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TO: Chairperson and Members of the Frisco Planning Commission

FROM: Thad W. Renaud, Esq.

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RE: Summary of the Law of "Takings"

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## INTRODUCTION

I am writing to provide the following summary of the law of "takings" under the constitutions of the United States and the State of Colorado. While the following outline addresses the core legal principles of takings law, it is not intended to be an exhaustive discussion of the law in this area. Most of the legal principles discussed are further refined by additional cases and statutes and, therefore, the applicability of the following legal principles to a given situation will vary depending on the facts and circumstances of that situation. It is also important to note that this memorandum is addressing an area of the law that is currently and rapidly evolving. Few single areas of the law have received as much attention from the U.S Supreme Court over the last fifteen years and that attention is likely to continue as the U.S. Supreme Court and the supreme courts of the several states continue to define the parameters of what have come to be known as "regulatory takings."

## BACKGROUND

The police power is the power to adopt and enforce laws to further the public health, safety and welfare. Pursuant to the police power municipalities may regulate the use of property in furtherance of the public health, safety, and welfare. See generally, *City of Colorado Springs v. Grueskin*; 422 P.2d 384 (Colo. 1966); *Averch v. City and County of Denver*, 242 P.2d 47 (Colo. 1925).

By virtue of the police power Colorado municipalities have long regulated the use of private property in order to accomplish public ends. See e.g., *U.S. West Communications, Inc. v. City of Longmont*, 948 P.2d 509 (Colo. 1997)(ordinance restricting above ground placement of telecommunications facilities in order to promote vehicular and pedestrian safety held reasonable exercise of the police power). *National Advertising Co. v. Bd. of Adjustment*, 800 P.2d 1349, 1351 (Colo. 1990)(ordinance restricting height of billboard signs to height which would not destroy effectiveness of signs as advertising devices held valid exercise of police power); *Landmark Land Company, Inc. v. City and County of Denver*, 728 P.2d 1281, 1286 (Colo. 1986)(ordinance restricting building height in order to promote preservation of mountain view

held reasonable exercise of police power); *Art Neon Co. v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973), cert. denied, 94 S.Ct. 2644 (1974)(ordinance prohibiting use of flashing, blinking, animated, or portable signs held valid exercise of police power, and further held not to be a taking of property for which compensation must be paid); *City of Leadville v. Rood*, 600 P.2d 62 (Colo. 1972); *VanHuysen v. Adams County Bd. of Adjustment*, 588 P.2d 392 (Colo. 1978)(ordinance creating minimum set-back for structures from any property line in order to further aesthetic goals is valid exercise of police power); *Curran Bill Posting and Distributing Co. v. City and County of Denver*, 107 P.2d 261 (Colo. 1910) (ordinance regulating the use and height of signs for purpose of limiting fire danger and promoting general welfare held valid exercise of the police power).

Similarly, Colorado courts have long held controls governing the use of streets and land appurtenant to streets (sidewalks, etc.) to be legitimate exercises of the police power. See e.g., *Magness v. State Dept. of Highways*, 844 P.2d 1304 (Colo. App. 1992)(access limitations placed upon permit for ingress and egress from local street held reasonable exercise of police power for reason that limitations promoted state interest in traffic flow off of abutting highway); *Orsinger Outdoor Advertising, Inc. v. Dept. of Highways*, 752 P.2d 55 (Colo. 1988)(denial of application for sign permit where outdoor sign would be visible from public highway held valid exercise of police power where application of relevant statute promoted recreational value of public travel, and preserved the natural and scenic beauty of the state); *Western Paving Construction Co. v. Jefferson County Board of County Comm'rs*, 689 P.2d 703 (Colo. 1984)(denial of application for rezoning of mining property based upon public health concerns brought on by the presence of increased truck traffic to and from mine held valid exercise of police power); *Carl Ainsworth, Inc. v. Town of Morrison*, 539 P.2d 1267 (Colo. 1975)(ordinance restricting use of city streets by trucks in order to reduce noise, congestion, and pollution held valid exercise of police power); *City of Denver v. Girard*, 42 P.2d 662 (Colo 1895)(ordinance prohibiting the use of streets for displaying merchandise in order to avoid obstruction of said streets held reasonable and valid exercise of the police power).

