WILLIAMSON & HAYASHI, LLC
ATTORNEYS AT LAW
1650 38TH STREET
SUITE 103 WEST
BOULDER, COLORADO 80301

DAVID S. WILLIAMSON
WILLIAM P. HAYASHI
MATHEW MUNCH

Telephone: 303-443-3100
Fax: 303-443-7835

MEMORANDUM

TO: Mayor and City Council

FROM: Dave Williamson

DATE: November 2, 2020

RE: Application of City and Zoning Land Use Regulations to Colorado School of Mines--- up-dated

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In 2019 the Colorado School of Mines ("CSM") adopted its Capital Improvement Plan Master addressing anticipated capital improvement projects on the CSM campus over the next several years. The City's staff has been in discussions with CSM officials in order to determine how best to coordinate the CSM Master Plan with the City's land use regulations.

On numerous occasions throughout our tenure with the City over the past 30 years we have been requested to offer legal opinions as to the City's authority to impose land use regulations upon property owned and used by other governmental entities such as CSM and Jefferson County. On several occasions we have provided City Council with formal written opinions that are confidential and protected from public disclosure by the attorney-client privilege.[1] While City Council does not wish to waive its privilege with respect to such opinions, Council has indicated that it would be beneficial to provide its constituents with a summary legal opinion in order provide a better understanding of the legal issues involved.

Over the years we have consistently concluded that CSM is not exempt or immune from the City's zoning and land use regulations. While the Colorado Supreme Court had not ruled directly on that question, our office was of the opinion that the City's broad home rule power to regulate land use within the limits of the City applies to use of land by CSM. There have been a few recent Supreme Court decisions that bear on our opinion, however we continue to believe that Golden's home-rule powers cannot be ignored by CSM.

[1] Preventing public disclosure of such protected legal opinions allows the City to protect it legal position and arguments in the event of litigation.

HISTORICAL CONTEXT

In 1986, a former city attorney for Golden opined in a letter to Jefferson County that "the County … may acquire and use property and erect buildings without regard to the zoning, building, or subdivision regulations or laws of the City of Golden." Our office undertook legal representation of the City of Golden in 1990. In 1991, Jefferson County proposed to utilize a building that it owned on 19th Street, west of U.S. 6, as a detoxification facility. The City's zoning for the property did not allow such a use. In response to the County's proposal, our legal research in 1991 indicated that the opinion of the former city attorney regarding the applicability of the City's zoning laws to the county was contrary to the law in Colorado at that time, and that Jefferson County was not exempt from the City's zoning regulations. We relied primarily upon a 1988 Court of Appeals case (*La Plata County Commissioners vs. Board of Adjustment of the City of Durango*, 768 P.2d 1250 (Colo. App. 1988)). In that case, La Plata County leased a house that was to be used for office purposes. These purposes violated Durango's zoning ordinance. The County sought an exemption from the City's Board of Adjustment; however, that exemption was denied. The County then filed a lawsuit to request a declaration that the property was exempt from the City's zoning ordinance.

In addressing the issue, the Colorado Court of Appeals analyzed the state statute that authorized *statutory cities* to adopt zoning regulations. (Section 31-23-301, C.R.S.) The Court held, based upon the statute, that the County was not immune from the City's zoning laws. The Court also ruled that in order to obtain an exemption that was afforded under the statute for "public buildings", the County must meet the standard of establishing "reasonable necessity," and that proof of the proposed use was "more convenient" would not be sufficient.

The exemption provided for in Section 31-23-301, C.R.S., remains in the statute and it appears that it must be made available to county governments in *statutory cities*. In 1991 we maintained that, although the Colorado courts had not addressed the issue, there is a good argument that the exemption procedure afforded to county governments in statutory cities was not required in home rule cities. The state legislature did not declare the exemption provisions of Section 31-23-301, C.R.S., to be a matter of statewide concern. Colorado court decisions have consistently held that zoning and land use matters within home rule cities are matters of local concern and may preempt statutory provisions. Therefore, we reasoned that the City of Golden, as a home rule municipality, was not required to accommodate the statutory exemption procedure, and could exercise its land use regulation over property held by the county, as the county was not exempt from local land use regulations.

The County abandoned its efforts to use the property for a detoxification facility and has complied with the City's zoning processes since that time. The Jefferson County Government Center has been zoned by the City as a PUD, and there have been relatively few, if any, land use conflict with the County since then.

In 1993, the City made significant amendments to its zoning regulations. The City, working with CSM and recognizing the ongoing nature and use of property at the CSM campus, adopted zoning regulations that permitted, as a use of right, "college and university buildings and uses, when incorporated into a residential campus" in the R-3 zone district. The density requirements of the

R-3 district remain applicable to the college and university buildings. By doing so, the City asserted its land use regulations over CSM's properties, yet allowed a certain amount of autonomy for CSM to design and plan its campus to meet its needs.

