CHAPTER 3: LAND USE

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The authority to control the use of land in the unincorporated area of the county is one of the most important and potentially controversial aspects of a county commissioner's job. In a very basic sense, Colorado is a local control state when it comes to land use planning and decision-making. This places commissioners at "ground zero" in the growth management debate. As the state continues to experience rapid growth, issues like traffic congestion, sprawl, loss of open space and agricultural land, availability of affordable housing, and private property rights will continue to dominate public conversations about land use.

As a county commissioner, you and the other members of your board will work side by side with your planning and community development departments, planning commissions, boards of zoning adjustment and the citizenry of your county to guide future development in your communities. This chapter outlines the major land use powers counties may employ as they work to shape their communities – including zoning, subdivision regulations, and 1041 powers – and explains the roles of planning commissions and zoning boards. Additionally, some evolving issues like open space preservation, public lands management, and the "takings" debate will be discussed.

INTRODUCTION TO COMPREHENSIVE PLANNING & ZONING

Local Government Land Use Control Enabling Act of 1974
Counties are granted broad regulatory authority under this act to regulate the use of land within their jurisdictions.[1] For example, the board may pass rules and regulations in the following areas:

- Regulating development and activities in hazardous areas;
- Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;
- Preserving historically and archaeologically important areas;
- Regulating roads on federal lands;
- Regulating significant population density changes;
- Providing for phased development of services and facilities;
- Regulating land based on the impact to the community or surrounding areas; and
- Providing for the orderly land use and protection of the environment.

Intergovernmental agreements for joint planning/development areas involving one or more municipalities or other local governmental entities are authorized by the Act. C.R.S. §29-20-105.

It is with this end in mind – using their broad regulatory authority to regulate the use of land for such purposes – that counties implement comprehensive plans and zoning regulations.

Comprehensive Plans
A comprehensive plan (sometimes referred to as a "master plan" or "comp plan" for short) is a planning document intended to guide the growth and long-term development of a community,

[1] NOTE: These powers cannot be used to impose subdivision regulations beyond those permitted under C.R.S. §30-28-133. Theobald v. Board of County Commissioners, Summit County, 644 P.2d 942 (1982).

whether at the county level or regional level. It is intended to be an advisory document only; it is not the equivalent of zoning and is not binding upon the BOCC. However, a BOCC is authorized to make its comprehensive plan – or any part of the plan – binding through zoning, regulations, or land use codes. C.R.S. §30-28-106.

A comprehensive plan usually includes a variety of standard elements alongside goals and policies related to each element. This involves designating and defining areas or circumstances in which certain types of growth and uses may be supportable and other types of growth or additional developed uses are discouraged. The criteria that may be incorporated into a comprehensive plan have been expanded in the last few years to include the following:

- Wildlife areas;
- Waterways and waterfronts;
- Mass transit routes;
- Availability of affordable housing;
- Cultural, historical, and archeological buildings and formations;
- Geological hazards;
- Floodways; and
- Wildfire hazards.

Not all counties are required to adopt master plans. Those that are required to do so include (1) those with populations of 100,000 or more, or (2) those with populations of 10,000 or more and with a 10% growth rate between 1994 and 1999 or during any 5-year period ending in 2000 or any subsequent year. Counties required to adopt master plans must include a recreational and tourism element in their plans. C.R.S. §30-28-106. Additionally, counties who choose to include a water supply element (which describes the general location and extent of a suitable supply of water) must include conservation policies determined by the county. C.R.S §30-28-106 (3)(a)(IV)(C).

The advisory nature of the comprehensive plan does not prevent a county from denying a specific development application based on noncompliance with the comprehensive plan, provided that the BOCC legislatively adopts the plan and that the plan is sufficiently specific to ensure consistent application. BOCC of Larimer County v. Conder & Sommervold, 927 P.2d 1339 (Colo. 1996). A zoning ordinance (described in the next section) provides the detailed means of giving effect to the principles in a comprehensive plan. Theobald v. Board of County Commissioners, Summit County, 644 P.2d 942, (1982).

The county planning commission must certify a copy of its comprehensive plan to the board and all planning commissions of municipalities within the county. Additionally, if portions of the comprehensive plan are applicable to any city or town, the city or town may – but it not required to – adopt it as an official advisory plan for the development of municipalities' territorial limits through the governing body and planning commission. C.R.S. §30-28-109.

Additionally, no roads, parks, or structures may be authorized or constructed without review and approval by the county planning commission, when a county comprehensive plan covering such structures has been adopted. C.R.S. §30-28-110.

Zoning

Zoning is the process of dividing and classifying land according to its intended use (e.g., residential, commercial, or agricultural). The BOCC may provide zoning for all or part of the unincorporated area of the county. C.R.S. §30-28-102. This is accomplished by having the planning commission prepare a zoning plan for consideration of the BOCC. C.R.S. §30-28-111-112. As part of this plan, the county may regulate the following:

- The location, height, and size of buildings and structures;
- The percentage of lots that may be occupied;
- The size of yards, courts, and other opens spaces;
- The uses of buildings and structures for trade, industry, residence, recreation, public activities, or other purposes;
- Access to sunlight for solar energy devices; and
- The uses of land for trade, industry, residence, recreation, flood control, or other purposes. C.R.S. §30-28-113(1)(a).

Following approval during a public hearing[2], the BOCC may, by a majority vote, amend any provision of the county zoning regulations. However, it must first submit any changes to the planning commission for review and suggestions. The board must file a copy of any approved resolution, zoning regulations, or maps with the clerk and recorder, who must index the certified copy as if it were an instrument of title to land. C.R.S. §30-28-125. The board must adhere to its own zoning regulations with respect to county property unless its regulations have specifically exempted county activities from those regulations. Clark v. Town of Estes Park, 686 P.2d 777 (1984); City of Englewood v. Rich, 686 P.2d 780 (1984).

