
PERSONAL LIABILITY OF PLANNING AND ZONING OFFICIALS

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**Technical Service Report No. 2
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**UNIVERSITY OF DENVER
COLLEGE OF LAW**

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*A Survey of Potential Claims
And Analysis of Legal Issues*

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PERSONAL LIABILITY

INTRODUCTION

The decisions of planning officials, whether members of a planning commission or governing body, have always been subject to legal challenge. However, recent legal developments have made it increasingly likely that a planning official might be sued personally for damages. While some planning officials might not give much thought to the possibility of being named in a lawsuit, many others are concerned about the scope of their potential liability.

This report is a legal analysis of personal liability issues in land use cases. Part 1 of the report is an overview of liability issues. It generally discusses why planning officials might be sued, the nature of personal versus entity liability, the claims that can be brought against planning officials and the defenses available to them. Part 2 more specifically examines state law claims that can be brought against planning officials and the role of Colorado's Governmental Immunity Act. This part also considers certain remedies that are generally available only against government officials. Part 3 describes federal claims that can be brought against planning officials and the scope of official immunity in such cases. Part 4 then examines how the Colorado Ethics in Government Law applies to planning officials. Part 5 very briefly discusses the relationship between insurance coverage and personal liability. Finally, Part 6 discusses how planning officials can reduce the likelihood of personal liability.

For purposes of this report, a "planning official" is any government officer who has the authority to make a decision regarding the use of land. For the most part, the report focuses on the potential liability of members of planning commissions and governing bodies. In addition, however, the legal analysis of personal liability is relevant to members of a board of adjustment, building or zoning officials and professional planners.

PART 1. OVERVIEW OF LIABILITY ISSUES

1.1 Why Liability is an Issue

Planning officials possess tremendous power to regulate the development and other uses of land. Colorado state law vests all local governments with the authority to engage in land use planning and to regulate land use through zoning and subdivision regulations. In addition, other statutes, such as the Land Use Control Enabling Act and the Planned Unit Development Act, provide further authority for the regulation of land. Apart from statutory authority, home rule governments possess broad powers to regulate land use through a grant of power contained in the Colorado Constitution.

Generally, the exercise of these powers does not result in litigation. However, it is realistic for a planning official to expect to be named in at least one lawsuit while serving the government. Because the regulation of land use limits the ability of a person to use land, with a possible decrease in the value or profitability of the land, land owners often sue the government and its officials when they believe that their property "rights" have been violated. When statutes or other laws require planning officials to follow certain procedures in the exercise of their powers, land owners can challenge a decision that was not made in compliance with those procedures. Even when officials comply with all necessary procedures, the substance of a decision might be challenged as an abuse of discretion or even a violation of constitutional rights. There can be little doubt that the exercise of land use powers is one of the most prolific sources of government litigation.

1.2 Entity Versus Personal Liability

A lawsuit against the government or its officials can be brought in several ways. First, the suit can be brought directly against a city or county. Thus, even though there is always some person or persons who have taken the allegedly illegal action, it is the governmental entity that is sued. Second, the lawsuit can be brought against a group of decision-makers. For example, a plaintiff might sue the planning commission or city council. Third, a plaintiff might sue a planning official in his or her "official" capacity. In fact, this is really just another way of suing the government, and a judgment against the official is a judgment against the government.¹

Finally, a planning official might be sued in the official's "personal" or "individual" capacity. This, of course, is the fear of many planning officials—that they might be held liable for a judgment payable out of their own pockets.

When land owners challenge a land use decision, they often name as many defendants as they can think of. Thus, the suit might be brought against the government, the governing body, the planning commission and the members of the governing body and planning commission. The suit might also name others who had anything to do with the decision, including the planning director, the city or county manager and even the government's legal counsel.

More often than not, when a lawsuit names government officials as defendants, it is not clear whether the officials are being sued in their official or personal capacities. If the suit is one for damages, this can be an important distinction. The defendants will probably have to engage in discovery to determine whether the officials have been sued in their official or personal capacities, or both.

1.3 State Versus Federal Claims

A planning official can be sued for violating either state or federal law, or both. Because land use decisions have an effect on the use of an individual's property, it is extremely common for a federal claim to be joined with a state claim. Although

¹ See *Brandon v. Holt*, 469 U.S. 466 (1985).

a lawsuit alleging tortious conduct by a planning official is not common, it is the type of claim most commonly associated with a claim for damages. Part 2 of this report examines the nature of these tort claims in more detail.

There also are certain claims that are virtually unique to government. These remedies include certiorari and mandamus. A writ of certiorari permits a court to review a decision of a body that exercises quasi-judicial authority or administrative authority that is discretionary in nature. A writ of mandamus allows a court to review the failure of a government official to perform some non-discretionary, ministerial duty. In Colorado, both of these claims are brought pursuant to Rule 106 of the Colorado Rules of Civil Procedure and are referred to as "Rule 106 actions."

As noted, it is common in land use cases to bring a federal claim for relief against planning officials. The federal claim can be based on a federal statute or on the federal constitution. Although a state constitutional claim can also be brought against planning officials, these claims are often merged into the federal claim and courts rarely distinguish between the two. Part 3 of the report describes the types of federal claims that might be brought against planning officials.

1.4 State Versus Federal Forum

A land use plaintiff often has a choice between filing a lawsuit in state court or federal court. Whenever the plaintiff raises a federal claim, the lawsuit can be filed in federal court and the plaintiff can join all of the state claims that arise out of the same events giving rise to the federal claim.² Even when a federal claim is not present, a plaintiff can file a lawsuit in federal court if the plaintiff is not a Colorado resident. This is referred to as diversity jurisdiction.

A plaintiff can also file a lawsuit in state court whether or not the plaintiff has a state claim for relief. Thus, the plaintiff can file in state court if there are only state claims, only federal claims,³ or a combination of state and federal claims.

This brief overview of liability issues is intended as a preview of issues to be dealt with in more detail in the report. The next area to be considered is the types of state claims for relief that can be brought against planning officials and the defenses available to officials.

PART 2. STATE LAW CLAIMS AGAINST PLANNING OFFICIALS AND THE COLORADO GOVERNMENTAL IMMUNITY ACT

2.1 Overview of State Law Claims

There are generally five types of state law claims that might be brought against planning officials. The first two types, contract claims and tort claims are based upon the common law—that is, judge-made law. The third type is statutory claims.

² 28 U.S.C. § 136.

³ See *Maine v. Thiboutot*, 448 U.S. 1 (1980).

Colorado has a number of statutes that are similar in kind to federal civil rights statutes and which might be the basis for a claim against a planning official. The fourth type of claim is a declaratory judgment action under Rule 57 of the Colorado Rules of Civil Procedure. A declaratory judgment action simply seeks a declaration as to the rights of a person, usually based on state constitutional law, and often is joined with a request for injunctive relief. The fifth type of claim is a Rule 106 claim. Rule 106 embodies those forms of relief generally available only against the government. The two most common forms are mandamus and certiorari.

