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RESEARCH MEMORANDUM

TO: The Members of the Water Resources Review Committee
FROM: The Office of Legislative Legal Services
DATE: October 8, 2013
SUBJECT: Issues Concerning the State's 35-acre Requirement and Cluster Development.

Question

You have asked this office to provide a memorandum explaining the statutory provisions governing: 1) The state's 35-acre rule; and 2) Cluster development, including the unique requirements the cluster development law impose on the water supply of a particular land use development.

Answer

The 35-acre rule essentially provides that the division of land into parcels that are 35 acres or more in size is exempt from county subdivision regulations. Cluster development is a process that allows the grouping of residential structures within a particular development on a portion of the available land, reserving a significant amount of the site as protected open space. In Colorado, these cluster development requirements allow a landowner to place 2 residential units on the 35-acre parcel in exchange for the landowner agreeing to preserve two-thirds of the total area for open space. In addition, the cluster development law also imposes unique requirements on the water supply of a particular land use development.

Discussion

The 35-acre rule

In Colorado, statutory requirements governing planning and zoning by county governments, including subdivision regulations, are found in article 28 of title 30, C.R.S.

Section 30-28-101 (10) (c) (I), Colorado Revised Statutes, defines “subdivision” or “subdivide land” to exclude “any division of land which creates parcels of land each of which comprises thirty-five acres or more of land and none of which is intended for use by multiple owners.” As such, under this definition, subdivision regulations are not applicable to a division of land that results in parcels of 35 acres or more. Stated differently, under this definition, landowners may avoid the application of subdivision regulation to their property by creating subdivisions comprised of parcels containing 35 or more acres.

The 35-acre rule was enacted by means of Senate Bill 72-35. In terms of statutory provisions, the rule is contained (and found) only within the definition of subdivision/subdivided land.

The proliferation of 35-acre parcels has numerous implications in terms of the most efficient provision and maintenance of county infrastructure, the most beneficial use of land, and environmental effects that are beyond the scope of this research memorandum.

Even though the 35-acre rule ostensibly exempts such large-lot subdivisions from subdivision regulation, Colorado counties are still be able to exert some control over the use of these larger-sized parcels for the purposes of balancing the goals of protecting the private property rights of land owners, preserving agricultural land and open space, and allowing development to accommodate growth and market demand. Some of the different approaches and devices adopted by counties over the course of the past generation include:

- **Density zoning**, or prescribing a minimum lot size permissible for residential construction on subdivided land.
- The use of **growth management regulations** such as, for example, requiring all new subdivisions of land to acquire a development right that may be exercised in exchange for protecting some portion of the land from development.
- The use of **cluster development**, which is addressed in the next section of this memorandum.

- The use of **conservation easements**.
- The use of **transferable development rights**.
- Regulating the use of land under the counties' "**1041 powers**", i.e., allowing local governments to identify, designate, and regulate areas and activities of state interest under article 65.1 of title 24, C.R.S.
- Conditioning how and where development will occur on 35-acre parcels by means of **site plan review**.
- The implementation of other **zoning strategies** to manage the impact of a 35-acre development.
- Offering incentives to landowners to get them to **voluntarily submit to greater land use review** by the county.
- The use of **rural road construction permits**.¹

Cluster development

In general, cluster development is the grouping of residential structures within a particular development on a portion of the available land, reserving a significant amount of the site as protected open space. The goals of cluster development are preserving open space, protecting ecological habitat, and preserving agricultural land.²

Current zoning practices typically establish minimum lot sizes, setbacks, and widths that developers must follow when they design subdivisions. This leads to developments that maximize the number of lots based on the total acreage of a parcel. For example, if the zoning code requires a minimum lot size of 2.5 acres and the developer has a 40-acre parcel, the site will be developed with 16 residential units unless there are major site limitations. The parcel is then said to have a gross density of 16 units.³

¹ The information about these different land use practices is taken from a report published by Colorado Counties, Inc., dated August, 2006, entitled "County Perspectives A report on the 35-acre subdivision exemption in Colorado" ("County Perspectives"). Additional information regarding these and other devices for dealing with the impacts of large-lot subdivisions under the 35-acre rule is found on pages 3 through 7 of this report.

² The general information on cluster development in this memorandum is taken from a fact sheet entitled "Cluster Development" published by the Ohio State University. It may be found online at ohioline.osu.edu/cd-fact/1270.html. This document is cited in this memorandum as "Fact Sheet". See section 30-28-403 (2), Colorado Revised Statutes (Requirement that cluster development plan "set aside land to preserve open space or to protect wildlife habitat or critical areas....").

