

ROCKY MOUNTAIN LAND USE INSTITUTE

RECENT LAND USE DECISIONS IN THE ROCKY MOUNTAIN WEST

Presented by:

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ARIZONA CASES

Dos Picos Land Limited Partnership v. Pima County, 225 Ariz. 458, 240 P.3d 853 (Ariz. App. 2010)

This case involves an inverse condemnation suit filed by a landowner who owned a parcel of land surrounded by a mountain preserve owned by Pima County. The northern and southern portions of the parcel were divided by a mountain ridge that was declared a “protected ridge,” which meant that a special use permit was required from the County in order to develop it. The landowner sought a special use permit to build a road across the ridge connecting the northern and southern portions of the parcel, which the County denied. The landowner then sought a special use permit to build a road across the County’s land to access the southern portion of the parcel, which the County also denied. The landowner then sued for inverse condemnation, arguing that the County’s actions constituted a governmental taking of private property.

The trial court granted summary judgment in favor of the landowner, finding as a matter of law that the County had affected a taking of the land, and a jury trial was subsequently held to establish the property’s value. The County appealed the trial court’s associated award of attorneys’ fees, arguing that because this had been a regulatory taking, the statute authorizing attorneys’ fees in inverse condemnation actions initiated because of physical takings (ARIZ. REV. STAT. § 11-972(B)) did not apply. The Arizona Court of Appeals observed that the trial court made no factual findings that the County physically took the land or intended to do so. The burden had been on the landowner to prove the taking was a physical one and that the statute authorizing the award of attorneys’ fees applied. The Arizona Court of Appeals discussed the differences between physical takings, characterized by “direct government appropriation of physical invasion of private property,” and regulatory takings, characterized by “government regulations that deprive an owner of the economic benefit of the property.” The conclusion was that the County had effected a regulatory taking because it did nothing but maintain the status quo on undeveloped, private land. Although the trial court implicitly found that the County’s regulations became a taking when they went too far in limiting the landowner’s use of its property, that finding did not convert a regulatory taking into a physical one. Therefore, trial court erred in awarding attorneys’ fees.

Home Builders Association of Central Arizona v. City of Mesa, 226 Ariz. 7, 243 P.3d 610 (Ariz. App. 2010)

The Home Builders Association of Central Arizona (the “HBA”) sought a declaration that the City of Mesa’s cultural facilities development fee was unlawful under ARIZ. REV. STAT. § 9-463.05. ARIZ. REV. STAT. § 9-463.05 authorizes municipalities to assess development fees to offset the costs associated with providing necessary public services to a development. The HBA challenged the fee on the grounds that cultural facilities were not “necessary” public services, the fee did not result in beneficial use to most new development, and the fee was not reasonably related to the burden imposed on new development.

“Necessary” public services was construed broadly by the Arizona Court of Appeals to include existing services already provided by the City or those identified in the municipality’s general plan or infrastructure improvement plan. The Arizona Court of Appeals held that the City could impose the fees because it had traditionally provided cultural facilities, such as the historical museum, art museum, and youth museum, and because the funding of cultural facilities was rationally related to the powers it was granted to develop and fund tourism-related improvements. In so holding, the City was found to have sufficiently demonstrated that cultural facilities would benefit new development and that there was a rational basis for the amount of the fee.

MONTANA CASES

Plains Grains Limited Partnership v. Board of County Commissioners of Cascade County, 357 Mont. 61, 238 P.3d 332 (2010)

Landowners and Southern Montana Electric (“SME”) sought a zone change from Agricultural (A-2) to Heavy Industrial (I-2) for 668 acres of land that the landowners planned to sell to SME for the construction of a power plant. Although the power plant was permitted in Cascade County under A-2 with a special use permit, SME opted for rezoning because it also wanted to create a tax increment financing district to help finance the power plant. After the County approved the rezoning, another landowner sought a declaratory judgment alleging that the zone change constituted impermissible spot zoning. The trial court denied the spot zoning claim on the basis that the rezone did not satisfy the applicable three-part test.

