IN THE

SUPREME COURT

OF THE STATE OF COLORADO

No. 79SA405

THE BOARD OF COUNTY COMMISSIONERS OF SUMMIT COUNTY, et al. Defendants-Appellants -vs- ROBIN G. THEOBALD, et al. Plaintiffs-Appellees	)	Appeal from the District Court In and for the County of Summit, State of Colorado. No. 5296 Honorable V. G. SEAVY, JR.

BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF SUMMIT COUNTY

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INTEREST OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

The Colorado Municipal League (League) is a non-profit association of two hundred twenty-nine Colorado municipalities. The primary objective of the League is to aid in the improvement of municipal government to the benefit of Colorado municipalities and their citizens.

The power to protect the health, safety and welfare of the general public through the adoption of a comprehensive master plan is a matter of great concern to municipalities and counties alike. A comprehensive plan to guide individual land use decisions is essential to the goal of providing a well-planned community, responsive to the needs of all citizens.

Municipalities throughout Colorado are vitally interested in and concerned with any action or decision which could adversely affect their ability to make and adopt a master plan. The issues presented by the above-entitled case fall within that area of concern. Insofar as the District Court held that Summit County's master plan was actually zoning, the concept of a comprehensive plan to guide future zoning decisions could be jeopardized. Although the case involves a county master plan, municipalities will be affected by any decision delineating the role of master plans.

The League has on various occasions appeared before Colorado appellate courts as Amicus Curiae in cases of significant interest to Colorado municipalities. Participation by the League would provide the Court with a statewide perspective of the issues involved.

Because of these interests, the League appears as Amicus Curiae in this case on behalf of Summit County.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Colorado Municipal League adopts the statement of the case and statement of the facts as set forth in Summit County's brief.

ISSUES PRESENTED

I. Did the District Court err in ruling that the Summit County Code was a zoning regulation? Does the fact that the Code establishes a land use policy for future development make it a zoning regulation?

II. Is it permissible for a master plan to recommend the location, character and extent of new development?

III. Did the District Court apply the wrong standard of review to the constitutional issues? Did it substitute its judgment for the legislative judgments of the County?

I. THE DISTRICT COURT ERRED IN RULING THAT THE SUMMIT COUNTY CODE WAS A ZONING REGULATION.

A central aspect of the District Court's ruling was its conclusion that Summit County's Comprehensive Land Use Code (Code)[1] is not solely a master plan, but is in substantial part, zoning. It is submitted that the factors pointed out by the District Court as indicative of zoning are the usual, normal concomitants of a master plan, and that the court misinterpreted the purpose and effect of a master plan under the applicable law.

A. The Fact That The Code Establishes A Land Use Policy For Future Development Does Not Make It A Zoning Regulation.

The District Court's conclusion that the Code is not simply a master plan was apparently based on several factors. On pages 3-4 of the Findings, Conclusions and Judgment (reprinted in full at Appendix A), the court listed its reasons for finding the Code to be zoning.

The court found that the Code "purports to regulate... uses of land" by establishing growth centers and rural areas "which have many of the characteristics of the districts or zones contemplated by §30-28-113, C.R.S. 1973." This meant that "subsequent applications for certain types of changes in land uses have already been predetermined by the Code...."

It is the League's contention that the Code does not regulate the use of land simply because it establishes a policy, and that it has no more "predetermined" future land use decisions than has any other master plan adopted by local governments throughout the state.

The question has been raised as to whether the Code was adopted according to the statutory procedure controlling the adoption of master plans. The District Court apparently decided it was not, but ruled that the substantive provisions of the Code went beyond the permissible scope of master plans. The issue of whether the Code was invalidly adopted is not addressed here. However, if that was true, the court should have so decided, and dismissed the case. It

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[1]The Code is reprinted at Appendix A of Summit County's Brief, and is herein incorporated by reference.

should not have taken it upon itself to speculate upon the Code's validity had it been correctly adopted. Consequently, in order to reach its substantive provisions, this argument deals with the Code on the assumption that it was validly adopted as a master plan.

The Code begins with the statement that it was drafted "[i]n recognition of the need for master planning or comprehensive planning in Summit County." and that it "becomes the county's master plan." Its substantive provisions establish a policy of encouraging growth within "growth centers", while attempting to preserve the rural character of "rural areas". Growth centers are defined as:

> Areas of concentrated human activity, usually containing commercial and industrial uses as well as residential, and most uses within such growth centers are served with centralized, public infrastructure. Section II, Page 1, Summit County Code.

The Code identifies six different growth centers, and then formulates two "development rules" for such centers. These two rules essentially call for an adherence to the "growth management polices and regulations" of the affected local governments when considering new development proposals.

