
Speech

Limiting Building Height: The Story of a Citizens Initiative to Preserve Mountain Vistas and a City's Future

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PROLOGUE

This piece, a story that has long needed to be told in full, traces the evolution of the historic 1971 decision by the citizens of the City of Boulder, Colorado to place a height limit of fifty-five feet on all future buildings. Ruth Wright is the perfect person to recount this fascinating episode. She was deeply involved in accomplishing this City Charter amendment and also happens to be a careful and objective scholar as well as a writer who knows how to present an engaging story. Further, this important article, set in its particular time and place, sheds light on the critical early years of the modern environmental era in America and reminds us of how it is that so often the greatest results are due to the efforts of informed, committed citizens.

These events in Boulder took place during the origins of the modern environmental movement. One of the first manifestations was the passage of the Wilderness Act in 1964. Then accomplishments turned into a deluge beginning in 1970. The National Environmental Policy Act went into effect on January 1 of that year and the first Earth Day was celebrated on April 22. The Clean Air Act, Clean Water Act, Endangered Species Act and other revolutionary statutes were passed soon afterward and most of the federal laws comprising the foundation of the field of environmental and natural resources law were enacted within the decade. Wright's account captures the new kind of creative thinking, citizen vitality, and community excitement that characterized this era.

The 1971 height limitation was the capstone on a series of innovations in these early days that established Boulder's well-deserved reputation as one of the most environmentally sensitive municipalities in the country. Boulder's stirring beauty is largely due to the verticality of the backdrop to town, rising sharply up from the plains at the exact base of the Rockies. The most dramatic formations are the sheer, arresting Flatirons, but the eye is also drawn to the long ridges and foothills heading off to the north and south. The people of Boulder treasured the matchless terrain and, just as the town was beginning to be "discovered," took decisive action to protect its unique natural qualities.

In 1959, citizens approved a ballot initiative that prevented development in the foothills above town. This innovation was the so-called "Blue Line," which prohibited the delivery of city water for any new buildings above the elevation line of 5,750 feet. The

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landscape that people looked up at from town would remain natural. A few years later, a luxury hotel complex was proposed for construction on the aptly-named Enchanted Mesa, just south of town. When a legal action proved to be inadequate, citizens turned again to the ballot box. The voters solidly approved a substantial bond issue to bring a condemnation proceeding, compensate the owner, and keep the mesa forever in open space. Then came an ambitious and enormously successful program to provide for preserving open space. In 1967, the voters overwhelmingly approved a one-percent sales tax, with sixty percent to go for transportation and forty percent for open space. This greenbelt system, created by the first voter-approved tax for open space in the country, has been expanded over the years and remains a revered staple in the community.

The 1971 height limitation was adopted in response to perhaps the biggest threat of all to Boulder's relationship with its landscape. As Wright explains in detail, the number and height of proposed buildings was overwhelming, almost incomprehensible. Potentially fifty buildings up to 140 feet high could have been built, obliterating vistas of the Flatirons and the Rocky Mountain foothills at locations all over town. It is worthwhile to examine the importance of a vista. It is so easy to say that such a thing is nothing more than an amenity. But vistas lift us up and stretch us out. They connect us with beauty. They give us inspiration and cause us to reflect. Vistas are a main source for invoking what landscape architect and philosopher Frederick Law Olmsted called the "contemplative faculty." Olmsted's son, Frederick Law Olmsted Jr., in his 1910 report for Boulder, urged creating parks to preserve the views of the mountains. Is it not true that one of the finest gifts of these parks is the reactions we have when we stand in them, pause for a moment, and look up toward the west?

The episode chronicled by Ruth Wright proves once again how committed citizens can change the world. No single individual or small group could have accomplished this height limitation. After all, the business community, the major developers, and a majority of the City Council supported the seemingly inevitable drive toward a radically different, impersonal, tall-building Boulder. But beyond any doubt Wright herself did make a difference. She was a law student at the time, and hardly looking for extra work, but was troubled by the threatened development. So she proceeded to write an authoritative seminar paper that painstakingly analyzed the constitutional law cases, federal and state, and concluded that a fifty-five foot height limit for buildings would be constitutional. This was early in the

development of the constitutional dimensions of environmental law and, while a number of cases had addressed the issue, there was still uncertainty over whether such a limitation might be a taking of private property rights. Wright's paper was accurate and convincing, though, and, combined with her effective presentations in speeches and debates, eliminated the constitutional issue both legally and politically. While she had good company, the fifty-five foot limit might well have not passed without Ruth Wright.

Wright has since gone on to a full life of public service. She served in the Colorado House of Representatives from 1980 through 1994, with six years as House Minority Leader. Since then, as an active supporter of nonprofit and governmental organizations, she has been a board member on the State Health Board, Colorado Water Quality Control Commission, Audubon Colorado, Colorado Water Trust, and the Boulder Open Space Board of Trustees. Wright has long been one of Colorado's most respected public figures, always available for fair and knowledgeable advice on public issues. From her selfless work in protecting Boulder's quality of life during the historic height limit controversy through her long career afterward, no one better stands for the proposition that a single person, especially one who can bring people together, can make a major difference.

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I. BACKGROUND

Boulder, Colorado, in 1968, was a city of about 70,000 souls,¹ nestled up against the foothills of the Rocky Mountains, and home to the University of Colorado.² The mountain waters of Boulder Creek flowed through downtown. Several federal laboratories were also headquartered here, attracting high-tech industries resulting in a highly-educated, engaged citizenry. Boulder (also referred to as the “City”) was blessed with a beautiful setting, and its thoughtful citizens cared deeply about their environment. But there was trouble in river city. The high annual growth rate of seven percent meant that the population would double in ten years.³ Recognizing the importance of controlling their destiny by controlling development, in November 1967, sixty-one percent of citizens voted to tax themselves to buy open space—the first community in the nation to do so.⁴ The goal was to buy the lands on the precious mountain backdrop along the western edge of the city, the valleys, the ridges, and the buffering agricultural lands that made Boulder one of the most desirable places to live in America.⁵

Just months after the successful open space sales tax vote, a new threat was brewing: high-rise buildings, especially in the downtown area. While some tall buildings in Boulder had been permitted under previous zoning ordinances, now a clamor for more high-rise buildings was erupting. News stories in Boulder’s local paper, the Boulder Daily Camera, showed there was strong interest by banks and other commercial entities—supported by architects—to create numerous buildings at least 100 feet high.

The City was just beginning to purchase lands on the mountain backdrop, the number one goal of the open space vote, yet suddenly high-rise buildings were proposed that would cut off the views Boulder residents cherished. This was a real threat, especially to the historic downtown, just eight blocks east of the mountain backdrop.⁶ This is the story of citizens versus a huge array of well-respected, influential,

1. Bill Hoffman, *Building Height, Growth Limit Issues Debated*, BOULDER DAILY CAMERA, Oct. 21, 1971.

2. Aerial View of the City of Boulder, 1970 (Attachment A). NOTE: the attachments for this Speech can be found in the online version of Ruth Wright’s speech available on the Colorado Natural Resources, Energy & Environmental Law Review website here: <http://www.colorado.edu/law/sites/default/files/CNREELR-V27-I2-Ruth.pdf>.

3. MICHAEL LINDEBURG, CIVIL ENGINEERING REFERENCE MANUAL app. 87.B (13th ed. 2016).

4. *OSMP Nature & History*, CITY OF BOULDER COLO., <https://bouldercolorado.gov/osmp/nature>.

5. Aerial View of the City of Boulder, *supra* note 2.

6. Street Map of the City of Boulder (1968) (Attachment B).

powerful people and entities that had a legitimate, but very different, vision for Boulder's future. The City Administration and the City Council (also referred to as the "Council") were also conflicted. If anyone had asked what would be the result of these conflicting visions, no one could possibly have guessed the final outcome.

Why is a civic battle that raged forty years ago still relevant today? Because in cities large and small, citizens are still concerned about high-rise buildings for several reasons. First, of course, in large cities, high-rise buildings are a necessary fact of life. In general, a strong argument for high-rise buildings is the potential for increasing population density.⁷ Density can reduce sprawl and make mass transit more feasible. Going up rather than out creates efficient offices, hospitals, and educational buildings, and it facilitates mobility for senior citizens. High-rises can be spectacularly beautiful symbols of a modern society. There is also the prestige factor; these buildings tower over their neighbors, and some even are named, such as Trump Tower and the Pan American Building in New York; Security Life Building and First National Bank Building in Denver, and the former Colorado Insurance Group Building in Boulder.

On the other hand, high-rise buildings can also have negative impacts: supplanting historic buildings or even districts, losing pedestrian friendly activities, taking over parkland or open space, obstructing views, or overwhelming lower architectural masterpieces. Just one high-rise can dramatically change a neighborhood, creating more traffic and the loss of community and family values. It is also worth mentioning that fires in a high-rise can be disastrous and much more difficult to fight.

In this speech, I will discuss the drama of a real-life story with a real cast of characters—people who cared, agonizing decisions being made by administrators and elected city council members, financial successes or failures at stake, heated debates, a robust media, a cliff-hanger election—and an epilogue forty-plus years later.

II. THE STORY UNFOLDS: ADOPTION OF AN INTERIM ORDINANCE TO CONTROL HIGH-RISE STRUCTURES

In April of 1968, PLAN-Boulder, the local environmental group that I chaired, sent a letter to the city, warning of the lack of control over

7. However, in Boulder density is controlled by Floor Area Ratio (FAR) and units per acre. See *infra* note 207.

potential high-rise structures.⁸ Bill Lamont, Planning Director, responded that he recognized the urgency, since five high-rise inquiries had already been received.⁹ Amendments to the zoning code to limit buildings to fifty feet, and to only allow taller buildings up to 100 feet under special review, were already being formulated.¹⁰

By January 1969, Lamont had developed a lengthy, detailed and well-reasoned memorandum to the City Council.¹¹ He stated, “For purposes of a common beginning, we are defining high-rise buildings as any building over 50 feet in height.”¹² He also stated that height limitations in Boulder had been established since the beginning of zoning in the 1920s and presented the advantages and disadvantages of such buildings.¹³ His recommended course of action for the City Council included these words of caution:

High-rise buildings create a tremendous impact upon the community Boulder would continue in its position as a desirable City in an excellent natural setting without the intrusion of high-rise buildings. Few developments can alter the character and appearance of a community more than high-rise buildings. . . . high-rise buildings can be an asset to Boulder, but one which is not absolutely necessary to relieve a lack of visual excitement. Our mountain backdrop does this far more successfully than any group of the most well designed buildings could ever hope to do.¹⁴

The City Council decided to move ahead with an interim ordinance. It had already asked Boulder architects to form a committee on height to make recommendations for a final ordinance.¹⁵

During a heated public hearing on an interim ordinance, Lamont responded that the proposed height limitations “were actually a stop-gap measure against a log-jam of proposed structures pushing the 100-foot limit in a panic move on the part of developers”¹⁶ The Planning Board concluded that interim height controls were necessary until the architects completed their study and recommended that buildings up to a

8. Letter from Ruth Wright, to Bill Lamont (Apr. 12, 1968) (Attachment C).

9. Letter from Bill Lamont, Planning Director, to author (Apr. 19, 1968) (Attachment D).

10. *Id.*

11. Memorandum from Planning Director to City Council (Jan. 6, 1969) (Attachment E).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Interim Control of Local Building Heights Urged*, BOULDER DAILY CAMERA, Feb. 8, 1969.

16. *Planning Board Asking Interim Height Limits*, BOULDER DAILY CAMERA, Mar. 7, 1969, at 12.

height of fifty feet be permitted without review. Projects above that height would require special review by the Board of Zoning Adjustment, with an advisory report from the Planning Board.¹⁷ A memorandum from the City Attorney's Office stated that the City Council should also consider an alternate proposal that would limit all buildings to the height of fifty feet, with no exceptions.¹⁸

At the April 1, 1969 council meeting, I urged the Council to adopt an interim ordinance to "hold the line" because the Zoning Board had shown a propensity towards approving high-rise buildings.¹⁹ Only five of the nine council members were present.²⁰ Joyce, Bowers, Geesaman and Trent voiced their positions that the City Council, not the Zoning Board, should have the final decision on all buildings proposed for high-rise development.²¹ Joyce felt the Council was more politically responsive.²² Buechner said he would only vote for an ordinance limiting height to fifty feet with no exceptions.²³ The hearing was continued to April 15.²⁴

The April 15 meeting was more contentious. Two and a half hours of public debate resulted in postponing action to May 6 on a five to two vote.²⁵ Pros and cons elicited some pithy comments such as one by citizen Mary Skumanich replying to John Cohagen's urging that high-rises be permitted now, "while Mr. Cohagen may weep for half a year, we may weep forever."²⁶ When attorney Guy Hollenbeck complained about the complexities of the ordinance proposals, such as light and shade calculations, Planning Board member Larry Brown retorted that such calculations have been made since the time of the Babylonians. "I don't think we are any less equipped today than we were 3,000 years ago" ²⁷ The debates had begun.

