

ROCKY MOUNTAIN LAND USE INSTITUTE

RECENT LAND USE DECISIONS IN THE ROCKY MOUNTAIN WEST

Presented by:

Douglas A. Jorden
JORDEN BISCHOFF & HISER, P.L.C.
7272 E. Indian School Road, Suite 360
Scottsdale, AZ 85251
480-505-3909
djorden@jordenbischoff.com

March 12 & 13, 2015

U.S. SUPREME COURT CASES

T-Mobile South, LLC v. City of Roswell, Georgia, 135 S. Ct. 808 (2015)

Under the Telecommunications Act of 1996 (the “Act”), “[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.” In February 2010, T-Mobile South, LLC (“**T-Mobile**”), applied to build a new cell tower on vacant residential property within the City of Roswell, Georgia (the “**City**”). The City’s ordinance required that any cell phone tower proposed for a residential zoning district must take the form of an artificial tree, clock tower, steeple, or light pole that, in the City Council’s opinion, is compatible with the natural setting and surrounding structures and effectively camouflages the tower. T-Mobile’s application proposed a structure in the shape of an artificial tree. The City’s Planning and Zoning Division reviewed T-Mobile’s application, along with a substantial number of letters and petitions in opposition, and issued a memorandum to the City Council concluding that T-Mobile had met all of the City ordinance requirements and recommending approval of the application. The City Council then held a two hour public hearing to consider the application. T-Mobile arranged to have the meeting transcribed and the City subsequently issued detailed minutes summarizing the proceedings. At the hearing, the Planning and Zoning Division presented its recommendation and T-Mobile made a presentation in support of the application, but a number of residents raised concerns – that the tower would lack aesthetic compatibility, that the technology was outdated and unnecessary, and that the tower would be too tall. T-Mobile supporters responded by saying that the tower met City requirements and a property appraiser testified that a tower would not reduce property values. At the conclusion of the meeting, one of the City Council members motioned to deny the application, stating that the tower would be incompatible with the natural setting, be too tall, and adversely affect the neighbors and the resale value of their properties. Two days later, the Planning and Zoning Division sent a letter to T-Mobile that stated the application was denied during the public hearing and minutes of the hearing may be obtained from the city clerk. Detailed minutes of the hearing were not approved and published until 26 days later. After the minutes were published and 29 days after the application was denied, T-Mobile filed suit in federal district court alleging that the denial was not supported by substantial evidence on the record and would prohibit wireless service in violation of the Act. On cross-motions for summary judgment, the district court concluded that the City had violated the Act when it failed to issue a written decision that stated the reasons for the denial, interpreting the Act to require that a written denial letter describe the reasons for the denial with sufficient explanation to allow a reviewing court to evaluate the reasons against the written record. The Eleventh Circuit reversed, acknowledging that the circuits were split on the question, but holding that the Act was satisfied if the denial and reasons were in different written documents that the applicant is given or has access to. The Eleventh Circuit held that because T-Mobile had its own transcript as well as the letter denying the application that informed T-Mobile that it could obtain access to hearing minutes, the requirements of the Act were met.

The U.S. Supreme Court first looked at whether the statute requires localities to provide reasons when they deny applications to build cell phone towers. The U.S. Supreme Court noted that the Act generally preserves the traditional authority of state and local governments to regulate the location,

