ROCKY MOUNTAIN LAND USE INSTITUTE

RECENT LAND USE DECISIONS IN THE ROCKY MOUNTAIN WEST

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ARIZONA CASES

Coleman v. City of Mesa, 230 Ariz. 352, 284 P.3d 863 (2012)

This case involves an application for a use permit to operate a tattoo parlor in the City of Mesa, Arizona. The City denied the application, citing concerns that the proposed use was not appropriate for the location or in the best interests of the neighborhood. The applicants then filed a complaint in superior court, alleging violations of their rights to free speech, due process, and equal protection under the Arizona and federal constitutions.

The superior court dismissed the complaint for failure to state a claim, noting that the City's decision was a reasonable and rational regulation of land use. The Arizona Court of Appeals reversed, holding that obtaining a tattoo, applying a tattoo, and engaging in the business of tattooing are pure speech entitled to protection under Arizona and federal constitutional provisions and that it had been error to dismiss the complaint without allowing the parties to develop a factual record. The Arizona Supreme Court granted review because the case involved issues of "statewide importance regarding the free speech rights of tattoo artists and the authority of municipal governments to regulate the location of tattoo parlors."

The Arizona Supreme Court noted that municipalities have legitimate interests in controlling the location of businesses through zoning ordinances but found that the applicants had sufficiently set forth claims for relief to survive a Rule 12(b)(6) motion to dismiss. The Arizona Supreme Court agreed with the appellate court that the business of tattooing is constitutionally protected but disagreed with the appellate court's application of intermediate scrutiny to First Amendment claims and strict scrutiny to due process and equal protection claims, finding intermediate scrutiny applicable to all three. The Arizona Supreme Court observed that tattooing is subject to generally applicable laws (such as taxes, health regulations, and nuisance ordinances) and subject to reasonable time, place, and manner regulations. The Arizona Supreme Court then held that the applicants had alleged sufficient facts to state claims for which relief could be granted in alleging that the City of Mesa's discretionary permit procedure was not a reasonable time, place, and manner regulation and did not contain adequate standards to guide or limit the City of Mesa's discretion in rendering a decision.

Scenic Arizona v. City of Phoenix Board of Adjustment, 228 Ariz. 419, 268 P.3d 370 (Ct. App. 2011)

The City of Phoenix Board of Adjustment granted a use permit for the operation of an electronic billboard sign adjacent to an interstate highway. Two citizen organizations petitioned for special action review in superior court, asserting that the billboard would violate a provision of the Arizona Highway Beautification Act (the "AHBA"). The superior court determined that the organizations had standing, but denied the petitions on the merits. The Arizona Court of Appeals affirmed the superior court's decision as to standing, but reversed on the merits, finding that the billboard's intermittent lighting was not allowed under the AHBA.

ARIZ. REV. STAT. § 9-462.06(K) provides that a "person aggrieved" by a decision of a board of adjustment may file a special action in superior court seeking review of the decision. In deciding whether the organizations were "persons aggrieved" and had standing, the Arizona Court of Appeals observed that the organizations must first demonstrate that at least one of its members is "aggrieved." The Arizona Court of Appeals then noted that the statute did not define "person aggrieved," but discerned, by comparing language in other statutes, that the legislature had intended to permit broader standing to challenge a board decision in superior court than in other proceedings. The Arizona Court of Appeals stated that examining whether a plaintiff can establish standing to challenge a permit for a billboard involved "unique considerations that may not be present in other land use contexts." In finding that the organizations were persons aggrieved, the potential impact of a billboard on a person operating a vehicle on the highway was held to be relevant in determining whether a person has been adversely affected. The injuries alleged by the plaintiffs were found to fall within the broad parameters of ARIZ. REV. STAT. § 9-462.06(K) and the established purposes of the AHBA. In examining the merits, Arizona Court of Appeals then held that the board acted in excess of its authority in granting a permit because the billboard's lighting violated the AHBA

Sedona Grand, LLC, v. City of Sedona, 229 Ariz. 37, 270 P.3d 864 (Ct. App. 2012)

In 2006, Arizona voters passed an initiative measure known as Proposition 207 or the Private Property Rights Protection Act (the "Act"). The Act requires, among other things, just compensation for diminution of value when any land use law enacted after its effective date reduces the existing rights to "use, divide, sell or possess private real property." ARIZ. REV. STAT. § 12-1134(A). The Act also contains a public health and safety exception.

