COLORADO LAND USE DECISIONS – 2013

Presented By

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Colorado

1. Risk of flooding caused by man-made diversion constitutes a "geologic condition" or "natural hazard"

In *Alpenhof, LLC v. City of Ouray*, 297 P.3d 1052 (Colo. App. 2013), the Court of Appeals upheld the City of Ouray's determination that a diverted natural waterway channel constituted a "geologic condition" or "natural hazard" within the meaning of the City's zoning code and therefore required mitigation as part of the development of a subdivision.

In 1929, the City of Ouray had diverted a local creek to protect against severe flooding from cloudbursts and spring runoff. Developer Alpenhof sought to subdivide a parcel adjacent to the diverted creek. The City code gave the City authority to require mitigation of "geologic conditions" and "natural hazards" threatening subdivisions. The City denied Alpenhof's application finding that it did not sufficiently mitigate the "geologic conditions" and "natural hazards" threatening the parcel. Alpenhof sought judicial review under C.R.C.P. 106(a)(4), arguing that the City had exceeded its jurisdiction and abused its discretion, because the flooding risk was caused by the City's diversion channel, which was not a geologic condition or natural hazard.

The court held that merely because the flooding may involve a public structure, it does not mean that it no longer results from a natural hazard or geologic condition. The court found the hazard "necessarily intertwined with the natural features and geologic conditions of the area." Concluding that the developer's interpretation would lead to an "absurd result" that leaves the city "powerless to protect the public health, safety and welfare from a flooding hazard partially resulting from human activity," the court ruled in favor of the city.

2. Denver dedication of parcel not subject to voter approval or referendum

In *Friends of Denver Parks, Inc. v. City and County of Denver,* ___ P.3d ___, 2013 WL 6814985 (Colo. App. Dec. 26, 2013), the Colorado Court of Appeals addressed how land in Denver becomes a public park. The City of Denver sought to transfer certain City-owned property to a Denver school district for school purposes. The plaintiffs, Friends of Denver Parks, Inc., sought to prevent the transfer via two methods. The first was a referendum petition seeking the repeal of the ordinance transferring the parcel. The second was a lawsuit seeking an

injunction enjoining the transfer on the grounds that the land was a park. The plaintiffs contended the City's conduct over the years had created a park under the common law and the City's charter requires voter approval of transfers of park property belonging to the City prior to 1956.

The court noted that in Colorado a dedication of land to public use may be made via statute or common law. A common law dedication must be made by "unambiguous actions" demonstrating the "unequivocal intent" to set land aside for a particular public use. Relying primarily on a construction of Denver's Charter, the Court of Appeals upheld the trial court's decision that an injunction was not warranted. Denver's Charter contained the following provision:

> Without the approval of a majority of those registered electors voting in an election held by the City and County of Denver, no park or portion of any park belonging to the City as of December 31, 1955, shall be sold or leased at any time, and no land acquired by the City after December 31, 1955, that is designated a park by ordinance shall be sold or leased at any time.... No land acquired by the City after December 31, 1955, shall be deemed a park unless specifically designated a park by ordinance.

Construing this provision in light of the applicable facts, the court concluded that the parcel of land at issue was not a park. Therefore the trial court had not abused its discretion in determining that plaintiffs had not established a reasonable likelihood of success on the merits. Finally, the court held that the sale of a single parcel of property was not legislative in nature and therefore was not subject to referendum.

3. Assessor lacks discretion in calculating and allocating urban renewal area tax increment financing

In *Northglenn Urban Renewal Authority v. Reyes*, 300 P.3d 984 (Colo. App. 2013), on cross motions for summary judgment, the district court held that the Adams County Assessor does not have discretion in determining how to calculate and distribute tax increment financing (TIF) revenue under Colorado's Urban Renewal Law when property is removed from a TIF area (via a suspension).

