

Colorado Counties, Inc.



COUNTY PERSPECTIVES

A report on 35 acre subdivision
exemption in Colorado

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Introduction

As a result of Colorado's growth trends and preferences, "rural sprawl" is increasingly impacting the complexion of Colorado's landscape. Individuals desiring an escape from crowded urban life are pursuing the purchase of large rural lots with the intention of building homes on them. This has resulted and continues to result in the loss of agricultural lands and open spaces. When these lots equal or exceed 35 acres in size, the development is exempt from subdivision regulation. Absent other regulatory tools, this exemption can impair both the ability of counties to provide and pay for services and their ability to manage land use within the county. Responses to the recently published 2004 Colorado County Land Use Survey indicate that land use plans relating to agriculture, growth management and open space rank high as areas of interest and concern.

Consider these provocative statistics published by the Environment Colorado Research and Policy Center in its March 2006 report, "Losing Ground: Colorado's Vanishing Agricultural Landscape":

- Between 1960 and 1990, the land area developed into exurban homes and rural ranchettes grew three times faster than the population growth rate.
- Two million acres of agricultural land was lost in tracts sized just big enough to avoid subdivision regulation (35 acres) from 1972 to 2000.
- 33% of Colorado counties report that agriculture plays a crucial economic role in their county.
- For every tax dollar they bring in, large lot rural developments in Colorado represent \$1.65 in infrastructure costs.
- The average real estate value of agricultural land increased 16% between 1999 and 2003, benefiting farmers and ranchers wishing to realize the value of their properties.

Population growth and land use are major areas of concern and interest for the counties of Colorado.

The Different Perspectives

The trend in "rural sprawl" has fueled both support and opposition to the 35-acre subdivision exemption for a variety of reasons.

Support for the 35-Acre Exemption

Land Values: According to the American Farmland Trust, farmers and ranchers in Colorado are recognizing land values exceeding agricultural production value by 30 to 100 times when selling to developers or real estate speculators. In many cases, this is great news for farmers and ranchers. Selling off a 35-acre parcel of land is equivalent to receiving a pension – the proceeds often fund their retirement. In other cases, the

appreciation in land value makes it possible for farmers and ranchers to obtain loans to continue funding their agricultural operations. This helps keep farmers and ranchers afloat during difficult economic times.

Preservation: Others see the development of 35-acre lots as an effective way to preserve open space and forests. They contend that development of large lots is far preferable to a scattering of developments made up of one-acre to five-acre parcels, especially in undeveloped mountainous areas.

Water: From a water resource standpoint, ownership of a 35-acre lot allows the landowner to obtain a domestic well permit. This is not a water right, but does enable the landowner to attempt to secure water for the residence, outbuildings, and irrigation for up to one acre of land and livestock. Some perceive the connection between the 35-acre (and greater) lot and the domestic well permit as a method to limit the impact of development on scarce water supplies. Parcels of land less than 35 acres are provided with a “household use only” permit, which allows water to be used only within the home. With this type of water permit, any outdoor use of water (for purposes such as washing a car and watering a garden or horses) is prohibited unless the water is hauled in; however, smaller lot sizes means many more homes may be served on a given 35 acres. A 35-acre lot provides water for only one residence, as well as the potential for a more desirable well permit.

Opposition to the 35-Acre Exemption

Costly for counties: Based on 2003 findings reported by the Environment Colorado Research and Policy Center, “the high cost of providing and maintaining infrastructure for sprawling development hurts taxpayers and contributes to the fiscal crises facing many local Colorado governments.” Costs associated with rural sprawl include the cost of building and maintaining roads, extending water and sewer lines, and providing emergency services. Occasionally, 35-acre lots are developed in areas that are completely inaccessible to fire protection. Simultaneously, the exurban developments do not generate sufficient tax revenue to provide the required infrastructure and services. Owners moving onto 35-acre parcels often aggravate counties and farmers and ranchers with nuisance complaints related to the active farming and ranching activities of their neighbors.