Finally, on May 6, 1969, the City Council adopted Interim Ordinance No. 3418, effective for six months.²⁸ It limited building height to fifty feet, but allowed up to 100 feet in the Planned Development

17. Memorandum from City Planning Department to City Council (Mar. 14, 1969) (Attachment F).

18. Memorandum from City Attorney's Office to the City Council (Mar. 31, 1969) (Attachment G).

19. *Council Delays Interim Limit on Building Heights*, BOULDER DAILY CAMERA, Apr. 2, 1969, at 1.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* Council members Knecht, Haertling, Klemme and Newkirk were absent.

24. *Id.*

25. *City Council Again Delays Building Height Limitation*, BOULDER DAILY CAMERA, Apr. 16, 1969, at 1.

26. *Id.*

27. *Id.*

28. Interim Ordinance No. 3418, May 6, 1969 (Attachment H).

Zoning Districts with special review, requiring approval by the Planning Board and the City Council—thereby taking the final decision unto itself.²⁹ A city questionnaire had also been sent to test citizens' attitudes on certain issues.³⁰ In response to the question "Should highrise buildings be discouraged in certain areas of Boulder?" 85.2 percent of Boulder citizens agreed.³¹ There is no doubt that after these difficult months, the City Council fully realized the potential impact of high-rise buildings on the future of Boulder. The Interim Ordinance was extended twice and was in effect for almost one and a half years.

III. HARD CHOICES

If the City Council's adoption of an Interim Ordinance was difficult, the Council's real-life decisions were agonizing—the actual locations of individual proposals, pressure by developers, their architects and attorneys, the effect on neighboring properties, the reaction by the public, media coverage, editorials, letters to the editor, and debates. The following sections will discuss three controversial proposed high-rise developments: the Horizon West proposal, the James Hunter proposal, and the John Cohagen proposal.

A. *The Horizon West Proposal*

The Horizon West apartment building was the first high-rise proposal to be processed under the new ordinance.³² The proposal in the 1800 block of Twenty-Fourth Street was heard by the Planning Board for a rezoning to the Planned Development Zoning District on June 5, 1969.³³ The Planning Board, having heard from staff that the proposal met the requirements of the Interim Ordinance and was in keeping with the initial thoughts of the Architects Committee for this area, gave its unanimous approval.³⁴ Then, on July 1, 1969, Council also gave its unanimous approval (Knecht absent).³⁵ No one had shown up at either of the public hearings. A few weeks later on July 31, 1969, a Denver Post story announced that a \$2.3 million high-rise luxury apartment would be constructed at 1850 Twenty-Fourth Street (now Folsom Street), with an

29. *Id.*

30. *High Rise Controls Supported*, THE DENVER POST, June 3, 1969, at 25.

31. *Id.*

32. BOULDER CITY PLANNING BOARD, BOARD MINUTES (1969).

33. *Id.*

34. *Id.*

35. BOULDER CITY COUNCIL, MINUTES OF THE MEETING (July 1, 1969); BOULDER, CO, ORDINANCE NO. 3500 (July 15, 1969).

artist's rendition of a huge building eleven stories high.³⁶ It was not until the following summer, however, when layer upon layer of stories reached skyward, did the visual reality hit home.³⁷ Citizens made comments such as appalling, offensive, gross and eyesore.³⁸ Why no one took up the cudgel early on is not easily explained, except that this location was many blocks east of downtown and the mountain backdrop, and the other two proposals (Hunter and Cohagen) were more controversial and heavily reported in the media.

B. The Hunter Proposal

The Hunter proposal at Sixth Street & Canyon had a colorful history. Respected Boulder architect James Hunter was proposing to revitalize the "Ruins"—the unfinished Park Allan Hotel foundations.³⁹ Financier Allen J. Lefferdink had built the first downtown high-rise at Fourteenth Street & Walnut in 1954, a nine-story building, with his office in the penthouse.⁴⁰ It was known as the Colorado Insurance Group Building, or Joslins, since it housed the Joslins Department Store. It had been designed by Hunter.⁴¹ On the north side of the building, Lefferdink touted his company with a red neon sign, three-stories high that read:

**Colorado
Insurance
Group**

The Park Allen Hotel was to be his second signature high-rise building, at a highly visible location—the mouth of Boulder Canyon where the creek leaves the foothills and flows into Boulder. Begun in 1958, all construction ceased when his federal tax problems and eventual bankruptcy put him in jail and out of business in the early 1960s.⁴² The huge red neon sign on the building went dark.

36. *\$2.3 Million is Price Tag*, THE DENVER POST, July 31, 1969 (Attachment I). The developer was James Kean, the designer William Heinzman, and the attorney Guy Hollenbeck.

37. TOWN & COUNTRY REVIEW (Boulder County), Aug. 19, 1970 (Attachment J).

38. *High Rise Building Draws Unfavorable Comment*, TOWN & COUNTRY REVIEW (Boulder County), Aug. 26, 1970.

39. On The Corner: The Lower Chautauqua Neighborhood Newsletter (Attachment K); *"The Ruins": The Concrete Foundations of the Proposed Lefferdink Hotel*, BOULDER DAILY CAMERA, Apr. 4, 1971 (Attachment L).

40. *Id.*

41. *Id.*

42. Silvia Pettem, *Silvia Pettem on Boulder History: Allen Lefferdrink Left Empty Pockets*, BOULDER DAILY CAMERA (Apr. 10, 2009), http://www.dailycamera.com/ci_13117857?source=most_emailed (Attachment M).

When Hunter took over years later, the concrete foundations had been sitting there as an eyesore for more than a decade.⁴³ On February 24, 1969, he submitted his plans to the Zoning Board for a variance to go beyond the 100-foot limit for an apartment building.⁴⁴ This was before the adoption of the Interim Ordinance, so a building up to 100 feet was “by right,” only requiring approval from the Zoning Board to go higher than 100 feet.⁴⁵ Most importantly, the Zoning Board’s approval would be final.⁴⁶ The Board did approve Hunter’s high-rise development, over the objection of many residents that were upset with any disruption to the mountain view.⁴⁷ Then, on March 4, the City Council encouraged the development by supporting several preliminary actions needed for the building. Mayor Robert Knecht approvingly stated, “It’s the first concrete show of faith in the redevelopment of the core area.”⁴⁸

This quote highlights a very important dynamic that played into the high-rise issue. With the competition from the Crossroads Shopping Center on the eastern side of Boulder, retailers were moving there, leaving the downtown with empty buildings and deteriorating shops.⁴⁹ In response, at a 1965 lunch for Boulder civic leaders, Knecht and Joe Stepanek, a University of Colorado official, outlined their ideas for revitalizing the downtown.⁵⁰ An organized group emerged from these discussions, eventually becoming Boulder Tomorrow in 1966—a strong movement to revitalize a faltering downtown.⁵¹ It drew support from an ever-increasing coterie of banks, business interests and citizens. Officers were Knecht, President; Stepanek, Vice President; myself (representing PLAN-Boulder), Secretary; and Clyde Reedy, Treasurer.⁵² It became dogma that high-rise buildings were necessary to bring downtown Boulder back to life. City Manager, Ted Tedesco, who joined the City

43. “*The Ruins*”: *The Concrete Foundations of the Proposed Lefferdink Hotel*, *supra* note 39.

44. *What Makes A High Building Too High?*, BOULDER DAILY CAMERA, Feb. 27, 1969.

45. *Id.*

46. *Id.*

47. *Id.* Board members voting for approval were George Boland, Cal Briggs and Sandy Belcher. Absent were Duane Sarbaugh and Verle Root.

48. *Council Encourages 6th, Canyon High Rise Apartment Development*, BOULDER DAILY CAMERA, Mar. 5, 1969.

49. Mary Butler, *Pearl Street parents – A decade before mall, visionaries sought to revive ‘core area,’* DAILY CAMERA (Boulder), July 19, 2002; *Officers Are Elected By Boulder Tomorrow*, BOULDER DAILY CAMERA, Oct. 7, 1966; *Photo of Contract Signing*, BOULDER DAILY CAMERA, Mar. 25, 1967 (Attachment N).

50. *Id.*

51. *Id.*

52. *Id.*

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Administration in June 1967, became a key proponent of the Boulder Tomorrow campaign.⁵³

Even though the Zoning Board had granted a variance and Council had supported the Hunter proposal in early 1969, Hunter's application for a building permit was turned down in June 1970 by Charles Carter, City Zoning Administrator, on the basis that the variance had expired.⁵⁴ Hunter argued with some justification that the variance was still in effect: he had received the variance by the Zoning Board for his development under the old ordinance, he had been waiting for those preliminary actions that the Council had promised, he had alerted the City of this non-action, and he had made investments in reliance on the variance.⁵⁵ In November 1970, he filed a lawsuit asking the court to declare his variance still valid and force Carter to reconsider his permit on its merits.⁵⁶

C. *The Cohagen Proposal*

What really caught everyone's attention, however, was John Cohagen's announcement that he intended to build a 200-foot building in the Arapahoe Shopping Center on Canyon Boulevard!⁵⁷ Carl Worthington would be the architect.⁵⁸ Worthington would become an articulate spokesman for the high-rise proponents; he also was on the City Planning Board and a member of the Architects Committee.⁵⁹ On March 20, 1969, the Boulder Camera printed an artist's rendition of a less-ambitious, but still surprising, seventeen-story skyscraper office and apartment building.⁶⁰ Earlier, Cohagen had asked for a variance from the Zoning Board to permit a 220-foot building.⁶¹ That hearing had resulted

53. *Id.* The project eventually faltered when a \$7 million bond issue was defeated; however, a far less extravagant version became a successful reality. Editorial, *Core Area — Heart of the Community*, BOULDER DAILY CAMERA, June 13, 1973, at 4 (Attachment O).

54. *Suit Filed Against City To Build Canyon Project*, BOULDER DAILY CAMERA, Nov. 16, 1970.

55. *Id.*

56. *Id.*

57. *17-Story Building Planned for 2600 Canyon Blvd.* THE DENVER POST, Mar. 20, 1969.

58. *Office-Apartment Plan Expanded*, BOULDER DAILY CAMERA, May 4, 1971.

59. COMMITTEE OF BOULDER ARCHITECTS, BOULDER HIGHRISE STUDY, FINAL REPORT (Nov. 13, 1969) (Attachment P); *Planning Board Approves High-Rise at 9th-Canyon*, BOULDER DAILY CAMERA, Sept. 19, 1969.

60. *17 Stories-too Many? Cohegan Defends "Skyscrapers,"* Mar. 20, 1969 (Attachment Q).

61. *A City Council Meeting Regarding the Interim Ordinance*, BOULDER DAILY CAMERA, Feb. 27, 1969.

in the Board's dismissal of the project, based on Assistant City Attorney Larry Rider's opinion that the Zoning Board did not have the authority to rule on so excessive a variance; however, the Board referred the matter to City Council and recommended approval.⁶² Lamont felt the project could have some effect on the Boulder Tomorrow plan by reducing the availability of tenants for office structures downtown.⁶³ Cohagen, never one to avoid controversy, responded that he planned on bringing in outside tenants by attracting them with advertisements in the Wall Street Journal and other large metro news sources—obviously promoting growth!⁶⁴

Then, in August 1969, after the adoption of the Interim Ordinance, Cohagen tried again to obtain approval on the basis of a variance, attempting to bypass that ordinance.⁶⁵ This time, the Zoning Board refused to even schedule the application on the directive of City Attorney Walt Wagenhals.⁶⁶ So, in early September 1969, Cohagen filed a \$100,000 damage suit on the basis that the Zoning Board had no legal authority to refuse to hear applications.⁶⁷ The City hired Boulder Attorney Gerald Caplan to defend the City, since, in an unusual move, Wagenhals was named as a co-defendant.⁶⁸

IV. A PIVOTAL DECISION IN THE HIGH-RISE DEBATE: THE MILBURN PROPOSAL

The Milburn Proposal was just three blocks east of the Hunter proposal.⁶⁹ It was for a 100-foot office building in downtown Boulder on the northeast corner of Ninth Street & Canyon Boulevard.⁷⁰ Its architect was William Milburn.⁷¹ In September 1969, the Planning staff had recommended approval, and the Planning Board unanimously approved the development⁷² in spite of objections from citizens, including PLAN-Boulder. In a letter to the editor, I wrote:

62. *Id.*

63. *17-Story Building Planned for 2600 Canyon Blvd.*, BOULDER DAILY CAMERA, Mar. 20, 1969, at 5.

