

SUPREME COURT, STATE OF COLORADO
CASE NO.98 SC 547

Petition from decision of Colorado Court of Appeals, Division V, Case No. 96 CA 2158
Opinion of Judge Pierce,
Marquez and Kapelke, J.J., concurring, June 11, 1998.

Appeal from the District Court, San Miguel County, Civil No. 94CV37
Honorable Robert A. Brown, District Court Judge

**BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE IN
SUPPORT OF PETITIONER, TOWN OF TELLURIDE**

TOWN OF TELLURIDE, COLORADO, a municipal corporation,

Petitioner,

v.

LOT THIRTY-FOUR VENTURE, L.L.C.,

Respondent.

COLORADO MUNICIPAL LEAGUE
GEOFFREY T. WILSON, #11574
1144 Sherman Street
Denver, Colorado 80203
(303) 831-6411
Fax: (303) 860-8175

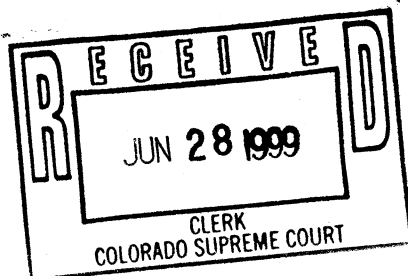


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COMES NOW, the Colorado Municipal League as amicus curiae through its undersigned counsel and submits this amicus brief in support of Petitioners, The Town of Telluride [hereinafter the "Town" or "Telluride"].

ISSUES PRESENTED

As announced in this Court's order of May 17, 1999, the issues on appeal are as follows:

- (1) Whether the Court of Appeals erred in finding that ordinance 1011 constitutes a form of "rent control" prohibited by § 38-12-301, 10 C.R.S. (1998), and
- (2) whether the Court of Appeals erred in affirming the Trial Court's opinion that ordinance 1011 is superceded by § 38-12-301, 10 C.R.S. (1998).

STATEMENT OF THE CASE

The Colorado Municipal League hereby adopts and fully incorporates by reference the statement of the case in the opening brief of Petitioner, the Town of Telluride.

SUMMARY OF ARGUMENT

Contrary to the holding of the Court of Appeals in the case at bar, the Telluride affordable housing mitigation ordinance at issue in this case is not a form of "rent control" that was within the contemplation of the General Assembly when it enacted the "rent control statute, § 38-12-301, 10 C.R.S. (1998) in 1981. The circumstances surrounding adoption of the statute, and its legislative history, indicate that the statute was intended to prohibit ordinances that freeze or roll back rents on existing multi-family rental housing. The Telluride ordinance does not do this.

Indeed, the Telluride ordinance does not “impose” rent control on anyone. Rather, developers of certain projects within certain zoning districts are given several options for mitigating the affordable housing impacts of their project. Among these options are acquiring or building rental housing and deed restricting it for affordable housing purposes. This is not the sort of ordinance that the General Assembly had in mind in 1981, and the Town’s ordinance is unlikely to lead to the sorts of problems that the General Assembly was interested in avoiding through enactment of section 38-12-301, 10 C.R.S. (1998).

Even if the Town ordinance is found to be some form of “rent control” and thus in conflict with the state statute, the ordinance should still be held to supercede the statute. A systematic analysis of the issue, involving the considerations announced by this Court for determining whether a matter is of local, statewide or mixed state and local concern, reveals that the Town ordinance, whether considered a part of the Town’s affordable housing program or an exercise that the Town’s land use and zoning authority, is a matter of local concern. As such, the local ordinance of Telluride, a home rule town, supercedes the conflicting state statute.

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

ARGUMENT

I. The Court of Appeals erred in finding that Telluride’s affordable housing mitigation ordinance constitutes a form of “rent control” prohibited by section 38-12-301, 10 C.R.S. (1998).

In 1981, the General Assembly enacted § 38-12-301, 10 C.R.S. (1998) (1981 Colo. Sess.

Laws 1818) [hereinafter the “rent control statute”). While the statute addresses “imposition of rent control” and prohibits counties and municipalities from adopting ordinances that “control rents on private residential property,” there is substantial disagreement over whether certain options in Telluride’s affordable housing mitigation ordinance (ordinance 1011; codified as Telluride, Colo., Municipal Code, Title 18 §§ 3-710 et. seq. (R. at 576-566) [hereinafter the “Town’s ordinance” or the “affordable housing mitigation ordinance”]) are “rent control” within the contemplation of the rent control statute. The San Miguel County District Court found that the Town’s ordinance did not constitute rent control; the Court of Appeals reached an opposite conclusion. Obviously, this is a statute reasonably susceptible to varying interpretations.

It is well established that, in construing a statute, a court’s primary task is to “determine and give effect to the intent of the legislature.” City of Grand Junction v. Sisneros, 957 P.2d 1026, 1028 (Colo. 1998); People v. Swain, 959 P.2d 426, 249 (Colo. 1998) (“[T]he intent of the legislature is to be ascertained and given effect whenever possible.”). This Court has stated that “if the statutory language is ambiguous and therefore susceptible of alternate constructions, we must consider principles of statutory construction to ascertain the legislative intent.” Colby v. Progressive Cas. Ins. Co., 928 P.2d 1298, 1302 (Colo. 1996). See also Engelbrecht v. Hartford Accident and Indem. Co., 680 P.2d 231, 233 (Colo. 1984) (“[S]tatutes susceptible to more than one interpretation must be construed in light of the apparent legislative intent and purpose.”). Among other matters, courts may consider: “(a) the object sought to be attained; (b) the

circumstances under which the statute was enacted; [and] (c) the legislative history” of the statute. § 2-4-203(1)(a)-(c), 1 C.R.S. (1998). Particularly appropriate in the context of this appeal is this Court’s instruction that “[i]f the language of the statute is reasonably susceptible to more than one meaning, courts should construe the language in light of the objectives sought to be achieved.” Farmers Ins. Exch. v. Bill Boom Inc., 961 P.2d 465, 470 (Colo. 1998).

The legislative history of the rent control statute reveals that the legislation was intended to trump a “classic” rent control ordinance that was, at the time, being proposed by citizen initiative in the City of Boulder.

It’s primarily due to the recent petition that is being passed in Boulder, Colorado, calling for a public vote to place all multiple family units on rent control.

Audio tape of Discussion/Action on H.B. 1604-81 Before the House Comm. On Bus. Affairs and Labor, 53rd Legis., 1st Reg. Sess. 14, lines 2-6 (Colo. 1981) (statement of Ray Baker, President, Colo. Apt. Assoc., Metro Denver) (transcript attached as Appendix A).

Representative Chaplin, the prime House sponsor of the bill, explained the motivation for his legislation as follows:

[T]he city of Boulder is talking about rent control. They’re talking about passing an ordinance which would put a - - establish a rent control board to go back to 1977 prices on rent.

Audio tape of Discussion/Action on H.B. 1604-81 Before the Senate Comm. on Local Gov’t, 53rd Legis., 1st Reg. Sess. 5, lines 15-17 (Colo. 1981) (statement of Rep. J. Chaplin) (transcript attached as Appendix B).

Mr. Jay Jurie, who identified himself to the Senate Committee on Local Government as the principal author of the Boulder initiative, pointed out that:

[T]he Boulder rent control proposal specifically exempts new construction from rent control.

Id. at 22, lines 9-10 (statement of Jay Jurie).

The transcripts of the committee hearings on H.B. 1604 reveal a focus by legislators on that forecast consequences of rent control ordinances that freeze or roll back rent on *existing* rental properties. For example, the Colorado Apartment Association, as part of its lobbying pitch to the House Committee, showed a film about rent control. Among the problems with rent control alleged in the film were:

- Decline in the number of rental units: “since rent control went on, we lost 8000 rental units. People are trying to get out of the rental business as fast as they can.”
- Decline in construction of new rental units: “The most significant factor that has been learned in the Eastern experience is that under rent control, little or no new apartment housing gets built.”
- Decline in rental property upkeep and resultant loss of property tax revenue: “When rent control comes to an area, the value of existing apartments decreases, ‘cause apartments are not as attractive for

investments as they first were. This causes the assessed value to decrease, therefore the property tax collected on those buildings decrease.”

Audio tape of Discussion/Action on H.B. 1604-81 Before the House Comm. on Bus. Affairs and Labor, 53rd Legis., 1st Reg. Sess. 6-7 (Colo. 1981) (transcript attached as Appendix A).

There is an obvious disconnect between the alleged evils of rent control discussed by the legislature in 1981 and what is happening today in Telluride. There is no indication that the Telluride ordinance has caused or will cause a precipitous decline in the number of rental units in the Town, a decline in construction of new units, or a decline in the maintenance of or assessed valuation of existing rental properties. This is not surprising, of course, because the Town's ordinance is not the sort of “rent control” that was the object of the General Assembly's 1981 legislation.

That the Town's ordinance bears little resemblance to what the General Assembly sought to prohibit in its 1981 rent control legislation is further borne out in commentary describing what is conventionally regarded as “rent control.”

Classic rent control ordinances do not normally isolate particular units for special treatment but, rather, tend to apply generally to all existing multi-family apartments. Richard A. Epstein, Rent Control and the Theory of Efficient Regulation, 54 Brook. L. Rev. 741, 745 (1988). “Strict rent control” normally imposes a uniform rent on existing housing stock without regard to inflation or rising operating costs. “Moderate rent control” or “rent stabilization” allows

regulated rents to rise with inflation and increases in operational costs. Regardless of type, new construction is almost always exempt from rent controls. Michael J. Mandel, Does Rent Control Hurt Tenants?: A Reply to Epstein, 54 Brook. L. Rev. 1267, 1269 (1988); John Cirace, Housing Market Instability and Rent Stabilization, 54 Brook. L. Rev. 1255, 1275 (1988).

The legislative history of the rent control statute and commentary concerning “rent control” ordinances nationwide, indicates clearly that the Town’s ordinance is not the sort of local enactment that the General Assembly had in mind when it passed the rent control statute. The Town’s ordinance has not produced, and is unlikely to produce the sort of consequences that the General Assembly was interested in avoiding in adopting its 1981 legislation. For these reasons, this Court should find that the Telluride ordinance here at issue is not prohibited by the rent control statute.

II. The Court of Appeals erred in holding that the Town’s ordinance was superceded by the rent control statute

A. The appropriateness of a Denver v. State analysis

Even if this Court finds that the challenged portions of the Town’s ordinance are “rent control” of the sort prohibited by § 38-12-301, 10 C.R.S. (1998) and that the ordinance thus conflicts with the statute, this Court should find that the ordinance supercedes the statute.

Telluride is a home rule town, having adopted a charter pursuant to Article XX of the Colorado Constitution. This Court has recognized three broad categories of regulatory matters in determining the respective authority of the General Assembly and home rule municipalities: (1)

matters of local concern, (2) matters of statewide concern; and (3) matters of mixed local and statewide concern. See City and County of Denver v. State of Colorado, 764 P.2d 788, 767 (Colo. 1990) [hereinafter "Denver v. State"]. In brief, when an ordinance conflicts with a state statute regarding a matter of local concern, the ordinance supercedes the statute; if the conflict involves a matter of statewide, or mixed statewide and local, concern, the statute will supercede the ordinance. Id. at 767.

In Denver v. State, this Court emphasized that determinations of how to characterize a given matter are made on an *ad hoc* basis, taking into account "the relative interests of the state and the home rule municipality in regulating the matter at issue in a particular case." Id. at 768.

The Court also pointed out that issues often do not fit neatly into one category or another:

Those affairs which are municipal, mixed or statewide concern often imperceptibly merge. [citation omitted.] To state that a matter is of local concern is to draw a legal conclusion based on all facts and circumstances presented by a case. In fact, there may exist a relatively minor state interest in the matter at issue but we characterize the matter as local to express our conclusion that, in the context of our constitutional scheme, the local regulation must prevail. Thus, even though the state may be able to suggest a plausible interest in regulating the matter to the exclusion of a home rule municipality, such an interest may be insufficient to characterize the matter as being even of "mixed" state and local concern.

Id. at 767.

In its Denver v. State opinion, this Court identified four considerations in determining whether a matter is of statewide, local or mixed concern. These four factors have been applied since Denver v. State in several major cases involving conflicts between state statutes and home

rule municipal ordinances, see Fraternal Order of Police, Colo. Lodge No. 27 v. City and County of Denver, 926 P.2d 582 (Colo. 1996) [hereinafter “Fraternal Order of Police” or the “FOP” case]; Winslow Const. Co. v. City and County of Denver, 960 P.2d 685 (Colo. 1998) [hereinafter “Winslow Construction”], and have been summarized as follows: “Whether there is a need for statewide uniformity of regulation; whether the municipal regulation has an extraterritorial impact; whether the subject matter is one traditionally governed by state or local government; and whether the Colorado Constitution specifically commits the particular matter to state or local regulation.” Voss v. Lundvall Bros. Inc., 830 P.2d 1061, 1067 (Colo. 1992).

Unfortunately, a Denver v. State analysis, involving application of the four factors to the facts in the case at bar, is completely lacking from the Court of Appeals decision. This is a striking omission, in light of this Court’s statement that it has “consistently relied on Denver v. State to review the spheres of regulatory authority that belong to the state and its political subdivisions by distinguishing local matters from matters of statewide concern.” Fraternal Order of Police, 962 P.2d at 588-589.

