



The Basics of Colorado County Land Use Law

Presented by:

Bruce T. Barker,
Weld County Attorney and
Matthew R. Hoyt,
Gunnison County Attorney

Based Upon Materials Created by former Douglas County Attorney Lance Ingalls

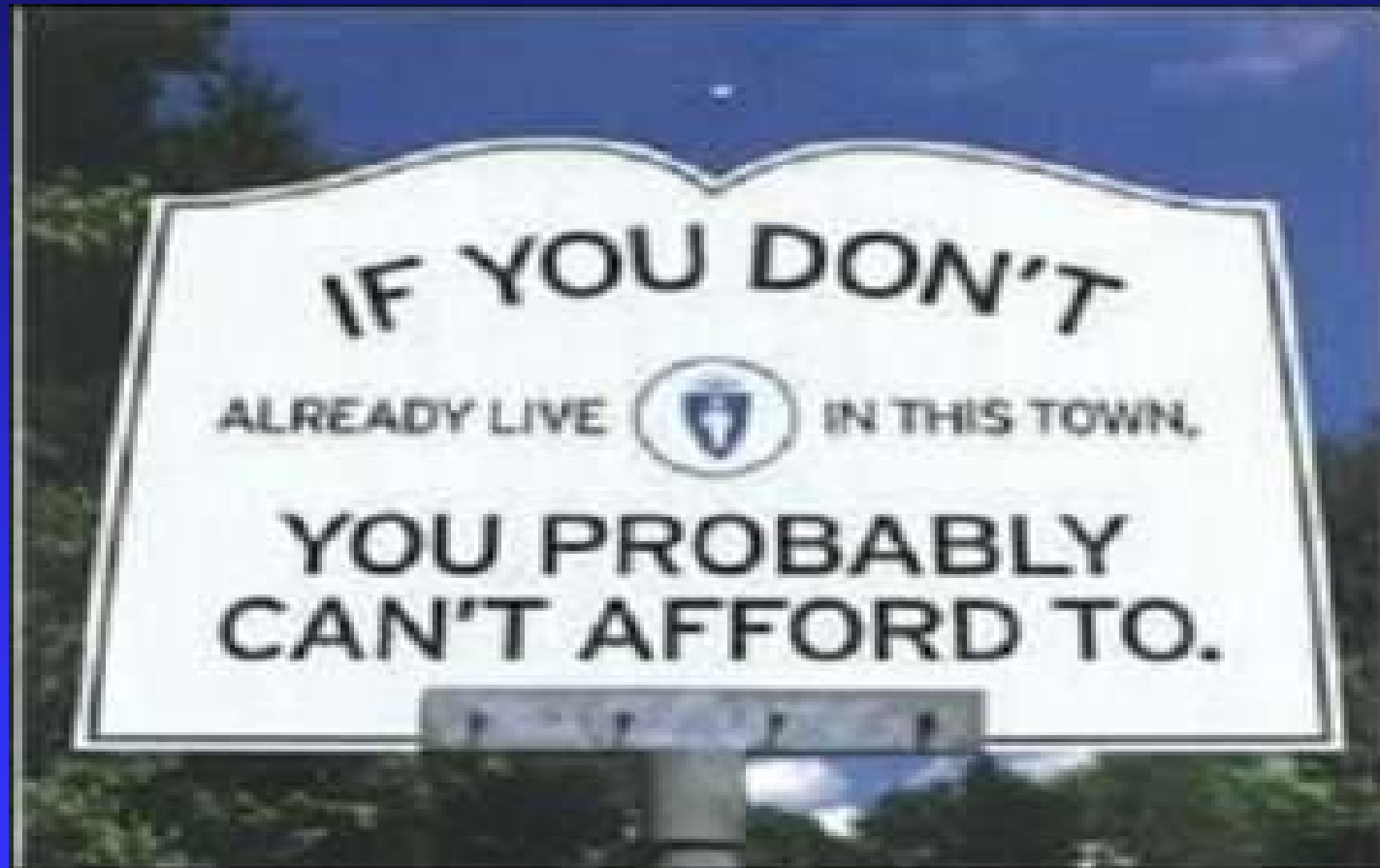
DISCLAIMER!

This presentation is a *broad* overview of county land use law in Colorado.

Any specific questions should be addressed to your county attorney (The Legal Beagle)!

