SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue, Denver, Colorado 80203	FILED IN THE SUPREME COURT MAY 31 2006 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING § 1-40-107(2), C.R.S. (2005) **Petitioner:** STEVEN DURHAM, Petitioner, v. **Respondents:** TIMONTY J. BROWN and MATTHEW GARRINGTON, Proponents, **Title Board:** WILLIAM A. HOBBS, JASON DUNN, and DAN CARTIN	▲ COURT USE ONLY ▲
Attorneys for Petitioner: Scott E. Gessler, # 28944 Hackstaff Gessler LLC 1601 Blake Street, Suite 310 Denver, Colorado 80202 Telephone: 303-534-4317; Telefax: 303-534-4309 Attorneys for Howard Stanley Dempsey, Jr.	Case No. 06SA169

PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2005-2006 #126 ("COMPENSATION FOR LAND USE REGS THAT DIMINISH VALUE")

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CLERK
COLORADO SUPREME COURT

Steven Durham, a registered elector of the State of Colorado, by and through undersigned counsel, respectfully petitions this Court under C.R.S. § 1-40-107(2), to review the title, ballot title, and submission clause set by the Ballot Title Setting Board for Proposed Initiative 2005-2006 #126 ("Damages for Mineral Extraction").

I. Actions of the Ballot Title Setting Board

The Title Board conducted its initial public meeting and set the title and submission clause for Proposed Initiative 2005-2006 #126 on May 17, 2006. On May 24, 2006, the Petitioner filed a *Motion for Rehearing* under C.R.S. § 1-40-107(1), and the Title Board considered the Motion for Rehearing at its next meeting on May 25, 2006. The Board granted in part and denied in part the Motion. The Petitioner now seeks review of the Title Board's decision under C.R.S. § 1-40-107(2).

II. Issues Presented

1. Does the initiative violate the single subject requirement by creating a new property right that gives landowners the ability to enforce land use ordinances that apply to surrounding properties?

2. Alternatively, is the ballot title and submission clause inaccurate, misleading, and incomplete because it fails to inform voters that the initiative

creates a new property right that gives landowners the ability to enforce land use ordinances that apply to surrounding properties?

3. Does the ballot title and submission clause cause confusion among voters because it is misleadingly similar to the ballot title and submission clause in Proposed Initiative 2005-2006 #86?

4. Is the ballot title and submission clause inaccurate, misleading, and incomplete because it fails to sufficiently inform voters that various exceptions are so broad and expansive that property owners will never receive compensation for land use regulations that diminish the value of their real property by twenty percent or more?

5. Is the ballot title and submission clause inaccurate, misleading and incomplete because it fails to explain the new standards for "public entity" and "land use regulation."

6. Is the ballot title and submission clause inaccurate, misleading and incomplete because it fails to state that the measure applies to land use regulations that have been in effect since 1970.

7. Is the ballot title and submission clause inaccurate, misleading and incomplete because it fails to state that it creates a new burden of proof, different from current statute, that requires a landowner to establish a diminution through clear and convincing evidence.

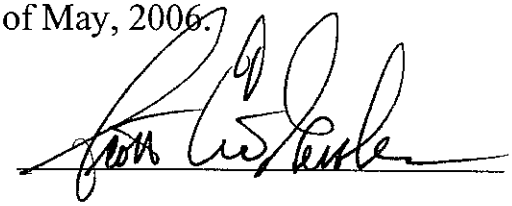
III. Supporting Documentation

As required by C.R.S. § 1-40-107(2), attached is a certified copy of the Petition, with the titles and submission clause of the proposed constitutional amendment, together with a certified copy of the Motion for Rehearing and final action by the Title Board. The Petitioner has ordered a copy of the transcript of the Motion for Rehearing and will file it with the Court upon receipt.

IV. Relief Requested

The Petitioner respectfully requests this Court to reverse the actions of the Title Board with directions to decline to set a title and return the Proposed Initiative to the proponents.

Respectfully submitted this 30th day of May, 2006.

By: 

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Attorney for Petitioner

Addresses of Petitioner:
Steven Durham
2550 Hill Circle
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2006, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2005-2006 #126 ("COMPENSATION FOR LAND USE REGS THAT DIMINISH VALUE")** was placed in the United States mail, postage prepaid, to the following:

Timothy J. Brown
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Denver, Colorado 80211

Matthew Garrington
3871 Tennyson St.
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Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
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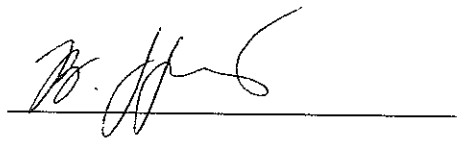

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

I, GINETTE DENNIS, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2005-2006 #126"...

IN TESTIMONY WHEREOF I have unto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver this 26th day of May, 2006.

Ginette Dennis

SECRETARY OF STATE

STATE OF COLORADO
Department of State
1700 Broadway
Suite 270
Denver, CO 80290

Ginette Dennis
Secretary of State

J. Wayne Munster
Acting Director, Elections Division

May 23, 2006

NOTICE OF REHEARING MEETING

You are hereby notified that the Secretary of State,

Attorney General, and the Director of the Office of Legislative

Legal Services will meet to consider all

Motions for Rehearing filed by the deadline of

Wednesday, May 24, 2006 at 5:00 p.m.

Meeting will take place on

Thursday, May 25, 2006 at 9:00 a.m.

Secretary of State's Blue Spruce Conference Room

1700 Broadway, Suite 270

Denver, Colorado

You are invited to attend.

Ginette Dennis

GINETTE DENNIS
Secretary of State

AUDIO BROADCASTS NOW AVAILABLE. PLEASE VISIT WWW.SOS.STATE.CO.US AND CLICK ON THE "INFORMATION CENTER".

COLORADO TITLE SETTING BOARD

In re Title and Ballot Title and Submission Clause for Initiative 2005-2006 #126

MOTION FOR REHEARING

On behalf of Steven Durham, a registered elector of the State of Colorado, the undersigned hereby moves for a rehearing of the title, ballot title, and submission clause for Proposed Initiative 2005-2006 #126, set by the Title Board on May 17, 2006, and states as follows:

1. The initiative violates the single-subject requirement because the initiative creates a new property interest for owners of surrounding properties. This new right gives landowners a property interest in land use regulations that affect neighboring properties. As a result, the initiative gives neighboring landowners due process claims against, and private enforcement of, land use regulations. This provision directly overturns *Hillside Community Church v. Olson*, 58 P.3d 1021 (Colo. 2002) (a copy of which is attached). It is a subject separate and distinct from the requirement that public entities provide remedies to owners of real property for a diminution of their value.

