

# **ROCKY MOUNTAIN LAND USE INSTITUTE**

## **RECENT LAND USE DECISIONS IN THE ROCKY MOUNTAIN WEST**

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## NINTH CIRCUIT COURT CASES

### **Reed v. Town of Gilbert, Arizona, 707 F.3d 1057 (9<sup>th</sup> Cir. 2013)**

The Town regulates the display of outdoor signs by requiring a sign permit unless the sign meets one of nineteen exemptions. One such exemption is for “temporary directional signs.” Another exemption applies to political signs and another applies to ideological signs. Each of these exemptions has different size, location, and duration requirements. For example, “temporary directional signs” are subject to certain size and location limitations and can only be displayed for up to 12 hours before, during, and one hour after a qualifying event. A church brought suit, arguing that, as applied to the church’s directional signs, the Town’s sign ordinance violated its right to free speech, free exercise of religion, and equal protection. In its initial suit, the church was denied an injunction and appealed the denial to the Ninth Circuit. The Ninth Circuit (in *Reed v. Town of Gilbert*, 587 F.3d 966 (9<sup>th</sup> Cir. 2009)) affirmed the denial of the injunction, finding that the Town’s sign ordinance was not a content-based regulation (because it regulated the physical characteristic of the signs), was narrowly tailored to further the Town’s significant interests (because it advanced aesthetic and safety interests), and did not favor commercial over noncommercial speech. The Ninth Circuit remanded to the district court to determine whether the Town impermissibly favored some noncommercial speech over other noncommercial speech. The district court then found that the sign ordinance did not discriminate among types of noncommercial speech and the church appealed.

The Ninth Circuit noted that the church’s main argument was that the sign ordinance had different restrictions for different types of noncommercial speech, which were necessarily content-based and thus unconstitutional. However, the Ninth Circuit found that each classification and its restrictions were based on objective factors; for example, the temporary directional sign exemption allows a sponsor of an event to put up directional signs immediately before an event, but does not distinguish between event sponsors or the type of event – the Town’s sign ordinance exempts all directional signs regardless of content so is therefore content-neutral. The restrictions placed on the different types of noncommercial signs are narrowly tailored to balance the Town’s significant interests in protecting the aesthetic appearance of the community and traffic safety against the constitutional interests of the type of sign. The exempted signs do not compete for limited space, the restrictions do not interfere with the purpose of the signs, and the Town left open alternative channels of communication. In sum, the Ninth Circuit found that the Town was not required to create an exemption for directional signs, but that the exemption the Town did create imposed restrictions rationally related to the purpose of the signs and the restrictions were reasonably designed to promote aesthetics and safety. Finally, the Ninth Circuit found that the sign ordinance did not interfere with free exercise of religion because it did not interfere with the church’s tenets and that the sign ordinance was not vague or overbroad.

**Pacific Shores Properties, LLC, v. City of Newport Beach, 730 F.3d 1142 (9<sup>th</sup> Cir. 2013)**

The City enacted an ordinance that had the practical effect of prohibiting new group homes for recovering alcoholics and drug users from opening in most residential zones. In the few areas group homes were permitted, the ordinance required new group homes to go through a permit process. The ordinance also required existing group homes to go through the permit process to continue operating. Rather than singling out group homes, the City imposed restrictions on other types of group living arrangements as well, but did not impose these restrictions on properties rented to vacationing tourists, despite the fact that such properties caused similar problems as group homes. Three organizations providing group homes and some of their residents filed suit, alleging that recent amendments to the City's zoning ordinance violated the Fair Housing Act ("FHA"), the Americans with Disabilities Act, equal protection, and California state law. The district court entered summary judgment in favor of the City and the plaintiffs appealed. The Ninth Circuit reversed on all but one of the claims.