The two types of claims most likely to result in financial liability for a planning official are tort claims and mandamus. Thus, this report focuses on those two types, although it also discusses certiorari since it is so commonly used against planning officials. After discussing these types of claims, this part of the report examines the Colorado Governmental Immunity Act in detail.

2.2 Tort Claims

Although state statutes may regulate tort litigation,⁴ a tort claim is based on the common law—that is, law made by judges in the resolution of litigation. A tort, generally speaking, is a wrong. More specifically, for legal purposes, a tort has been defined as an act or omission that unlawfully violates a person's legal rights through injury to the person or his property and for which the law provides a remedy in damages.⁵ Torts range from the simple trespass to property to sophisticated claims for economic injuries. The most common type of tort is a negligence claim in which it is alleged that the defendant violated a duty to avoid an unreasonable risk of injury to the plaintiff and thereby caused the plaintiff actual injury.

2.2.1 Examples of Tort Claims

While it is certainly possible to conjure up tort claims that might be brought against planning officials, the truth is that such claims are not very common, especially given the provisions of the Colorado Governmental Immunity Act. An example of a possible tort claim is an action by neighbors of a subdivision who are injured by storm drainage from a drainage system approved by and dedicated to the local government.⁶ Homeowners in a subdivision might also bring suit if they believe that the government approved plans that contributed to an injury to the owners.⁷

⁴ See, e.g., Colo. Rev. Stat. § 13-21-102 (limiting punitive damages).

⁵ Burdick, Torts 12 (3d ed. 1913), cited in Prosser, Law of Torts 1 n. 2 (1971).

⁶ See, e.g., *Docheff v. City of Broomfield*, 623 P.2d 69 (Colo. App. 1980). See also *Burnsworth v. Adams County*, 826 P.2d 368 (Colo. App. 1991) (sovereign immunity waived for government storm drainage system).

⁷ See Shultz & Kelley, "Subdivision Improvement Requirements & Guarantees: A Primer," 28 Wash.U. J. Urb. & Cont. L. 3, 77 (1985).

Another type of claim might occur if a developer relies upon a representation by a planning official that his intended use of a piece of property is lawful, only to later discover that the use is not permitted. If the developer reasonably relied to his detriment on the representation of the official, he could sue in estoppel.⁸ In both of these cases, however, it is more likely that the plaintiff will sue the local government than the local planning officials.

2.2.2 Damages in Tort Cases

A tort plaintiff is entitled to damages for all injury that is factually and proximately caused by the tortious conduct. In addition, tort claims, unlike contract claims, permit plaintiffs to obtain punitive damages when the defendant's conduct is willful and wanton. "Willful and wanton" conduct occurs when a defendant purposely engages in the conduct and it is practically certain that the conduct will create injury to the plaintiff.⁹ It is similar to a reckless disregard for the rights of the plaintiff. The availability of punitive damages under these circumstances is important because, as will be discussed further below, a planning official loses the protections of the Colorado Governmental Immunity Act when the official's conduct is willful and wanton.

2.2.3 Attorneys' Fees in Tort Cases

As a general rule, successful tort plaintiffs are not entitled to attorneys' fees.¹⁰ Thus, absent certain exceptional circumstances, the losing planning official will not be required to pay the tort plaintiff's attorneys' fees.¹¹

2.3 Mandamus

Mandamus is a special type of remedy generally available only against the government. The purpose of a mandamus action is to compel an official to perform a clear legal duty that is owed to the plaintiff.¹² Thus, mandamus is only available to compel performance of a non-discretionary duty and the plaintiff must have a clear legal right to the performance of the duty.

Rule 106(a)(2) of the Colorado Rules of Civil Procedure authorizes mandamus actions without expressly using the name. The rule states that it applies to any action where the relief sought is to compel an "act which the law specially enjoins as a duty

⁸ See, e.g., *Jones v. City of Aurora*, 772 P.2d 645 (Colo. App. 1988) (damages granted in estoppel action). But see *Lehman v. City of Louisville*, 857 P.2d 455 (Colo. App. 1992) (sovereign immunity bars damages in estoppel case; distinguishes Jones where immunity issue was not raised).

⁹ Colo. Rev. Stat. § 13-21-102.

¹⁰ See *Hart & Trinen v. Surplus Electronics Corp.*, 712 P.2d 491 (Colo. App. 1985).

¹¹ See Colo. Rev. Stat. § 13-17-102.

¹² See *Gramiger v. Crowley*, 660 P.2d 1279 (Colo. 1983).

resulting from an office, trust, or station."¹³

2.3.1 Examples of Mandamus Claims

The most common example of a mandamus action involves the issuance of a building permit. In most jurisdictions, a building permit must issue if the permit applicant's intended use of property is lawful under local zoning regulations and construction plans comply with the applicable building code.¹⁴ If these two criteria are met, then the building official has a clear legal duty to issue the permit to the applicant. If the official refuses to issue the permit, then the applicant will have an action in mandamus.

A second type of mandamus claim involves final subdivision plat approval. Although approval of a preliminary plat involves the exercise of discretion and is generally considered a quasi-judicial function, approval of a final plat is often deemed to be a ministerial function.¹⁵ Similarly, if a state or local law sets out time limits within which an official is supposed to act, a land use applicant might bring a mandamus action to compel the official to act.

2.3.2 Damages, Attorneys' Fees and Mandamus Claims

Rule 106(a)(2) provides that in addition to obtaining performance of the sought for action, any "judgment shall include any damages sustained." Thus, a successful mandamus plaintiff is entitled to damages if he or she suffers injury as a result of the official's refusal to act. Presently, Colorado law is unsettled as to whether the Governmental Immunity Act applies to damages that are part of a mandamus claim.¹⁶ At least three Supreme Court justices have said that the Governmental Immunity Act is not applicable to such claims for damages.¹⁷ As with tort claims, the successful mandamus plaintiff is not entitled to an award of attorneys' fees.

2.4 Certiorari

Rule 106(a)(4) of the Colorado Rules of Civil Procedure authorizes what is traditionally known as a certiorari action. Certiorari is available to review the decision of "any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions."¹⁸ The certiorari plaintiff must demonstrate that the governmental body or officer has exceeded their authority or abused their

¹³ C.R.C.P. Rule 106(a)(2).

¹⁴ See, e.g., *Mahnke v. Coughenour*, 458 P.2d 747 (Colo. 1969).

¹⁵ See, e.g., *Reynolds v. City Council*, 680 P.2d 1350 (Colo. App. 1984) (court treats process as quasi-judicial, but says duty to approve final plat is mandatory).

¹⁶ See *Sherman v. City of Colorado Springs Planning Commission*, 763 P.2d 292 (Colo. 1988).

¹⁷ *Sherman*, 763 P.2d at 298.

