LA PLATA COUNTY 2011 COMP PLAN
LEGAL ISSUES MEMORANDUM

Memo No. 2

Date: July 9, 2011

From: La Plata County Attorney's Office (MTB)

Subject: Exactions of private property for public use

I. STATEMENT OF THE ISSUE PRESENTED

Chapter 11 of the April 7, 2011, DRAFT #2a of the La Plata County, Colorado, Comprehensive Community Plan contains a section entitled "Future Land Use Plan Designations", which sets forth and describes certain "land use designations" that are intended to "identify areas in La Plata County that are suitable for future growth (receiving areas) and areas that are sensitive to development (donor areas) within a new development project application". Descriptions of some of the land use designations refer to the following items: "50% set-aside", "70% set aside", "50% open space set-aside", "bike/equestrian/pedestrian pathways connected to legal access or public lands", "community facilities" such as "schools, parks, community centers" post office, recreations facilities, etc.", "multi-modal transportation (bicycling, equestrian, ride-share, park and ride and transit provisions)", and "public gathering places".

The purpose of this memorandum is to describe the legal constraints that exist upon the County's ability to implement these items by requiring the dedication of private land for public use.

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II. CONCLUSIONS/RECOMMENDATION

If the County wishes to implement the above-referenced aspects of the Comprehensive Plan by requiring the dedication of land to the public as conditions of development, such requirements must be based on specific, duly adopted standards which ensure that a landowner is required to dedicate land only as necessary to alleviate the impacts specifically caused by the proposed development.

III. ANALYSIS

Colorado's enabling statutes clearly grant counties broad authority to regulate the use of land, and both the U.S. and Colorado Supreme Courts have clearly held that zoning is a constitutional and valid regulation of real property.[1] Such authority is of course limited, however, particularly by the federal and Colorado constitutions. Both the federal and the Colorado constitutions include "takings" clauses. The federal takings clause provides "nor shall private property be taken for public use, without just compensation".[2] This provision is applicable to the states through the Fourteenth Amendment.[3] The Colorado takings clause provides, in relevant part, "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation".[4]

Property owners can challenge land use regulations and requirements in court on the basis that they go too far and therefore constitute a "regulatory taking" of their property. Both the United States Supreme Court and the Colorado Supreme Court have recognized that there can be instances when government land use requirements may constitute a regulatory taking.[5]

A government land use requirement that a landowner dedicate land to the public as a condition of development is one type of a land use condition referred to by the law as a "development exaction" and may constitute a regulatory taking. [6] Such a development exaction, which I will refer to as a "dedication exaction" in this memorandum, must meet a two part test that has been established by the United States Supreme Court, acknowledged by the Colorado Supreme Court and codified by the Colorado General Assembly by enactment of Colorado's "Regulatory

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[1] Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926); Colby v. Board of Adjustment, 81 Colo. 344, 255 P. 443 (Colo. 1927); Animas Valley Sand and Gravel v. Board of County Commissioners of the County of La Plata , 38 P.3d 59 (Colo. 2001).
[2] U.S. Const. Amend. V.
[3] Animas Valley Sand and Gravel , 38 P.3d at 63 (Colo. 2001).
[4] Colo. Const. Art. II, § 15. For. purposes of takings claims based on land use regulation, the Colorado Supreme Court has interpreted the Colorado takings clause as consistent with the federal clause. Animas Valley Sand and Gravel, 38 P.3d at 63 (2001); Cent. Colo. Water Conservancy Dist. v. Simpson, 877 P.2d 335, 346 (Colo.1994).
[5] Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Penn Central Transp. Co. v. City of York, 438 U.S. 104 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 399 (1922); Animas Valley Sand and Gravel v. Board of County Commissioners of the County of La Plata, 38 P.3d at 63 (2001).
[6] Krupp v. Breckenridge Sanitation District, 19 P.3d 687 (Colo. 2001).

Impairment of Property Rights Act" ("RIPRA").[7] According to the two part test, referred to as the *Nollan/Dolan test*, for a dedication exaction to be valid: (1) there must be an "essential nexus" between the legitimate government interest to be advanced and the required dedication, and (2) there must be "rough proportionality" between the governmental interest and the required dedication.[8]

To demonstrate the required "essential nexus" between the government interest and the dedication exaction, the dedication must directly serve the public objective sought and offset impact of the proposed development.[9] For example, in Nollan v. California Coastal Commission a residential building permit was conditioned on the landowner's dedication of a public access easement across the subject property, connecting two public beach areas. The U.S. Supreme Court found there was no "essential nexus" between the dedication the governmental interest sought, which was not pedestrian access but rather "visual access" to the beach by passersby and motorists.[10]

With respect to the necessary "rough proportionality" between the governmental interest and the required dedication, "[n]o precise mathematical calculation is required", but the government "must make some sort of *individualized determination* that the required dedication is related both in nature and extent to the proposed development's impact".[11] As an example, in Dolan v. City of Tigard a permit to enlarge a business was conditioned on an exaction of property for flood drainage in addition to the dedication of an easement for a public bicycle path.[12] With respect to the bicycle path easement, although there was an "essential nexus" between the exaction and the asserted public purpose –traffic mitigation – the U.S. Supreme Court found there was no "rough proportionality" between the impacts being mitigated and the exaction placed on the owner, because the city "had not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably related to the city's

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[7]See Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan, 483 U.S. at 837 (1987); CRS § 29-20-203; Krupp, 19 P.3d at 695 (Colo. 2001); Wolf Ranch v. City of Colorado Springs, 220 P.3d 559 (Colo. 2009); CRS §§ 29-20-201 through 29-20-205.