In this case, in 2004, the City of Northglenn City Council added property to an existing urban renewal area with a TIF. The property that was added languished due to market conditions with no significant redevelopment activity, which meant that no significant TIF revenue was generated. In 2009, the City Council decided to suspend the TIF to preserve the remaining duration of the TIF for a time when redevelopment could occur. Under the Colorado Urban Renewal Law, C.R.S. § 31-25-101, *et seq.*, TIF revenue is collectible for a maximum of 25 years. In response to the suspension of the TIF, the Assessor calculated the TIF using a method set forth in the Assessor's Manual dealing with how to recalculate a TIF in years of general reassessment. Essentially, even though the property was removed from the TIF area, the Assessor took the position that only its current assessed value was removed from the total assessed value of the entire TIF area. The Assessor left the value of the removed property in the base value (and

adjusted it using a proportional adjustment method applicable to general reassessments in the Assessor's Manual). The result was that the urban renewal authority lost TIF revenue it believed it was due, because the total value of the property came out of the total value of the TIF area, but a portion of the base value remained in the base value of the TIF area (resulting in a smaller increment).

The Colorado Court of Appeals held that the Adams County Assessor erred in his calculation of the TIF. The court first held that the Assessor lacked discretion in determining the appropriate calculation of TIF revenue in this situation. Next, the court held that the value of the property removed from the TIF area must be subtracted from the total value of the TIF area and from the base value.

4. Town security inspection fee for oil and gas wells prohibited by Colorado Oil and Gas Act

In *Town of Milliken v. Kerr-McGee Oil & Gas Onshore, LP*, ___ P.3d ___, 2013 WL 1908965 (Colo. App. May 9, 2013), the Town of Milliken sought to recover fees imposed on oil and gas wells for site safety and security inspections conducted by the Town's police department. The fees were essentially for inspecting well sites for trespassers, vandalism, criminal activity and first alert signs of dangerous conditions. The Colorado Court of Appeals held that such fees are prohibited by C.R.S. § 34-60-106(15), a provision in Colorado's Oil and Gas Conservation Act, which provides as follows:

> No local government may charge a tax or fee to conduct inspections or monitoring of oil and gas operations with regard to matters that are subject to rule, regulation, order, or permit condition administered by the [Oil and Gas Conservation] [C]ommission. Nothing in this subsection (15) shall affect the ability of a local government to charge a reasonable and nondiscriminatory fee for inspection and monitoring for road damage and compliance with local fire codes, land use permit conditions, and local building codes.

The Town did not argue that its security fee fell within the exception for inspection and monitoring of road damage and compliance with local fire codes, land use permit conditions, and local building codes. Rather, the Town attempted to argue that its fee was not subject to the statutory provision at all - that is, the fee was not for matters related to the Oil and Gas Conservation Commission rules, regulations, or orders. The court disagreed and found that the Town's security fee did concern such matters, and was therefore prohibited.

5. Bond requirement for septic system improvements resulted in Section 1983 claim by same-sex couple

In *Rodgers v. Bd. of County Comm'rs of Summit County*, ___ P.3d ___ 2013 WL 1764663 (Colo. App., Apr. 25, 2013) *cert. granted by Board of County Commissioners of Summit County v. Hazel*, 2014 WL 279881 (Colo. Jan 27, 2014), plaintiffs, a same-sex couple, built a home with a septic system in Summit County. After construction, the County inspected the system and found that it was not built in compliance with the County-approved plans.

Because the system could not be brought into compliance with County's requirements by the commencement of winter, the County offered to issue a temporary certificate of occupancy, provided that the plaintiff's posted a bond in an amount equivalent to the estimated costs to bring the system into compliance. Notably, the County rejected the plaintiffs' contractor's estimate of the costs, and instead sought its own bids for the costs, and set the bond amount at the County's higher estimated costs. Plaintiffs failed to post the required security and the home was eventually foreclosed upon. Plaintiffs filed suit against the County claiming that the County's failure to approve the system resulted in the foreclosure and their loss of the property.

Both the trial court and the court of appeals rejected plaintiffs' inverse condemnation claim. However, the court of appeals was divided on the plaintiffs' equal protection claim, which alleged that as a same-sex couple they were treated differently than other similarly situated individuals. Ultimately, the matter was remanded to the trial court for a new trial on the equal protection claim.

