

# Growth Management In Boulder, Colorado: A Case Study

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## INTRODUCTION

Growth management and “smart growth” are the only plausible responses thus far to the sprawl, the geography of nowhere, that characterizes twenty-first century America. Boulder’s experiments with growth management have spanned four decades. As a result, Boulder’s successes and failures and the various paths it has explored may hold lessons for others who are searching for effective growth management measures.

Growth -- particularly in the form of urban sprawl -- is on the minds of many in the western states. It is projected, for example, that the population of Colorado will increase by 1,920,000 people during the period from 1996 through 2025 -- an increase of over twenty-five percent.<sup>1</sup> The prospect of this intense growth, focused on the Front Range cities, has stimulated great concern about the potential environmental impacts:

- Increasing air and water pollution;
- Increasing energy and resource consumption;
- Loss of wildlife habitat and biological diversity; and
- Loss of open space, scenic vistas and historical areas.

Growth and sprawl are experienced by people on a very personal level. Often, this takes the form of increasing traffic congestion and a dispiritingly long commute to work. Or it may manifest itself when children are forced to endure staggered school days because of inadequate facilities to serve ever-expanding communities. Attention increasingly focuses on the crop of identical roofs which seem to grow across land which was once open country.

These and other stimuli inspire community concern about maintaining the quality of life as the population increases. The image of the west which attracts new immigrants -- and which holds old residents -- includes open spaces and long, beautiful vistas. The specter of a never-ending concrete urban landscape is jarring to Coloradans, and other westerners, in a way that it probably isn’t to other Americans, but all of America suffers from sprawl.

### Evaluating Growth Management

Evaluating the success of growth management is not easy. Frank Gray, Director of Community Planning and Development for the City of Lakewood, Colorado, and past Planning

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<sup>1</sup>Edward H. Ziegler, Professor of Law, University of Denver College of law, “Effective Growth Management: Proposals and Perspectives,” prepared for the Rocky Mountain Land Use Institute Seminar, 1999.

Director for Boulder, has suggested that an analysis of the success of growth management should focus on four interdependent factors:<sup>2</sup>

- Effectiveness of attempts to control the **rate of growth**;
- Effectiveness of attempts to control the **location of growth**;
- Effectiveness of attempts to control the **type of growth**, including the balance between residential and non-residential development; and
- Effectiveness of attempts to control the **impact of growth** upon the physical and social environment.

Gray stresses that all of the above factors must be considered simultaneously. Focus on one to the exclusion of others will, in his view, cause systemic distortions and may cause as many problems as it solves. For example, exclusive focus on the rate of growth fails to recognize issues presented by a problematic type of growth. Thus, residential growth rate management without some constraint on commercial and industrial growth is likely to cause a jobs/housing imbalance over time. That is certainly Boulder's experience.

But Gray's four factors may not be sufficient. In view of the strong reactions which can be generated by fast growth and by attempts at management of that growth, it is also appropriate to judge growth management systems by a fifth factor: **The degree to which they stimulate broad community involvement with, and acceptance of, growth management program elements.**

## **Boulder's Experience with Growth Management**

Boulder has experimented with a series of growth management measures. The process has not been smooth. At times it has changed direction or approach. It has often been driven by direct community legislative efforts -- or by the prospect of initiated legislation in the absence of City Council action. Because of the longevity and variety of these efforts, Boulder's experience has lessons for the future of the many communities which face rapid growth and resultant political and legal pressures.

### **I. URBAN SERVICE AREAS**

The City of Boulder ("City") has used urban service areas as a method of controlling or regulating growth since the 1950's. In the building boom that occurred after World War II, the City refused to provide urban service to any property outside of its municipal limits. That policy changed in 1958 with the decision to provide out-of-city revokable water and sewer permits. The City's first urban service boundary, called the "Blue Line," was established in 1959 and runs along the base of the City's "mountain backdrop." The Charter limits the extension of water above a certain elevation. Once the western limit was established, the City adopted a simple eastern service area boundary

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<sup>2</sup>Frank Gray, "Is there a magic pill for urban growth, sprawl and equity?" prepared for the Rocky Mountain Land Use Institute Seminar, 1999.

based on its ability to perpetuate a gravity flow sewer system. The direction of development within the service area started with a liberal out-of-city utility connection policy known as “The Spokes of the Wheel,” designed to promote expansion of the City, and evolved to the growth-limiting three-stage urban service area system used today. Utility extension policy was the earliest sprawl issue debated among Boulder citizens.

## **The Blue Line**

Boulder has long valued its beautiful surroundings at the base of the Front Range foothills. After examining the City for the Boulder Civic Improvement Association, Frederick Law Olmsted, Jr. recommended in 1910 that the foothills of the City be preserved in their natural state.<sup>3</sup> Boulder’s first urban service boundary, the “Blue Line,” was established in 1959 as a citizen-initiated City Charter amendment. The purpose of the Blue Line is to protect the foothills from development which was considered imminent and extremely detrimental to the natural beauty of Boulder. It insured that City water service could not be used to further urban development up into the foothills.

In 1959, after the City Council repeatedly failed to refer a measure to the voters, group of citizens began circulating a petition for a Blue Line charter amendment. The Blue Line charter amendment prohibits the supply of City water to areas lying above a certain elevation. Effectively, this line prevented the City from annexing or serving the land west of its municipal limits.

Once the City had adopted the Blue Line as an urban growth boundary along its western side, it appeared poised to continue to develop its utility capacity to serve new growth. The City’s primary planning document was called the “Guide for Growth,” adopted in January, 1958. It consisted of a land use and circulation map, a summary of basic studies, plans for circulation, land use, schools, recreation, central district and utilities, and action programs. It was issued jointly by the Boulder Regional Planning Board, which consisted of Boulder County, the Boulder Valley School District, and the City.

## **The Service Area Concept Emerges - a.k.a. “The Spokes of the Wheel”**

While the Guide for Growth offered a rudimentary land use plan for the Boulder Valley, it did not address the issue of delivery of urban services. The City Council began to investigate the service area concept in 1962. From the study, a service area was drawn that could utilize a gravity flow sewer system. The boundary is roughly the natural drainage basin for the Boulder Valley.

As a result of these planning efforts, two documents were adopted: “Boulder’s Fringe Area Objectives” (1964) and “The Service Area Concept: A Program for Boulder’s Planned Development” (1965), often referred to as “The Spokes of the Wheel.” The assumption for both plans was that growth of the City was inevitable. Therefore, the plans concluded, the City should

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<sup>3</sup>Frederick Law Olmsted, Jr., “The Improvement of Boulder, Colorado,” prepared for the Boulder City Improvement Association, 1910.

guide growth in the fringe areas, to prevent disorderly sprawl, through contracts for water and sewer service outside of the City's boundaries.

The objective was to extend services along three major arteries (or "spokes") radiating from the center of Boulder to the north (the Diagonal Highway), south (South Broadway), and east (Arapahoe Avenue), with development occurring along the rim of the Boulder Valley. This version of "manifest destiny" would allow development to begin from the outer reaches of the City's service area and to work inwards towards the City, while allowing development adjacent to the City to work outward. This required persons on out-of-city utility service to:

1. Annex when eligible;
2. Build improvements to City standards;
3. Allow City review of development plans; and
4. Pay increased plant investment fees and user rates.

The proponents of The Spokes of the Wheel concept asserted that by having the City serve the properties, the City would discourage the formation of special districts throughout the Boulder Valley. The concept was summed up by a Councilmember, who stated that: "There is nothing we can do that will stop growth. The question is whether the growth that will happen will be orderly or just haphazard."<sup>4</sup>

The Spokes of the Wheel plan was implemented to the north, along the Diagonal Highway, with the development of the Gunbarrel community and its so-far-only-partial absorption into the City. But, expansion was more contiguous to the east, and the whole concept came a cropper to the south in 1965, in the Rudd election, as the voters put an end to the construction of the third spoke by repealing an ordinance approving an out-of-city utility connection going down Broadway and Highway 93 towards Eldorado Springs and the Jefferson County line.

## **The Rudd Election**

In 1965, the developer of the Rudd Property, a large tract to the south of the City, proposed to finance and construct the three mile, twenty inch wide, transmission line, together with pumping and storage facilities, and a two-mile sewer trunk to tie into the City's sewer system. The City staff estimated that it would be able to acquire additional water rights from the increased water rates that would be paid by the rate payers within the development. The water capacity planned to serve water to the property was based on a population of 25,000 people.

As news of the plan surfaced, opposition within the community grew. Some citizens questioned the rationale for using the City's excess water capacity to serve an area that would not be eligible to annex within the near future. Opponents of The Spokes of the Wheel concept and the provision of water and sewer service to the Rudd property questioned the City's ability to acquire

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<sup>4</sup>"Service Area Concept Endorsed," *Daily Camera*, July 15, 1964.

the amount of water necessary to serve all of the proposed new service area. Citizens pointed out that the City should not be using its capacity to serve water to serve property so far away from the existing municipal limits. There was also a concern that construction of the transmission line would accelerate the development of properties along the utility line out to the property. And the environmental coalition that had supported the Blue Line just six years before was ready to take another stand against growth in the Boulder Valley -- this time to the south.

Citizens requested that the matter be submitted to the voters. The City Council refused. Again, a successful petition effort resulted in a referendum of the ordinance. A majority of the voters voted against the City Council's ordinance. The election ended The Spokes of the Wheel concept, but left the City to deal with the spoke that had already been extended to the north. With the annexation of the non-residential portions of Gunbarrel (located northeast of Boulder), including the IBM plant, in 1964, the stage was set for a long impasse over annexation of the residential portion of Gunbarrel -- a still unresolved issue. But with the Rudd election, expansion of Boulder along the spokes of the wheel was dead.

### **1970 Boulder Valley Comprehensive Plan**

The adoption of the 1970 Boulder Valley Comprehensive Plan was important in that it set the tone for further City and County cooperation and introduced the concept of staged urban growth in the Boulder Valley. The plan consisted of a map on one side, and the text of the plan on the other side. The detail was sketchy. It was primarily a land use and service area map which also defined future open spaces around the City. The concept of staging development based upon proximity of land to the existing City limits shows up as a land use category called "development after 1990." However, the plan continued to reflect "The Spokes of the Wheel" concept albeit deferring the impact, by showing subcommunity centers in the "development after 1990" area. While it was jointly adopted by both the City and the County, the implementation section suggested the adoption of some additional development regulations. However, it largely placed the burden on the City to implement the plan through annexation and utility service policies.

### **The *Robinson* Case and the 1977 Boulder Valley Comprehensive Plan**

Boulder's comprehensive planning efforts took a hit when the Colorado Supreme Court handed down its decision in *Robinson v. City of Boulder*, 547 P.2d 228 (Colo. 1976), *reversed in part, Bd. of Co. Com'rs v. Denver Bd. of Water Com'rs*, 718 P.2d 235 (Colo. 1986). Robinson received an approval for a subdivision in Gunbarrel, which was in the County, consistent with the County's zoning for the land. As a condition of the subdivision approval, Robinson was required to secure water and sewer service for the development. Robinson's land was included in the City's service area. But at the time, the City provided water and sewer service to Gunbarrel only through the Boulder Valley Water and Sanitation District, ("District"). Robinson's property was next to the District. Pursuant to a City ordinance, the District could not expand without prior approval of the City Council, which was refused.

The *Robinson* Court concluded that the City could not deny water and sewer service to this area based upon land use and growth control considerations, but instead, could only deny such service based upon “utility-related” reasons, because the City’s utility service program constituted a public utility under state law. The Court’s conclusion was based on the fact that the City, through a variety of actions, had exclusive control of the provision of water and sewer service in this part of the Boulder Valley. *Robinson* effectively ended the City’s reliance on utilities extension as a tool for controlling growth in the unincorporated portion of the Boulder Valley. But many people were philosophical and optimistic about the result. Boulder County Long Range Planner Bill Trim thought that the *Robinson* decision took away a crutch: “It was the best thing that could have happened. The policies needed more support. Now they will have to open up a dialogue on the realities of planning.”<sup>5</sup> In other words, the contradictions between the County’s and the City’s plans for the unincorporated areas, and specifically Gunbarrel, would have to be resolved. The debris left by The Spokes of the Wheel would have to be mopped up.

And that is exactly what happened. Through intergovernmental cooperation with Boulder County, the City was able to participate in extra-territorial planning. The City changed its service area concept with the adoption of the 1977 Boulder Comprehensive Plan which was based on staged development. It divided Boulder Valley into three service areas:

- Area I, land within existing City limits, which were receiving all municipal services;
- Area II, land eligible for annexation within the next fifteen years; and
- Area III, land not planned for urban development within the fifteen year planning period.

One of the important implementation strategies of the 1977 Comprehensive Plan was again tied to utility provision. Immediately after adopting the Comprehensive Plan, the City changed its policies regarding the provision of out-of-city utility service, limiting it to properties within Area II of the designated service area and to properties that do not constitute new urban development. New urban development required the full range of urban services, -- not just water and sewer, but police and fire services as well. After 1977, the City would only supply out-of-city service to properties developed prior to 1977, not eligible to annex, and in Area II.<sup>6</sup> Also adopted was a land use map that specifically defined the type and intensity of land use. The County agreed to zone the unincorporated areas in a manner that was consistent with the Comprehensive Plan. The County’s rezoning of 25,340 acres in 1985 and 1986 was its most difficult step in implementing the Boulder Valley Comprehensive Plan.<sup>7</sup> The result has been true comprehensive planning between both the

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<sup>5</sup>Penne, R. Leo, “Boulder: A Case Study in the Management of Urban Growth,” *Nation’s Cities*, September 1976, p. 15.

<sup>6</sup>City of Boulder Ordinance Nos. 4365 (water) and 4366 (sewer), 1978.

<sup>7</sup>Gillen, Sharon, “Comp Plan Dreams Come True - Creators Say Plan a Success,” *Daily Camera*, April 3, 1988.

City and the County in the Boulder Valley. Both the City and the County have lived with a stable Comprehensive Plan framework since 1977.

