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Using Planned Development Ordinances To Downzone: *Sherman v. City of Colorado Springs Planning Commission*

Recently local land use planning authorities have attempted to eliminate the rigidity of traditional Euclidean zoning[1] by supplementing it with more flexible zoning techniques such as floating zone and planned development ordinances. These ordinances allow a city on a case-by-case basis to consider proposed uses not conforming to the underlying zone. Under these ordinances, approval of the proposed development results in upzoning[2] the landowner's property.[3]

In *Sherman v. City of Colorado Springs Planning Commission*,[4] the city of Colorado Springs rejected a development plan meeting all requirements of its underlying zone,[5] and the Colorado Court of Appeals confronted the issue whether Colorado Springs had appropriately used its planned development ordinance to downzone. Contrary to the conclusion in *Sherman*, this note suggests that a planned development ordinance is a valid means of downzoning if the ordinance contains proper standards.

I. THE *Sherman* CASE

Marvin and Marie Sherman acquired 5.05 acres of land on the west side of Colorado Springs in 1955. The land was zoned for high-rise residential development in 1963. In January 1981, Colorado Springs passed a planned development ordinance requiring approval of development plans prior to issuance of building permits in most zones, including the zone permitting

1. Euclidean zoning creates districts of designated uses. Each district imposes height, bulk, and area restrictions deemed necessary to separate incompatible uses. 2 R. ANDERSON, AMERICAN LAW OF ZONING § 9.01 (2d ed. 1976).

2. Upzoning reclassifies land to a less restrictive use, and downzoning reclassifies land to a more restrictive use. *See* 2 A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING & PLANNING § 27.02(3) (4th ed. 1984).

3. Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670, 677 (Colo. 1982). *See generally* 2 R. ANDERSON, *supra* note 1, § 11.06.

4. 680 P.2d 1302 (Colo. Ct. App. 1983).

5. *Id.* at 1304.

high-rise residential development. The ordinance outlined the minimum amount of information to he included in each plan submitted. However, the ordinance contained no criteria for approval or rejection of proposed developments.[6]The Shermans submitted a plan for a fourteen-story multi-family building in August 1981. After holding public hearings, the Colorado Springs Planning Department rejected the plan. The Shermans appealed to the city, and public hearings were again held. The city ultimately rejected the plan, contending that the proposed use was incompatible with the surrounding area. Specifically, the city claimed that high-density development would cause traffic problems.[7]

The Shermans filed an action in state district court seeking a writ of mandamus to compel city approval of the plan. In the alternative, the Shermans asked the court to reverse the city's action as arbitrary under a writ of certiorari. The parties stipulated that the proposed development plan complied with requirements for high-rise residential districts.[8] The trial court held that mandamus[9] was inappropriate because the city had discretion to approve or reject development plans under the planned development ordinance. It also denied certiorari,[10] holding that the city's action was neither arbitrary nor capricious.[11]

The court of appeals reversed, holding:

> Where, as here, the zoning body has determined that the health, safety, and general welfare are hest promoted by zoning land for residential high-rise purposes with specified set back [sic], height, and bulk limitations, that body may not thereafter attempt to reserve to itself the discretion to decide whicb of the complying land uses will be permitted.[12]

The appellate court also held that the planned development ordinance's lack of standards for approving or denying develop-

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6. *Id.* at 1303.

7. *Id.*

8. *Id.*

9. Colorado allows relief in the nature of mandamus "[w]here the relief sought is to compel an inferior tribunal . . . to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station . . . ." COLO. R. CIV. P. 106(a)2.

10. Colorado allows certiorari "[w]bere an inferior tribunal (whether court, board, commission, or officer) exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion . . . ." COLO. R. CIV. P. 106(a)4.

11. *Sherman*, 680 P.2d at 1303-04.

12. *Id.* at 1304.

ment plans "runs contrary to the requirement of adequate standards."[13]

II. Analysis

In *Sherman*, the Colorado Court of Appeals held that a city may not reject a proposed use under a planned development ordinance when the proposed use complies with requirements of an underlying zone.[14] This broad holding fails to recognize that no landowner has a vested right in the continuation of zoning classifications.[15] Case law clearly establishes that, subject to certain limitations protecting property owners, local governments have the power to upzone or downzone. Downzoning under a planned development ordinance is permissible because application of a planned development ordinance is essentially an act of rezoning.[16] However, valid planned development ordinances must contain standards that limit and guide decision making, thereby providing landowners with the same basic protections offered by traditional rezoning methods. Because the Colorado Springs planned development ordinance lacked standards, the decision reached by the Colorado Court of Appeals was correct.

