WHAT'S HAPPENING IN NEW MEXICO

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Land Use in the Rocky Mountain West
New Mexico

Anita P. Miller
Assistant City Attorney
PO Box 2248
Albuquerque, NM 87103
(505) 768-4500
apmiller@cabq.gov

I. "Pornutopia": Will the U.S. Constitution trump Adult Use Zoning?

Zoning utilized to control adult uses in a community—those uses which "feature" Adult Entertainment –and upheld in *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), in *Young v. American Mini-Theatres,* 427 U.S. 50 (1976), and in New Mexico in *Texas National Theatres, Inc. v. City of Albuquerque,* 97 N.M. 282 (1982) is under attack once again. On February 15, the New Mexico Supreme Court heard a case of national significance, *City of Albuquerque v. Pangaea Cinema, LLC*, in a crowded courtroom in Albuquerque. The oral argument was attended by law professors and their students, city attorneys and planners, and members of the ACLU.

The question at issue was whether the City could enforce its Adult Amusement Ordinance, relegating "adult uses" to its C-3 zone, in which there are already 9 Adult uses, and in which 50 acres remain, against the Guild Theatre in Nob Hill, one of the trendiest areas in town. The theatre showed "Couch Surfers, Trans Men in Action", which emphasized females' and males' "specified anatomical areas" and females and males conducting "specified sexual activities," defined in the City's *Zoning Code* as "adult amusement", in a "Pornotopia Festival". The festival features erotic films during one weekend a year. The City had issued a zoning citation during the Theatre's second Pornotopia Festival.

The City's enforcement of its Adult Use Ordinance had been upheld by the District Court and by the New Mexico Court of Appeals. (No. 30, 380, May 29, 2012) The ACLU, however, wasn't giving up, having appealed the case to the State's highest Court.

Although there were several issues in the case, it will probably be resolved by an interpretation by the Court of how the word "featuring" should be applied. Pangaea Theatres, represented by the ACLU, argues that "featuring" should only be applied to a theatre which regularly shows adult entertainment films, and therefore doesn't apply to this once a year festival. The City, on the other hand, interprets "featuring" to apply to any theatre which ever shows a film which "features" adult entertainment. It's the City's position that if Pangaea wins, then there could be any number of theatres in a single neighborhood getting away with having a "festival" featuring an adult film one weekend a year. Just one showing of a film featuring such

adult uses violates the City's ordinance and deserves to receive a citation for violating the law, whether or not the "secondary effects" described below result.

The parties had stipulated that there were no "secondary effects", in terms of an increase of prostitution, drug use, or other crimes in the area of the theatre when the "Couch Surfers" was shown. "Secondary effects" were recognized in *Renton* as justifying utilizing zoning to locate theatres showing adult films in certain zones. The United States Supreme Court in that case also ruled that it was sufficient to rely on a study done in neighboring Seattle indicating secondary effects in areas which exhibited adult entertainment. It was also stipulated in *Pangaea* case that the City had not done a "study" of the subject neighborhood to substantiate that "secondary effects" were present as a result of the festival.

This case will most likely be resolved mainly on the Court's interpretation of the word "featuring". The Dissent in the Court of Appeals decision states that the Guild certainly cannot be considered an Adult Amusement Establishment. The decision of the New Mexico Supreme Court will either uphold the City's enforcement of adult use zoning or make Pornutopia an anticipated annual event!

It should be noted that courts are increasingly interpreting the "secondary effects" justification of adult use ordinances as being an acceptable excuse for stifling speech. Although "few of us would march our children off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice" *Young v. American Mini-Theatres,* 427 U.S. at 62, if Albuquerque should lose this case, it could be a nail in the coffin of those adult use ordinances.

II. See attached outline of additional cases.

II. New Mexico Appellate Cases

Audette v. Montgomery, 2012-NMCA-011, 270 P.3d 1273, cert. denied (Dec. 21, 2011)

Plaintiff sought review of the lower court's decision regarding a zoning issue. The Court found that the petitioners had effectively filed a timely cert petition by filing a docketing statement, but denied the petition on the merits.

