SUPREME COURT, STATE OF COLORADO

Case No. 91 SC 622

AMICUS CURIAE BRIEF OF THE COLORADO MUNICIPAL LEAGUE AND COLORADO COUNTIES, INC. IN SUPPORT OF RESPONDENT BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY

KURT F. G. JAFAY,

Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS
Case No. 90 CA 0375, Division 2
Opinion by Judge Van Cise
Smith and Metzger, JJ., concur

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II. Whether County's rezoning activity violated procedural due process.

III. Whether the trial court erred in ruling that the County Commissioners were not estopped from rezoning the landowner's property.

STATEMENT OF FACTS

Amici adopt and incorporate herein by reference the Statement of Facts contained in the brief of Respondent County of Boulder. All references to the record herein shall be in the form used by Boulder County.

SUMMARY OF ARGUMENT

The main issue upon which this case rests is a determination of whether the rezoning action by Boulder County is a legislative or quasi-judicial action. Jafay argues that the decision is quasi-judicial relying on several cases involving rezoning decisions affecting the property of one property owner. In this case, Boulder County adopted amendments to its zoning ordinance text and maps to comply with the master plan adopted pursuant to §30-28-106, C.R.S. for the unincorporated area of the county, some 25,340 acres divided into 4,000 separate parcels. The position urged by Jafay would mean that no local government could adopt comprehensive amendments to its original zoning ordinance. Such a position presumes that governments are static and should not be able to

respond to changing circumstances and changing needs of their citizens. Such a position would remove any meaning from the planning process contemplated for municipalities by §§31-23-101, et seq. 12B C.R.S. (1986) and for counties by §§30-28-101, et seq., 12A C.R.S. (1986).

Colorado has adopted the minority position that rezonings can be quasi-judicial while original zoning decisions are legislative. As a result, in several cases, this Court has attempted to define the difference between quasi-judicial and legislative rezonings. It is essential to affected property owners, citizens, and local governments that it be known before the process starts whether the process is quasi-judicial or legislative. Applying previous decisions to this case makes it clear that the comprehensive rezoning by Boulder County was legislative. This case gives this Court the opportunity to clearly define the distinction between quasi-judicial and legislative rezonings.

Jafay makes further arguments including that there has been a taking of his property. Because there has been no taking and that issue can be decided on the facts of this particular case, amici have not briefed that issue. The allegations of procedural due process violations are similarly without merit as Boulder County followed all of the statutorily required procedures in adopting amendments to its zoning ordinance. The estoppel argument suggested by Jafay would empower administrative officials to make legislative decisions. Such a result would deprive citizens of

their right to have legislative decisions made at meetings open to the public, and would deprive them of their constitutional right to have government decisions subject to referendum and made by elected officials subject to recall.

Amici adopt and incorporate herein the legal arguments presented in the brief of Respondent County of Boulder.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT A COMPREHENSIVE REZONING IS LEGISLATIVE IN CHARACTER AND THEREFORE A PROPERTY OWNER IS NOT ENTITLED TO RULE 106(a)(4) REVIEW.

Jafay argues that the comprehensive rezoning by Boulder County was a quasi-judicial rather than a legislative decision. Whether an action is quasi-judicial or legislative determines two things: the procedures to be followed for the decision process (notice and hearing procedures), and the form of judicial review to challenge the final decision of the governing body. If the decision is quasi-judicial, the process requires the public entity to give notice by posting or publishing a notice that describes the subject matter of the hearing, any changes to be considered, and the action contemplated, and conducting separate hearings on each individual parcel, allowing the affected property owner to cross-examine witnesses. City & County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982). If the decision is legislative, the public entity is not required to give any particular notice except that required by the Colorado Sunshine Law, §§24-6-401, et seq., 10A C.R.S. (1988, 1992 Supp.), unless notice and a public hearing is required by an

applicable statute. See, e.g., §31-12-101, et seq., 12B C.R.S. (1986) regarding hearings on annexations, and §§31-23-304 and 305, 12B C.R.S. (1986), regarding zoning ordinances and amendments thereto. If the decision was quasi-judicial, Jafay would be entitled to judicial review pursuant to Rule 106 C.R.C.P.; if the decision was legislative, he would be entitled to judicial review by a declaratory judgment action pursuant to Rule 57 C.R.C.P. Particularly because of the procedures necessary before and during the different types of hearings, it is essential to all parties that they know ahead of time what type of hearing is being conducted.

