

**NEW MEXICO'S LAND USE CASES
2013-2014**

**Rocky Mountain Land Use Institute
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I. How far can you go with Adult Use Zoning?

State of New Mexico City of Albuquerque v. Panagaea Cinema, LLC, d/b/a Guild Cinema, Keif Henley, Registered Agent.

On a November weekend in 2008, the Guild Theater, Albuquerque's "art cinema", hosted a film festival titled "Pornotopia", featuring at least one erotic or pornographic film which featured gay sex. The Nob Hill Business Association described the event as a "success, not only in driving [customer] traffic to the area, but also in the quality and caliber of those customers." In other words, there were no "negative secondary effects" on the Nob Hill neighborhood, an Albuquerque entertainment area featuring restaurants, art galleries and boutiques. The term "negative secondary effects" was immortalized in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which utilized that term as justification for regulating adult entertainment.

Albuquerque had adopted an adult use zoning ordinance, modeled after the Ordinance which had been upheld by the U.S. Supreme Court in *Young v. American Mini Theaters*, 427 U.S. 50 (1976). Albuquerque's ordinance relegated adult entertainment to certain zones in the City, and set fixed distances for separation of these uses from schools and churches. It "enforced" this ordinance in the present case by convicting the Guild of a zoning violation for operating an "Adult Amusement Establishment" in an improper zone.

Did this ordinance apply to the festival at the Guild? This was the question brought before the New Mexico courts by the American Civil Liberties Association, representing the Guild and its owner.

The Metropolitan Court found the Guild guilty. The District Court, on the Guild's appeal, held that the Guild had committed a zoning violation, and that the ordinance was constitutional as applied to the Guild. The District Court also imposed a criminal fine of \$500. The Court of Appeals affirmed the Guild's conviction.

The New Mexico Supreme Court, however, reversed the Court of Appeals. The parties agreed that the film shown, "Couch Surfers", was "adult amusement or entertainment" The question, then, did not concern the content of the film, but rather, whether the Guild was an adult, amusement establishment within the meaning of the ordinance.

The Supreme Court gave examples of "one time showings", and citing case law from other jurisdictions, concluded that the Guild couldn't possibly be construed as

violating the City's ordinance. It finally concluded that it is unconstitutional to zone a business as "adult" based on a single weekend performance, especially since there was no evidence of negative secondary effects. It did state that the City could change its Ordinance to include "one time" showings of adult entertainment, but that it would have to include those "negative" secondary effects that certainly were not present in the "pornotopia" case.

II. Why should we care about Johnny Robinson? Should the press play a role in zoning cases?

Robinson v. City of Albuquerque, CD 2013-06792

Johnny Robinson, a licensed pipefitter who lived with a teenaged son, wanted to build his dream house. He bought a one-story home in an area in which all the other homes were one-story as well, although there were no zoning restrictions nor covenants which prevented 2-story homes in the area. Johnny intended to build a 2-story home, and enlarge the footprint of the home in order to build a larger garage in which to store his truck and equipment. He needed a variance in order to enlarge the house, since his addition would exceed setback regulations. He brought detailed plans for his project to that desk in the City which reviews them. After reviewing Johnny's plans, as well as reviewing the signature of the neighbor whose home was thought by the City to be on the side of the proposed garage addition, who might be impacted by the addition, Johnny received both a variance and a permit, which was later renewed, since Johnny could only work on his home in his spare time, and the original permit had expired.

So far, so good! Now things get rocky. A City Building Inspector found that what was thought to be the side of Johnny's lot was really the rear of his lot, which required a greater separation from adjoining property and thus he was out of compliance. Also, evidently Johnny had built a balcony, not in his original plans, which encroached on the setback on the actual side of his lot. This neighbor was furious and complained to the City, as did other neighbors offended both by the size of Johnny's addition and his setback violations. Since Johnny now had two major violations of City regulations, and the City did not want a property developed in violation of its regulations, Johnny was ordered to demolish the violating portions of his addition. He refused to tear down all of his hard work. He sued the City instead, filing a lawsuit in the District Court, *Robinson v. City of Albuquerque*, CD 2012-06792, seeking a Declaratory Judgment and damages.

I did not mention that Johnny happens to be black. Not only did he sue the City, based on his reliance on an invalid permit, but he also filed a complaint with HUD, alleging violations of the Fair Housing Act, based on his race.

Johnny has also managed to get two front page articles and pictures in the Albuquerque Journal describing his predicament and emphasizing his race. His

The City has filed a Motion for Summary Judgment in the state court action, alleging that Johnny must comply with the City's Ordinances and Building Code. Johnny's reliance on press coverage, plus his HUD action, certainly have not won over the hearts of those in the City who grant permits and inspect construction and demand compliance with its regulations!

Should a local government be held accountable for the errors of the "guy behind the desk" who wrongfully issues a permit in violation of City regulations? Should the Press glorify such a complaint because the race of the applicant makes a good story?

Stay tuned!

III. Can the State's Municipal Boundary Commission deny a Petition for Annexation for reasons other than non-contiguity and the municipality's ability to serve the annexed area?

Town of Edgewood v. State Municipal Boundary Commission, No. 30,768, NMCA 2013

The Town of Edgewood (Town) petitioned New Mexico's Municipal Boundary Commission (Commission) to annex unincorporate land that was intermixed with its incorporated areas. The Commission denied the annexation. The District Court held that the Commission had overstepped its authority and considered matters outside its statutory prerogatives, which clearly state that the Commission, which represents one of three methods of annexation, may, under New Mexico law, states that territory can be annexed into a municipality if it is contiguous, and the municipality can provide it with services.

The Court of Appeals reversed, holding that the Commission may determine the statutory sufficiency of a petition and may make that determination at any time in the proceedings. In this case, although a map showing roads had been filed, ownership of the roads had now been included on the map, and the roads were owned by the federal, state and county governments. The County, at the Commission had objected to the annexation of the roads by the Town. The Town had stated that it didn't intend to annex the roads and had no intention of maintaining them, although they were on the map. This map, then, did not give sufficient information to the Commission.

The Court of Appeals held that the Commission could both consider the sufficiency of the submitted map and could rule on whether there was sufficient evidence to support the outcome of the petition—in this case, denial of the annexation petition.

Thus the Municipal Boundary Commission can look at more than what the statute requires for annexations to be approved.

These additional cases were summarized for Land Use Law, presented by the State Bar of New Mexico on October 16, 2013, by Robert M. White, of Robles, Rael & Anaya, P.C., and former City Attorney, City of Albuquerque, with the assistance of Jordan George.