ACCESS TO OIL, GAS, AND OTHER MINERALS IN URBAN AREAS

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Synopsis

[e] Be prepared.

[f] Keep Records of Every Interaction

[g] Comprehensive State Regulatory Schemes

[h] Be Willing to Insist That Agencies Observe all Requirements

[i] Persist

[6.01] Introduction

Local governments (towns, villages, cities, counties, townships) have a surprising amount of power to regulate the uses to which landowners can put their property. Notwithstanding the fact that mineral development has historically been a favored use of land, local governments are more interested than ever before in deciding for the mineral owner where, when, or whether such development will happen within their jurisdictions. There are a number of devices that local governments employ to try to get control over the decision; this discussion will provide a non-exhaustive discussion of them and a set of recommendations for dealing with them.

[6.02] Power of Local Governments to Regulate Land Use

Local governments have a surprising amount of power to regulate land use. Although state and federal agencies enjoy a great deal of authority in their (regulating federal lands and regulating activities that are of interest statewide, respectively), local governments are the entities that regulate what you can do on your land, depending on where it is located and what the uses are in the neighborhood. The source of power is generally derived from state government or state constitution, and it takes the form of the "police power," or the generalized power to regulate activities affecting the public health,

safety and welfare.

[1] **Police Power**. The police power is the term used to describe the general authority of state governments to regulate activities that affect the health, safety and welfare of the community. The federal government does not hold a general police power, but the states do. The state's police power extends to federal lands to the extent such power is not preempted by federal law.[1] Accordingly, local governments may assert a certain amount of control over activities on federal lands, if regulation of them has not been reserved to the federal or state government. The police power can be delegated to local governments by the state legislature through explicit statutory delegation, or directly by the state's constitution.

The police power is not easily defined, nor are its boundaries easy to draw.

> The definition [of the police power] is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition… Public safety, public health, morality, peace and quiet, law and order-these are some of the

[1] Kleppe v. New Mexico, 426 U.S. 529, 543 (1976).

> more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.[2]

Zoning and land use regulations have been held to be legitimate exercises of the police power in numerous cases. Courts typically defer to the legislative power (that is, the rulemaking power of a city council or equivalent body) on the question of whether a particular form of land use regulation is allowable, provided the question is fairly debatable. A question is fairly debatable when "its determination involved testimony from which a reasonable [person] could come to different conclusions."[3] A decision is said to be fairly debatable when it is supported by substantial evidence on the record taken as a whole.[4] Judicial evaluation of state and local land use regulatory action tends to be highly deferential, to focus on the context in which regulations are enacted and implemented, and to weigh the public benefit of such regulation against the burden imposed on individual property owners.

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[2] Berman v. Parker, 348 U.S. 26, 32-33 (1954)

[3] Village of Euclid v. Ambler Realty, 272 U.S. 365, 387-88 (1926) (citing Radice v. New York, 264 U.S. 292, 294 (1924)

[4] *See id*., Howard County v. Dorsey, 416 A.2d 23, 28 (1980) (*Rev'd* on other grounds, Howard County v. Dorsey, 438 A.2d 1339 (1982)).

Notwithstanding the great deference accorded to legislative power by the courts, the police power is not unlimited. Land use regulation as an exercise of the police power must be made (1) for a valid public purpose; (2) through means reasonably tailored to those purposes; (3) in a manner that does not impose excessive costs on individuals affected by the regulation.[5] Land use regulations that go too far may constitute an unconstitutional regulatory taking of private property. However, the question of how far is "too far" has been the subject of much litigation and remains unanswered (and perhaps unanswerable in the abstract).[6] Some states have attempted to address this question by enacting legislation that defines the point at which a particular exercise of the police power goes too far.[7]

[2] **Regulation to Protect Health, Safety, and Welfare**. The police power is the general governmental power to regulate individuals and organizations to protect the health, safety, and welfare of the community. Local governments have such police power as is delegated to them by State constitution or legislation. It is the source of power to zone, to regulate nuisances, to regulate land uses that are deemed noxious, and to prohibit land uses that have effects that are deemed

[5] Lawton v. Steele, 152 U.S. 133, 137 (1894)

[6] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001).