¹⁸ C.R.C.P. Rule 106(a)(4).

discretion and that there is no other plain and speedy remedy available. In addition, the plaintiff must bring a certiorari claim within thirty days from the time of the final decision under review.

2.4.1 Examples of Certiorari Claims

The certiorari remedy is extremely important in Colorado because the Colorado Supreme Court has determined that most site-specific land use decisions, including rezonings, are quasi-judicial in character; thus, certiorari is the exclusive method for challenging those land use decisions.¹⁹ Section 3.5.4 below discusses this issue in greater detail. If a planning official is sued, it is very likely that the suit will be a certiorari proceeding under Rule 106.

Technically, certiorari must be brought against the governmental body or official that made the decision under review. Thus, a plaintiff who challenges a city's rezoning decision must sue the city's governing body—the city council.²⁰ It is common, however, for plaintiffs to name each council person individually. On the other hand, when an individual officer makes a quasi-judicial decision on a land use matter, that official will be the person subject to suit and not the government. Therefore, a land use hearing officer should be named in a certiorari suit challenging the officer's decision.

2.4.2 Damages, Attorneys' Fees and Certiorari Claims

Unlike mandamus, the certiorari rule does not provide for an award of damages resulting from the official's misconduct. A successful plaintiff will only obtain a reversal of the decision or a remand for further proceedings. Thus, if a plaintiff wants damages in addition to certiorari relief, the plaintiff will likely join state and federal constitutional claims with the certiorari claim. Absent special circumstances, the successful certiorari plaintiff is not entitled to an award of attorneys' fees.

2.5 Colorado Governmental Immunity Act

A significant source of comfort for planning officials is the Colorado Governmental Immunity Act.²¹ In essence, this act bars suits against the government and its employees and officials that lie or could lie in tort unless the suit is brought within one or more of six enumerated exceptions. Except as noted below, the immunity of a planning official is equivalent to the immunity of the government for which the officer serves.

Prior to adoption of the Governmental Immunity Act, immunity was a judicial creation in Colorado. The Supreme Court abrogated the doctrine, however, and provided that it would exist in the state only to the extent provided by statute. The

¹⁹ *Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1975).

²⁰ See *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670 (Colo. 1982).

²¹ Colo. Rev. Stat. §§ 24-10-101 to -120.

legislature stepped into the void and substantially filled it with the Governmental Immunity Act.

It is not the purpose of this report to explain the Governmental Immunity Act in detail, still it is important that planning officials have a basic understanding of how the law works. It safely can be said that the Governmental Immunity Act bars the vast majority of tort claims that could otherwise be brought against planning officials.

2.5.1 Types of Claims Barred

The Governmental Immunity Act bars any claim lying in tort, or which could lie in tort, "regardless of whether that may be the type of action or the form of relief chosen by the claimant"²² but then provides six specific exceptions. The Colorado Supreme Court has read this provision broadly and determined that many claims are barred even though the plaintiff attempted to bring the claim under contract, property or equity law principles. Thus, for example, the court has barred a replevin action, which sounds in property law, treating it as a tort claim.²³ In addition, the court has barred an alleged inverse condemnation claim on the grounds that it was a negligence action.²⁴

2.5.2 Types of Claims Not Barred

There are a number of non-tort claims that are not barred by the Governmental Immunity Act. Contract claims and Rule 106 claims are not barred, although claims for damages as part of a mandamus action might be barred.²⁵ Declaratory judgment actions based on state constitutional rights are not barred. This is clearly so when the plaintiff seeks only declaratory and injunctive relief. Inverse condemnation claims, which result in an award of just compensation, are not barred.²⁶ Similarly, the Governmental Immunity Act does not bar **any** federal claim for relief.²⁷

Additionally, the Governmental Immunity Act specifies six areas in which sovereign immunity is waived. For the most part, these exceptions have little to do with the actions of planning officials. The areas in which immunity is waived and a tort claim against planning officials might be possible is the dangerous condition of a public highway or road, a public facility located in a park, or a public water, gas,

²² Colo. Rev. Stat. §§ 24-10-106 & -118.

²³ *City & County of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759 (Colo. 1992).

²⁴ *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993) (negligence action for leakage from water storage tanks).

²⁵ See *Sherman v. City of Colorado Springs Planning Comm.*, 763 P.2d 292 (Colo. 1988).

²⁶ See *Hayden v. Board of County Commissioners*, 580 P.2d 830 (Colo. App. 1978).

²⁷ Colo. Rev. Stat. § 24-10-106(1).

sanitation, electrical or power facility.²⁸ In each area, it can be alleged that approval of plans for such public improvements by planning officials can be the basis for liability. Even here, however, there may be other common law immunities that will protect the government and the planning officials involved in such decisions. More importantly, even when sovereign immunity is waived, the government, under normal conditions, will have a duty to defend and indemnify its officers and employees.

Most importantly, however, a planning official will not be protected under the Act if:

1. the official's conduct does not occur during the performance of his or her duties; or
2. the official's conduct is not within the scope of the official's employment; or
3. the official acted willfully and wantonly.²⁹

Willful and wanton conduct occurs when the planning official acts despite the practical certainty that the plaintiff's injury will result. Such conduct borders on action that is intended to create injury. Under these circumstances, a planning official loses the Act's protection.

2.5.3 Persons Protected Under the Act

The Governmental Immunity Act provides protection to both elected and appointed officials and all government employees.³⁰ This is true whether or not the officials are compensated. In addition, planning officials for any type of governmental entity, including joint planning authorities, are protected under the Act.³¹

2.5.4 Other Limitations on Plaintiffs

In addition to barring most tort actions against the government and its employees and officers, the Governmental Immunity Act imposes other limitations upon tort plaintiffs who would sue the government. First, in addition to filing a lawsuit within the applicable statute of limitations, a plaintiff must file a notice of

²⁸ *Id.* § 24-10-106(1)(d) & (e) See, e.g., *Denver Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993) (water storage tanks); *Burnsworth v. Adams County*, 826 P.2d 368 (Colo. 1991) (storm drainage improvements).

²⁹ *Id.* § 24-10-118(1).

³⁰ *Id.* § 24-10-103(4).

³¹ *Id.* § 24-10-103(5).

claim within 180 days from the date that the plaintiff discovered his or her injury.³² Second, even where immunity is waived, the Act imposes maximum limits on judgments that may be awarded of \$150,000 per plaintiff and \$600,000 per occurrence regardless of the number of plaintiffs.³³ Third, punitive damages may not be awarded in those areas where immunity is waived.³⁴

2.5.5 Other Protection for Planning Officials

Beyond barring most tort claims that could be brought against planning officials, the Act offers planning officials other protection. In those areas where immunity is waived, the government has the duty to defend, to pay the costs of defense, including attorneys' fees, and to pay any judgment entered against a planning official if the following conditions are met:

1. the official's wrongful conduct occurs during the performance of his or her duties; and
2. the official's conduct is within the scope of his or her employment; and
3. the official's conduct is not willful and wanton; and
4. the official does not willfully and knowingly fail to notify the government within a reasonable time that his or her conduct might result in litigation; and
5. the official notifies the government of the litigation within 15 days after commencement of the action when the government is not a co-defendant in the action; and
6. the official does not compromise or settle the litigation without the government's consent.³⁵

In those areas where the Governmental Immunity Act waives immunity, a planning official may still avoid liability based on common law doctrines. For example, a plaintiff will have to prove that the planning official had a duty to avoid a risk of injury to the plaintiff. Under the so-called public duty doctrine, public

³² *Id.* § 24-10-109(1).

