COLORADO LAND USE DECISIONS – 2016

Presented By

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1. Traditional method of establishing and operating developer districts found to be a sham by Court of Appeals.

The Colorado Special District Act, C.R.S. § 32-1-101, *et seq.*, requires an election to form a special district. In addition, TABOR requires an election to approve the special district's taxes and debt. When creating a special district for a new development, long-standing practice has been, to create what is known as a "director's parcel," which is a small, separate parcel of property carved out of the larger parcel planned for development. The developer typically retains ownership over the director's parcel, but enters into contracts to purchase the property with a small number of people who are affiliated with the development company. These contracts to purchase render the potential purchasers the only eligible electors of the special district. They can then control the organizational election for the special district.

In the case of *Landmark Towers Assn. v. UMB Bank, N.A.*, Nos. 14CA2099 and 14CA2463, 2016 WL 1594047 (Colo. App. April 21, 2016), the Colorado Court of Appeals held that the director parcel practice constituted a "sham" and held that all bonds issued were invalid and that taxes paid could be recovered by property owners in the district. This ruling shook the development, special district, and legal community, because the developer district practice has been commonplace throughout Colorado. In this case, the development involved had been mired in lawsuits and felony charges against the principal developer, who fled arrest and subsequently took his own life.

In this case, the director's parcel constituted a 10-by-10 foot parcel of property in the district. Six individuals (the developer himself and 5 of his associates) executed purchase contracts for an undivided $1/20^{th}$ interest in the parcel, which obligated them to pay taxes on the parcel (a requirement for being an eligible elector). The larger parcel was owned by limited partnerships, which under Colorado's Special District law are not eligible electors. As a result, these six individuals approved the creation of the District and authorized the issuance of bonds and a property tax to pay the bonds. Thirty million dollars in bonds were authorized, which were earmarked for paying for public infrastructure in a portion of the development. Eight million dollars was withdrawn by the district, a large portion of which was misused by the developer. Members of a condominium association who owned property that was subject to the taxes used to pay the bonds (all of which was earmarked for use on property other than their property) brought a number of claims against the special district and the bank that issued the bonds. Included in these claims were claims that the bond and tax TABOR election was illegally conducted because the organizer's option contracts were a sham.

The Court of Appeals agreed, holding that the purchase contracts were a sham because the six individuals never paid the ten dollar down payments, never paid any taxes on their interests, their interests were so small they were of no real use, and because there was no intention that they ever pay anything or purchase the property. Therefore, they were not eligible electors, their votes were void, and the bonds and taxes they approved were invalid. Compounding this problem, 130 individuals had entered into bona fide contracts to purchase condominiums in the planned development. These contracts expressly provided that they did not have to pay property taxes during the term of their purchase contracts, which rendered them ineligible to vote. The court held that even though they had no immediate obligation to pay property taxes under their purchase contracts, they would be required to pay property taxes when they purchased the property. The court held that this was a sufficient obligation to render them eligible to vote in the election. Thus, the court held that individuals who were not eligible voted, and individuals who were eligible did not vote.

The result of this opinion was moderate panic, as many special districts were established in the same manner, albeit generally without the fraud and self-dealing that was found to have occurred in the *Landmark* case. The *Landmark* holding applied to these other elections could have led to the invalidation of numerous other elections and potential refund obligations in the millions of dollars throughout the state for legitimate infrastructure projects. A legislative solution was rapidly implemented to provide a degree of protection to existing metropolitan districts that held elections under identical procedures to those found to be a sham by the *Landmark* court. *See* Senate Bill 16-211.

2. Comprehensive plans are advisory in nature . . . unless they are not.

In *Friends of the Black Forest Preservation Plan¸ Inc. v. Board of County Comm'rs of El Paso County*, 381 P.3d 396 (Colo. App. 2016), the Colorado Court of Appeals held that the county's master plan was advisory in nature, and therefore, the Board of County Commissioners had broad discretion in considering its elements when approving a special use permit for a large greenhouse operation in the county.

In this case, Black Forest Mission, LLC filed a special use application to construct a 1.19 acre greenhouse. The planning commission voted to recommend denial of the application to the Board of County Commissioners based on its inconsistency with the applicable portion of the county's master plan for the area in which the greenhouse would be sited. The Board of County Commissioners, however, ultimately approved a special use permit for a revised application that sought to address planning commission concerns. It found, in part, that it met a requirement of the county's land development code that the proposed land use was "consistent with the applicable Master Plan." Notably, there was significant concern regarding whether the proposal was consistent with the applicable portion of the master plan, but after being advised by a county attorney that the master plan was advisory in nature only, the Board of County Commissioners approved the special use permit.

