

COLORADO UPDATE

Jeff Parker

Hayes, Phillips, Hoffmann & Carberry, PC

1530 Sixteenth Street, Suite 200

Denver, Colorado 80202-1468

(303) 825-6444

jhparker@hphclaw.com

Override of Zoning Authority

Bd. of County Comm'rs of County of Boulder v. Hygiene Fire Protection District, No. 09SC68, 2009 WL 4756589 (Colo. 2009)

- ▶ Fire District can build new fire station despite Boulder County disapproval of project
- ▶ Political subdivisions with special statutory purposes may override county zoning authority
- ▶ Override authority “assures that a county's authority to control land use does not interfere with, for example, a fire protection district's statutory obligation to provide fire protection services”

Scope of *Hygiene*?

Court's broad statement:

- "long-standing rule that other political subdivisions may override the restrictions of county or municipal zoning regulations."
- This rule is codified in C.R.S. § 30-28-110(1)(c)

All zoning decisions?

For municipalities?

- See C.R.S. § 31-23-209
- Similar language to county statute at issue in *Hygiene*

How about home rule municipalities?

- Unlike counties and statutory municipalities in that they are not "existing only for the convenient administration of the state government"



SCHWADRON

"WHAT A BEAUTIFUL SPOT TO BUILD SOME SORT OF EYESORE."

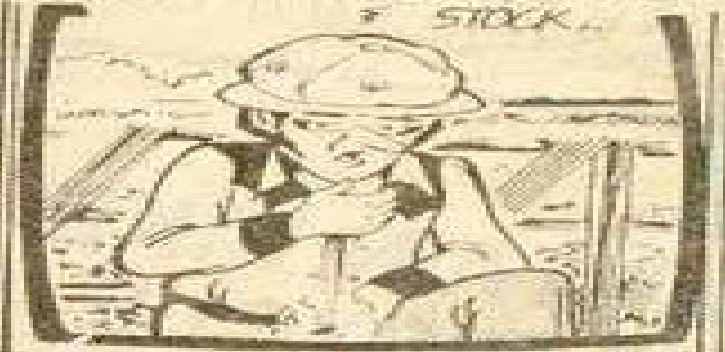
Taking Compensation Limitation

City of Brighton v. Palizzi, 214 P.3d 470 (Colo. App. 2008), *cert. granted*, 2009 WL 2488956 (Colo. Aug 17, 2009) (NO. 08SC1026)

- ▶ Decided in 2008, but cert. granted
- ▶ City eminent domain action for strip of land to widen road
- ▶ Strip part of larger parcel of agricultural land
- ▶ To develop larger parcel, it would need to be annexed to City
- ▶ Strip would need to be dedicated to City
- ▶ Therefore, valuation of strip should not be as commercial developable land
- ▶ Court of Appeals held that “consequences and costs of . . . rezoning . . . must be taken into account.”

Doonesbury

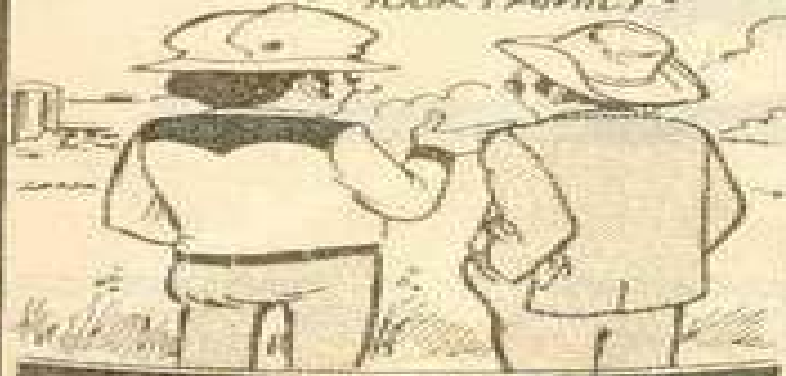
TEXAS SOIL. THERE'S NEVER BEEN ANY SHORTAGE OF BRAVE MEN TO DEFEND IT. LOCAL BUSINESSMAN ROY DEWITT SPRINGS FROM SUCH STOCK...



MY GREAT GREAT GRANDPA FOUGHT WITH SAM HOUSTON. HE WAS THE FIRST TO FARM THIS SPREAD. MY DADDY WAS THE LAST. LOST ALL THE TOPSOIL IN THE '30S.



BUT IT'S STILL PART OF YOU, ISN'T IT, MR. DEWITT? WHAT IS IT ABOUT THIS LAND THAT MAKES IT SO SPECIAL TO YOUR FAMILY?



IT'S LEVEL. WE'RE LOOKIN' TO PUT UP A K-MART HERE.

UH-HUH.