Federal Cases

1. *Nollan/Dolan* takings analysis applies to denials of land use applications and monetary exactions

In *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), the United States Supreme Court clarified the traditional *Nollan/Dolan* takings analysis applying it to a denial of a land use application and a monetary exaction.

In the cases of *Nollan* and *Dolan*, the U.S. Supreme Court established the rule that any government exaction of property required as a condition of a land use approval must meet two standards. First, there must be a nexus between the development and the exaction. Second, the exaction must be roughly proportional to the impacts of the development.

In *Koontz*, an individual sought a permit from a water management district to develop a portion of his property that was situated on a wetland. The district required permit applicants who wished to build on wetlands to offset the environmental damage. Koontz offered to mitigate the damages by providing the district with a conservation easement on approximately three-quarters of his property. The district rejected his proposal informing him that it would approve his application if he reduced the size of his development and provided an even larger conservation easement, or if he made improvements to wetlands owned by the district miles away. Koontz filed suit arguing that the district's demands were excessive. The Florida Supreme Court ultimately ruled that Koontz's claims failed because, unlike *Nollan* or *Dolan*, the district denied Koontz's application, and a demand for money could not give rise to a *Nollan/Dolan* claim.

The U.S. Supreme Court reversed the Florida Supreme Court and held that a government's demand for property from a development applicant must satisfy the *Nollan/Dolan* requirements: (1) even when the government denies a permit; and (2) even when the demand is for money and not real property.

2. Affordable housing development contract dispute not a federal matter

In *211 Eighth, LLC v. Town of Carbondale*, 922 F. Supp. 2d 1174 (D. Colo. 2013), the United States District Court for the District of Colorado, upheld the Town of Carbondale's enforcement of its local affordable housing legislation, pursuant to which a developer was required to provide affordable housing units as a part of a subdivision project.

Pursuant to a subdivision improvement agreement (amended a number of times), a developer agreed to provide three units of affordable housing, which were required to be ready for occupancy no later than the occupancy of the free market units in the development. A lawsuit resulted after the Town refused to issue certificates of occupancy to free-market units and drew on the developer's letter of credit, based on the developer's failure to construct the affordable units. The developer argued that the housing units were to be marketed as "pre-sales" to be constructed only after the buyer had entered into a commercially reasonable contract. The developer contended that the Town's affordable housing agent could only find a single buyer due to unreasonable conditions in the housing contracts, which made the pre-sale units impossible to finance. The developer brought claims against the Town for violations of its equal protection and due process rights, for a regulatory taking, and for state law claims for breach of contract and declaratory and injunctive relief. The Town counterclaimed for breach of contract.

Equal protection. Acknowledging that it was not a suspect class, the developer argued that it had a fundamental right to lease, sell, and convey property. The court declined to expand fundamental rights implicated by the Equal Protection Clause, holding that such fundamental rights are limited to the right of interstate travel, the right to vote, First Amendment rights, procedural due process rights, and personal privacy rights. The court held that the right to dispose of one's property is not a fundamental right for equal protection purposes. The court also rejected the developer's argument that it was a "class of one," holding that the developer was not intentionally treated differently than those similarly situated and that the treatment was not objectively irrational and abusive.

Procedural due process. To state a valid claim for a due process violation, plaintiffs must first show that there is a deprivation of an interest within the ambit of the Fourth Amendment, that is, an interest in life, liberty or property. The developer argued that Colorado's Vested Property Rights Act provided such an interest. However, whether the developer had a right to complete its development under the Vested Property Rights Act depended upon whether developer had breached the contract with the Town. The court held that because Colorado law provides an adequate remedy through a breach of contract action, there can be no procedural due process violation.

Substantive due process. To prevail on a substantive due process claim, a plaintiff must show that a fundamental right was infringed upon or that a government's actions are so egregious as to shock the conscience of the court. The court held that the right to dispose of property is not a fundamental right, and the actions of the Town were not of the magnitude necessary to shock the court.

Regulatory taking. A regulatory taking occurs when a regulatory or administrative action places such burdens on ownership of private property that essential elements of such ownership must be viewed as having been taken. The court noted that if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. Finding that Colorado's eminent domain statute, C.R.S. § 38-1-101, *et seq.*, provides such a remedy, the court held that the developer's regulatory takings claim was not ripe for review.