There are three primary mechanisms through which counties enforce zoning violations, and a zoning resolution can help direct such enforcement. The statutes also contemplate some discretion for the county attorney to select an appropriate enforcement remedy.

- *Civil legal action*: Probably the most common enforcement is through a civil legal action in which the court imposes a fine of between $500 and $1000 and up to an additional $100/per day for each day the violation continues after the court enters an order. C.R.S. §30-28-124.5. This enforcement mechanism can involve injunctive relief.
- *Criminal offense*: Zoning can also be enforced criminally, either as a Class 2 petty offense or a misdemeanor, with each day of violation acting as a separate offense. For class 2 petty offense penalties, the fine can be a set fee or a graduated schedule of up to $1000. For misdemeanors, the punishment can be a fine of up to $100 per day and a jail sentence of up to 10 days in jail per day of violation. Criminal enforcement can also involve injunctive relief.
- *Permit withholding*: Lastly, zoning regulations can also be enforced by the withholding of building permits if the county commissioners have taken certain procedural steps. C.R.S. §30-28-114.

[2] There are statutory and potentially local regulatory notice requirements for such public hearings. See C.R.S. §30-28-112 and C.R.S. §30-28-116.

Planning Commissions & Zoning Boards

As previously noted, planning commissions can be both county-wide and regional. While planning commissions often operate at the front end of the process developing plans and zones, zoning boards operate at the back end, hearing arguments for exceptions to those plans and zones.

County Planning Commission

Every county is authorized to appoint a three- to nine-member planning commission, with two additional distinctions. In counties of less than 15,000 persons, the board may, at its discretion, serve as the planning commission. In counties with a population of 100,000 or more, the BOCC may appoint a commission of three to *fifteen* members (rather than three to nine members).

Each member of the planning commission must be a resident of the county and is to be appointed for a three-year term. Members of the planning commission are compensated as the board determines and must be reimbursed for actual expenses. Authority for employment of experts and staff for the county planning commission is exclusively vested in the board. C.R.S. §30-28-103 - 104.

The county planning commission is responsible for providing a comprehensive plan for the physical development of the unincorporated areas of the county. The plan provides recommendations for the development of the territory it covers. C.R.S. §30-28-106. The county planning commission has jurisdiction over studies, surveys, and plans, except those affecting development in two or more governmental units.[3] The county planning commission has primary responsibility for implementing zoning, housing, transportation, health, safety, public works, and similar plans. All decisions made by the planning commission are subject to approval by the board. C.R.S. §30-28-131.

Overruling Planning Commissions: Location & Extent Power

When a comprehensive plan has been adopted encompassing a county or parts thereof, no road, park, public way, ground or space, public building, or structure or utility (whether publicly or privately owned) in the unincorporated area covered by the plan may be constructed or authorized without the location and extent thereof being approved by the jurisdiction's planning commission. This is commonly referred to as a Location & Extent approval. The planning commission must act within 30 days of the date of submission, or the request is deemed approved unless extended by the submitting board or official. The board of the entity proposing and financing the improvement[4] may overrule the planning commission by a majority vote. C.R.S. §30-28-110.

District and Regional Planning Commissions

State statutes also allow for the creation of planning commissions that cover only a portion of the county (district planning commissions) or that extend to cover several counties (regional planning commissions).

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[3] Such multijurisdictional plans may be under jurisdiction of the regional planning commission if its members agree. A regional planning commission may perform the functions of a county planning commission to the extent provided for in a resolution adopted by the BOCC or through an intergovernmental agreement (IGA) with the affected municipalities.

[4] Or the PUC for a public utility or the School Board for a public or charter school.

District planning commissions may also be formed by citizen petition in any county that is not zoned for the purpose of zoning a proposed district. Petitions to form a district planning commission must be signed by at least half of the qualified electors who are residents and by more than 50% of the residents and nonresidents who own more than 50% of the real property within the proposed district. Following a public hearing, the BOCC may then form a district planning commission consisting of 3 or 5 members. Commissioners can omit parcels from the proposed district if the landowner files a statement arguing against the creation of the district planning commission. District zoning must be reviewed by the county planning commission (if one exists) and any district-zoning plan is subject to approval by the BOCC. C.R.S. §30-28-119.

Two or more local governments may – on agreement of their boards – create a regional planning commission. C.R.S. §§30-28-105, 30-28-109. This authority extends to the creation of joint zoning boards of adjustment as well. C.R.S. §§30-28-117, 31-23-307. Any county adjacent to lands within a regional planning commission may be included therein upon agreement by its board and by the governing bodies of the regional planning commission. Relatedly, a county may withdraw from a regional planning commission but must first give 90 days' notice of its intent to withdraw to the regional commission. C.R.S. §30-28-130.

Boards of Zoning Adjustment (BOA)

The BOCC of any county with a zoning law must appoint a three-to-five-member board of zoning adjustment, not more than half of whom may be members of the planning commission. Similarly, counties forming regional planning commissions are authorized to form joint zoning boards of adjustment (BOAs).

The members of the BOA are appointed for terms such that one of their terms expires each year. The BOCC may appoint associate members to the BOA, who are to serve in the temporary absence of regular members, may remove appointees for cause, and may create governing rules and procedure.

The BOA hears arguments for exceptions to the requirements of the zoning regulations and may grant variances under certain conditions. It also may interpret questions regarding maps, lot lines, district boundaries and similar matters. Members may be paid a per diem rate fixed by the BOCC. This authority extends to the creation of joint zoning boards of adjustment as well. C.R.S. §30-28-117. BOAs also hear appeals for any party who is aggrieved by an administrative decision made during the administration or enforcement of the provisions of the zoning resolution. Overturning such administrative decisions requires at least 80% vote of the BOA.