Zoning is the manner in which local governments provide for planned and orderly development, balancing the character of a certain area and its suitability for particular uses for the purpose of encouraging the most appropriate use of land throughout the respective jurisdiction. Colorado has specifically granted broad zoning authority to municipalities by §§31-23-301 et seq., 12B C.R.S. (1986), and to counties for unincorporated areas by §30-28-102, 12A C.R.S. (1986). The policy decision to grant local governments broad authority to plan for and regulate land use was reiterated in the Local Land Use Control Enabling Act, §§29-20-101, et seq., 12A C.R.S. (1986), adopted in 1974, and upheld by this Court in Colorado State Board of Land Commissioners v. Colorado Mined Land Reclamation Board, 809 P.2d 974 (Colo. 1991).

In order to implement land use controls, local governments are authorized to appoint planning commissions and adopt comprehensive plans. It is a duty of a county or municipal planning commission to make and adopt a comprehensive plan for the physical development of the unincorporated territory of a county or the area of a municipality. §§30-28-106(1), 12A C.R.S. (1986); and 31-23-306, 12B C.R.S. (1986); Johnson v. Bd. of County Comm'rs, 34 Colo. App. 14, 523 P.2d 159, 161 (1974), aff'd. sub nom. Colorado Leisure Products, Inc. v. Johnson, 187 Colo. 443, 532 P.2d 742 (1975). The master plan is certified by the planning commission to the governing body. §§30-28-109, 12A C.R.S. (1986); and 31-23-206 and 208, 12B C.R.S. (1986). The comprehensive plan is to show the planning commission's recommendations for the development of the territory covered by the plan. §§30-28-106(3)(a), 12A C.R.S.; 31-23-206 and 208, 12B C.R.S. (1986). It may include a land classification and utilization program. Id. The objective of the plan is to accomplish the harmonious development of the county in terms of the general welfare of the inhabitants and the efficient and economic use of its land. Johnson v. Bd. of County Comm'rs, supra. The comprehensive plan is the planning commission's recommendation of the most desirable use of land. Theobald v. Bd. of County Comm'rs, 644 P.2d 942, 948 (Colo. 1982); see 1 E. Ziegler, Rathkopf's Law of Zoning and Planning § 12.05 (4th ed. 1991). It is a guide to development rather than an instrument of land use control. Theobald, 644 P.2d at 948; see R. Anderson,

American Law of Zoning, § 23.15 (3rd ed. 1986); 8 E. McQuillin The Law of Municipal Corporations, § 25.79 (3rd ed. 1991 Rev. Vol.).

It is the responsibility of the governing body to apply the broad planning principles contained in the comprehensive plan to specific property. Theobald, 644 P.2d at 948-49. However, the guidelines of the comprehensive plan are not, as Jafay argues, intended to be the specific criteria discussed in Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975), which indicate a quasi-judicial action. The comprehensive plan embodies policy determination and guiding principles and is advisory only; zoning ordinances provide the detailed means of giving effect to those principles. Theobald, 644 P.2d at 949, quoting Fasano v. Bd. of County Comm'rs., 264 Or. 574, 507 P.2d 23, 27 (1973); Margolis v. District Court, 638 P.2d at 305 (Colo. 1981).

A planning commission may prepare a zoning plan, including text and maps, for zoning all or any part of the unincorporated territory within a county or the area within a municipality. §§30-28-111(1), 12A C.R.S. (1986); 31-23-306, 12B C.R.S. (1986). The plan is to represent the recommendations of the commission for the regulation by districts or zones of the density and distribution of population, the location, and use of buildings and the uses of land. Id. The planning commission is to certify the zoning plan, or any amendment thereto, to the governing body. §§30-28-112, 12B C.R.S. (1986); 31-23-306, 12B C.R.S. (1986).

Before the adoption of a zoning ordinance or resolution, the governing body is required to hold a hearing. §§30-28-112, 12A C.R.S. (1986); 31-23-304, 12B C.R.S. (1986). Notice of the hearing must be published in the county prior to the hearing. §§30-28-116, 12A C.R.S. (1986); 31-23-304, 12B C.R.S. (1986).

