fracking waste within the City. This ban was challenged by a fracking trade group, the Colorado Oil and Gas Conservation Commission (the state regulatory agency with oversight of oil and gas activity in the state), and an oil and gas company that owned sizeable oil and gas holdings in or adjacent to Longmont. Joining the city in defending the ban were a variety of environmental organizations.

The District Court performed an in-depth analysis of Colorado case law addressing the ability of local governments to regulate oil and gas operations within their boundaries. The court's analysis focused on whether the City's ban was preempted by state oil and gas law, which is set forth in the Colorado Oil and Gas Conservation Act and related regulations enacted by the Colorado Oil and Gas Conservation Commission. In applying the relevant case law, the court concluded that Longmont's ban was preempted by state law. In reaching this conclusion, the court rejected Longmont's argument that although state law regulates the oil and gas industry, it does not regulate the specific activity of fracking. Longmont attempted to argue that, therefore, Longmont's specific ban applicable to fracking was not preempted. The court expressly found that state law, while not specifically addressing fracking, did address many aspects of oil and gas operations that govern drilling in general and that would apply to and govern fracking activity.

The court then addressed the three forms of preemption recognized in Colorado law: (1) express preemption; (2) implied preemption; and (3) operational conflict preemption. The court did not find the existence of express or implied preemption. Rather, the court found that operational conflict preemption exemption existed. In reaching this determination, the court reviewed the four factors for this type of preemption: (1) the need for statewide uniformity; (2) the extraterritorial impacts of the proposed regulation; (3) whether the field is traditionally governed by state law; and (4) whether the matter is addressed in the Colorado Constitution. The court found the first three factors favored state preemption, and the fourth factor did not apply because the Colorado Constitution does not address whether oil and gas activity should be regulated by the state or local government.

The court then determined that fracking and the storage and disposal of fracking waste is a matter of mixed state and local interest. Finally, the court concluded there was an "obvious" operational conflict, because Longmont prohibits what the Commission permits, and noted that "giving effect to the local interest, banning fracking, has virtually destroyed the state interest in [oil and gas] production." *Id.* at 15. The court then found there was an "irreconcilable conflict" and invalidated Longmont's ban.

4. Special district may assign right to development fee revenue, but ability to assign right to increase fees questionable

In *SDI, Inc. v. Pivotal Parker Commercial, LLC*, No. 12SC870, 2014 WL 6879133 (Colo. Dec. 8, 2014), the Colorado Supreme Court held that a special district not only has the right to pledge future revenue for a specific purpose, but may assign the right to receive future revenue to a third party.

In this case, a special district serving a portion of the Town of Parker constructed infrastructure to serve a development, and established a development fee to be collected from each parcel in that development at the time of development. This fee was increased by the district for a number of years at a rate of approximately four percent per year. The district financed a portion of the infrastructure by borrowing money from a private entity that was one of the original developers of the land, SRD. In return for this loan, after a number of years, the district assigned the right to receive the revenue to SRD. The assignment agreement was silent regarding the right to increase the development fee. SRD then increased the fees by the eight percent per year, which was the statutory rate of interest for agreements assigning a revenue stream that are silent as to interest. SRD then assigned the right to an affiliated entity, SDI. Ultimately, a dispute arose between SDI and the owner of a portion of the impacted property over the right of SDI to increase the fee. The owner contended that SDI had no right to increase the fee, because the setting of fees is a legislative function, which could not be delegated by the special district.

The district court sided with SDI and upheld the eight percent interest charged. On appeal, however, the appeals court held that a special district has no right to assign its revenue streams. The court of appeals relied on language in the special district law expressly authorizing special districts to "pledge" revenue. *See* C.R.S. § 32-1-1001(1)(j)(I). The court held that a pledge is different than an assignment. The court found no other provisions in the Special District Act expressly or impliedly permitting an assignment of revenue. Therefore, the court of appeals held that the attempted assignment was void in its entirety.

On review, the Colorado Supreme Court overturned the court of appeals, and found that the express power to pledge revenue does not act as a limitation on a special district's power to assign revenue. *SDI* at *4. The court noted that the Special District Act clearly states that the powers of special districts enumerated in the act "shall not be considered as a limitation on any power necessary or appropriate to carry out the purposes and intent of [the Special District Act]." *Id.* The court then held that another power, the power to "acquire, dispose of, and encumber real and personal property" in C.R.S. § 32-1-1001(1)(f) includes the power to assign revenue. The court then reversed the court of appeal's decision, but declined to address the original question, which was whether the special district could delegate the power to increase the development fee.

5. Federal due process claim based on invalid zoning legislation fails for lack of a sufficient property right and inability to show state law provides insufficient process

In *Quinn v. Bd. of County Commr's of Elbert County*, 13CV02818-CMA-BNB, 2014 WL 4799643 No. (Colo. Dist. September 26, 2014), landowners in Elbert County brought a federal procedural due process claim against the county based on expenses they incurred due to a defective county zoning regulation. The district court rejected plaintiffs' claims on the grounds that they had not shown they had a constitutionally protected property right, nor had they shown that state law provided them with insufficient process to protect such a right if it existed.

Plaintiffs alleged that the County required them to rezone their property to the A-1 classification if they desired to redevelop their property. After incurring expenses to accomplish this rezoning (impact fees, filing fees, etc), plaintiffs allege they discovered that A-1 zoning did not exist, because apparently a County employee had added the A-1 classification arbitrarily and without following the required rezoning procedures.

Evaluation of a procedural due process claim is a two-step process. First, the defendant's actions must have deprived a plaintiff of a constitutionally protected property interest. If this can be shown, the plaintiff must be provided with an appropriate level of process, which is fundamentally that notice and an opportunity to be heard regarding why a proposed action of defendant should not occur. In determining that the plaintiffs had no constitutionally protected property interest, the court held that mere "bureaucratic malfeasance" that made the rezoning process "more complicated" did not transform a "minor headache" and "extra expense" into a constitutional tort. *Quinn* at *3. The need to pay extra fees and fill out extra forms is not sufficient to constitute a property interest justifying a constitutional claim. With respect to the second factor, the court held that "it is unclear how state mechanisms – as opposed to a federal lawsuit – do not provide an adequate remedy to addressing the allegedly improper actions taken by Defendant." The court noted that the plaintiffs opted not to contest the validity of the zoning regulation at the state level, and failed to show the district court whether there was any sort of state law process for contesting the zoning, and if there was such a process, why it was insufficient. Therefore, the court dismissed the plaintiffs' complaint.