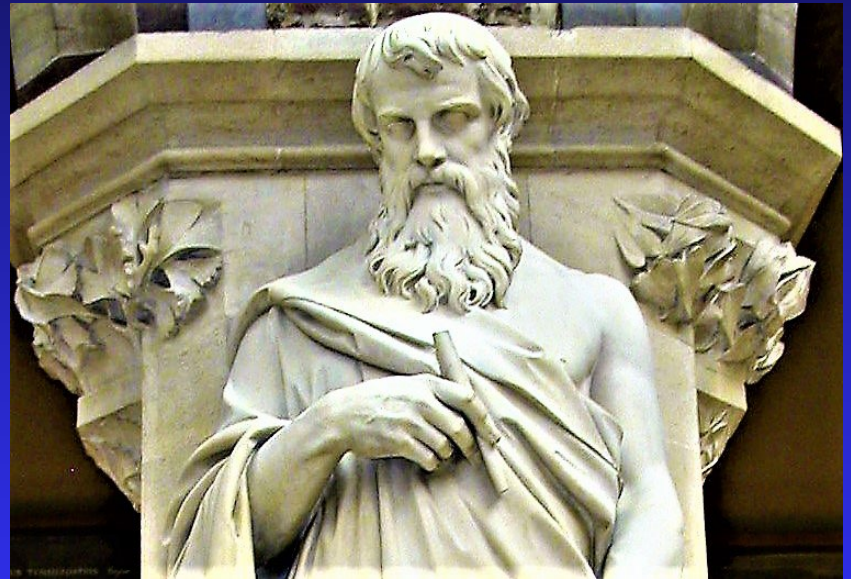


How Important is Land Use Planning and Regulation by Counties?



What is “Euclidean Zoning?”

In 1926, in the case of *City of Euclid, Ohio v. Amber Realty Company*, 272 U.S. 365, 47 S. Ct. 114 (1926), the United States Supreme Court upheld a zoning ordinance enacted by the City of Euclid, Ohio, as a constitutional exercise of police power.



Thus, “Euclidian Zoning” is the process by which a local government restricts the use of real property and provides for the allowable land uses within its jurisdiction.

Does a Zoning Plan Have to Use Euclidean Zoning?

- *See, e.g.,* Title 29, Article 20, C.R.S: Local Government Land Use Control Enabling Act of 1974.
 - “Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by:
 - (a) Regulating development and activities in hazardous areas;
 - (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;
 - (c) Preserving areas of historical and archaeological importance; . . .

Does a Zoning Plan Have to Use Euclidean Zoning? (Cont.)

- (e) Regulating the location of activities and developments which may result in significant changes in population density;
- (f) Providing for phased development of services and facilities;
- (g) Regulating the use of land on the basis of the impact of the use on the community or surrounding areas[.]” § 29-20-104, C.R.S.

The answer appears to be NO – a county has flexibility in their plan to decide on land uses.

Zoning/ Land Use Development

The Board of County Commissioners may provide for the physical development and for the zoning for all or any part of the unincorporated areas of the county.

See C.R.S. § 30-28-102

Planning Commission

§ 30-28-103. County planning commission

“(1) Except as otherwise provided in this subsection (1), the board of county commissioners of any county within the state is authorized to appoint a commission of not less than three and not more than nine members, to be known as the county planning commission; except that, in counties of the state having a population of fifteen thousand or less desiring to establish a commission, the board of county commissioners may constitute the commission, or the board of county commissioners may appoint a separate body to serve as the commission. In counties of the state having a population of one hundred thousand or more, the board of county commissioners is authorized to appoint a commission of not less than three and not more than fifteen members.”

Regional Planning Commission

- Cities and multiple counties can agree to form regional planning commission. *See* § 30-28-105(1), C.R.S.
- RPC is its own governmental body with power to spend money, sue and be sued, adopt its own rules, etc. *See, e.g.,* § 30-28-105(6), (7), (8), C.R.S.
- Otherwise performs functions similar to PC for its region of counties and municipalities.

Planning Commission Highlights

- Members must be resident of County
- 3 staggered year terms
- BOCC Appoints and Replaces
- Compensated as determined by BOCC
- BOCC can appoint alternate members
- Adopt Comprehensive Master Plan (CMP)
- Location and Extent Review

Comprehensive Master Plan

C.R.S. § 30-28-106

Can be Advisory or Binding (Subsection 3(a))

Numerous Elements (Roads, Utilities, Recreation, Schools,
Community centers and Townsites, land classification, agricultural areas, and many more)

Mandatory Adoption (Subsection 4(a))

Must rely on surveys and studies

C.R.S. § 30-28-107

Commission certifies plan to BOCC

Some Master Plan Elements

- General character, use, and population areas
- Major transportation corridors and growth and hubs
- Access to solar
- Availability of affordable housing and regulatory impediments to affordable housing
- Water supply planning
- Natural resources and mineral extraction areas
- Geological areas or hazards
- Flood zones
- Utility areas
- And many more...