2. The title and submission clause set by the Board is misleading, inaccurate, and incomplete for the following reasons:

a. The title and submission clause are misleadingly similar to the title and submission clause in Proposed Initiative 2005-2006 #86. In order to meaningfully inform voters, the title and submission clause must explain the differences between this initiative and Proposed Initiative 2005-2006 #86.

b. The title and submission clause do not sufficiently inform voters that the intent of the measure is to prevent private owners of real property from receiving compensation, because the title and submission clause fail to inform voters of the sweeping breadth of the exceptions that prevent owners from receiving compensation of the exemption: (1) decreases the value of surrounding real property; (2) threatens commonly-held community values, to include aesthetics; or (3) threatens the natural or built environment.

c. The title and submission clause state that a public entity may enact regulations that "serve to prevent" a decrease in fair market. In fact a land use regulation may only be exempted if it can be shown that the fair market value of a surrounding property is actually decreased.

d. The title and submission clause state that a public entity may enact regulations

that "protect" commonly held values or the built or natural environment. In fact, the exceptions are far broader and may be invoked on a mere showing that the exemption would "threaten" community held values.

e. The title and submission clause fail to state that the exemptions may also be construed to protect the public health, safety, morals or general welfare.

f. The title and submission clause do not reflect the initiative's newly created standard for a "public entity" engaged in land use regulation. That new standard includes entities not currently involved in or associated with such regulation.

g. The title and submission clause do not reflect the initiative's newly created, open-ended standard for "land use regulation." That new standard is not limited to the listed actions and includes acts that have never been considered to be land use regulations such as guidelines, enforcement actions, deed restrictions, and any action taken in connection with applications and permits, including their denial.

h. The title and submission clause fail to state that the measure applies to land use regulations that have been in effect since 1970.

i. The title and submission clause fail to state that it creates a new burden of proof, different from current statute, that requires a landowner to establish a diminution through clear and convincing evidence.

Respectfully submitted this 24th day of May, 2006.

By: _____

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Attorney for Steven Durham

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2006, a true and correct copy of the foregoing **MOTION FOR REHEARING** was placed in the United States mail, postage prepaid, to the following:

Timothy J. Brown
4644 Alcott St.
Denver, Colorado 80211

Matthew Garrington
3871 Tennyson St.
Denver, Colorado 80212

H

Briefs and Other Related Documents

Supreme Court of Colorado.
HILLSIDE COMMUNITY CHURCH, S.B.C., a non-profit corporation; First Bank of
Arvada, N.A; The City of Golden, a Colorado municipal corporation; and the City Council of the City of Golden, Petitioners,
v.
Marian L. **OLSON** and Ida M. Brueske, Respondents.
The City of Golden, a Colorado municipal corporation; and the City Council of the City of Golden, Petitioners,
v.
Marian L. **Olson** and Ida M. Brueske, Respondents.
Nos. 01SC808, 01SC878.

Nov. 25, 2002.
Rehearing Denied Dec. 16, 2002.

Adjoining landowners challenged **church's** construction of building addition in residential zone. The District Court, Jefferson County, Kenneth E. Barnhill, Jr., J., vacated the certificate of occupancy and height variance, required the city to conduct a hearing on an application for a special use permit, and applied the doctrine of relative hardships to preclude removal or alteration of the additions. Cross-appeals were taken. The Court of Appeals, 42 P.3d 52, Plank, J., affirmed in part, reversed in part, and remanded with directions. **Church** appealed. The Supreme Court, Rice, J., held that landowners had no property interest in special use permit or hearing sufficient to invoke procedural due process.

Reversed and remanded.

West Headnotes

[1] Civil Rights 1304
78k1304 Most Cited Cases
(Formerly 78k196.1, 78k192)
In bringing a due process claim under the civil rights act, a plaintiff must show that (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

[2] Constitutional Law 277(1)
92k277(1) Most Cited Cases

[2] Constitutional Law 278(1)
92k278(1) Most Cited Cases
In evaluating a due process claim, a court must consider: (a) whether a property right has been identified; (b) whether governmental action with respect to that property right

amounts to a deprivation; and (c) whether the deprivation, if one be found, was visited upon the plaintiff without due process of law. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 277(1)
92k277(1) Most Cited Cases
When deciding whether due process property interest exists, the identification and parameters of certain circumscribed benefits, and what constitutes a "legitimate claim of entitlement" to them, is determined not by the Constitution, but largely by state law. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 277(1)
92k277(1) Most Cited Cases

[4] Constitutional Law 278.2(2)
92k278.2(2) Most Cited Cases

[4] Zoning and Planning 436.1
414k436.1 Most Cited Cases
Adjoining landowners did not have a cognizable property interest in their claimed right to notice of, and an opportunity to participate in, a special review hearing for an addition to a **church**, and thus landowners' due process rights were not violated the city's failure to hold such a hearing; rather, violations of the municipal code were to be pursued under state law remedies, and did not rise to the level of procedural due process claims. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; Rules Civ.Proc., Rule 106(a)(2).

[5] Constitutional Law 277(1)
92k277(1) Most Cited Cases
Whether a property interest exists, for due process purposes, in the outcome of a particular zoning board decision depends not on the probability of a favorable result, but on the degree of discretion vested in the decision-maker. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 277(1)
92k277(1) Most Cited Cases
Adjoining landowners had no property interest in the denial of a special use permit regarding an addition to a **church** sufficient to invoke due process; the municipal code vested both the planning commission and the city council with discretion to grant or deny the permit, thereby negating landowners' claimed entitlement to the denial of the special use permit. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law 278.2(2)
92k278.2(2) Most Cited Cases

[7] Zoning and Planning 436.1
414k436.1 Most Cited Cases
Adjoining landowners had an adequate remedy for their claims, arising from **church's** addition, under state law, and thus were not entitled to a pre-deprivation remedy under procedural due process rights; the failure to hold a special use permit hearing was not an intentional and deliberate decision made by the planning commission, city council, and city attorney, and landowners had identified no cognizable property interest to which their claim for a pre-
deprivation remedy could attach. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983;

Rules Civ.Proc., Rule 106(a)(4).

*1022 The Overton Law Firm, Thomas J. Overton, Denver, CO, Attorneys for Petitioner **Hillside** Community **Church**.