Poor use of land: Developments made up of 35-acre lots carve up open space into a maze of roads and long driveways. Counties have limited leverage to discourage the parceling out of land and where the parcels occur. According to David Theobald of the Colorado State University Natural Resource Ecology lab, “rural sprawl has a larger footprint - between five and ten times the amount of land as urban and suburban development – throughout the West.” (“The new pioneers of sprawl”, Amanda Paulson, Christian Science Monitor, March 29, 2004) That is, the impact of exurban development reaches much further than urban or suburban development. Others perceive the loss of farmland and open space to low-density development as a poor use of land and believe that it reflects inadequate planning.

Environmental impact: Colorado State University reports exurban sprawl can have a dramatic effect on wildlife because many native species cannot survive in exurban or large lot subdivisions. Consequences of rural sprawl include weedy flora and the inclusion of domestic animals in a rural environment, which diminishes the population of native songbirds and predators. Further, fragmentation caused by the large lot developments disrupts migration corridors. Often, the developed parcels of land occur on sensitive areas such as wetlands, rangelands or forests.

Rural landowners do not necessarily understand the impact their habitation of rural areas has on the environment or the responsibility it carries. The Picnic Rock fire, which destroyed more than 9,000 acres of wildlands in the Colorado foothills during the spring of 2004, started as a result of a 35-acre lot landowner burning trash on his property. The proximity of forest fuel to the lot provided the perfect conditions for a wildfire. Containment and extinguishment of the fire required 444 firefighting staff, one heavy air tanker, 7 fixed wing airplanes and 4 helicopters. Besides consuming wildlands, the fire also claimed 2 structures and caused numerous evacuations. The total cost of the fire was approximately \$2.3 million. The county was fortunate in that its share came to only about \$100,000; however, re-vegetation of the burned area will take many years.

County Management Practices

From a county perspective, the proliferation of 35-acre parcels of land has many implications. Prevention of rural sprawl benefits counties by minimizing the costs and the difficulty associated with the provision of services (i.e., road construction, fire/police/emergency protection). Agricultural land is perceived as economically important to many counties for the related jobs and support services it sustains but, in most cases, the lots resulting from 35-acre subdivisions are generally considered too small to productively farm or ranch. As large lots spread, agricultural land is lost and the task of managing land becomes increasingly difficult without forward-looking plans in place.

CCI conducted a survey of counties to determine the reaction of various counties to the creation of “ranchette” subdivisions and how they are attempting to manage the situation. Out of 64 counties, 37 responded to the survey. Of the respondents, 17 counties currently do not control 35 acre parcels, 9 counties rely on “density zoning” to control 35 acre subdivisions and 12 counties use other methods (in some cases, in addition to density zoning) to manage the development of these larger parcels.

When considering regulatory approaches, counties must consider the protection of landowners’ private property rights, the need for preservation of agricultural lands and open space, and the importance of allowing development to accommodate growth and market demands. Some of the approaches employed in Colorado and across the nation include:

- **Density Zoning:** Density zoning, as a general concept, regulates the minimum lot size permissible for residential construction on subdivided land. In counties using density zoning to manage the development of subdivided land, the minimum lot sizes range from 60 acres up to 160 acres. Density zoning is being utilized in various forms by Adams, Custer, Elbert, Jackson, Morgan, Pitkin, Rio Blanco, Summit and Weld counties.
- **Growth Management Regulations:** Pitkin County, in particular, has implemented a unique approach to deter subdivision of land into 35-acre parcels. Pitkin County has developed growth management regulations (GMQS), which require all new subdivisions of land to acquire a development right. The theory is that a parcel of land has a single development right attached to it. If the land is subdivided, there is still only a single development right. The landowner must acquire the development right for the new parcel by going through the growth management review process in Pitkin County. Pitkin County limits the amount of development square footage provided each year. Exemptions to the GMQS process are offered to owners of parcels exceeding 80 acres to encourage them to keep large parcels intact. Pitkin County is also evaluating the idea of conservation development, whereby parcels exceeding 200 acres would receive more transferable development rights (TDRs) in exchange for protecting the land from development.
- **Cluster developments:** Cluster developments conserve land by limiting development to specified portions of the land site, preserving the remaining undeveloped portion as open space. Larimer County has experimented with cluster developments through its Rural Land Use Process (RLUP). This process provides incentives to landowners to help retain the rural and agricultural land of the county by allowing additional housing units to be built only if the units are located within a certain distance of one another. The remaining land is then preserved and protected from development by placing the land in a conservation easement or by applying a protective covenant. The RLUP requires that two-thirds of the land be preserved for agricultural uses, wildlife habitats or open space and that the covenant or easement must provide this protection for a minimum of 40 years. This approach attempts to balance the often opposing views of property rights advocates and environmental protectionists. Some of the benefits of this type of solution include: landowners and developers realize value through the ability to build additional housing units, existing agricultural lands and open space are protected, existing infrastructure is better utilized, costs are reduced for future infrastructure improvements, fewer road networks are required, and pollutant loads on water sources are reduced.
- **Conservation easements:** A conservation easement is a legal agreement between a landowner and a land trust or government agency that limits a property's uses in order to protect benefits that flow from natural resource conservation. Such benefits could include conservation of agricultural land, open spaces, wildlife habitats, and/or scenic vistas. In Colorado, landowners may subject their land to a conservation easement and receive state tax credits in