Rural areas are those lands not included within a growth center, and the policy for development of such lands "strongly emphasizes the retention of 'rural character'". Four more "development rules" are set down which contain policies favoring rural uses, small-scale structures, architectural compatibility, and low density development of one dwelling unit per 20 acres.

The court stated that the establishment of a policy of "growth centers" and "rural areas" is an attempt "to regulate the use of land within such... centers or areas." However, in the following paragraph, the court stated that, while it thought the Code was zoning,

> it is not <u>rezoning</u> or <u>down</u>-zoning. Certain areas or properties are targeted for down-zoning. The owners may well be presently fearful, and justifiably so, of that occurring. But it has not yet occurred.

Thus, the District Court recognized that the Code in fact made no zoning changes. The zoning which existed prior to the Code's adoption still exists, uses permitted under those classifications are still permitted, and the regulations applicable to such classifications have been neither expanded nor contracted. The Code does not even purport to change any zoning classification. That being the case, it is difficult to see how it could be considered anything more than a master plan. It is a *non sequitur* to say that the Code is zoning, but that it does not change or add to the existing zoning regulations.

The court's decision could perhaps be explained by the fact that the Code contains maps dividing the County into growth centers and rural areas. This established "districts" which looked too much like zoning classifications. However, §30-28-106, C.R.S. 1973, requires master plans to be submitted "with the accompanying maps, plats, charts, and descriptive and explanatory matter" showing the planning commission's "recommendations for the development of the territory covered by the plan." The recommendations are to include "the general character, location, and extent" of a broad range of land uses, including townsites, housing developments, forests, agricultural areas, and open development areas for purposes of conservation or protection of urban development. It is also to include "a land classification and utilization program," i.e., recommendations for future rezonings. It would be impossible to do any of this without differentiating, on a map, areas of high density development from those of low density development. That is what the Code does, and that is what master plans adopted by most local governments do. See, Anderson, American Law of Zoning, Vol. 3, §17.08.

However, these recommendations do not constitute "zoning" in any sense of the word. It is true that the Code plans for growth centers and rural areas, and is designed to be implemented through zoning regulations. However, it is only a plan that has yet to be implemented, as recognized by the District Court. As such, it is identical to master plans adopted by local governments throughout the state.

A related factor in the court's conclusion that the Code is zoning was its perception that the Code had, by establishing policies, "predetermined" future land use decisions. Much is made of the fact that "various of the Code's provisions and sections speak in mandatory rather than advisory terms."

However, the legal effect of the Code, and all other master plans, is determined by the statutes and case law. It is not a function of the language used. With respect to the Code's "mandatory" language, nothing is served by a rule of law requiring the text of master plans to be carefully phrased in "advisory" terms. Whether a master plan states that a land use policy "shall be" or "should be" a certain way, it can have only the legal effect given it under the statutes and case law. It is not a rule of law to which an individual must conform, and thus need not be so meticulously phrased.

The legal effect of the Code, and the limit on its ability to "predetermine" individual zoning decisions, is well-defined. Under §30-28-110, C.R.S. 1973, once a county has adopted a master plan, the proposed location and extent of new development must be submitted to and approved by the planning commission. Those applications which are not in conformance with the plan and are thus disapproved are referred to the board of county commissioners. Under the statute, the board "has the power to overrule such disapproval by a vote of not less than a majority of its entire membership." Thus, even though the Code establishes a policy which is intended to be adhered to, it is merely a statement of policy, and can be disregarded by a majority vote of the board.

The relevant case law is also clear upon the subject. In Richter v. City of Greenwood Village, 513 P.2d 241 (Colo.App. 1973) (not selected for official publication), the court held that the city was not bound by recommendations in its master plan.

> A comprehensive plan is helpful in guiding a coordinated, adjusted and harmonious development of a municipality and its environs, but the plan is still no more than just that - a *plan*. (Citation omitted.) The City's zoning ordinance is determinative of the available zoning classifications.... 513 P.2d at 242 (emphasis by the court.)

This decision, that master plans are merely non-binding policy guidelines, represents the majority rule. *See*, e.g., Copple v. City of Lincoln, 202 Neb. 152, 274 N.W.2d 520 (1979); Kalakowski v. John A. Russell Corp. 401 A.2d 906 (Vt. 1979); Iverson v. Zoning Bd., Howard County, 22 Md.App. 265, 322 A.2d 569 (1974); Forks Township Bd. Supervisors v. George Calantoni & Sons, Inc., 6 Pa. Cmwlth. 521, 297 A.2d 164 (1972); Mott's Realty Corp. v. Town Plan and Zoning Committee, 152 Conn. 535, 209 A.2d 179 (1965). Thus in Cochran v. Planning Bd. of Summit, 87 N.J. Super. 526, 210 A.2d 99 (1965), the court held that a master plan could not constitute a taking of property under the Fifth Amendment because:

> The mere adoption and recording of a master plan has no legal consequence. The plan is merely a declaration of policy and a disclosure of an intention which must thereafter be implemented by the adoption of various ordinances. **** Until appropriate municipal legislative action is taken, however, the municipality has only a dormant plan which differs from proposals which may be under consideration by any municipal board or citizen of the municipality in that it is comprehensive and has been reduced to printed form. Id. at 535, 536, 210 A.2d at 105.