### **What Was Learned from All of This**

The City, as a utility provider, has to be cognizant of the needs and desires of the community, not simply the engineering and economic challenges of designing a system that works. Both the Blue Line and the Rudd elections occurred despite staff and Council advocacy to the contrary. When a community grows to distrust its policy makers, it goes to the ballot box. And that is what happened in 1959 and 1965, setting the stage for the Open Space election in 1967, the fifty-five-foot height limit election in 1971, and the growth management election in 1976, which will be examined in the remainder of this monograph.

After the *Robinson* decision, Boulder's efforts to guide growth escalated. The City moved away from reliance on utility service to guide growth. And once the City decided on the staged urban service area concept, the reservation of Area III ultimately made it possible to acquire most of the open land surrounding the City, out to the rim of Boulder Valley, as City Open Space. This eventually became the City's most potent growth management tool.

Unlike many cities that have either sprawled into the countryside or facilitated leapfrog development, Boulder has created a sharp edge between urban and rural development. The definition of areas where services are to be provided (along with initial designations of land use) allows a direct link between land use planning and infrastructure planning. Parks, recreation, police, fire, transportation, water, sewer and flood control service providers can develop their master plans knowing where services are to be extended, over what time frame, and for what types of land uses. The urban service areas also help to focus investment on redevelopment within the City. Through redevelopment of underutilized areas and infill development, the City has been able to capitalize on its existing public investments in infrastructure.

The City coordination of planning efforts with the County is the glue that holds all of the planning efforts together. The City and County have maintained relations that lead to cooperative planning efforts from the early days of the Boulder Regional Planning Commission in the early 1950's to today. City and County cooperation in working toward common goals has prevented leapfrog development patterns in the Boulder Valley and other problems that occur when governments compete with each other. Thus, the environmental coalitions that spearheaded the 1959, 1965, 1967, 1971, and 1976 elections have essentially guided Boulder City and County land use planning since then, with occasional scrapes along the way. The result has been the preservation of two-thirds of the Boulder Valley.

## **II. THE COUNTY'S PERSPECTIVE**

### **Boulder County's Entry into Growth Management: Comprehensive Planning**

Boulder County, Colorado, is located along Colorado's Front Range and within the Denver-Boulder Metropolitan Statistical Area. It contains 753 square miles, the eastern third of which is characterized by high plains, the western two-thirds being the foothills and Rocky Mountains, leading up to the Continental Divide, which forms the western boundary of the County. Much of the mountainous area is owned by public entities, including the federal government, in the form of Rocky Mountain National Park, Indian Peaks Wilderness Area, Roosevelt National Forest and Bureau of Land Management lands. In addition, the cities of Boulder, Denver and Longmont have large municipal water reservoirs and preserved watershed lands. There are three incorporated towns and many small private landholdings in the mountainous area. In the eastern one-third of the County, the "high plains" area, there are eight incorporated cities and towns. This portion of Boulder County has for several decades been in the path of suburban development in the northwest corner of the Denver metro area. Over 90% of the County's 260,000 population resides in this part of the County.

As the wisdom and benefits of the City of Boulder's growth management efforts became known and popular with citizens in surrounding areas of Boulder County, the County began its own growth management planning and implementation in 1974, with the formation of a citizen's committee charged with the formulation of a new Comprehensive Plan for Boulder County. Over four years, this committee worked on a plan which was guided by several fundamental concepts:

- Development requiring urban services should occur only within incorporated cities, not in the unincorporated area of the County.
- Due to the difficulty of controlling land use where urban services are made available by special districts, new special district formation should occur only in those limited unincorporated areas already developed at urban density.
- The separate character of communities in Boulder County, both incorporated and unincorporated, should be preserved, and the best method of accomplishing this is to ensure that visually-significant greenbelt, agricultural or other limited development, rural areas remain as buffers in between such communities.
- Riparian areas and other wildlife habitat should be preserved.
- Natural landmarks, and the visual access to them from roadways and other public places, should be preserved.

After creating a proposed plan, the proposal was submitted to the Boulder County Long Range Planning Commission, which reviewed and approved the plan in 1977. After further public hearings before the Board of County Commissioners, the plan was approved by the Board in 1978.

Of course, having a plan in place is the easy part, and there are many master plans sitting gathering dust on shelves all over the country. The difficult part comes in its implementation. In fact, there is a statutory basis for the schizophrenia between plan adoption and implementation. In Colorado, counties are not required to enact zoning regulations (although counties are required to adopt subdivision regulations), and even when they choose to enact zoning, a comprehensive plan is not required. Moreover, where adopted, comprehensive plans are held to be advisory only, except to the extent that comprehensive plan provisions are incorporated expressly into regulations.

## **Implementation: Downzoning**

As is so often the case, Boulder County, in the period between the advent of general zoning regulations in 1956 through 1985, had utilized a typical Euclidean pyramid zoning scheme, with the emphasis on providing for future development through land uses more intense and densities greater than were currently extant “on the ground”. Some of this was by design, implementing early comprehensive plan visions of a future suburban county, some by speculative upzonings.

Over the six years after adoption of the Boulder County Comprehensive Plan, the County and interest groups of its citizens debated the best methods of implementation of the plan’s vision. Ultimately, in 1984, the Land Use Department staff brought forward a proposal to the Planning Commission and then the Board of County Commissioners to implement the comprehensive plan’s recommendations through downzoning most of the unincorporated area of the County. Much of the County had over the years been upzoned from agricultural zoning to various residential and commercial districts, and most of this rezoning had been done on a speculative basis, resulting in large areas zoned for urban uses and densities, but only scattered, minimal actual development.

The County’s downzoning was comprised of a trio of primary initiatives. First, the regulations for the agricultural zone district, and its companion district in the mountainous area of the County, forestry, were amended to require 35-acre minimum lot sizes (up from 1 to 5 acre minimums). The 35-acre minimum corresponded to the state subdivision law’s limitation, which prevents counties from imposing regulations on the subdivision of land into parcels of 35 acres or more.<sup>8</sup>

Second, undeveloped parcels zoned for commercial or industrial use were downzoned to agricultural, except where in an urban enclave. Finally, undeveloped residential areas were downzoned to agricultural or forestry, and developed residential areas were rezoned to a “dead” zone district, i.e. a zone district which recognized established development, but future rezonings to these districts were not permitted.

After almost two years of hearings in which much bitter debate occurred amongst the citizenry, in early 1986, the Board of County Commissioners approved the final set of downzoning proposals, resulting in a comprehensive downzoning of tens of thousands of parcels county-wide.

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<sup>8</sup>The basis for the use of 35 acres as the limit of subdivision authority goes like this: in a state which was originally laid out and conveyed according to the federal government’s survey, sections of land are supposed to be 640 acres, and many farms were a quarter section (supposed to be 160 acres). However, since the earth is round, the curvature of the earth requires that sections deviate from the 640-acre standard, and the government survey varied section lines in order to account for this by creating numerous sub-640-acre sections. Thus, instead of using a 1/16th section standard for subdivision limits (40 acres), recognizing that this could result in limiting a number of the quarter-section farms to subdivision into less than 4 legal parcels, the legislature moved the limit down to 35 acres.

In order to preserve this result, the Zoning Resolution was amended to incorporate the use and density provisions of the Comprehensive Plan, and the rezoning regulations were amended to mandate compliance therewith. Thus, in the 14 years since the downzoning, fewer than 10 parcels have received rezoning approvals, in a county which has more than doubled in population in that time.

The Comprehensive Plan is buttressed and to the extent of conflict superceded by the Boulder Valley Comprehensive Plan, entered into jointly by the City and the County for the first time in 1977, for the Boulder Valley area of the County. For the unincorporated area within the Boulder Valley, defined as Areas II and III, this Plan shares the goals noted above for the county-wide Comprehensive Plan.

### **Other Regulatory Implementation Tools**

#### Lot Merger Requirements:

In 1993, for the mountainous area, and subsequently county-wide in 1994, the County adopted lot merger requirements which mandate that multiple contiguous lots held in common ownership which are non-conforming as to the minimum lot size standard (35 acres), where one or more of the lots is vacant, be treated as a single building parcel in order to meet, as closely as possible, that standard. For the most part, this requirement has meant that many multiple parcels originally created by patent from the federal government for mining claims, each of which is no more than 5 acres in size, must be combined if they are to be used as building sites for residential purposes. Administrative review provisions ensure that, should there be situations in which this requirement would run afoul of legitimate investment-backed expectations, a variance can be obtained.

#### Regional Comprehensive Development Plans by Intergovernmental Agreement:

One way in which county comprehensive planning which seeks to preserve the rural character and agricultural viability of unincorporated areas is frustrated is municipal annexation. Under the Municipal Annexation Act of 1965, §31-12-101, C.R.S., *et seq.*, cities and towns have virtually unfettered ability to annex surrounding unincorporated lands, even lands which are distant from any current municipal boundary.

The liberal scope of annexation powers creates a significant amount of uncertainty for residents and landowners in the unincorporated areas, where the county comprehensive plan may give way to the plans of cities and developers with only a moment's notice. Of course, once lands are annexed, all county regulatory jurisdiction is extinguished. The competition for economic development among multiple municipalities simply exacerbates this, often creating a bidding war between the cities over individual properties which causes planning, both the county comprehensive plan and the extraterritorial master plans of the cities, to get ignored in the exigent circumstances of a race to annex. Moreover, this situation, when left unchecked, dooms any attempt to preserve

rural and agricultural areas, ensuring that such lands are merely in a holding pattern for future development.

However, a relatively recent series of constitutional and statutory authorizations has helped to give counties and cities some tools to deal with this problem. In 1970, the voters of Colorado adopted an amendment to the state constitution, Art. XIV, §18, which authorizes the state and any of its political subdivisions to cooperate and contract for the provision of any function, service or facility lawfully authorized to each of the contracting entities. This includes provision of such function, service or facility through creation of a separate governmental entity. This constitutional authorization was implemented by statutory authority set forth in §29-1-201, *et seq.*, C.R.S. The legislative declaration for this Act provides that its authority shall be liberally construed to permit and encourage "...governments to make the most efficient and effective use of their powers and responsibilities by cooperating and contracting with other governments." §29-1-201, C.R.S.

In 1989, the Local Government Land Use Control Enabling Act, §29-20-101, *et seq.*, C.R.S., (also known as H.B. 1034, 1974 Sess. Laws), was amended to provide for intergovernmental cooperation in the land use regulatory context. Section 29-20-105, C.R.S., provides additional specific authority for intergovernmental cooperation by expressly granting the power to contract for joint adoption of "...mutually binding and enforceable comprehensive development plans for areas within their jurisdictions." Further, the statute provides broad authority for local governments in effectuating their joint goals, and sets forth various mechanisms which can be considered for accomplishing these purposes, including use of land use regulations which apply irrespective of the annexation status of the properties involved, as well as the sharing of tax revenues from properties involved. §29-20-105(f) and (h), C.R.S. Thus, use of intergovernmental agreements to resolve conflicts between multiple jurisdictions(county-county, city-county, city-city) is a welcome and necessary tool for rural preservation in Colorado.

This authority has ushered in the opportunity for a new era in planning and regulating for major development proposals having regional impacts as well as for areas where multiple development proposals which have multi-jurisdictional impacts. The experience in Illinois may be instructive in this regard. See, e.g., *People v. City of North Chicago*, 586 NE2d 802 (Ill. App., 2nd Dist., 1992). The significance of statutory authorizations in this regard cannot be overstated, since local governments have long labored under special impediments in the area of contractual relationships.

#### Common-law Doctrines:

Binding Successors; Bargaining Away Legislative Authority: Local government counsel shy away from recommending many contractual relationships for their clients due to the existence of these doctrines, inherited from English common law. Generally, these doctrines prohibited contracts of local governments concerning their "governmental" powers, including the police power, as opposed to their "proprietary" areas of authority. See, e.g., *Pikes Peak Power Co. v. City of Colorado Springs*, 105 F. 1 (10th Cir., 1900)(long-term hydro-electric power supply contract is

enforceable; concerns propriety interest of city); see also Rohan, Local Government Law §22.05. The consideration of the application of these doctrines by Colorado courts has uniformly been in the areas of public utilities supply contracts and franchises, and contracting for public employees, either individually or collectively.

Although not to date considered by Colorado courts, these doctrines have been held not to apply to intergovernmental agreements, Rohan, supra, §18.11, §20.05 n.21. The existence of state enabling legislation permitting such intergovernmental agreements has repeatedly been held to overcome such common law objections. *Terminal Enterprises, Inc. v. Jersey City*, 258 A.2d 361 (N.J. 1969); *McLaughlin v. Housing Authority of City of Las Vegas*, 227 P.2d 206 (Nev. 1951); *State v. Smith*, 141 P.2d 651 (Wash. 1943); McQuillen, Municipal Corporations §29.101. See also *City of Centreville v. City of Warner Robins*, 508 S.E.2d 161 (Ga. 1998).

#### Antitrust - State Action Exemption:

This is an additional area in which local government counsel have urged caution in connection with contracts, at least since the decision of the U.S. Supreme Court in *City of Lafayette v. Louisiana Power and Light Co.*, 435 US 389 (1978), in which the Court held that local governments are not automatically immune under the state action doctrine first applied in *Parker v. Brown*, 317 U.S. 341 (1943). The good news is that federal case law concerning intergovernmental agreements has uniformly upheld the state action immunity of local governments acting under either a statute authorizing a specific type of intergovernmental agreement or under a general intergovernmental cooperation and contracting enabling statute or constitutional provision. See *McCallum v. City of Athens*, 976 F.2d 649 (11th Cir. 1992) (immunity where intergovernmental agreement between municipal water providers allocating exclusive service territories was undertaken pursuant to general water system enabling statutes); *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988), *cert. den. sub nom. Alter v. Schroeder*, 488 U.S. 891 (1988) (immunity where intergovernmental agreement between county and city allocated "spheres of influence" for purposes of controlling sewer connections, pursuant to general statute providing for intergovernmental cooperation in provision of sewer services); *LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985) (immunity where intergovernmental agreement between county and multiple cities within county allocated "spheres of influence" for annexation and utility purposes, pursuant to general constitutional provision authorizing intergovernmental cooperation); *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983) (immunity where intergovernmental agreement required all participating municipalities to adopt ordinances restricting disposal of solid wastes to jointly operated landfill, pursuant to state solid waste facilities enabling statute); *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823 (9th Cir. 1981) (immunity where intergovernmental agreement allocated unincorporated territory between two cities for water service purposes pursuant to water service enabling statute); and *Pinehurst Enterprises v. Town of Southern Pines*, 690 F.Supp. 444 (MD N.C. 1988) (immunity where intergovernmental agreement allocated exclusive sewer service areas, pursuant to general sewer service enabling act).