Otten, Johnson, Robinson, Neff, & Ragonetti, PC, J. Thomas MacDonald, Griffiths, Tanoue, Light, Harrington & Dawes, P.C., Steven J. Dawes, Denver, CO, Attorneys for Petitioners City of Golden and The City Council of the City of Golden.

*1023 Victor F. Boog & Associates, PC, Victor F. Boog, Linda A. Battalora, Lakewood, CO, Attorneys for Respondents.

Geoffrey T. Wilson, Carolynne C. White, Denver, CO, Attorneys for Amicus Curiae the Colorado Municipal League.

Josh A. Marks, Hall & Evans, LLC, Denver, CO, Attorneys for Amicus Curiae Colorado Counties, Inc.

Justice RICE delivered the Opinion of the Court.

In this combined proceeding, we granted certiorari to determine whether the requirement in the Golden Municipal Code (GMC) that a public hearing be held before a special use permit is issued affords neighboring landowners a property right in that procedure warranting the protection of Fourteenth Amendment due process guarantees. [FN1]

FN1. We granted certiorari on the following issue: Whether the failure to conduct a public hearing on a landowner's application for a special use permit pursuant to a provision of a municipal code, which grants adjacent landowners the right to notice of and an opportunity to participate in such hearing, violates the adjacent landowners' procedural due process rights, even though adjacent landowners successfully sued for mandamus to remedy the mistake.

The trial court held, and the court of appeals affirmed, that Respondents had a legitimate claim of entitlement to notice of, and participation in, a public hearing regarding a special use permit for **Hillside** Community **Church's** building addition. They concluded that this entitlement was a property right warranting procedural due process protection. Accordingly, because no public hearing was held as required by the GMC, both courts held that Respondents' due process rights were violated pursuant to their claim under 42 U.S.C. § 1983. In addition, because 42 U.S.C. § 1988 provides for an award of attorney fees to the prevailing party in a § 1983 claim, the court of appeals affirmed the trial court's grant of attorney fees to Respondents in a separate opinion.

We reverse. We hold that procedural guarantees stemming from state law or local ordinance do not create a constitutionally cognizable property interest. As such, they cannot be the basis of a meritorious § 1983 claim, and hence, the award of attorney fees to

Respondents under § 1988 was improperly granted. We further conclude that Respondents had an adequate remedy for their claims under state law, and therefore no basis upon which to seek recourse under § 1983.

I. FACTS & PROCEDURAL HISTORY

This case arose from a dispute between the **Hillside** Community **Church** (**Hillside**) and Respondents Marian L. **Olson** and Ida M. Brueske, over the construction of an addition to the **church**. Respondents own and reside in homes adjacent to the **church** property in Golden, Colorado. In the spring of 1997, **Hillside** began construction activities on its property without investigating applicable planning and zoning requirements, and thus without obtaining a permit of any kind. Although **Hillside** belatedly obtained a "Foundation Only" permit in May of 1997, it subsequently exceeded the bounds of that permit by commencing construction on the addition itself. Petitioner, the City of Golden, eventually issued a building permit to **Hillside** in October of 1997.

In April of 1998, when the addition was substantially complete, Respondents asserted to the City of Golden that **Hillside** should have obtained a special use permit prior to construction, that the addition might be in violation of height limitations applicable to the R 1 zone district, and that other code provisions were being violated.

In May of 1998, the City Attorney for Golden agreed, determining that **Hillside's** building permit had been improperly granted because the **church** addition constituted an extension of a non-conforming use in the R 1 zone district. Under the requirements of the GMC, the extension of a non-conforming use was precluded unless a special use permit had been obtained. The GMC further mandated that before a special use permit could be issued, a public hearing must be held and neighboring landowners given notice and an opportunity to participate. This had never occurred with regard to the **church** addition. Although acknowledging the mistake, the City Attorney did not require that a special *1024 use permit be obtained or a hearing held after the fact, because the addition was by then substantially complete. He also declined to revoke the building permit or require that the addition be modified or torn down, relying on the doctrine of relative hardship set forth in *Hargreaves v. Skrbina*, 662 P.2d 1078 (Colo.1983). In June, **Hillside** belatedly obtained a five-foot height variance. In November, the City issued a certificate of occupancy to **Hillside** for the addition.

In June of 1998, Respondents filed suit in the district court seeking injunctive relief and mandamus under C.R.C.P. 106(a)(2). They alleged six claims for relief, [FN2] among them a violation of their rights under 42 U.S.C. § 1983. That statute states, in pertinent part, that:

> FN2. In addition to their claim under 42 U.S.C. § 1983, Respondents also alleged that: (1) **Hillside** had

> impaired their prescriptive right of access over and across the **church** property; (2) **Hillside** had violated numerous provisions of the GMC and the Uniform Building Code, entitling them to relief under C.R.C.P. §§ 106(a)(2) and 65(a); (3) the City of Golden had improperly granted **Hillside** a building permit and must accordingly direct the **church** to remove the addition; (4) the City Council had exceeded its jurisdiction and abused its discretion in granting the variance to **Hillside;** and (5) the City of Golden had violated the Establishment Clause of the First Amendment of the United States Constitution by giving preferential treatment to **churches.**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,....

42 U.S.C. § 1983 (2000). Specifically, Respondents claimed that because Golden had issued a building permit to **Hillside** without granting them an opportunity to participate in the special use permit hearing as mandated by the GMC, Respondents had been deprived of a property interest in violation of their due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

The trial court ordered the City to set aside the height variance, vacate the certificate of occupancy, hold a hearing as required by the GMC pursuant to the issuance of a special use permit, and only reissue a certificate of occupancy upon approval of the special use permit and compliance with all other provisions of the GMC. Provided that the special use permit was ultimately granted, however, and finding that **Hillside** had relied in good faith on the assurances of the City, the court declined to order the **church** addition altered or removed, citing the doctrine of relative hardship. Finally, the trial court held that Respondents had a "constitutionally protected property interest to see that local zoning and planning ordinances are followed, where non-compliance affects their property." ***Olson*** *v.* ***Hillside*** *Cmty.* ***Church,*** No. 98CV1842, slip op. at 19 (Colo.Dist.Ct.1999). Having thus concluded that Respondents had prevailed in their claim under 42 U.S.C. § 1983, the trial court ordered reasonable attorney fees awarded to them pursuant to 42 U.S.C. § 1988.