³³ *Id.* § 24-10-114(1).

³⁴ *Id.* § 24-10-114(4).

³⁵ *Id.* § 24-10-110.

officials often owe their duties to the public at large and not to any specific individual.³⁶ Additionally, the common law provides immunity when an official is performing a discretionary function.³⁷ This immunity is generally lost only if the official acts willfully or maliciously.

2.6 Summary of State Law Claims

Most state claims that can be brought against planning officials will not result in personal financial liability. The Colorado Governmental Immunity Act bars most tort claims, and there is the possibility that it also bars damage claims that are part of mandamus actions. Even when the Governmental Immunity Act waives immunity, other defenses are available to the planning official. If the planning official is ultimately held liable, the government has the duty to pay the costs of defense and any judgment entered against the official as long as the official has complied with the Act's requirements.

PART 3. FEDERAL LAW CLAIMS AGAINST PLANNING OFFICIALS

3.1 Overview of Federal Law Claims

Federal law claims that can be brought against planning officials are of two major types: statutory claims and constitutional claims. This distinction is a bit misleading since federal constitutional claims are usually brought pursuant to 42 U.S.C. § 1983 (Section 1983), itself a federal statute. Often without realizing it, plaintiffs who challenge local land use decisions on constitutional grounds are relying on Section 1983.

Because the primary focus of this report is on the potential liability of planning officials for money damages, it only broadly examines the specific types of federal claims that can be brought against planning officials, concentrating more on the defenses available to local officials and the likelihood of damages. It also discusses the government's duty to indemnify an official who has been held personally liable for damages.

3.2 Entity Versus Personal Liability

Before examining the various types of federal statutory and constitutional claims that can be brought against planning officials, it is important to keep in mind the distinction between entity and personal (or individual) liability. The several federal statutes that can be the basis for a claim against planning officials often prohibit "persons" from violating their provisions. "Persons" not only includes natural persons, it also includes corporations, including municipal corporations. Thus, for example, the federal Fair Housing Act, which makes it unlawful to discriminate against people on the basis of race, ethnic or national background, religion, gender

³⁶ *Id.* § 24-10-106.5.

³⁷ See *Trimble v. City and County of Denver*, 697 P.2d 716 (Colo. 1985).

and handicap status, can be applied to individuals who make decisions that violate the act as well as the government for whom the individuals serve.³⁸

Any official who violates federal law can be held liable in his or her personal capacity even though the official is performing the official's job and acting within the scope of the official's duties. It is not a defense under federal law that an official was "only doing his or her job."

On the other hand, the government for which the official works will often be liable only when the official's conduct is attributable to the government because it represents the government's official policy. The "official policy" doctrine is especially important in Section 1983 litigation where the United States Supreme Court has rejected the idea that the government can be liable simply because its officer or employee has violated someone's constitutional rights.³⁹

Whenever a plaintiff files a suit for damages against a planning official, it is important to know whether the suit is against the official in his or her official capacity, personal capacity or both. A judgment against an official in his or her official capacity is really a judgment against the government and not one for which the official can be held personally liable.⁴⁰ On the other hand, a judgment against an official in the official's personal capacity is one for which the official is being held personally liable.⁴¹

The capacity issue is often unclear because a plaintiff will sue the government by name as well as its officials. Often this technique is the result of litigation "overkill." Other times, however, the plaintiff may very well intend to sue the officials in their personal capacities. This is a common "scare" tactic intended to induce a quicker settlement with the plaintiff.

Because many plaintiffs often do not understand the distinction between official and personal capacity lawsuits, or wish to keep the issue murky, a defendant might have to engage in some discovery to determine whether a suit against a planning official is in his or her official or personal capacity.⁴² A clearly worded interrogatory on this point might be in order. In addition, when the government and its officials are sued, a motion to dismiss the individuals might be a way to determine the capacity in which they have been sued.

It is important to get this issue resolved quickly since the official will have

³⁸ 42 U.S.C. § 3602(d).

³⁹ *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

⁴⁰ *Brandon v. Holt*, 469 U.S. 466 (1985).

⁴¹ *Kentucky v. Graham*, 473 U.S. 159 (1985).

⁴² *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

certain defenses if the suit is in his or personal capacity that are not available if the suit is in the official's official capacity. See the discussion on the official immunity doctrine in Section 3.5 below.

3.3 Federal Statutory Claims

There are a number of federal statutes that can form the basis for a claim against local planning officials.⁴³ Often, a plaintiff relies on these statutes because the burden of proof is different from what would be required to prove a constitutional violation, they clearly provide for damages and they provide for attorneys' fees for the successful plaintiff. The following federal statutes are most likely to be relied upon by a land use plaintiff.

3.3.1 Federal Fair Housing Act

The federal Fair Housing Act prohibits discrimination in housing based upon race, ethnic or national background, religion, gender or handicap status.⁴⁴ Although the Act was most concerned with discriminatory practices in the sale and rental of real property, it has often been applied against local governments that have made land use decisions that prohibited the development of low-income housing.⁴⁵ Because such decisions can have the effect of discriminating against racial minorities, the decisions might violate the Fair Housing Act. Officials who make challenged decisions can be sued personally for violating the law.

In 1988, Congress amended the Fair Housing Act.⁴⁶ Among other things, the amendments extended coverage to handicapped persons. As a result, land use decisions that have the effect of discriminating against the handicapped can be challenged under the law. The most common type of suit against the government under this part of the Fair Housing Act occurs when a local government's land use decision interferes with the ability to establish a group home for mentally retarded or other handicapped persons.⁴⁷

The Fair Housing Act provides that lawsuits may be brought by the individual victim of discrimination or the federal government.⁴⁸ It is not necessary to prove

⁴³ See *Maine v. Thiboutot*, 448 U.S. 1 (1980) (listing statutes).

⁴⁴ 42 U.S.C. §§ 3601-3631.

⁴⁵ See, e.g., *United States v. City of Black Jack*, 508 F.2d 1170 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

⁴⁶ See Kushner, "The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing," 42 Vand. L. Rev. 1050 (1989).

⁴⁷ See, e.g., *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396 (D. Minn. 1990), aff'd, 923 F.2d 91 (8th Cir. 1991).

