

RECENT LAND USE DECISIONS IN THE ROCKY MOUNTAIN WEST

ROCKY MOUNTAIN LAND USE INSTITUTE

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NEW MEXICO LEGISLATION AND COURT DECISIONS

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I. Tax Increment Financing: Legislative Change on the Horizon?

Like its Rocky Mountain neighbors, New Mexico's cities are facing growth. A major issue in Albuquerque is whether Tax Increment Development Districts (TIDD's), enabled in 2006 by the Tax Increment for Development Act, NMSA 1978, §§5-15-1 et seq. (2006) should be used for "greenfield development", or whether these districts should be created only for redevelopment. Mesa Del Sol, a New Urban mixed use community being developed by Forest City Covington, the developer of Stapleton, worked with legislators to get the statute adopted, and had several TIDD's approved by the City. Mesa Del Sol has already attracted Albuquerque Studios, an enormous movie production development, as well as Schott AD, a German aviation company and Fidelity Investments, among other employers. "Employment Centers" are being developed in advance of residential areas, to create jobs in advance of residential communities which are intended to house employees of these corporations.

When the Atrisco Land Grant, located partially in Albuquerque and partially in the unincorporated area of Bernalillo County, to the west of the City, was sold to SunCal, a California development company, it also proposed utilizing TIDD's to finance infrastructure in a 55,000 acre enormous new planned community. The New Urban community is being planned by Stefanos Polyzoides. SunCal proposes to develop residential communities first, and its application, as of January, 2008, was pending before the City Council.

A City Councilor, Michael Cadigan, joined by 1000 Friends of New Mexico, other "smart growth" advocates, and Voices for Children, a children's advocacy organization, questioned whether TIDD's should be allowed to develop greenfields at the edge of the City, stating that they should only be used for redevelopment and alleging that they divert funding from city-wide infrastructure needs as well as state spending on social needs. At this writing, the Mayor had vetoed a bill in City Council which would only permit TIDD's for City redevelopment. The veto has not been overridden, but efforts are

underway to get legislative changes to the statute. As of January 25, S 434 had been introduced in the State Senate to impose a moratorium on the use of Tax Increment Financing Districts for “greenfields” development, and on the use of a state gross receipts tax increment for bonds, and creating a Tax Increment Financing Task Force to examine these issues. Whether this bill passed and whether other bills relating to TIDD’s were introduced and adopted by the Legislature will be discussed at RMLUI.

New Mexico’s statute is unique in that it allows tax increment financing, in which a property is assessed at its blighted or undeveloped level, to include both property and gross receipts taxes revenues generated from development on the property. Gross receipts taxes payable to the State, County and school and other “use districts” may also be used for the increment, if the state and other affected districts approve. The justification for this feature is that New Mexico, unlike other jurisdictions, prefers to raise revenue from gross receipts taxes, rather than property taxes, which are low in comparison to other states.

As in other tax increment programs in other states, developers float bonds to pay for construction of infrastructure and proceed with planned development. The increase in taxes generated (the tax increment) from development is used to repay the debt service on the bonds. The statute imposes no liability on the city, state, county or special districts the bonds default.

This is certainly the hottest topic affecting land use in 2008! Considering that New Mexico is way behind other Rocky Mountain jurisdictions in implementing tax increment financing, and considering that when tax increment financing was only used once or twice by Albuquerque when it was only allowed pursuant to the New Mexico Municipal Redevelopment Act, NMSA 1978, §§ 3-60A-1 et seq. (1979), the outcome of this battle will be significant to future development in New Mexico.

II. Other Legislative Issues: Will be discussed if significant at RMLUI, after the close of the 2008 Legislature

III. Significant New Mexico Cases

Primetime Hospitality, Inc. v. City of Albuquerque, 2007-NMCA-129

A City waterline was ruptured during excavation work which was part of the construction of a hotel on Primetime’s property. The waterline had been wrongfully installed on private property adjacent to city right-of-way. The hotel was completed and opened operations about 1 ½ years later. Primetime, in addition to damage to its construction site, resulting in increased construction costs alleged as damages, which were not contested by the City, claimed “lost profits” of about \$450,000 as consequential tortt-like damages in the case.