64. *Id.*

65. *City Sued Over Issue of High Rise*, BOULDER DAILY CAMERA, Sept. 3, 1969.

66. *Id.*

67. *Id.*

68. *City Hires Attorney in Lawsuit*, BOULDER DAILY CAMERA, Oct. 8, 1969.

69. *Planning Board Approves High-Rise at 9th-Canyon*, *supra* note 59.

70. *Id.*

71. The Milburn Proposal: Architect's Rendition of 100-Foot Building at 9th & Canyon Blvd. (Attachment R).

72. *Planning Board Approves High-Rise at 9th-Canyon*, *supra* note 59.

We are dismayed at the city planning staff's recommendation for approval of a 100-foot highrise building on the northeast corner of 9th and Canyon Boulevard. This is, of course, in addition to the 122-foot building which will definitely be built at 6th and Canyon. Are we to lose our view of Boulder Creek Canyon altogether? And is this another step towards the disappearance of our mountain backdrop? . . .

. . . .

Whenever the citizens of Boulder have had the opportunity to voice their position for preserving their natural heritage . . . they have overwhelmingly voted to do so – witness the Blue Line Charter provision, the Enchanted Mesa bond issue, and the greenbelts sales tax. Do we need to go this route again on height limitation?⁷³

At the City Council level on October 8, the development won preliminary approval five to three.⁷⁴ At the City Council meeting on November 18 for final approval, however, the proposal was hotly-contested, and it lost on an astonishing tie vote.⁷⁵ Klemme, switching his vote, said he would have preferred postponement for more time to digest the issue, but since he had to vote, he could not take the risk of destroying the view of the mountains from the city.⁷⁶ “I’m not satisfied we have thought through what we are doing This will be an irrevocable decision, at least in our lifetime.”⁷⁷ Joyce, however, said that the building would have been a “real shot in the arm for the core area and Boulder Tomorrow.”⁷⁸ Knecht added, “The press for high-rises will continue and it is naive for us to think we will have a vital core of municipal activity separate from a vital private core.”⁷⁹ These quotations encapsulate the two opposing visions. It was obvious that council members understood that they were making momentous and irreversible decisions about the future of Boulder. Some were not convinced that Boulder needed buildings higher than fifty feet; others, like Mayor

73. Ruth Wright, Letter to the Editor, *Highrise Threatens Us Again*, BOULDER DAILY CAMERA, Aug. 6, 1969.

74. *Minutes of Meeting*, City Council of the City of Boulder, Oct. 7, 1969. Haertling, Joyce, Klemme, Knecht, and Newkirk were in support, and Bowers, Buechner, and Geesaman opposed, with Trent absent.

75. *Council Defeats 9th-Canyon High-Rise*, BOULDER DAILY CAMERA, Nov. 19, 1969, at 1. Four council members in support (Haertling, Joyce, Newkirk, and Knecht) and four opposed (Bowers, Buechner, Geesaman, and Klemme) with Trent absent.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

Knecht, were convinced that without high-rise buildings, their hopes for revitalizing downtown Boulder could not be realized.⁸⁰

V. CHANGING OF THE GUARD

The City of Boulder has a City Manager/City Council form of government.⁸¹ The City Council has nine members with staggered terms.⁸² Elections are held every two years.⁸³ There are four hold-over members, and five members are elected; the four highest vote-getters get four-year terms, the fifth gets a two-year term.⁸⁴ The City Council elects one of its members as mayor.⁸⁵

On November 4, 1969, a city election was held for five City Council members.⁸⁶ The two incumbent City Council members running for re-election, Haertling and Geesaman, received four-year terms.⁸⁷ The four hold-over City Council members were Bowers, Buechner, Klemme and Knecht.⁸⁸ Three new members were elected: Dwayne Nuzum, Richard McLean, and Thomas Waugh, who received the two-year term.⁸⁹ This was the new team that would probably be making the momentous decision on a final high-rise ordinance.⁹⁰ The new Council took office on January 1, 1970, when Knecht was again chosen as mayor.

Also in January 1970, I returned to the University of Colorado to finish my law degree. I had not sought re-election as an officer of Boulder Tomorrow⁹¹ due to my growing concern regarding Boulder Tomorrow's support of high-rise buildings. I also resigned as Chair of PLAN-Boulder. Joyce Davies became the Chair and was at the helm for the rest of the controversy.⁹²

80. *Id.*

81. The Charter of the City of Boulder, Colorado, 1984, Art. V., Administrative Service, The City Manager, §§ 63, 64.

82. The Charter of the City of Boulder, Colorado, 1984, Art. II., The Legislative Body: Its Powers and Duties, § 5.

83. *Id.*

84. *Id.*

85. *Id.* § 14.

86. Email from Marti Anderson to Author (May 22, 2014).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Phase II Contract Specifies 'Continuous Exchange of Ideas' Between Planners and Boulder Tomorrow on Ten Key Problems and Details*, BOULDER TOMORROW, May 1968.

92. Interview with Joyce Davis (Nov. 2015).

VI. CONSTRUCTING A FINAL HIGH-RISE ORDINANCE

During this period, the Committee of Boulder Architects⁹³ had been hard at work developing a draft of a final ordinance, issuing its report in November 1969.⁹⁴ A preliminary report had stated that high-rises in Boulder were highly desirable, and that explicit regulations regarding their location, bulk, land-coverage, shape, orientation, and effect on the immediate neighborhoods should be spelled out, leaving as little interpretation as possible to the body regulating high-rises.⁹⁵ Chairman Alan Zeigel said, “So we decided if we were smart enough to set up the criteria now, we would avoid future problems.”⁹⁶ The recommended maximum heights in the Final Report were:

Core area (essentially the downtown area) and the Crossroads area – 300 feet

Sub-community Cores – 200 feet

Open Areas (Greenbelts and around lakes) – 100 feet

Planned Development Zones – as appropriate, but not to exceed 200 feet

Other areas – 35 feet⁹⁷

The report also stated that, “[h]igh rise buildings should be spaced apart from one another by a specific formula with the core spacing being the closest allowed.”⁹⁸ Legally, this was a major problem because the first high-rise to be approved could negatively affect other proposed high-rise projects. If such projects were denied because of the spacing requirement, the proponents could plead “denial of equal protection.” Later, the City Council also saw this as a problem requiring further research because “the proposal was seen by some as tending toward a ‘first-come, first served’ policy.”⁹⁹

93. Members of the Committee were H. Alan Zeigel, Chairman, Gale Abels, Stan Nord Connolly, Ken C. Dell, Stanley Mason Goldberg, Steven I. Gunn, William W. Milburn Jr., Wallace D. Palmer, David E. Rowland, James E. St. John, Rigomar A. Thurmer, Richard F. Veasey, Richard B Whitaker, and Carl A. Worthington. COMMITTEE OF BOULDER ARCHITECTS, *supra* note 59.

94. *Id.*

95. *Preliminary Report Issued on Control of High Rises*, BOULDER DAILY CAMERA, Sept. 2, 1969, at 1.

96. *Id.*

97. COMMITTEE OF BOULDER ARCHITECTS, *supra* note 59.

98. *Id.*

99. Ron Tollefson, *City Continues Height Debate*, BOULDER DAILY CAMERA, Apr. 14, 1971, at 1.

The public was stunned by the recommendations that buildings could be 200 feet and 300 feet high! Planning Director Lamont's reaction to the Architects Committee report was a surprising rebuke. Lamont even questioned the Architects Committee's basic assumption that high-rise buildings should be allowed at all, stating that low-rise buildings can be just as economical and would be much more fitting for Boulder's setting at the foot of the mountains; however, he felt that it was necessary once and for all to clarify the question.¹⁰⁰ He also thought that the final answers should be left to a vote of the citizens!¹⁰¹ "They have the prerogative and ability to decide."¹⁰² The "no action" by the City Council on the report spoke for itself. A small Sub-Sub Committee made up of two representatives each from the City Council, the Planning Board, and the Architects Committee would continue the work to find consensus.¹⁰³

By April 13, 1970, the Sub-Sub Committee had reached consensus¹⁰⁴ on a somewhat less controversial proposal:

150 feet in the Core Area, (Downtown)

100 feet surrounding the Core Area

75 feet in the area south of Arapahoe, east of Seventeenth Street and west of Twenty-Fourth Street

55 feet in all other MR-3 and business zoned areas¹⁰⁵

The committee stated that the sub-community centers, such as the area east of Twenty-Fourth Street and north of Boulder Creek, needed further evaluation.¹⁰⁶ Cohagen urgently requested that his property be addressed to permit 150-foot buildings.¹⁰⁷ He and his architect, Carl Worthington, had revised their proposal from one 220-foot building to two buildings in the 100-foot-plus range.¹⁰⁸ Subsequent evaluations did result in the Planning Director's recommendation that the area where 150-foot buildings would be permitted be increased from Twenty-Fourth Street all the way east to Thirty-Third Street and between Arapahoe and

100. *Boulder Planning Director Mostly Opposes High-Rises*, BOULDER DAILY CAMERA, Nov. 17, 1969.

101. *Id.*

102. *Id.*

103. Memorandum from the Sub Sub-Committee on Height to the City Council (Apr. 13, 1970) (Attachment S).

104. *Id.*

105. *Id.*

106. *Id.*

107. Memorandum from the Planning Board to the City Council (Apr. 27, 1970).

108. *Id.*

Pearl Street, which included two shopping centers.¹⁰⁹ The memorandum stated that “if any place in the City was to permit higher buildings, based on physical conditions, this general area would be very well suited.”¹¹⁰ It must be noted here that moving the boundary further to the east actually negatively impacted the revitalization of the downtown area, one of the most important reasons for allowing high-rise buildings. Why would anyone build downtown when it was much easier to develop out east: the land was cheaper, it was mostly undeveloped so that no valuable buildings needed to be razed, there was plenty of space for parking, it was at the crossroads of major thoroughfares, and the area was closer to the geographical center of Boulder. To reinforce his development proposal, Cohagen had also contacted attorney Richard Babcock to evaluate the height ordinance and to meet with staff to further explore some of the requirements in the code.¹¹¹

When the City Council held a public hearing on the proposed final ordinance on July 7, 1970, there were negative responses from all sides.¹¹² Setback requirements, the effect on scenic views, and inadequacy of utilities were cited.¹¹³ People even objected to the process whereby the Planning Board would have final approval unless called up by, or sent to, the City Council.¹¹⁴ As one spokesman for a developer stated, “I don’t think details of this have been discussed enough – I even agree with PLAN-Boulder for a change.”¹¹⁵ Cohagen went so far as to say that a Chicago attorney (undoubtedly the aforementioned Mr. Babcock) had told him the ordinance might be illegal.¹¹⁶ It would take another year of meetings, public hearings, and revisions to come up with recommendations for a final ordinance. During that period, City Manager Tedesco showed some frustration with the City Council stating, “Everytime you have a meeting on this, the whole thing grows like yeast.”¹¹⁷

109. Memorandum from the Planning Director to the Planning Board (June 23, 1970) (Attachment T).

110. *Id.*

111. Memorandum from the Planning Board to the City Council (July 2, 1970). Babcock was a nationally-recognized legal expert and author of *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (1966).

112. *Boulder Skyline Controls Sent Back for Redrafting*, BOULDER DAILY CAMERA, July 8, 1970, at 1.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Ron Tollefson, *High Rise Debate Returns to Council*, BOULDER DAILY CAMERA, Mar. 24, 1971.

