MEMORANDUM

DATE: September 11, 2018
TO: Board of County Commissioners
CC: La Plata County Planning Commission
FROM: La Plata County Attorney's Office — Sheryl Rogers and Kim Perdue

Re: Legal Overview of Zoning's Purpose and Implementation

I. INTRODUCTION

This memorandum examines, from a legal perspective, how zoning functions as a tool to provide for the physical development of land within the County's land use jurisdiction. First, the memorandum provides a brief overview of zoning's purpose, and certain legal limitations on its practice. Next, it examines how Colorado law contemplates that the practice of zoning will be a primary resource to local governments in their fulfillment of their statutory land use duties. Finally, it examines the current state of the law as to how zoning legally may and may not be used to further specific land use and development goals.

II. BRIEF OVERVIEW

Local governments in the United States began to employ zoning as a method for managing land use and development in the early twentieth century. In 1926, the United States Supreme Court recognized that Euclidean zoning[1] was not only constitutionally permissible, but a practical means for local governments to fulfill their duties to safeguard the public welfare. As the United States Supreme Court noted in a 1926 case, "[t]here is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances."[2] The Court noted, however, that zoning (as with any land use regulation) must be compatible and commensurate with the hazards it is intended to mitigate, stating: "The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which

[1] Euclidean zoning entails dividing land into zones in which particular uses, e.g., residential, commercial, and industrial, may be allowed by right, allowed subject to land use review, or prohibited. Donald L. Elliott, A BETTER WAY TO ZONE at 10 (2008).
[2] *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365, 388 (1926).

would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities."[3]

That analysis carries forward to today's legal framework pertaining to zoning. Zoning regulations (as a whole, or as they pertain to the re-zoning of any particular parcel) frequently are subject to allegations that they are arbitrary and capricious, or an unauthorized taking of private property, or an invalid exercise of governmental police power. Although specific legal analyses apply to each circumstance, the overarching question is whether the zoning regulation reasonably addresses a public health, safety, or welfare concern which the local government has jurisdiction to remedy. [4]

III. COLORADO LAW

A. Scope of County Land Use Authority

Though zoning authority generally derives from local governments' police powers to regulate for the public health, safety, and welfare, most states, including Colorado, have passed laws (commonly designated "enabling acts") which delegate land use authority to local governments for specific purposes. Colorado's enabling act, at C.R.S. § 30-28-101 et seq., is very broad in its delegation. Colorado's counties "are authorized to provide for the physical development of the unincorporated territory within the county and for the zoning of all or any part of such unincorporated territory in the manner provided [herein]."[5] In fact, Colorado's enabling act gives counties authority to regulate for purposes beyond protecting the public health, safety, and welfare, specifically, to promote "the health, safety, morals, convenience, order, prosperity, or welfare of the present and future inhabitants of the state, including lessening the congestion in the streets or roads or reducing the waste of excessive amounts of roads, promoting energy conservation, security safety from fire, floodwaters, and other dangers, providing adequate light and air, classifying land uses and distributing land development and utilization, protecting the tax base, securing economy in governmental expenditures, fostering the state's agricultural and other industries, and protecting both urban and nonurban development."[6] Given this lengthy list of purposes for which the County may exercise its land use authority, the Board has broad discretion in selecting the manner and means of regulating land use and development. The primary limit on that authority is that the Board

---

[3] *Id.*

[4] *See, e.g, id.; Grant v. Seminole Cty., Fla.*, 817 F.2d 731, 736 (11th Cir. 1987) (upholding restrictions of zoning district because rationally related to county's public health, safety, and welfare goals); *Colo. Manufactured Hous. Ass'n. v. Bd. of County Comm'rs of Pueblo County, Colo.*, 946 F. Supp. 1539, 1554 (D. Colo. 1996) (holding it "well settled" that local governments "may zone land to pursue any number of legitimate objectives related to the health, safety, morals, or general welfare of the community"); *Patterson v. Utah Cty. Bd. of Adjustment*, 893 P.2d 602, 607 (Utah App. 1995) (zoning ordinance promotes the public health, safety and welfare if it will contribute to the orderly development of the county as a whole).

[5] C.R.S. § 30-28-102.

[6] C.R.S. § 30-28-115(1).

may not regulate in a manner that is arbitrary or capricious, in clear violation of the law, or which lacks any rational relationship to the purposes identified in the enabling act. [7]

B. Exercise of County Land Use Authority

1. Enactment of Zoning Regulations

Notably, section 30-28-102 specifically identifies zoning a county's unincorporated territories as the means by which counties may provide for their physical development. Thus, Colorado law recognizes that land use authority and zoning are intertwined, and much of Colorado's enabling act presumes that counties will regulate the development of land through zoning (and Euclidean zoning, in particular).

