

ROCKY MOUNTAIN LAND USE INSTITUTE

RECENT LAND USE DECISIONS IN THE ROCKY MOUNTAIN WEST

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ARIZONA CASES

Lowe v. Pima County, 217 Ariz. 642, 177 P.3d 1214 (App. 2008)

This case involved a dispute regarding the validity of a public right-of-way dedication. In 1958, a Pima County property owner signed and recorded a document dedicating a 60 foot wide strip of land (the “60 Foot Strip”) as a public right-of-way. The property owner later sold a parcel adjoining the 60 Foot Strip, and sometime before 1983, a fence was constructed within the 60 Foot Strip without a permit. In 2000, the parcel was sold to Larry and Roberta Lowe (the “Lowes”). Although the Lowes’ property deed excluded the 60 Foot Strip, the deed did not indicate that the 60 Foot Strip had been dedicated as a public right-of-way. When Pima County cited the Lowes for having an unpermitted fence in a public right-of-way, the Lowes argued that the dedication of the 60 Foot Strip was invalid. The trial court determined that the dedication was effective because the dedicatory instrument was recorded and the Lowes’ deed excluded the 60 Foot Strip; the Lowes appealed.

The Arizona Court of Appeals first explains that an effective dedication of private land to a public use has two components—an offer by the owner of the land to dedicate and acceptance by the general public. As the parties agreed that there was an offer to dedicate the 60 Foot Strip, the Court focused on two ways in which an offer to dedicate may be accepted: (i) referring to the dedication in the deed to the parcel(s) on which land was dedicated and (ii) use of the right-of-way by the general public. Because the Lowes’ deed did not reference the dedication, the Court held that there was not acceptance of the dedication under (i) above. The Court explained that merely recording the dedicatory instrument is insufficient because it would only constitute constructive notice to those who are bound to search for it, and the Lowes were not bound to search for a recorded deed dedicating property that they were not purchasing. Similarly, merely excluding the 60 Foot Strip from the Lowes’ deed is insufficient as it does not provide notice of dedication. Regarding (ii) above, the Court found that the record reflected questions of fact as to whether there had been any general public use of the 60 Foot Strip and the Court remanded the issue to the trial court.

City of Tucson v. Clear Channel Outdoor, Inc., 218 Ariz. 172, 181 P.3d 219 (App. 2008)

In 2000, the City of Tucson (the “City”) sued Clear Channel Outdoor, Inc.’s (“Clear Channel”) predecessor for violation of the City’s ordinances governing billboards. Because the City’s complaint involved 170 billboards, each constituting a separate count, the trial court ordered the parties to select a small number of billboards representative of the violations alleged (hoping that after litigating those billboards, the parties would be more likely to reach a settlement regarding the remaining billboards). The parties selected ten billboards for trial; the City requested the trial court to order the removal of all ten. The trial court’s judgment required Clear Channel to remove five of the billboards, relocate two, and replace the face of another. The trial court denied the City’s request for relief for two of the billboards. The City appealed and Clear Channel cross-appealed. The Arizona Court of Appeals affirmed the trial court’s judgment as to eight of the billboards and remanded the case for further consideration of two of the billboards.

Clear Channel's Challenge

The Court first addressed Clear Channel's appeal, which challenged the trial court's judgment on two primary grounds. The first challenge regards the interpretation of ARIZ. REV. STAT. § 9-462.02(C), which requires a municipality to issue a citation and file an action involving outdoor advertising/sign code violations within two years after discovering the violation. Clear Channel argued that the trial court erred by determining that the two-year limitations period runs from the date the City actually discovers a violation. Instead, Clear Channel argued that the limitations period should run from the date the City knew or, in the exercise of reasonable diligence, should have known of the facts underlying the purported violation. The Court rejected this argument, finding that ARIZ. REV. STAT. § 9-462.02(C) unambiguously provides that the two-year statute of limitations begins to run upon actual discovery of a violation.

Clear Channel then argued that the City cannot enforce its current ordinances against the billboards because the ordinances did not exist when the billboards were constructed. The Court held that the trial court's judgment is not an impermissible retroactive application of the City's current ordinances. This is because Clear Channel conceded that certain billboards violated the City's previous ordinances when those billboards were constructed. Those billboards were therefore never legally non-conforming and Clear Channel did not acquire a vested property right. The Court further held that while some of the billboards complied with the City's ordinances at the time of construction, those billboards lost their legal nonconforming use status when Clear Channel added a second face to them, allowing more advertising to be displayed.

City's Challenge

The Court next addressed the City's appeal. Regarding the three billboards that the trial court ordered Clear Channel to remediate, the City argued that the trial court lacked discretion to order anything other than removal and even if it did, it abused that discretion. The Court rejected the City's argument and held that because unlawful billboards are public nuisances, and proceedings to enforce zoning ordinances are proceedings in equity, the trial court has discretion to fashion a remedy other than removal. But the Court remanded the case as to two of the billboards for further consideration of whether Clear Channel failed to establish an equitable estoppel defense. The Court upheld the trial court's order to reface one of the billboards and the denial of relief for two of the billboards.

