Colorado Land Use Decisions - 2017

Presented By

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1. Springing effective date of tax increment financing is not permissible under Colorado's urban renewal law

In *City of Aurora v. Scott*, 2017 WL 710507 (Colo. App., February 23, 2017), the Court considered for the first time whether a municipality could postpone the start of the tax increment financing ("TIF") period by writing a delay into the urban renewal plan. The City of Aurora approved two urban renewal plans, each with multiple phases of redevelopment. For each plan, TIF was to be collected immediately for the initial phases but be delayed for subsequent phases until the city actually approved a site plan for that particular phase. After approval of the urban renewal plans, the Arapaho County Assessor calculated base tax values for all development phases, arguing that he was required to do so to comply with the urban renewal law ("URL"), which does not appear to allow a city to delay the start of TIF allocations. Aurora subsequently sued the assessor.

The Court of Appeals upheld the District Court's interpretation of the URL, finding that the plain statutory language does not permit a municipality to "alter or evade" the twenty-five-year limit on TIF provisions, that the period begins running once the TIF provision is adopted, and that the provision is adopted when the plan that contains the provision is approved. The fact that Aurora is a home rule municipality had no bearing on this decision, as the Court found that urban renewal is a matter of mixed local and state concern and any ordinance conflicting with state law on such a matter is superseded by the state statute. As Aurora's interpretation of the plans directly conflicted with the URL, it was invalid.

The Court did note that Aurora could have avoided the issue by approving only the first phases of the development and later modifying the plans to include additional land subject to new TIF provisions. Doing so would delay the approval of the plan, and therefore the adoption of the TIF and the running of the twenty-five-year clock.

2. Environmental protection is "a condition that must be fulfilled" in state rule-making for oil and gas…for now

After failing to establish the existence in the Colorado Constitution of a public trust doctrine for development of the state's natural resources, "fracktivists" have moved to petitioning the COGCC for a rule-making. In *Martinez v. Colorado Oil and Gas Conservation Commission*, 2017 WL 1089556 (Colo. App., March 23, 2017); cert. granted (January 29, 2018), the Court

addressed the factors that the Commission must weigh when considering and promulgating rules under the Colorado Oil and Gas Conservation Act, C.R.S. § 34-60-102(1)(a)(I).

The Plaintiffs in Martinez proposed a rule requiring that new permits only be issued if independent review showed that drilling could occur in a manner that did not impair Colorado's environment or human health and did not contribute to global warming. Both the Commission and the District Court held that the Act requires a balance between the development of oil and gas resources and protection of public health, safety, and welfare, and therefore adopting a rule that gives environmental concerns precedence over development is beyond the Commission's statutory authority. The District Court upheld the Commission's decision to deny the rule-making petition on the grounds that it was not arbitrary or capricious.

The Court of Appeals disagreed with the application of a balancing test, instead holding that the language in C.R.S. § 34-60-102(1)(a)(I), specifically the phrase "in a manner consistent with," clearly and unambiguously requires that development be *subject to* environmental and health interests, not balanced against them. The appeal was limited to the rejection of the proposed rule on the grounds that it was *ultra vires* and does not validate or place the rule into effect, but the decision does leave the door open for challenges to existing Commission rules and approval of permits that do not place environmental and health concerns above development. Certiorari to the Colorado Supreme Court was recently granted and a decision affirming or reversing this watershed opinion can be expected within the year.

3. Denver rezoning decision upheld despite a flood of procedural challenges

Denver is currently engaged in several 106(a)(4) appeals challenging a site-specific rezoning approval that turned a blighted church into an age-targeted apartment complex. In *Whitelaw v. Denver City Council*, 405 P.3d 433 (Colo. App. 2017), the neighbors bringing the suit cited several claims in their complaint in an attempt to show that the City Council abused its discretion and their right to due process, all of which failed:

- *Ex parte communications.* In the most publicized portion of this decision, despite a councilwoman's undisclosed private email correspondence with lobbyists and constituents, there was not enough evidence of substantial prejudicial to rebut the presumption of impartiality that attaches to a quasi-judicial decisionmaker. The Court noted that the councilwoman had reiterated several times in those emails that she had a duty to remain impartial and would not prejudge the merits of the rezoning.