It is clear that under the statues and the case law, master plans are merely guidelines for development, guidelines which can be disregarded by the governing body. No amount of "mandatory" language in the plan itself can change that fact. Summit County's Code sets down guidelines and policies, and relates them to specific parts of the County. It does not, however, change, detract, or add to the existing zoning regulations. Neither does it bind the discretion of the board of county commissioners in making individual zoning decisions. Insofar as the District Court held the Code to be a zoning regulation, it should be reversed.

B. Planning The Location, Character And Extent Of New Development Is A Permissible And Necessary Part Of A County Master Plan.

On page 3 of the Findings, Conclusions and Judgment, the court indicated that "[t]he Code contains many provisions which do not fit into the...categories" listed in §30-28-106, C.R.S. 1973, entitled Adoption of master plan-contents. Thus, the court implied that the Code went beyond the statutes controlling master plans.

An examination of the applicable statutes indicates a legislative intent to provide broad authority to local governments in the area of land use planning.[2] Under §30-28-106, C.R.S. 1973, a county master plan may include:

> The general location, character, and extent of streets or roads, viaducts, bridges, parkways, playgrounds, forests, reservations, parks, airports, and other public ways, grounds, places, and spaces; the general location and extent of public utilities and terminals, whether publicly or privately owned, for water, light, power, sanitation, transportation, communication, heat, and other purposes; the acceptance, widening, removal, extension, relocation, narrowing, vacation, abandonment, or change of use of any of the foregoing public ways, grounds, places, spaces, buildings, properties, utilities, or terminals; the general character, location, and extent of community centers, townsites, housing developments, whether public or private, and urban conservation or redevelopment areas; the general location and extent of forests, agricultural areas, flood control areas, and open development areas for purposes of conservation, food and water supply, sanitary and drainage facilities, flood control, or the protection of urban development; and a land classification and utilization program.[3] (Emphasis added.)

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[2]It should be emphasized that this section is concerned with the power to plan for future land use decisions, i.e., to develop a policy. The power to implement that policy through individual, quasi-judicial zoning decisions is not dealt with here.

[3]This statute was amended in 1979 to give counties the power to include in the plan "methods for assuring access to sunlight for solar energy devices."

It can be seen that a master plan is intended to be a comprehensive document dealing with practically all matters of land use. What is difficult to see, especially with reference to the emphasized language, is why the Code does not fit within this statute. It seems obvious that the concepts of growth centers and rural areas are included within the above-quoted language. A master plan which recommends the "location, character, and extent" of streets, parks, utilities, public buildings, community centers, townsites and housing developments has established a growth center. Similarly, rural areas are created when the "location and extent of forests, agricultural areas, flood control areas, and open development areas" are planned. Finally, a plan which includes "a land classification and utilization program" will necessarily make land use recommendations, e.g., the Code's recommendation that development in rural areas not exceed one dwelling unit per 20 acres.

Given the statute's plain language, it is clear that a master plan can and should provide for orderly growth by identifying areas where intensive development can best occur, as well as areas where high density uses would be inappropriate. A contrary holding would unduly restrict the intent and language of the statute, and would frustrate a major goal of master plans.

This conclusion is made even clearer by an examination of §30-28-107, C.R.S. 1973, which deals with the purpose of a county master plan. Under this statute, a master plan must be made with the purpose of:

> [G]uiding and accomplishing a coordinated, adjusted, and harmonious development of the county or region which, in accordance with present and future needs and resources, will best promote the health, safety, morals, order, convenience, prosperity, or general welfare of the inhabitants, as well as efficiency and economy in the process of development, including such distribution of population and of the uses of land for urbanization, trade, industry, habitation, recreation, agriculture, forestry, and other purposes as will tend to create conditions favorable to health, safety, transportation, prosperity, civic activities, and recreational, educational, and cultural opportunities; will tend to reduce the wastes of physical, financial,

> or human resources which result from either excessive congestion or excessive scattering of population; and will tend toward an efficient and economic utilization, conservation, and production of the supply of food and water and of drainage, sanitary, and other facilities and resources.[4]

Implicit in this language is the concept of providing for orderly, planned growth, which is precisely the intent and effect of Summit County's Code. A master plan is supposed to promote "efficiency and economy in the process of development", including the "distribution of population" and the "uses of land for urbanization, trade, industry, habitation, recreation, agriculture, forestry, and other purposes" which tend to reduce "excessive congestion or excessive scattering of population". In order to serve these ambitious purposes, a county master plan would, at a minimum, have to differentiate areas of high density development (growth centers) from areas of low density (rural areas). A plan which failed to so provide would be woefully inadequate under this statute. To hold a county powerless to enunciate a policy with respect to the locations of new development is to destroy one of the primary purposes of a master plan.