During this period, Boulder's Fire Chief Jake Ringleman brought up the issue of fighting fires in new high-rise and large commercial buildings and recommended changes in the City Building Code to require sprinkler systems.¹¹⁸ He warned that, without such requirements, the department's budget may have to triple to finance additional men and equipment.¹¹⁹ He argued forcefully that the do-nothing alternative would risk citizens' and firemen's lives.¹²⁰ Area realtors and developers coalesced against such changes.¹²¹ Hunter and Cohagen both expressed opposition.¹²² Hunter charged that the proposed changes were part of the City's policy of having the developer pay for city services in lieu of increasing taxes, that this policy had stymied new growth and was an intrusion on his rights by a "paternalistic system."¹²³ Cohagen added that the code changes would impose extra costs on new construction and sprinklers would invite vandalism.¹²⁴ They both recommended that the measure be turned over to a citizens committee, "one of hard-boiled business men with dollar signs in their eyes."¹²⁵

A few weeks later a Boulder Daily Camera story revealed that a group of about forty real-estate developers, lawyers, and businessmen had met, with Councilman Geesaman attending as a private citizen but providing City representation.¹²⁶ John Cohagen explained that after his two-year effort to obtain approval for a high-rise building, he had decided to seek an independent appraisal of the proposed code, and that the Urban Land Institute had recommended Richard Babcock.¹²⁷ Geesaman said, "This is probably one of the most far-reaching and controversial pieces of legislation I will handle," and added that the proposed code needed review by civic groups such as this one.¹²⁸ The meeting ended with Cohagen asking the group for proposals for hiring Babcock.¹²⁹ After naming itself FORWARD Boulder, Cohagen stressed that the group did not intend to be a political organization, but rather an

118. *Fire Chief Says Decision Needed on City Protection*, BOULDER DAILY CAMERA, July 22, 1970.

119. *Council May Tighten Rules for High-Rise Fire Systems*, BOULDER DAILY CAMERA, Aug. 5, 1970.

120. *Id.*

121. *Council Delays Action on Fire Code Proposal*, BOULDER DAILY CAMERA, Sept. 2, 1970.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Business Group to Continue Efforts to Hire Zoning Expert*, July 22, 1970.

127. *Id.*

128. *Id.*

129. *Id.*

independent study group.¹³⁰ Bill Lamont welcomed the new group's comments and said that the Home Builders Association and the League of Women Voters had already submitted their comments and that the Planning Staff had already consulted with Professor Daniel Mandelker of Washington University's School of Law.¹³¹ If Babcock were to be retained, Lamont said that it would mean that the code would be reviewed by two of the top five legal experts in the field.¹³²

FORWARD Boulder announced its Executive Committee. It read like a Who's Who of Boulder Business Leaders, with John Cohagen as its spokesman.¹³³ It was a formidable group made up of movers and shakers, and one that could have a profound impact on City Council decisions.

VII. JAMES JOHNSON AND THE TOWN & COUNTRY REVIEW

At this point, another key actor needs to be introduced: James G. Johnson, editor and publisher of the free *Town & Country Review*. Begun in 1963, the weekly paper had become *the* voice for the environment and a strong challenger to the *Boulder Daily Camera* for the hearts and minds of the citizens of Boulder County. By this time, circulation was 32,000 with about forty pages in each edition. It had a

130. *FORWARD Boulder Set to Hire Zoning Expert*, BOULDER DAILY CAMERA, Aug. 6, 1970.

131. *Id.*

132. *Id.*

133. *FORWARD Boulder Lists Executive Group Names*, BOULDER DAILY CAMERA, Sept. 2, 1970. It included:

Neal King	A partner in Hollenbeck, King and French, attorneys
Ken Penfold	Ken Penfold Realty, Inc.
Dr. Richard Geesaman	City Councilman
Dick Wilson	Manager of Hogsett Lumber Co.
William Suitts	Real estate developer
Ed Erwin	Manager of Capitol Federal Savings in Boulder
Harold Short	President of the Flatiron Companies and the Chamber of Commerce
James Hunter	Architect
Gene Cline	Lu-Gen Homes, Inc.
Ed Singer	Vice president of the United Bank of Boulder
Bill Hellwig	Executive vice president of Mountain Savings and Loan
Dr. D. W. Pettyjohn	Professor of economics at the University of Denver who lived in Boulder.

vibrant editorial page with up-to-the-minute editorials by Johnson and many letters to the editor. Candidates and issue-committees that ignored the Town & Country Review did so at their peril. Its business advertisers were many and diverse; they knew the paper was being read. So what was Town & Country Review's involvement with the high-rise issue? In August 1970, the paper published a small cut-out ballot entitled "How Do You Feel About High Rise In Boulder?" with these options: "None, Up to 5, Up to 10, Up to 20, and No Limit."¹³⁴ While not a statistically valid survey, the results showed overwhelming antipathy towards high-rise buildings: out of 589 responses, 560 were "None."¹³⁵ Later, these ballots would become very useful because the responses included names and addresses. In that same issue, Johnson wrote one of his many editorials on the subject, this one bluntly entitled "Stop High-Rise."

Boulder at this point should not sacrifice one square inch of land surface, blue sky or mountain backdrop to encourage growth in any direction—upward, outward or even downward

. . . .

The pressures for high-rise and other undesirable growth will continue unabated. . . . In short, those interested in preserving Boulder will have to work with the same diligency as those who stand to benefit from exploitation of it.¹³⁶

Note that Johnson prominently mentions growth. This was an integral part of citizens' concerns about the future. The growth issue would eventually be brought to a head when Zero Population Growth ("ZPG") filed its petition for its proposal to be placed on the November 1971 ballot.¹³⁷ More on that later.

VIII. UPPING THE ANTE—1971

A. *The Hunter Proposal Update*

Instead of continuing his futile attempt to get approval for his high-rise at Sixth Street & Canyon through the Zoning Board, Hunter came roaring back under the Interim Ordinance with three buildings: a

134. *How Do You Feel About High Rise in Boulder?*, TOWN & COUNTRY REVIEW (Boulder County), Aug. 26, 1970; *High-Rise Poll Results*, TOWN & COUNTRY REVIEW (Boulder County), Sept. 2, 1970 (Attachment U).

135. *Id.*

136. James G. Johnson, *Stop High-Rise*, TOWN & COUNTRY REVIEW (Boulder County), Sept. 2, 1970.

137. *Election Questions in Brief*, BOULDER REPORT, Oct. 1971 (Attachment V).

110-foot high-rise hotel-convention center, a 110-foot apartment building adjacent to the hotel, and another 122-foot apartment building across Sixth Street.¹³⁸ And he brought in a “big gun”—Eric Hilton, “a third generation member of the family whose surname has come to be synonymous with quality hotel living.”¹³⁹ On February 4, 1971, after a lengthy hearing, the Planning Board voted four to two to recommend approval of the hotel (but limited it to 100 feet including the mechanical penthouse) and the adjacent apartment building (limiting it to fifty feet), but made no recommendation as to the third building.¹⁴⁰ In an interview with *Town & Country Review*, Hilton said they were ready to accept the project and added proudly that the hotel would create 100 new jobs for Boulder.¹⁴¹ The *Boulder Daily Camera* report of the February 16 City Council meeting stated, “Seen by many as a prelude to a council policy on the future of high-rise in Boulder, the session packed nearly 300 advocates and enemies of tall buildings into the council chamber[s]. And they remained as the hearing stretched from 8 p.m. to well after midnight.”¹⁴² Hunter was distressed with the City Council debate, saying “I’m asking for a pair of shoes — and you’re saying I can have one. . . . You’re killing the whole thing.”¹⁴³ To which Mayor Knecht responded, “We’re trying to be fair, Mr. Hunter. It’s your project — but it’s our city.”¹⁴⁴ After more than four hours and statements from nearly forty citizens, the City Council did approve the hotel at 100 feet, adding fourteen feet for a mechanical penthouse, and a fifty foot high apartment building adjacent to the hotel.¹⁴⁵ It rejected the third building, but indicated a potential compromise after restudy.¹⁴⁶

B. *The Cohagen Proposal Update*

Not to be outdone, Cohagen revised *his* project to create a spectacular “superblock” on the Arapahoe Shopping Center site with plazas, landscaping, and pedestrian walks among several buildings,

138. *Boulder Hilton?*, BOULDER DAILY CAMERA, Feb. 5, 1971 (Attachment W).

139. *Id.*

140. Bill Hoffman, *Planning Board Limits Ruins’ Hotel Height*, BOULDER DAILY CAMERA, Feb. 5, 1971, at 1.

141. *City Council to Consider Hotel*, TOWN & COUNTRY REVIEW (Boulder County), Feb. 10, 1971.

142. Ron Tollefson, *City Balks at High-Rise Luxury Apartment Plans*, BOULDER DAILY CAMERA, Feb. 17, 1971, at 1.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

including one about 150 feet and one 300 feet high.¹⁴⁷ According to his architect, Worthington, high-rise construction is a key to prevent urban sprawl and with proper design, height would not greatly interfere with views.¹⁴⁸

IX. A MODEST PROPOSAL

Watching from the halls of academia, I realized that the City Council was heading towards permitting high-rise buildings. Fortuitously, a course in “Law and the City Environment” in the 1971 spring semester allowed me to write an extensive paper on height control for Professor Steve Williams. The purpose of the paper was to examine the legal, social, and urban planning aspects and consequences of establishing a maximum building height limitation of fifty-five feet in the City of Boulder, by amendment to the City Charter. The paper recognized that height is only one of many variables that make up the visual and practical impact of buildings in a community. Others include bulk, scale, color, texture, shape, landscaping and location. Many different kinds of controls are available, such as floor area ratio, density, parking requirements, maximum horizontal dimensions, maximum square footage, and setback requirements. The proposal would establish only one variable: height. The citizens would still be depending upon the good judgment of the City Council to establish the many other variables that make up a well-planned, well-designed community. Also, a simple height limitation in the City Charter could be changed or revoked by future electors.

Extensive research resulted in a lengthy paper in May 1971, entitled “A Proposed City Charter Amendment for the City of Boulder, Colorado, Limiting Building Height to 55 Feet.”¹⁴⁹ Why fifty-five feet? The City Council, the Planning Board, the Planning Staff, and the Architects Committee all generally agreed that “high-rise” buildings are those above the fifty-five foot level. It made sense. Buildings above that height have a much greater impact on the cityscape, and view protection to the west is an important factor in Boulder.

The paper gave a history of height control in Boulder, included arguments for and against high-rise buildings, presented thorough legal research on height control throughout the United States, and proposed

147. *Set for Height Discussion*, BOULDER DAILY CAMERA, June 2, 1971 (Attachment X).

148. *Id.*

149. Minor changes have been made to the original text for clarity. A digital version of this entire paper is available at <http://hdl.handle.net/10974/21484>.

the wording for a City Charter amendment. The section, "ARGUMENTS FOR AND AGAINST HIGHRISE," included density, open space, land values and economics, the prestige factor, fire and panic, wind, view preservation, focal point, variety, in-structure parking, and harmony. In terms that specifically addressed the Boulder situation, it discussed revitalization of the core area, which was the original impetus for permitting high-rise buildings.

A. The Proposed Amendment

The wording for the proposed amendment was as follows:

All buildings and other structures throughout the City of Boulder shall be limited to a height not exceeding fifty-five (55) feet. This height limit shall not apply to spires, belfries, cupolas or domes not used for human occupancy, nor to silos, parapet walls, cornices without windows, antennas, chimneys, ventilators, skylights, or other necessary mechanical appurtenances usually carried above the roof level so long as they do not take up more than 25% of the roof area. "Height" shall be the vertical distance from the lowest point within twenty-five (25) feet of the tallest side of the structure to the uppermost point of the roof.

The purposes of this height limitation are to promote the health, safety and general welfare of the community; to secure safety from fire, panic, wind turbulence, and other dangers; to provide adequate light and air to abutting properties and the neighborhood; to prevent the overcrowding of land; to avoid undue concentration of population; to prevent encroachment of privacy; to lessen traffic congestion in the streets; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements; to insure personal safety by encouraging intensive use at the sidewalk level; to encourage the most appropriate use of land; to conserve and enhance property values; to preserve the integrity and character of established neighborhoods; to preserve scenic views of the mountain backdrop, which are a unique asset to the community and provide a distinctive character and setting for the city, and which provide an attraction to tourists, visitors, and students of the University of Colorado; and to protect a public investment of over \$3,000,000 in the mountain backdrop.

Note that the amendment is in two sections. The first states the legal restrictions which are to be implemented for future buildings in the city and provides for reasonable exceptions such as church spires, necessary mechanical equipment, chimneys, etc. The second section provides the purposes of the amendment. These are crucial to establish the rationale supporting the constitutionality of such

restrictions, protecting them from charges of violation of due process and the taking of private property without just compensation. Having researched all of the state supreme court decisions, I was able to include the key words from those decisions that approved height restrictions in the “purposes” section of the proposed amendment, and added some provisions which were specific to Boulder.

B. Is the Height Restriction Constitutional?

For a law school paper recommending that a governmental entity adopt a major restriction that tells private property owners what they can or cannot do with their property, one issue stands out above all others: constitutionality. If it fails that test, all else is for naught. Because constitutionality is *the* fundamental issue, that portion of my 1971 paper is reproduced here. Also included from the 1971 paper is the section entitled “The 55-foot Height Limitation” because it also addresses constitutionality.