[7] *See, e.g.,* Tex. Gov't. Code Ann. § 2007.001-2007.002 et seq. (Vernon 2000 and Supp. 2002).

hazardous or deleterious to the surrounding community. The local government's power over oil and gas or mining activities comes from this authority to protect public health, safety, and welfare by regulating or prohibiting hazardous activities and conditions. Provided such regulation does not go "too far," or interfere in the state's particular areas of interest such as the prevention of waste and protection of correlative rights of owners of adjoining tracts, local governments may impose certain restrictions on mineral operators and operations.[8]

[6.03] **Sources of Local Government Authority - Constitution and Statute**

[1] **Constitutional Power and Limitations**. As noted above, the police power is the general governmental power to regulate and to protect the health, safety, and welfare of the community. The reach of the police power is limited by specific constitutional prohibitions against the taking of private property for public use without just compensation and against the deprivation of life, liberty, or property without due process, and by the guarantee of equal protection of the laws. For land use regulations

[8] *See, e.g.*, Colorado Mining Ass'n v. Bd. of County Comm'rs of Summit County, 2007 WL 851745 (Colo. App. Mar 22, 2007), *reh. den*. (May 10, 2007) (County government imposed a ban on the use of cyanide extraction processes in metal mining and milling; court held that ban was not preempted by state mining reclamation law, since the state's statute did not occupy the entire field of mining regulation; the county's ban did not attempt to regulate activities in the state's area of interest and did not ban all mining.)

to be valid, they must (1) substantially advance legitimate state interests, and (2) not deny all economically valuable use of land.[9] Regulations imposing stricter standards on uses geared to particular classes of people may violate the guarantee of equal protection.[10]

[2] **Delegated Legislative Power**. The police power belongs to state governments. However, all states have delegated the power to regulate land use to cities and counties. This is generally done in one of two ways: (1) general delegation of power to local governments through the constitutional or legislative grant of authority to write home rule charters, or (2) more specific enabling statutes authorizing zoning, subdivision regulations, and other forms of land use control.

[3] **Local government land use control acts**. These acts codify and clarify the range of authority that local governments hold. In some cases they create specific types of authority that are then delegated to local governments. For example, Colorado's Local Government Land Use Control Act[11] makes it clear that local governments have the power to "exact," that is, to require the dedication of land for the location and construction of facilities to provide amenities to offset the impacts of

[9] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[10] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

[11] C.R.S. § 30-15-401 et seq., *See also,* Utah Code Ann. § 17-27-101 et seq.

development (such as green space, parks and playgrounds, and dedicated streets and roads), and to levy "impact fees" for the support of capital improvements intended to offset development impacts. The use of exactions and impact fees is widespread in residential and commercial subdivision and development. Although they are less often seen in mineral and oil and gas development projects, there is no analytical reason why a local government could not impose such burdens on a project that seeks zoning or land use approval in the manner of a subdivision application.

[6.04] How the Power Gets Applied – Methods of Local Government Regulation

[1] Zoning and zone district designation.

Zoning is the most basic, fundamental tool by which local governments regulate land use. It is premised on the idea that certain uses are incompatible with each other and should be separated from one another. The fact that certain uses are deemed to be incompatible does not mean that some uses must be banned while others are permitted; instead, incompatible uses are relegated to separate zone districts where each can be carried on without interfering with the other.

The key elements of zoning that distinguish it from other forms of land use regulation are the division of land into physical districts and the application of land use regulations uniformly within each district but distinctly from other districts having a different zone designation. Zoning regulations usually are "permissive," that is, they specify which uses are allowed within a given zone district, and prohibit uses that are not expressly permitted by regulation.