In its reversal, the Ninth Circuit first noted that group homes for recovering alcoholics and drug users were "dwellings" under the FHA, which prohibits discriminatory actions adversely affecting the availability of such group homes. The Ninth Circuit then went on to state that "any indication of discriminatory motive" was all that was needed for a disparate treatment claim to survive summary judgment. The Ninth Circuit criticized the district court for refusing to consider the large amount of evidence showing Newport Beach's discriminatory intent: the legislative history indicated that the ordinance was enacted for the purpose of eliminating or reducing the number of group homes, the ordinance did in fact reduce the number of group homes, and group homes were targeted for enforcement. Although the ordinance was facially neutral, there was evidence that it was designed to have a discriminatory effect – it was supported by a petition signed by residents and a council member promised that the ordinance would reduce the number of group homes (the council member stated that, although the drafters would have preferred to simply ban all group homes, only a facially neutral ordinance stood any hope of surviving a challenge). The Ninth Circuit observed that a "willingness to inflict collateral damage" does not "cleanse the taint of discrimination," noting that overdiscrimination is prohibited. The Ninth Circuit concluded that the plaintiffs met their burden to create a triable issue of fact as to whether the city's ordinance had been enacted with a discriminatory purpose of harming group homes and therefore limiting the housing options available to disabled individuals recovering from addiction. The Ninth Circuit also found that all but one of the plaintiffs showed evidence that they were harmed as a result – the homes had expenses associated with applying for special use permits and reasonable accommodations required under the new ordinance, the group homes lost revenue, and a resident suffered emotional distress – and returned the case to the district court for trial.

**Omnipoint Communications, Inc. v. City of Huntington Beach, 738 F.3d 192 (9<sup>th</sup> Cir. 2013)**

In 1996, Congress passed the Telecommunications Act (the “Act”) to encourage development of telecommunications technologies, including wireless telephone services. The Act does this by preventing local zoning authorities acting in their legislative function from unreasonably discriminating “among providers of functionally equivalent services” and from prohibiting the provision of “personal wireless services.” The Act also requires local zoning authorities acting in their adjudicative function to adopt administrative procedures that require timely, written decisions when adjudicating applications for approval of a development project involving “personal wireless service facilities.”

In 2007, T-Mobile submitted two applications to the City to construct wireless antennae in two City parks. After the permits were approved, T-Mobile began negotiating with the City to lease space in the parks for the antennae. After obtaining the leases, T-Mobile applied for building permits and the City learned that the total construction value of the projects exceeded \$100,000 for each antennae. Under an initiative adopted by the City called “Measure C,” no structure costing more than \$100,000 could be built on or in any park or beach unless authorized by the affirmative votes of at least a majority of the total membership of the City Council and the majority of electors voting at a general or special election. The City determined that T-Mobile was therefore required to obtain voter approval before it could proceed with construction. Instead of seeking voter approval, T-Mobile filed a complaint in district court asking for an injunction to prevent the City from requiring compliance with Measure C.

The district court found that Measure C did not comply with the procedural requirements of the Act because it took more than a reasonable amount of time and did not include a written decision. The district court gave the City 60 days to grant or deny T-Mobile’s permit applications in compliance with the Act. On remand, the City revoked the permits; the City and T-Mobile reached a settlement regarding one location and the City appealed on the other location, claiming that the district court erred in prohibiting it from delaying a decision on the permit until T-Mobile obtained approval from the voters pursuant to Measure C. On appeal, the Ninth Circuit found that Measure C was not part of a local government’s zoning and land use decision-making process subject to the Act – instead it provides a mechanism for the City, through its voters, to decide whether to allow construction on its own land. Measure C restrains the City’s actions as a property owner without affecting the City’s administrative procedures for approving or denying a request to construct “personal wireless service facilities.” The Ninth Circuit concluded that City’s exercise of its rights under Measure C was non-regulatory, non-adjudicative behavior akin to an action by a private land owner, not preempted by the Act.

## ARIZONA CASES

### **Stagecoach Trails MHC, L.L.C., v. City of Benson, 231 Ariz. 366, 295 P.3d 943 (2013)**

This case involves a manufactured home/mobile home park's quest for a permit to install a new home in the 50-space park after a space became vacant. The City amended its zoning regulations in 1998 to increase the size and setback requirements for spaces within such parks. After several years of not enforcing the requirements, the City sent notice to park operators in 2009 that it would begin enforcing the requirements as individual homes were replaced. After the City began enforcing the new requirements, the park sought to replace a home but was denied a permit because it did not meet the new requirements. The park appealed the permit denial to the City's board of adjustment ("BOA"), arguing that the entire park was a nonconforming use under the Arizona statute that protects the right to continue a nonconforming use and individual homes could be replaced without relinquishing the park's nonconforming use status. The BOA rejected this argument, finding that the particular space was the nonconforming use and affirming the denial of the permit.