The broad power granted by the above statues is expanded even further by the Local Government Land Use Enabling Act, §29-20-101 et seq., C.R.S. 1973. The legislative decaration in §29-20-102 states that "the policy of this state is to clarify and provide broad authority to local governments to plan for and regulate the use of land...." Pursuant to that legislative policy, §29-20-104 gives local governments the authority to plan for and regulate the use of land by:

> (a) Regulating development and activities in hazardous areas;
> (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife

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[4]This statute was amended in 1979 to provide that one of the purposes of a master plan is to "create conditions favorable to...energy conservation...."

habitat and would endanger wildlife species;
(c) Preserving areas of historical and archaeological importance;
(d) Regulating, with respect to the establishment of, roads on public lands administered by the federal government...
(e) Regulating the location of activities and developments which may result in significant changes in population density;
(f) Providing for phased development of services and facilities;
(g) Regulating the use of land on the basis of the impact thereof on the community or the surrounding areas; and
(h) Otherwise planning for and regulating the use of land so as to provide planned and orderly use of land and protection of the environment in a manner consistent with constitutional rights. (Emphasis added.)

This statute was enacted in 1978 (H.B. 1034), at a time when the General Assembly was greatly concerned with the statewide effects of uncontrolled growth. See, Bermingham, *1974 Land Use Legislation in Colorado*, 51 Den.L.J. 467 (1974). Consequently, local governments were given broad authority to plan for this growth so that it will occur in an orderly fashion. It is only logical that this planning would manifest itself first in the master plan. The District Court's ruling that Summit County could not plan for growth in its master plan frustrates the important goals of this statute.

The language and legislative intent of these statutes is clear. The General Assembly has recognized the destructive effects of uncoordinated, unplanned growth, and has given local governments the power to plan for that growth to the benefit of all. The power to anticipate new development, to plan for its "general character, location, and extent", and the governmental infrastructure necessary to support it, is essential to the concept of a master plan. Without such authority, a master plan can "plan" for very little; it can merely react.

It must be re-emphasized that the Summit County Code is simply a master plan. It changes none of the existing zoning regulations, but is intended only as a guide for future land use decisions. Insofar as the District Court ruled that Summit County was powerless to set a land use policy for future development, it should be reversed.

II. THE DISTRICT COURT APPLIED THE WRONG STANDARD OF REVIEW TO THE CONSTITUTIONAL ISSUES.

Although it found that the Code was not validly adopted as a master plan, the District Court took a step further and hypothesized that, if the Code had been validly adopted, its substantive provisions would go beyond the permissible scope of master plans. The court did not stop there, but went on to declare that if it had been procedurally valid, the Code would have been unconstitutional.

Specifically, the District Court ruled that the Code "constitutes a denial of substantive due process, of equal protection", and that it was "not an appropriate exercise of the police power." See page 11, Findings, Conclusions and Judgment. This brief does not address the dubious wisdom of deciding constitutional questions unnecessarily. However, it is clear from the court's opinion that, having taken it upon itself to decide the question, it substituted its subjective judgment for the legislative judgments of the County.

The standard of review applied in challenges to legislative enactments is well-defined by the case law.

> [I]f any state of facts reasonably can be conceived that would sustain [a legislative classification], there is a presumption of the existence of that state of facts....

Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209 (1934). See also, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). This presumption can be rebutted, but only by a clear showing that the enactment is "wholly unreasonable and arbitary". Consumer's League v. Colorado & S. Ry. Co., 53 Colo. P.577, 578 (1912). In other words, "there need only be a rational basis" to uphold the challenged provisions. People v. Summit, 183 Colo. 421, 425, 517 P.2d 850 (1974); People v. Benjamin, 591 P.2d 89, 91 (Colo. 1979). As stated in Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488 (1955), courts no longer strike down legislative enactments "because they may be unwise, improvident, or out of harmony with a particular school of thought." On the contrary, "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new [law]." Id. at 487.