Ideally, zoning takes place in two steps. First, a local government creates and adopts a "comprehensive plan," which lays out the intended purposes of the plan, specifies permitted uses and assigns them to districts, and usually includes a map of the jurisdiction showing the intended application of district designation to specific areas. The planning process may include input from the public. The plan and map are then enacted through a public notice and hearing procedure, at which affected property owners and other interested persons are given an opportunity to comment on the proposed plan. Often, public hearings are held before an unelected planning commission, which then makes recommendations to the elected legislative body (such as the city council or town board of trustees), which may hold its own hearings before voting to adopt a zoning scheme. Once the comprehensive plan is in

place, the local jurisdiction may then exercise its police power in administering, enforcing, and amending its zoning ordinance and plan.[12]

The essence of zoning is the regulation in the comprehensive ordinance of the land use in relation to other, usually adjacent, land. Land uses that are permitted in one district may be prohibited in other adjacent districts. As long as the zoning ordinance treats property in a particular district the same as other similarly situated property in that district, the fact that a prohibited use may be permitted in another district does not per se invalidate a classification. Zoning ordinances are not invalid because they prohibit the most desirable or most convenient use of land, and courts generally will not interfere with a legislative judgment that "one use is more or less objectionable than another."[13]

[2] **The Effect of Zoning**

Put simply, zoning creates areas where certain uses are allowed, and others are prohibited. Under the simplest permissive zoning scenario, allowed uses are "uses by right," meaning that after zoning designation

[12] This is a highly simplified summary of the process. In fact, local zoning power is subject to the limits of the delegation of authority from the state legislature, and written formal comprehensive plans have not been required as a threshold in all states. *See generally,* P. SALSICH & T. TRYNIECKI, *Land Use Regulation* 25-26 (American Bar Association 2003) (1991).

[13] Bd. Of County Comm'rs of Boulder v. Thompson, 493 P.2d 1358, 1361 (Colo. 1972).

is completed, no other discretionary approval is needed from the local government to put a parcel in that zone district to one of the uses designated for that district. Examples of typical zone district designations are agricultural, light industrial, heavy industrial, large lot residential, residential, multifamily residential, and commercial or office. Uses that are compatible with those designations, and therefore permitted, are usually listed in the ordinances. For example, agricultural zoning may allow farming and ranching uses, commercial uses that are geared to supporting farming and ranching, and oil and gas development. Commercial zoning may allow only retail or office uses and not others, such as warehouse or industrial uses. The landowner has the right to put its property to any use that is allowed under the zone designation but may not use its property for any use not allowed. If the landowner's proposed use does not conform to the zone designation of the property, then there are few alternatives besides obtaining a variance or a rezoning. These are generally extremely difficult to do if there is any opposition.

Mining or oil and gas development may be uses by right in industrial, forestry, or agriculture zone districts, but are generally prohibited in residential and commercial zone districts. It is important for mineral owners or lessees to be aware of, and be present at, proceedings where zoning designations or changes are being considered, because the

potential always exists for mining or oil and gas development uses to be zoned or otherwise regulated out of existence in certain zone districts.

[3] **Other Mechanisms of Local Control**

Needless to say, simple zoning can be a cumbersome tool. It requires a comprehensive plan, multiple hearings with plenty of opportunity for people to object, and the results are rigid. Local governments have evolved a number of other approaches to increase the flexibility and leverage available to them and to potential developers. Among them are modified forms of zoning, modified designations of allowable uses, and permit structures designed to make it easier to render decisions case-by-case.

[a] **Planned Unit Development ("PUD")**

Planned Unit Development ("PUD") is a form of zoning approval that attempts to tailor the zone designations of a mixed-use parcel so that the developers' proposed uses and the proposed zone district designations for the property are considered and approved all together and at the same time. In essence, the developer draws up a "mini master plan" for the PUD parcel that shows where certain types of uses will be

located and how they will relate to one another. The PUD parcel normally will have multiple uses that cannot all be encompassed within one zone district designations, so a PUD plan may show office uses in one part of the parcel, single family homes in another, retail in another, and so on. The local government planning entity will review the proposed plan, suggest revisions, and then pass it on to the county commission or town board of trustees for final consideration. It is analogous to a zoning process, but more flexible in that the proponent of the PUD has specific uses and a development schedule in mind. This is in contrast to regular municipal zoning, where there generally is no overall development schedule. The PUD process is most often applied to large greenfield sites or to previously existing sites where extensive redevelopment is proposed. In jurisdictions where oil and gas development is an anticipated use, the PUD designation process ideally should set areas aside for wells, surface facilities, and access. Often the proponent of a PUD will require multi-well development on small operating areas with tight layout of surface facilities. The developer may try to limit use of development areas to a single operator. Like conventional zoning, once a PUD is approved, it can be very difficult to change without the cooperation of the plan

proponent. Therefore, in any PUD proceeding that may affect the mineral owner's rights of access to its property, it is important that the oil and gas developer participate in the planning of the PUD from an early stage to avoid having their surface rights put off limits by zone designation.