While these examples illustrate the vast breadth of the municipal police power, as will be discussed below, any exercise of that power which has the effect of denying a landowner all "economically viable use of his land" will result in a taking of property for which compensation must be paid

## THE CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution, applied to the states by virtue of the Fourtheenth Amendment, provides "...nor shall private property be taken for public use without just compensation." In a like fashion, Article II, § 15 of the Colorado Constitution provides "Private property shall not be taken or damaged for public or private use without just compensation."

Two types of "takings" can arise under these prohibitions. The first, often referred to as a physical taking, is brought about when the government physically invades or makes use of private property (such as for the construction of public improvements such as streets, water or sewer lines). This sort of taking is relatively common and is usually planned for and addressed in advance of the invasion and use by way of an eminent domain or "condemnation" proceeding. In cases where the government has not planned for the invasion (such as where a public water

main is placed within private property by mistake) and the landowner files suit seeking compensation, the claim is referred to as being one for "inverse condemnation." In most instances, the issues in eminent domain cases have very little to do with the government's right to take property and focus instead upon the value of the property taken. This memorandum is not intended to discuss these types of takings.

The second type of taking is often referred to as a "regulatory taking" and it arises when the existence of a particular regulation, or the application of that regulation to a particular piece of property, has the effect of denying a landowner all "economically viable use of his land." Because these cases are always brought by the landowner, they are always "inverse condemnation" claims. Prior to the 1980's, courts almost never found a taking as the result of a land use regulation of general applicability. In 1992, however, the U.S. Supreme Court decided *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 120 L.Ed.2d. 798 (1992) and the law of regulatory takings began what has become its rapid evolution.

## LAND USE REGULATIONS AND REGULATORY TAKINGS

Zoning and subdivision regulations advance the public interest by applying limitations on the use of property and, as discussed above, are generally legitimate exercises of the police power. As mentioned above, however, any exercise of the police power that has the effect of denying a landowner all "economically viable use of his land" will result in a taking of property for which compensation must be paid. See generally, *Dolan v. City of Tigard*, 512 U.S. 374, 129 L.Ed. 304 (1994); *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 120 L.Ed.2d. 798 (1992); *Nolan v. California Coastal Comm'n*, 483 U.S. 825, 97 L.Ed.2d 677 (1987). Colorado observes this rule See e.g., *U.S. West Communications, Inc. v. City of Longmont*, 948 P.2d 509, 522 (Colo. 1997); *Animas Valley Sand & Gravel v. Bd. of County Comm'rs of County of La Plata*, WL 123991, 3 (Colo. App. 2000).

The problem that arises for municipalities regulating in this area (and for the attorneys charged with defending the regulations against takings challenges) is that it is not at all clear what, exactly, it takes to deny a landowner all "economically viable use of his land." Like "obscenity," it is clear that while the courts are unable to define exactly what it is, they know it when they see it. However, where some reasonable economic value remains, Colorado Courts have determined that an ordinance affecting private property will not result in a taking. See, *Van Sickle v. Boyes*, 797 P.2d 1267, 1271-72 (Colo. 1990)(regulatory taking did not result where application of safety ordinance to building did not foreclose all reasonable use of building for commercial purposes). *Sellon v. City of Manitou Springs*, 745 P.2d 229 (Colo. 1987)(downzoning of residential property from high density use to low density use did not result in regulatory taking for reason that ordinance still permitted landowner to construct a maximum of 60 residences on property); *Landmark Land Company, Inc. v. City and County of Denver*, 728 P.2d 1281, 1286 (Colo. 1986)(regulatory taking did not result from 'mountainview' ordinance restricting height of commercial buildings as landowner's present use could continue unabated under new ordinance). *Roeder v. Miller*, 412 P.2d 219 (Colo. 1966)(in absence of showing that land was rendered not usable for any reasonable purpose permitted by law, property owner may not claim application of zoning ordinance against use of property as automobile wrecking yard constituted an unconstiutional taking of his property).

Courts in other jurisdiction have reached similar findings. See e.g., *Zealy v. City of Waukesha*, 548 N.W.2d 528, 534 (Wis. 1996)(owner of 10.4 acre parcel of land originally zoned for residential and business uses not entitled to compensation where re-zoning to create

conservancy district altered said use as to approximately 8.4 acres within parcel for reason that remaining 2.1 acres retained residential and business use classification and 8.4 acres was still usable for some economic purpose.); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d. Cir. 1986)(rezoning which diminished value of property from $495,600 to $52,000 did not constitute taking as land retained some economic value).