Having dismissed all federal claims, the court declined to exercise supplemental jurisdiction and remanded the state law claims to state court.

3. Municipal sex offender residency restrictions acted as a total ban on residency in municipality and were pre-empted by state law

In *Ryals v. City of Englewood*, ___ F. Supp. 2d ___, 2013 WL 4478676 (D. Colo., Aug. 21, 2013), the United States District Court invalidated the City of Englewood's sex offender legislation, which restricted where sex offenders could live within the City.

In 2006, the Englewood City Council adopted residency restrictions for sex offenders living in the City that made it unlawful (with some exceptions) for them to establish permanent or temporary residence within 2,000 feet of any school, park, or playground, or within 1,000 feet of any licensed day care center, or swimming pool, or on any property adjacent to any designated public or private school bus stop, walk-to-school route, or recreational trail. These restrictions resulted in 55 unrestricted parcels out of a total of 11,314 parcels in the City (a 99% restriction rate). Evidence at trial showed that in the seven-year history of the legislation, no sex offender had ever attempted to register at a restricted address and then been able to find a suitable address within the City. In reviewing the legislation, the court found that the legislation acted as a ban against sex offenders living in the City.

After analyzing the comprehensive nature of Colorado's sex offender legislation and applying Colorado's standard home-rule preemption analysis for municipal legislation, the court concluded that the matter sex offender residency was a matter of mixed, rather than local or state concern. In finding the matter to be of mixed concern, the court reviewed the traditional factors: (1) the need for statewide uniformity; (2) the extraterritorial impacts outside of the municipal boundaries; (3) the historical and traditional regulation of the matter; and (4) whether the Colorado Constitution specifically commits the matter to state or local regulation. In addition, the court noted that other appropriate factors could be considered, including any legislative declaration as to whether the matter is of statewide concern, and the need for cooperation between state and local government in order to effectuate the local government scheme.

After finding the matter to be of mixed concern, the court proceeded to examine whether a conflict existed between the ordinance and state law. In determining whether a conflict exists, the court was tasked with determining whether the City's home-rule ordinance authorizes what the statute forbids, or forbids what the statute authorizes. The court noted that "mere overlap" is not sufficient to void a local ordinance. A conflict exists if the ordinance and statute contain

either express or implied conditions that are inconsistent and irreconcilable with each other. The court then stated:

> The Court concludes that the operational effect of City of Englewood's Ordinance 34 impermissibly conflicts with the application and effectuation of the state interest in the uniform treatment, management, rehabilitation and reintegration of sex offenders during and after state supervision. The ordinance not only undermines the underlying policy interests that envelop the existing state regulations, but it also operationally forbids what the state scheme allows.

Id. at 11.

The court found it particularly important that despite the "stated and laudable" purpose of the ordinance to protect children, the ordinance does not consider whether the individual committed the sex offense against a minor. The court noted that there was no assessment of the individual's recidivism risk or his or her rehabilitation or reintegration needs. Additionally, the court found that the City's ordinance would conflict with the state's system of sentencing, parole, and prohibition, making it very difficult for probation and parole officers to return sex offenders to the community.

Finally, the court stated that it was "not declaring that the City of Englewood cannot adopt any ordinance relating to sex offender residency." *Id.* at 13. The court concluded as follows:

> What the Court is concluding is that an ordinance that (1) effectively bans all felony (and many misdemeanor) sex offenders from living within its boundaries, but (2) draws no distinctions based upon the nature of the offense, the treatment the offender has received, the risk that he or she will reoffend against children, and the evaluation and recommendations of qualified state officials, is preempted. That is a fatal combination.

Id. The court then held that Englewood's ordinance was preempted by state law.

4. Claim against municipality to protect individual against radiofrequency radiation from cell towers not actionable in federal court

In *Firstenberg v. City of Santa Fe*, 696 F.3d 1018 (10th Cir. 2012), the Tenth Circuit Court of Appeals held that there was no federal jurisdiction for an individual's claim against the City of Santa Fe, New Mexico, to enforce its zoning laws against AT&T for cell tower radiation.