While the case was pending on appeal, the County amended its zoning regulations and map to update the regulations, definitions, districts, and boundaries. The County and SME argued that these updates rendered the appeal moot. However, the Montana Supreme Court held that because there was no wholesale change in the County’s growth policy and because the SME property and surrounding agricultural land retained their original designations after the updates, the updates did not preclude the ability of the courts to provide meaningful relief and therefore the appeal was not moot. The County and SME also argued that the sale of the land to SME also rendered the appeal moot. Again, the Montana Supreme Court found that the court had the ability to provide meaningful relief and restore the parties to the original status quo, which involved the zoning designation and not property ownership. Although SME claimed that the status quo could not be restored because the damage had already been done, the power plant had not yet been constructed. The Montana Supreme Court noted that one party sought to prevent the operation of a large industrial facility on land previously zoned for agricultural purposes, while the other party alleged, but failed to establish a record on, amounts it expended in addition to the purchase price, which would be inappropriate to include as part of the mootness analysis.

The Montana Supreme Court then turned to the question of whether the rezoning constituted impermissible spot zoning and concluded that it did. The first prong used in analyzing impermissible spot zoning is whether the requested use would differ significantly from the prevailing land uses in the area. In denying the spot zoning claim, the trial court had determined that the power plant would not be a significantly different use because SME could have constructed the power plant without obtaining a zoning change. However, the Montana Supreme Court held that the proposed use would be allowed, if at all, only through the grant of a special use permit, which was discretionary rather than a “mere ministerial act,” and that the proposed rezone would create “an island of heavy industrial zoning within a large area zoned for agricultural use.” The Montana Supreme Court agreed with the trial court on its determinations regarding the second prong, whether the size of the parcel to be rezoned is “relatively small,” and the third prong, whether the proposed zone change constitutes “special legislation” designed to benefit one party.

Aspen Trails Ranch, LLC, v. Simmons, 356 Mont. 41, 230 P.3d 808 (2010)

A developer filed an application with Lewis and Clark County to create a subdivision. In conjunction with the application, the developer submitted an environmental assessment (the “EA”). Although some members of the County Commission expressed concern about flooding and high groundwater in the area, the Commission voted to approve the preliminary plat. Landowners filed a complaint, which was defended by the Commission, contesting this decision on the grounds that neither the EA nor the County’s staff report adequately addressed the resulting impacts from the proposed subdivision. The trial court found that the landowners had standing and held an evidentiary hearing in which it took expert testimony regarding the baseline information needed to evaluate impacts to groundwater that was not included in the EA. The trial court then voided the preliminary plat, holding that the lack of information in the EA prevented the Commission from taking a “hard look” at impacts on water quality. When the County declined to challenge the trial court’s decision, the developer sought leave to intervene. The trial court granted leave, finding that the developer’s motion was timely made and that its interests were sufficiently substantial so that it should have the opportunity to be adequately represented.

The Montana Supreme Court found that the trial court did not abuse its discretion in allowing intervention, noting that the developer’s intervention did not cause any delay and that its interests were substantial and no longer adequately represented after the Commission declined to appeal. The Montana Supreme Court also agreed that the landowners had standing, observing that the Commission had conceded at oral argument that if one party had standing the suit could move forward and noting that it was undisputed that one landowner was a contiguous landowner whose enjoyment of his property would be affected by the proposed subdivision given that the area was already prone to flooding. The Montana Supreme Court then reviewed the trial court’s decisions to conduct an evidentiary hearing and to void the preliminary plat. Regarding the evidentiary hearing, the standard of review for an administrative decision is whether the decision was arbitrary, capricious, or unlawful, and it is appropriate, in applying that standard, to accept new evidence and not limit its review to the administrative record in order to determine whether the agency took all relevant factors into consideration when reaching its decision. Regarding the decision to void the preliminary plat, the Commission had to apply the “hard look” standard to the EA, which requires that a reviewing agency must take a hard look in examining the environmental impacts of a given project. The Montana Supreme Court concluded that the trial court did not err in accepting evidence from the expert on the relevant factors and found that the trial court correctly concluded that “the paucity of information regarding groundwater information” in the EA “prevented the Commission from taking a “hard look” at these impacts.”