The City argued that just compensation in condemnation is limited to damage to the value of the property for the period of the taking and does not allow for tort-like damage recovery.

The District Court awarded lost profits as damages. The New Mexico Court of Appeals reversed the District Court's award of lost profits, rejecting tort like damages as a measure of damages in condemnation cases, and remanded the case for a determination of fair market rental value for the period of the taking. The fair market rental value would be based on the property's use as a hotel construction site and that value would represent what an objective owner would take to be delayed in the construction and opening of the hotel.

The New Mexico Supreme Court accepted certiorari on the case, and has not yet rendered an opinion

Albuquerque Commons Partnership v. Albuquerque City Council, 2006-NMCA-143, 140 N.M. 751, 149 P. 3d 67

The Court of Appeals opinion in this case, written by Judge Celia Foy Castillo, is one of the most significant land use opinions ever rendered in New Mexico. An appeal is now pending in the New Mexico Supreme Court, which could change both the case's conclusion, and have a major impact on land use law in New Mexico.

The case was originally brought by Albuquerque Commons Partnership ("ACP") as a 42 U.S.C. §1983 action for denial of due process and for a taking arising out of the City's adoption of its 1995 Uptown Sector Development Plan, which replaced its 1981 Uptown Sector Development Plan. ACP proposed to build a "big box" retail shopping center in Albuquerque's Uptown Center. When the City's Uptown Sector Plan had been adopted in 1981, big box shopping centers had only been developed at the edges of the City. The 1981 Plan had depicted Uptown as an "urban" center, but had no urban criteria requirements, such as limitations on retail, FAR minimums and structured parking requirements. Policies and goals allowed for less "urban" development near surrounding residential development.

ACP had submitted a site plan in 1987, reflecting a high density mix of retail, office and hotel development, which was approved by the City. The office market dried up, however, so the development as approved was never built. When the big box center plan was submitted in 1994, the City enacted a moratorium on development in Uptown, and revised the Uptown Sector Plan, adding quantitative limitations on retail, minimum density requirements and required structured parking within a loop road which encloses the "intense urban core" of the Uptown sector area. Outside of the intense urban core, less stringent requirements were imposed.

The City considered its amendment of the 1995 Uptown Sector Plan to be a legislative matter, rather than a "quasi-judicial" zone change. ACP claimed that the adoption of the

95 Uptown Sector Plan was a quasi-judicial downzoning of its property, in violation of the “change and mistake” rule set forth in Miller v. City of Albuquerque, 89 N.M. 503, 554 P. 2d 665 (1976). The “change and mistake” rule, which has been rejected by every state but Maryland, holds that property may only be downzoned to more restrictive use if there has been a significant change in the area, or a mistake, in the nature of a clerical error, in the original zoning. ACP claimed that the City, by treating what was actually a downzoning of its property as a legislative matter in its conduct of hearings on the 95 Plan, had denied it due process. It also claimed that due to market conditions, the office development that would be required under the 95 Uptown Sector Development Plan to accompany retail development was unfeasible, so it was forced to leave its land undeveloped, which constituted a taking. The jury in ACP’s District Court case agreed with ACP and awarded it approximately \$8.3 million dollars.

After over a year of considering the City’s appeal of the District Court’s decision, the Court of Appeals ruled:

(1) The 95 Uptown Sector Plan was a valid legislative action that did not rezone ACP’s property because it merely defined and quantified the policies and goals of the 81 Uptown Sector Plan, and therefore there was no basis for the due process claim.

(2) There was no taking since ACP was not more restricted in the use of its land by the 95 Uptown Sector Plan than by the 81 Uptown Sector Plan, since both plans required that urban development be approved within the discretion of the City and the goals and policies of the applicable sector plan. Actually, the 95 Plan allowed greater density of development!

ACP appealed to the New Mexico Supreme Court, once again arguing the sanctity of the “change and mistake” rule as it applied to its alleged downzoning of its property. The City once again stressed the legislative nature of the added restrictions in the 95 Uptown Sector Plan.

