



La Plata County
Colorado

LA PLATA COUNTY 2011 COMP PLAN
LEGAL ISSUES MEMORANDUM

Memo No. 3
Date: July 9, 2011
From: La Plata County Attorney's Office (MTB)
Subject: Colorado's Right to Farm law

I. STATEMENT OF THE ISSUE PRESENTED

Goal Number 7 listed in Chapter 6 of DRAFT #2a of the La Plata County, Colorado, Comprehensive Community Plan, entitled "Sustainable Development", is to "[p]romote and encourage retention of agricultural lands". Strategy 7(e) listed within this Goal is to "[a]dopt a Right to Farm/Ranch ordinance including content of Colorado's revised statute 35-3.5-101: Nuisance Liability of Agriculture Operations". It is our understanding that the La Plata County Planning Department and the Comprehensive Plan Working Group are interested in enhancing the rights of traditional agricultural operations beyond the scope of Colorado's right to farm statute, and possibly providing preferential regulatory fees and processing treatment for such operations.

The purpose of the memorandum is to discuss (1) the law related to adoption of a right to farm ordinance and the enhancement of the rights of traditional agricultural operations beyond the scope of Colorado's state Right to Farm statute, (2) the relationship between Colorado's Right to Farm Statute and County land use regulatory authority, and (3) the equity of providing preferential regulatory fees and processing treatment for agricultural operations.

II. CONCLUSIONS/RECOMMENDATION

La Plata County may adopt an ordinance that provides “protection for agricultural operations consistent with the interests of the affected agricultural community” in addition to the protections afforded by Colorado’s Right to Farm statute, and can address agricultural operations within its Land Use Code.

Providing a preferential fee and processing structure for agricultural operations within a Land Use Code could present equitable and legal difficulties.

III. ANALYSIS

Right to Farm and County Land Use Regulation. In Colorado, a nuisance action is a lawsuit based on the premise that one has been deprived of the right to the use and enjoyment of his or property based on the activities conducted on a different property, often times related to problems of noxious odors or noise.¹ A private nuisance is the unreasonable interference with another’s use and enjoyment of his or her real property.² A public nuisance, on the other hand, is the doing of or failure to do something that injuriously affects the safety, health, or morals of the public or works substantial annoyance, inconvenience, or injury to the public. A governmental entity may bring an action to abate a public nuisance.³

C.R.S. §§ 35-3.5-101 through 35-3.5-103, which I will refer to in the memorandum as Colorado’s “Right to Farm Statute”, was enacted to “protect and encourage the development and improvement of agricultural land for the production of food and other agricultural products” and “reduce the loss to the state of Colorado of its agricultural resources” by “limiting the circumstances under which agricultural operations may be deemed to be a nuisance”.⁴ Pursuant to the Right to Farm Statute, an “agricultural operation shall not be found to be a public or private nuisance if the agricultural operation alleged to be a nuisance employs methods or practices that are commonly or reasonably associated with agricultural production.”⁵

Thus, the Right to Farm Statute protects agricultural operations from being deemed a nuisance. It also specifically provides that “[a] local government may adopt an ordinance or pass a resolution that provides additional protection for agricultural operations”.⁶ It does not, however, address County land use regulation of agricultural operations.

Colorado counties have been expressly granted the rights to regulate the use of land on the basis of the impact thereof on the community or surrounding areas, and the use of

¹ See West’s Colorado Practice Series, Personal Injury Practice – Torts and Insurance, Chapter 31. Nuisance, Section 31.1.

² See West’s Colorado Practice Series, Personal Injury Practice – Torts and Insurance, Chapter 31. Nuisance, Section 31.2 (citations omitted).

³ Id.

⁴ C.R.S. § 35-3.5-101.

⁵ C.R.S. § 35-3.5-102(1).