⁴⁸ 42 U.S.C. §§ 3610 & 3613.

that a local government intentionally discriminated against a protected group, only that its decision had the effect of discriminating and that the decision lacked adequate justification.⁴⁹ The act provides for damages and attorneys' fees for the successful plaintiff.⁵⁰

3.3.2 Federal Antitrust Laws

Federal laws make it illegal for persons to monopolize a market, to conspire to monopolize a market or to enter into any agreement that constitutes a restraint of trade.⁵¹ The argument can be made that land use decisions that deny a person the ability to develop land are really disguised efforts to permit others to monopolize the development market in a given area or represent agreements in restraint of trade. This argument has the greatest chance of success when it can be shown that local officials have conspired with private parties to deny a competing developer's land use application.⁵²

Several years ago, federal antitrust laws were frequently used by plaintiffs in land use cases because they offered treble damages and attorneys' fees for the successful plaintiff. Recent developments have greatly reduced the likelihood that a local government official will have to contend with federal antitrust litigation. First, Congress amended the law to reduce the availability of damages against local governments.⁵³ Second, the United States Supreme Court has held that local government action is exempt from federal antitrust laws when there is a clearly expressed intent found in state law to allow local governments to displace competition.⁵⁴ As a result, federal courts have dismissed most of the antitrust suits brought against local governments.

3.3.3 Federal Racketeer Influenced and Corrupt Practices Act

The federal Racketeer Influenced and Corrupt Practices Act (RICO) is a federal statute that has been extended to the limits of its broad language.⁵⁵ As its name

⁴⁹ See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2nd Cir.), *aff'd in part*, 488 U.S. 15 (1988).

⁵⁰ 42 U.S.C. § 3613.

⁵¹ 15 U.S.C. §§ 1 & 2.

⁵² This could occur where a government induces a business to come to town and then promises not to approve competing development applications. See, e.g., *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982) (subsequent history omitted).

⁵³ 15 U.S.C. §§ 34-36.

⁵⁴ See, e.g., *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

⁵⁵ 18 U.S.C. §§ 1961-68.

implies, it was intended to be a tool against organized criminal activity. Because of its breadth, plaintiffs have relied upon the law in numerous commercial litigation cases, and it has been applied to government wrongdoing.

RICO allows a person who has been injured by a pattern of corrupt practices to sue for treble damages.⁵⁶ This part of RICO is usually referred to as "civil RICO" in contrast to the criminal provisions of RICO. Thus, a plaintiff who alleges that he has suffered economic injury at the hands of a person who engaged in a pattern of corrupt practices is entitled to bring a claim for damages. In the government context, and generally speaking, if a plaintiff can show that local government officials caused him or her economic injury and committed two or more acts of racketeering, then a civil RICO claim is available to the plaintiff.⁵⁷

It is not likely that a planning official will have to deal with a civil RICO claim, but the possibility exists. More often than not, it is another "scare" tactic used by plaintiffs who have knowledge of the statute based upon its application to commercial litigation.

3.4 Federal Constitutional Claims

It is far more likely that a planning official will have to contend with a claim for damages for a federal constitutional violation than for a federal statutory violation. In the vast majority of cases, the constitutional claim is brought pursuant to 42 U.S.C. § 1983 (Section 1983), a federal statute that entitles a plaintiff to bring a lawsuit for damages or other relief for a violation of federally guaranteed rights.⁵⁸ Thus, it is important for a planning official to understand both the types of constitutional rights that can be violated by land use decisions and the scope of the Section 1983 remedy. Section 1983 does not create substantive rights, it only creates a right of action and remedy for the violation of other federal laws, including the federal constitution.

3.4.1 Fourteenth Amendment

The vast majority of federal constitutional claims that are brought against a state or local government are based upon the fourteenth amendment to the United States

⁵⁶ *Id.* § 1964(c).

⁵⁷ See, e.g., *Franchesi v. City of Huntington Beach*, 988 F.2d 118 (9th Cir. 1993).

⁵⁸ Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Constitution. The amendment prohibits states, including their political subdivisions, from depriving "any person of life, liberty, or property, without due process of law; [and from denying] to any person within its jurisdiction the equal protection of the laws." The United States Supreme Court has interpreted the due process clause as incorporating nearly all of the fundamental freedoms found in the first ten amendments, which by their terms would otherwise only apply to the federal government. Thus, for example, state and local governments cannot interfere with the freedom of speech or religion any more than the federal government can.

As a result of the fourteenth amendment, land use decisions can be challenged on a number of constitutional grounds. There are five general types of fourteenth amendment claims: substantive due process, procedural due process, equal protection, takings and other incorporated rights. A substantive due process claim is based on an allegation that the substance of the government's decision is arbitrary and without any rational basis.⁵⁹ A procedural due process claim is generally based upon an allegation that a land owner has been deprived of property without adequate notice and an opportunity to be heard.⁶⁰ It might also allege a lack of fundamental fairness during the government's consideration of a land owner's application or petition, including hearings on the application or petition.

Although procedural due process is not applicable to legislative decisions, it does apply to decisions that are part of an adjudicatory process. Thus, since Colorado considers most site-specific land use decisions to be quasi-judicial acts,⁶¹ procedural due process requirements are applicable. Section 3.5.4 deals with this issue in greater detail.

An equal protection claim is based upon an allegation that the plaintiff, as a member of a class of persons, has been treated differently from other persons without any rational basis for the distinction.⁶² Unless the plaintiff can show that he or she is being discriminated against based upon membership in a group that deserves special protection, such as a minority racial group, the equal protection challenge is most likely to fail.

Takings claims are based upon the just compensation clause of the fifth amendment which has been incorporated into the fourteenth amendment. The just compensation clause prohibits the taking of private property for public purpose without the payment of just compensation. The typical takings claim in a land use

⁵⁹ See Ziegler, Rathkopf's *The Law of Zoning and Planning* § 2.02[2] at 2-6 to 2-7 (1993).

⁶⁰ *Id.* § 2.02[2] at 2-3 to 2-6.

⁶¹ See, e.g., *Buck v. Park*, 839 P.2d 498 (Colo. App. 1992); *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622 (Colo. 1988).

⁶² See Ziegler, *supra* note 59, § 2.02[3] at 2-7 to 2-8.

case is based upon an allegation that the government, through its land use regulations, has denied a property owner all reasonable use of the owner's land.⁶³ Before a federal court will hear a takings claim, a plaintiff usually must seek just compensation from the government that allegedly caused the taking in a state inverse condemnation proceeding.⁶⁴ As a consequence, takings claims are most likely to involve the governmental entity and not its officials. If the takings claim is ripe, however, the claim might be brought against the government and its officials.