The City and amici which filed briefs in both the Court of Appeals and Supreme Court emphasized the legislative nature of planning as conducted by the City in its updating of the Uptown Sector Plan to flesh out policies which, although they had emphasized mixed use urban development, did not foresee that big box retail would ever locate in the Urban Core. ACP, especially at the September 2007 oral argument at the Supreme Court treated the “change and mistake” rule with the reverence accorded to the Ten Commandments. Given the increased emphasis on the need for contemporary planning to address urban sprawl and global warming, it’s about time that New Mexico joined other states in eliminating the “change and mistake” rule. Land use junkies in New Mexico anxiously await the Supreme Court’s decision!

It should be noted that Phase I of the subject property was developed in 2005 by a subsequent developer as ABQ Uptown, a “lifestyle” walkable shopping center with both on street and structured parking. It’s the most popular retail area in the City. Phase II will include high density office and residential. ACP missed the boat on this one!

**New Cingular Wireless PCS, LLC v. City Council of the City of Albuquerque,
Second Judicial District Court, CV-2006-07241**

If it hadn't resulted in costly litigation, this case could be considered a comedy of errors. Cingular Wireless PCS, LLC, applied for approval to remove a light pole in a shopping center parking lot and replace it with a concealed wireless communications facility (WTF), meeting the requirements of the City's telecommunications ordinance, Revised Ordinances of Albuquerque, N.M., §14-16-3-17 (1999 as amended through 2002). The ordinance requires that applicants for telecommunications towers provide mailed notice to adjacent property owners and neighborhood associations. Cingular incorrectly listed Lot 2A in the shopping center as the proposed WTF site, resulting in the City's generating an incorrect list of adjacent property owners who were given the required notice.

The City Planning Department approved the application on February 15, 2006.. There was no appeal during the applicable 15 day appeal period after the Planning Department's approval, so Cingular applied for a building permit on Lot 9A, and not 2A, the lot in its application. Construction began on Lot 1B, however, and not 2A or 9A. Adjacent neighbors observed the construction on March 14, 2006, on Lot 1B and contacted the Planning Department reporting that they had never received mailed notice of the Cingular application.

The Planning Department corrected the listing of the lot on the application and then officially notified the neighbors on March 30, 2006, that they had 15 days to appeal, thus extending the original appeal date which would have applied had 2A been the lot on which the tower was approved. The neighbors to Lot 1B filed a formal appeal of the Planning Department decision approving the tower on April 14, 2006.

The neighbors' appeal was heard by the City's Hearing Officer. Cingular claimed that the neighboring property owners did not have standing to appeal the approval since they appealed too late. The Hearing Officer ruled for the neighbors, finding that since it was Cingular's error in listing the appropriate site on its application, it was disingenuous to say that the neighbors had no standing to appeal. He also found that there was a disparity between the ordinance requirement that the proposed tower not have adverse effects on neighboring property and the actual tower which was approved. Cingular's tower was going to be 65 feet high; surrounding light poles were only 30 feet high. The City Council rejected the Hearing Officer's findings, although it again ruled for the neighbors, finding that Cingular had failed to integrate the tower design with existing buildings and had also failed to minimize adverse effects on neighboring residential property. Cingular appealed the denial of its application to the District Court, alleging denial of its due process rights because of the City's extension of the appeal period, vested rights in the original approval, and that the City's Telecommunications Tower ordinance was unconstitutionally void for vagueness.

The District Court held that the City properly extended the appeal period to give neighbors, who had not been properly noticed about the tower application an opportunity to be heard. It also held that Cingular had no “vested” rights in the original approval of the tower by the City, since the initial approval by the City of the tower was invalid, even though Cingular had changed position in reliance on that approval. The Court also held that the City’s ordinance was not unconstitutionally vague in its requirement that the tower be compatible with surrounding residences and structures and not obstruct mountain views from surrounding residences, considering that Cingular’s 65 foot pole was surrounded by other surrounding poles which were 30 feet high. Cingular’s pole also had a much broader circumference than surrounding light poles. Finally, the Court upheld City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 418, 389 P. 2d 13, 19 (1964), which had rejected a constitutional challenge to ordinances which require harmony with adjacent buildings.