

COLORADO LAND USE DECISIONS – 2015

Presented By

Jefferson H. Parker
Hoffmann, Parker, Wilson and Carberry, P.C.
511 Sixteenth Street, Suite 610
Denver, Colorado 80202
(303) 825-6444
jhparker@hpwclaw.com

1. United States Supreme Court rules that content-based sign code regulations are unconstitutional

In *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015), the United States Supreme Court struck down the Town's sign code for being impermissibly content-based. The Town of Gilbert, Arizona (the "Town") had a comprehensive sign code (the "Sign Code") that banned the posting of outdoor signs without a permit, but contained exemptions for 23 categories of signs, including: "Ideological Signs," "Political Signs," and "Temporary Directional Signs." The Sign Code defined the categories of signs based on the type of information they convey, and then imposed different restrictions in terms of size, number, timing and duration of posting for each category.

The category of Ideological Signs included any "sign communicating a message or ideas for noncommercial purposes that was not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." The Sign Code allowed these types of signs to be up to 20 square feet in area and to be placed in all zone districts without time limits.

Political Signs included any "temporary sign designed to influence the outcome of an election called by a public body." Such signs were treated less favorably than Ideological Signs under the Code, since they could only be up to 16 square feet if placed on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and "rights-of-way." They could only be displayed up to 60 days before a primary election and up to 15 days following a general election.

Temporary Directional Signs Relating to a Qualifying Event were the most heavily restricted under the Code, which only allowed such signs if they were no larger than 6 square feet, placed on private property or on a public right-of-way, with no more than four signs on a single property at any time. Also, such signs could be displayed no more than 12 hours before the "qualifying event" and no more than 1 hour afterward.

A church and its pastor, desiring to advertise the time and location of their Sunday church services, began placing temporary signs around the Town, displaying the church's name, along with the time and location of the upcoming service. The church received citations from the Town, once for exceeding the time limits for displaying its temporary signs, and once for a time

limit violation as well as the failure to include the date of the event on the signs. The Town refused to work with the church and its pastor to reach an accommodation, and insisted that there would be "no leniency under the Code."

The church and its pastor (collectively, "Reed") brought suit in the U.S. District Court for the District of Arizona, arguing that the Sign Code abridged their freedom of speech in violation of the First and Fourteenth Amendments.

Procedural History

Reed filed a motion for a preliminary injunction, which the District Court denied. The Ninth Circuit affirmed, holding that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. The Ninth Circuit remanded to the District Court to determine whether the Sign Code's distinctions among the three categories of signs nevertheless constituted a content-based regulation of speech. On remand, the District Court granted summary judgment in favor of the Town, and the Ninth Circuit again affirmed, holding that the distinctions among the three categories were content neutral. The Supreme Court then granted Reed's petition for certiorari.

Holdings

The Supreme Court held as follows: (1) the Sign Code is content-based on its face and as such, it is subject to strict scrutiny review, regardless of the government's justifications or purposes for enacting the Code; and (2) the Sign Code does not survive strict scrutiny, because even assuming that preservation of the Town's aesthetic appeal and traffic safety are compelling governmental interests, the Code's distinctions are not narrowly tailored to achieve those interests.

Analysis

Under the First Amendment, "a government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" Laws that target speech based on its communicative content "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Regulation of speech is content-based "if the law applies to particular speech because of the topic discussed or the idea or message expressed."

Government regulation of speech is content-based *on its face* if the regulation defines regulated speech either by its particular subject matter or, more subtly, by its function or purpose. Either way, the regulation is subject to strict scrutiny. Another category may also be deemed content-based regulations of speech, and therefore subject to strict scrutiny, even though they are facially content-neutral. These are "laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'"

Here, the Supreme Court held that the Sign Code is content-based on its face. The Sign Code defines three categories of signs – Temporary Directional Signs, Political Signs, and Ideological Signs – based entirely on the content of the message, and it then imposes different restrictions for each category. In reaching this conclusion, the Supreme Court rejected three arguments.