A. Background

Traditional Euclidean zoning ordinances divide a community into districts and prescribe uses in each district.[17] A landowner knows the permissible uses and plans accordingly. He also relies on limitations applicable to adjacent land. However, traditional zoning does not change to meet new conditions. Thus, although traditional zoning has the benefit of certainty, it lacks flexibility.[18]

A planned development ordinance is intended to make traditional zoning more flexible.[19] It allows a city to consider specific developments not permitted under existing zoning clas-

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13. *Id.*

14. *Id.*

15. 2 R. Anderson, *supra* note 1, § 11.06.

16. Lutz v. City of Longview, 83 Wash. 2d 566, 568-69, 520 P.2d 1374, 1376 (1974); *see also* 2 R. Anderson, *supra* note 1, § 11.09 ("The end product is an amendment to the zoning ordinance which reclassifies the land in question.").

17. 2 R. Anderson, *supra* note 1, § 11.06.

18. Tri-Stete Generation & Transmission Co. v. City of Thornton, 647 P.2d 670, 677-78 (Colo. 1982).

19. *Id.*

sifications. A city can determine on a case-by-case basis if developments are compatible with surrounding areas. A planned development ordinance thus provides two benefits: "the flexibility to permit adjustment to changing needs," and "the ability to provide for more compatible and effective development patterns within a city."[20] However, a planned development ordinance must have adequate standards to guide and limit a city's zoning discretion.[21]

B. No Vested Right In Zoning Classification

Courts have recognized that no vested right exists in the continuation of a particular zoning classification. "[P]ersons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise."[22] However, cities are not free to rezone at will even though landowners do not have vested property rights in current zoning classifications.

1. Appropriate circumstances for rezoning

Colorado case law establishes circumstances justifying the exercise of rezoning power. In *Roosevelt v. City of Englewood*,[23] the city upzoned a 57-acre tract from single-family residential to multi-family residential. Plaintiffs, who owned surrounding properties, claimed to be adversely affected by the rezoning.[24] The Colorado Supreme Court held that the surrounding property owners had a right to rely on existing zoning regulations absent a material change in the character of the neighborhood.[25] The city offered evidence of numerous material changes, includ-

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20. *Id.*

21. *Id.*

22. Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121, 96 N.E.2d 731, 733 (1951); *see also* Miller v. City of Albuquerque, 89 N.M. 503, 506, 554 P.2d 665, 668 (1976); City of Miami Beach v. 8701 Collins Ave., 77 So. 2d 428 (Fla. 1954). *See generally* 2 A. RATHKOPF & D. RATHKOPF, *supra* note 2, § 27A.03(2)(c); 1 R. ANDERSON, *supra* note 1, § 4.25.

23. 176 Colo. 576, 492 P.2d 65 (1971).

24. *Id.* at 580-81, 492 P.2d at 67.

25. *Id.* at 581, 492 P.2d at 68; *see also* King's Mill Homeowner's Ass'n v. City of Westminster, 192 Colo. 305, 311, 557 P.2d 1186, 1190 (1976) (holding that "changed conditions" were present to support a change in zoning); Clark v. City of Boulder, 146 Colo. 526, 362 P.2d 160 (1961) (holding that a material change in the character of the neighborhood is necessary to justify rezoning); Information Please, Inc. v. Board of County Comm'rs, 42 Colo. App. 392, 600 P.2d 86 (1979).

ing population increases, major highway construction in the area, a need for multi-family use, and impracticality of the site for single-family residential use.[26] The court found this evidence sufficient to support the city council's rezoning decision.[27]

Unlike *Sherman, Roosevelt* dealt with a challenge to upzoning. However, *Roosevelt* did not distinguish between downzoning and upzoning. Therefore, the "material change" rule arguably applies in determining the validity of downzoning as well as upzoning. Case law from other jurisdictions supports this conclusion.

For example, in *Miller v. City of Albuquerque*[28] the New Mexico Supreme Court outlined circumstances necessary for valid piecemeal rezoning.[29] In *Miller,* the landowner desired to develop two adjacent tracts of land. The larger tract of 17.82 acres was classified multi-family residential and the smaller tract of 1.8 acres was classified single-family residential. The landowner sought to have the smaller piece upzoned to multi-family residential. Contrary to the landowner's desire, the tracts were not upzoned, but were downzoned to a more restrictive special use for planned residential development.[30] The landowner successfully challenged the rezoning decision in the trial court.[31] On appeal, the supreme court affirmed, holding that the City Environmental Planning Commission had violated due process requirements by acting beyond its authority and failing to follow its established procedures.[32] However, the court noted that a landowner has no vested right in a particular zoning classification.[33]

According to *Miller,* two factors are critical to the validity of piecemeal rezoning. First, a presumption exists that the initial zoning determination is correct. Second, a landowner has a right

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26. *Roosevelt,* 176 Colo. at 582, 492 P.2d at 68.