However, the District Court failed to heed these rules. The most obvious example is on page 8 of the Findings, Conclusions and Judgments. The court stated that:

> There was some testimony to the effect that the property in the vicinity of Farmer's Corner was in a so-called scenic view corridor. In other words, the county wants to retain the area immediately west of the commercial area at Farmer's Corner in its present condition so that those traveling Highway 9 will have a view to the gateway of the Upper Blue River Valley. The court notes judicially that the gateway to the Upper Blue and Breckenridge includes the intervening rock piles, which no one could consider scenic.

Thus, in spite of testimony indicating that the County made a legislative decision regarding the scenic character of this property, the court substituted its judgment for that of the County's, and ruled that it was not rational to consider this area scenic.

It is a contradiction in terms to say that it is not "rational" to consider certain property "scenic". Beyond that, it is not a court's role to make such judgments. Whether particular pieces of property are considered aesthetically valuable or not is, and should be, a decision uniquely confined to legislative bodies.

The opinion contains other examples making it clear that the court simply did not agree with the legislative policy set down by the County. On page 8, the court opines that a certain area not within a growth center constituted "some of the most desirable developable property in Summit County." Whether high density development is "desirable" in an area or not is a legislative judgment. However, the court found this area "most desirable", and ruled that it was not rational to think otherwise.

The League does not contend that a legislative judgment declaring an area "desirable" or "scenic" is unassailable on constitutional grounds. For example, if it could be clearly shown that property was included in a rural area because of its owner's racial heritage, that classification would clearly

be irrational. However, to rule that it is irrational to think a particular area scenic, simply because the court doesn't find it to be so, is to replace the judgment of the elected county officials with that of the court.

On page 9, the court notes that the presence of development "infrastructure" was an important factor in the Code's recommendations as to the location of growth centers, but that:

> [S]ome areas with substantial infrastructure...were excluded from growth centers. **** Other areas with minimal or nonexistent infrastructure...were included within growth centers.

The fact that the Code admits of some exceptions does not make it irrational. As stated in Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 487-8 (1955),

> The...law may exact a needless, wasteful requirement in many cases. **** But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

It is clear that the court did not analyze the Code according to the traditional constitutional standards. Its findings that the Code is unconstitutional are based on the court's disagreement with the considered legislative judgment of the County, rather than a lack of minimum rationality. Such is not the role of the judiciary. Insofar as the District Court held the Code to be unconstitutional, it should be reversed.

CONCLUSIONS

1. The District Court erred in ruling that the Summit County Code was a zoning regulation. Under the statutes and case law, a master plan is merely a non-binding policy statement. It does not add to, detract from, or alter any existing zoning regulations. It does not establish rules of conduct to which an individual must conform. Consequently, the Code cannot be deemed to be a zoning regulation, and the District Court should be reversed.

2. Planning the location, character and extent of new development is a permissible and necessary part of a master plan. The statutes clearly give counties the power to plan for all matters of land use, ranging from the location of utilities, streets and public buildings to townsites, housing developments, forests and agricultural areas. This specific power has been broadened even further by the supplemental authority contained in the Local Government Land Use Enabling Act of 1974, §29-20-101 et seq., C.R.S. 1973. Consequently, the District Court's ruling that the Code exceeded the permissible scope of master plans should be reversed.

3. The District Court applied the wrong standard of review to the constitutional issues. The court's opinion makes it clear that its ruling was based on a philosophical disagreement with the legislative policy set down by the Code, rather than a clear showing that the Code made irrational distinctions. Insofar as the District Court ruled the Code unconstitutional, it should be reversed.

Respectfully submitted,

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CERTIFICATE OF MAILING

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APPENDIX A

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF SUMMIT AND

STATE OF COLORADO

Civil Action No. 5296 and other case numbers as listed below

ROBIN G. THEOBALD,

Plaintiff,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SUMMIT, et al.,

Defendants.

and

PLAUT v. BOARD OF COUNTY COMMISSIONERS, et al.
Civil Action No. 5297

BRAM, et al. v.
GOULD, et al.
Civil Action No. 5299

GROSSBARD v. GOULD, et al.
Civil Action No. 5302

PEERLESS DEVELOPMENT CORPORATION v. GOULD, et al.
Civil Action No. 5303

RED, LTD. v. GOULD, et al.
Civil Action No. 5304

CONSOLIDATED OIL & GAS, INC. v. GOULD, et al.
Civil Action No. 5305

BLUE VALLEY LTD., et al. v. GOULD, et al.
Civil Action No. 5307

BEENAC DEVELOPMENT CORPORATION v. GOULD, et al.
Civil Action No. 5308

BLUE RIVER INVESTMENT CO. v. GOULD, et al.
Civil Action No. 5309

FARNCOMB HILL DEVELOPMENT CORPORATION, et al. v. GOULD, et al.
Civil Action No. 5310