The scope of the County's zoning authority is commensurate with the scope of its land use powers. C.R.S. §§ 30-28-111(1) and 30-28-113(1)(a) provide that counties may regulate, through a zoning resolution:

- the location, height, bulk, and size of buildings and other structures;
- the percentage of lot[s] which may be occupied;
- the size of lots, courts, and other open spaces;
- the density and distribution of population;
- the location and use of buildings and structures for trade, industry, residence, recreation, public activities, or other purposes;
- access to sunlight for solar energy devices; and
- the use of land for trade, industry, recreation, or other purposes.

To do so, C.R.S. § 30-28-113(1)(b)(I) expressly authorizes counties to "divide the territory . . . that lies outside of cities and towns into districts or zones of such number, shape, or area as it may determine, and, within such districts or any of them . . . regulate the erection, construction, reconstruction, alteration, and uses of buildings and structures and the uses of land." This broad authority gives the County flexibility to apply zoning to a variety of land use goals, including, for example, to protect and promote agriculture or to facilitate a transition from a nonconforming to a conforming use,

Enactment of a zoning resolution is a legislative act.[8] The Commissioners, therefore, have reasonable discretion to legislate in a manner consistent with their policy positions and input from their constituents, so long as the legislation promotes public health, safety, and welfare, and does not violate equal protection by treating similarly situated persons or businesses differently without a

---

[7] *See e.g. Board of County Comm'rs of Jefferson County, Colo. v. Simmons*, 494 P.2d 85, 87 (Colo. 1972).
[8] *E.g., Snyder v. City of Lakewood*, 542 P.2d 371, 374 (Colo. 1975) (quoting *Fleming v. Tacoma*, 502 P.2d 327 (Wash. 1972)) *overruled on other grounds by Margolis v. Arapahoe County Dist. Court*, 638 P.2d 297 (Colo. 1981).

rational basis upon which to do so. But, as discussed below, far less discretion is available to the Board when it applies the zoning regulations it has enacted in its quasi-judicial capacity.

2. Rezoning

The Board's power to zone includes the power to rezone, which it may exercise by legislative amendments to the zoning map,[9] or by quasi-judicial consideration of applications to rezone particular properties.[10] A legislative amendment to the zoning map is a comprehensive alteration, generally applicable to property owners or occupants in the areas impacted by the amendment.[11] Thus, as with their enactment of an initial zoning resolution, Commissioners may apply their political perspectives and consider input from their constituents.

In contrast, when acting in its quasi-judicial capacity to grant or deny a citizen's rezoning application, the Board must apply the land use code's criteria and standards[12] for rezoning in a neutral and uniform manner, regardless of the Commissioners' policy priorities, constituents' preferences, or the individual applicant's identity or status.[13] Consistency with the County's Comprehensive Plan, and any applicable District (Area) Plans, is paramount because those Plans comprise the community's goals as to how future land use (including the prospective use of a re-zoned parcel) should occur.

3. Impact of Rezoning

Applications for rezoning typically request "up-zoning," that is, a change from a classification allowing less intense uses with modest off-site impacts, e.g., residential or agricultural, to a classification allowing more intense uses with more significant off-site impacts, e.g., commercial or industrial. (Requests for "down-zoning" are infrequent, because land use regulations generally allow less intense uses to occur on parcels zoned for more intense uses, e.g., residential uses are allowed on industrial parcels.)

Granting a rezoning application by, for example, changing a parcel's classification from agricultural to commercial, means that the standards applicable to uses on that parcel may become stricter, e.g., larger setbacks. The stricter standards are to mitigate the greater offsite impacts likely to result from the rezoning. Thus, in practice, the property owner receives more leniency in the manner he or she wishes to use her property in exchange for more stringent regulations to protect and preserve neighboring uses.

---

[9] C.R.S. § 30-28-112

[10] C.R.S. § 30-28-116.

[11] *See, e.g., Colo. Leisure Prods., Inc. v. Johnson*, 532 P.2d 742, 744 (Colo. 1975).

[12] For example, our current land use code requires the Board to consider rezoning in the Animas Valley (our only area employing Euclidean zoning) according to the area's character; consistency of the proposal with existing plans; adequacy or infrastructure; and impacts on health, safety, and welfare. LPLUC § 82-20(IV)(C).