return. This arrangement serves the dual purpose of permanently preserving agricultural land and open space while providing the landowner with the realization of some of the value of the land. Colorado law currently allows for tax credits on donated land of up to \$260,000. If a landowner is unable to use the tax credits, they may be sold (at a discount) to generate cash. As of January 1, 2007, the amount of these tax credits will increase to \$375,000. The actual amount of credits received by any landowner is dependent upon the appraised fair market value of the land. The use of conservation easements is not a method of directly regulating the development of 35-acre parcels. However, by providing a fiscal benefit, a conservation easement can help mitigate a landowner's desire to use the 35-acre exemption to divide a much larger parcel that may provide other community benefits if kept intact.

One concern about conservation easements has arisen in the Arkansas Valley, where landowners have subjected all or a portion of their land to conservation easements to ease the effects of weak crop prices. For them, it has been "a way to cash in without selling out." Some controversy has arisen, however, with respect to land values and the perception that some valuations have been inflated. Great Outdoors Colorado (GOCO) has rejected conservation easement applications from some Otero County landowners due to suspect appraisals of the land involved. The Lower Arkansas Valley Water Conservancy District decided to review appraisals it felt were inconsistent with the standards of the Internal Revenue Service. Some appraisers have been accused of valuing property based on unrealistic assumptions related to the future earnings potential of the land. This poses a risk to landowners donating land for conservation easements. They fear that if their appraisal is found to be faulty, they may be required to repay all or a portion of their tax credits, which would create a major hardship.

- **Transferable development rights (TDRs):** Transferable development rights allow landowners to transfer the right to develop one parcel of land to a different parcel of land. This tool may be used to shift development from agricultural land or open space to areas that are developed or prepared for development. It also allows the landowner transferring a TDR to realize tangible value from the transaction. The TDRs are typically transferred from a sending parcel of land to a receiving parcel of land and the sending parcel is subjected to a permanent conservation easement or other development restriction. The local government designates which areas are to be considered sending and receiving areas. Since TDR transactions generally occur between private landowners and developers, there is usually no need for local governments to raise large amounts of money to execute a TDR program, although some jurisdictions have established TDR "banks" from which development rights may be purchased. TDR programs allow preservation of rural lands while enabling higher density growth in urbanized or urbanizing areas. Communities are expressing a willingness to create denser urban areas to maintain agricultural lands and open spaces in their less developed areas. Counties utilizing this tool include: Adams, Boulder, Larimer, Mesa, Pitkin, and Summit.