* * * *

When a city restricts heights of buildings it usually does so as part of a general zoning ordinance.¹⁵⁰ Since a height limitation would in effect be a city-wide zone restricting buildings to that height, the constitutional attacks thereon would be the same as on zoning regulations generally.

The usual attacks on a zoning restriction are that it violates due process and is a taking of private property without just compensation.¹⁵¹ A possible third attack—that of denial of equal protection—can be made on the type of zoning ordinance which establishes various districts with different restrictions in each.¹⁵² The various City of Boulder proposals establishing certain high-rise zones would be open to this attack. A property owner on the east side of Sixteenth Street, for example, immediately outside of the high-rise zone, whose property is restricted to, say, thirty-five feet, might allege a denial of equal protection where property directly across the street could be built to 140 feet. As early as 1909, however, in *Welch v. Swasey*,¹⁵³ the U.S. Supreme Court upheld the division of the city into zones of different heights, and in *Euclid v. Ambler Co.*¹⁵⁴ it upheld comprehensive zoning in general, with its many different types of restrictions. An unusual feature of the latest Planning Department proposal—that of requiring specific spacing between

150. *Atkinson v. Piper*, 195 N.W. 544, 547 (Wis. 1923).

151. Maxine Kurtz, *Recent Developments in Zoning Law in Colorado*, 39 *DICTA* 211, 218 (1962).

152. *Welch v. Swasey*, 214 U.S. 91 (1909).

153. *Id.*

154. *Euclid v. Ambler Co.*, 272 U.S. 365, 390 (1926).

buildings depending on their height—may also be open to this attack. There is the possibility that the first high-rise which goes up on a block has an effect on what can be built on adjacent property, or at least where the second building must be located on the lot in order to satisfy the spacing requirement. If this did occur, the regulation might be benefiting one property owner (the one who built first) over the adjacent property owner—again a potential denial of equal protection. The equal protection issue is being mentioned here only because it indicates that a height limitation of fifty-five feet throughout the City would probably be less open to constitutional attack than present and proposed regulations.

1. *U.S. Supreme Court Cases*

There are several cases which are pertinent to the constitutionality of height control. *Welch v. Swasey* is a landmark case in height control.¹⁵⁵ The plaintiff had been denied a building permit because his building was designed to be over 120 feet high in a 100-foot zone.¹⁵⁶ In addition to the equal protection argument mentioned above, he argued that: (1) he was being denied the extra height for aesthetic purposes alone (to preserve architectural symmetry and regular skylines), which was not a proper public purpose for which the police power could legitimately be used; (2) that even if it were a proper public purpose, the restriction bore no reasonable and substantial relationship to it; and (3) that since it deprived him of profitable use, it was a taking.¹⁵⁷

Regarding the public purpose, the Court pointed out that the state supreme court, in upholding the ordinance, had not relied purely on aesthetic grounds (fire hazard was mentioned as one of the others) and “[t]hat in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them.”¹⁵⁸

In regard to the due process argument, the Court agreed that if the statutes have no real, substantial relation to a public object and are arbitrary and unreasonable beyond the necessities of the case, the courts will declare them invalid.¹⁵⁹ However, the Court did find such a reasonable relation here, and upheld the restriction.¹⁶⁰

Regarding the taking argument, the Court decided this limitation was not so unreasonable that it deprived the owner of its profitable use

155. *Welch*, 214 U.S. 91.

156. *Id.*

157. *Id.*

158. *Id.* at 108.

159. *Id.* at 105.

160. *Id.* at 106.

without justification.¹⁶¹ In addition, the Court stressed the fact that in passing upon questions of this character:

[I]n relation to limitations as to height of buildings in a large city, the matter of locality assumes an important aspect. The particular circumstances prevailing at the place or in the State where the law is to become operative; whether the statute is really adapted, regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare¹⁶²

The next major case came in 1926, when a realty company attempted to invalidate a comprehensive zoning ordinance which divided the city into various districts, regulating uses, lot area, size and height of buildings, etc.¹⁶³ While the decision wrestled mainly with the constitutionality of the districting aspect (which it upheld), regarding height limitations the Court said:

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of over-crowding, and the like¹⁶⁴

The Court stated further that before a zoning ordinance could be declared unconstitutional, it would have to be established, “that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹⁶⁵

The Court itself used this test in striking down an ordinance as applied to specific premises in *Nectow v. Cambridge* (1928).¹⁶⁶ It found that an ordinance restricting the property to residential uses did not bear a substantial relation to the public health, safety and welfare where immediately adjoining lands were zoned and used for industrial purposes.¹⁶⁷

From these cases, it appears that height restrictions will be upheld if they are reasonable and bear a substantial relation to public health,

161. *Id.*

162. *Id.* at 105.

163. *Euclid*, 272 U.S. at 381. Building height classifications were limited to 2.5 stories or 35 feet; four stories or 50 feet; up to 80 feet; to all of these, certain exceptions were made, such as church spires, water tanks, etc.

164. *Id.* at 388 (citing *Welch*, 214 U.S. 91).

165. *Id.* at 395.

166. 277 U.S. 183 (1928).

167. *Id.* at 188.

safety and welfare, and that the inclusion of aesthetic considerations will not invalidate them.

Since *Nectow*, the U.S. Supreme Court has not spoken again on zoning. However, *Berman v. Parker* (1954)¹⁶⁸ expanded the “public welfare” concept to include aesthetics in the famous passage:

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.¹⁶⁹

While this is a strong argument for aesthetics in zoning, the governmental power being tested here was that of eminent domain rather than the police power. “State courts, therefore, can still rule as they see fit on aesthetic zoning -- employing or disregarding *Berman* as they wish.”¹⁷⁰

2. State Cases

Every state which has had the opportunity to rule thereon has upheld the governmental power to limit heights to promote public health, safety and welfare, and has upheld the application of this power in the vast majority of cases.¹⁷¹ In 1956, the Illinois Supreme Court upheld a blanket height limitation of three stories or forty-five feet throughout the City of Highland Park.¹⁷² The same court, in a decision reminiscent of *Nectow*, found an ordinance which restricted property in Chicago to forty-five feet unreasonable where adjacent properties were already built-up with multi-storied structures, stating that the character of the neighborhood afforded no basis for the height restriction.¹⁷³ In another case, a zoning ordinance requiring that the completed appearance of every new structure in the subdivision be substantially equal to that of

168. 348 U.S. 26 (1954).

169. *Id.* at 33 (internal citations omitted).

170. L. Masotti and B. Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URB. L. 723, 784 (1969). This article is highly recommended as a survey of the development of aesthetic zoning.

171. V. Woerner, Annotation, *Validity of building height regulations*, 8 A.L.R.2d 963 (1949).

172. *Chicago City Bank & Trust Co. v. City of Highland Park*, 137 N.E.2d 835, 840 (Ill. 1956).

173. *La Salle Nat’l Bank of Chicago v. City of Chicago*, 125 N.E.2d 609, 614 (Ill.1955).

adjacent buildings in appearance, square foot area and height was void. When regulations are imposed in order to promote health, welfare, safety and morals it is necessary that exactions be fixed in the ordinance with such certainty that they not be left to the whim or caprice of the administrative agency and the ordinance must have some relation to a lawful purpose.¹⁷⁴

While most of the courts adopted the reasonable relations standard, the Florida Supreme Court has held that to invalidate a zoning ordinance, evidence must show that the effect would be to completely deprive the owner of beneficial use of his property.¹⁷⁵

In a recent Eighth Circuit case, *City of St. Paul v. Chicago, St. P., M. & O. Ry. Co.* (1969), the matter of restricting building heights for aesthetic reasons alone came up for review.¹⁷⁶ The core area of St. Paul, Minnesota, is on a bluff forty to ninety feet above a strip of riverfront.¹⁷⁷ In the 1930s, a bond issue was passed to improve the downtown, build a courthouse, and locate a park on the edge of the bluff overlooking the river.¹⁷⁸ In the 1960s, a renewal plan for the downtown was implemented with great success through public and private efforts.¹⁷⁹ Up to that time the riverfront strip had been used for railroad tracks.¹⁸⁰ No longer needing the area for tracks, the railroad decided to sell the property.¹⁸¹ A consultant proposed buildings which would rise from ten to twenty-two stories above the park and the bluff.¹⁸² The city passed an ordinance which prohibited the erection of buildings which would rise above the level of the park and bluff.¹⁸³ The district court found that the fair value of the property prior to the passage of the ordinance was \$320,000 and afterwards \$150,000.¹⁸⁴ The plaintiffs conceded that the city's purpose was a public one, but to accomplish this purpose, it must use its power of eminent domain, compensating the railroad for the devaluation of its property.¹⁸⁵ In upholding the ordinance as a valid use of police power, the two to one decision cited the *Euclid* test for constitutionality and said that fairly debatable questions as to the reasonableness, wisdom and

174. *City of W. Palm Beach v. State ex rel. Duffey*, 30 So. 2d 491, 492 (Fla. 1947) (en banc).

175. *Bay Harbor Islands v. Burk*, 114 So. 2d 225, 228 (Fla. Dist. Ct. App. 1959).

176. 413 F.2d 762 (8th Cir. 1969).

177. *Id.* at 763.

178. *Id.* at 764.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 765 n.5.

183. *Id.* at 765.

184. *Id.*

185. *Id.* at 766.

propriety of an ordinance are not for the determination of the courts but of the legislative body (citing Minnesota cases); that the mere fact that an ordinance seriously depreciates value of property is not enough to establish its invalidity.¹⁸⁶ nor can it be invalidated on the grounds that aesthetic considerations will be furthered.¹⁸⁷

3. Colorado Cases

There is only one case which could be said to deal in any way with height restrictions: *Weicker Transfer & S. Co. v. Council of City of Denver*.¹⁸⁸ It arose before Denver had adopted a zoning ordinance.¹⁸⁹ The City Council had refused to permit the building of a warehouse giving several reasons relating to noise, danger and excessive height. The court held their decision invalid, stating on the height matter:

If the council has the power to enforce conformity in size and height of buildings and preserve uniformity of sky line it certainly must do so by ordinance. These things can be specifically prescribed. They call for no exercise of discretion in individual cases and any attempt in that direction must result in the establishment of the mere will or whim of the council as the sole guide.¹⁹⁰

Since the Colorado zoning enabling legislation had been passed in 1923 and the case was decided in 1924, the court seemed to be chastising Denver for not enacting zoning ordinances pursuant thereto instead of making such decisions in an ad hoc manner.¹⁹¹

On zoning in general, the Colorado Supreme Court's early decisions reflect a wariness of the use of police power to restrict private property.¹⁹² However, in *Colby v. Board of Adjustment* (1927),¹⁹³ the

186. *Id.* at 767 (citing *Goldblatt v. Town of Hempstead*, 172 N.E.2d 562 (N.Y. 1961)).

187. *Id.* (citing *Berman*, 348 U.S. 26 (1954)). As regards aesthetic zoning, it was the desire of the author not to duplicate the excellent work done by Mr. Robert E. Temmer for Professor Carmichael's Land Use Planning Seminar in May of 1969. His paper was entitled *View Protection Ordinances* and he covered the subject of aesthetics in zoning in far greater detail than time permits here. However, the Eighth Circuit case cited above was not available to Mr. Temmer at that time.

188. *Weicker Transfer & Storage Co. v. Council of City and Cty. of Denver*, 226 P. 857 (Colo. 1924).

189. *Id.*

190. *Id.* at 858.

191. *Id.*

192. *See, e.g., Curran Bill Posting & Distributing Co. v. City of Denver*, 107 P. 261 (Colo. 1910); *see also Willison v. Cooke*, 130 P. 828 (Colo. 1913).

193. *Colby v. Bd. of Adjustment*, 255 P. 443, 445 (Colo. 1927) (en banc) (The specific issue in the case was the prohibition of a brickyard in a residential district).

court embraced *Euclid* in upholding Denver's comprehensive zoning ordinance.