First, the Supreme Court considered the Ninth Circuit's conclusion that the Sign Code was content neutral, because the Town did not adopt its Code based on disagreement with the message conveyed, and because the justification for regulating temporary directional signs was not related to the sign's content. In rejecting this analysis, the Supreme Court asserted that the crucial first step in the content-neutrality analysis is determining whether the law is content-neutral on its face. Only if the regulation is content-neutral on its face does the court proceed to the next question, whether the purpose and justification are content based. The Supreme Court reasoned that only where a regulation is facially content-neutral is it necessary to apply the framework of *Ward v. Rock Against Racism*, (to look at "whether the government had regulated speech 'because of disagreement with its message and whether the regulation was 'justified without reference to the content of the speech.'"). "The vice of content-based legislation...is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes."

Second, the Supreme Court rejected the Ninth Circuit's finding that the Sign Code was content neutral because it does not censor or favor any particular viewpoint, reasoning as follows:

This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints – or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker" – is a "more blatant" and "egregious form of content discrimination." But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."

Third, the Supreme Court disagreed with the Ninth Circuit's ruling that the Sign Code's distinctions were based on who was speaking through the sign, and whether and when an event is occurring, both content-neutral elements. The Supreme Court found that the Sign Code's distinctions are not speaker based, applying to each type of sign regardless of who sponsors them. Likewise, the Supreme Court found that the distinctions in the Code are not dependent upon whether and when an event is occurring; because citizens are not permitted "to post signs on any topic whatsoever within a set period leading up to an election, for example." Even if the Sign Code had regulated speech based on the speaker or the fact that an event is occurring, that would not necessarily render the distinction content neutral. Often, restrictions of speech based on the identity of the speaker are simply a means to control content. Thus, when a content preference is present, strict scrutiny is required. The Court reasoned that applying a "clear and firm rule governing content neutrality" is essential to protecting the freedom of speech, even if that means that seemingly reasonable laws "will sometimes be 'struck down because of their content-based nature.'"

Concluding that the Sign Code was a content-based regulation of speech, the Supreme Court turned to the question of whether the Code provisions survived strict scrutiny, which required the Town to prove that the restriction of speech furthers a compelling interest and is narrowly tailored to achieve that interest. The Court held that Sign Code did not survive such scrutiny.

Even assuming that the preservation of the Town's aesthetic appeal and traffic safety are compelling governmental interests, the Court reasoned, the Sign Code's restrictions on temporary directional signs are too under-inclusive to achieve those interests. Interestingly, the Supreme Court did not find that the Code provisions were not worded narrowly enough, but that the Code, by

distinguishing between Ideological Signs, Political Signs, and Temporary Directional Signs, *did not go far enough* in protecting the governmental interests that it claims the Code was designed to protect. With respect to the interest of preserving the aesthetics of the Town, the Court found that temporary directional signs are "no greater an eyesore" than ideological or political signs, yet the Code has different restrictions regarding the number of each type of sign that can be placed. Similarly, the Court found that the Town had not shown that the additional limits placed on temporary directional signs was necessary to eliminate threats to traffic safety, whereas it was not necessary to impose these same limits on other types of signs.

Finally, the Court pointed out that "[t]he Town has ample content-neutral options available to resolve problems with safety and aesthetics," including regulation of such content-neutral elements of signs as "size, building materials, lighting, moving parts, and portability." The Court also noted that the Town could permissibly forbid the posting of signs, particularly on public property, provided it does so in a content-neutral manner. Finally, the Court noted that sign ordinances could certainly be narrowly tailored to meet the challenges of protecting the safety of a municipality's citizens – "such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses" – in such a way as to survive strict scrutiny.

In *Reed*, the U.S. Supreme Court found a content-based municipal sign code to be unconstitutional. The Sign Code was a content-based regulation of speech on its face, because it imposed varying levels of restrictions on the time, duration, and location of signs that could be placed on private and public property, depending entirely on the communicative content of the speech. Because the Code was facially content-based, the Court did not need to consider the motives or justification of the government for enacting the law before applying strict scrutiny to determine whether the Code was a constitutional limitation on free speech. When applying strict scrutiny, the Court held that the Sign Code's restrictions on temporary directional signs were too under-inclusive to further the Town's stated governmental interests in aesthetics and traffic safety. Therefore, the Town failed to meet its burden of demonstrating that its Sign Code is narrowly tailored to achieve such interests.

2. Panhandling regulations unconstitutionally content-based pursuant to United States Supreme Court *Reed v. Gilbert* opinion.

