July 14, 2015

Ms. Mary W. Gibson
Jackson Hole Conservation Alliance
685 S Cache St
Jackson, WY 83001

Re: Transferrable Development Rights

Dear Ms. Gibson:

You have asked that I provide you with a written legal opinion on the authority of the Teton County Commissioners to adopt an ordinance providing for the transfer of development rights within the County. Following is my opinion.

Description of Ordinance

A typical transfer of development rights (TDR) ordinance is enacted as an amendment to an existing zoning ordinance. A TDR ordinance creates areas within the locality identified, again typically, as “sending zones” and “receiving zones.” Such zones normally only apply to residential development; although there is no inherent reason why they could not apply to other types of development as well.

Landowners within a sending zone are allowed to “transfer” development potential allocated to their land to land within the receiving zone. Depending upon the type of ordinance sending zone landowners may have the option of developing their land with existing development rights, or transferring them; or the ordinance may prohibit use of some or all of the development rights pre-existing the adoption of the TDR ordinance but allow those prohibited development rights, and any permitted rights, to be transferred.

Land within a receiving zone is typically zoned for a given density, but allowed to increase in density provided that the landowner on such an increased density parcel first obtains the development rights necessary to realize the increased density from a landowner in the sending zone. For a TDR ordinance to work properly land in the receiving zone cannot already be zoned for the optimal density or there will be no market for development rights.

An alternative to implementing the use of TDRs by increasing zoning density itself is to provide zoning at the desired density, but require as a condition of site plan or subdivision plat approval that the receiving zone landowner first obtain development rights from the sending zone.

Authority for the type of TDR ordinance described above is what is addressed by this opinion.
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**Constitutional Authority**

The Constitution of Wyoming distinguishes between the authority of cities and towns and the authority of counties. Article 13, §1(b) of the Constitution grants broad powers to cities and towns to manage their own affairs. Article 13, §1(d) provides that such authority “. . . shall be liberally construed for the purpose of giving the largest measure of self-government to cities and towns.”

On the other hand, the Constitution of Wyoming is silent on the authority of counties. Article 12 merely provides for the recognition of counties existing when Wyoming became a state and for the creation of new counties. Article 12, §5 provides that the state legislature shall provide for the election of necessary county officials. Therefore, it is necessary to look at statutory law to determine whether Wyoming counties have the authority to adopt a TDR ordinance.

**Statutory Authority**

Wyoming Statutes (W.S.) §§18-1-101 through 18-16-119 contain the general authority granted to counties by the Legislature. W.S. §18-2-101 provides for the “general powers” of counties. W.S. §18-2-101(a)(v) provides that counties may “Exercise other powers as provided by law.” In other words, in addition to the list of county powers provided in the statute, counties may exercise such additional powers as may be granted them by the Legislature.

In fact, the Legislature has granted counties the power to plan the future use of land within their boundaries, and to zone such land for specific uses. Specifically, W.S. §18-5-201 expressly authorizes counties

“To promote the public health, safety, morals and general welfare of the county, each board of county commissioners may regulate and restrict the location and use of buildings and structures and the use, condition of use or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use and other purposes in the unincorporated area of the county.”

W.S. §18-5-202(b) grants counties the authority to create planning and zoning commissions and grants such commissions the authority to adopt comprehensive plans for the county.
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W.S. §18-5-203 provides:

“It is unlawful to locate, erect, construct, reconstruct, enlarge, change, maintain or use any building or use any land within any area included in a zoning resolution without first obtaining a zoning certificate from the board of county commissioners and no zoning certificate shall be issued unless the plans for the proposed building, structure or use fully comply with the zoning regulations then in effect. The board of county commissioners shall act promptly upon any application filed with it and shall grant certificates when the proposed construction or use complies with the requirements of the zoning resolution. If it denies the application, the board shall specify the reasons for such denial. The decision of the board of county commissioners may be reviewed by the district court and by the supreme court upon appeal in the same manner as provided in W.S. 15-1-609, for review of decisions of boards of adjustment.”

