Land Use and Water

A. Land Use Regulation and Watershed Planning[1]

Introduction

Traditional land use regulatory techniques can reduce or eliminate nonpoint source pollution in several ways. Comprehensive plans and zoning ordinances can control the location, type and rate of new development. In turn, if abatement of nonpoint source pollution is included within the plans or ordinances, this will help to minimize the pollution problem at the outset of development. Subdivision controls, special overlay districts, special use permits and site plan review processes can also include measures that require mitigation of nonpoint source pollution. This type of planning allows for pollution controls to be in place before development and curtails the need to deal with a water quality problem after development occurs.

Comprehensive Plans

Comprehensive plans establish policies to guide decision-makers in such areas as transportation, housing, future land use, water and sewer, and other infrastructure. As a watershed management tool, a comprehensive plan can include statements of goals and objectives to address watershed management. In addition, the comprehensive plan can be used to identify critical areas for water quality protection such as open space sites, stream corridors, drainage-ways and wetlands. Where an area-wide waste water management plan has been adopted under § 208 of the Clean Water Act, local government comprehensive plans should incorporate the policies and strategies identified in the 208 plan.

Zoning Regulations

Zoning regulations usually address the overall density and uses allowed within the geographic area defined for each zoning classification. Typically, development characteristics such as density, height, setbacks, lot area coverage, impervious surface ratio and access to light are addressed. Setbacks from streams, lakes and wetlands are frequently required by zoning ordinances to minimize sedimentation, bank erosion and chemical pollutants from interfering with water quality.

An alternative to zoning requirements that apply to all zoning categories is the overlay district. An overlay district establishes additional requirements designed to protect specific environmentally sensitive areas. For example, portions of a watershed may be designated as an overlay district in which land use activities are regulated to prohibit degradation to the aquatic habitat. Transfer of development rights programs can also be used to transfer permitted densities from areas critical to water quality protection. One of

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[1] Barbara Green and John Alby, *Watershed Planning*, 1 U. Denv. Water L. Rev. 75, 80-82 (1997).

the most effective zoning tools for minimizing water quality impacts associated with development is a limitation on the percentage of a site that may be covered by impervious surfaces. As impervious coverage increases, the velocity and volume of surface run-off increases and there is a corresponding decrease in infiltration. Increased run-off results in increased erosion from areas disturbed by construction, which, in turn, increases sedimentation in adjacent water bodies. Erosion can also cause loss of streamside habitat and instream habitat as the stream channel is covered by a blanket of eroded sand and silt.

Subdivision Controls

Another way to protect water quality is through subdivision design standards or approval criteria. Water quality impacts can be minimized by erosion and sedimentation control requirements, stormwater management systems, drainage design standards, landscaping specifications and construction management practices. To the extent the avoidance of polluted run-off from a subdivision cannot occur, a requirement of developers should be to mitigate the impacts of increased polluted run-off through some other project.

In areas that experience high snowfall, the implementation of snow storage requirements can take place to ensure that snowmelt does not result in a direct discharge to water bodies. Subdivision site design standards can prevent direct stormwater discharge to water bodies by requiring urban runoff to first pass over vegetated, undisturbed land. Site design standards can prohibit major modifications of stream channels, wetlands or lake shorelines and require that all instream work be avoided.

The design of the subdivision itself can affect water quality by encouraging the clustering of dwelling units and requiring that aquifer recharge areas, wetlands, steep slopes or other sensitive areas be left free from development. Street widths can be reduced to minimize paved surface areas and wetlands can be used to filter runoff from the development before it enters adjacent water bodies.

Regional Planning

To effectively employ land use planning and zoning techniques as a watershed protection tool, cooperation among neighboring units of government is essential. Typically, land use regulatory authority is coterminous with municipal or county boundaries. However, the need for a regional approach is evident when communities attempt to protect water quality because water pollution problems do not respect political boundaries. Decisions to approve land use activities in one jurisdiction can have adverse water quality impacts on a neighboring, downstream jurisdiction. Regional planning can encompass strategies to control these impacts from developments that transcend the boundaries of individual units of local government.