In addition, the U.S. Supreme Court has recently made the downside of guessing wrong as to the limits of statutory authority in this area less drastic. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the court held that a local government does not lose its state action immunity where it has made procedural or substantive errors in implementing state authority. Thus, invalidation under state law is the sole remedy, and it is not actionable under the federal antitrust laws. [Note: even where state action immunity is not available, local governments are not liable in damages for antitrust violations; the remedy under the federal antitrust laws is limited to invalidation. Local Government Antitrust Act of 1984, 15 U.S.C.A. §§35 & 36.]

### Cluster Development:

In Boulder County, one incentive for clustering development, and thus realizing service efficiencies as well as preserving agricultural lands in viable-size acreage, is the Non-Urban Planned Unit Development (NUPUD). This type of subdivision, which permits an additional residential unit per 35 acres as an incentive, requires the development occur only on 25% (or 15%, where the Board of County Commissioners finds that the land involved is designated lands of agricultural or environmental importance) of the property and the remaining acreage (the agricultural outlot) is encumbered by a conservation easement. The outlot remains in private ownership, but the conservation easement is deeded to the county.

In 1989 the NUPUD regulations were modified to allow for the assemblage of development units from two or more non-adjacent parcels of land. The development rights appurtenant to the sending parcel(s) are transferred to one or more receiving parcels. Unlike the NUPUD, the Noncontiguous Non-urban Planned Unit Development (NCNUPUD) has as one of its stated objectives the preservation of designated significant lands -- agricultural, open space, environmental and cultural resources.

### **The “TDR” Program**

In deciding whether to proceed with a TDR program as part of the overall regulatory comprehensive development plan implementation, two questions presented themselves. First, what statutory authority exists for such a program, and second, could we legally adopt a mandatory, or combination mandatory and incentive-based voluntary program?

Statutory authority is always the first question for a county, at least in Colorado. Colorado is a Dillon-rule state, requiring express, or necessarily-implied, statutory authority for all actions taken by non-home rule governments. In considering the question of statutory authority, it is useful to consider what a TDR program does. A TDR program provides for the shifting of density, usually residential but sometimes commercial/industrial, from one area of the county to another, based upon a policy determination, preferably backed up by the county's comprehensive plan, that lower density than that otherwise provided by right under the county's zoning regulations is desirable in certain areas, and that in order to achieve such lower density, it is appropriate to allow an increase in density in certain other areas of the county.

A TDR program implicates the most basic of statutorily-granted powers. In §30-28-105, C.R.S., (part of Colorado's adoption of the standard zoning enabling act), county planning commissions are empowered to adopt master plans which provide for the physical development of the county, addressing issues including location and extent of public facilities and infrastructure; the character, location and extent of residential developments, agricultural areas and open space; and a general land use classification system. This master plan is to be adopted based upon studies which deal with issues including the coordination of future development to promote efficiency and economy in land use, and includes plans for the distribution of population and uses of the land for urbanization, habitation, recreation and agriculture, among others. Specifically included is direction to ensure that future development reduces the waste of resources which comes from "...excessive scattering of populations...." §30-28-107, C.R.S.

In preparation for adoption of a general zoning resolution, planning commissions are authorized to adopt a zoning plan for the county, including text and maps, which recommends regulations governing the density and distribution of population and which provides for areas "...which it deems to be...suitable for urban development and those (areas) which...it deems suitable for non-urban development", and boards of county commissioners are then authorized to adopt regulations for those purposes. §30-28-113, C.R.S. Other express purposes of such regulations include lessening of congestion in and reducing the waste of excessive amounts of roads, distributing land development and utilization, fostering agriculture, and protecting urban and non-urban development. §30-28-115, C.R.S.

Given the authorization for adoption of regulations for these purposes, it is clear that TDR programs are within the County's traditional zoning powers. In addition, powers for land use regulations set forth in Colorado's Local Government Land Use Control Enabling Act (LUCEA), §29-20-101, *et seq.*, C.R.S., also include authority for TDR programs. Neither of these sources of authority expressly states anything about TDRs, because these statutes are worded as a general authorization for all kinds of regulations which serve the purposes set forth therein. Thus, the only test for a land use regulation's authorization is whether it is intended to and does in fact serve the purposes and goals set forth in these statutes. Since TDR programs are intended to provide for the density and distribution of population within the county, often to allow the sending areas to preserve agriculture or wildlife habitat, and result in location of greater density in receiving areas which are appropriate for urbanization, these programs come within the express authority of the statutes.

The second question mentioned above, legal bases for mandatory versus voluntary programs, has several considerations. For all TDR programs, one issue is the increased density permitted in the receiving areas over that which would otherwise be permitted by comprehensive plan and/or existing zoning regulations. One way to address this is to amend the comprehensive plan to recognize the TDR program's increased density in receiving areas as meeting plan objectives for a functional area which includes both sending and receiving areas; thus, overall density for the general area is not increased. Another way is to use plan objectives for preservation of environmental/agricultural values in the sending areas as a "trump" over limitations on densities for the receiving areas in the plan. Courts have generally approved these purposes for TDR programs against claims concerning the excess receiving area density. See, e.g., *Barancik v. County of Marin*,

872 F.2d 834 (9th Cir. 1989), *cert. den.* 493 U.S. 894 (1989); *City of Hollywood v. Hollywood, Inc.*, 432 So.2d 1332 (Fla. App.4th Dist. 1983), *rev. den.* 441 So.2d 632 (Fla. 1983).

Mandatory programs raise a question which voluntary programs do not, i.e., whether the landowner of a mandated sending site has a takings claim due to inability to develop that site, despite receipt of TDR units for sale or use as part of that regulatory program. Although some courts have upheld mandatory TDR regulations as they apply to sending sites, see e.g. *Glisson v. Alachua County*, 558 So.2d 1030 (Fla. App. 2d Dist. 1990), *rev. den.* 570 So.2d 1304 (Fla. 1990); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), these have generally been in situations where TDRs were usable on contiguous, commonly held property. Even in this limited area of application, another court has held the mandatory TDR program caused a taking, and its provision of TDR units was a violation of constitutional procedural just compensation provisions. See *Corrigan v. City of Scottsdale*, 720 P.2d 528 (Ariz. App. 1985), *aff'd* 720 P.2d 513 (Ariz. 1986), *cert. den.* 479 U.S. 986 (1986).

More recently, a program of the Tahoe Regional Planning Agency which mandates the preservation of sending sites and requires landowners of such sites to receive TDR units for use on other non-contiguous sites or sale to others for same, came under scrutiny by the US Supreme Court. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). The Court there found that these regulations on their face represented a final determination of what can be done with the subject property, and therefore remanded the case back to the trial court for a decision on the merits of the takings claim. At least one court has found *Suitum* to stand for the proposition that the provisions of TDRs as an integral part of the regulatory process does not affect the property's residual value for the substantive determination of a *Lucas* taking, but may be a constitutional method of providing at least partial "just compensation." See *W.J.F. Realty Corp v. State of New York*, 672 N.Y.S.2d 1007 (N.Y. S.Ct., Suffolk County, 1998), but compare *contra* a pre-*Suitum* decision. *Rector v. City of New York*, 914 F.2d 348, 359 (2d Cir. 1990). Such decision is consistent with another court's determination that TDRs are not realty. *Wilkinson v. St. Jude Harbors, Inc.*, 570 So.2d 1332 (Fla. App. 2nd Dist. 1980).

Concerns about the legal and political ramifications of mandatory TDR programs led Boulder County in 1995 to adopt a voluntary, incentive-based program. The adopted program provides bonus density beyond that for which the property would be otherwise eligible under any other regulatory program (NUPUD, NCNUPUD), as an incentive to persuade landowners of properties in the targeted sending areas to participate. Where immediate cash considerations are paramount for some owners, the County occasionally purchases a conservation easement on some or all of the sending site and, sometimes, the County then makes available to the market some TDR units attributable to said site.

The principle TDR program components are:

- Site-specific sending areas adopted legislatively and designated by map.
- Receiving areas approved upon individual applications according to TDR PUD standards.

- TDR units represented by book ownership-registered certificates.
- Intergovernmental agreements with most plains-area cities to provide utility services to TDR PUDs located adjacent to municipal boundaries, and to accept TDR units for development in newly annexed areas.
- No “banking” of units by the County or other entity.

TDR units are awarded at the NUPUD rate (2 units per 35 acres of conservation easement). In addition, for agricultural land still in production upon which water rights are held and applied, a third unit per 35 acres is awarded where the developer grants the County an undivided interest in the water rights, and commits in the conservation easement to their continued application to the area covered by the conservation easement.

### III. OPEN SPACE

Beginning in 1967, the City implemented a point four percent sales and use tax to support an open space program for the community.<sup>9</sup> The tax is currently point seventy-three percent. With total principal expenditures of \$128 million<sup>10</sup> and current annual revenues of about \$17 million, the program has bought almost 29,000 acres<sup>11</sup> at an average cost per acre of \$4,452. Current costs are running much higher, and costs are rising fast as the remaining open land grows more and more scarce. In a sense, the end of the frontier has been reached in 1999, as the Open Space Program now stretches from Lefthand Canyon to Coal Creek Canyon. These are likely to be Boulder’s final boundaries. The total protected land in the Boulder Valley now is about 37,000 acres, of a planning area of just 60,000 acres -- almost a **two-thirds** ratio. This forms a belt of unannexed open land surrounding the remainder of the City’s planning area and the 12,000-acre City, frustrating annexation and new transportation corridors from outside. Strategic parcels have been left as (or conveyed to) Boulder County Open Space, which, together with large parcels, enjoys extra legal protection against involuntary annexation under Colorado law, § 31-12-104(1)(a), C.R.S. The 54,000-acre Boulder County Open Space Program surrounds the Boulder Open Space Program on the north and on the southeast -- and, with the Betasso Preserve and the Walker Ranch, on the southwest and the west as well, into the foothills. This is the most concrete manifestation of the City’s and the County’s cooperative relationship in managing growth in and around the Boulder Valley. The Roosevelt National Forest protects a patchwork of remaining public lands to the west, to the continental divide.

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<sup>9</sup>This monograph will capitalize the term “Open Space” when referring to the City of Boulder’s Open Space Program and its assets.

<sup>10</sup>Total Open Space revenues through 1998 were \$168 million. This number includes all sources identified in the City’s audited financial statements, as reported by the City Finance Department.

<sup>11</sup>Precisely 28,907 acres.

Aside from preserving recreational opportunities and scenic vistas, the Boulder Open Space Program has had an important role in the community's management of its growth, and that of its region. The Open Space Program has affected the location of growth in at least three ways: by compensating owners of close-in property who otherwise would have campaigned for comprehensive plan and zoning changes; by buying property zoned for development in the County; and by blocking annexation and new transportation/growth corridors. Perhaps most significantly, the program has, with Boulder's other efforts, kept the I-470 beltway seven miles from the City and four miles from the Open Space boundary on U.S. 36, at the top of Davidson Mesa. In all of these ways, the Open Space Program has been a critical support to the Boulder Valley Comprehensive Plan. The Open Space Program also has bought industrial and commercial land to help (somewhat) redress the City's jobs/housing imbalance,<sup>12</sup> has helped to establish sharp urban edges to the north and the south of the City where Open Space defines the City limits, and with the help of the Parks Program, on the west as well, and has mitigated the effects of Boulder's growth on wildlife and the environment.

The inspiration for of the Open Space Program was the City's crown jewel Mountain Parks Program, founded in 1898, with the protection of the Flatirons and eventually all of South Boulder, Bear, Green and Flagstaff Mountains. Sixty years later, in the midst of the post-World War II boom, the 1959 Blue Line was adopted by the Boulder electorate, which effectively stabilized the western (foothills) boundary of the City. Thus, having avoided development of the "mountain backdrop," the citizens three years later (in 1962) authorized a \$105,000 bond issue to acquire the 150-acre Enchanted Mesa site immediately south of the Chautauqua grounds for the Mountain Parks, to avoid development of a proposed hotel.<sup>13</sup> Significantly, the first (and last) foothills subdivision adjacent to Boulder on the west, Pinebrook Hills, was approved by Boulder County just two years later-- in 1964. After that success and failure, the citizens then three years later (in 1967) authorized the City to begin acquisition of the remaining backdrop land as well as the open land on the plains with remaining scenic or "open space" value, by passing the point four percent Open Space tax. The land was purchased when it became apparent that the Blue Line alone would not preserve the backdrop, since "water runs uphill to money." Pinebrook Hills, a subdivision northwest of the City in the foothills, simply developed its own water system.

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<sup>12</sup>The 1997 IBM purchase eliminated about 2,500 jobs from the Area I land use projections. The current balance is .94: 88,500 jobs and 94,250 population. The build out balance is projected to rise to 1.1: 112,800 jobs and 103,000 population. All of these estimates have been prepared by the City Planning Department.

<sup>13</sup>This date has been mistakenly reported as 1963 in the past. In fact, Ordinance No. 2528 (1962), set an election date of July 10, 1962, and the measure passed by 2,265-1911 on that date. However, due to eminent domain litigation and the need to raise \$20,000 in additional costs, the purchase was not closed until 1964. In spite of this purchase, two individual homes now have been built on the mesa side, without City water.

No discussion of the Open Space Program would be complete without an acknowledgment of the significant effects of the Blue Line, and the Comprehensive Plan in saving the land for ultimate acquisition as Open Space and park lands. Likewise, no general discussion of growth control would be complete without a reference to Charter Section 84, passed in 1971, by the same environmental coalition that made the 1959 Blue Line and the 1962 Open Space Program happen -- led by PLAN-Boulder (later PLAN Boulder County). Charter Section 84 adopted a fifty-five foot height limit for the entire City, at mature treetop height, that ensured that all Boulder citizens could see the Open Space and park lands they were to buy. It is important to acknowledge the critical support of the Parks and Recreation Department and Advisory Board in the formulation and the implementation of the 1967 ballot issue. Boulder County's critical contribution will be addressed as part of this presentation. Finally, no discussion of the urbanization of the Boulder Valley would be complete without acknowledgment of the decisive impact of the Rocky Flats plutonium trigger plant in directing Denver's growth to the south and east and away from Boulder in the boom years following World War II.<sup>14</sup> Rocky Flats was the moat and plutonium was the alligator that protected the open lands to the south of Boulder before the City had the means to do so.