Since that time, the Colorado Supreme Court has passed on many zoning disputes. It has recognized that limitations on the use of property are an essential and fundamental purpose of all zoning.¹⁹⁴ A zoning ordinance must be reasonable¹⁹⁵ and must bear a substantial relation to the public health, safety or general welfare.¹⁹⁶ However, the legislation is entitled to a presumption of constitutionality,¹⁹⁷ and the court will not sit as a super zoning commission to substitute its judgment for that of the legislators.¹⁹⁸ The burden is on the person alleging invalidity to prove it beyond a reasonable doubt;¹⁹⁹ although, one recent case established the burden of proof as "clear and convincing evidence."²⁰⁰ This case, however, also stated that it had to be shown that the land as zoned was not susceptible to any reasonable or lawful use.²⁰¹ A zoning ordinance is not unconstitutional because it prohibits a landowner from using or developing his land in the most profitable manner.²⁰²

It is apparent from the above that the plaintiff attacking a zoning restriction has to overcome considerable obstacles.²⁰³ It has been done,

194. *Baum v. City & Cty. of Denver*, 363 P.2d 688 (Colo. 1961) (en banc).

195. *Jones v. Bd. of Adjustment*, 204 P.2d 560, 563–64 (Colo. 1949) (en banc); *see also Di Salle v. Giggall*, 261 P.2d 499, 501 (Colo. 1953) (en banc).

196. *Jones v. Bd. of Adjustment*, 204 P.2d 560 (1949), *Di Salle v. Giggall*, 261 P.2d 499 (1953), *Englewood v. Apostolic Church*, 362 P.2d 172 (1961), *Westwood Meat Market, Inc. v. McLucas*, 361 P.2d 776 (1961).

197. *Baum*, 363 P.2d 688.

198. *Id.*, *Orth v. Bd. of Cty. Comm'rs*, 408 P.2d 974 (Colo. 1966).

199. *Id.*, *City and Cty. of Denver v. American Oil Co.*, 374 P.2d 357 (Colo. 1962).

200. *Roeder v. Miller*, 412 P.2d 219 (Colo. 1966).

201. *American Oil Company*, stated the strongest test in requiring that the plaintiff would have to prove beyond a reasonable doubt that his property could not be devoted to any reasonable lawful use under the zoning ordinance. 374 P.2d 357.

202. *Colby v. Bd. of Adjustment*, 255 P. 443, 445 (Colo. 1927) (en banc); *City of Colorado Springs v. Miller*, 36 P.2d 161 (Colo. 1934); *Hoskinson v. City of Arvada*, 319 P.2d 1090 (Colo. 1958), *Baum*, 363 P.2d 688.

203. Justice Hall dissenting in *Vickers v. Township Committee of Gloucester Township*, 181 A.2d 129, 143 (N.J. 1962), complained that "our courts have in recent years made it virtually impossible for municipal ordinances to be attacked. Judicial scrutiny has become too superficial and one-sided." (The majority had upheld an ordinance excluding all trailers from the township.). Since then, there have been several cases where judges have demanded more than minimum rationality. In *National Land and Investment Co. v. Kohn*, 215 A.2d 597 (Pa. 1965), the court struck down four-acre minimum zoning; and in *Appeal of Kit-Mar Builders, Inc.*, 268 A.2d 765 (Pa. 1970), the same court invalidated two- and three-acre minimums. In another Pennsylvania case, a township ordinance which permitted apartments only by variance was held unconstitutional. *Appeal of Girsh*, 263 A.2d 395 (Pa. 1970). A federal court in *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970), found a building permit denial had been racially motivated and was arbitrary and unreasonable. And another federal court struck an ordinance which had attempted to keep low-income housing (for African Americans)

however, notably in the *Denver Buick* case where the requirement for off-street parking facilities was held to be confiscatory.²⁰⁴

There apparently has been no Colorado case testing the validity of a zoning-type restriction imposed directly by the citizens. However, the following language gives considerable support to the concept of democracy in action:

Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny With the wisdom or lack of wisdom of the determination we are not concerned. The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life. Let us state the proposition as clearly as may be: It is not our function to approve the ordinance before us as to wisdom or desirability. For alleged abuses involving such factors the remedy is the ballot box, not the courts.²⁰⁵

Where Colorado stands on aesthetic zoning is apparently unclear and whether aesthetics can be the sole purpose or only ancillary remains open.²⁰⁶

out of a white residential area. *Kennedy Park Homes Ass'n. v. City of Lackawann*, 318 F. Supp. 669 (W.D.N.Y. 1970). It will be noted that these are all in the area of exclusionary and segregation-type zoning. Since highrise buildings are more expensive to construct, they usually demand higher rents. The present low-income housing in Boulder is being built no higher than five stories. Since the lower buildings are cheaper to build, and since height limitation does not decrease density, the height limitation is in no way exclusionary or segregation-type zoning.

204. *City and Cty. of Denver v. Denver Buick, Inc.*, 347 P.2d 919 (Colo. 1960).

205. *Baum*, 363 P.2d 688.

206. See *Temmer*, *supra* note 187. Where Colorado fits in to this scheme is not entirely clear. The early case of *Willison v. Cooke*, 130 P. 828 (Colo. 1913) is generally cited for the proposition that Colorado follows the general rule that aesthetic considerations alone are not sufficient to justify the exercise of the police power for a zoning ordinance. The case was not specifically dealing with a zoning ordinance, but with an ordinance placing certain restrictions on the erection of store buildings. The ordinance required a certain setback for a building, and required the owner to obtain signatures from a majority of the property owners in the block in which the building was to be built, approving its erection, if it was to be built in an existing residential section. The court held that these restrictions were invalid. *Id.* at 832 (“A store building in a residence section of the city is not desirable, from an aesthetic point of view; but restrictions for this purpose alone cannot be upheld, as it is only those having for their object the safety and welfare of the public which justifies restricting a use of property by the owner.”). *Willison* was decided before Denver enacted its first zoning ordinance in 1925, but the principle of the case was reaffirmed in 1932 by the Colorado Supreme Court in the case of *Hedgcock v. People (Setback Case)*, 13 P.2d 264 (1932). One other early Colorado case, *Curran Co. v. Denver*, 107 P. 261 (Colo. 1910) contains language indicating that aesthetic considerations alone will not be allowed to control land use. In commenting upon this language, the Colorado Supreme Court later said, “[w]e recognize the fact that this language was composed prior to the adoption of zoning laws, and the

C. *The Fifty-Five Foot Height Limitation*

As has been mentioned above, there are many different restrictions which can be placed on property by zoning. The two major factors, however, are those which establish how the property can be used (e.g. residential, commercial, industrial) and those which control to what extent the property can be developed, typically stated in terms of floor area ratio (FAR) or dwelling units per acre. The height restriction affects neither of these.²⁰⁷ What it is really saying to the property owner is, “You may put your property to the use for which it has been zoned, and you may build the same number of square feet or dwelling units in, but you must place them more horizontally than vertically.” Since it is more expensive to build a high-rise than a lower building, the lower building cost is less. The limitation is really depriving the property owner of nothing more than the prestige factor of building vertically. And all property owners throughout the city are being treated equally.

The line of demarcation between high-rise and low-rise is a relative matter. Criteria to be used to establish that line should reflect local

courts have generally expanded the conception of ‘general welfare’ with relation to such laws; nevertheless it points up the dangers to be guarded against in imposing unnecessary and unreasonable restrictions on freedom of action.” If there were only these cases to consider, there would not be much doubt that Colorado's position is against zoning for exclusively aesthetic purposes, at least if they were unnecessary and unreasonable restrictions. However, there is also the early case of *Weicker Transfer and Storage Co. v. Denver*, 226 P. 857 (Colo. 1924), which also was decided before Denver enacted its first zoning ordinance. In *Weicker*, an application for a building permit for a multi-story warehouse had been turned down. One of the objections that the city had to the building was that it would not conform in size and height to surrounding buildings, and because it would be ‘a nuisance to the sky line.’ In commenting upon this particular objection, the court said: “[i]f the council has power to enforce conformity in size and height of buildings and preserve uniformity of sky line it certainly must do so by ordinance. These things can be specifically prescribed. They call for no exercise of discretion in individual cases and any attempt in that direction must result in the establishment of the mere will or whim of the council as the sole guide.” The court went on to hold that the refusal of the building permit was an abuse of discretion, because the city failed to establish that any of their objections were valid, but in so doing, the court left the question unsettled as to whether the city could enact valid regulations to control the visual sky line, and thus left the question of aesthetic zoning for these purposes unsettled. No later Colorado case has dealt with this problem, and so it remains an open question.

207. The following information was not in the original height paper and is added here to explain why there is no financial advantage to building high-rise buildings vs. buildings fifty-five feet high or lower. The FAR controls density and can be used to prevent overloading city infrastructure such as water and sewer lines and streets. In 1971, in the area being proposed for high-rise buildings, the FAR was 3:1. This meant that a three-story building could cover the entire lot. Going higher did not increase the number of square feet or units that could be built. For example, on 100 by 100 foot lot with a 3:1 FAR, a building with 30,000 square feet of floor area could be built. If the building had more floors it was still limited to 30,000 square feet.

situations, not those of Chicago, New York or Denver. Boulder is located at the foot of the Front Range of the Rocky Mountains. Because of its topography, its spectacular mountain backdrop, and the fact that the height of its mature trees is about fifty to sixty feet, buildings above five stories begin to have much more of an impact on the cityscape than lower structures. It was, therefore, generally agreed by the City Council, the Planning Board, the Planning Staff, the Architects Committee on Highrise in Boulder, and the citizens, that high-rise buildings are those above the fifty to fifty-five foot level.

The fifty-five foot measure is a rational one. It is, in fact, more rational than a 100 or 140-foot limit. From a design point of view, five stories is the cutoff height for use of the hydraulic elevator. This type of elevator is raised by a telescoping shaft from the ground upwards. Once a building is designed beyond five stories, the more expensive electric elevator must be used, which is pulled upward by cables and machinery at the top of the building. Since there is almost no limit to the distance an elevator can be raised by this technique, there is no further convenient cutoff based on the elevator criterion. A bonus to using the hydraulic elevator is that it does not require the large mechanical penthouse on top of the building as does the electric elevator. The amendment includes logical exceptions such as church spires. The limit is set at fifty-five rather than fifty feet to provide some leeway so that there is no difficulty in building five stories pursuant to the limitation.

Its purposes are not purely aesthetic but include those that have been traditionally upheld, such as providing light and air, conserving and enhancing property values, and ensuring safety from fire and panic. But even if it were held to be purely for view protection, surely the fact that the view has been preserved by an enormous public investment in the mountain backdrop would convince the court that a substantial economic factor is involved.

Finally, if this amendment is unconstitutional, then every height ordinance setting height limitations Boulder has had, presently has, or would have in the future, must of necessity also fall as unconstitutional. They are no less arbitrary and unreasonable, nor bear no more substantial relation to the public health, safety, morals, or general welfare than this amendment. However, the U.S. Supreme Court has specifically upheld such height restrictions, and this amendment is in the same category.

* * * *

X. TAKING THE INITIATIVE AND THE FINAL HIGH-RISE ORDINANCE

After summarizing the history of height control in Boulder, my 1971 paper stated “Thus the matter stands. What further changes or refinements will be made is as yet unknown. What is apparent, however, is that the present City Council will not place a blanket 55 foot height limit throughout the city.” The time for citizen action had come. It was already May 14, and time was of the essence with the November 1971 election looming. In order to control high-rise buildings in Boulder, citizens would have to petition the city government to put the proposed charter amendment on the November 2, 1971 ballot, thereby adding this specific language to the City Charter.²⁰⁸ A City Charter is the constitution of a home rule city. It can only be adopted or changed by a majority vote of the citizens.²⁰⁹ Citizens would have to obtain the required number of valid signatures on legal petitions and get City Council certification.²¹⁰ The initiative process is controlled by state statutes: the petitions need to state the exact wording of the proposed amendment, include sheets for valid signatures of registered voters (in our case at least 1,005), and a request that the item be placed on the ballot at the next election.²¹¹ One of the requirements is a committee of five citizens to sponsor the petitions, whose names are to be listed on the petitions.²¹² Here, the five citizens were Albert A. Bartlett, Joyce A. Davies, Ted J. Fiflis, Campbell Robertson, and Ruth M. Wright.²¹³ Then the gathering of signatures began. The names that had been gleaned from the Town & Country Review cut-out ballots were now hugely useful—a ready-made campaign team to carry petitions, with PLAN-Boulder leading the effort, the Sierra Club, other organizations, and citizens rallying to the cause.