The zoning ordinance or resolution may regulate the uses of land and the location and use of buildings. §§30-28-113(1), 12A C.R.S. (1986); 31-23-301, 12B C.R.S. (1986). In order to accomplish such regulation, the governing body may divide the unincorporated area of the county or the area of the municipality into districts or zones, and within such districts may regulate the uses of land and buildings. Id. Zoning regulations are to have among their purposes the proper distribution of land development and utilization, economy in governmental expenditures, the fostering of industry, protection of both urban and non-urban development, reduction of traffic congestion, promotion of energy conservation, and prevention of fires and floods. §§30-28-115(1), 12A C.R.S. (1986); 31-23-303, 12B C.R.S. (1986).

The boundaries of a zoning district, any regulation applicable to a district, or any other provision of a zoning resolution may be amended by the county or municipal governing body. §§30-28-116, 12A C.R.S.; 31-23-305, 12B C.R.S. (1986). The amendments must be proposed by or first submitted to the planning commission for approval, disapproval, or suggestions. §§30-28-116, 12A C.R.S. (1986); 31-23-306, 12B C.R.S. (1986). Before adopting any such

amendment, the governing body shall hold a public hearing, and publish notice of the hearing. §§30-28-116, 12A C.R.S. (1986); 31-23-304, 12B C.R.S. (1986).

Amendments to zoning ordinances can be of two different types: a rezoning of a particular parcel to allow different uses of the property than originally planned in the zoning ordinance, or a general amendment to the zoning ordinance which implements changing policies and circumstances. The difficulty of classification lies in the continuum between these two types of amendments to original zoning. This Court has held that rezonings may be quasi-judicial or legislative. Judicial review of a quasi-judicial rezoning is limited to Rule 106(a)(4), but all rezonings are legislative for purposes of initiative and referendum. Snyder v. City of Lakewood, 189 Colo. 421, 426, 542 P.2d 371, 375 (1975); Margolis v. District Court, 638 P.2d 297, 303 (1981). The bright line between rezonings which are legislative and those that are quasi-judicial has not been drawn by this Court, but several cases have established the policy basis for the distinction.

This Court has generally described legislative decisions as those which are prospective in nature, of general application and which require a balancing of questions of judgment and discretion, whereas quasi-judicial decisions carry out existing policies by the application of specified criteria to past or present facts at a hearing conducted for the purpose of resolving the particular interest in question. City and County of Denver v. Eggert, 647

P.2d 216, 222 (Colo. 1982); Aurora v. Zwerdlinger, 194 Colo. 192, 571 P.2d 1074, 1077 (1977); State Farm Mut. Auto Ins. Co. v. City of Lakewood, 788 P.2d 808, 813 (Colo. 1990); Cherry Hills Resort Development Co. v. City of Cherry Hills Village, 757 P.2d 622, 627 (Colo. 1988); City of Idaho Springs v. Blackwell, 731 P.2d 1250, 1254 (Colo. 1987); Witcher v. Canon City, 716 P.2d 445, 449 (Colo. 1986); Margolis v. District Court, 638 P.2d 297, 303 (Colo. 1981). The distinction between legislative and quasi-judicial action is not made on whether or not the statute requires, or the governing body determines, to provide notice and a hearing; local governments should not be penalized for providing notice to the public. In fact, the recent inclusion of local governments within the Colorado Sunshine Law by the Colorado legislature, §§24-6-401, et seq., 10A C.R.S. (1988, 1992 Supp.), indicates the public policy to have government as open as possible. The distinction is also not made on whether individual notice to each affected property owner could be given. As records of property ownership are open to the public, at any given point in time the owners of each parcel of property within a described area can be determined. The distinction is made on the basis of the nature of the decision and the process by which the decision is reached. Cherry Hills Resort Development Co. v. City of Cherry Hills Village, 757 P.2d 622, 627 (Colo. 1988).

This Court first recognized that rezoning of a particular parcel of property may be quasi-judicial in Snyder v. City of

Lakewood, 189 Colo. 421, 426, 542 P.2d 371, 355 (1975). The Snyder court did not find that all rezonings were quasi-judicial, but only those that require a public hearing for which notice and the presentation of evidence is mandatory, and which require the decision to be based upon applying facts of a specific case to certain criteria established by law. The Court distinguished between application of specific existing standards to a specific parcel of property and adoption of general policies applicable to an open class of individuals or property. The former is quasi-judicial, while the latter is legislative. This Court modified Snyder in Margolis v. District Court, 638 P.2d 297 (Colo. 1981). There this Court found that large rezonings such as occurred in the Lakewood portion of the case were without question general and permanent in character and set a general rule or policy meeting the definition of a legislative action. 638 P.2d at 304.[1] The difficulty arose when the Court attempted to apply its previous definition to the facts in the Arvada and Greenwood Village portions of the case. Rather than drawing a bright line between what is legislative and what is quasi-judicial, the Margolis Court found that all rezonings are legislative for purposes of initiative and referendum, and limited Snyder to holding that quasi-judicial