ROBIN G. THEOBALD v. BOARD OF COUNTY COMMISSIONERS, et al.
Civil Action No. 5311

FARNCOMB HILL DEVELOPMENT CORPORATION, et al. v. GOULD, et al.
Civil Action No. 5356

THE DUNKIN GROUP, et al. v. GOULD, et al.
Civil Action No. 5357

THE DUNKIN GROUP, et al. v. GOULD, et al.
Civil Action No. 5306

FINDINGS, CONCLUSIONS AND JUDGMENT

This matter having been tried to the court on April 16, 17, 18, 19, 20, 23, 24 and 25, 1979, and the court having entered its oral findings, conclusions and judgment on May 2, 1979, hereby enters its written findings, conclusions and judgment as follows:

1. During the trial, cases 5299, 5305 and 5308 were disposed of by mutual agreement of counsel in those cases and will not be further dealt with herein.

2. Exhibits 158 and 159, which were previously offered but upon which the court has heretofore reserved its ruling, are admitted and have been considered by the court herein.

3. Various plaintiffs have contended that in these matters it was appropriate for them to seek relief under the provisions of Rule 106, C.R.C.P. The court determines that except for the plaintiff in Case 5311, no plaintiffs were in a position to proceed by way of Rule 106, since the agency action sought to be reviewed was legislative rather than quasi-judicial in nature. In Case 5311 the action of the Board of County Commissioners was quasi-judicial in nature and review under Rule 106 is appropriate.

4. From the unrebutted evidence before it, the court finds that the adoption of the Comprehensive Land Use Code ("the Code") caused a diminution in value of the properties excluded from the growth centers and an appreciation of the value of properties included within the growth centers. In making that finding, the court disregards entirely the testimony of landowners not otherwise qualified as experts regarding diminution in value of their property. Based on these findings, the court finds and determines that plaintiffs have standing to raise the issues which they have raised in these cases.

5. Although allegations of equitable estoppel were made in most, if not all, of the cases consolidated for trial, the court determines that there is not sufficient evidence of equitable estoppel to entitle any plaintiff to relief based on that theory.

6. The court finds and concludes that the Code is not solely a master plan but is, in substantial part, zoning. The language used in the Code itself clearly indicates that it is a

land use regulatory mechanism and, without enumerating the specific references in the Code, the court notes that, as was pointed out during the trial, various of the Code's provisions and sections speak in mandatory rather than advisory terms.

Under applicable Colorado statutes, the purpose of adopting a master plan is for the physical development of the unincorporated areas of a county. Items which may be included within the master plan include the following:

(a) The general location, character and extent of streets or roads, viaducts, bridges, parkways;

(b) The general location and extent of public utilities and terminals, whether publicly or privately owned for water, light, power, sanitation, transportation, communication, heat and other purposes;

(c) The acceptance, widening, removal, extension, relocation, narrowing, abandonment or change of use of any of the foregoing of public ways, grounds, places, spaces, buildings, properties, utilities or terminals;

(d) The general character, location and extent of community centers, townsites, housing developments;

(e) The general location and extent of forests, agricultural areas, flood control areas; and

(f) Land classification and utilization programs. The Code contains many provisions which do not fit into the foregoing or similar categories.

7. The reasons the Code constitutes zoning, as that term is used in §30-28-113, C.R.S., 1973, include each of the following:

(a) It purports to regulate, within the unincorporated portions of the county, uses of land for various purposes with the apparent emphasis being upon preserving most of such unincorporated land as open spaces.

(b) It establishes so-called "growth centers" and "rural areas" or "rural lands" which have many of the characteristics of the districts or zones contemplated by §30-28-113, C.R.S., 1973, and it attempts to regulate the use of land within such districts, zones, centers, or areas.

(c) By the adoption of a list of "prerequisites" for their consideration, subsequent applications for certain types of changes in land uses have already been predetermined by the Code, and it appears that such proposed changes would not receive serious consideration for a period of at least four years following adoption of the Code.

While the court determines that the Code, in substantial part, constitutes zoning, the court finds and concludes that it is not rezoning or down-zoning. Certain areas or properties are targeted for down-zoning. The owners may well be presently fearful, and justifiably so, of that occurring. But it has not yet occurred.

8. Since the Board of County Commissioners ("the Board"), in the adoption of the Code, engaged in the adoption of zoning which was legislative action, the Code must be stricken as being invalid. This determination of invalidity is based on the court's finding that the Board failed to meet the mandatory requirements of law in each of the following respects: there was no proper notice for the hearing at which the Code was to be adopted; the Board did not act initially by resolution in adopting the Code; a certified copy of the Code was not filed with the clerk and recorder; and the maps were not signed by the secretary of the Board.