[b] **Permitting of Use by Special Review**

Use by special review ("USR") is a hybrid process, combining the characteristics of zone district designation of allowable uses with a permit requirement for certain types of uses. Uses that require a USR permit may be allowed, but they are not uses by right. Rather, they must be individually reviewed and permitted, and there is no right to a permit for a USR use. For example, mining is not a use by right in any zone district in Gilpin County, Colorado, but it is allowable in certain zone districts subject to a special review process.[14] Similarly, oil and gas development may be allowable in a given zone district of a county, but is not a use by right. Instead, an owner must submit a proposal for the use to the appropriate permitting authority before it may put its property to an allowed use. Fort Worth, Texas, for example, requires a USR permit for drilling

[14] Gilpin County, CO Zoning Regulations §§ 6.1, 6.1.4 (Dec. 5, 2006)

gas wells.[15] Gilpin County is in the heart of a Colorado mining district, where mining historically was the highest and best use of land. Tarrant County, the site of Fort Worth, is the epicenter of the Barnett Shale trend, and of course Texas is considered by many to be the birthplace of the American oil industry. Nevertheless, modern local governments have other constituents to serve besides the traditional economic leaders, and the USR process is one way they try to balance competing interests in land use. The process usually has substantial paperwork requirements and the regulatory body often has the power to reject a proposed USR permit. Approval of a use by special review almost always requires a hearing that is subject to public notice and the opportunity of interested members of the public to comment.

[c] **Impact Fees and Exactions**

It is an article of faith among planners that development costs local governments money. Whether or not this is true will normally depend on the nature of the development, the local and state government tax structure, and a host of other factors. It is true that PUDs and large greenfield developments or redevelopments may require the installation of substantial

[15] The Code of Ordinances of Fort Worth, Texas § 15.34 *et seq.* (Amended Jan. 1, 2002)

infrastructure improvements, such as roads, sewers, communications, schools and firehouses, which may impose large costs on the local community. Oil and gas and mining development generally do not require that local governments put in such direct support facilities the way residential development often does. However, an oil and gas development boom may spur secondary development as people move to the area to work in the newly created industry.[16] In addition, it is often asserted that the increased truck traffic that accompanies an oil and gas development boom causes local infrastructure to wear out faster than planned. Local government tax assessments, collections, or both may fail to keep up with the pace of development, leaving the government unable to provide the necessary expansions of roads, sewers, schools, emergency response and other services that citizens expect. One response is the "impact fee," a system by which a local government levies fees on proposed projects to pay the cost of improving or upgrading infrastructure to accommodate the new development.[17] Local governments may levy impact fees as

[16] For example, Sublette County, Wyoming has seen its population soar as the gas boom there has developed; the county has had to increase its spending on infrastructure substantially. *See, e.g.*, "Wyoming Wildlife Faces Twin Threats," High Country News, January 24, 2005.

[17] Impact fees are levied on the theory that development should "pay its own way." Colorado's impact fee statute, C.R.S. § 29-20-104.5(1), allows local governments to impose "impact fees or other

part of their general power to tax in some states. In Colorado, where governments at all levels are severely restricted from raising taxes by a 1992 constitutional amendment, such exactions must be closely matched to a defined impact, and must be dedicated to pay for capital improvement projects or facilities that will address the impacts.[18]

This is different than exaction (also called "dedication") where the local government may require a developer to "donate" lands or capital improvements to the government as a condition of approval of its development proposal. Exactions most often take the form of a requirement that a developer must give part of its land to the public as a condition of receiving approval to develop the remainder. The exaction is usually for parks, open space, floodways, schools, and roads. The United States Supreme Court has held that exactions are not illegal per se, but must have an "essential nexus" to the proposed project, and

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similar development charge[s] to fund expenditures by such local government on capital facilities needed to serve the new development," provided they are legislatively adopted, generally applicable to a broad class of property, and intended to defray the projected impacts on capital facilities caused by the proposed development.