This appeal raises significant issues concerning the appropriate division of authority under the Colorado Constitution between home rule municipalities and the General Assembly in the areas of zoning, land use and affordable housing programs. To these important matters the Court of Appeals opinion gives three sentences — one paragraph. And in that paragraph, the Court of Appeals relies exclusively upon “concern” expressed in the committees considering adoption of

the rent control statute, that “if rent control were allowed on a broad class of housing statewide, investment in rental housing in this state would decrease significantly.” Op. at 3 (attached as Appendix C).

Respectfully, the issues in this appeal deserve a more rigorous analysis. If critical constitutional prerogatives of home rule municipalities can be extinguished based upon expressions in committee testimony of “concern” by legislators and lobbyists whose clients, for whatever reason, are unwilling or unable to accomplish their objectives by working directly with local elected officials, there will shortly be little left of home rule in Colorado. It is common practice for all manner of special interests to dispatch their lobbyists to the Capitol in an attempt to resolve a particular local “problem” by statewide act. Indeed, the 1981 rent control statute at issue in this case was not proposed in response to widespread adoption of local rent control ordinances across Colorado; the bill was introduced to deal with an initiated rent control ordinance then being proposed in the city of Boulder.

Of course, because these bills are often aimed at something going on in a home rule municipality, they are regularly and solemnly presented as involving issues of the greatest “statewide” significance. In an effort to shore up the statute in any subsequent legal challenge involving a home rule municipality, the General Assembly often will go so far as to “find and declare” a matter to be “of statewide concern.”¹ In fact, the rent control statute contains just such

¹ See, for example, the declaration in § 8-2-120(1), 3 C.R.S. (1998), concerning a prohibition on residency requirements for local government employment, held inapplicable to

a declaration.

Fortunately, this Court has recognized that the constitutional authority of home rule municipalities would not be protected from General Assembly usurpation if the legislature could “end-run” Colo. Const. Art. XX by the simple expedient of inserting declarations of “statewide concern” into its acts. For this reason, this Court has stated repeatedly that it is not bound by such declarations. See, e.g., Denver v. State, 788 P.2d at 766 n.6; Winslow Construction, 960 P.2d at 694.

As this Court has observed, “the overall effect of the [home rule] amendment [Colo. Const. Art. XX] was to grant to home rule municipalities the power the legislature previously had and to limit the authority of the legislature with a respect to local and municipal affairs in home rule cities.” Fraternal Order of Police, 926 P.2d at 587. Furthermore, the General Assembly may not “reinvest itself with any portion of the authority it lost to home rule cities upon adoption of Article XX by the people.” Four-County Metro. Capital Improvement Dist. v. Board of County Commissioners, 149 Colo. 284, 295, 369 P.2d 67, 72 (1962).

Clearly, it would have been inappropriate for the Court of Appeals to find that rent control is a matter of statewide concern based solely upon the legislature’s *declaration* to that effect in the statute. By the same token, the Court of Appeals erred in treating *statements* of “concern” expressed by industry lobbyists and others in the legislative committees as completely dispositive

home rule cities in Denver v. State, 788 P2d at 772.

of the issue, rather than engaging in a Denver v. State analysis and applying the four factors.

This appeal presents an opportunity to cure this omission. As set forth below, the League respectfully urges that a Denver v. State analysis leads to the conclusion that the Town's ordinance involves a matter of local concern, and that the ordinance thus supercedes the statute.

B. The Denver v. State analysis

(1) Uniformity

In determining whether the state's interest is sufficient to justify a statute overriding an inconsistent home rule municipal ordinance, the first consideration announced by the Court in Denver v. State is "the need for statewide uniformity of regulation." Denver v. State, 788 P.2d at 768. Substantially more is required here, however, than that a statewide prohibition on ordinances of the sort adopted by Telluride would be desirable or convenient to those involved in passing the state rent control statute. As this Court declared in its FOP decision, "[u]niformity in itself is no virtue, and a municipality is entitled to shape its law as it sees fit if there is no *discernable pervading state interest* involved." Fraternal Order of Police, 926 P.2d at 589-590 (emphasis added by the Court).

The question then is whether there is such a discernable, pervasive state interest in uniform prohibition of rent control as to justify preempting Telluride's ordinance. The League believes that there is not.

This case does not involve a statewide program for rent control, nor does it involve a

challenge to a myriad of local ordinances controlling rents on existing rental property across Colorado. To the contrary, this case is about the Town of Telluride's affordable housing mitigation ordinance. No rents on any existing rental properties are affected by the ordinance. *If* new development subject to the ordinance occurs in the zoning districts covered by the ordinance, and *if* the developer chooses to build or purchase housing and deed restrict it to affordable housing (rather than selecting another mitigation option under the ordinance), and *if*, in the end, there is less investment in rental housing, there will be less investment in Telluride. No one can seriously argue that a decision to invest in rental housing in Ft. Morgan will be determined by an ordinance in Telluride or that somebody would decide not build an apartment house in Northglenn because of two options in Telluride's affordable housing mitigation ordinance.

This is a local ordinance, designed to meet local conditions. Whether and to what extent it is effective at accomplishing its objectives will be felt locally. The ordinance is intended to result in more affordable housing in the Town; if the result is instead less investment in rental property or a decline in the number of rental units available in Town, it is a safe bet that the Town's board of trustees would repeal the ordinance in short order. There is no overriding, pervasive state interest in a uniform prohibition on home rule municipalities such as Telluride trying to address their pressing local affordable housing problems through ordinances such as the one at issue here.

Loss of investment in rental housing, if it occurs at all, will be felt first, and most

profoundly, in the local community itself. What this Court said in Denver v. State applies here, and bears repeating:

To state that a matter is of local concern is to draw a legal conclusion based on all the facts and circumstances presented by a case. *In fact, there may exist a relatively minor state interest in the matter at issue but we characterize the matter as local to express our conclusion that, in the context of our constitutional scheme, the local regulation must prevail.*

Denver v. State, 788 P.2d at 767 (emphasis added).

Whatever the state interest in uniformity of prohibition of rent control may be, it does not rise to the level of the “discernable, pervading state interest” required by this Court, and is thus not sufficient to preempt the Telluride ordinance.

(2) Extraterritorial impact

As articulated by the Court in Denver v. State, the second consideration concerning whether a matter should be classified as of local, statewide or mixed state and local concern is “the impact of the municipal regulation on persons living outside the municipal limits.” Denver v. State, 788 P.2d at 768.

Denver v. State involved a challenge by Denver to a state statute prohibiting residency as a condition of local government employment. In defending the statute, the state claimed that municipal residency requirements had had and would have dire economic impacts on surrounding communities, citing loss of property and sales tax revenues in those communities. The Court rejected these arguments as speculative and found that, even if the consequences of residency

requirements were as forecast, “the state has not shown that such an impact is *significant*.” Id. at 769 (emphasis added). Instead, the Court found that the extraterritorial impact of the Denver residency requirement on the remainder of the state to be *de minimis*. Id. at 769.

The Court also found it “unpersuasive” indicia of extraterritorial impact that 60-70% of police and fire personnel hired after enactment of Denver’s ordinance had lived outside the City when hired. From this, the State argued that a similar percentage of Denver employees could be expected to live outside of the City (where they would contribute to extraterritorial property and sales tax revenues, so the argument went), if the City’s residency ordinance was preempted by the state statute. This Court rejected this argument, observing that a significant number of municipal employees might be motivated to move into the City in order to be closer to work - - a reason completely unrelated to the challenged ordinance. Id. at 769.

The parallels to the case at bar are striking. Any extraterritorial impacts of the Town ordinance are, if anything, even more contingent and speculative than those found inadequate to support preemption by this Court in Denver v. State.

At the outset, there is the uncertainty about how much impact the Town’s ordinance will have *at all*. This depends upon how much new construction subject to the ordinance is built in the Town, a decision that is, of course, affected by a myriad of financial and local market conditions. Then there is the uncertainty as to how many, if any, of these developers will decide to satisfy their affordable housing mitigation obligations by choosing one of the ordinance options

challenged in this appeal, rather than one of the other options provided in the ordinance. Only at this point would the challenge of attempting to discern any extraterritorial impact of the developer's choice begin.

As in Denver v. State, are persons employed in the Town induced to move out of surrounding communities and into Town solely because of the Town's ordinance, or might they be moving in simply to be closer to work, or perhaps for some other reason? To what extent might a forecast migration out of other communities and into Telluride not occur due to the Town's ordinance, because the spouse of the person who works in Telluride works in another community, the children are enrolled in school in another community, or the couple prefers its housing or quality of life in the other community? Who knows? Respectfully, the League urges that it is impossible to specify what, if any, "significant" extraterritorial impact there may be from the Town's ordinance.

This Court's opinion in Winslow Construction also serves to illustrate how significant the extraterritorial impact of local ordinances must be in order to justify a finding of preemption.

Winslow Construction was a use tax case in which a construction company argued that a state use tax exemption controlled its obligation to remit tax to Denver, superceding a conflicting city ordinance. This Court applied the familiar four-part Denver v. State analysis. Colorado's home rule municipalities possess extensive sales and use taxation authority, since imposition of such taxes is a matter of "local concern" (this proposition was reaffirmed in Winslow

Construction, 960 P.2d at 694). Consequently, home rule municipalities may define their local tax base and exemptions in a manner different from the state and from other home rule municipalities.

Unlike the uncertain, speculative extraterritorial impacts of the Telluride ordinance here at issue, the Court in Winslow Construction had before it a 1985 Legislative Council report to the General Assembly emphasizing the current reality that “local sales and use taxes impact businesses which are operating throughout the state and which must comply with a wide variety of different taxing procedures.” Winslow Construction, 960 P.2d at 694. Notwithstanding this concrete evidence of *actual* extraterritorial impact of home rule sales tax ordinances widely in effect across Colorado, the Winslow Construction court did not find this impact adequate to justify preemption of home rule authority. If the actual impact shown in Winslow Construction was not sufficiently “significant” to justify preemption of home rule authority, then fairly, the uncertain extraterritorial impacts of the Telluride ordinance certainly would not rise to that level.

(3) Historical and other state or local considerations, including whether the matter has traditionally been regulated at the local or state level.

The third prong of the Denver v. State analysis involves “historical considerations, i.e., whether a particular matter is one traditionally governed by state or by local government.”

Denver v. State, 788 P.2d at 768. In this portion of the Denver v. State opinion and in its FOP decision, the Court also weighed “other state interests” against the various “local interests” involved. Id. at 767, 771; Fraternal Order of Police, 926 P.2d at 591-592.

(a) The Town’s ordinance as affordable housing regulation.

Telluride's affordable housing mitigation ordinance is part of the Town's effort to deal with its local affordable housing problem; affordable housing has traditionally been regulated at the local, rather than at the state level. Furthermore, Colorado municipalities have a strong interest in being primarily responsible for solving affordable housing problems in their communities through locally developed mechanisms.

Colorado statutes provide convincing evidence that the General Assembly recognizes that affordable housing has traditionally been within the domain of local regulation. In §§ 31-23-207, 9 C.R.S. (1998) and 30-28-106(3)(e), 9 C.R.S. (1998) the General Assembly expressly listed "affordable housing" as one of the topics to be addressed in local land use master plans. In § 30-28-106(3)(e), 9 C.R.S. (1998), the General Assembly encouraged counties "to examine any regulatory impediments to development of affordable housing." By this language the General Assembly recognized both that regulation of affordable housing is local in nature and that it is a feature of the local land use planning process.

Indeed, the legislature's recognition that this is an area of traditionally local regulation is evident in the language and legislative history of the rent control statute itself. This is, after all, a statute aimed at prohibiting local government from adopting a particular type of local regulation in the affordable housing area. Furthermore, since 1981, when the statute was adopted, regulation of affordable housing, through land use and other forms of police power regulation, has remained a local matter. There has been no effort by the state to establish uniform regulation of

rents, implement uniform regulation of affordable housing or otherwise occupy this field of regulation and further preempt local government.

The legislative history of the rent control statute contains comments by legislators indicating recognition that this is a traditional area of local regulation and, indeed, expressing concern as to whether this statute could successfully supercede the constitutional prerogatives of home rule municipalities. For example, during the House Business Affairs and Labor Committee consideration of H.B. 1604-81, Rep. Hudson remarked that:

I guess my only concern about - - I think rent controls are stupid and I don't think they work. And I think that they're lousy economics, and everything else.

But on the other side of the coin, I have some reservations about the state telling local jurisdictions they can't do it. Certainly, it is within the constitutional rights of these communities to do it.

Even if we pass it, I think particularly in the case of home rule cities, there's a real question about whether or not this law will apply to them.

I sympathize with your situation, but I'm wondering if you shouldn't be fighting it in Boulder instead of here?

Audio tape of Discussion/Action on H.B. 1604-81 Before the House Comm. on Bus. Affairs and Labor, 53rd Legis., 1st Reg. Sess. 24, lines 1-12 (Colo. 1981) (statement of Rep. M. Hudson) (transcript attached as Appendix A).

In the Senate Local Government Committee, several senators expressed the (we respectfully suggest, well founded) concern that this statute may not appropriately apply within home rule municipalities:

I don't know how this can be a matter of statewide concern when, as far as I understand, not one county or city has enacted rent control ordinances.

Audio tape of Discussion/Action on H.B. 1604-81 Before the Senate Comm. on Local Gov't, 53rd Legis., 1st Reg. Sess. 7, lines 5-8 (Colo. 1981) (statement of Sen. D. Gallagher) (transcript attached as Appendix B).