The City of Sedona has prohibited short-term rentals of residential property since 1995. Sedona Grand owns property on which it uses option agreements to facilitate the sale of its property, giving prospective buyers inspection rights for less than 30 days. In 2008, Sedona enacted an ordinance to expand the ban short-term rentals of residential property. Sedona Grand then filed a claim, arguing that it was entitled to just compensation under the Private Property Rights Protection Act because the new ordinance banned its use of option agreements.

In reviewing the claim, the Arizona Court of Appeals first found that the new ordinance was a land use law, defined as "any statute, rule, ordinance, resolution or law enacted by this state or a political subdivision of this state that regulates the use or division of land or any interest in land…." Although, the city asserted that the option agreements were actually "rentals" that had already been prohibited before the new ordinance, the appellate court found that the city did more than reaffirm the ban, but expanded it by adding an enforcement mechanism and expansive definitions that amounted to new restrictions on land use. The city also argued that the ordinance was exempt because it was enacted for "the protection of the public's health and safety." The trial court had granted summary judgment in favor of the city based on this argument. However, the appellate court found this grant was in error. To invoke the exception, a city must provide more than a legislative assertion. Where a nexus between the prohibition on short-term occupancy and public health is not self-evident, a city must meet the burden of demonstrating that the exemption applies. A city must

establish by a preponderance of the evidence that the law was enacted for the principal purpose of protecting the public's health and safety before the exemption can apply. The case was remanded to the trial for evidentiary hearings on whether the option agreements had been banned prior to the adoption of the new ordinance and whether the ordinance had been enacted for health and safety reasons.

Bonito Partners, LLC, v. City of Flagstaff, 229 Ariz. 75, 270 P.3d 902 (Ct. App. 2012)

When a property owner refused to make sidewalk repairs adjacent to his parcel after notice pursuant to city ordinance, the city made the repairs and then recorded a lien on the parcel after the owner filed to pay the city for the repairs. The owner filed a complaint in superior court arguing that the City's ordinance requiring owners to repair public sidewalks (i) violated the federal and state constitutional provisions against the taking of private property for public use without just compensation, (ii) was an unlawful tax, and (iii) exceeded the authority permitted under Arizona statute and city charter. The trial court granted summary judgment in favor of the city and the owner appealed.

The Arizona Court of Appeals noted that, under the auspices of its police power, the burden of upkeep of sidewalks may be placed on the abutting owner rather than the community at large, provided the burden is not arbitrary or unreasonable. This is because keeping the sidewalks safe benefits not only the general public but also the abutter, who has an interest in keeping the sidewalk in front of his property clean and safe. The Arizona Court of Appeals then remanded the case to the trial court to determine whether the city's lawful exercise of its police power nevertheless constituted an unconstitutional taking by going too far under the formula stated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In looking at other issues, the Arizona Court of Appeals held that the city's ordinance was not an unlawful tax because it was not a revenue-generating measure. The city's ordinance was also found not to be an unlawful special law because the limitation on the class was rationally related to the purpose, the ordinance applied uniformly to all property owners, and the class was elastic and changing as property is acquired and relinquished. Finally, the Arizona Court of Appeals found that the city's grant of general and specific powers under Arizona statutes and the city's charter encompassed the power to compel private property owners to repair public sidewalks adjacent to their property.

Pawn 1st, LLC, v. City of Phoenix, ____ P.3d ____, 2013 WL 375588 (Ariz. Ct. App. 2013)

Jachimek, a pawn business owner, sought and received a variance from the City of Phoenix requirement that a pawn business in a Commercial C-2 District have exterior walls located at least 500 feet from a residential district. Pawn 1st, LLC ("Pawn 1st"), which owns three pawn businesses in Phoenix, voiced opposition to the variance at the variance hearing and filed a complaint for special action with superior court contesting the City's grant of the variance. Jachimek filed a motion for summary judgment, arguing that Pawn 1st did not have standing because it was not a "person aggrieved" as that term is defined in ARIZ. REV. STAT. § 9-462.06(K), which authorizes superior court review from decisions of boards of adjustment. Pawn 1st asserted it had standing as a

taxpayer, arguing that the applicable city ordinance and ARIZ. REV. STAT. § 9-462.06(K) authorized challenges by a taxpayer as well as by an aggrieved person. Pawn 1st also argued that it had standing to challenge the operation of a competing business operating unlawfully. In addition, Pawn 1st asserted that a pawnshop is a closely regulated industry with limited locations, creating a vested property interest in Pawn 1st's locations that were undermined by allowing the variance. The superior court granted Jachimek's motion for summary judgment, finding that any loss suffered by Pawn 1st was due to competition and therefore Pawn 1st had no special damage giving it standing to bring the special action.