[1]The case does not specify the number of parcels or acres involved, but describes the rezoning as an amendment to the Master Land-Use Plan of the City rezoning certain properties within the area covered by the amendment to the master plan. 638 P.2d at 300.

rezonings were limited to judicial review by Rule 106(a)(4). 638 P.2d at 305. The Margolis court recognized that:

> [i]t seems entirely inconsistent to hold that an original act of general zoning is legislative, whereas an amendment to that act is not legislative. It appears only logical that since the original act of zoning is legislative, the amendatory act of rezoning is likewise legislative even though the procedures may entail notice and hearing which characterize a quasi-judicial proceeding. Essentially, the city council ultimately amends the zoning ordinance or denies the amendment, a legislative function. [citation omitted]
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> It cannot be disputed that large rezonings ... are general and permanent in character and involve the setting of a general rule or policy. [citations omitted]
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> While decisions on "small" rezonings may directly affect only a few people, such decisions may more properly be seen as the setting of policy for the future. While rezonings occur more frequently than initial zonings, they likewise tend to be permanent in nature. See Arnel, supra, [Arnel Development Co. v. City of Costa Mesa, 28 Cal.3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980)] for a listing of California cases which hold rezoning of "small" parcels of land to be legislative.

638 P.2d at 304. Further attempts to create a clear definition of which rezoning actions are quasi-judicial and which are legislative are discussed in Landmark Land Co. v. City and County of Denver, 728 P.2d 1281 (Colo. 1986); and Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village, 757 P.2d 622 (Colo. 1988). In all the cases in which the rezoning was initiated by the property

owner, this Court has found the decision to be quasi-judicial. Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village, 757 P.2d 622 (Colo. 1988); Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975). In all the cases where the rezoning was initiated by the government to apply to more than one parcel, this Court has determined the decision to be legislative. Landmark Land Co. v. City and County of Denver, 728 P.2d 1281 (Colo. 1986); Margolis v. District Court, 638 P.2d 297 (Colo. 1981) (referring to the Lakewood portion of the decision). The small minority of states, including all of those cited on page 14 of Jafay's Opening Brief, that have adopted a view that rezonings can be quasi-judicial, have similarly limited the application of the rule to a rezoning request by the affected property owner. Town v. Land Use Commission, 524 P.2d 84 (Haw. 1974) (owner application for rezoning of his property; Hawaii Administrative Procedure Act that all "contested cases" be afforded a quasi-judicial hearing applied); Cooper v. Board of County Commissioners, 101 Idaho 407, 614 P.2d 947 (1980) (landowner application to rezone 99 acres he owned); Golden v. City of Overland Park, 584 P.2d 130 (Kan. 1978) (owner application for rezoning own property[2]); City of Louisville v.

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[2]The Kansas court stated:
A city, in enacting a general zoning ordinance, or a planning commission, in exercising its primary and principle function under K.S.A. 12-704 in adopting and in annually reviewing a comprehensive plan for development of a city, is exercising strictly legislative functions. When, however, the focus shifts from the entire city to one specific tract of land for which a zoning change is urged, the function becomes more quasi-judicial than legislative. While policy is involved,

McDonald, 470 S.W.2d 173 (Ky. 1971) (adoption of comprehensive plan or other regulation of general application is legislative.[3]); Little v. Board of County Commissioners, 631 P.2d 1282 (Mont. 1982) (rezoning performed by county for one property at request of property owner.[4]). The remainder of the states cited in Jafay's brief make the distinction between a quasi-judicial rezoning and a legislative comprehensive rezoning urged by amici.[5] These decisions are consistent with the policy discussed in Rathkopf's treatise on the subject:

> A truly comprehensive rezoning or comprehensive zoning ordinance amendment--affecting a substantial portion of land within the zoning jurisdiction belonging to many

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> such a proceeding requires a weighing of the evidence, a balancing of the equities, an application of rules, regulations, and ordinances to facts, and a resolution of specific issues.

[3]Note, Kentucky case cited by Jafay, Kaelin v. City of Louisville, 643 S.W.2d 590 (Ky. 1982), involved rezoning requested by owner of property and did not overturn ruling of McDonald).