Moongate Water Co. Inc. v. City of Las Cruces, 2009-NMCA-117, 147 N.M. 260, 219 P.3d 517

Expired franchise between city and water supplier was continued as an implied contract as long as supplier continued to provide services, and thus was not a new franchise subject to requirement that franchise be granted by ordinance, but was the same franchise that had governed the parties relationship prior to its expiration.

Ricci v. Bernalillo County Bd. of County Com'rs, 2011-NMCA-114, 150 N.M. 777, 266 P.3d 646

The Court of Appeals held that board of commissioners was not required to consider criteria for considering a zone map change when considering special-use permit.

City of Rio Rancho v. Amrep Sw. Inc., 2011-NMSC-037, 150 N.M. 428, 260 P.3d 414

Drainage easement in favor of city designated on plat for parcel was not dedication for public use such that city would have fee title to parcel and plat designating drainage easement was not writing or conveyance that could establish color of title to parcel for purposes of city's adverse possession claim.

Curtis v. Bd. of Trustees of Vill. of Los Ranchos de Albuquerque, 31,648, 2012 WL 874884 (N.M. Ct. App. Feb. 16, 2012)

Court of Appeals reversed district court ruling that homeowner could not be forced to connect his septic system t the Village of Los Ranchos' system and remanded for constitutional considerations.

Los Chavez Cmty. Ass'n v. Valencia County, 2012-NMCA-044, 277 P.3d 475

County Commissioner was required to recuse herself from voting on an application for a zoning map amendment as she was a first cousin one of the applicants.

Glaser v. LeBus, 2012-NMSC-012, 276 P.3d 959

A PID board of directors was authorized to approve special levy without election.

Pinghua Zhao v. Montoya, 2012-NMCA-056, 280 P.3d 918, cert. granted (May 23, 2012)

NMSA 1978 § 7–36–21.2 (2003) limiting increase in valuation of residential property to three percent a year after property has changed ownership and been revalued according to general valuation provisions of the property tax code, as applied to homeowners, did not violate State Constitution.

TENTH CIRCUIT CASES:

Penner v. City of Topeka, Kan., 437 F. App'x 751 (10th Cir. 2011)

Applicant who filed § 1983 action alleging that city's denial of his application for permit to operate salvage yard violated his due process and equal protection rights failed to establish class-of-one equal protection claim.

Klen v. City of Loveland, Colo., 661 F.3d 498 (10th Cir. 2011)

Applicants brought civil rights action against the City and various employees alleging that the defendants deliberately delaying request for building permit and imposed unreasonable requirements. The Tenth Circuit found that defendants were entitled to summary judgment on some of the claims, and remanded to the district court to decide the remaining claims.

Trout Ranch, LLC v. C.I.R., 11-9006, 2012 WL 3518564 (10th Cir. Aug. 16, 2012)

This appeal concerns the tax treatment of a conservation easement. The taxpayer, Trout Ranch, LLC (Trout Ranch), purchased some 450 acres of land in Gunnison County, Colorado, with the aim of developing home sites on a small segment while preserving the rest, approximately 85 percent of the property, by means of a conservation easement. Trout Ranch claimed a charitable deduction for the easement, which it valued at approximately $2.2 million. The IRS determined the easement did not reduce the value of the taxpayer's property, appraised the charitable contribution at zero, and disallowed the deduction. The tax court concluded the proper value of the easement was $560,000. Trout Ranch challenges that figure on appeal and insists the correct valuation is higher, closer to the $2 .2 million estimate it originally offered. The Tenth Circuit affirmed the decision of the tax court.

Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917 (10th Cir. 2012)

Residential treatment center brought action under Fair Housing Act (FHA), Americans with Disabilities Act (ADA), and Rehabilitation act (RA), challenging city's denial of zoning variance to allow residential treatment center to operate within public motel. The Tenth Circuit affirmed the district court's award of summary judgment to the city.

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 183 L. Ed. 2d 211 (2012)

Owner of property near site of proposed Indian casino brought action challenging decision by Secretary of the Interior to take parcel of land into trust on behalf of Indian tribe. Tribe intervened. The United States District Court for the District of Columbia, Richard J. Leon, J., 646 F.Supp.2d 72, dismissed complaint on ground that resident lacked prudential standing. Resident appealed. The Supreme Court held that the property owner did have standing.