27. *Id.* at 582-83, 492 P.2d at 68-69.

28. 89 N.M. 503, 554 P.2d 665 (1976).

29. Comprehensive rezoning affects large portions of land belonging to many landowners. Piecemeal rezoning affects smaller tracts belonging to one or a few landowners. *See* 2 A. RATHKOPF & D. RATHKOPF, *supra* note 2, § 27.02(4). Though *Roosevelt* dealt with a relatively large tract of land (57 acres), it is likely that the rezoning was piecemeal since one person owned the property. The fact that the *Roosevelt* court tested the rezoning's validity by using the material change rule is further evidence that piecemeal rezoning was in question since this rule applies only to piecemeal rezoning. *Id.*

30. *Miller,* 89 N.M. at 504, 554 P.2d at 666.

31. *Id.* at 505, 554 P.2d at 667.

32. *Id.* at 506, 554 P.2d at 668.

33. *Id.*

to rely on original zoning absent one of the following factors: (1) a mistake in original zoning, or (2) a substantial change in the character of the neighborhood such that reclassification of the property is justified.[34] This "substantial change" requirement is identical to the "material change" requirement relied upon in Colorado case law.

Thus, in certain circumstances, Colorado cities have power to rezone. This power includes the ability to downzone piecemeal as in *Miller*. Of course, a municipality can create severe hardships for landowners by exercising rezoning power. For this reason, courts have imposed several limitations on a city's power to rezone. One of these limitations is the change or mistake rule previously discussed.[35] Other limitations include prohibitions against spot zoning and reverse spot zoning,[36] the vested rights doctrine,[37] the requirement that zoning be in accordance with a comprehensive plan,[38] and the prohibition against confiscatory zoning.[39]

2. *The need for proper standards*

In jurisdictions using planned development ordinances to rezone there is clearly a theoretical basis for allowing downzoning. However, since application of a planned development ordinance is an act of rezoning,[40] such ordinances should be subject

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34. *Id.*

35. *Roosevelt* and the cases cited in note 25 apply only the material change requirement of the change or mistake rule.

36. Invalid spot zoning occurs when the zoning is for the benefit of a particular tract and not for the general welfare of the community. Clark v. City of Boulder, 146 Colo. 526, 362 P.2d 160 (1961); *see also* King's Mill Homeowners Ass'n v. City of Westminster, 192 Colo. 305, 557 P.2d 1186 (1976). *See generally* 2 A. RATHKOPF & D. RATHKOPF, *supra* note 2, § 27A.04(5)c & ch. 28. Reverse spot zoning rezones property to a classification more restrictive than that applicable to surrounding properties. Such rezonings are often invalidated as discriminatory. *Id.* § 28.01(2).

37. In Colorado, a landowner can use the vested rights doctrine to challenge downzoning if two things exist: "(1) a valid building permit, whether or not issued in error, and (2) detrimental reliance on the permit." Schwartz, *Asserting Vested Rights in Colorado*, 12 COLO. LAW. 1199, 1200 (1983).

38. The requirement that zoning be in accordance with a comprehensive plan is statutory. This requirement protects against piecemeal development inconsistent with zoning patterns. *See* King's Mill Homeowners Ass'n v. City of Westminster, 192 Colo. 305, 312, 557 P.2d 1186, 1189 (1976). *See generally* 1 A. RATHKOPF & D. RATHKOPF, *supra* note 2, ch. 12.

39. To successfully challenge zoning as confiscatory, a landowner must show that zoning deprives him of any reasonable use of his property. Baum v. City of Denver, 147 Colo. 104, 110-22, 363 P.2d 688, 691-97 (1961).

40. 2 R. ANDERSON, *supra* note 1, § 11.06.

to limitations similar to those imposed on traditional zoning techniques. A valid planned development ordinance must contain standards governing approval or rejection of submitted plans. Properly applied, these standards then grant landowners the same protection from arbitrary state action as limitations on traditional zoning methods.