[13] *Id.*; *also see Snyder,* 542 P.2d at 374.

4. Nonconformities

Any enactment of or change to land use regulations (whether or not they include a zoning plan) has the potential to render a legal land use out of conformance with the new regulations. For example, a retail store established in the 1960s, before any land use permit was required in La Plata County, would become a legal, nonconforming use upon the adoption of land use regulations requiring a permit to operate a retail store. Or, a food processing facility permitted in the 1990s on land zoned "industrial" would become a legal, nonconforming use if a legislative amendment to the zoning map changed that parcel and its surrounding neighborhood to "commercial" in 2010. When land use regulations change, and create a legal, nonconforming use, **the use may continue in the same manner**, and the right to maintain the nonconforming use runs with the land.[14]

But although enactment of land use regulations generally, and zoning or rezoning in particular, does not prohibit or foreclose existing uses of land, neither should the nonconformity be allowed to expand or change indefinitely without land use oversight.[15] Therefore, regulations limiting the expansion or alteration of nonconforming uses function to either:

- allow the nonconforming use to continue, so long as it does not significantly expand or change; or
- if possible, bring the nonconforming use into compliance with current standards (under which it could more readily expand or change); or
- phase out the nonconforming use and, ultimately, replace it with a conforming one.[16]

Without such oversight, unwanted and incompatible impacts could occur. For example, the nonconforming retail store might double its floor space and parking area, creating noise congestion in an otherwise quiet area. Or the food processing facility might transition to manufacturing marijuana edibles, without complying with land use regulations intended to protect public health and safety. Furthering the goals of the Comprehensive Plan thus requires the Board to regulate nonconforming uses to prevent them from defeating the community's goals for future development.

IV. LIMITATIONS ON ZONING AUTHORITY AND REGULATION

As discussed above in section III.A, United States and Colorado courts afford considerable deference to county zoning regulations, and presume that they comply with the United States Constitution.[17] Within this framework of deference and presumption of validity, courts have been

---

[14] C.R.S. § 30-28-120(1); *Town of Lyons v. Bashor*, 867 P.2d 159, 160 (Colo. App. 1993).
[15] *E.g., Anderson v. Bd. of Adjustment for Zoning Appeals*, 931 P.2d 517, 519 (Colo. App. 1996) ("Non-conforming uses are entitled to protection under the law. The use may continue, however, the right to continue does not include the right to extend or enlarge the use.").
[16] *Id.* ("[N]on-conforming uses should be reduced to conformity as speedily as possible . . ."
[17] *See Board of Comm'rs of Boulder County v. Thompson*, 493 P.2d 1358, 1361 (Colo. 1972).

reticent to overturn zoning ordinances based on a variety of constitutional challenges. There are, nevertheless, limits to the County's zoning authority, derived primarily from the U.S. Constitution's Fourteenth Amendment (which prohibits takings without just compensation[18] and denials of equal protection).

A. Takings Without Just Compensation

Lawsuits by landowners claiming that zoning regulations amount to a taking without just compensation are common, but usually unsuccessful. Takings actions based on zoning typically allege inverse condemnation (also known as a regulatory taking), which is a claim that a government's regulatory interference has deprived a person of the use and/or economic value of his or her property.[19] [20] Zoning regulations do occasionally have the incidental effect of diminishing individual properties' marketability or interfering with their owners' expectations of how they may be used. But diminution in property value is rarely sufficient to amount to a regulatory taking. Rather, a regulation amounts to a taking only where it denies "all economically viable use of [a]property," or (in "truly unusual" circumstances) where the diminished economic value, combined with interference with the owner's investment-backed expectations, amounts to an unacceptable level of governmental interference.[21]

Likewise, rezoning, or the denial of a rezoning request, amounts to a taking only if it precludes entirely the property's beneficial use. Owners' arguments that zoning denies them the most profitable, or highest and best use of their property, typically fail.[22] For example, La Plata County prevailed against a sand and gravel company's inverse condemnation claim, which arose from the County's rejection of the company's application for a change in zoning designation in the Animas Valley from "river corridor district" to "industrial."[23] The company alleged that a river corridor district zoning designation rendered the parcel's underlying mineral estate "economically

---

[18] The Fifth Amendment to the United States Constitution specifically prohibits the federal government's taking of property without just compensation, and the Fourteenth Amendment incorporates that prohibition as to states (and their political subdivisions). *E.g. Chicago, B.&Q.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

[19] *Animas Valley Sand and Gravel, Inc. v. Board of County Comm'rs of La Plata County*, 38 P.3d 59, 63 (Colo. 2001).