By late July 1971, about 1,500 signatures were turned in.²¹⁴ At the August 3, 1971 Council meeting, City Clerk Carl Chapel and City Attorney Wagenhals declared that PLAN-Boulder had met the City’s legal standards for a place on the November ballot, and Council

208. The Charter of the City of Boulder, Colorado, 1984, Art. I, Art. III, Art. IV, Art. X, § 137.

209. *Id.*

210. *Id.*

211. Art. XX Colo. Const., CRS 70-1-1 to 70-1-19.

212. *Id.*

213. Petition to Amend the Charter of the City of Boulder to Limit Height to Fifty-Five Feet (Attachment Y).

214. Letter from author to Carl Chapel, City Clerk, City of Boulder (July 25, 1971).

certified.²¹⁵ And none too soon! At that same meeting, the City Council adopted Ordinance No. 3732 to replace the Interim Ordinance that had been in effect for more than two years.²¹⁶ Councilman Klemme had resigned in July, and Harvey Platts was appointed in his place.²¹⁷ Mayor Knecht had left for a federal position in Washington D.C. Six council members voted for the ordinance.²¹⁸ Buechner, now the acting mayor, held true to his original position and voted no.²¹⁹

Ordinance No. 3732 went into effect on September 2, 1971, just two months before the election.²²⁰ Prepared by City Planning Staff, it was long, complex and intricate. Under the Ordinance, as many as fifty buildings up to 140 feet high could possibly be permitted in the downtown, Arapahoe and Crossroads Shopping areas and east to Thirty-Third Street.²²¹ The November election would have an enormous impact and could irreversibly decide what the City of Boulder would look like in the future.

The ZPG petition for a charter amendment for growth control also had received enough signatures to be on the November ballot. It said simply:

The City Administration and Council shall adopt regulations and policies to stabilize the ultimate population of the City of Boulder near one hundred thousand.²²²

Concerned, that if the issue failed, it could be interpreted as Boulder citizens supporting growth, some environmentalists urged Council to place an alternative growth policy on the ballot, giving citizens another opportunity to vote *for* growth control. The result was the following ballot issue:

BE IT RESOLVED that the City Government is directed immediately to undertake a definitive analysis of the optimum population and growth rate for the Boulder Valley. Pending the completion of this analysis and approval of programs developed to implement its results, the City Government, working with the County

215. *Council Oks Height Limit, Petition Drive*, BOULDER DAILY CAMERA, Aug. 4, 1971.

216. *Id.*

217. Email from Marti Anderson to author (May 22, 2014).

218. Minutes of Meeting of The City Council of the City of Boulder, Aug. 3, 1971. Mayor Knecht and Councilman Waugh were absent. The council members who voted for the ordinance were Bowers, Geesaman, Haertling, McLean, Nuzum, and Platts.

219. *Id.*

220. Final Height Control Ordinance: Ordinance No. 3732, Published July 22, 1971 in BOULDER DAILY CAMERA, adopted Aug. 3, 1971 (Attachment Z).

221. *Id.*

222. *Election Questions in Brief*, *supra* note 137.

Government, shall take all steps necessary to hold the rate of growth in the Boulder Valley to a level substantially below that experienced in the 1960's and shall insure that the growth that does take place shall provide living qualities in keeping with the policies found in the Boulder Valley Comprehensive Plan.²²³

Apparently a City Council compromise, it was considered a “wimpy” alternative to the ZPG proposal since the growth rate in the 1960s was an astonishing seven percent per year—but at least citizens had an alternative to vote for. And so the battle between very different visions for the future of Boulder was joined.

XI. THE CONTROVERSY INTENSIFIES: DEBATES AND CAMPAIGNS

The two months of campaigning before the November 2 election were intense. An earlier meeting in late June had set the stage. Worthington and I were the speakers.²²⁴ We were congenial opponents and respected each other's points of view. We both wanted the best for Boulder—we just differed on what that was. We also had competing slide shows.²²⁵ Worthington showed beautiful high-rise buildings with landscaped plazas. I showed the famous cities of Europe where only the cathedral spires pierce the skyline. Then I clicked on my final slide showing an elegant five-story building in the Denver Tech Center—designed by Worthington. It showed that he could design well, even when restrained to fifty-five feet. Reacting with a smile, Worthington said, “She disarmed me with that last one.”²²⁶

A panel discussion sponsored by the Democratic Women of Boulder County featured James Hunter, Beverlee Johnson (Chair of ZPG), Councilman Homer Ball and me (representing PLAN-Boulder). Right from the start, Hunter blasted PLAN-Boulder, saying that the height limitation was “based on emotion” and “patently shallow and hackneyed,” referring to PLAN-Boulder as a group of “[w]ell intentioned persons whose competence is still to be proven.”²²⁷ Responding to a charge that PLAN-Boulder assumed “a cloak of omniscience,” I responded, “We're not trying to push anything down anybody's throat.

223. *Id.*

224. *Debate High-Rise Value*, BOULDER DAILY CAMERA, June 24, 1971.

225. *Id.*

226. *Id.*

227. *Growth, Building Height Subjects of Debate*, BOULDER DAILY CAMERA, Oct. 2, 1971.

It's completely up to the voters. This is the democratic system."²²⁸ Beverlee Johnson pointed to the ZPG study, "Is Population Growth Good for Boulder Citizens?" which indicated that the best economies of scale are realized where the population ranges between 50,000 and 100,000 and that the limitation could be implemented through techniques outlined some months ago by the City Administration.²²⁹ Ball retorted that no one had looked at the costs of forcibly imposing a limit and that the key to controlling growth lies with land use, rather than setting a population ceiling.²³⁰

On October 19, the League of Women Voters sponsored a meeting with the Height Amendment and the two growth issues (by ZPG and City Council) receiving the most attention.²³¹ Worthington insisted that high-rise buildings would allow a better view of Boulder's mountain backdrop than lower, broader buildings.²³² I countered that architects do not design cities—they only design one building at a time and in accordance with the desires of the landowner.²³³ On the growth issue, attorney Chuck Howe argued that the ZPG amendment was just a planning directive that would give government the muscle to resist developers.²³⁴ But Councilman Richard McLean responded that if it was merely an expression of opinion, he would be all for it because "growth isn't really profitable." He considered the vote a mandate, worried about the cost of implementation and that it would spur growth in the county. Responding to the contention that the City Council's resolution was weak, he said that in any community other than Boulder, it would be "revolutionary."²³⁵

By far the biggest and much-heralded debate took place on October 20, sponsored by FORWARD Boulder.²³⁶ Richard Babcock was again brought in from Illinois, together with Walter Lewis, a professor of architecture at the University of Illinois and a nationally-recognized speaker on improved city planning.²³⁷ Law Professor Steve Williams, who approved my law school report, and I spoke on behalf of the Height Amendment.²³⁸ For ZPG there were Beverlee Johnson and University of

228. *Id.*

229. *Id.*

230. *Id.*

231. Phil Gruis, *League of Women Voters Meeting, ZPG Amendment Termed 'A Shot in the Dark,'* BOULDER DAILY CAMERA, Oct. 20, 1971.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Hoffman, *supra* note 1.

237. *Id.*

238. *Id.*

Colorado's Economics Professor Charles B. Howe.²³⁹ Lewis and Babcock would respond to both "teams."²⁴⁰ County Commissioner Jack Murphy was tapped as the neutral moderator.²⁴¹

I pointed out that most of the recently adopted building code would remain in effect and that the Height Amendment would affect only those areas where the newly-adopted ordinance now permitted potentially fifty buildings up to 140 feet high, blocking views of the mountain backdrop, losing the intimacy of historic downtown Boulder, and creating hard-to-fight fire hazards on the upper floors.²⁴² Lewis argued that a flat fifty-five foot limit does not allow variety and imagination, nor does it accomplish the goal of planning that "enriches our life and gives it meaning."²⁴³ He added that Boulder's setting lends itself to high-rise buildings because the scale of the mountains is so immense.²⁴⁴ Babcock said that the real issue here is preserving the mountain view, and that the other stated goals are only legalistic "nonsense" and "archaic" concerns such as fire danger and the preservation of light and air.²⁴⁵ Thus, while reading the amendment, he was "overcome by a wave of nostalgia."²⁴⁶ (Note: as an attorney, surely Babcock appreciated the importance of judicial precedence in sustaining a legal challenge.)²⁴⁷ Williams countered that in the early days, courts maintained that beauty did not count, only money. But new precedents involve bans on billboards and support historic preservation through zoning, like in Santa Fe, New Mexico. "It's conceivable that the court will hold this [amendment] unconstitutional, but I feel the court will not take that narrow, retrograde view."²⁴⁸ After Johnson gave her well-reasoned statement, Lewis reiterated that, like the Height Amendment, the specificity [of 100,000] would prevent flexibility in planning.²⁴⁹ Babcock, with ungracious disdain, said, "I get depressed that a person as bright as Mrs. Johnson is entranced by a simplistic solution."²⁵⁰ Howe responded that instead of citizens subsidizing business growth, it should pay its own way.²⁵¹

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

Thankfully, during the entire time, the media was fully engaged and reported these debates in great detail. Lengthy news stories quoted both sides extensively, and numerous compelling “letters to the editor” appeared almost daily. Two such letters, representing the best of opposing viewpoints were by Professor Steve Williams and Architect Carl Worthington.²⁵² And the two major newspapers were on opposite sides, with competing editorials. With the Boulder Daily Camera vehemently opposed to height control, it was crucial to have another editorial voice in support. The Town & Country Review filled that mission in spades. The Colorado Daily, a student newspaper at that time, also weighed in. Such media coverage resulted in a very well-informed citizenry and cannot be underestimated; without the coverage, it would have been almost impossible to overcome the fortune spent by the opposition. The most scathing editorial appeared on October 12. After extolling the virtues of the City Council ordinance, it went on to say:

Contrast all of that with the Wright proposal, the brainchild of one person, an amateur, backed by an organization of about 300 members of which about 30 are considered “most active” by PLAN-Boulder leadership. Consider the fact that the main designers and backers of the city’s building-height code are by the nature of their positions responsible to the public for the future impact of their decisions. On the other hand, the author (or authors) of the PLAN-Boulder height limit proposal need not answer to anybody for the consequences of their ill-conceived scheme but may quietly fade away from any accountability. . . . We consider the height-limit proposal now on the ballot by petition to be misguided, inimical to its avowed environmental purpose and detrimental to the best interests of our community’s future.²⁵³

In response, Campbell Robertson wrote:

This issue of height limit is a highly-subjective one; it isn’t at all a matter of right-or-wrong, rather just a question of what a voter majority wants Boulder to look like. . . . I also question seriously the recent recurrent use of the word “expertise,” This word constitutes a back-handed way by which very small groups imply that “they know what’s best,” . . . Finally, I feel it regrettable that those opposing the passage of the amendment descend to personally attacking Mrs. Wright by name. Attacks on persons can often be an indication that the case is too weak to stand on its own merits; I

252. Stephen Williams, Letter to the Editor, *Building Height Limit Defended*, BOULDER DAILY CAMERA, 1971; Carl Worthington, Letter to the Editor, Great 55-Foot Misunderstanding, BOULDER DAILY CAMERA, Oct. 30, 1971 (Attachment AA).

253. *City’s Height Code Reasonable, Workable*, BOULDER DAILY CAMERA, Oct. 12, 1971.

would expect that many will feel this very same way and vote accordingly.²⁵⁴

Jim Johnson's editorial, however, was critical of the City Council:

Disillusioned, disappointed and distrustful describes our reaction to Boulder's City Council during the past years. . . . We are not opposed to high rise buildings per se. . . . We are only opposed to allowing 9 men on the City Council telling us where they should go.²⁵⁵

In supporting the Height Amendment, Johnson faulted the City Council for approving three high-rise buildings at Sixth Street & Canyon, against the recommendation of its Architects Committee that no high-rise be built that close to the mountains.²⁵⁶

It is almost inconceivable that a rational body could first appoint a study committee, then ignore its recommendations, then enact legislation in agreement with the same study they had previously ignored. Do we really want to leave future decisions on high rise buildings up to the City Council?²⁵⁷

The campaign really heated up when a group calling itself "A Bolder Coalition" (also referred to as the "Coalition") was organized to oppose both the Height and the ZPG issues.²⁵⁸ It was chaired by distinguished Dr. Leo C. Reithmayer, Director of the Institute of Public Administration at the University of Colorado.²⁵⁹ He had been Mayor in the late 1950s when the citizens had to put a charter amendment on the ballot by petition so that they could stop the city from pumping water up the mountain backdrop for development there.²⁶⁰ Members of the Coalition included many well-known, respected citizens.²⁶¹ The

254. Campbell Robertson, *Height Question*, TOWN & COUNTRY REVIEW (Boulder County), Oct. 20, 1971.

255. *High Rise Question*, TOWN & COUNTRY REVIEW (Boulder County), Oct. 27, 1971.

256. *Id.*

257. *Id.*

258. *Bolder Coalition Formed to Inform Community of Issues*, TOWN & COUNTRY REVIEW (Boulder County), Oct. 20, 1971.