The court of appeals affirmed Respondents' § 1983 claim, but reversed on the relative hardship doctrine. The court concluded that **Hillside** had not, in fact, acted in good faith, and hence should not be afforded the positive presumption of that doctrine. It accordingly reversed the trial court's ruling on that issue,

and remanded to the trial court to require **Hillside** to modify the **church** addition to comply with existing GMC ordinances. [FN3] In affirming the Respondents' § 1983 claim, the court of appeals held that they had a "legitimate property interest arising from the GMC" and their "procedural due process rights were violated." *1025 *Olson v. Hillside Cmty. Church*, 42 P.3d 52, 55 (Colo.App. 2001). In a separate ruling, the court of appeals also upheld the award of attorney fees to Respondents under 42 U.S.C. § 1988. *Olson v. City of Golden*, No. 00CA0570, slip op. at 5 (Colo.App. Sept. 13, 2001).

> FN3. In its petition to this court, **Hillside** seeks the abandonment of that order because it maintains that compliance has been achieved during the pendency of the appeal to this court. We conclude that the determination of whether **Hillside** has complied with the court of appeals' order is an issue of fact which must ultimately be determined by the trial court. Accordingly, we decline to rule on that issue.

Petitioners City of Golden and **Hillside** Community **Church** appealed the court of appeals' decisions to this court. We granted certiorari only with respect to the due process issue. We thus address the question of whether Respondents had a legitimate property interest either in their right to a special use hearing, or in their right to a denial of the special use permit, and hence a meritorious claim under 42 U.S.C. § 1983. We also granted certiorari in regard to the separate ruling affirming the award of attorney fees. We have combined those petitions in the present proceeding, and now reverse.

II. PROCEDURAL DUE PROCESS RIGHTS

[1] In bringing a due process claim under 42 U.S.C. § 1983, a plaintiff must show that (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). That Golden was acting under color of state law in this case is undisputed. Respondents' claim instead centers on the second *Parratt* prong; specifically, that they were deprived of property without due process of law.

[2] In evaluating a due process claim, a court must consider:

> (a) whether a property right has been identified; (b) whether governmental action with respect to that property right amounts to a deprivation; and (c) whether the deprivation, if one be found, was visited upon the plaintiff without due process of law.

Fusco v. Connecticut, 815 F.2d 201, 205 (2d Cir.1987); *accord Double J Ltd. P'ship v. Plan and Zoning Comm'n*, 218 Conn. 65, 588 A.2d 624 (1991). Because we conclude that Respondents have no property right at issue in this case, our analysis will center primarily on

the first factor listed in *Fusco*--the identification of a property right.

Since we have not before considered whether state law procedural protections create a cognizable property right in the land use context, we preface our analysis with an overview of what types of property are protected under the due process clause, and how those rights are ascertained.

[3] The Fourteenth Amendment mandates that a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. The definition of what type of property is safeguarded by the Fourteenth Amendment has evolved over the years to encompass not only tangible physical property, but a "legitimate claim of entitlement" to certain circumscribed benefits. *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The identification and parameters of those benefits, and what constitutes a "legitimate claim of entitlement" to them, however, is determined not by the Constitution, but largely by state law. *Id.* Once the state has legislatively created a certain entitlement and a person can demonstrate a legitimate claim to that entitlement, only then is the Fourteenth Amendment implicated to ensure that the person is not deprived of her entitlement absent due process of law. In short, "legislatures create property and courts protect it." Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 Calif. L.Rev. 146, 146 (1983).

Having thus established a basis in how constitutionally protected property is created and identified, we now turn to the question of whether a property interest has been established in this case. The court of appeals determined that Respondents had a property interest in the procedures set forth in the GMC because they had a legitimate claim of entitlement to (1) notice of, and an opportunity to participate in, the special review hearing for the **Hillside** addition; and (2) denial of the special use permit for the **Hillside** **1026 addition. [FN4] We will discuss these two potential property interests in turn.

FN4. In their brief to this court, Respondents also claim appeal rights to Golden's City Council under Section 18.30.040 of the GMC and to subsequent judicial review under Section 18.30.050 of the GMC. Because the special use permit hearing failed to occur, Respondents' right to appeal that decision to the City Council was subsumed by their subsequent filing in district court. In any event, the right to appeal to the City Council, like the right to notice and participate in the hearing itself, is purely procedural, and does not give rise to due process protection. *See Fusco v. Connecticut*, 815 F.2d 201, 205-206 (2d Cir.1987)("The opportunity granted abutting landowners ... to appeal decisions of planning and zoning commissions and zoning boards of appeal is purely

procedural and does not give rise to an independent interest protected by the fourteenth amendment.") (citations omitted). As for the right to subsequent judicial review under Section 18.30.050, Respondents have clearly availed themselves of that right in the present proceeding.

A. Notice and Opportunity to Participate in a Special Use Permit Hearing

The court of appeals held that Respondents had a "legitimate claim of entitlement arising from the GMC, which requires **Hillside** to obtain a special use permit." ***Olson v. Hillside Cmty. Church***, 42 P.3d 52, 55 (Colo.App.2001). Respondents more specifically claimed that their due process rights were infringed by Petitioners' violation of sections 18.30.020(4), 18.30.020(6), and 18.30.020(7) of the GMC. Those sections require, respectively: (1) that upon receipt of a special use permit application, the Planning and Development Department shall notify all adjacent property owners of the filing, inform them of the date, time, and location of the permit hearing, and advise them that they can inspect the application prior to the hearing; (2) that the property shall be posted, and a notice of the hearing published in a newspaper of general circulation at least twelve days prior to the hearing; and (3) that the Planning Commission shall hold a public hearing on the permit, and shall subsequently make a determination of approval, approval with limitations or conditions, or denial of the special use permit. GMC §§ 18.30.020(4),(6), and (7) (1996).

These code sections set out the specific procedures that must be followed pursuant to a special use permit review; hence, the essence of the court of appeals' holding is that Respondents have a property interest in these procedures. [FN5] This holding cannot stand. Although the precise issue has never been addressed by this court, the United States Supreme Court and a significant body of case law from other jurisdictions have conclusively established that there can be no property right in mere procedure.

FN5. Petitioners argue that because these provisions of the GMC are only triggered when a special use permit application is filed, and because no such application was ever filed in this case, these code sections are simply inapposite to the present discussion. Because the court of appeals held that Respondents had a cognizable property interest in these procedures notwithstanding the absence of an actual application, however, we must analyze this issue accordingly.

The point is straightforward: the Due Process Clause provides that certain substantive rights--life, liberty, and property--cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be

defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee."