> [4]The Montana court stated at 631 P.2d 1288:
> The commissioners were not involved in adopting a general policy of zoning for the area. Rather, they were involved in selecting a specific tract of land for a special zoning consideration for a particular owner. This activity is more of a quasi-judicial decision-making process than a legislative zoning process. The commissioners have no power to engage in such a process.

[5]West Montgomery County Citizens Association v. Maryland-National Capital Park and Planning Commission., 552 A.2d 1328 (Md. 1987); Culver v. Dagg, 533 P.2d 1372 (Or.App. 1975) (rezoning of 50% of County through adoption of zoning ordinance implementing newly created comprehensive plan is legislative); Fifth Avenue Corp. v. Washington County, 581 P.2d 50 (Or. 1978) (comprehensive revision of zoning ordinance for the entire county and adoption of a new comprehensive plan is legislative; landowners subsequent request for zone change and special use permit quasi-judicial).

> landowners, and usually undertaken in implementation of broad public policy and, typically, after studies and recommendation of planning staff or consultants--is universally considered a legislative act entitled to broad judicial deference. Such a comprehensive rezoning, for purposes of judicial review, occupies the same posture of presumed validity as the original enactment of a zoning ordinance.

2 E. Ziegler, Rathkopf's The Law of Zoning and Planning, §27.02[4] (4th Ed. 1991).

> Even in those jurisdictions which view small parcel rezonings as quasi-judicial, it is acknowledged that initial zoning enactments and comprehensive rezonings or rezonings of large areas are still legislative. This is because initial zonings and large rezonings bear the indicia of traditional legislative action, i.e., they are acts of establishing policy and have effect on the entire community or large portions thereof. Thus, in jurisdictions where the quasi-judicial approach to small parcel rezonings is adopted, it becomes necessary to distinguish between small parcel (and, therefore, quasi-judicial) rezonings and comprehensive or policy making (and, therefore, legislative) rezonings. Reluctance to become involved in this distinction making has undoubtedly been a factor preventing wider adoption of the quasi-judicial approach.

2 E. Ziegler, Rathkopf's The Law of Zoning and Planning, §27A.05[3] (4th Ed. 1991).[6]

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[6]See also, Policy Statement No. 2 adopted by the ABA Advisory Commission on Housing and Urban Growth, Housing for All Under Law (Fishman ed. 1978):

> The Advisory Commission recognizes that the local legislature, in enacting or amending a zoning ordinance applicable to all or a substantial part of a political jurisdiction, is acting in a different role from the one it assumes when making a decision on requests by parties or individuals for particular changes from the general scheme. The latter role is more akin to that of settling disputes, and therefore, to promote greater fairness and avoid the risk of arbitrariness, should be afforded greater due process standards. This approach does not affect text amendments applying to class of land use or a collection of parcels within an area, comprehensive or

Jafay urges this Court to adopt a rule that all rezonings are quasi-judicial. His argument would mean that once an original zoning ordinance was adopted by a governing body, no future comprehensive amendments could be made without conducting the type of quasi-judicial hearing requested by Jafay. The amici conducted informal surveys of their respective members. Of the twenty cities that received the surveys, responses as to the number of amendments to zoning ordinance maps or texts to respond to changing needs and circumstances of the citizens in the last ten years ranged from two to fifty. In all instances, notice of the proposed changes was given by publication in the local newspaper. In the vast majority of cases, written notice was mailed to all affected property owners. To require individual quasi-judicial hearings for each parcel of property within the municipality for each of these amendments would create an impossible burden on the ability of local governments to respond to the land use needs of their citizens. The example Jafay proposes shows the stifling effect of his proposal. Jafay requested a five hour hearing to present

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> planning area rezonings, and adoption of the comprehensive plan (in whole or by area); such actions should retain their 'legislative' characterization and be subject to the traditional standards of judicial review. The legislative characterization may continue to be appropriate for individual requests for development permission that have a substantial or disproportionate impact on the community, regardless of the size of the parcel or parcels at issue.

2 E. Ziegler, Rathkopf's The Law of Zoning and Planning, §27A.05, Note 43 (4th ed. 1991) (emphasis added).

evidence and call and cross examine witnesses. The Boulder County rezoning involved 4,000 parcels. To provide each property owner with the type of hearing Jafay urges this Court to require, Boulder County would have had to hold 20,000 hours of hearings amounting to 2,500 eight hour days of hearings.