W.S. §18-5-301 grants counties the authority to control subdivision within their boundaries.

The foregoing are the statutory provisions that provide counties with authority to control subdivision and plan and zone for land uses within their territory. Unlike some states (e.g. Virginia) the authority granted Wyoming counties is broad, general and briefly stated. This enabling authority does not grant authority for planning, zoning and subdivision by way of numerous, specific, limited and detailed provisions as is the case in other states.

In my opinion, this is significant because it indicates that the Legislature did not intend to confine county authority over subdivision, zoning and planning to a series of express small grants of authority but rather to grant that authority broadly allowing counties discretion in implementing that authority. However, we must look to judicial review for official explanation of the extent of authority granted by the enabling authority. The Wyoming Supreme Court’s decisions support the proposition that counties have broad latitude in implementing the statutory authority concerning subdivision, planning and zoning.

Supreme Court Decisions

The question of whether a county has authority to adopt an ordinance, and if it has that authority, how it is to be implemented, has been traditionally explained relying on the legal treatise known as Dillon on Municipal Corporations. The Wyoming Supreme Court relied on Dillon in interpreting the extent of Park County’s authority to impose a temporary freeze on land use in the case of Schoeller v Board of County Commissioners of Park County, Wyoming, 568 P.2d 869 (Wyo. 1977). The Court noted that there was no
provision in the enabling legislation expressly authorizing such a provision. Nevertheless, the Court ruled that

“The County Commissioners’ ‘emergency’ resolution of August 24, 1971, freezing existing land-use in Park County without previously publishing a notice and holding a public meeting as provided by law, was initially a valid exercise of its implied power to do those thing[s] which would make its express power to regulate and restrict the use of buildings and land in unincorporated areas of the county meaningful.”

Id. at 875.

However, the Court concluded that the County had allowed the freeze to become permanent and therefore it was invalid because it had not been enacted pursuant to the required notice and hearing provisions that were expressly required for the enactment of a zoning ordinance.

In coming to its conclusion that the initial action was lawful the Court cited Dillon:

“‘It is a general and undisputed proposition of law that a municipal corporation [including counties in this context] possesses and can exercise the following powers, and no others: First, those granted by express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.’ Dillon on Municipal Corp., 5th Ed, . . .

‘The rule of strict construction does not apply to the mode adopted by the municipality to carry into effect powers expressly or plainly granted, where the mode is not limited or prescribed by the legislature, and is left to the discretion of the municipal authorities. In such a case the usual test of validity of the act of a municipal body is whether it is reasonable.’ Id. §239.” [Emphasis added.]

Id. at 877.

The Court concluded:

[The zoning enabling statute] . . . provides that the board of county commissioners is authorized to regulate and restrict the use of buildings and land in
unincorporated areas of the county. We find that this express power is sufficient in and of itself, or, in the alternative, necessarily implies the authority, to adopt recommendations which would freeze such building and land-uses. We further find that in order to make such a power meaningful, the board necessarily must have the appurtenant power to enact a freeze-resolution without notice and hearing. The exercise of this power, however, is subject to certain restrictions. Such a resolution may not be extended, as a matter of course, so that it essentially becomes a board's comprehensive plan, without notice and hearing. The restrictions which would bar such a result can be found in the plain language of [the statute]. Under our construction of this provision, a freeze-resolution may initially continue only for a length of time which affords an opportunity to give notice and hold a hearing on the issue of whether or not such a resolution should be given more permanent status under [the statute]. [Emphasis added.]

Id. at 879.