Zoning/Land Use Plan

C.R.S. § 30-28-111

- PC has discretion to adopt
 - *but* BOCC can require PC to adopt
- Unincorporated Parts of the County
 - Types of Uses -- Business, Commercial, Etc.
 - Size of Lots, Building Heights, Setbacks
 - Density
 - Open Space, percent of lot use

Temporary Regulations

“The board of county commissioners of any county, after appointment of a county or district planning commission and pending the adoption by such commission of a zoning plan, where in the opinion of the board conditions require such action, may promulgate, by resolution without a public hearing, regulations of a temporary nature, to be effective for a limited period only and in any event not to exceed six months, prohibiting or regulating in any part or all of the unincorporated territory of the county or district the erection, construction, reconstruction, or alteration of any building or structure used or to be used for any business, residential, industrial, or commercial purpose.”

§ 30-28-121, C.R.S.

Zoning Plan Certified to BOCC

BoCC holds public hearing(s) before plan becomes resolution
C.R.S. § 30-28-112

And now you have your

Zoning/Land Use Resolution (or Ordinance)

Zoning/Land Use Enforcement

Normally **Civil Infraction** CRS §§ 30-28-124 (1)(a) (usually small fines and no jail time)

Injunctive relief (CRS §§ 30-28-124(2); 30-28-124.5)

Withhold Building Permits (C.R.S. § 30-28-114)

Zoning/Land Use Related Functions

Board of Adjustment

CRS § 30-28-117

- ◆ 3 to 5 members (less than ½ planning commissioners)
- ◆ Rules and Procedures in Zoning Resolution -- BOCC decides jurisdiction
- ◆ Can have authority over variances-special exceptions, and interpretation
- ◆ Can be a joint BOA with a municipality

CRS § 30-28-118 -- Appeals to board of adjustment (who has standing to appeal)

(1)(a) Appeals to the board of adjustment may be taken by any person aggrieved by his inability to obtain a building permit or by the decision of any administrative officer or agency based upon or made in the course of the administration or enforcement of the provisions of the zoning resolution.

Requires Supermajority vote to reverse County staff decision = all 3 or 4 of 5. C.R.S. § 30-28-118(3)

Variances

C.R.S. § 30-28-118(2)(c)

“Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the regulation or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under this part 1 would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the owner of such property, to authorize, upon an appeal relating to said property, a variance from such strict application so as to relieve such difficulties or hardship if such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning resolutions.”

“Grandfathered” Uses

Technically called “Non-Conforming” Uses

- Must have been legal at the time the use began
- Use must be continuous
- Use (outside a building) cannot expand

C.R.S. § 30-28-120

- May have public health, safety and welfare exceptions
- May provide for reconstruction in Zoning/Land Use Resolution

Subdivision

Every Board of County Commissioners must adopt and enforce subdivision regulations for unincorporated areas within the county.

The Board 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.

In other words, counties are not permitted to regulate the subdivision of land into parcels that are each 35 acres or greater in size. See § 30-28-101(10(c)(1), C.R.S.

Subdivision (Cont.)

BOCC can create exemptions for the definition of subdivision. C.R.S. § 30-28-101(10)(d)

A subdivision improvements agreement (defined in C.R.S. § 30-28-101(11)) is required prior to recording any subdivision. *See* C.R.S. § 30-28-137

Location and Extent Review

C.R.S. § 30-28-110

“(1)(a) Whenever any county planning commission or, if there is none, any regional planning commission has adopted a master plan of the county or any part thereof, no road, park, or other public way, ground, or space, no public building or structure, or no public utility, whether publicly or privately owned, shall be constructed or authorized in the unincorporated territory of the county until and unless the proposed location and extent thereof has been submitted to and approved by such county or regional planning commission.”

BOCC can overrule Commission's disapproval by majority vote of entire Board.

Planned Unit Development (PUD) Zoning

C.R.S. § 24-67-102

Vested Property Rights

- “‘Vested property right’ means the right to undertake and complete the development and use of property under the terms and conditions of a site specific development plan.” § 24-68-102(5), C.R.S.
- Counties “shall specifically identify, by ordinance or resolution, the type or types of site specific development plan approvals within the local government's jurisdiction that will cause property rights to vest[.]” § 24-68-103(1)(a), C.R.S.
- If county fails to do so, “then rights shall vest upon the approval of any plan, plat, drawing, or sketch, however denominated[.]” *See id.*

Vested Property Rights (Cont.)