construction, and modification of wireless communication facilities, but imposes specific limitations on that authority. The Act requires decisions by a locality to deny a request for a cell phone tower to be “in writing and supported by substantial evidence contained in a written record.” Parties adversely affected by a locality’s decision may seek judicial review. In order to determine whether a locality’s denial was supported by substantial evidence, courts must be able to identify the reasons why the locality denied the application. The Act also provides that a locality shall not unreasonably discriminate among providers of functionally equivalent services and may not regulate the construction of wireless service facilities based on the environmental effects of radio frequency emissions to the extent the facilities comply with Federal Communications Commission (“FCC”) regulations concerning such emissions. The U.S. Supreme Court noted that it would be more difficult for a reviewing court to determine whether a locality had violated these substantive provisions if the locality was not obligated to state its reasons. The “substantial evidence” requirement combined with the substantive provisions led the U.S. Supreme Court to conclude that localities must provide reasons when they deny cell phone tower siting applications clear enough to allow judicial review. The U.S. Supreme Court then looked at whether the reasons must appear in the same writing that conveys the denial. The U.S. Supreme Court found no requirement in the Act that the reasons must be in any particular document. However, the U.S. Supreme Court did note that the Act provides that an entity adversely affected by a locality’s decision may seek judicial review within 30 days after the decision. Because an entity may not be able to make a considered decision whether to seek judicial review without knowing the reasons for the denial and because a court cannot review the denial without knowing the reasons, the U.S. Supreme Court decided that the locality must provide or make available its written reasons at essentially the same time that it communicates its denial, although not necessarily in the same document. The U.S. Supreme Court concluded that its rule should not unduly burden localities because the denial needs only be issued within a reasonable period of time after the decision (generally interpreted by the FCC as 90 days for new antennas on existing towers and 150 days for other siting applications); therefore, if a locality is not in a position to provide its reasons promptly, it can delay the issuance of its denial within the 90-150 day window and release its denial along with its reasons when the reasons are ready to be provided. In short, the U.S. Supreme Court held that the Act requires localities to provide reasons when they deny cell phone tower siting applications, but the reasons do not need to be in the written denial letters themselves. A locality may satisfy its obligations if it states its reasons with sufficient clarity in some other written record issued essentially contemporaneously with the denial. In this case, the City provided its reasons in writing and in the acceptable form of detailed minutes of the City Council meeting, but did not provide the detailed minutes until 26 days after the date of the written denial and just four days before the time to seek judicial review would have expired. Therefore, the City did not comply with its statutory obligations. The U.S. Supreme Court reversed the Eleventh Circuit’s judgment in favor of the City and remanded the case for further proceedings regarding questions regarding the application of harmless error or questions of a remedy.

NINTH CIRCUIT COURT CASES

American Tower Corporation v. City of San Diego, 763 F.3d 1035 (9th Cir. 2014)

American Tower Corporation (“ATC”) had three cell tower facilities located in the City of San Diego. The City had granted conditional use permits (“CUPs”) for each facility, each of which stated that they would expire ten years from the date of its approval, unless renewed, and that ATC was required to return the site to its original condition at the time of expiration or denial of renewal. After the CUPs expired by their terms, ATC filed new CUP applications for each site. Under the California Permit Streamlining Act (“PSA”), the City was required to approve or disapprove the CUP applications within 60 days after a determination that the facilities were exempt from the California Environmental Quality Act. However, the City failed to act on any of the CUP applications within the 60-day period. Instead, the City and ATC continued discussions regarding the applications and what would be required for ATC to obtain the CUPs. The City published a notice of public hearing for each facility and all three applications were subsequently denied. ATC appealed the denials to the City’s planning commission, but the appeals were denied based on a finding that the information presented by ATC on design and siting solutions was insufficient to meet the requirements of the City’s Land Development Code. In response to the City’s denial, ATC filed suit in federal district court, raising claims under the PSA, the Federal Telecommunications Act, vested rights under the California Code of Civil Procedure, and the Equal Protection Clause. The district court granted summary judgment in favor of ATC on its PSA claim, reasoning that the CUP applications were deemed approved when the City failed to make its decisions within the 60-day window and granted summary judgment in favor of the City on the other claims. Both sides appealed.

The Ninth Circuit first looked at the provisions of the PSA and noted that the PSA provided that a permit application shall be deemed approved if the agency fails to act within the time limit, but only if the public notice required by law has occurred. Under the PSA, an applicant has two forms of self-help if the agency fails to act. First, the applicant may file an action to compel the agency to comply with its legal duty to provide public notice or hold a public hearing. Second, 60 days after the expiration of the time limit for approving or disapproving the project, if the applicant provides seven days advance notice to the agency of its intent to provide public notice, the applicant itself may provide the required public notice. The Ninth Circuit reasoned that if the public notice required by law did not occur before the City denied ATC’s applications, then the applications cannot be deemed approved. The Ninth Circuit noted that California due process protections require reasonable notice and an opportunity to be heard before an agency makes an adjudicatory land use decision that constitutes a substantial or significant deprivation of other landowners’ property rights. Here, automatic approval would have constituted a substantial or significant deprivation of the adjacent property owners’ rights because the facilities included dozens of antennas perched on hundreds of feet of towers alongside hundreds of square feet of equipment shelters. Therefore, deemed approval would be improper unless the agency holds a properly noticed hearing. After a properly noticed hearing is held, the lead agency can decide the issue. If the application is denied, the applicant can pursue available remedies; if the application is approved, aggrieved parties can pursue available remedies. If, after the hearing, the agency does nothing, the application will be deemed approved.