The Wyoming Supreme Court summed up the authority of a county to implement zoning in the case of Ford v. Board of County Commissioners of Converse County, 924 P.2d 91 (Wyo. 1996) as follows:

"As an arm of the state, the county has only those powers expressly granted by the constitution or statutory law or reasonably implied from powers granted." Board of County Commissioners of Laramie County v. Dunnegan, 884 P.2d 35, 40 (Wyo.1994) (quoting Dunnegan v. Laramie County Commissioners, 852 P.2d 1138, 1142 (Wyo.1993)). Counties have been statutorily granted the authority to regulate the use of their lands. WYU. STAT. §§ 18-5-201 to -207 (1996). We have found that the authority granted in § 18-5-201 gives counties broad power to regulate their lands, Snake River Venture v. Board of County Commissioners of Teton County, 616 P.2d 744, 752 (Wyo.1980)." [Emphasis added.]

Id. at 96.

A seminal case interpreting Wyoming county’s zoning authority was the Wyoming Supreme Court’s decision in Snake River Ventures v. Board of County Commissioners of Teton County, 616 P.2d 744 (Wyo. 1980). This case addressed the extent of Teton County’s zoning authority. Referring to W.S. §18-5-201, the statute that grants counties authority over zoning, the Court stated:

"We read the very lucid first sentence of the statute to mean that the board of county commissioners, acting as the board, has power to regulate and restrict the use and location of buildings. The dissent[ing opinion] says that this statute ‘does
not pertain in any manner to subdivision control.’ We cannot agree. The language is a broad grant of authority. As the dissent points out, zoning power derives from the State's police power. We think it abundantly clear that the statute just quoted delegates whatever police power is necessary to promulgate a subdivision, zoning, or planning ordinance.” [Emphasis added.]

*Snake River Ventures v. Board of County Commissioners of Teton County*, 616 P.2d 744, 752.

More recently the Wyoming Supreme Court stated:

“The issues raised in these appeals must be considered in light of the authority that has been delegated to Teton County by the Wyoming Legislature with respect to planning and zoning. The legislature has granted broad power to counties to regulate the unincorporated lands within their respective jurisdictions. [footnote omitted.] [citing] *Ford v. Board of County Commissioners of Converse County*, 924 P.2d 91, 95 (Wyo.1996); *Snake River Venture v. Board of County Commissioners, Teton County*, 616 P.2d 744, 752-53 (Wyo.1980).” [Emphasis added.]


In this case, among other arguments, the Crows argued that Teton County lacked the authority to regulate the size of single-family residences by zoning to preserve its “rural western character.” Such authority is not expressly granted by the enabling authority described previously in this letter. The Court responded:

“The statute confers on Teton County broad authority to shape its destiny, control its growth, and determine how best to promote the health, safety, morals, and general welfare of its citizens. Crow’s view is one to be pursued at the ballot box and not in the courtroom. The word ‘welfare’ has as its meaning in the context of this statute: ‘the state of faring or doing well: thriving or successful progress in life: a state characterized esp. by good fortune, happiness, well-being, or prosperity.’ Webster’s Third New International Dictionary, 2594 (1986). Teton County’s choice of the word ‘character’ in conjunction with the words ‘rural’ and ‘western’ connotes something that we think is quite clear, especially given Teton County’s documentation of its plan. ‘Character,’ in this context means: ‘main or essential nature esp. as strongly marked and serving to distinguish: individual composite of salient traits, consequential characteristics, features giving distinctive tone (each town came to have a character of its own—Sherwood
Anderson).’ Webster’s Third New International Dictionary, 376. Indeed, preserving ‘community character’ is at the very heart of zoning and planning legislation. Hagman and Juergensmeyer, Urban Planning and Land Development Control Law, § 3.16, at 62-63. We hold that Teton County’s decision to preserve its community character served the welfare of the people of Teton County and is within the delegation of the authority granted it by Wyo. Stat. Ann. §18-5-201.”