### **1974 Open Space Plan**

The City began, in 1967, acquiring Open Space land to supplement the parks substantial land that it already owned in and around the City. Originally, the program was administered by the City Manager's Office and the Department of Parks and Recreation, but a staff proposal to collapse its management into the Parks and Recreation Department failed in 1973. Instead, a Council-appointed Open Space Board of Trustees was created, under Ordinance No. 3940 (1973), to oversee the program. Starting in 1974, Donald Walker became the first director of the Open Space Program, which was thereafter administered separately from Parks and Recreation, although Parks and Recreation rangers continued to patrol and manage Open Space lands until 1983. Thus, the program achieved functional independence from Parks and urban-shaping initiatives began to predominate over recreation, and especially active recreation, in Open Space acquisition. Mr. Walker was successful in formulating the first formal Open Space acquisition plan, in 1974.<sup>15</sup>

The 1974 Open Space Plan provided, as had the original 1967 election materials, for the acquisition of "over 10,000 acres of land." A rather modest map which had been circulated during the 1967 election campaign was amended and republished in 1974, and finally integrated into the Boulder Valley Comprehensive Plan in 1978. The 1974 Open Space Plan defined some objectives of the Open Space Program, omitting a number of active recreation elements that had been included in the 1967 election materials and discussed in the intervening years. However, the definitions were still by way of example and included a residual category of "preservation of land for future land use needs," which was not further defined. Thus, as stated by Mr. Walker, "the Open Space Plan [did]

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<sup>14</sup>The Rocky Flats plant was in operation from 1952-1992.

<sup>15</sup>This history is best summarized in Mr. Walker's article, "Boulder Preserves Open Space," *Urban Land*, October, 1977 Volume 36, No. 9, pp. 4-10.

not attempt to define open space.” In fact, Mr. Walker himself once proposed an active recreation site, characterized by some as an “amusement park,” on the “Flatirons” or “Gateway” parcel on South Boulder Creek now owned by the University of Colorado. There were very few constraints in the plan. The plan did set “priorities” for the acquisition of particular properties. But these were soon ignored in practice. Mr. Walker’s successor, James Crain, focused on acquisitions outside the boundaries of the plan -- building in instead of building out, as the 1974 Open Space Plan had proposed. The Open Space Board of Trustees and the City Council formally abrogated the plan in 1984.

Subsequent acquisitions focused on targets of opportunity, going for more remote and more environmentally sensitive land first and seeking to anticipate rather than to follow development pressure. In a sense, the evolution of the Open Space Program after 1979 reflected the primary objective of the City’s earlier “The Spokes of the Wheel” program, which was to protect an area of interest around Boulder from outside annexation. This time, Open Space acquisition rather than water service would be the method. Annexation and development was to be avoided by Boulder or any other city, in order to avoid growth altogether in the Open Space buffer area.

The program also kept enough money on hand to expand the buffer area when the City Council determined the need to do so, as it did in 1980, when it condemned land just north of the county line, west of Colorado 93, that was proposed for annexation to the Town of Superior and imminent development. The proposed Systems Development Corporation (“SDC”) headquarters would have opened up south Boulder County to development, starting with the 475-acre Flatirons Vista parcel condemned by the City. The City, with Boulder County Open Space, then assembled the south Boulder County area, from the 496-acre Eldorado Mountain/Conda quarry parcel on the west, and extending east to McCaslin Boulevard. This contained the Superior threat, which became more dire after the massive 1,700-acre Rock Creek annexation in 1987 that led to the visually striking development on McCaslin that greets visitors to the Boulder Valley on U.S. 36 today. The City also succeeded in closing the Conda quarry on Eldorado Mountain and the Varra quarry on Coal Creek, thus resolving the two great south Boulder County environmental battles that had been fought for many years, over mining of the backdrop and the Coal Creek flood plain.

All of south Boulder County was outside of the 1974 Open Space Plan boundaries. Much of it was designated as Boulder County Open Space, on the 1978 County Comprehensive Plan and the joint City/County response to the potential urbanization of these spacious short and tall grass prairie open lands was decisive and successful, with the result that the 1974 Open Space Plan was overtaken by events. Thus, flexibility in the approach and direction of the acquisition program served the City well during this period. Boulder’s use of Open Space as a method to control regional growth and to protect its natural setting was not simply a plan hatched in 1967 and implemented in the following years. It was, rather, a goal toward which we stumbled and for which we improvised and “muddled through.” The Open Space Program then began a consolidation and expansion in response to these events.

### **1986 Charter Amendment: Consolidation**

The Open Space Department and Board of Trustees functioned under Ordinance No. 3940 (1973), alone from 1979 until 1986, when the City Council adopted a goal of increasing protection of Open Space lands, which culminated in a charter vote that year, enacting Charter Sections 170-177. The new charter provisions gave the Open Space Board of Trustees charter status and also created a Department of Open Space with defined functions, conforming to practice since 1974. The provisions dealing with the department and the board paralleled quite closely those relating to Parks and Recreation. But, unlike “parks lands,” “Open Space” was restrictively defined, and more passive uses were prescribed. This gave the Open Space Program its definitive form, and responded to gathering anxiety over the open-ended uses to which Open Space land might be put. The charter locked up the Open Space land bank. The specific purposes for which land may be acquired under the Open Space Program were defined in Charter Section 176 as follows:

**Sec. 176. “Open Space Purposes-Open Space Land”**

Open space land shall be acquired, maintained, preserved, retained and used only for the following purposes:

- (a) Preservation or restoration of natural areas characterized by or including terrain, geologic formations, flora, or fauna that are unusual, spectacular, historically important, scientifically valuable, or unique, or that represent outstanding or rare examples of native species;
- (b) Preservation of water resources in their natural or traditional state, scenic areas or vistas, wildlife habitats, or fragile ecosystems;
- (c) Preservation of land for passive recreational use, such as hiking, photography or nature studies, and, if specifically designated, bicycling, horseback riding, or fishing;
- (d) Preservation of agricultural uses and land suitable for agricultural production;
- (e) Utilization of land for shaping the development of the City, limiting urban sprawl, and disciplining growth;
- (f) Utilization of non-urban land for spatial definition of urban areas;
- (g) Utilization of land to prevent encroachment on flood plains; and
- (h) Preservation of land for its aesthetic or passive recreational value and its contribution to the quality of life of the community.

Open Space land may not be improved after acquisition unless such improvements are necessary to protect or maintain the land or to provide for passive recreational, open agricultural, or wildlife habitat use of the land.

Significantly, the residual category of “preservation for future land use needs” was rejected, although “utilization of land for shaping the development of the City, limiting urban sprawl, and disciplining growth,” and “utilization of non-urban land for spacial definition of urban areas,” were both maintained as objectives, in addition to the core objectives of preservation of fragile

ecosystems, wildlife habitats, scenic areas or vistas, agricultural uses, natural areas, flood plains and water resources, and preservation of the aesthetic and passive recreational values of the land. Thus, the charter amendment, while rejecting the concept of using the Open Space Program for “land banking,” endorsed the use of Open Space to define the edges of the urbanized area adjacent to an area of influence of the City of Boulder. The acquisition program, in turn, focused on outer areas first, to define competing urbanizing areas, and built the Open Space Program inward, toward the City. Regulation of annexations and land use within the City assured management of growth pending acquisition of the remaining close-in open lands.

In addition, disposal of Open Space land was restricted under Charter Section 177, so that disposal must first be approved by at least three members of the Open Space Board of Trustees and then by a majority of a quorum of the City Council, subject to a five percent referendum petition, filed within sixty days following the date of City Council approval, which triggers an election. And, of course, any amendment to the charter also requires an election. So the Open Space Program is well protected.

Of course, protection from sale was never the primary issue. The real issues remain: Do we fence it off for wildlife or agricultural use, or do we walk on it or play on it? Can we use it and still protect it? Can we defer planning and management any longer in favor of acquisition, and should we? And conversely, do we risk losing support for the program by focusing on environmental management over public access or acquisition of additional land?

These questions were not all resolved by the new charter provisions dealing with Open Space, but the direction of the program after 1986 was toward greater environmental stewardship, greater emphasis on planning and management of the land, and less accommodation to recreational uses. This set up conflicts with the City’s “Greenways” bicycle/pedestrian path program, with agriculture and with dog and horse owners, and others, that would play out in future years.

### **1989 Accelerated Acquisition Program: Expansion**

After the reorganization of the Open Space Program in 1986, a successful election was held in 1989 to increase the point four percent Open Space tax by an additional point thirty-three percent originally set to expire in 2004 but extended through 2018 by a subsequent, 1997 election. The initial point four percent tax has no sunset clause. These elections began the “Accelerated Acquisition Program,” which greatly expanded the ultimate scope of the Open Space Program and its impact on growth in the Boulder Valley, based on new and somewhat vague (“conceptual”) maps, circulated during the 1989, 1996 and 1997 election campaigns. The elections were not all successful (the 1996 election ended in a narrow defeat). But together, they showed the ongoing public support for the Open Space Program after the 1986 consolidation. The public was ready to support expansion of the program. The public did not insist on the specifics of proposed acquisitions. The program had gained the public’s trust.

In fact, while the Boulder Valley Comprehensive Plan retains the 1977 Open Space designations, and designates as Open Space the land (generally at the fringes of the planning area)

that has been acquired since then, no new Open Space designations of privately held land have been made in the Boulder Valley since 1977. This has avoided any potential conflict between the comprehensive planning process and the Open Space acquisition program. Many of the recent acquisitions have been of lands designated as open space under the County Comprehensive Plan, but outside of the Boulder Valley planning area. The 1980 SDC purchase that began the City/County effort to preserve south Boulder County as open space was an example of this, and the Accelerated Acquisition Program ultimately fulfilled the promise of the County Comprehensive Plan for south Boulder County.

Most recently, in February of 1999, the City acquired approximately 1,500 acres in Jefferson County, just south of the county line, that were not designated at all, on either City or County maps. But the City Council was determined to protect this important buffer area, absent action by Jefferson County to do so, under a threat of annexation and development as part of the proposed 18,000-acre Jefferson Center development in Arvada, to the south-east of Boulder. Thus, through the Accelerated Acquisition Program, the Open Space Program has advanced south in two major stages, with almost twenty years in between, to include the Rocky Flats area of northern Jefferson County. Again, the City, with Boulder County's support, but this time with (necessarily) less assistance, moved the open space buffer to the south -- this time by four miles, to Colorado 72, Coal Creek Canyon Road.

## **Development Rights**

The initial Open Space acquisition program focused on purchase of the full fee simple title to the land, and subsequent public access to the land. This meant that some designated open land could not be acquired, because its owners wanted to continue to use it. The Accelerated Acquisition Program has allowed acquisition of more conservation easements and development rights, which now constitute thirteen percent of the Boulder Open Space Program (3,800 acres). While there is no public access to these lands, the development threat and development value have been removed, usually in a way that accommodated open land use of the properties by the owners. Conservation easements and development rights have not been controversial in practice. They are integral to the fabric of the program as it has evolved, and they are as much Open Space as fee ownership lands. No distinction is made in this report. They have been used, and used effectively, when there was no other practical way to preserve the land. And development rights can be increased should the need develop, so there is ample flexibility for the future.

## **Mineral Interests and Water Rights**

In addition to land, the program has acquired 7,300 acres of severed or leased mineral rights, to protect Open Space lands in danger of development by mineral extraction, where the mineral rights were severed or leased prior to Open Space acquisition of the surface rights, oil and gas drilling and coal gravel and fire clay strip mining are an ongoing threat to portions of Open Space where the rights have not yet been acquired. The program also has acquired approximately 8,950-acre feet of average annual yield of water for agricultural use and maintenance of minimum stream flows. These too were a product of the new resources made available through the Accelerated Acquisition Program.

## **Vision**

The controversies that remain include the fate of the University of Colorado's approximately 300-acre parcel along South Boulder Creek, adjacent to Open Space (the so-called "Flatirons" or "Gateway" site). The City would like to protect at least some of that land, but the University already has a large investment in it. This will require a great deal of quiet diplomacy over the many years that the University says are needed to plan the use of the land. The City also needs to work with the Denver Water Board, Arvada and Jefferson County to the south, with the Rocky Flats coalition of communities on the plant site and its buffer (hopefully, a future federal wildlife preserve, like the former Rocky Mountain Arsenal) and with Lafayette, Louisville, Erie, and the new City and County of Broomfield to the east. Public Service and the National Center for Atmospheric Research own important preserves that must be legally secured as well, in order to complete the Open Space Program. And there remain many gaps that the City hopes to fill.

The City has reached ninety percent of residential and seventy-five percent of non-residential buildout under its comprehensive plan. Ultimately, aside from 648 acres in Area II (the remaining unannexed service area), and 400 acres in the Planning Reserve area set aside under the Comprehensive Plan, the City intends to preserve all of the remaining open lands that can be

preserved within the Boulder Valley planning area. It is now clear that a permanent open space buffer will be preserved between Boulder and the remainder of the Denver metropolitan area as the metropolitan area becomes clogged with infill development and Colorado grows cheek by jowl from Pueblo to Fort Collins. Of course, growth beyond the buffer will affect Boulder and increase pressure on its Open Space. The Open Space Program will substantially alleviate the many impacts that full development of the area would have implied for the residents of Boulder and the region. And both Boulder and Jefferson Counties have helped make this effort a success. This land acquisition program will have a far more significant long term effect than could be obtained through zoning, allocation of building permits, or any other form of growth management. But it must also be acknowledged that the City's and the County's development of land use techniques to complement the Open Space acquisition program has been an important element in its success.

## **Management**

In addition to growth management, the Open Space Program also has achieved substantial environmental protection. Careful planning and management of the acquired Open Space has protected 3,400 acres of State-designated and proposed Natural Areas, including an endangered plant, the Ute-ladies Tresses orchid (*spiranthes diluvialis*) which covers 160 acres, plus at least 2,200 acres of threatened Preble's meadow jumping mouse (*zapus hudsonius preblei*) habitat. In total, about 1,400 acres of significant wetlands are protected by the Open Space Program. A total of six federal and state listed plants and animals occur on City Open Space.