- *Planning board conflict of interest.* Though the developer's architect sat on the planning board that recommended approval of the rezoning to the City Council, no due process violation occurred as such recommendations in Denver are only advisory in nature and therefore not reviewable under 106(a)(4).

- *Flawed quasi-judicial decision making.* Quasi-judicial decisionmakers are required to base their decisions on relevant review criteria and the evidence on the administrative record. Though the councilmember's debate on the rezoning may have included extraneous matters, the record supports the ultimate conclusion of the Council and members relied on

information in the record when explaining their votes. Therefore, the presumption of impartiality was again not overcome.

- *Protest petition procedure.* Once a protest petition is filed by nearby landowners representing 20% or more of the adjacent land area, a super majority vote of the Council is required to approve a rezoning in Denver. In calculating the adjacent land area for eligibility to sign the petition, Denver included land owned by the City. The Court once again upheld this longstanding practice.

- *Campaign contributions.* The neighbors allege that the entire Council was tainted due to campaign contributions from the developer, but the Court refused to address these allegations as they were brought for the first time on appeal and no evidence was previously placed in the record to corroborate this allegation.

- *Compliance with the zoning code.* The decision to rezone as supported by the record shows that the Council followed the criteria set forth in the Code, the rezoning is consistent with the master plan, and that Council considered traffic and parking impacts as is necessary in some situations to fully appreciate the influences on public health, safety, and welfare.

- *Spot zoning*. Last but not least, the Court once again rejected the neighbor's contention that the rezoning was illegal spot zoning, which the Appeals Court has not found present in over 50 years. The court ruled that the rezoning was not spot zoning because the new zone district was consistent with the City's adopted plans which contemplate rezoning as a tool for meeting the plan goals.

4. Absent privity of contract, homebuyer cannot sue master developer under implied warranty of suitability

In *Forest City Stapleton Inc. v. Rogers*, 393 P.3d 487 (Colo. 2017), the Court addressed whether contractual privity is required for a homebuyer to assert a claim for breach of the implied warranty of suitability against a developer. In this case, a master developer, Forest City, sold a vacant lot to a professional homebuilder who then contracted with the homebuyer to purchase the lot and construct the house. The finished house was to have a basement, but after completion the homebuyer found that the water table was too high for the basement to be habitable. The homebuyer subsequently sued the master developer claiming breach of the implied warranty of suitability.

The Supreme Court ruled that the homebuyer could not sue the master developer under this claim, as breach of implied warranty of suitability is a contract claim and because the homebuyer and the master developer were not parties to the same contract, there was no privity of contract and thus no implied warranty. The Court noted that though privity of contract has been eliminated for implied warranties in cases of personal property and consumer goods, this is not the case for real property. Thus, the master developer was insulated from claims of implied warranty of habitability.

5. The Colorado Immunity Act does not protect a public employee or officer when sued in tort by public employer

In *Tallman Gulch Metropolitan District v. Natureview Development*, 399 P.3d 792 (Colo. App. 2017), the court of appeals addressed for the first time in the 46-year history of the Colorado Governmental Immunity Act ("CGIA") the ability of a public employer to sue its employees and whether the CGIA could be a bar to the suit. The court limited its holding to the facts stated in the case and invited the legislature to clear up the ambiguities that were addressed in the case.

Tallman Gulch Metropolitan District was created by Natureview Development and Michael Richardson, owner of Natureview Development, to provide public improvements to residents and taxpayers of a planned development in Douglas County. Richardson served as the president of the District's Board of Directors and was sued by the District for various fraud claims, misrepresentation, and breach of fiduciary duty after the development failed and went into foreclosure. Subsequent to the bank's filing for foreclosure proceedings, Richardson approved the issuance of over $4 million in bonds by the District to Natureview in exchange for the infrastructure improvements in the development. When authorizing the bonds, Richardson had failed to disclose to the District the financial status and pending foreclosure of the development.

Richardson and Natureview moved to dismiss the claims, arguing that Richardson was protected by the CGIA as an officer of the District and therefore could not be sued in tort. The appeals court disagreed, and held that the CGIA does not apply to these facts." The court found that while the CGIA's application is clear when called upon to *defend* against tort claims, it is ambiguous as to the application of the CGIA when suits are *brought* by a public entity plaintiff. Reasoning that the injury suffered in these facts was by a public, not private, entity and that the purpose of sovereign immunity is to limit the liability of public entities and therefore the burden of unlimited liability on taxpayers, the court held that "it would frustrate the purpose of the CGIA to permit the employee to shield himself for herself with the sovereign immunity meant to protect a public entity, and a public employee only when acting as an extension of the entity."