Because in this case the applications were denied during the hearings, the applications could not be deemed approved.

ATC also argued that it had a fundamental vested right to continue operations at the three facilities. When reviewing vested rights, a court looks at whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking judicial power. The Ninth Circuit found that ATC did not have a fundamental vested right in the continued operation of the facilities because ATC allowed the CUPs to expire by their terms, even though each expressly stated that the CUP would expire ten years from the date of approval, absent renewal. The Ninth Circuit found that, by failing to obtain new CUPs before the originals expired, ATC abandoned any right it had to continue operating the facilities and could not reasonably rely on the renewal of the CUPs. The Ninth Circuit reversed the district court's grant of summary judgment in favor of ATC on the PSA claim, and upheld the district court's grant of summary judgment in favor of the City on vested rights and the other claims.

ARIZONA CASES

Ponderosa Fire District v. Coconino County, 235 Ariz. 597, 334 P.3d 1256 (Ct. App. 2014)

This case involves whether Coconino County (the “**County**”) has the discretion to call performance bonds posted by a developer to ensure completion of subdivision improvements under applicable Arizona statutes and county ordinance. The County approved a developer’s proposal to subdivide land and begin developing a residential community within the County. When the County approved the proposed preliminary plat, the County issued a resolution that included a requirement for the developer to submit a performance bond or other security for the costs of any improvements not completed prior to submittal of the final plat, plus 10%. Based on this resolution, the developer acquired four subdivision bonds, which combined totaled more than \$4,000,000. The developer began construction of subdivision improvements and one of the bonds was released, but before it could complete the remaining improvements, the developer declared bankruptcy and abandoned the development. At the time of abandonment, the development had no functional internal roads or utilities, no homes had begun construction, and no lots had been sold. A new developer eventually acquired the development with the intent to construct homes on the subdivided lots and selling them to the public. The new developer applied to the County for a building permit and asked the County to call the outstanding bonds. Over the next several months, the County negotiated with the new developer about the cost of finishing the subdivision improvements; the County also sought to protect itself from potential litigation costs that might be incurred if it called the bonds. The parties could not reach an agreement and the County passed a resolution not to call the bonds, noting that the improvements were not constructed and there were no residents suffering from lack of infrastructure, thus calling the bonds would benefit only the new developer rather than the general public or the neighborhood; the resolution also noted that litigation was likely to result from calling the bonds, placing the County’s general fund at risk. Without a plan to complete the necessary improvements, the County denied the new developer’s building permit application. In response, the new developer filed a complaint alleging that it had acquired the development with the expectation that the bonds would be called to pay for improvements. The new developer requested a declaration from the court that the County’s duty to call the bonds was a mandatory ministerial act, a writ of mandamus compelling the County to call the bonds, and monetary damages. After a hearing, the court ordered the County to (i) adopt a resolution stating that the improvements were not finished and (ii) send the resolution to the surety; the County then appealed.

On appeal, the only issue before the appellate court was whether the County had discretion to call the subdivision bonds. The appellate court looked at the plain language of the applicable statute to determine whether the County had such discretion, noting that counties have no inherent powers and that a county’s authority is limited to powers expressly or impliedly delegated to it by the state constitution or statutes. The appellate court stated that the purpose of the bond posting requirement under the applicable statute was to protect the public from bearing the costs of necessary subdivision improvements by requiring the developer to install and pay for such improvements. The new developer claimed that it was “just a county property owner” who owned multiple lots in a subdivision and argued that there was no current developer. The appellate court concluded that the new developer was a developer under the statute because it purchased the development with the intent to construct homes on the lots and sell them to the public. The appellate court noted that the