ARIZ. REV. STAT. § 9-462.06(K) states that a "person aggrieved by a decision of the legislative body or board or a taxpayer, officer or department of the municipality affected by a decision… may… file a complaint for special action in the superior court to review the legislative body or board decision." The Arizona Court of Appeals interpreted the statute, first looking to see if it was ambiguous. The Court of Appeals found that the statute clearly established two classes that can file a complaint for special action: a person aggrieved by a decision" and a "taxpayer, officer or department of the municipality affected by a decision." The City asserted that the statute applied to a taxpayer affected by the decision and that, to have standing, the taxpayer is required to show pecuniary loss. However, the Court of Appeals applied the "last antecedent rule" and found that the modifier "affected" applied to the phrase "of the municipality." The Court of Appeals then concluded that the legislature intended to permit a challenge by any taxpayer of the affected municipality, rather than only a taxpayer affected by the decision. The Court of Appeals also found that the City's interpretation would render the inclusion of "taxpayer" superfluous because a "taxpayer affected" was essentially the same as a "person aggrieved." The Arizona Court of Appeals ultimately held that the plain language of the statute gave standing to any taxpayer, officer, or department of the City of Phoenix, despite Jachimek's argument that this interpretation would result in a "high volume of low quality litigation."

MONTANA CASES

Heffernan v. Missoula City Council, 360 Mont. 207, 255 P.3d 80 (2011)

In Montana, governing bodies are authorized by statute to create planning boards that promote orderly development through the adoption of growth policies. Before submitting a growth policy to the governing body, the planning board must hold a public hearing and make a recommendation to the governing body, who may then adopt or reject the proposed growth policy. Although not a regulatory document, the governing body "must be guided by and give consideration to the general policy and pattern of development set out in the growth policy" when making land use decisions.

After going through the public planning process, the Rattlesnake Valley plan was adopted, which designates a density of six to eight dwellings per acre in the area closest to services, with less density in other areas. A proposal for a 38-lot subdivision (with two dwelling units per acre) was submitted in areas where the plan recommended one unit per two acres and one unit per five to ten acres. Although neighbors voiced opposition, the city council's majority voted in favor of the subdivision. An association of neighbors sought review, alleging violations of subdivision and zoning laws because the subdivision did not substantially comply with the growth plan. The trial court found in favor of the neighbors, finding the city had ignored or failed to substantially comply with the density and other recommendations of the growth plan.

The Montana Supreme Court first looked at whether the association of neighbors had standing. The Montana Supreme Court found that neighboring property owners did qualify as "aggrieved" by the governing body's decision to approve the subdivision because they satisfied statutory standing by making sufficient allegations to establish that they had specific personal and legal interests likely to be specially and injuriously affected by the subdivision. The Montana Supreme Court noted that an owner of contiguous property can meet this statutory standing requirement without making the additional showing of a likelihood of material injury to the landowner's property or its value. The Montana Supreme Court found the neighboring property owners satisfied the constitutional standing requirement as well because they had alleged an injury that could be alleviated by successfully maintaining the action. The Montana Supreme Court also found that the association had standing because the association's members had standing, the interests the association sought to protect were germane to its purpose, and neither the claim nor the relief required the participation of individuals.

The Montana Supreme Court then looked at whether an agreement with the previous owner of the subdivision superseded the growth policy. The agreement had provided for city's sewer services in return for a contribution to a rural special improvement district. Although the agreement allocated a certain density to the remaining land that was now the subdivision, the Montana Supreme Court found that it did not create vested density rights because (i) the city could not have bargained away its zoning power under such an agreement and (ii) the agreement did not appear guarantee a certain density in any event because it provided for a right of reimbursement if the city adopted a lesser density. Finally, the Montana Supreme Court looked at whether the governing body's decision was unlawful because it failed to comply with applicable statutes. The Montana Supreme Court found that the governing body must be "guided by and give consideration to" the general policy and

pattern of development set out in the growth policy. The Montana Supreme Court recognized that strict compliance was not required, because that would be so unworkable in that the plan would have to be constantly changed to comply with reality. However, to require no compliance at all would defeat the whole idea of planning. The Montana Supreme Court found that 2003 legislative amendments that included a provision that a land use approval could not be denied based solely on compliance with the growth policy confirmed that strict compliance was not needed and was consistent with the "substantial compliance" approach. The Montana Supreme Court ultimately found that the city did not give any consideration to many components of the plan and even where the city did consider the plan, the city was not guided by it. The Montana Supreme Court held that the city's decision was unlawful and arbitrary and capricious because it was not based on the relevant factors set out in the applicable growth plan and because the city's decision would undermine all of the goals and objectives of the plan.

