

NEW MEXICO: THREE IMPORTANT CASES AND A NEW PLAN!

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- I. *Santa Fe Pacific Trust, Inc. v. City of Albuquerque*, 2014-NM-093, 335 P.3d 232 (Ct. App, 2014)

This case adds further defines the “law of takings” in New Mexico. Former Albuquerque Mayor Martin Chavez wanted an arena to be built on property downtown, part of which was already owned and occupied by Santa Fe Pacific Trust, Inc. He and his administration did a lot of “pre-condemnation planning” for the arena, accompanied by a lot of conversation and publicity. When the City Council would not approve the building of the arena downtown, and the City never formally acquired property for the arena, the Santa Fe Pacific Trust sued the City, alleging that the City had “taken” its property unconstitutionally, since all of the talk about the proposed arena had led to an unconstitutional taking of its property,, had causes it to lose tenant leases, and had interfered with its contract relations. The New Mexico Court of Appeals ruled that since the City had never entered onto the property nor actually “taken” any of it for the Arena, no taking had occurred. The City’s pre-condemnation conversations and publicity did not amount to a taking under State or Federal law. Had the City actually entered onto the Trust’s property it might have had a case. talk about the possibility of acquiring a particular piece of property is not enough to constitute a takings claim!

- II. *State of New Mexico, City of Albuquerque v. Pangaea Cinema, d/b/a Guild Cinema, LLC*, 335 P. 3d 232 (2013)

The City of Albuquerque does not allow adult uses in its C-2 zone, either as a permissive or conditional use, in its C-2 Zone, which is the zoning of Central Avenue in Nob Hill, an “up and coming” commercial area of Albuquerque. The Guild Cinema, an old single screen movie house, is located in Nob Hill. One weekend a year, the Guild hosts Pornotopia, a “film festival” which features “adult films”. “Adult amusement establishment” is defined in the Albuquerque Code of Ordinances, at Section 14-16-1-5-(B)(1974, amended 1912) as “an establishment, such as a..... theater....that provides amusement or entertainment featuring....film, motion pictures.... or other visual representations or recordings characterized by or distinguished by an emphasis on...specified anatomical areas or....specified sexual activities.” *Id.* The ordinance further states that “any use not designated as a permissive or conditional use in a zone is specifically

prohibited from that zone, except as otherwise provided herein.” There was no provision “herein” for the Guild to show an adult movie! The City therefore believed that the Guild was in violation of its ordinance after two inspectors viewed films at the Guild.

Regulation of adult entertainment has been upheld by the U.S. Supreme Court when it addresses “secondary effects” which usually accompany such entertainment, such as drugs and prostitution. See *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) Albuquerque’s adult use ordinance is based on the Detroit adult use ordinance which was at issue in that case. There were no unfavorable “secondary effects” reported when the Guild had its festival. Instead, Nob Hill merchants were pleased with the amount of business that the festival created in their neighborhood.

Although the District Court and New Mexico Court of Appeals had ruled in favor of the City, upholding its enforcement of its Zoning Ordinance, the New Mexico Supreme Court ruled for the Guild, stressing that adult films were only shown one weekend a year during a festival”, which didn’t make the Guild an Adult Entertainment establishment, and there was no evidence of those “secondary effect s” which might have enabled the City to close down the “festival” and cite the Guild for a zoning violation.

III. *SWBPI v. Mora County, N.M et.al.*, No. Civ 14-0035, JB/SCX, January 19, 2015

Judge James Browning, of the United States District Court for the District of New Mexico, ruled on February 2, 2015, that Mora County, New Mexico, could not ban fracking and drilling in that county, a rural area about 100 miles north of Santa Fe. County voters passed the ban in 2013, which was enacted in the form of an ordinance, and the ban was challenged in a lawsuit filed last year by Royal Dutch Shell PLC. The ruling challenged those who want to see more “local control” over oil and gas regulation. Judge Browning ruled that Mora’s ordinance violated the U.S. Constitution’s Supremacy Clause by attempting to discard corporate rights protected by federal case law. The County’s measure explicitly noted that oil and gas companies “shall not have the rights of ‘persons’ afforded by the United States and New Mexico Constitutions”, including First Amendment and due process. Browning wrote that the County should be challenging the rights of corporations in the U.S. Supreme Court, since that’s the only Court which can overrule its own precedent. He also stated that Mora’s ban conflicted with New Mexico Law, under which the State controls oil and gas development. If appealed, this case will head to the 10th Circuit, and eventually, could end up in the Supreme Court of the United States. It should be noted that there has been no Federal Court ruling on, regulating oil and gas development, and particularly fracking, through zoning, which is an approach which was used in Santa Fe County, New Mexico.

IV. The Plan

The City of Albuquerque has retained Clarion Associates, a Denver planning firm, to redo its Comprehensive Plan. The City and Bernalillo County, which both adopted, the Albuquerque/Bernalillo County Comprehensive Plan in the 1980’s, agree that it is now obsolete, since current development trends, plus contrary utilization of neighborhood plans, which have included separate zoning designations,, have made the plan incomprehensible to

neighbors and developers. Don Elliott, a principal with Clarion, will be working with the City to develop a Plan which better suits City and County development trends and will make planning and zoning more comprehensible to developers and neighborhoods. Stay tuned!

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