In December of 2002, we provided Council with a specific opinion addressing the application of the City's zoning and land use regulations to CSM. In that opinion, our office updated the 1991 opinion that was rendered with respect to the County, and concluded that CSM was in the same position, vis-à-vis zoning and land use regulations, as the County. As of 2002, there had been no appellate court decisions in Colorado that altered our conclusion in that regard. Over the years there had been ongoing discussion with the Attorney General's Office and CSM regarding the authority of the City to impose its land use regulations on the school, and that there was no agreement on the City's authority. However, since before 2002, and continuing to date, CSM, while not conceding the issue, has complied with the City's zoning processes and procedures in conjunction with construction and uses on campus. On numerous occasions, site plans, variance requests and rezoning applications have made their way through the City's processes, and CSM has modified its construction plans in response to the City's process in order to obtain City approval. Of particular note was the construction of Marv Kay stadium, the design of which was significantly modified as a result of the City's process and input.

In addition to acknowledging and following the City's land use regulatory proceedings, CSM has involved the City in CSM's master planning process. Likewise, the City has specifically involved CSM in its comprehensive planning process. The end result over the past 30 years, is that both the City and CSM have acknowledged and respected their relative differences of opinion as to the City's land use authority over CSM property, and worked cooperatively to resolve land use issues without resorting to expensive, and uncertain, litigation.

RECENT COURT DECISIONS

There have been no definitive appellate court cases announced since our opinion in December of 2002 that directly clarify the extent of the City's power to regulate land uses on the CSM campus. The City's primary position, that the authority to regulate land uses is a matter of "local concern", thus the City may, through its home rule power, fully and lawful exercise this authority over property owned and used by CSM, remains viable. CSM's likely position is that it is mandated by statute to provide for higher education and that such a mandate represents a matter of "statewide concern", which would pre-empt the City's powers.

While the courts have not addressed the conflict between the City's home rule authority over land use and the CSM's interest in providing a higher education, the Colorado Supreme Court did issue an opinion in 2003 wherein a home rule city's land use authority was preempted by the state's interest in fulfilling its statutory obligation to place and supervise adjudicated delinquent children in foster care homes. In *Northglenn v. Ibarra*, 62 P.3d, 151 (Colo. 2003), the Colorado Supreme Court invalidated a Northglenn zoning ordinance that prohibited unmarried registered sex offenders from living together in a single family residence, to the extent that the ordinance prohibited placement of adjudicated delinquent children in foster care homes pursuant a state statute. The *Ibarra* case does not resolve the current issue pertaining to CSM or Jefferson County, or, for that matter, shed any light on how the Supreme Court would rule on this issue. However, it

does provide an instance where the home-rule authority to regulate land use did not trump a specific statutory duty carried out by the state.

On January 25, 2016, the Colorado Supreme Court issued an opinion in *Ryals v. City of Englewood* that upheld the City of Englewood's home rule power to adopt an ordinance that, in effect, prohibited certain sexual offenders from residing in the city. The plaintiff in the case argued that Englewood was preempted from adopting such an ordinance as the regulation of sexual offenders was a matter of statewide concern. In a 5-2 decision, the Supreme Court somewhat shifted its analysis of home rule authority when it determined that the case involved a matter of "mixed local and statewide concern," and because Englewood's ordinance did not conflict with the state's interest in regulating sexual offenders, the home rule powers to enact the ordinance was upheld. While the Englewood case does lend support to the City's position that its height regulations should apply to CSM's buildings, the case certainly is not definitive with respect to the potential dispute.

The Colorado Supreme Court also announced two additional decisions in 2016 addressing the ability of a home rule city to use its land use powers to regulate fracking (*City of Ft. Collins v. Colo. Oil and Gas Ass'n. and City of Longmont v. Colorado Oil and Gas Ass'n.)*, again holding that the land use power of the home-rule cities and the states authority to regulate the oil and gas industry presented matters of "mixed state and local concern", meaning that the cities could legislate in the field, but not to the extent that such legislation would materially impair or impede the state's objectives.

The cases that have been announced by the Supreme Court since 2002 only underscore the uncertainly of the outcome should either the City or CSM choose to litigate the issue.

CONCLUSIONS

We believe that Golden is justified, and should continue to preserve and vigorously assert, its home rule authority to exercise land use regulations over properties owned by CSM (as well as Jefferson County). However, Council and Golden's citizenry should also be aware of a general reluctance of the courts to intervene in disputes between governmental entities, the courts most always encouraging a cooperative resolution if possible. This appears to be the same approach that has been followed by other Colorado municipalities that are faced with this issue, such as Boulder (University of Colorado), Ft. Collins (CSU) and Denver (Auraria Campus), none of whom have pushed the issue to litigation. When I have contacted the city attorneys for these cities, all agree that there is no clear and definitive answer from the courts on the supremacy of the zoning power. All acknowledge that the ability to cooperate and work with the universities on land use matters was the key to a resolution that was ultimately acceptable to all sides.

In light of the uncertainties associated with the exercise of Golden's land use powers, Golden should continue to work closely with CSM on land use matters so as to achieve a result that serves both the citizens of Golden and CSM. In the event that the issue pertaining to the extent of Golden's home rule power is litigated and an appellant decision is issued, the ability of CSM and the City to cooperate will, to some degree, be stifled.

The proposed Intergovernmental Agreement with CSM allows development on the CSM campus only if that development is in accord with the approved CSM Master Plan. It also specifically limits height and set-backs on the edges of the campus. The IGA would only become effective if the Agreement is incorporated into Golden's land use code through the ordinance process. If the IGA is violated or otherwise terminated, then the City's current legal arguments as to the extent of its home rule powers will be preserved and could be asserted as such time.

Cc: Jason Slowinski
Steve Glueck
Rick Muriby