⁶ C.R.S. § 35-3.5-102(7).

land for trade, industry, recreation, or other purposes.⁷ One possible example of how a Colorado county may acknowledge the Right to Farm Statute, enhance the rights of agricultural operations and address agricultural operations in a land use code is shown in the *Model Code for Colorado's Counties* prepared by the Colorado Department of Local Affairs' Office of Smart Growth (the "DOLA Model Land Use Code").⁸ The DOLA Model Land Use Code addresses agricultural operations in various ways, including the following:

- Exhibit A attached hereto contains Division 4 of Chapter 1, entitled "Right to Farm". These provisions acknowledge and support Colorado's Right to Farm Statute.
- Exhibit B attached hereto contains Section 2-104, which includes "Traditional Agricultural Operations" as one type of use that *could* be exempted from the Land Use Change Permit review process.
- Exhibit C attached hereto contains Section 3-501. This is a "Use Table" which lists the different types of uses that are allowed in various manners in different zones. Agricultural uses in the tables are placed in bold print, and allowed in different zones in different manners.

Regulatory Fees and Processing. Application fees for land use approvals are essentially service fees, charged to cover the cost of the service provided. Such fees cannot be assessed arbitrarily, and must be reasonably related to the overall cost of the service.⁹ Strict mathematical precision is not required, but the County must carefully match the fee to the costs associated with providing the service and ensure that all fee revenue is used for that service.¹⁰ To grant agricultural operations lower application/processing fees and expedited review time could very possibly run afoul of these legal requirements, unless their processing does indeed require less time and it can be demonstrated clearly that no revenues from fees for other types of applications are supporting the services provided to process applications for agricultural operations.

⁷ C.R.S. §§ 35-3.5-102(7). C.R.S. §§ 30-28-205, which governs County issuance of building permits, as opposed to land use permits, exempts agriculture buildings from building permit requirements to a certain extent by providing, in part, as follows: "After the adoption of the building code, it shall be unlawful to erect, construct, reconstruct, alter, or remodel any structure, dwelling, or building in the designated area, *except buildings or structures used for the sole purpose of providing shelter for agricultural implements, farm products, livestock, or poultry* without first obtaining a building permit from the county building inspector.

⁸ The DOLA Model Land Use Code for counties is intended for use as a template to guide the preparation of land use regulations for Colorado counties, meets statutory requirements and was drafted to be consistent with land use law. See <http://dola.colorado.gov/dlg/osg/modelcodes.htm#MLUCbyArticle>.

⁹ See Colorado Land Planning and Development Law, Seventh Edition, Donald L. Elliot, Esq., General Editor, Section 6.6.4; Krupp v. Breckenridge Sanitation District, 19 P.3d 687 (Colo. 2001).

¹⁰ *Id.*

EXHIBIT A

DIVISION 4 RIGHT TO FARM

It is the policy of the Board of County Commissioners that ranching, farming, and all manner of agricultural activities and operations throughout [*County*] are integral elements of and necessary for the continued vitality of the County's history, economy, landscape, lifestyle and culture. Given their importance to the County and the state, agricultural lands and operations are worthy of recognition and protection.

Section 1-401 Agricultural Activities and Operations Within the County Shall Not Be Considered To Be Nuisances. Colorado is a "Right to Farm State" pursuant to Section 35-3.5-101, *et seq.*, C.R.S. Landowners, residents, and visitors must be prepared to accept the activities, sights, sounds and smells of [*County*] agricultural operations as a normal and necessary aspect of living in a county with a strong rural character and a healthy agricultural sector. Those with an urban sensitivity may perceive such activities, sights, sounds and smells as inconveniences, eyesores, noises and odors. However, state law and County policy provides that ranching, farming or other agricultural activities and operations within the County shall not be considered to be nuisances so long as they are operated in conformance with the law and in a non-negligent manner. Therefore, all landowners, residents and visitors must be prepared to encounter sounds, smells, lights, mud, dust, smoke, chemicals, machinery on public roads, livestock on public roads, storage and disposal of manure, and the application by spraying or otherwise of chemical fertilizers, soil amendments, herbicides and pesticides, any one or more of which may naturally occur as a part of legal and non-negligent agricultural operations.

Section 1-402 Rights and Responsibilities of All Landowners. All owners of land, regardless of use, have obligations under state law and County regulations with regard to maintenance of fences. Irrigators have the right to maintain irrigation ditches through established easements that transport water for their use, and said irrigation ditches are not to be used for the dumping of refuse. Landowners are responsible for controlling weeds, keeping pets under control, and other aspects of using and maintaining property in accordance with County regulations. Residents and landowners are encouraged to learn about these rights and responsibilities and to act as good neighbors and citizens of the county.

EXHIBIT B

Section 2-104 Exemption from Land Use Change Permit Requirements.