[20] Regulatory takings also may occur as exactions, in which a government "requires a landowner to forfeit part of his or her property for public use as a condition of development." *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695 (Colo. 2001). This memo, however, does not specifically address exactions because they usually do not arise in relation to the exercise of zoning authority but, rather, in the context of conditions imposed on new development, e.g., dedication of public rights of way.

[21] *Animas Valley Sand and Gravel, Inc.*, 38 P.3d at 65-66 (reciting federal authority holding no taking had occurred when subject properties' values were reduced by between 75% and 92.5%). *Also see Applebaugh v. Board of County Comm'rs of San Miguel County*, 837 P.2d 304, 309 (Colo. App. 1992).

[22] *E.g. Animas Valley Sand and Gravel, Inc.*, 38 P.3d at 65; *Cottonwood Farms v. Bd. of Cty. Comm'rs of Jefferson County*, 763 P.2d 551, 554 (Colo. 1988) ("It is well-established that extant zoning ordinances do not constitute unconstitutional confiscations of property merely because they restrict the ability of landowners to realize greater profit from the use of their property" [and] "the fact that the plaintiff may have paid more than the land was worth under existing zoning in the hope of securing a zoning change is generally not a factor to be considered in the plaintiff's favor in analyzing a taking claim.").

[23] *Id.* at 62.

idle."[24] Yet, some economic value remained to the surface estate, which could have been developed for agricultural, residential, or tourism uses.[25] In that case, the Colorado Supreme Court applied recent United States Supreme Court precedent from *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) to determine that, notwithstanding the property's retention of some economic viability, denial of the map amendment could amount to a taking if, based on a fact-specific analysis, the regulation waged sufficient economic impact and interfered with the owner's investment-backed expectations.[26] However, following a remand, the La Plata County District Court found, and the Colorado Court of Appeals affirmed, that the alleged 70.6% diminution in property value and interference with investment-backed expectations did not rise to the level of taking.[27]

Thus, the United States and Colorado Supreme Courts' analyses do not clearly define the circumstances under which zoning regulations, adopted within the bounds of the County's land use authority, would amount to a regulatory taking. But voluminous federal and state precedent indicates that, even when zoning regulations negatively impact some property values or prevent owners from developing land for its most profitable use, they do not amount to a taking without just compensation.[28]

B. Equal Protection Considerations

Questions of compliance with the Equal Protection Clause of the United States Constitution's Fourteenth Amendment most commonly arise, in the zoning context, when a land use regulation treats similarly situated properties differently, without a reasonable basis for the different treatment.[29]

The equal protection clause's principal purpose is "to ensure that all citizens are not subject to arbitrary and discriminatory state action."[30] Thus, it forbids the imposition, without justification, of legal restrictions or requirements upon one person or group of persons, when those restrictions or requirements are not also imposed on other persons or groups who are similarly situated.[31] In the

---

[24] *Id.*
[25] *Id.*
[26] *Id.* at 66, *citing Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).
[27] *See Animas Valley Sand and Gravel, Inc. v. Board of County Comm'rs of the County of La Plata, Colorado*, 2006 WL 3259381, Case No. 06SC403, (November 13, 2006) (denying petition for writ of certiorari).
[28] *See, e.g., Landmark Land Co., Inc. v. City and County of Denver*, 728 P.2d 1281, 1287 (Colo. 1986) ("[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.") *quoting Penn Central*, 438 U.S. at 130; *Van Sickle v. Boyes*, 797 P.2d 1267, 1270 (Colo. 1990) ("[A] landowner is not constitutionally entitled to use his property in a manner that results in the maximum attainable profit.").
[29] 1 Rathkopf's The Law of Zoning and Planning § 4:5 (4th ed.) ("Different treatment of two [parcels] of land similarly situated or in the same area is unconstitutionally discriminatory . . . if there is no reasonable [basis] for the differentiation."). *Also see Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kan.*, 927 F.2d 1111, 1118 (10th Cir. 1991) ("A violation of equal protection occurs when the government treats someone differently than another who is similarly situated.").
[30] 16B Am. Jur. 2d Constitutional Law § 847.
[31] *Id. Also see Jacobs, Visconsi & Jacobs, Co.*, 927 F.2d at 1118.

context of zoning-related equal protection claims, persons (and, more specifically, their properties and/or development projects) are similarly situated when they are alike in all material respects, e.g., location, size, geographic features, access to infrastructure, and other characteristics.[32]