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“Crow contends that Teton County may not seek to promote or preserve ‘community character, rural western character, land use and character type compatibility, social and economic diversity through housing affordability, and social and economic diversity by lessening the demand on affordable housing,’ as these things have nothing to do with the ‘health, safety, morals and general welfare’ of the people of Teton County. . . . We disagree. We hold that the LDR’s at issue do not exceed the authority delegated to Teton County to ensure the general ‘welfare’ of the people of that county.” [Emphasis added.]

Board of County Commissioners v. Crow, 65 P.3d 720, 735, 736.

Attorney General Opinions

Relying on the rulings of the Wyoming Supreme Court, the Attorney General of Wyoming has opined that county zoning authority is sufficiently broad to authorize adoption of zoning regulations for the creation of planned unit developments, although there is no express authority for such an ordinance. The Attorney General found that such authority existed by virtue of the county’s “implied powers” under the zoning enabling statute. AGO 1989-001.

In AGO 1984-006 the Attorney General has also stated:

“The essential object or purpose of zoning regulations is to stabilize the uses which may be made of property. Zoning is to adopt measures to regulate property use in conformance with a comprehensive plan, such as that adopted by the state land use commission, which provides a balanced and well-ordered scheme for all activity deemed essential to the particular municipality in order to develop a balanced cohesive community which will make efficient use of available lands in such an orderly fashion so as to meet public needs for residential, commercial, and industrial growth.”

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“It is a maxim of zoning and planning law that one of the objects of zoning is to protect, as far as possible, land areas in more restricted districts from certain activities and land uses permitted in less restricted areas.”

With respect to the application of Dillon’s Rule the Attorney General stated:

“Under the Dillon rule, local governments have only those powers that are expressly or impliedly conferred upon them. However, in Schoeller v. Board of County Commissioners of County of Park, 568 P.2d 869 (Wyo. 1977), the Wyoming Supreme Court quoted the following from Dillon:

“The rule of strict construction does not apply to the mode adopted by the municipality to carry into effect powers expressly or plainly granted, where the mode is not limited or prescribed by the legislature, and is left to the discretion of the municipal authorities. In such a case the usual test of validity is whether it is reasonable. [Citation omitted].

“While the mode for adoption of the plan is specified within the statute and therefore must be followed, the mode of preparation is not specified as it is in many jurisdictions. [Citation omitted].”

As stated in Part I, above, the mode or method in which a comprehensive plan is to be prepared is not prescribed, other than it is to be prepared by the Planning and Zoning Commission and certified to the Board of County Commissioners. When the method is not prescribed, it is left to the discretion of the local government. [Emphasis added.]

AGO 1981-001

Conclusion

The authorities cited in the preceding sections of this letter have not been “cherry-picked” out of a number of differing opinions about county zoning authority. The authorities are all in accord that counties have broad authority to implement zoning and planning in any reasonable manner. It is also clear that such authority includes such things as zoning freezes, limitation on house size, and PUDs; none of which regulations are expressly authorized by the enabling authority.
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Although there is no express authority for adoption of a transferrable development rights ordinance, I believe it is highly likely that the adoption of such an ordinance, along the lines described at the beginning of this letter, would be upheld by the Supreme Court of Wyoming as an exercise of power properly implied from the zoning and planning enabling authority. I think it also useful that the Supreme Court has taken judicial notice of the unique natural and scenic character of Teton County in the Crow case.

The opinion of the Attorney General regarding the matters covered by this letter can certainly be sought. However, it would be a significant break from precedent for the Attorney General to find that a TDR ordinance is outside the scope of existing zoning and planning authority available to counties.

I should note “for the record” that I am an active member of the Wyoming Bar; I have a Master’s Degree in Community and Environmental Planning, and a JD, from the University of Virginia; and I taught Zoning and Planning Law at the University of Virginia for twenty years as an adjunct professor, which curriculum specifically covered local zoning and planning authority and TDRs; and in my former work in Jackson I became very familiar with local zoning and planning regulations there.

Please let me know if you have any further questions.

Sincerely,

Timothy Lindstrom