The Open Space Program has purchased all water rights available with each land purchase. It has purchased additional water rights to ensure minimum stream flows in the streams that flow through Open Space, such as South Boulder Creek, and has an arrangement with the Denver Water Board to store minimum stream flow water in Gross Reservoir. These water rights also provide irrigation for farming and ranching activities on Open Space land. As a result of Project Greenslope, which began in 1979, the Open Space Department began to expand its management base to include people who had direct experience and expertise in land management both for farms and ranches and for native ecosystems. This allowed, for example, the initial burns that were done on the Burke properties in 1980 in order to rid the properties of red-top grass, which is a non-native grass species that is highly flammable and was out-competing the native ecosystem. Prescribed burns have become an integral component of Open Space Management in the ensuing years. Project Greenslope was an early attempt to thin the forests in order to reduce fire danger and improve ecosystems. The current Open Space/Mountain Parks Forest Ecosystem Plan is a much more sophisticated proposal to manage the ecosystem for fire prevention values as well as habitat improvements. This will provide a larger safety factor for people who live in the urban-wildland interface zone adjacent to Open Space. And, finally area management plans are being prepared for each of seven areas, and longer standing access and trail route issues will be resolved in the planning process.

The Open Space commitment to return much of the Boulder Valley agricultural area to native prairie grass has resulted in a decrease of erosion and flooding, for example in the Gunbarrel Hill area. Returning the land to a more native state has decreased the amount of effort needed to manage

Open Space properties, and agricultural yields have been protected by sustainable grazing practices. An early bias against cattle and dogs has been overcome by prudent management, although some tension remains. Prairie dogs are, of course, also controversial, especially in agricultural areas. But prairie dogs are a “keystone” species. Thus, Open Space maintains 4,600 acres of prairie dog habitat, of which 910 acres are occupied -- a virtual raptor cafeteria. Use of Open Space to offset wetlands and prairie dog problems encountered in private development is an ongoing area of controversy. And with almost 2,000,000 visitors a year, serving as a playground for the entire Denver metropolitan area, management of the City’s Open Space and park lands is a more and more urgent and costly priority.

### **County Open Space Program**

The 1978 Boulder County Comprehensive Plan included goals and policies for preserving open space, protecting environmental resources (includes both natural and cultural resources) and developing a county-wide trail system. Areas that citizens thought were most important to be preserved as open space for future generations were shown on a map, which together with the goals and policies formed the open space plan. The designation of "proposed open space" on the map is not a zoning category, and development of any designated area is determined by the applicable zoning. The implementation of the open space plan is based on private cooperation, various land use regulatory tools, and the county’s financial ability to acquire an interest in these lands.

In 1993, County voters approved a point twenty-five percent sales and use tax county-wide with revenues earmarked for open space and recreational trails acquisition and trail development. This revenue stream currently produces \$9 million. In addition to up to \$4 million in general fund monies annually appropriated for this purpose, this revenue stream pays for all or most of the debt service for \$140 million in revenue bonds which have been approved by the voters in three elections held beginning in 1993. State conservation trust funds comprise the balance of the funds available for acquisition. The state distributes these funds monthly to local governments. The amount received varies from year to year, but Boulder County’s share in 1999 was approximately \$500,000. The state’s primary lottery funds program, Great Outdoors Colorado, provides additional funding on a project by project basis, in exchange for the provision of a conservation easement to the state GOCO program.

Currently, the County Open Space Program comprises 58,000 acres of preserved land scattered throughout the county, along with 80 miles of trails. Approximately fifty percent of this acreage is open for public use; the remainder is under agricultural lease or conservation easements which do not include public access. Most of the properties are well-suited to passive recreation, and are limited to such uses, but the County Open Space Program does not have the structure of charter protection developed for the City program.

## Interaction of Initiatives

A study, entitled "Population, Community Diversity and Growth Management," by Robert G. Cornwell of the University of Colorado (April 30, 1981), analyzed, *inter alia*, the effects of the Blue Line, the Open Space Program, the Boulder Valley Comprehensive Plan, and the Danish Plan (which limited residential growth in the City to 450 building permits per year, under a permit system). The final conclusion of the study was that no differential assessment of the various policies affecting Boulder's growth can be made. What *is* clear is that a twenty-five year growth rate in excess of five percent suddenly leveled off to two percent or less in 1977. It is now under one percent.

Thus, it is impossible to know how successful the Open Space Program would have been without the prior enactment of the Blue Line, or how effective it would have been without the continuing support of the County and City planning procedures and criteria set forth in the jointly adopted Boulder Valley Comprehensive Plan. Similarly, it is impossible to know how the City's residential and non-residential growth rate control systems have affected its Open Space Program.

But some general observations are in order. It is clear that the Open Space Program, in tandem with its Parks Program, has set aside a large amount of acreage ringing the City, including the backdrop, most flood plains and riparian land, and most land in proximity to the major entrances to the Boulder Valley and the Rocky Flats area to the south. In addition, by "painting the land green," the Comprehensive Plan has made its intent clear and thus discouraged the development of designated Open Space land, including flood plains. Ultimately, much of such land could be developed if it were not purchased under the Open Space Program. However, the "run on the bank" which might be anticipated in an open space acquisition program such as Boulder's has not developed. Instead, a steady program of Open Space acquisition, focusing on negotiation prior to the preparation of development plans, has forestalled development planning and development pressure for most designated Open Space. The absence of new designations and the stability of the service area (Area II) boundary over the last twenty years have avoided making this an issue. Land owners have not had to threaten development to realize substantial appreciation in their land values through Open Space purchases. And a series of threats from nearby development have been contained -- although the ongoing mining of the Hogan property on Coal Creek in Jefferson County, the ongoing intergovernmental dialogue/struggle over Rocky Flats, and the ongoing threat of the Jefferson Center development still present great challenges to the south.

The attitude of Boulder County and the policies of the joint Boulder Valley Comprehensive Plan, the 1985 downzoning of the County that implemented the 1977 Comprehensive Plan, and the active 54,000-acre Boulder County Open Space acquisition program on the boundaries of the Boulder Valley, also have been critical. By its decision to avoid most rural development except as permitted by the State's disastrous thirty-five-acre "by right" subdivision law, the County assured that outlying land designated as Open Space would not be so available for alternative uses under County land use policies that a "run on the bank" might be a successful gambit. And, when negotiation and planning have failed, the City has been able to purchase threatened land with available funds in order to avoid imminent development. Yet there have been a total of only nine

eminent domain actions covering about 800 acres -- less than three percent of the current Open Space holdings. Instead, the City generally has managed to purchase interests in Open Space land from willing sellers, at agricultural values and under agricultural zoning, prior to major speculative pressure. Although the average cost is now almost \$4,500 per acre, the City was able to buy most property at under \$3,000 per acre, up until very recently. Costs are now upwards of \$10,000 per acre.

The absence of a rigid acquisition blueprint has facilitated this strategy, focused on keeping cash on hand to bring willing sellers to the table. And, of course, the City's overall land use strategy, to annex and develop at a slower rate, within a stable service area, made it possible to buy the critical parcels on the boundaries of the service area before the price was affected by development pressure. The program's relative lack of success in preserving more expensive and closer-in urban open lands is the one clear downside. There, the development pressure was just too great. Thus, the outermost belt of inexpensive land surrounding the City and its service area, which is the least expensive, and thus, the most profitable to subdivide and develop, has been taken off of the market. The proverbial "corn fields" are now Open Space. And the biggest and most environmentally sensitive parcels have been acquired. But many small open land parcels within and near the City have been lost to development, as the City has densified within its Comprehensive Plan boundaries.

And the conclusion? There are other down sides, of course, the most significant being the gentrification of the Boulder Valley and the inevitable windfalls to landowners and developers bordering Open Space.<sup>16</sup> And densification and its inevitable transportation and other effects have never been popular, anywhere. But densification cannot really be blamed on Open Space. Thus, the Open Space Program remains extremely popular in Boulder, with recent polls indicating about a ninety percent approval rating. The program has defined the City and its service and interest boundaries. And since property interests are stronger than regulatory and zoning policies, at least under the Boulder City Charter, these boundaries are likely to endure, even against efforts to annex from outside, and even if Boulder never annexes its Open Space.

## **Definition of Boulder**

What is the extent of the City of Boulder's area of influence, at this point, as the ultimate boundaries of the Open Space Program become clear? With the most recent acquisition of land in Jefferson County, the Open Space Program stretches from Lefthand Canyon<sup>17</sup> to Coal Creek Canyon

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<sup>16</sup>Lake Valley and Waterstone (approximately 100 acres in the middle of the Open Space adjacent to Boulder Reservoir) are the most recent examples, and the City and the County differed sharply over both. Expansion of Lake Valley resulted in a lawsuit between the City and the County, which was settled by stipulation to development concessions.

<sup>17</sup>Significantly, the City has owned the 228-acre Buckingham Park in Lefthand Canyon since 1912.

on the backdrop. Thus, we can now say “from Lefthand to Coal Creek.” This includes Coal Creek, Eldorado, Boulder, Sunshine, Four Mile, and Lefthand Canyons. It includes the towns of Eldorado Springs and Marshall and what remains of the Valmont townsite. And it is bounded by Lake Valley, Niwot, Erie, Lafayette, Louisville, Superior and Arvada. When we say “Boulder,” this extraordinary natural setting is what we will mean.

The Open Space Program also defines an economic sphere of influence, of course. And transportation corridors, including the ubiquitous beltways that have suffocated America’s great cities, remain the greatest threat. Thus, the biggest cloud on Boulder’s horizon is the imminent completion of the I-470 beltway around Denver. Thanks in part to the Open Space Program’s efforts over the years, I-470 will go through the 95th Street/McCaslin/Indiana corridor, at least as far as Colorado 72, and perhaps as far as I-70. This means that Boulder and its Open Space will be largely spared from the growth that will be spurred by I-470. But the Flatiron Crossing Mall and associated development in Broomfield, at the U.S. 36/I-470 intersection inevitably, will become the regional shopping center when it is completed. And a new commercial and “high tech.” suburb is already being built at Flatiron Crossing and Interlocken in Broomfield. Some day, it will rival the Denver Technology Center, south of Denver, that already has more office space than downtown Denver.<sup>18</sup> Boulder will have to deal with the economic reality of a decreasing tax base. This is also a legacy of the Open Space Program.

This last point is critical. Boulder’s imminent loss of regional prominence will come about at least indirectly as a result of the growth decisions that put the I-470 beltway at the periphery of Boulder’s Open Space. Those include the community’s battle against the “missing link” between Foothills Parks and Colorado 93 as well as the shift of the Open Space Program’s focus south to Coal Creek, which precluded a western route for I-470, as proposed until 1998. Most Boulder citizens will happily forego the traffic and the crowds that come with regional retail prominence. Foregoing such growth is, in the final reckoning, the most significant of Boulder’s growth management policies so far.<sup>19</sup>

To explain: The aim of the Open Space Program from the start has been to protect against leap-frog growth in and into the Boulder Valley region, which now stretches from Lefthand to Coal Creek. The inevitable corollary has been to spur development in the center and on the periphery of the Boulder Valley region. And I-470 will make Broomfield the node of the “edge” City on the eastern rim of the valley. In a poignant reversal of the old western story, Boulder has managed to get the railroad to run seven miles outside of town. Boulder has exported some of its growth to Broomfield. This is perhaps Boulder’s ultimate growth management achievement.

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<sup>18</sup>Broomfield currently projects more than 100,000 jobs at Interlocken. Housing and transportation impacts will be enormous.

<sup>19</sup>But as Boulder’s traffic problems are mitigated, congestion on U.S. 36 will make access to and from Denver more difficult. Every “solution” begets a new problem.

It will hurt, of course. Boulder will lose convenient access to and from Denver and precious sales tax dollars. And Boulder will need to do its best to avoid as much retail “leakage” to Broomfield as possible. But a repeat of the 1978-1982 Crossroads Mall urban renewal project that resurrected and preserved Boulder’s regional retail infrastructure for twenty years seems less and less likely. Given the inevitability of the I-470 beltway, urban renewal would not succeed in maintaining Boulder’s sales tax as well this time, in any event. So Boulder will simply have to compete. And Boulder will inevitably have to call into question its use of the sales tax as a way of financing competition local government. Catalogues and the Internet have already raised this question for all cities. But it is the evils of cash register land use planning and profligate competition in offers of tax increment financing that we all need to stare in the face. Even though the sales tax built the Open Space Program, there *has* to be a better way.

#### **IV. RESIDENTIAL RATE CONTROL**

The City has a long history with residential growth control. The rate of residential growth, whether the perception is that there is too much or not enough, has long been an issue in Boulder. From the Zero Population Growth initiative and the Danish Plan in 1970’s to the more streamlined residential rate control based upon a simple prorated “sharing” of available building permit allocations on the books today, Boulder has experimented with many regulatory techniques to slow the rate of residential growth.

The City readily accommodated new housing development throughout the post-war period, up to the 1970’s through continued expansion of the City’s water and sewer utilities, doubling the population from 33,000 to 66,000 over that decade. The average annual growth rate from 1960 to 1970 was approximately six percent, six times the national annual growth rate. The local consensus was that it was too much.<sup>20</sup> Dissatisfaction with the constant growth resulted in two initiatives in 1971. The first, attempting to enact a population cap of 100,000 people, narrowly failed. The other directed the City to “take all steps necessary to hold the rate of growth in the Boulder Valley substantially below that of the 1960’s.” The measure passed, with seventy-three percent of the voters favoring the measure.

The planning effort subsequent to the election resulted in a ten-volume document called the “Boulder Area Growth Study” that was completed in 1973. It recommended a variety of actions on the state, county, and local levels for intergovernmental cooperation; a growth rate not to exceed three percent; open space financing and acquisition; historic preservation; and transportation, environmental, and land use planning.<sup>21</sup> In an effort to implement the growth study, the City adopted an interim growth policy while more permanent solutions were developed. In 1975, Paul

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<sup>20</sup>Penne, R. Leo “Boulder: A Case Study in the Management of Urban Growth,” *Nation’s Cities*, September, 1976, p. 13, quoting Paul Danish.