The following uses and activities are exempt from the requirement to obtain a Land Use Change Permit if the proposed use or activity complies with applicable zone district regulations and use restrictions set forth in Article 3, *Zoning*. Exemption from Land Use Change Permit requirements is not an exemption from other federal, state and local permit requirements applicable to the proposed development or land use including, without limitation, building permits, Floodplain Development Permit, access and grading permits.

[NOTE: Following are examples of uses and activities that could be exempted from the Land Use Change Permit review process.]

- A. Single Family Dwelling.** One single-family dwelling per legally established lot in compliance with these Regulations.

- B. Accessory Structure to Single Family Dwelling.** Construction of sheds and other structures smaller than *[120 square feet]* in size that are Accessory Structures to the single-family dwelling, in compliance with these Regulations.

- C. Excavation of Less Than [500 Cubic Yards].** Excavations of less than [500 cubic yards] of material.

- D. Traditional Agricultural Operations.** Traditional agricultural operations conducted in areas zoned *[Agricultural]*, including the following.
 - 1. Production, cultivation, growing and harvesting of crops and plants.
 - 2. Raising and breeding livestock, excluding confined animal feed lot operations.
 - 3. Harvesting, storage, grading, packaging, processing distribution and sale of agricultural commodities occurring at the point of production.
 - 4. Construction of sheds, outbuildings and other accessory structures smaller than [120 square feet] in size that are necessary to agricultural operations.
 - 5. Construction of internal roads, ponds, dams and ditches necessary to agricultural operations.
 - 6. Construction of Accessory Structures smaller than [120 square feet] in size that are associated with agricultural operations.

EXHIBIT C

Section 3-501 Use Table. This Table identifies the uses allowed in each zone district and the level of review the use shall be subject to. Unless otherwise specified, the level of review required is based upon the use as a principle use of the property.

- E Exempt Use, pursuant to Article 2, Section 2-104
- A Use Permitted Subject to Administrative Review
- L Use Permitted Subject to Limited Impact Review
- M Use Permitted Subject to Major Impact Review

USE	ZONE DISTRICT								
	RESOURCE	RURAL RESIDENTIAL	ESTATE RESIDENTIAL	SUBURBAN RESIDENTIAL	MULTIFAMILY RESIDENTIAL	MANUFACTURED HOME PARK	COMMERCIAL - LIMITED	COMMERCIAL - GENERAL	INDUSTRIAL
Accessory Agricultural Retail Sales	E	L	M						
Accessory Building or Structure [120 sq. ft. or larger] ¹	A	A	A	A	A	A	A	A	A
Accessory Building or Structure [smaller than 120 sq. ft.] ¹	E	E	E	E	E	E	E	E	E
Accessory Concrete or Asphalt Batch Plant	M	M							L
Accessory Dwelling Unit ²	L	L	L				L	L	
Agricultural Equipment, Supplies and Materials Store							L	L	L
Agricultural Operations, Customary Accessory Buildings and Structures, and Uses Accessory to Agricultural Operations	E	E	M						
Agricultural Products Processing, Storage, Distribution and Sale Off-Site ²	M								L
Agricultural Products Processing, Storage, Distribution and Sale at Point of Production ³	E	A	M						
Agricultural Products Retail Outlet	M	M	M	M			A	A	A

USE	ZONE DISTRICT								
	RESOURCE	RURAL RESIDENTIAL	ESTATE RESIDENTIAL	SUBURBAN RESIDENTIAL	MULTIFAMILY RESIDENTIAL	MANUFACTURED HOME PARK	COMMERCIAL - LIMITED	COMMERCIAL - GENERAL	INDUSTRIAL
Aircraft Landing Strip [private]	L								
Art Gallery							A	A	
Bakery							A	A	
Bakery, Commercial									L
Boarding or Rooming House					L		L	L	
Broadcasting Studio	L						A	A	
Campground	M	M							
Car Wash							A	A	A
Cemetery	L	L	L						
Church	M	M	L	L	L	L	M	M	
Clinic, Medical and Dental							A	A	
Communication Facility	M	M	M	M	M	M	M	M	M
Community Meeting Facility, Reception Hall, or Auditorium	L	L	L	L	L	L	L	L	
Convenience Store	M	M	M	M	M	M	L	L	
Corrections Facility	M								
Day Care Center	L	L	L	L	L	L	L	L	
Duplex			A	A	A		M	M	
Eating or Drinking Establishment	M	M	M	M	M	M	A	A	
Educational Facility	M	M	L	L	L				
Electric Power Distribution Line and Facilities	M	M	M	M	M	M	M	M	L
Electric Power Generating Facility	M	M	M	M	M	M	M	M	L
Electric Power Transmission Line	M	M	M	M	M	M	M	M	L
Equestrian Center	L	L							
Excavations of Less Than 500 Cubic Yards, Unrelated to Mining	E	E	E	E	E	E	E	E	E
Excavations of 500 Cubic Yards or More, Unrelated to Mining	A	A	A	A	A	A	A	A	A