[18] *Id*.

must be "roughly proportional," to avoid being a compensable taking.[19]

[d] **Permit Application Fees**

Permit application fees are self-explanatory. Most jurisdictions now charge application fees that vary depending on the amount of time and effort that must be expended to process them to a decision. These can be substantial, and the ability to externalize the costs of processing permits can make the local government permit review process become quite elaborate.[20]

[19] *See* Dolan v. City of Tigard, 512 U.S. 374 (1994).

[20] Gunnison County (Colorado) adopted oil and gas regulations May 20, 2004 (Resolution No. 04-27). The oil and gas regulation is in addition to the County's land use regulations, and created an obligation to obtain a separate oil and gas permit in addition to any land use approvals. The regulations deal with a significant number of issues specific to oil and gas development, such as wildlife plans, wildfire prevention, view requirements and watershed protection requirements. Oil and Gas permits require review by the Planning Department, a joint public hearing by the Planning Commission and Board of County Commissioners, and a vote of the Board of County Commissioners. Gunnison County's regulations were recently upheld against a preemption challenge. Bd. of County Comm'rs of Gunnison Cty. v. BDS Int'l., LLC., 159 P.3d 773 (Colo. App. 2006), cert. den., 2007 WL 1666562 (June 11, 2007).

[e] **Inspection Requirements/Inspection Fees**

Because local governments have police power to regulate public health, safety, and welfare, they often require annual inspections of oil and gas facilities and charge a fee for the service. The inspections are usually said to be necessary to ensure compliance with building codes and fire safety regulations. These can be substantial for an operator with many wells in a jurisdiction.[21] Because the purpose of the inspection is ostensibly to protect public health, safety and welfare, it is difficult to challenge such inspection fee regimes unless they become transparently extortionate.

[f] **Historic Designation**

This is a technique that is generally used to protect buildings or districts from development that threatens to change their character and eliminate their historical significance. Historic designation power exists at the federal level by act of

[21] The Town of Silt (Colorado) imposes a requirement that "all wells, well sites, potential well sites and accessory equipment and structures shall be inspected annually by the inspectors of the Town. The Operator shall pay an inspection fee of one thousand dollars for each separate well…well site and potential well site for each annual inspection." Town of Silt Code Ch. 17.75, 030 (2007).

Congress.[22] Some local governments have enacted them as well. For example, Denver, Colorado has one, which requires that an owner obtain a permit from the Landmark Preservation Commission before demolishing any designated structure.[23] Although Denver's code does not directly affect natural resources development activity, similar codes in historic mining districts can severely affect the ability of a mining company to redevelop old areas using modern extraction techniques. The United States Supreme Court has ruled that historic designation and restriction of uses to protect historic character are legitimate exercises of police power.[24]

[g] **Transferable Development Rights**

One way that local governments attempt to promote flexibility in their regulatory systems is by the creation of "transferable development rights." These are legislatively created rights, whereby the government declares that the right to develop certain categories of uses, or to develop beyond a certain level of density, are a kind of quasi property right that can be sold. Thus, even if the right cannot be used in a certain place

[22] The National Historic Preservation Act is at 16 U.S.C. § 470 *et seq*.

[23] Denver Revised Municipal Code 30-1.

[24] Penn Central Transp. v. New York City, 438 U.S 104 (1978)

because of zoning restrictions, that right can be transferred to another property elsewhere and allow that other property to be developed in a way that would not be available to it without the transferred rights. Using this concept, local government acknowledge that certain development rights have value and create a mechanism whereby the value can be realized. The regulation of a given piece of property will not completely destroy its economic value, because the development rights can be sold. This lowers the risk that a local government will be found to have committed a taking by restricting development in a given area.

[h] **Moratoria on Development Approvals**

Local governments must often deal with unanticipated development pressure. An increase in permit applications may seem overwhelming; planning officials may believe that their existing authority does not give them enough control over the decisions they have to make. Enacting new ordinances and regulations takes time and must be done in an open process. Meanwhile, the applications pour in.