First amendment rights also have been incorporated into the fourteenth amendment and can be the basis for a claim against planning officials. Land use decisions that restrict the free exercise of speech or religion are vulnerable to challenge.⁶⁵ For example, if the government denies a rezoning for sexually oriented uses, such as an adult theater or bookstore, the government and its planning officials might be sued for violating the applicant's first amendment rights.⁶⁶ Similarly, sign code decisions are always subject to challenge on first amendment grounds.⁶⁷

3.4.2 Other Constitutional Claims

Other provisions in the federal constitution also can be the basis for a federal claim against planning officials. The Contract Clause prohibits states and their political subdivisions from taking actions that impair the obligation of contract without sufficient justification. A Contracts Clause challenge is most likely to arise when the government takes some action that is deemed to violate a development agreement between the government and a property developer. In the land use context, Contract Clause claims have rarely been successful.⁶⁸

The federal Commerce Clause also might be the basis for a claim in a land use case. The effect of the Commerce Clause is generally to prohibit state or local governments from interfering with interstate commerce. The Commerce Clause has been used, unsuccessfully, to challenge growth management ordinances.⁶⁹ The

⁶³ *Id.* § 2.02[4].

⁶⁴ *Hamilton Bank v. Williamson County Regional Planning Commission*, 473 U.S. 172 (1985).

⁶⁵ See Ziegler, *supra* note 59, § 2.02[5].

⁶⁶ See, e.g., *7250 Corporation v. Board of County Commissioners*, 799 P.2d 917 (Colo. 1990) (upholding adult zoning ordinance).

⁶⁷ See, e.g., *City of Lakewood v. Colfax Unlimited Association*, 634 P.2d 52 (Colo. 1981) (striking sign code).

⁶⁸ See, e.g., *Kaiser Development Co. v. City & County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986) (denying contracts clause claim).

⁶⁹ See, e.g., *Construction Industry Association v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975) (denying commerce clause claim).

clause might also be invoked if a government conditioned development approval upon the developer purchasing products from within the local market.

3.5 The Official Immunity Doctrine

There is a substantial body of law on the extent to which government officials will be held immune from liability despite the fact that they have violated a person's federal statutory or constitutional rights. Although federal statutes do not generally address the issue of individual immunity, the federal courts have borrowed from the immunity doctrine that applies in Section 1983 cases. Thus, this section of the report focuses upon officer immunity under Section 1983. Official immunity is only available to officials of the government and does not apply to the government itself. Moreover, it is applied when an official is sued in his or her personal capacity.

The two major purposes of the official immunity doctrine are to avoid chilling official action based upon a fear of litigation and to prevent interference with the efficient operation of government. The type of immunity accorded an official is based upon the function that the official performs.

⁷⁰ Thus, the United States Supreme Court has created different types of immunity based upon whether the official is performing a legislative, judicial or administrative function.

3.5.1 Legislative Immunity

The Supreme Court has held that officials acting in a legislative capacity have absolute immunity from a Section 1983 lawsuit.⁷¹ This means that as long as the official is acting within the scope of his or her duties, the official cannot be sued for damages or any other type of relief. Since a plaintiff is not entitled to any type of relief against the legislative official because, the plaintiff cannot prevail in the litigation and will not be entitled to attorneys' fees against the official.

3.5.2 Judicial Immunity

Judges are entitled to slightly less immunity than legislators. Although judges cannot be sued for damages when acting within the scope of their duties, they are subject to suits for injunctive and declaratory relief.⁷² Thus, judges might also be liable for the payment of attorneys' fees to a prevailing plaintiff.

3.5.3 Qualified Immunity

For nearly all officials other than legislators and judges, the courts have applied a qualified immunity. Qualified immunity provides that an official will be immune from a suit for damages unless he or she knew or reasonably should have known that

⁷⁰ See, e.g., *Forrester v. White*, 484 U.S. 219 (1988).

⁷¹ See *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

⁷² *Pulliam v. Allen*, 466 U.S. 522 (1984).

the conduct in issue could violate clearly established legal rights.⁷³ This formulation of immunity means that many Section 1983 lawsuits focus on the extent to which a plaintiff's legal rights had been clearly established at the time of the official's conduct.

3.5.4 Characterization of the Official's Action

Because the scope of an official's immunity depends on the type of function that gave rise to litigation, it is important to know how a court will characterize official actions. Many local officials, even those who are members of a governing body, wear a variety of hats. Thus, they can act legislatively, judicially and administratively. This issue is confusing because the characterization of the function is probably a federal law question, yet it is usually state courts that have characterized the nature of various land use decisions.

In Colorado, most site-specific land use decisions are characterized as quasi-judicial decisions. This does not mean that officials are judges when making land use decisions, only that they act more like judges than like legislators. A quasi-judicial action is similar to what many officials for administrative agencies perform; thus, qualified immunity is more applicable to these decisions than is judicial immunity.⁷⁴

Colorado applies a three-part test to determine if a land use decision is a quasi-judicial action:

1. Does a state or local law require notice to the property owner prior to making the decision?
2. Does a state or local law require a public hearing prior to making the decision?
3. Does the decision require the government to apply pre-established criteria to adjudicated facts?⁷⁵

When the answer to all three questions is "yes," the decision is quasi-judicial. Even when the law does not clearly establish the notice or hearing requirement, however, a decision will be quasi-judicial if the court implies a notice and hearing requirement into the decision-making process.⁷⁶ Thus, it is clear that the third factor is really the most important.

Applying the above test, the Colorado Supreme Court has held that a rezoning of property that is not part of a broader rezoning within the community is a quasi-

⁷³ *Anderson v. Creighton*, 483 U.S. 635 (1987).

⁷⁴ See, e.g., *Stone's Auto Mart v. St. Paul*, 721 F. Supp. 206 (D. Minn. 1989).

⁷⁵ *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622 (Colo. 1988).

⁷⁶ *Id.*

judicial act rather than a legislative one.⁷⁷ Decisions regarding subdivisions,⁷⁸ special use permits⁷⁹ and planned unit developments⁸⁰ are also quasi-judicial decisions.

On the other hand, decisions that establish broad policy applicable to a variety of cases will be characterized as legislative decisions.⁸¹ Thus, an amendment to a government's zoning regulations is characterized as a legislative action. Similarly, a large-scale rezoning of a number of properties within a jurisdiction will be characterized as a legislative action.⁸² In these cases, legislative immunity should apply to planning officials.

A third category of land use decisions is more clearly administrative in nature. These decisions are usually characterized by a minimum of discretion. For example, the decision whether to issue a building permit is administrative. Likewise, approval of a final subdivision plat might be characterized as administrative or ministerial. In both cases, qualified immunity should apply to the officials making the decisions.⁸³

3.6 Damages and Attorneys' Fees in Federal Claim Cases

3.6.1 Damages

The federal statutes that can be the basis for a claim against planning officials provide specific remedies that usually include compensation for actual injury, the possibility of punitive damages and attorneys' fees for successful plaintiffs. The size of a judgment against a planning official will be based upon the extent of the plaintiff's injuries. The injuries can include actual economic loss as well as pain and suffering.