A more reasoned view than that suggested by Jafay is for the Court to adopt the rule that it has implemented in practice in Margolis, Landmark Land, Cherry Hills Development Co., and other cases cited, that only rezonings initiated by the property owner or the local government for a property held in a single ownership, should be quasi-judicial. All other rezoning decisions, including map and text amendments to zoning ordinances, whether initiated by the governing body or the citizens, should be legislative. Such a rule is clear enough to let all participants know, prior to initiation of the process, what type of process will apply. It also supports the legislative purposes for zoning and comprehensive planning; that local governments be free to make general policy decisions in their legislative capacity to respond to changing circumstances, while individual property owners retain their right to petition the government for a change in the classification of their property, and property owners and neighbors affected by an isolated rezoning retain a higher degree of judicial review if that decision is not satisfactory to their property interest.

II. THE COUNTY'S REZONING PROCESS MET ALL PROCEDURAL DUE PROCESS REQUIREMENTS.

Before the adoption of a zoning resolution, the board of county commissioners is required to hold a public hearing. §§30-28-112, 12A C.R.S. (1986); 31-23-304, 12B C.R.S. (1986). Notice of the hearing must be published in the county prior to the hearing. Id. Boulder County scheduled a public hearing for December 10, 1985. Notice of the hearing was published in the Boulder Daily Camera and Longmont Daily Times-Call. 5:17:8718-19.

Jafay argues he was given a "cursory hearing." The board of county commissioners conducted the hearing over a period of three days. Any interested party was given up to fifteen minutes to make an oral presentation to the board. Jafay's planning consultant testified on behalf of Jafay and submitted 74 pages of written testimony from five individuals and sixteen exhibits. 5:17:8704; 8900-9069.

Where a legislative body is required to conduct a "public hearing," interested persons are entitled to an opportunity to appear and express their views pro and con regarding the proposed legislative action. Although a legislative body may take testimony, in the absence of a statutory requirement, it is not obligated to do so. Schlagheck v. Winterfield, 108 Ohio App. 299, 161 N.E.2d 498, 504 (1958).

A board of county commissioners acting in a legislative capacity is not required to hear all persons in attendance without limitation as to number and amount of time. See Freeland v. Orange

County, 273 N.C. 452, 160 S.E.2d 282, 286 (1968); Washington County Taxpayers Ass'n., Inc. v. Bd. of County Comm'rs., 269 Md. 454, 306 A.2d 539, 543-44 (1973) (upholding three-minute limitation on statements made by speakers at a public hearing concerning adoption of proposed comprehensive plan for county); Inganamort v. Borough of Ft. Lee, 120 N.J. Super. 286, 293 A.2d 720, 724 (1972), aff'd. on other grounds, 62 N.J. 521, 303 A.2d 298 (1973) (upholding five-minute limitation upon speakers at public hearing); Smith v. City of Little Rock, 279 Ark. 4, 648 S.W.2d 454, 457 (1983) (upholding ten-minute per person limitation on comments).

Jafay had no right to present and cross-examine witnesses at the hearing. No such right is conferred by statute, or other law. This comprehensive rezoning was a legislative action of the board of county commissioners and was not attended by any right to present and cross-examine witnesses. See, Reed v. California Coastal Zone Conservation Comm'n., 55 Cal. App. 3d 889, 127 Cal. Rptr. 786, 790 (1975); Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 376 A.2d 483, 498 (1977); Swinehart v. Pottstown, 1 Pa. D & C 3d 405, 413-17 (1976), aff'd. 27 Pa. Cmwlth 174, 365 A.2d 909 (1976).

In this case, interested persons were given a reasonable opportunity to appear and express their views concerning the proposed comprehensive rezoning. This is all that was required. See Golden Gate Corp. v. Town of Narragansett, 116 R.I. 552, 359 A.2d 321, 326 (1976); Barber v. Town of North Kingston, 118 R.I.

169, 372 A.2d 1269, 1272 (1977); 1 E. Ziegler, Rathkopf's The Law of Zoning and Planning, §10.12 (4th ed. 1991).

The rule proposed by Jafay presupposes that the property owner is the only individual served by the process. However, the mail, posting, and published notice required for a quasi-judicial hearing is for the benefit of the public at large, not the subject property owner. Culver v. Dagg, 20 Or.App. 647, 532 P.2d 1127 (1975). Obviously Jafay had sufficient notice of the proceeding and an opportunity to be heard when he appeared and presented 74 pages of written testimony from five individuals.