Following the initial improper adoption of the Code, and the filing of these lawsuits, the Board, by styling itself as

a Planning Commission, sought to readopt the Code by resolution. This "bootstrapping" did not alter the mandatory provisions of the instrument or amend its zoning characteristics to something less. The mandatory requirements of the statute were still not met.

9. The court finds and concludes that the land which is the subject of Case 5311 has been zoned B-1 Highway Business from the time Summit County first adopted a zoning regulation in 1969, and the uses proposed by plaintiff Robin G. Theobald in his amended site plan application are permitted uses under that zoning classification.

10. In Case 5311, the court finds that although the Code had not even been adopted at the time the application for site plan approval was before the Regional Planning Commission ("RPC") for review, the RPC recommended denial of the application on the basis of noncompliance with the Code. When the application came before the Board, the only issues addressed by the Board in voting to return the matter to the RPC for further consideration, other that noncompliance with the Code, were the issues of highway access and water availability. It is clear from the record, and the court finds, that at that time there was no justifiable question concerning either highway access or water availability, and that all other requirements necessary for site plan approval had been met by the applicant.

11. Based on the foregoing, the court finds and concludes that the Board abused its discretion, and acted in an arbitrary and capricious manner, in directing that the matter be resubmitted to the RPC. Such action of the Board is hereby vacated and the matter is remanded to the Board for appropriate action not inconsistent herewith.

12. Ordinarily, the foregoing determinations would be dispositive of all issues in this case, particularly in light of the general rule that a court should, whenever possible, avoid deciding constitutional issues.

13. However, there are at least two exceptions to that general rule, both of which apply here. One exception exists where the matter before the court is of sufficient public interest or importance; the court finds that clearly to be the case here, as is indicated by the intervention in these cases of the Attorney General at the request of the Governor. The other applicable exception is that which exists where, as the court finds to be the case here, the matters at issue are likely to be of a recurring nature. Finally, the court notes that counsel for all parties have agreed that the court should address the issue of the constitutionality of the Code.

In view of the foregoing, the court will, reluctantly, address the constitutional issue in this case. The court's reluctance is based on the general proposition that constitutional questions should be avoided, and is not because the court is doubtful of how the issue of constitutionality should be resolved in these cases.

14. The court, in determining the constitutionality of the Code, does so being fully aware of the limitations and restrictions placed on this court, or any court, when dealing with the constitutionality of zoning regulations. The court has considered the admonition in Rocco Co. v. Town of Cherry Hills Village, 180 Colo. 217, 504 P.2d 344 (1973) stating that, for both practical and legal reasons, a court is without power to substitute its zoning philosophy for that of the zoning body. This court will not and does not substitute its philosophy for that of the Board of County Commissioners.

Daum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961) and a number of other cases, establish clearly that a zoning regulation is presumed to be valid, and that one challenging such regulation bears the burden of overcoming the presumption of its validity beyond a reasonable doubt. The findings set forth in the following paragraphs are findings established by the evidence beyond a reasonable doubt.

15. At least one of the Code's clear purposes is to restrict competition to specific geographical areas of the county, which the Code designates as "growth centers." This is not simply a restriction between governmental entities such as municipalities on the one hand and the county itself on the other. Rather, it is clear that private economic factors were considered by, and affected by, the Code in the designation and location of growth centers, as shown by the favored status as growth centers which was given to both Copper Mountain and Keystone, neither of which are municipalities. It should also be observed that one existing municipality in the county, namely the Town of Blue River, was not accorded "growth center" status by the Code. It should also be noted that in the case of the county's municipalities other than Blue River, a great deal of land not presently within the boundaries of such municipalities and not presently experiencing development of any consequence, was included within the "growth center" designation.

16. It is apparent from the Code and from the evidence that the Board and its agents made a determination to favor for development, those areas of the county where the anticipated developers were believed to have very substantial financial resources: witness, again, areas such as Keystone and Copper Mountain.

17. Certain geographical areas of the county were either included or excluded from growth centers without any apparent rational basis. One of the clearest examples of this would be a comparison of the inclusion within a growth center of the large tract of undeveloped land north of Silverthorne, and the exclusion from a growth center of the substantial area of already-developed land located at Farmer's Corner. As a matter of fact, the Farmer's Corner area and the adjacent meadow constitute some of the most desirable developable property in Summit County, and the failure to designate this area as a growth center is without any apparent rational basis.