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (citing *Arnett v. Kennedy*, 416 U.S. 134, 167, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (Powell, J., concurring in part and concurring in result in part)). *See also Olim v. Wakinekona*, 461 U.S. 238, 251 n. 12, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) ("an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause."); *Montgomery v. Carter County*, 226 F.3d 758, 768 (6th Cir.2000) ("What the Due Process clauses of the Fifth and Fourteenth Amendments protects is 'life, liberty [and] property,' not the procedures designed to protect life, liberty and property."); ***1027** *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1117 (10th Cir.1991) ("The Supreme Court has recognized that the mere existence of an entitlement to a hearing under state law, without further substantive limitation, does not give rise to an independent substantive liberty interest protected by the fourteenth amendment."); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58 (2d Cir.1985) ("the mere existence of reasonable procedures entitling a person to a hearing under state law does not give rise to an independent substantive liberty interest protected by the Fourteenth Amendment."); *Slotnick v. Staviskey*, 560 F.2d 31, 34 (1st Cir.1977), ("The simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension."); *Double I Ltd. P'Ship v. Plan and Zoning Comm'n*, 218 Conn. 65, 588 A.2d 624, 631 (1991) (citing *Cain v. Larson*, 879 F.2d 1424, 1426 (7th Cir.1989)) ("A party seeking to demonstrate a property interest entitled to protection under the due process clause cannot 'simply rely upon the procedural guarantees of state law or local ordinance.' ").

We find distinguishable the sole case cited by the court of appeals to support its conclusion that "[s]tatutes or regulations can create a legitimate property interest." ***Olson v. Hillside Cmty. Church***, 42 P.3d 52, 55 (Colo.App.2001). In *Painter v. Shalala*, 97 F.3d 1351 (10th Cir.1996), the court rejected a doctor's claim that he had a protected property interest in receiving Medicare reimbursements calculated in a particular way. The court indicated in dicta that although the doctor may have had a legitimate property interest under the Medicare statute for reimbursement of medical services already rendered, he had no such interest in the procedure by which those reimbursements were calculated. *Id.* at 1357-58.

From this reasoning, the court of appeals erroneously concluded that *Painter* stood for the proposition that a statute itself could confer a property right. This misconstrues the court's logic. Instead, the Tenth Circuit held that a doctor has a property right in his preexisting entitlement to payment of services already rendered, not the enforcement of the

Medicare statute per se. Accordingly, we interpret *Painter* consistently with the line of cases cited above.

Respondents nevertheless argue that their case is distinguishable from this body of law because Golden failed to follow its own procedures. Petitioner's failure to follow the procedural requirements of the GMC may have indeed contravened state law. A state procedural failure alone, however, does not create a violation of constitutional proportions. The crux of our examination is not compliance with or violation of the prescribed procedure; rather, it is determining whether Respondents had a preexisting entitlement which gives rise to constitutional due process guarantees, an inquiry we answer in the negative.

[4] Accordingly, we hold that Respondents did not have a cognizable property interest in their claimed right to notice of, and opportunity to participate in, a special use permit hearing for the **Hillside** addition. The violations of the GMC that Respondents claim were properly pursued under state law remedies pursuant to C.R.C.P. 106(a)(2), and do not rise to the level of procedural due process claims under 42 U.S.C. § 1983.

B. No Property Interest in Denial of a Special Use Permit Due to the Discretion of the Decision Maker

We now turn to Respondents' claim that they had a property interest in the denial of the special use permit for the **Hillside** addition. The court of appeals generally concluded that the GMC provisions were not discretionary, *Olson v. Hillside Cmty. Church*, 42 P.3d 52, 55 (Colo.App.2001), thereby suggesting that had the special use permit hearing been held, the Planning Commission would have been obligated to deny **Hillside's** special use permit. We disagree.

[5] Whether a property interest exists in the outcome of a particular zoning board decision depends not on the probability of a favorable result, but on the degree of discretion vested in the decision-maker. *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir.2000). Thus, in order to prove a property interest in the denial of the special use permit, Respondents must show that, had it held the hearing, the Golden Planning *1028 Commission was obligated to deny the special use permit. Our analysis concludes that Golden, had it held the hearing, would not have been obligated to deny the special use permit, and hence Respondents have no legitimate claim of entitlement to a denial.

Like the right to certain procedures, the right to certain outcomes has been extensively litigated in the land use context, albeit usually in regard to the failure of a zoning department to *grant* a permit or license. [FN6] The Tenth Circuit Court of Appeals has described the test for determining the existence of a protected property interest:

> FN6. This distinction is of no consequence to our analysis. Whether a litigant claims a protected property interest with regard to the granting of

> a permit or its denial are simply opposite sides of the same argument.

If the decisionmaker is granted a broad range of discretion, the applicant is seeking neither an interest that he or she has already acquired nor a claim upon which he or she should rely, regardless of the characterization of the process involved. *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1117 (10th Cir.1991); *see also Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir.1985) ("the question of whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate should depend on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted.").

Applying the "discretion of the decisionmaker" analysis to the facts of this case, we now turn to the provisions of the GMC in order to determine how much (if any) discretion the Golden Planning Commission would have had in deciding whether to grant or deny **Hillside's** special use permit. Section 18.30(7) of the GMC provides as follows: "The Planning Commission shall hold a public hearing on the special use permit application, and upon conclusion of the public hearing, make a determination of *approval, approval with limitations or conditions, or denial of the special use permit.*" GMC § 18.30(7) (1996) (emphasis added). This language clearly indicates that the Planning Commission has significant-if not unlimited-discretion to rule on a special use permit application in whatever manner it deems appropriate.

On the other hand, section 18.30.020(5) lists a number of factors the Planning Commission should consider in deciding whether to grant a permit, and arguably limits that body's discretion by mandating that "[s]pecial use permits *shall be granted only if* the usage will not authorize or require any construction or alteration in violation of any ordinances of the city, including the planning and zoning ordinance and the city building code." GMC § 18.30.020(5) (1996) (emphasis added). Given that the trial court noted some twelve specific code and ordinance violations, there is some merit to Respondents' contention that they had a "certainty or very strong likelihood" that the special use permit would have been denied. *Cf. Polenz v. Parrott*, 883 F.2d 551, 556 (7th Cir.1989) ("where a municipal ordinance provides substantive criteria which, if met, dictate the issuance of a permit, an applicant who has met those criteria might assert a legitimate claim of entitlement to the permit.").