- “A vested property right shall attach to and run with the applicable property and shall confer upon the landowner the right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan including any amendments thereto.”
§ 24-68-103(1)(c), C.R.S.
- **EXCEPT** “A local government may approve a site specific development plan upon such terms and conditions as may reasonably be necessary to protect the public health, safety, and welfare.” *See id.*

Vested Property Rights (Cont.)

“A vested property right . . . precludes any zoning or land use action by a local government or pursuant to an initiated measure which would alter, impair, prevent, diminish, impose a moratorium on development, or otherwise delay the development or use of the property as set forth in a site specific development plan, except:

- (a) With the consent of the affected landowner;
- (b) Upon the discovery of natural or man-made hazards on or in the immediate vicinity of the subject property, which hazards could not reasonably have been discovered at the time of site specific development plan approval, and which hazards, if uncorrected, would pose a serious threat to the public health, safety, and welfare; or
- (c) To the extent that the affected landowner receives just compensation for all costs, expenses, and liabilities incurred by the landowner after approval by the governmental entity, . . .”

§ 24-68-105(1), C.R.S.

Vested Property Rights (Cont.)

EXCEPT “The establishment of a vested property right shall not preclude the application of ordinances or regulations which are general in nature and are applicable to all property subject to land use regulation by a local government, including, but not limited to, building, fire, plumbing, electrical, and mechanical codes.”

§ 24-68-105(2), C.R.S.

Vested Property Rights (Cont.)

- “an application for approval of a site specific development plan as well as the approval, conditional approval, or denial of approval of the plan shall be governed only by the duly adopted laws and regulations in effect at the time the application is submitted to a local government.” § 24-68-102.5, C.R.S.

Vested Property Rights (Cont.)

- **EXCEPT** “a local government may adopt a new or amended law or regulation when necessary for the immediate preservation of public health and safety and may enforce such law or regulation in relation to applications pending at the time such law or regulation is adopted.” § 24-68-102.5(2), C.R.S.

Pending Ordinance Doctrine

Can you apply a not yet finalized regulatory change to a pending application?

- Zoning/land use/building permits? Probably (note, however, “vested rights”)
- Subdivision? Probably no. *See* C.R.S. § 30-28-133.5(1)

Building Codes

- Counties can adopt building codes consistent with Uniform Building Code. *See* C.R.S. § 30-28-201
 - ◆ “Buildings or structures used for the sole purpose of providing shelter for agricultural implements, farm products, livestock, or poultry may be excepted.”
 - ◆ Similar enforcement options to zoning/land use violations. *See* C.R.S. § 30-28-210.

Water Supply Adequacy

- County “shall not approve an application for a development permit unless it determines in its sole discretion, after considering the application and all of the information provided, that the applicant has satisfactorily demonstrated that the proposed water supply will be adequate.”
- County “shall make such determination only once during the development permit approval process unless the water demands or supply of the specific project for which the development permit is sought are materially changed.”
- County “shall have the discretion to determine the stage in the development permit approval process at which such determination is made.”

§ 29-20-303, C.R.S.

Affordable Housing

- Local Government Land Use Enabling Act empowers counties to regulate development “in order to promote the construction of new affordable housing units”
 - ◆ Can restrict rent on new units IF County gives developer choice to develop new affordable housing units on site
- County must first demonstrate it has adopted changes to zoning regs to promote affordable housing

§ 29-20-104, C.R.S.

Affordable Housing (Cont.)

Examples of land use regulatory incentives for affordable housing:

“(A) Changing its zoning regulations to increase the number of housing units allowed on a particular site;

(B) Promoting mixed-use zoning that permits housing units to be incorporated in a wider range of developments;

(C) Permitting more than one dwelling unit per lot in traditional single-family lots;

(D) Increasing the permitted household size in single family homes;

(E) Promoting denser housing development near transit stations and places of employment;

(F) Granting reduced parking requirements to residential or mixed-use developments that include housing near transit stations or affordable housing developments;

(G) Granting density bonuses to development projects that incorporate affordable housing units;. . .”

§ 29-20-104, C.R.S.

Affordable Housing (Cont.)