statute did not specify when a county was required to call a bond, and so declined to read into the statute such a requirement. The appellate court then concluded that the County's decision not to call the bonds was a proper exercise of its necessary and implied power under the statute because the County had decided that calling the bonds would not serve the purpose of the bond and instead decided, in its discretion, to forego calling the bonds and require the new developer to pay for the cost of improvements. The appellate court also noted the absurd results if a county had a mandatory duty to call bonds, regardless of the circumstances, when a subdivision is abandoned. The county would be required to call a bond and finish improvements on a subdivision that may lay vacant for many years. The appellate court found that the County's ordinance also allowed the County discretion in calling the bonds, consistent with the statute. The appellate court found that the County exercised its discretion in refusing to call the bonds and therefore trial court erred in issuing a mandamus order.

MONTANA CASES

Phillips v. City of Whitefish, 375 Mont. 456, 330 P.3d 442 (2014)

Under Montana statutes, a city may enforce its zoning and subdivision regulations beyond the city limits only until the county adopts a growth policy. As a second class city, according to its population, Whitefish (the “**City**”) could extend its regulations for up to two miles beyond the city limits into Flathead County (the “**County**”). In 2005, after two years of negotiation, the City and the County entered into a formal agreement regarding the City’s jurisdictional area, which provided for the City’s exclusive jurisdiction to establish and enforce zoning, subdivision, floodplain, and lakeshore protection regulations for an area two miles beyond its city limits; the agreement could not be altered or terminated without the mutual consent of the parties. In 2008, the City adopted an ordinance that imposed zoning regulations in a certain area subject to the 2005 agreement; the County disagreed with the City’s ordinance and passed a resolution to withdraw from the 2005 agreement. The City then filed a lawsuit to uphold the 2005 agreement. The City and County ultimately entered into settlement discussions. In 2010, the City held public meetings and eventually passed two resolutions, one approving a new agreement between the City and the County and the other approving the dismissal of the lawsuit; the lawsuit was dismissed in July 2011. After the two resolutions were passed, unhappy citizens began collecting signatures to put a referendum on the ballot to repeal the resolution authorizing the City to enter into the 2010 agreement. The referendum passed in the November 2011 election; the City then took the position that the 2010 agreement was revoked and the 2005 agreement was reinstated, allowing the City to once again exercise jurisdiction over the area in dispute. Residents of the City and County then filed a lawsuit challenging the validity of the referendum because the decision to enter into the 2010 agreement was contractual and administrative in nature. The City filed a third-party complaint against the County alleging breaches of the 2010 agreement. On cross-motions for summary judgment, the district court found that the resolution was an administrative act not subject to the power of referendum and the City and intervenors appealed.

The Montana Supreme Court first addressed the question of whether the lawsuit was untimely. The Montana Supreme Court noted the statutes that required a local government must challenge a referendum or initiative within 14 days after a petition is approved as to form, but no statute places a time limit on a challenge by private citizens. The Montana Supreme Court also found that laches did not bar the lawsuit because the laches requirement of prejudice had not been addressed; although there was a showing that the suit *could* have been brought sooner, there was no support for why the *must* have been brought sooner. The Montana Supreme Court then addressed whether the resolution at issue was (i) an administrative act not subject to repeal by referendum or (ii) a legislative act subject to referendum. While determining whether a particular government action is legislative or administrative can be difficult, the Montana Supreme Court listed certain guidelines applicable to such a determination: (a) an ordinance that makes a new law is legislative while an ordinance that executes an existing law is administrative; (b) acts that declare public purpose and provide ways and means to accomplish the purpose are legislative; acts that deal with a small segment of an overall policy question generally are administrative; (c) decisions that require specialized training and experience in local government in order to make a rational choice may be administrative, even

though they may also establish policy; and (d) while an act may not be solely administrative or legislative, initiative and referendum are restricted to measure that are “quite clearly and fully legislative and not principally executive or administrative.” After applying these factors, the Montana Supreme Court held that the resolution had significant administrative characteristics that made it principally administrative in nature: it did not zone or alter the designation of who had authority to zone in the area at issue (although it gave the County an unspecified power of oversight), it did not effectuate a new zoning policy, and it involved a decision to settle a lawsuit (which required investigation and analysis, appropriately within the discretion and business judgment of a local government). The Montana Supreme Court concluded that the resolution was not subject to the power of referendum.