Jafay also implies that some or all of the county commissioners should have delegated their decisionmaking authority to someone else because plans had been suggested, but not adopted, for some of the property involved in the comprehensive zoning to be acquired as open space.[7] Legislative decisions cannot be delegated. The policy reasons for this are sound; legislative decisions need to be made by the persons responsible to the people who elect them. Only elected officials are subject to recall; only their decisions are subject to initiative and referendum. The rights to initiative, referendum, and recall are all reserved by

[7]Jafay relies on Ward v. Village of Monroeville, 509 U.S. 57 (1972); a case in which a mayor sat as a judge with the right to impose penalties in a traffic and general offense court. The case has no application here as the rights of a criminal defendant differ substantially from the rights of a property owner in a legislative or quasi-judicial proceeding.

the citizens in the Colorado Constitution. Art. V, §1 and Art. XXI, §4, Colo. Const.

Most importantly, no vested property rights are affected by a rezoning. Jafay could, and can still, develop his property in accordance with the Subdivision Agreement between him and the county. He and any other landowner who had entered into a written development agreement with the governing body, or obtained vested property rights pursuant to §§24-68-101, et seq., 10B C.R.S. (1988), could develop the property in accordance with the agreement or the vested right regardless of any rezoning occurring after signing the agreement or obtaining the vested property rights. City & County of Denver v. Stackhouse, 135 Colo. 289, 310 P.2d 296 (1957).

III. THE COUNTY COMMISSIONERS CANNOT BE ESTOPPED FROM REZONING JAFAY'S PROPERTY BY ALLEGED STATEMENTS OF COUNTY EMPLOYEES.

It is not at all clear from the record in this case that there were representations made by County employees on which Jafay could have relied leading to an estoppel argument against Boulder County. Amici address the policy considerations of estopping a zoning decision because of representations of government employees.

In order to prove estoppel against a government, the plaintiff must show that: (1) the party to be estopped knew the facts; (2) the person making the representations must have intended that they be acted on or must have so acted that the person asserting the estoppel had a right to believe they were so intended; (3) the

person claiming the estoppel must have been ignorant of the true facts; and (4) the person claiming the estoppel must have relied on the representation to his injury. Jefferson County School District No. R-1 v. Shorey, 826 P.2d 830 (Colo. 1992); Griffith v. Wright, 6 Colo. 248 (1882); Tosco Corp. v. Hodel, 611 F. Supp. 1130 (D.C. Colo. 1985); Armstrong v. United States, 516 F. Supp. 1252 (D. C. Colo. 1981); Freirich, "Estopping Local Governments in Colorado," 18 The Colorado Lawyer, 2113 (Nov. 1989). In this case Jafay cannot prove these initial elements. Even assuming that the alleged statements were made, there is no assertion that the County Commissioners knew of the representation. Jafay has suffered no injury because the rezoning does not affect the land use approvals he had obtained by his Subdivision Agreement, which encompass the maximum build out he could have made of the property with the available utility services.

If the trial court had found that Jafay had established the first four elements of estoppel, Jafay would then need to prove that the acts of the employees were authorized and would not require a violation of the law. Tosco Corp. v. Hodel, 611 F.Supp. 1130 (D.C. Colo. 1985); Armstrong v. United States, 516 F.Supp. 1252 (D.C. Colo. 1981); City and County of Denver v. Bergland, 517 F.Supp. 155 (D.C. Colo. 1981); Seeley v. Board of County Commissioners, 791 P.2d 696 (Colo. 1990); Van Cleave v. Board of County Commissioners, 33 Colo.App. 227, 518 P.2d 1371 (1974); Beery v. American Liberty Insurance Company, 150 Colo. 542, 375 P.2d 93

(1962).[8] Any reliance by Jafay on alleged representations by county employees would have to be justifiable. Sandomire v. City and County of Denver, 794 P.2d 1371 (Colo.App. 1990); Van Pelt v. State Board for Community Colleges & Occupational Educ., 195 Colo. 4, 316, 577 P.2d 765 (1978); City of Sheridan v. Keen, 34 Colo.App. 228, 524 P.2d 1390 (1974).

