RECENT UTAH AND WYOMING LAND USE CASES
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Time to Challenge Land Use Decision

[Utah]

Green v. Brown, 330 P.3d 737 (UT App 2014)

County zoning ordinances require a party aggrieved by a land use decision to file an appeal with the Board of Adjustment within fifteen days.

County issued a building permit to Green in March with driveway across Brown's property based on a right of way shown in a subdivision plat.

Brown engaged in negotiations with Green over the placement of the driveway and received a copy of the building permit in September.

In October Brown questioned the permit and the ROW in a letter to the Planning Director.

Time to Challenge Land Use Decision (Cont'd)

The PD responded that the permit was issued appropriately .

In November, within 15 days after receiving the PD's response but months after receiving a copy of the building permit, Brown filed an appeal with the County Board of Adjustment, challenging the width of the ROW.

Issue: Was Brown's appeal outside the 15-day limitation period?

Held: Brown's appeal was untimely, despite Brown's claim that the county planner lacked authority to allow the ROW to be used as a driveway. The relevant land use decision was the issuance of the building permit. Brown's receipt of a copy of the permit in September started the running of the 15-day appeal period.

Analysis: "The planner's decision to issue a building permit is not rendered a "non-decision" by Brown's argument that the planner lacked the authority to issue the permit.

Time to Challenge Land Use Decision (Cont'd)

Powder Run Ass'n v. Black Diamond Lodge, 320 P.3d 1076 (UT App 2014)

In 2001 Black Diamond offered to dedicate as a public street an easement it held over Powder Run's property.

Powder Run was aware of the offer and did not object.

The City adopted an ordinance accepting the dedication, and Black Diamond constructed a street and installed utilities in the easement.

Nine years later, Powder Run brought a quiet title action against Black Diamond and the City to void the street dedication.

Utah Code Ann. § 10–9a–801(2)(a) places a thirty-day limit on challenges to municipal land use decisions.

Time to Challenge Land Use Decision (Cont'd)

Held: Powder Run's suit was barred by the statute of limitations.

Analysis:

1. City's acceptance of dedication was a land use decision, regardless of whether Black Diamond had a legal right to dedicate the easement.
2. There is no "void ordinance exception" that would allow Powder Run avoid the statute of limitations.
3. The traditional "quiet title exception" to the statute of limitations does not apply because this was not a "true quiet title action," but rather an action to void an ordinance.
4. The "actual possession exception" to the statute of limitations does not apply because Powder Run was not in actual possession of the easement.

Religious Liberty – Public Monuments

[Utah]

Summum v. Pleasant Grove, 2015 WL 404367 (Utah Supreme Court)

Pioneer Park in Pleasant Grove is a city park commemorating the Utah pioneers. It has a monument displaying the Ten Commandments.

Next to it, the Summum Church offered to erect a monument displaying its "Seven Aphorisms."

Pleasant Grove said "No, thanks, we only accept monuments relating to our Mormon pioneer ancestors. They did not follow the Seven Aphorisms."

First, Summum sued in federal court alleging that the City's decision violated the Free Speech and Establishment clauses of the federal Constitution.

Summum lost. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009).

Undeterred, Summum sued in state court, alleging that the City violated the religious liberty clause of the Utah Constitution.

Religious Liberty - Public Monuments (Cont'd)

Held: Regardless of whether the Ten Commandments monument constitutes religious worship, exercise, or instruction, the religious liberty clause of the Utah Constitution does not force Pleasant Grove to permanently display a similar Seven Aphorisms monument.

Rationale: Requiring Pleasant Grove to erect a second religious monument would not render the allocation of public property and money to the two monuments neutral. Many other religious views would not be represented. In other words, two wrongs don't make a right.

Note: Court did not decide whether the Ten Commandments violated the religious liberty clause. It simply held Summum could not force the City to accept the Seven Aphorisms.

Code Enforcement

[Wyoming]

Defendant owns 40 acres in Sheridan County, Wyoming.

According to the trial record, defendant had “at least thirty-six different automobiles, mobile homes, recreational vehicles, and trailers in various states of disrepair on the property. Many of the trailers were being used as chicken coops and goat houses, and almost all of the vehicles were inoperable.”

In other words, this was typical Wyoming property.

County sued for code violations and the lower court issued an order *nunc pro tunc* requiring defendant to remove the offending items from her property within 60 days.

