

Legal Issues in Zoning

Presented by
Carolynne White

City of Lakewood

Community Advisory
Group

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Overview of Topics

- What can zoning do? What can't zoning do?
- Roles of decision-making bodies/entities in zoning
- Types of decisions
 - *ex parte* communications
 - challenges
- Due Process
- Standards
- Vested Rights
 - statutory v. common law
 - site specific development plans
 - "pending ordinance" doctrine
- Special topics
 - group homes
 - billboards
 - family size
 - outdoor patios

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▪ What is zoning?

- Zoning is the organization of rules and regulations that control what is built on the ground, and the corresponding uses that occupy buildings and sites. Zoning determines the form and character of development, such as the size and height of buildings, and also includes provisions to ensure that new development and uses will fit into existing neighborhoods by establishing the rules for compatibility.
- Exercise of police power: health, safety, welfare.
- But . . . zoning is not a right, unless it is a vested right . . . (more on that later)

What can zoning do?



- Identify desired/allowed uses; separate incompatible uses.
- Identify/encourage certain forms; shape physical character; regulate use, bulk, form, design.
- Preserve natural features.
- Promote infill development and mixed-use development.
- Provide an increased level of predictability for residents, developers, staff, and decision makers about how land will be developed.

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What can't zoning do?

- Zoning cannot override a recorded covenant.
- Zoning cannot govern ***behavior***.
- Zoning is not the "architecture police." It cannot and should not be used to ensure that houses are "pretty."



When is a zoning regulation "legal?"

- Courts have generally held that a zoning regulation is legal or valid if it is:
 - reasonable and not arbitrary; and
 - bears a reasonable and substantial relation to the public health, safety, comfort, morals, and general welfare; and
 - if the means employed are reasonably necessary for the accomplishment of its purpose.

Decision-making bodies

- City Council
- Planning Commission
- Board of Adjustment
(a.k.a. Board of Zoning Appeals, Board of Review)
- Zoning Administrator/Planning Director
- Other
 - Landmark or Historic Preservation Board
 - HOA/Architectural Review Board
 - Urban Renewal Authority Board
(Lakewood Reinvestment Authority)



Political Process v. Legal Process



"Would everyone check to see they have an attorney? I seem to have ended up with two."

Types of Decisions

- Legislative
 - Quasi-judicial
 - Administrative
-
- Not a bright-line distinction.
 - Criteria from case law and CRCP 106(a)(4), not statutory.



Legislative Actions

- Public policy relating to matters of permanent or general character.
- Of general application.
- Concerns an area usually general by legislation.
(State Farm v. City of Lakewood, 788 P.2d 808 (Colo. 1990))

Legislative Actions - *continued*

- Generally prospective in nature.
- Usually relates to a matter of public policy.
- No limits on communication with decision makers.

Legislative Actions - *continued*



- May be challenged only by initiative or referendum
 - Initiative – Citizens power to initiate a new law by proposing it for a vote of the people.
 - Referendum – Citizens power to refer a law passed by the legislative body to a vote of the people.

Legislative Actions - *continued*



- Governing law
 - Colorado Constitution – Article V, Section 1
 - Colorado State Statutes – C.R.S. 31-11-101
 - Lakewood City Charter – Article XIII
- Powers of initiative and referendum liberally construed, and any governmental action that has the effect of curtailing the people's fundamental right to legislate is viewed with close scrutiny.
McKee v. City of Louisville, 616 P.2d 969 (Colo. 1980).

Quasi-judicial Decisions

- Courts look to three factors:
 - State or local law requiring notice to the community.
 - State or local law requiring public hearing following notice, and opportunity for citizens to be heard and present evidence.
 - State or local law requiring the body to make a determination by applying facts of a specific case to certain criteria established by law.

Quasi-judicial Actions - *continued*

- Generally involves determination of rights, duties, or obligations of specific individuals by applying existing legal standards to facts developed at a hearing conducted for the purpose of resolving the particular interests in question.
- No "litmus test" for identifying a quasi-judicial action (*Cherry Hills Resort Dev. Colo. V. City of Cherry Hills Village, 757 P.2d 622 (Colo. 1988)*).
- Generally reactionary, not prospective, and apply to specific individuals, situations, or parcels of land (*Jafay v. Bd. Of County Commissioners of Boulder County, 848 P.2d 892 (Colo. 1993)*).

Quasi-judicial Actions - *continued*

- *Ex parte* communications prohibited
- Why?
 - Decision makers should make decision based only on what's in the record.
 - Potential for real or perceived bias/influence.
 - Compare a court case – would you want to find out the judge spoke privately to the other side?
 - Can invalidate the decision.