I'm just going to suggest that . . . when you try to adopt by state statutes, something that attempts to impose this on a Constitution home rule city, I have very grave concerns about the Constitutionality of the application of this bill to the - - any home rule city.

Id. at 9, lines 20-24 (statement of Sen. J. Beatty).

Following Sen. Beatty's observation, Sen. Strickland, the prime Senate sponsor of HB 1604-81, responded:

I share your concern for potential conflict of interest with the Constitution.

Id. at 10, lines 18-19 (statement of Sen. T. Strickland).

Insecurity about whether the statute could successfully intrude upon this traditionally local area of regulation is further evidenced by the inclusion of a declaration of statewide concern in the legislation. "Statewide concern" is a legal term of art in Article XX jurisprudence, of course. The declaration was thus an effort to armor the statute in the event of a future contest involving its applicability to a home rule municipality. See Id. at 10, lines 1-11 (statement of House prime sponsor, Rep. Chaplin). Of course, as noted above (see Argument supra pp. 10-11), the General Assembly cannot, through use of this device, reinvest itself with the power that the people have

lodged with home rule municipalities. As this Court said in commenting on attempts by the General Assembly to intrude into areas reserved by the people for regulation by elected officials in home rule municipalities:

Constitutional limitations upon the exercise of power cannot be swept aside or ignored to aid in the solution of problems in a manner pleasing to those officials who have the burden of finding solutions. Ours is a government by law, not a government by men. That which cannot be done because of constitutional limitations on the power of office holders, simply cannot be done, either directly or indirectly, notwithstanding that desirable, social or economic ends might be achieved by ignoring the limitations, and despite the unquestioned good intentions of those seeking to exercise the powers thus forbidden.

Four-County Metro. Capital Improvement Dist. v. Board of County Commissioners, 149 Colo. at 289, 369 P.2d at 69 (1962).

The traditional role of local government in regulating affordable housing reflects the fact that there have been and continue to be strong local interests in the provision of affordable housing. For many Colorado municipalities, the lack of affordable housing is becoming a very serious issue. In response to a 1999 survey of municipal officials, 71% of the 177 responding indicated that lack of affordable housing is a major problem they will face in 1999. Colorado Municipal League, Financial Condition of Colorado Municipalities, 13th Annual Report 1-3 (1999) (excerpt attached as Appendix D).

Municipalities have historically had, and continue to have a direct, immediate interest in addressing their local affordable housing problems. There are a number of reasons for this; for example:

- The availability of affordable housing allows people to live in the community where they work. Local residents support local businesses, such as grocery, hardware, furniture, clothing and appliance stores. This in turn supports the local employment and economic base of the community.
- Community traffic problems are exacerbated by a lack of housing for local workers. Lower paid service workers, in particular, are obliged to commute into town to work.
- Planning for affordable housing and its integration into new development helps to minimize impact on the local ecosystem. If housing is addressed in isolation, there is a greater likelihood of urban sprawl, with the attendant air pollution and traffic problems.
- When residents live where they work, community bonds are strengthened. People tend to identify more with the community where they live than the community where they work. It is primarily local residents who get involved in community activities, including local government affairs.²

The fact that a large number of Colorado municipalities are concerned about lack of affordable housing and have a strong interest in resolving the problem does not, of course, mean that one solution will work everywhere in Colorado. Local elected officials regularly legislate to

² These and other illustrations of local government's strong interest in addressing affordable housing problems are described in Chapter 1 of Colorado Department of Local Affairs, Housing Colorado: A Guide for Local Officials (1995), a copy of which is attached as Appendix E.

resolve local problems according to local conditions. There is no reason to suspect that local affordable housing legislation should be any exception. Indeed, state and local interests alike would be best served by assuring local governments' maximum flexibility to address this important problem; state imposed uniformity could be quite counterproductive. In sum, local governments have a significant interest in solving their affordable housing problems and having the latitude to tailor their solutions to local conditions.

(b) The Town ordinance as an exercise of local land use and zoning authority.

The Town's affordable housing mitigation ordinance was adopted as an exercise of the Town's traditional authority to regulate land use and zoning. The ordinance amends the Telluride "Land Use Code," and attaches conditions to development within certain zoning districts of the Town.

This Court stated early in this century that "zoning ordinances have a much wider scope than mere suppression of offensive uses of property, and act not only negatively, but affirmatively for the promotion of the public welfare." Colby v. Board of Adjustment, 81 Colo. 344, 351, 255 P. 443, 446 (1927). This broad scope of municipal zoning authority has carried forward to the present day.

It is well-settled that "[m]unicipalities may zone land to pursue any number of legitimate objectives related to the health, safety, morals, or general welfare of the community" [citations omitted]. The police power of a municipality is very broad and the objectives of zoning ordinances can be many and varied.

Colorado Manufactured Hous. Ass'n v. Board of County Commissioners, 946 F. Supp. 1539,

1554 (D. Colo. 1996).

In discussing modern zoning practices, Professor Ziegler notes that the purposes of zoning have broadened considerably over the years.

[P]olice power regulation [has] expended [sic] to meet the demands put upon it by the increasing complexities and concerns of our society. The objectives and purposes for zoning have similarly expanded. This is evidenced by the change in earlier case law, which indicated that the function of zoning was to “crystalize” existing land uses and conditions, to the now widely held view of courts that zoning may undoubtedly look to the future in implementing a comprehensive land use plan that promotes and enhances the quality of life within the community.

1 Edward H. Ziegler, Jr., Rathkopf’s The Law of Zoning and Planning § 1.03, at 1-37 to 1-38 (West, 4th ed. 1999). Professor Ziegler describes one dimension of modern zoning as “inclusionary zoning.”

[Inclusionary zoning] requires developers to include a minimum amount of lower income housing in their overall developments.

Some inclusionary programs permit alternatives to the usual requirement that lower income housing be constructed on-site. These alternatives include off-site construction of inclusionary units, the dedication of land, either on-or off-site, for lower income housing, and in-lieu cash payments to a fund used to finance construction of lower income units.

. . . [A]ny successful inclusionary program must provide for some degree of continuing municipal supervision of the units, first to set proper sale or rental rates, then to assure continued availability at the lower rates.

2 Edward H. Ziegler, Jr., Rathkopf’s The Law of Zoning and Planning § 17.06, at 17-48 to 17-51 (West, 4th ed. 1999).

Telluride’s affordable housing mitigation ordinance is an inclusionary zoning mechanism.

As this Court has declared on numerous occasions, zoning by home rule municipalities is a matter of local and municipal concern under Article XX of the Colorado Constitution. Zavala v. City and County of Denver, 759 P.2d 664 (Colo. 1988); City of Colorado Springs v. Smartt, 620 P.2d 1060 (Colo. 1981); City of Greeley v. Ells, 186 Colo. 352, 527 P.2d 538 (1974); Service Oil Co. v. Rhodus, 179 Colo. 335, 500 P.2d 807 (1972); Roosevelt v. City of Englewood, 176 Colo. 576, 492 P.2d 65 (1971).

Particularly instructive in the context of the case at bar is the Court of Appeals' decision in Moore v. City of Boulder, 29 Colo. App. 248, 484 P.2d 134 (1971). That case involved a challenge to a City zoning ordinance designed to facilitate construction of affordable housing. Those challenging the ordinance claimed that the City's action was inconsistent with state statutes purporting to limit the City's authority. The City argued that, as a home rule city, its ordinance superceded the conflicting state statute. The Court of Appeals resolved this issue as follows:

[W]e must determine whether a zoning ordinance adopted by a Home Rule City aimed at establishing low cost housing in a specific area within that city is a matter of statewide concern, purely local concern, or of mixed concern. Woolverton v. Denver, 146 Colo. 247, 361 P.2d 982; Klemme, The Powers of Home Rule Cities in Colorado, 36 Colo. L. Rev. 321.

We rule that the matter before us is a question of purely local concern and that the City derives its authority to enact zoning ordinances of this type and content under the Home Rule provisions of the Colorado Constitution and not from state statute.

Id. at 253, 484 P.2d at 136.

As an exercise of the Town's home rule municipal zoning authority, the Town's

inclusionary zoning, affordable housing mitigation ordinance should be held to supercede the prohibition of the state rent control statute.

(4) Constitutional allocation of authority.

The last of the Denver v. State factors is whether “the Colorado Constitution specifically commits a particular matter to state or local regulation.” Denver v. State, 788 P.2d at 768.

Article XX of the Colorado Constitution does not expressly mention “affordable housing,” much less “rent control.” That acknowledged, it is nonetheless worth noting here what this Court said in Four-County Metro. Capital Improvement Dist. v. The Board of County Commissioners: “In numerous opinions handed down by this Court extending over a period of fifty years, it has been made perfectly clear that when the people adopted Article XX they conferred *every power* theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs. Four-County Metro. Capital Improvement Dist. v. Board of County Commissioners, 149 Colo. at 294, 369 P.2d at 72 (1962) (emphasis added by the Court).

The Denver v. State criteria evidence considerable deference to this plenary authority of home rule municipalities. Preemption of home rule authority is not favored. There must be more than simply a state interest in uniformity of regulation to overcome a home rule ordinance; there must be a “*discernable pervading state interest*” in uniformity (see Argument supra p. 12). For a state interest to justify overriding a home rule ordinance, the regulation must have more than a contingent, speculative or *de minimis* extraterritorial impact; the extraterritorial impact must be

This deference is especially appropriate where, as here, the challenged local regulation involves an exercise of home rule land use and zoning authority, an area long recognized as of local and municipal concern, and the local regulation affects a local issue traditionally within the regulatory domain of local government, viz., affordable housing.

There is no discernable, pervading state interest in a uniform prohibition of ordinances such as Telluride's. The extraterritorial impacts of the ordinance are contingent and speculative, at best; they are certainly not significant. Affordable housing has traditionally been regulated at the local level, where local interests are strong; as a zoning regulation, this ordinance operates in an area long held to be of local concern.

This Court should hold that the Town's ordinance supercedes the rent control statute, if indeed the Town's ordinance conflicts with the statute in the first place.

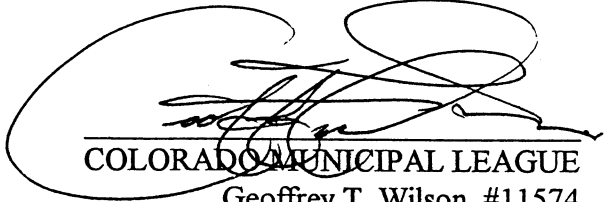
CONCLUSION

The circumstances surrounding adoption of the 1981 rent control statute, and its legislative history, indicate that the Town's ordinance at issue in this case is not the sort of "rent control" ordinance that the General Assembly intended to prohibit. Even if the Town's ordinance is found to be "rent control" and in conflict with the state statute, the ordinance should supercede the statute. Whether as an exercise of local land use and zoning authority, or as an exercise of the Town's traditional authority to resolve affordable housing problems locally, the Town's ordinance should be found to relate to a matter of local concern.

For these reasons and for the reasons set forth in the Petitioner's Brief, the decision of the Court of Appeals should be reversed.

WHEREFORE, the League respectfully urges that the decision of the Court of Appeals be reversed.

Respectfully submitted this 28th day of June, 1999.



A handwritten signature in black ink, appearing to read 'Geoffrey T. Wilson', is written over a horizontal line. The signature is stylized and somewhat cursive.

COLORADO MUNICIPAL LEAGUE

Geoffrey T. Wilson, #11574

General Counsel

1144 Sherman Street

Denver, Colorado 80203

(303) 831-6411

Fax: (303) 860-8175

STATE OF COLORADO
HOUSE COMMITTEE ON BUSINESS AFFAIRS AND LABOR

March 26, 1981

DISCUSSION/ACTION ON HOUSE BILL 1604 - 81

TRANSCRIPT OF TAPE RECORDED PROCEEDINGS

Meeting chaired and called to order by REP. WINKLER

COMMITTEE APPEARANCE

Rep. Peter M. Minahan, Rep. Bill Artist, Rep. William H. Becker, Rep. George Boley, Rep. John Davoren, Rep. Miller Hudson, Rep. Stanley Johnson, Rep. Bob Stephenson, Rep. Glenn Underwood.

FURTHER APPEARANCES

Rep. James T. Chaplin, sponsor..

WITNESSES

Tom Brooke, National Association of Realtors.

Doug Palmer, Boulder, apartment manager.

Frank Hayes, Jr., Colorado Association of Realtors.

Sam Mamet, Colorado Municipal League.

1 [The tape recorded proceedings as set forth on page one
2 are transcribed as follows:]

3 MR. CHAIRMAN: We'll take up House Bill 1604 by Rep.
4 Chaplin. Rep. Chaplin is in another committee. If whoever is
5 prepared to show us the film on 1604, I think we'll go ahead and
6 look at that film while we're waiting for Rep. Chaplin to come
7 over. Raise the sheet. We have a short film.

8 REP. BOLEY: We don't know what the rating is, though.

9 MR. CHAIRMAN: I don't have the rating, Rep. Boley.

10 REP. BOLEY: I've seen some of those short films when I
11 was in college.

12 MR. CHAIRMAN: Were you away from home?

13 REP. ???: Was it like this?

14 [Background discussion. Inaudible. Further background
15 discussion setting up screen not transcribed.]