The plaintiffs then challenged the decision under C.R.C.P. 106(a)(4) arguing that it was based on the erroneous conclusion that the master plan was merely advisory. Plaintiffs argued that its advisory nature was lost when it was incorporated into the county's land development code as a criterion in the county's quasi-judicial decision.

Citing prior case law, the court noted as follows:

> Unlike binding regulations, a master plan is a guide to development rather than an instrument to control land use. A master plan is only one source of comprehensive planning, and is generally held to be advisory only.

Id. at 400 (internal citations and quotations omitted). The court then noted:

> However, the law is also clear in Colorado that master plans may become binding if they are properly incorporated into a county's legislatively adopted subdivision, zoning, or other similar land development regulations.

Id. at 401. These findings are consistent with the applicable county planning statutes, which provide as follows:

> The master plan of a county or region shall be an advisory document to guide land development decisions; however, the plan or any part thereof may be made binding by inclusion in the county's or region's adopted subdivision, zoning, platting, planned unit development, or other similar land development regulations after satisfying notice, due process, and hearing requirements for legislative or quasi-judicial processes as appropriate.

See C.R.S. 30-28-106(3)(a).

In this case, the county's land development code contained numerous references to the purpose of the master plan, which viewed as a whole were held to evidence an intent that the master plan was advisory in nature. So, despite the one provision providing that in approving a special use permit, the Board of County Commissioners "shall" find the use to be consistent with the applicable master plan, the board had retained considerable discretion in deciding how to apply its master plan to special use permit applications. The holding is consistent with the statute, and provides that a master plan is advisory unless a county's land use code, taken as a whole, expressly provides that it is not.

3. Discretion given to City Council in determining which provisions of its zoning code are mandatory. Liberal notion of standing applied to allow neighbors to challenge rezoning.

In *Rangeview, LLC v. City of Aurora*, 381 P.3d 445 (Colo. App. 2016), neighboring landowners brought a C.R.C.P. Rule 106(a)(4) challenge to the City of Aurora's rezoning and site plan approval. In particular, the neighbors challenged the lack of outdoor gathering space, which they alleged was a requirement of the City's development regulations. After holding that neighboring landowners had standing to sue despite providing limited evidence of damages, the Colorado Court of Appeals ruled in favor of the City and developer holding that the City had significant discretion in interpreting its own code provisions concerning rezoning criteria.

First, the court clarified that Colorado law permits a court to look beyond the four corners of a complaint to determine whether a plaintiff has standing. This had been unresolved up until this case. The court then held that despite not pleading any damages in their complaint, the

record showed that the plaintiffs presented evidence at the City Council hearing that their properties would be harmed economically and aesthetically by the rezoning. The court deemed this sufficient despite the failure to include it in the complaint.

The court then engaged in an analysis similar to that undertaken in the *Black Forest* case, discussed above. It reviewed the totality of the City's land use regulations as a whole to determine whether they established mandatory criteria or whether the City Council (sitting in a quasi-judicial capacity) had discretion to determine their importance and weight. Portions of the land use regulations provided that such developments "shall" provide outdoor gathering spaces, while other portions provided that such spaces "should" be provided. The court looked at the overall intent of the regulations and found language indicating that infill development (like the one at issue in the case) guidelines were meant to be flexible. Construing the regulations as a whole, the court deferred to the City's interpretation of its own regulations, and concluded that the City had not exceeded its authority or abused its discretion (the standard of review under C.R.C.P. 106(a)(4)) in approving the development.

4. GOCO funding used on a portion of a project does not extinguish Town's eminent domain authority.

In *Town of Silverthorne v. Lutz*, 370 P.3d 368 (Colo. App. 2016), the Town of Silverthorne did not lack authority to use eminent domain to acquire an easement for a public recreational trail despite its use of GOCO funds on a portion of the project.

In this case, the Town was constructing a network of trails along the Blue River, which involved acquiring lands and easement rights from private parties. As part of the project, the Town applied for and received GOCO funding. Section 9 of Article XXVII of the Colorado Constitution bars a GOCO fun recipient from using GOCO funds to acquire property by condemnation. The landowners argued that the Town lacked authority to condemn their property, because it had received and used GOCO funds on portions of the trail project.