<sup>21</sup>*Boulder Area Growth Study Commission Final Report*, Nov. 1973, vol. 1, pp. 3-6.

Danish was elected to Boulder's City Council. Not willing to wait around to see how all of the pieces of the puzzle would come together, Danish pushed his plan for controlling growth forward.

### **The Danish Plan: Residential Rate Control Comes to Boulder (1976)**

Councilman Paul Danish presented his five-year growth management plan (the "Danish Plan") in 1976. The Danish Plan, based on a system developed for Petaluma, California, set a limit on the number of housing permits issued each year. The Danish Plan set up a merit system for rationing building permits. The features of the plan included:

1. A population growth rate of two percent or less;
2. A limit of 450 dwelling units a year for projects of over four dwelling units in the City; and
3. Not more than 275 of the 450 units could be built outside of the central area of the City to discourage sprawl and encourage redevelopment of a denser urban core.

The Planning Department recommended against the adoption of the Danish Plan to both the Planning Board and the City Council, noting that in order to be effective, any growth management plan should, at a minimum, cover the entire Boulder Valley, and possibly all of Boulder County, advising that growth management should occur on a regional rather than a local level. The planning staff considered the adoption of the rate control plan to be premature, and instead was focused on finishing a major update to the Boulder Valley Comprehensive Plan first. The Planning Board recommended denial and the Council followed the recommendation, voting 5-4 against referring the Danish Plan to the people as a citizen initiative.

After City Council failed to pass the ordinance, Danish successfully petitioned to put the measure on the November, 1976 ballot. The arguments presented against the adoption of the Danish Plan included urging that the Boulder Valley Comprehensive Plan revision could adequately manage growth, and that the Danish Plan would raise the cost of housing. In spite of the opponents' arguments, the measure passed with a razor-thin victory margin of 552 votes out of a total of over 36,000 cast.

The Danish Plan required the City to adopt a growth control ordinance by March of 1977, or a building moratorium would go into effect until it was adopted. The Council did not adopt such an ordinance until mid-March. From November until March, there was a feeding frenzy of homebuilders pulling building permits. The City issued about 900 building permits during this time period.

Housing prices sky-rocketed in the first six months of the program from a cost that was between ten and fifteen percent higher than similar houses in the Denver metropolitan area to a cost between twenty-five to thirty percent higher. However, the prices dropped back to the ten to fifteen

percent range rather quickly, and the prices then went up in step with the Denver metropolitan area for the life of the Danish Plan.<sup>22</sup>

The original Danish Plan was a competition-based system for allocating residential building permits so that annual population increase would not exceed two percent. The projects with the best features could build, those with less appealing features could not. Projects competed for points based on various criteria such as proximity to urban services, design quality, provision of low and moderate income housing, and energy conservation features. The projects that received the highest number of points got all of the allocations. The competitive nature of the system gave the planners and the community a second opportunity to “extract” land use concessions, and the opportunity certainly was taken.

### **The Progeny of Danish - a.k.a. the “Trigger Plan” (1982)**

Early in 1980, Planning Director Frank Gray embarked upon a two-year study of options for a second-generation Danish Plan (which expired by its own terms in 1981). During initial discussions with City Council, the issue of integrating residential and business expansion into one growth management plan was put on the table. The idea was to balance employment opportunities, commercial services, and housing. Although the non-residential part of the plan was dropped in the early stages of the process, Gray’s ideas regarding the need to balance residential with commercial and industrial growth were insightful. Throughout the 1990’s, Boulder has had to address the jobs/housing in balance within the community resulting in part from the City’s decision to manage only residential growth. In an attempt to balance these two areas, the City experimented with non-residential rate control. Its discontents led to its ultimate replacement with a general revision of development standards and comprehensive rezoning, and a persistent jobs/housing imbalance.

Based on the recommendations of a task force appointed by City Council to evaluate the impacts of the Danish Plan, the revised ordinance adopted the same goal of capping population growth at two percent per year.<sup>23</sup> The development community questioned the need for a merit review system if Boulder was growing at less than the two percent growth rate. Thus, the new merit system had an “off-again, on-again” trigger. Residential building permits were to be given out on a first-come, first-served basis until the number of permits reached a trigger point, upon which the allocation system switched to a competitive merit system. It was anticipated that there would be a year of unregulated building, followed by a year of building actively regulated by a growth management merit system.

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<sup>22</sup>Danish, Paul, “Boulder’s Self-Examination,” *Growth Management, Keeping on Target?* Douglas R. Porter, ed., ULI-Urban Land Institute, (1986), p. 29.

<sup>23</sup>Ordinance No. 4639 (1981).

That system worked well as long as the demand for building permits did not exceed the available supply. But uncertainty of whether a competition would be required or not hindered the development community in its ability to make time and financial commitments. The system operated as everyone presumed it would. In 1983, permits were issued until the trigger point was reached, and in 1984, the merit system was back. A number of builders were denied permits under the merit system. Two of the builders that were denied sued the City, without success. The development community didn't like the plan, because of the uncertainty that occurred when the trigger went off and caused developers to compete among themselves for the available permits.

### **Pro Rata System (1985)**

Amid complaints of the uncertainty caused by the trigger system, the City Council endorsed a different approach to growth management. Staff was directed to look at different ways of managing growth. The development community argued that a growth management system needed to be more efficient, equitable, simple to understand, and predictable. The merit and the trigger systems both were seen as problems. The options presented to the City Council ranged from straight rate control to a "winner take all" competition. The staff recommended something that had elements of both. In the end, the system was reduced to simple rate control. All elements of the quality of the development were left out, instead deferring to the City's land use regulations. All projects would at least get a portion of the permits requested, rather than face potential denial, like the prior winner-take-all system.

In 1985, City Council adopted a revised ordinance to address the concerns of the development community. The ordinance awarded allocations quarterly. If in an allocation period 200 allocations were available and the City received requests for 400 allocations, each development received half of its request. The first two ordinances required extensive application materials and extensive staff and Planning Board review time, whereas the third growth management ordinance was self-executing, using a pro-rata formula for allocating residential building permits. Moderate income housing, energy conservation and design factors were translated into performance standards applied to all new development. This third ordinance was in effect for a decade, until September of 1995.

In contrast to the City's complex and time-consuming early growth management ordinances, the 1985 ordinance was very simple to administer. The one-page application required a minimal amount of information. Allocations were distributed as requested, if available, and prorated as necessary. The supply of allocations exceeded the demand for most of the allocation periods since 1985. There was a limit of forty allocations per development per year, which could be increased to seventy-five by Planning Board review or, at year's end, with unused allocations if available. This meant that many larger projects built out over a longer period of time than if there had not been a limit on the number of permits available on a yearly basis. When there were excess allocations left over (demand did not exceed supply), those were made available on a first-come, first-served basis to any applicant with the limitation that no development could have more than twenty excess allocations, or more than twenty percent of the available excess allocations. In periods of high

demand for allocations, unused allocations were forfeited, and the holder could not apply for allocations in the following quarter. In periods of low demand, those penalty provisions were waived.

Soon after passage of the new system, a group of over twenty builders joined together and sued the City, claiming that the City had overstepped its authority. The City successfully defended the growth control system. The Court of Appeals held that growth management programs are matters of local concern for Colorado home rule cities.<sup>24</sup>

### **Allocation Pools (1995)**

Another fundamental change to the City's residential growth management system was made in 1995 in response to concerns that the housing that was being built was not affordable to much of the City's workforce and lower income population. An attempt was made to gear the residential growth management system to produce the types of housing most needed in the community.

While the mechanics of the growth management system remained unchanged from the 1985 pro rata system, the details of the system were extensively modified in 1995. First, the growth rate was reduced to less than one percent of the existing housing stock per year. Second, the available allocations were divided into allocation pools designated for housing units meeting various affordability criteria. Third, housing projects that cater to mixed incomes had the ability to enter into agreements to reserve allocations. These agreements set aside allocations for certain time periods and provided some certainty to developers as to the timing for the build-out of their projects.

Applicants applied for allocations from a specific allocation pool, depending on the type of unit proposed: Permanently affordable, size restricted, and unrestricted or "market rate."

1. "Permanently affordable" allocations were for housing units with deed restrictions capping sales or rents at levels affordable to households earning up to eighty percent of the Area Median Income (the "AMI"). Units that targeted households earning under eighty percent of the AMI were effectively exempt from the rate control system;
2. "Restricted" allocations were for housing units that were required to be owner-occupied and initially affordable to households earning up to one hundred twenty percent of the AMI. The units were supposed to be restricted as to size with initial market affordability for qualified buyers; and
3. "Unrestricted allocations" were to be used for units that were not permanently affordable or restricted, in other words, market rate housing.

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<sup>24</sup>*Boulder Builders Group v. City of Boulder*, 759 P.2d 752 (Colo. App. 1988).

The goal of the allocation pool system was to create incentives to produce affordable and moderate income housing. It was easier to get allocations for these categories because they are the types of housing needed in the community. As the City already had a great deal of market rate housing, there were a limited number of allocations available in this category.

There was some increased construction of housing in the permanently affordable category through new construction. However, it is clear that the allocation pool ordinance had required additional City administrative time as well as an added level of complexity for the development community.

Boulder turned its attention to the broader issue of affordable housing in 1998. As a part of the development of a comprehensive housing strategy for the City, the residential growth management system was examined to see if a more effective approach to creating affordable housing as part of new residential development could be found. In the then current residential growth management system, the number of market rate units was becoming smaller and smaller, but nobody was switching to the allocation pools for size restricted units and permanently affordable units, unless they were a part of a very large development or the City had put up a subsidy.

Given the over-prescribed market rate pool, those projects received just fractions of allocations and faced the prospect of waiting a long time for a whole allocation. Consequently, the growth rate was more like one-half a percent than one percent and not a lot of affordable housing was being produced.

Forums were held and options created, but the real breakthrough in thinking came after a report from the economic consulting firm BBC Research and Consulting which concluded: "In sum, from a developer's perspective there is very little financial value in pursuing the near term development of an affordable unit, rather than waiting even a considerable length of time for an open market unit allocation. The rising value of open market units and the significant loss of value associated with producing affordable units means the 'tipping point' (when the value associated with producing affordable unit exceeds the value of waiting for an open market allocation) may never occur or would occur only under an unusual set of distant circumstances."<sup>25</sup>

In other words, giving Boulder's rapidly escalating land values, it made more sense for someone to wait for an allocation for a market rate unit rather than produce an affordable unit. The basic scheme was not working. The City could not produce significant affordable housing through a timing preference. In selecting an alternative approach, the City went "back to the future" and made a change similar to that made in 1985. A simple pro-rata residential growth management system would be employed, along with a requirement that all new residential development contribute to affordable housing, or an inclusionary zoning approach.

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<sup>25</sup>BBC Research and Consulting, Memo to the City of Boulder Planning Department, May 13, 1999.

In January 2000, both the revised residential growth management system and inclusionary zoning were put in place. The rate control system bears a great similarity to the 1985 ordinance. Given the new focus on affordable housing, some new exemptions were added. Any housing in a mixed use, business or industrial zone is exempted from the system, as well as market rate units in a development when more than thirty-five percent of the units are permanently affordable to persons earning up to eighty percent of the area median income.

### **Inclusionary Zoning (1999): Lessons to be Learned**

Fundamentally, Boulder's residential building permit allocation system slows the rate of change. The Danish Plan was a reaction to the rapid pace of development in Boulder in the 1960's. Slowing growth to manageable rates provides communities with the time necessary to deal with the impacts that come with growth. However, even if the transportation, water, and sewer improvements are developed concurrently with new development, other social infrastructure, programs and institutions that define a community cannot always keep pace.

Depending on the details of the system chosen to allocate building permits, links can be made to other growth management objectives. The Danish Plan merit system was able to generate a number of community benefits, including more energy efficient buildings, improved site design, housing affordability and development nearer to existing infrastructure. The particular criteria selected can offset, at least in part, some of the negative aspects of limiting building permits in the first place, such as the provision of affordable housing.

The complications of administering the Danish Plan led Boulder to adopt a simple pro ration process and incorporate the various aspects of the merit system into land use and building ordinances. Now, all projects have to meet minimum standards. In the previous system, by creating scarcity and picking projects on the basis of "merit," Boulder was able to maximize benefits by encouraging competition. However, while a complex growth management system may have significant community benefits, the administrative and private costs associated with running the system may be too great.

Some have argued that controlling the rate of residential growth leads to an increase in housing prices. The process of allocating building permits itself incurs some costs. And intuitively, if supply is constrained and demand is constant, then prices should rise. However, it is arguable just how much of the increase in housing prices in Boulder is attributable to any particular growth management policy. Boulder has always been a popular place to live, and housing prices have always been higher in Boulder than in surrounding communities. There has been a general trend towards larger dwelling units and higher quality building. And housing prices have risen across the region. Colorado experienced a ninety seven point three percent increase in housing prices between 1980 and 1995; Boulder's increase during the same time was about one-hundred percent. Is the difference a product of rate control, other policies of the City such as the Open Space Program, or simply the market?

No recent studies exist, but at the time the City was considering the successor to the Danish Plan, two studies were completed looking at the effects of rate control on housing prices.<sup>26</sup> A 1980 survey by the City of Boulder found that while eighty-six percent of recent home buyers were convinced that the Danish Plan had driven up the price of their homes, sixty-six percent said they would vote for it again.<sup>27</sup> A 1981 National Association of Homebuilders study showed that single-family, detached home prices increased twenty-nine percent in Boulder compared with five point eight percent in Lakewood and ten percent in Arvada over the period 1975 to 1979. That study found that Boulder builders were building larger houses on larger lots to compensate for the limited supply of permits.<sup>28</sup>

City studies showed more multi-family housing being produced along with significantly more expensive single-family detached housing.<sup>29</sup> In other words, a more polarized housing stock. But the average followed the market. Overall, the City found that housing prices in Boulder jumped \$4,000 to \$5,000 in 1977 when the Danish Plan first took effect. But from 1977 to 1981, the rate of increase paralleled the rest of the state and nation.<sup>30</sup>

Limiting housing growth in a single community can lead to growth pressures on surrounding communities. It is not possible to stop the growth; it just moves around. Nearby communities accommodated the growth. Thus, in some respects, the Danish Plan was a positive force in encouraging new development in communities that wanted it.