When the code enforcement officer and a deputy sheriff arrived at her property 60 days later, defendant met them at the gate at 10 a.m. drinking a can of beer. The officers asked what would happen if they opened the gate and she said “What do you think? You’d be trespassing.”

Code Enforcement (Cont'd)

The officers decided to leave and the lower court convicted the defendant of criminal contempt.

At a criminal contempt hearing, the defendant testified that she thought *nunc pro tunc* meant she had 60 additional days to comply. Nevertheless she was convicted.

On appeal the Wyoming Supreme Court stated that the *nunc pro tunc* order "muddied the waters" because the defendant was not proficient in Latin and would not understand *nunc pro tunc* as a "fancy phrase for backdating."

Accordingly, the County could not show willful disobedience of the court's order, and the conviction was reversed.

Lesson: Don't quote Latin to Wyoming landowners who are drinking at 10 in the morning.

Res Judicata

[Wyoming]

Tarver v. Sheridan Board of Adjustments, 327 P.3d 76 (Wyo. 2014)

Appeal from a special exemption for a bed and breakfast.

Round 1: neighbor successfully challenges exemption in district court on procedural grounds.

Round 2: Applicant files a second application; it is granted by the Board, and the neighbor files a second petition for review in district court, claiming the second application was barred by *res judicata*.

Res judicata is a legal doctrine that bars re-litigation of previously litigated claims or issues.

The court noted that *res judicata* applies in in land use cases; however, "res judicata will not prevent the approval of a second application where the second application presents substantial changes from the first application."

Res Judicata (Cont'd)

Even though the application was for the same bed and breakfast exemption, the Wyoming Supreme Court declined to apply *res judicata* for two reasons:

1. The second application differed in that it included an approved parking plan (the first only had a proposed plan.)
2. The district court's ruling that the Board failed to follow proper procedures was not a ruling on the merits of the first application. Moreover, it would be unfair to apply a preclusion doctrine against the applicant where the Board erred in applying its own rules and procedures.

This case illustrates how easy it is to avoid traditional *res judicata* principles in land use cases.

However, many jurisdictions have rules prohibiting the re-filing of denied applications. Those rules are not affected by this ruling.

Gravel Pits – Nonconforming Use

[Wyoming]

Seherr-Thoss v. Teton County, 329 P.3d 936 (Wyo. 2014)

Plaintiff's gravel pit was grandfathered under Wyoming's non-conforming use statute, Wyo. Stat. Ann. § 18–5–207.

County sought to limit operations to the three acre footprint in existence at the time the County adopted land use regulations prohibiting new gravel pits.

Issue # 1: Does the statute allow regulation of the expansion of a non-conforming use?

To answer this question, the Wyoming Supreme Court turned to the *Doctrine of Diminishing Assets.*

This doctrine, recognized by a number of states and authorities, holds that limiting nonconforming uses to land used prior to the enactment of the zoning ordinance may work a hardship on quarries.

Quarries begin on one spot and spread to additional ground as the mineral reserve is exhausted. Such diminishing-asset enterprises "use" all of the land contained in a particular asset. Courts, therefore, have respected the unique character of such diminishing-asset uses by permitting them to expand onto adjacent land.

Gravel Pits – Nonconforming Use (Cont'd)

The Court adopted a three prong test to determine whether the doctrine should apply:

1. Excavation activities were actively being pursued when the ordinance became effective;
2. The owner clearly intended to excavate the area in question, as measured by objective manifestations and not by subjective intent; and,
3. Continued operations will not have a substantially different and adverse impact on the neighborhood.

The Court reversed the County's determination under the second prong that the owner did not manifest intent to expand beyond three acres.

It held that the owner was not required to "cordon off" additional land as a designated expansion area. Rather, he was entitled to devote these areas to other uses until they were needed for the quarry.

Gravel Pits – Nonconforming Use (Cont'd)

The Court accepted non-specific evidence of intent, and noted that the very presence of an extraction operation on a parcel inherently suggests an intention to expand on that particular parcel.

The Court also took a very lenient approach towards the third prong. It held that the expansion did not have a substantially different and adverse impact on the neighborhood, since most of the neighbors did not move in until after that the quarry was established.

Issue # 2: Can the County impose reclamation and bonding requirements on the quarrying operation?

Held: These requirements are impermissible because they duplicate Wyoming DEQ regulations.