Mayer Unified School District and Gadsen Elementary School District v. Winkleman, ___ Ariz. ___, ___ P.3d ___, 2 CA-CV 2007-0126 (App. 5/19/08) (Review pending in Arizona Supreme Court)

Parents of public school children and two public school districts sought to void approximately 900 easements that the State granted to governmental entities from 1929 to 1967. These easements were

granted on lands that were to be held in trust for the benefit of Arizona's public schools, universities, and other public institutions under the Arizona-New Mexico Enabling Act of 1910. As the State did not receive compensation for the easements, the plaintiffs argued that the easements were invalid under *Lassen v. Arizona ex rel. Ariz. Hwy. Dept.*, 87 S.Ct. 584, 385 U.S. 458 (1967), in which the U.S. Supreme Court held that the State must compensate the trust for easements conveyed. Although *Lassen* held that any future easements would be invalid without compensation, it did not address the validity of the prior easements.

The trial court dismissed the case on laches grounds and the plaintiffs appealed. The Arizona Court of Appeals affirmed, but for a different reason. The Court did not find that the case was barred by laches because the plaintiffs did not unreasonably delay in bringing their challenge. Instead, the Court used a three-factor balancing test to determine if *Lassen* should be applied retroactively: (i) whether the decision establishes a new legal principle by overruling clear and reliable precedent; (ii) whether retroactive application will further application of the rule announced in the decision; and (iii) whether retroactive application will produce substantially inequitable results. Finding that the first and third factors weighed against retroactivity, the Court held that *Lassen* could only be applied prospectively and the easements were upheld. On October 28, 2008, the Arizona Supreme Court granted review.

Sklar v. Town of Fountain Hills, ___ Ariz. ___, ___ P.3d ___, 1 CA-CV 08-0519 (App. 11/25/08)

The Town of Fountain Hills (the "Town") approved a developer's request to rezone the developer's property and to amend the Town's General Plan. A ballot measure committee, Save Our Small Town ("SOST"), filed referendum petitions seeking to invalidate these actions. Sherry Sklar, who is a qualified elector of the Town, filed a complaint seeking to invalidate the referenda and enjoin the Town from placing the measures on the ballot; SOST intervened as a defendant. The trial court granted Sklar's motion for summary judgment, holding that the referendum petitions do not comply with ARIZ. REV. STAT. § 19-101(A), which requires petitions to include a 100-word "description of . . . the principal provisions of the measure sought to be referred." On appeal by SOST, the Arizona Court of Appeals affirmed. The Court first set forth the general principles governing referendum petitions, noting that although citizens have the constitutional right to referendum, referendum petitions must comply strictly with applicable constitutional and statutory provisions. Although strict compliance is required, ARIZ. REV. STAT. § 19-111 requires that specific requirements for referendum petitions be broadly construed. Applying these principles, the Court held that SOST's referendum petitions were defective under ARIZ. REV. STAT. § 19-101(A) because the petitions only described the purported anticipated effect of the matters to be referred and failed to "identify in any meaningful way any of the provisions of the challenged governmental acts, let alone the principal ones."

MONTANA CASES

Mills v. Alta Vista Ranch, LLC, 344 Mont. 212, 187 P.3d 627 (2008)

The issue in this case is whether the filing of a certificate of survey that divides a tract of land into two tracts, one larger than 160 acres, and one smaller than 160 acres, is subject to review under the Montana Subdivision and Platting Act (the “Act”). The Act defines “subdivision” as the “division of land or land so divided that it creates one or more parcels containing less than 160 acres.” In 2004, landowners filed numerous certificates of survey with the Clerk and Recorder of Gallatin County (“Mills”). Almost all of these certificates of survey divided land into two parcels: one parcel larger than 160 acres and a “remainder” parcel smaller than 160 acres. As each of the certificates created a parcel larger than 160 acres, Mills did not believe that the certificates were subject to the Act and accepted the certificates and deeds for recordation. The following year, however, Mills brought a declaratory judgment action, arguing that the certificates were subject to review under the Act and requesting a declaration that the certificates were illegal divisions of land. The District Court granted the landowners’ motion for summary judgment and held that the Act does not apply to transactions that create parcels of land larger than 160 acres, even if the division leaves “remainder” parcels smaller than 160 acres. Mills appealed, challenging this “remainder doctrine.” The Montana Supreme Court agreed with Mills, stating that the “remainder doctrine” “defies logic as well as the plain language of the statute” because all future land divisions would be exempt from the Act as long as a parcel larger than 160 acres was created by the division. The Court also noted that the Act does not include an exception for “remainders” smaller than 160 acres. The Court held that any division of land that creates a parcel smaller than 160 acres—regardless of whether larger parcels are also created in the same transaction—is subject to review under the Act, unless it is exempt from review under one of the exceptions listed in the Act.

Country Highlands Homeowners Association, Inc. v. Board of County Commissioners of Flathead County, 345 Mont. 379, 191 P.3d 424 (2008)

The Country Highlands Homeowners Association (“Country Highlands”) sued the Flathead County Board of Commissioners, alleging that the County’s approval of amendments to (i) the 1987 Flathead County Master Plan (the “1987 Master Plan”) and (ii) the Highway 93 North Zoning District (collectively, the “Amendments”) were invalid. The District Court granted the County’s summary judgment motion, concluding that the adoption of the Amendments was procedurally and substantively valid. Country Highlands then appealed. But in 2007, while the appeal was pending, the County adopted the Flathead County Growth Policy (the “2007 Growth Policy”) that replaced the 1987 Master Plan. The County argued that the suit was rendered moot by the enactment of the 2007 Growth Policy. Country Highlands disagreed, arguing that the Amendments still exist under the 2007 Growth Policy. After considering the parties’ arguments, the Court dismissed the case as moot, finding that the 2007 Growth Policy was a separate legislative action that reenacted the Amendments and that action is presumed lawful and valid absent another challenge.