³ Id.

Cluster development protects open space by establishing the number of units allowed for a parcel completely independent of any minimum lot size. While the gross density requirement in the example above allows a maximum of 16 units to be developed on a 40-acre site, if lot sizes can be less than 2 acres or of variable size, some clustering of units is possible. The developer is still limited to 16 total units, but has the flexibility to place them in a way that is more responsive to the site's physical characteristics.⁴

The process allows landowners to help retain the rural and agricultural character of land by allowing additional housing units to be built only if the units are located within a certain distance of one another.⁵

In Colorado, cluster development is encouraged and authorized for tracts of land that are exempt from county subdivision regulations by part 4 of article 28 of title 30, Colorado Revised Statutes. The legislative declaration to this part 4 states:

(1) The general assembly hereby finds and declares that:

(a) **It is in the public interest to encourage clustering of residential dwellings on tracts of land that are exempt from subdivision regulation by county government pursuant to section 30-28-101 (10) (c) (X),** thereby providing a means of preserving common open space, of reducing the extension of roads and utilities to serve the residential development, and of allowing landowners to implement smart growth on land that is exempt from subdivision regulations. (Emphasis added)

(b) Landowners should have the option to consider cluster development when subdividing land into parcels in a manner that constitutes an alternative to the traditional thirty-five acre interests described in section 30-28-101 (10) (c) (I).

(c) A process should be available for the development of parcels of land for residential purposes that will authorize the use of clustering, water augmentation, density bonuses, not to exceed two units for each thirty-five acre increment, or other incentives, and the transfer of development rights and fulfill the goals of the county to preserve open space, protect wildlife habitat and critical areas, and enhance and maintain the rural character of lands with contiguity to agricultural lands suitable for long-range farming and ranching operations.

As noted above, the statute explicitly states that cluster development is intended, in part, to constitute an alternative to the treatment of large parcels under the 35-acre rule.

Under the substantive provisions of the state's cluster development law, the statute defines cluster development to mean "any division of land that creates parcels containing less than 35 acres each, for single family residential purposes only, where one or more tracts are being divided pursuant to a rural land use process and where at least two-thirds of the total area of the tract or tracts is reserved for the preservation of open space." See section 30-28-403 (1), Colorado Revised Statutes.

⁴ Id.

⁵ County Perspectives, at p. 4

This subsection (1) goes on to state that “[n]o rural land use process as authorized by this section shall approve a cluster development that would exceed one residential unit for each seventeen and one-half acre increment.”⁶

The statute goes on to require, as a condition of approving a cluster development, that the cluster development plan not permit development of the portion of the parcel set aside as open space for at least forty years from the date the plan is approved.⁷

Thus, under the 35-acre rule, a landowner would presumably be limited to one residential structure on each 35-acre parcel (and would be exempt from any subdivision regulations that would otherwise apply to smaller parcels). Under the state’s cluster development provisions, the same landowner would be permitted to place one residential unit on each of two seventeen and one-half acre sections of the overall parcel in exchange for the landowner agreeing to preserve two-thirds of the total area for open space for at least forty years. This arrangement would therefore allow the landowner greater residential density on one-third of the total parcel than the owner would otherwise enjoy under the rules generally governing lots of that size in exchange for agreeing to preserve two-thirds of the overall area as open space for a forty year period.

Finally, the cluster development law imposes unique requirements for the water supply of a particular development. Generally, under section 37-92-601 (1) (b), Colorado Revised Statutes, domestic well waters are exempt from the state’s priority water administration system, including the requirement to obtain an otherwise necessary plan for augmentation, so long as the well’s pumping capacity does not exceed 15 gallons per minute and is not used for more than 3 single-family dwellings. However, section 30-28-404 (2), Colorado Revised Statutes, specifies that a plan for augmentation may be required if the cluster development’s annual withdrawal rate exceeds one acre-foot of water for each 35 acres in the development. For purposes of illustration, one 15-gallon per minute well would pump one acre-foot of water if left running continuously for about 15 days.

Please contact Bob Lackner or Tom Morris at 303-866-2045 with any questions you may have regarding the matters addressed in this memorandum.

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⁶ The statute defines “rural land use process” to mean “a planning process duly enacted and adopted by a county which is designed to offer a land use option for single family residential purposes that differs from traditional thirty-five acres of land, as described in section 39-28-101 (10) (c) (I).” See section 30-28-402 (1), Colorado Revised Statutes.

⁷ See section 30-28-403 (2), Colorado Revised Statutes.