One response is to declare a moratorium on development approvals, to buy time while the government puts in place new processes and requirements.[25] Moratoria differ from development bans in that they are temporary. The U.S. Supreme Court has held that a temporary development ban does not per se constitute a regulatory taking.[26] The City of Rifle, Colorado recently enacted such a moratorium, arguing it was necessary to bridge the gap between an old planning and permitting ordinance and the new one that had been enacted but had not yet taken effect.

[i] **Watershed Ordinances**

Water supplies are a significant concern in Colorado, where growth has challenged the ability of limited supplies to satisfy all the demands that are placed on them. Municipalities in Colorado have turned to a nineteenth-century statutory

[25] Dill v. Bd. of County Comm'rs, 928 P.2d 809 (Colo. App. 1996) (allowing a temporary moratorium on solid waste facilities); State ex rel. the Diehl Co. v. City of Helena, 593 P.2d 458 (Mont. 1979) (holding that a municipal moratorium must be reasonable in duration and scope, must promote public health, safety or welfare, and must conform to statutory procedures.)

[26] Tahoe – Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002) (holding that a 32-month delay did not result in a compensable deprivation of economic use).

authority that gives municipalities the power to protect water supplies by regulating certain activities in the watershed.[27]

There is a significant question whether such ordinances confer the authority that local governments claim, or whether they are preempted by state water quality control acts.[28]

[j] **Bans on Certain Processes and Activities**

Several state and local governments have attempted to outlaw the use of cyanide processing in gold mining operations, with varying degrees of success. While this arguably is regulation of activities potentially affecting public health and safety, the desired effect is to make gold mining economically infeasible. The use of local or state legislative or initiative power to outlaw certain processes has been upheld in Colorado and Montana; the effort in South Dakota was held to be preempted by federal law.[29]

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[27] C.R.S. ' 31-15-707(1)(b)

[28] *See* Town of Carbondale v. GSS Properties, LLC, 140 P.3d 53 (Colo. App. 2005), *cert. granted,* (July 17, 2006).

[29] *See* Colorado Mining Assoc. v. Bd. County Comm'rs Summit County, 2107 WL 85174 (Colo. App. Mar. 22, 2007) (05 CA 1996), *reh. den.* (May 10, 2007); Seven Up Pete Venture v. Montana, 114 P.3d 1009 (Mont. 2005); In the Matter of the Title, Ballot Title and Submission Clause, and Summary for

[k] **Oil and Gas Ordinances**

Oil and gas ordinances are gaining popularity in Colorado, where local governments have enacted comprehensive systems of permitting and review for oil and gas development activities in addition to their existing zoning and special use review requirements.

[4] **Limits to the Power of Land Use Regulation**

As noted above, the police power is not unlimited. Local governments must exercise it subject to certain restraints. In the effort to get control over oil and gas or mineral development in their jurisdictions, local governments must avoid inadvertently taking private property by depriving owners of all value. They must avoid extending their regulatory reach further than the law allows, and they must avoid regulating in areas where other governmental entities, such as state conservation commissions, have express power. If local governments exceed their authority, the effort to regulate may be found invalid and

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1999-2000, Ballot No. 215, 3 P.3d 11 (Colo. 2000); South Dakota Mining Assoc. v. Lawrence County, 155 F.3d 1005 (8th Cir. (S.D.) 1998).

the government entity may be subject to equitable relief or money damages.

[a] **Legitimate Public Purpose**

First, any government regulation of property must be made for a legitimate public purpose. If it is not, then it is not valid. Legitimate purposes include protection of public health, safety and welfare. Mere "not in my backyard" sentiment is not a legitimate public purpose on its face, though it is not difficult for local governments to clothe that sentiment in fancier dress so that it passes muster.

[b] **Rough Proportionality**

Any local regulation that requires the dedication of private property as a condition of approval risks being deemed a taking unless the dedication being required is "roughly proportional" to the impact it is intended to offset.

[c] **Preemption**

Local government regulation may not intrude into areas that are regulated by state or federal authorities. Regulation of operational details of mining or oil and gas projects is generally the province of expert agencies in the state government, and the power of local governments to do so may be limited by the requirement that it not create "operational conflict" with the state's power to regulate those activities.[30] In addition, local governments' ability to regulate land uses on federal lands is constrained by federal preemption.[31] The federal government authorizes specific uses for federal lands, and local governments generally may not prohibit that use by local regulation or permit requirements.