Unique Planning & Zoning Issues

Major Municipal Development or Annexation

The county must be notified by the governing body of a municipality when a subdivision or commercial/industrial activity covering five or more acres is proposed in the municipality. C.R.S. §31-23-225. Similarly, the clerk of the BOCC and the county attorney must be provided notice of a hearing on any annexation petition by a municipality. C.R.S. §31-12-

108. The county may seek to comment on the proposal, but the municipality retains the authority to approve or deny the petition.

When a municipality receives a petition for annexation for land which is subject to a development plan to which the municipality is not a party and of which it has notice, the municipality must notify the county before it takes any action on the petition. C.R.S. §24-32-3209. If a county objects to this annexation, it may file an objection with the municipality and may also seek mediation (for which it bears the cost). C.R.S. §24-32-3209. If a municipality seeks to annex an enclave where the population is more than 100 people and contains more than 50 acres, the municipality must create an annexation transition committee of which two committee members must be from the county in which the enclave is located. C.R.S. §31-12-106.

When land disconnects, or "de-annexes," from a municipality, the disconnected tract of land becomes subject to the county's zoning and other land development regulations within 90 days of the disconnection. During this 90-day period, the county may elect not to issue building or occupancy permits for any portion of the land subject to disconnection. Counties may only allow land development entitlements to tracts after the county receives notice that the municipality is disconnecting via ordinance. A landowner is prohibited from applying for disconnection until all vested property rights affecting the tract have either been terminated or have expired. C.R.S. §31-12-501.5

State-Licensed Group Homes

For zoning purposes, state-licensed group homes for eight mentally ill people or for eight developmentally disabled people are considered a residential property. The same applies to homes of eight people aged 60 years or older who do not need skilled and intermediate care facilities and elect to live in normal residential surroundings. C.R.S. §30-28-115(2). Residential facilities that are licensed by the state (alcohol treatment facilities, boarding homes, childcare facilities, and developmentally disabled homes) must comply with local zoning regulations, although federal law can impact such zoning requirements. C.R.S. §25-1-306.5. Any time a group home is proposed for any protected class of individuals, a county must consider the requirements of the Fair Housing Act and must consider a reasonable accommodation for any county regulation or requirement.

The 35-Acre Subdivision Exemption Issue

In 1972, the legislature passed SB72-35 (enacted in statute in C.R.S. §30-28-101(10)) prohibiting counties from regulating the division of land when the division creates parcels of land of 35 acres or more. More information about subdivisions in general can be found later in this chapter.

While the actual subdivision of these large lot parcels is beyond the scope of a county's control, other aspects of development on 35-acre or larger lots are not. While landowners have the right to subdivide their land into parcels of 35 acres or more without county approval, they do not have an automatic right to build on those parcels. Counties still retain some control over these parcels through zoning, site plan review requirements, and issuance of road access permits, building permits, and septic permits. Additionally, to address the

issue of large lot subdivisions on agricultural lands, some counties have established zoning regulations that limit building authority.

Renewable Energy
Renewable energy projects are subject to local land use permitting and approval. Accordingly, counties may adopt certain zoning regulations for such projects. Recent law has expanded in recent years, broadening certain aspects of local government authority by expanding the technologies that local governments may regulate through siting, and limiting it in other ways by requiring compliance with specific rules. Please see the section on renewable energy toward the end of this chapter for more information.

"Zoning Out" Manufactured Housing
The BOCC may not exclude manufactured housing (mobile homes or other prefabricated homes) from its county by "zoning out" any such homes that meet or exceed engineering requirements on a performance basis as compared to other single-family housing units. Without excluding manufactured housing, a county can still adopt aesthetic, historical, foundation, minimum floor space, unit size or sectional, location, and setback requirements. Similarly, restrictions protecting manufactured housing shall not supersede any valid covenants running with the land. C.R.S. §30-28-115(3)(a).

Inclusionary Zoning
Counties are explicitly authorized to regulate development or redevelopment to promote the construction of new affordable housing units, except that a local government may not adopt any ordinance or regulation that would have the effect of controlling rent on existing private residential housing. C.R.S. §29-20-104(1)(e.5).

Counties are specifically authorized to adopt inclusionary zoning policies (land use regulations that restrict rent on a portion of newly constructed or redeveloped housing units) so long as (1) the regulation provides alternatives to the property owner or land developer, and (2) the county takes one or more actions to increase housing density. C.R.S. §29-20-104.

Planned Unit Development
Under the Planned Unit Development Act of 1972, any BOCC may authorize Planned Unit Developments (PUDs) by resolution designating the objectives of such developments. PUDs are generally designed and allowed to create a more comprehensive and unified land use plan than traditional lot-by-lot zoning. The applicable planning commission and the board must review applications for permits and development standards required to be met and conduct hearings and approval procedures.

As a practical matter, PUDs are a zoning designation but are more inclusive and comprehensive than "straight zoning". Property originally designated for one use, such as R-1 (residential), is frequently rezoned to PUD pursuant to the PUD resolution passed by the board. The subdivision requirements discussed earlier apply to PUDs and can be augmented in individual PUD designations. C.R.S. §24-67-101 et seq.

Should the organization responsible for maintenance of common use space within a PUD fail to maintain it, the county may maintain the space and recovers its maintenance costs from property owners having right of access thereto. C.R.S. §24-67-105.

BUILDING CODES

In addition to zoning authority, which allows counties to regulate use of land, counties also have authority to adopt a building code in all or in parts of the county to regulate construction of buildings. C.R.S §30-28-211. Contractor licensing programs can also be adopted in counties with an adopted building code. C.R.S §30-11-125.

Municipalities may adopt their own building codes and are not subject to county building codes. School buildings are not subject to county building codes; they must instead adhere to state building codes. Requirements must be uniform for types and classes of buildings. C.R.S.§30-28-201.

While Colorado has no statewide building code, there are a few exceptions to the practice of locally adopting and enforcing building codes. These exceptions are noted below.