Examples of land use regulatory incentives for affordable housing (cont.):

“(II) Materially reduce or eliminate utility charges, regulatory fees, or taxes imposed by the local government applicable to affordable housing units;

(III) Grant affordable housing developments material regulatory relief from any type of zoning or other land development regulations that would ordinarily restrict the density of new development or redevelopment;

(IV) Adopt policies to materially make surplus property owned by the local government available for the development of housing”

§ 29-20-104, C.R.S.

1041 Powers-Areas and Activities of State Interest

- In 1974, the legislature passed HB 74-1041, granting county government the authority to affect issues outside the normal scope of local land use authority. (Codified at C.R.S. § 24-65.1-101)
- “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.
- 1041 powers authorize counties to select and create criteria over statutorily defined areas and activities of state level interest and to exercise local control and local permitting over such areas and activities.
- Examples include:
 - ◆ Mineral resource areas, airports natural hazard areas, areas around key facilities, major transportation site selection, water projects, major utility infrastructure, and conducting nuclear detonations

1041 on Federal Lands

- State and local environmental regulations that apply to private activities on federal lands are **not** preempted by FLPMA or federal mining laws. *California Coastal Commission v. Granite Rock*, 480 U.S. 572 (1987).
- Distinction between land use and environmental regulation? Think of “standards” instead of zoning. May include 1041 regulations

Quasi-Judicial
or Legislative?

Quasi-Judicial Decisions

Quasi-judicial is when you are acting as a judge, determining the facts, and applying the “law”

In other words, when an applicant presents an application to convince you (the Board) that it meets your approval criteria and the public responds, you “judge” that.

Legislative Decisions

Broad decisions that affect a large number of people are generally legislative in nature.

Examples include:

- Changing uses in an entire zoning category.
- Adopting or changing regulations
- Determining whether and how to spend county dollars

Quasi Judicial?

Quasi-judicial action is characterized by the following factors: (1) a local or state law requiring that notice be given before the action is taken; (2) a local or state law requiring a hearing before the action is taken; and (3) a local or state law directing that the action results from the application of prescribed criteria to the individual facts of the case. See *Hadley v. Moffat County Sch. Dist.*, 681 P.2d 938, 945 n. 3 (Colo.1984). Such criteria may include broadly stated provisions of an agency's enabling act, regulations promulgated thereunder, or both. See *Zamarripa v. Q & T Food Stores, Inc.*, 929 P.2d 1332, 1342 (Colo.1997). Quasi-legislative action involves the formulation of regulatory policy of general application to an affected group.

Quasi-judicial action focuses on the application of legislative or quasi-legislative requirements to an individual under a particular set of facts. See *Colorado Ground Water Comm'n v. Eagle Peak Farms*, 919 P.2d 212, 217 (Colo.1996).

Key Questions When Deciding Whether Quasi Legislative or Judicial

- How much discretion do you have?
- Do the facts determine the outcome?
- How many people will be affected by this decision?
 - *E.g.*, an ordinance affecting entire county vs. a land use change affecting one or just a handful landowners
- Are there approval criteria you must consider?
- Are you limited by the record before you?

Public Hearings

Mandatory published notice and a hearing used to be the only criteria for determining the nature of a public hearing.

Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill., 757 P.2d 622, 627–28 (Colo. 1988)

Now, all meetings and hearings of a Board **must** have some form of notice to the public. *See generally* Colorado Open Meetings Law.

Notice is **not** the deciding factor in determining the type of hearing

Procedural Due Process

“In order to establish a procedural due process violation, a plaintiff must prove that he or she was deprived of an opportunity ... granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case.” *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir.1988); *see also Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). When a state affords reasonable remedies to rectify legal errors by local administrative bodies, including avenues of appeal, and when no challenge is raised as to the regulatory or statutory scheme itself, allegations that the local administrative body reached its decision on erroneous reasoning or made demands which exceeded its statutory authority are not sufficient to establish a procedural due process claim. *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.1982); *see also Bello v. Walker*, 840 F.2d 1124 (3d Cir.1988).

Here, plaintiffs were accorded the opportunity for a public hearing on their application, and they could have availed themselves of a C.R.C.P. 106(a)(4) procedure for judicial review of the county commissioners' decision. We conclude that this comports with procedural due process requirements. *See Van Sickle v. Boyes*, 797 P.2d 1267 (Colo.1990).

Because, as pertinent here, the county procedures, and the state procedures which plaintiffs chose not to utilize, meet all constitutional procedural due process requirements, plaintiffs' due process claim under 42 U.S.C. § 1983 is precluded as a matter of law. *See Brady v. Town of Colchester, supra; Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir.1980).”