The GMC is ambiguous with respect to which code section was intended to prevail over the other. Specifically, the question is whether section 18.30(7) prevails over section 18.30(5), or vice-versa. Given the use of the mandatory language in section 18.30(5) ("special use permits shall be granted only if" GMC and building code provisions are complied with), coupled with its list of provisions the Planning Commission "shall" consider, this section could arguably be

considered to control over the language of 18.30(7). In other words, the Planning Commission might only have the discretion to grant the permit under 18.30(7) if the project was otherwise in compliance.

We find, however, that section 18.30(7), with its expansive discretionary language, was intended to vest the Planning Commission with the broad degree of flexibility necessary to individually tailor project requirements to particular circumstances, even to the extent of negating the directives of section 18.30(5). Indeed, the special permit process*1029 itself has been recognized by other courts as largely discretionary in nature. *See, e.g.*, *Irwin v. Planning and Zoning Comm'n*, 244 Conn. 619, 711 A.2d 675, 678-79 (1998) ("We previously have recognized that the special permit process is, in fact, discretionary.... 'If the special permit process were purely ministerial there would be no need to mandate a public hearing.' ") (citing *Conn. Health Facilities, Inc. v. Zoning Bd. of Appeals*, 29 Conn.App. 1, 613 A.2d 1358, 1362 (1992)).

Moreover, section 18.30.040 vests the City Council with the power, upon appeal by either an applicant or person to whom notice is required, to "uphold, deny, or modify the decision of the Planning Commission." [FN7] GMC § 18.30.040 (1996). Section 18.30.040, therefore, creates a wholly separate, yet equally expansive, grant of discretionary power to the City Council. This lends support to our conclusion that sections 18.30(7) and 18.30.040, granting discretion to the Planning Commission and the City Council, respectively, were intended to prevail over section 18.30(5). By vesting discretionary power in these two bodies by the plain language of the code, Golden expressly declined to tie its own hands with respect to the denial of a special use permit.

> FN7. This section reads as follows: **Council review.** The applicant and any person to whom notice is required, pursuant to paragraph 18.30.020(3) above, aggrieved by the decision of the Planning Commission on any special use permit, may, within 15 days of the date of the decision thereon, apply to the City Council for review of said decision by filing a request for review with the City Clerk. The City Council shall within 30 days of receipt of the review request, based on the record alone as certified to the Council by the Planning Commission, decide to uphold, deny, or modify the decision of the Planning Commission.

[6] Because the plain language of two separate sections of the GMC vests broad decision-making powers in both the Planning Commission and City Council to either grant or deny a special use permit, we conclude that had the special use permit hearing been held, Respondents would have had no certainty that **Hillside's** special use permit application would have been denied. Accordingly, Respondents could have had no preexisting claim of entitlement to the denial of the special use permit.

In summary, we conclude that: (1) Respondents' right to notice of, and an opportunity to participate in, the special use permit hearing was solely a procedural claim and as such lacked the requisite property entitlement necessary for the successful assertion of a due process claim; and (2) both the Planning Commission and the City Council had discretion whether to grant or deny the permit, thus negating Respondents' claimed entitlement to the denial of the special use permit. Accordingly, we hold that Respondents have no cognizable property interest in the right to notice of, and participation in, the special use hearing, nor in the denial of the special use permit to **Hillside.**

III. Adequacy of State Law Remedy

Finally, Respondents assert that because Golden's failure to follow the special use permit procedures mandated by the GMC was a deliberate and intentional decision, made jointly by the Planning and Zoning Commission, the City Council, and the City Attorney, as opposed to a "random and unauthorized" act by a single governmental official, the post-deprivation remedy afforded them by C.R.C.P. 106(a)(2) was inadequate. They claim that in such circumstances, only a pre-deprivation remedy is legally sufficient to protect a claimant's due process rights, a remedy they were denied. [FN8]

> FN8. We first emphasize that we need not reach the merits of this claim. As we explain, the argument that Respondents advance is relevant only when a cognizable property interest hangs in the balance. Because we have found no such property interest at issue in this case, Respondents' argument is essentially mooted at the outset. We address it to the extent we do, however, only to clarify our holding that Respondents had an adequate remedy under state law.

The United States Supreme Court articulated the distinction upon which Respondents rely in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). In *Parratt*, the Court rejected a prisoner's claimed violation of his procedural due process rights pursuant to § 1983 when prison officials lost ***1030** the prisoner's mail-ordered hobby kit due to their failure to follow proper procedures regarding the distribution of prison mail. The Court reasoned that had the loss been the direct result of an "established state procedure," the prisoner would have had a cognizable due process claim which could be adequately addressed only by a pre-deprivation remedy. *Id.* at 538, 101 S.Ct. 1908. Since the failure was instead the result of a "random and unauthorized" act taken by prison officials, however, and because such an act could not have been reasonably predicted prior to its occurrence, the Court held that a post-deprivation remedy was constitutionally sufficient in these circumstances. *Id.* at 541, 101 S.Ct. 1908. It therefore concluded that a state statute providing redress when officials failed to follow state procedures provided an adequate remedy, and the prisoner's due process rights were accordingly not violated.

Id.

Respondents' assertion that the failure to follow the dictates of the GMC was an intentional and deliberate decision made by the Planning Commission, City Council, and City Attorney, as opposed to a "random and unauthorized" act by an isolated official, is unsupported by the record. Indeed, the argument is belied by the fact that it was the City Attorney himself who later acknowledged that the failure to hold a special use permit hearing was in error.

Even were we to agree with Respondents' claims that the failure to follow the mandates of the GMC was a deliberate decision made by the entirety of the Golden city government, however, we still could not find a violation of Respondents' due process rights requiring a pre-deprivation remedy. This is because, as we indicated earlier, a necessary prerequisite to the *Parratt* distinction is the existence of cognizable property right at issue. In *Parratt*, the prisoner's hobby kit was clearly property; a preexisting right to that property was simply assumed. Here, however, for the reasons we have articulated in Part II of this opinion, Respondents have identified no cognizable property interest to which their claim for a pre-deprivation remedy can attach. Their reliance on the *Parratt* distinction accordingly fails.