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[30] See, for example, Voss v. Lundvall Bros., 830 P.2d 1061 (Colo. 1992); Bd. Of County Comm'rs v. Bowen/Edwards Associates, 830 P.2d 1045 (Colo. 1992); Town of Frederick v. North American Resources Corp., 60 P.3d 758 (Colo. App. 2002) (both cases holding that attempts at comprehensive regulation of oil and gas activities by local governments must fail if they create "operational conflict" with state Oil and Gas Conservation Commission regulations). *But see* Bd. of County Comm's of Gunnison Cty. v. BDS Int'l., LLC., 159 P.3d 773 (Colo. App. 2006), cert. den., 2007 WL 1666562 (June 11, 2007) (holding that whether or not a particular local regulation presents an operational conflict is properly subject to a fact-finding hearing).

[31] Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), *aff'd without opinion*, 445 U.S. 947 (1980).

[d] **Takings Jurisprudence**

Sometimes government regulation goes too far. When a property owner can establish that the government has actually prevented all reasonable economic uses of its land, then s/he has made the most important showing required to establish a taking. The problem that most mineral owners have in this circumstance is the necessity of showing that regulation causes the loss of all economic value of his/her property.[32] Denial of the highest and best use of property is generally not a per se taking if there is some use that can be made of the property. The actual facts of these cases are indispensable; it is extremely difficult to generalize or hypothesize, except to say that as-applied tests are generally more likely to find a taking than a facial challenge.

[5] **Conclusion: Coping with Local Government Regulation**

[1] **Recognize and accept the fact that local governments have significant, legitimate power to regulate.**

Local governments have significant power to regulate land use. Courts will usually defer to local governments if they exercise their power for

[32] Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Animas Valley Sand & Gravel v. Bd. of County Comm'rs of La Plata County, 38 P.3d 59 (Colo. 2002).

legitimate public purposes, if their power to regulate is not preempted by state or federal law, if they do not regulate selectively, if they provide due process, and they do not completely wipe out all economic value of a parcel of land. Unless your project is subject to one of those illegitimate exercises of government power, it is likely that local regulation will be upheld.

[2] **Understand the social and political forces driving the regulations and adapt to them.**

Land use regulation is a highly political government function. Like any legislative body, local governments are subject to strongly asserted competing claims. Real estate developers, retiree homeowners, ranchers, oil and gas developers and environmental advocates all have well-developed positions and arguments. Local governments know that they have to try to accommodate all of these interests but cannot give any of them everything they want. The persons who get the most from the legislative process are those who participate over the long term, who build trust and relationships with the influential participants, and who understand what is possible in any given situation.

[3] **Understand the technical requirements of the application process and make maximum use of your understanding.**

[a] Application and approval processes are often complicated and may involve multiple meetings, public forums, presentations, comment and review sessions, and approvals by more than one level of local government such as the Planning Commission and the Board of Trustees. Be prepared to demonstrate that you know all of the requirements and are prepared to address them in a serious manner.

[b] Get to know the planning staff and Commission; be a source of useful information about industry's and your company's practices.

[c] Plan for the permitting process; anticipate the amount of time that will be required to get approvals through multiple levels of review.

[d] Provide lots of information about your processes and plans. Your opponents will make things up; if you don't provide the information theirs will be the only story anyone hears. Get your experts involved early and give credible answers. Be honest. Understand your message and deliver it consistently.

[e] Be prepared. Know what the local jurisdiction can require and what they can't. Know in advance what you are willing to concede in negotiation with regulators and what you are not.

[f] Keep careful records of every interaction with the local authorities. Although it is hard to bring an estoppel claim against a municipal government, it is impossible without contemporaneous records.

[g] In most states, comprehensive state regulatory schemes may present preemption issues for local governments; your response to local regulations should raise all preemption arguments in a helpful, informative style.

[h] Be willing to insist, politely, that the local authorities observe all requirements, both substantive and procedural. This helps you protect your chances of winning an appeal.

[i] Persist. They are in it for keeps; so must you be.