- The State Buildings Program within the Office of the State Architect is responsible for establishing minimum building codes for all construction by state agencies on state-owned or state lease-purchased properties or facilities.
- The Colorado Department of Public Safety adopts building codes for the construction of public K-12 schools and junior colleges.
- The Division of Housing under the Department of Local Affairs enforces codes for manufactured homes built to HUD standards, adopted and enforces building codes for factory-built/modular housing, and applies installation standards to all manufactured housing. The Division also adopts and enforces codes for hotels, motels, and multifamily buildings in jurisdictions with no codes.

Energy Efficiency

In 2019, Colorado passed HB19-1260 establishing a *minimum* building energy code. On or after July 1, 2023, and before July 1, 2026, counties that update or adopt a building code are required to adopt and enforce an energy code that achieves equivalent or better energy performance than the 2021 International Energy Conservation Code (IECC) *and* the model electric and solar ready code to be developed by the Energy Code Advisory Board. After July 1, 2026, counties that update a building code must adopt and enforce an energy code that achieves equivalent or better energy performance than the model low energy and carbon code to be developed by the Energy Code Advisory Board. Rural counties with a population of 30,000 or less that apply for but do not receive a grant that significantly assists with costs of implementing these requirements are only subject to the previous standard of adopting a code that is equivalent to or more stringent than one of the last three versions of the IECC. C.R.S. §30-28-211.

Additionally, Colorado's Building Performance Program aims to understand and track energy use in large buildings by requiring building owners – including local governments – to benchmark their energy use under specific circumstances. Counties with buildings over 50,000 square feet are required to submit an annual report on energy usage to the Energy Office. C.R.S. §25-7-142. Additionally, starting in 2026 and every 5 years thereafter, county buildings over 50,000 square feet

must meet energy performance standards to be set in rule by 2023, but only if construction or renovation is initiated that costs more than $500,000 and affects energy usage. C.R.S. §25-7-142 (8). With respect to these two programs, counties are exempt from fees and penalties for non-compliance. C.R.S. §§25-38.5-112 (1), 25-7-122 (1). Counties may also establish energy standards that are more stringent than those set by the state. C.R.S. §25-7-142 (9).

Wildfire Resiliency Codes
SB23-166 established a Wildfire Resiliency Code Board (WRCB) that will promulgate rules concerning the adoption of codes and standards for the hardening of structures and reducing fire risk in the defensible space surrounding structures in the wildland-urban interface (WUI). Local governments within the WUI (as it comes to be defined by the code board) will be required to adopt a code that meets or exceeds the minimum standards set forth by the code board. They will be required to do so within three months after the code board's adoption of the rules, which must occur no later than July 1, 2025. C.R.S. §24-33.5-1236.

Enforcement of adopted codes will be determined according to the governing body's regulations for code enforcement. C.R.S. §24-33.5-1237(2). Additionally, a local government may petition the code board for a modification of the codes in accordance with a procedure determined by the code board. C.R.S. §24-33.5-1237(3).

Public Building Restroom Requirements
Beginning January 1, 2024, all *newly* constructed public buildings must provide a non-gendered restroom facility with signage or a multi-stall non-gendered facility on each floor where restrooms are available. C.R.S. §9-5.7-103(1)(b). New buildings that are slated for construction but have already gone through the design review process are exempt from this requirement.

DECISIONMAKING: HEARINGS, SITING, & PERMITTING

Basic Due Process Requirements of Land Use Hearings
County commissioners will consider zoning and subdivision applications for specific properties as part of their regular responsibilities. These hearings are sometimes referred to as quasi-judicial hearings because the commissioners are acting as a judge for the proposal.[5] There are some procedural requirements related to such applications that are important to remember.

Every applicant for a land use approval is entitled to due process, which is a legal way of mandating fairness in the process. This means commissioners must fairly consider the request and whether it is consistent with the adopted county criteria. Commissioners cannot pre-determine the result of the application before the public hearing (i.e., commissioners must be willing to approve or deny until after the presentation of all evidence). Commissioners cannot have *ex parte* communications regarding the application: that is, the commissioners cannot communicate with one side or the other about an application outside of the public hearing where testimony is offered. Relatedly, an application must have been fully noticed to the public according to the relevant regulations in state statute or county regulations, so that anyone with a concern has an opportunity to raise it. Finally, an

[5] Some public hearings will be legislative in nature and the same due process considerations, other than required notices, do not apply.

application must be judged based on the criteria adopted at the time that the application was submitted, even if the criteria were amended thereafter.[6]

While public hearings regarding land use applications can create very difficult and/or unpopular BOCC commissioner decisions, the legal parameters can nonetheless be stated simply. Following a public hearing, if an application meets all the county approval criteria for that type of application, then the application must be approved. Conversely, if an application fails to meet even one approval criteria, it must be denied. As commissioners hear public testimony, it can be very helpful to focus on the adopted approval criteria when deciding how to vote.

Building Permits & Fees

The BOCC may require that a building permit be issued by a county building inspector before any construction, reconstruction, repair, remodeling, or change of use can be made for any building or premises in all or part of the unincorporated area of the county. A schedule of fees may be established for such permits in order to finance the operation of the building department. C.R.S. §30-28-114. Except in specific circumstances (C.R.S. §30-28-113), the building permit fees charged by the county are not limited to the amount of the direct costs of operating the building department. They may, however, be limited to the overall (direct plus indirect) costs of operating the department. Bainbridge, et al v. B.O.C.C. of Douglas County, No. 96CA1648, Feb. 5, 1998 (Colo. 2000). Building code enforcement is similar to zoning enforcement in that the county has the option to pursue such violations criminally or civilly and can further seek injunctive relief. C.R.S §30-28-209 - 210. Unpaid penalties can become a lien against the property and are collectible with taxes.