© B. Tindall

Legislative Fees Not a Taking

Wolf Ranch, LLC, v. City of Colorado Springs, 220 P.3d 559 (Colo. 2009)

- ▶ Supreme Court reviewed when a legislatively adopted fee is exempt from Colorado's Regulatory Impairment of Property Rights Act
- ▶ Involved application of Colorado Springs' drainage fee to development
- ▶ Developer argued: even though fee legislatively enacted, it was being applied on an individualized and discretionary basis and not roughly proportional
- ▶ Court looked behind simple legislative enactment to past applications of fee and review and appeal procedures.
- ▶ Held developer was not being "singled out"
- ▶ Lesson: Apply fees consistently and provide a review process

Government Exempt from Own Sign Regulation

Mountain States Media, LLC v. Adams County, Colorado, 2009 WL 2169267 (D. Colo. 2009)

- ▶ County interpreted its own sign regulation to exempt County signs under “civic events” exemption’
- ▶ County treating itself differently than private actors permissible
- ▶ Not an Equal Protection violation, because government and private actor not similarly situated:
- ▶ “A citizen and the government are not in an equivalent position with respect to announcing road closures, election logistics, county meetings and the like.”

RLUIPA POWER

Rocky Mountain Christian Church v. Bd. Of County Comm'rs of Boulder County, 612 F.Supp.2d 1163 (D. Colo. 2009)

- ▶ Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, *et seq.* ("RLUIPA")
- ▶ Special use application for church expansion from 116,000 to 240,800 square feet
- ▶ Mostly denied by Boulder County
- ▶ Jury verdict in favor of church on three RLUIPA grounds:
 - equal terms provision
 - substantial burden
 - unreasonable limitations
- ▶ Injunction issued requiring county to grant application
- ▶ Good RLUIPA analysis in district court opinion

Administrative Sign Review Timeframe Limited

Mahaney v. City of Englewood, 2009 WL 3128538 (Colo. App. 2009)

- ▶ City of Englewood cited owner of headshop for sign code violation for murals on building wall
- ▶ Citations based on owner failing to get permit before painting murals
- ▶ Court held
 - Prior Restraint
 - No timeframe for administrative review
 - No prompt judicial review
 - Therefore unconstitutional
 - “a prior restraint that does not limit the time within which the city manager must issue a license or permit is impermissible”



Amendment 20

- Colo. Const. Art. XVIII, § 14
- Citizen Initiated Amendment
- Legalizes the “medical use” of marijuana

“Medical Use”

Medical Use means the acquisition, possession, production, use or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient’s debilitating medical condition, which may be authorized only after a diagnosis of the patient’s debilitating medical condition by a physician or physicians, as provided in this section.

Medical Marijuana Dispensaries (MMDs)

- Where are MMD's discussed in Amendment 20?

Medical Marijuana Dispensaries (MMDs)

- Where are MMD's discussed in Amendment 20?
 - They're not!

Medical Marijuana Dispensaries (MMDs)

Question of the Hour: If MMDS are not mentioned in Amendment 20, are they legal?

- Probably yes.
 - There is nothing prohibiting MMDs under state law and medical marijuana use is permitted if limited to patients and primary caregivers.

Medical Marijuana Dispensaries (MMDs)

- How can MMDs operate lawfully?
 - Via the primary care-giver/patient relationship
PCGs are permitted to engage in the “medical use” of marijuana
 - This includes the acquisition, possession, production, use or transportation of marijuana.
 - This authority has been interpreted by MMD owners to include the sale of medical marijuana.

Medical Marijuana Dispensaries (MMDs)

- What does a MMD look like?
 - Generally a store front operation



Medical Marijuana Dispensaries (MMDs)

- What does an MMD look like?



Medical Marijuana Dispensaries (MMDs)

- What does an MMD look like?
 - Home occupations





Medical Marijuana Dispensaries (MMDs)

- Do we have to allow MMDs to operate in our communities?
 - Maybe.
 - Can likely limit when, where and who operates an MMD in a municipality.
 - However, a municipality cannot likely prohibit individuals from engaging in a patient/primary-care giver relationship involving the medical use of marijuana.

What Do We do About MMDs?

Least
Restrictive

Most
Restrictive

**Do
Nothing**

Basic
Zoning

Zoning
Plus

Specialty
Licensing

Effective
Ban

Ban



Do Nothing

Positives

- Use existing business license procedures.
- Avoid political implications of addressing the MMD issue.
- Cost efficient

Negatives

- No control over the location.
- Limited control over the business operations.
- City will likely become a haven for MMDs

What Do We do About MMDs?

Least
Restrictive

Most
Restrictive

Do
Nothing

**Basic
Zoning**

Zoning
Plus

Specialty
Licensing

Effective
Ban

Ban



Basic Zoning

Positives

- Control over location.
- Use existing business license procedures.
- Cost efficient.

Negatives

- Not much control other than location.

Municipalities that are Implementing

- None to date

What Do We do About MMDs?

Least
Restrictive

Most
Restrictive

Do
Nothing

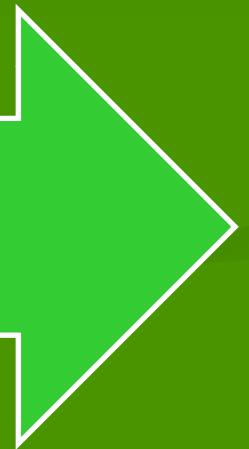
Basic
Zoning

**Zoning
Plus**

Specialty
Licensing

Effective
Ban

Ban



Zoning Plus

Positives

- Control over location.
- Additional limitations included within the zoning code including limits on hours of operation, distance limitations, and cultivation limitations.