USE	ZONE DISTRICT								
	RESOURCE	RURAL RESIDENTIAL	ESTATE RESIDENTIAL	SUBURBAN RESIDENTIAL	MULTIFAMILY RESIDENTIAL	MANUFACTURED HOME PARK	COMMERCIAL - LIMITED	COMMERCIAL - GENERAL	INDUSTRIAL
Extraction or Exploration: gravel pit, petroleum or natural gas well, coal or ore mine	M								M
Fabrication – Equipment, Small Appliances									L
Fabrication – Vehicles, Machinery, and Heavy Equipment									M
Fabrication - Assembly of Structures									M
Fabrication– Cabinet Making, Woodworking, Metalworking, Glazing, Machining	L			L	M		L	L	L
Feedlot	M								
Feedlot, Commercial	M								M
Fire Station	L	L	L	L	L	L	L	L	L
Forestry	E								
General Service Establishment – Plumbing Contractor, Electrical Contractor, Building Contractor, Blacksmith, Service and Repair of Appliances, Equipment and Machinery								A	A
Golf Course	M	M	M						
Group Home Facilities	M	M	M	M	M				
Guiding and Outfitting	E	E							
Home Occupation	A	A	A	A	A	A	A	A	
Heliport	M	M					M	M	M
Helistop	L								
Hospital	M	M	M	M	M		M	M	
Indoor Recreation, Amusement or Theater							A	A	

USE	ZONE DISTRICT								
	RESOURCE	RURAL RESIDENTIAL	ESTATE RESIDENTIAL	SUBURBAN RESIDENTIAL	MULTIFAMILY RESIDENTIAL	MANUFACTURED HOME PARK	COMMERCIAL - LIMITED	COMMERCIAL - GENERAL	INDUSTRIAL
Kennel	L						L	L	L
Laundromat, Laundry or Dry-Cleaning Facility – Individual Service	L	L	L	L	L	A	A	A	
Laundry or Dry-Cleaning Plant, Commercial									L
Library	L	L	L	L	L	L	A	A	
Lodging Facilities - Major	M						M	M	
Lodging Facilities - Minor	L						L	L	
Manufactured Home						A			
Mass Transit Facility	M	M	M	M	M	M	M	M	M
Mineral Waste Disposal Areas	M								M
Mortuary							L	L	
Motor Sports Center	M							M	
Multi-Family Dwelling Units			A		A		M	M	
Museum							L	L	
Natural Gas Transmission Line	M	M	M	M	M	M	M	M	M
Nursery/Greenhouse/Garden Supply and Plant Materials	E	E	L				A	A	A
Nursery, Commercial	L	L	M				L	L	L
Nursing Facility/Convalescent Home					M		M	M	
Outdoor Recreation	M	M	M	M	M	M		M	
Park or Playfield	A	A	A	A	A	A	A	A	
Parking Lot or Parking Garage [as Principal use of Property]							M	M	M
Personal Storage Facility						L	L	L	
Processing –Batch Plant	M								M