In certain circumstances, counties may perform school building and fire code inspections. C.R.S. §§22-32-124, 23-71-122. Counties are also authorized to do electrical and plumbing inspections. C.R.S. §§12-23-117, 12-58-114.5. In the absence of county building department inspections, these services are provided by the state.

For manufactured (factory-built residential) homes that comply with federal manufactured home construction and safety standards, counties may not duplicate efforts to review or approve manufactured homes that are under review by the state, nor may counties charge separate building permit fees for plan reviews or inspections performed by the state. C.R.S. §24-32-3311. However, counties may require onsite mitigation for manufactured homes to address public safety requirements. C.R.S §24-32-3318. The same rules and regulations apply to tiny homes: counties may require inspection of a tiny home installed prior to the promulgation of a state standard (July 2023), and counties or the state electrical or plumbing inspector (where there is no such local inspection) may approve the connection of tiny homes to electrical and plumbing services C.R.S. §24-32-3329.

Mining Operations - Mined Land Reclamation Permits

Most counties operate at least one gravel pit from which road materials are mined. Counties involved in mining operations must obtain permits by filing an application with the Office of Mined Land Reclamation on a form approved by the Mined Land Reclamation Board. The application must contain a reclamation plan, an accurate map of the affected land, and a list of owners of the surface and subsurface rights to the affected lands, among other things. C.R.S. §34-32.5-101 et seq.

[6] There is a doctrine called the "pending ordinance doctrine" that may make an exception to this general rule for zoning applications. There is no exception for subdivision applications.

The Division of Minerals and Geology charges fees for operating gravel pits (C.R.S. §34-32.5-125) and the Mined Land Reclamation Board or the Office of Mined Land Reclamation authorizes reclamation of lands affected or proposed to be affected by surface coal mining operations. C.R.S. §34-33-109. Landowners also can apply for mining land uses with a county, and it is common to have regulations for such applications within the zoning resolution. In such cases, commissioners will likely be asked to evaluate compliance with the approval criteria specific to mining, similar to all other land use hearings.

SUBDIVISION REGULATIONS

Every BOCC must adopt and enforce subdivision regulations for unincorporated areas within the county. The BOCC must publish notice and hold a public hearing prior to adoption or revision of any subdivision regulations. C.R.S. §30-28-133(1).

A "subdivision" or "subdivided land" means any parcel of land of less than 35 acres which is used for single-family residences, condominiums, apartments, or any other multiple-dwelling units (unless such land, when it was previously subdivided, was accompanied by a filing which complied with the provisions of C.R.S. §30-28-101), or which is divided into two or more parcels with either separate interests or interests in common. Subdivision regulations apply only to such parcels. "Interests" include all interests on the surface of the land but excludes all subsurface interests. Commissioners have some authority to create exceptions to the definition of subdivision. C.R.S. §30-28-101(10)(d).

"Subdivision" and "subdivided land" and resulting subdivision regulations do not apply to any division of land which creates parcels of land each of which is 35 or more acres of land and is not intended for use by multiple owners. It also does not apply to rural land use processes involving cluster developments. C.R.S. §30-28-101(10). Subdivision regulations adopted by the board shall require sub-dividers to submit to the board information outlined in C.R.S. §30-28-133(3), including:

- Property survey and ownership of the surface and mineral estates, if applicable;
- Relevant site characteristics and analyses applicable to the proposed subdivision;
- A plat and other documentation showing the layout or plan of development;
- Adequate evidence that an adequate water supply is available for the proposed subdivision (C.R.S. §29-20-301 et. seq);
- Oil and gas/mineral estate notification (C.R.S. §24-65.5-101); and
- Evidence the developer has made access and sites available for electric and natural gas utility service.

Subdivision regulations adopted by the county must also include, at a minimum, provisions for:

- Suitable areas for schools and parks (reserved for acquisition by the county and dedicated to the county);
- Payment-in-lieu-of dedication not exceeding the full market value of the sites, or a combination of such dedications and payments not exceeding the full market value;
- Standards and procedures applicable to storm drainage plans and designs to ensure proper drainage ways;

- Standards and procedures to ensure sanitary sewer plans and design (including soil percolation testing) and rates and site design standards for on-lot sewage disposal systems when necessary; and
- Water systems standards and technical procedures. C.R.S. §30-28-133(4)

Streets and highway plans, plots, plats, and re-plats of land subdivided for building lots (and their streets, alleys, and other public ways) must be approved by the appropriate planning commission and the board before they may be recorded. C.R.S. §30-28-110(3)(a).

Subdivision Plan Referral & Decision
When the BOCC receives a complete preliminary plan for a subdivision from a developer, prior to approval, it shall refer it to:

- The concerned school districts, when 20 or more dwelling units are involved, for recommendations on school sites and structure adequacy;
- Each county or municipality within two miles of the proposed subdivision;
- Any utility, local improvement, or special district involved;
- The state forest service, when applicable;
- The appropriate planning commission;
- The affected soil conservation districts for review of soil suitability and flooding problems;
- The county, district, or regional health department or the Colorado Department of Public Health and Environment (CDPHE), when applicable, for review of sewage treatment works and water quality (the board may not approve a plan unless the appropriate health agency has approved proposed sewage disposal facilities); and
- The state engineer for an opinion on the effect of the subdivision on water rights. If the state engineer finds injury or inadequacy, s/he must provide an estimate of additional water required or exchange water necessary to prevent such injury. The board may approve the subdivision only if it finds the sub-divider has corrected the injury or inadequacy set forth by the state engineer.

Other copies shall be given to cities and towns for estimates of water supply and to the Colorado Geological Survey regarding geologic factors. Agencies notified have no more than 21 days to provide their reactions unless they apply for an extension. Failure to respond within that time signifies approval. C.R.S. §30-28-136.

Denial of a subdivision application shall be supported by written findings specifying the provisions of the application that did not satisfy adopted criteria. C.R.S. §30-28-133.5.