States and their political subdivisions, like the County, may regulate in a manner that treats similarly situated persons (or properties) differently, but only if it can demonstrate justification for such disparate treatment. The type of justification required depends on the person or activity that is regulated. For most equal protection claims arising from zoning regulations, the County need only demonstrate a rational basis for the regulation, i.e., that the regulation is rationally related to a legitimate governmental interest.[33] The "rational basis test" is very deferential; typically, regulations triggering that test will be upheld unless the County cannot demonstrate any relationship whatever between the disparate treatment and a legitimate purpose of government.[34]

1. Spot Zoning

One zoning practice which commonly raises equal protection concerns is "spot zoning," which entails imposing restrictions on one property which are different (typically more lenient) than those imposed on surrounding properties.[35] In the course of receiving public comment on the County's land use code amendments, many citizens have proposed that they be permitted to "color in the map," that is, select their preferred Euclidean zoning classification for their properties. But allowing property owners to choose an Euclidean zoning classification likely would result in spot zoning, to the extent that similarly situated properties could receive disparate zoning classifications. Such disparate treatment of similarly situated properties could violate equal protection unless the County demonstrates that zoning one property differently than neighboring properties is rationally related to a legitimate governmental purpose.

Furtherance of the County's Comprehensive Plan is a legitimate governmental purpose, so to the extent citizens' zoning selections comport with that purpose, they might be upheld. But it is unlikely that the random nature of individual zoning selections would comport with the Comprehensive Plan. In making zoning decisions, the Board must act to benefit the general public rather than individual property owners. The fulfillment of this requirement can frequently be determined by analyzing whether the action relieves a particular parcel/property owner from restrictions in spite of rather than in with conformance the County's Comprehensive Plan. Doing the former (relieving a single property owner) may constitute impermissible spot zoning, thus running afoul of the equal protection clause while a decision in conformance with the Comprehensive Plan would not.[36]

---

[32] *See Brockton Power LLC v. City of Brockton*, 948 F.Supp.2d 48, 71 (D. Mass.).
[33] *See, e.g., Zavala v. City and County of Denver*, 759 P.2d 664, 672 (Colo. 1988).
[34] 16B. Am. Jur. 2d Constitutional Law § 858.
[35] *Whitelaw v. Denver City Council*, 405 P.3d 433, 445 (Colo. App. 2017).
[36] See *Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961)

For example, in a rural area, many persons might choose an Euclidean zone consistent with their properties' current uses, e.g., agricultural or residential. But someone who intends to develop his or her property for a more intense use (or just wants to keep that option open) likely would select a less restrictive classification, such as commercial or industrial, even though the property and its related infrastructure would not support that use.

Such a selection would be incompatible with the Comprehensive Plan in two ways. First, it could allow the establishment of neighboring, incompatible uses, possibly without any compatibility review or mitigation requirements. This would contravene the Comprehensive Plan's goal of developing a land use planning system that encourages compatible land uses and managed growth.[37] Second, it would impede the Comprehensive Plan's policy of establishing growth hubs, to ensure the balance of service needs against the County's fiscal responsibilities.[38] The incompatibility between "islands" of individualized uses, and the goals and policies of the Comprehensive Plan, likely would create spot zoning, and result in zoning classifications subject to legal challenge and reversal by a reviewing court.[39]

So might the inverse scenario, where the owner of property in a designated growth hub could elect a restrictive zoning classification to preserve his or her agricultural or residential use, or even allow conservation restrictions. Allowing a restrictive classification amidst more intensive commercial or industrial development likewise would encourage incompatible development and preclude the growth hub's purpose, thus amounting to spot zoning.[40]

Even in the unlikely event that property owners select compatible Euclidean zoning classifications which support the development of growth hubs, the entire scheme of determining zoning based on individual preference could be subject to challenge as inconsistent with the Comprehensive Plan's goals and policies as stated above. Generally speaking, property owners' preferences are not, under the law of Colorado and other jurisdictions, an adequate basis on which to assign zoning classifications.[41] Rather, zoning classifications should be assigned uniformly to similarly situated properties throughout the County, and must support, rather than impede, the Comprehensive Plan.

