The Next West

Land Use in the Rocky Mountain West

March 4, 2011

• Land Use in the Rocky Mountain West: New Mexico

- There is very little development going on in New Mexico, giving municipalities and Counties the opportunity to examine plans and zoning ordinances, and consider new land use strategies.

- Santa Fe County adopted a new land use plan, which addresses sustainable growth, and goes further than any other local government in New Mexico to plan to encourage alternative energy.

- The two "new communities" in Albuquerque, Mesa Del Sol, and Sun Cal, are virtually at a halt. Mesa Del Sol has postponed its residential development. Sun Cal went bankrupt!

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IMPORTANT CASES:

• Andalucia Development Corporation, Inc., et al. v.City of Albuquerque, et al.,2010-NMCA-052

– Even though the unplatted Phase 3 of a development had been approved by the Planning Commission in 2001 before the City passed its Impact Fees Ordinance in 2004, the Planning Commission made it clear that this approval only made it possible for the developer to proceed with platting individual lots, building heights, setbacks, etc. which then would have conferred development rights.

– The City's Impact Fees Ordinance provided that any development which had development rights approved before the date of enactment of the Impact Fees Ordinance would be exempt from paying the fees.

Andalucia, cont.

- Since the developer still had more to do to achieve development rights under the City's Impact Fees Ordinance, it wasn't exempt from paying the fees.

- The District Court had confused the "common law" doctrine of impact fees, which holds that final approval of a development and substantial reliance on that approval by spending considerable sums of money toward the development vests rights, protecting the developer from changes in regulation, with the vested rights provision in the City's Impact Fees Ordinance.

- The Court of Appeals, citing other New Mexico cases, found that the developer had not even acquired vested rights under the common law vested rights doctrine, since it still had more to complete to have such rights.

- In any event, the City's Impact Fees Ordinance's definition of vested rights applied, and the developer did not meet the criteria for exemption from paying the fees.

Potential cases

- Challenge to a Solar Right

  The Solar Rights Act, Section 47-3-1 NMSA 1978, allows individuals who install solar panels on their homes or properties to acquire a recorded "right" to solar access. It enables local governments to enact their own solar rights legislation, as Albuquerque has done with the Albuquerque Solar Permit Ordinance, Sections 14-11-1 through 9.

  Albuquerque's Solar Permit Ordinance is being challenged in a Writ of Certiorari proceeding, Romaine v. City of Albuquerque, No. CV 201100 101, by a neighboring property owner after a solar panel owner obtained a solar permit after a hearing before the City's Zoning Hearing Examiner.

Alto Eldorado Partners, et al. v. The City of Santa Fe and The County of Santa Fe. In the Court of Appeals for the 10th Circuit

No. 09-2214

The U.S. District Court for the District of New Mexico dismissed this case stating that Plaintiffs presented insufficient facts to establish that they had standing to challenge the City of Santa Fe's affordable housing ordinance.

Alto Village Partners, cont.

- Plaintiffs, involved in the development, sale or rental of residential properties, alleged that the Affordable Housing Ordinance deprived developers of their property by forcing them to set aside significant portions of their developments for affordable housing, at a loss to the developers.
- The District Court dismissed the case which is now on appeal in the 10th Circuit. Stay tuned!

Albuquerque Commons Partnership v. City Council of City of Albuquerque, 2010-NMSC-002

- This case is finally over! But…
- Issue: Does NMSA 1978, Section 56-8-4(D) bar an award of post judgment interest against the state and its political subdivisions when a plaintiff successfully establishes the deprivation of a federally protected constitutional right in violation of 42 U.S.C. Section 1983?

Albuquerque Commons Partnership, cont.

- The New Mexico Supreme Court held that NMSA 1978, Section 56-8-(D) did not bar an award of post judgment interest!

Albuquerque Commons Partnership, cont.

- Therefore the successful plaintiff in this case was not precluded by state law from receiving interest on its judgment, even though the Section 1983 case was tried in state court.
- The state statute in this case, NMSA 56-8-4(D) is interpreted by the Court as allowing the rate of post-judgment interest set forth in 42-U.S.C. Section 1961, the federal statute applicable to post-judgment interest in order to secure full compensation to litigants deprived of their civil rights.
- But....the actual rate of interest still may be contested!

Albuquerque Commons Partnership, cont.: Other post mortems

- This landmark case is continuing to influence land use in New Mexico.
- That the number of property owners impacted by a land use action, rather than whether the action is considered a legislative change applicable to an entire area, is the determinant of whether a proceeding is to be considered quasi-judicial or legislative, is causing municipalities and counties to be advised by counsel to follow quasi-judicial procedure in cases where a small number of property owners are affected!

SB **69: Making ACP "Permanent"!**

SB 69 is pending in the New Mexico State Legislature. It would commit to statute the "change and mistake" rule which the New Mexico Supreme Court, in the Albuquerque Commons Case, applied to the change in Sector Plan at issue in that case.

SB 69 states that an amendment to the existing zoning of any property may be based on the preponderance of evidence that:

(1) the existing zoning is inappropriate because there was an error when the existing zone map pattern was created; or

(2) the existing zoning is inappropriate because changed neighborhood or community conditions justify the change.

SB 69, continued

(3) An amendment to the existing zoning of property in a municipality with a population of over 30,000 may be based on a preponderance of evidence that a different zoning for the property is more advantageous to the community because it is reasonably expected to reduce vehicle miles traveled or to provide increased energy efficiency, even if the change in zoning would provide different zoning than the zoning of surrounding property.

SB 69, cont.

- SB 69 is championed by the development community.
- NM's APA chapter opposes SB 69 because:
  (1) It makes "change and mistake" statutory, rather than leaving it with the courts, when New Mexico is the only state still following this rule to justify zone changes.
  (2) While reducing vehicle miles traveled is a noble sustainability goal, it allows "spot zoning".

HB 110: Restoring Eminent Domain for Antiquated Subdivisions

- After Kelo, the New Mexico Legislature removed the power of eminent domain from its Metropolitan Redevelopment Act. NMSA Section 3-60A-1, et seq. (1978, 2007).
- Inadequate platting was a condition of "blight", enabling eminent domain to be utilized to assemble and replat lots.
- Rio Rancho has 20,000 lots with antiquated platting, and would like to utilize eminent domain to acquire these lots and turn them over to private developers.
- HB 110 would restore the power of eminent domain to a municipality of 60,000 or more residents—Rio Rancho!
- HB 110 is opposed as enabling a municipality to take property from those poor individual lot owners all over the world and give it to rich developers!