16 MR. CHAIRMAN: Ready.

17 MR. BAKER: Yes, I'm ready.

18 MR. CHAIRMAN: Go ahead and identify yourself, if you'd
19 like.

20 MR. BAKER: I'm Ray Baker, president of the Colorado
21 Apartment Association, Metro Denver.

22 I think, to save time for everyone concerned, I think
23 this movie is basically an institutional movie that was provided
24 for educational purposes, regarding the plus and minuses of rent
25 control. And I think we should go into that now, and then if any

1 questions would like to be directed to me, I'd be more than happy
2 to answer them.

3 MR. CHAIRMAN: All right.

4 [Background movie music. The following is transcribed
5 from the audio portion of the movie.]

6 MODERATOR: Like most great endeavors, the building of
7 this nation had modest enough beginnings. A handful of honest
8 men in search of opportunity arrived on these shores. And
9 finding it to be a rich and fertile land, they settled.

10 Within a short period of time, word spread throughout
11 the world that the future was here, in America. And by the time
12 of this last century, we had built this land into a nation of
13 great cities and housing millions of immigrants who came in
14 search of that future.

15 Indeed there were times when it seemed we couldn't
16 build fast enough (coughing-inaudible) and in many instances for
17 those of less means, finding the future became secondary to
18 simply finding a place to live.

19 The world has changed a great deal since then. But the
20 question of how best to house a nation of over 200 million people
21 is as difficult today as its ever been.

22 We've experimented with numerous programs designed to
23 hold rent down to affordable levels, and provide assistance for
24 people with special housing needs. Some have been quite
25 promising but others have been more questionable in value.

1 In New York City for example, where rent controls have
2 been in effect since World War II, artificially low rents have
3 made it impossible for many landlords to maintain their property.
4 Those buildings have deteriorated to the point where they've had
5 to be abandoned, thus making it even more difficult to find
6 adequate housing. And what seemed like a good idea at the time,
7 has not turned out that way.

8 "I moved into a rent control building in New York, and
9 at the time, I thought I was really getting a bargain. But all
10 the work that I've had to do on the apartment over the course of
11 the years has been (unintelligible) and the buildings
12 (inaudible)."

13 "You look around, it's happening all over. The
14 building is standing there, the building is standing there, the
15 lots are standing there, and nothing is happening. The city is
16 becoming more and more of a slum."

17 "And it's a very depressing kind of thing. A very,
18 very (inaudible) funny thing happens to here. You end up, you
19 have the worst deal in the world. I may have saved a few dollars
20 in the beginning, (inaudible) but the cost to myself and the cost
21 to the people and the cost that we were to save, was really not
22 worth it. You know, I had a -- but I thought I was saving. And
23 I really saved nothing."

24 MODERATOR: For many, the solution to the ongoing
25 housing problems in the East has been to move West. Horace

1 Greeley said it first in 1855. And by 1985, 50 million people
2 will have taken his advice.

3 As our population moved across the nation, more and
4 more cities found themselves faced with the same housing
5 shortages and the high prices that have plagued the East. And,
6 again, those people with moderate or little income have felt it
7 the most.

8 Something has to be done to help. But what is it that
9 we want to do. Rent control is an idea that has some grass roots
10 support, but most people look into rent control and how it
11 adversely impacts on major metropolitan areas, most people who
12 really look into it know that it's the dismal failure that it is.

13 "If somebody (inaudible) is holding themselves between
14 a renter and an owner and saying, 'This shall be your return,'
15 and 'You can or cannot sell this apartment houses,' (inaudible)
16 and you have to provide certain services, and so on."

17 "I really question whether we have to learn all the sad
18 stories that the Eastern United States has learned all over
19 again, out here in California."

20 "I was chairman of the Senate District of Columbia
21 Committee at the time that rent control was first authorized by
22 the Congress, and delegated as a responsibility with the District
23 Government. So I share in some of the blame, with respect to
24 this."

25 "I went on with the denying recognition that maybe rent

1 control was a good thing. But since that time I've looked into
2 what's happened in the District of Columbia and it's been a total
3 failure."

4 "Instead of adding about 1,200 new rental units a year,
5 and that's what we should be doing in our nation's capital, since
6 rent control went on, we lost 8,000 rental units. People are
7 trying to get out of the rental business as fast as they can."

8 "And rent control, rather than helping poor people,
9 giving them better and additional facilities, has dried up the
10 market even worse. So I think people in the lower income scales
11 are worse off with rent control in the District of Columbia than
12 they were a few years ago before rent control."

13 The most significant factor that has been learned in
14 the Eastern experience is that under rent control, little or no
15 new apartment housing gets built. On top of that, as building
16 deteriorates to the point of decay, they are removed from the tax
17 rolls leaving a gap in income for the city. To make up for this
18 loss of revenue, the property tax burden shifts to the single
19 family homeowner.

20 "I (inaudible) for example thought it was very
21 important to own our own home, and we had five children, and to
22 me that meant security and a place for the children to play, and
23 peace of mind. But with constantly taxes going up, its putting a
24 tremendous burden on homeowners who felt that they would be able
25 to pay for that home, and in the latter years, when they have

1 less money, be able to afford the taxes. And it gets to the
2 point where that is not so."

3 "In the last four years, in the state of California,
4 there has been a shift of the property tax rolls from business
5 properties to single family homes. Four years ago, single family
6 homes were paying 30 percent of the tax burden. Now, they are
7 almost paying 42 percent of the tax burden."

8 "When rent control comes into an area, the value of
9 existing apartments decreases, 'cause apartments are not as
10 attractive for investments as they first were. This causes the
11 assessed value to decrease, therefore the property tax collected
12 on those buildings decrease."

13 "The taxing authorities on which the schools, the
14 counties, the cities, to raise the needed revenue, have to
15 increase the property tax rate, and therefore our property tax of
16 homeowners goes up."

17 The real solution to the problem is to build more
18 housing, and to encourage the building of the kinds of housing we
19 need the most. If there is a surplus of housing, prices goes
20 down.

21 "There is no question that our housing supply is in
22 short supply. We all know that what makes property value go up
23 is the supply and demand. If you have enough housing to satisfy
24 the demand, the prices stabilize. The minute you have a great
25 demand and no supply the prices go up."

1 "But the movement to curtail supply which has been a
2 very effective movement has stopped the free market from
3 functioning in the manner that it should. I think it is up to
4 the developer to get out and produce that housing, to try to find
5 a balance of community wishes and their environment and their
6 ecology, but still produce houses."

7 "The objection that many people have toward growth in
8 general is making it very difficult to provide new housing and
9 it's also driving up the cost of housing."

10 MODERATOR: In Southern California, planners are
11 experimenting with developments that balance both the
12 environmental and economic concerns of people.

13 "I would say one of the significant successes has been
14 the integration of all of the different kinds of housing types
15 that it takes to make up a community, to mixing apartments and
16 more moderately priced housing in with more traditionally higher
17 priced, single family kinds of housing in an overall integrated
18 (inaudible) environment."

19 "There's definitely a need for new housing, and I think
20 that what's going to happen is you're going to see a revolution
21 or a condemnation between the environmentalists and the people
22 who are against growth, and the people needing the housing. And
23 they need the jobs. And that will come out of the political
24 process."

25 MODERATOR: Another positive step is one toward better

1 like to give us on the bill?

2 MR. BAKER: Yes. I would like to provide, you know,
3 the background of -- the reason our association is in favor of
4 this bill. It's primarily due to the recent petition that is
5 being passed in Boulder, Colorado, calling for a public vote, to
6 place all multiple family units on rent control.

7 We feel, assuming such a vote is favorable, we feel a
8 considerable amount of capital from the out-of-state concerns
9 will be eliminated, not only in Boulder, Colorado, but throughout
10 the state. Our firm personally represents out-of-state concerns
11 who have been driven from California for the simple fact the area
12 that they were primarily doing business in has been converted to
13 rent control. They no longer provide capital in that area 100
14 percent totally because of the rent control provisions.

15 We feel that inflation has caused a tremendous burden
16 upon the -- our state and our country's supply and demand
17 process. Imposing rent control, not only in Boulder, will have a
18 rippling effect throughout the state. It's our opinion that such
19 an issue would not only harm the industry, but would, in effect,
20 destroy it.

21 MR. CHAIRMAN: All right. Any questions of Ray? Rep.
22 Underwood.

23 REP. UNDERWOOD: Mr. Chairman. Do you live in Boulder,
24 by any chance, Ray?

25 MR. BAKER: No, sir.

1 REP. HUDSON: I guess my only concern about -- I think
2 rent controls are stupid and I don't think they work. And I
3 think they're lousy economics, and everything else.

4 But on the other side of the coin, I have some
5 reservations about the state telling local jurisdictions they
6 can't do it. Certainly, it's within the Constitutional rights of
7 these communities to do it.

8 Even if we pass it, I think particularly in the case of
9 Home Rule cities there's real question about whether or not this
10 law will apply to them.

11 I sympathize with your situation, but I'm wondering if
12 you shouldn't be fighting it in Boulder instead of here?

13 MR. PALMER: Well, believe me, we are. Okay. But I
14 think one thing that you need to realize is that it's not going
15 to stop in Boulder, they way we feel.

16 We feel that any community with low income -- with a
17 high rate of low income people of students, they're next. That's
18 the way we feel. It just keeps spreading.

19 REP. HUDSON: This is the domino theory of rent
20 control, or --

21 [General laughter.]

22 MR. PALMER: It seems to be. Yes. You look at
23 California, and that's what's happening there.

24 MR. CHAIRMAN: Rep. -- Are you finished? Rep. Boley,
25 did you have questions?

STATE OF COLORADO
SENATE COMMITTEE ON LOCAL GOVERNMENT

April 21, 1981

DISCUSSION/ACTION HOUSE BILL 1604 - 81

TRANSCRIPT OF TAPE RECORDED PROCEEDINGS

Meeting chaired and called to order by Sen. Sam Barnhill

COMMITTEE APPEARANCES

Sen. James D. Beatty, Sen. J. Robert Allshouse, Sen.
Dennis J. Gallagher, Sen. Dan D. Noble, Sen. Ray Powers, Sen.
Paul Sandoval.

APPEARANCES

Sen. Ted Strickland, sponsor
Rep. James Chaplin, sponsor

WITNESSES

Ray Baker, Colorado Apartment Association.
Tom Brook, appearing individually.
Duane Duggen, Summit Property Realty.
Barry Roseman, appearing individually.
Jay Jurie, appearing individually.
Catherine Partridge, Boulder Alliance for Community Awareness.
Mark Fearer, Renters Rights Project.
Frank Hays, Colorado Association of Realtors.

1 missed, Mr. Chairman.

2 MR. CHAIRMAN: Very good. Rep. Chaplin.

3 REP. CHAPLIN: Thank you, Mr. Chairman. Members of the
4 Committee.

5 I want people to be totally aware that I support those
6 measures which will increase our housing stock for the low-income
7 and moderate income people in the state of Colorado. I think
8 it's absolutely necessary.

9 We're facing future disasters. Any rent control lowers
10 the availability of housing stock for those types of people.

11 The New York experience that Sen. Strickland alluded to
12 is a prime example. We had a film we should have shown -- could
13 have shown this committee today that shows what happens when you
14 have rent control.

15 The City of Boulder is talking about rent control.
16 They're talking about passing an ordinance which would put a --
17 establish a rent control board to go back to 1977 prices on rent.
18 This would have a disastrous effect, and a rippling effect
19 throughout our entire state of Colorado.

20 We are a capital-poor state for housing stock. We need
21 outside investment.

22 I personally worked for a property management company
23 in California. California started talking about rent control.
24 The company sold about 20 million dollars worth of property and
25 went and invested in Texas.

1 MR. CHAIRMAN: Very good. Before we go into the
2 testimony, with a good many signed up. It looks like about
3 eight. Any questions the Committee would like to ask at this
4 time of the sponsor? Sen. Gallagher.

5 SEN. GALLAGHER: Just a short one. I don't know how
6 this can be a matter of statewide concern when, as far as I
7 understand, not one county or city has enacted rent control
8 ordinances. I just don't understand why we need the --

9 SEN. STRICKLAND: Sen. Gallagher, the statewide effect
10 is as Rep. Chaplin explained it to you. Let's use the City of
11 Boulder as an example, in their no-growth policy.

12 The effect of that ordinance was not limited to the
13 City of Boulder. It had a ripple effect throughout the entire
14 county of Boulder, causing the shortage of housing within the
15 city, and taking those potential residents to Longmont, to Niwot,
16 to Loveland and other country -- other municipalities surrounding
17 that.

18 The same thing holds true in the Western Slope in the
19 illustration that we gave you just a few moments ago.

20 REP. CHAPLIN: Mr. Chairman.

21 MR. CHAIRMAN: Rep. Chaplin.

22 SEN. ????: Has there been one municipality or county
23 that has enacted this?

24 REP. CHAPLIN: The answer is no. And the reason the
25 bill is before you is because we don't want to have one to have

1 said.

2 SEN. SANDOVAL: 9 through 13. You bring up the
3 provisions of Article 20 in the state Constitution. And I might
4 be wrong, but what does it say? I mean, I --

5 SEN. ???: It's Denver, my friend. Article 20.

6 MR. CHAIRMAN: Rep. Chaplin.

7 REP. CHAPLIN: We wanted to make it very clear in the
8 definition to municipality. The reason it's there is to the
9 definition of municipality.

10 Because -- and when we talked about it before, we
11 wanted to make sure that it was very clear in the intention when
12 I used the word municipality up above there. What --

13 And I've had problems with that in some of the other
14 bills I've been sponsoring, when some people say, "What's a
15 municipality?" So it's defined and it asks the drafting office
16 to put the definition in there.