In *Browne v. City of Grand Junction*, Civil Action No. 14-CV-00809-CMA-KLM (D. Colo. Sept. 30, 2015) (order on motions for summary judgment), the American Civil Liberties Union ("ACLU") sued the City of Grand Junction, challenging a panhandling ordinance Grand Junction enacted. The ACLU claimed that Grand Junction's ordinance was unconstitutional on three separate grounds: (1) it violated the plaintiffs' freedom of speech; (2) it violated the plaintiffs' right to equal protection of the laws; and (3) it violated the plaintiffs' due process rights because it was unconstitutionally vague. *Id.* at 13-14. Ultimately, the court held that Grand Junction's ordinance was unconstitutional because it violated the constitutional protections of freedom of speech under both the U.S. Constitution and the Colorado Constitution. The court did so based in part on recent case law from the U.S. Supreme Court in *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015).

Grand Junction's ordinance defined "panhandling" as to "knowingly approach, accost or stop another person in a public place and solicit that person without that person's consent,

whether by spoken words, bodily gestures, written signs, or other means, for money, employment or other thing of value.” The ordinance placed certain restrictions on panhandling and made it illegal under certain circumstances. In particular, the ACLU challenged the following provisions of the ordinance, which made it illegal to panhandle under the following circumstances:

1. One-half (1/2) hour after sunset to one-half (1/2) hour before sunrise;
2. If the person panhandling knowingly continues to request the person solicited for money or other thing of value after the person solicited has refused the panhandler’s request;
3. If the person panhandling knowingly solicits an at-risk person;
4. Within one hundred feet of an automatic teller machine or of a bus stop;
5. On a public bus;
6. In a parking garage, parking lot, or other parking facility;
7. When the person solicited is present within the patio or sidewalk serving area of a retail business establishment that serves food and/or drink, or waiting in line to enter a building, an event, a retail business establishment, or a theater;
8. On or within one hundred (100) feet of any school or school grounds; and
9. At anytime directly from the occupant of a vehicle on any highway including the interstate or state highway system, including any entrance to or exit from the highway.

Freedom of Speech Claims

Because the *Browne* court invalidated Grand Junction’s ordinance under the First Amendment’s protection of the freedom of speech, we limit our discussion to that context, as opposed to the other constitutional areas of equal protection and due process.

The First Amendment of the U.S. Constitution and Article II, Section 10 of the Colorado Constitution provide that no law shall be passed that impairs freedom of speech. U.S. Const. amend. I; Colo. Const. art. II, § 10. However, governments may impose reasonable time, place and manner restrictions on speech. To be such a reasonable restriction, the law must: (1) be content neutral; (2) be narrowly tailored to serve a significant government interest; and (3) leave open ample alternatives to communicate the information.

When someone challenges a law for violating freedom of speech, a court must first determine whether the law is a content-based or content-neutral restriction. Content-based restrictions are those that regulate speech on the basis of its message, its ideas, the subject matter,

or the content. In deciding whether a law is content-based, courts look to whether the law, “on its face,” makes a distinction based on the message the speaker conveys.

If a law is content-based, then it is subject to what is called “strict scrutiny.” Strict scrutiny is the most rigorous level of judicial review, which requires that the law in question further a “*compelling* governmental interest” and be narrowly tailored to achieve that interest. Stated another way, the law must be the “least restrictive means” to achieve the compelling interest. It is the government’s responsibility to prove that the law passes the strict scrutiny test, which is very difficult. If a law is subject to strict scrutiny, it will likely be found unconstitutional.

On the other hand, if a law is content-neutral, it must be “narrowly tailored to serve a *significant* governmental interest, and . . . it [must] leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989). This standard is less stringent than strict scrutiny, but is still a difficult standard to meet. To do so, the City would need to be able to show that its panhandling ordinances do not restrict substantially more speech than is necessary to further the City’s interests.

In *Browne*, the court found that Grand Junction’s ordinance was a content-based restriction. *Browne v. City of Grand Junction, Colo.*, Civil Action No. 14-CV-00809-CMA-KLM, at 10 (D. Colo. June 8, 2015) (order granting in part and denying in part motion to dismiss). In doing so, the court clarified that a regulation targeted at a specific subject matter, regardless of whether it regulates a particular viewpoint, is content-based. Similarly, if the regulation “on its face” makes distinctions based on a speaker’s message, that regulation is content-based. The distinction can be obvious, such as regulating speech by a particular subject matter. A law can also be content-based for a subtler reason, such as when regulating speech based on its function or purpose. In *Browne*, the court found that Grand Junction’s ordinance was a content-based restriction on its face because it regulated conduct based on the message a speaker conveys, namely personal solicitation.