Negatives

- Requires additional administrative review.
- More costly.

Municipalities that are Implementing

- Boulder, Commerce City, Frisco, Silverthorne.

What Do We do About MMDs?

Least
Restrictive

Most
Restrictive

Do
Nothing

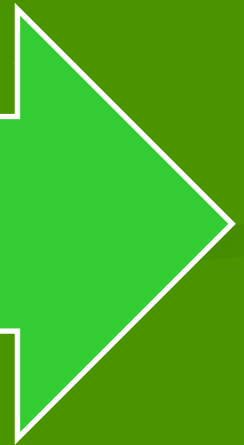
Basic
Zoning

Zoning
Plus

**Specialty
Licensing**

Effective
Ban

Ban



Specialty Licensing

Positives

- All zoning control benefits *plus* specialty licensing review
- Background investigations, security, patient ledgers, etc.

Negatives

- Requires significant administrative review
- Cost
- Requires significant code amendments (political will)

Municipalities that are Implementing

- Denver, Northglenn, Breckenridge, Black Hawk, Wheat Ridge, Trinidad, Hudson.

What Do We do About MMDs?

Least
Restrictive

Most
Restrictive

Do
Nothing

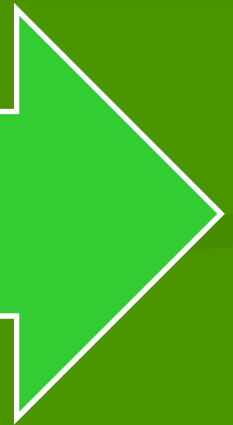
Basic
Zoning

Zoning
Plus

Specialty
Licensing

**Effective
Ban**

Ban



Effective Ban

Positives

- Avoid MMD decision based on existing code provisions (nuisance and business licensing regulations)
- May not require code amendments (politically neutral)
- Cost efficient

Negatives

- Can be more challenging to enforce
- Raises the preemption issue
- Question of Validity in light of *Fraser v. City of Centennial* case.

Municipalities that are Implementing

- Aurora, Greenwood Village, Superior, Broomfield, Avon, Centennial.

What Do We do About MMDs?

Least
Restrictive

Most
Restrictive

Do
Nothing

Basic
Zoning

Zoning
Plus

Specialty
Licensing

Effective
Ban

Ban



Ban

Positives

- Avoid issues associated with allowing and regulating MMDs

Negatives

- Potential for constitutional challenge
 - Depends on breadth of the ban
 - Rational basis review
- In light of *Fraser v. Centennial* case, this is probably not an attractive option at this time.

Municipalities that are Implementing

- None to date

Pending Legislation

Senate Bill 10-109

Regulates patient/physician relationship

House Bill 10-1284

Regulates MMDs

SB-109

Bona-fide physician/patient relationship

- Prior relationship – at least one consult before patient applies for ID card
- Full medical assessment *before* marijuana recommendation
- No remuneration from primary caregiver
- No discounts to patient
- No diagnosis at MMD

Creates Medical Marijuana Review Board

HB 10-1284

Mimics State liquor licensing scheme

- State and local licensing authorities
- Application to local authority for review
- Review by State Authority after approval by local authority
- Distance limitations from schools, preschools, and daycare facilities
- Community needs test

HB 10-1284 cont.

- 500 patient limit per “Medical Marijuana Center” (2000 ounce on-site limit)
- Appears to allow MMC be a primary caregiver
- Potential expansion of Amendment 20 from actual persons being primary caregiver
- Nonprofit requirement
- Hour limitations 8:00 a.m. to 7:00 p.m.
- No on-premise consumption

HB 10-1284 cont.

- On-site cultivation permitted (10% off-site sale limitation)
- Only Colorado-grown marijuana may be sold
- Record-keeping requirements
- Signage limitations

House Bill 10-1107

Urban Renewal on Agricultural Land

Alters Colorado's Urban Renewal Law, C.R.S. 31-25-101, *et seq.*

Addition of agricultural land to urban renewal area prohibited unless:

1. The agricultural land is a brownfield;
2. At least $\frac{1}{2}$ of the urban renewal area is developed and $\frac{2}{3}$ of the perimeter of the urban renewal area is adjacent to developed land;
3. The agricultural land is an enclave within the municipality and has been entirely surrounded by developed land for at least three years;
4. All taxing entities agree to the inclusion of the agricultural land; or
5. The agricultural land was included before the effective date of the statute

House Bill 10-1107

"Agricultural Land"

- ▶ Agricultural land is defined as land classified by assessor as agricultural land
- ▶ Zoning of land irrelevant

House Bill 10-1107

Tax Increment

- ▶ Increment is based upon fair market value
- ▶ Base is no longer established based upon agricultural land value
- ▶ Reduction in TIF revenue available to urban renewal authority