[7] We therefore conclude that Respondents had an adequate remedy for their claims under state law, and no basis upon which to seek recourse under § 1983. Section 18.30.050 of the GMC allows any person "adversely affected or aggrieved" by any city action to seek judicial review pursuant to C.R.C.P. 106(a)(4). Respondents successfully sued under that provision, and under C.R.C.P. 106(a)(2) for a writ of mandamus, achieving injunctive relief in the trial court that was not only upheld on appeal, but enhanced by the court of appeals' rejection of the relative hardship doctrine and their order to Hillside to modify its addition to bring it into compliance with the code. These state law remedies were all the process that was due, and Respondents therefore have no recourse to a § 1983 claim. *See, e.g., River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166-67 (7th Cir.1994) ("the Constitution does not require state and local governments to adhere to their procedural promises. Failure to implement state law violates that state law, not the Constitution."); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58- 59 ("even an outright violation of state law ... will not necessarily provide the basis for a federal claim, at least when the applicant has a state law remedy."); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104-05 (8th Cir.1992):

> It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983.... we have unequivocally held that a state-law error, no matter how fundamental, cannot in and of itself create a federal due-process violation.

Therefore, we hold that although the City of

Golden may indeed have violated the provisions of the GMC, Respondents had an adequate state law remedy under section 18.30.050 of the GMC allowing for a writ of mandamus, and under C.R.C.P. 106(a)(2) which provides for judicial review of governmental decisions.

IV. CONCLUSION

We conclude that Respondents have no cognizable property interest with respect to *1031 (1) notice of, and an opportunity to participate in **Hillside's** special use permit hearing, or (2) the denial of the special use permit to **Hillside**. Respondents therefore cannot successfully assert a § 1983 claim against the City of Golden. Accordingly, we also reverse the court of appeals' opinion allowing the payment of reasonable attorney's fees under 42 U.S.C. § 1988. We conclude that Respondents received an adequate remedy under state law, and were not deprived of their right to be heard. We therefore reverse the court of appeals' holding that Respondents procedural due process rights were violated, and remand to the trial court for the determination of whether **Hillside** adequately complied with all other orders issued by the court of appeals.

58 P.3d 1021

Briefs and Other Related Documents
(Back to top)

- 2002 WL 32350521 (Appellate Brief) Petitioners' Reply Brief (Jul. 18, 2002)Original Image of this Document (PDF)
- 2002 WL 32350520 (Appellate Brief) Answer Brief (Jun. 24, 2002)Original Image of this Document (PDF)
- 2002 WL 32350519 (Appellate Brief) Opening Brief of Amici Curiae the Colorado Municipal League and Colorado Counties, Inc. (May. 02, 2002)Original Image of this Document (PDF)
- 2002 WL 32350517 (Appellate Brief) Opening Brief (Apr. 22, 2002)Original Image of this Document (PDF)
- 2002 WL 32350518 (Appellate Brief) Petitioner's Opening Brief (Apr. 22, 2002)Original Image of this Document (PDF)

END OF DOCUMENT

Final Text #126 Jun

Be it enacted by the People of the State of Colorado:

Section 15 of article II of the constitution of the state of Colorado is amended to read:

Section 15. Taking property for public use – compensation, how ascertained

(1) Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

(2) IF ANY PUBLIC ENTITY ENACTS OR ENFORCES ANY LAND USE REGULATION OR ANY COMBINATION OF LAND USE REGULATIONS THAT DIMINISHES THE FAIR MARKET VALUE OF ANY PORTION OF PRIVATELY OWNED REAL PROPERTY BY TWENTY PERCENT OR MORE, THE PUBLIC ENTITY SHALL EITHER PROVIDE JUST COMPENSATION TO THE OWNER OF THE AFFECTED PORTION OF REAL PROPERTY OR EXEMPT THE OWNER FROM THE LAND USE REGULATION AT THE DISCRETION OF THE PUBLIC ENTITY.

(a) THIS SUBSECTION (2) SHALL NOT APPLY TO ANY LAND USE REGULATION THAT IS:

(I) ENACTED:
(A) PRIOR TO 1970; OR
(B) AFTER 1970 BUT PRIOR TO ACQUISITION OF THE PROPERTY BY THE OWNER; OR

(II) NECESSARY TO:
(A) RESTRICT OR PROHIBIT ACTIVITIES HISTORICALLY RECOGNIZED AS NUISANCES UNDER COMMON LAW;
(B) PROTECT THE PUBLIC HEALTH, SAFETY, MORALS, OR WELFARE;
(C) COMPLY WITH FEDERAL LAW.

(b) THIS SUBSECTION (2) SHALL NOT APPLY TO ANY PORTION OF PRIVATELY OWNED REAL PROPERTY THAT, IF EXEMPTED FROM SAID LAND USE REGULATION, WOULD:

(I) DECREASE THE FAIR MARKET VALUE OF ANY PORTION OF SURROUNDING REAL PROPERTIES;

(II) THREATEN COMMONLY-HELD COMMUNITY VALUES, BOTH MARKET AND THOSE VALUES EXTERNAL TO THE MARKET. EXAMPLES INCLUDE, BUT ARE NOT LIMITED TO: THE REDUCTION OF OPEN SPACE, LOSS OF RECREATIONAL OPPORTUNITIES, OR A DEGRADATION OR CHANGE IN THE NEIGHBORHOOD AESTHETIC;

(III) THREATEN THE NATURAL OR BUILT ENVIRONMENT INCLUDING, BUT NOT LIMITED TO, ANY REDUCTION IN AIR OR WATER QUALITY, THE FRAGMENTATION OR REDUCTION OF WILDLIFE HABITATS, OR SIGNIFICANT IMPACT ON A RESOURCE INCLUDING, BUT NOT LIMITED TO, WATER THAT WOULD IMPACT CURRENT USES OR RIGHTS.

(c) THE FOLLOWING SHALL APPLY TO ANY EFFORT TO ENJOIN ENFORCEMENT OF A LAND USE REGULATION OR OBTAIN JUST COMPENSATION FROM ANY PUBLIC ENTITY

UNDER THIS SUBSECTION (2)

(I) THE OWNER SHALL PROVIDE WRITTEN DEMAND FOR COMPENSATION OR EXEMPTION TO THE PUBLIC ENTITY AT LEAST ONE HUNDRED EIGHTY DAYS PRIOR TO COMMENCING ANY COURT ACTION. THE DEMAND SHALL IDENTIFY THE AFFECTED PORTION OF REAL PROPERTY, ANY LAND USE REGULATION, AND THE AMOUNT OF DIMINUTION;

(II) WRITTEN DEMAND SHALL BE MADE WITHIN FIVE YEARS OF:
(A) THE EFFECTIVE DATE OF THIS MEASURE;
(B) THE DATE OF THE ENACTMENT OF THE LAND USE REGULATION; OR
(C) THE DATE THE PUBLIC ENTITY SEEKS TO ENFORCE THE LAND USE REGULATION, TO INCLUDE USE OF THE LAND USE REGULATION AS AN APPROVAL CRITERIA TO AN APPLICATION SUBMITTED BY THE OWNER.