6. Condominium developers can require the use of binding arbitration in construction defect claims

Proponents of construction defect reform won a great victory in this Supreme Court case, which found that requiring binding arbitration in the covenants or declarations to a common interest community is permissible under current state statutes, and no additional state or local laws will be required to facilitate binding arbitration. In *Vallagio at Inverness Residential Condominium Association v. Metropolitan Homes, Inc*., 395 P.3d 788 (Colo. 2017), an HOA brought suit against the developer for construction defects despite a clause in the condominium declarations that these claims be resolved through binding arbitration. Furthermore, this provision could only be altered by written consent of the declarant, the project's developer. The residents challenged these provisions claiming they violate the Colorado Common Interest Ownership Act ("CCOIA"), which limits the maximum percentage of votes required to amend a declaration to 67%.

The Supreme Court ruled that these provisions in the declaration are permissible under the CCOIA and nothing in that Act prohibits requiring binding arbitration. The Court found that the 67% maximum only applies to percentage of votes required to initiate a change and does not preclude additional requirements such as a consent-to-amend provision. Furthermore, the CCOIA expressly permits a declaration to specify when arbitration will be used to resolve issues.

7. Condemnation of private property must be for an immediate and essential public purpose

In *Carousel Farms Metropolitan District v. Woodcrest Homes*, 2017 WL 5897715 (Colo. App., November 30, 2017), a developer entered into an agreement with the Town of Parker conditioning approval of a development plan on the acquisition of the subject property. When the owner refused to sell, the developer created a metropolitan district to condemn the property and dedicate it to the Town for eventual public use as roads and sewers for the development.

The Court found that the essential purpose of the taking was to facilitate the developer's compliance with the Town's agreement and thus the approval of the development plan. The fact that the land was dedicated to the Town for public improvements was not enough to justify the condemnation, as the rule is that the taking itself must be for a public purpose regardless of the later intent for the land. The "Resolution of Necessity" published by the district prior to the condemnation proceedings stated that the property was necessary for constructing the public improvements to serve the development- a development that had not yet been approved and could not be approved without the acquisition of the property.

The Court also found substantial evidence of bad faith in initiating the condemnation proceedings. The condemnation was clearly in the interest of the developer using the district as an alter ego to help further the development process. The Court found that the district had manipulated the circumstances to skirt the prohibition against a governmental entity's taking of private property for transfer to a private entity.

Because the metropolitan district failed to show that the condemnation was for a public purpose, was necessary for such purpose, and that there was no bad faith in condemning the land, the order of possession was reversed. While this decision is consistent with other opinions of the court regarding condemnation, it acts as a cautionary reminder to developers and special districts to be careful of the conflicts presented by the alter-ego relationship.

8. Challenge to a TABOR election was time barred despite district's non-compliance with election requirements

In this exciting chapter of the Landmark Towers case that shook metropolitan districts last year, the Colorado Supreme Court concluded that the challenge to the TABOR election was actually time barred, and reversed the judgment of the Court of Appeals that awarded the disgruntled condominium owners the right to recover taxes paid to the district.

Without repeating the facts of this well publicized case in great detail, a group of condominium owners sued the Marin Metropolitan District after finding that their property had

been included in the district under suspicious circumstances and subjected to taxation, which taxes were being funneled to pay for infrastructure not directly needed for their property and grossly misappropriated by the developer in charge of the District. The principal developer of the Landmark Towers created a director's parcel that would allow him to control the election for the special district, a common practice amongst developers. Bonds were issued and taxes imposed on the property within the District based on the votes of this director parcel. Ultimately, the vote of six individuals resulted the ability of the District to issue up to $35.5 million in bonds, $30.5 million of which were actually issued.