The Court rejected the landowners' argument, holding that under Colorado's condemnation statues, the source of funds for the acquisition of property in an eminent domain action is not admissible. In addition, the court held that the Colorado Constitution only prohibits the use of GOCO funds to actually pay for the acquisition of the property via eminent domain. The Town used the GOCO funds for other activities related to the trail project, and did use the funds to pay for the property acquired via condemnation. Consequently, the Town was not prevented from condemning plaintiff's property despite the Town's receipt of GOCO funds.

5. Municipal sex offender residency ban does not conflict with Colorado state law

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.

6. City of Fort Collins' moratorium on fracking operationally conflicts with Oil and Gas Conservation Act and is therefore invalid

The Colorado Supreme Court concurrently decided two cases involving municipal regulation of fracking activity in *City of Fort Collins v. Colorado Oil and Gas Assoc.,* 369 P.3d 586 (Colo. 2016) and *City of Longmont v. Colorado Oil and Gas Assoc.*, 369 P.3d 573 (Colo. 2016). The issues decided were whether 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 the *Longmont* case, the Longmont voters passed an amendment to the city charter to ban fracking and the storage and disposal of fracking waste within city limits. In the *Fort Collins* case, the City of Fort Collins had imposed a five-year moratorium on fracking and the storage and disposal of fracking waste within city limits. The court concluded that because fracking is a matter of mixed state and local concern, both cities' regulations were subject to preemption by state law. The court then concluded that both the ban and the moratorium operationally conflicted with state law. The court then held that the moratorium and ban were preempted by state law and were, therefore, invalid and unenforceable.

Fort Collins had attempted to distinguish its moratorium from Longmont's ban, as a temporary measure needed for it to study and implement appropriate regulations. The court held that it "is not merely a regulation; it is a prohibition, and one that lasts for five years." *Fort Collins*, 369 at 594. The court held that such a lengthy prohibition impeded the goals of Colorado's Oil and Gas Conservation Act and the state's interest in fracking. The court made it clear that even a one-year moratorium would be unlikely to survive.

The court did state that not all local regulation of oil and gas activity is prohibited. Room remains for regulations that do not operationally conflict with the Colorado Oil and Gas

Conservation Act. However, given the detailed nature of the regulations addressing the technical aspects of fracking, there may be limited room for additional local regulation.

7. Property owner and municipality cannot contract to disconnect annexed property in contravention of Colorado Municipal Annexation Act

In *Golden Run Estates, LLC v. Town of Erie*, No. 15CA1135 2016 WL 6087885 (Colo. App. Oct. 6, 2016), a landowner and the Town of Erie entered into a pre-annexation agreement providing that the landowner could withdraw his annexation petition if the annexation agreement proposed by the landowner was not approved by the town at the same time the town approved the annexation. The town annexed the property and several months later the landowner submitted an annexation agreement to the town for the town's approval. When the parties could not agree upon the terms, the landowner demanded that the town disconnect (de-annex) his property. After the town refused, the landowner sued claiming breach of contract by the town and sought damages and a court order disconnecting his property. The trial court ruled in favor of the landowner awarding damages for the town's breach of the pre-annexation agreement.

On appeal, the court held that the trial court lacked subject matter jurisdiction over the landowner's breach of contract claim. The Municipal Annexation Act requires that if any landowner "believes itself to be aggrieved by the acts of the governing body of the annexing municipality," the landowner may have such acts reviewed in proceedings instituted in a "district court having jurisdiction of the county in which the annexed area is located." C.R.S. § 31-12-116(1)(a). Any party who wishes to bring such an action must file a motion for reconsideration "within ten days of the effective date of the ordinance finalizing the challenged annexation." § 31-12-116(2)(a)(II). Compliance with this provision is a condition precedent to the right to obtain judicial review under this section. Furthermore, "[a]ll such actions to review the findings and the decision of the governing body shall be brought within sixty days after the effective date of the ordinance [approving an annexation], and, if such action is not brought within such time, such action shall forever be barred." § 31-12-116(2)(a)(I). The statute provides that this is "the only procedure for judicial review of municipal annexations implemented under the Act."

The court held that the sixty day time limitation is jurisdictional, and is not just a statute of limitations. *Id.* At 4. Therefore, it cannot be tolled or waived via a contract. The court then held that the landowner failed to follow the procedures in the Municipal Annexation Act, and was therefore, jurisdictionally barred from attacking the annexation after the statutory time limit for claims had expired, regardless of the terms of the pre-annexation agreement.