In Section 1983 land use cases, the damage that a plaintiff suffers is usually of two types: economic loss occasioned by the denial of a land use application and a violation of the plaintiff's constitutional rights. Except for takings claims, economic loss is usually lost profits from the inability to obtain a return on investment as quickly as had been desired. In addition to damages for economic loss and other injury, plaintiffs might seek damages specifically for the violation of their constitutional rights. For example, a plaintiff might argue that he or she is entitled

⁷⁷ *Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1975).

⁷⁸ *Reynolds v. City of Longmont*, 670 P.2d 1350 (Col. App. 1984).

⁷⁹ *Norby v. City of Boulder*, 577 P.2d 277 (Colo. 1978).

⁸⁰ *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622 (Colo. 1988).

⁸¹ See *Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1975).

⁸² *Jafay v. Board of County Commissioners*, 848 P.2d 892 (Colo. 1993).

⁸³ See *supra* note 74 and accompanying text.

to be compensated specifically for the value of the loss of procedural due process rights or first amendment rights. The United States Supreme Court has held that a plaintiff is not entitled to damages for the violation of a constitutional right unless the plaintiff can show actual injury.⁸⁴ This is an important holding because it means that plaintiffs cannot obtain large damage awards for the violation of constitutional rights unless they demonstrate actual injury.

3.6.2 Attorneys' Fees

Successful plaintiffs who sue under federal civil rights statutes, including Section 1983 are entitled to attorneys' fees.⁸⁵ There is a substantial body of law on attorneys' fees. The normal rule is that a plaintiff must "prevail" to be entitled to attorneys' fees. The Supreme Court has read the right to attorneys' fees liberally, and it is only necessary that a plaintiff succeed on a significant issue in the litigation that achieves some of the benefit that the plaintiff sought in bringing the suit.⁸⁶ Attorneys' fees can be substantial, even in cases where the plaintiff does not obtain significant damages.⁸⁷ In addition, a plaintiff is entitled to attorneys' fees even if the plaintiff does not obtain a judicial judgment so long as the plaintiff obtains some remedial action from the defendant.⁸⁸ Thus, if the defendant in a Section 1983 settles the lawsuit and provides the plaintiff some relief, the plaintiff will be able to seek attorneys' fees from the defendant. It is, therefore, necessary to address the attorneys' fee issue in the settlement agreement.

When a plaintiff prevails against a government official in his or personal capacity, the fee award should run against the official and not the government.⁸⁹ However, if the official is held immune under the official immunity doctrine, then the plaintiff is not entitled to attorneys' fees even though the defendant might have violated the plaintiff's federally protected rights. In addition, it has been suggested that a plaintiff who only obtains injunctive relief against the defendant official will be entitled to attorneys' fees only if the official acted with subjective bad faith.⁹⁰

In those cases in which the government defends the claim against the official,

⁸⁴ See *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986).

⁸⁵ 42 U.S.C. § 1988. See 2 Schwartz & Kirklin, *Section 1983 Litigation* (2nd ed. 1991) (excellent treatise on attorneys' fees issues).

⁸⁶ *Texas State Teacher's Association v. Garland Independent School District*, 489 U.S. 782 (1989).

⁸⁷ See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (\$245,000 in attorneys' fees and \$33,000 in damages).

⁸⁸ See *Hewitt v. Helms*, 482 U.S. 755 (1987).

⁸⁹ *Kentucky v. Graham*, 473 U.S. 159 (1985).

⁹⁰ See *Hutto v. Finney*, 437 U.S. 678 (1978).

the government or its insurance carrier can be held directly liable for attorneys' fees. This avoids the need for the official first to pay the fees and then to be indemnified by the government. On the other hand, some state indemnification statutes have been narrowly construed so that the government was not liable for attorneys' fees assessed against an official personally.⁹¹

3.7 Federal Claims and the Governmental Immunity Act

The Colorado Governmental Immunity Act provides that it is applicable to claims under federal law. Section 24-10-119 provides:

The provisions of this article shall apply to any action against a public entity or a public employee in any court of this state having jurisdiction over any claim brought pursuant to any federal law, if such action lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant.

The apparent intent of this section is that every limitation on the right of a person to sue the government on a state law claim also will apply to a federal claim. This section also appears to apply to federal claims the requirement that employees of the government notify it of potential claims and actual litigation. Finally, the obligation of the government to defend a lawsuit and to pay damages and attorneys' fees on behalf of its officers and employees should apply to federal claims.

3.7.1 Limitations on Plaintiffs' Claims

To the extent that the section limits the rights of federal law claimants, it is preempted by federal law and unenforceable. The Supreme Court has held that the immunity that a government might have in state court for state claims is not applicable to a Section 1983 claims brought in state courts.⁹² Such immunity is contrary to the purpose of the federal civil rights statutes. Thus, a planning official should not expect to be immune from any suit brought under federal law based on the Governmental Immunity Act. In addition, the Supreme Court has held that state notice of claim statutes are inapplicable to federal civil rights claims brought in state court.⁹³ There is no doubt that the Governmental Immunity Act's limitation on damages also are inapplicable to federal claims.

3.7.2 Protection Available to Official

The provisions of section 24-10-119 that are enforceable are those that apply to the government official who is the subject of litigation. Thus, a planning official is entitled to be defended by the government against a federal claim and to have the government pay any damage award against the official, so long as the official's conduct was not willful and wanton and so long as the official otherwise complies

⁹¹ See *Hill v. Longini*, 767 F.2d 332 (7th Cir. 1985); 2 Schwartz & Kirklin, *supra* note 85, at 374.

⁹² *Howlett v. Rose*, 496 U.S. 1356 (1990).

⁹³ *Felder v. Casey*, 487 U.S. 131 (1988).

with the Governmental Immunity Act's requirements.

As noted above, attorneys' fees awarded to a plaintiff who succeeds on a federal claim can be substantial. Although the Government Immunity Act provides that the government, under normal circumstances, must pay the official's attorneys' fees, it is not clear whether the government must pay attorneys' fees awarded to the successful plaintiff when the official is otherwise subject to the Act's protections.⁹⁴

It also is not clear whether the government is obligated to pay punitive damages that are awarded to a successful plaintiff. For a state-law claim, although the government is not required to pay punitive damages awarded against an official, it may do so.⁹⁵ In order for a federal law plaintiff to obtain punitive damages, it will probably be necessary to prove that the defendant acted in a manner that is similar to willful and wanton conduct.⁹⁶ Thus, since a public official loses the protections of the Governmental Immunity Act for willful and wanton conduct, the government will probably not be required to pay punitive damages awarded against an official on a federal claim, though it may do so in its discretion.

3.8 Summary on Federal Law Claims

It is most likely that if a planning official faces a claim for damages, it will be a constitutional claim brought under Section 1983. Although the Colorado Governmental Immunity Act does not limit such claims, an official may still be immune from suit under the official immunity doctrine. In addition, the Governmental Immunity Act provides that the government must defend the official and pay the costs of defense and any judgment entered against the official so long as the official complies with the Act.