Grant Creek Heights, Inc. v. Missoula County, 366 Mont. 44, 285 P.3d 1046 (2012)

A developer attempted to subdivide an area subject to a planned unit development ("PUD") adopted by the county in 1979. The county amended the PUD in 1987 and notified the developer that several conditions had to be met within one year in order to proceed with development, but the developer failed to comply within the specified time frame. The county's zoning ordinance provided that if a developer failed to comply within the one-year time frame, the zoning would revert to the original zoning classification. Therefore, in 1991 the county notified the office of community development that the conditions of approval had not been met and the PUD zone had reverted to its pre-1979 original zoning classification.

The developer filed a complaint, arguing that the reversion should have been to the 1979 PUD and that automatic reversion violated notice laws. The trial court determined that the reversion returned the property to its pre-1979 zoning and that the statute of limitations had run on developer's notice claim. The Montana Supreme Court affirmed, holding that the 1979 PUD had expired when the developer failed to submit a subdivision application within one year of the 1979 PUD. Because the 1979 PUD had expired, the property reverted to pre-PUD zoning, rather than the 1979 version of the PUD, when the 1987 PUD expired because the developer failed to submit a subdivision application within one year of the 1987 PUD. The developer argued that by failing to follow proper procedures when it terminated the PUD in 1991, the county took no legitimate action that would trigger the running of the statute of limitations. The Montana Supreme Court disagreed, finding that the statute of limitations did apply to alleged zoning decision errors and was triggered, not by the 1991 notification by the county, but by the automatic reversion when the developer failed to submit its application within one year. The developer failed to bring its claim within the applicable six month statute of limitations, so his claim was untimely.

Helena Sand and Gravel, Inc. v. Lewis and Clark County Planning and Zoning Commission, 367 Mont. 130, 290 P.3d 691 (2012)

In Montana, local zoning districts may be established by citizen petition to the board of county commissioners ("Part 1 zoning") or directly by the board of county commissioners ("Part 2 zoning"). Under Part 1 zoning, a board may create a planning and zoning district upon petition by "60% of the affected freeholders" unless "50% of the titled property ownership in the district" protest the establishment of the district within 30 days after its creation. Helena Sand and Gravel ("HSG") challenged a board's decision to adopt a citizen-initiated proposal to configure a zoning district that favors residential uses and prohibits mining. HSG complained that the petition constituted illegal gerrymandering because the borders had been specifically and unreasonably drafted to benefit the petitioners. However, no protest was filed by the required percentage after approval, so the boundaries of the new district were adopted by the board. The matter then went to the county's planning and zoning commission to adopt a development plan for the new district. After receiving the commission's recommendations, public input, and comments by HSG, the board approved regulations for the new district.

HSG filed a complaint, arguing that the county had adopted a zoning pattern and regulations that improperly prohibited HSG from mining sand and gravel on its property and constituted a taking of HSG's property. The district court entered summary judgment in favor of the county on both issues because (i) the regulations did not single out HSG for disparate treatment and (ii) HSG did not have an established property right because a mining permit was discretionary, not "virtually assured." The Montana Supreme Court found that the county had followed the Part 1 requirements in creating the district, and although the citizens had initiated the process with the purpose of stopping mining, the county had not acted with that same purpose. The Montana Supreme Court also considered whether the county's decision was reverse spot zoning – a land use decision that arbitrarily singled out a particular parcel for different, less favorable treatment than the neighboring ones. The Montana Supreme Court considered the three-part framework for illegal spot zoning: (i) whether the requested use is significantly different from the prevailing use in the area, (ii) whether the area in which the requested use is to apply is rather small, and (iii) whether the requested change is more in the nature of special legislation. The Montana Supreme Court held that reverse spot zoning did not apply because the subject parcel was not small (over 400 acres), HSG was the only adversely affect landowner, and the adopted zoning regulations complied with the growth policy for the area. Although the Montana Supreme Court agreed with the district court that HSG did not have a constitutionally protect interest in the right to apply for a mining permit, the case was remanded for further proceeding to see whether the adoption of the zoning pattern and regulations constituted a taking of HSG's property without just compensation under the factors of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)((i) the character of the governmental action, (ii) the extent to which the regulation interfered with investment-backed expectations, and (iii) the economic impact of the regulation on the claimant), which had not been examined by the district court. The district court was tasked with considering, under the *Penn Central* factors, whether HSG has suffered economic injuries that were required by justice and fairness to be compensated by the government rather than remain disproportionately concentrated on HSG.