17 MR. CHAIRMAN: Sen. Sandoval, any further.

18 SEN. SANDOVAL: I yield to Senator --

19 MR. CHAIRMAN: Sen. Beatty.

20 SEN. BEATTY: I'm just going to suggest that maybe
21 that -- when you try to adopt by state statutes, something that
22 attempts to impose this on a Constitution home rule city, I have
23 very grave concerns about the Constitutionality of the
24 application of this bill to the -- any home rule city.

25 MR. CHAIRMAN: Rep. Chaplin.

1 REP. CHAPLIN: I talked to some legal people and I know
2 you're a legal person, too, Sen. Beatty, about that. And they --
3 I keep hearing that you have to declare it's a matter of
4 statewide concern. That's the words they've said. You have to--
5 I've talked to two to three people about this particular issue,
6 and that's what they've said.

7 When you declare it's a matter of statewide concern,
8 you'll always have that question on everything we do, down here
9 at the legislature, dealing with home rule cities. Not just this
10 particular bill, but, you know, is it a matter of statewide
11 concern or is it not?

12 SEN. STRICKLAND: The reason why I have --

13 MR. CHAIRMAN: Sen. Strickland.

14 SEN. STRICKLAND: -- a particular problem with that is
15 because of our general severability clause. Understood the
16 reason why they were going to do that. It's always going to be
17 that argument, I think, and so I really don't care one way or the
18 other if it stays in there. I share your concern for potential
19 conflict of interest with the Constitution.

20 MR. CHAIRMAN: Very good. Let's proceed with the
21 testimony. Ray Baker.

22 As you're approaching, I'm going to make the general
23 comment that I'll ask everybody to be brief. And since there's
24 so many of you, I would implement a five-minute rule. If you
25 speak beyond five minutes, why, we'll cut you off. If you would,

1 questions of Mr. Roseman at this time? Hearing none, we
2 appreciate your testimony very much.

3 Jay Jurie? If I'm reading that properly. Is Jurie
4 correct?

5 MR. JURIE: Correct.

6 MR. CHAIRMAN: Very good. Identify yourself and any
7 organization and proceed with your testimony. And I'll remind
8 you of the five-minute rule.

9 MR. JURIE: All right. My name is Jay Jurie. I am
10 here as an individual from Pueblo, a home rule city. I am the
11 primary author of the draft of the petition now circulating in
12 Boulder.

13 I'm not presently working on that initiative drive.
14 But it is situated well within the context of the home rule
15 charter of the City of Boulder. It follows the wording of the
16 charter that provides that citizens can take initiatives with
17 regard to the health, welfare and safety of the inhabitants of
18 the City of Boulder. We feel -- the people that are pursuing the
19 petition drive feel that this is necessary for those reasons.

20 And the reason that Mr. Chaplin and Mr. Strickland have
21 brought this bill before you is because certainly their
22 colleagues in the real estate industry are afraid that the bill
23 might pass in Boulder. And so taking something from a local
24 context, they're seeking to extrapolate it to a state level.

25 And I'm particularly appalled when the two gentlemen

1 made their testimony because it was apparent to me that they have
2 not, in fact, read the bill. They were referring to New York,
3 and there is not a great deal of similarity between what they're
4 talking about in New York and what's being talked about in the
5 City of Boulder today.

6 And I want to make it clear again that this is not
7 something that is being proposed by the City Council in Boulder
8 or by City Administration. It's something that's being proposed
9 by a citizens committee following the initiative process laid out
10 in the home rule charter of the City of Boulder. And I would say
11 that to thwart that effort at this time would be a thwarting of
12 the democratic process in the City of Boulder.

13 And if the bill is enacted, it would furthermore thwart
14 that kind of democratic process throughout the State of Colorado
15 in cities like Pueblo and Colorado Springs.

16 I want to echo the words of the Mayor of LaSalle who
17 testified before you earlier that I think this is an in-house
18 rather than a legislative concern.

19 Now, I have some problems with the wording of the bill
20 before you. For one thing, it doesn't define the word "control."
21 I'm not sure what that means.

22 I think that their intention is to proscribe our
23 ability to, in fact, control rents, that we will find ways around
24 that. I think that the word is so specious and vague that it
25 doesn't constitute a serious problem for us on that level.

1 I want to respond to the comments made by the gentleman
2 from the real estate industry in Boulder. That there's no
3 substantial or effective documentation to back up his claim that
4 investment flees rent control cities. I've looked for this
5 information in California and I haven't been able to find it.

6 There are some real estate oriented -- or studies that
7 originate from real estate sectors that offer some points of view
8 on that subject, but I would hardly call those objective.

9 Also in that light, I would like to mention that the
10 Boulder rent control proposal specifically exempts new
11 construction from rent control. So I think they're beating a
12 dead horse when we're talking about keeping -- rent control
13 keeping investment capital away from Boulder or any other city
14 where rent control might be considered.

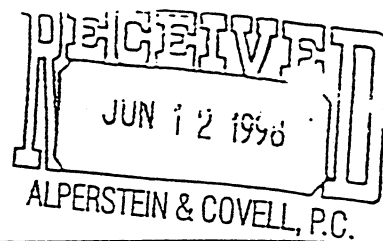
15 MR. CHAIRMAN: Thank you for your testimony, Mr. Jurie.
16 Are there questions of Mr. Jurie? Sen. Strickland.

17 SEN. STRICKLAND: No questions, Mr. Chairman. Just a
18 point of clarification.

19 For your information, Mr. Jurie, I'm not in the real
20 estate business. I don't have colleagues in the real estate
21 business. When you make those kinds of statements, you'd better
22 check your facts before you make them.

23 MR. CHAIRMAN: Are there further questions of Mr.
24 Jurie? Seeing none, we appreciate your testimony.

25 Catherine Partridge. Or is it Patridge?



COLORADO COURT OF APPEALS
No. 96CA2158

June 11, 1998

Lot Thirty-Four Venture, L.L.C.,

Plaintiff-Appellant and Cross-Appellee,

v.

Town of Telluride, Colorado, a municipal corporation,

Defendant-Appellee and Cross-Appellant.

Appeal from the District Court of San Miguel County
Honorable Robert A. Brown, Judge
No. 94CV37

Division V
Opinion by JUDGE PIERCE*
Marquez and Kapelke, JJ., concur

JUDGMENT REVERSED
AND CAUSE REMANDED
WITH DIRECTIONS

Herbert S. Klein & Associates, P.C., Herbert S. Klein, Aspen,
Colorado, for Plaintiff-Appellant and Cross-Appellee

Alperstein & Covell, P.C., Edward M. Caswall, Denver, Colorado,
for Defendant-Appellee and Cross-Appellant

*Sitting by assignment of the Chief Justice under provisions of
the Colo. Const. art. VI, Sec. 5(3), and §24-51-1105, C.R.S.
1997.

Plaintiff, Lot Thirty-Four Venture, L.L.C., appeals from a summary judgment that found in favor of defendant on two of plaintiff's claims for relief and that dismissed three additional claims. We reverse and remand for further proceedings.

In June 1994, plaintiff acquired title to Lots 34 and 34B located within an AC-2 zone in the town of Telluride (Town). At the time plaintiff purchased the lots, the Town's Land Use Code applicable to the lots within this AC-2 zone allowed site coverage for development of up to a maximum of forty percent per lot or up to a maximum of fifty percent per lot if the subject development provided for its required parking by covering or enclosing such parking lot on site.

In June 1994, the Town Council adopted Ordinance 1007, which amended the Town's Land Use Code. This amendment reduced the allowable site coverage to thirty percent, or up to forty percent with covered or enclosed parking.

In enacting this amendment, the Town did not precisely follow the requirements of its amendment procedures in that its Planning Commission failed to provide the Council with specific findings of fact in support of the ordinance.

In September of 1994, the Council also enacted Ordinance 1011, which added affordable housing mitigation requirements for

new developments within several zoning districts, including AC-2. Under this ordinance, new development must make provisions for affordable housing for forty percent of the number of employees generated by the development. The provisions of this ordinance apply to future development of lots in question.

A developer can satisfy the mitigation requirements by any one of four options. Two of the options require the developer to place affordable housing restrictions in a deed. If the developer chooses such an option, the units must thereafter be sold or rented to qualified persons subject to sale prices or rental rates established by the Town's affordability guidelines. Additionally, the deed must name the Town as an interested party in the deed restriction.

Plaintiff is the successor to certain entitlement agreements which previously defined its predecessor's obligations to provide affordable housing. These entitlement agreements required the predecessor to convey to the Town five lots from this subdivision. This requirement was complied with. Plaintiff takes the position that, through those agreements, it has already satisfied all of the affordable housing requirements for lots 34 and 34B.

I.

Plaintiff first contends that the district court erred in finding that the Town did not violate its procedural due process rights when it adopted Ordinance 1007 without strictly complying with its Land Use Code. We disagree.

Telluride is a home rule city as defined by Colo. Const. art. XX, §6, and therefore, we must look to the charter and ordinances of the Town to determine the proper procedures to be followed when amending its Land Use Code. McArthur v. Zabka, 177 Colo. 337, 494 P.2d 89 (1972).

It is not necessary that the Council strictly comply with all of its ordained procedures. Substantial compliance is all that is required, and only material departures that deprive a citizen of due process will result in nullification of an ordinance. Sundance Hills Homeowner's Ass'n v. Board of County Commissioners, 188 Colo. 321, 534 P.2d 1212 (1975).

Here, the Town failed to adhere to its procedures in that the Planning Commission did not provide the Council with specific findings of fact to support the ordinance. We conclude, however, that this oversight was not a material departure and is insufficient to warrant nullification.

The Council did not proceed without guidance from the Commission. The Commission reviewed and recommended the approval of the ordinance. Ordinance 1007 itself sufficiently identified the reasons supporting its adoption, thereby providing the community with assurance that it was passed for legitimate reasons. Hence, the requirements of due process were met.

II.

Plaintiff next contends that Ordinance 1011 violates §38-12-301, C.R.S. 1997. We agree.

Section 38-12-301 provides:

The general assembly finds and declares that the imposition of rental control on private residential housing units is a matter of statewide concern; therefore, no county or municipality may enact any ordinance or resolution which would control rents on private residential property. This section is not intended to impair the right of any state agency, county, or municipality to manage and control any property in which it has an interest through a housing authority or similar agency.

Ordinance 1011 requires affordable housing mitigation for any new development of these lots. The developer can satisfy the mitigation by one of the following options: (1) constructing affordable housing units and deed restrict them to affordable housing; (2) purchasing existing housing units and restrict them by deed to affordable housing; (3) paying a cash fee in lieu of

providing actual units; or (4) providing land or a combination of land and cash in lieu of providing actual units. The trial court found that the first two options result in a form of rent control by requiring that the units be restricted by deed to affordable housing and, thus, subject to the sales price or rental rates established under the Town's affordability guidelines.

The statute does not define "rental control." The rules of statutory construction require that we construe that term in such a manner as to further the General Assembly's intent in enacting the legislation. See Golden Animal Hospital v. Horton, 897 P.2d 833 (Colo. 1995).

To discern the legislative intent, we must first examine the language of the statute, and unless the result is absurd, the words must be given their plain and ordinary meaning. Snyder Oil Co. v. Embree, 862 P.2d 259 (Colo. 1993).

If the statutory language is clear and unambiguous, the statute should be applied as written. Husson v. Meeker, 812 P.2d 731 (Colo. App. 1991). Nevertheless, we may also consider other indicia of legislative intent, such as the object to be attained, the legislative history, and the consequences of the particular construction. City of Westminster v. Dogan Construction Co., 930 P.2d 585 (Colo. 1997).

Transcripts of the proceedings before the House and Senate reveal that the enactment of §38-12-301, C.R.S. 1997, arose from a concern that, if rent control were allowed on a broad class of housing statewide, investment in rental housing in this state would decrease significantly. The adoption of this type of control around the state could have such an effect. Therefore, the regulation of rent control is a matter of statewide concern, and the statute preempts the power of even home rule municipalities. See U.S. West Communications, Inc. v. City of Longmont, 948 P.2d 509 (Colo. 1997); City of Golden v. Ford, 141 Colo. 472, 348 P.2d 951 (1960).

As noted above, the trial court found that the provisions of Ordinance 1011 were a form of rent control, but it nevertheless concluded they did not constitute the type of rent control contemplated by §38-12-301. We agree that they authorize rent control, but further conclude that the statute applies to the ordinance because the restrictions set out therein operate to reduce the number of options available to plaintiff in the use of its property from what it had agreed to under the previous agreements. Thus, because the ordinance is a rent control measure, it violated the statute.

The Town argues that the statute is unconstitutional. However, there is a presumption that statutes are constitutional. Culver v. Ace Electric, 952 P.2d 1200 (Colo. App. 1997). To overcome that presumption, the Town must demonstrate the statute's invalidity beyond a reasonable doubt. Dempsey v. Romer, 825 P.2d 44 (Colo. 1992). It has failed to do so.

III.

We also agree with plaintiff's final contention that the trial court abused its discretion in dismissing the first, sixth, and eighth claims for declaratory relief.

The decision to grant an anticipatory declaratory judgment is within the sound discretion of the trial court and will only be overturned in the instance of an abuse of discretion. Villa Sierra Condominium Ass'n v. Field Corp., 878 P.2d 161 (Colo. App. 1994). We conclude that there was an abuse of discretion here.

A declaratory judgment action is appropriate when the rights asserted by plaintiff are present and cognizable. See Farmers Insurance Exchange v. District Court, 862 P.2d 944 (Colo. 1993).