[8] See Id. RIPRA codifies the *Nollan/Dolan* test with respect to dedication conditions. CRS § 29-20-201(3) ("The general assembly intends, through the adoption of section 29-20-203, to codify certain constitutionally-based standards that have been established and applied by the courts."); Wolf Ranch, 220 P.3d at 563 (Colo. 2009) ("RIPRA's practical effect was to codify the test for regulatory takings announced by the United States Supreme Court in Nollan v. California Coastal Commission, . . . and Dolan v. City of Tigard . . ."); Krupp, 19 P.3d at 696 (Colo. 2001) ("Colorado's regulatory takings statute has codified the *Nollan/Dolan test* . . . *See* § 29-20-201(3), 9 C.R.S. (2000)"). RIPRA also applies the "essential nexus" and "rough proportionality" requirements to development conditions that require a property owner to "pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis", but exempts from such requirements "any legislatively formulated assessment, fee, or charge that is imposed on a broad class of property owners by a local government." CRS § 29-20-203. Impact Fees are not governed by RIPRA or the Nollan/Dolan test. CRS § 29-20-203; Krupp, 19 P.3d at 696 (Colo. 2001).

[9] See Nollan, 483 U.S. at 825 (1987).
[10] See Id. See also Colorado Lawyer, November, 1999, Specialty Law Column, "Recent Developments in Regulatory Takings", p. 2, by Greg Clifton.
[11] Dolan, 512 U.S. at 377 (1994)(emphasis added).
[12] Id.

requirement for a dedication of the pedestrian/bicycle pathway easement".[13] The city "simply found that the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion".[14]

Pursuant to RIPRA, no local government may impose any "discretionary condition upon a land-use approval", which would include a dedication exaction, "unless the condition is based upon *duly adopted standards* that are sufficiently specific to ensure that the condition is imposed in a rational and consistent manner". [15] This requirement is consistent with the principle that land use decisions must be based on specific standards, which has been applied by the Colorado courts regardless of RIPRA.[16] A review of the cases decided by various federal and state courts throughout the country in which the *Nollan/Dolan test* has been applied reveals the importance of such specific standards in meeting the "essential nexus" and "rough proportionality" requirements. It also reveals that tying such standards to studies of the needs created by differing levels of development can serve as a basis for meeting the requirements of the *Nollan/Dolan test*. In summary, in order to justify a dedication exaction the government must quantify the impacts created by the development and document how the required dedication will alleviate the impact created. [17]

A question has arisen regarding whether the *Nollan/Dolan test* would apply if the above-referenced aspects of the comprehensive plan are sought to be achieved by use of "development standards" rather than "exactions". Case law makes it clear that the *Nollan/Dolan test* applies if and when a landowner is required to dedicate land to public ownership or access as a condition of development, regardless of what the government calls the required dedication or the basis for it. Referring to a dedication requirements as a "development standard" would not exempt the requirement from the *Nollan/Dolan test*. Courts have subjected restrictions on land for possible, future public use to the takings analysis, and rejected arguments that such requirements are merely *restrictions* rather than exactions.[18] The trigger for the test is whether private land is to be dedicated for public ownership or access as a condition of development, regardless of how one describes the requirement or the basis for it.

A question has also arisen as to whether the availability of some lesser level of development *without* a dedication requirement would exempt a dedication condition from the requirements of

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[13] Id. See also Colorado Lawyer, November, 1999, Specialty Law Column, "Recent Developments in Regulatory Takings", p. 2, by Greg Clifton.
[14] Id.
[15] . CRS § 29-20-203(2). CRS

[16] See Colorado Lawyer, November, 1999, Specialty Law Column, "Recent Developments in Regulatory Takings", p. 4, by Greg Clifton. See also Board of County Commissioners of the County of Larimer v. Conder, 927 P.2d 1339 (Colo. 1996); Beaver Meadows v. Board of County Comm'rs, 709 P.2d 928 (Colo. 1985); Tri-State Generation v. City of Thornton, 647 P.2d 670 (Colo. 1982); C & M Sand & Gravel v. Board of County Comm'rs, 673 P.2d 1013 (Colo. App. 1983); Wilkinson v. Board of County Comm'rs, 872 P.2d 1269 (Colo.App. 1993) (standards which may be statements of general policy in the abstract may be sufficiently specific as applied).
[17] See Colorado Land Planning and Development Law, Seventh Edition, Donald L. Elliot, Esq., General Editor, Section 6.4.1 "Exactions".
[18] See Howard County v. JJM, Inc., 482 A.2d 908 (Md., 1984); Ventures in Property I v. City of Wichita, 594 P.2d 671 (Kan., 1979); Robbins Auto Parts, Inc. v. City of Laconia, 371 A.2d 1167 (N.H., 1977).

the *Nollan/Dolan test*. My research has revealed no authority to support such an exemption, and such an exemption would defeat the purpose of the "essential nexus" and "rough proportionality" requirements and essentially constitute the "sale" of density (i.e., property owner can have more density in exchange for dedicating land to the public, even though the higher density does not create the need for the dedication).