Guarantees for Improvements
The sub-divider must provide assurance and collateral with the board for construction of all required public improvements. As the developer completes such improvements, they may be given a release by the board for all or parts of the related collateral. Should the board find construction not in accordance with specifications, it must furnish a list of deficiencies and may withhold collateral sufficient to assure compliance. The board, upon finding substantial non-compliance with specifications by the developer, may employ as much of the collateral as may be necessary to complete public improvements to specification. C.R.S. §30-28-137.

IMPACT FEES

Prior to 2001, counties lacked explicit statutory authority to levy impact fees. A number of counties, however, imposed impact fees for road construction/maintenance and fire protection by citing the broad land use authority found in the Local Government Land Use Control Enabling Act and the Planned Unit Development Act. C.R.S. §§29-20-101 et seq., 24-67-101 et seq. Counties also required dedication or fees-in-lieu for parks, school sites and storm drainage facilities during the subdivision process. C.R.S. §30-28-133(4).

In 2001, the Colorado General Assembly granted counties the authority to impose impact fees or other similar development charges as a condition of issuing development permits. Local governments wishing to impose impact fees must first legislatively adopt fees that (1) quantify the reasonable impacts of proposed development, (2) are applicable to a broad class of property owners, and (3) will defray the projected impacts on capital facilities caused by development. Double-charging developers impact fees for the same facility for which the jurisdiction has imposed an exaction must be avoided. Additionally, impact fees may be waived for low- or moderate-income housing. Developers subject to the fee may seek judicial review of such fees while development proceeds. C.R.S. §29-20-104.5.

Plat Corrections
The board may approve technical corrections of subdivision plats and corrections to an approved plat without a hearing or without compliance of any of the submission, referral or review requirements by any agency required to pass on the original approved plat. C.R.S. §30-28-133(9).

Counties may vacate certain subdivision plats created prior to current subdivision regulations or portions thereof to permit the creation of subdivision exemption plats for the purpose of correcting the legal description of properties located therein. C.R.S. §30-28-301.

Municipal Three-Mile Extraterritoriality
When the board approves a subdivision within three miles of a corporate municipal boundary, there is an argument that the subdivision must conform to the municipal planning commission's major street plans of that municipality pursuant to C.R.S. §31-23-212.

"1041 POWERS"

In 1974, the legislature passed HB 74-1041, granting county governments the authority to affect issues outside the normal scope of local land use authority. These so-called "1041 powers" allow the board to designate certain areas and activities as being of "state interest" and apply additional regulations to the uses of these lands. Such 1041 powers authorize counties to select and create criteria over statutorily defined areas and activities of state interest and to exercise local control and local permitting over such areas and activities. The areas subject to such designation and regulation fall into the following broad categories:

- Mineral resources areas;
- Natural hazard areas;
- Areas relating to historical, natural, or archaeological resources; and

- Areas around "key facilities" (i.e., airports, mass transit terminals, highway interchanges, public utilities, etc.).

Local governments may designate certain activities of state interest in order to realize increased regulatory authority over water and sewage treatment systems, airports, solid and hazardous wastes disposal sites, mass transit systems, highways, oil and gas development, and public utility facilities. Upon designation, the board may establish rules and regulations related to development in these areas, provided that those rules and regulations meet certain statutory minimum criteria. C.R.S. §24-65.1-100 et seq.

RESTRICTIONS ON COUNTY LAND USE CONTROLS

The "Takings" Issue

One of the perennial issues commissioners face in land use decisions is the threat of litigation over "takings." The issue derives from a clause in the Fifth Amendment to the U.S. Constitution stating, "…nor shall private property be taken for public use without just compensation." At the crux of the matter is the following question: At what point does a land use regulation or decision go too far and "take" private property, thus entitling an owner to compensation? There have been numerous court cases regarding the matter, with the U.S. Supreme Court rendering the 1994 benchmark decision in the case of *Dolan v. City of Tigard*. The *Dolan* decision states local governments may only exact conditions on a permit that are roughly proportional to the impact of the project being proposed. A previous case, *Nollan v. California Coastal Commission*, stated there must be an "essential nexus" between the conditions being placed on a permit and a legitimate government interest. The legislature codified these holdings in SB 99-218 and SB 01S2-15, setting up standards for exactions and conditions placed on land use permits. C.R.S. §29-20-201 et seq. Ultimately, the bottom line is that if a property owner is denied all economically viable use of his/her property, a taking has probably occurred.

Vested Rights

A "vested right" is a right of a landowner to proceed with a particular development with assurance that local laws and regulations will not change in a manner preventing the development from occurring or imposing new requirements on the development. The state first passed a vested rights bill in 1987, providing that when a development right is vested by the BOCC, there can be no regulatory changes of a specific nature to the development right, without compensation, for a period of three years. This law was revised in 1999, establishing that a development right is considered vested upon the approval of a site-specific development plan, unless a county has passed an ordinance or resolution identifying an alternative vesting point**.** The 1999 law also modified the definition of what constitutes a site-specific development plan. C.R.S. §24-68-101 et seq. In general, zoning approval does not create a vested property right. C.R.S. §24-68-103(2). Counties can also extend the period of vesting for any specific development approval by entering into a development agreement. C.R.S. §24-68-104(2).

"Rule 106 Review"

If a landowner or other aggrieved party is dissatisfied with a land-use decision or regulation enacted by the BOCC (subdivisions, zoning, etc.), they may ask for a judicial review to determine if the BOCC acted in an arbitrary or capricious manner or exceeded its jurisdiction. Colorado Rules of

Civil Procedure, Rule 106. Once a complaint is filed, the BOCC has 30 days to certify the record of the land use decision in question. C.R.S. §13-51.5-103. If a land use decision is challenged, it is important that the public hearing record contains evidence supporting the decision that was made.