2. Piecemeal Rezoning

As discussed above, the Board also must consider and apply the Comprehensive Plan when it evaluates applications for rezoning. Failure to rezone in a manner consistent with the Comprehensive Plan can result in a practice known as "piecemeal rezoning."[42]

---

[37] *See* La Plata County Comprehensive Plan at 1.9, Goal 1.1 (May 2017).
[38] *Id.* at 1.10, Policy 1.1.A3.
[39] *See Whitelaw*, 405 P.3d at 445.
[40] *See Albano v. Mayor and Tp. Comm. of Wash. Tp.*, 476 A.2d 852 (N.J. Super. 1984) ("[Z]oning regulations cannot create invidious distinctions between similarly situated property and thus . . . there must be real differences between [the subject] property and the surrounding areas in order to uphold their disparate treatment.").
[41] *E.g., Clark*, 362 P.2d at 162.
[42] 1 Rathkopf's The Law of Zoning and Planning § 38:15 (4th ed.).

Piecemeal rezoning presents a heightened challenge to avoid illegal spot zoning because it can be more difficult to consider the health, safety, morals, convenience, order, prosperity, and welfare of all current or future County citizens[43] in the context of evaluating a single property and its proposed uses. Because of the risk that the individual owner's preferences could eclipse the Comprehensive Plan's policies and goals (and because neighbors as well as the property owner are likely to challenge the rezoning decision) piecemeal rezoning often is exposed to judicial scrutiny. [44]

Thus (as with any initial zoning resolution) the Board should evaluate carefully whether granting the proposal would amount to treating one property differently from others similarly situated; and, if yes, whether a reasonable justification exists to support that different treatment. And (again) the Board also must consider the zoning plan's regulations governing rezoning, the consistency of the proposal with the Comprehensive Plan.

3. Partial Zoning

Colorado law recognizes that counties might apply different zoning plans and land use regulations in different areas of their unincorporated territories.[45] For example, our Comprehensive Plan currently provides for Euclidean zoning for the Animas Valley, and Performance-based elsewhere in the County. Consistent with this flexibility, many community members have commented that Euclidean zoning should not apply to agricultural lands, or not in certain areas (e.g., the southeast region or Florida Mesa). Under such a scenario, however, concerns related to equal protection, and to the County's land use application fee structure, arise.

The community's call for a use- or district-based exception from Euclidean zoning raises the question: how can the County fairly apply disparate standards and permitting procedures in Euclidean vs. Performance-based zoning areas? Of primary concern, the Planning Department would have to take care that its land use application fee structure was consistent with the different burdens associated with reviewing planning projects under the two zoning plans. For example, to the extent Euclidean zoning is intended, among other things, to streamline compatibility analyses for land use projects, the review process for Euclidean parcels likely would be more efficient and less costly than for Performance-based parcels, where compatibility still would have to be determined on a case-by-case basis.

"[B]ecause a service fee is designed to defray the cost of a particular governmental service, the amount of the fee must be reasonably related to the overall cost of the service."[46] So charging the same fee for review of projects in Euclidean vs. Performance-based areas could expose the County to challenges that its fee structure is not rationally related to its service costs. Thus, to

---

[43] *See* C.R.S. § 30-28-115(1) (setting forth the purpose of County land use regulations).
[44] 1 Rathkopf's The Law of Zoning and Planning § 3:21 (4th ed.).
[45] C.R.S. § 30-28-111(1) ("The [Planning Commission and Board of County Commissioners] may make a zoning plan for zoning *all or any part of* the unincorporated territory within [a] county.").
[46] *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 693-94 (Colo. 2001).

ensure that there is a rational relationship, and thus survive equal protection scrutiny, the County might have to charge a higher service fee for review of land use applications in Performance-based areas.

To alleviate the disparity and complexity associated with a resolution providing for partial zoning, as provided above, the zoning resolution might provide for a transitional area between Euclidean and Performance-based zoning areas. Although, generally, new development will be likely to gravitate toward areas with an Euclidean zoning plan, where land use approval processes are more efficient and less costly, a transitional area could provide less cumbersome approval processes for nearby parcels zoned under a Performance-based plan, where neighboring Euclidian parcels ensure adequate infrastructure and inform compatibility.

V. CONCLUSION

This memorandum provides just a few examples of the many ways in which the County can use zoning to facilitate the planned development of its unincorporated areas. The Planning Department and the Board of County Commissioners have a broad menu of options as to whether and how to zone all or only some portions of the County, and how to employ zoning classifications to direct development in a manner that protects established uses and property owners' expectations about future uses of their, and neighboring, properties. The limits imposed by the Equal Protection Clause require only that the County's zoning (and rezoning) decisions have a rational relationship to the legitimate purpose of land use regulation, and thus provide a framework for ensuring the equitable treatment of the County's diverse citizens and land uses.

4838-0290-4669, v. 10