The standard of review for action under a planned development ordinance is whether such action is arbitrary, unreasonable, or an abuse of discretion.[41] Whether the municipality acts illegally depends on whether it reasonably applies the standards of the planned development ordinance to the proposed development.

Ordinance standards are general criteria considered in relation to a proposed use. If a city considers these criteria when initially establishing zoning districts, then a proposed development complying with existing zoning is presumed compatible with the surrounding area. For the city to reasonably apply the criteria of a planned development ordinance and find that the proposed use is incompatible with the surrounding area, it must find either a substantial change in conditions since the initial zoning, or a mistake in the initial zoning. Thus standards in a planned development ordinance provide landowners with the same protection that the change or mistake rule provides.

If planned development ordinances lack standards governing approval and rejection of submitted development plans, several practical and constitutional problems arise. When a planned development ordinance is used to upzone, the result is clear to the landowner: the city has rezoned his property to allow the proposed use. But when a city uses a planned development ordinance to downzone, the owner knows only that his plan is proscribed; he is uncertain about what use the city will approve. This argument was made by the Shermans' attorney.

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41. Moore v. City of Boulder, 29 Colo. App. 248, 255, 484 P.2d 134, 137 (1971). In an attempt to give landowners additional protection against rezoning abuse, some courts have characterized rezoning decisions as quasi-judicial rather than legislative. *See, e.g.*, Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973). One result of this quasi-judicial characterization is that a court may closely scrutinize rezoning decisions. *See generally* 2 A. RATHKOPF & D. RATHKOPF, *supra* note 2, § 27A.05; Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972). Colorado has adopted a quasi-judicial characterization of rezoning decisions for the limited purpose of allowing direct judicial review by petition for certiorari under Colorado Rules of Civil Procedure. Margolis v. District Court, 638 P.2d 297 (Colo. 1981).

> "What are the Shermans to do at this point in time? Must they keep submitting expensive development plans until they have one that is acceptable to the personal whims and caprices of the individual members of the city council? . . . There is no possible way [the Shermans] can have insight into what is acceptable to the city council."[42]

In *Sherman*, the court found that the Colorado Springs planned development ordinance contained "no criteria or general standards for approval or rejection of submitted plans."[43] The city argued that it had applied "general planning standards, zoning standards, and zoning principles to the [Shermans'] development plan."[44] The city further cited the intent and purpose clause of the city zoning code, arguing that this clause provided adequate standards. The clause stated:

> This Chapter is designed to encourage the most appropriate use of land throughout the City to insure a logical growth of the various physical elements of the City; to lessen congestion in the streets, and to facilitate the adequate provision of transportation, to secure safety from fire, panic, and other dangers; to provide adequate light and air; to approve housing standards; to conserve property values; to facilitate adequate provisions for water, sewerage, schools, parks and other requirements; to protect against flood conditions and poor geological conditions and in general to promote health, safety and general welfare.[45]

The Shermans argued that these standards were inadequate: "The law simply cannot be that the City can continually reject development plan concepts under the basis and concept of public health, safety and welfare. . . . [This] gives the City the absolute discretion to turn down any plan that may be tendered."[46] The court resolved this issue by simply stating that "[t]o interpret this development plan ordinance as giving the city the power to deny a lawful use of property runs contrary to the requirement of adequate standards."[47]

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42. Reply Brief for Appellant at 8, *Sherman*, 680 P.2d 1302.

43. *Sherman*, 680 P.2d at 1303.

44. Answer Brief for Appellee at 4, *Sherman*, 680 P.2d 1302.

45. *Id.*

46. Reply Brief for Appellant at 7-8, *Sherman*, 680 P.2d 1302.

47. *Sherman*, 680 P.2d at 1304. Arguably, the court's reference to "a lawful use of property" in this quotation may be interpreted that the planned development ordinance's standards were adequate, but Colorado Springs improperly applied them. However, this interpretation is probably incorrect. The court never says that the ordinance's

C. *Adequate Standards*

An example of proper standards for a planned development ordinance is found in *Tri-State Generation & Transmission Co. v. City of Thornton.*[48] In *Tri-State,* Mountain Bell sought to rezone a 12-acre parcel under a planned unit development ordinance (PUD). At the time of the rezoning application, part of the parcel was zoned as an industrial district and the remainder was a restricted service district. Mountain Bell desired to use the site for a corporate processing center. The proposed facility conflicted with existing height limitations and parking requirements. However, Mountain Bell's proposed development allowed greater setback distances than required by the existing zones and also offered design amenities not required in those zones.[49]