PART 4. THE ROLE OF INSURANCE IN PLANNING OFFICIAL LIABILITY

This part of the report briefly discusses some of the issues concerning the insurance that most local governments carry for the benefit of their employees and officers. Although a number of governments are self-insured, many others are either part of a pooled insurance arrangement, such as the Colorado Intergovernmental Risk Sharing Agency (CIRSA), or obtain insurance through a private insurance company. Insurance that is intended to apply to a government's officers and employees is usually referred to as "errors and omissions" coverage because it applies to litigation based on the "errors" or "omissions" of the officers or employees. Most often, insurance coverage is on a "claims-made" basis. This means that the government and its officers and employees are covered if the claim is made while the coverage is in effect even if the cause of action arose at some other time.

⁹⁴ See Colo. Rev. Stat. § 24-10-110(1.5).

⁹⁵ See Colo. Rev. Stat. § 24-10-118(5).

⁹⁶ See *Smith v. Wade*, 461 U.S. 30 (1983).

4.1 Insurance and the Governmental Immunity Act

The Governmental Immunity Act expressly authorizes local governments to obtain insurance coverage and to pool coverage.⁹⁷ It provides that the purchase of insurance does not constitute a waiver of immunity for acts for which immunity exists under the Act. In addition, if the government purchases insurance coverage in excess of limits on monetary awards, there is no waiver of those limits.

As pointed out in part 2, there are instances where immunity is waived and a planning official might be held personally liable for his or her misconduct. Absent special circumstances, the government will have a duty to pay the judgment entered against the official. In these cases, the government's insurance will usually provide coverage if the carrier has been properly notified of the claim.

On the other hand, if an official has lost the protection of the Governmental Immunity Act because the officer's action was not part of the performance of his or her duties, not within the scope of employment or was willful and wanton, the government has no duty to pay any judgment and it is most likely that insurance will not cover the judgment based upon exclusions in the policy. Similarly, most insurance policies do not cover punitive damages.

4.2 Other Insurance Policy Requirements

Insurance policies have a number of requirements that must be satisfied for coverage to be available. Specifically, the local government must notify the carrier of any incidents that could reasonably be expected to result in liability. In addition, the government must cooperate with the insurance carrier in the investigation of any claim filed against the government and in the handling of litigation. Local officials should be educated on the requirements of the policies that cover them so that they can avoid nullifying coverage.

⁹⁷ Colo. Rev. Stat. § 24-10-115 & -115.5.

PART 5. AVOIDING PERSONAL LIABILITY ON STATE AND FEDERAL CLAIMS

Of course, the best advice to give any planning official is to avoid becoming involved in litigation in the first place. Although this is easier said than done, there are things that planning officials can do to avoid personal liability. This part of the report discusses some obvious and not so obvious ways to avoid personal liability.

5.1 Avoiding Willful and Wanton Conduct

A planning official who is performing his or her duties will virtually always be acting within the scope of employment; thus, the Governmental Immunity Act's protections will generally be lost only if the official acts willfully and wantonly. As noted earlier, this generally means that the official acted despite the practical certainty that the plaintiff's injuries would result. Willful and wanton conduct usually occurs when an official acts out of vengeance or spite and really does have a desire to injure the plaintiff. Consequently, planning officials must avoid becoming angry with land use applicants and the desire "to get" someone. Although land use approval processes can become contentious, officials need to stay above the fray and act professionally.

5.2 Provide Fair Hearings

One of the most common Section 1983 claims is the allegation that a land use applicant was denied procedural due process. Procedural due process requires adequate notice and a fundamentally fair opportunity to be heard. Planning officials must remember that site-specific land use decisions are quasi-judicial acts, not legislative acts. Thus, planning officials are under significant restrictions regarding how they deal with site-specific applications.

The most common ways to violate a land use applicant's rights are to prejudge the application, display bias or to have *ex parte* contacts with opponents of a project. A planning official is required to make a quasi-judicial land use decision based on a record that results from a public hearing. An official who makes up his or her mind prior to the public hearing has violated the applicant's rights. Similarly, if the official has contacts outside of the hearing with the applicant's opponents, the process lacks fundamental fairness unless the official discloses the contacts at the public hearing and gives the applicant the chance to respond to any information that the official gained through the contacts.

These principles are difficult for elected planning officials to accept since they believe that they need to respond to the concerns of their constituents. Those constituents need to be told that land use decisions are different from legislative decisions and that they must bring their concerns to the public hearing or hearings on the application that they oppose.

5.3 Document Everything

Often planning officials have difficulty justifying their actions after the fact because a good record was not kept that supports the decision. A land use decision must be based on supportable facts that relate to the government's conditions for

approval.⁹⁸ If a land use decision is handled administratively, the planning official must keep good files that support the decision that is made. If a land use decision involves a public hearing and a planning official is concerned that the record is not adequate to support a given decision, then the matter can be referred back to the planning commission or staff for further evaluation. Moreover, the government should be prepared to hire experts to provide evidence on a project rather than rely on speculation about a project's effects. Although the temptation often exists, a land use decision cannot be based upon a show of hands at the public hearing.

5.4 Know Your Code

Planning officials are heavily reliant on the government attorney to provide them with quality advice. Whenever an official is unclear about proper procedures to follow or the standards that apply to a project, the official should consult with his or her attorney. A planning official's decision must be based on standards set out in state or local law, otherwise the decision is likely unlawful.⁹⁹ If the local code does not specify standards for approval, then the code itself is probably invalid.¹⁰⁰

Planning officials can only impose conditions on development within the standards set by state and local law.¹⁰¹ If a planning official attempts to impose conditions on a proposed development that are not authorized by law, litigation is likely. In addition, the conditions imposed upon development must be justified by a need to limit the potentially negative impacts of development.¹⁰² Conditions that merely leverage developers into paying for community benefits are subject to both a Rule 106 and constitutional challenge.

Planning officials do possess great power, and the exercise of that power is a frequent basis for litigation. Thus, officials should seek as much training as possible. They should insist on their local attorneys providing such training, or if the attorney does not feel competent in the area, an attorney or other person trained in land use law should be brought in.

5.5 The Inevitability of Litigation

The truth is that no amount of caution and training will avoid every lawsuit. There is always a land use applicant who will challenge a decision simply to try to get a court to second-guess the planning official's decision or to get the government to enter into a favorable settlement with the applicant. The law provides a very low

⁹⁸ See *Bauer v. City of Wheat Ridge*, 513 P.2d 203 (Colo. 1973).

⁹⁹ See *Bauer v. City of Wheat Ridge*, 513 P.2d 203 (Colo. 1973).

¹⁰⁰ See *Sherman v. City of Colorado Springs Planning Commission*, 763 P.2d 292 (Colo. 1988).

¹⁰¹ See *Beaver Meadows v. Board of County Commissioners*, 709 P.2d 928 (Colo. 1985).

¹⁰² *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

threshold that a plaintiff must cross to bring a lawsuit in good faith. Thus, even the best planning officials should expect to have their decisions judicially challenged.