The park then filed a complaint in superior court, asking the court to declare the new ordinance invalid and to require the City to grant the permit or alternatively, asking the court to find that the ordinance did not apply because the park was a nonconforming use. The City admitted that the ordinance had not been properly adopted and reconsidered the permit, but then denied the permit because the space did not conform to setback requirements of the R-3 district in which the park was located. The City asked the superior court to find the park's complaint partially moot but the court instead granted partial summary judgment in favor of the park, finding the ordinance void. The park then filed a supplemental action challenging the new reasons for the permit denial. The superior court found that the park had properly exhausted its administrative remedies because the BOA had considered the nonconforming use issue and the park was not required to bring the new reasons for denial to the BOA. The superior court ruled that the entire park was a nonconforming use and ordered the City to issue the permit to the park. The City appealed and the court of appeals reversed, declining to address the nonconforming use issue and ruling that the park had not exhausted its administrative remedies because the BOA had not considered whether the space would have been legal before the new ordinance was adopted; therefore the trial court lacked jurisdiction. The Arizona Supreme Court granted the park's petition for review to address the exhaustion requirement.

The Arizona Supreme Court first noted that a party must exhaust administrative remedies before appealing to the courts. The Arizona Supreme Court then agreed with the superior court that the park was not required to appeal again to the BOA. The parties had consistently recognized that a key issue was whether the entire park or an individual space within the park is a nonconforming use. The park had never argued that the space would comply with R-3 setbacks, but had argued that these requirements did not apply because the entire park was a nonconforming use; replacing an individual home within the park was merely a continuation of the existing use that did not alter the nonconforming status. The City had argued that the individual space was the nonconforming use and placing a new home was a different use that must satisfy current zoning requirements. The Arizona Supreme Court noted that when the park had appealed to the BOA, the BOA had agreed with the City that the individual space, not the entire park, was the nonconforming use. The Arizona

Supreme Court therefore found that the park had exhausted its administrative remedies and the superior court had properly exercised jurisdiction over the park's claims. The Arizona Supreme Court remanded the case to the appellate court to consider whether the park as a whole or an individual space was the nonconforming use.

**Stagecoach Trails MHC, L.L.C. v. City of Benson, 232 Ariz. 562, 307 P.3d 989 (Ct. App. 2013)**

On remand of the case above, the appellate court concluded that the manufactured home/mobile home park in its entirety was entitled to nonconforming use status. The appellate court examined the law regarding nonconforming uses, noting that, under Arizona statutes, a zoning regulation may not be retroactively applied to extinguish a preexisting use of property and that a zoning regulation could not affect the owner's right to make "any reasonable repairs or alterations in building or property used for such existing purposes" unless the municipality purchases or condemns the property. The appellate court went on to observe that courts interpret these protections narrowly because nonconforming uses are not favored under the law and should be eliminated or reduced to conformity as quickly as possible, but that elimination was to be accomplished within the limits of fairness and justice. In looking at the key issue of whether the nonconforming use was the entire park or a particular space, the appellate court looked at the overall use of the property (which was to rent spaces), Arizona statutes that regulate mobile home parks as a unified use, and the fact that internal spaces were not platted or legally recorded. The appellate court then concluded that the protected nonconforming use was the use of the entire parcel as a mobile home park. The appellate court went on to determine whether replacing one home with another was permissible and concluded that because replacing a mobile home did not alter the number of units in the park or increase the park's acreage, replacing a home was a reasonable alteration that did not extinguish the park's nonconforming use status. The appellate court went on to note that the new mobile home must conform to the zoning regulations in place when the park was last a conforming use and remanded the case to the superior court to determine if the new home would violate the setback requirements in place when the park was last a conforming use.

## MONTANA CASES

### **Allen v. Lakeside Neighborhood Planning Committee, 371 Mont. 310, 308 P.3d 956 (2013)**

In 1995, county commissioners adopted a neighborhood plan designed to address land use and growth in the area. As recommended in the 1995 plan, an advisory board was created to address community issues pertaining to neighborhood plan development. In 2007, the county adopted a growth policy that acknowledged existing neighborhood plans and the possibility that some of the neighborhood plans required revisions to comply with the new growth policy. The advisory board then created a neighborhood planning committee to assist with updating the 1995 plan. Beginning in October 2007, the planning committee worked on drafting a new plan or revising the old plan and held several meetings, most of which were held in private residences without notice or invitations to the public. After about a year, complaints about the lack of transparency arose and the county's attorney advised the committee that it was required to hold public meetings with proper notice. Thereafter, all planning committee meetings were properly noticed public meetings.