A greater problem was that Boulder limited only residential growth, not commercial and industrial growth. Housing demand was pushed outward, but the revenue-generating non-residential uses did not follow. This affected the ability of surrounding communities to finance their own growth. In 1981, Kathy Davis, a city planner in nearby Lafayette, was quoted as saying, "What is irritating about growth control is that residential growth is held back while commercial growth is encouraged. Boulder benefits from increased sales tax revenue, but we have to provide services to

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<sup>26</sup>Miller, Thomas I., and Sam Fitch, "Impacts of the Danish Plan on Housing Sales Prices in Boulder," 1981, and the *National Association of Home Builders*, "The Danish Plan in Retrospect: A Look at Growth Management Issues in Boulder, Colorado," 1981.

<sup>27</sup>Gibson, Daryl, "Homebuyers Back Danish Plan: Survey," *Daily Camera*, Oct. 3, 1980.

<sup>28</sup>Gibson, Daryl, "Homebuilders Criticize Danish Plan," *Daily Camera*, June 10, 1981.

<sup>29</sup>Miller, Thomas I., "Must Growth Restrictions Eliminate Moderate-Priced Housing?" *APA Journal*, Summer 1986, pp. 319 - 326.

<sup>30</sup>Cracraft, Jane, "Boulder's Different -- But Not Because of the Danish Plan, Report Says," *Denver Post*, May 27, 1981.

new residents."<sup>31</sup> Unfortunately, surrounding communities have followed the same pattern of limiting housing growth and encouraging commercial and industrial growth, exacerbating the jobs/housing imbalance over time.

## **V. NON-RESIDENTIAL GROWTH MANAGEMENT**

In the 1990's Boulder's planning has primarily focused on the relationships between the number of jobs in the City, the amount and price of housing, and local and regional transportation impacts. Boulder has learned that the art of managing growth and change is tricky -- requiring constant adjustments as the community balances between conflicting values and makes and re-thinks trade-offs.

### **What's Best for What's Left**

In the early 1990's, Boulder woke up to a significant change in the community. While the City had been managing the rate of residential growth since the late 1970's, job growth had not abated and had greatly exceeded population growth for several years. Between 1980 and 1995, more than 27,000 jobs were added to the City while population grew by only 19,000. The City had also completed a joint study with the County to determine how suitable the remaining land outside the City's service area in the Boulder Valley was for urban development. The conclusion was that most of the land should remain rural in character and that a square mile reserve area should be used to maintain options for either rural or urban development some time in the distant future.

Boulder's boundaries were becoming even more finite just as growth was accelerating. Suddenly it seemed, there were many more people commuting into the City than commuting out. Traffic congestion was getting worse. The town was more crowded, and there was a diminished sense of community. The town and the region were changing, and people weren't at all sure that it was for the better.

In the minds of many, there was a disconnect between the goals of the City's comprehensive plan, zoning and development review system and the increasing tide of development. A set of "opportunity sites" had been identified where significant development proposals could be expected. On one hand, there was a concern that these could develop with poor quality projects, and on the other hand, there was concern that they could develop at all! In March 1993, the City Council declared a moratorium on development approvals and initiated the Integrated Planning Project (IPP) to construct scenarios of what could happen in the Boulder of the future, elaborate on the policy trade-offs inherent in each of the scenarios and solicit community feedback on which scenario best fit Boulder's vision of the future. The motto of this project became, "What's best for what's left."

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<sup>31</sup>Tracey, Brian, "Boulder's Neighbors Complain: Danish Plan Spreads Growth Problems," *Longmont Times Call*, Aug. 31, 1981.

While the IPP covered the same ground as an update to the comprehensive plan, it had several distinct differences. First, it had a short time frame: seven months. There was a heightened sense of urgency including the direct involvement of a City Council steering committee. And the IPP used a project design that attempted to define the essential trade-offs between environment, transportation, economy, housing, and land use. The IPP started with a scenario of what the build out of the community would be under current policy. Four alternative scenarios were used to illustrate different land use patterns for the Boulder Valley. They showed different outcomes as to population, employment, land use and zoning, housing, transportation, environment, and the economy in the year 2020.

After an intensive community outreach and survey program, the City Council adopted goals and action items in October, 1993. The IPP growth goal was to set an upper limit on population and employment growth. The target population for the year 2020 was between 98,000 and 103,000. There was a desire to control employment growth as well to maintain a jobs to population ratio of eight jobs to every ten residents. (Currently, the City estimates a 1999 population of 95,000 and employment of 102,550 for a jobs to population ratio of 1.08.) The suggested action was to consider rezoning or acquiring selected vacant residential, commercial and industrial areas to lower population and employment projections. Other suggested options included managing the rate of employment growth by limiting land supply and developing requirements to reduce the impacts of growth.

### **Regulating the Rate of Non-residential Growth**

City Council started discussions concerning commercial, industrial, and retail growth in June, 1994, and considered various options for managing this growth. The options ran the gamut from rate control to rezoning to travel demand management programs. Also, during this time, a citizen's group was circulating a petition to place an initiated ordinance on the ballot to control the rate of non-residential growth. The citizens were frustrated with what they perceived as foot-dragging on the part of the City Council and the Council's seeming unwillingness to tackle the issue of non-residential growth. The City Council declined to put the "Slow Growth!" measure on the November 1994 ballot, but it qualified for the November, 1995 ballot anyway.

This ballot item became known as the "Slow Growth! Initiative." The initiative sought to limit the amount of non-residential building square footage to 1,300,000 over a five year period. The proponents pointed to a possible build out of eleven million square feet of commercial and industrial floor area, the equivalent of thirteen new shopping centers the size of Boulder's regional mall. "The congestion, pollution, noise and crowding that such additional growth would generate will drastically lower everyone's quality of life -- particularly if it occurs in the space of ten to fifteen years and commercial and industrial growth rates are not greatly reduced."<sup>32</sup>

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<sup>32</sup>Campaign booklet: "Slow Growth!, Restore the Balance, Yes on 2A," 1995.

But City Council had other ideas. By January 1995, the City Council selected four projects to be the focus of non-residential growth management efforts: The update to the Boulder Valley Comprehensive Plan land use map, revisions to commercial and industrial zoning, the update to the City's Transportation Master Plan and the development of a regulatory program to control the rate of non-residential growth. A City Council subcommittee developed the following list of objectives for the management of commercial and industrial growth in April, 1995:

- Keep the population/physical size of the community within manageable limits;
- Keep the ratio of jobs to housing from getting further out of balance;
- Mitigate the impacts of development;
- Preserve economic robustness to protect the community from boom/bust cycles;
- Enhance the diversity of jobs and businesses;
- Maintain appropriate services in convenient locations; and
- Preserve our revenue/tax base so we can keep paying for the things that create a quality community.

The City Council considered specific ordinances dealing with limits on the annual amount of non-residential growth in the summer of 1995. On first reading, City staff proposed that the effective date of the ordinance be June 15, but that was stripped from the ordinance. As a result, building permit applications continued to stream into the City. By October of 1995, some 975,000 square feet of non-residential building was permitted.

Prior to developing its own ordinance, the City researched similar efforts in California by visiting the communities of Pasadena, Santa Barbara, San Luis Obispo, Palo Alto and Walnut Creek. All of these communities had dealt with the political fallout from rapid rates of non-residential growth. Some had turned to more conventional zoning changes to decrease the total amount of non-residential growth, some had dealt with citizen-led efforts to limit the rate of growth and some actually had rate control laws on the books. However, since the California economy had slipped into recession, none of the allocation systems had experienced any stress -- non-residential development was at a standstill. There were some interesting ideas, but all untested as management tools.

In September of 1995, while the campaign to pass the Slow Growth! Initiative was heating up, City Council adopted an ordinance that limited the rate of non-residential growth. In Boulder's new ordinance, a decreasing amount of new non-residential building square footage was specified for each year through the year 2000. The ceiling was set at 495,000 feet in 1996 and would descend to 385,000 feet by 2001. The total amount of square footage available was broken into a general allotment which was available on a first-come, first-served basis (seventy-five percent of the available square footage) and a community priority allotment that was subject to allotment by the City Council after a recommendation by the Planning Board (twenty-five percent). This last category was designed to give the City some flexibility for urgent needs. The total amount of building square footage that would be available over five years was 2,200,000. Projects to be eligible for allocations had to first score points in a merit system related to transportation improvements designed to reduce traffic congestion.

The debate over the initiative was largely about the inflexibility of the initiative process itself. There is a significant difference between an initiated ordinance and a Council adopted ordinance. An initiated ordinance can only be amended by initiative while a Council adopted ordinance can be amended or repealed at essentially the next Council meeting.

The Slow Growth! Initiative failed at the November, 1995 election fifty-five to forty-five percent, at least in part due to the fact that Council had already passed an ordinance dealing with the non-residential growth rate, albeit at a much higher number. There was also an aggressive campaign against the measure. The Citizens for a Balanced Community secured the endorsement of three Boulder mayors and used arguments like the following:

“The Slow Growth Initiative suggests that simply putting a cap on commercial development will alleviate our growing pains. In reality, it will spark a multitude of negative consequences without addressing any of our key concerns about growth -- traffic, air pollution, and the cost of housing. It will cause the elimination of quality jobs, and ultimately turn Boulder into an enclave for the elite. It will be a nice place to live, but only if you have a trust fund.”<sup>33</sup>

The City rate control system was started up in early by 1996 by opening up applications for new non-residential building square footage. Projects immediately queued up through 1998 and into 1999! The allocation process itself was fraught with problems. Both the Planning Board and the City Council found the allotment of building square footage under the community priority category difficult to administer. How do you choose between a day care center and the needs of an existing employer to expand? Council chose to grant allocations for two private schools, a cultural facility, and three existing employers. But to pull that off, it had to borrow allocations from the next year.

In the queuing system, how were manufacturers who developed new products to react quickly? How could those who needed more space for their own businesses plan for and compete against those who could speculate on office space development? The business community raised significant concerns about the effect the allocation system was having on picking “winners and losers” in the market. The system had serious problems.

In April 1996, City Council passed Resolution 750 directing the City Manager to defer accepting new applications for non-residential building allotments in order to consider alternatives to the non-residential growth management system.

### **From Rate Control to Downzoning**

The Council decided to make a significant tradeoff: Rather than regulate the rate of non-residential growth, why not lower the potential amount of job growth through a combination of

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<sup>33</sup>*Balanced Community Advocate*, Fall 1995, Volume 1, No. 1.

actions designed to reduce the non-residential build out of Boulder? The political tradeoff became the uncertainty of waiting for an allocation for a building permit under non-residential growth management versus the certainty of knowing the development potential under a lower zoning. Essentially, the development community hated the rate control system more than it hated the idea of downzoning. The private sector tacitly endorsed the move to zoning changes but remained watchful.

In May, 1966, City Council passed Resolution 752 directing staff to develop a program to decrease projected job growth that “would, in the aggregate, reduce the incremental non-residential development potential in the Boulder Valley.” The City focused on three strategies to reduce projected job growth:

1. Conversion of land zoned for commercial or industrial zones to residential uses;
2. Changes in the uses allowed in commercial or industrial zones to less intensive uses;
3. Changes in building square footage permitted in commercial or industrial zones.

The essential policy, as reflected in the BVCP adopted in November 1996 was as follows:

#### 5.02 Balance of Employment and Housing

The City and the County recognizes that there is an imbalance between population and employment in the Boulder Valley, with jobs significantly exceeding the workforce residing in the Valley. Projections of future growth in the Boulder Valley indicate an increasing imbalance between population and employment. In order to reduce the magnitude of this imbalance in the future, the City intends to reduce potential non-residential development while maintaining the City’s industrial, research and development base, and maintaining the City’s retail position in the region. It is the City’s intent to accomplish this through a combination of changes to the Comprehensive Plan land use map, possible land acquisitions, revisions to the City’s non-residential zoning categories, and rezoning appropriate areas.

In the end, the idea of converting industrial land to residential land was of limited usefulness mostly because of incompatibilities with existing land uses, lack of amenities like parks and schools, and property owner hostility to the idea. Only one parcel was changed to residential zoning, ultimately to allow for a private school use not allowed under industrial zoning.

The rezoning effort gave the City a chance to significantly update its industrial zoning ordinance. Much was learned about the types of uses that define Boulder’s industrial areas, and three new industrial zones were created: one for general industrial uses, one for larger scale manufacturing uses, and one designed to protect service industrial uses (auto repair, etc.) from “higher and better” (but less useful) uses like office parks.

As a result of City purchase of a large park site along Valmont Road in an area slated for industrial development and acquisition of a 160-acre parcel owned by IBM just across the Diagonal Highway from its existing plant, a downzoning of the downtown, and the use of floor area limitations in industrial zones, the Council was able to reduce the projected amount of non-residential development and their associated jobs by 12,000 potential jobs. As Council adopted the rezoning ordinance, it repealed the non-residential growth management system.

Although there were certainly winners and losers in the rezoning effort, the City was able to refine the intended use and intensity of non-residential land to the point where most were satisfied that they could proceed with their business plans. In fact, for areas like downtown, there was a new awareness that the old zoning might have damaged the very environment that enhanced individual investment -- the build out allowed under the previous zoning could have changed the character of the Downtown for the worse.

Even with the rezoning, job growth will continue to be robust in Boulder. At this time, Boulder projects another 3,700 dwelling units and another 24,000 jobs to the build out of the community.