Lewis and Clark County v. Hampton, 376 Mont. 137, 333 P.3d 205 (2014)

In 1996, an owner acquired a 12.3-acre parcel of land subject to an agricultural covenant, which stated that the land would be used exclusively for agricultural purposes; the agricultural covenant ran with the land and could be revoked only by mutual consent of the owner of the parcel and governing body of Lewis and Clark County (the “County”). After acquiring the parcel, the owner requested that the County lift the covenant multiple times but the County denied the request. In 2004, when the owner requested that the covenant be revoked, the County decided to hear the request and scheduled a public meeting. At the public hearing, County staff recommended denial of the owner’s request and the County commission requested input regarding how it might conditionally approve the owner’s request. At the next meeting, County staff presented a memo with 15 conditions of approval, later revised to include the 13 conditions. The conditions mirrored those required of other subdivisions in the area and were designed to bring the owner’s property into compliance with applicable laws and regulations by mitigating impacts or eliminating hazards resulting from subdividing the property. Two of the conditions involved access to the property. The County commission voted to approve the revocation of the agricultural covenant subject to 13 conditions. The County then sent the owner a letter stating that prior to any development, the owner must submit its proposed development plan to the County for approval, which would be granted upon a determination that the conditions have been met. After the County’s decision, the owner began working on developing its residence, received approval from the department of environmental quality, and received his address assignment from the County. The County also approved the owner’s septic drainfield and changed the property tax classification. In 2006, a developer applied to subdivide the owner’s parcel. In reviewing the application, the County realized that the owner may not have completed the conditions placed in 2004. In 2007, the County sent a letter rejecting the application and stating that the property was subject to an agricultural covenant. In 2008, the County sent a letter to the owner informing him that it had not received verification that the conditions had been met. The owner informed the County that he was unable to comply with two of the conditions, which required him to make the access roads to his property public, because he could not obtain the neighboring property owners’ approval. In 2009, the County filed a complaint in the district court requesting injunctive relief and an order requiring the owner to complete the conditions. Each party moved for summary judgment and the court granted partial summary judgment to the owner, ruling that the County had agreed to lift the covenant. After a jury trial, the jury determined that the owner had notice of the conditions and failed to comply with four of them. Following trial, the court

ordered the owner to comply with the conditions regarding the road by paying his proportional cost to upgrade one of the roads and the entire cost to upgrade the other road. The County appealed.

The Montana Supreme Court first looked at whether the district court erred in granting partial summary judgment to the owner by finding that the County had agreed to lift the covenant. The County argued that the owner failed to meet the conditions for revocation of the covenant and no revocation had been recorded, therefore the covenant was still in effect. However, the Montana Supreme Court agreed with the district court that the evidence demonstrated the County's intent to revoke the covenant while imposing conditions to be completed prior to development. The Montana Supreme Court found that the district court's denial of summary judgment to the County was moot because the jury verdict essentially granted the County the relief it sought in its motion for summary judgment. The Montana Supreme Court then looked at the three errors raised by the County in the district court's final judgment: (i) that one access road was public and that the other did not need to be made public, (ii) that the owner was only responsible for its proportionate share of improvement costs for one of the roads, and (iii) that the district court failed to order all of the County's requested relief, which included imposing a penalty, compensatory damages, punitive damages, and attorneys' fees. Regarding the roads, the Montana Supreme Court found that the trial court's order effectuated the County's desire to block additional residential development of the property – the trial court required that the owner file a deed restriction to prevent further division or development of the property and required the owner to upgrade the roads to ensure legal and physical access by emergency responders, eliminating the need for public access. Regarding improvement costs, the Montana Supreme Court ruled in favor of the County and remanded the issue to the trial court, finding that the owner was responsible for development in the area and that the access roads were dead-end roads serving only the owner's property; the upgrades to the roads were necessary to service his residence and the owner should be responsible for the entire costs of upgrading the roads. Regarding the additional relief requested by the County, the Montana Supreme Court found that there was no authority for penalties or enforcements costs or an award of attorneys' fees in the type of case filed by the County. The Montana Supreme Court remanded the case to the district court to modify the judgment with respect to road improvements.