In 2009, several property owners filed a lawsuit claiming violations of Montana's open meeting laws, but the parties stipulated to holding the cause of action in abeyance until the county commissioners either approved or rejected the plan. The planning committee finally submitted a revised neighborhood plan to the planning board, who then approved the plan and forwarded it to the county commissioners. The county commissioners passed a resolution to adopt the plan in 2010. The adoption of the plan revived the lawsuit, with the property owners seeking to have the plan declared void by claiming the planning committee was a public body that had violated open meeting laws by holding unannounced meeting in private homes and deleting files posted to the committee's website. The trial court concluded that voiding the plan was not an appropriate remedy for the offenses and the property owners appealed.

On review, the Montana Supreme Court noted that the planning committee's earlier meetings were held in private homes, but that the meetings came into compliance with Montana's open meeting laws after the first year. After the meetings came into compliance, the planning committee held at least 50 public meetings before the plan was finally adopted, all of which satisfied open meeting laws, which gave the property owners ample opportunity over two years to participate in the process. The Montana Supreme Court acknowledged that it had previously recognized that "a process flawed by lack of public participation can be corrected and the flawed result confirmed by proper process." Although voiding a decision for failure to comply with open meeting laws may sometimes be an appropriate remedy, that was not the case here. Although the property owners had been deprived of information regarding early discussions, they had not been deprived of data critical to the final decision; the property owners had access to the information relied upon and ample time to digest the material and propose revisions before the final decision was made. The Montana Supreme Court also noted that the county commissioners had not been involved in the early non-public meetings and were not bound to accept the recommendation of the planning committee. Therefore, the Montana Supreme Court concluded that voiding the decision of the county commissioners was not an appropriate remedy.

**Williams v. Board of County Commissioners of Missoula County, 371 Mont. 356, 308 P.3d 88 (2013)**

Montana statutes contain a protest provision in Section 76-2-205(6) that allows landowners to prevent the board of county commissioners from adopting a zoning resolution when protests are received from one of the following two groups: (i) 40 percent of the real property owners within the district or (ii) real property owners representing 50 percent of the property taxed for agricultural purposes or as forest land in the district. A successful protest prevents the county commissioners from proposing any further zoning resolutions on the subject property for one year.

In 2010, five landowners who together owned more than 50 percent of the agricultural and forest land in the district filed a written protest against a zoning proposal that would prohibit sand and gravel mining within the district. Another property owner filed suit to have the protest provision declared unconstitutional because it violated equal protection, due process, and voting rights; the county commissioners agreed, but stated that they would apply the protest provision unless the trial court ordered otherwise, and the protesting landowners moved to intervene. The trial court concluded that the protest provision was unconstitutional because (i) it violated the fundamental right to vote because not all landowners could participate equally in the zoning process, (ii) it violated equal protection rights because there were no compelling state interests in giving some landowners a vote against zoning regulations while depriving other landowners of the opportunity to vote in favor of the zoning regulations, and (iii) it constituted an unconstitutional delegation of legislative powers because it did not provide any standards or guidelines for a protest and failed to provide a legislative bypass to allow review of a protest. The protesting landowners appealed.

On review, the Montana Supreme Court focused on whether the protest provision was an unconstitutional delegation of legislative powers. The Montana Supreme Court noted that a local zoning district can be created in two ways in Montana: (i) by citizen petition to the board of county commissioners (“Part 1 zoning”) or (ii) directly by the board of county commissioners (“Part 2 zoning”). The Montana Supreme Court noted that the protest provision was enacted to give agricultural and forest property owners the ability to protect their property interests from unwanted regulation by residential property owners, who often outnumber agricultural and forest land property owners in a district. However, zoning is a valid form of regulation to promote public health, safety, and welfare and the delegation of the power to regulate must contain standards or guidelines to inform the propriety of the exercise of that power. The Montana Supreme Court criticized the protest provision, noting that it contained no such standards or guidelines, and allowed property to be held hostage by the whims of one landowner, regardless of how the regulation might affect its own land and without reason or justification. Further, the protest provision lacked a provision for review by a legislative body with the power to consider exceptional cases, which is essential to the proper exercise of police power. The Montana Supreme Court noted that the protest provision not only failed to contain a provision for review, but “prohibited the county commissioners from even proposing an alternative zoning resolution for a period of one year.” Therefore, the Montana Supreme Court concluded that the protest provision was an unconstitutional delegation of legislative power and declined to address the other challenges.