FURTHER TOPICS

Affordable Housing

Counties do not have statutory obligations related to affordable housing, but – as noted earlier – they are authorized to regulate development or redevelopment to promote the construction of new affordable housing units. C.R.S. §29-20-104(1)(e.5). However, a local government may *not* adopt any ordinance or regulation that would have the effect of controlling rent on existing private residential housing. C.R.S. §29-20-104(1)(e.5). With these general guidelines, counties have taken various steps through the creation of programs and policies designed to promote affordable housing.

Incentive Programs & Funding Opportunities

Several incentive programs have recently been created to provide resources and technical assistance to local jurisdictions seeking to facilitate this type of development. Many counties rely on housing authorities for the planning, financing, acquisition, construction, reconstruction, repair, maintenance, management, and operation of housing projects or programs. Counties may set up their own housing authority or to partner with other local governments to form a multi-jurisdictional housing authority. Housing authorities have broad powers within state statute, which reside in CRS 29-4-209. The State Department of Local Affairs often partners with local governments and housing authorities to provide housing and related services to citizens.

In 2021, the Colorado General Assembly passed legislation creating three new programs to offer grant money and other forms of state assistance to local governments seeking to facilitate the development of affordable housing:

- *The Planning Grant Program* provides grants to help local governments understand their housing needs and adopt policy and regulatory strategies to qualify for the Incentives Grant Program.
- *The Incentives Grant Program* provides grants to local governments to develop one or more affordable housing developments in their community. These grants can help cover tap fees, infrastructure, land acquisition, rehabilitation and renovation, parks/playgrounds and other needs and amenities that support the development of affordable housing. To qualify for this program, local governments must adopt at least three strategies from the menu of policy and regulatory options listed in the program guidelines, including but not limited to:
    - Using vacant publicly owned real property for the development of affordable housing.
    - Creating a program to subsidize or reduce local development review or fees, including building permit fees, planning waivers, and water and sewer tap fees, for affordable housing development.
    - Expediting the development review process for affordable housing development or acquisition or repurposing of underutilized commercial properties that can be rezoned to include affordable housing units.

    - Granting duplexes, triplexes, and other multi-family housing options as a use by right in single-family residential zoning districts.
    - Authorizing accessory dwelling units as a use by right on parcels in single family zoning districts.
- The *Affordable Housing Guided Toolkit and Local Officials Guide Program* is intended to help local communities identify possible housing opportunities and streamline their processes to achieve housing faster. The Toolkit will include affordable housing training sessions, an online web resource focused on policy development, and tailored technical assistance through a competitive application and state help line.

Additional affordable housing programs were established in the 2022 legislative session, including the Local Investments in Transformational Affordable Housing Grant Program, the Infrastructure and Strong Communities Grant Program, and the Transformational Affordable Housing Revolving Loan Fund Program. Collectively, the state invested over $300 million into these new programs available to local governments around the state.

Most recently, in November 2022, Colorado voters approved Proposition 123, which dedicates a portion of state revenue to fund affordable housing across the state. The funding is divided between six funding programs, three of which are housed under and administered by the Department of Local Affairs, and three of which are housed under the Office of Economic Development and International Trade but administered by the Colorado Housing & Finance Authority. The funds may be granted or loaned to non-profits, community land trusts, private entities, and local governments. However, for most programs, the local government must have "opted in" by making a commitment to grow their affordable housing stock by 3% each year over a three-year period, in order for the other entities to be eligible for funding.[7]

Short-Term Rental Licensing

Short-term rentals (STRs) are often discussed as part of the affordable housing conversation, as the proliferation of short-term rentals typically takes long-term rental opportunities for workforce housing out of that market. Counties are permitted to license short-term rentals. Most recently, counties were given authority to enforce county STR licensing requirements via VRBO and Airbnb by requiring such rental services to include the license or permit number (if applicable) of the STR on the platform and to remove listing for those STRs which have had their license or permit suspended or revoked by a county. C.R.S. §30-15-401(1)(s)(III).

Growth Cap Prohibition

In 2023, the legislature passed a law stating that a local government may not enact or enforce an anti-growth law affecting property - that is, a land use law regulating the use or division of property that explicitly limits the growth of the population or the number of development/building permits reviewed or approved. C.R.S. §29-20-104.2(3). This law is intended to prevent local governments from implementing so-called "growth caps" that are perceived to limit growth in the community, to the detriment of neighboring communities.

[7] Beginning in 2026, local governments that opt in will also need to implement a Fast Track process for affordable housing developments. For more details, refer to DOLA's Prop 123 website.

CCI Housing Surveys

In 2021, CCI conducted a county housing survey capturing data from all 64 counties in the state. The survey was conducted once again in 2023 with a smaller sample size, but with more robust data. Both surveys explore the various strategies that counties around the state are employing to facilitate the development of affordable housing, as well as the unique needs and challenges different jurisdictions face. You can find both surveys on CCI's housing resource page.

Open Space & Ag Land Preservation

As the state continues to experience rapid growth, preserving open space and agricultural land is a rising priority for many counties. Open space provides several beneficial uses, including wildlife habitat, community buffers that help preserve a community's sense of place and identity, and recreational space for hiking and biking. Preserving agricultural lands, which often provides benefits similar to open space, also accomplishes multiple goals. Many of the counties along the Front Range and in the rural resort regions have passed either sales tax or mill levy increases to fund preservation and management of open space parcels. Additional funding and technical assistance are available from organizations like Great Outdoors Colorado, the Endangered Species Trust Fund, the Land and Water Conservation Fund and American Farmland Trust. In addition, there are a number of land trust organizations around the state willing to assist in acquiring open space. One of the more unique ones is the Colorado Cattlemen's Agricultural Land Trust, which specializes in preserving working farms and ranches.