The rational behind allowing metropolitan districts to use the "sham" of a director's parcel in establishing taxing authority is that an ultimate purchaser in a development will be aware of the district and taxes imposed on the property before purchase and makes the decision to purchase with that knowledge. However, the condominium owners suing in this case had entered into bona fide contracts to purchase condominiums in the planned development before the creation of the District and thus before the District's election to issue bonds. Those contracts expressly provided that they did not have to pay property taxes during the term of the purchase contract, rendering them ineligible to vote or even be given notice of the election. The Court of Appeals held last year that though there was no immediate obligation to pay property taxes under the contracts, they would be required to pay property taxes after the purchase was complete and therefore there was a significant obligation to render them eligible to vote in the election. Thus, the bonds issued were invalid and the taxes paid could be recovered by property owners.

On appeal to the Colorado Supreme Court in *UMB Bank, N.A. v. Landmark Towers Association, Inc.*, 408 P.3d 836 (Colo. 2017), it was decided that this challenge to the TABOR election notice requirements was actually barred by the provision requiring that a party seeking to contest an election file a written statement of intent to contest within ten days after the official survey of returns has been filed with the designated election official. The condominium owners did not file the written statement to contest until more than three years after the official survey of the election. The statute requiring that intent be filed within 10 days is a non-claim statute taking away jurisdiction to hear a case after 10 days, and thus equitable estoppel does not apply.

The result of this holding may seem harsh in denying the owners' challenge to the fraudulent election, but the door is still open for the possibility of challenging on the basis that the tax assessment was illegal and in violation of the owners' due process rights since they received no benefit from the assessment. It should be noted that the Appeals' decision invalidating the practice of creating a "director parcel" (at least in the manner that occurred in this case) was not up for review on certiorari and was thus not overturned.

9. County has authority to acquire an easement for a city and the public's use

In *City of Lakewood v. Armstrong*, 2017 WL 6614122 (Colo. App., December 28, 2017), the Court of Appeals discussed the requirements for a valid easement deed and whether a county may acquire an easement for the benefit of another public entity. In 1984, Jefferson County acquired an easement deed over private property for access to a public park greenbelt. A month later, the County conveyed the easement deed to the City with a reverter clause stating that the City must use the easement exclusively for public parks and purposes. In 2011, the new owner of

the property attempted to obstruct the easement's use by putting up a gate and claiming that the easement was invalid on the grounds that it violated the statute of frauds and did not describe the easement in enough detail.

The Court found that though the deed only described the servient estate and not the dominant estate and that the easement was not particularly identified, this was not an "extreme case of vagueness" that would invalidate the granting of the easement. The Court also found that though counties do not have "blanket authority to deal in real estate" they do have statutory authority to purchase real estate for the "use of the county" and to "acquire, sell, own…open space and parklands" and acquire public projects. The Court ruled that the County thus had the authority to acquire the easement for intended access to the public park greenbelt, and its conveyance of that deed with a reverter clause to the City was permissible as a continued public purpose.

10. Home rule municipality has the power to convey public property without an election and where there is no dedication of the property for a particular public purpose

In *Save Cheyenne v. City of Colorado Springs*, 2018 WL 774108 (Colo. App., February 8, 2018), the Court of Appeals discussed the conditions necessary for a municipality to convey public property as part of a land exchange. Colorado Springs was sued by unhappy residents when the City entered into a land exchange with the Broadmoor, whereby the City received over 300 acres of land and trail easements in exchange for a parking lot and 189.5-acre parcel within Cheyenne Park to be converted into a private equestrian center. The residents sued to invalidate the exchange on the grounds that the City did not have the power to convey the land, claiming it had been statutorily dedicated and was promised for a particular public purpose.

In holding that the transfer was valid, the Court once again ruled that strict compliance with the dedication statute is required to seek protection under that statute. Though the 1885 ordinance appropriating funds for the acquisition of the park dedicates the land as such, strict compliance was nevertheless absent as the park had not been designated for public use on the map or plat of the City or county. Common law dedication was also defeated on the grounds that the ordinance gave the City Council the power to convey all or any portion of the park. In the absence of a statutory or common law dedication, the City is free to dispose of the property. The exchange was also not an unconstitutional gift as the City received consideration for the land it conveyed to the Broadmoor.

The plaintiff also argued that the land cannot be conveyed unless an election is held pursuant to C.R.S. §31-15-713(1)(a). While this remains true for statutory municipalities, the constitutional home rule powers of Colorado Springs allow the City to adopt its own procedures for purchasing and disposing of real estate. A claim for zoning violations of the future use of the parkland was also not ripe for review, as no final zoning decision had been made and no current zoning violation exists on the property.