Sundheim v. Bd. of Cty. Comm'rs of Douglas Cty., 904 P.2d 1337, 1345–46 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. 1996)

Due Process Do's and Don'ts when you Act as a Judge

(i.e., in your quasi-judicial capacity)

Don't

- Decide the issue before the hearing
- Promise anyone a specific result
- Grant a land use application just because the applicant is a nice person or you feel sorry for her.
- Ignore your adopted process
- Engage in *Ex Parte* communications
- Go outside the record
- Show bias
- Ignore your own rules or criteria
- Participate if you have an actual, or even potential, a conflict of interest

Do

- Treat all applicants equally, respectfully and fairly
- Create a clear record – like a courtroom
- Use your experts
 - County Attorney
 - Planning Department
- Know what process you are in and how much discretion you have
- Be prepared-and try to have a poker face
- Discuss potential conflicts with the County Attorney in advance
- Consider **all** of the facts and apply the law to the facts.

May a Land Use Decision by the Board of County Commissioners be Appealed?

Yes, to the District Court, pursuant to C.R.C.P 106.

Questions?

Commissioner Participation!

Question #1

An attorney, who is a good friend of mine, invited me to play golf with him and then took me out to lunch at the golf club, bought me drinks, and then started talking to me about a land use variance application pending before our board of county commissioners and telling me the reasons why I should grant his client's application. I asked him to stop but he would not, saying this was just talk amongst friends. What should I do?

Commissioner Participation!

Question #2

My friend is the consultant who is presenting the case for the applicant in the land use case we are currently hearing. Is it OK for me during our breaks to step into the audience and chat with my old friend? Would it be OK if we went to lunch together? I promise we won't discuss the case!

Commissioner Participation!

Question #3

An attorney, who is also a voter and constituent in my county, wants to talk to me about a letter he just sent my county threatening to appeal to the district court a decision by our planning commission. He sent me an email but did not first get permission of the county attorney to communicate with me, and did not copy the county attorney on the email. I was not involved in the commission's decision, and there's nothing for me to decide, so what's wrong with me responding to him instead of the county attorney?

Commissioner Participation!

Question #4

I spent time last night going through the application of the upcoming land use case. I have a few questions. I would really like to go to the site this afternoon and look around and ask the landowner my questions. Why can't I do that?

Commissioner Participation!

Question #5

My fellow commissioner wants to know if I will sign on to a letter to our United States Senators lobbying them to name a new post office in our county after John Elway. We are a three-member board. Would it violate the Open Meetings Law to discuss this matter with her?

Commissioner Participation!

Question #6

If this applicant wants my vote, he had better pony up and give the County the property it needs for that bike path we want to build. Would it be OK for me to bring that up during the hearing and see if in exchange for our approval of the application he will deed us that property?

Commissioner Participation!

Question #7

Our county is building a workforce housing project and is applying for a land use permit that is ultimately decided by our board. I recently ran for re-election and campaigned on an affordable housing platform, and during a debate I pointed to this project as evidence that housing was my top priority as commissioner. My fellow commissioner on our three-member board also mentioned this project during her campaign, and we both won re-election. Now we both have to decide the county's land use application, but if we both recuse ourselves there will not be a quorum to decide the matter, and our rules do not allow another county body to make the decision or appoint alternates. What do we do?

Commissioner Participation!

Question #8

During the hearing, I need to leave to drive my mother-in-law to a doctor's appointment. Should not take more than 25 minutes. I'm just picking her up and dropping her off. Can I do that and then come right back and the other Commissioners can fill me in on what I missed?

Commissioner Participation!

Question #9

After conferring with the County Attorney, we determined that I have a conflict of interest on a pending land use application because my wife is part of the development team who will stand to make a lot of money on the development once entitlements are obtained, the matter is before the county commission, and there will still be a quorum if I recuse. (If she gets the permit she promised me I could buy a boat!) So I decided, after conferring with our attorney, to recuse myself from the decision making. However, I will still like to listen in on the hearing on Zoom, using my account that states my name on the screen, but planning not to say anything and just listen. I want my name to appear to show her support because she doesn't like public speaking and will likely get really nervous. I just want to emotionally support my wife by being there, but I won't be in the room and won't say anything in favor of the application. Is that OK?

Commissioner Participation!

Question #10

If I vote to approve or deny the land use application and then over the weekend realize I made a terrible mistake, can I change my vote the following Monday?