In a case decided June 29 with substantially similar facts, the Tenth Circuit ruled that a property owner could not maintain an estoppel claim under Colorado law when a planning director advised the owner in writing that the applicable zoning ordinance allowed the use requested by the owner. The court found that only the governing body could regulate land uses by the terms of the Municipal Planning Code, §31-23-301, 12B C.R.S. (1986): "The officials that spoke with appellants simply lacked the authority to bind the City Council in any way." Lehman v. City of Louisville, 967 F.2d 1474 (10th. Cir. 1992). Jafay does not argue that county employees are authorized to zone property or that he reasonably thought they could. Jafay obviously knew the decision to rezone was the commissioners' decision, as he was in the process

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[8]The facts behind the estoppel argument presented by Jafay are not the same as the line of cases where a property owner has relied on a building permit issued by a building official and the government later attempted to revoke the permit as invalidly issued. In those cases there has been a differentiation between estopping a government based upon the ministerial acts of a building official with reliance by the property owner in the form of constructing a building, and attempting to estop a governing body from performing a legislative function. See, Freirich, "Estopping Local Governments in Colorado," 18 The Colorado Lawyer, 2113 (Nov. 1989).

of preparing for a hearing on that issue before them. Therefore, there can be no reasonable reliance by Jafay on any alleged representations of county employees. University of Colorado v. Silverman, 192 Colo. 75, 555 P.2d 1155 (1976).

If Jafay's arguments were accepted, several basic principles of law applicable to local governments would be undermined. The main issue in this case is whether the rezoning decision was legislative or quasi-judicial; both decisions that must be made by the governing body. If public employees could make zoning decisions, vital land use decisions would be completely removed from the realm of meetings open to the public in violation of the Colorado Sunshine Law, §§24-6-401, et seq., 10A C.R.S. (1988, 1992 Supp.), and the specific requirements for notice and hearing of both the County and Municipal Planning Codes, §§30-28-112, 12A C.R.S. (1986) and 31-23-304, 12B C.R.S. (1986). Additionally, county employees are not subject to recall. If land use decisions were made by employees rather than elected officials, citizens would be deprived of their constitutional right to recall elected officials for their actions. Colo. Const. Art XXI, §4. Further, if rezoning decisions were made by county employees, citizens would be deprived of their right to referendum guaranteed by Art V, §1 of the Colorado Constitution.

If governments were estopped by statements of planning office employees, no such employees would be willing to work with developers or property owners as plans were being developed for

presentation to planning commissions, city councils, or county commissioners. Elected officials would then be in the role presently served by planning staffs of working with property owners to work out details of plans, and assist property owners and developers in complying with application regulations, thereby increasing costs to property owners and the time commitment of elected officials.

Finally, in two out of the three cases relied upon by Jafay, there was no estoppel found by the Court. In National Advertising Company v. Department of Highways, 718 P.2d 1038 (Colo. 1986) this Court ruled that a property owner cannot rely on the issuance of a county sign permit for compliance with state sign requirements. In Webster Properties v. Board of County Commissioners, 682 P.2d 506 (Colo. App. 1984), the court found that the property owners could not have reasonably relied on a zoning resolution that was adopted ten years before without the required statutory notice. If property owners cannot reasonably rely on a zoning resolution adopted by a board of county commissioners ten years before because it did not follow statutory procedures, Jafay certainly cannot rely on alleged representations by county employees about a zoning resolution that had not been adopted. In the third case relied upon by Jafay, Colorado Water Quality Control Commission v. Town of Frederick, 641 P.2d 958 (Colo. 1982), this Court held that the Water Quality Control Commission was estopped from asserting that the plaintiffs had failed to seek admission as parties to the

hearing before the Commission. The plaintiffs had relied on the Commission's own rules and on the agenda notice for the hearing. In the case sub judice, Jafay did not rely on any rules, regulations or representations of the board of county commissioners.

CONCLUSION

There was no violation of due process, nor are concepts of estoppel applicable. The only issue is the distinction between a quasi-judicial and a legislative rezoning. Previous decisions of this Court and the appellate courts of other states have made it clear that a comprehensive rezoning such as that adopted by Boulder County is of a legislative nature. When a rezoning is requested by the property owner, the procedure is of a quasi-judicial nature. Clarifying that rule in this case is important to all participants so that they can follow the correct procedures and preserve a proper record for any necessary judicial review.

DATED this 28th day of September, 1992.

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 28th day of September, 1992, a true and correct copy of the foregoing AMICUS CURIAE BRIEF OF THE COLORADO MUNICIPAL LEAGUE AND COLORADO COUNTIES, INC. IN SUPPORT OF RESPONDENT BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY was placed in the U.S. mail, postage prepaid and addressed to:

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