Plaintiff claims that Ordinance 1011 conflicts with entitlement agreements reached between the Town and plaintiff's predecessor in 1982, and asserts that those agreements establish its only affordable housing mitigation requirement and that the

adoption of the new ordinance constitutes a breach of those agreements because it requires plaintiff to increase the amount of mitigation it is required to provide.

Here, a comparison of the rights of plaintiff before and after the passage of Ordinance 1011, as previously discussed, shows that the choices available to plaintiff for the use of its land are restricted. Because of this diminution, there is a justiciable controversy here.

o The Town, however, has further argued that, because the land owner has not applied for a permit under Ordinance 1011, there is no such controversy as yet. We reject this argument; rather, we conclude there is a controversy and that plaintiff need not apply for a use permit before asking for declaratory relief. See Board of County Commissioners v. Bowen/Edwards Associates, 830 P.2d 1045 (Colo. 1992).

Also, plaintiff had standing to pursue these remedies. See Conrad v. Denver, 656 P.2d 662 (Colo. 1982); People v. Ki Suk Grell, 950 P.2d 660 (Colo. App. 1997).

The judgment is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

JUDGE MARQUEZ and JUDGE KAPELKE concur.

1999

Financial

Condition

*of Colorado
Municipalities*

13th Annual Report



Colorado Municipal League
1144 Sherman St.
Denver, CO 80203-2207
(303) 831-6411; FAX (303) 860-8175
Internet: www.cml.org
E-mail: cml@cml.org

Survey Results: Municipal Finances in 1999

In response to the Colorado Municipal League's 13th annual survey of financial condition, municipal officials reported major problems confronting their cities and towns. They also noted actions taken in adopting their municipal budgets for 1999. As shown in Figure 1, more than 65 percent of 177 responding municipal officials noted the following major problems:

- unfunded street improvement needs,
- coping with growth,
- lack of affordable housing and
- increasing employee health insurance costs.

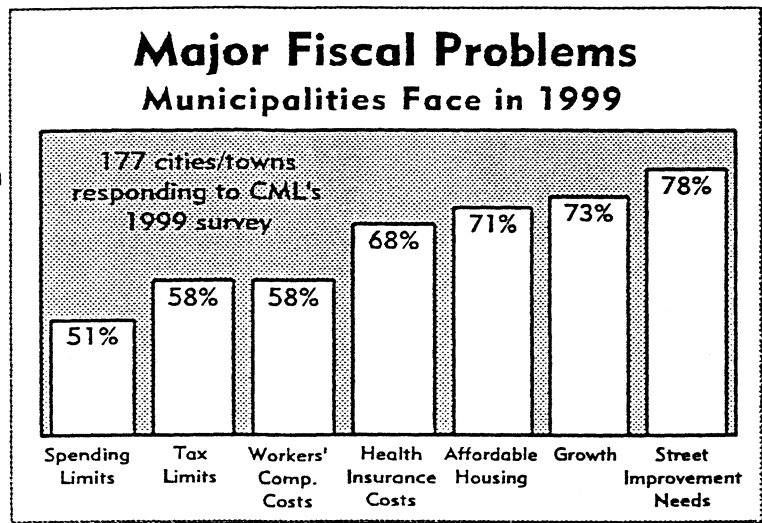


Figure 1

Again, municipal officials listed coping with growth as a significant fiscal problem, with more expressing concern than ever before, as shown in Figure 2. City dwellers, suburban commuters and rural residents alike all seem to be saying, "It just isn't like it used to be around here!" Whether on local streets or interstate highways, traffic congestion has increased noticeably. It is important to understand that rapid growth is not occurring in some

communities, so coping with growth is not considered a major problem in those communities. However, unfunded street improvement needs remain a major municipal problem in communities regardless of whether they are experiencing rapid growth.

Street Improvement Needs

Among municipal officials, unfunded street maintenance and improvement needs took the lead again this year as a major problem they must confront. Municipal officials, faced with increasing costs to provide services as the state's population continues to grow, are particularly concerned about funding for local transportation needs. It's easy to understand why when looking at the increased usage of an aging system.

From 1990 to 1996, the number of Colorado municipal residents increased by 13.8 percent, but the number of vehicles registered within municipalities increased by 19.2 percent.¹

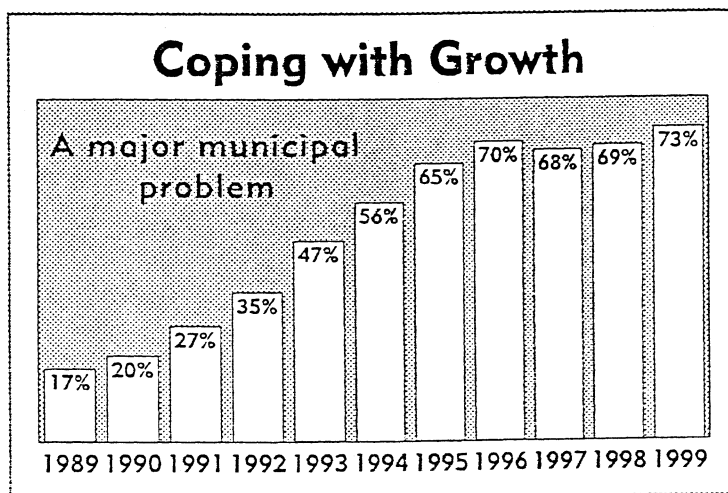


Figure 2

Nationwide, since 1970, the U.S. population has grown by 30 percent, the number of American drivers by 61 percent, the number of vehicles by 90 percent, and vehicle miles traveled by 123 percent.⁴ This data shows that the number of vehicle miles traveled has increased at an even faster pace than the growth of population and registered vehicles.

So it is not surprising that a recent Blue Ribbon Panel of business and government leaders identified more than \$13 billion in unfunded transportation needs over the next 20 years--\$8 billion at the state level and \$5 billion at the municipal and county level. While the state has allocated additional state funds to address the state needs over the past three years, local governments have received no such additional state financial support.

Transportation Network

The statewide transportation network is a partnership of state and local highways, streets, roads, transit systems, rail, and bike and pedestrian ways used by and benefiting all taxpayers of the state. Local governments are responsible for more than 82 percent (69,500 miles) of the public roads in Colorado, more than 4,300 local bridges, 32 public transportation services, many bicycle paths, and other transportation improvements. For municipalities, the only own-source revenues available to fund street improvement needs are sales and property taxes, neither of which are user fees.

Colorado has a strong tradition of relying on user fees to pay for maintenance and construction of this network. Recognizing the interdependency of this system, state lawmakers have long shared Highway User Tax Fund (HUTF) revenues with local governments. Since the late 1970s, the state has allocated highway user revenues

Local governments are responsible for more than 82 percent (69,500 miles) of the public roads in Colorado.

Municipal Share *Highway Users Tax Fund*

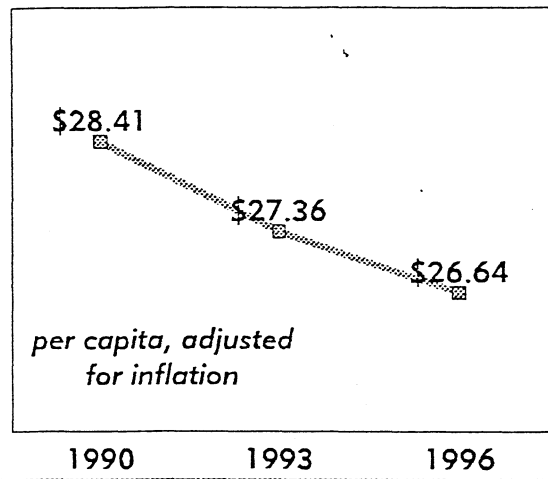


Figure 3

according to a formula providing 60 percent to the state, 22 percent to counties, and 18 percent to municipalities. However, since 1990, the municipal share, per capita, when adjusted for inflation, has decreased, even though the percentage share has remained the same.² See Figure 3.

Growth in HUTF revenue is lagging far behind population growth plus inflation. HUTF growth is approximately 2.4 percent per year, while population growth plus inflation has been more than 5 percent per year. One reason for this is that a major HUTF funding source--motor fuel taxes--is not indexed for inflation. It has remained at 22 cents per gallon since Jan. 1, 1991. All 50 states impose a motor fuel tax, and some of these index the basic fuel tax rate according to changes in the consumer price index or impose an additional sales tax on gasoline. Several other states periodically adjust the tax rate in accordance with the wholesale or retail price of gasoline.³ Another reason is the increased fuel efficiency of many motor vehicles.

Lack of Affordable Housing

Municipal officials also recognize lack of affordable housing as a challenging consequence of growth, with 71 percent listing this issue as a major fiscal problem they face in 1999. In every major area in Colorado, the housing market is booming. Increasing personal incomes, affordable interest rates and consumer confidence have driven selling prices for single-family homes and townhomes to all-time highs. For example, in the five-county Denver metro area, the average selling price for single-family homes in 1998 (through June) topped \$187,000, while condos and townhomes are averaging over \$113,000. The averages seem even more astonishing when compared with 1986 averages. At that time, houses averaged \$101,000 and condos were \$70,000.⁵

Statewide apartment vacancies remain at dangerously low levels that may soon force employers to find their workers housing. The state's average vacancy rate hovers at 4 percent, with the lowest rate at a mere 0.3 percent in Eagle County and the highest at 8.2 percent in Fort Morgan/Sterling. (A vacancy rate of 5 percent is generally considered to be an equilibrium rate.) When considering the availability of affordable housing, the vacancy rates for affordable apartments are far less than the area vacancy rate. In September 1998, statewide average rents hovered at \$641 for a two-bedroom, two-bath apartment.⁶ In metro Denver, the average rental rate was \$685 with a vacancy rate of 3.9 percent.

Given the state's average rent, many employees earning \$10 to \$15 per hour are unable to afford to live in the communities where they work. This is becoming increasingly true for local government employees, who would prefer to live in their communities.

In many communities the cost of housing is becoming a source of community-wide concern. The availability of a diversified housing inventory is an essential component of successful communities. A balanced housing stock allows for a diversified work force and contributes to economic and environmental sustainability. Depending on the community, owning a home is no longer an option for a growing number of middle-income families. The bad news for many workers is that the situation is not improving. Housing costs are increasing faster than income.

Several Colorado municipalities have launched innovative programs to increase the availability of affordable housing in their communities.

Rising health insurance costs

This year, 68 percent of survey respondents reported rising employee health insurance costs as a major fiscal problem, a significant increase from 60 percent in 1998, shown in Figure 4. Employee health insurance cost is a major concern because more than half of the typical municipal budget is for personnel-related costs. However, for some smaller municipalities, these rising costs are "not applicable," because they cannot afford to provide health insurance benefits for their employees anyway.

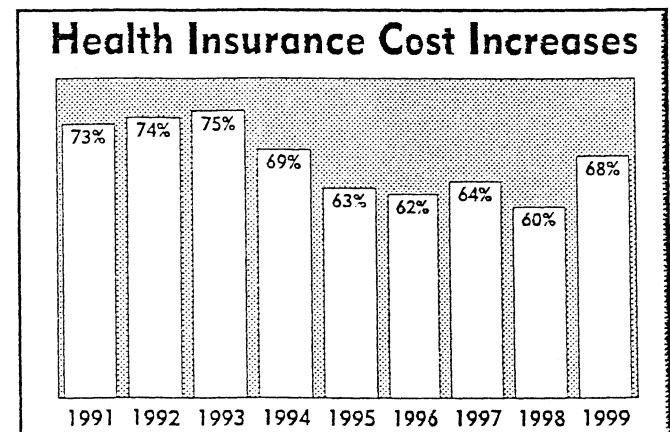
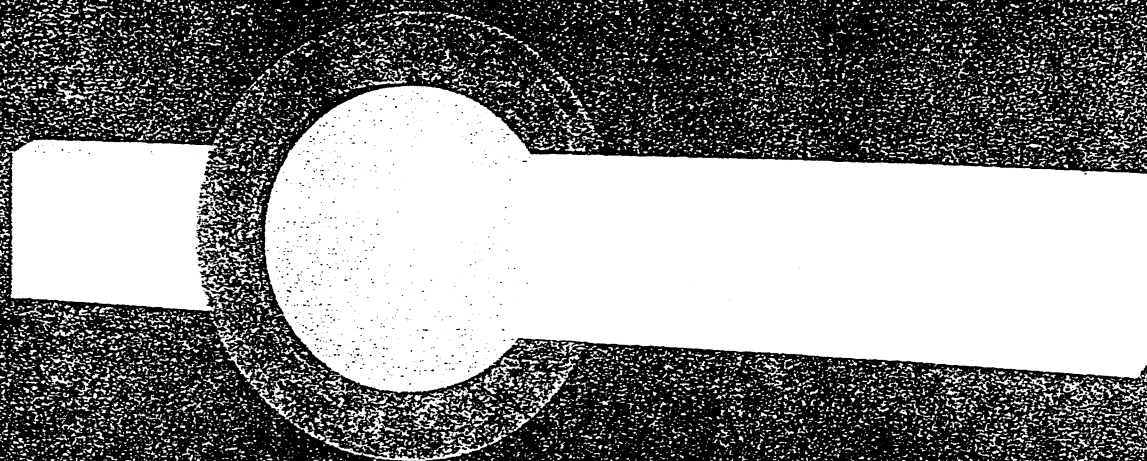


Figure 4



HOUSING COLORADO: A GUIDE FOR LOCAL OFFICIALS

COLORADO DIVISION OF HOUSING



COLORADO DEPARTMENT OF LOCAL AFFAIRS

CHAPTER 1

BUILDING SUCCESSFUL COMMUNITIES: THE IMPACT OF HOUSING ON THE LOCAL COMMUNITY

The availability of a diversified housing inventory is an essential component of successful communities. A balanced housing stock allows for a diversified work force and can contribute to economic and environmental sustainability.