Recently, a regional planning approach known as the "compact" has received attention from commentators. This is a voluntary approach to regional cooperation that includes a regional plan and an ongoing management process for a particular geographic area. Each unit of government with jurisdiction in that area is a designated stakeholder. Under the compact approach, each governmental unit has the option of implementing portions of a

regional plan. If it adopts the plan, it becomes a "participating community" in a compact. The compact approach is ideal for addressing issues on a watershed scale because it integrates units of government horizontally (between neighboring jurisdictions) and vertically (between federal, state and local levels), all of which may have an impact on water pollution associated with the use and development of land.

Colorado has enacted a statute that confers on local governments the authority to regulate "developments of regional impact" ("DRIs"). This Act, the Colorado Areas and Activities of State Interest Act, authorizes municipalities and counties to regulate certain "areas and activities of state interest." Pursuant to this authority, several Colorado municipalities and counties have implemented permit requirements to regulate the impact to water quality and loss of quantity caused by matters of state interest.

B. House Bill 1041 (S 224-65.1-101)

Colorado House Bill 1041, also known as the Areas and Activities of State Interest Act, was enacted in 1974 and allows local governments to regulate a wide variety of development activities with guidance from the state. This gives local governments the authority to create land use policies tailored to the intricacies and interests of their communities. Development may only proceed if in line with the environmental and development goals of the local communities as outlined in their 1041 regulation. However, the bill does not give local governments the power to pass regulations absolutely prohibiting the building or operation of municipal extraterritorial water projects. It simply allows local governments to require a permit with expressed guidelines before construction is able to start. The goal is to limit water projects that will create a nuisance or significantly degrade the environment. If a project does not meet the regulations, then the permitting be deemed or conditioned.

Eagle County exercised this local authority by denying local “1041” land use permits to Colorado Springs and Aurora for their Homestake II water development project. The County found the project to breach local interests due to its negative environmental impacts and lack of local control. The Colorado Supreme Court refused to review Eagle County’s decision, even though the project was to solve many water problems for Colorado Springs and Aurora.

C. Land Use Control Enabling Act (1034)

This Act gave towns, cities, and counties the authority to:

- Regulate development in hazardous areas
- Protect wildlife habitat and species
- Preserve areas of historical and archeological importance
- Regulate the location of activities and development that may cause significant changes in population density
- Regulate land use based on impacts to the community

- Impose impact fees or other charges related to impacts from proposed development on facilities provided as a service of the local government (e.g. wastewater treatment plants).

D. Intergovernmental Agreements

Intergovernmental agreements give neighboring municipalities or counties the authority to regulate beyond their borders and within the entire area covered by the agreement. In fact, in Colorado governments are expressly authorized and encouraged "to cooperate or contract with other units of government … for the purposes of planning or regulating the development of land including, but not limited to, the joint exercise of planning, zoning, subdivision, building and related regulations."[2] This allows governments to plan for a regional and coordinated approach to addressing impacts of water development activities. This is particularly important for water projects located within one jurisdiction that cause impacts in other jurisdictions. Intergovernmental agreements can mitigate project impacts by incorporating all the counties or municipalities involved in a cross-border agreement, and agreeing to any stipulations prior to the occurrence of any impacts.

E. Resources

Citizens Guide to Colorado Water Law, Colorado Foundation for Water Education (2003).

Citizen's Guide to Colorado Water Quality Protection, Colorado Foundation for Water Education (2003).

Peter D. Nichols, Megan K. Murphy, and Douglas S. Kenney, *Water and Growth in Colorado: A Review of Legal and Policy Issues*, Natural Resources Law Center, University of Colorado School of Law (2001).

Headwaters, Colorado Foundation for Water Education (Summer 2004).

[2] C.R.S. § 29-20-105(1).