Because the ordinance was a content-based regulation of speech, the *Browne* court applied strict scrutiny and found the ordinance was unconstitutional. The Court focused on Grand Junction’s purported purpose behind the ordinance – to promote public safety by prohibiting panhandling that threatened public safety. The Court stated that public safety is a legitimate compelling governmental interest, but found that the ordinance was overly broad, meaning it prohibited speech that presented no threat to public safety. A review of the Court’s holdings follows:

1. *Time Limitations*

With respect to the prohibition against panhandling within one half hour of sunset or sunrise, the court found Grand Junction failed to show panhandling at night was inherently dangerous or threatening to the public. Accordingly, this prohibition was not necessary to advance the compelling governmental interest of public safety.

2. *Multiple Requests*

With respect to the prohibition against continuing to request money or other thing of value from the person solicited after that person has refused the panhandler's initiation request, the court found Grand Junction failed to show that the repeated request for money by a panhandler was a threat to public safety. Accordingly, the ban on multiple requests was not necessary to serve the compelling governmental interest of public safety.

3. *Distance Restrictions*

With respect to the distance limitation for panhandling near ATMs, the court found that Grand Junction failed to show "how any request for money, simply because it occurs within 20 feet of an ATM" constitutes a threat to public safety. Similarly, the court did not see how a request for money made within 20 feet of a bus stop was a threat to public safety just based on the location where it occurred. Accordingly, the court held that such a prohibition was not necessary to serve the compelling governmental interest of public safety.

4. *Public Parking Areas*

With respect to the restriction on panhandling in public parking garages or parking lots, the court held that Grand Junction failed to show that solicitation for money or other thing of value in such a location is a threat to public safety simply because the request took place in a public parking garage, parking lot, or other parking facility. Accordingly, the court held that this specific prohibition was not necessary to serve the compelling governmental interest of public safety.

5. *Restaurants and Lines*

Finally, with respect to the restriction on soliciting people on restaurant patios or waiting in line to enter buildings or events, the court held that Grand Junction failed to show that panhandling in those specific areas constituted a threat to public safety. Accordingly, the specific prohibition against soliciting people within patio or sidewalk serving areas of retail businesses serving food and/or drink, or people waiting in line to enter a building, an event, a retail business or a theater, was not necessary to serve the compelling governmental interest of public safety.

Importantly, the court noted that certain panhandling conduct could constitute a threat to public safety, and therefore be appropriate for regulation. The court provided the example of conduct that is "intimidating, threatening, coercive, or obscene and that causes the person solicited to reasonably fear for his or her safety." The court reiterated that the focus of Grand Junction's regulation should be on threatening conduct, not just panhandling alone. The court further stated that non-threatening panhandling is constitutionally-protected conduct. Accordingly, the Court struck down the five prohibitions discussed above.

3. Summit County Building Department cleared on three out of four equal protection claims for treatment of same-sex couple

In *Rodgers v. Bd. of County Comm'rs of Summit County*, 363 P.3d 713 (Colo. App. 2013), 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. The court of appeals found fault with the trial court's directed verdict in favor of the County on some, but not all of the equal protection claims.

The Supreme Court, in *Board of County Comm'rs v. Rogers*, 2015 WL 5227617 (Colo. September 8, 2015), reversed the court of appeals and held that under C.R.C.P. 50 partial directed verdicts are permissible. The Supreme Court held that when four separate claims are asserted based upon four distinct acts of discrimination, a trial court can determine only one of the four claims can survive a motion for a directed verdict based on the evidence in the plaintiff's case in chief.