Maintaining this balance has become more challenging in recent years. In Colorado, the rise in housing costs has steadily out paced resident incomes during the past five years. (See Chapter 2 for detailed analysis and discussion.) It is increasingly recognized that this disparity creates imbalances within communities. Often, the location and type of new housing does not meet the needs of many Colorado households, forcing many to move far outside the community in which they work and go to school.

Real estate prices are cyclical and we can expect an eventual reversal of the current growth and inflationary pressures. But the time frame for these cycles and the depth of a future downturn are not predictable. During the 1970s and 1980s the California housing market appreciated uninterrupted for over two decades up to 400%+ prior to the current downturn. While a correction in the Colorado real estate market is inevitable, the major decline of the early 1980's is unlikely due to the increased diversification of the state economy.

There is a significant level of interactivity and interdependence between different facets of a community: economic development, environmental, transportation, and housing. The availability and cost of housing can have a major impact on various aspects of your community. A shortage of diverse housing can lead to a number of undesirable impacts. Here are a few of the potential consequences:

- ◆ Economic development may be limited if potential new employers believe that employees will have a difficult time finding housing. They may take their business to a different community or a different state where their work force will have an easier time locating a home.
- ◆ A lack of diversified housing inventory and prices may result in limited diversity of the population within the community. Those who may be forced to live elsewhere include: young people who are entering the work force, single income households, or the elderly in the neighborhood. The exodus of these segments of the population leads to the disintegration of families and a loss of sense of community.

a strong equity position in their home. For elderly on a fixed income, however, the taxable valuations have increased so dramatically that taxes and insurance may consume over 50% of income. Currently, it is estimated that 40,800 elderly households in Colorado are paying more than 50% of their income for housing costs. As our population continues to age - it is anticipated that the number of seniors in the state will increase from 399,000 to 527,000 between 1990 and 2000 - the incidence of excessive housing cost burden in elderly households will also increase.

At the other end of the age spectrum, young working families are unable to afford starter homes. This is especially true of single income households. In many communities, even dual income households have difficulty in qualifying for purchase of the local housing stock. A working family that makes \$20,000 - \$25,000 annually may qualify for an \$80,000 home but in many Colorado markets, there is no inventory in this price range. In many communities, this family would also have significant difficulty paying market rents. (See Chapter 2 for more information and analysis.)

Local Economy

There is a direct connection between the overall economic health of a community and the health of the housing sector. Although connected, housing and the rest of the economy do not always move in unison. It is common for the housing industry to lag behind the rest of the economy. A region may be well into recession before new construction slows which results in significant overbuilding. Conversely, during the early stages of economic recovery, the housing industry may remain sluggish. There are two primary reasons for this lag time: 1) investors want to see strong evidence of the market need before they are willing to invest significant time and capital into a project; and 2) the transaction time-frame for real estate development is usually at least one year.

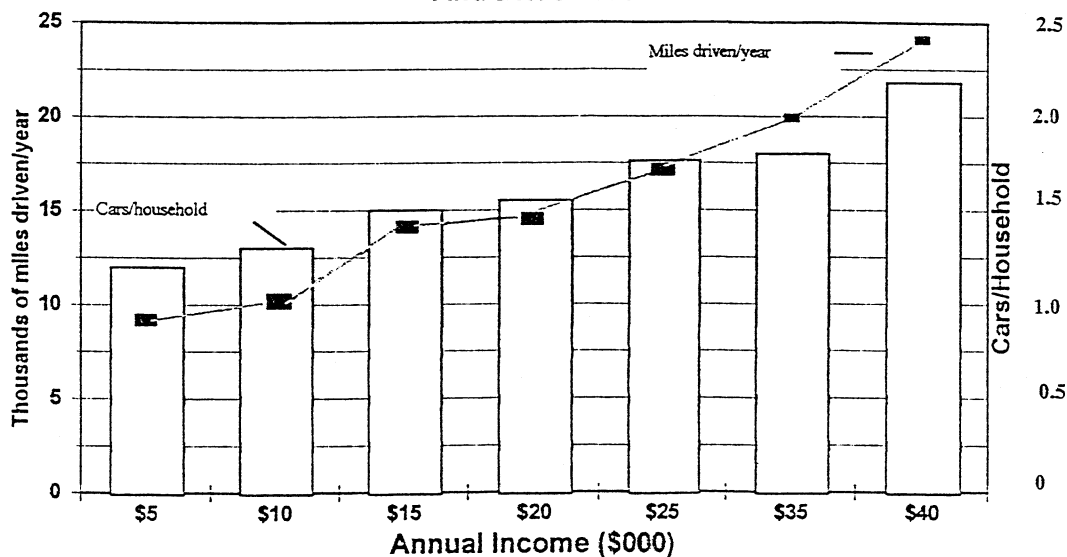
The housing industry has a significant impact on the local economy. Direct stimulus results from the generation of jobs, wages, tax revenues and demand for goods and services. Strength in the housing sector creates jobs for developers, architects, general contractors, building trades workers, lenders, Realtors, insurance agents and vendors of home furnishings. More than half of the loans in the financing industry are for housing mortgages or construction loans. According to the National Association of Home Builders (NAHB), it is estimated that the construction of 100 single family homes generates 270 full-time jobs in construction and construction-related industries and over \$7,000,000 in wages and combined federal, state and local revenues and fees.

In Colorado, it is estimated that residential construction will directly generate at least \$2 billion of wage income per year between 1997 and 2000. Each year, at least 50,000 people will be employed in the residential construction industry.

Colorado is in the forefront of a national transition toward an information economy. The advent of computerization, the fax, the modem and teleconferencing presents a unique opportunity for "new" (revival of old) community designs. These "new" designs closely resemble the community structures that existed prior to the industrial age. The emergence of the information economy is compatible with the revival of integrated zoning that allows a variety of uses: civic, business, recreational, and mixed income residential. The need is reduced for segregation of these functions. Many people are working from their homes. Well thought out planning and design along with a flexible regulatory structure can have very positive results: children can walk to school or the library; service providers can walk or bicycle to work.

It is common for neighbors to cite concerns about traffic when discussing proposed development of affordable housing. In fact, much more traffic is generated by pushing housing to the fringes of the community rather than allowing in-fill development. It has also been documented that low-income households own fewer cars and drive significantly less than higher income counterparts:

**Low-Income Households own fewer cars
And Drive Less**



U.S. Energy Information Administration Residential Transportation Energy Consumption Survey, 1985 (Washington DC:USGPO, 1987), Table 3 Page 30

It has also been documented that there are fewer auto trips per person in higher density areas. In a neighborhood of 15 homes to the acre, there are one third fewer trips per person than in suburban developments according to the Institute of Transportation engineers.

expensive homes filter down to lower income families as they are vacated. Some housing planners contend that the best strategy to address community housing needs is to build new housing and let it circulate.

Several Colorado communities recognize that they have a significant number of single elderly residents who remain in their two or three bedroom homes. Maintenance of these older homes becomes more challenging as residents age. The development of congregate care housing offers a solution with multiple benefits. The elderly are provided with appropriate housing and services. At the same time, the homes that they occupied become available for local families. The creation of new housing opportunities has a multiplier effect which allows numerous local residents to improve their housing status.

The housing market is complex and is influenced by various local and national factors. The concept of the "housing ladder" may not apply in some markets, but it is a concept that merits consideration as communities weigh housing development options.

Strengthening Families and Community Organizations

A productive society depends on safe, decent and affordable housing. A lack of adequate shelter can contribute to the breakdown of families and communities. Secure housing provides an environment that allows people to address concerns beyond their own immediate needs.

When residents live where they work, community bonds are strengthened. In general, people identify with the community in which they live more than the community in which they work. The volunteer base for community organizations comes from local residents. Workers spend less time driving and more time with their families.

These true stories are illustrative:

- ◆ As a result of a severe snowstorm, the power lines went down one night in Aspen. There were no resident utility personnel available to do the necessary repairs. None of the employees at the local utility could afford the housing costs in Aspen and the road conditions made travel prohibitive. The residents had to wait until the next day for restoration of power.
- ◆ In Lafayette, the City Council selected their preferred candidate to be the new city manager after a nation-wide search. The candidate came out for final negotiations and turned down the job because he was unable to find local housing that he could afford.

Fort Collins housing providers actively participate in the Larimer County Affordable Housing Task Force.

Summary

Anticipate and plan for changing housing needs and your community will be stronger in many ways. Thoughtful and holistic approaches to development will allow for growth while maintaining the fabric of the community. It is possible to maintain a "sense of place" while achieving a balance between environmental responsibility and economic sustainability. A balanced inventory of housing stock allows for a balanced community. It allows people to live where they work and reduces commuting, traffic and air pollution. A balanced community needs police officers, fire fighters, teachers, service workers and people who work with their hands. These workers will have an increased commitment to their neighbors if they are residents rather than commuters.

Today, in the United States, we are in the midst of a major shift in the role of the Federal government. The current devolution points to greater responsibility for solutions at the state and local level. Most of the answers are in the hands of the private market. But with a thorough understanding of the local housing situation, local government officials can influence the housing market and help to achieve a balanced community.

CHAPTER 2

SUPPLY AND DEMAND: HOUSING MARKET AND HOUSING COSTS

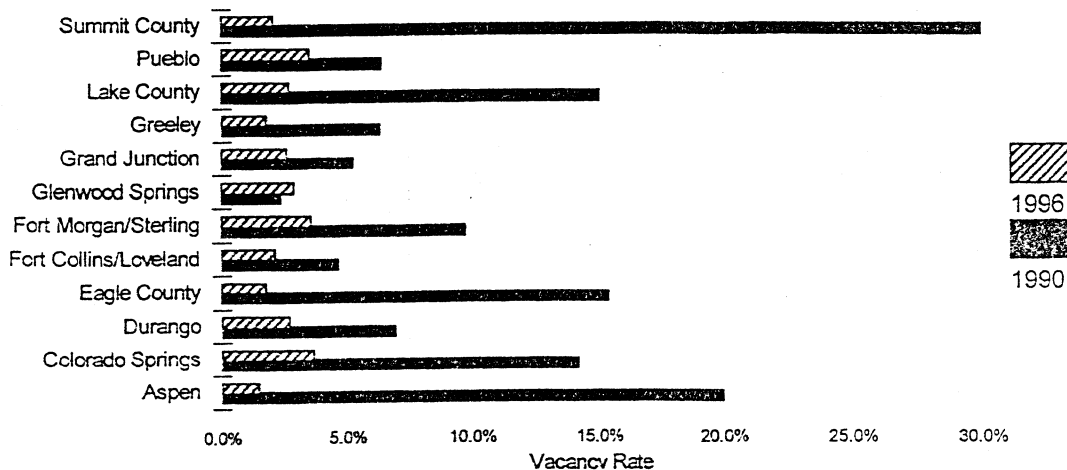
Wages, Growth and Housing Costs are Linked

There is a misconception about the supply of and demand for housing in Colorado. The assumption is that as the demand for housing increases, the price of housing will also increase, but only temporarily. With increased prices will come more housing production. With more units on the market, the price of housing should fall. However, this is not the case in Colorado for many reasons.

The low vacancy rate in Colorado is illustrative of the strong demand for housing in the state. The September 1996 Multi-Family Housing Vacancy and Rental Survey published by the Colorado Division of Housing shows an overall statewide vacancy rate of only 3% - considered to be very problematic. This vacancy rate has been low for quite some time, not only in the large metro areas of the state, but in communities such as Sterling, Durango, Grand Junction and Glenwood Springs.

Colorado's population keeps growing, currently at 3,785,000. Additional households moving into the state keep the demand for more housing units high. The Colorado Department of Local Affairs Demography Office projects that Colorado will experience growth at an average annual rate of 1.6% until reaching over 5,000,000 in the year 2020. This increased growth in population will ensure that the demand for housing continues to grow.

Colorado Vacancy Rates 1990 and September 1996



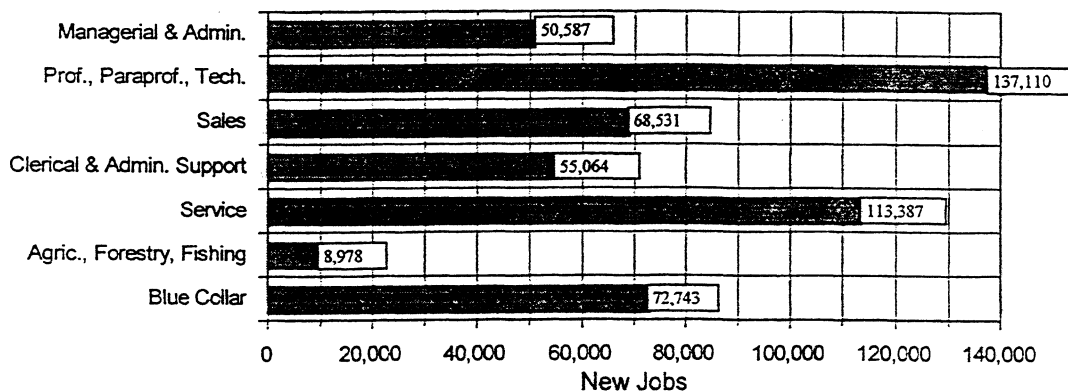
Colorado Division of Housing, Multi-Family Housing Vacancy and Rental Survey, September 1996 and 1990 Census.