### **What Next?**

Now, the focus is turning from limiting the number of new jobs to possibilities for increasing new housing. For the years 2000 and 2001, the new City Council set four goals, one of which is affordable housing.<sup>34</sup> In a sense, this goal tries to deal with the other side of the jobs-housing equation. We had lowered the potential number of jobs in the rezoning, what are the ways to use the existing and new housing stock to maintain an economically diverse community in the face of strong market pressures that drive the cost of housing ever higher? And what are the ways in which

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<sup>34</sup>Recent policy initiatives and developments with reference to this community goal have included the following: In 1999, the City adopted an inclusionary zoning system which mandates that 20 percent of all new housing developments be dedicated to affordable housing. As originally drafted, the dedication could be in the form of ownership units with deed restrictions, rental properties with permanently controlled rent, "in-lieu" financial contributions, the dedication of land or the dedication (or restriction) of off-site housing units so that they became permanently affordable. Recently, while reviewing housing policies of another Colorado community, the Colorado Supreme Court held that any control of rents violates provisions of a state law. *Town of Telluride v. Lot Thirty-four V.*, No. 98SC547, \_\_\_ P.2d \_\_\_ (Colo. June 5, 2000). As a result, Boulder's inclusionary zoning system (which has some similar features) is in the process of being revised to eliminate the controlled rent option. Boulder will use tax and in-lieu fee money to purchase and control some rental units. In addition, a citizen commission was established to review ways to fund other City affordable housing programs recently issued its report. As a result of that process, it appears that a ballot measure to raise taxes for affordable housing purposes may appear on the ballot in November of 2000.

new housing might be appropriate given Boulder's special character and unique environment? Growth-managed Boulder is now considering increasing the potential number of residential dwelling units, primarily through the redevelopment of commercial areas through mixed use development.

## **GROWTH MANAGEMENT: SUCCESSES AND NEW CHALLENGES**

Growth management, in one variant or another, has been a central part of the Boulder political culture for more than forty years. It was born in response to the specific challenge of protecting the City's physical beauty and sense of community. In recent years, growth management has played a central role in the community's attempt to mitigate some negative side effects of an expanding regional population and an extremely vibrant economy.

By some measures, Boulder's growth management clearly has been successful. It has helped preserve important elements of the local physical environment. It has focused community attention on the relationship between economic development and the infrastructure necessary to support that development. It has stimulated continuing public participation in the political process. The sense that both the City's natural beauty and its manageable lifestyle may be protected over time has contributed to the desirability of the City as a place in which to live and work.

*Rate of growth* has been addressed by the various manifestations of Boulder's residential growth management system. The *location of growth* has been addressed by the definition of service areas and the containment of sprawl -- from within the City and from other cities expanding toward Boulder -- which is accomplished by the City's Open Space Program. Zoning tools, height regulation and various approaches to non-residential growth management have, to some extent, attempted to direct the *type of growth* in Boulder. The *impact of growth* has been somewhat mitigated by the green swath of open space and parks with which the City has surrounded itself.

However, growth-related concerns have not evaporated in Boulder. Rather, the City finds itself facing a new set of challenges. So, with fewer available undeveloped spaces remaining, fewer construction options exist to compensate for any deficiencies in the City's mix of residential and non-residential uses. It is also true that the political and legal climate in which growth control has prospered is changing. Particularly as "takings" litigation has flowered over the last decade and as the possibility of more rigid "vested rights" legislation has repeatedly surfaced, legal uncertainty has developed concerning the viability of potential new growth management tools.

While *rate of growth*, *location of growth*, *type of growth* and *growth impacts* have all been addressed, there is concern about the extent to which the consideration of those factors has been balanced. For example, despite all its planning efforts, the number of jobs in Boulder has far outstripped the ability of this City to provide housing for all of the workers who labor within it. The consequence is increasing commute times for working people and attendant environmental impacts on the whole region. Also, Boulder has found that balancing the various factors related to growth management is not an exercise without costs. Thus -- to provide one example -- by walling off development on the edge of the City with open space, Boulder may have encouraged some large

commercial entities to locate in other parts of the region. While this has helped to control the jobs/housing balance within the City, it has not been without consequences for Boulder's tax base. The beltway-bound development of Flatirons Crossing and Interlocken nine miles east of Boulder is a sign of Boulder's success in growth management but also a harbinger of difficulties to come, in transportation as well as finance.

### **A Less Certain Legal Environment**

It was in 1954, only a few years before Boulder instituted its Blue Line, that the United States Supreme Court decided *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98 (1954). That case established that the police powers of government include the ability to regulate aesthetics. Twenty-six years later, in 1980, the high Court declared that a plaintiff wishing to state a cause of action for inverse condemnation based upon community zoning and planning must show: (1) that the application of zoning laws to a piece of property does not substantially advance a legitimate state interest; or, (2) that application of such laws would deprive the affected property of substantially all economically viable use. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

These cases, and others which preceded them, provided a relatively stable legal environment within which Boulder was able to develop its growth control approaches.<sup>35</sup> Thus, some of Boulder's experiments were made more feasible because land owners who wanted to assert that regulation improperly degraded the value of their property had to overcome significant legal obstacles. Some courts demanded that property owners prove that the economic value of their private property interest had been wiped out. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Other courts required that challenged regulations be shown to interfere with a plaintiff's reasonable investment-backed expectations. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Agins v. City of Tiburon* required that a challenged government action fail to advance a *legitimate state interest* and deny landowners *all economically viable use* of their property in order to justify compensation.

However, a newly charged legal atmosphere involving "takings litigation" has developed over recent years. A set of legal challenges, brought pursuant to the Fifth Amendment to the U.S. Constitution and parallel state constitutional provisions, has raised some questions about the future prospects of established doctrine in this area of the law.<sup>36</sup> Two relatively recent United States

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<sup>35</sup>The early United States Supreme case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926), recognized a municipality's authority to regulate the use of land through the segregation of industries, commercial pursuits, and dwellings to particular districts within a city. The Court held that such rules were rationally related to health, safety and general welfare of a community.

<sup>36</sup>Despite these new cases, well designed growth control systems should still survive legal attack. In *Long Beach Equities v. Supreme Court of Ventura County*, 231 Cal. App. 3rd 1016, at

Supreme Court decisions -- *Dolan v. the City of Tigard*, 512 U.S. 374 (1994), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) -- have played an important role in this new legal environment.

In these cases, the Supreme Court examined situations in which property owners were required to dedicate some of their property for public use as a condition of receiving building permits. The Court held that in order to sustain such "exactions," there must be: (1) an "essential nexus" between the permit condition and the community goal being furthered by the exaction; and, (2) "rough proportionality" between the burden placed upon a property owner by the exaction and the impact of the proposed development upon the community.

The new takings analysis has generally not been extended to legislatively enacted zoning or growth control schemes. It has been applied only to exactions required by specific land use permit proceedings. However, the new cases have heralded a re-evaluation of takings doctrine generally.

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1030, 31 (Cal. App. 1991), a court upheld a growth management ordinance against a takings challenge, and found that the ordinance promoted a pattern of development beneficial to the public welfare. The court held that local legislation, including the growth management ordinance at issue, was constitutional on its face as long as (1) it bears "a substantial relationship to the public welfare," and (2) it inflicts no irreparable injury on the landowner. The court found this to be true even where a plaintiff alleged a substantial diminution in property values as the result of the growth management scheme.

Other cases have come to similar results. In *Golden v. Planning Board of Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed* 409 U.S. 1003 (1972), a timed sequential zoning program was upheld by the New York Court of Appeals. *Construction Industry Assn. v. City of Petaluma*, 522 F.2d 897, (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976), upheld a growth management policy which limited residential development permits to 500 per year. The court held that the growth management policy was a reasonable exercise of the city's police power and did not violate the due process clause.

Colorado courts have recognized a City's home rule authority to adopt growth management ordinances. *See, Boulder Builders Group v. City of Boulder*, 759 P.2d 752 (Colo. App. 1988). Also, *Wilkerson v. Board of County Com'rs*, 872 P.2d 1271, (Colo. App. 1993), upheld the validity of the Pitkin County Growth Management Quota System as a valid exercise of the County's police power. *P.W. Investments, Inc. v. City of Westminster*, 655 P.2d 1365, 1369 (Colo. 1982), mentions a growth management plan without criticism, but does not analyze the plan.

As a result, the entire field is in a state of some uncertainty. This establishes a more difficult legal atmosphere within which growth management options must now be considered.<sup>37</sup>

## Increasing Economic and Population Pressures

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<sup>37</sup>Exemplary of current uncertainties is the relatively recent United States Supreme Court decision in the case of *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). In that case, the United States high court evaluated a situation in which the City of Monterey had been sued for an illegal “taking” of private property (and for a violation of equal protection) pursuant to the Fifth Amendment to the United States Constitution. The facts, in brief, were that a developer had been denied permission to develop a piece of property so often that at oral argument, Supreme Court Justice Scalia put one of the issues as follows: “The landowner here essentially thinks that it was getting jerked around . . . isn’t there some point at which . . . you begin to smell a rat, and at that point can’t we say . . . this is simply unreasonable.” United States Supreme Court Official Transcript, 1998 WL 721087.

One issue before the court was whether there is a right to a jury trial in a “takings” claim in a case such as this. Another issue was whether a “rough proportionality” test utilized for exactions could be applied to a regulatory takings case. The final plurality decision apparently answered the questions as follows: Under limited circumstances (which because of other legal constraints are not apt to arise often) a jury trial is permitted; and, the “rough proportionality” test used in other legal contexts could not be extended beyond exactions.

However, there was such a hodgepodge of opinions that a reader is almost compelled to make a chart of which justice said what and who concurred with whom. This suggests, of course, that the area of law remains unsettled and both cities and developers will continue to operate in an atmosphere of some uncertainty.

Also reflective of a changing legal milieu is the doctrine relating to “temporary takings.” In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the United States Supreme Court held that compensation is not precluded for temporary government land-use restrictions. As a consequence, potential planning tools such as building moratoria -- or even unreasonably long waiting periods for development as a part of a growth control system -- must be analyzed to ensure that no “temporary takings” occur. An example: In *River Oaks Marine, Inc. v. Town of Grand Island*, 1992 U.S. Dist. LEXIS 18974 (W.D.N.Y. Nov. 24, 1992), a temporary takings claim against the Town of Grand Island, New York, was sustained in the amount of almost 1.5 million dollars. The damages were awarded based upon a moratorium on removing solid substances from beneath Grand Island. In contrast, *Williams v. City of Central*, 907 P.2d 701 (Colo. App. 1995), analyzes the significant legal hurdles confronting a party claiming a temporary taking.

Over the years, Boulder has utilized a series of tools to limit sprawl. Some of these have worked better than others. The efforts have included:

- The Blue Line limitation on extension of water service;
- Comprehensive Plan limitations on expansion of Boulder's service area and use of annexation policy;
- Residential growth management limitations affecting the rate and type of residential growth;
- Non-residential growth management — through rate control, rezoning and the use of traditional zoning tools;
- The Integrated Planning Project targets for population and employment at build out; and
- The ring of open space and parks with which the City has surrounded itself.

Significantly, these various programs were all initiated -- or at least substantially advanced -- by direct community political involvement. For the most part, the objectives that launched these efforts remain immensely popular.

However, changing economic and political realities may test this community consensus. In the past, the City of Boulder was the largest employment and housing center in the county. Now other local municipalities are projecting significant new job growth. At the same time, many of those other communities are limiting new residential growth. As a result, significant land use imbalances between new jobs and new housing are developing across the entire region. Transportation and environmental consequences result as workers have no choice but to travel further to reach their jobs. Boulder's resolve to resist reevaluating its self-imposed targets for limiting population increases may be tested.

On the other hand, most Boulder citizens clearly believe that the community is a desirable place in which to live and work in large measure *because* of the success of growth control efforts. So, for example, a recent report on affordable housing prepared for the Boulder City Council starts with the observation that "Boulder has a long history of citizens and city leaders making decisions, which have cumulatively contributed to Boulder's desirability today."<sup>38</sup> However, the same report goes on to acknowledge that this success has not been achieved without negative impacts. It notes:

Boulder has a long history of growth management and open space preservation. These policies effectively limit the supply of land for future residential development. The ability to provide housing in Boulder is impacted by existing policies, regulations and programs, including the residential growth management system, the Open Space Program and the Comprehensive Plan. . . .

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<sup>38</sup>"Boulder's Comprehensive Housing Strategy," Draft 2, 1999, page 14.

There is a serious concern that Boulder's population diversity may be at risk. We see this in statistics about the cost of home sales in Boulder as well as in the change in income ranges of the population. . . .

It is important to provide housing to Boulder's lower and middle wage employees who are critical to the community's functions. These include the school teachers, firemen, policemen, car mechanics, retail clerks, nurses, restaurant cooks and servers, to name just a few. In order to maintain our high quality of life, we must continue to provide all the elements critical to the functioning of a vital community as well as a diversity of citizens.<sup>39</sup>

Thus, as Boulder approaches its self-imposed build-out boundaries, it confronts a series of new challenges. Employers are starting to express concerns about their ability to attract workers. Local university students, faculty members and other university employees increasingly are forced to look beyond Boulder's borders for housing. There is a wide-spread anxiety that children growing up in Boulder may not be able to afford to live in the community when they become adults. There is a perceived danger that Boulder's successes in growth control could combine with an ever increasing regional population to push Boulder in the direction of extreme gentrification -- a ghetto for the very rich.

While Boulder has been successful in painting a ring of green around its borders, it now faces the challenge of finding places for working people to live within the ring. Boulder has limited its outward sprawl, but it now faces the challenge of finding infill and redevelopment opportunities within which to retain some demographic balance. Boulder has effectively controlled densities to preserve some of its small town heritage. Now it faces the challenge of making sure that the City's zoning does not lead to social elitism and other unintended changes in the quality of life in Boulder.

These new challenges are stimulating some within the Boulder community to focus on policy issues with a somewhat different perspective than in the past. Past efforts were designed (in part) to preserve spacial separation between Boulder and its surrounding communities. Now, however, regional transportation solutions are being considered to allow workers to commute between those same communities. The Integrated Planning Process and comprehensive rezoning exercises resulted in limitations on the density of commercial development and housing within the City. Now, however, the community agenda includes consideration of infill building, mixed use development and accessory dwelling options in order to foster demographic diversity.

As Boulder steps forward to meet its new challenges, it faces a reality which differs in scope and kind from the one it faced forty years ago. Other population centers in the region -- including

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<sup>39</sup>“Boulder's Comprehensive Housing Strategy,” Draft 2, page 15 - 16.

those outside of Boulder County -- are now also struggling to establish compact service areas, to preserve open space and to provide (or preserve) affordable housing. As a consequence, as the regional impacts of growth and growth management are becoming ever more evident, it is no longer feasible to conceive of growth management strictly within the borders of any single city. It is, perhaps, for this reason that Boulder's growth management experiments may be of interest to many outside of Boulder's city limits.