While some comfort can be taken from these cases, there are also any number of cases where regulatory takings have been found and there is no formula in the law by which one might measure whether, in a particular instance, a taking will or will not be found to have occurred. Rather, the courts take a case-by-case approach and examine what have been described as the landowner's "reasonable investment backed expectations." This inquiry takes in factors such as the purchase price of the property, the regulations that existed at the time of that purchase, the degree to which an owner could expect changes in those regulations, the degree to which the regulations have changed and the impact of the new regulations on the value of the property.

From this rather unsatisfactory state of affairs, some rules have emerged. For example, as a prerequisite to a takings claim, a property owner must demonstrate the local government has reached a final and authoritative determination regarding the type and use of property controlled by a given ordinance. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, L.Ed. (1985). See also, *Amwest Investments, Ltd. v. City of Aurora*, 701 F.Supp. 1508 (1988). Generally, this means that a landowner must at least apply for a special use permit, variance, or other exemption to allow for what would otherwise be prohibited, and be denied in that application, prior to resorting to the courts. How many times a landowner must submit for approval is unsettled. However, it is clear that an aggrieved party must make at least "meaningful application" to be entitled to judicial review. *Kinzli v. City of Santa Cruz*, 818 F.2d 968 (1987).

Where a land use regulation fails to substantially advance a legitimate state interest it constitutes a taking. *Agins v. Tiburon*, 447 U.S. 255, L.Ed. (1980). See also, *National Advertising v. Denver Bd. of Adjustment*, 800 P.2d 1349, (Colo. App. 1990). However, pursuant to the broad municipal police power, courts generally defer to the local decision-makers' determination that a particular threat to the public welfare requires regulation in the manner prescribed.

An ordinance will not constitute a taking where it merely prohibits the highest or best use of a parcel leaving some other use, *Van Sickle v. Boyes*, *supra*., or increases the cost of a landowners intended use, *Fumalaro v. Adams County Comm'rs*, 505 P.2d 958 (Colo. 1973), or simply diminishes the value of a given parcel, *Village of Euclid v. Ambler Realty*, 272 U.S. 365, L.Ed (1926). However, where a reasonable investment backed expectation is totally denied by the law, a taking results. *Animas Valley Sand & Gravel, Inc. v. Bd. of CountyComm'rs of the County of La Plata*, 2000 WL 123991, 2 (Colo. App.. 2000). Where a taking results, some courts have awarded aggrieved landowners damages based upon the fair market value of the subject property. *First Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, L.Ed. (1987). Other courts have simply found the underlying ordinance to be invalid.

Rules have also emerged concerning those types of "takings" that are often referred to as "exactions." Generally speaking, an exaction is a requirement for the dedication of land, or of an easement, or for the payment of money, as a condition of a land use approval that is imposed on a discretionary, case-by-case basis (as opposed, for example, to a land dedication that is required by an ordinance of general applicability, such as a dedication for park purposes in connection

with a large subdivision). These discretionary exactions are usually imposed to address some adverse public impact that will result from the proposed development. Three principal rules have arisen in the past few years which, if not followed, can result in successful "taking" claims. The first is that there must be a rational nexus between the adverse public impact caused by the development and the exaction itself. *Nolan v. California Coastal Comm'n*, 483 U.S. 825, 97 L.Ed.2d 677 (1987). The second is that even if there is a rational nexus between the adverse public impact and the exaction, the exaction (in terms of its size, extent, etc.) must be roughly proportional to the impact. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). And the third is that while mathematical exactitude is not required, it is the duty of the party imposing the exaction to demonstrate that the exaction is roughly proportional to the impact and that determination must be part of the record at the time of the exaction. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

## CONCLUSION

I hope that the foregoing discussion has given you a general sense of the law of "takings" as it relates to land-use regulation and decision-making. If you are left with a feeling of uncertainty as to what might or might not constitute a "regulatory taking" you are not alone. The question of which land use regulations "go too far" in adversely impacting a landowner's property and his "investment backed expectations" with regard to that property is one that is, and is likely to remain for some years, very much a matter of debate in courts throughout this country. As always, if you have any questions concerning any of the foregoing, please do not hesitate to call me.