Conservation Easements

While the outright purchase of selected parcels is an effective way to preserve open space, it is often cost prohibitive and sometimes controversial since the land is removed from the county tax rolls. One alternative is to seek the purchase or donation of a conservation easement on property targeted for preservation. A conservation easement is a partial interest in a piece of property that holds the development right of the property. By purchasing or receiving the donation of a development right (conservation easement), a county can ensure the parcel in question will never be developed or will not be developed for an agreed upon period of time. Pursuant to C.R.S. §38-30.5-104, conservation easements may also be held in reservation; meaning the county could establish and retain the easement. This option may be exercised if and when a county decides to sell off property. At the same time, the landowner retains ownership of the land and can continue to use it in a traditional manner (e.g., running cattle, farming, etc.). C.R.S. §38-30.5-101 et seq.

The general assembly has added incentives in recent years to both encourage agricultural land preservation and assist agricultural producers struggling economically. Landowners donating a conservation easement to a qualified land trust can receive an income tax credit equal to 100% of the first $100,000 of the easement's value and 40% of the remaining value. Total credits, however, must not exceed $260,000 per donation. Since most agricultural producers do not have large income tax liability, a provision was put into law allowing these producers to sell the tax credit on the open market or carry the credit forward up to 20 years. C.R.S. §39-22-522.

Transfer of Development Rights

Another method of preserving open space in the unincorporated area is the establishment of transferable development rights (TDR) programs. In these programs, development rights are "transferred" from the areas the county wants to retain as open space and/or farmland and directed to areas either within the incorporated area or in direct proximity to developed areas where they can be annexed easily. Developers commonly purchase the development rights from rural landowners in "sending" areas and are then able to develop at a higher density in the "receiving" areas where development is desired. Several counties in the Front Range area have TDR programs, including Larimer, Douglas, and Boulder.

Right-To-Farm Ordinances

One of the side effects of rapid growth in the unincorporated areas of the state is increasing friction between agricultural producers in business for years (and sometimes even generations) and newcomers moving to outlying suburbs. New rural residents are often unaccustomed to some of the more irksome aspects of agricultural production (odors, dust, noise, etc.) and react by complaining to the county and, in some instances, even filing nuisance lawsuits against their farming and ranching neighbors. In this era of declining agricultural profitability, the costs and hassles associated with these nuisance lawsuits have a detrimental effect on a farmer or rancher's willingness and/or ability to stay in business. In response to this issue, counties may pass "right-to-farm" ordinances protecting agricultural producers from nuisance liability. County right-to-farm ordinances may be more protective than state statute. They will not eliminate all conflicts between farmers and new residents, but they are an important tool for maintaining agricultural viability, ensuring agricultural lands stay in production, and preserving cultural heritage. C.R.S. §35-3.5-101 et seq.

Renewable Energy

Solar

Counties can authorize roof or ground mounted solar systems in particular zoning districts, including PUDs, as an accessory use.

Wind

Owners or operators of new wind-powered energy generation facilities are required to install light mitigating technology on turbines.[8] The BOCC may adopt and enforce an ordinance or resolution to impose civil penalties up to $1,000 per day if the owner or operator fails to comply with the statute's requirements. C.R.S. §30-11-130. A facility owner or operator may request an extension of time up to twenty-four months, and the BOCC is required to grant the request if the owner or operator can demonstrate that, despite the owner's or operator's reasonable efforts, the availability of light mitigating technology constrained the ability to comply in the time frame afforded. The BOCC may not impose any penalties during the extension period granted.

[8] This is specifically the case if construction of the facilities begins on or after April 1, 2022. Now, of course, new construction of such facilities automatically meets that criterion.

Carbon Capture, Deep Geothermal, & Natural Gas

Local governments may regulate surface impacts of deep geothermal operations, of intrastate underground natural gas storage facilities, and of class VI injection wells for geologic sequestration of carbon dioxide. C.R.S. §29-20-204(1)(h). Additionally, local governments have authority to impose fees to enhance emergency preparedness in case of carbon dioxide release from carbon sequestration technology. C.R.S. §29-20-104(2)(d).

Electric Vehicles

To promote the adoption of electric vehicles (EVs) in the state, counties are required to count spaces served by EV charging stations toward any local government minimum parking requirements. C.R.S. §30-28-140(2). Additionally, counties may not prohibit the installation or utilization of EV charging stations unless the prohibition is narrowly drafted to address a bona fide safety concern. C.R.S. §30-28-212. Any such prohibitions are subject to judicial review.

Local governments will also need to comply (beginning on March 1, 2024) with rules from the State Electrical Board, promulgated to require compliance with the EV power transfer infrastructure requirements for new multifamily buildings in the Model Electric Ready and Solar Ready Code. C.R.S. §12-115-107(3). However, in the event that there is a provision in a local building or zoning code that prevents a project from complying with the Board-promulgated rules, the rules prevail.

Transmission Lines

A constant subject in the clean energy discussion is the development and extension of transmission lines around the state. Most recently, legislation was passed indicating that a local government must expedite, "as practicable," its review of a land use application to renovate, rebuild, or recondition a transmission line. C.R.S. §29-20-108(7). In effect, this is more of an encouragement for local governments to do so, as there is currently no enforcement mechanism in place, nor is "expedite" defined.

Public Lands

Over one-third of the land in Colorado is owned and managed by the federal government. These public lands are located primarily along the Rocky Mountains and on the Western Slope. The presence of public lands creates unique challenges for county governments. The Bureau of Land Management (BLM) and the U.S. Forest Service manage the lion's share of the public lands in Colorado. While counties cannot usually exercise any land use controls on public lands, they do have a number of service obligations on these lands, including fire protection, road maintenance, search and rescue efforts, law enforcement, wildlife protection and control of predators, pests and noxious weeds. Counties do not collect property taxes on public lands. They do, however, receive some reimbursement from the federal government. Chapter five provides more detail on federal public lands funding programs.