Representatives of neighboring businesses appeared at the planning commission's hearing on Mountain Bell's proposed development. They argued that the proposed development was incompatible with the surrounding area.[50] Hearings were also held before the Thornton City Council which subsequently approved Mountain Bell's application.[51]

Thereafter neighboring businesses brought suit in district court attacking the validity of the rezoning. One of the plaintiffs' claims was that the PUD ordinance was unconstitutional because it lacked sufficient standards to guide the City Council's review of PUD applications.[52] The trial court rejected this argument and the Colorado Supreme Court affirmed.[53]

The supreme court held that the PUD ordinance was constitutional because its standards adequately protected against arbitrary state action. The ordinance under review provided:

> The Planning Commission and the City Council shall consider the following in making their determination [whether to grant an application for a PUD]:
> 1. Compatibility with the surrounding area.
> 2. Harmony with the character of the neighborhood.

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standards were adequate, and it expressly mentioned that the ordinance contained no standards. The court's reference to "a lawful use of property" likely refers to the fact that the Shermans' proposed use complied with the requirements of the underlying zone.

48. 647 P.2d 670 (Colo. 1982).

49. *Id.* at 672.

50. *Id.* at 672-73.

51. *Id.* at 673.

52. *Id.*

53. *Id.* at 677-79.

> 3. Need for the proposed development.
> 4. The [e]ffect of the proposed Planned Unit Development upon the immediate area.
> 5. The [e]ffect of the proposed Planned Unit Development upon the future development of the area.
> 6. Whether or not an exception from the zoning ordinance requirements and limitations is warranted by virtue of the design and amenities incorporated in the development plan.
> 7. That land surrounding the proposed Planned Unit Development can be planned in coordination with the proposed Planned Unit Development.
> 8. That the proposed change to Planned Unit Development District is in conformance with the general intent of the comprehensive master plan and Ordinance #325 [the general zoning ordinance of Thornton].
> 9. That the existing and proposed streets are suitable and adequate to carry anticipated traffic within the proposed district and in the vicinity of the proposed district.
> 10. That existing and proposed utility services are adequate for the proposed development.
> 11. That the Planned Unit Development creates a desirable and stable environment.
> 12. That the Planned Unit Development makes it possible for the creation of a creative innovation and efficient use of the property.[54]

The court reasoned that these standards "serve[] to ensure that a City Council's enhanced discretion under a planned development ordinance will be guided by proper considerations, and that a benchmark for measuring the council's action will be available in case of subsequent judicial review."[55]

Colorado Springs' standard of general zoning and planning principles (health, safety, and public welfare) clearly falls short of the specific *Tri-State* standards. Such a broad standard allows Colorado Springs to decide on an ad hoc basis the factors upon which it will base a rezoning decision. The Shermans' argument that this standard was inadequate is persuasive.

The standards in the Intent and Purpose Clause of the Colorado Springs Zoning Code, which the city also relied upon for "adequate standards," come close to being specific enough to meet the *Tri-State* standards. However, these standards were

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54. *Id.* at 678-79 (citing City of Thornton planned unit development ordinance).
55. *Id.* at 678.

not within the planned development ordinance itself.[56] It is likely that Colorado Springs never specifically applied these criteria when considering and rejecting the Shermans' plan. The city probably invoked the Intent and Purpose Clause of the zoning code only after the Shermans challenged the validity of the planned development ordinance. Thus, as a practical matter, no standards specifically guided Colorado Springs' discretion when it applied the planned development ordinance.

The city's deliberations and conclusion on the Shermans' development plan may have taken place in good faith. But good faith does not meet the requirements for a valid planned development ordinance. "[C]ourts have generally required that standards be incorporated into a planned development ordinance in order to protect against arbitrary state action in violation of the right to due process of law."[57]

Incorporating adequate standards into the planned development ordinance assures that cities will not act arbitrarily. In addition, the presence of adequate standards eliminates some uncertainty a landowner is likely to experience when seeking approval of a development plan. The landowner will have access to the planned development ordinance and will be able to rely on its standards.

III. Conclusion

Planned development ordinances give the land use planning process needed flexibility. Courts should allow the use of this flexible zoning technique for downzoning as well as upzoning. To protect landowners from governmental abuse, however, the planned development ordinance must contain adequate standards for government approval or rejection of development plan applications. Because the Colorado Springs planned development ordinance contained no criteria for approval or rejection, the *Sherman* court properly held that the ordinance was invalid.

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56. *Sherman*, 680 P.2d at 1303.

57. Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670, 678 (Colo. 1982).