USE	ZONE DISTRICT								
	RESOURCE	RURAL RESIDENTIAL	ESTATE RESIDENTIAL	SUBURBAN RESIDENTIAL	MULTIFAMILY RESIDENTIAL	MANUFACTURED HOME PARK	COMMERCIAL - LIMITED	COMMERCIAL - GENERAL	INDUSTRIAL
Processing - Brewing, Bottling Plant									M
Processing – Custom Meat and Poultry	M								M
Processing – Food and Beverages									M
Processing of Natural Resources – Petroleum, Oil Shale, Coal, Wood Products	M								M
Processing – Recyclable Material									M
Professional or Business Office							A	A	
Pumping Station	M								M
Recycling Collection or Drop Off Center	L	L	L	L	L	L	L	L	L
Recycling Plant	M								M
Resort, Lodge, Conference Center	M	M							
Retail or Personal Service Facility							A	A	
Retail/Wholesale : Building Supply and Material								A	A
Retail/Wholesale: Bulk Sales of LPG (more than 2000 gallons)									M
Retail/Wholesale: Electronic, Mechanical and Plumbing Supplies								A	A
Retail/Wholesale: Industrial Equipment Sales and Leasing								L	A
RV Park	M	M							
Salvage Yard									M
Sanitary Landfill	M								
Shooting Range	M								
Single-Family Dwelling Unit on One Lot	E	E	E	E	E	E	E	E	
Ski Area, Ski Lift and Trails	M	M							
Solid Waste Disposal Site or Facility	M								M
Solid Waste Transfer Facility	M	M						M	A

USE	ZONE DISTRICT								
	RESOURCE	RURAL RESIDENTIAL	ESTATE RESIDENTIAL	SUBURBAN RESIDENTIAL	MULTIFAMILY RESIDENTIAL	MANUFACTURED HOME PARK	COMMERCIAL - LIMITED	COMMERCIAL - GENERAL	INDUSTRIAL
Storage: Accessory Storage of Materials or Equipment Within a Building	A	L					L	L	A
Storage: Bulk Storage of LPG (greater than 2000 gallons)	M								M
Storage: Cold Storage Plants									M
Storage: Hazardous Materials Requiring a Special State or Federal Permit	M								M
Storage: Heavy Equipment	M							M	L
Storage: Petroleum, Natural Gas, Methane or Other Volatile Substance	M								M
Storage: Supplies, Machinery, Equipment, or Products Customary or Accessory to Agriculture Operations	E	E	M						M
Storage: Supplies, Machinery, Equipment or Products Customary or Accessory to Oil and Gas Drilling Operations	M	M							M
Telecommunication Facilities	M	M	M	M	M	M	M	M	M
Temporary Batch Plant	A	A							A
Temporary Construction or Sales Office	A	A	A	A	A	A	A	A	A
Temporary Fireworks Stands and Christmas Tree Lots	A	A	A	A	A	A	A	A	A
Transit Operations Facility: Storage, Repair and Dispatch Center									M
Utility Distribution Facility	A	A	A	A	A	A	A	A	A
Utility Substation	M	M	M	M	M	M	M	M	M
Vehicle Sales/Rental Lots							L	L	L
Vehicle Service Center							L	L	A
Vehicle Repair Shop/Body Shop/Paint Shop							M	M	L

USE	ZONE DISTRICT								
	RESOURCE	RURAL RESIDENTIAL	ESTATE RESIDENTIAL	SUBURBAN RESIDENTIAL	MULTIFAMILY RESIDENTIAL	MANUFACTURED HOME PARK	COMMERCIAL - LIMITED	COMMERCIAL - GENERAL	INDUSTRIAL
Veterinary Clinic	L						L	L	L
Warehouse & Distribution Center								M	L
Water Diversion Structures, Ditches and Pipeline Structures engineered to convey fifteen (15) cfs of water or less, or designed to serve as a domestic supply for less than ten (10) dwelling units	A	A	A	A	A	A	A	A	A
Water Diversion Structures, Ditches and Pipeline Structures engineered to convey more than fifteen (15) cfs of water or less, or designed to serve as a domestic supply for ten (10) or more dwelling units	M	M	M	M	M	M	M	M	M
Water Impoundment	A	A	A	M	M	M	M	M	M
Water Storage Facility	M	M	M	M	M	M			
Water or Wastewater Projects	M	M	M	M	M	M	M	M	M
Water or Wastewater Treatment Facility	M	M	M	M	M	M	M	M	M
Welding Shops									L
Wind Powered Electric Generator	M								M
Notes: 1. Accessory to Uses other than Agriculture . 2. Accessory Dwelling Unit not allowed in conjunction with Duplex or Multi-family dwelling units. 3. Use does not include processing and storage of meats and poultry.									