The City had a zoning ordinance purporting to require owners of cell facilities to apply for a special permit for a more intense use of an existing cell facility. However, the federal Telecommunications Act of 1996 ("TCA") expressly prohibits "the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions." 47 U.S.C. § 332(c)(7)(B)(iv). In 2010, AT&T upgraded its broadcast signals, which increased the amount of RF radiation from its base stations. The

plaintiff, a property owner in Santa Fe, allegedly suffered from hypersensitivity to RF radiation. After AT&T upgraded its base stations, he complained of insomnia, irritability, eye pain, dizziness, nausea, and itching. His lawsuit was brought in state court to force the City to regulate the upgrades.

AT&T and the City removed the case to federal court and argued that the matter involved questions of federal law; namely, whether the City can enforce its code in light of the TCA's prohibition against local regulation of environmental effects of radio frequency. In examining the complaint, the court applied the federal "well-pleaded complaint" rule, which provides that for a case to arise under federal law, the complaint must establish one of two things: (1) that federal law creates the cause of action; or (2) that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. The court found that plaintiff's claims turned exclusively upon a question of state law, and that federal issues entered only by way of a defense and rebuttal. The court then concluded that plaintiff's complaint, which was that the City was duty-bound to regulate AT&T's upgraded broadcasts, satisfied neither prong of this rule.

5. Municipality has authority to limit age of manufactured housing

In *Schanzenbach v. Town of Opal*, 706 F.3d 1269 (10th Cir. 2013), the Tenth Circuit Court of Appeals upheld the Town of Opal's ordinance prohibiting the installation of any manufactured home older than 10-years (the "10-Year Rule").

The plaintiff, an owner of several properties in the Town, asserted that the 10-Year Rule was preempted by the National Manufactured Housing Construction and Safety Standards Act of 1974 (the "Manufactured Housing Act"), and that it violated the Commerce Clause, the Fourteenth Amendment, and the Privileges and Immunities Clause. In his summary judgment motion, plaintiff also claimed the 10-Year Rule violated his substantive due process and equal protection rights.

The Manufactured Housing Act establishes construction standards for manufactured homes. It expressly preempts conflicting local standards, providing:

> *Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding the construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.* Federal preemption under *this subsection shall be broadly and liberally construed* to ensure that disparate State or local requirements or standards do not affect the uniformity and comprehensiveness of the standards promulgated under this section nor the Federal superintendence of the manufactured housing industry as established by this chapter. Subject to section 5404 of this title, there is reserved to each State the right to establish standards for the stabilizing and support systems of manufactured homes sited within that State, and for the foundations on which manufactured homes sited

> within that State are installed, and the right to enforce compliance with such standards, except that such standards shall be consistent with the purposes of this chapter and shall be consistent with the design of the manufacturer.

42 U.S.C. § 5401(d) (emphasis added by court).

The accompanying regulations provide as follows:

> (a) No State manufactured home standard regarding manufactured home *construction and safety* which covers aspects of the manufactured home governed by the Federal standards shall be established or continue in effect with respect to manufactured homes subject to the Federal standards and these regulations unless it is identical to the Federal standards.
> ....
> (d) No State or locality may establish or enforce *any rule or regulation or take any action that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The test* of whether a State rule or action is valid or must give way *is whether the State rule can be enforced or the action taken without impairing the Federal superintendence of the manufactured home industry* as established by the Act.

24 C.F.R. § 3282.11 (emphasis added by court).

It was uncontested that the preemptive effect of the Manufactured Housing Act is limited to the construction and safety of manufactured homes. The issue in the case was whether the 10-Year Rule related to construction and safety. The plaintiff contended that the 10-Year Rule was to ensure the "durability" of manufactured homes, and was therefore a construction and safety standard that was preempted. The court disagreed and sided with the Town that the 10-Year Rule was not related to construction and safety. Rather, the court found that the rule "simply embodies the town council’s judgment that the aesthetics and property values of its neighborhoods would be protected by preventing the installation of homes older than 10 years." 706 F.3d at 1275. The court then quickly rejected the plaintiff's constitutional challenges.