259. *Id.*

260. Interview with Robert McKelvey (July 2015).

261. Members were: Don Beeson (Beeson-Baehr), Alten A. Bringle (Memorial Hospital), Frank Buchanan, Gerald A. Caplan (Attorney), Frank Chrisbens (Community Hospital), Bly Curtis (Formerly of the Council and the Health Department), Jim Flood (IBM), James Friggens (Readers Digest), Clyde Gelwick, Margaret S. Hansson (Gerico), Dr. Howard H. Heuston, Leo Hill (First National Bank), Ray Joyce (Lashley Persons), Neil King (Attorney), Dolores Kiser (NCAR), Carl McGuire, Ray Moses (Attorney), Rev. A.B. Patterson, Fred Pruett (Pruett Press), Francis Reinert, John Sayre (Attorney), Harold Short (Flatirons Company), Gary Svoboda (CU student), Richard Thornton (YMCA), Eugene Wilson (University of Colorado).

Coalition believed that now is the time for bold and progressive action, not a bury-your-head-in-the-sand attitude.²⁶²

Professional and creative full-page ads started appearing in the newspapers. The Coalition attacked both issues together, which was detrimental to the Height Amendment. The ZPG issue appeared easier to defeat as being potentially unconstitutional, or at least impractical to enforce, so that combining them made the Height Amendment more vulnerable—even though *its* constitutionality had been thoroughly researched. It is estimated that the coalition vastly outspent the proponents, with daily full-page ads and a blockbuster eight-page Election Special in the Boulder Daily Camera the day before the election.²⁶³ Height Amendment supporters' expenditures were mainly for posters, bumper stickers, and handouts.²⁶⁴ The “boots on the ground” campaign was people intensive, but cost-effective. In addition, there was a hotly contested City Council race with twenty-three candidates, and voters knew how they stood on height control.²⁶⁵

Also weighing in during these final days were two important entities: the Associated Students of the University of Colorado (“ASUC”) City Committee (CU student government), and the Colorado Daily. It should be pointed out that on July 1, 1971, the Twenty-Sixth Amendment to the United States Constitution was ratified, lowering the voting age to eighteen. The 1971 election throughout the country was the first test of the so-called “Youth Vote.” ASUC said:

It is the City Commission's general feeling that . . . (the height) amendment . . . is of merit in helping to preserve the scenic beauty of Boulder's natural environment and in restraining higher density in this area. Support the candidates that support all of these issues, and most importantly, VOTE Nov. 2.²⁶⁶

The ASUC was thereby stressing that the eyes of the nation were watching.

Popular cartoonist Pudim added his pithy pictorial comments essentially in support of the Height Amendment.²⁶⁷ Former Mayor

262. *Tomorrow is more than just another election day, November 2 Tuesday an election special*, Advertising Supplement to BOULDER DAILY CAMERA, Nov. 1, 1971.

263. *Id.* The advertising supplement was sponsored by A Boulder Coalition/ Leo C. Reithmayer, Chairman.

264. Poster: SAVE OUR SCENE (SOS): HEIGHT CONTROL, VOTE YES ON #5 (Attachment BB).

265. Printed Ballot for Nov. 2, 1971 Election [hereinafter Printed Ballot] (Attachment CC).

266. *On Election Issues*, TOWN & COUNTRY REVIEW (Boulder County), Nov. 2, 1971.

267. Pudim, *Higrise In The Canyon? He Did It*, COLORADO DAILY, Oct. 1971; Pudim, *Move On You're Loitering*, COLORADO DAILY, Oct. 1971 (Attachment DD).

Robert Knecht, who pushed for high-rise buildings in the hope of revitalizing the downtown, sent a thoughtful and gracious letter from Washington, D.C. which said:

55' Height Limit – I feel that the city's present ordinance restricting high rise to two very small areas (a portion of downtown and the Crossroads area) is adequate. However, many people want to see high buildings ruled out entirely in favor of preservation of our mountain views, a point of view I can well understand.²⁶⁸

XII. THE ELECTION: NOVEMBER 2, 1971

A last-minute shock for height control and ZPG proponents—just a day or so before the election—was obtaining a copy of the printed election ballot that showed what voters would be seeing when they pulled the levers in the voting booth on Election Day.²⁶⁹ In October, the City had prepared and distributed a pamphlet entitled “Election Questions in Brief” which described the six issues that would be voted on and gave them all titles and numbers.²⁷⁰ The height control issue was titled: “HEIGHT LIMIT, BY PETITION, QUESTION 5.”²⁷¹ The ZPG issue was titled: “POPULATION LIMIT, BY PETITION, QUESTION 6.”²⁷² The pamphlet also specifically stated: “Questions 4, 5 and 6 deal with community policies and *are presented as they will appear on the ballot.*” (emphasis added)²⁷³ But on the printed ballot, no numbers were shown, and in contrast to the four City proposals which *were* identified by titles in bold letters, there were no identifying titles on the height control or ZPG issues!²⁷⁴ In the voting booth on November 2, with neither a title nor a number, it was exceedingly difficult to find these two issues. You had to read the small print four lines down to finally find the phrase “height not exceeding fifty-five (55) feet.” No one in City Hall had informed the proponents of this major change, nor alerted them in any way whatsoever. Many votes were probably lost on this problem alone. Whether this was intentional or inadvertent, of course, will never be known.

Election night was exciting, with voters following the election returns, either at the County Clerk's office where precinct returns were

268. *The Old Firehouse Syndrome*, BOULDER DAILY CAMERA, Nov. 1971.

269. Printed Ballot, *supra* note 265.

270. *Election Questions in Brief*, *supra* note 137.

271. *Id.*

272. *Id.*

273. *Id.*

274. Printed Ballot, *supra* note 265.

posted as they came in, or listening to Roger Cracraft at KBOL, the local radio station. The ZPG issue went down rather early, (final result 12,156 to 8,605) with the City Council's growth option winning overwhelmingly (16,364 to 6,171).²⁷⁵ It showed that Boulder citizens *did* support slower growth.

The Height Amendment was teetering on the edge throughout most of the evening. Finally, when the reports came in from the last precincts, some with the highest student votes, it zoomed ahead. The final vote was 11,577 to 10,273, a fairly healthy fifty-three percent to forty-seven percent—and the battle was over.²⁷⁶

The vote also showed that, out of twenty-three candidates running for City Council, John Buechner, Pen Tate, Ken Wright, Tim Fuller, and Karen Paget had won.²⁷⁷ Buechner was running for his second term, the others were new. Buechner had actually touted his support of height control in his campaign ads.²⁷⁸ None of the other incumbents—Ball, Bowers, Platts or Waugh were re-elected.²⁷⁹ They had all voted in favor of the ordinance permitting buildings up to 140 feet.²⁸⁰ The headline in the Boulder Daily Camera the next day read, “Youth Vote Key in Building Height Amendment OK.”²⁸¹ My quote was, “Young people are very environmentally concerned -- and this was an environmental issue.”²⁸²

XIV. EPILOGUE

A. *The Hunter Proposal*

In 1972 James Hunter bought the property at Sixth Street and Canyon from an Oklahoma insurance company for \$510,000, and sold it

275. Phil Gruis, *Youth Vote Key in Building Height Amendment OK*, BOULDER DAILY CAMERA, Nov. 3, 1971 [hereinafter *Youth Vote Key*] (Attachment EE).

276. *Id.*

277. *Precinct-by-Precinct Voting For Council, Issues*, BOULDER DAILY CAMERA, Nov. 3, 1971 (election results) (Attachment FF). Notably, the “Youth Vote” also helped to elect the first black person, Tate (a lawyer); the first avowed environmentalist, Wright (a consulting water engineer); the first “hippie,” Fuller (the proprietor of a book store); and the first woman, Paget, a professor at CU (comment by author).

278. See John Buechner’s Campaign Advertisement (Attachment GG).

279. *Precinct-by-Precinct Voting For Council*, *supra* note 277.

280. Minutes of Meeting (City Council), Aug. 3, 1971.

281. *Youth Vote Key*, *supra* note 275.

282. *Id.*

four days later to Boulder County for \$770,000.²⁸³ An investigation ensued, but eventually Hunter was cleared of any wrongdoing.²⁸⁴ He insisted that the large profit he made was due to improvements he made on the land.²⁸⁵ He had certainly put in an enormous effort over several years, both architecturally and politically, to get something built. Within a few years, Boulder County, together with the City of Boulder, built the two-story Justice Center. The views up Boulder Canyon are magnificent.

B. The Cohagen Proposal

John Cohagen, together with his talented architect Carl Worthington, had envisioned a nine-square superblock with a 300-foot high-rise and two 100-foot-plus buildings with landscaped plazas in between.²⁸⁶ This plan, of course, came crashing down on November 2, 1971. A bit sadly, as a “last hurrah,” in January 1972 a full-page ad appeared in the Boulder Daily Camera, showing what might have been, including a large photo of the possible design for Cohagen’s superblock.²⁸⁷ Over the years, however, the Arapahoe Shopping Center has thrived with a new upscale five-story hotel and successful shops. Cohagen’s threat—that if the fifty-five foot height control election was successful, he would take the issue to court the next day—never materialized.

C. Downtown Boulder Today

Many new commercial and residential buildings have been built, and although some are the maximum five stories high, they are not the dull, unimaginative structures that Professor Lewis had warned about. Downtown Boulder is thriving with one of the most successful pedestrian malls in Colorado, the Pearl Street Mall. Many people, too numerous to name here, have contributed to its success. In spite of the 1970 bond election loss for a new civic center, Boulder Tomorrow, led by architect H. Alan Zeigel and others, continued to provide the leadership for revitalization. Several parking structures were built to provide easier auto

283. On The Corner: The Lower Chautauqua Neighborhood Newsletter, *supra* note 39; Sheriff’s Report on Probe of ’72 Land Deal Released, BOULDER DAILY CAMERA, Apr. 28, 1977.

284. On The Corner: The Lower Chautauqua Neighborhood Newsletter, *supra* note 39.

285. *Id.*

286. *Set for Height Discussion, supra* note 147.

287. *Id.*

access.²⁸⁸ In 1974, City Council closed Pearl Street to auto traffic from Eleventh Street to Fifteenth Street (over the objections of some recalcitrant shop owners who wanted parking right outside their front doors—calling it the “Boulder Maul”).²⁸⁹ Over the years the Mall has been landscaped with trees, flower beds and fountains, and paved with bricks. The historic buildings have been preserved and create an intimate and totally pedestrian-friendly setting. University of Colorado students bring their parents and grandparents to enjoy the ambiance. Many visitors come from out of town. Shops stay open in the evening, and the many restaurants, outdoor cafes and bistros are buzzing. Children’s play areas have rocks to climb on and squirting water to dodge. Festivals and art markets thrive, and buskers entertain. No need now to worry that Downtown Boulder will die on the vine. Mayor Knecht and City Manager Tedesco would be pleased. Chicago Professor Lewis would have to admit that the mall “enriches our life and gives it meaning” without high-rise buildings. Attorney Babcock should note that the constitutionality of the Height Amendment has never been challenged.

D. Colorado Case Law Update

In a section entitled “Is the Height Restriction Constitutional,” which is included in this speech, the original 1971 University of Colorado Law School report stated:

It is apparent from the above that the plaintiff attacking a zoning restriction has to overcome considerable obstacles. It has been done, however, notably in the 1959 *Denver Buick* case where the requirement for off street parking facilities were held to be confiscatory.

In 1975, the Colorado Supreme Court in *Stroud v. City of Aspen*,²⁹⁰ expressly overruled *Denver Buick* (1959),²⁹¹ citing not only the older U.S Supreme Court case of *Village of Euclid v. Ambler Realty Co.* (1926),²⁹² but also the more recent case of *Village of Belle Terre v. Boraas* (1974).²⁹³ Both cases recognized that zoning is constitutionally permissible so long as it is not arbitrary and is reasonably related to the public health, safety, morals and welfare. The Colorado Supreme Court then stated that Colorado has adopted a similar view. Thus, the only

288. Butler, *supra* note 49.

289. *Id.*

290. 532 P.2d 720.

291. 347 P.2d 919.

292. 272 U.S. 365.

293. 416 U.S. 1.

Colorado case which weakened the authority to adopt zoning restrictions is no longer valid.

E. Prestigious Appointment

It should also be noted that Professor Steve Williams, who accepted and supported the idea that researching height control was a valid issue for a law school class, received a presidential appointment to the United States Court of Appeals for the District of Columbia in 1986 (for which prestigious appointment the height control proponents take no credit).