(III) WITHIN ONE HUNDRED EIGHTY DAYS AFTER THE WRITTEN DEMAND IS SENT, THE PUBLIC ENTITY SHALL:
(A) EXEMPT THE OWNER FROM ENFORCEMENT OF THE LAND USE REGULATION;

(B) PROVIDE JUST COMPENSATION; OR

(C) SUBMIT TO THE OWNER A STATEMENT THAT IDENTIFIES CURRENTLY APPROVED USES OF THE AFFECTED PROPERTY.

(IV) AN OWNER MAY ENJOIN ENFORCEMENT OF THE LAND USE REGULATION OR OBTAIN JUST COMPENSATION BY BRINGING AN ACTION IN DISTRICT COURT IN THE DISTRICT WHERE THE REAL PROPERTY IS LOCATED. THE OWNER'SCLAIM SHALL BECOME RIPE FOR JUDICIAL REVIEW ONE HUNDRED EIGHTY DAYS AFTER THE WRITTEN DEMAND. THE OWNER SHALL COMMENCE LEGAL ACTION NO LATER THAN TWO YEARS FROM THE DATE THE OWNER'S CLAIM BECOMES RIPE FOR JUDICIAL REVIEW. THE OWNER NEED NOT COMPLETE ANY ADMINISTRATIVE PROCEDURES BEFORE INSTITUTING COURT ACTION.

(V) THE OWNER SHALL ESTABLISH A DIMINUTION OF VALUE OR JUST COMPENSATION BY CLEAR AND CONVINCING EVIDENCE. THE OWNER MAY SUBMIT EVIDENCE IN ADDITION TO EVIDENCE PRESENTED TO A PUBLIC ENTITY OR ADMINISTRATIVE BODY.

(VI) ALL EXCEPTIONS PARAGRAPH (a) AND (b) OF THIS SUBSECTION (2) SHALL BE CONSTRUED TO PROTECT THE PUBLIC HEALTH, SAFETY, MORALS, OR GENERAL WELFARE.

(d) AS USED IN THIS SUBSECTION (2):

(I) "LAND USE REGULATION" INCLUDES ANY PERMANENT OR TEMPORARY ACTIONS TAKEN BY ANY PUBLIC ENTITY THAT AFFECTS OWNERSHIP OF, OR AN INTEREST IN, REAL PROPERTY. THE TERM SHALL INCLUDE, BUT NOT BE LIMITED TO, ANY LAW, REGULATION, MORATORIUM, ORDINANCE, RULE, GUIDELINE, ENFORCEMENT ACTION, DEED RESTRICTION, OR OTHER ACTION TAKEN IN CONNECTION TO AN APPLICATION OR PERMIT, TO INCLUDE THE DENIAL OF AN APPLICATION OR PERMIT. "LAND USE REGULATION" SHALL INCLUDE TWO OR MORE LAND USE REGULATIONS.

(II) "OWNER" SHALL INCLUDE THE PRESENT OWNER OF REAL PROPERTY OR ANY INTEREST IN REAL PROPERTY. "OWNER" SHALL NOT INCLUDE A PUBLIC

ENTITY, OR THE UNITED STATES, OR ANY AGENCY, DEPARTMENT OR DIVISION OF THE UNITED STATES.

(III) "PUBLIC ENTITY" INCLUDES THE STATE OF COLORADO, ANY POLITICAL SUBDIVISION OF THE STATE, ANY AGENCY OR DEPARTMENT OF THE STATE GOVERNMENT, A COUNTY, CITY AND COUNTY, CITY, TOWN, SERVICE AUTHORITY, SCHOOL DISTRICT, LOCAL IMPROVEMENT DISTRICT, LAW ENFORCEMENT AUTHORITY, CITY OR COUNTY HOUSING AUTHORITY, OR WATER, SANITATION, FIRE PROTECTION, METROPOLITAN, IRRIGATION, DRAINAGE, OR OTHER SPECIAL DISTRICT, OR ANY OTHER KIND OF MUNICIPAL, QUASI-MUNICIPAL, OR PUBLIC CORPORATION ORGANIZED PURSUANT TO LAW, OR ANY ENTITY THAT INDEPENDENTLY EXERCISES GOVERNMENTAL AUTHORITY. "PUBLIC ENTITY" SHALL INCLUDE TWO OR MORE PUBLIC ENTITIES. "PUBLIC ENTITY" SHALL NOT INCLUDE A COURT OF RECORD.

(IV) "REAL PROPERTY" MEANS ANY INTEREST IN REAL PROPERTY RECOGNIZED BY THE LAWS OF COLORADO.

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 - Taking Property for Public Use2.doc

Ballot Title Setting Board

Proposed Initiative 2005-2006 #126[1]

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning a requirement that public entities provide remedies in limited circumstances to owners of privately-owned real property for land use regulations that diminish the value of the property, and, in connection therewith, requiring public entities in limited circumstances to compensate an owner or exempt the owner from the land use regulations if a public entity enacts land use regulations that reduce the value of any portion of the property by twenty percent or more, unless said exemption results in a decrease in fair market value of any portion of surrounding real properties, threatens commonly held community values, or threatens the built or natural environment.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning a requirement that public entities provide remedies in limited circumstances to owners of privately-owned real property for land use regulations that diminish the value of the property, and, in connection therewith, requiring public entities in limited circumstances to compensate an owner or exempt the owner from the land use regulations if a public entity enacts land use regulations that reduce the value of any portion of the property by twenty percent or more, unless said exemption results in a decrease in fair market value of any portion of surrounding real properties, threatens commonly held community values, or threatens the built or natural environment?

Hearing May 17, 2006:
At request of proponent, technical corrections allowed in text of measure. (In Section 15(2)(c)(IV), line 3, inserted a space after the word "owner's"; in Section 15(2)(d)(I), line 6, changed the first "to" to "with".)
Single subject approved; staff draft amended; titles set.
Hearing adjourned 1:46 p.m.

Hearing May 25, 2006:
Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.
Hearing adjourned 5:14 p.m.

[1] Unofficially captioned "**Compensation for Land Use Regs that Diminish Value**" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.