The Affordability Gap - A Statewide Perspective

To determine whether Colorado households can afford to live in their communities and will continue to be able to afford housing in their communities, it is important to look at existing wages and future trends in the Colorado job market. While Colorado had a smaller share of low wage workers in 1995 compared to the nation as a whole, many areas of the state rely heavily upon the service and retail trade industries, which have more lower wage jobs than other industries.⁷

First, we should look at projected growth in jobs by occupation. Professional, paraprofessional, and technical occupations are projected to add the most jobs to the Colorado economy between now and 2005, an increase of 137,100, or 32.5%, over this time period. Service occupations will add 113,387 jobs, a growth of 33%, over this same 10-year period. The following graph shows

Growth by Occupational Group Colorado, 1995 - 2005



Colorado Department of Labor and Employment, Labor Market Information.

projected growth by occupational group from 1995 - 2005. While professional, paraprofessional and technical occupations had an average annual salary of \$36,300 in 1994, service occupations had an average annual salary of only \$14,331.

The two industries projected to grow the most by 2005 are the service industry and retail trade industry. The service industry will grow at a rate of over 50%

⁷Michael Rose, "Smaller Share of Low-Wage Workers in Colorado than Nation," *Colorado Department of Labor and Employment, Labor & Industry Focus*, August 1996: 1-2. "Eighteen percent of hourly workers in the State made less than \$6.00 per hour compared with just over 23% in the nation."

Occupation	Average Annual Salary 1995	Monthly Housing Allowance
Retail Salesperson	\$16,540	\$414
Nurse	\$23,000	\$575
Carpenter	\$26,865	\$672
Elementary School Teacher	\$29,470	\$737
Police Patrol Officer	\$36,635	\$916

Colorado Department of Labor, Labor Market Information
Colorado Division of Housing Analysis

Using data from the Colorado Association of Realtors, we estimate that the average median price of a home in Colorado was \$133,000 in 1995. An estimate of the average rent for the state in 1995 is \$560.⁹ For this exercise, we will use an average monthly utility cost of \$78, which comes from a sampling of 2 bedroom single family and multi-family rental units across the state.

The following table shows just how affordable the average rental or home for sale is to persons earning the above wages. The Affordable Purchase Price is the price that these persons could pay if they were to purchase a home. The Percent of Average Home Price shows how far this person's purchasing power will go to pay for the average priced home in Colorado. The Affordable Rent column shows the rents affordable at these wage rates, taking utility costs into consideration, while the last column illustrates how much of the average rent these wages can afford.

Occupation	Monthly Housing Allowance	Affordable Purchase Price*	Percent of Median Home Price	Affordable Rent	Percent of Average Rent
Retail Salesperson	\$414	\$39,166	29%	\$336	60%
Nurse	\$575	\$60,796	46%	\$497	89%
Carpenter	\$672	\$73,473	55%	\$594	106%
Teacher	\$737	\$83,396	63%	\$659	118%
Patrol Officer	\$916	\$104,206	78%	\$838	150%

*assumes annual insurance payment of between \$300 and \$450 depending upon price, other monthly payments of between \$165 - \$250 per month, taxes at 1% of home value, 8% interest for 30 years, 5% down.

⁹Colorado Division of Housing Multi-Family Housing Vacancy and Rental Survey. Denver Metro Apartment Vacancy and Rent Survey.

The above analysis shows that while persons with the average income in three of the occupations could afford to pay the average rent in Colorado, none could afford to purchase the average priced single family home on the market in 1995 without having two incomes per household. The retail salesperson, an occupation that is one of the fastest growing in Colorado, can only afford a rent that is 60% of the average rent price for the state. In high cost areas, this gap is much wider.

Is the gap between income and housing cost widening for low and moderate income households? The Colorado Division of Housing has projected that 244,307 renter households in the state paid more than 30% of their income for housing in 1995. This number is up from 172,884 in 1990 and 205,964 in 1993. If Colorado local economies continue to attract many lower wage jobs, and if rents and sales prices continue to rise more than the average household income in the state, this affordability gap will continue to grow. In the third quarter of 1996, the median sales price of a home in the 29 reporting areas for the Colorado Association of Realtors was up an average of 12% over 1995. Much of the growth in the job market will be in lower paying service and retail jobs.

Affordability Gap - A Local Example

To get a picture of how Colorado's growth and rising housing costs have affected one local area, we will look at a community economy that is strong and representative of many communities in Colorado. Durango - located in La Plata County in southwestern Colorado - is known for its beauty, outdoor lifestyle, Fort Lewis College, and proximity to the Purgatory Ski Resort and Mesa Verde National Park. La Plata County's population was 32,284 in 1990 and is projected to grow to 44,253 by the year 2000 - an average of 4% growth per year. Durango has had very strong job growth since 1990, most of it in the service and retail industries. The town's economic base has shifted from mining, to providing services for tourists and retirees.

Durango has had growth in employment of over 6% per year since 1990 with more than 70% of new jobs in the trade and service sectors.¹⁰ Tourism is the driving force of the local economy with the service sector employing 33% and the retail trade sector employing 25% of the local work force.¹¹ Other strong industries in the Durango economy are coal bed methane drilling, oil and gas exploration and extraction, and employment at Fort Lewis College. Recent economic diversification has come from jobs in recreational equipment and clothing manufacturing.

¹⁰Housing and Urban Development, "U.S. Housing Market Conditions," November 25, 1996: p. 43.

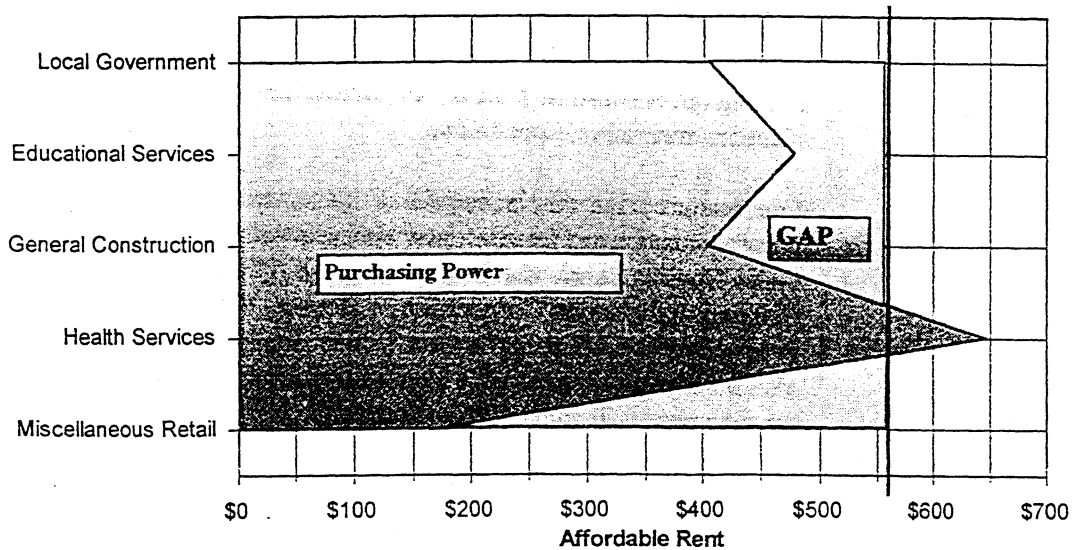
¹¹Colorado Legislative Council Staff Report, "Focus Colorado: Economic & Revenue Forecast, 1996 - 2002," September, 1996: 76 - 77.

Occupation	Average Annual Salary	Monthly Housing Allowance	Affordable Purchase Price*	Percent of Median Home Price	Affordable Rent	Percent of Average Rent
Misc. Retail	\$11,850	\$296	\$16,110	11%	\$179	32%
Health Svcs.	\$30,507	\$763	\$81,662	58%	\$646	115%
Gen. Const.	\$20,846	\$521	\$44,716	32%	\$404	72%
Educ. Svcs.	\$23,790	\$595	\$57,036	41%	\$478	85%
Local Gvmt.	\$20,866	\$522	\$45,682	32%	\$405	72%

*assumes annual insurance payments of between \$300 and \$450 depending upon price, other monthly payments between \$150 - \$200 per month, taxes at 1% of home value, 8% interest for 30 years, 5% down.

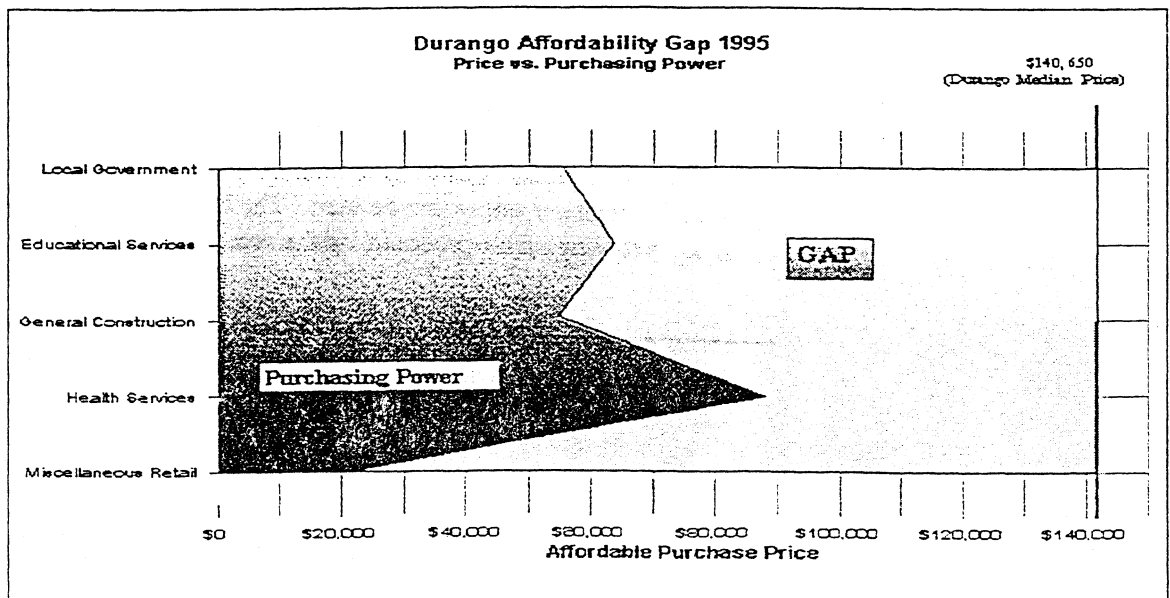
Durango Affordability Gap 1995
Rent vs. Purchasing Power

\$562
(Durango Average Rent)



Durango Affordability Gap 1995
Price vs. Purchasing Power

\$140,650
(Durango Median Price)



EMPLOYEE WAGES (EXAMPLE)

Occupation #	Occupation	Id	% of Empl. By Wage	Earnings Hourly (Mid-Point)	Number of Employees	Annual Income
1:	Mgmt & Adm	a.	2.2%	\$4.00	0	\$8,320
		b.	1.8%	\$5.75	0	\$11,960
		c.	6.5%	\$7.75	1	\$16,120
		d.	12.4%	\$10.50	1	\$21,840
		e.	20.4%	\$14.00	2	\$29,120
		f.	14.3%	\$18.00	1	\$37,440
		g.	12.7%	\$22.50	1	\$46,800
		h.	15.9%	\$30.00	2	\$62,400
		i.	7.5%	\$40.00	1	\$83,200
		j.	3.8%	\$52.50	0	\$109,200
		k.	3.0%	\$65.00	0	\$135,200
2:	Profess.	a.	3.3%	\$4.00	1	\$8,320
		b.	6.4%	\$5.75	2	\$11,960
		c.	11.3%	\$7.75	4	\$16,120
		d.	15.7%	\$10.50	5	\$21,840
		e.	20.4%	\$14.00	6	\$29,120
		f.	12.6%	\$18.00	4	\$37,440
		g.	13.5%	\$22.50	4	\$46,800
		h.	9.3%	\$30.00	3	\$62,400
		i.	2.8%	\$40.00	1	\$83,200
		j.	1.2%	\$52.50	0	\$109,200
		k.	3.9%	\$65.00	- 1	\$135,200

[Section Continues
in Actual Model]

Summary

Without taking steps to decrease the gap between wages and housing costs, many Colorado communities may find that their labor force is commuting from out of town where housing is more affordable, or choosing not to move to communities where there is no affordable housing. When planning for healthy community growth, it is imperative to determine how affordable it is to live in your community now and consider what impact new economic development activity will have on the quality of life for residents. The above analysis shows that as Colorado's economy grows, so does the price of housing. If growth in wages continues to lag behind growth in housing costs, many working Colorado residents will find that their quality of life is stagnating.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 28^m day of June 1999, I deposited a true and accurate copy of the foregoing **Brief as Amicus Curiae in Support of Petitioner** in the United States mail, first class postage prepaid, addressed as follows:

Herbert S. Klein, Esq.
201 North Mill Street, Suite 203
Aspen, CO 81611
(970) 925-8700

Edward M. Caswall
Alperstein & Covell, P.C.
1600 Broadway, Suite 2350
Denver, CO 80202
(303) 894-8191

Barbara Major