- **1041 powers:** Regulation of land use may be effected through the use of “1041 powers,” which were granted to local governments by Colorado House Bill 74-1041 and are now codified in section 24-65.1-101, C.R.S., et seq. 1041 powers allow local governments to identify, designate and regulate 21 statutorily defined areas and activities of state interest. If land being subdivided into 35-acre lots is in an area designated pursuant to 1041 powers, the county may require compliance with its 1041 regulations. The 21 categories defined as areas or activities of state interest include: geological hazard areas, wildfire hazard areas, flood hazard areas, historical and archeological resource areas, and significant wildlife habitats. Eagle County and Pitkin County currently employ 1041 powers as one method to manage growth.
- **Site Plan Review:** Boulder County, responding to an increase in 35-acre subdivisions in areas with steep slopes, poor access and wildfire and erosion hazards, implemented a site plan review (SPR) process. The county does not believe it is able to prohibit building altogether but can condition how and where building will occur on a 35-acre parcel. An SPR is required to issue building permits for any development on vacant parcels. This provides the county with the opportunity to work with landowners to determine the best building sites and plans for the land to protect scenic vistas, wildlife migration corridors and habitats, and reduce the risk of wildfires.
- **Zoning Regulations:** Counties implement other zoning strategies to manage the impact of 35-acre development, as well. For example, Lincoln County has put into place a Rural Design Development process as an overlay to its agricultural zone, which covers almost all of the unincorporated area. The purpose of this regulation is to encourage flexibility and innovation in the initial development of “small” parcels of land (anything under 160 acres in Lincoln) by requiring special use review of permit applications that considers whether the development will: 1) promote safe, efficient and economic use of land, public facilities, transportation and services, 2) preserve open space to the greatest extent practicable, 3) achieve compatibility of land uses, and 4) improve the design, character and layout of development.

Similarly, Jackson County used zoning to create a “Ranching District”. This regulation stipulates that if a residence is to be built on a 35-acre lot within the district but not devoted to ranching, the owner must obtain a Special Use Permit. The permit application process allows the county to consider the impacts of the subdivision and related planned development before the permit is issued.

- **Voluntary Submission to Review:** Gunnison County, under a land use resolution, structured a voluntary compliance program known as the Large Parcel Incentive Process (LPIP). It applies to tracts of land that are at least 70 acres in size and is intended to provide incentives to Land Use Change Permit applicants “to preserve and enhance open space and to protect and promote agricultural uses.” To this end, the county offers the following incentives:
 - Expedited processing and review of proposals;

- Standards to provide more certainty with respect to the review process and methods to promote high quality and environmentally sensitive proposals;
- Development density bonuses;
- Statutory benefits regarding wells; and
- Lot size flexibility along with allowing larger sized residences.

Under this arrangement, a minimum of 75% of the subject land must be protected through the use of a conservation easement.

- **Rural Road Construction Permits:** Larimer County has stipulated that any access from a public road requires a permit and the design of that road should be one that is safe and functional while minimizing erosion and disturbance to natural landscapes. Before any road construction work may be done, a Rural Road Construction Permit must be issued. In deciding whether or not to issue a permit, the county will consider whether the design:
 - Causes minimal surface disturbance;
 - Avoids extensive cuts, fills and steep sections;
 - Provides for emergency access; and
 - Addresses impacts to drainage and maintains natural drainage patterns.

Road construction permits assist counties in having a say where structures are built on large lots and how and where the roads are constructed to access these structures.

- **Other methods:** Other options considered by counties to manage development on 35+ acre lots include:
 - Use of permits for grading, wetland special use and floodplain development;
 - Regulating the issuance of septic permits via the county health department;
 - Requiring that roads, access to public rights of way, road length and water storage/access are consistent with recommendations of the National Fire Protection Act;
 - Providing incentives to ranchers to improve environmental management of rangelands;
 - Helping ranchers and farmers find new ways to capitalize on land values;
 - Adopting “right to farm” ordinances to protect existing agricultural operations from nuisance lawsuits;
 - Developing and publicizing a “Code of the West” or similar guide to rural living that helps educate new rural landowners and residents; and
 - Changing state tax policy to make large lots less attractive.

Conclusion

Unchecked growth across Colorado's agricultural lands and open spaces will likely occur if not managed in a fair, realistic manner. Counties have an opportunity to determine the desires of their constituents and what priorities are driving those preferences with respect to how land is developed or preserved. Based on that knowledge, counties should employ the various techniques available and work regionally with other jurisdictions where possible to ensure that new development in Colorado comports with counties' ability to support that development, respects the rights of landowners, and maintains Colorado's western heritage.