MM & I, LLC v. Board of County Commissioners of Gallatin County, ___ Mont. ___, ___ P.3d ___ (2010)

After its preliminary subdivision application was denied, a developer brought suit seeking to overturn the denial and receive damages for lost profits. The trial court refused to consider post-

hearing deposition testimony of Commission members regarding their reasons for denying the developer's application and concluded that the Commission's denial was not arbitrary and capricious. Although it timely filed its appeal, almost three years elapsed before the developer served its lawsuit on the Gallatin County Commission. As an initial matter, the Montana Supreme Court admonished counsel in future cases to serve process promptly, observing that the delay in service not only delayed review of the matter but also severely impaired the Commission's ability to defend its actions.

The Montana Supreme Court then examined whether the trial court abused its discretion in refusing to consider post-hearing deposition testimony to explain their reasons for denying the subdivision because the testimony was irrelevant and not part of the record. The developer argued that the deposition testimony showed that the Commissioners abused their discretion by ignoring evidence in the record and basing their decisions on their own personal opinions and beliefs, citing *Aspen Trails Ranch v. Simmons* (discussed above). In *Aspen Trails*, the testimony consisted of additional information from an expert witness that was required to be contained in an EA but was not; in contrast, the deposition testimony in the instant case concerned "the Commissioner's thought processes regarding actions taken more than five years earlier." Therefore, the Montana Supreme Court held that the trial court's refusal to consider the deposition testimony was not an abuse of discretion. The Montana Supreme Court proceeded to note the applicable standard of review: whether the record establishes that the governing body acted arbitrarily, capriciously, or unlawfully such that the decision being challenged appears to be "random, unreasonable, or seemingly unmotivated, based on the existing record." The Commission's decision to deny the subdivision application because the developer had not presented adequate mitigation of adverse impacts was supported by substantial evidence in the record. The Montana Supreme Court agreed with the trial court that the Commission had not abused its discretion because it had considered the testimony and evidence before it, applied the facts to the relevant and appropriate review criteria, commented on the information presented, and explained its reasons for the denial.

Hansen v. Granite County, 356 Mont. 269, 232 P.3d 409 (2010)

Landowners appealed the decision of the Granite County Commissioners to deny their application for preliminary plat approval of a subdivision. The Commissioners had determined that the subdivision would cause significant adverse impacts to the local school district and to public health and safety and existing agricultural operations due to the increase in the amount of traffic on a certain road. The Commission also found that the subdivision application did not identify any specific improvements that would be made to mitigate those adverse impacts. The landowners appealed the decision denying plat approval and sought damages resulting from the denial. The trial court affirmed and awarded damages to the County for unpaid application fees.

A preliminary plat of a proposed subdivision is subject to review by the governing body to determine whether the plat conforms to the master growth plan for the area and the plat's effect on public health, safety, and welfare. A person may bring an action to recover actual damages caused by a denial of a subdivision application if the decision is arbitrary or capricious. Reversal is not permitted

merely because the record contains conflicting evidence but rather the decision must appear to be “random, unreasonable, or seemingly unmotivated, based on the existing record.” After discussing portions of the record below, the Montana Supreme Court held that the Commissioner’s decision was not arbitrary and capricious and that the trial court did not err in affirming that decision, noting that the landowners failed to meet its obligations to provide all the information to the governing body for its consideration and to identify the impacts and propose a subdivision that mitigates the impacts. The Montana Supreme Court also held that the district court’s award of damages to the County was not an abuse of discretion, but that it was reasonable and supported by clear and convincing evidence. In so holding, the Montana Supreme Court observed that, even though the County failed to raise the issue of damages in a compulsory counterclaim, including it in the pretrial order served the same purpose, which was to avoid a multiplicity of suits.

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