4. Rule 106(a)(4) claim can be filed in any district court in the state.

In *Maslak v. Town of Vail*, 345 P.3d 972 (Colo. App. 2015), a landowner opposed the Town of Vail's decision to allow an event center to be constructed at an existing golf course. The landowner contested the town's decision under C.R.C.P. Rule 106(a)(4), which requires that such actions be filed in district court within 28 days of a final administrative decision. Attorneys for the landowner intended to file the complaint in Eagle County District Court, the judicial district within which Vail is located. However, an administrative assistant clicked on the wrong court when filing the 106(a)(4) complaint in the state's internet-based filing system and inadvertently filed it in Denver. The Colorado Court of Appeals held that the filing of a Rule 106(a)(4) appeal in any district court in the state is sufficient to invoke jurisdiction, regardless of whether the venue is proper. The court did note that there was no substantive prejudice to the Town of Vail, and that the caption of the complaint properly identified the Eagle County District Court as the intended court.

5. 28-day filing deadline is strictly enforced even if Rule 106(a)(4) complaint can be filed in any district court in state.

In *Auxier v. McDonald*, 36 P.3d 972 (Colo. App. 2015), a pro se plaintiff timely filed a mandamus action seeking to force the Town Administrator of the Town of Salida to revoke her approval of a building permit for an accessory dwelling unit. Later, well after expiration of the 28-day deadline for filing a Rule 106(a)(4) action, the plaintiff sought to amend his complaint to add a Rule 106(a)(4) claim. Plaintiff argued that under Rule 106(b), the amended complaint should relate back to the date the initial complaint was filed. Rule 106(b) specifically provides that “[a] timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and such amendment shall relate back to the date of filing of the original complaint.” The Court of Appeals held that this provision only allows for relation back when adding, dismissing, or substituting parties in a Rule 106(a)(4) action. In the instant case, however, the original action was filed under a different subsection of Rule 106, and a new and different claim under subsection 106(a)(4) that is not filed within the 28-day period will not relate back.

6. Judge decides evidentiary issues in eminent domain cases tried to commission of freeholders.

In the case of *Regional Transportation Dist. v. 750 West 48th Ave., LLC*, 357 P.3d 179 (Colo. 2015), the Colorado Supreme Court held that in an eminent domain action, even though the valuation of the subject is tried to a commission of three freeholders, the supervising judge has final authority to rule on evidentiary matters. The court ruled that supervising judge's explicit denial of motion to exclude expert witness testimony on relevance grounds precluded the commission from sustaining the relevance objection at hearing and deeming the evidence inadmissible. The court also held that the supervising judge had the power to instruct the commission at end of hearing to disregard certain evidence that the commission had deemed relevant and admissible during the hearing.

7. In-stream flow appropriation decision by Colorado Water Conservation Board is legislative in nature despite specific criteria for decision.

In *Colorado Water Conservation Bd. v. Farmers Water Development Co.*, 346 P.3d 52 (Colo. 2015), the Colorado Supreme Court held that a decision by the Colorado Water Conservation Board (CWCB) was legislative, not quasi-judicial in nature, and therefore, it was not subject to procedural due process requirements. The CWCB has the “exclusive authority, on behalf of the people of the state of Colorado, to appropriate ... such waters of natural streams and lakes as the board determines may be required for minimum stream flows ... to preserve the natural environment to a reasonable degree.” C.R.S. § 37–92–102(3). Pursuant to this authority, and after a notice and comment period as well as a hearing, the CWCB voted to appropriate an instream flow right on the San Miguel River and to file a water application for water rights with the water court. As required by the applicable statute, the CWCB made three determinations regarding the appropriation: that the natural environment would be preserved to a reasonable degree by the water to be appropriated; that there was a natural environment that could be preserved with the CWCB’s water right; and that such environment could exist without material

injury to water rights. Despite having a number of elements commonly associated with quasi-judicial actions (public notice and hearing requirement and decision criteria), the court focused on the nature of the substantive decision. In this case, the court concluded that the CWCB decision was “quasi-legislative because it is a policy decision to ‘preserve the natural environment’ ‘on behalf of the people of the state of Colorado,’ § 37–92–102(3), as opposed to an adjudication of the rights of any specific party, as is the case with quasi-judicial determinations.”

8. Colorado Supreme Court grants certiorari review of cases addressing municipal regulation of fracking activity

In *Food and Water Watch v. Top Operating Company*, No. 15SC667, 2015 WL 5554333 (Colo. Sept. 21, 2015) and *City of Fort Collins v. Colorado Oil and Gas Assoc.*, No. 15SC668, 2015 WL 5554358 (Colo. Sept. 21, 2015), the Colorado Supreme Court granted certiorari review on the issue of “[w]hether home-rule cities are preempted from promulgating local land-use regulations that prohibit the use of hydraulic fracturing in oil and gas operations and the storage of such waste products within city limits when the Colorado Oil and Gas Conservation Commission regulates hydraulic fracturing within the state.”