There was some testimony to the effect that the property in the vicinity of Farmer's Corner was in a so-called scenic view corridor. In other words, the county wants to retain the area immediately west of the commercial area at Farmer's Corner in its present condition so that those traveling Highway 9 will have a view to the gateway of the Upper Blue River Valley. The court notes judicially that the gateway to the Upper Blue and Breckenridge includes the intervening rock piles, which no one could consider scenic.

It has been, appropriately, suggested in argument that if the present land use planners of Summit County, including its Board of Commissioners, are desirous of retaining "scenic-corridors" of highly developable property, perhaps consideration should be given by them to the purchase of the property. Brought to mind is the terse comment of Mr. Justice Holmes made years ago in another context:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 160 67 L.Ed. 322.

18. The presence or absence of what has been called "infrastructure" has been asserted by the defendants as one of the most important considerations in designating specific areas in the Code as growth centers. However, some areas with substantial infrastructure such as the Farmer's Corner area and the Gold King area, were excluded from growth centers. In the case of the Gold King, this was done even though that property was immediately adjacent to an already-designated growth center. Other areas with minimal or nonexistent infrastructure, such as the large undeveloped area north of Silverthorne, were included within growth centers.

19. There was no rational basis for excluding from a growth center those agriculturally zoned lands owned by the plaintiffs in Civil Actions Nos. 5304, 5306 and 5357, which lie to the south and southeast of Breckenridge. Moreover, it was shown that the existing agricultural zoning classification (A-1) and the more restrictive R-ME zoning classification contained in the Code for parcels of less than 20 acres preclude use of the land in Civil Action No. 5304 for any purpose for which it is reasonably adapted. Nor was there any rational basis for excluding from a growth center the Farmer's Corner area, which already has existing infrastructure and a number of commercial establishments, being in part a restaurant and bar, natural gas supply center, a filling station, grocery store, and other like commercial establishments.

20. An area consisting of some 700 or 800 acres, including the area known as Summit Cove (portions of which were the subject property of Civil Action No. 5303, Key West Farms, and the subject property involved in Civil Action No. 5302, is located between the "growth centers" of Dillon and Keystone,

being less than two miles from either growth center. This area was shown by the evidence to have existing zoning for approximately 2,500 residential units, including several hundred already constructed, as well as commercially zoned areas. Much of such property (including that described in Civil Actions Nos. 5302 and 5303) has been included in an existing water and sanitation district for many years, and it is and has been served for several years by roads, telephone, electricity and other types of infrastructure. Nevertheless, the boundaries of the growth centers were arbitrarily drawn in such a manner as to exclude these properties therefrom, without any apparent rational basis for such exclusion.

21. Defendants have argued that allowing growth outside the designated growth centers would place an undue burden on services and utilities such as police protection, ambulance service and waste water treatment. In Township of Willistown v. Chesterdale Farms, Inc., 341 A.2d 466 (Pa., 1975), the court noted that it was unconvinced by Willistown's argument that the developer's plans would overburden the town's municipal services, stating: "Suburban municipalities within the area of urban outpour must meet the problems of population expansion into its borders by increasing municipal services, and not by the practice of exclusionary zoning." Further, as stated in National Land and Investment Company v. Kohn, 215 A.2d 597 (Pa., 1966), at 610, "[z]oning is a means by which a governmental body can plan for the future -- it may not be used as a means to deny the future. ... A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities cannot be held valid."

22. In making its findings and conclusions herein, the court recognizes that a growth center concept may, in certain circumstances, be useful and appropriate, and also finds and determines that the presence or absence of infrastructure is indeed one of the appropriate criteria to be considered when applying the growth center concept. However, those concepts and criteria have been unconstitutionally applied in these cases.

23. The court finds and concludes that the Board of County Commissioners, acting as the Board of County Commissioners, acted arbitrarily and capriciously when it adopted the Comprehensive Land Use Code which includes within it significant provisions which constitute zoning.

24. As adopted, the Code constitutes a denial of substantive due process, of equal protection of the laws, and, as applied in the instant cases, the Code is not an appropriate exercise of the police power to preserve and protect the public health, safety and welfare.

25. Based on the foregoing, the court specifically finds and declares that the Summit County Comprehensive Land Use Code is and shall be null, void and of no effect.

26. The court has been asked to consider retaining jurisdiction in one or more of the cases consolidated for trial; that request is denied.

27. Costs will be awarded to plaintiffs. Plaintiffs in each case should submit a bill of costs to the court and, following the submission thereof, an evidentiary hearing will be set for determining those costs which should be assessed against defendants.

28. The stay previously entered by this court is vacated, effective as of the time these findings, conclusions and judgment were orally announced from the bench on May 2, 1979.

Done and signed in open court this 4th day of June, 1979.

BY THE COURT:

V. G. Seavy, Jr., District Judge