Quasi-judicial Actions - *continued*

- Difficulty for elected officials – conflict between need to listen to and represent constituents, and need to make a fair and impartial decision.

Quasi-judicial Actions - *continued*

- May be challenged only under C.R.C.P. 106(a)(4)
 - 30 days
 - Review is on the record – no discovery
 - Expedited process
 - Court will only overturn Council's decision if it is an abuse of discretion, or exceeds Council's jurisdiction.

Administrative or Executive Actions

- Generally non-discretionary
- Don't involve application of a set of criteria or standards to a set of facts.

Legislative v. Quasi-judicial Land Use Actions

| Function | Legislative | Quasi-judicial |
|--|-------------|----------------|
| Master planning | x | |
| Comprehensive zoning | x | |
| Zoning text amendments | x | |
| Piecemeal rezonings: Proceedings Decisions | x | x |
| Special exceptions | | x |
| Variances | | x |
| Subdivision approvals | | x |
| Zoning or permit issuance & violations | | x |
| Permit appeals | | x |
| Annexation | x | |

Legislative v. Quasi-judicial Land Use Actions - continued

- The following matters have been held to be quasi-judicial in character:
 - Rezoning - *Snyder v. City of Lakewood*, 189 Colo. 421, 541 P.2d 371 (1975);
 - Subdivision applications, *Vick v. Bd. of County Commissioners*, 689 P.2d 699 (Colo. App. 1984) and *Reynolds v. City Council of the City of Longmont*, 680 P.2d 1350 (Colo. App. 1984);
 - Applications for approval of development plans, *Cherry Hills Resort Development Co. v. City of Cherry Hills Village, supra*;

Legislative v. Quasi-judicial Land Use Actions

- Variance requests, *Danielson v. Zoning Board of Adjustment*, 807 P.2d 541 (Colo. 1990);
- Applications for licenses, *Scott v. City of Englewood*, 672 P.2d 225 (Colo. App. 1983);
- Special assessments, *Cline v. City of Boulder*, 35 Colo. App. 349, 532 P.2d 770 (1975);
- Liquor license matters, *Norris v. Grimsley*, 41 Colo. App. 231, 585 P.2d 925 (1978).

“Hybrid” Actions

- Rezoning, under Colorado law, is always both quasi-judicial, for purposes of ex parte communications being prohibited, and the ability to challenge under C.R.C.P. 106(a)(4), AND legislative, for purposes of challenge by initiative and referendum. (*Margolis v. District Court*, 638 P.2d 297 (Colo. 1981)).

Due Process

- Notice
 - Who is entitled to notice.
 - What notice are they entitled to.
- Opportunity to be heard
 - who can testify at a public hearing?
 - does property owner have right to be heard/testify?



Standards

- Zoning – common standards
 - change in character
 - harmonious/compatible with surrounding development/adjacent properties
 - does not unduly burden public infrastructure
- Variance – is a request to deviate from zoning requirements; not a change in zoning, but a waiver of certain requirements of zoning
 - hardship
 - unique to particular property
 - not caused by applicant
 - no harm to adjacent properties

Vested Rights

- Old – “common law” vesting
 - Once you have commenced a project (more than just grading, poured foundation), have the right to finish.
- New – statutory
 - C.R.S. 24-68-101 *et seq.*
 - City must designate site specific development plan.
 - Once SSDP approved, right to build for 3 years.
- Both old and new – Development Agreement
 - Can grant longer than 3 years.

- A municipality cannot change the rules under which a land application is to be reviewed after the application is submitted, at least with respect to applications for approval of site specific development plans. See C.R.S. § 24-68-102.5.



Special Topics

- Group homes and Family size
- Billboards
- Outdoor patios
- Other?

Group Homes

- City's authority to regulate who can live together limited by:
 - Federal Constitution, First Amendment, Freedom of Association
 - Federal Fair Housing Act, 42 U.S.C. 3601
 - State law
 - Home Rule – Colorado Constitution Article XX, Section 6
 - matters of local concern, v. matters of statewide concern
 - statewide interest in regulating state-created foster care families
 - State Statutes, e.g. Children's Code, Criminal Code
 - *City of Northglenn v. Ibarra*, 62 P.3d 151 (Colo. 2003)

Billboards

- City's authority to regulate limited by
 - Federal Constitution, First Amendment, Freedom of Speech
 - Federal Constitution, 5th Amendment, Taking of Private Property without Just Compensation
 - Highway Beautification Act, January 1965, 23 U.S.C. 131
 - Colorado State Statutes, C.R.S. 43-1-401



Questions?