In these cases, the Colorado Supreme Court will address whether Colorado home-rule municipalities are preempted from enacting land-use regulations prohibiting the use of fracking in oil and gas activities within municipal limits. In 2012, Longmont voters passed an amendment to the city charter to ban fracking and the storage and disposal of fracking waste within city limits. The Colorado Oil and Gas Association, the Colorado Oil and Gas Commission, and an oil and gas operator sued Longmont, asserting the ban was preempted by state law. The Boulder County District Court ruled that Longmont's ban was preempted by the Colorado Oil and Gas Conservation Act, citing to prior Supreme Court case *Voss v. Lundvall*, 830 P.2d 1061 (Colo. 1992), which previously held that state law preempted Greeley's drilling ban, but which found that state law did not completely preempt municipal regulations relating to oil and gas activity. In the *Voss* case, municipal land use regulations that affect oil and gas activity may coexist with the state regulations as long as there is no conflict. With respect to Longmont's ban, the Boulder District Court found that it was impossible to harmonize the city's fracking ban with the Oil and Gas Conservation Act, because it was essentially impossible to not economically drill wells without hydraulic fracturing. After Longmont appealed to the Colorado Court of Appeals, the Court of Appeals referred the matter directly to the Colorado Supreme Court due to the important nature of the issue.

9. Municipal sex offender residency ban does not conflict with Colorado state law (2016 Case).

In *Ryals v. City of Englewood*, 364 P.3d 900 (Colo. 2015), the Colorado Supreme Court answered a question certified to it by the United States Tenth Circuit Court of Appeals regarding whether the City of Englewood's ordinance effectively banning sex offenders from residing within the city was preempted by Colorado state law. The ordinance applied generally in two instances. First, it applied to sexually violent predators. Second, it applied to sex offenders who are required to register under Colorado Sex Offender Registration Act. The ordinance made it

unlawful for people in either group to “establish a permanent residence or temporary residence within two thousand feet (2,000’) of any school, park, or playground or within one thousand feet (1,000’) of any licensed day care center, recreation center or swimming pool (other than pools located at private, single-family residences).” Those restrictions made 99 percent of the city off limits to qualifying sex offenders. The stated intent of the ordinance was “to serve the City’s compelling interest to promote, protect and improve the public health, safety and welfare by creating areas, around locations where children regularly congregate in concentrated numbers, where sexual predators and specified sexual offenders are prohibited from establishing temporary or permanent residence.”

The federal district court had concluded that the city’s ordinance conflicted with state law, because Colorado has generally opted for a policy of individualized treatment of sex offenders, and the Englewood ordinance acted as an effective bar to residency. However, the Colorado Supreme Court disagreed and found no conflict. The court held that there is no state law requiring individual consideration with regard to the residency of sex offenders, and therefore, state law and the City’s ordinance may both be given full effect. The Colorado Supreme Court then concluded that the City’s ordinance was not preempted by state law.

10. Construction defect arbitration provision in condominium declaration enforceable and not a violation of Colorado’s Common Interest Ownership Act

In Vallagio at Inverness Residential Condominium Ass’n. v. Metropolitan Homes, Inc., No. 14CA1154, 2015 WL 2342128 (Colo. App. 2015) (unpublished opinion), the Colorado Court of Appeals held that a covenant in the condominium declarations imposed by the developer (declarant) requiring arbitration of construction defect claims was enforceable. Unlike other provisions in the declaration, the covenant at issue in this case provided that it could never be amended without the consent of the developer. When the condominium association sought to amend the covenant and sue the developer in court instead of submitting the dispute to binding arbitration, the developer objected. The court of appeals upheld the objection and held that the covenant was enforceable. This ruling has the potential to spur further condominium development in Colorado, as developers have long argued that the cost of litigating construction defect claims in the state court system makes condominium development cost-prohibitive. It will also provide an alternative mechanism to efforts by some municipalities that have passed ordinances seeking to control how construction defect claims are resolved for condominium developments in their jurisdiction.